Regina Dryjanski, Esq. (CA 336432)
(858) 361-9725
reginac@jfssd.org
Krista Kshatriya, Esq. (CA 274609)
(858) 201-0349
kristak@jfssd.org
Jewish Family Service of San Diego
8804 Balboa Avenue
San Diego, CA 92123
Pro Bono Counsels for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SOL DE LA ROSA GUARIN,

Petitioner,

v.

CHRISTOPHER J. LAROSE, Warden, Otay Mesa Detention Center; PATRICK DIVVER, Field Office Director, San Diego Field Office, United States Immigration and Customs Enforcement; TODD M. LYONS, Acting Director, United States Immigration and Customs Enforcement; KRISTI NOEM, Secretary of Homeland Security; PAMELA JO BONDI, United States Attorney General, *in their official capacities,*

Respondents.

Case No.: 3:25-cv-03085-DMS-VET

MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Date: TBD

Time: TBD

Courtroom: TBD

Judge: Judge Dana M. Sabraw

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

I. INTRODUCTION

Petitioner files this motion for a temporary restraining order ("TRO") ordering his immediate release, and prohibiting his re-detention without notice and a pre-deprivation hearing before a neutral decisionmaker. Respondent Immigration and Customs Enforcement (ICE) has held Petitioner at the Otay Mesa Detention Center in prolonged, indefinite detention for 16 months in violation of Petitioner's constitutional and statutory rights.

Petitioner is a bisexual man of Roma ethnicity who fled persecution in Spain and Mexico. Ex. A Declaration of Sol Joel De La Rosa Guarin ("Sol Decl.") ¶ 1. The Immigration Judge granted Petitioner Withholding of Removal ("WOR") from both Spain and Mexico under the Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3) over five months ago on May 22, 2025. Ex. B, Declaration of Reilly Frye, Attachment 2, Immigration Judge's Order Granting Withholding of Removal ("Withholding Grant"). Neither Petitioner nor the Department of Homeland Security (DHS) appealed this WOR grant. Sol Decl. ¶ 13. Yet Respondents refuse to release him.

Petitioner has been detained in ICE custody since July 9, 2024 — 489 days as of the date of this filing. He has been detained after having won WOR—and with no ongoing removal proceedings in connection with his detention—for 172 of those days, or over 5 months. During this time, Petitioner has had to take medication for depression and anxiety, he has had difficulty sleeping, and he has been separated from his U.S. citizen half-brother, who is located on the other side of the country. Sol Decl. ¶¶ 7, 11.

Petitioner's prolonged detention violates the Due Process clause of the Fifth Amendment. It is not reasonably related to 8 U.S.C. § 1231(a)(6)'s primary purpose of ensuring his removal because his removal is not reasonably foreseeable and thus no longer serves a legitimate government purpose. *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001). Moreover, Petitioner has a

strong private interest in his liberty; the risk of erroneous deprivation is high where, as here, the absence of safeguards has subjected Petitioner to prolonged unjustified confinement after he *won* relief from removal; and the government can claim no interest in continuing to detain him where there are no flight risk or danger concerns to justify it. *Mathews v. Eldrige,* 424 U.S. 319, 335 (1976).

Additionally, Respondents have failed to observe what few regulatory safeguards Petitioner was entitled to, including a custody review prior to the expiration of the 90-day removal period after the WOR grant. 8 U.S.C. § 1231; 8 CFR § 241.4. Respondents did not provide Petitioner with 30 days' notice of his initial custody review under § 241.4(h)(2); they have failed serve the representative of record as required by § 241.4(d)(3); and Petitioner was further entitled to, and Respondents failed to provide, written notice approximately 30 days in advance of the pending records review "so that the alien may submit information in writing in support of his or her release." 8 CFR § 241.4(h)(2). Under the Administrative Procedure Act (APA), Respondents' failure to comport with these requirements renders his continued detention arbitrary and capricious and must be set aside. *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

Thus, Petitioner challenges his detention as a violation of 8 U.S.C. § 1231(a)(6), the substantive and procedural guarantees of the Due Process Clause of the Fifth Amendment, and the APA.

Because Petitioner is likely to succeed on the merits of his claim, suffers irreparable harm each day he remains unlawfully and unconstitutionally detained, and because the balance of the equities favors release, this Court should grant Petitioner's Motion for Temporary Restraining Order and order his immediate release from Respondents' custody, as courts in this district have recently done. *Conchas-Valdez v. Casey*, No. 25-cv-02469-DMS-JLB, 2025 WL 2884822 (S.D. Cal Oct. 6, 2025) (granting petition for writ of habeas corpus and ordering release within 48 hours of individual subjected to prolonged detention after winning relief from removal under the

Convention Against Torture); *Alic v. DHS*, No. 25-cv-01749-AJB-BLM, 2025 WL 2799679 (S.D. Cal Sep. 30, 2025) (granting petition for writ of habeas corpus and ordering release within 48 hours of individual subject to post-removal order prolonged detention).

II. STATEMENT OF FACTS

Petitioner is a bisexual man of Roma ethnicity. Sol Decl. ¶ 1. He was born in Spain, where most Roma are Muslim. *Id.* ¶¶ 1, 4. Petitioner is Christian, and his family was beaten, their house burned to the ground, when they attempted to start a Christian church. *Id.* ¶ 4. He was also ridiculed and assaulted by the Roma community for his sexual orientation. *Id.* He was forced to flee Spain for Mexico at a young age, and eventually gained permanent residence in Mexico. *Id.* ¶ 5. In Mexico, he became an addiction counselor at a drug rehabilitation clinic. *Id.* One of his clients discovered Petitioner carried a Spanish passport and asked him to use that passport to transport drugs internationally. *Id.* When he refused, his house was broken into, he was kidnapped, and he was beaten for over two days. *Id.* ¶¶ 5-8. After leaving the hospital where he sought treatment for his injury, he was again forced to seek sanctuary in another country—this time, the United States. *Id.* ¶ 9.

As a child and young adult, Petitioner was granted entry to the United States through the Visa Waiver Program as a citizen of Spain. *Id.* ¶ 3. He visited the country a handful of times. *Id.* On one such visit in November 2007, he landed in the Philadelphia airport and received a Notice to Remove for overstaying his visa, and promptly left the United States without ever leaving the airport. *Id.* Petitioner contends he never overstayed his visa, and that an officer made a mistake in not recording his exit in an earlier visit before 2007, when he was still a child. *Id.* Nevertheless, Petitioner left the United States and did not enter or attempt to enter until 17 years later, when circumstances in Mexico forced him to flee for his life. *Id.* Outside of this incident, Petitioner has followed all immigration laws, complied with all requests from ICE while detained, and appeared

to every hearing at the immigration court. *Id.* ¶ 25. Petitioner additionally has no criminal convictions or arrests in the United States and has been given a blue jumpsuit to wear in detention, indicating he has no criminal history. *Id.*

On July 9, 2024, Petitioner arrived at the San Ysidro Port of Entry Ped East Pedestrian Lane in San Ysidro, California with his Spanish passport and claimed fear of return to his home country and to Mexico. *Id.* ¶ 9. He had previously applied to enter the country through the Visa Waiver Program, but could not wait to receive his pending decision on that application due to the immediate threat on his life. *Id.* ICE took Petitioner into custody at Otay Mesa Detention Center. He has remained in custody ever since. *Id.*

Petitioner requested a custody redetermination on November 11, 2024. Ex. B, Declaration of Reilly C. Frye, Attachment 1: Immigration Judge's Order Denying Bond. The Immigration Judge denied the Petitioner's request for lack of jurisdiction because of his entry as a Visa Waiver Program applicant.[1] *Id.* While in detention, Petitioner has received medication for depression and anxiety. Sol Decl. ¶ 11. He reports extreme difficulty sleeping and he is pending a procedure to get painful nerves removed after his tooth was extracted, but this cannot take place while he remains detained. *Id.*

On May 22, 2025, the Immigration Judge granted Petitioner WOR under the Immigration and Nationality Act § 241(b)(3), 8 U.S.C. § 1231(b)(3), from both Spain and Mexico. Withholding Grant. Neither Petitioner nor DHS counsel appealed this decision. Sol Decl. ¶ 13.

On August 26, 2025, at the expiration of the post-order removal period, 8 U.S.C. § 1231(a), counsel for Petitioner emailed Petitioner's assigned Deportation Officer and two Deportation

[1] *See Matter of A-W-*, 25 I&N Dec. 45 (BIA 2009) (finding a noncitizen admitted to the United States pursuant to the Visa Waiver Program who has not been served with a Notice to Appear pursuant to 8 C.F.R. Part 1240 is not entitled to a custody hearing before an Immigration Judge under 8 C.F.R. § 1236.1(d)).

Officers formerly assigned to Petitioner, notifying them that Petitioner was overdue for his 90-day custody review, as required by 8 CFR § 241.4, and included documents demonstrating that Petitioner is not a danger to the community and does not present a flight risk. Ex. B, Declaration of Reilly C. Frye, Attachment 3: Counsel's Emails with Deportation Officers ("D.O. Emails"); Ex. B, Declaration of Reilly C. Frye ("Frye Decl.") ¶ 10. Counsel for Petitioner also notified his assigned Deportation Officer of the same information over a phone call on August 27. Frye Decl. ¶ 11. The Deportation Officer never responded to the email and did not communicate with counsel for Petitioner after the phone conversation on August 27. *Id.* ¶ 12; *see also* D.O. Emails.

On September 4, 2025, counsel for Petitioner again emailed the request for custody review pursuant to 8 CFR § 241.4 to the following email addresses, which counsel understands to be the contact for all ICE officers in San Diego: sandiego.outreach@ice.dhs.gov, omdc-g28@ice.dhs.gov, OMDC-Detained@ice.dhs.gov, omdcdetainedunit@ice.dhs.gov. D.O. Emails; Frye Decl. ¶ 14. No one responded. *Id.*

That same day, Counsel spoke on the phone with another Deportation Officer to request a custody review. Frye Decl. ¶ 11. That officer told Counsel that she would check with her supervisor on the case. *Id.* On September 8, 2025, the officer informed Counsel over a phone call that she had referred the case to management. *Id.* ¶ 16. Counsel has not heard from Officer Barroga since then. *Id.*

On October 1, 2025, counsel for Petitioner contacted an Assistant U.S. Attorney (AUSA) for the Southern District of California to notify their office of Petitioner's unlawful detention. Ex. B, Declaration of Reilly C. Frye, Attachment 4, Counsel Emails with Assistant U.S. Attorneys ("AUSA Emails"); Frye Decl. ¶ 17. AUSA Janet Cabral quickly responded, indicating that she would contact ICE regarding Petitioner's status. AUSA Emails; Frye Decl. ¶ 17. On October 2, the AUSA wrote, "ICE has informed me that it plans to conduct a Post-Order Custody Review shortly." *Id.*

On Friday, October 3, 2025, ICE Deportation Officers approached Petitioner and pressured him to sign a back-dated document indicating, in English, that he had received notice on June 9, 2025, that his custody status would be reviewed on or about August 18, 2025. Ex. B, Declaration of Reilly C. Frye, Attachment 5, Documents ICE Gave to Petitioner in October 2025 ("ICE Documents"); Sol Decl. ¶ 17; Frye Decl. ¶ 18. Counsel for Petitioner was not contacted. Frye Decl. ¶ 18. Neither counsel nor Petitioner had received this documentation prior to October 3, 2025. Sol Decl. ¶ 17; Frye Decl. ¶ 18. Spanish-speaking Petitioner refused to sign this document, written in English, without interpretation and the presence or advice of counsel. Sol Decl. ¶ 17

That same day, counsel for Petitioner contacted the AUSA to inform her that ICE had pressured Petitioner to sign backdated documents and without the presence of counsel. AUSA Emails.

On Monday, October 6, 2025, ICE presented Petitioner with updated documents indicating that Petitioner would receive his first Post-Order Custody Review on November 5, 2025—a whopping 167 days after Petitioner won WOR. ICE Documents; Sol Decl. ¶ 19; Frye Decl. ¶ 22. Again, Petitioner was approached without counsel and refused to sign without the presence or advice of his attorney. Sol Decl. ¶ 19

On October 15, another ICE deportation officer approached Petitioner and again pressured him to sign documents written in English without providing translation and without presence of counsel. ICE Documents; Sol Decl. ¶ 21; Frye Decl. ¶ 23. Petitioner asked the officer to contact his attorney so that he could sign the documents. Sol Decl. ¶ 21. When the officer did not contact Petitioner's attorney, again, he refused to sign without the presence or advice of his attorney. *Id.*

The October 15 documents indicate that ICE decided to continue Petitioner's detention pursuant to their custody review based on documents that Petitioner submitted to ICE on June 24, 2025, due to the following: "You have not demonstrated that, if released, you will not: pose a risk to public safety. You have not established to ICE's satisfaction that you are not a danger to the

community or U.S. security. Pose a significant risk of flight. An imposition of a bond or other conditions of parole would not ensure, to ICE's satisfaction, your appearance at required immigration hearings pending the outcome of your case. ICE has made such determination based upon: You are a native and a citizen of Spain who last entered the United States unlawfully at the San Ysidro, CA Port of Entry (U.S.) on July 9, 2024. On May 23[sic], 2025, an Immigration Judge in San Diego, CA granted you withholding of removal." ICE Documents.

Neither Petitioner nor Petioner's counsel was aware of any custody review taking place prior to October 15, and the notice does not indicate the date when Petitioner's custody was reviewed and resulted in a denial of release. ICE Documents; Sol Decl. ¶ 23; Frye Decl. ¶ 24. Further, Petitioner did not submit documents for review on June 24, 2025, the notice provides no reasoning specific to the Petitioner as to why the Petitioner was determined a danger/flight risk, and the notice indicates an incorrect date when Petitioner was granted WOR. ICE Documents; Frye Decl. ¶ 24. Finally, the flight risk analysis does not apply to Petitioner, as he has no future immigration hearings to attend and his case has already reached a final outcome. Withholding Grant.

As aforementioned, Petitioner received a document notifying him that he would undergo a custody review on November 5, 2025. ICE Documents. Neither Petitioner nor Petitioner's counsel is aware of any custody review taking place that day. Sol Decl. ¶ 24; Frye Decl. ¶ 26.

To this date, Petitioner has not received a lawful custody review following all regulations required by 8 CFR § 241.4. *See generally*, Sol Decl.; Frye Decl. He has been detained by ICE since July 9, 2024 —489 days. Sol Decl. ¶ 25. He has been detained with no ongoing removal proceedings in connection with his detention for 172 of those days. *Id.*

Petitioner has no criminal history in the United States, and he has never missed a court hearing. *Id.* He has no residency or ties to any country other than those to which his removal has

been withheld. *Id.* ¶ 23. Petitioner's half-brother is a U.S. citizen who is waiting to receive him upon release from detention. *Id.* ¶ 7.

III. STANDARD OF REVIEW

The standard for a TRO is the same as the standard for a preliminary injunction. *Velazquez-Hernandez v. ICE*, 500 F.Supp.3d 1132, 1141 (S.D. Cal. 2020). The party seeking relief "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in their favor, and [4] that an injunction is in the public interest." *City & County of San Francisco v. USCIS*, 944 F.3d 773, 788-89 (9th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Likelihood of success on the merits is the most important factor." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quotations omitted). Where the government is the opposing party, the third and fourth factors merge. *Nken v. Holder,* 556 U.S. 418, 435 (2009).

Additionally, in the Ninth Circuit, courts may "employ an alternative 'serious questions' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Fraihat v. ICE*, 16 F.4th 613, 635 (9th Cir. 2021) (quotations and citations omitted and alterations accepted). Under that test, "serious questions going to the merits and a balance of hardships that tips sharply toward the plaintiff[s] also show[] that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* (internal citations omitted).

Plaintiff meets all requirements for relief.

IV. ARGUMENT

A. Petitioner Is Likely to Succeed on the Merits.

Respondents knowingly continue to detain Petitioner in violation of federal law and his due process rights. His detention is a violation of the substantive and procedural guarantees of the Due

Process Clause of the Fifth Amendment, 8 U.S.C. § 1231(a)(6), and the Administrative Procedure Act (APA).

i. Petitioner's prolonged detention violates his substantive due process rights.

The Due Process Clause of the Fifth Amendment forbids the government from depriving any person of liberty without due process of law. U.S. Const. amend. V. Civil immigration detention violates due process if it is not reasonably related to its statutory purpose. *Zadvydas v. Davis*, 533 U.S. at 697. In the immigration context, the Supreme Court has recognized only two valid purposes for civil detention: to mitigate the risk of flight and to prevent danger to the community. *Demore v. Kim*, 538 U.S. 510 at 528 (2003). Where removal is not likely, the flight risk justification is weak or nonexistent, and detention no longer bears a reasonable relationship to its purpose. *Zadvydas*, 533 U.S. at 690-692 ("by definition the first justification—preventing flight—is weak or nonexistent where removal seems a remote possibility at best.").

Petitioner's civil detention cannot be justified by flight risk concerns because his removal is "a remote possibility at best." *Id.* First, Petitioner's removal is withheld to not one, but two countries—and the only countries that he has ties to other than the United States. Withholding Grant; Sol Decl. ¶ 22.

Second, Petitioner has the right to claim fear under 8 U.S.C. § 1231 to any country where DHS may send him if he fears his life or freedom would be threatened there on account of his bisexuality or Roma ethnicity. 8 U.S.C. § 1231(b)(3); *see also Popova v. INS*, 273 F.3d 1251 (9th Cir. 2001). For example, Spain, is located in the Schengen Zone, where 29 European countries have abolished passport and similar border control checkpoints at their mutual borders. If Petitioner were to be removed to any of the other 28 countries in that area, he would also be unsafe there due to the unique freedom of movement of his persecutors in that area, and he would thus have a right to claim

fear under 8 U.S.C. § 1231 and request his proceedings to be re-opened. 8 U.S.C. § 1231(b)(3); *see also Popova*, 273 F.3d at 1251.

Third, the passage of time without any progress on Petitioner's removal is sufficient to show there is no significant likelihood of removal in the reasonably foreseeable future. Petitioner has been assigned multiple deportation officers for over 5 months, and, presumably, these officers have been diligently pursuing his removal, but to no avail. *See generally*, D.O. Emails. Petitioner has been compliant with ICE throughout the pendency of his detention, as evidenced by his lack of write-ups. The fact that Respondents have been unable to remove him, and have not demonstrated any leads or possibility shows that Petitioner's removal is not likely and therefore his ongoing detention cannot be justified by flight risk concerns.[2]

Nor can Petitioner's civil detention be justified by danger concerns. Respondents have vetted Petitioner on multiple occasions and ultimately determined that he does not present a danger to the community. In Petitioner's youth, DHS determined that he could enter the country lawfully under the Visa Waiver Program, showing that Respondents determined in the past that he did not present a danger. Sol Decl. ¶ 2. More recently, Respondents dressed Petitioner in a blue jumpsuit when they initially detained him in ICE custody, and he has remained in that blue jumpsuit for 16 months, showing that Petitioner has no criminal history and that Respondents do not believe he presents any security threat. *Id.* ¶ 25. Finally, Petitioner underwent biometric review as a necessary

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[2] To the extent Respondents now seek to justify Petitioner's detention by attempting to stage him for removal to a fourth country, Petitioner additionally seeks a court order prohibiting such removal without notice and a meaningful opportunity to be heard, as required by statute and precedent, 8 U.S.C. § 1231(b)(3); *Popova*, 273 F.3d at 1251, and as courts in this district and others have ordered, *Siriphone Louangmilith v. Noem*, No. 25-cv-2502-JES-MSB, 2025 WL 2881578 (S.D. Cal Oct. 9, 2025); *J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025); *Vaskanyan v. Janecka*, 25-cv-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *7 (E.D. Cal. July 16, 2025); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *7 (E.D. Cal. July 16, 2025).

part of the removal proceedings process and again demonstrated his lack of criminal history, and the Immigration Judge granted his application for WOR, necessarily finding he was not barred by any past criminal convictions. 8 U.S.C. § 1231(b)(3). As such, Petitioner's detention is not justified by danger concerns.

In sum, Petitioner poses no danger to the community, and where removal is not likely, as is the case here, the flight risk justification for detention is weak or nonexistent. *Zadvydas*, 533 U.S. at 690-692. Thus, there is no valid purpose for his continued civil detention. *Demore v. Kim*, 538 U.S. 510 at 528 (2003). As such, Petitioner's detention violates his substantive due process rights.

ii. Petitioner's prolonged detention violates his procedural due process rights.

Prolonged civil detention also violates due process unless it is accompanied by strong procedural protections to guard against the erroneous deprivation of liberty. *Zadvydas* at 690-91; *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992); *Kansas v. Hendricks*, 521 U.S. at 346, 364-69 (1997); *United States v. Salerno,* 481 U.S. 739, 750-752 (1987).

Under *Mathews v. Eldrige*, procedural due process must be evaluated by balancing 1) the private interest affected; 2) the risk of erroneous deprivation of such interest; and 3) the government's interest. 424 U.S. at 335. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333.

Petitioner unequivocally has a private interest in his liberty where "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects. *Zadvydas*, 533 U.S. at 690. Petitioner has an interest in finally being reunited with his U.S. citizen half-brother, finding a job and providing for himself financially, and building a safe environment surrounded by friends, not deportation officers, where he can begin to heal from the persecution he experienced in not one, but two countries. *See Diaz v. Kaiser*, No. 3:25-CV-05071, 2025 WL 1676854 (N.D. Cal. June 14, 2025) (cleaned up) (holding that petitioner had a substantial private interest in

remaining out of custody where it would enable to him to "work[ ], liv[e] at home, and be[ ] with family and friends to form the enduring attachments of normal life").

The risk of erroneous deprivation is great where, as here, the absence of safeguards has subjected Petitioner to prolonged unjustified confinement after he *won* relief from removal. The immigration judge granted Petitioner protective relief, yet he has remained in detention without Respondents providing any sufficient reasoning as to why his continued civil detention is permissible. Respondent has no criminal history and has spent 16 months complying with ICE and the immigration court's request while detained. Thus, there is a significant risk that the government is erroneously depriving Petitioner of his liberty interest.

Similarly, the government can claim no interest in keeping Petitioner confined where Petitioner poses no danger to the community, and where any flight risk justification is undermined by the unlikelihood of his removal, as discussed above. Considering the foregoing, Petitioner's detention also violates his procedural due process.

iii. Petitioner's prolonged detention violates the Immigration and Nationality Act – 8 U.S.C. § 1231

Petitioner is detained pursuant to the discretionary, post-removal period detention provision, Section 1231(a)(6), because more than ninety days of detention have elapsed since his removal order became administratively final. *See* 8 U.S.C. § 1231(a)(1)(A) & (B); 8 C.F.R. § 1241.1.

In *Zadvydas*, the Court construed § 1231 to limit "an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." 533 U.S. at 678. As discussed above, "[i]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699-700. The Court found an implicit temporal limitation on such detention of six months. *Id.* at 678.

The six-month grace period is only "*presumptively* reasonable." *Zadvydas*, 533 U.S. at 701 (emphasis added). Several courts have concluded that an immigrant may rebut that presumption with sufficiently compelling evidence that his removal is not foreseeable. *See Trinh v. Homan*, 466 F. Supp. 3d 1077, 1092 (C.D. Cal. 2020); *see also Zavvar v. Scott*, No. 25-2104-TDC, 2025 WL 2592543, *6 (D. Md. Sept. 8, 2025) (granting habeas petition and ordering Iranian citizen with withholding to Iran released due to *Zadvydas* violations even though the petitioner had "not yet been detained for six months," because the six-month period is "rebuttable"); *Ali v. Dep't of Homeland Sec.*, 451 F.Supp.3d 703, 708-09 (S.D. Tex. Apr. 2, 2020)("Whereas the *Zadvydas* Court established a presumption that detention that exceeded six months would be unconstitutional, it did not require a detainee to remain in detention for six months or to prove that the detention was of an indefinite duration before a habeas court could find that the detention is unconstitutional.").

Zadvydas established a burden shifting framework in which the Petitioner must "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Courts have found that "[a] petitioner need not establish that there exists no possibility of removal." *Freeman v. Watkins*, No. CV B:09-160, 2009 WL 10714999, at *3 (S.D. Tex. Dec. 22, 2009). Nor does "'[g]ood reason to believe' . . . place a burden upon the detainee to demonstrate no reasonably foreseeable, significant likelihood of removal or show that his detention is indefinite; it is something less than that." *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL 3972319, at *3 (W.D.N.Y. July 14, 2020) (quoting *Senor v. Barr*, 401 F. Supp. 3d 420, 430 (W.D.N.Y. 2019)). In other words, even if "there remains *some* possibility of removal," a petitioner can still meet their burden if there is good reason to believe that successful removal is not significantly likely. *Kacanic v. Elwood*, No. CIV.A. 02-8019, 2002 WL 31520362, at *4 (E.D. Pa. Nov. 8, 2002) (emphasis added).

For the reasons discussed above, *supra* Section IV(A)(i), there exists no significant likelihood of Petitioner's removal in the reasonably foreseeable future and Petitioner additionally

poses no danger concerns. Thus, his continued detention additionally violates 8 U.S.C. § 1231 and he is entitled to immediate release from custody.

iv. Petitioner's prolonged detention violates the Administrative Procedure Act (APA) – 5 U.S.C. § 706(2)

Under the APA, Courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A).

Final Agency Action

The APA provides for judicial review of final agency action. 5 U.S.C. § 702. In deciding whether an agency's action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). The Supreme Court has provided that if an agency has issued a "definitive statement of its position, determining the rights and obligations of the parties," the agency's action is final notwithstanding the possibility of further proceedings in the agency on related issues, so long as judicial review at the time would not "disrupt the administrative process." *Bell v. New Jersey*, 461 U.S. 773, 779–80 (1983).

Respondents' failure to conduct the 90-day POCR period constituted an agency action because DHS "failed to take a *discrete* agency action that it is required to take" by statute. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (emphasis original). Namely, DHS failed to conduct a timely custody review under 8 C.F.R. § 241.4(k)(1)(i) in which it considered relevant factors, such as Petitioner's lack of criminal convictions and his ties to the United States, under § 241.4(k)(1)(i). This agency action clearly determined Petitioner's right to be free from confinement that bears no reasonable relationship to its purpose. As such, DHS's failure to conduct the 90-day POCR constitutes "final agency action" reviewable by the court.

Arbitrary and Capricious

Courts may set aside as arbitrary and capricious agency actions that fail to comport with their own regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 226 (1954) (holding that BIA must follow its own regulations in its exercise of discretion).

Under the *Accardi* doctrine, agencies are bound to follow their own rules affecting the fundamental rights of individuals, and when the agency fails to do so, a court may apply the rule itself and order relief consistent with the agency's policy. *See* 347 U.S. at 226 (holding that BIA must follow its own regulations in its exercise of discretion); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

Respondents' actions with respect to Petitioner's ongoing detention violate the *Accardi* doctrine because they do not comport with 8 C.F.R. § 241.4, including:

(a) § 241.4(h)(2): "The District Director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review..." to enable the noncitizen to submit information in writing arguing for their release and the noncitizen may be "assisted by a person of his or her choice...in preparing or submitting information..."

(b) § 241.4(k)(1)(i): "Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period or is impracticable or contrary to the public interest."

(c) § 241.4(h)(1): The initial POCR "will consist of a review of the alien's records and any written information submitted in English to the district director by or on behalf of the alien."

(d) § 241.4(d): "A copy of any decision by the District Director, Director of the Detention and Removal Filed Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention." *Id.*

(e) § 241.4(d)(3): "The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record."

Respondents did not provide Petitioner with 30 days' notice of his initial custody review under § 241.4(h)(2). Sol Decl. ¶ 16; Frye Decl. ¶¶ 9-16. They did not conduct a custody review within the 90-day removal period as required by § 241.4(k)(1)(i). *Id.* In their custody determination decision, which Petitioner received 145 days after his WOR grant, they gave absolutely no indication that they reviewed the written information submitted on Petitioner's behalf in August 2025 as required by § 241.4(h)(1), and instead referred to information received on June 24, which—if that information does exist—was not submitted by Petitioner or Petitioner's counsel. ICE Documents. Respondents' decision to retain custody did not set forth the reasons for continued detention, as required by § 241.4(d). *Id.* Instead, the paperwork simply reiterated the legal authority for detention. *Id.* Finally, Respondents have provided Petitioner with two notices and one decision, none of which were subsequently served to the representative of record as required by § 241.4(d)(3). *See generally*, Frye Decl. In short, Respondents neglected to follow at least five of their own regulations, which are in place to protect people like Petitioner from unlawful prolonged detention.

Respondents clearly recognized their grave error in deciding not to take this final agency action, as they later attempted to rectify it at three different intervals. They first deceitfully attempted to get Petitioner to sign a document conceding that the proper custody review had taken place when, indeed, it had not. Sol Decl. ¶ 17; Frye Decl. ¶ 18; AUSA Emails. Then, they offered

Petitioner a custody review well outside of the 90-day timeline as required by statute, and that custody review never took place. ICE Documents; Sol Decl. ¶ 24; Frye Decl. ¶ 26. Finally, Respondents issued Petitioner a discretionary "Decision to Continue Detention" on October 15, 2025, related to an alleged custody review that neither Petitioner nor Petitioner's counsel was aware took place, and nearly 2 months after the initial 90-day review should have occurred. ICE Documents.

Respondents' denial of this process to Petitioner and failure to follow their own regulations render the agency action arbitrary and capricious in violation the APA. 5 U.S.C. §706(2).[3]

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Accordingly, Plaintiff is likely to succeed on his claims that his continued detention violates the substantive and procedural guarantees of the Due Process Clause of the Fifth Amendment, 8 U.S.C. § 1231(a)(6), and the APA.

B. Petitioner Will Suffer Irreparable Harm.

Each additional day that Petitioner remains in ICE custody in violation of federal law and the Constitution, he suffers irreparable harm. Petitioner has already spent 489 days in detention and missed being able to celebrate two birthdays, two Halloweens, and one Christmas with his friends and family.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) ("When an alleged deprivation of a constitutional right is involved, most courts

[3] Any later custody reviews at 90-day or discretionary intervals do not and will not present adequate alternative remedies to judicial review under the APA, where any such reviews would offer only "doubtful and limited relief," especially considering the same regulatory considerations apply in these subsequent reviews that DHS did not follow in the first instance. *Bowen v. Massachusetts*, 487 U.S. 879, 901 (1988). Thus, release is the only proper remedy for the agency's APA violations.

hold that no further showing of irreparable injury is necessary." (quoting Wright, Miller, & Kane, Federal Practice and Procedure, § 2948.1 (2d ed. 2004)). The Ninth Circuit has specifically recognized irreparable harm imposed on anyone subject to unconstitutional immigration detention. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017). As discussed above, Petitioner's detention clearly contravenes 8 U.S.C. § 1231(a)(6), the APA, and violates his constitutional due process rights. Thus, his continued unconstitutional detention constitutes sufficient irreparable harm to justify emergency relief.

While unnecessary to justify granting a TRO, Petitioner's continued detention is also detrimental to his well-being and the well-being of his family. Petitioner's continued detention compounds the trauma and harm resulting from the persecution he fled in Spain and Mexico. This trauma is reflected in the medicine he takes to subdue his anxiety and depression, his difficulty sleeping, and his persistent toothache. Sol Decl. ¶ 11. Petitioner's continued detention also affects his half-brother, a U.S. citizen, who has waited to be reunited with Petitioner since July 2024. *Id.* ¶ 7. Petitioner's half-brother has endured over a year-long wait to see his family member, and has had to suffer the trauma of hearing of Petitioner's difficulties in detention, from multiple continued individual hearings to difficulty in getting medical attention, without being able to provide any meaningful support. Petitioner's unconstitutional, unlawful, and unnecessary prolonged detention under these conditions constitutes irreparable harm justifying this emergency relief.

C. The Balance of Equities Tips Heavily in Favor of Petitioner and a TRO is in the Public Interest

The ongoing injury to Petitioner far outweighs any harm that will result to Respondents if the Court issues a TRO or an injunction. Further, the issuance of an injunction does not disserve the public interest but, rather, promotes it because it upholds the rule of law.

"[N]either equity nor the public's interest are furthered by allowing violations of federal law to continue." *Galvez v. Jaddou*, 52 F.4th 821, 832 (9th Cir. 2022); *Preminger v. Principi*, 422

F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution"); *see also Hernandez*, 872 F.3d at 996 ("The public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process"). In this case, Respondents are detaining Petitioner in contravention of the law. As such, granting the injunction promotes the rule of law.

Petitioner therefore satisfies prongs 3 and 4 of the *Winter* test.

V. CONCLUSION

For the foregoing reasons, this Court should issue a temporary restraining order or preliminary injunction ordering Respondents to immediately release Petitioner and prohibiting his re-detention without notice and a pre-deprivation hearing before a neutral decisionmaker to determine if Petitioner's detention is legally justified. To the extent that Respondents now seek to justify Petitioner's detention by attempting to stage him for removal to a fourth country, Petitioner additionally seeks an order prohibiting such removal without notice and a meaningful opportunity to be heard.

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Respectfully submitted,

Regina Dryjanski, Esq. (CA 336432)
Pro bono Counsel for Petitioner
Jewish Family Service of San Diego
8804 Balboa Avenue
San Diego, CA 92123
(858) 361-9725
reginac@jfssd.org

Krista Kshatriya, Esq. (CA 274609)
Pro Bono Counsel for Petitioner
Jewish Family Service of San Diego
8804 Balboa Avenue
San Diego, CA 92123
(858) 201-0349
kristak@jfssd.org