UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Helen Sarahi Funes GAMEZ, Petitioner, v. LaDeon FRANCIS, in his official capacity as Acting Field Office Director of New York, Immigration and Customs Enforcement; Kristi NOEM in her official capacity as Secretary of Homeland Security; Pam BONDI, in her official capacity as Attorney General of the United States Respondents	Case No. 1:25-cv-07429-PAE

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION BY ORDER TO SHOW CAUSE FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

Less than a week ago, Petitioner, a 31-year-old citizen of Honduras with no criminal history, was living in Shirley, New York with her husband, caring for their two young children. Petitioner's 2-year-old son is a U.S. citizen, and both her husband and their 5-year-old daughter have been granted asylum to remain in the United States, safe from the violence and threats that they, like she, faced in Honduras. Since her arrival in the United States, Petitioner has committed no crimes and has diligently complied with a Department of Homeland Security Order of Supervision while she cares for her children and awaits legal status. The last step to keep her family together in New York forever is for U.S. Citizenship and Immigration Services to process an I-730 application for derivative asylum that Petitioner's husband filed in April on her behalf.

On Monday, September 8, at a required Immigration and Customs Enforcement ("ICE") check-in, Petitioner was separated from her family and placed into detention. Petitioner was given no process—no notice that her Order of Supervision had been changed or terminated (if it has been), no identification of the reason for any change in status, and no opportunity to challenge the action; the only explanation given for the detention was that "there is a new president." And while Petitioner had duly applied for a Stay of Removal before her hearing, and although ICE told counsel just days before the check-in that her stay application was still pending, the ICE officer at the check-in asserted that her stay request had been denied weeks earlier.

Petitioner had her 2-year-old son with her at the check-in, so the ICE officer presented her with an unthinkable choice: she could bring her child into detention with her in Texas or leave her child and accept detention in a facility closer to her family. To remain in contact with her counsel and her husband, and to spare her U.S. citizen child from detention, she handed her toddler over and was taken away. Yet today, Petitioner sits in a jail cell in Louisiana, in a facility that has been

unable to allow counsel a legal phone call with Petitioner.

Petitioner and her family cannot return to Honduras, as they will be persecuted there. Her husband and daughter have been granted asylum on this basis, and Petitioner has dutifully followed a strict Order of Supervision for years while awaiting her own request for a Reasonable Fear Interview (RFI) and the processing of a derivative asylum claim. Refugee families are entitled to be processed under Congress's instruction at 8 U.S.C. § 1231(a)(3) and the regulations issued at 8 C.F.R. §§ 208.31, 241.4(l), and 241.8(e). Yet Petitioner's current detention was commenced and continues without regard for these rules, and on imprudent and punitive grounds.

Petitioner seeks a Temporary Restraining Order and Preliminary Injunction to Respondents to restore the *status quo* of September 8, when Petitioner was subject to a constitutionally-valid Order of Supervision rather than her current unlawful detention, and moves the Court to order Respondents to release Petitioner from detention and restore her previous Order of Supervision, enjoin them from rearresting her for civil immigration detention during pendency of her petition, and return Petitioner to the greater New York area where her family lives and her counsel practice.

II. RELEVANT FACTS

Petitioner was born in 1994 in Honduras.[1] When she was ten years old, in June of 2004, her mother brought her to the United States. They were apprehended on the U.S. side of the Rio Grande river. Petitioner and her mother were released and went to stay with family in the northeast United States. The government issued an *in absentia* removal order against Petitioner when she was still ten years old, on November 4, 2004.

In June of 2009, Petitioner—then fifteen-years-old—was apprehended by ICE as a

[1] Respondents have moved Petitioner to a facility, over 1,000 miles from New York, that will not let counsel conduct a legal phone call until September 12. Accordingly, to timely file this motion, counsel verifies certain facts below regarding Petitioner's early personal history on information and belief, and proffers declaration testimony from Petitioner consistent thereto.

passenger in a vehicle driven by a family member and was sent to Honduras as an unaccompanied minor under the *in absentia* removal order.

Back in Honduras, Petitioner met her now-husband, Erick Yariel Cruz Villanueva, and together they had a daughter named L.M.C.F. born in 2020. On May 21, 2023, Petitioner entered the United States with Erick and their daughter, then three-years-old. Petitioner was six-months pregnant with a second child by Erick. At the border, they all formally asked for protection in the United States. Erick had been [redacted] in Honduras who had seen and documented [redacted] All three were apprehended and temporarily detained, but released on May 23, 2023 for "humanitarian and safety issues with overcrowding." Moffa Decl. Ex. A (Form I-831). Petitioner was placed in proceedings to reinstate the removal order issued when she was ten years old, *id.* at 3, while Erick and their daughter requested asylum and were placed in removal proceedings under INA § 240. Petitioner, who was ineligible for asylum, expressed a fear of return to Honduras and asked for a Reasonable Fear Interview ("RFI")—the corresponding option for a noncitizen in reinstatement proceedings. Over two years later, no RFI has been scheduled or conducted.

Petitioner was released with her family under an Order of Supervision. Moffa Decl. Ex. B (Order of Supervision). Her release conditions required that Petitioner report to the ICE office at 26 Federal Plaza, appear for medical examinations upon request, not be associated with any criminal activity, and participate in an Alternatives to Detention program. *Id.*; Moffa Decl. Ex. C (ATD Enrollment Notice). Since her release in May 2023, Petitioner has met the conditions of her supervision. She has gone to all scheduled ICE check-ins, adhered to all reporting requirements, and has no criminal history. She has remained at home as primary caregiver to her young family

while Erick works outside the home.

Soon after her arrival, in 2023, Petitioner gave birth in Islip, New York to a baby boy, E.Y.C.F., a U.S. citizen. Moffa Decl. Ex. D (birth certificate). Since her arrival in the United States, Petitioner has lived in New York and cared for her family. On December 20, 2024, Ms. Funes Gamez married Erick in Patchogue, New York. Moffa Decl. Ex. E (marriage certificate).

On February 20, 2025, Petitioner's husband and daughter were granted asylum by Immigration Judge Thomas Mungoven of the New York Varick Street Immigration Court. Moffa Decl. Ex. F (Asylum Order). The Department did not appeal and the decision is final.

On April 15, 2025, Petitioner's husband filed a Form I-730 Refugee/Asylee Relative Petition naming Petitioner. When granted, I-730 will let Petitioner remain with her husband and family as a derivative asylee. The petition has been acknowledged by USCIS and remains pending. Moffa Decl. Ex. G (I-730 Receipt). The USCIS Case Proceeding Time calculator (at https://egov.uscis.gov/processing-times/) gives no estimated processing time for an I-730 petition.

On July 14, 2025, Petitioner went with her counsel, Livia Santoro, to the ICE Field Office at 26 Federal Plaza, New York, New York for an ICE check-in. Santoro Decl. ¶2. At the check-in, the ICE office reminded Petitioner that individuals with final removal orders were subject to re-detention and that Petitioner would be detained because of her removal order. *Id.* ¶2. Ms. Santoro reminded the ICE officer that Petitioner was entitled to a Reasonable Fear Interview that was yet to be scheduled, and that Petitioner was named in a pending I-730 petition of her asylee husband. *Id.* ¶2. Petitioner was then released under her same Order of Supervision. That same day, right after the hearing, Petitioner's counsel applied for a Stay of Removal or Deportation (ICE Form I-246) at the same ICE field office. *Id.* ¶2.

On September 3, 2025, Petitioner and her counsel reported to ICE-ERO for a following

scheduled hearing but were turned away for the (stated) reason that ICE-ERO did not have capacity to accommodate more ICE check-ins that day. *Id.* ¶4. Before leaving 26 Federal Plaza on September 3, Petitioner's counsel went to the 9th Floor to request the status of Petitioner's stay request, and was affirmatively told that the request was pending in the system and no decision had yet been made. *Id.* ¶4. Later that day, Petitioner was told to return on September 8, 2025. *Id.* ¶4.

On September 8, 2025, Petitioner, accompanied by her two-year-old son and Ms. Santoro, returned for the scheduled check-in at 26 Federal Plaza. *Id.* ¶5. There, an officer stated that Petitioner would be detained, and that all individuals with final removal orders were indiscriminately being detained at appointments that day. *Id.* ¶6. Ms. Santoro asked why Petitioner would be detained given that she had followed her Order of Supervision check-ins and had a pending request for a Reasonable Fear Interview and I-730 petition pending, and as no changes had occurred. *Id.* ¶6. The officer stated, in substance, that the reason for Petitioner's detention was that Petitioner had a final order and that "we have a new president now." *Id.* ¶6. The officer also told Ms. Santoro that Petitioner's stay of removal application had been denied on discretionary grounds on August 14, 2025, although neither Petitioner nor her attorney had ever been notified of such a denial (despite many inquiries by her counsel). *Id.* ¶7. The Officer stated that a decision had been mailed to Ms. Santoro, but Ms. Santoro had received no such decision by mail. *Id.* ¶7. In fact, Ms. Santoro never received the decision by mail until September 11, 2025—and it bears a postmark date of September 9, 2025, the day *after* the check-in. Moffa Decl. Ex. I.

Petitioner was told she would be taken into immediate custody. Santoro Decl. ¶7. She was told she could choose between being detained *with* her toddler at a family detention center in Texas or being detained *without* her child if she wanted to be detained closer to home, specifically in New Jersey, Long Island, or Pennsylvania. *Id.* ¶8. Petitioner's counsel asked to be scheduled for

another check-in in one week, as this was an important decision for Petitioner and her family, but the officer refused. *Id.* ¶8. Petitioner then communicated by message with her husband and they decided that the baby would remain in his care and not suffer in detention, so she elected to be detained closer to home and within visitation access of her husband and family. *Id.* ¶9.

Petitioner's husband arrived at 26 Federal Plaza at about 10:00 a.m. *Id.* ¶10. The ICE officer said he would make a note asking for a Reasonable Fear Interview again and indicating Petitioner was represented by counsel and had two minor children, with the intention she be detained locally. *Id.* ¶11. Petitioner's husband left with their baby, and she was placed into detention at 26 Federal Plaza, which is a short-term holding facility without beds, showers or basic sanitation and hygiene services. *Id.* ¶12.[2]

At 1:02 p.m., Ms. Santoro emailed NY Outreach Enforcement and Removal Operations division ("ERO") and NY Attorney Inquiry ERO requesting a legal call with Petitioner. *Id.* ¶13. At 2:12 p.m., she received a response misstating that Petitioner was not in custody. *Id.* ¶13; Moffa Decl. Ex. H. At 2:22 p.m., she received another email stating, "Our records do no indicate that this subject is NOT in ICE custody." [sic] *Id.* She continued to check the ICE Online Detainee Locator throughout the day, but it did not show any record for Helen. Santoro Decl. ¶13.

At about 6 p.m. that evening, Petitioner left a WhatsApp message for Ms. Santoro, informing her she was still at 26 Federal Plaza and would be transferred out on September 9, 2025, but with no sign of where she would be transferred to. *Id.* ¶13.

On September 9, Ms. Santoro attempted again to ask for a legal call with her client. *Id.* ¶14.

[2] Hours after Ms. Santoro had left and Petitioner was detained, the ICE officer presented Petitioner with a paper in English referencing her order of supervision. Counsel have not received a copy of this paper and do not further know its contents, and have not been allowed to present privileged questions to their client about it as it remains in her possession.

At about 7:25 PM, Ms. Santoro received an email from an Assistant Field Office Director with ICE ERO, recommending that Ms. Santoro check the ICE online detainee locator, which indicated that Petitioner was now being held in Richwood, Louisiana. *Id.* ¶14. Ms. Santoro then twice asked the new facility for a legal call with Petitioner on the morning of September 10, but was told the facility was "fully booked" and no calls were available until September 12. *Id.* ¶15. Later that day, Petitioner was afforded one fifteen-minute call with Ms. Santoro, on an unsecured line, on which she relayed that she had been transported by plane to Louisiana in handcuffs and shackles. *Id.* ¶16.

Petitioner was never notified of any alleged violations of the conditions of her release under the Order of Supervision—nor, to counsel's knowledge, has it ever been violated. *Id.* ¶17. Petitioner was not informed before her detention that her Order of Supervision was formally revoked (if it has been), or what authority ICE relied on to justify her re-detention. *Id.* ¶7. No reason beyond unbridled discretion has been given for the denial of Petitioner's motion for a stay of removal. *Id.* ¶7. No reason has been given for the counsel's lack of protected legal access to her client. *Id.* ¶15.

Petitioner an essential caregiver for her family, and her detention has already placed an unthinkable burden on her husband and children. Villanueva Decl. ¶¶2–8. Her five-year old daughter has been especially hurt, crying and showing deep sadness. *Id.* ¶3. She no longer wants to attend school and her father worries she will fall into depression. *Id.* Her two-year-old son cries and is visibly distressed. *Id.* ¶4. Without the primary caregiver, and with the need for her husband to work, her husband has had to hire someone to care for their son during the day, paying her $150 a week. *Id.* ¶6. A neighbor has been volunteering to pick up their daughter from school, but Petitioner's husband fears the neighbor will not be able to help for much longer. *Id.* ¶6. Petitioner's husband is "devastated" and attests is it "extremely hard" for them to be separated. *Id.* ¶7. The

family is "suffering deeply because of their absence." *Id.* ¶8.

III. LEGAL STANDARDS

A. Temporary Restraining Orders and Preliminary Injunctions

The standard for issuance of a temporary restraining order is the same as that governing the issuance of a preliminary injunction. *3M Co. v. Performance Supply, LLC*, 458 F. Supp. 3d 181, 191 (S.D.N.Y. 2020). A Petitioner must show (1) that she is likely to suffer irreparable harm in the absence of preliminary relief; (2) that she is likely to succeed on the merits; and (3) that the balance of equities tips in her favor, and that an injunction is in the public interest. *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

"Harm may be irreparable where the loss is difficult to replace or measure, or where plaintiffs should not be expected to suffer the loss." *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 285 (2d Cir. 2012). Plaintiff need only show a "likelihood of success on the merits of at least one of [her] claims," *725 Eatery Corp. v. City of New York*, 408 F. Supp. 3d 424, 459 (S.D.N.Y. 2019) (citation omitted), or that there are sufficiently "serious question[s] going to the merits to make them a fair ground for trial," *Citigroup*, 598 F.3d at 33.[3] A showing of "absolute certainty" is not required, only "a showing that the probability of prevailing is better than fifty percent." *Regeneron Pharms., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 510 F. Supp. 3d 29, 41 (S.D.N.Y. 2020).

B. Detention and Release

Congress has authorized civil detention of noncitizens in removal proceedings for specific,

[3] Petitioner seeks a prohibitory injunction that orders the government to release her from detention and return her to her previous *status quo* Order of Supervision with alternatives to detention. *See New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 472 (S.D.N.Y 2006). Because the injunction is properly characterized as a prohibitory injunction, she need not meet the higher "likelihood of success" standard for a mandatory injunction—although she does so.

non-punitive purposes. *See Jennings v. Rodriguez*, 583 U.S. 281, 281 (2018); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "Congress has created an expedited process for aliens who reenter the United States without authorization after having already been removed," set forth at 8 U.S.C. § 1231(a)(5). *Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021). Section 1231(a)(5) provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date . . . ."

Reinstatement is a summary proceeding conducted by an ICE official, which involves determining whether a noncitizen was subject to a past order of removal, whether the noncitizen was removed or left voluntarily while under an order of removal, and whether the noncitizen unlawfully reentered the United States. *See* 8 C.F.R. § 241.8. If those three criteria are met, the ICE official can issue a notice of reinstatement. *Id.* That decision is subject to appeal by petition for review.

An individual with a final order of removal may be subject to required or discretionary detention under 8 U.S.C. § 1231(a). If released, she is subject to the terms of supervision under 8 U.S.C. § 1231(a)(3). She is also entitled to an opportunity to demonstrate a fear of return to her country of citizenship during reinstatement proceedings, and if she does so, DHS must refer her to an asylum officer for a reasonable fear interview. 8 C.F.R. §§ 208.31, 241.8(e).

8 C.F.R. § 241.4(l) sets forth the procedures ICE must follow to revoke an Order of Supervision and return a noncitizen to custody. Section 241.4(l)(1) provides that an individual "who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody." The alien must be "notified of the reasons for revocation of [] her release" and "afforded an initial informal interview promptly after [] her

return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." *Id.* The Executive Associate Commissioner has independent discretionary authority "to revoke release and return to Service custody an alien previously approved for release under the procedures in this Section." *Id.* § 241.4(l)(2). While a district director may also revoke release of an alien when, "in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner," to exercise its discretion, the revoking official must find that "(i) the purposes of release have been served; (ii) the alien [has] violate[d] any condition of release; (iii) it is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (iv) the conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." *Id.*

C. Due Process for Noncitizens

Because "[t]he Fifth Amendment entitles all 'persons' to due process of law ... the Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful, temporary, or permanent." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020).

The government violates the Due Process Clause when it revokes a noncitizen's order of supervision without the requisite notice, hearing, and findings, and thereafter re-detains the noncitizen. *Zhu v. Genalo*, No. 1:25-CV-06523 (JLR), 2025 WL 2452352, at *4 (S.D.N.Y. Aug. 26, 2025); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 144 (W.D.N.Y. 2025); *Torres-Jurado v. Biden*, No. 19 CIV. 3595 (AT), 2023 WL 7130898, at *5 (S.D.N.Y. Oct. 29, 2023); *see also You v. Nielsen*, 321 F. Supp. 3d 451, 463 (S.D.N.Y. 2018) ("Even assuming *arguendo* that Respondents had the authority to revoke Petitioner's release under § 241.4 in May 2018, they could not detain him without providing him with notice and an informal interview. Nor could they detain Petitioner without finding that he was 'a risk to the community or unlikely to comply with the order of

removal.'" (citing 8 U.S.C. § 1231(a)(6) and 8 C.F.R. § 241.4(l))).

This is consistent with the many cases holding that due process violations occur when a noncitizen is detained without individualized assessment when reporting for an immigration court hearing. *See, e.g.*, *Samb v. Joyce*, No. 25 CIV. 6373 (DEH), 2025 WL 2398831, at *4 (S.D.N.Y. Aug. 19, 2025) ("By complying with his legal responsibilities and attending his regularly scheduled immigration court proceeding, Mr. Samb joined the unlucky ranks of Mr. Lopez Benitez and others in losing a perilous game of chance currently taking place outside of immigration court in Manhattan. These seemingly random and arbitrary detentions contravene the basic guarantees of constitutional due process."); *Valdez v. Joyce*, No. 25 CIV. 4627 (GBD), 2025 WL 1707737, at *4 (S.D.N.Y. June 18, 2025) ("Respondents' ongoing detention of Petitioner with no process at all, much less prior notice, no showing of changed circumstances, or an opportunity to respond, violates his due process rights."); *Chipantiza-Sisalema v. Francis*, No. 25 CIV. 5528 (AT), 2025 WL 1927931, at *3 (S.D.N.Y. July 13, 2025) ("The suggestion that government agents may sweep up any person they wish . . . without consideration of dangerousness or flight risk . . . offends the ordered system of liberty that is the pillar of the Fifth Amendment.").[4]

D. Jurisdiction and Exhaustion

Notwithstanding the jurisdiction-stripping clauses of 8 U.S.C. § 1252, this Court has

[4] Re-detention by ICE without process is likewise regularly prohibited in other districts. *See Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 1771438, at *4 (N.D. Cal. June 26, 2025) (collecting cases); *see, e.g.*, *Ortega v. Bonnar*, 415 F. Supp. 3d 963 (N.D. Cal. 2019) (permanent injunction forbidding ICE on procedural due-process grounds from re-detaining petitioner unless and until a hearing with adequate notice conducted about putative necessity of re-detention), *appeal dismissed*, No. 20-15754, 2021 WL 1590193 (9th Cir. 2021); *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050 (N.D. Cal. 2021) (preliminary injunction forbidding ICE on procedural-due-process grounds from re-detaining petitioner without notice and pre-deprivation hearing), *appeal docketed*, No. 21-15992 (9th Cir. 2021); *Vargas v. Jennings*, Civ. No. 20-5785, 2020 WL 5517277 (N.D. Cal. 2020), *appeal dismissed*, No. 20-17223, 2021 WL 1929147 (9th Cir. 2021); *Romero Romero v. Kaiser*, Civ. No. 22-02508, 2022 WL 1606294 (N.D. Cal. 2022); *Meza v. Bonnar*, No. 18-02708, 2018 WL 2554572 (N.D. Cal. 2018).

jurisdiction to adjudicate the constitutionality of Petitioner's detention and whether the government has followed its own procedures. *See Zhu*, 2025 WL 2452352, at *3–4 (S.D.N.Y. Aug. 26, 2025) (citing *Öztürk v. Hyde*, 136 F.4th 382, 396–97 (2d Cir. 2025)); *Torres-Jurado v. Biden*, 2023 WL 7130898, at *2–3.

Petitioner need not exhaust administrative remedies where "(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question." *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *13 (S.D.N.Y. Aug. 13, 2025) (finding no statutory or prudential exhaustion requirement for habeas petitioner's claim that detention without an individualized consideration of his circumstances and/or an opportunity to appeal the decision violated the Due Process Clause) (citing *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003), as amended (July 24, 2003)).

IV. ARGUMENT

Petitioner's detention violates the Due Process Clause because no proper notice or hearing were given to her, and because no change in her case compels a change in her custody status. She was already found to warrant release on humanitarian grounds, and nothing has occurred to alter this assessment—rather, those grounds are stronger today. She has no criminal history and has never been shown to be a danger or flight risk. In re-detaining her, Respondents have offered no indication of any permissible statutory or immigration purpose, particularly where she is already under an Alternatives to Detention program. Crucially, she was given no process before her re-detention by ICE. She received neither notice nor opportunity to be heard as required by regulation.

Petitioner's substantive and procedural due process rights entitle her to a hearing and an opportunity to oppose any change to her Order of Supervision. ICE did not comply with its own regulations governing the revocation of an Order of Supervision under 8 C.F.R. § 241.4(l). Worse,

Petitioner's counsel was affirmatively misinformed regarding her application for a Stay of Removal or Deportation. With no pre-detention compliance with regulation and no regard for Petitioner's rights, Respondents have no lawful basis for Petitioner's ongoing detention and Petitioner has the right to be returned to the *status quo* conditions of her past Order of Supervision.

The Court should order Respondents to immediately release Petitioner from detention and restore her previous order, and should enjoin Respondents from rearresting her during the pendency of her habeas petition. Respondent is caretaker for two small children (one a U.S. citizen), and is merely awaiting administrative processing of her husband's application to extend his asylum protections to her.[5] Emergency relief is proper because Petitioner is likely to succeed on the merits of her underlying claims for habeas relief, she faces irreparable injury and ongoing constitutional harm, and the balance of interests supports a return to her *status quo* temporary restraints. And, even if Petitioner remains detained—though she should not be—due process includes at a minimum ICE's adherence to its representation that she could be detained close to her home and with access to counsel.

A. Petitioner meets the requirements for a Temporary Restraining Order and a Preliminary Injunction.

1. Petitioner's detention is causing irreparable harm

In the Second Circuit, "it is well-settled that an alleged constitutional violation constitutes irreparable harm." *Basank v. Decker*, 613 F. Supp. 3d 776, 788 (S.D.N.Y. 2020) (collecting cases); *see, e.g., Conn. Dept. of Env't Prot. 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); *Statharos v. New York City Taxi & Limousine Comm'n*,

[5] Petitioner has also timely requested a Reasonable Fear Interview and filed a Petition for Review of her reinstatement decision; either application, if granted, could provide an additional path to status in the United States with no basis for further detention.

198 F.3d 317, 322 (2d Cir.1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (clarifying that "it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm") (emphasis in original); *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (finding that immigrant established irreparable harm by alleging that prolonged immigration detention violated his constitutional due process rights).

Here, Respondents ignored their own regulations governing Orders of Supervision, denied Petitioner an opportunity to contest any findings against her, misleadingly represented the status of Petitioner's Application for a Stay, separated Petitioner's family under threat to detain her U.S. citizen son, and now deny her liberty by holding her in jail with limited access to her counsel and family. Individually and collectively, these actions deny Petitioner her constitutional due process rights. *See Zhu*, 2025 WL 2452352, at *3; *see also Kelly v. Almodovar*, No. 25 CIV. 6448 (AT), 2025 WL 2381591, at *3 (S.D.N.Y. Aug. 15, 2025) (granting petition where petitioner was re-detained at an ICE check-in with no individualized review, even where petitioner had a new arrest).

Courts grant emergency relief where denial of these due process rights occurs—or even is threatened. *See Torres-Jurado v. Biden*, No. 19 CIV. 3595 (AT), 2023 WL 7130898, at *5 (S.D.N.Y. Oct. 29, 2023) (granting preliminary injunction prohibiting petitioner's threatened detention and removal unless afforded "a constitutionally adequate opportunity to respond" to revocation of his order of supervision); *You*, 321 F. Supp. at 469 (on order to show cause, granting stay of removal and release from custody pending resolution of petitioner's habeas petition "to permit Petitioner to vindicate his rights and prevent irreparable injury"); *Garcia v. Bondi*, No. 3:25-CV-05070, 2025 WL 1676855 (N.D. Cal. June 14, 2025) (granting *ex parte* motion for temporary restraining order prohibiting re-detention of habeas petitioner "until such time as he has

had an opportunity to challenge his re-detention before a neutral decisionmaker.")

To be clear, this is not a case like *Andoh v. Barr*, where the government expressly revoked the noncitizen's Order of Supervision before apprehending him. No. 19 CIV. 8016 (PAE), 2019 WL 4511623, at *1 (S.D.N.Y. Sept. 18, 2019) (noting ICE served petitioner with "a notice that the Government was revoking his OSUP"). Nor are the predicates for government action similar to those in *Andoh*. There, the petitioner's Order of Supervision was "issued exclusively to enable Andoh to be at liberty pending receipt of the travel documents from the Ivory Coast necessary to permit Andoh's removal. And it was revoked based on the Government's determination that the necessary travel documents were in hand." *Id.* at *3. Here, in contrast, Petitioner's Order of Supervision was issued for *inter alia* "humanitarian" reasons—reasons all the more compelling now that Petitioner has a husband and child with permanent asylee status in the United States, and a U.S. citizen infant. And, regardless, the Government made no revocation determination before apprehending Petitioner.

Petitioner has a substantial private interest in remaining out of custody, *see Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), and with her family. The conditions of her ongoing detention injure not only her, but also her husband and children. *Mahmood v. Nielsen*, 312 F. Supp. 3d 417, 425 (S.D.N.Y. 2018) (finding that plaintiff's detention in violation of his constitutional rights established irreparable harm and that the consequences of plaintiff's detention, including separation from his family, bolster plaintiff's claim of irreparable harm); *see You*, 321 F. Supp. 3d at 468 (noting "grave emotional and psychological harm to [petitioner's spouse] and children by splitting apart their family"); *Garcia*, 2025 WL 1676855, at *1 (irreparable harms from immigration detention include "the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are

detained."). Every day that Petitioner remains detained without justification or process, apart from her family and with no reasonable access to counsel, is a day she and her family cannot have back.

Even if Petitioner is eventually released when her husband's petition is granted, she will still have suffered the harm that is the subject of this motion: her unjustified and unnecessary ongoing detention. *See Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1055 (N.D. Cal. 2021) (requiring a pre-deprivation hearing and noting that respondents "misapprehend[ed] the purpose of a pre-detention hearing: if Petitioner is detained, he will already have suffered the injury he is now seeking to avoid"). That harm also extends to her husband and children, who will suffer needlessly by her detention. The previous Order of Supervision was more than sufficient to secure her compliance with the law while her status is adjudicated on the government's timetable, without causing them irreparable harm. Petitioner has shown a likelihood of irreparable harm unless returned to her *status quo* Order of Supervision.

2. Petitioner is likely to succeed on the merits of her claim

The Due Process Clause forbids the government from depriving a person of life, liberty, or property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319 (1976). It applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693.

The U.S. Constitution prohibits pretrial and civil detainees from being detained in punitive conditions of confinement because the purpose of this detention is allegedly not punitive. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). These detainees, including immigrant detainees, "may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.* (internal quotations and citations omitted). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. Because this interest is even more significant in civil confinement,

heightened burdens apply. *See, e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) ("[D]ue process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.") (internal quotations and citations omitted).

Here, Petitioner was *already* under satisfactory conditions to secure her attendance before ICE during adjudication of her family's asylum claims. The conditions of her Order of Supervision—which include consent to participation in an Alternatives to Detention program,. such as an ankle monitor—met the government's needs for years, while still letting her care for her U.S. citizen son and her refugee family. The government has offered Petitioner no justification to change those conditions.

In *Zhu*, the Court found that the same lack of notice and hearing pled by Petitioner here alone gave rise to an irreparable constitutional violation. *Zhu*, 2025 WL 2452352, at *10. There, ICE had apprehended a noncitizen during a field operation and directly re-detained him without hearing or notice, even though he had been complying with an order of supervision for over six years after his original release from detention under 8 U.S.C. § 1231. *See id.* at *1. The Court carefully reviewed 8 C.F.R. § 241.4(d) and (l) to reject the government's contention that no notice or interview was required before re-detaining noncitizens under final removal orders to effectuate their removal. *See Zhu*, 2025 WL 2452352, at *5–9. The Court found that re-detention of a noncitizen without a notice or interview was not allowed under the regulations, as it "thwarts his ability to contest the revocation," including by concealing "notification of the reasons for the revocation of his release" and "any information on the identity or position of the ICE official who authorized that revocation" to determine under what authority the order had been revoked. *Id.* at *8. The Court concluded that "ICE's failure to follow its own regulations and provide Petitioner

with notice or an interview violated Petitioner's procedural due process rights," and ordered the Petitioner to be returned to New York and released. *Id.* at *10; *accord Ceesay*, 781 F. Supp. 3d at *159–62 (reviewing 8 C.F.R. § 241.4(l) to conclude that ICE violated petitioner's due process rights by, *inter alia*, failing to provide an interview and a lawful revocation notice).

Arrest and detention by ICE "in the absence of any pre-deprivation notice or opportunity to be heard" generally violates the Due Process Clause. *See Lopez v. Sessions*, No. 18 CIV. 4189 (RWS), 2018 WL 2932726, at *7 (S.D.N.Y. June 12, 2018). In *Lopez v. Sessions*, a habeas Petitioner under a supervision agreement had satisfactorily met all pre-detention conditions of custody and had never shown himself to be a danger to himself or others, nor a flight risk. The Court found it was a constitutional violation to arrest him "without notice, a hearing, or an on-the-record determination." *Id.; accord Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1200–06 (N.D. Cal. 2017) (where detention of unaccompanied minor previously found unnecessary, due process requires that he or she "cannot reasonably be rearrested absent a material change in circumstances" and "a prompt hearing in which the government must show that these changed circumstances exist"), *aff'd*, 905 F. 3d 1137 (9th Cir.). Petitioner's rights under 8 C.F.R. § 241.4(l)(1)—to consideration of her individualized family circumstances and the factors listed in § 241.4(l)(2), and the opportunity to contest any assessments against her—are no less compelling than the right of the petitioner in *Lopez* to placement in the least restrictive setting.

Likewise, detention outside of the New York region, where Petitioner's family and counsel live, is presumptively punitive, since the government successfully addressed any concerns of "humanitarian and safety issues with overcrowding" in 2023 by releasing her on an Order of Supervision—one that Petitioner meticulously followed.

Petitioner's *in absentia* order of removal is the only reason Petitioner is treated differently

under the law from her husband and daughter, all refugees. That order arose because her mother brought her to the United States when she was ten years old and then failed to comply with a government instruction—actions that cannot be attributed to Petitioner. Here, in contrast, when Petitioner arrived in this country as an adult, she affirmatively sought protection from persecution for herself and her family and has since complied with every order by the government. There is no justification to now subject her to punitive restraints.

Petitioner is likely to succeed on the merits of her *habeas* claims—and has, at minimum, raised sufficiently "serious question[s] going to the merits" to warrant restoring the *status quo*. *Citigroup*, 598 F.3d at 33. The Court can and should restore the *status quo* of her order of supervision, which already meets any legitimate purpose the government might offer for her detention and better preserves the rights of herself and her family (including her U.S. Citizen son) as she secures permanent status in the United States.

3. The balance of equities favors Petitioner and the requested relief is in the public interest

The irreparable harm Petitioner will suffer if she continues to be detained without process greatly outweighs any harm that the government may suffer because of her release, particularly where the *status quo* Order of Supervision she would return to has not been shown to have been deficient in any regard. The cost to the government to detain Petitioner in a prison is presumably more than the cost of her regularly-scheduled check-ins under her Order. But even if the government could show otherwise (i.e. that her civil detention is more affordable than her Order), that harm would be purely fiscal or administrative. The Second Circuit has held that where, as here, "a plaintiff alleges constitutional violations, the balance of hardships tips decidedly in the plaintiff's favor despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government." *Sajous*, 2018 WL 2357266, at *13 (citing *Mitchell v.*

Cuomo, 748 F.2d 804, 808 (2d Cir. 1984)); *see also Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (characterizing government's claimed fiscal and administrative harm as "minimal").

Public interest also supports granting Petitioner's relief. Public interest is harmed when the government detains caretakers of U.S. Citizen children, when those caretakers already complied with duly-issued ICE Orders of Supervision. Moreover, "there is a public interest in maintaining families together and in avoiding extreme hardship to Plaintiff's citizen wife and child." *Torres-Jurado*, 2023 WL 7130898, at *5 (citing *You*, 321 F. Supp. 3d at 469). The public interest is also served when laws are followed and constitutionally-guaranteed process is provided. *See Sajous*, 2018 WL 2537266 at *13 ("The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.").

A Temporary Restraining Order returning Petitioner to New York and restoring Petitioner to her past Order of Supervision appropriately restores the status quo, which satisfied government and public interests for years already—while also allowing Petitioner's children and husband access to their caregiver. *See Nat'l Ass'n of Letter Carriers v. Sombrotto*, 449 F.2d 915, 921 (2d Cir. 1971) ("[A]s a general rule, the status quo is the last uncontested status which preceded the pending controversy."); *see, e.g.*, *Kuzmenko v. Phillips*, No. 25-cv-00663, 2025 WL 779743, at *7 (E.D. Cal. Mar. 10, 2025) (granting a temporary restraining order requiring immediate release of the petitioner back to home confinement from custody as a restoration of the status quo).

V. CONCLUSION

Petitioner is entitled to a temporary restraining order and preliminary injunction ordering Respondents to release Petitioner from detention and restore her previous Order of Supervision, enjoining them from rearresting her for civil immigration detention during the pendency of her habeas petition, and returning her to the greater New York area where her family lives and her counsel practice.

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Respectfully submitted,

/s/ Matthew J. Moffa

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