

1 Kristina David
2 CA Bar # 346347
3 David Strashnoy Law, PC
4 1901 Avenue of the Stars, Suite 200
5 Los Angeles, CA 90067
6 Tel.: 818-646-7350
7 kristina@strashnoylaw.com

8 Jesse M. Bless
9 MA Bar No. 660713
10 Bless Litigation LLC
11 6 Vineyard Lane
12 Georgetown, MA 01833
13 781.704.3897
14 jesse@blesslitigation.com
15 Attorneys for Petitioner

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

18 **Yan Sun,**

19 *Petitioner,*

20 v.

21 **Jesus Rocha, in his official capacity as Acting**
22 **Field Office Director, San Diego Field Office,**
23 **U.S. Immigration and Customs Enforcement,**

24 **Christopher Larose, in his official capacity as**
25 **Warden, Otay Mesa Detention Center,**

26 **United States Department of Homeland**
27 **Security,**

28 **United States Immigration and Customs**
Enforcement,

Respondents.

Case No. **'25CV3127 CAB MSB**

MOTION AND MEMORANDUM OF
LAW IN SUPPORT FOR TEMPORARY
RESTRAINING ORDER

I. MOTION FOR A TEMPORARY RESTRAINING ORDER

Petitioner, Ms. Yan Sun, (“Ms. Sun” or “Petitioner”), is a national of the People’s Republic of China who faces immediate irreparable harm absent this Court’s intervention. This

MOTION AND MEMORANDUM OF LAW IN SUPPORT FOR TEMPORARY RESTRAINING ORDER - 1

1 Court should issue a temporary restraining order because “immediate and irreparable injury . . .
2 or damage” is occurring and will continue in the absence of an order. Fed. R. Civ. P. 65(b). On
3 August 20, 2025, Respondents unlawfully re-detained Ms. Sun while she was under an order of
4 supervision (“OSUP”). On May 11, 2018, an immigration judge granted Ms. Sun withholding of
5 removal after finding she had suffered past persecution, and was likely to suffer future persecution
6 if removed to China. This Court should follow the prior decisions of the Court which have found
7 that the re-detention of a non-citizen without prior notice and revocation of an OSUP is unlawful,
8 and thus warrants the individual’s immediate release. *See Minh Nhat Phan v. Noem*, 3:25-cv-
9 02422-RBM-MSB, 2025 U.S. Dist. LEXIS 201411, *8-9 (S.D. Cal. Oct. 10, 2025).

10
11 **II. MEMORANDUM OF LAW IN SUPPORT OF MOTION**

12 **A. STATEMENT OF FACTS**

13 **1. Ms. Sun**

14 On January 7, 2009, Ms. Sun lawfully entered the United States on an exchange visa or
15 “J-1” visa for employment, as a trainee in hospitality and restaurant management. Exhibit A
16 (**Declaration of Ms. Yan Sun**) ¶2. In July 2010, Ms. Sun filed a change of status to an H-3
17 nonimmigrant visa to continue her training. *Id.* ¶3. Ms. Sun’s nonimmigrant visa expired in
18 December 2012, and in July 2013, she filed an affirmative application for asylum and withholding
19 of removal in the alternative. *Id.* ¶¶ 4-5. Ms. Sun sought protection due to the persecution she
20 endured from the Chinese government, which had physically forced her to undergo two abortions.
21 *Id.* ¶6. On May 11, 2018, the immigration judge issued an order granting Ms. Sun withholding of
22 removal, after the successful completion of biometrics and security screening. *Id.* ¶9; Exhibit B
23 (**Immigration Court’s May 11, 2018 Order**).

24 Ms. Sun has continued to work while under OSUP. Exhibit A ¶10. Ms. Sun has no criminal
25 history and has never violated the terms and conditions of her OSUP. *Id.* ¶11. On August 20,
26 2025, ICE detained Ms. Sun without prior notice and without revoking her OSUP. *Id.* ¶¶12-13.

27 ICE officers forced Ms. Sun to sign a document that she could not read, and that was not translated
28

1 to Mandarin so that she could understand its contents. *Id.* ¶17. ICE officers threatened to remove
2 Ms. Sun to a third country if she did not sign the document. *Id.* Ms. Sun has not received this
3 document from ICE during her detention. *Id.* ¶ 18. On October 10, 2025, the immigration judge
4 denied Ms. Sun’s motion for her release on bond, noting that release was available in habeas
5 corpus proceedings in federal court. Exhibit C (**Immigration Court’s October 10, 2025 Order**).

7 2. Punitive Removal to Third Countries

8 Since January 2025, Respondents have developed and implemented a policy and practice
9 of removing individuals to third countries, without first following the Immigration and
10 Nationality Act (“INA”) procedures for designation and removal to a third county, and without
11 providing fair notice and an opportunity to contest their removal in immigration court. These
12 removals are unconstitutionally punitive, crossing the line from the civil sanction of deportation
13 to blatant punitive banishment.¹ The Administration has negotiated with countries to have U.S.
14 deportees detained in prisons, camps or other facilities. Deportees sent to third countries have, in
15 fact, been incarcerated. In February, Panama and Costa Rica took in hundreds of deportees from
16 countries in Africa and Central Asia, and imprisoned them in hotels, a jungle camp, and a
17 detention center.² In Panama, officials confiscated cell phones, and did not allow the detainees
18
19
20
21
22

23 ¹ Roll Call, *Donald Trump Vlog Self-Deportation Program - May 9, 2025*, at 00:00:55
(emphasis added), <https://rollcall.com/factbase/trump/transcript/donald-trump-vlog-self-deportation-program-may-9-2025/> (last visited July 24, 2025).

24 ² The Associated Press, *Migrants Expelled from U.S. to Costa Rica, Panama in a Legal ‘Black Hole,’* CBC News (Feb. 28, 2025, 6:29 AM), <https://www.cbc.ca/news/world/costa-rica-panama-us-migrants-1.7471142>; Juan Zamorano, *Nearly 300 Deportees from US held in Panama Hotel as Officials Try to Return Them to Their Countries*, AP World News (Feb. 18, 2025), <https://apnews.com/article/panama-trump-migrants-darien-d841c33a215c172b8f99d0aeb43b0455>; Manuel Rueda, *Asylum Seekers Deported by the U.S. Are Stuck in Panama and Unable to Return Home*, All Things Considered, NPR (May 5, 2025), <https://www.npr.org/2025/05/05/nx-s1-5369572/asylum-seekers-deported-by-the-u-s-are-stuck-in-panama-unable-to-return-home>.

1 access to their attorneys.³ Deportees slept in structures made from plastic sheets and had to be
2 escorted to the toilet.⁴ They were “guarded like prisoners.”⁵

3 For its unlawful third country deportation program, the Administration has selected
4 countries known for human rights abuses. For example, Eswatini is ruled by a monarch with
5 complete power, and many of its citizens live on less than four dollars a day.⁶ The prison system
6 is overcrowded, with prisoners receiving one meal a day.⁷ The U.S. Department of State advises
7 Americans to “exercise increased caution in Eswatini due to crime and civil unrest.”⁸

9 III. LEGAL STANDARD

10 To obtain a Temporary Restraining Order, movant “must establish that he is likely to
11 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
12 relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”
13 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int’l Sales Co. v. John D.*
14 *Brush & Co.*, 240 F.3d 832, 839-40 & n.7 (9th Cir. 2001) (noting that a TRO and preliminary
15 injunction involve “substantially identical” analysis). Courts also employ “an alternative ‘serious
16 question’ standard, also known as the ‘sliding scale’ variant of the *Winter* standard.” *Fraihat v.*
17 *U.S. Immigr. & Customs Enf’t*, 16 F.4th 613, 635 (9th Cir. 2021) (citation omitted). Under this

18
19
20 ³ Julie Turkewitz et al, *Migrants, Deported to Panama Under Trump Plan, Detained in Remote*
21 *Jungle Camp*, N.Y. Times (Feb. 19,
22 2025), [https://www.nytimes.com/2025/02/19/world/americas/us-migrants-panama-jungle-](https://www.nytimes.com/2025/02/19/world/americas/us-migrants-panama-jungle-camp.html?login=smartlock&auth=login-smartlock)
[camp.html?login=smartlock&auth=login-smartlock](https://www.nytimes.com/2025/02/19/world/americas/us-migrants-panama-jungle-camp.html?login=smartlock&auth=login-smartlock).

23 ⁴ Matias Delacroix & Megan Janetsky, *Isolated in ‘Harsh Conditions:’ Deportee from US*
24 *Details Legal Limbo in Panama Camp Near Darien Gap*, AP World News (Feb. 22,
25 2025), [https://apnews.com/article/panama-deportees-trump-hotel-darien-gap-iom-](https://apnews.com/article/panama-deportees-trump-hotel-darien-gap-iom-bba8c3dc33fd38efd569a5b51e481a86)
[bba8c3dc33fd38efd569a5b51e481a86](https://apnews.com/article/panama-deportees-trump-hotel-darien-gap-iom-bba8c3dc33fd38efd569a5b51e481a86).

26 ⁵ *Id.*

27 ⁶ Nimi Princewill et al., *‘Not Trump’s Dumping Ground’: Outrage Over Arrival of Foreign US*
28 *Deportees in Tiny African Nation*, CNN World (July 18,
2025), <https://www.cnn.com/2025/07/17/africa/africa-eswatini-trump-us-deportees-intl>.

⁷ *Id.*

⁸ U.S. Department of State, Travel.State.Gov, *Eswatini Travel Advisory* (July 1, 2024),
[https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/eswatini-travel-](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/eswatini-travel-advisory.html)
[advisory.html](https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/eswatini-travel-advisory.html).

1 approach, the four *Winter* elements are “balanced, so that a stronger showing of one element may
2 offset a weaker showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131
3 (9th Cir. 2011). A TRO may be granted where there are “serious questions going to the merits’
4 and a hardship balance. . . tips sharply toward the plaintiff,” and so long as the other *Winter* factors
5 are met. *Id.* at 1132.

6 IV. ARGUMENT

7 A. Ms. Sun Is Likely to Succeed on the Merits of Her Claims

8 1. Ms. Sun’s Re-Detention Is Unconstitutional and Unlawful

9 Ms. Sun is likely to succeed on the merits of her claim that her re-detention violates the
10 Due Process Clause, 8 U.S.C. § 1231(a), and governing regulations. ECF 1 (**Petition for Habeas**
11 **Corpus**). The INA provides that after a removal order becomes final, the government “shall
12 remove the alien from the [U.S.] within a period of 90 days.” 8 U.S.C. § 1231(a)(1)(A). This 90-
13 day period is often referred to as the initial removal period, and during it, the government “shall
14 detain the alien.” *Id.* § 1231(a)(2). In some circumstances, federal immigration authorities can
15 continue to detain a non-citizen beyond the initial removal period. Specifically, section 1231(a)(6)
16 allows the government to detain certain enumerated classes of immigrants—including those
17 ordered removed due to criminal convictions—for more than 90 days. *Id.* § 1231(a)(6).

18 The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) rejected the
19 government’s position that section 1231(a)(6) permitted indefinite detention following the initial
20 removal period. It held that “[a] statute permitting indefinite detention of an alien would raise a
21 serious constitutional problem” because it would become punitive. *Id.* at 690. “[G]overnment
22 detention violates [the Fifth Amendment’s Due Process Clause] unless the detention is ordered in
23 a *criminal* proceeding with adequate procedural protections.” *Id.* The Court held that section
24 1231(a)(6) “implicitly limits an alien’s detention to a period reasonably necessary to bring about
25 that alien’s removal.” *Id.* at 679. Thus, “once removal is no longer reasonably foreseeable,
26 continued detention is no longer authorized by [section 1231(a)(6)].” *Id.* at 699. “[F]or the sake
27

1 of uniform administration in the federal courts,” the Court found that post-removal detention was
2 “presumptively reasonable” for the first six months. *Id.* at 700–01.

3 After that “presumptively reasonable” six-month period ends, once the non-citizen
4 “provides good reason to believe that there is no significant likelihood of removal in the
5 reasonably foreseeable future, the Government must respond with evidence sufficient to rebut
6 that showing. And for detention to remain reasonable, as the period of prior postremoval
7 confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to
8 shrink.” *Id.* at 701.

9 Upon release from custody, a non-citizen subject to a final order of removal must comply
10 with certain conditions of release. 8 U.S.C. §§ 1231(a)(3), (6). The regulations at 8 C.F.R. §
11 241.4(l)(1)-(2) and 8 C.F.R. § 241.13(i) set forth the process for revoking orders of supervision.
12 For instance, a designated official may revoke a non-citizen’s release and return them to ICE
13 custody due to failure to comply with any of the conditions of release, 8 C.F.R. § 241.13(i)(1), or
14 if, “on account of changed circumstances, the Service determines that there is a significant
15 likelihood that the [non-citizen] may be removed in the reasonably foreseeable future.” *Id.* §
16 241.13(i)(2).

17 Upon making a determination to re-detain, “the alien will be notified of the reasons
18 for revocation of his or her release. [ICE] will conduct an initial informal interview promptly
19 after his or her return to [ICE] custody to afford the alien an opportunity to respond to the
20 reasons for revocation stated in the notification. The [non-citizen] may submit any evidence
21 or information that he or she believes shows there is no significant likelihood he or she [will]
22 be removed in the reasonably foreseeable future, or that he or she has not violated the order
23 of supervision. The revocation custody review will include an evaluation of any contested
24 facts relevant to the revocation and a determination whether the facts as determined warrant
25 revocation and further denial of release.” *Id.* § 241.13(i)(3).

26 1. ICE’s decision to re-detain Ms. Sun is governed by the factors laid out in 8 C.F.R.
27 § 241.13(f), including “the history of the [non-citizen’s] efforts to comply with the order of
28 MOTION AND MEMORANDUM OF LAW IN SUPPORT FOR TEMPORARY RESTRAINING ORDER - 6

1 removal, the history of [ICE’s] efforts to remove [non-citizens] to the country in question or to
2 third countries, including the ongoing nature of [ICE’s] efforts to remove [the non-citizen] and
3 the [non-citizen’s] assistance with those efforts, the reasonably foreseeable results of those efforts,
4 and the views of the Department of State regarding the prospects for removal of [non-citizens] to
5 the country or countries in question.” *See also Phan v. Beccerra*, No. 2:25-CV-01757, 2025 WL
6 1993735, at *3 (E.D. Cal. July 16, 2025). A court may not make this determination in the first
7 instance, but may review it for compliance with the regulation. *See id.*; *Minh Nhat Phan*, 3:25-
8 2025 U.S. Dist. LEXIS 201411, *8-9; *Nguyen v. Hyde*, No. 25-cv-11470-MJJ, 2025 WL 1725791,
9 at *3 (D. Mass. June 20, 2025) (citing *Kong v. United States*, 62 F.4th 608, 620 (1st Cir. 2023)).

10
11 Here, there is no lawful justification for Ms. Sun’s re-detention and continued
12 detention. Ms. Sun remains protected from being removed to China, and ICE did not revoke
13 Ms. Sun’s OSUP prior to detaining her. Exhibit A ¶¶9-13. Ms. Sun’s removal to China having
14 been granted withholding of removal is not foreseeable, and there is no legitimate, non-
15 punitive change in circumstance which makes her removal reasonably foreseeable. *Id.* ¶¶9-
16 11.
17

18
19 The government’s re-detention of Ms. Sun, without following the requisite procedures to
20 revoke her OSUP, was unlawful, and her continued detention is unconstitutional. *See Zadvydas*,
21 533 U.S. at 701 (“as the period of prior postremoval confinement grows, what counts as the
22 ‘reasonably foreseeable future’ conversely would have to shrink”). Respondents did not comply
23 with the procedural requirements of 8 C.F.R. § 241.13(i) and §§ 241.4(l)(1)-(2). ICE is required
24 to follow its own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268
25 (1954); *see Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (“The legal proposition that
26 agencies may be required to abide by certain internal policies is well-established.”). “Where the
27

1 rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.
2 This is so even where the internal procedures are possibly more rigorous than otherwise would
3 be required.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

4 There are no “changed circumstances” which make it significantly likely that Ms. Sun
5 will be removed in the foreseeable future. 8 C.F.R. § 241.13(i)(2). ICE did not notify Ms. Sun of
6 the “reasons for revocation of [her] release,” conduct “an initial informal interview promptly after
7 [her] . . . return to [ICE] custody to afford [her] an opportunity to respond to the reasons for
8 revocation stated in the notification,” allow her to “submit any evidence or information that he or
9 she believes shows there is no significant likelihood he or she [will] be removed in the reasonably
10 foreseeable future,” or provide her with a written “revocation custody review.” *Id.* § 241.13(i)(3);
11 *see also Phan*, 2025 WL 1993735, at *3. Moreover, ICE did not consider the factors in § 241.13(f)
12 that govern their decision to re-detain a noncitizen previously released. Accordingly, Ms. Sun is
13 likely to succeed on the merits of her claim that her continued detention is unconstitutional.
14
15

16 **2. Ms. Sun Is Entitled to Legally Required Procedures Prior to Any**
17 **Nonpunitive Third Country Removal**

18 Ms. Sun is likely to succeed on the merits of her claim that she may not be removed to a
19 third country, absent Respondents following the legally required, multistep procedures set out in
20 8 U.S.C. § 1231(b), and required by due process under the Fifth Amendment of the U.S.
21 Constitution. There is no safe country that the government could use for Ms. Sun’s removal. 8
22 U.S.C. § 1231(b)(2)(A)-(E). Moreover, to remove Ms. Sun to a third country, the statute requires
23 that the Attorney General—here, an immigration judge—first determine that it is “impracticable,
24 inadvisable, or impossible” to remove Ms. Sun to China, and that the designated third country
25 “will accept [Ms. Sun] into that country.” *Id.* § 1231(b)(2)(E)(vii); *see Himri v. Ashcroft*, 378
26 F.3d 932, 939 n. 4 (9th Cir. 2004) (8 U.S.C. § 1231(b)(E)(vii) (“indisputably requires the Attorney
27 General to prove that the proposed country of removal is willing to accept the alien”); *see also*

1 *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 344 (2005). It is the immigration judge, not
2 DHS, that the statute authorizes to designate a third country for removal. 8 U.S.C. §
3 1231(b)(2)(E)(vii) (“the Attorney General shall remove the alien to. . .”); *see also* 8 C.F.R. §
4 1240.10(f) (in removal proceedings the immigration judge “shall. . . identify for the record a
5 country, or countries in the alternative, to which the alien’s removal may be made”). Here,
6 Respondents would first need to move to reopen the removal proceedings, and to then request the
7 immigration judge to designate a third country for removal before seeking to remove Ms. Sun to
8 a third country. *See, e.g., Sadychov v. Holder*, 565 F. App’x 648, 651 (9th Cir. 2014)
9 (unpublished) (holding that should a new country of removal be designated, “the agency must
10 provide [the non-citizen] with notice and an opportunity to reopen his case for full adjudication
11 of his claim of withholding of removal from” the third country); *Aden v. Nielsen*, 409 F. Supp. 3d
12 998, 1009, 1011 (W.D. Wash. 2019) (finding that removal proceedings “shall be reopened and a
13 hearing shall be held before the immigration judge so that petitioner may apply for relief from
14 removal” as to a country not designated in prior proceedings).

15 Adherence to that process also ensures Ms. Sun’s statutory right to claim protection in
16 immigration court, against removal to a third country where she may be persecuted or tortured.
17 8 U.S.C. § 1231(b)(3)(A); *see also* 8 C.F.R. §§ 208.16, 1208.16. The process further ensures
18 Ms. Sun maintains his right to claim deferral of removal under the INA and the Convention
19 Against Torture (“CAT”) from any third country. *See* 28 C.F.R. § 200.1 (“A removal order. . .
20 shall not be executed in circumstances that would violate [the CAT]”); 8 C.F.R. §§ 208.17-18,
21 1208.17-1208.18.
22

23 Notice cannot be “last minute,” because that would deprive an individual of a
24 meaningful opportunity to apply for fear-based protection from removal. *Andriasian v. INS*, 180
25 F.3d 1033, 1041 (9th Cir. 1999). Non-citizens must have time to prepare and present relevant
26 arguments and evidence, and to seek reopening of their removal case. “[W]ritten notice of the
27 country being designated” is required, and “the statutory basis for the designation, i.e., the
28

1 applicable subsection of § 1231(b)(2)” must be specified. *Aden*, 409 F. Supp. 3d at 1019; *see*
2 *also D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1
3 (D. Mass. May 21, 2025) (“All removals to third countries, *i.e.*, removal to a country other than
4 the country or countries designated during immigration proceedings as the country of removal
5 on the non-citizen’s order of removal, must be preceded by written notice to both the non-
6 citizen and the non-citizen’s counsel in a language the non-citizen can understand.” (internal
7 citation omitted)); *Andriasian*, 180 F.3d at 1041 (due process requires notice to the non-citizen
8 of the right to apply for asylum and withholding to the country where they will be removed).

9 Due process also demands that the government “ask the non-citizen whether he or she
10 fears persecution or harm upon removal to the designated country and memorialize in writing
11 the non-citizen’s response. This requirement ensures DHS will obtain the necessary information
12 from the non-citizen to comply with § 1231(b)(3) and avoids [a dispute about what the officer
13 and non-citizen said].” *Aden*, 409 F. Supp. 3d at 1019. Respondents’ third country removal
14 program circumvents these statutory and constitutional procedural protections afforded to non-
15 citizens. According to ICE’s July 9th guidance, individuals can be removed to third countries
16 “without the need for further procedures,” so long as “the [U.S.] has received diplomatic
17 assurances.” Ms. Sun is likely to succeed on the merits of her claim because the policy instructs
18 officers to violate their statutory and constitutional obligations. The same unlawfulness applies
19 to the insufficient procedures ICE offers when no diplomatic assurances are present. The policy
20 provides no meaningful notice (6-24 hours), instructs officers *not* to ask about fear, and
21 provides no actual opportunity to see counsel and prepare a fear-based claim (6-24 hours), let
22 alone reopen removal proceedings. In sum, the guidance instructs ICE officers to violate the
23 rights of non-citizens whom they seek to subject to their unlawful third country removal
24 program.

25
26 Several courts have recently granted individual TROs against removal to third countries
27 under similar circumstances. *See generally See Van Tran v. Noem*, 25-cv-2334-JES-MSB, 2025

1 U.S. Dist. LEXIS 191834, 7-8 (S.D. Cal. September 29, 2025); *Minh Nhat Phan*, 2025 U.S.
2 Dist. LEXIS 201411, *8-9; *J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash.
3 Jun. 30, 2025) (immediately enjoining removal to “Cuba, Libya, or any third country in the
4 world absent prior approval from this Court”); *Phan*, 2025 WL 1993735, at *7 (enjoining
5 Respondents from “re-detaining or removing Petitioner to a third country without notice and an
6 opportunity to be heard”); *Hoac*, 2025 WL 1993771, at *7 (same); *Vaskanyan v. Janecka*, 25-
7 cv-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-
8 05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025).

9 **3. The Constitution Prohibits Third Country Removals Without Due Process**

10 Ms. Sun is likely to succeed on the merits of her claim that the Constitution prohibits her
11 from being subjected to Respondents’ punitive third country removal program. The prohibition
12 against imposing punitive measures on a non-citizen subject to a final order of removal is as old
13 as immigration law. *Wong Wing v. United States*, 163 U.S. 228 (1896). In *Wong Wing*, the
14 Supreme Court struck down a provision of the Chinese Exclusion Act that imposed one year of
15 imprisonment at hard labor as an immigration sanction before their deportation. *Id.* at 237. The
16 Court drew a distinction between “deportation,” which it described as a sanction for failure to
17 comply with the legal requirements of residency in the U.S. that may be imposed by executive
18 authorities, and “punishment,” which may not. *Id.* at 236-37. The Court held that the
19 government could not attach a punishment to deportation—here, imprisonment—without
20 criminal charges, a judicial trial, and the concomitant protections of the Fifth, Sixth and Eighth
21 Amendments. *Id.*

22
23 The government’s third country removal program defies 130 years of constitutional
24 immigration law distinguishing between civil penalty and infamous punishment. *See, e.g.,*
25 *Zadvydas*, 533 U.S. at 694. To determine whether a given sanction constitutes punishment,
26 courts look to intent. If the government’s intent is to punish, “that is the end of the inquiry.” *Am.*
27 *Civ. Liberties Union of Nevada v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (citing *Smith v.*

1 *Doe*, 538 U.S. 84, 92 (2003)). As shown above, the government’s own statements show intent
2 to deport individuals, particularly those with criminal convictions, into situations of forever
3 confinement and substantial harm.

4 When the government’s intent to punish is unclear, courts move to the second step of the
5 inquiry, and determine whether the practices are “so punitive either in purpose or effect as to
6 negate the [government’s] intention to deem it civil.” *Id.* (quoting *Smith*, 538 U.S. at 92). To
7 determine punitive purpose or effect, courts often turn to the factors laid out in *Kennedy v.*
8 *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *See also Hudson v. United States*, 522 U.S.
9 93, 99 (1997) (“the factors listed in *Kennedy v. Mendoza-Martinez* [citation], provide useful
10 guideposts”). Those factors are: “[w]hether the sanction involves an affirmative disability or
11 restraint, whether it has historically been regarded as a punishment, whether it comes into play
12 only on a finding of scienter, whether its operation will promote the traditional aims of
13 punishment—retribution and deterrence, whether the behavior to which it applies is already a
14 crime, whether an alternative purpose to which it may rationally be connected is assignable for
15 it, and whether it appears excessive in relation to the alternative purpose assigned.” *Mendoza-*
16 *Martinez*, 372 U.S. at 168-69 (footnotes omitted).

17
18 Under these factors, the government’s third country removal program undeniably
19 constitutes punishment, as each factor is met. Under the first factor, the government’s practice
20 of deporting non-citizens, only to have them imprisoned or subjected to other forms of physical
21 harm, is an “affirmative disability or restraint.” The “paradigmatic affirmative disability” is the
22 “punishment of imprisonment.” *Smith*, 538 U.S. at 100. Moreover, under this factor, “we
23 inquire how the effects of the [sanction] are felt by those subject to it. If the disability or
24 restraint is minor and indirect, its effects are unlikely to be punitive.” *Id.* at 99-100. There can
25 be no question that being deported to a country, to be imprisoned or experience other extreme
26 harm, will be felt as a significant and direct disability or restraint.

1 The second factor is also satisfied. “[D]evices of banishment and exile have throughout
2 history been used as punishment.” *Mendoza-Martinez*, 372 U.S. at 168 n.23. In 1791, the year
3 the Bill of Rights was ratified, deportation was *exclusively* used and understood as punishment.
4 *Fong Yue Ting v. U.S.*, 149 U.S. 698, 740-41 (1893) (Brewer, J. dissenting) (citing President
5 James Madison); *see id.* at 740 (“[I]t needs no citation of authorities to support the proposition
6 that deportation is punishment. Everyone knows that to be forcibly taken away from home,
7 family, friends, business, and property, and sent across the ocean to a distant land, is
8 punishment, and that oftentimes most severe and cruel.”). Banishment as a form of punishment
9 dates to ancient times, and was used on citizens and non-citizens alike. Peter L. Markowitz,
10 *Deportation is Different*, 13 U. Pa. J. Const. L. 1299, 1308-09 (2011) (tracing the use of
11 banishment from medieval England through colonial America).

12 The third factor, whether it promotes the traditional aims of punishment—retribution
13 and deterrence—is also satisfied. The government’s own statements make clear that its goals are
14 retribution and deterrence, and through fear, threaten immigrants to leave the country on their
15 own. As DHS Secretary Kristi Noem stated, “President Trump and I have a clear message to
16 criminal illegal aliens: LEAVE NOW. If you do not leave, we will hunt you down, arrest you,
17 and you could end up in this El Salvadorian prison.”⁹ The Supreme Court has made clear that
18 such “general deterrence” justifications are impermissible absent criminal process. *See Kansas*
19 *v. Crane*, 534 U.S. 407, 412 (2002) (warning that civil detention may not “become a
20 ‘mechanism for retribution or *general deterrence*’—functions properly those of criminal law,
21 not civil commitment” (quoting *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J.,
22 concurring) (emphasis added)); *see Hendricks*, 521 U.S. at 373 (Kennedy, J. concurring)
23

24
25
26
27
28 ⁹ Secretary Kristi Noem (@sec_noem), Instagram (Mar. 27, 2025),
<https://www.instagram.com/p/DHtVvbgHhh/>

1 (“[W]hile incapacitation is a goal common to both the criminal and civil systems of
2 confinement, retribution and general deterrence are reserved for the criminal system alone.”).

3 The program also satisfies the fourth, fifth, sixth and seventh factors, because
4 Respondents have designed the program specifically for non-citizens being deported for
5 criminal convictions, there is no logical, nonpunitive rationale for deporting such non-citizens
6 into dangerous conditions of imprisonment or other harm, and the program is designed to be
7 patently excessive in relation to intended goal of simply removing non-citizens, deemed a flight
8 risk or threat to the community, from the country.

9 **B. Petitioner Will Suffer Irreparable Harm Absent Injunctive Relief**

10 “It is well established that the deprivation of constitutional rights ‘unquestionably
11 constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting
12 *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Where the “alleged deprivation of a constitutional
13 right is involved, most courts hold that no further showing of irreparable injury is necessary.”
14 *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quoting 11A Charles Alan
15 Wright et al., *Federal Practice and Procedure*, § 2948.1 (2d ed. 2004)). “Unlawful detention
16 certainly constitutes ‘extreme or very serious damage, and that damage is not compensable in
17 damages.’” *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

18 Here, the irreparable harm to Ms. Sun is severe. *See* Exhibit A. Ms. Sun has resided in
19 the United States since 2009 and has no criminal history. Exhibit A ¶¶ 2, 11. Ms. Sun was
20 employed and living under the terms of her supervised release. *Id.* ¶¶ 10-12. Ms. Sun’s arrest
21 and detention served no purpose other than to punish her and deprive her of her liberty. Absent
22 relief, Ms. Sun will remain in detention, continuing to face harm. *See* Exhibit C.

23 **C. The Balance of Hardships and Public Interest Weigh Heavily in Petitioner’s Favor**

24 The final two factors for a preliminary injunction—the balance of hardships and public
25 interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418,
26 435 (2009). “[T]he balance of hardships tips decidedly in plaintiffs’ favor” when “[f]aced with
27

1 such a conflict between financial concerns and preventable human suffering.” *Hernandez*, 872
2 F.3d at 996 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). Here, the balance
3 of hardships heavily weighs in Ms. Sun’s favor. Ms. Sun has suffered hardship: deprivation of
4 her liberty, and threatened removal to a third country where she is likely to suffer imprisonment
5 or other serious harm. Exhibit A ¶¶ 7-17. “[T]he [government] cannot reasonably assert that it is
6 harmed in any legally cognizable sense by being enjoined from constitutional violations.”
7 *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Moreover, it is always in the public interest
8 to prevent violations of the U.S. Constitution and ensure the rule of law. *See Nken*, 556 U.S. at
9 436 (describing public interest in preventing non-citizens “from being wrongfully removed,
10 particularly to countries where they are likely to face substantial harm”); *Moreno Galvez v.*
11 *Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019) (when government’s treatment “is
12 inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in
13 favor of a preliminary injunction.”). Accordingly, the balance of hardships and the public
14 interest overwhelmingly favor emergency relief to ensure Ms. Sun’s freedom. and prevent her
15 unlawful removal to a third country.

16
17 **V. CONCLUSION**

18 For the foregoing reasons, the Court should grant Petitioner’s motion for temporary
19 restraining order and order her immediate release from detention.

20 November 13, 2025

Respectfully Submitted,

21 /s/ Kristina David

22 Kristina David

23 CA Bar No. 346347

24 David Strashnoy Law, PC

1901 Avenue of the Stars, Suite 200

Los Angeles, CA 90067

25 818-646-7350

kristina@strashnoylaw.com

26 /s/Jesse M. Bless

27 Jesse M. Bless

28 MA Bar No. 660713

1 Bless Litigation LLC
2 6 Vineyard Lane
3 Georgetown MA 01833
4 781.704.3897
5 jesse@blesslitigation.com

6 Attorneys for Petitioner

7 **CERTIFICATE OF SERVICE**

8 I, Kristina David, hereby certify that on November 13, 2025, I served the above and
9 foregoing, by causing a true and accurate copy of such papers to be filed and served on all
10 counsel of record via the Court's CM/ECF electronic filing system.

11
12 /s/ Kristina David
13 Kristina David
14 CA Bar No. 346347
15 David Strashnoy Law, PC
16 1901 Avenue of the Stars, Suite 200
17 Los Angeles, CA 90067
18 818-646-7350
19 kristina@strashnoylaw.com