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10
11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 **DAVID VIKTOROVICH**
14 **NIKOLAYEV,**

15 Petitioner,

16 v.

17 **KRISTI NOEM**, Secretary of the
18 Department of Homeland Security,
19 **PAMELA JO BONDI**, Attorney General,
20 **TODD M. LYONS**, Acting Director,
21 Immigration and Customs Enforcement,
22 **JESUS ROCHA**, Acting Field Office
23 Director, San Diego Field Office,
24 **CHRISTOPHER LAROSE**, Warden at
25 Otay Mesa Detention Center,

26 Respondents.

CIVIL CASE NO.:

'25CV3208 LL BJW

**Notice of motion and memorandum
of law in support of temporary
restraining order**

27 ¹ Federal Defenders of San Diego, Inc., is filing the instant motion and associated
28 petition with provisional appointment under Chief Judge Order No. 134.
Mr. Nikolayev's financial eligibility for representation is included in a sworn
statement attached to the petition.

1 **I. Introduction**

2 Petitioner David Nikolayev faces immediate irreparable harm:

3 (1) revocation of his release on immigration supervision, despite ICE's failure to
4 follow its own revocation procedures; (2) indefinite immigration detention with
5 no significantly likely prospect of removal in the reasonably foreseeable future;
6 and (3) potential removal to an unidentified, potentially dangerous third country
7 never considered by an immigration judge. This Court should grant temporary
8 relief of release on his pre-existing order of supervision to preserve the status quo.

9 Mr. Nikolayev has been ordered removed to Russia since 2017. Ever since
10 2017, the government has proved unable to remove him. Ever since 2017,
11 Mr. Nikolayev has complied with his conditions of immigration supervision. On
12 October 28, 2025, the government arrested Mr. Nikolayev at his scheduled ICE
13 check-in. ICE gave him no opportunity to contest his re-detention, and it did not
14 identify the reasons why it thought it could re-detain him. It did not identify why
15 it thought it could remove him to Russia now when it has been unable to do so for
16 individualized reasons specific to Mr. Nikolayev for the last eight years. But its
17 own policies allow ICE to remove him to a third country never before considered
18 with zero, six, or twenty-four hours' notice.

19 Mr. Nikolayev is therefore facing both unlawful detention and a threat of
20 removal to a dangerous third country without due process. The requested
21 temporary restraining order would preserve the status quo while he litigates these
22 claims by (1) reinstating Mr. Nikolayev's release on supervision, and
23 (2) prohibiting the government from removing him to a third country without an
24 opportunity to file a motion to reopen with an IJ.

25 In granting this motion, this Court would not break new ground. Courts in
26 this district and around the Ninth Circuit have granted TROs or preliminary
27 injunctions mandating release for post-final-removal-order immigrants like
28 Mr. Nikolayev. *See, e.g., Sun v. Noem*, 2025 WL 2800037, No. 25-cv-2433-CAB

(S.D. Cal. Sept. 30, 2025); *Van Tran v. Noem*, 2025 WL 2770623, No. 25-cv-2334-JES, *3 (S.D. Cal. Sept. 29, 2025); *Truong v. Noem*, No. 25-cv-02597-JES, ECF No. 10 (S.D. Cal. Oct. 10, 2025); *Khambounheuang v. Noem*, No. 25-cv-02575-JO-SBC, ECF No. 12 (S.D. Cal. Oct. 9, 2025); *see also, e.g., Phetsadakone v. Scott*, 2025 WL 2579569, at *6 (W.D. Wash. Sept. 5, 2025); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *7 (E.D. Cal. July 16, 2025); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *7 (E.D. Cal. July 16, 2025); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *29 (W.D. Wash. Aug. 21, 2025). These courts have determined that liberty is the status quo, and only a return to that status quo can avert irreparable harm.

Courts have likewise granted temporary restraining orders preventing third-country removals without due process. *See, e.g., Van Tran v. Noem*, 2025 WL 2770623 at *3; *Nguyen Tran v. Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18, 2025); *Louangmilith v. Noem*, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D. Cal. Oct. 9, 2025); *see also, e.g., J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025); *Vaskanyan v. Janecka*, 25-cv-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *7 (E.D. Cal. July 16, 2025); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *7 (E.D. Cal. July 16, 2025).

II. Mr. Nikolayev is detained indefinitely, his release was revoked contrary to ICE regulation, and ICE policy permits his removal to a third country without due process.

David Nikolayev was born in the U.S.S.R., in what is now Russia. Exhibit A to Habeas Petition, Declaration of David Nikolayev, ¶ 1. He came to the United States with his family in late 1991 or early 1992 when he was eight years old. *Id.* They all got green cards. *Id.*

1 On December 13, 2017, Mr. Nikolayev was ordered removed to Russia. *Id.*
2 ¶ 2; see EOIR Automated Case Information.² However, ICE was not able to
3 deport him to Russia. The Russian Consulate could not find records of Mr.
4 Nikolayev’s citizenship and ultimately did not issue travel documents for him.
5 Exhibit A to Habeas Petition ¶ 2. Mr. Nikolayev remained detained, and in late
6 June 2018, he filed a habeas petition requesting release under Zadvydas. Exhibit
7 B to Habeas Petition. ICE released Mr. Nikolayev on an order of supervision in
8 late August 2018 and then subsequently moved to dismiss the petition as moot. *Id.*

9 For the next seven years, Mr. Nikolayev checked in with ICE without
10 incident. See Exhibit A to Habeas Petition ¶ 3.

11 On September 15, 2025, Mr. Nikolayev went for his regularly scheduled
12 check-in and ICE put him on a GPS ankle monitor. *Id.* ¶ 4. He was told to return
13 on October 28, 2025. When he did, ICE arrested him. *Id.* He explains, “They gave
14 me a piece of paper saying I was deportable. I don’t remember any other pieces of
15 paper.” *Id.*

16 As of November 6, Mr. Nikolayev had not been given “notice of the
17 reasons why [he] was re-detained,” “a chance to fight his re-detention,” or an
18 explanation of “what changed to make it more likely that [he] can be deported to
19 Russia.” *Id.* ¶ 5. As of that date, he had not “been able to talk to an ICE officer
20 since [he] checked in and was told [he] was being detained.” *Id.*

21 Meanwhile, ICE has begun removing immigrants to third countries without
22 adequate notice or a hearing. Under prevailing ICE policy, an immigrant can be
23 removed to a third country with no notice, 6 hours’ notice, or 24 hours’ notice
24 depending on the circumstances. Exhibit C to Habeas Petition (Third Country
25 Removal Policy). Many of these countries are extremely dangerous and subject
26 immigrants to imprisonment without sentence or charge. *See generally* Edward
27

28 ² Available at <https://acis.eoir.justice.gov/en/caseInformation>.

1 Wong et al, *Inside the Global Deal-Making Behind Trump's Mass Deportations*,
 2 N.Y. Times, June 25, 2025.

3 **III. Argument: Mr. Nikolayev meets all *Winter* factors.**

4 To obtain a TRO, a petitioner “must establish that he is likely to succeed on
 5 the merits, that he is likely to suffer irreparable harm in the absence of preliminary
 6 relief, that the balance of equities tips in his favor, and that an injunction is in the
 7 public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008);
 8 *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 & n.7
 9 (9th Cir. 2001) (noting that a TRO and preliminary injunction involve
 10 “substantially identical” analysis). A “variant[] of the same standard” is the
 11 “sliding scale”: “if a plaintiff can only show that there are ‘serious questions
 12 going to the merits—a lesser showing than likelihood of success on the merits—
 13 then a preliminary injunction may still issue if the balance of hardships tips
 14 sharply in the plaintiff’s favor, and the other two *Winter* factors are satisfied.”
 15 *Immigrant Defenders Law Center v. Noem*, 145 F.4th 972, 986 (9th Cir. 2025)
 16 (internal quotation marks omitted). Under this approach, the four *Winter* elements
 17 are “balanced, so that a stronger showing of one element may offset a weaker
 18 showing of another.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131
 19 (9th Cir. 2011). A TRO may be granted where there are “‘serious questions going
 20 to the merits’ and a hardship balance. . . tips sharply toward the plaintiff,” and so
 21 long as the other *Winter* factors are met. *Id.* at 1132.

22 Here, this Court should issue a temporary restraining order because
 23 “immediate and irreparable injury . . . or damage” is occurring and will continue
 24 in the absence of an order. Fed. R. Civ. P. 65(b). Not only have Respondents re-
 25 tained Mr. Nikolayev and held him in violation of his due process, statutory,
 26 and regulatory rights. ICE policy also allows them to remove him to a third
 27 country in violation of his due process, statutory, and regulatory rights.

28

1 **A. Mr. Nikolayev is likely to succeed on the merits, or at a**
 2 **minimum, raises serious merits questions.**

3 As described in detail in Mr. Nikolayev’s habeas petition, he is likely to
 4 succeed on each of his three claims.

5 First, ICE failed to follow its own regulations before and during Mr.
 6 Nikolayev’s re-detention. This was a violation of both the regulations and due
 7 process and requires his release. *See, e.g., See Phan v. Noem*, 2025 WL 2898977,
 8 No. 25-CV-2422-RBM-MSB, *3–*5 (S.D. Cal. Oct. 10, 2025) (explaining this
 9 regulatory framework and granting a habeas petition for ICE’s failure to follow
 10 these regulations for a refugee of Vietnam who entered the United States before
 11 1995); *Rokhfirooz*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165 at *2 (same
 12 as to an Iranian national).

13 Second, *Zadvydas v. Davis* holds that immigration statutes do not authorize
 14 the government to detain immigrants like Mr. Nikolayev, for whom there is “no
 15 significant likelihood of removal in the reasonably foreseeable future.” 533 U.S.
 16 678, 701 (2001); *see, e.g., Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL
 17 2419288 *17 (W.D. Wash. Aug. 21, 2025) (granting habeas petition on *Zadvydas*
 18 grounds); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, *5,
 19 *7 (E.D. Cal. July 16, 2025) (granting preliminary injunction and temporary
 20 restraining order on these same grounds).

21 Third, Respondents cannot remove Mr. Nikolayev to a third country
 22 without first providing notice and a sufficient opportunity to be heard before an
 23 immigration judge. Their current policy allowing third-country removal in the
 24 absence of that notice “contravenes Ninth Circuit law.” *Nguyen v. Scott*, No. 25-
 25 CV-1398, 2025 WL 2419288, *19 (W.D. Wash. Aug. 21, 2025) (explaining how
 26 the July 9, 2025 ICE memo contravenes Ninth Circuit law on the process due to
 27 noncitizens in detail); *see also Delkash v. Noem*, No. 25-cv-1675-HDV-AGR,
 28 2025 WL 2683988, *1, *6 (C.D. Cal. Aug. 28, 2025); *Rebenok v. Noem*, No. 25-

1 cv-2171-TWR at ECF No. 13; *Van Tran v. Noem*, 2025 WL 2770623 at *3;
 2 *Nguyen Tran v. Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18,
 3 2025); *Louangmilith v. Noem*, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D.
 4 Cal. Oct. 9, 2025) (all either granting temporary restraining orders or habeas
 5 petitions ordering the government to not remove petitioners to third countries
 6 without notice and an opportunity to be heard).

7 **B. Mr. Nikolayev will suffer irreparable harm absent injunctive**
 8 **relief.**

9 Mr. Nikolayev also meets the second factor, irreparable harm. “It is well
 10 established that the deprivation of constitutional rights ‘unquestionably constitutes
 11 irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)
 12 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Ninth Circuit has
 13 specifically recognized the “irreparable harms imposed on anyone subject to
 14 immigration detention.” *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir.
 15 2017). Where the “alleged deprivation of a constitutional right is involved, most
 16 courts hold that no further showing of irreparable injury is necessary.” *Warsoldier*
 17 *v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quoting 11A Charles Alan
 18 Wright et al., *Federal Practice and Procedure*, § 2948.1 (2d ed. 2004)).

19 Further, “[i]t is beyond dispute that Petitioner would face irreparable harm
 20 from removal to a third country.” *Nguyen*, 2025 WL 2419288, at *26. Recent
 21 third-country deportees have been held, indefinitely and without charge, in
 22 hazardous foreign prisons. See Edward Wong et al, *Inside the Global Deal-*
 23 *Making Behind Trump’s Mass Deportations*, N.Y. Times, June 25, 2025. They
 24 have been subjected to solitary confinement. Gerald Imray, *3 Deported by US*
 25 *held in African Prison Despite Completing Sentences, Lawyers Say*, PBS (Sept. 2,
 26 2025). They have been removed to countries so unstable that the U.S. government
 27 recommends making a will and appointing a hostage negotiator before traveling
 28

1 to them. *See Wong, supra*. These and other threats to Mr. Nikolayev’s health and
 2 life independently constitute irreparable harm.

3 **IV. The balance of hardships and the public interest weigh heavily in**
 4 **Mr. Nikolayev’s favor.**

5 The final two factors for a TRO—the balance of hardships and public
 6 interest—“merge when the Government is the opposing party.” *Nken v. Holder*,
 7 556 U.S. 418, 435 (2009). That balance tips decidedly in Mr. Nikolayev’s favor.

8 On the one hand, the government “cannot reasonably assert that it is
 9 harmed in any legally cognizable sense” by being compelled to follow the law.
 10 *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Moreover, it is always in the
 11 public interest to prevent violations of the U.S. Constitution and ensure the rule of
 12 law. *See Nken*, 556 U.S. at 436 (describing public interest in preventing
 13 noncitizens “from being wrongfully removed, particularly to countries where they
 14 are likely to face substantial harm”); *Moreno Galvez v. Cuccinelli*, 387 F. Supp.
 15 3d 1208, 1218 (W.D. Wash. 2019) (when government’s treatment “is inconsistent
 16 with federal law, . . . the balance of hardships and public interest factors weigh in
 17 favor of a preliminary injunction.”).

18 On the other hand, Mr. Nikolayev faces weighty hardships: unlawful,
 19 indefinite detention, and possible removal to a third country where he is likely to
 20 suffer imprisonment or other serious harm. The balance of equities thus favors
 21 preventing the violation of “requirements of federal law,” *Arizona Dream Act*
 22 *Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014), by granting emergency
 23 relief to protect against unlawful detention and prevent unlawful third country
 24 removal.

25 **V. Counsel will give the government notice of this motion immediately,**
 26 **and the TRO should remain in place throughout litigation.**

27 When Federal Defenders first started filing TROs in immigration habeas
 28 cases, a Federal Defenders attorney called the U.S. Attorney’s Office and was put
 in touch with Janet Cabral. Ms. Cabral requested that Federal Defenders provide

1 notice of these motions via email after the motion has been filed with the court.
2 Federal Defenders will do so in this case.

3 Additionally, Mr. Nikolayev requests that this TRO remain in place until
4 the habeas petition is decided. Fed. R. Civ. Pro. 65(b)(2). Good cause exists,
5 because the same considerations will continue to warrant injunctive relief
6 throughout this litigation, and habeas petitions must be adjudicated promptly. *See*
7 *In re Habeas Corpus Cases*, 216 F.R.D. 52 (E.D.N.Y. 2003).

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Respectfully submitted,

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Dated: November 18, 2025

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s/ Jessie Agatstein

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Federal Defenders of San Diego, Inc.
Attorneys for Mr. Nikolayev
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PROOF OF SERVICE

I, the undersigned, caused to be served the within Notice of Motion and Memorandum of Law in Support of Temporary Restraining Order by email, at the request of Janet Cabral, Chief of the Civil Division, to:

U.S. Attorney's Office, Southern District of California
Civil Division
Janet.Cabral@usdoj.gov

Date: November 18, 2025

/s/ Jessie Agatstein
Jessie Agatstein