UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION

LARYSA KOSTAK, *Petitioner*, v. DONALD J. TRUMP, et al. *Respondents*.	Civil Action No. 3:25-cv-1093 Judge Jerry Edwards Jr.

MOTION FOR RELEASE PENDING ADJUDICATION OF PETITIONER'S HABEAS CORPUS PETITION AND, AS APPLICABLE, HER MOTION FOR A TERMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Petitioner Larysa Kostak ("Larysa" or "Petitioner") submits this motion for immediate release pending adjudication of (1) her temporary restraining order (ECF No. 3, "TRO"), and (2) her habeas corpus petition (ECF No.1), upon which her TRO was premised.

As detailed in the attached memorandum of law, this Court has inherent authority to grant Petitioner's release. *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974).

This afternoon (July 31, 2025), Respondents were contacted regarding this Motion for Release and noted that they object to same.

Dated: July 31, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on July 31, 2025, I electronically filed the foregoing document, supporting documents, and proposed order with the Clerk of the Court using the CM/ECF system and that a courtesy copy of this Motion and all attachments thereto and the related Petition in this matter will be sent today, July 31, 2025, to the United States Attorney's Office for the Western District of Louisiana, at the following email addresses:

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MEMORANDUM IN SUPPORT OF MOTION FOR RELEASE PENDING ADJUDICATION OF PETITIONER'S HABEAS CORPUS PETITION AND, AS APPLICABLE, HER MOTION FOR A TERMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Petitioner Larysa Kostak ("Larysa" or "Petitioner") submits this memorandum in support of her request for immediate releasing pending adjudication of (1) her temporary restraining order (ECF No. 3, "TRO"), and (2) her habeas corpus petition (ECF No.1), upon which her TRO was premised.

This Court has the inherent authority to release habeas petitioners pending adjudication of their petitions. *See Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974); *Nelson v. Davis*, 739 F. App'x 254, 254–55 (5th Cir. 2018) (restating test from *Calley*); *Singh v. Gillis*, No. 5:20-CV-96, 2020 WL 4745745, at *2 (S.D. Miss. June 4, 2020) (applying bail adjudication to disposition of noncitizens' habeas petitions challenging immigration confinement) (collecting cases and relying on *Mapp v. Reno*, 241 F.3d 221, 230 (2d. Cir. 2001))). This authority ensures that the writ remains an effective remedy under extraordinary circumstances. *Id.* A habeas petitioner should be released pending resolution of their petition, where: (1) they raise substantial legal claims that have a high probability of success; and (2) extraordinary circumstances exist. *Calley v*, 496 F.2d at 702. Larysa meets both prongs of this legal test.

As an initial matter, Larysa raises substantial legal claims that have a high probability of success. First and foremost, there is little question that applying the mandatory detention provision to Larysa's circumstance was wrong based on the plain meaning of the statute—and that applying that provision to her without notice or process violated her right to procedural due process. Her arrest and attendant detention, which was precipitated by a policy determination to which no deference by this Court is owed, was an abuse of discretion, and accordingly unlawful. In a nutshell, Larysa is not subject to expedited removal and yet is being told she cannot be released because she is subject to the mandatory detention provision of that same law. That makes no sense

because Section 1225(b)(2) of Chapter 8 of the United States Code ("Section 1225(b)(2)") applies to individuals in expedited removal proceedings. Mandatory detention does not apply to individuals in Section 1226(a) proceedings of that same chapter—the provision that provides for bond eligibility and under which Larysa's case falls (as confirmed by the full merits hearing she currently has scheduled for October of this year).

Because Larysa is being detained in the absence of any criminal record or risk of flight (indeed, she was arrested at a required immigration court hearing), her detention also violates substantive due process. Moreover, because her arrest was premised on a ruse in the absence of any exigent circumstances, her seizure too was unlawful, rendering her detention the fruit of the poisonous tree. In sum, because Larysa has multiple viable claims, any one of which would entitle her to release, she has a high probability of succeeding on the merits of her habeas petition.

Second, Larysa' detention is extraordinary and requires immediate rectification because Respondents cannot unilaterally decide to detain a noncitizen based on a misapplication of federal statutory law that goes against the plain meaning of the text. This is particularly true where, as here, it relates to an individual that is neither a flight risk nor a danger to the community. On this record, release is appropriate. *See Mahdawi v. Trump*, *et al.* No. 2:25-CV-389, 2025 WL 1243135, at *14 (D. Vt. Apr. 30, 2025) (detention does "not benefit the public in any way" when a habeas petitioner "appears not to be either a flight risk or a danger to the community"); *Ozturk v. Trump*, *et al.*, No. 2:25-CV-374, 2025 WL 1420540, at *16 (D. Vt. May 16, 2025) (finding release appropriate where petitioner presents sufficient evidence demonstrating her detention is for a purpose other than danger or flight risk); *Khalil v. Joyce, et al.*, No. 2:25-cv-01963-MEF-MAH, Hr'g Tr. at *54-58 (D.N.J. June 20, 2025) (ordering release because petitioner was not a flight risk, nor a danger).

Because Larysa meets the standard set forth in *Calley*, as applied by lower courts in this Circuit to the immigrant habeas petitioner context, she should be released pending final adjudication of her TRO and habeas petition. 496 F.2d at 702; *Nelson v*, 739 F. App'x at 254–55; *Singh*, 2020 WL 4745745, at *2.

STATEMENT OF RELEVANT FACTS AND HISTORY

Larysa is a citizen and national of Ukraine who has resided in the United States since 2005. *See* Pet. at ¶36, ECF No. 1. Her asylum application is currently pending in immigration court, with an individual full merits hearing scheduled for October 27, 2025. *Id*. at ¶40. On the date of her arrest, she appeared in immigration court, at 26 Federal Plaza, in New York, New York, for her master calendar asylum hearing. *Id*. at ¶39. It was there, after the hearing that she was arrested. *Id*. at ¶40. In hindsight, the denial of her attorney's motion to appear via Webex for the routine master calendar hearing, which would set the date for her full merits asylum hearing, appears to have been for the sole purpose of ensuring her presence in court to effectuate her arrest. *Id*. at ¶39. Her arrest followed an unpublished Board of Immigration Appeals ("BIA") decision from May 22, 2025, which held contrary to prior precedent that all noncitizens who entered the United States without inspection ("EWI"), and not just those who presented at or near the border, were subject to mandatory detention under Section 1225(b)(2)(A). *Id*. at ¶11.

After she was seized outside of the courtroom, Immigration and Customs Enforcement ("ICE") detained Larysa in a cramped detention cell at 26 Federal Plaza; she sat there for days without any explanation concerning her detention. *Id*. at ¶41. On July 4, 2025, she was transferred to the Richwood Detention Center in Monroe, Louisiana, where she remains today, deprived of her liberty without due process of law. *Id*. at ¶43.

On July 8, 2025, the Department of Justice ("DOJ") issued a policy mandate instructing

immigration courts to deny bond to all EWIs under Section 1225(b)(2)(A), no matter when they entered the country, whether they had any criminal record, and regardless of whether they had been placed in expedited removal proceedings. *See* Ex. 1 (DOJ Policy); *see also* Mem. Supp. TRO at 3, ECF No. 3-1 (discussing ramifications of DOJ Policy). Larysa applied for bond the day after, on July 9, 2025, because she understood that her current asylum proceedings fell within the auspices of Section 1226(a)—not Section 1225(b). Pet. at ¶44, ECF No. 1; *see also* ECF No. 3-2 (bond application submitted to the immigration court). Although her bond application was set for a hearing, the merits of the application were not heard because she was informed on that day—July 23, 2025—that her detention was subject Section 1225(b), rendering her ineligible for bond. Pet. at ¶44, ECF No. 1.

This jurisdictional bar to Larysa's freedom failed to resonate with her because she is not subject to expedited removal proceedings. In fact, her Section 1226(a) asylum merits hearing has been set for October 27, 2025. *Id*. at ¶40. Faced with the prospect of remaining behind bars while subject to an unconstitutional application of Section 1225(b)(2)(A), Larysa retained habeas counsel to challenge her unconstitutional detention pursuant to her right to procedural and substantive due process, and her right to be free from unlawful seizure. *Id*. at ¶17.

Larisa respectfully moves this Court to release her pending the adjudication of her petition for habeas corpus and TRO.

LEGAL STANDARD

Courts have an inherent authority to release habeas petitioners pending adjudication of their petitions. *Calley* 496 F.2d at 702; *Nelson v*, 739 F. App'x at 254–55. In *Calley*, the Fifth Circuit explained that "bail should be granted . . . when the petitioner has raised substantial constitutional claims upon which [s]he has a high probability of success, and also when extraordinary or

exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *Calley*, 496 F.2d at 702. While *Calley* does not "explicitly extend" to the immigrant habeas context, district court cases in this Circuit, relying on the Second Circuit's decision in *Mapp*, so extended *Calley*. *See, e.g.*, *Singh*, 2020 WL 4745745, at *2 (adopting *Mapp* and collecting cases); *Sanchez v. Winfrey*, 2004 WL 1118718, at *2 (W.D. Tex. Apr. 28, 2004) (recognizing "the Court's authority to order release of habeas petitioners pending review of their writ applications by the Court").

When district courts in this Circuit consider "a habeas petitioner's fitness for bail," they analyze (1) whether the habeas petition itself raises "substantial claims," meaning that the claim has "some merit," *Ibarra v. Davis*, 786 Fed. Appx. 420, 423 (5th Cir. 2019) (quoting *Martinez v. Ryan*, 566 U.S. 1, 14 (2012)); and (2) whether "extraordinary circumstances" exist "that make the grant of bail necessary to make the habeas remedy effective.'" *See, e.g.*, *Singh*, 2020 WL 4745745, at *2 (citing *Mapp*, 241 F.3d at 230 (cleaned up)); *Sanchez*, 2004 WL 1118718, at *2 (same). Where petitioners would face "the very outcome they seek to avoid" (in short, if they remained in detention pending determination of the merits of their habeas petition), release is necessary to make the habeas remedy effective. *See Singh* WL 4745745 at *2; *see also Ozturk v. Trump,* No. 2:25-CV-374, 2025 WL 1420540, at *5 (D. Vt. May 16, 2025) (similar). *Mohammed H. v. Trump*, No. CV 25-1576 (JWB/DTS), 2025 WL 1334847, at *7 (D. Minn. May 5, 2025) (finding extraordinary circumstances included uncontested lack of dangerousness and "shifting post hoc explanations to justify the arrest").

ARGUMENT

I. Larysa's Habeas Petition Presents Substantial and Likely Meritorious Claims

Larysa raises multiple substantial claims that go to the core of her constitutional rights

and the purpose of the writ of habeas corpus—satisfying the first prong of the *Calley/Mapp* test. In particular, Larysa raises the following substantial and likely meritorious claims:

Count 1: Procedural Due Process Claim. Larysa's petition raises substantial claims that go to the core of procedural due process protections. "[T]he Fifth Amendment entitles noncitizens to due process of law . . . whether their presence here is lawful, unlawful, temporary, or permanent." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993) and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)); *see also* Mem. Supp. TRO, ECF No. 3-1, at 6-10 (discussing the reasons why Larysa's procedural due process rights were violated). "Noncitizens are also entitled to challenge through habeas corpus the legality of their ongoing detention," including "the lawfulness of detention when it is first imposed." *Velasco Lopez*, 978 F.3d at 850. "The Supreme Court has been unambiguous that executive detention orders, which occur without the procedural protections required in courts of law, call for the most searching review." *Id*. "These requirements take on particular significance when [the Court] consider[s] what actually happened to [Larysa]. [S]he was not 'detained'; [s]he was, in fact, incarcerated under conditions" that are substantially worse than "those imposed on criminal defendants sent to prison following convictions for violent felonies and other serious crimes. But in sharp contrast to them, the 'sum total of procedural protections afforded' to [Larysa] was far less." *Id*. at 850–51 (quoting *Boumediene v. Bush*, 553 U.S. 723, 783 (2008)).

In this case, Larysa is being denied her bodily freedom because the immigration court is following a policy mandate from the Department of Justice (issued on July 8, 2025), premised on a May 22, 2025 unpublished BIA decision, to which the federal courts owe no deference. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (holding that is the judiciary's role to interpret statutory language and to ascertain the rights of the parties). Larysa's right to

procedural due process has been violated in three ways:

First, the policy mandate at issue contravenes the plain meaning of the statute, which applies strictly to those individuals subject to expedited removal proceedings. Larysa is not subject to expedited removal proceedings, and as such she is not subject to mandatory detention. *See* Pet. at ¶5 (explaining that Larysa is in Section 1226(a)—not Section 1225(b)—proceedings and is thus eligible for bond and a release determination). Placing Larysa in mandatory detention violates her right to due process because the statutory text dictates a different result. *See, e.g.*, Order, *Lazaro Maldonado Bautista et al v. Ernesto Santacruz Jr et al.,* 5:25-cv-01873-SSS-BFM (Jul. 28, 2025) (finding Congress' intent for Sections 1225 and 1226 dictates that individuals like Petitioner are not subject to mandatory detention); *see also* Mem. Supp. TRO, ECF No. 3-1, at 10-11.

Second, Larysa was provided with no notice or process to challenge Respondents' tenuous application of Section 1225(b) to her Section 1226(a) proceedings. Respondents were required to make an individualized determination justifying her incarceration but failed to do so—presenting no "clear and convincing" evidence that applying Section 1225(b) to someone who has otherwise been placed in Section 1226(a) proceedings is lawful. Pet. at ¶6; *Rodriguez Vazquez v. Bostock*, --- F. Supp. 3d --- 2025 WL 1193850, *12 (W.D. Wash. Apr. 24, 2025) (explaining the plain textual meaning of Section 1226 and that Section 1225(b)(2) has been historically limited by its text and in practice); *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299, at *8 (D. Mass. July 7, 2025) (granting habeas petition based on same conclusion); *Benitez v. Francis*, 29-CV-5937, Oral Tr. at 39:2-15 (S.D.N.Y July 28, 2025) (finding Section 1225(b)(2) inapplicable to petitioner who clearly falls within the scope of Section 1226(a) and ordering immediate release as a result); *see also* Mem. Supp. TRO, ECF No. 3-1, at 7 (discussing *Mathews v. Eldrige,* 424 U.S. 319, 335 (1976), test and why its procedural due process requirements have not been met here).

Third—because her Section 1226(a) proceedings are continuing apace with the next hearing set for October 27, 2025—her arrest and detention under Section 1225(b) was an abuse of discretion that appears tied to increasing the quota for noncitizen arrests and not to any legitimate basis for applying mandatory detention to those in Section 1226(a) proceedings. Pet. at ¶¶10, 42, ECF No. 1. Arbitrarily and capriciously applying an unlawful statute to Larysa violates her right to procedural due process. *See United States ex rel. Accardi v. Shaugnessy,* 347 U.S. 260, 266-67 (1954) (emphasizing the importance of a fair hearing and due process, regardless of the outcome of that hearing); 5 U.S.C. § 706 (2)(A),(B),(C) (courts have jurisdiction to adjudicate unlawful agency action); *see also* Mem. Supp. TRO, ECF No. 3-1 at 9-10 (explaining the essential nature of a fair hearing, which has been denied here).

In sum, whether each aforementioned argument is considered separately or in tandem, Larysa raises a substantial claim that her procedural due process rights were violated when she was taken into custody on June 26, 2025—and that those rights continue to be violated each additional moment that she sits in immigration detention.

Count 2: Substantive Due Process. Larysa's petition also raises a substantial substantive due process claim. In the immigration context, the only permissible purposes for detention are preventing danger to the public and mitigating flight risk. *See Zadvydas*, 533 U.S. at 690-91. When these twin goals are not present, as is the case here, and there is additionally no statutory basis for mandatory detention, incarceration is not permissible. *See* Mem. Supp. TRO at 10-11, ECF No. 3-1. Because Larysa is neither a flight risk, nor a danger to her community, and falls within the scope of Section 1226(a) proceedings, her substantive due process claim is likely to succeed, thereby necessitating her release. *See* ECF No. 3-2 (bond application); *Ozturk*, 2025 WL 1420540, at *21 ("Where a detainee presents evidence that her detention, though discretionary, is motivated by

unconstitutional purposes in violation of the Due Process Clause, the Court may reasonably conclude the same in the absence of countervailing evidence"); *Mahdawi*, 2025 WL 1243135, at *14 (detention does "not benefit the public in any way" when a Petitioner "appears not to be either a flight risk or a danger to the community").

At bottom, if ICE wishes to detain a noncitizen under the detention authority provided by Section 1226(a), ICE must allow the noncitizen to "demonstrate to the satisfaction of the officer that 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. §§ 1236.1(c)(8), 236.1(c)(8); *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). Larysa was not afforded this opportunity when her bond hearing was summarily denied pursuant to Section 1225(b)(2)—this despite the fact that she poses no risk of flight or danger to the community. *See* ECF No. 3-2 (bond application).

Instead, she was detained by ICE without an individualized assessment, notice, or opportunity to be heard. This was done under an arbitrary and capricious policy geared towards arresting as many noncitizens as possible by declaring them subject to mandatory detention pursuant to the expedited removal statute, when they clearly fall outside of its ambit. *See* Pet. at ¶15; *see also e.g. Benitez v. Francis*, 29-CV-5937, Oral Tr. at 39:2-15 (S.D.N.Y July 28, 2025) (noting "the application of [Section] 1226 is clear just from the specific facts" of a petitioner having been residing for years in the United States); *id.* ("[Y]ou wouldn't consider someone who stays in a movie theater for 30 minutes without having gone to the box office in accordance with the movie theater's rules and obtained a ticket and sat down and then watched the first 30 minutes of the movie, you wouldn't describe that person as seeking admission."). Larysa's substantive due process claim is accordingly substantial and likely meritorious.

Count 3: Fourth Amendment. Larysa's arrest and attendant detention violated the Fourth

Amendment when she was taken into custody pursuant to an unlawful ruse to which no exigent circumstances attached. *See* Pet. at ¶¶78-82, ECF No. 1; Mem. Supp. TRO at 10-11, ECF No. 3-1; *see also SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310, 316 (5th Cir. 1981) ("When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations"); *see also Lewis v. United States*, 385 U.S. 206, 209 (1966) ("the various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual").

Larysa appeared in-person for her master calendar asylum hearing on June 26, 2025, after being denied the ability to appear via Webex with her attorney who had filed a motion requesting such an accommodation. *See* Pet. at ¶8. Although a number of other individuals on June 26, 2025 appeared via Webex for their hearings, Larysa appears to have been asked to come to court that day for the sole purpose of her arrest. *See* Pet. at ¶¶8-9, 39, 79, ECF No. 1. After all, ICE agents were waiting outside the courtroom with an administrative warrant in tow, prepared to immediately take her in after her appearance. *Id*. at ¶¶9, 40, 80. They did this without converting her Section 1226(a) proceedings into expedited removal proceedings (because they cannot), thereby seizing her absent any basis. *Id.* at ¶¶ 49. These courthouse arrests have occurred consistently at 26 Federal Plaza in New York, New York, where in-person court hearings have been used as a pretext for arrests. *See* Hayley Miller, *ICE arrests at NYC immigration court offers harrowing snapshot of Trump's crackdown* (Jul. 30, 2025 12:01 PM), https://www.msnbc.com/top-stories/latest/26-federal-plaza-ice-arrests-immigrants-trump-jacob-soboroff-rcna221970.

Larysa's wrongful Fourth Amendment arrest—which should have never occurred in the first place (as Larysa is not subject to mandatory detention and was neither a danger to the

community nor a flight risk)—is a substantial claim on which she is likely to succeed.

II. Larysa's Incarceration is Extraordinary

Larysa's incarceration is extraordinary because it is based on an unlawful courthouse arrest and the subsequent misapplication of federal statutory law that goes against the plain meaning of the text. In addition, her detention has no valid purpose as she is neither a danger to the community, nor a flight risk. *See* Pet. at ¶¶15, 71-73, 95, ECF No. 1; *see also id*. at ¶¶15,73 (she has no criminal record and appears for court hearings); ECF No. 3-2 (bond application demonstrating that she is an active member of her church and local community). Larysa's "release [thus] presents not a hint of danger to person or property," such that the "interests of justice dictate" granting bail in this case. *Sanchez,* 2004 WL 1118718, at *3 (finding petitioner's "residence, employment, relationships and financial condition are exceedingly stable," where the petitioner "has lived in the same city since she arrived in the United States," "has never been convicted of any criminal offense," or "has never been the subject of a lawsuit"); *see also Singh,* 2020 WL 4745745, at *2 (discussing examples that qualify as "extraordinary circumstances" in the bail habeas petition context); *Mohammed*, 2025 WL 1334847, at *7 (finding exceptional circumstances include uncontested "lack of dangerousness" and "shifting post hoc explanations to justify the arrest").

In the end, Larysa lacks "flight risk or dangerousness," *Ozturk,* 2025 WL 1420540, at *5—an extraordinary circumstance within the context of assessing bail eligibility in the immigrant habeas context. *See Leslie v. Holder*, 865 F. Supp. 2d 627, 638 (M.D. Pa. 2012); *Moss v. Miniard*, No. 18-CV-11697, 2024 WL 4326813, at *5 (E.D. Mich. Sept. 27, 2024); *United States v. Nkanga*, 452 F. Supp. 3d 91, 96 (S.D.N.Y. 2020); *Han Tak Lee v. Cameron*, No. 4:08-CV-1972, 2014 WL 4187590 (M.D. Pa. Aug. 22, 2014); *Hall v. San Francisco Superior Ct*., No. C 09-5299 PJH, 2010 WL 890044, at *13 (N.D. Cal. Mar. 8, 2010); *Rado v. Manson*, 435 F. Supp. 349, 350 (D. Conn.

1977). Accordingly, her incarceration is extraordinary. *See Zadvydas v. Davis*, 533 U.S. 690, 691 (2001) (explaining the sole purposes of immigration detention being to ensure the appearance of noncitizens at future hearings and to prevent danger to the community pending the completion of removal).

CONCLUSION

Larysa's immediate release is necessary to ensure that her habeas corpus remedy is effective. No government interest can be served by incarcerating of a 50-year-old woman who is an active member of her community and a productive member of society. "The Government . . . has no interest in the continued incarceration of an individual who it cannot show to be either a flight risk or a danger to his community." *Ozturk*, 2025 WL 1420540, at *5. Larysa's liberty interest is harmed each day she spends in detention:

> When the Government incarcerates individuals, it cannot show to be a poor bail risk . . . it separates families and removes from the community breadwinners, caregivers, parents, siblings and employees. The Government articulates no public interest that any of this serves and we see none. . . . While such an infringement may be justified if the government presented a legitimate purpose for it, . . . the government has not done so in this case.

Id. If Larysa's claims are in fact proven, her detention at Richwood "will have been an unconstitutional deprivation with no public purpose or benefit." *Id.*

While Larysa's habeas petition ultimately challenges her detention as unlawful, the claims therein, including the prospect of a TRO and any preliminary injunctions, will likely require time to adjudicate. Granting her bail is an interim step that allows Respondents to continue to fight the allegations contested in the habeas, and yet also ensures Larysa's constitutional rights are not being violated every day she sits in detention.

Dated: July 31, 2025

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EXHIBIT 1

To All ICE Employees
July 8, 2025

Interim Guidance Regarding Detention Authority for Applicants for Admission

As you are all well aware, the U.S. Department of Homeland Security's (Department or DHS) detention authority under the immigration laws is extraordinarily broad and equally complex. The Department's authority to detain, and its authority or lack of authority to release, an alien from immigration detention varies based upon the circumstances of the case. This message serves as notice that DHS, in coordination with the Department of Justice (DOJ), has revisited its legal position on detention and release authorities. DHS has determined that section 235 of the Immigration and Nationality Act (INA), rather than section 236, is the applicable immigration detention authority for all applicants for admission. The following interim guidance is intended to ensure immediate and consistent application of the Department's legal interpretation while additional operational guidance is developed.

Custody Determinations

An "applicant for admission" is an alien present in the United States who has not been admitted or who arrives in the United States, whether or not at a designated port of arrival. INA § 235(a)(1). **Effective immediately, it is the position of DHS that such aliens are subject to detention under INA § 235(b) and may not be released from ICE custody except by INA § 212(d)(5) parole.** These aliens are also ineligible for a custody redetermination hearing ("bond hearing") before an immigration judge and may not be released for the duration of their removal proceedings absent a parole by DHS. For custody purposes, these aliens are now treated in the same manner that "arriving aliens" have historically been treated. **The only aliens eligible for a custody determination and release on recognizance, bond, or other conditions under INA § 236(a) during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237, with the exception of those subject to mandatory detention under INA § 236(c).**

Moving forward, ICE will not issue Form I-286, *Notice of Custody Determination*, to applicants for admission because Form I-286 applies by its terms only to custody determinations under INA § 236 and part 236 of Title 8 of the Code of Federal Regulations. With a limited exception for certain habeas petitioners, on which the Office of the Principal Legal Advisor (OPLA) will individually advise, if Enforcement and Removal Operations (ERO) previously conducted a custody determination for an applicant for admission still detained in ICE custody, ERO will affirmatively cancel the Form I-286.

Because the position that detention is pursuant to INA § 235(b) is likely to be litigated, however, OPLA will need to make alternative arguments in support of continued detention before the Executive Office for Immigration Review. Accordingly, ERO and Homeland Security Investigations (HSI) should continue to develop and obtain evidence, including conviction records, to support OPLA's arguments of dangerousness and flight risk in those bond proceedings.

Re-detention

This interpretation does not impose an affirmative requirement on ICE to immediately identify and arrest all aliens who may be subject to INA § 235 detention. Rather, the custody provisions at INA § 235(b)(1)(B)(ii), (iii)(IV), and (b)(2)(A) are best understood as prohibitions on release once an alien enters ICE custody upon initial arrest or re-detention.

This change in legal interpretation may, however, warrant re-detention of a previously released alien in a given case. Until additional guidance is issued, ERO and HSI should consult with OPLA prior to rearresting an alien on this basis.

Parole Requests by Previously Released Aliens

It is expected that ICE will see an increase in applicants for admission previously released under INA § 236(a) requesting documentation of parole pursuant to INA § 212(d)(5) in order to establish eligibility for certain immigration benefits, including employment authorization and adjustment of status. DHS does not take the position that prior releases of applicants for admission pursuant to INA § 236(a) were releases on parole under INA § 212(d)(5) based on this change in legal position. Accordingly, ERO and HSI are not required to "correct" the release paperwork by issuing INA § 212(d)(5) parole paperwork.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION

LARYSA KOSTAK,

Petitioner,

v.

DONALD J. TRUMP, et al.

Respondents.

Civil Action No. 3:25-cv-1093

Judge Jerry Edwards Jr.

ORDER

Considering Petitioner's Motion (ECF No. ____), it is ordered that the Motion for Release is GRANTED.

Respondents are to release the Petitioner forthwith.

_____

HON. JERRY EDWARDS JR.