IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Emilio S. R. G., Petitioner, v. **Markwayne Mullin**, Secretary, Department of Homeland Security; **David Venturella**,[1] Acting Director, Immigration and Customs Enforcement; and **David Easterwood**, Acting Director, St. Paul Field Office Immigration and Customs Enforcement; Respondents.	Civil No.: 26-cv-2189 (KMM/DLM) **PETITIONER'S RESPONSE TO FEDERAL RESPONDENTS' OBJECTION TO REPORT AND RECOMMENDATION**

INTRODUCTION

On May 11, 2026, the Honorable Magistrate Judge Douglas L. Micko recommended that the Court grant Petitioner Emilio S. R. G.'s[2] petition for a writ of habeas corpus. R. &. R., Dkt. 8, at 15–16. The Court set a May 16 deadline to object. *Id.* at 15. On May 15, 2026, Respondents requested a four day extension, which the Court granted the same day. Dkts. 9, 10. On May 20, 2026, Respondents filed their objection to the Report and

[1] Pursuant to Fed. R. Civ. P. 25(d), David Venturella has been automatically substituted in for Todd M. Lyons as the latest Acting Director, Immigration and Customs Enforcement.

[2] "This District has adopted a policy of using only the first name and last initial of any nongovernmental parties in immigration cases." *Jor Y. v. Noem*, No. 26-CV-1210, slip op. at 1 n.1 (D. Minn. Feb. 11, 2026).

Recommendation. Dkt 11. Therein, Respondents seem to argue that there was no requirement that the informal interview required by ICE's regulations actually provide any measure of due process. *Id.* at 1–3. Further, Respondents seem to introduce, for the first time in this case, an argument that Petitioner must affirmatively show he was prejudiced by their trampling of his due process rights. *Id.* at 3–4.

Respondents are wrong on both counts. Courts both within this District and without have regularly found that the informal interview is an integral part of the re-detention scheme set forth by 8 C.F.R. § 241.13. And Respondents invert the burden of proof by requiring Petitioner to show prejudice. The burden of proof remains on Respondents to justify their re-detention of Petitioner and they still fail to do so. Thus, the Court should adopt the Report and Recommendation and order Petitioner be released immediately.

ARGUMENT

I. ICE violated the informal interview requirement in this case.

Respondents claim that "the R&R imposes an amorphous 'meaningful opportunity' requirement untethered to either the text of the governing regulation or existing precedent." Objection, Dkt. 11, at 1–2. Respondents main objection seems to be that "[t]he R&R relies heavily on *Kiwana v. LaRose*," and that case ordered release primarily because "that petitioner received defective notice regarding the basis for revocation." *Id.* at 2. In doing so, Respondents elide the actual due process analysis of both the Report and Recommendation, the courts of this District, the Supreme Court, and the regulation at issue itself. Rather, the *corpus* of law concerning 8 C.F.R. § 241.13 emphasizes that Petitioner was denied due process he was owed and must be released.

"Noncitizens released pursuant to 8 C.F.R. § 241.13 under conditions of supervision maintain a protected liberty interest in their continued release. Accordingly, any attempt to redetain an individual who has been released under § 241.13 necessarily implicates the individual's constitutionally protected liberty interests." *Ge Y. v. Noem*, No. 26-CV-1700 (KMM/LIB), slip op. at 6 (D. Minn. Mar. 17, 2026) (citations omitted), *R. & R. adopted*, (D. Minn. Mar. 23, 2026). The "informal interview" at issue is required by 8 C.F.R. § 241.13(i)(3). "The interview is intended to give the noncitizen an opportunity to respond to the stated reasons for revocation . . . ." *Chong W.V. v. Noem*, No. 26-CV-1622 (JWB/DTS), slip op. at 7 (D. Minn. Mar. 9, 2026). To argue for their release, "the individual may submit supporting evidence and information to rebut the reasons for revocation; and ICE must evaluate contested facts and determine whether the facts warrant revocation of release." *Mohammad A. v. U.S. Immigr. & Customs Enf't*, No. 26-CV-1585 (JRT/JFD), slip op. at 4 (D. Minn. Mar 02, 2026), *R. & R. adopted*, (D. Minn. Mar. 5, 2025); *accord Si T.P. v. Noem*, No. 26-CV-1445 (ECT/DJF), slip op. at 7 (D. Minn. Feb. 24, 2026), *R. & R. adopted*, (D. Minn. Mar. 2, 2026); R. & R., *Ge Y. v. Noem*, No. 26-CV-1700, slip op. at 11.

Respondents focus on the fact that the Court discussed *Kiwana v. LaRose* and tries to distinguish that case because, unlike here, that court found the notice of revocation defective. Objection, Dkt. 11, at 2. Respondents claim that "*Kiwana* does not support the R&R's conclusion that conducting the interview on the same day as arrest, standing alone, constitutes a regulatory or constitutional violation." But while *Kiwana* does discuss a defective notice, it also makes clear that "conduct[ing] Petitioner's informal interview on

the same day [as his arrest] . . . . under the imposed time constraints, deprived Petitioner of a meaningful opportunity to contest his detention, which violated his due process rights." *Kiwana v. LaRose*, No. 25-CV-3678, slip op. at 9 (S.D. Cal. Jan. 14, 2026). The petitioner in *Kiwana* was arrested, had his release revoked, and received his interview all on the same day. *Id.* at 2. That court stressed that the "extremely brief timeline" of arrest, notice, and interview "resulted in substantial prejudice to Petitioner." *Id.* at 11.

While the analysis of the timing of the interview is mixed with that concerning the defective notice, it is clear that the timing analysis can stand alone. Defects in timing and notice affect a detainee in different ways. A defective notice does not self-cure no matter how much time a detainee is given. The deprivation of due process from a defective notice, impairing a detainee's ability to know what to respond to, is the same whether the interview is held on Day 1 or Day 100. But the ability of a detainee to "present rebuttal evidence and argument" in an informal interview, *Si T.P.*, No. 26-CV-1445, slip op. at 7, is far more impaired on Day 1 than Day 100. A properly noticed detainee who receives either (1) ample advance notice of their re-detention before being brought in, or (2) adequate time after being detained to obtain evidence from contacts on the onside, may well be able to collect evidence and receive the benefit of due process from their interview. But an individual who is re-detained on the day they are released from a three-year prison sentence, taken directly from one facility to another with "no ability to access his personal or legal records," R. and R., Dkt. 8, at 14, and then receives their informal interview on the same day has been subjected to an "extremely brief timeline" and thus "deprived of an 'opportunity to be heard, in a meaningful manner and at a meaningful time.'" *Kiwana*, 25-CV-3678, slip op.

at 11 (quoting *Mathews*, 424 U.S. at 335).

Moreover, Respondents' examination of *Kiwana* makes the error of myopically focusing on the comorbidities of the Government's case in that matter rather than considering the underlying reasoning that court employed. Respondents complain that "the R&R imposes an amorphous 'meaningful opportunity' requirement untethered to either the text of the governing regulation or existing precedent." Objection, Dkt. 11, at 2. But as the Report and Recommendation makes clear, the "meaningful opportunity" requirement stems from the dictates of the Supreme Court's landmark due process decision in *Mathews v. Eldridge*. R. & R., Dkt. 8, at 12. That case held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). And the reasoning in *Mathews* has been embraced by other courts in this District evaluating claims concerning Respondents' violations of 8 C.F.R. § 241.13 *See, e.g.*, *Tou V. v. Bondi*, No. 26-CV-1381 (JMG/DLM), 2026 WL 458195, slip op. at 5 (D. Minn. Feb. 18, 2026) ("Considering the perennial factors of *Mathews* . . . the petitioner's detention without the codified regulatory protections violates the Constitution."); *Bashir A. O. v. Blanche*, No. 26-CV-2426 (JRT/DLM), slip op. at 8–9 (D. Minn. May 20, 2026) (citing *Mathews* while examining "the informal interview requirement under 8 C.F.R. § 241.13(i)(3)").

Moreover, even where courts of this District do not cite *Mathews*, their analysis of fundamental due process concerns accords with the "meaningful opportunity" reasoning employed by the Report and Recommendation. In *Ge Y. v. Noem*, the court found that Respondents' violations of the § 241.13 were "significant because it prevented [the

petitioner] from challenging the revocation" and thus constituted "a violation of Petitioner's due process rights." *Ge Y.*, No. 26-CV-1700, slip op. at 11, *R. & R. adopted* (D. Minn. Mar. 23, 2026). In *Kao Y. v. Noem*, the court noted that the "apparently pro forma interview conducted without benefit of counsel that took place on the same day [as the petitioner's arrest] does nothing to give the Court confidence in the process." No. 26-CV-1403 (MJD/DJF), slip op. at 10 (D. Minn. Feb. 26, 2026). And in *Por M. v Noem*, the court found that "Respondents' failure to follow their own regulations in arresting and detaining [the petitioner] deprived him of an opportunity to mount a defense, and that deprivation establishes grounds to release him." *Por M. v. Noem*, No. 26-CV-1546 (PJS/DJF), slip op. at 8 (D. Minn. Mar. 9, 2026), *R. & R. adopted*, (D. Minn. Mar. 19, 2026).

These cases all make clear that the fundamental concern of the interlocking notice and interview requirements of § 241.13 are to "afford a noncitizen facing revocation of release 'a meaningful opportunity to present their case.'" R. & R., Dkt. 8, at 14 (quoting *Mathews*, 424 U.S. at 348–49). This all rings in due process. "The essence of due process is notice and an opportunity to respond." *Roble*, No. 25-CV-3196, slip op. at 8 (emphasis added) (D. Minn. Aug. 25, 2025).[3] Where Respondents have deprived Petitioner of the benefit of his informal interview, they have not complied with the requirements of § 241.13(i)(3). "When those requirements are not followed, continued detention is not authorized." *Linh H.V. v. Mullin*, No. 26-CV-2090 (JWB/SGE), slip op. at 8 (D. Minn.

[3] Counsel for Petitioner will note that *Roble* is reported at 803 F. Supp. 3d 766 (D. Minn. 2025). However, Counsel does not have access to federal materials on Westlaw, and thus cites to the slip opinion for *Roble*. He apologizes to the Court for the inconvenience.

Apr. 6, 2026). Thus, Petitioner should be released immediately.

II. Petitioner need not show prejudice in an *Accardi* claim, but the Report and Recommendation's findings show prejudice anyway.

Respondents also seem to argue that, regardless of how little due process they provided Petitioner, they should prevail because Petitioner has not shown "actual prejudice." Objection, Dkt. 11, at 3. But this argument fails on two counts. First, Respondents contradict the law of this District by inverting the burden of proof. Second, Respondents fail to cite any case law which implies prejudice is an element of an *Accardi* claim. Rather, Respondents bear the burden of proof at all times in their re-detention of Petitioner and no showing of prejudice is required. But even if the Court considers prejudice, the Report and Recommendation's findings show ample prejudice to Petitioner justifying release.

As the Report and Recommendation made clear: "the government must show that it followed its own regulations when it revoked Petitioner's release." Dkt. 8 (citing *Tou V. v. Bondi*, No. 26-CV-1381, 2026 WL 458195, at *3). But Respondents try to seek a burden of proof in through the back door, claiming that regardless of any regulatory missteps on their part that Petitioner must show he was prejudiced by Respondents due process violations. Objection, Dkt. 11, at 33 (demanding that Petitioner make a "showing that the timing of the interview affected the outcome of the revocation determination in any respect").

Respondents bear the burden of proof in *Accardi* claims evaluating re-detention under 8 C.F.R. § 241.13. The case law of this District has focused on the requirement that

ICE show "changed circumstances that make removal significantly likely in the reasonably foreseeable future," but the underlying logic in *Roble v. Bondi* explains why Respondents bear the burden of proof on all aspects of their attempt to re-detain Petitioner. No. 25-CV-3196, slip op. at 9. The *Roble* Court was "guided by the 'default rule' that the burden falls on the party who 'generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.'" *Id.* (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)).

To require Petitioner to show he was prejudiced shifts the burden back onto an individual who was detained immediately following a three-year prison sentence. R. & R., Dkt. 8, at 5. This requirement is contained nowhere in *Accardi* or the case law concerning re-detention. 8 C.F.R. § 241.13. Rather, here as in *Roble*, "it is ICE that 'seeks to change the present state of affairs' by re-detaining" the petitioner. No. 25-CV-3196, slip op. at 10. Thus, Respondent bears the burden of proof on prejudice, not Petitioner.

Respondents cite *Al Khouri v. Ashcroft* for the proposition that a failure to produce evidence showing "any evidence, witness, or information that additional preparation time would have uncovered or presented. . . . is fatal to any claim of prejudice." Objection, Dkt. 11, at 3. But *Al Khouri v. Ashcroft* is not an *Accardi* case. It is a direct petition for review of a decision Board of Immigration Appeals to the 8th Circuit under 8 U.S.C. § 1252. *Al Khouri v. Ashcroft*, 362 F.3d 461, 462 (8th Cir. 2004). The question in that case was whether the immigration court violated the Fifth Amendment "mandate[] that removal hearings be fundamentally fair." *Id.* at 464. As Respondents have stressed, this is not a removal proceeding. Response, Dkt. 5, at 11 ("Petitioner does not challenge his final order

of removal here, nor could he. Apart from an administrative appeal, jurisdiction over a challenge to a final order of removal lies exclusively with the appropriate Circuit Court of Appeals."). Their citation to *Khouri*, a removal case, cannot stand for the proposition that Petitioner must make an affirmative showing of prejudice.

But even if the Court finds that a showing of prejudice is required, the underlying logic in *Khouri* supports Petitioner's argument that he was prejudiced by Respondents' failure to provide due process. Prejudice, in the context of *Khouri*, "does not require 'but for' causation." 362 F.3d at 466. The 8th Circuit made clear that "prejudice may be shown where the [immigration judge's] inadequate explanation of the hearing procedures and failure to elicit pertinent facts prevented the alien from presenting evidence relevant to their [sic] claim." *Id. at* 466 (quotation omitted) (alteration in original). And it made clear that the required showing is incredibly slight. *Id.* at 466–67 (quoting cases and stating itself that the petitioner need only show that the proceeding "may well have" gone differently, that the error "potentially affects the outcome," has "the potential for affecting" the outcome, or that the petitioner "might have proffered alternative" evidence (quotations omitted)).

If the Court decides to apply a prejudice requirement, the Report and Recommendation has found such prejudice. It specifically found that "conduct[ing] Petitioner's informal interview on the same day that it arrested him immediately upon his release from a three-year prison sentence . . . 'deprived Petitioner of a meaningful opportunity to contest his detention, which violated his due process rights.'" R. & R., Dkt. 8, at 13. And it found that "problem was exacerbated by ICE transferring Petitioner from

MCF-Faribault to the Sherburne County Jail before conducting the interview, leaving Petitioner in a resource-free environment when called upon to discuss the revocation of his OSUP." *Id.* Respondents place great weight on the fact that Petitioner has brought forth no showing of what evidence he may have presented, but the R&R already found that "[t]hroughout this process, Petitioner had no ability to access his personal or legal records." *Id.* at 14. These are precisely the findings prejudice Respondents claim is not present in this case. So, if the Court requires a showing of prejudice, Petitioner has made it and should be released. And release is the proper remedy, as "Courts in this District have repeatedly found that the government's failure to follow its own requirements under Section 241.13 warrants release, not a 're-do' of Section 241.13 procedures." *Por M. v. Noem*, No. 26-CV-1546 (PJS/DJF), slip op. at 11 (D. Minn. Mar. 9, 2026) (collecting cases), *R. & R. adopted*, (D. Minn. Mar. 19, 2026).

CONCLUSION

Accardi characterized its inquiry as "whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954). That is precisely what the Report and Recommendation found: that ICE's re-detention on Petitioner immediately following his release from a three-year prison sentenced "failed to provide Petitioner with a meaningful opportunity to challenge his detention." Dkt. 8, at 15. This behavior is the sort of agency excess that the Supreme Court, and the courts of this District, have continualkly reined in. For the reasons articulated in the Petition, Reply, and above, Petitioner respectfully requests that the Report and

Recommendation be adopted and his Petition for a Writ of Habeas Corpus be granted.

DATED: June 1, 2026

Respectfully submitted,

/s/ Daniel P. Suitor

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