

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:25-cv-04014

JOSUE ALDAIR ALFARO HERRERA,

Petitioner-Plaintiff,

v.

JUAN BALTAZAR, in his official capacity as Warden of the Aurora Contract Detention Facility,

ROBERT HAGAN, in his official capacity as Field Office Director, Denver, U.S. Immigration and Customs Enforcement,

KRISTI NOEM, in her official capacity as Secretary, U.S. Department of Homeland Security,

TODD LYONS, in his official capacity as Acting Director of Immigration and Customs Enforcement, and

PAMELA BONDI, in her official capacity as Attorney General of the United States,

Respondents-Defendants.

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**PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR  
PRELIMINARY INJUNCTION**

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### **PRELIMINARY STATEMENT**

The law in this District is clear that children who enter the United States alone, fleeing violence and neglect, and receive an "Unaccompanied Child" or "Special Immigrant Juvenile" designation, may not be indefinitely detained or forcibly deported without the application of stringent procedural safeguards.

And yet, that is precisely what has happened to Petitioner Josue Aldair Alfaro Herrera ("Josue"). Respondents have detained Josue for over six months and counting and re-initiated removal proceedings despite that (1) in 2021, an Arizona Court determined removal was not in his best interests and DHS granted Josue Special Immigrant Juvenile (SIJ) Status, which provides a congressional guarantee of protection for vulnerable youth who cannot safely return to their countries of origin; (2) in 2022, USCIS granted Josue "deferred action," granting him further protection and allowing him to remain in the United States while awaiting the chance to apply for permanent residency until this protection was rescinded without explanation following his detention; (3) the purpose of Josue's SIJ status approval is entirely thwarted by his detention and potential removal because they serve to strip him of his ability to pursue his permanent residency; (4) the government has no legitimate basis for Josue's detention; and (5) Josue's detention has become unconstitutionally prolonged.

Josue respectfully moves this Court to:

1. Order his immediate release from unlawful detention by ICE pursuant to 28 U.S.C. § 2241; and

2. Enjoin his removal from this District during the pendency of habeas proceedings, pursuant to the All Writs Act, 28 U.S.C. § 1651, and the Court's inherent equitable authority, pending resolution of his Petition for a Writ of Habeas Corpus; and
3. Order Respondents to afford him due process, including sufficient notice and a meaningful opportunity to be heard with the assistance of counsel, during his asylum and removal proceedings.

Josue is likely to prevail on his claims that his ongoing removal proceedings, arrest, and detention, all without due process, violate the Constitution and the Administrative Procedure Act (APA). He will suffer irreparable harm if he is removed from the District of Colorado and if he remains subject to arbitrary and unlawful detention, and both the balance of the equities and the public interest weigh in his favor. This Court should thus issue an order pursuant to Federal Rule of Civil Procedure 65 mandating his immediate release, an injunction from transferring him from this District, and due process for the adjudication of his asylum application.

#### **FACTUAL BACKGROUND<sup>1</sup>**

Josue is a 22-year-old who came to the United States from Honduras alone at the age of only 16 in 2019, after fleeing abandonment and neglect by his parents, as well as death threats by gangs. Upon his arrival in this country, Josue was designated an "Unaccompanied Child" and was transferred to the custody of ORR pursuant to the

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<sup>1</sup> Josue incorporates the factual background included in his Petition for a Writ of Habeas Corpus, and the exhibits cited therein, and includes a summary of the most relevant facts below. All exhibits cited here are references to exhibits attached to Josue's petition.

Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act (“TVPRA”) of 2008. A few months later, Josue was transferred from a short-term ORR shelter (Children’s Home of Kingston in New York) to Long-Term-Foster-Care (“LTFC”) in Queen Creek, Arizona. In May of that same year, Josue was transferred to another LTFC in Tucson, Arizona. Ex. 1, Declaration of Josue Aldair Alfaro Herrera (hereinafter “Josue Decl.”).

On December 14, 2020, Josue filed for Asylum, Withholding of Removal, and protection under the Convention Against Torture with U.S. Citizenship and Immigration Services (“USCIS”), which has initial jurisdiction over fear-based claims for children like Josue, designated as Unaccompanied Children. Five years later, that application remains pending.

On April 6, 2021, while still in LTFC in Tucson, Arizona, Josue obtained an order declaring his court dependency and entering findings establishing his eligibility for SIJ status—namely that he could not reunify with his parents due to neglect and abandonment and it would not be in his best interests to be returned to Honduras. Ex. 2., Arizona Superior Court Findings of Fact.

On May 10, 2021, DHS filed a motion to dismiss Josue’s removal proceedings with the Tucson Arizona Immigration Court, arguing that doing so was appropriate as USCIS maintained initial jurisdiction over his pending asylum application, and that dismissing the case was in the interest of docket efficiency. On May 13, 2021, the Tucson Immigration Court granted the motion and Josue’s removal proceedings were dismissed without prejudice.

On July 21, 2021, Josue received a grant of SIJ status, meaning that a court has found—and DHS has agreed—that it is not in Josue’s best interest to be returned to Honduras. Ex. 3, SIJ Status Approval Notice.

On September 13, 2021, Josue was accepted into the Unaccompanied Refugee Minor (“URM”) program with the Massachusetts Department of Children and Families obtaining legal custody of him. Ex. 4, URM Program Approval Letter. Josue voluntarily continued in his placement at the URM program after turning 18, Ex. 5, Voluntary Placement Agreement, where for nearly four years Josue lived in a supportive independent living apartment, graduated from high school, enrolled in community college, and obtained employment in the Boston, Massachusetts area to support himself and prepare for his higher education and future in the United States. Josue Decl.

On May 12, 2022, USCIS issued Josue an amended SIJ status approval notice granting him “deferred action” in accordance with USCIS policy aimed at allowing youth to remain in the United States and obtain employment authorization while they await the chance to apply for permanent residency. Ex. 7, Deferred Action Approval. In October 2022, USCIS granted Josue’s application for work authorization based on his approved “deferred action.” Josue Decl. Since receiving this approval, Josue has worked several jobs to support himself.

On May 25, 2025, while Josue was driving in Wyoming, he was pulled over by an officer from the Laramie County Sheriff’s Office for failure to maintain lane. *Id.* During the traffic stop, Josue was arrested for possession of a “controlled substance-Plant” after handing over a vape pen containing CBD, purchased legally in Nebraska. After his arrest,

Josue was taken to the Laramie County Jail. *Id.* He posted a \$1,000 bond on May 27, but he was then told his release was delayed due to an ICE hold. *Id.*

Despite Josue's status, which is supposed to provide safeguards against his removal to Honduras, ICE arrested and detained him on May 28, 2025. ICE transferred him to the GEO ICE facility in Aurora, Colorado. *Id.*

On the same day, ICE reinitiated removal proceedings against Josue after issuing him a second NTA, charging him again under 8 U.S.C. § 1182 for entry without inspection. ICE later added an additional charge against him for entering without adequate entry documents.

On June 9, 2025, Josue appeared for a bond hearing pro se. Josue Decl. At this hearing, the court improperly placed the burden of proof for bond release on Josue, as opposed to requiring the government to show why Josue should be detained. The Aurora Immigration Court denied bond.

On July 22, 2025, Josue received notice from USCIS that it was terminating his period of deferred action, which also automatically revoked his deferred action-based employment authorization. Ex. 8, Notice of Termination.

Since his detention, Josue has attended several master calendar hearings before the Aurora Immigration Court. Yet, the immigration judge ("IJ") does not have jurisdiction over his asylum case because of his Unaccompanied Minor designation. USCIS must adjudicate the application before an IJ can assess his claim.

Despite DHS's past attempts to terminate Josue's removal proceedings to preserve judicial efficiency, the Aurora Immigration Court continues to reset the case for

hearings every two weeks based on DHS's assurances that USCIS will expedite his asylum interview. Josue still has not received an asylum interview, and his case remains pending before the Aurora Immigration Court despite an IJ not having jurisdiction over his asylum claim, all while DHS continues to detain him.

Josue has an infant daughter who is a U.S. citizen and who is currently in foster care. Josue Decl. He has been in touch with his daughter's caseworker and explained that his goal is to return to Massachusetts to the URM program and to gain custody of his child. Josue needs to be released so that he can meet his newborn daughter and ensure that he does not lose his parental rights. He also seeks to resolve his pending charges in Wyoming so that these do not impact his eligibility for adjustment of status to permanent residency.

Josue's priority date for when he could qualify to apply for permanent residency is June 9, 2021. As of December 2025, youth who have priority dates prior to February 15, 2021 are eligible to apply for permanent residency, and only those with a priority date prior to September 1, 2020 can be approved for permanent residency. Josue is not yet eligible to apply, and his priority date could still be many months out while he remains indefinitely detained. Josue also needs to resolve the charges in Wyoming before he applies for permanent residency and has been unable to do so while in detention.

#### **LEGAL STANDARD**

Federal Rule of Civil Procedure 65 authorizes courts to enter preliminary injunctions and issue temporary restraining orders ("TROs"). Fed. R. Civ. P. 65(a), (b). To warrant preliminary relief, a movant must establish four factors demonstrating: (1) a

substantial likelihood of success on the merits of their suit; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the threatened harm outweighs the harm a preliminary injunction may pose to the opposing party; and (4) if issued, the injunction will not adversely affect the public interest. *Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 112 (10th Cir. 2024); *D.B.U. v. Trump*, 779 F. Supp. 3d 1264, 1273 (D. Colo. 2025) (“The legal standard governing TROs is the same standard governing preliminary injunctions.”). “[T]he third and fourth factors ‘merge’ when, like here, the government is the opposing party.” *Rocky Mountain*, 121 F.4th at 112 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). All factors weigh in favor of issuing a TRO or preliminary injunction.

The Court likewise has independent authority under habeas corpus, 28 U.S.C. § 2241, to order the immediate release of detained persons from unconstitutional confinement.

The All Writs Act empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651(a). Pursuant to this authorization, this Court has, in several cases, ordered to enjoin removal from its jurisdiction or from the United States. *Arostegui-Maldonado v. Baltazar*, 794 F. Supp. 3d 926, 948 (D. Colo. 2025) (“Several judges in this District have relied on the All Writs Act in entering injunctive relief similar to that requested here.”) (internal quotations omitted); *id.* (“[T]he Court will enter an injunction preventing Maldonado’s unlawful removal from the United States while these proceedings remain pending.”); *Mendoza Gutierrez v. Baltazar*, No. 25-CV-2720-RMR, 2025 WL 2962908, at \*1 (D. Colo. Oct. 17, 2025)

(ordering that “Respondents shall be enjoined from removing Mr. Gutierrez and the class he proposes to represent from the United States or transferring them from the District of Colorado during the pendency of this action.”).

As other district courts in similar situations have also recognized, this Court has inherent power to issue an order to ensure the exercise of its jurisdiction over the underlying case challenging the legality of Petitioner’s detention. *See, e.g., Mahdawi v. Trump*, No. 2:25-CV-00389, 2025 WL 1099021, at \*1 (D. Vt. Apr. 14, 2025) (“In order to preserve this Court’s jurisdiction, and pursuant to the All Writs Act, 28 U.S.C. § 1651, it is ordered that the Petitioner . . . not be removed from the United States or moved out of the territory of the District of Vermont pending further order of this Court.”); *Suri v. Trump*, No. 1:25-CV-480 (PTG/WBP), 2025 WL 914757, at \*1 (E.D. Va. Mar. 20, 2025) (ordering that Petitioner not be removed from the United States “[p]ursuant to the Court’s authority to preserve its jurisdiction under the All Writs Act...”).

### **ARGUMENT**

Josue has satisfied all factors required for a TRO and a preliminary injunction. First, Josue is likely to succeed on the merits of his claim because the government’s de facto revocation of his SIJ status and his detention violate the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act (APA). Second, Josue is suffering, and will continue to suffer, irreparable harm. Because of his detention, Josue was not present for the birth of his U.S. citizen daughter and fears each day that he will lose his parental rights because she is currently in the custody and care of the State of Massachusetts. Josue has lost his employment and the opportunity to request continued

participation in the URM program during his prolonged detention. If his detention continues, Josue will likely be unable to resolve his pending charges before he applies for permanent residency, a fact that will be weighed heavily against him. Third, the balance of the equities tips in Josue's favor, as the threatened injury outweighs any harm that the TRO or preliminary injunction may cause the opposing party. Finally, the public interest favors requiring Respondents to follow the law.

**I. Josue Is Likely to Succeed on the Merits of His Habeas Petition.**

When assessing this prong of the test, the appropriate standard is a "reasonable likelihood" of success and nothing more. See *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); e.g., *Singer Mgmt. Consultants, Inc., v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc) (internal quotation marks omitted) ("[L]ikelihood of success on the merits" means that a plaintiff has "a reasonable chance, or probability, of winning . . . A likelihood does not mean more likely than not.").

Here, Josue's claim is likely to succeed because (1) de facto revocation of his SIJ status violates procedural due process, (2) Josue was re-detained in violation of procedural due process and substantive due process, (3) Josue's detention has become prolonged in violation of procedural due process and substantive due process, and (4) seeking removal in light of his SIJ status is arbitrary and capricious.

**A. Violation of Procedural Due Process**

Josue is likely to succeed on the merits of his claim that the Government's de facto revocation of his SIJ status and its unlawful detention of him violate the Procedural Due

Process Clause of the Fifth Amendment of the U.S. Constitution. Under *Mathews v. Eldridge*, courts must balance three factors to determine whether procedural due process is satisfied: (1) the private interest at issue; (2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including fiscal and administrative burdens that additional or substitute procedural requirements entail. 424 U.S. 319, 333 (1976).

### **1. De Facto Revocation of Josue's SIJ Status**

The government's attempt to forcibly remove Josue from the United States violates his procedural due process rights because it *de facto* revokes his SIJ status without affording him notice and an opportunity to be heard.

*First*, Josue has a substantial, legally "protected liberty [and] property interest" in his SIJ status. See *Joshua M. v. Barr*, 439 F. Supp. 3d 632, 679 (E.D. Va. 2020); *J.L. v. Cissna*, 374 F. Supp. 3d 855, 869 (N.D. Cal. 2019). Such interest is rooted in the congressional intent to "accord those abused, neglected, and abandoned children a legal relationship with the United States and to ensure they are not stripped of the opportunity to retain and deepen that relationship without due process." *Joshua M.*, 439 F. Supp. 3d at 678 (quoting *Osorio-Martinez v. Atty. Gen. United States of Am.*, 893 F.3d 153, 170 (3d Cir. 2018)). To that end, Congress afforded SIJ status holders both due process, 8 C.F.R. § 205.2, as well as substantive benefits, including "access to federally-funded education and preferential status for employment-based green cards," *J.L.*, 374 F. Supp. 3d at 869.

*Second*, the risk of erroneously depriving Josue of his interest in his SIJ status—including his right to seek status adjustment to lawful permanent resident (“LPR”)—is extraordinarily high, and additional procedural safeguards are necessary to address that risk.

The INA requires that an individual be present in the United States to maintain SIJ status and to seek adjustment to LPR status. See 8 U.S.C. § 1101(a)(27)(J). Forced removal of Josue would thus effectively, with near certainty, revoke his SIJ status as well as his ability to seek adjustment to LPR status. Such a revocation would be erroneous, as it does not follow the substantive and procedural requirements. While the likelihood of *legally* removing Josue is extremely low due to the statutory protections guaranteed by his SIJ status, the prospect of Respondents *illegally* removing him despite substantive and procedural defects of the proceedings is a very real one, as is showcased by Respondents’ blatant violations of the law that have already taken place in this case. Moreover, by continuing to detain Josue, Respondents are preventing him from addressing the pending charge in Wyoming, which could impact his eligibility for adjustment of status to permanent residency pursuant to his SIJ status.

Given the high stakes of Josue’s liberty and property interest at risk, coupled with the complete absence of due process, additional procedural safeguards are of extremely high probable value and, indeed, necessary. Thus, Josue should be given notice and an opportunity to be heard, in line with the SIJ regulations’ due process mandates. See 8 C.F.R. § 205.2. This should be granted before any revocation of his SIJ status, whether *de jure* or *de facto*, through his continuing detention and removal proceedings.

*Third*, the government's interest in revoking Josue's SIJ status without due process is entirely nonexistent. The SIJ regulations themselves require notice and an opportunity to be heard before SIJ status may be revoked for cause. 8 C.F.R. § 205.2. The government cannot have an interest in undermining the laws of the United States.

Furthermore, to the extent that the government might have any legitimate interest in circumventing the financial and administrative costs related to affording Josue due process, that interest would be outweighed by the costs and burdens of continuing detention, removal proceedings, and additional judicial determinations.

The Due Process Clause entitles Josue to meaningful process assessing whether his detention is justified and whether revocation of his SIJ status is proper. Here, Josue's re-arrest, detention, and ongoing forced removal proceedings occurred without an opportunity for him to contest his detention or the *de facto* revocation of his SIJ status in front of a neutral adjudicator. Under the *Mathews* test, Josue is thus likely to succeed on the merits of his Procedural Due Process claim with regard to the *de facto* revocation of his SIJ status.

## **2. Re-Detention**

Josue's re-detention also violates his Fifth Amendment right to due process. Federal courts have repeatedly granted temporary restraining orders requiring a pre-deprivation hearing before a noncitizen released from custody, like Josue, is re-detained. *Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021, 1033 (N.D. Cal. 2025) (noting that the court could not "identify any other context in which government agents could permissibly take someone who ha[d] been released by a judge, lock up that person, and have no

hearing either beforehand or promptly thereafter.”). These hearings must include constitutionally adequate processes. See, e.g., *Domingo v. Kaiser*, No. 25-CV-05893 (RFL), 2025 WL 1940179, at \*1–4 (N.D. Cal. July 14, 2025) (granting preliminary injunction where a non-citizen was convicted of a crime following his release on bond, holding that mandatory detention would violate his due process rights unless he was afforded adequate process, including a hearing before a neutral decision maker to determine whether his detention was warranted at which the government bore the burden of establishing a change in circumstances).

Although Josue attended a bond hearing pro se on June 9, 2025, that hearing was constitutionally inadequate. For example, Josue did not even understand that he was required to present evidence. Further, as discussed below, because the burden was improperly placed on Josue, not the government, Respondents did not meet their burden of proof for continued detention, leaving the risk of erroneous deprivation of liberty not just high, but almost certain. Requiring Respondents to give notice and an opportunity to respond prior to re-detention is of great value because it reduces the probability of needless detention of a person, like Josue, who is neither dangerous nor a flight risk.

The Constitution entitles Josue to a bond hearing at which DHS must demonstrate the necessity of continued incarceration by clear and convincing evidence and with other constitutionally necessary safeguards. Civil immigration detention is constitutional only in “certain special and ‘narrow’ nonpunitive ‘circumstances.’” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Those limited circumstances include risk of flight and danger to the community. *Id.* at 690–91. Circuit

courts that have meaningfully considered the constitutionality of placing the burden on the noncitizen in Section 1226(a) bond hearings have applied *Mathews*. See, e.g., *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27 (1st Cir. 2021); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020). Further, the Supreme Court “has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake, and has reaffirmed the clear and convincing evidence standard for various types of civil detention.” *Velasco Lopez*, 978 F.3d at 856.

A proper application of the *Mathews* test in Josue’s case demonstrates that the Constitution requires the government to bear a clear and convincing evidence burden in Section 1226(a) bond hearings like this one.

First, Josue’s freedom from bodily restraint, the private interest at stake, is at the core of liberty interests protected by due process. In the United States, detention without an adequate opportunity to be heard is meant to be “the carefully limited exception,” *United States v. Salerno*, 481 U.S. 739, 755 (1987), and it “constitutes a significant deprivation of liberty that requires due process protection” no matter its purpose. *Id.* DHS has stripped Josue of his liberty and jailed him for over six months and counting at the Aurora facility. Notably, courts in the District of Colorado have repeatedly found civil detention at the Aurora facility to be akin to punitive imprisonment. See, e.g., *Martinez v. Ceja*, 760 F. Supp. 3d 1188, 1195 (D. Colo. 2024) (noting the government did not contest allegations that incarceration in the Aurora detention center resembled “penal confinement”); *Daley v. Choate*, No. 22-CV-03043-RM, 2023 WL 2336052, at \*4 (D. Colo. Jan. 6, 2023). In addition, detention’s deleterious effect on an incarcerated person’s

mental health further impacts the individual's private interest. Although Josue did not previously struggle with his mental health while living in Massachusetts and in the URM program, since his detention he has had trouble sleeping and suffers from anxiety and depression, particularly with respect to his newborn daughter. Josue has been prescribed medication to help him address these issues. Josue Decl.

*Second*, placing the burden of proof on Josue during his bond hearing created an overwhelming risk of erroneous deprivation. Bond hearings pursuant to Section 1226(a) require noncitizens to prove two negatives, even though “[a]s a practical matter it is never easy to prove a negative.” *Elkins v. United States*, 364 U.S. 206, 218 (1960). “[P]roving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern.” *Hernandez-Lara*, 10 F.4th at 31; *L.G. v. Choate*, 744 F. Supp. 3d 1172, 1183–84 (D. Colo. 2024) (“Petitioner argues, and the Court agrees, proving a negative is difficult.”). In addition, noncitizens have no right to court-appointed counsel in immigration court and overwhelmingly appear pro se. Requiring noncitizens to appear pro se and carry the burden to secure their liberty inherently increases the risk of erroneous results. Further, Detained individuals “have little ability to collect evidence.” *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013); *Hernandez-Lara*, 10 F.4th at 30. The risk of erroneous deprivation is reduced when the government is assigned the burden given its substantial resources. *See, e.g., Velasco Lopez*, 978 F.3d at 853 (citations omitted); *Diaz-Ceja v. McAleenan*, No. 19-CV-00824-NYW, 2019 WL 2774211, at \*11 (D. Colo. July 2, 2019).

The stakes of erroneous deprivation are incredibly high in Josue's case. The government suddenly separated Josue from his community, prevented him from pursuing

his occupation and planned college education, and most egregiously, separated him from his newborn daughter, who is now left in the care of the state.

*Finally*, Respondents' interests are not served by detaining Josue or by the current Section 1226(a) bond framework, and Respondents would not suffer hardship if they carried their proper burden. The government has no interest in detaining individuals like Josue, who present no flight risk or danger. In fact, the government has already made a determination about flight risk and risk of danger in Josue's case and found that there was no risk. Just recently, a court in this district ordered immediate release of a petitioner from detention where that petitioner previously had been released on bond after a finding that petitioner was not a flight risk or danger. *Cruz Valera v. Baltazar*, No. 1:25-CV-03744-CNS, 2025 WL 3496174, at \*1 (D. Colo. Dec. 5, 2025). Further, the current bond process fails to ensure that detention serves government interests because the IJ requires no affirmative finding that the individual is a flight risk or a danger to the community before denying bond. *See Hernandez-Lara*, 10 F.4th at 33 (shifting the burden and finding that "limiting the use of detention to only those noncitizens who are dangerous or a flight risk" align with due process requirements).

For the foregoing reasons, Josue is likely to succeed on the merits of his claim that the government's re-detention of him violates the Procedural Due Process Clause of the Fifth Amendment.

### **3. Prolonged Detention**

Putting aside that Respondents' re-detention of Josue was procedurally unconstitutional, his detention also has become unconstitutionally prolonged. As a result,

continued detention violates his right to procedural due process.

As discussed above, Josue has a protected liberty interest in his release from immigration custody. See *supra* page 10. As this District recognized in *L.G. v. Choate*, 744 F. Supp. 3d at 1186, all three *Mathews* factors weigh against continued detention unless Respondents can demonstrate, by clear and convincing evidence, that continued detention is justified (and here, additional factors warrant immediate release as well as a bond hearing).

*First*, Josue has a compelling private interest in freedom from indefinite deprivation of freedom. Josue has already been detained for six months and counting. He was previously in ORR custody for nearly two years, based on one of the same charges Respondents now use to justify his detention. Together with the current indeterminate detention, Josue has been detained for two and a half years.

*Second*, the risk of erroneous deprivation as a result of Josue's prolonged detention is substantial. Josue's prolonged detention is preventing him from addressing a pending charge in Wyoming, which could threaten his eligibility for permanent status under SIJ. In addition, his prolonged detention is preventing him from seeking custody of his newborn child, which could permanently and erroneously deprive him of his parental rights to care for her. Josue's prolonged detention has also led him to miss out on six months of paychecks that he planned to use to pay for his daughter's livelihood and his education. Relatedly, it has forced him to put off his dream of starting college.

*Third*, the government's interest in detaining Josue for a prolonged period is low. The government has no interest in detaining noncitizens who cannot be removed and

present no flight risk or danger. Josue has been granted SIJ status and is dutifully meeting all obligations while waiting for his opportunity to receive LPR status adjustment. He is firmly settled in Massachusetts, where he is enrolled in college, employed, and has a newborn daughter. And, the government previously released Josue without any bond, having determined that Josue was not a flight risk or danger to the community.

Here, the District of Colorado should apply the six-factor test it has used to consider whether detention is unconstitutionally prolonged under Section 1226(c) to consider the constitutionality of Josue's prolonged detention under Section 1226(a). Those factors include:

1. the total length of detention to date;
2. the likely duration of future detention;
3. the conditions of confinement;
4. delays in removal proceedings caused by the person in immigration custody;
5. delays in removal proceedings caused by the government; and
6. the likelihood that removal proceedings will result in a final order of removal.

*E.g.*, *de Zarate v. Choate*, No. 23-CV00571-PAB, 2023 WL 2574370, at \*3 (D. Colo. Mar. 20, 2023); *see also Arosetegui-Maldonado v. Baltazar*, 794 F. Supp. 3d 926, 939 (D. Colo. 2025) (applying six-factor test to detention cases under Section 1231).

Each of those factors weighs in Josue's favor.

### ***Length of Detention***

The Supreme Court has suggested that detention generally becomes

unreasonably prolonged when it exceeds six months. *See Zadvydas*, 533 U.S. at 701. This factor weighs in Josue's favor: At the time of this filing, Josue's detention has stretched past six months, and there remains no prospect of release.

***Likely Duration of Future Detention***

This factor weighs in Josue's favor because, in the absence of intervention by this Court, Josue's detention will continue indefinitely. No meaningful movement has been made in Josue's pending removal proceedings because the immigration court lacks jurisdiction over his asylum application. Additionally, Josue's priority date to apply for permanent residency based on his SIJ status is uncertain but remains several months away. Josue's case is lost in limbo, and there is no mechanism for ICE to pursue his removal or for Josue to obtain asylum or adjustment of status in the short term, untethering Josue's detention from any legal basis.

***Conditions of Detention***

When conditions of detention resemble a penal institution, this factor weighs in favor of finding that detention is unreasonable. *Singh v. Choate*, No. 19-CV-00909-KLM, 2019 WL 3943960, at \*6 (D. Colo. Aug. 21, 2019). Josue is detained at the Aurora facility, which this Court has already held weighs in a noncitizen's favor because it is akin to a penal institution. *See, e.g., Sheikh v. Choate*, No. 1:22-CV-01627-RMR, 2022 WL 17075894, at \*8–9 (D. Colo. July 27, 2022). The conditions of detention weigh in Josue's favor because they are as punitive as criminal custody and are causing tangible harm to Josue's well-being.

### ***Reasons for Delay***

When an entity other than the noncitizen causes the delay in immigration proceedings, this factor weighs in favor of concluding that continued detention without a bond hearing is unreasonable. See *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at \*11 (S.D.N.Y. May 23, 2018). Here, Respondents have caused the delay in Josue's continued detention. By claiming in its opposition to terminate that the Asylum Office had agreed to expedite adjudication of Josue's asylum application, DHS has funneled Josue into an endless cycle of two-week continuances. That interview has yet to take place, and the current policy pausing all applications demonstrates that continued detention has failed to expedite Josue's interview.

### ***Likelihood That Proceedings Will Result in Removal***

Finally, Josue's proceedings are unlikely to result in legal removal. Josue's SIJ status and pending asylum proceedings protect against removal, creating "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." See *Zadvydas*, 533 U.S. at 701 (requiring the government to show evidence sufficient to rebut a petitioner's good reason to believe there is not a significant likelihood of removal). Moreover, Josue has two viable avenues to seek lasting immigration status in the United States: his future ability to adjust status based on SIJ status and his bona fide asylum claim.

### **B. Violation of Substantive Due Process**

Josue is also likely to succeed on the merits of his claim that the government's unlawful detention of him also violates the Substantive Due Process Clause of the Fifth

Amendment of the U.S. Constitution. As discussed above, Josue maintains a protectable liberty interest in being out of immigration custody. *See supra* page 10. In addition, under the substantive due process doctrine, a restraint on liberty is only permissible if it serves a “legitimate nonpunitive objective.” *See Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). The Supreme Court has only recognized two legitimate objectives of immigration detention: preventing danger to the community or preventing flight prior to removal. *See Zadvydas*, 533 U.S. at 678, 690–92 (discussing constitutional limitations on civil detention).

**1. Unconstitutional Re-Detention Purpose**

As discussed above, a critical component of ORR's decision to release Josue included a determination that Josue was not a flight risk or a danger to the community. *See supra* page 16. In fact, Josue's actions have rendered him an actualization of Congress's intent for SIJ recipients. He has dutifully followed the SIJ process by applying for deferred action, legally becoming employed in the United States, and waiting for his opportunity to receive lawful permanent residency. Josue's history shows that he is dedicated to building a better life through legal channels, which are facts that the government has previously recognized. These facts suggest that there is no non-punitive rationale underpinning Respondents' re-detention of Josue, rendering his detention unconstitutional.

**2. Prolonged Nature of Detention**

The prolonged nature of Josue's detention also violates his substantive due process rights under the Fifth Amendment by depriving him of his liberty interest. *See*

*Salerno*, 481 U.S. at 747.

Over six months have elapsed since Josue's detention, and no meaningful movement has been made in his pending removal proceedings. The government has confined him without any further court proceedings, appellate process, or indication of any plan for removal. Under these circumstances, Josue's continued detention is untethered to any legal basis. *Zadvydas*, 533 U.S. at 690 ("where detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." (internal citation omitted)). At this stage, DHS's refusal to release Josue is "the exercise of power without any reasonable justification" and a violation of due process principles. See *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

DHS argued in its Opposition to Motion to Terminate in Josue's removal proceedings on July 23, 2025 that the "Asylum Office has agreed to expedite adjudication of [Josue]'s I-589 [asylum application]" resulting in "the respondent getting a decision on his application more quickly." Ex. 10. Instead, after almost six months of detention, Josue has still not even received his Asylum interview, demonstrating that his detention has *not* expedited his asylum application.

**C. Violation of Administrative Procedure Act, 5 U.S.C. §§ 702, 706,  
Because the Government's De Facto Revocation of Josue's SIJ  
Status Is Arbitrary and Capricious.**

Under the APA, a court is likely to hold unlawful and set aside Respondent's detention and attempt to remove Josue from the United States because it is "arbitrary" and "capricious," "not in accordance with the law," and "contrary to constitutional right" for

at least three reasons. 5 U.S.C. § 706(2)(A)–(C).

*First*, forced removal from the United States would render Josue ineligible for SIJ status, constituting a *de facto* revocation of his SIJ status and leading to a result contrary to the law.

Under the law, once granted, SIJ status may not be revoked unless “[t]he Secretary of Homeland Security [] find[s] ‘good and sufficient cause’ for revocation; the agency [] provides notice of intent to revoke; and the SIJ designee [is] given the opportunity to present evidence opposing revocation.” *Osorio-Martinez*, 893 F.3d at 163–64 (citing 8 U.S.C. § 1155; 8 C.F.R. § 205.2; 7 USCIS Policy Manual, pt. F, ch. 7 (Mar. 21, 2018)). SIJ designees also have appeal rights for any adverse ruling. *Id.* at 164.

Here, Josue is entitled to these statutory protections before his SIJ status may be revoked. ICE, however, is seeking a final order of removal before the Aurora Immigration Court in disregard of these statutory protections. Because of his continued detention, Josue is unable to adequately respond to ICE’s attempt to *de facto* revoke his SIJ status, or to assert the rights that SIJ provides. Therefore, Respondents’ actions contradict the law by violating Josue’s procedural rights under 8 C.F.R. § 205.2.

*Second*, removing Josue would contravene the very purpose of the SIJ statutory framework and is therefore arbitrary and capricious.

Congress created the SIJ status to provide beneficiaries like Josue with a means to become an LPR from within the United States even when their presence would otherwise be unlawful. See 8 U.S.C. § 1255(h)(2). Pursuant to this goal, Congress also created “a clear set of rights, including eligibility to apply for adjustment to LPR status....”

*Osorio-Martinez*, 893 F.3d at 178–79. Removing an SIJ beneficiary from the United States before they are eligible to apply for adjustment would “summarily strip[]” this right from them, *id.*, because physical presence in the United States is required to adjust status pursuant to SIJ. See 8 U.S.C. § 1101(a)(27)(J).

Allowing Josue to be removed *after* he has already been granted SIJ status but *before* he has had an opportunity to pursue adjustment of status—a right granted to him by Congress—would thus eviscerate Congress’s goal in creating the SIJ framework in the first place and is therefore contrary to the law.

*Third*, Respondents’ re-detention and attempt to remove Josue is arbitrary and capricious because it creates a position contradictory to and in opposition of Josue’s SIJ status granted by USCIS. See *Gen. Chem. Corp. v. U.S.*, 817 F.2d 844, 857 (D.C. Cir. 1987). ICE and USCIS, both part of Respondent DHS, are taking contradictory, opposing positions from within the same agency, which the agency has failed to explain and reconcile.

Courts have held that “internally inconsistent and inadequately explained” agency action is arbitrary and capricious. *Gen. Chem. Corp. v. U.S.*, 817 F.2d 844, 846 (D.C. Cir. 1987); see also *Lee Lumber and Bldg. Material Corp. v. N.L.R.B.*, 117 F.3d 1454, 1460 (D.C. Cir. 1997) (an agency’s failure to explain “inconsistency is arbitrary”). In *Joshua M.*, the district court considered the exact issue of attempted removal of a petitioner with SIJ status, holding that petitioner was entitled to a temporary stay of removal. 439 F. Supp. 3d. at 679–80, 682. Specifically, the court found it “peculiar that the DHS grants [the petitioner] relief pursuant to the SIJ statutes while another agency

within DHS, Immigration and Customs Enforcement, simultaneously pursues removal.”  
*Id.* at 680.

**II. Josue Will Suffer Irreparable Harm Absent Preliminary Relief.**

Absent a preliminary injunction directing his immediate release and a temporary stay of removal proceedings, Josue will continue to suffer irreparable harm from Respondents’ flagrant violation of his constitutional and statutory rights.

*First*, Respondents’ deprivation of Josue’s liberty constitutes irreparable harm. *Rocky Mountain*, 121 F.4th at 128 (“Most courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury.” (quoting *Free the Nipple–Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805 (10th Cir. 2019))). No right is more fundamental than the right to freedom from unlawful government detention. *See Zadvydas*, 533 U.S. at 690. Unlawful immigration detention is itself irreparable harm. *See Mendoza Gutierrez v. Baltasar*, No. 25-cv-2720, 2025 WL 2962908, at \*9 (D. Colo. Oct 17, 2025); *Arostegui-Maldonado v. Baltasar*, 794 F. Supp. 3d at 942. Josue’s continued detention and potential removal will result in his inability to apply for permanent residency, entirely frustrating the purpose of USCIS’s decision to grant him SIJ status and deferred action status.

Moreover, Josue’s prolonged detention has already resulted in his missing the birth of his daughter and being unable to attend community college this fall as planned. *See* Josue Decl. It is further preventing him from fighting for custody of his newborn daughter, which may result in Josue losing parental rights. Josue’s daughter has been in foster care since she was born, *id.*, and his release would allow the infant a chance at a life

under her own father's care instead of remaining in foster homes.

*Second*, Respondents' attempt to remove Josue from the United States without due process will cause irreparable harm. As demonstrated above, forced removal will result in a *de facto* revocation of Josue's SIJ status in disregard of the constitutional and statutory due process afforded to him, rendering him unable to apply for status adjustment to LPR. In fact, Josue will lose his right to both a lawful presence in the United States and "a legal relationship" with the United States, *see Osorio-Martinez*, 893 F.3d at 170, not due to any wrongdoing of his own, but because Respondents have set out to illegally strip him of that right. Worse still, a removal will almost certainly result in Josue losing custody over his daughter, *see Josue Decl.*, forcibly separating a young family and unnecessarily compelling the child to grow up in foster care.

In that sense, as to Josue, Respondents are actively dismantling the institutional framework that Congress intentionally and expressly put in place for the protection of "those abused, neglected, and abandoned children...." *Osorio-Martinez*, 893 F.3d at 170. The harm is irreparable to Josue, to his daughter, and to the rule of law of the United States.

### **III. The Remaining Factors Weigh in Favor of a TRO and/or Preliminary Injunction.**

The remaining factors—the possibility of harm to other interested parties and the public interest—also weigh in favor of granting a TRO and preliminary injunction directing Josue's immediate release and a temporary stay of his removal proceedings.

A court considering a preliminary injunction "must balance the competing claims of injury and must consider the effect on each party of granting or withholding the

requested relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “When a constitutional right hangs in the balance,” it “usually trumps any harm to the defendant.” *Free the Nipple—Fort Collins*, 916 F.3d at 806. *Cf. Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012) (“[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh [a Petitioner’s interest] in having his constitutional rights protected.”). The “public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.” *Sajous*, 2018 WL 2357266, at \*13 (internal citation omitted); *Free the Nipple—Fort Collins*, 237 F. Supp. 3d at 1134 (It is “always in the public interest to prevent the violation of a party’s constitutional rights.”) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

Respondents will not be harmed by releasing Josue. In making its initial release decision, ORR was required to—and did—determine that Josue was not a flight risk or a danger to the community and in 2022, USCIS itself granted Josue deferred action. More critically, Respondents do not “enjoy an unfettered right to detain noncitizens in contravention of the law or in violation of the noncitizens’ Fifth Amendment rights.” *Mendoza Gutierrez*, 2025 WL 2962908, at \*10. Josue’s release from unlawful detention therefore does not harm Respondents, and the public interest tips in his favor.

**IV. The Proper Remedy Is Immediate Release, an Injunction From Josue’s Removal from this District, and Due Process for His Asylum and Removal Proceedings.**

The proper remedy for Respondents’ unlawful detention of Josue is to order his immediate release. “It is clear [] that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the

writ is to secure release from illegal custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Josue’s claims strike at the heart of the freedom that habeas corpus has historically been used to vindicate. Importantly here, Respondents’ unlawful actions relate back to the time that he was taken into custody and cannot be cured by any *post hoc* rationalization Respondents may provide. Due process requires some form of notice *at the time* of detention, not days or weeks or months later. See *Martinez v. McAleenan*, 385 F. Supp. 3d 349, 365 (S.D.N.Y. 2019). Because Respondents failed to provide Josue with due process when he was detained, they “cannot enjoy the poisonous fruits of their unlawful acts” and must release Josue. *Id.* at 369; see *Tumba Huamani v. Francis*, No. 25-cv-8110, 2025 WL 3079014, at \*9 (S.D.N.Y. Nov. 4, 2025) (ordering release where the petitioner’s detention was “illegal from the start because of the lack of any due process.”). *Post hoc* rationalizations also will not cure the APA violations. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020). Thus, the proper remedy for Respondents’ unlawful detention of Josue is his immediate release.<sup>2</sup>

The proper remedy for Respondents’ *de facto* revocation of Josue’s SIJ status in violation of constitutional and statutory requirements is to enjoin his removal from this District and to order Respondents to afford him due process, including sufficient notice and a meaningful opportunity to be heard with assistance of counsel. As described

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<sup>2</sup> Josue’s immediate release should include no additional indefinite restrictions on his liberty, such as a GPS monitor. See *Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61, 69 (D. Mass. June 11, 2025) (finding the indefinite imposition of a GPS monitor by ICE to violate due process rights under the Fifth Amendment); *N-N- v. McShane*, No. 25-cv-5494, 2025 WL 3143594, at \*4 (E.D. Pa. Sept. 10, 2025).

above, this Court has the power to and should protect its own jurisdiction by enjoining Respondents from removing Josue from its jurisdiction until it has ruled on the merits of Josue's *habeas corpus* petition.

As described in the Petition, because of his Unaccompanied Child designation, USCIS has sole, exclusive, initial jurisdiction over Josue's asylum application and must adjudicate it before an immigration judge can assess any claim related to his removal proceedings.<sup>3</sup> However, on July 28, 2025, the Aurora Immigration Court denied Josue's motion to terminate his removal proceedings and summarily denied a motion to reconsider in August of 2025. Instead, the Immigration Court continues to reset the case for hearings despite not having jurisdiction over his asylum claim. This directly contradicts the purpose of Josue's designation as an Unaccompanied Child pursuant to the Homeland Security Act of 2002 and the Trafficking Victims Protection Reauthorization Act of 2008.

With his asylum application still pending, this Court should issue an order to enjoin Respondents from removing Josue from this District until it has ruled on the merits of his Petition. Such an order is crucial to protect this Court's rightful jurisdiction over the underlying Petition and to preserve the integrity of this Court's proceedings. It would also allow Josue to pursue his asylum application with USCIS and to pursue adjustment of status, as is his right guaranteed by his SIJ status. In addition, this Court should order that Josue in fact be afforded due process, including sufficient notice and a meaningful

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<sup>3</sup> See Trafficking Victims Protection Reauthorization Act, Pub. Law No. 110-457, § 235(d)(7)(C), 122 Stat. 5044 (2008).

opportunity to be heard with assistance of counsel, during his ongoing asylum and removal proceedings.

**CONCLUSION**

For the foregoing reasons, Josue merits a temporary restraining order and/or preliminary injunction. Josue therefore respectfully requests that the Court issue an order pursuant to Federal Rule of Civil Procedure 65 directing Respondents to immediately release Josue without imposing additional indefinite conditions of release; to enjoin from removing Josue from the jurisdiction of this Court until it has ruled on the merits of his habeas corpus petition; and to ensure that he is afforded due process during his asylum and removal proceedings.

Dated: December 15, 2025  
Denver, CO

Respectfully Submitted,

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### CERTIFICATE OF SERVICE

Pursuant to D.C.Colo.L.Civ.R 65.1(a), I, Laura Sturges, hereby certify that on December 15, 2025, I sent copies of the Petitioner's Motion For A Temporary Restraining Order And/Or Preliminary Injunction by **CERTIFIED MAIL** to Respondents and the United States Attorney's Office for the District of Colorado.

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/s/ Laura Sturges  
**Laura Sturges**

**CERTIFICATE OF CONFERRAL**

I confirm that I have conferred with the opposing counsel in good faith regarding this motion, as required under local rule D.C.COLO.LCivR 7.1(a).

December 15, 2025

    /s/ Laura Sturges

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