

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

WILMER ALAS 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, U.S.
Department of Homeland Security;

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,

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

Respondents-Defendants.

Case No. 1:26-cv-136

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

**POINTS AND AUTHORITIES
IN SUPPORT OF EX PARTE
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
MOTION FOR PRELIMINARY
INJUNCTION**

Challenge to Unlawful Incarceration;
Request for Declaratory and Injunctive
Relief

I. INTRODUCTION

Petitioner-Plaintiff, Wilmer Alas Herrera by and through undersigned counsel, hereby files this motion for a temporary restraining order and preliminary injunction to enjoin the U.S. Department of Homeland Security's ("DHS"), U.S. Immigration and Customs Enforcement ("ICE") from continuing his unlawful detention.

Mr. Alas Herrera is a native and citizen of El Salvador who has resided in the Boulder, CO area for nearly nine years with his family. Although subject to reinstatement of his prior removal order, ICE issued an order of supervision in 2016 after his most recent entry to the United States, and Mr. Alas Herrera has faithfully complied with that order since that time, appearing for, literally, hundreds of check-ins with ICE officers. Meanwhile, he has pursued withholding of the removal order, a case that remains in progress. Nevertheless, on October 6, 2025, Mr. Alas Herrera was arrested at an ICE check-in without an explanation or opportunity to meaningfully contest his detention, despite the lack of any changed circumstances in his case. He has been incarcerated in the Aurora Detention Center in Aurora, CO since that time.

Mr. Alas Herrera's detention is unlawful and release is necessary because: (1) Mr. Alas Herrera's detention violates 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), given there is not a substantial likelihood that DHS can carry out his removal in the reasonably foreseeable future; (2) Mr. Alas Herrera cannot be removed to a third country in the reasonably foreseeable future because he first must receive notice and a meaningful opportunity to present a claim for fear-based protection; and (3) ICE detained Mr. Alas Herrera without notice or opportunity to be heard, based on the decision of an individual without authority to do so, without findings required by law, and in violation of agency rules.

Mr. Alas Herrera meets the standard for a temporary restraining order. He will suffer immediate and irreparable harm absent an order from this Court enjoining the government from continuing his redetention and deporting him. Because holding federal agencies accountable to the demands of the U.S. Constitution, statues, and regulations is in the public interest, the balance of equities and public interest are also strongly in Mr. Alas Herrera's favor.

II. STATEMENT OF FACTS AND CASE

Mr. Alas Herrera is a native and citizen of El Salvador. On or about November 5, 2016, he entered the United States without permission and surrendered to Border Patrol officer, who processed him and reinstated his prior removal order. *See* Exh. 2, Tab K (release request/order of supervision documents).¹ However, he was released on an order of supervision to reunite with his family in Colorado and pursue his application for relief from removal. *Id.* He was thereafter required to periodically report to ICE. *Id.* For nearly nine years, Mr. Alas Herrera complied with the terms of his order of supervision and built a life in Boulder, Colorado, working and raising his children. His wife and older children, age 14 and 20, have resided in the United States since 2015 under an order of release on recognizance, while their own cases are in process. *See generally* Exh. 2. His ten-year-old son was born in Texas and is a United States citizen. Mr. Alas Herrera applied for withholding of removal before the immigration court, and his application was denied on March 7, 2022. Exh. 3 (EOIR Automated Case Information). However, he timely filed an appeal with the Board of Immigration Appeals, which remains pending as of this writing. *Id.*

Initially, Mr. Alas Herrera was required to report to ICE two times a week in person, as well as send a photo of himself every day. ICE also monitored him by GPS through an ankle

¹ Mr. Alas Herrera notes that at present, he only possesses more recent documents from his Order of Supervision; however, those documents do reflect the date of his entry and arrest, as well as reinstatement of his prior removal order.

bracelet. Over time, as he continued to comply with the rigorous requirements, the frequency of his assigned check-ins decreased. After what was to the best of his recollection, a couple of years, ICE took him off the ankle monitor. At that point, he only had to report once a week, then this became every two weeks, every month, and finally every two months. Mr. Alas Herrera was required to present literally hundreds of times over these nine years, and did so without fail.

While in the community for these nine years, Mr. Alas Herrera largely avoided criminal legal contact. The limited exception was an arrest for misdemeanor driving under the influence in 2020. Exh. 2, Tab J. Mr. Alas Herrera served no jail time, successfully completed probation with a clean record, and has not reoffended. *Id.* Otherwise, his time on an OSUP was unblemished.

On August 6, 2025, Mr. Alas Herrera reported for a check-in and was noted as being in compliance with the order of supervision. Exh. 2, Tab K. Nevertheless, on September 9, 2025, ICE placed him on an ankle monitor. *Id.* No reason specific to Mr. Alas Herrera was given for this change. The officer, who spoke Spanish, told Mr. Alas Herrera that there were orders to put everyone similarly situated on an ankle monitor, but that he might not be on it for long.

His next in-person check-in was set for 8:00 am on October 6, 2025, but Mr. Alas Herrera became confused by his new paperwork and did not report at that time. Sometime after 9 am, an ICE supervisory officer called Mr. Alas Herrera asking why he was not at the check-in. Upon receiving this call, Mr. Alas Herrera immediately went to the ICE office to report. He explained that he simply misunderstood the date and time of his check-in and had promptly reported as soon as he realized otherwise.

Nevertheless, an ICE officer arrested Mr. Alas Herrera at this check-in. The officer spoke to Mr. Alas Herrera in English. To the best of Mr. Alas Herrera's recollection and understanding, the reason given was simply "you're going to be in custody until there's a decision about you."

Mr. Alas Herrera was neither given an opportunity to contest the revocation of his OSUP, nor was he provided with an explanation that he could understand. He signed some papers which he neither understood nor was given a copy of, and ultimately he was incarcerated at the Aurora ICE Processing Center, where he remains.

As stated above, Mr. Alas Herrera did not understand the reason why his order of supervision was revoked, and has not received any paperwork providing an explanation despite his requests. Likewise, undersigned counsel has attempted to contact ICE without success on four separate occasions, subsequent to submitting his formal entry of appearance as Mr. Alas Herrera's representative. ICE also did not give Mr. Alas Herrera an opportunity to present evidence or argument as to why his reincarceration was unnecessary.

Upon information and belief, the official responsible for revoking Mr. Alas Herrera's OSUP did not first refer the case to the ICE Executive Associate Director, did not make a finding that revocation was in the public interest, and did not make a finding that circumstances did not reasonably permit referral to the Executive Associate Director. Also upon information and belief, the person that revoked Mr. Alas Herrera's OSUP was not a delegated authority to revoke an OSUP. Regardless, as noted above, if ICE followed these procedures, it has had numerous requests and opportunities to so demonstrate, but has failed to do so, necessitating the filing of the concurrent habeas corpus petition and accompanying motion. Moreover, even if ICE followed those procedures, Mr. Alas Herrera was not given an opportunity to contest his redetainment before a neutral adjudicator, and at any rate there is no change in circumstances or violation of the OSUP to justify such redetainment.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 authorizes courts to enter preliminary injunctions and issue temporary restraining orders (“TRO”). Fed. R. Civ. P. 65(a), (b). The Court exercises its discretion when deciding whether to issue a TRO. *Allen W. Hinkel Dry Goods Co. v. Wichison Indus. Gas Co.*, 64 F.2d 881, 884 (10th Cir. 1933). The procedure and standards for determining whether to issue a TRO mirror those for a preliminary injunction. The Supreme Court has explained that temporary restraining order or preliminary injunction is warranted when a party is “likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [his] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Diné Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016). The Tenth Circuit has held that “a showing of probable irreparable harm is the single most important prerequisite” for a preliminary injunction or temporary restraining order, and “the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.” *Dominion Video Satellite v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1260–61 (10th Cir. 2004) (quotation and citation omitted).

IV. ARGUMENT


Mr. Alas Herrera satisfies all three factors for a temporary restraining order and preliminary injunction. First, he is likely to suffer irreparable harm. As argued below, his unlawful detention itself constitutes such harm. Additionally, he experiences separation from his family, including his children, who are suffering tremendously without him. He also faces risk of removal to a third country where he may face persecution or torture. Second, he is likely to succeed on the merits of his claim because his detention is unlawful, in violation of the Due Process Clause of the Fifth Amendment, statutes, and regulations. Third, the balance of equities

tips in his favor, as the threatened injury outweighs any harm that the preliminary injunction may cause the opposing party. Finally, the public interest favors requiring Respondents to follow the law. The public has an extremely strong interest in a government that does not arbitrarily arrest and detain individuals that are subject to its jurisdiction.

A. Mr. Alas Herrera will Suffer Irreparable Harm Absent Injunctive Relief

Mr. Alas Herrera will suffer irreparable harm if his unlawful detention continues. First, each day Mr. Alas Herrera is detained in violation of his constitutional rights, he faces irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976); *Free the Nipple—Fort Collins v. City of Fort Collins*, 916 F.3d 792, 805–06 (10th Cir. 2019) (citing *Awad v. Ziriya*, 670 F.3d 1111, 1131 (10th Cir. 2012)). The due process violation alone is sufficient to meet this standard.

Second, Mr. Alas Herrera provides cogent evidence of individualized harm resulting from his continued detention, further supporting an irreparable harm finding. *See, e.g., Burnham v. Villani*, 2023 WL 6464914 at *3 (D. Colo. Oct. 4, 2023) (holding that serious medical ailments that could lead the plaintiff to require a colostomy bag constituted irreparable harm); *Carranza v. Reams*, 614 F. Supp. 3d 899, 917 (D. Colo. 2020); *Essien v. Barr*, 457 F. Supp. 3d 1008, 1019 (D. Colo. 2020); *Castillo v. Barr*, 449 F. Supp. 3d 915 (C.D. Cal. 2020); *Coronel v. Decker*, 449 F. Supp. 3d 274, 281 (S.D.N.Y. 2020); *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 218 (D.D.C. 2020).

Mr. Alas Herrera is being held in “prison-like conditions.” *Preap v. Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016). As the Supreme Court has explained, “[t]he time spent in jail . . . has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972). Mr. Alas Herrera is separated from his wife and children in detention, and cannot support them. Mr. Alas Herrera’s incarceration has had a devastating effect on his family. His 14-year-old daughter  who previously struggled

with severe depression and was hospitalized for suicide attempts, was improving, but has begun to relapse due to her father's absence. Exh. 2, Tabs A, G, I. His son [REDACTED] suffers from migraines. *Id.* Tab F. His wife reports that the children "are slowly fading away in sadness and in pain." *Id.* Tab A. Although a U.S. citizen, his son [REDACTED] has had difficulty even visiting Mr. Alas Herrera at the Aurora facility because his wife is afraid to enter the facility and interact with ICE, despite her release on an order of recognizance.

Additionally, the government itself has documented alarmingly poor conditions in ICE detention centers. *See, e.g.*, DHS, Office of Inspector General (OIG), Summary of Unannounced Inspections of ICE Facilities Conducted in Fiscal Years 2020-2023 (2024) (reporting violations of environmental health and safety standards; staffing shortages affecting the level of care people in detention received for suicide watch, and holding people in administrative segregation in unauthorized restraints, without being allowed time outside their cell, and with no documentation that they were provided health care or three meals a day).²

A TRO or preliminary injunction is necessary to prevent Mr. Alas Herrera from suffering such irreparable harm.

B. Mr. Alas Herrera is Likely to Succeed on the Merits of His Claims

1. Violation of Due Process Because Removal Is Not "Reasonably Foreseeable"

First, Mr. Alas Herrera is likely to succeed on his due process claim because his removal is not reasonably foreseeable. "The Due Process Clause applies to all persons within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citation modified). "Freedom from

² Available at <https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-59-Sep24.pdf> (last accessed January 12, 2026).

imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Id.* at 690 (2001). Under substantive due process doctrine, a restraint on liberty like revocation of a non-citizen’s order of supervision is only permissible if it serves a “legitimate nonpunitive objective.” *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). “Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty,” like the decision to revoke a non-citizen’s order of supervision. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (citation modified). “The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Id.* at 333 (citation modified); *Guillermo M. R. v. Kaiser*, --- F.Supp.3d ---, 2025 WL 1983677, at *7 n.4 (N.D. Cal. July 17, 2025) (applying the *Mathews* Test where ICE intended to redetain petitioner, who was released on an OSUP, and finding that procedural due process required a hearing before a neutral adjudicator given the importance of his liberty interest).

Under the Immigration and Nationality Act (“INA”), a non-citizen with a final order of removal who is not removed within the 90-day removal period following a removal order “shall be subject to [an order of] supervision.” 8 U.S.C. § 1231(a)(3) (titled “Supervision after 90-day period”). Detention may only continue beyond the 90-day removal period if the noncitizen is found to be “a risk to the community or unlikely to comply with the order of removal” or if the order of removal was on specified grounds. 8 U.S.C. § 1231(a)(3). Furthermore, the Supreme Court has held that, even where initial detention past the 90-day removal period is authorized, if

“removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by [§ 1231(a)(6)].” *Zadvydas*, 533 U.S. at 699–700.

Here, Mr. Alas Herrera’s removal is not reasonably foreseeable, and he should therefore be released under *Zadvydas*. His release may be conditioned “on any of the various forms of supervised release that are appropriate in the circumstances.” *Id.* at 700. Mr. Alas Herrera cannot be deported to El Salvador while his application for withholding of removal proceeds, and DHS has provided no notice of intent to remove him to any other country. Nor has DHS provided any evidence that it can remove Mr. Alas Herrera in the reasonably foreseeable future.

2. Violation of Procedural Due Process

Mr. Alas Herrera’s detention is also unlawful because it violates procedural due process. There are two key aspects of this claim. First, Mr. Alas Herrera’s arrest and detention by ICE on October 6, 2025 violates procedural due process. Second, any removal to a third country without the opportunity to present a fear-based claim would violate procedural due process. Under *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), 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.

a. Unlawful Re-Detention in 2025

Mr. Alas Herrera’s redetention by ICE in October 2025, without any notice or opportunity to respond, violates procedural due process. The first factor, the private interest at issue, favors Mr. Alas Herrera. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due

Process] Clause [of the Fifth Amendment] protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

The second factor, the risk of erroneous deprivation of liberty and the probable value of procedural safeguards, also favors Mr. Alas Herrera. To safeguard against erroneous deprivations of liberty, the statute specifies the limited number of reasons that an order of supervision can be revoked. 8 U.S.C. § 1231(a)(3). Regulations further specify who may lawfully revoke the order and the procedures that must be followed when doing so, including giving notice and an opportunity to be heard. 8 C.F.R. §§ 241.4, 241.13. As explained further below, Respondents violated those laws here, leaving the risk of erroneous deprivation of liberty not just high, but certain. Requiring Respondents to give notice and an opportunity to respond prior to revoking an order of supervision is of great value because it reduces the probability of needless detention of a person, like Mr. Alas Herrera, who is neither dangerous nor a flight risk.

The third factor, the government’s interest, also favors Mr. Alas Herrera. When the government ignores law that ensures notice and an opportunity to respond to a person at risk of revocation of an order of supervision, it is more likely to waste limited financial and administrative resources on unnecessary detention. This waste drags down the efficiency of the entire immigration system. And because the government must also spend resources defending against a habeas corpus petition in federal court to compel Respondents to comply with the law, requiring Respondents to instead provide notice and a meaningful opportunity to respond prior to revoking an order of supervision reduces fiscal and administrative burdens on the government.

b. Removal to a Third Country Without the Opportunity to Present a Fear-Based Claim

Removal to a third country without the opportunity to present a fear-based claim would also violate procedural due process. *See Arostegui Maldonado v. Baltazar*, No. 25-CV-2205-

WJM-STV, 2025 WL 2280357, at *13 (D. Colo. Aug. 8, 2025) (granting “an injunction requiring Respondents to adhere to their *non-discretionary* obligation to provide Maldonado with notice and an opportunity to seek withholding of removal before he is deported to any third country.”). The Supreme Court has stressed that before being spirited away, noncitizens are “entitled to notice and an opportunity to challenge their removal.” *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025).

In immigration proceedings addressing fear-based claims for protection, judges are obligated to provide notice of proposed countries of removal. *See* 8 C.F.R. § 1240.10(f) (stating that “immigration judge shall notify the [noncitizen]” of proposed countries of removal); 8 C.F.R. § 1240.11(c)(1)(i) (“If the [noncitizen] expresses fear of persecution or harm upon return to any of the countries to which the [noncitizen] might be removed pursuant to § 1240.10(f) . . . the immigration judge shall . . . [a]dvice [the noncitizen] that he or she may apply for asylum in the United States or withholding of removal to those countries[.]”).

Prior to removal to a third country, Mr. Alas Herrera must be given these same protections. The Ninth Circuit found in an unpublished opinion that “last minute orders of removal to a country may violate due process if an immigrant was not provided an opportunity to address his fear of persecution in that country.” *Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016). Numerous district courts across the country have found similarly. *See, e.g., Aden v. Nielsen*, 409 F. Supp. 3d 998, 1009 (W.D. Wash. 2019) (“A noncitizen must be given sufficient notice of a country of deportation that, given his capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation.”) (citing *Mathews*, 424 U.S. at 349); *Mahdejian v. Bradford*, No. 9:25-CV-00191, 2025 WL 2269796, at *4 (E.D. Tex. July 3, 2025) (“Noncitizens have a right to meaningful notice and opportunity to

be heard before being deported to a third country.”); *Sagastizado Sanchez v. Noem, et al.*, Case 5:25-cv-00104, ECF No. 26 (S.D. TX, Oct. 2, 2025) (applying the *Mathews* factors in the context of a claim against unlawful removal to a third country, finding that “the cost-benefit analysis weighs in [petitioner’s] favor”); *Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 1771438, at *3 (N.D. Cal. June 26, 2025) (finding that, where CAT deferral to El Salvador was previously granted, “there are no countries to which [petitioner] could currently be removed without his first being afforded notice and opportunity to be heard on a fear-based claim as to that country, as the Fifth Amendment Due Process Clause requires”); *Vaskanyan v. Janecka*, No. 5:25-CV-01475-MRA-AS, 2025 WL 2014208, at *7 (C.D. Cal. June 25, 2025) (requiring “adequate notice and a meaningful opportunity to raise any fear-based claim under CAT prior to effectuating [petitioner’s] removal.”).

When applied to the present circumstances, the *Mathews* factors weigh heavily in Mr. Alas Herrera’s favor. *See Mathews*, 424 U.S. at 335. First, Mr. Alas Herrera has a private interest at stake: his right to have his removal withheld from a country where he is more likely than not to be tortured. To date, he has not been provided with notice or a meaningful opportunity to present a fear-based claim to protect against his removal to a third country, yet he remains detained, presumably in part on this basis. In other words, Mr. Alas Herrera’s detention and the question of its legality merges with his right to have his removal withheld from a country where it is likely he will face torture. As such, he seeks to raise a claim for withholding protection to any country where the government intends to effectuate removal. 8 U.S.C. § 1231(b)(3) (providing restrictions on removal to a country where a person’s life or freedom would be threatened); 8 C.F.R. §§ 208.17–18; 1208.17–18. Given the significance of this interest and the

mandatory nature of withholding of removal for noncitizens who qualify, Mr. Alas Herrera's private interest weighs heavily in favor of a robust due process requirement.

Second, there is a high risk of Respondents' erroneous deprivation of Mr. Alas Herrera's rights given they have not provided *any* notice of an intended third country of removal or an opportunity to seek protection, a right to which he is entitled. *See* 8 U.S.C. § 1231(b)(3). Because he has not received any process in this regard, the importance of additional procedural safeguards far outweighs the minimal administrative burden.

Finally, the public interest in preventing unlawful deportation of noncitizens outweighs the government's interest in executing a removal order—particularly where protection has already been afforded. The procedures Mr. Alas Herrera requests would create a minimal delay in that process, and he will likely demonstrate he is at risk of harm in any intended country of removal given the risk factors he displays. Thus, pursuant to *Mathews*, due process requires the procedural protections Mr. Alas Herrera seeks prior to being unlawfully removed.

3. Violation of Administrative Procedure Act

Under the Administrative Procedure Act ("APA"), agency action that violates a federal statute is arbitrary and unlawful and may be set aside by federal courts. 5 U.S.C. § 702(2)(A), (B), (C) (empowering courts to set aside agency action that is "arbitrary and capricious," "otherwise not in accordance with law," "short of statutory right," or "contrary to constitutional right"). Judicial review is authorized for final agency actions. 5 U.S.C. § 704. Final agency actions are those (1) that "mark the consummation of the agency's decisionmaking process" and (2) "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation modified). Here, Mr. XXX challenges two final agency actions that violate the APA: (1) ICE's revocation of his order of

supervision; and (2) ICE's third country removal policy. Both actions are arbitrary, capricious, and contrary to law.

a. ICE's Revocation of Mr. Alas Herrera's Order of Supervision was arbitrary, capricious, and contrary to law.

Respondents' revocation of Mr. Alas Herrera's order of supervision was not in accordance with the INA and implementing regulations governing who may lawfully revoke an order of supervision and under what circumstances. Agency regulation delineates circumstances when noncitizens may be detained beyond the removal period. 8 C.F.R. §§ 241.4, 241.13. "[T]hese regulations are intended to provide due process in that they are fairly construed to be part of a procedural framework 'designed to ensure the fair processing of an action affecting an individual,' such that when they are not followed, prejudice is presumed." *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2444087, at *6 (D. Md. Aug. 25, 2025) (citing *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999)). Subsection (b)(4) indicates that "[t]he custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 C.F.R. 241.13, that there is no significant likelihood that [a noncitizen] under a final order of removal can be removed in the reasonably foreseeable future." 8 C.F.R. § 241.4(b)(4). The sole exception is if there is a change in circumstances related to the viability of removal in the reasonably foreseeable future. *Id.* Here, there is no indication of any such change in circumstances.

Moreover, the regulations permit only certain officials to revoke an order of supervision: the ICE Executive Associate Director, a field office director, or an official "delegated the function or authority . . . for a particular geographic district, region, or area." *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 161 (W.D.N.Y. 2025) (citing 8 C.F.R. §§ 1.2, 241.4(l)(2) and explaining that the Homeland Security Act of 2002 renamed the position titles listed in § 241.4).

If the field office director or a delegated official intends to revoke an order of supervision, they must first make findings that “revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate [Director].” 8 C.F.R. § 241.4(l)(2). And for a delegated official to have authority to revoke an order of supervision, the delegation order must explicitly say so. *See Ceesay*, 781 F. Supp. 3d at 161 (finding a delegation order that “refers only to a limited set of powers under part 241 that do not include the power to revoke release” insufficient to grant authority to revoke an order of supervision). Finally, upon revocation of an order of supervision, ICE must give a noncitizen notice of the reasons for revocation and a prompt interview to respond. 8 U.S.C. § 1231(a)(3); 8 C.F.R. §§ 241.4(l)(1); 241.13(i)(3).

Here, there is no evidence that the ICE Executive Associate Director revoked Mr. Alas Herrera’s order of supervision. Nor were any findings made by a field office director or other delegated official that revocation was in the public interest and that circumstances did not reasonably permit referral to the Executive Associate Director. Additionally, Mr. Alas Herrera was never given notice of the reasons for revocation, an interview, or any opportunity whatsoever to respond. The revocation of his order of supervision therefore violated the statute and regulations and occurred without any consideration of the serious constitutional concerns discussed above. Such agency action should be set aside as contrary to law and as arbitrary or capricious.

The Supreme Court has recognized that a federal agency’s failure to comply with its own regulations generally renders the associated agency action unlawful. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). As previously discussed, Respondents violated agency regulations governing who may properly revoke an order of supervision and the

findings that must be made prior to revocation. “As a result, this Court cannot conclude that [the revoking officer] had the authority to revoke release,” and Petitioner “is entitled to release on that basis alone.” *Ceesay*, 781 F. Supp. 3d at 162 (citing *Rombot*, 296 F. Supp. 3d at 386–89); *see also, e.g., Zhu v. Genalo*, 2025 WL 2452352 (S.D.N.Y. Aug. 26, 2025); *M.S.L. v. Bostock*, 2025 WL 2430267 (D. Or. Aug. 21, 2025) (releasing habeas petitioner where revocation of an ICE order of supervision was ordered by someone without regulatory authority to do so).

As with the third-country removal analysis, Mr. Alas Herrera’s APA/procedural due process claim amply satisfies the *Mathews* factors. The private interest at stake, erroneous deprivation of liberty in and of itself, has long been considered a fundamental private interest against which all others are weighed. The risk of erroneous deprivation of that interest here is massive and has already occurred, because Mr. Alas Herrera was not provided with any meaningful process to contest his detention, and—equally important—no material facts exist justifying his detention after nine years in compliance with his order of supervision. Finally, the government’s interest can be satisfied simply by continuing with Mr. Alas Herrera’s order of supervision, as his many years of compliance with that order amply demonstrate. Moreover, the fiscal burden on the government is actually lessened when it does not need to house, feed, and provide Mr. Alas Herrera with medical care.

b. ICE’s Third Country Removal Policy is Arbitrary, Capricious, and Contrary to Law

In addition, DHS’s third country removal policy violates the APA, since it fails to follow non-discretionary statutory duties requiring notice and a meaningful opportunity to present a fear-based claim, violates CAT’s implementing regulations, and violates regulations requiring immigration judges to notify noncitizens of proposed countries of removal and advise them of their right to apply for protection if they fear persecution or torture. *See* 8 U.S.C. § 1231(b)(3)

(providing restrictions on removal to a country where a person’s life or freedom would be threatened); 8 C.F.R. §§ 208.17–18; 1208.17–18 (implementing CAT); 8 C.F.R. §§ 1240.10(f), 1240.11(c)(1)(i) (immigration judge advisal and opportunity to apply for protection); *see also Tomas-Ramos v. Garland*, 24 F.4th 973, 977 (4th Cir. 2022) (recognizing that 8 U.S.C. § 1231 and CAT’s implementing regulations provide noncitizens with a pathway to seek withholding of removal and CAT protection “to prevent removal to a particular country”).

In recent months, courts have relied on this logic to enjoin third country removals. *See Arostegui Maldonado*, 2025 WL 2280357, at *13 (granting injunctive relief, recognizing that the notice and opportunity to seek fear-based relief requirements are non-discretionary); *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2444087, at *8 (D. Md. Aug. 25, 2025) (“Where an expression of fear of removal to a third country is comparable to an expression of fear of removal to one’s home country, such an interview is likely required under 8 U.S.C. § 1231(b)(3)(A) and 8 C.F.R. § 208.31.”) (citing *Tomas-Ramos*, 24 F.4th at 977).

C. The Balance of Equities and Public Interest Weigh Heavily in Mr. Alas Herrera’s Favor

The balance of hardships and the public interest both tip strongly in Mr. Alas Herrera’s favor. Where, as here, the government is a party to a case, the final two injunction factors—*i.e.*, the balance of equities and the public interest—merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). When assessing whether a TRO or preliminary injunction is warranted, the Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24.

The government cannot suffer harm from an injunction that prevents it from engaging in an unlawful practice, and the public interest is best served by ensuring that constitutional rights

and statutes are upheld. Federal legislative enactments, as “democratic determinations of the public interest,” offer useful guidance to courts analyzing the public interest prong of the preliminary injunction inquiry. *Fish v. Kobach*, 840 F.3d 710, 755 (10th Cir. 2016) (quoting *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003)); *see also O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1174 (10th Cir. 2003) (affirming a preliminary injunction because “failure to vindicate religious freedom protected under RFRA—a statute specifically enacted by Congress, as representative of the public ... — would be adverse to the public interest”); *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) (“[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.”); *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (“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.”); *Andujo-Andujo v. Longshore*, 2014 WL 2781163 at *6 (D. Colo. June 19, 2014) (reasoning that ICE’s “compliance with the law serves the public interest”). Therefore, the government cannot allege harm arising from having to comply with the Constitution, INA, or regulations. If a TRO or preliminary injunction is not entered, the government would effectively be granted permission to detain and deport Mr. Alas Herrera in violation of law.

Further, any burden imposed by requiring DHS to refrain from detaining Mr. Alas Herrera is both *de minimis* and clearly outweighed by the substantial harm he will suffer as if he continued to be detained. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (“Society’s interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.”). This is especially true where, as here, Mr. Alas Herrera

demonstrated compliance with a rigorous order of supervision over a period of many years. There is no meaningful burden imposed on DHS when they themselves have already demonstrated, through the successful implementation of alternatives to detention in this case, that a sufficient alternative to detention exists.

Courts granting temporary restraining orders in immigration habeas cases have routinely found that these factors weigh in a petitioner's favor. *See, e.g., Arostegui-Maldonado*, 2025 WL 2280357, at *10 ("True, there may be a generalized public interest in the enforcement of the country's immigration laws. But that cannot mean that Respondents enjoy an unfettered right to detain noncitizens in contravention with their Fifth Amendment rights."); *Pham v. Becerra*, No. 23-CV-01288-CRB, 2023 WL 2744397, at *7 (N.D. Cal. Mar. 31, 2023) (noting the administrative burden of a bond hearing is minimal when weighed against a petitioner's severe hardships); *Xuyue Zhang v. Barr*, 612 F. Supp. 3d 1005, 1017 (C.D. Cal. 2020) ("the public interest benefits from a preliminary injunction that expedites a bond hearing to ensure that no individual is detained in violation of the Due Process Clause."). Therefore, the balance of equities and public interest both overwhelmingly favor granting a TRO or preliminary injunction requiring Mr. Alas Herrera to be released.

D. In the Alternative, Mr. Alas Herrera Requests That the Government be Enjoined From Transferring Him Out of District While His Petition is in Process

If the Court does not order Mr. Alas Herrera immediately released, he respectfully requests that, at a minimum, this Court enjoin Respondents from transferring him outside the District of Colorado during the pendency of his underlying habeas case. In a recent case in this district, the respondents transferred the petitioner to an ICE facility in Arizona one day before she was able to get her habeas petition on file with this Court, thus frustrating this Court's

exercise of jurisdiction. *See Fuentes v. Choate*, 2024 WL 2978285 (D. Colo. June 13, 2024). To preserve this Court's jurisdiction over this matter, facilitate judicial review of Mr. Alas Herrera's significant constitutional and statutory claims, and preserve judicial resources by avoiding the necessity of refiling this case elsewhere, Mr. Alas Herrera respectfully asks this Court to enjoin his transfer outside this district during the pendency of this case.

CONCLUSION

For all the above reasons, this Court should find that Mr. Alas Herrera warrants a TRO or preliminary injunction ordering that Respondents release him from unlawful detention.

Dated: October 21, 2025

/s/ Charles J Vernon
Charles J Vernon
El Comité de Longmont
455 Kimbark St.
Longmont, CO 80501
Telephone: (520) 309-1751
Email: charles@elcomitedelongmont.org

CERTIFICATE OF SERVICE

I, Charles J Vernon, hereby certify that on January 12, 2026, I filed the foregoing with the Clerk of Court using the CM/ECF system, pursuant to Fed. R. Civ. P. 5 and provided a courtesy copy to:

Kevin.Traskos@usdoj.gov

/s/ Charles J Vernon