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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Chancely FANFAN, María MALDONADO CRUZ, and Elesban ANGEL MENDEZ,

Plaintiff-Petitioners,

v.

Kristi NOEM, Secretary of Homeland Security; Christopher J. LAROSE, Warden, Otay Mesa Detention Center; Daniel A BRIGHTMAN, Field Office Director, San Diego Field Office, United States Immigration and Customs Enforcement; Todd M. LYONS, Acting Director, United States Immigration and Customs Enforcement; Pamela Jo BONDI, Attorney General *in their official capacities,*

Defendant-Respondents.

Case No.: 25-cv-3291-DMS-BJW

PLAINTIFF-PETITIONERS' NOTICE OF MOTION AND MOTION FOR CLASS-WIDE ORDER POSTPONING EFFECTIVE DATE OF AGENCY ACTION UNDER 5 U.S.C. 705

Date and Time: April 17, 2026, 1:30pm
Before: Honorable Dana M. Sabraw

NOTICE OF MOTION AND MOTION FOR CLASS-WIDE ORDER POSTPONING EFFECTIVE DATE OF AGENCY ACTION UNDER 5 U.S.C. 705

To all Parties and their counsel of record:

PLEASE TAKE NOTICE that on April 17, 2026, Plaintiff-Petitioners will and do hereby move the Court for a class-wide order postponing the effective date of agency action under Section 705 of the Administrative Procedure Act on behalf of the following class, which Plaintiff-Petitioners have concurrently moved to certify:

> Noncitizens with pending 8 U.S.C. 1229a removal proceedings who have been or will be re-detained in the Southern District of California while appearing at an ICE "check-in" or appointment; who DHS previously released from custody; and for whom ICE has not conducted a pre-deprivation hearing to determine whether material changes in circumstances justify re-detention.

This Motion is based on the accompanying Memorandum of Points and Authorities and exhibits, and upon all other matters of record herein.

Dated: February 25, 2025

Respectfully submitted,

/s/ Monika Y. Langarica

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MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

This case challenges Defendant-Respondents (Defendants)' abrupt departure from a decades-long policy of not re-detaining individuals whom the Department of Homeland Security (DHS) previously released, absent a finding of material changed circumstances related to flight risk or danger to the community. Under the new policy, Immigration and Customs Enforcement (ICE) re-detains individuals whom DHS previously released from custody without any individualized assessment of whether material changes in circumstances related to flight risk or danger justify re-detention (hereinafter the "Arbitrary Re-detention Policy").

This Court previously granted Plaintiff-Petitioners (Plaintiffs)' Motion for Temporary Restraining Order (TRO Motion), ECF 3, ordering their immediate release based on a finding that their re-detention likely violates Procedural Due Process, ECF 13. Because the challenged policy affects at least dozens of others in the Southern District of California and will affect countless more moving forward, and in order to "prevent" further "irreparable injury," Plaintiffs now move for a class-wide order postponing the effective date of Defendants' new policy, which is arbitrary and capricious and contrary to constitutional right, pending the conclusion of these proceedings. 5 U.S.C. 705. [1]

This Court should grant the motion because Plaintiffs easily satisfy the three requirements for preliminary relief. *First*, Plaintiffs are likely to succeed on the merits of their claims that Defendants' new policy is arbitrary and capricious in violation of 5 U.S.C. 706(2)(A), especially where Defendants have offered *no* explanation for the abrupt departure from prior policy—let alone a satisfactory and contemporaneous analysis—and have failed to consider putative class members' reliance interests in their prior releases. They are also likely to succeed on their claim that the Arbitrary Re-detention Policy is contrary to constitutional right in violation of 5 U.S.C. 706(2)(B), where the policy authorizes re-detention of individuals whose

[1] Plaintiffs have concurrently filed a Motion for Provisional Class Certification.

prior releases created protectable liberty interests that the government cannot deprive them of without a pre-deprivation hearing to determine whether material changes in circumstances justify re-detention, and where there is no countervailing government interest that outweighs the liberty interests. *Second*, just as Plaintiffs did, putative class members will continue to suffer irreparable harm in the absence of relief, where the policy directly results in detention—often for months at a time—under prison-like conditions and sudden separation from their family, work, and community. *Third*, the balance of the equities and public interest, which merge in this case, favor an order requiring Defendants to comply with the APA and Due Process.

Accordingly, to preserve the rights of putative class members pending conclusion of these proceedings, it is "necessary" and "appropriate" for the Court to postpone on a class-wide basis the effective date of Defendants' new Arbitrary Re-detention Policy while this litigation proceeds, pursuant to the APA. 5 U.S.C. 705. Indeed, a court in the Northern District of California recently issued such an order under materially indistinguishable circumstances. *See Garro Pinchi v. Noem*, No. 25-CV-05632-PCP, 2025 WL 3691938, at *19 (N.D. Cal. Dec. 19, 2025). This Court should do the same.

STATEMENT OF FACTS

I. Defendants Had a Long-Standing Policy of Not Arbitrarily Re-Detaining Previously Released Individuals

The Immigration and Nationality Act (INA), including its implementing regulations, governs ICE's authority to detain and release noncitizens pending removal proceedings. 8 U.S.C. 1226 covers the detention of noncitizens "already in the country pending the outcome of removal proceedings." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). Under this provision, DHS may directly release noncitizens who do not have a disqualifying criminal history on conditional parole, bond, or their own recognizance. 8 U.S.C. 1226(a)(1)-(2); 8 C.F.R. 236.1(c)(8). Section 1226 also authorizes noncitizens who DHS has not yet released to obtain a

bond hearing before an immigration judge to decide if they should remain detained or be released. *See* 8 U.S.C. 1226(a); 8 C.F.R. 236.1(d)(1); 1003.19(a), 1236.1(d). Section 1225 controls detention of recent arrivals at or near the border. *Rodriguez*, 583 U.S. at 287 (describing 8 U.S.C. 1225 as relating to "borders and ports of entry"). DHS may release noncitizens detained under Section 1225, including on humanitarian parole. 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.5, 235.3(c).

Release under any of these authorities requires an individualized determination that the noncitizen does not pose a danger to the community and is likely to appear at future proceedings. *See* 8 C.F.R. 236.1(c)(8) (authorizing release on recognizance where the noncitizen can "demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the [noncitizen] is likely to appear for any future proceeding"); 8 C.F.R. 212.5(b) (authorizing parole of certain noncitizens "provided [they]] present neither a security risk nor a risk of absconding"). Thus, release necessarily "reflects a determination by the government that the noncitizen is not a danger to the community or a flight risk." *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1176 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F. 3d 1137 (9th Cir. 2018).

DHS has long maintained a policy of not re-detaining previously released noncitizens absent an individualized determination that there has been a material change in circumstances related to flight risk or danger to the community. In 1981, the Board of Immigration Appeals (BIA) made clear the rule that immigration agencies may not re-detain a noncitizen released by an immigration judge on bond "absent a change of circumstance" warranting detention. *Matter of Sugay*, 17 I&N Dec. 637, 640 (BIA 1981). In the decades since that BIA decision, federal immigration officials have reconfirmed this policy on numerous occasions. In a 1995 memorandum, the head of the Immigration and Naturalization Service (ICE's predecessor agency) reiterated that "[w]hen a [] [noncitizen] has been released from INS custody under bond, such bond can be revoked by the district director . . . but

only based upon 'a change in circumstances.' . . . As such, INS must be able to justify any revocation decision, future detention or release condition." *Demore v. Kim*, 2002 WL 34705774 (U.S. Aug. 29, 2002), (No. 01-1491), Joint Appendix at 57.

In addition to limiting the re-detention of noncitizens released on an immigration judge bond, DHS also applied the policy to those whom the agency previously directly released under conditions of supervision or on their own recognizance. *Saravia*, 280 F.Supp.3d at 1197 (noting DHS "incorporated" the holding from *Matter of Sugay* "into its practice, requiring a showing of changed circumstances both where the prior bond determination was made by an immigration judge and where the previous release decision was made by a DHS officer" (internal citations omitted)). Other courts have also repeatedly acknowledged DHS's policy of not arbitrarily re-detaining previously released individuals. *See, e.g.*, *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 968 (N.D. Cal. 2019) (noting the practice that "DHS re-arrests individuals only after a 'material' change in circumstances"); *Lesic v. LaRose*, No. 25-cv-2746-LL-BJW, 2025 WL 3158675, at *2 (S.D. Cal. Nov. 12, 2025) (same) (quoting *Ortega*, 415 F.Supp.3d at 968); *Bermeo Sicha v. Bernal*, No. 1:25-CV-00418-SDN, 2025 WL 2494530, at *4 (D. Me. Aug. 29, 2025) (same) (citing *Saravia*, 280 F.Supp.2d at 1197); *Rosado v. Figueroa*, No. CV-25-02157-PHX-DLR (CDB), 2025 WL 2337099, at *12 (D. Ariz. Aug. 11, 2025) (noting that, consistent with BIA interpretation, "ICE has the authority to re-arrest a noncitizen and revoke their release pending the outcome of removal proceedings only when there has been a change in circumstances since the individual's initial release").

DHS also incorporated this rule in the official paperwork it provides to released noncitizens. *See, e.g.*, Decl. of Monika Y. Langarica, ECF 3-5, Exhibits 2, 3. For example, Mr. Angel Mendez's Order of Release on Recognizance (ROR order) sets forth specific conditions for his release, such as "report[ing] for any hearing or interview as directed by the Department of Homeland Security or the Executive Office for Immigration Review." *Id.* The ROR order also provides the

ICE officers only two options for cancelling the release: if he "failed to comply with the conditions of release," or is "taken into custody for removal," which necessarily occurs only after removal proceedings have ended. *Id.*

Countless previously released noncitizens, including Plaintiffs, relied on Defendants' prior policy against arbitrary re-detentions to establish and plan their lives in the United States pending a decision on removal. Indeed, under any reasonable interpretation of the rule and release paperwork, as long as released individuals attended immigration proceedings, avoided new contact with the criminal legal system, and otherwise complied with their conditions of release, they could go about their lives without fear of arbitrary re-detention. *See id.* This allowed them to consult with lawyers and pursue evidence in support of their applications to remain in the United States, seek work authorization and employment when eligible, enter into leases, invest in their education, develop community ties, participate in religious life, and grow and take care of their families pending a final decision in their immigration cases. *See e.g.*, Declaration of Chancely Fanfan, ECF 3-1 (Fanfan Decl.), ¶¶ 13-16 (discussing enrollment in plumbing school and deep involvement in his local ministry since his release from DHS custody); Supplemental Declaration of Chancely Fanfan (concurrently filed) (Supp. Fanfan Decl.), ¶ 5; Declaration of Maria Maldonado Cruz, ECF 3-2 (Maldonado Cruz Decl.), ¶¶ 9-13 (explaining that she has been "develop[ing] a life in California" since her release from DHS custody, including meeting and marrying and entering into a lease for a house); Supplemental Declaration of Maria Maldonado Cruz (concurrently filed) (Supp. Maldonado Cruz Decl.), ¶ 6; Declaration of Elesban Angel Mendez, ECF 3-3 (Angel Mendez Decl.), ¶¶ 9-12 (noting the ongoing support he provides for his family, including working at an egg farm that his family depends on for housing); Supplemental Declaration of Elesban Angel Mendez (concurrently filed) (Supp. Angel Mendez Decl.), ¶¶ 5-7.

II. Defendants Replaced Past Practice with the Arbitrary Re-Detention Policy

Sometime in 2025, ICE silently broke with its prior policy against arbitrary re-detention. The agency instead adopted the Arbitrary Re-detention Policy, pursuant to which it re-detains individuals it previously released without conducting an individualized assessment to determine whether material changes in circumstances related to flight risk or danger justify re-detention.[2] In San Diego, ICE claimed "[e]very [noncitizen] present in violation of U.S. immigration laws may be subject to arrest, detention . . . and removal[.]"[3] Indeed, numerous reports reflect that the ICE San Diego Field Office is following "orders to detain everyone,"[4] which necessarily includes even those whom DHS previously released without regard for whether material changes in their circumstances warrant re-detention. The Executive Director of Immigration Services for Jewish Family Service of San Diego noted that, based on calls for assistance that the organization receives, "it is evident that ICE is carrying out arbitrary detentions during scheduled check-ins" at a scale he has not previously seen in his nearly decade of practice in San Diego, and that "[i]ndividuals who appear for their appointments as instructed by ICE are being taken into custody

[2] Defendants' new policy may be unwritten, or it may be written but not currently accessible to the public, consistent with DHS's practices under this administration of secretly maintaining internal memoranda which significantly impact the rights of noncitizens. *See* Rebecca Santana, *Immigration officers assert sweeping power to enter homes without a judge's warrant, memo says*, Associated Press (Jan. 21, 2026), https://apnews.com/article/ice-arrests-warrants-minneapolis-trump-00d0ab0338e82341fd91b160758aeb2d (describing ICE memorandum dated May 12, 2025—released via a whistleblower disclosure on January 7, 2026—which purports to authorize warrantless entry into homes).

[3] Kate Morrissey, *ICE in San Diego has a new policy- detain everyone,* Daylight San Diego (Oct. 10, 2025), https://www.daylightsandiego.org/ice-in-san-diego-has-a-new-policy-detain-everyone/; Lillian Perlmutter, *Asylum-seekers now held for days-in a downtown San Diego basement*, Times of San Diego (Oct. 20, 2025), https://timesofsandiego.com/politics/2025/10/20/asylum-seekers-held-basement-san-diego-ice/

[4] *Id.* ("'[The ICE supervisor] said, in essence, we're under orders to detain everyone. This is not our call,' Jacobs recalled, paraphrasing. 'My understanding was that this is something that came from Washington, D.C.'")

without prior notice or a change in their reporting requirements. These community members are complying with ICE's directives, yet their compliance results in unexpected and unjustified detention." Declaration of Luis Gonzalez (concurrently filed) (Gonzalez Decl.), ¶ 6.

This is consistent with Plaintiffs' experiences and ICE's recent practices. The ICE agent who arrested Mr. Fanfan told him explicitly that the reason for his detention was simply that "the government was requiring" the agent to do it, not that the agent himself made any individualized "decision." Fanfan Decl. ¶ 23. ICE gave Ms. Maldonado Cruz's lawyer and Mr. Angel Mendez similar reasons. Declaration of Matthew Holt, ECF 3-4 ¶ 8 ("Based on what an ICE officer told me Ms. Maldonado Cruz was arrested because he (the ICE officer) had been instructed to detain everyone coming in for check-ins that day"); Angel Mendez Decl. ¶ 16 ("The ICE officer said he was arresting me because under President Trump every person who is here illegally had to be arrested."). Individuals subjected to the new Arbitrary Re-detention Policy overwhelmingly lack post-release criminal history or other factors going to danger to the community, and they have a track record of compliance with immigration court hearings and ICE appointments. *See, e.g.,* Fanfan Decl. ¶ 12; Maldonado Cruz Decl. ¶ 4; Angel Mendez Decl. ¶¶ 6, 8; Plaintiff-Petitioners' Motion for Class Certification (concurrently filed), n.15.

At least dozens of individuals have been subjected to the Arbitrary Re-detention Policy, including at least 21 who fit the class definition and have sought habeas relief from courts in this district. *See Id.*; Declaration of Suzan Worm (concurrently filed), ¶¶ 5-6. Numerous additional writ of habeas corpus cases in this district reflect re-detentions pursuant to the policy.[5] These tallies almost certainly

[5] *See, e.g.*, *Rivera v. Warden, Otay Mesa Det. Ctr.*, No. 26-cv-375-JES-AHG, 2026 WL 310193 (S.D. Cal. Feb. 5, 2026) (granting petition for noncitizen previously granted ROR and re-detained at border patrol checkpoint); *Kazybayeva v. Warden of Otay Mesa Det. Ctr.*, No. 26-cv-0421-GPC-MMP, 2026 WL 280478 (S.D. Cal. Feb. 3, 2026) (granting petition for noncitizen previously paroled and re-detained at military base while driving uber); *L.J. v. LaRose*, No. 26-cv-0463-AGS-KSC, 2026

(Footnote continues on next page.)

amount to an undercount, as they reflect instances in which individuals were able to seek habeas relief or were otherwise represented by lawyers with whom undersigned counsel made contact. Indeed, volunteers have documented over 200 arrests at ICE offices in San Diego, Declaration of Jessica Ziling Ho (concurrently filed), ¶ 7 a county official documented twenty-seven such arrests, Declaration of Michael Garcia (concurrently filed), ¶ 6, and news reports captured more than 135.[6]

As Plaintiffs described in their TRO Motion and in their concurrently-filed Motion for Class Certification, Defendants have implemented the Arbitrary Re-detention Policy by targeting people who show up for ICE check-ins and appointments and re-detaining them in the Southern District of California. Because compliance with check-ins and appointments is mandatory and often an explicit condition of prior release (as in the cases of Plaintiffs Angel Mendez and Maldonado Cruz. Langarica Decl., Exhs. 2, 3), this implementation of the policy amounts to an arrest trap whereby ICE lures people doing exactly what it has asked of them, only to take them into detention for no justifiable reason. Thus, not only is ICE arbitrarily

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WL 202871 (S.D. Cal. Jan. 26, 2026) (ordering the government to respond to petition for noncitizen who was re-detained at ICE check-in); *Perez v. Noem*, No. 3:25-cv-03777-CAB-JLB, 2026 WL 102643 (S.D. Cal. Jan. 14, 2026) (granting petition for noncitizen who was previously paroled and was re-detained after master calendar hearing); *Kirboga v. LaRose,* No. 25-cv-3706-GPC-DDL, 2025 WL 3779426 (S.D. Cal, Dec. 31, 2025) (granting petition for noncitizen previously granted ROR and re-detained after immigration court hearing); *Ramirez-Bibiano v. LaRose*, No. 25-cv-3429-JLS-SBC, 2025 WL 3632748 (S.D. Cal. Dec. 15, 2025) (ordering release of petitioner who was re-detained at regular ICE check-in); *Rangel Velazquez v. LaRose*, No. 25-cv-3474-AGS-DEB, 2025 WL 3539264 (S.D. Cal. Dec. 10, 2025) (ordering government to respond to petition filed by petitioner who was re-detained and issued a notice to appear at ICE check-in).

[6] Jesus Jimenez, *Emotional Glimpses of an Immigration Crackdown in a San Diego Courthouse*, New York Times (Nov. 8, 2025), https://www.nytimes.com/card/2025/11/08/us/immigration-ice-san-diego-courthouse; Kate Morrissey, *ICE in San Diego is arresting everyone who shows up for contractor check-in, attorneys say*, Daylight San Diego (Dec. 18, 2025), https://www.daylightsandiego.org/ice-in-san-diego-is-arresting-everyone-who-shows-up-for-contractor-check-in-attorneys-say/

re-detaining unsuspecting noncitizens; in many cases, the agency is doing it while those individuals are actively complying with the conditions of their prior releases.

Defendants have offered no public explanation for their abrupt policy change. In their Opposition to Plaintiffs' TRO Motion, Defendants simply recycled arguments that the re-detentions are justified because Plaintiffs are now subject to detention under 8 U.S.C. 1225(b). ECF 7 at pp. 12-16. They have provided no different explanation in the many habeas petitions brought by re-detained individuals fortunate enough to secure habeas counsel. As discussed in greater detail below, *see* Argument Section I(B)(i), *infra*, Defendants' explanation is untenable.

STANDARD OF REVIEW

The APA authorizes district courts to "issue all necessary and appropriate process to postpone the effective date" of agency action "or to preserve status or rights pending conclusion" of the proceedings "to the extent necessary to prevent irreparable injury." 5 U.S.C. 705. A motion to postpone agency action to preserve the movants' status or rights under Section 705 is governed by the *Winter* preliminary injunction factors. *Immigr. Defs. L. Ctr. v. Noem*, 145 F.4th 972, 983-84 (9th Cir. 2025). As discussed below, Plaintiffs readily satisfy these factors.

A party seeking relief "must establish [1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in their favor, and [4] that an injunction is in the public interest." *City & Cnty. of San Francisco v. USCIS*, 944 F.3d 773, 788-89 (9th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "Likelihood of success on the merits is the most important factor." *California v. Azar*, 911 F.3d 558, 575 (9th Cir. 2018) (quotations omitted). Where the government is the opposing party, the third and fourth factors merge. *Nken v. Holder,* 556 U.S. 418, 435 (2009). Additionally, in the Ninth Circuit, courts may "employ an alternative 'serious questions' standard, also known as the 'sliding scale' variant of the *Winter* standard." *Fraihat v. ICE*, 16 F.4th 613, 635 (9th Cir.

2021) (cleaned up). Under that test, Plaintiffs must show "serious questions going to the merits and a balance of hardships that tips sharply toward the plaintiff[s]" along with "a likelihood of irreparable injury and that the injunction is in the public interest" *Id.* (internal citations omitted).

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims that the Arbitrary Re-Detention Policy Violates 5 U.S.C. 706(2)

The Arbitrary Re-detention Policy is reviewable and unlawful under the APA as agency action that is arbitrary and capricious and contrary to constitutional right.

A. The Arbitrary Re-Detention Policy is Reviewable Under the APA

To be reviewable under the APA, Defendants' Arbitrary Re-detention Policy must constitute "final agency action." 5 U.S.C. 704. In general, there is a strong presumption that Congress intends judicial review of administrative action. *Garro Pinchi*, 2025 WL 3691938 at *19 (citing *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 718–19 (9th Cir. 2011).

"Agency action" includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). The word "rule" means "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Garro Pinchi*, 2025 WL 3691938 at *20. Thus, the APA "defines agency action broadly," *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 575 (9th Cir. 2019) (cleaned up), such that it is "meant to cover comprehensively every manner in which an agency may exercise its power," *id.* at 576.

Accordingly, agency action "need not be in writing to be final and judicially reviewable . . . [a]n unwritten policy can still satisfy the APA's pragmatic final agency action requirement." *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1206–07 (S.D. Cal. 2019) (finding an unwritten "policy mandating that CBP officers

at [ports of entry] drastically restrict the flow of asylum seekers at [ports of entry] along the U.S.-Mexico border by turning them back to Mexico" constituted reviewable final agency action) (cleaned up); *see also R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164,174–176 (D. D.C. 2015) (determining that plaintiffs had shown a reviewable unwritten "DHS policy direct[ing] ICE officers to consider deterrence of mass migration as a factor in their custody determinations"); *Venetian Casino Resort LLC v. EEOC*, 530 F.3d 925, 929, 931 (D.C.Cir.2008) (finding reviewable as final agency action a policy, "written or otherwise," of disclosing documents without first notifying the submitting party). "[A] contrary rule would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing." *Al Otro Lado*, 394 F. Supp. 3d at 1206-07. Agency behavior is "relevant to inferring the existence of a policy." *See Garro Pinchi*, 2025 WL 3691938 at *21 (citing *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 166 (E.D.N.Y. 2018)).

Written or not, agency action is final where (1) it marks the "consummation" of the agency's decision-making process and is therefore not "of a merely tentative or interlocutory nature;" and (2) is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997) (internal citations omitted). The focus is "on the practical and legal effects of the agency action." *Or. Nat. Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006). The Ninth Circuit considers "whether the action amounts to a definitive statement of the agency's position or has a direct and immediate effect on the day-to-day operations of the subject party[.]" *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417 (9th Cir. 2023).

As discussed, Defendants' prior policy was to not re-detain individuals whom it had previously released without first making an individualized determination that circumstances related to flight risk or danger warranted re-detention. *See* Statement of Facts Section I, *supra*; *see also Garro Pinchi*, 2025 WL 3691938 at *20 (citing *Ortega*, 415 F. Supp. 3d at 969 (N.D. Cal. 2019); *Saravia*, 280 F. Supp. 3d at 1197).

In 2025, Defendants broke from that prior policy and replaced it with the Arbitrary Re-detention Policy—one under which ICE re-detains previously released noncitizens without conducting individualized assessments of whether material changes in circumstances justify the re-detentions. This policy change has had an immediate effect on ICE's day-to-day operations, resulting in its re-detention of at least dozens of individuals whom DHS had previously released. Statement of Facts Section II, *supra.* As explained above, this tally is almost certainly an undercount, where volunteers, county officials, and media outlets have documented hundreds of arrests at ICE offices in San Diego. *Id.* The group affected by the policy change includes Plaintiffs, for whom Defendants offered no individualized flight risk or danger justification for re-detention at the time of arrest or in the course of this litigation.[7] The fact that Defendants have arbitrarily re-detained at least dozens of individuals, including Plaintiffs, "infer[s]" the existence of the policy, *Garro Pinchi* 2025 WL 3691938 at *21, which is not "merely tentative or interlocutory in nature," *Bennett*, 520 U.S. 177–178; *see also San Francisco Herring Ass'n* , 946 F.3d at 579 (noting that where the agency "execute[d] on the directive . . . its decisionmaking processes are clearly consummated."). Local experts' observations about ICE's changed tactics further prove the existence of the policy. Gonzalez Decl. ¶ 6.

There is also no question that enforcement of the policy results in actions "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. Indeed, the "practical and legal effects of the agency action" are to deprive individuals, like Plaintiffs and putative class members,

[7] *See* Respondents' Opposition to Petitioners' TRO Motion, ECF 7. Defendants offered no justifications for Plaintiffs' re-detentions at the time they occurred, other than broad statements that their arrests were required by "the government." ECF 3-1, Fanfan Decl. ¶ 23. The ICE officer who arrested Ms. Maldonado Cruz even explicitly told her lawyer that he had instructions to arrest everyone who appeared for check-ins that day and disregarded individualized circumstances which should have counseled against her detention. ECF 3-4, Holt Decl. ¶ 6-8. An ICE agent told Mr. Angel Mendez that he was arresting him because "under President Trump" all persons who are unlawfully present "had to be arrested." ECF 3-3, Angel Mendez Decl. ¶ 16.

of their liberty, often for months. *Or. Nat. Desert Ass'n* , 465 F.3d at 982; *see also* 5 U.S.C. 551(10)(A), (13) (defining "agency action" to include an agency's "prohibition, requirement, limitation, or other condition affecting the freedom of a person"). This is sufficient to satisfy the second finality factor. *R.I.L.-R*, 80 F. Supp. 3d at 184 (finding impermissible detention pursuant to DHS's unwritten deterrence policy caused "profound and immediate consequences" for affected asylum seekers under the second *Bennett* factor).

Thus, Defendants' Arbitrary Re-detention Policy constitutes reviewable final agency action.

B. The New Policy is Arbitrary and Capricious

Courts must hold unlawful and set aside agency action that is arbitrary and capricious. 5 U.S.C. 706(2)(A). Plaintiffs are likely to succeed on their claim that the Arbitrary Re-detention Policy is arbitrary and capricious because Defendants have articulated no legitimate contemporaneous explanation for it, and because the policy change failed to consider important aspects of the problem, including individuals' reliance interests in their prior releases.

i. Defendants Have Offered No Reasoned Basis for the Arbitrary Re-Detention Policy

An action is arbitrary and capricious if the agency fails to "articulate a satisfactory explanation" for it, "including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42–43 (1983) (internal quotation marks omitted). Agencies must "support and explain their conclusions with evidence and reasoned analysis." *Ctr. for Biological*, 623 F.3d at 648. "[W]here the agency has failed to provide even the minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *see also Garro Pinchi*, 2025 WL 3691938 at *26 (citing *State Farm*, 463 U.S. at 42) ("[A]n agency changing its course ... is obligated to supply a reasoned analysis for the change."). Moreover, courts may not consider

"impermissible" agency "*post hoc* rationalization." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 21 (2020) (internal citations omitted).

In *Garro Pinchi*, where plaintiffs similarly challenged ICE's abrupt change to a re-detention policy within the San Francisco Area of Responsibility, the district court found that DHS "did not publicly articulate a reason for its re-detention policy at the time it was implemented" and "declined to disclose any records showing such a reason." 2025 WL 3691938 at *26. Because no contemporaneous rationale existed, the court concluded that the challenged policy is likely arbitrary and capricious and postponed its effective date under 5 U.S.C. 705. *Id* at 34.

Here, Defendants have similarly offered no justification for replacing decades of practice with the Arbitrary Re-detention Policy. Instead, as in *Garro Pinchi*, they have departed from the prior policy "sub silentio" and "disregard[ed] rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Garro Pinchi*, 2025 WL 3691938 at *26. Their failure to provide any analysis at all—let alone a satisfactory and contemporaneous explanation—renders the policy arbitrary and capricious, full stop. *Encino Motorcars*, 579 U.S. at 221.

To the extent that Defendants now seek to justify the changed policy based on their purported detention authority under 8 U.S.C. 1225(b)(2) and *Matter of Yajure Hurtado,* 29 I. & N. Dec. 216 (BIA 2025), first, such a "*post hoc* rationalization" is categorically "impermissible." *Regents*, 591 U.S. at 21. This "prevents agencies from forcing both litigants and courts to chase a moving target." *Garro Pinchi*, 2025 WL 3691938 at *26 (cleaned up). Second, even if the court could consider such an explanation, it would not amount to a rational connection between the "facts found and the choice made," *State Farm*, 463 U.S. at 42–43, because the explanation is not "permissible under the statute," *Fox,* 556 U.S. at 515.

As Plaintiffs explained in their TRO Motion, Section 1225(b)(2) mandates detention for any noncitizen "who is an applicant for admission, if the examining immigration officer determines that a[] [noncitizen] seeking admission is not clearly

beyond a doubt entitled to be admitted[.]" *See* 8 U.S.C. 1225(b)(2); *Rodriguez*, 583 U.S. at 287 (describing Section 1225 as relating to "borders and ports of entry"). As individuals re-arrested in the interior of the country at their ICE check-ins months and years after they arrived in the United States, Plaintiffs' and putative class members' re-detentions are governed by 8 U.S.C. 1226(a). They were plainly not "seeking admission" at the time of their re-detention. Moreover, any interpretation suggesting that Section 1225(b)(2) governs putative class members' re-detention in the interior would render superfluous recent amendments enlarging the category of people subject to the mandatory detention provision of 8 U.S.C. 1226. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).[8] It would also contravene decades of agency policy and practice, including as articulated in implementing regulations. *Bostock*, 802 F. Supp. 3d. at 1333-34 (concluding that longstanding practice supports plaintiffs' challenge to government's interpretation of Section 1225(b)(2)); *see also* 8 C.F.R. 1.2. Thus, Section 1226(a) governs.

In writ of habeas corpus cases filed across the country, courts have overwhelmingly rejected the government's novel interpretation of the applicability of 8 U.S.C. 1225(b) detention authority to individuals arrested in the interior of the country. *Barco Mercado v. Francis*, No. 1:25-CV-06582, 2025 WL 3295903, at *4, 13 (S.D.N.Y. Nov. 26, 2025) (collecting over 350 decisions by over 160 different district judges finding unlawful the application of Section 1225(b)(2)(A) to noncitizens residing in the United States). Courts in this district are no exception.[9]

[8] *See also Maldonado Bautista v. Santacruz,* 5:25-cv-01873-SSS-BFM, 2025 WL 3289861, *9-11 (Nov. 20, 2025) (explaining that the government's "expansive interpretation of 'applicants for admission' would effectively nullify a portion of the INA"); *Rodriguez v. Bostock*, 802 F. Supp. 3d 1297, 1326 (W.D. Wash. 2025) ("'[T]he Court does not lightly assume Congress adopts two separate clauses in the same law to perform the same work,' and this Court is not persuaded that Congress did so in passing the Laken Riley Act.").

[9] *See, e.g.*, *Lucas v. LaRose*, No. 3:25-cv-02973-GPC-JLB, 2025 WL 3485163 (S.D. Cal. Dec. 4, 2025); *Velasquez v. LaRose,* No. 25-cv-3137-JLS-MSB, 2025 WL 3251373 (S.D. Cal. Nov. 21, 2025); *Esquival-Ipina v. LaRose*, No. 25-cv-2672-JLS-BLM, 2025 WL 2998361 (S.D. Cal. Oct. 24, 2025); *Garcia v. Noem*, No. 25-cv-

(Footnote continues on next page.)

Moreover, in a nationwide class action lawsuit, a district court in this circuit issued a class-wide order declaring the government's interpretation unlawful. *Maldonado Bautista v. Santacruz*, 5:25-cv-01873-SSS-BFM, 2025 WL 3288403, at *9 (Nov. 25, 2025).[10]

Moreover, even *if* Defendants' position on the applicability of 8 U.S.C. 1225(b)(2) to those detained in the interior of the country could hold water (it cannot), "the INA expressly authorizes DHS to process applicants for admission [subject to 8 U.S.C 1225(b)(2)] under . . . parole." *Biden v. Texas*, 597 U.S. 785, 806 (2022) (citing 8 U.S.C. 1182(d)(5)(A)). Thus, Defendants maintain authority to *not* detain individuals who it argues are subject to its erroneous interpretation of Section 1225(b)(2), undercutting any position that their hands are tied. And *Yajure Hurtado* says nothing about how individuals previously released under the former interpretation of DHS's detention authority should be categorized. For this additional reason, the Defendants' expansive view of its Section 1225(b) detention authority cannot constitute "reasoned analysis," independently rendering the policy change arbitrary and capricious. *Ctr. for Biological*, 623 F.3d at 648.

In sum, any purported justification Defendants might offer that relies on the government's expansive application of 8 U.S.C. 1225(b) to justify putative class members' detention constitutes "impermissible" post-hoc rationalization. *Regents*, 591 U.S. at 21. It is additionally "legally erroneous" and thus "necessarily []

02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Mosqueda v. Noem*, No. 25-cv-2304-CAS-BFM, 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025).

[10] To the extent Defendants seek to rely on *Buenrostro-Mendez v. Bondi*, No. 25-20496, 2026 WL 323330 (5th Cir. Feb. 6, 2026), in which the Fifth Circuit recently held that 8 U.S.C. 1225(b)(2) controls the detention of noncitizens arrested in the interior of the United States, that out-of-circuit case is not binding here and is far outweighed by the hundreds of district court decisions from across the country that have issued contrary rulings.

capricious and arbitrary," *Garro Pinchi*, 2025 WL 3691938 at *29, and otherwise belied by Defendants' parole authority, *Texas*, 597 U.S. at 806.

ii. Defendants Failed to Consider Reliance Interests in the Prior Policy

Agency action is also arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem," including reliance interests generated by its prior policies. *See State Farm*, 463 U.S. at 42–43; *Regents*, 591 U.S. at 30-31 (holding that the government's failure to take into account serious reliance interests of DACA recipients rendered DHS's attempted recission of the program arbitrary and capricious); *Fox*, 556 U.S. at 515 (holding that "[i]t would be arbitrary or capricious to ignore" serious reliance interests); *Encino Motorcars,* 579 U.S. at 222 (when an agency changes a policy, it must address the "serious reliance interests . . . engendered . . . [by] longstanding policies"); *Centro Legal de la Raza v. Exec. Off. for Immigr. Rev.*, 524 F. Supp. 3d 919, 971 (N.D. Cal. 2021) (government's complete failure to consider reliance interests of noncitizens when it dispensed with long-standing pathway for relief was arbitrary and capricious).

Here, Plaintiffs exemplify the kinds of reliance interests that putative class members engendered in Defendants' past policy of not arbitrarily re-detaining after prior release. For example, after their prior releases from DHS custody, Plaintiffs lawfully obtained and maintained employment, started educational programs, married and grew their families, and invested in their church communities. *See* Statement of Facts Section I, *supra.* Those reliance interests also implicate others in their lives. Plaintiffs are providers for their families; they are the source of food, housing, support for their children's education, and general sustenance. *See, e.g.,* Angel Mendez Decl. ¶¶ 21-22; Fanfan Decl. ¶ 15. Indeed, as the court in *Garro Pinchi* found, "[t]he consequences of the re-detention policy also radiate outward to noncitizens' families, including their ... children, to the schools where they study and teach, and to the employers who have invested time and money in training them."

2025 WL 3691938, at *29 (cleaned up). Defendants were required to consider such reliance interests, even if after considering them they determined that they were insufficient to stop the policy change. *Regents,* 591 U.S. at 31-32. Their total failure to do so independently renders the policy arbitrary and capricious. *Id.; see also Garro Pinchi*, 2025 WL 3691938 at *29 (finding DHS's failure to consider reliance interests in prior releases, including employment, leases, cultivation of religious communities, and marriage and family growth, likely renders re-detention policy arbitrary and capricious).

Plaintiffs are likely to succeed on the merits of their arbitrary and capricious claim. Alternatively, Plaintiffs have raised "serious questions" going to the merits, which weighs in favor of preliminary relief. *Fraihat*, 16 F.4th at 635.

C. The New Policy is Contrary to Constitutional Right

Plaintiffs are also likely to succeed on the merits of their claim that the Arbitrary Re-detention Policy violates Procedural Due Process and thus is contrary to constitutional right under 5 U.S.C. 706(2)(B). Indeed, this Court has already found Defendants likely violated Plaintiffs' Procedural Due Process rights by re-detaining them without conducting a pre-deprivation hearing to determine whether such re-detention was justified. Order Granting Temporary Restraining Order, ECF 13 at *8. The same analysis applies to the putative class's challenge to the Arbitrary Re-detention Policy.

The Due Process Clause of the Fifth Amendment protects all "person[s]" from deprivation of liberty "without due process of law." U.S. Const. amend. V. This protection applies to noncitizens. *Zadvydas v Davis,* 533 U.S. 678, 690 (2001). While immigration laws afford ICE some discretion over its decisions to arrest, detain, and revoke prior releases, those decisions are nonetheless constrained by the requirements of the Constitution, including the Due Process Clause. *See generally id.* at 690; *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017).

Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), courts evaluate procedural

Due Process by balancing (1) the private interest affected; (2) the risk of erroneous deprivation of such interest; and (3) the government's interest. *Id.* at 335.

There is no question that freedom from government imprisonment is a profound private interest that "lies at the heart of the liberty that" Due Process protects. *Zadvydas,* 533 U.S. at 690. In cases where an individual has been previously released from government custody, the release itself creates a liberty interest in remaining out of custody. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). In the immigration context courts have consistently found the private interest in "retaining [] liberty" is significant, *Garro Pinchi v. Noem*, 792 F. Supp. 3d 1025, 1035 (N.D. Cal. 2025) (hereinafter "*Garro Pinchi I*"), even where "ICE has the initial discretion to detain or release a noncitizen pending removal proceedings," *Id.* at 1032 (citing *Romero v. Kaiser*, No. 22-cv-02508, 2022 WL 143250 at *2 (N.D. Cal. May 6, 2022); *Jorge M. F. v. Wilkinson*, No. 21-cv-01434, 2021 WL 783561, at *2 (N.D. Cal. Mar. 1, 2021); *Ortiz Vargas v. Jennings*, No. 20-cv-5785, 2020 WL 5074312, at *3 (N.D. Cal. Aug. 23, 2020); *Ortega*, 415 F.Supp.3d at 969.

Courts in this district have specifically recognized that individuals have a significant liberty interest in both "continued freedom after *release on own recognizance*," *Alegria Palma v. LaRose*, No. 25-cv-1942-BJC-MMP, Dkt. No. 14 at *6 (S.D. Cal. Aug. 11, 2025) (emphasis added), and in "freedom from imprisonment" after "the government grants a [noncitizen] *parole* into the country," *Sanchez v. LaRose*, No. 25-CV-2396-JES-MMP, 2025 WL 2770629, at *3 (S.D. Cal. Sept. 26, 2025) (emphasis added).

Where individuals subject to re-detention have "not received any bond or custody hearing, the risk of an erroneous deprivation of liberty is high because neither the government nor [the petitioner] has had an opportunity to determine whether there is any valid basis for her detention." *Garro Pinchi I*, 792 F. Supp. 3d at 1035 (citing *Singh v. Andrews*, No. 1:25-CV-00801, 2025 WL 1918679 (E.D. Cal. July 11, 2025) (cleaned up)). Indeed, where a petitioner "was previously released

following a determination that he posed no flight risk or danger to the community, and absent any new evidence showing a material change in circumstances, the risk of erroneous detention without a hearing is substantial." *Alegria Palma*, No. 25-cv-1942-BJC-MMP, Dkt. No. 14 at *6.

The requirement that ICE conduct a pre-deprivation hearing to determine whether changed circumstances justify *re-detention* is especially crucial to safeguard Due Process because the prior "[r]elease reflects a determination by the government that the noncitizen is not a danger to the community or a flight risk." *Saravia*, 280 F. Supp. 3d at 1176; *see also* 8 C.F.R. 1236.1(c)(8) (authorizing release of noncitizens under 1226(a) if they "would not pose a danger to property or persons," and are "likely to appear for any future proceeding"); 8 C.F.R. 212.5(b) (authorizing parole from custody of noncitizens deemed "neither a security risk nor a risk of absconding"). "To be lawful" any re-detention "must be based on evidence that the circumstances relevant to that original release decision have changed." *Saravia,* 280 F. Supp at 1196; *see also Sanchez*, 2025 WL 2770629 at *3 ("To satisfy due process, those changed circumstances must represent individualized legal justification for detention." (internal citation omitted)). Where, as with the Arbitrary Re-detention Policy, the government fails to conduct *any* individualized determination of whether changed circumstances justify re-detention—let alone pre-deprivation hearings—the risk of erroneous deprivation is too high to comport with Due Process.

Finally, Defendants can claim no legitimate countervailing government interest in re-detention under the policy where they do not conduct individualized determinations of changed circumstances regarding flight risk or dangerousness, which are the only two permissible justifications for immigration detention. *Zadvydas*, 533 U.S. at 690.

To the extent that Defendants seek to justify re-detention "to meet an administrative quota, or because the government has not yet established constitutionally required pre-detention procedures," or because providing pre-

deprivation procedures would be "fiscally or administratively onerous," those excuses are not legitimate government interests that outweigh class members' liberty interests. *Garro Pinchi I*, 792 F. Supp. 3d at 1036. Compared to the "staggering" "costs to the public of immigration detention," *Hernandez*, 872 F.3d at 996, "[t]he effort and cost required" of providing a hearing "is minimal." *Doe v. Becerra*, 787 F. Supp. 3d 1083, 1094 (E.D. Cal. 2025).

A textbook *Mathews* analysis illustrates that the Arbitrary Re-detention Policy likely violates Procedural Due Process, or, at minimum, raises serious questions going to the merits of Plaintiffs' claim that the policy is contrary to constitutional right under APA 706(2)(B). Indeed, a growing number of district courts around the country—including this one—have so held.[11]

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For these reasons, it is "necessary" and "appropriate" for the Court to postpone the effective date of Defendant-Respondents' new Arbitrary Re-detention Policy on a class-wide basis while this litigation proceeds. 5 U.S.C. 705.

II. The Arbitrary Re-Detention Policy Causes Irreparable Harm

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury,'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), as does "[d]eprivation of physical liberty," *Arevalo v. Hennessy*, 882 F.3d 763, 767 (9th Cir.

[11] *See, e.g.*, *Singh v. LaRose*, No. 26-CV-0556-JES-VET, 2026 WL 353355 (S.D. Cal. Feb. 9, 2026); *Luo v. LaRose*, No. 25-cv-3848-LL-VET, 2026 WL 202872 (S.D. Cal. Jan 27, 2026); *Karokhel v. LaRose*, No. 25-cv-3751-JLS-KSC, 2026 WL 35976 (S.D. Cal. Jan. 6, 2026); *Gil v. Warden, Otay Mesa Det. Ctr.*, No. 3:25-cv-03279-DMS-VET, 2025 WL 3675153 (S.D. Cal. Dec. 17, 2025); *Prieto-Cordova v. LaRose*, No. 25-cv-2824-CAB-DDL, 2025 WL 3228953 (S.D. Cal. Nov. 19, 2025); *Faizyan v. Casey,* No. 25-cv-02884-RBM-JLB, 2025 WL 3208844 (S.D. Cal. Nov. 17, 2025); *Ramazan M. v. Andrews,* No. 25-cv-01356-KES-SKO (HC), 2025 WL 3145562 (E.D. Cal. Nov. 10, 2025); *Gomez Vilela v. Robbins*, No. 25-cv-01393-KES-HBK (HC), 2025 WL 3101334 (E.D. Cal. Nov. 6, 2025); *Pablo Sequen v. Albarran*, No. 25-cv-06487-PCP, 2025 WL 2935630 (N.D. Cal. Oct. 15, 2025); *Hyppolite v. Noem*, No. 25-cv-4304 (NRM), 2025 WL 2829511 (E.D. N.Y. Oct. 6, 2025); *Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Ramirez Tesara v. Wamsley*, No. 25-cv-01723-MJP-TLF, 2025 WL 2637663 (W.D. Wash. Sept. 12, 2025); *E.A. T.-B. v. Wamsley*, No. C25-1192-KKE, 2025 WL 2402130 (W.D. Wash. Aug. 19, 2025).

2018). Unconstitutional immigration detention also causes irreparable harm. *Hernandez*, 872 F.3d at 994. This alone justifies emergency relief. *See Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Additionally, Plaintiffs' experiences illuminate the irreparable harm that the re-detention policy causes putative class members. Mr. Fanfan was detained and separated from his wife and eleven-month-old U.S. citizen son for nearly two months. Fanfan Decl. ¶ 31. He suffered being unable to provide for his family or watch his baby grow, and was devastated to miss his son's first birthday due to his unlawful detention. *Id* ¶ 31, Supp. Fanfan Decl. ¶ 8. He suffered from chest pain for which he did not receive adequate medical attention while at the Otay Mesa Detention Center. Fanfan Decl. at ¶ 28. Moreover, his detention interfered with his ability to communicate with his lawyer and prepare for his asylum case. *Id.* ¶ 32. Ms. Maldonado Cruz likewise suffered immensely while detained and separated from her family, especially during her time of grief in the wake of her father's death. Maldonado Cruz Decl. ¶¶ 29-30. She could not reliably speak with her mother in Honduras while detained, which made matters even more difficult. *Id.* ¶ 30. She struggled not being able to provide for her family or properly continue her immigration case. *Id.* ¶¶ 31-33. Mr. Angel Mendez suffered being away from his wife and U.S. citizen daughters and being unable to provide for his family. Angel Mendez Decl. ¶ 21. He was "extremely worried" that his family could have lost their housing had he not gotten out of detention before January of this year. *Id.* He, too, missed his youngest daughter's 15-year-old birthday, a major milestone in his culture. *Id.* at 23; Supp. Angel Mendez Decl. ¶ 12.

Just as Plaintiffs did, putative class members are suffering and will suffer irreparable harm from their unlawful detention, thus militating in favor of preliminary relief.

III. The Balance of the Equities and the Public Interest Favor Relief

Where the government is the opposing party, the balancing of harms and the public interest merge. *Immigr. Defs. L. Ctr.* , 145 F.4th at 994 (citing *Nken v. Holder*, 556 U.S. at 435). Here, they favor preliminary relief.

"[N]either equity nor the public's interest are furthered by allowing violations of federal law to continue." *Galvez v Jaddou*, 52 F 4th 821, 832 (9th Cir. 2022); *see also Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."); *California v. Azar,* 911 F.3d 558, 581 (9th Cir. 2018) ("The public interest is served by compliance with the APA."); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("[A party] cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations."). In this case, postponement would simply require Defendants to stop violating the law and the Constitution and to operate temporarily under their prior policies, and it would restore class members to the status quo prior to the legal violation, which the equities favor.

Moreover, any "alleged injuries to the Executive's immigration agenda that are articulated in general terms without concrete evidence of prejudice to the government amount to only a weak showing of governmental harm." *Garro Pinchi*, 2025 WL 3691938 at *32 (cleaned up).

Thus, the balance of the equities and public interest favor Plaintiffs, and this Court should issue preliminary relief.[12]

IV. This Court Has Authority to Order Class-Wide Postponement

In similar litigation, the government has often recited a familiar list of jurisdictional arguments in a desperate attempt to avoid the merits. Plaintiffs address

[12]In light of the gravity of the harms, preliminary relief is warranted even if Plaintiffs only show "serious questions going to the merits," as opposed to a likelihood of success, because the balance of hardships tips so sharply in favor of Plaintiffs under the Ninth Circuit's alternative sliding-scale test. *See Fraihat*, 16 F.4th at 635.

but a few here.

First, any argument that the Court cannot grant the class-wide relief Plaintiffs seek is meritless. The Ninth Circuit has explicitly acknowledged that courts have authority to order APA 705 stay or postponement relief to the parties before the court, which here includes the putative class (should this Court certify it). *Immigr. Defs. L. Ctr.*, 145 F.4th at 995-96 (affirming APA 705 postponement order as applied to the parties to the litigation). Any argument that a class-wide stay is barred by 8 U.S.C. 1252(f)(1) has been neatly discarded by the Ninth Circuit. *Nat'l TPS All. v. Noem*, 150 F.4th 1000, 1018 (9th Cir. 2025) ("1252(f)(1) does not prohibit relief in the form of a stay or postponement of agency action under the APA."); *see also Immigr. Defs. L. Ctr.*, 145 F.4th at 990 ("we hold that § 1252(f)(1) does not bar the district court's stay pursuant to § 705 of the APA pending further review of the merits of Plaintiffs' APA challenge").

Second, the INA does not strip this Court of jurisdiction. The jurisdictional bar at 8 U.S.C. 1252(b)(9) does not apply in this case because Plaintiffs do not seek review of any removal orders. Indeed, by definition, no putative class members even have removal orders. For similar reasons, Section 1252(g) does not apply because it should be read "narrow[ly]" to bar review only over the "three discrete actions," all involving exercises of discretion, named in the statute. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999). The re-detention policy at issue is not a "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. 1252(g). Instead, this case raises "purely legal question[s]" regarding the lawfulness of the policy, which § 1252(g) does not foreclose. *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004). The provision "does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Ibarra-Perez v. United States*, 154 F.4th 989, 997 (9th Cir. 2025). Finally, Section 1252(g) does not bar the Due Process claims Plaintiffs raise. *Walters v. Reno*, 145 F.3d 1032, 1032 (9th Cir. 1998).

Third, the APA does not independently bar review. Section 701(a)(2) disallows judicial review where "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The Supreme Court has held that circumstances meeting this standard are "rare," and only occur "where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). This is not such a circumstance. Indeed, "agency practice provide[s] a 'meaningful standard by which this court may review" its actions.'" *Garro Pinchi*, 2025 WL 3691938 at *24 (quoting *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015). As the court in *Garro Pinchi* observed,

> DHS's prior practice of re-detaining only those noncitizens whom it individually determined to have a material change in circumstances provides such a standard. Even if DHS's recent departure from that practice could conceivably fall within its broad discretion under the relevant statutes . . . DHS's prior practice provides a benchmark against which to measure whether the agency justified its choice on specious grounds, failed to satisfy the general requirements of reasoned agency decisionmaking, or failed to comply with its own regulations. *Id.* In other words, the prior practice provides law to apply in determining whether the new agency action is arbitrary and capricious.

2025 WL 3691938 at *24 (internal quotations omitted). Thus, APA 701(a)(2) does not bar review.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Class-Wide Order Postponing the Effective Date of the Agency Action under 5 U.S.C. 705.

Dated: February 25, 2025

Respectfully submitted,

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