UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

E.R.D.

Petitioner,

v.

Kristi NOEM in her official capacity as Secretary of Homeland Security; LaDeon FRANCIS, in his official capacity as Acting Field Office Director of New York, Immigration and Customs Enforcement; Todd LYONS, in his official capacity as Acting Director U.S. Immigrations and Customs Enforcement; Pam BONDI, in her official capacity as Attorney General; and, Anthony J. LAROCCO, in his official capacity as Sheriff of Nassau County New York and warden of the Nassau County Jail,

Respondents.

Case No. 1:26-cv-85

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT

INTRODUCTION

1. Petitioner E.R.D.[1] is a 23-year-old transgender woman originally from El Salvador. **Exhibit A, Declaration of E.R.D.** ("E.R.D.'s Decl.") ¶ 1, 19. E.R.D. has been granted withholding of removal to El Salvador, due to the likelihood that she[2] would face torture based on her gender and sexuality, and as a deportee. *Id.* ¶ 3. This means that E.R.D. cannot be removed to El Salvador. E.R.D. also has Special Immigrant Juvenile Status ("SIJS"), a protection afforded to E.R.D. based on abuse, abandonment, and neglect she suffered as a juvenile. *Id.* ¶ 2. Once the SIJS priority date becomes current, E.R.D. could seek to adjust her status for lawful permanent residency.

[1] Petitioner filed a Motion for Leave to Proceed Under Pseudonym, which this Court granted on January 16, 2026. *See* Dkt. Order dated Jan. 16, 2026.

[2] Petitioner's preferred pronouns are she/her/hers.

2. Following her withholding grant, which is now administratively final, E.R.D. has been living peacefully in the community with her family and fully complying with an Order of Supervision ("OSUP") from Immigration and Customs Enforcement ("ICE"). *Id.* ¶¶ 3–9. Despite this, and despite no facts having changed that would warrant her re-detention, ICE suddenly took E.R.D. back into immigration custody on January 6, 2026. *Id.* ¶ 11. While detained, E.R.D. was physically assaulted by an officer who tried to force her to sign for deportation to El Salvador, the very country to which she cannot be deported based on her final withholding grant. *Id.* ¶¶ 3, 12.

3. On January 7, 2026, E.R.D. challenged her re-detention by bringing an Emergency Petition for Writ of Habeas Corpus and Complaint ("Original Petition"). ECF No. 1. Before this Court could adjudicate E.R.D.'s Original Petition, ICE released E.R.D. on January 8, 2026. E.R.D.'s Decl. ¶ 14. Although no changed circumstances gave rise to the need for additional restrictions to E.R.D.'s liberty, ICE threatened to place an ankle monitor on her. *Id.* ¶¶ 15–17. ICE also threatened to "pay [her] a visit" if E.R.D. did not attend the check-in to be fitted for an ankle monitor. *Id.* ¶ 17. E.R.D. understood this to mean that ICE would redetain her once more. *Id.* ICE ultimately did not place an ankle monitor and, in new OSUP documentation, kept the same conditions as E.R.D.'s original OSUP. *Id.* ¶ 18. However, despite extensive negotiations, ICE refused to provide assurances that it would not redetain E.R.D. without first providing notice and an opportunity to be heard before a neutral adjudicator. *Id.*

4. Absent intervention from this Court, E.R.D. faces imminent risk that Respondents will once more revoke her OSUP arbitrarily and without valid justification, in violation of the Due Process Clause of the Fifth Amendment, the Immigration and Nationality Act ("INA") and implementing regulations, the Administrative and Procedure Act ("APA"), and the *Accardi* doctrine, which obligates administrative agencies to follow their own rules, procedures, and

instructions. *See, e.g., Roman-Cruz v. Lyons*, No. 25-CV-10522 (RA), 2026 WL 114936, at *3 (S.D.N.Y. Jan. 15, 2026); *Funes Gamez v. Francis*, No. 25-cv-7429, 2025 WL 3263896, at *1 (S.D.N.Y. Nov. 24, 2025); *E.M.M. v. Almodovar*, No. 25-cv-8212, 2025 WL 3077995, at *6 (S.D.N.Y. Nov. 4, 2025); *Zhu v. Genalo*, No. 25-cv-6523, 2025 WL 2452352, at *9 (S.D.N.Y. Aug. 26, 2025); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 166 (W.D.N.Y. 2025).

5. Additionally, absent intervention from this Court, E.R.D. faces imminent risk that Respondents will re-detain and remove her to a third country, pursuant to the policies and practices of the current Administration, without affording her fundamental procedural protections in violation of the INA, the Foreign Affairs Reform and Restructuring Act (FARRA) of 1998, and the Due Process Clause of the Fifth Amendment.

6. E.R.D. thus brings this action requesting that this Court enjoin Respondents from re-detaining Petitioner without notice and an opportunity to be heard before a neutral arbiter and in which Respondents bear the burden to establish that Petitioner is not a danger or a flight risk that cannot be mitigated by bond and in which alternatives to detention and ability to pay are considered.

7. E.R.D. further requests that this Court enjoin Respondents from removing E.R.D. to a country not listed on her removal order. In the alternative, E.R.D. asks the Court to order fundamental procedural protections in the event that Respondents seek to remove her to a third country.

JURISDICTION

8. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 2241; 28 U.S.C. § 1331; Article I, § 9, cl. 2 of the United States Constitution; the All Writs Act, 28 U.S.C. § 1651; and the Administrative Procedure Act, 5 U.S.C § 701.

9. This Court has additional remedial authority under 28 U.S.C. §§ 2201-02 (the Declaratory Judgment Act), to grant injunctive and declaratory relief.

10. Although only the Court of Appeals has jurisdiction to review removal orders directly through a petition for review, see 8 U.S.C. § 1252(a)(1), (b), district courts have jurisdiction to hear habeas corpus claims by noncitizens challenging the lawfulness or constitutionality of their detention by ICE. *See Jennings v. Rodriguez*, 583 U.S. 281, 292-96 (2018); *Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. at 687.

11. Additionally, district courts have jurisdiction to hear habeas corpus claims by noncitizens seeking adequate process before third country removal. *See, e.g.*, *Arostegui-Maldonado v. Baltazar*, 794 F. Supp. 3d 926, 947 (D. Colo. 2025) (finding 8 U.S.C. § 1252(g) did not bar "an injunction requiring [the government] to adhere to their non-discretionary obligation to provide [the noncitizen] with notice and opportunity to seek withholding of removal before he is deported to any third country"); *Sagastizado v. Noem*, 802 F. Supp. 3d 992, 1005 (S.D. Tex. 2025) (asserting jurisdiction over noncitizen's "claim that he cannot be removed to a third country without sufficient notice and a meaningful opportunity to raise a claim, and that Respondents' failure to provide him with review of his negative [fear interview] determination deprives him of his rights under the Due Process Clause of the Fifth Amendment"); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1006 (W.D. Wash. 2019) (asserting jurisdiction over noncitizen's challenge to third country removal "without reopening his proceedings so that an IJ could make the designation in the first instance and/or determine whether petitioner's life or freedom would be threatened in that country" because the claims were "independent of [the noncitizen's] removal order" and the petitioner "could not have brought these claims during his immigration proceedings"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 367, 376 (D. Mass.), *opinion clarified*, No. CV 25-10676-

BEM, 2025 WL 1323697 (D. Mass. May 7, 2025), *and opinion clarified*, No. CV 25-10676-BEM, 2025 WL 1453640 (D. Mass. May 21, 2025), *reconsideration denied sub nom. D.V.D v. U.S. Dep't of Homeland Sec.*, 786 F. Supp. 3d 223 (D. Mass. 2025); *see also Torres-Jurado v. Biden*, No. 19 CIV. 3595 (AT), 2023 WL 7130898, at *2 (S.D.N.Y. Oct. 29, 2023) ("Courts can review 'how' Defendants exercise their discretion because such a claim does not ask 'why the Secretary chose to execute the removal order' but rather 'whether the way [Defendants] acted accords with the Constitution and the laws of this country.'").

12. Federal courts also have federal question jurisdiction, through the APA, to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). APA claims are cognizable in habeas. *See* 5 U.S.C. § 703 (providing that judicial review of agency action under the APA may proceed by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus"). The APA affords a right of review to a person who is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Respondents' continued detention of Petitioner has adversely and severely affected Petitioner's liberty and freedom.

13. Pursuant to 5 U.S.C. §§ 702, 706, Respondents have waived sovereign immunity and consented to suit.

14. Further, federal courts have broad power to fashion equitable remedies to address constitutional violations in prisons, *Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), including "the power to order bail in habeas proceedings," which is "a legal and logical concomitant of the court's habeas jurisdiction." *Leslie v. Holder*, 865 F. Supp. 2d 627, 634 (M.D. Pa. 2012).

VENUE

15. Pursuant to 28 U.S.C. §2241(d) which states, "Where an application for a writ of habeas corpus is made by the person in custody. . . the application [for writ of habeas corpus] may be filed in the district court for the district wherein such person is in custody." Further, pursuant to 28 U.S.C. § 1391, venue is also proper in the district where "a substantial part of events or omissions giving rise to the claim occurred." *See also Vega v. Schneiderman*, 861 F.3d 72, 74 (2d Cir. 2017) (citing *Jones v. Cunningham*, 371 U.S. 236, 239–40 (1963)) ("The custody requirement may be satisfied by restraints other than 'actual, physical custody' incarceration."); *Roba v. United States*, 604 F.2d 215, 219 (2d Cir. 1979) ("Petitioner need not wait until the marshals physically lay hands on him; he is entitled now to challenge the allegedly unlawful conditions of his imminent custody.").

16. Venue is proper in this Court because Petitioner was detained within the jurisdiction of this Court in the Nassau County Jail. Venue is proper in this Court because Petitioner is under the custody of and under imminent risk of re-detention and removal arbitrarily and without justification or procedural safeguards by the New York Field Office for ICE. The New York Field Office, which operates within the District, is solely responsible for decisions regarding Petitioner's custody, including any initial decision to take her into detention and any subsequent decision to continue detaining or removing her.

PARTIES

17. Petitioner E.R.D. is a native and citizen of El Salvador, residing in Westbury, New York. Petitioner was detained by ICE on January 6, 2026, and released before this Court could adjudicate the merits of her Original Petition challenging her unlawful detention. Petitioner is currently subject to an OSUP requiring that she attend in-person check ins with ICE and is at

imminent risk of being re-detained and removed to a third country arbitrarily and without justification or procedural safeguards.

18. Respondent Kristi Noem is named in her official capacity as the Secretary of Homeland Security in the United States Department of Homeland Security ("DHS"). In this capacity, she is responsible for ICE, including the administration of immigration laws and is a legal custodian of Petitioner. She routinely transacts business in the Eastern District of New York. Respondent Noem's address is U.S. Department of Homeland Security, 800 K Street N.W. #1000, Washington, District of Columbia 20528.

19. Respondent Ladeon Francis is named in his official capacity as the Acting Field Office Director of the New York Field Office for ICE within DHS. In this capacity, he is also responsible for the administration of immigration laws and the execution of detention and removal determinations and is a legal custodian of Petitioner. Respondent Francis's address is New York ICE Field Office Director, 26 Federal Plaza, 7th Floor, New York, New York 10278.

20. Respondent Todd Lyons is sued in his official capacity as Acting Director of ICE. As the Acting Director of ICE, Respondent Lyons is a legal custodian of Petitioner. Respondent Lyons's address is U.S. Immigration and Custom Enforcement, 500 12th Street SW, Washington, District of Columbia 20536.

21. Respondent Pam Bondi is sued in her official capacity as Attorney General of the United States. As head of the U.S. Department of Justice, the agency that oversees the Executive Office for Immigration Review ("EOIR"), Attorney General Bondi is responsible for administration of the immigration laws as exercised by EOIR. She is legally responsible for the pursuit of Petitioner's detention and removal. Respondent Bondi's office is located at the Robert F. Kennedy Building, 950 Pennsylvania Avenue, N.W., Washington, District of Columbia, 20530.

22. Respondent Anthony J. LaRocco is sued in his official capacity as Sheriff of Nassau County New York and warden of the Nassau County Jail. As the Warden of Nassau County Jail, he was a custodian of Petitioner. His office is located at 100 Carman Avenue, East Meadow, NY 11554.

LEGAL FRAMEWORK

A. Due Process Requirements for Immigration Detention

23. "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*, 533 U.S. at 693 (citation modified). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 690.

24. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty," like the decision to detain a noncitizen or revoke a noncitizen'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). The Second Circuit has applied the *Mathews* tripartite test when assessing due process challenges to civil immigration detention. *See, e.g.*, *Black v. Decker*, 103 F. 4th 133, 147 (2d Cir. 2024); *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020).

25. 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 690–92 (discussing constitutional limitations on civil detention).

26. Courts have found due process violations where noncitizens who were previously released from detention by DHS—such as release on orders of supervision, orders of release on recognizance, bond, or parole—are re-detained without notice and an opportunity to be heard and without following governing regulations. *Zhu*, 2025 WL 2452352, at *9 ("ICE's failure to follow its own regulations and provide Petitioner with notice or an interview violated Petitioner's procedural due process rights."); *Al-Thuraya v. Warden*, No. 25-cv-2582, 2025 WL 2858422, at *6 (S.D.N.Y. Oct. 6, 2025); *Rojas Acevedo v. Almodovar*, No. 25-cv-7189, 2025 WL 3034183, at *6 (S.D.N.Y. Oct. 30, 2025); *Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021, 1030 (N.D. Cal. 2025); *Pinchi v. Noem*, 792 F. Supp. 3d 1025, 1032-33 (N.D. Cal. 2025).

B. Regulations Regarding Revocation of an Order of Supervision

27. Consistent with the Due Process Clause's mandate, regulations require notice and an opportunity to be heard before a noncitizen's order of supervision can be revoked.

28. The Executive Associate Director of ICE has the authority to revoke release under an order of supervision.[3] 8 C.F.R. § 241.4(*l*)(2). The district director may revoke release if "in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner." *Id.* The district director includes the field office director. *Id.* § 1.2.

29. Release may be revoked if: (1) "the purposes of release have been served"; (2) the noncitizen "violates any condition of release"; (3) revocation "is appropriate to enforce a removal

[3] The regulation's reference to the Executive Associate Commissioner of the Immigration and Naturalization Services now means the Executive Associate Commissioner of ICE. *See* 8 C.F.R. § 1.2.

order or to commence removal proceedings against" a noncitizen; or (4) "[t]he conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." *Id.* § 241.4(*l*)(2)(i)-(iv).

30. ICE is required to follow certain procedures when revoking orders of supervision. Upon revocation, the noncitizen must "be notified of the reasons for revocation of his or her release or parole" and "afforded an initial informal interview promptly after his or her return to Service custody to afford the [noncitizen] an opportunity to respond to the reasons for revocation stated in the notification." *Id.* § 241.4(*l*)(1). The notification must be in writing. *See Funes Gamez*, 2025 WL 3263896, at *14.

C. The APA Sets Minimum Standards for Final Agency Action

31. The Administrative Procedure Act authorizes judicial review of final agency action. 5 U.S.C. § 704.

32. Final agency actions are those (1) that "mark the consummation of the agency's decision-making 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).

33. ICE's revocation of an order of supervision is a final agency action subject to this Court's review.

34. Any revocation of Petitioner's current OSUP would mark the consummation of ICE's decision-making process regarding her custody.

35. The revocation would also be an action by which rights or obligations have been determined or from which legal consequences flowed because it led ICE to detain Petitioner in violation of his rights under the Constitution, statute, and regulations.

D. The *Accardi* Doctrine Requires Agencies to Follow Internal Rules

36. Under the *Accardi* doctrine, a foundational principle of administrative law, agencies must follow their own procedures, rules, and instructions. See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (setting aside an order of deportation where the Board of Immigration Appeals failed to follow procedures governing deportation proceedings); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

37. *Accardi* is not "limited to rules attaining the status of formal regulations." *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991). Courts must also reverse agency action for violation of unpublished rules and instructions to agency officials. *See Morton v. Ruiz*, 415 U.S. 235 (affirming reversal of agency denial of public assistance made in violation of internal agency manual); *U.S. v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) (under *Accardi*, reversing decision to admit evidence obtained by IRS agents for violating instructions on investigating tax fraud).

38. Where a release notification issued alongside an order of supervision instructs that a non-citizen with a final order of removal will be given an opportunity to prepare for an "orderly departure," ICE's failure to follow that instruction is an *Accardi* violation. *See Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 169; *Ragbir v. Sessions*, 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018), *vacated and remanded on other grounds sub nom. Ragbir v. Barr*, 2019 WL 6826008 (2d Cir. July 30, 2019); *Rombot v. Souza*, 296 F. Supp. 3d 383 (D. Mass. 2017) (ordering release of petitioners to give an opportunity to prepare for orderly departure).

E. Withholding of Removal

39. Noncitizens in removal proceedings can seek three main forms of relief based on their fear of returning to their home country: asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). Noncitizens may be ineligible for asylum for several reasons, such as applying for asylum more than one year after arrival in the United States. *See* 8 U.S.C. § 1158(a)(2). There are fewer restrictions on eligibility for withholding of removal, *id.* § 1231(b)(3)(B)(iii), and no restrictions on eligibility for CAT deferral of removal. 8 C.F.R. § 1208.16. Furthermore, withholding of removal and CAT are mandatory forms of relief without a discretionary component.

40. Withholding of removal embodies the binding principle of *non-refoulement* in international humanitarian law. This principle states that a state must not return a refugee to a state where the refugee will face persecution or torture. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) ("Article 33.1 of the [1951 United Nations Convention Relating to the Status of Refugees] . . . imposed a mandatory duty on contracting States not to return [a non-citizen] to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons.").

41. When an immigration judge grants withholding of removal, the immigration judge issues a removal order and simultaneously "withholds" that order with respect to the country or countries for which the non-citizen demonstrated a sufficient risk of persecution. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 524 (2021). Once withholding is granted, both parties have the right to appeal the decision to the Board of Immigration Appeals (BIA) within 30 days. *See* 8 C.F.R. § 1003.38(b). If both parties waive appeal or neither party appeals within the 30-day period, the withholding grant and the accompanying removal order become administratively final.

See id. § 1241.1. At that point, removal to the designated country can only be effectuated if "the order of withholding is terminated." *Johnson v. Guzman Chavez*, 594 U.S. 523, 524; *see also* 8 CFR § 208.24(f) (Procedure for termination of an immigration judge's grant of withholding of removal requires DHS to reopen immigration proceedings and demonstrate by a preponderance of evidence that the recipient no longer qualifies).

42. When a noncitizen has a final withholding grant, she cannot be removed to the country or countries for which she demonstrated a sufficient likelihood of persecution. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(b)(2). In addition to this statutory protection, the United States' obligations under the CAT, codified by FARRA of 1988, prohibit the government from removing a noncitizen to any country where the noncitizen would be more likely than not to be tortured. Pub. L. No. 105-277, div. G, Title XXII, §2242, 112 Stat. 2681–822 (1998) (codified as Note to 8 U.S.C. § 1231).

43. Noncitizens granted withholding or deferral of removal are authorized to work in the United States. 8 C.F.R. § 742a.12(a)(10).

44. Individuals who have been granted withholding of removal also cannot be removed to an alternative or "third" country if it is likely they will suffer persecution or torture there as well. *See D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv10676, 2025 WL 1142968, at *3 (D. Mass. Apr. 18, 2025) ("[T]hird-country removals are subject to the same mandatory protections that exist in removal or withholding-only proceedings.").

45. Both due process and the United States' international obligations require that noncitizens have an opportunity to assert fear of persecution or torture in the third country. *See,* e.g., *Noem v. Abrego Garcia*, 604 U.S. ----, 145 S. Ct. 1017, 1018 (U.S. Apr. 10, 2025) (Sotomayor, J., concurring) (explaining that the Government has an "obligation to provide [the plaintiff who

was subject to an order of removal and granted withholding of removal] with 'due process of law,' including notice and an opportunity to be heard" and ensure compliance with its "obligations under [CAT]" prior to removal); *see also Andriasian v. I.N.S.*, 180 F.3d 1033, 1041 (9th Cir. 1999) (finding that "last minute designation" of removal country during formal proceedings "violated a basic tenet of constitutional due process: that individuals whose rights are being determined are entitled to notice of the issues to be adjudicated, so that they will have the opportunity to prepare and present relevant arguments and evidence").

46. If ICE intends to deport an individual with a grant of withholding of removal to a third country, and that individual asserts a fear of removal to a third country, she thus must be provided with an opportunity to seek withholding of removal or protection under the Convention Against Torture from the third country. For example, for individuals who have removal orders that are reinstated, if they assert a fear of removal they are provided a "reasonable fear" interview, *see* 8 C.F.R. § 241.8(e), which is a screening interview at which the examiner determines if there is a "reasonable possibility" of persecution or torture, which has been found to mean a ten-percent chance. If found to have a reasonable fear of persecution, the individual then has the right to see an immigration judge to seek withholding of removal or deferral of removal, at which they will ultimately bear the burden of demonstrating they merit withholding or deferral of removal due to persecution nor torture being "more likely than not." *See* 8 C.F.R. § 208.31(e). If found by the agency to not have a reasonable fear of persecution, the individual has the right to seek review of that finding before an immigration judge. *See* 8 C.F.R. § 208.31(f). Ultimately, the individual may also petition a federal circuit court for review of the agency's decision. 8 U.S.C. § 1252(a)(1).

F. Noncitizens Granted Withholding of Removal May Only Be Detained for the Purpose of Effectuating Their Removal

47. 8 U.S.C. § 1231 governs the detention of noncitizens "during" and "beyond" a 90-day "removal period." 8 U.S.C. § 1231(a)(2)-(6).

48. The "removal period" begins once a noncitizen's removal order "becomes administratively final." 8 U.S.C. § 1231(a)(1)(B).[4] It lasts for 90 days, during which ICE "shall remove the [noncitizen] from the United States" and "shall detain the [noncitizen]" as it carries out the removal. 8 U.S.C. § 1231(a)(1)-(2). If ICE does not remove the noncitizen within the 90-day removal period, under the Immigration and Nationality Act (INA) the noncitizen "may be detained beyond the removal period" if they meet certain criteria. These criteria are being inadmissible under 8 U.S.C § 1182, or deportable under specified statutory categories relating to specific criminal convictions, violation of nonimmigrant status, and security related grounds that relate to espionage, criminal activity which endangers, "national security," or activities that opposed or attempts to overthrow the United States Government by "force, violence, or other unlawful means." 8 U.S.C. §§ 1231(a)(6), 1227(a)(2), 1227(a)(1)(c), (a)(4).

49. DHS regulations provide that, at or before the end of the 90-day removal period that begins when a noncitizen's removal order becomes final, the local ICE field office with jurisdiction over the noncitizen's detention must conduct a custody review to determine whether the noncitizen should remain detained or can be released on an Order of Supervision. *See* 8 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). In making a custody determination, ICE considers several factors, including whether the non-citizen is not likely to pose a danger to the community, violate the condition of release, or flee. § 241.4(e).

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[4] Two other events may trigger the start of the removal period, which are not applicable here. *See* 8 U.S.C. § 1231(a)(1)(B).

50. In its landmark decision *Zadvydas v. Davis*, the Supreme Court addressed the "serious constitutional concerns" that 8 U.S.C. § 1231(a)(6) raises by permitting potentially indefinite detention. 533 U.S. at 682. The *Zadvydas* Court thus construed §1231(a)(6) to contain an implicit time limit on post-order detention, finding that § 1231(a)(6) authorizes detention only for "a period reasonably necessary to bring about the [non-citizen]'s removal from the United States." *Id.* at 689.

G. ICE Has a Longstanding Policy in Favor of Releasing People Granted Withholding of Removal

51. Recognizing that a grant of withholding of removal drastically reduces the likelihood of executing a removal order, the government has a binding policy (the "Release Policy") favoring release of noncitizens granted withholding or deferral of removal. *See* **Exhibit B, Release Policy**.

52. The Release Policy goes back 25 years. Longstanding agency guidance states that, "[i]n general, it is ICE policy to favor release of [non-citizens] who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain." Release Policy at 2. It goes on to state that "In all cases, the Field Office Director must approve a decision to keep [a non-citizen] granted protection relief in custody pending appeal, in consultation with the Chief Counsel." *Id.*

53. In 2012, a follow-up message was sent on behalf of Gary Mean, then Executive Associate Director of Enforcement and Removal Operations, clarifying that this policy "applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period." *Id.* at 3.

54. In 2021, then-Acting ICE Director Tae Johnson clarified that ICE personnel must "continue to follow this Directive," emphasizing that release should occur even if the government was appealing a grant of fear-based relief. *Id.* at 4. Acting Director Johnson further stated that "prior convictions alone do not necessarily indicate a public safety threat or danger to the community" and "the individual facts and circumstances of the case, including extensiveness, seriousness, and recency of the criminal activity, along with any evidence of rehabilitation, should be considered in making such determination [to release a noncitizen granted withholding of removal]." *Id.*

H. Removals to a Third Country Are Historically Rare and Subject to Constraints

55. Whereas historically third-country removals were exceptionally rare, the Government began intensifying its efforts to remove noncitizens to third countries in early 2025. *See D.V.D.*, 2025 WL 1142968, at *3 (describing Executive Order 14165, entitled "Securing our Borders." 90 Fed. Reg. 8467 and the February 18, 2025, DHS directive to the Enforcement and Removal Operations ("ERO") division of ICE).[5] Particularly notable have been third-country removals to El Salvador—where people are indefinitely detained incommunicado and without process at the Terrorism Confinement Center ("CECOT"), a mega-prison notorious for inhumane treatment and torture,[6] and other foreign prisons—where both the U.N. and the U.S. State

[5] See also Whistleblower complaint filed on June 24, 2025, by Mr. Erez Reuveni, formerly the Acting Deputy Director for the Office of Immigration Litigation of the Department of Justice, https://www.judiciary.senate.gov/imo/media/doc/06-24-2025_-_Protected_Whistleblower_Disclosure_of_Erez_Reuveni_Redacted.pdf.

[6] *See, e.g.*, Laura Romero, *Venezuelan migrants deported to El Salvador despite order barring removal to third countries*, ABC NEWS (Apr. 1, 2025), https://abcnews.go.com/Politics/venezuelan-migrant-recently-deported-el-salvador-final-order/story?id=120353709; Rebecca Ingber and Scott Roehm, The Trump Administration's Recent Removals to El Salvador Violate the Prohibition on Transfer to Torture, JUST SECURITY (March 20, 2025),

Department have issued warnings for armed conflict, human rights abuses, and violence.[7] Other countries that have recently agreed to accept third country removals from the United States, have stated they will repatriate such people despite having withholding of removal or CAT protection due to the risk of persecution or torture if repatriated.[8] *See Y.T.D. v. Andrews*, No. 1:25-cv-01100, 2025 WL 2675760, at *2 (E.D. Cal. Sept. 18, 202) (finding sufficiently imminent risk that petitioner will be subjected to improper process in relation to any third country removal to warrant imposition of an injunction requiring additional process).

56. On March 30, 2025, the Department of Homeland Security issued a memorandum titled Guidance Regarding Third Country Removals ("March 30 Guidance").[9] Under the protocol described in this memorandum, DHS first determines if a third country "has provided diplomatic

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https://www.justsecurity.org/109284/non-refoulement-alien-enemies-act/; Bryan Avelar, *Inmates in El Salvador tortured and strangled: A report denounces hellish conditions in Bukele's prisons*, EL PAÍS (May 29, 2023), https://english.elpais.com/international/2023-05-29/inmates-in-el-salvador-tortured-and-strangled-a-report-denounces-hellish-conditions-in-bukeles-prisons.html.

[7] See, e.g., Beatrice Peterson et. al., *Judge rules DHS violated court order in deporting 8 migrants to South Sudan*, ABC NEWS (May 21, 2025), https://abcnews.go.com/Politics/8-migrants-south-sudan-deportation-flight-officials-confirm/story?id=122033692; Maya Yang and Maanvi Singh, *Judge rules White House violated order by deporting migrants to South Sudan*, THE GUARDIAN (May 21, 2025), https://www.theguardian.com/us-news/2025/may/21/trump-deportations-south-sudan.

[8] *See, e.g.*, *Why African Countries Keep Making Deals to Accept U.S. Deportees*, NY Times (Sept. 23, 2025), https://www.nytimes.com/2025/09/23/world/africa/african-countries-us-deportees.html (Eswatini took in five migrants from third countries in July but has said they will be sent home. The migrants are being held in prison.); West Africans Deported by the U.S. Sue Ghana for Rights Violations, NY Times (" Justice Department lawyers did not dispute that Ghana sending the migrants to their home countries would violate their court-ordered protections. The lawyers instead argued that once a migrant had been removed from the United States and was in foreign custody, the issue was out of their hands."); *African Nation Says It Will Repatriate Migrants Deported by U.S.*, NY Times (July 17, 2025), https://www.nytimes.com/2025/07/16/world/africa/eswatini-trump-migrants-deportation.html.

[9] Available at https://immigrationlitigation.org/wp-content/uploads/2025/04/43-1-Exh-A-Guidance.pdf [https://perma.cc/6HER-YUCV].

assurances that [noncitizens] removed from the United States will not be persecuted or tortured." March 30 Guidance at 1. If the Department of State is satisfied that the assurances are credible, DHS may deport the noncitizen to that country without any further procedure. However, if the Department of State does not believe the assurances are credible, DHS follows an alternate pathway. First, DHS notifies the noncitizen of its intent of deportation to the third country. "Immigration officers will not affirmatively ask whether the [noncitizen] is afraid of being removed to that country[,]" as DHS believes that affirmative questioning will provoke false claims of fear, which would create inefficiency, and will elicit accusations of torture against Government with which the United States has "diplomatic relationships." *Id.* at 2. However, if the noncitizen affirmatively states that they have a fear, DHS will then refer them to a screening for withholding of removal and CAT protection before United States Citizenship and Immigration Services. USCIS then conducts a remote screening, at which the noncitizen has the burden to establish they will more likely than not be persecuted under a protected ground or subject to torture. If USCIS makes a negative finding, DHS then deports the person to the designated third country without any further process, including no review by a neutral adjudicator, no amendment of the order of removal to designate the alternate country, and no process for appeal.

57. On June 23, 2025, the U.S. Supreme Court granted the Government's application to stay the district court's nationwide preliminary injunction in *D.V.D. v. Department of Homeland Security*, No. 25-10676, 2025 WL 1142968 (D. Mass. Apr. 18, 2025). In response, ICE issued a July 9, 2025 memo, titled "Third Country Removals Following the Supreme Court's Order in Department of Homeland Security v. D.V.D., No. 24A1153 (U.S. 23, 2025) ("July 9 Guidance").[10]

[10] Available at https://immigrationlitigation.org/wp-content/uploads/2025/07/190-1-July-9-Guidance.pdf [https://perma.cc/KBE2-QGY9].

In this memo, ICE directed adherence to the March 30, 2025 Guidance while expanding upon details of the procedure. For non-citizens to whom ICE provides a written Notice of Removal to a third country, the July 9 Guidance directs ICE Enforcement and Removal Operations ("ERO") to wait 24 hours before carrying out the deportation unless the noncitizen affirmatively states a fear or persecution or torture. However, the memo authorizes ICE to deport a person after six hours of service of the Notice of Removal in "exigent" circumstances with the approval of DHS General Counsel or the Principal Legal Advisor where the DHS General Counsel is not available. The USCIS screening of an individual's fear—which is the only process by which the merits of the individual's claim for withholding of removal or protection under CAT are to be heard under Respondents' policies, and at which the non-citizen bears the burden of proof—are also directed to happen "within 24 hours."

58. The March 30 and July 9 Guidance is inconsistent with due process and the United States's non-refoulement obligations. *Compare, e.g., Y.T.D.*, 2025 WL 2675760, at *10; *see also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (holding that "[t]he fundamental requisite of due process of law is the opportunity to be heard," which includes "timely and adequate notice") (citation omitted); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (holding that due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); *Oakes v. United States*, 400 F.3d 92, 98 (1st Cir. 2005) ("The ubiquity of the 'notice and opportunity to be heard' principle as a matter of fundamental fairness is deeply engrained in our jurisprudence.").

59. CAT regulations implementing FARRA make clear that *individualized* CAT protections are mandatory. *See, e.g.*, 8 C.F.R. § 1208.16(c) (discussing IJs' individualized

assessment of applicants' CAT claims); 8 C.F.R. § 1208.17 (same, as well as individualized notice to individuals with CAT protection).

60. Any blanket diplomatic assurances do not protect noncitizens against either chain *refoulment*, whereby the third country proceeds to return an individual to their country of origin, or torture by state or non-state actors. *See* 8 C.F.R. § 1208.18(a)(1); *see also Murillo Morocho v. Garland*, 80 F.4th 61, 71 (1st Cir. 2023) (vacating decision denying CAT protection where the BIA failed to properly consider risk of torture by non-state actors); *cf.* United Nations High Commissioner for Refugees, Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum Seekers ¶ 3(vi) (May 2013)[11] (requiring protection against refoulement in transfer agreements governing asylum seekers); *accord* United Nations Human Rights Committee, General Comment No. 31 ¶ 12, 2004, The Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights ("ICCPR"), CCPR/C/21/Rev.1/Add. 13 (May 26, 2004)[12] (explaining obligation against chain refoulement in ICCPR).

61. The regulation implementing the CAT states that "[t]he Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that *an* alien would not be tortured there if *the* alien were removed to that country." 8 C.F.R. § 1208.18(c)(1) (emphasis added); *see also id.* § 1208.18(c)(2), (c)(3) (referencing "the alien"); *Niz-Chavez v. Garland*, 593 U.S. 155, 161 (2021) (examining the "ordinary meaning" of statutory text and finding that "[t]o an ordinary reader—both in 1996 and today—'a' notice would seem to suggest just that: 'a' single document").

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[11] Available at https://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943.

[12] Available at https://digitallibrary.un.org/record/533996?ln=en&v=pdf.

62. Even if an individualized assurance is provided to a single individual in accordance with § 1208.18(c)(1), the regulation further instructs that one of only three officials, the Attorney General, Deputy Attorney General, or Commissioner of the Immigration and Naturalization Service (a position that no longer exists), must independently "determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable" to allow deportation consistent with CAT. 8 C.F.R. § 1208.18(c)(2).

63. Although the regulation indicates that compliance with subsections (c)(1) and (c)(2) precludes further consideration of a CAT claim by an IJ, the BIA, or an asylum officer, *see* 8 C.F.R. § 1208.18(c)(3), it does not limit or eliminate judicial review regarding any such CAT claim. Indeed, a path to judicial review must be provided. *See* 8 U.S.C. § 1252(a)(4); *see also Nasrallah v. Barr*, 590 U.S. 573, 585 (2020) ("[Section] 1252(a)(4) now provides for direct review of CAT orders in the courts of appeals.").

STATEMENT OF FACTS

64. E.R.D. is a 23-year-old transgender woman from El Salvador. E.R.D. Decl. ¶¶ 1, 19. E.R.D. was granted withholding of removal under the CAT in 2024, due to the likelihood E.R.D. would be tortured or killed if deported to El Salvador. *Id.* ¶ 3.

65. E.R.D. was born in 2002 in the municipality of San Ignacio, Chalatenango, El Salvador. *Id.* ¶ 1. When very young, E.R.D.'s mother left E.R.D. and a sibling in the care of step-grandparents when she moved to the United States. E.R.D's step-grandparents provided a safe and happy home for the siblings until they were both murdered by gang members when E.R.D. was only eight years old and forced to move into the abusive home of another relative. Gang members continued targeting the family and the siblings had to move from one abusive home to another with maternal grandparents.

66. Despite E.R.D's very young age at the time, E.R.D.'s maternal grandparents forced E.R.D. to work on their farm and prohibited attendance at school. They were also physically abusive, beating E.R.D. with phone chargers or a belt.

67. At the age of fourteen, E.R.D. could no longer endure the abuse and ran away. A neighbor permitted E.R.D. to live in his barn in exchange for work. E.R.D. lived in the barn until the neighbor became sick with cancer and had to sell off his farm. E.R.D. became homeless and was forced to sleep in the streets or parks.

68. E.R.D. entered the United States at sixteen years old. E.R.D. entered the United States as an unaccompanied child and finally reunited with her mother in Westbury, New York after over a decade of separation.

69. E.R.D. was placed into non-detained removal proceedings as an unaccompanied child. Within a year of arriving in the United States, E.R.D. timely filed an I-589 application for asylum, withholding of removal, and protection under the CAT with U.S. Citizenship and Immigration Services ("USCIS").

70. In addition to reuniting with her mother, E.R.D. was able to meet two half-siblings born in the United States, and E.R.D.'s mother's partner. E.R.D.'s sibling from El Salvador joined soon after, and they lived happily together in Westbury, New York, for the next two years.

71. E.R.D. attended Westbury High School in addition to caring for younger siblings before and after school and working late evening shifts to help support the family. Despite this grueling schedule and the challenges of adjusting to a new country and learning a new language, E.R.D. describes this period of life as happy and beautiful, reunited with family.

72. During E.R.D.'s teenage years, E.R.D. began to notice that they felt different from other boys. While E.R.D. dated a few girls as a teenager, E.R.D. realized they were not attracted

to them sexually. E.R.D. realized they were attracted to boys in class instead. Still, because of the strong cultural taboo against queerness in Salvadoran society, E.R.D. suppressed those feelings and did not want to believe that they could be gay.

73. During her time in American high school, E.R.D. began to admire the way that women dressed and presented themselves in the United States. E.R.D. yearned to be able to dress like them. They also learned more about gender identity through a friendship with a classmate who identified as a transgender woman. As time went on, E.R.D. came to consider herself to be a woman, too.

74. Still, E.R.D. was afraid that sharing thoughts about gender with family and friends would lead to rejection. E.R.D. began to present more femininely, growing hair long, dyeing it blonde, and wearing tighter clothing. This all made E.R.D. feel more like a woman, even if E.R.D. did not feel ready to come out as a transgender woman.

75. In January 2021, E.R.D.'s former stepfather accused E.R.D. of abusing a half-sibling. Child Protective Services (CPS) investigated the allegation and determined it unfounded, *i.e.,* the allegations were not supported by a fair preponderance of the evidence. *See* NY Soc. Serv. L. § 422(5). In spite of this determination, criminal charges were brought against E.R.D., who was arrested.

76. E.R.D. vehemently denied the charges. E.R.D. was released on bail and planned to fight the charges until trial if necessary.

77. In July 2021, while the criminal case was pending and E.R.D. was out on bail, ICE arrested E.R.D. and placed E.R.D. in immigration detention. ICE then transferred E.R.D. back to criminal custody at Nassau County Jail in pretrial detention. Because ICE retained legal custody over E.R.D., E.R.D. was technically only a "borrowed prisoner" while held at Nassau County Jail,

meaning E.R.D. was ineligible for criminal bail. E.R.D.'s removal proceedings were administratively closed.

78. E.R.D. faced horrific conditions while detained at Nassau County Jail. E.R.D. was targeted at different times by [redacted] Ultimately, E.R.D. was placed in protective custody for her safety.

79. During E.R.D.'s detention, in September 2023, USCIS granted E.R.D. Special Immigrant Juvenile Status ("SIJS"). *See* **Exhibit C, SIJ I-360 Approval**; *see also* E.R.D. Decl. ¶ 2. Special Immigrant Juvenile Status provides a pathway for children who have experienced parental abuse, neglect or abandonment to adjust status and seek lawful permanent residency in the United States.

80. E.R.D. ultimately spent over three years in pretrial custody fighting the charges. Eventually, however, despite knowing they were innocent, E.R.D. accepted a plea offer in order to avoid further incarceration and threats to her life. E.R.D. pleaded guilty to a misdemeanor, Endangering the Welfare of a Child, with a sentence of time served and three years of probation.

81. Upon the completion of the criminal case in July 2024, ICE re-detained E.R.D. and placed E.R.D. in immigration custody at the Orange County Jail in Goshen, New York. ICE moved to restart E.R.D.'s removal proceedings.

82. On November 26, 2024, the Varick Street Immigration Court held E.R.D.'s individual merits hearing. E.R.D. sought asylum, withholding of removal, and protection under the CAT based on the likelihood they would be persecuted and tortured upon return to El Salvador based on her gender and sexuality, and also due to the horrific treatment of deportees to El Salvador under the State of Exception. E.R.D. Decl. ¶ 3. E.R.D. could not yet seek adjustment of status based on her SIJS status because the USCIS priority date was not current. *See id.*

83. At the merits hearing, ICE counsel stipulated that E.R.D. would be tortured upon return to El Salvador and agreed that E.R.D. should be granted withholding of removal under CAT. The Immigration Judge then granted withholding of removal and both parties waived appeal, making the decision administratively final. *See* **Exhibit D, Order Granting Withholding**.

84. On November 29, 2024, ICE released E.R.D. from Orange County Jail under an Order of Supervision ("OSUP"). *See* **Exhibit E, 2024 OSUP**; *see also* E.R.D. Decl. ¶ 4. Since that date, E.R.D. has been under ICE supervision. E.R.D. has complied with ICE check-ins, reporting to ICE at 26 Federal Place in Manhattan on multiple dates. E.R.D. Decl. ¶¶ 5–8.

85. While released, E.R.D. has maintained consistent employment, doing demolition jobs full-time at a construction company, and complied with probation appointments. *Id.* ¶ 9. With her earnings, E.R.D. was able to support herself and her mother, contributing to their rent, food, and bills. *Id.* E.R.D. applied for and was granted employment authorization as an individual who has a grant of withholding of removal. *See* **Exhibit F, Employment Authorization Document** (valid through March 2030).

86. On April 17, 2025, E.R.D.'s criminal conviction was vacated. Because of E.R.D.'s age at the time of arrest, the court improperly failed to designate E.R.D. as having Youthful Offender status. *Id.* ¶ 10. Thus, following the vacatur, E.R.D. no longer has a criminal conviction, only a Youth Offender adjudication, which is not considered a criminal offense. *Id.*

87. Recently, E.R.D. made the courageous decision to come out to her family as transgender. Sadly, E.R.D.'s family did not initially react well to the news.

88. On January 6, 2026, E.R.D. reported to the Nassau County Probation Office for a probation appointment. E.R.D. Decl. ¶ 11. E.R.D. did not leave the appointment as expected, however. *Id.* E.R.D.'s mother received a call from E.R.D. in the early evening in which E.R.D.

reported that they were being detained by ICE. *Id.* E.R.D. was able to inform family members that they were being detained at the Nassau County Jail. *Id.*

89. While detained at Nassau County Jail, an officer, who E.R.D. believed to be Deportation Officer E. Walz, pressured E.R.D. to sign for deportation to El Salvador, the country to which she has a final withholding grant. *Id.* ¶ 12; *see also* **Exhibit G, Notice of Revocation of Release** at 3 (signed by Deportation Officer E. Walz #1198). The officer explained to E.R.D. that ICE had revoked her case and had an order of deportation for her. E.R.D. Decl. ¶ 12. The whole time, the officer spoke to E.R.D. in English, never in Spanish. *Id.* E.R.D. understood most of what the officers were trying to explain to her but refused to answer. *Id.* At one point, the officer physically assaulted E.R.D., slapping her in the face. *Id.* The officer told E.R.D. that it would be better for her to cooperate and call her family to help with her deportation. *Id.* The officer further told E.R.D. that, even if she refused to answer, she would still get deported. *Id.*

90. On January 7, 2026, E.R.D. challenged her re-detention by bringing the Original Petition. ECF No. 1.

91. Before this Court could adjudicate E.R.D.'s Original Petition, ICE released E.R.D. at around midnight on January 8, 2026. *Id.* ¶ 14; *see also* ECF No. 4 (letter from Respondents' counsel confirming E.R.D.'s release). Upon release, ICE did not give E.R.D. her property back, which included her cellphone, and simply told E.R.D. to report to criminal probation the next morning. E.R.D. Decl. ¶¶ 14–15.

92. On January 9, 2026, E.R.D. had to miss work to report to probation. *Id.* ¶ 16. E.R.D. arrived at the probation office, but the probation officer was not there. *Id.* After that, E.R.D. went home and, without her cellphone, was unable to communicate with her boss. *Id.* When E.R.D. was later finally able to reach her boss, she learned that she had lost her job due to her ICE detention—

her boss hired a replacement thinking that E.R.D. would be detained for a long time and no longer had a position available for her. *Id.* ¶ 21. E.R.D. has continued to look for employment but remains unemployed to this date. *Id.*

93. Although no changed circumstances gave rise to the need for additional restrictions to E.R.D.'s liberty, ICE threatened to place an ankle monitor on her. *Id.* ¶¶ 15–17 . ICE also threatened to "pay [her] a visit" if E.R.D. did not attend the check-in to be fitted for an ankle monitor. *Id.* ¶ 17. E.R.D. understood this to mean that ICE would redetain her. *Id.* ICE ultimately did not place an ankle monitor and, in new OSUP documentation, kept the same conditions of E.R.D.'s original OSUP. *Id.* ¶ 18; *see* **Exhibit H, 2026 OSUP**. However, despite extensive negotiations, ICE refused to provide assurances that it would not re-detain E.R.D. without first providing notice and an opportunity to be heard before a neutral adjudicator.

94. At some point during her detention, E.R.D. also received a Notice of Revocation of Release. *See* **Exhibit G, Notice of Revocation of Release.** In this document, ICE purported that E.R.D. could "be removed from the United States pursuant to an outstanding order of removal against [E.R.D.]." *Id.* at 1. ICE further asserted: "ICE has determined there is significant likelihood of removal in the reasonably foreseeable future based on the likely issuance of a travel document and or retrieval of your passport, or to an alternative country…." *Id.* at 1 (citing ICE's determination pursuant to the March 30, 2025 Guidance Regarding Third Country Removals). To date, ICE has offered no support for its determination that there is a significant likelihood of removal, let alone any evidence of travel documents.

95. Despite her release, E.R.D. is at imminent risk of re-detention and removal absent intervention by this Court. This is evidenced by ICE's conduct, including the recent re-detention of E.R.D. without changed circumstances or procedural safeguards—both as to her danger and

flight risk, as well as ICE's ability to remove her to a third country. Moreover, this is evidenced by ICE's tactics of threats and violence against E.R.D., including the physical assault by a deportation officer while in detention, the threat to increase her conditions of release, the threat to "pay [her] a visit" ever after her release, and the threat to deport her to El Salvador—the country to which she has a final withholding grant. Further, this is evidenced by ICE's recent intensifying efforts to remove noncitizens to third countries. *See supra* ¶¶ 55–58.

96. As a transgender woman, E.R.D. lives in constant fear that ICE will re-detain or deport her. E.R.D. Decl. ¶ 19. E.R.D. only recently came out to her family as transgender, and they have slowly started to accept her gender identity. *Id.* ¶ 21. In the United States, E.R.D. has hopes of being able to continue to transition to a woman. *Id.* ¶ 19. However, she fears that if she were to be deported to, for example, El Salvador, she would not be able to safely identify or live her life as a transgender woman. *Id.* As a transgender person, E.R.D. is also at increased risk of physical and mental harm if re-detained.[13]

CAUSES OF ACTION

COUNT ONE
Violation of the INA and Implementing Regulations

97. E.R.D. repeats and re-alleges the allegations contained in all preceding paragraphs of this Amended Petition as if fully set forth herein.

98. 8 C.F.R. § 241.4(*l*) governs the procedures for the revocation of OSUPs. Only the Executive Associate Director of ICE or, in certain circumstances and upon making specific

[13] *See* Guadalupe Marquez-Velarde, *et al.*, *Transgender in Detention: Victimization Experiences in Immigration Facilities*, 9 Transgender Health 6, 597–98 (2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11669631/ (explaining that transgender detainees experience systemic violence and "victimization including physical and sexual assault, degrading strip searches and intake procedures, being asked to visually confirm their gender identity, or placed in solitary confinement," and are "at high risk of adverse mental health outcomes").

findings, the field office director, are authorized to revoke OSUPs. 8 C.F.R. § 241.4(*l*)(2); *id.* § 1.2. Additionally, the noncitizen must be "notified of the reasons for revocation of his or her release or parole" in writing and provided "an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification." *Id.* § 241.4(*l*)(1); *Funes Gamez*, 2025 WL 3263896, at *14 (notice must be in writing).

99. Respondents failed to comply with these requirements when they re-detained E.R.D. on January 6, 2026. The purpose of release has not been served because E.R.D. cannot be removed to El Salvador nor is it reasonable to believe they would be removable to any other country, they have not violated any conditions of release that would warrant re-detention, it is not appropriate to enforce a removal order because E.R.D. has been granted withholding of removal, and there has been no conduct to indicate that release would no longer be appropriate. The proper remedy for failure to comply with these regulations is release. *See, e.g.*, *Ceesay*, 781 F. Supp. 3d at 170 (ordering release); *Funes Gamez*, 2025 WL 3263896, at *26 (same); *E.M.M.*, 2025 WL 3077995, at *6 (same).

100. Where ICE has already released E.R.D., but she continues to face the threat of the unlawful revocation of her OSUP and re-detention, the proper remedy is to enjoin Respondents from re-detaining E.R.D. without notice and an opportunity to be heard before a neutral adjudicator. *See, e.g.*, *Tran v. Bondi*, No. 2:25-CV-02335-DGE-TLF, 2025 WL 3725677, at *8 (W.D. Wash. Dec. 24, 2025) (ordering that the "[p]etitioner shall not be re-detained without notice and an opportunity to be heard unless Respondents have evidence detention is authorized under 8 C.F.R. §§ 241.13(i)(1) or (2)" where ICE had revoked the petitioner's OSUP); *He v. Lyons*, No. 3:25-CV-10639-JSC, 2025 WL 3564207, at *3 (N.D. Cal. Dec. 12, 2025) (enjoining, at TRO stage,

the Government from "re-detaining Petitioner without notice and a pre-deprivation hearing before a neutral decisionmaker" where ICE had revoked his OSUP, despite the petitioner's compliance with all check-in requirements); *J.L.R.P. v. Wofford*, No. 1:25-CV-01464-KES-SKO (HC), 2025 WL 3190589, at *10 (E.D. Cal. Nov. 14, 2025) ("Respondents are ENJOINED AND RESTRAINED from re-detaining petitioner unless there are material changed circumstances and a neutral decisionmaker determines that there is a significant likelihood of petitioner's removal in the reasonably foreseeable future, or respondents demonstrate by clear and convincing evidence at a pre-deprivation bond hearing before a neutral decisionmaker that petitioner is a flight risk or danger to the community such that his physical custody is legally justified."); *see also Hyppolite v. Noem*, No. 25-cv-4304 (NRM), 2025 WL 2829511, at *17 (E.D.N.Y. Oct. 6, 2025) (granting pre-deprivation hearing in non-OSUP context); *R.P.L. v. Maldonado*, No. 25-CV-6886 (HG), 2025 WL 3731864, at *4 (E.D.N.Y. Dec. 26, 2025) (same); *O.F.B. v. Maldonado*, No. 25-cv-6336 (HG), 2025 WL 3277677, *8 (E.D.N.Y. Nov. 25, 2025) (same).

COUNT TWO
Violation of Fifth Amendment Right to Procedural Due Process

101. E.R.D. repeats and re-alleges the allegations contained in all preceding paragraphs of this Amended Petition as if fully set forth herein.

102. The procedural component of the Due Process Clause prohibits the government from depriving an individual of a protected interest without notice and an opportunity to be heard. *Mathews*, 424 U.S. at 333.

103. Due process requires that a noncitizen previously released from custody receive a pre-deprivation hearing before the government can re-detain them. *See Guillermo M. R.*, 791 F. Supp. 3d at 1036. Or, at the very minimum, due process requires DHS to follow its own regulations before re-detaining noncitizens who were previously released. *See Zhu*, 2025 WL 2452352, at *9

("ICE's failure to follow its own regulations and provide Petitioner with notice or an interview violated Petitioner's procedural due process rights."). Petitioner's detention violates the Due Process Clause because no change in Petitioner's case compels a change in her custody status. In re-detaining Petitioner, Respondents have offered no indication that any permissible statutory purpose is served. Their detention is not rationally related to any immigration purpose.

104. Respondents failed to provide E.R.D. with a pre-deprivation hearing when they re-detained E.R.D. in violation of their due process rights. Respondents failure to provide E.R.D. with a pre-deprivation hearing before re-detaining her will similarly violate E.R.D.'s procedural due process rights.

105. The proper remedy is to enjoin Respondents from re-detaining E.R.D. without notice and an opportunity to be heard before a neutral adjudicator. *See supra* ¶100.

COUNT THREE
Violation of Fifth Amendment Right to Substantive Due Process

106. E.R.D. repeats and re-alleges the allegations contained in all preceding paragraphs of this Amended Petition as if fully set forth herein.

107. Congress has authorized civil detention of noncitizens in removal proceedings for specific, non-punitive purposes. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 833 (2018); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The requirement that deprivation of liberty be specific and non-punitive was violated here. The Fifth Amendment guarantees that people in civil detention may not be subject to conditions of confinement or denial of medical care that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Civil detention is unconstitutionally punitive when it is not "reasonably related to a legitimate goal." *Id.* at 538-39.

108. In the immigration context, the only legitimate government objectives for detaining a noncitizen are preventing danger to the community and flight risk. *Zadyvdas v. Davis*, 533 U.S. 678, 690-91 (2001).

109. When DHS initially issued Petitioner the OSUP, it determined that she was not a danger to the community or a flight risk. Petitioner has complied with every condition of her OSUP. There are no changed circumstances that justify the OSUP's revocation.

110. Respondents have no legitimate, non-punitive basis for revoking Petitioner's OSUP and detaining Petitioner. Therefore, E.R.D.'s re-detention without notice and an opportunity to be heard before a neutral adjudicator is unconstitutionally punitive and violates her substantive due process rights.

COUNT FOUR
Violation of the APA
(Detention is Arbitrary and Capricious; Contrary to Constitutional Right; In Excess of Statutory Authority; and Without Observance of Procedure Required by Law)

111. E.R.D. repeats and re-alleges the allegations contained in all preceding paragraphs of this Amended Petition as if fully set forth herein.

112. The APA enables courts to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

113. As explained, *supra*, E.R.D.'s re-detention would violate the Constitution and the regulations governing revocation of release under OSUP and is therefore not in accordance with law and contrary to a constitutional right.

COUNT FIVE
Violation of the *Accardi* Doctrine
(Respondents Failed to Follow 8 C.F.R. § 241.4(*l*))

114. E.R.D. repeats and re-alleges the allegations contained in all preceding paragraphs of this Amended Petition as if fully set forth herein.

115. Under the *Accardi* doctrine, a foundational principle of administrative law, agencies must follow their own procedures, rules, and instructions. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (setting aside an order of deportation where the Board of Immigration Appeals failed to follow procedures governing deportation proceedings); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

116. Here, as explained *supra*, Respondents' failure to follow the regulations governing revocation of release under 8 C.F.R. § 241.4(*l*) is inconsistent with and in violation of the Release Policy that applies to individuals with a grant of withholding or deferral of removal. This constitutes an *Accardi* violation. Because re-detention would be inconsistent with the Release Policy, the proper remedy is to enjoin Respondents from re-detaining E.R.D. without notice and an opportunity to be heard before a neutral adjudicator. *See supra* ¶100.

COUNT SIX
Violation of the INA and FARRA of 1998
(As A Result of Any Imminent Removal to a Third Country Without Notice or Opportunity to Respond)

117. The INA and the Foreign Affairs Reform and Restructuring Act of 1998 codify the principle of non-refoulement, guaranteeing noncitizens the non-discretionary protections of withholding of removal and withholding under the CAT, both of which prevent noncitizen from being removed to a country where they fear torture or persecution. *See* 8 U.S.C. § 1231(3)(A)

(withholding of removal); Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681–822 (1998) (codified as Note to 8 U.S.C. § 1231) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States"; *see also Moncrieffe v. Holder*, 569 U.S. 184, 187 n.1 (U.S., 2013) ("the Attorney General has no discretion to deny [withholding of removal or deferral of removal under the CAT] to a noncitizen who establishes his eligibility").

118. Noncitizens facing third country removal have the right to seek fear-based protections such as withholding of removal and deferral of removal under CAT. *See D.V.D.*, 778 F. Supp. 3d at 367 (D. Mass.); *Vaskanyan v. Janecka*, No. 5:25-CV-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. June 25, 2025).

119. ICE, under its current procedures, removes noncitizens to third countries without any notice to that noncitizen or their counsel and without any opportunity for the noncitizen to seek fear-based protections such as withholding of removal and deferral of removal under CAT before an immigration judge. *See* March 30 Guidance; July 9 Guidance.

120. If E.R.D. is removed to a third country under these procedures, she will be denied sufficient opportunity to communicate with her counsel, prepare an application for protection under CAT or withholding of removal, and present her claims before an immigration judge. Such summary removal would constitute an unlawful deprivation of E.R.D.'s statutory right to apply for fear-based protection against removal to the third country.

COUNT SEVEN
Violation of Fifth Amendment Right to Procedural Due Process
(As a Result of Imminent Removal to a Third Country Without Meaningful Notice or Opportunity to Respond)

121. Noncitizens with a final order of removal have due process rights under the Fifth Amendment. *See Zadvydas*, 533 U.S. at 693 ("this Court has held that the Due Process Clause protects [a noncitizen] subject to a final order of deportation") (citing *Wong Wing*, 163 U.S. at 238 (1986)); *Black*, 103 F.4th at 143 (citing *Reno v. Flores*, 507 U.S. 292, 306 (1993)). In the context of removal, procedural due process requires that noncitizens receive notice "within a reasonable time and in such a manner as will allow them to actually seek... relief in the proper venue before such removal occurs." *See Trump v. J.G.G.*, 604 U.S. 670, 673 (2025). Even if relevant statutes did not require notice and the meaningful opportunity to apply for fear-based protection for removal, such process is constitutionally required. *See Mathews*, 424 U.S. 319 at 332; *Zhu*, 2025 WL 2452352 at *9 n.4 ("Courts in this Circuit apply the three-factor balancing test set forth in [*Mathews*] in determining the adequacy of process in the civil immigration context") (citing *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir, 2020)).

122. If ICE follows its current procedures in effectuating E.R.D.'s removal to a third country, it will likely remove her either without notice or with only twenty-four hours' notice prior to removal. *See* July 9 Guidance. Such short notice is insufficient time for someone to contact counsel and prepare an application for withholding of removal or protection pursuant to CAT, particularly during which the individual bears the burden of proof and may have only 24-hours' notice prior to being heard. The procedures also do not afford sufficient written notice or ability to seek judicial review or review by an impartial adjudicator with sufficient procedural protections. These procedures deny E.R.D. the meaningful opportunity to challenge the decision to remove her to a third country. They are a clear violation of her due process rights. *See Sagastizado v. Noem*,

802 F. Supp. 3d 992, 1005 (S.D. Tex. 2025); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1006 (W.D. Wash. 2019); *Barka v. Mattos*, No. 2:25-CV-01781-GMN-MDC, 2025 WL 3723998, at *8 (D. Nev. Dec. 23, 2025); *Nguyen v. Scott*, 796 F. Supp. 3d 703, 732 (W.D. Wash. 2025); *Y.T.D. v. Andrews*, No. 1:25-CV-01100 JLT SKO, 2025 WL 2675760, at *13 (E.D. Cal. Sept. 18, 2025); *Portela-Hernandez v. Trump*, No. 25-1633-BAH, 2026 WL 74042, at *12 (D. Md. Jan. 9, 2026); *Arenado-Borges v. Bondi*, No. 2:25-CV-02193-JNW, 2025 WL 3687518, at *6 (W.D. Wash. Dec. 19, 2025).

COUNT EIGHT
Violation of Fifth Amendment Right to Substantive Due Process
(As a Result of Imminent Removal to a Third Country)

123. Under the Due Process Clause, the government may not impose punishment without "an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (collecting cases). The Supreme Court has long held that noncitizens subject to final orders of removal are subject to the guarantees of the Due Process Clause. *See Zadvydas*, 533 U.S. at 693. Moreover, the Due Process Clause prohibits the federal government from imposing punishment as part of its effectuation of noncitizen removal. *Wong Wing v. United States*, 163 U.S. 228, 237 (finding that Congress cannot add punishment to immigration detention or deportation without a prior adjudication of guilt).

124. The Trump Administration has expanded the use of third country removals in an explicit attempt to punish noncitizens and deter immigration. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *24 (W.D. Wash. Aug. 21, 2025) (citing official video of President Trump stating "[I]f illegal aliens choose to remain in America, they're remaining illegally and they will face severe consequences. Illegal aliens who stay in America face *punishments*, including significant jail time, enormous financial penalties, confiscation of all property, garnishment of all

wages, imprisonment and incarceration, and sudden deportation in a place and manner solely of our discretion.") (emphasis added). The court in *Nguyen* found that the petitioner was likely to succeed on his claim "that ICE's practice of removing noncitizens to countries where they face imprisonment violates the Constitution's prohibition on 'punitive' third country removal." *Id.* at 23; *see also Abubaka v. Bondi*, No. C25-1889RSL, 2025 WL 3204369, at *8 (W.D. Wash. Nov. 17, 2025) (finding that the "the government's practice of third-country removal paired with imprisonment is intended to be punitive and thus violates due process under" *Wong Wing v. United States*, 163 U.S. 228 at 236–38 (1896), and *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001), and ordering that the government not remove him "to any third country where he is likely to face imprisonment upon arrival"); *Baltodano v. Bondi*, No. C25-1958RSL, 2025 WL 3484769, at *10 (W.D. Wash. Dec. 4, 2025) (same).

125. By subjecting E.R.D. to unconstitutionally punitive third country removal practices, Respondents violate her rights under the Due Process Clause.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1) Assume jurisdiction over this matter;
2) Issue a Writ of Habeas Corpus on the ground that Petitioner's re-detention violates the Constitution and the laws of the United States;
3) Enjoin Respondents from re-detaining Petitioner without notice and an opportunity to be heard before a neutral arbiter and in which Respondents bear the burden to establish that Petitioner is not a danger or a flight risk that cannot be mitigated by bond and in which alternatives to detention and ability to pay are considered.
4) Enjoin removal to a country not listed on Petitioner's removal order as punitive;

5) Alternatively, in the event that Respondents attempt to remove Petitioner to a country not listed on her order of removal, order Respondents and those with whom they contract to comply with the following in order to provide Petitioner with a meaningful opportunity to seek withholding of removal and/or protection under the Convention Against Torture to a country not listed in her removal order:

   a. provide written notice to Petitioner and his counsel of the third country to which Petitioner may be removed, in a language that Petitioner can understand;

   b. following notice, provide a minimum of 15 days for Petitioner to raise a fear of return for eligibility for CAT and withholding protections, and then provide meaningful notice and opportunity—a minimum of 60 days—prior to a screening interview at which USCIS would inquire as to "reasonable fear" of removal to the third country;

   c. if Petitioner demonstrates "reasonable fear," reopen his immigration proceedings in order to designate the third country as a country for removal and through which Petitioner can seek withholding and protection under CAT in immigration court, with all attendant procedural protections applicable in immigration court including the right to be represented by counsel of choice and right to submit evidence and take testimony, and to seek further judicial review; and,

   d. if Petitioner is not found to have demonstrated "reasonable fear," Respondents are enjoined/prohibited from removing Petitioner from the continental United States until 30 days after a neutral adjudicator reviews Petitioner's denied Reasonable Fear Interview, and only if the neutral adjudicator affirms such denial after notice and a hearing in immigration court with all attendant procedural protections applicable in immigration court including the right to be represented by counsel of choice and right to submit evidence and take testimony, and only if there is no pending appeal of such denial.

6) Order Respondents not to remove Petitioner to any third country where she is likely to face imprisonment upon arrival;

7) Order Respondents to show cause why the writ should not be granted within 60 days;

8) Award Petitioner reasonable attorneys' fees and costs for this act under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

9) Grant Petitioner any other relief this Court deems just and proper.

Dated: February 17, 2026
Brooklyn, New York

Respectfully submitted,

/s/ Alexandra Lampert

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