JON M. SANDS
Federal Public Defender
KEITH J. HILZENDEGER #023685
Assistant Federal Public Defender
250 North 7th Avenue, Suite 600
Phoenix, Arizona 85007
(602) 382-2700 voice
keith_hilzendeger@fd.org
Attorneys for Petitioner Aguilar Olarte

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Victor Alfonso Aguilar Olarte,

Petitioner,

vs.

David R. Rivas, Warden, et al.,

Respondents.

No. 2:25-cv-1662-PHX-DLR (ESW)

Reply in Support of Petition for a Writ of Habeas Corpus and Motion for a Preliminary Injunction

The government has failed to show that Mr. Aguilar's[1] removal from the United States is likely to occur in the reasonably foreseeable future. Although an immigration judge has ordered Mr. Aguilar removed to Colombia, the country of which he is a citizen, she also granted his request for deferral of removal to that country under the Convention Against Torture. The government has produced evidence that three other countries in Latin America have refused to

[1] Petitioner's full name is Victor Alfonso Aguilar Olarte. The docket in this matter incorrectly spells the third of these names as "Aguila." The Court should correct this typographical error.

For its part, the government uses the surname Olarte to refer to petition. But the immigration records that respondents provided indicate that his father's surname is Aguilar and his mother's is Olarte. "As a general rule, according to Spanish naming conventions, Hispanics typically have two surnames. The first last name is the father's family name, and the second last name is the mother's paternal family name. A person may be known by merely his father's name, as in English; still in all formal cases, or where the father's name is common, the mother's name is often used in addition to the father's name." *Ventura de Paulino v. New York City Dep't of Education*, 959 F.3d 519, 524 n.4 (2d Cir. 2020) (citations omitted). Following this convention, this document will refer to petitioner using the surname Aguilar.

accept him for removal. In the last eight months, respondents appear to have made one attempt to remove Mr. Aguilar to yet another third country, although the documentation of this effort is vague and incomplete. This country, Mexico, has not yet responded to ICE's request, which was made over a month ago. The government thus has failed to defeat Mr. Aguilar's claims that his detention violates the Due Process Clause of the Fifth Amendment. This Court should grant the petition and order him released from immigration detention on an order of supervision.

Background

Mr. Aguilar was born in Colombia in 1985. (DISC-1)[2] On June 10, 2023, Mr. Aguilar "applied for entry at the San Ysidro West Port of Entry" using the CBP One app. (DISC-2)[3] He presented himself with a Colombian passport and identified a point of contact in the United States who lives in San Diego. (DISC-2) He was paroled into the United States. He was also charged with being removable because he was an arriving alien who applied for admission without a valid entry document and was thus inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I). (DISC-2, DISC-3) He provided the address of a sponsor who lives in San Diego. (DISC-2)

On November 14, 2023, Mr. Aguilar appeared at the San Diego Immigration Court for a master calendar hearing in his removal proceedings. Through counsel, he requested asylum, withholding of removal, and protection under the Convention Against Torture. (DISC-7) The government moved to dismiss the removal proceedings, and the judge did so. (DISC-7, DISC-8)

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[2] Along with this document, Mr. Aguilar is filing for the record some of the documents he received from the Department of Homeland Security pursuant to the Court's discovery order. This filing, consisting of a single pdf document of 74 pages, will be submitted separately under seal. What is effectively a table of contents will be available for the public docket. The documents will be referenced here as "DISC-xxx," where xxx is the pdf page of the filing.

[3] In his amended petition, Mr. Aguilar said that he presented himself for entry on June 10, 2022, rather than 2023. (Dkt. #12 at 3 ¶ 10) The discovery provided by respondents has allowed Mr. Aguilar to correct this discrepancy.

On February 14, 2024, Mr. Aguilar was arrested near the Border Patrol checkpoint in San Clemente, California. (CASD Docs. 2)[4] He was driving a 2007 Hyundai Entourage minivan in which he was carrying two passengers. (CASD Docs. 2) Border Patrol agents suspected that the passengers were not lawfully present in the United States. (CASD Docs. 3) Mr. Aguilar denied knowing that fact. (CASD Docs. 3) He was charged by complaint in the United States District Court for the Southern District of California with two felony counts of alien smuggling, in violation of 8 U.S.C. § 1324(a)(1)(A)(ii). (CASD Docs. 1, 5, 6) He was ordered detained pending trial. (CASD Docs. 8)

To settle these charges, Mr. Aguilar and the U.S. Attorney entered into a plea agreement. He agreed to plead guilty to one misdemeanor count of being an accessory after the fact to illegal entry, in violation of 18 U.S.C. § 3 and 8 U.S.C. § 1325. (CASD Docs. 9–10, 14) In exchange, the U.S. Attorney agreed to dismiss a second misdemeanor count of accessory after the fact to illegal entry, not to seek mandatory minimum punishment for the originally-charged § 1324 violation, and to recommend a sentence of one year of probation. (CASD Docs. 14–15, 20) On May 2, 2024, a magistrate judge sentenced Mr. Aguilar according to the recommendation in the plea agreement to one year of unsupervised probation. (CASD Docs. 11–12)

In connection with his arrest in San Clemente, another notice to appear was issued to Mr. Aguilar, charging him with being removable as inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) as an alien present in the United States without being admitted to the United States. (DISC-30, DISC-31) ICE officers transferred Mr. Aguilar from pretrial detention to immigration detention after sentencing in the Southern District. (DISC-38) At that time, ICE noted that Mr. Aguilar claimed a fear of persecution if he were returned to Colombia. (DISC-38)

Mr. Aguilar's removal proceedings resumed. With the assistance of pro bono counsel, Mr. Aguilar presented a case for asylum, withholding of removal, and protection under the

[4] These documents, from Mr. Aguilar's criminal case in the United States District Court for the Southern District of California, are attached as the exhibit to the motion for judicial notice filed September 2, 2025, and found at Dkt. #41. These documents will be cited "CASD Docs. xxx," where xxx is the page number of the pdf file that is the exhibit to Dkt. #41.

Convention Against Torture. On December 19, 2024, an immigration judge ordered Mr. Aguilar removed to Colombia, but also granted him deferral of removal to that country under the Convention Against Torture. (DISC-43 to DISC-46) Neither he nor the government appealed the immigration judge's order, so it became final on January 21, 2025, when the time expired for either party to do so. He remained in immigration custody. *See* 8 U.S.C. § 1231(a)(2) (requiring detention of aliens ordered removed for 90 days after the removal order becomes final).

On December 30, 2024, ICE sent requests to the consulates for Peru (DISC-47), Argentina (DISC-62), and Chile (DISC-66) that they accept Mr. Aguilar for removal. Each of these countries refused to accept Mr. Aguilar for removal. The Peruvian consulate directed ICE to the Colombian consulate and refused to accept him. (DISC-68) The Chilean (DISC-63 to DISC-66) and Argentinian (DISC-61 to DISC-62) consulates also refused to accept him. The government has produced no evidence to indicate that Mr. Aguilar did not cooperate with these efforts to remove him to Peru, Argentina, or Chile.

Since it made the requests to Peru, Argentina, and Chile, ICE has made only one further request to any other third country to see if any other third country is willing to accept him for removal. On July 30, 2025, according to respondents and their counsel, an ICE officer called an unspecified official of the Mexican government to inquire whether that country would accept Mr. Aguilar for removal. (Dkt. #44-3 at 2) As recently as August 25, 2025, the government confirmed that ICE had no plans to remove Mr. Aguilar to Uganda in particular. (RT 8/25/2025 at 3:19–24) And as of September 10, 2025, respondents have not received any response to their telephonic request, unsupported by any written request or supporting documentation, that the Mexican government accept Mr. Aguilar for removal.

Despite this solitary attempt in the last eight months to locate a country other than Colombia, Argentina, Chile, or Peru to which to remove Mr. Aguilar, ICE has told him that this effort is ongoing and certain to succeed. On August 24, 2025, it delivered a notice to him explaining why it was continuing to detain him even though his removal order had been final since January 21, 2025. "ICE continues to seek your removal to a third country on your behalf.

ICE is confident that your removal from the United States will occur in the foreseeable future. Therefore, you are to remain in ICE custody. In addition, ICE is unable to conclude that the factors set forth at 8 C.F.R. § 241.4(e) have been satisfied." (DISC-72) (The § 241.4(e) factors describe criteria for releasing from detention an alien who has been ordered removed.) Even though in the last eight months ICE has made one single telephonic request, unsupported by any written request or other documentation, that Mexico accept him for removal, it continues to believe that there is a significant likelihood that Mr. Aguilar will be removed in the reasonably foreseeable future. (DISC-74) And based on this belief, the government is telling this Court that Mr. Aguilar's removal is imminent. (Dkt. #24 at 5)

Argument

1. The government has failed to carry its burden to show that there is any likelihood that Mr. Aguilar will be removed in the reasonably foreseeable future, and so this Court should grant the petition and order him released from respondents' custody.

In the first ground for relief set forth in his amended habeas petition, Mr. Aguilar contends that his detention violates the Due Process Clause of the Fifth Amendment because there is no significant likelihood that he will be removed from the United States in the reasonably foreseeable future. (Dkt. #12 at 7) Mr. Aguilar's detention is presently authorized by 8 U.S.C. § 1231(a)(6) because he was ordered removed as inadmissible under 8 U.S.C. § 1182 and more than 90 days have elapsed since his removal order became final. The Supreme Court has interpreted § 1231(a)(6) to permit detention of an alien with a final order of removal only during "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The statute "does not permit indefinite detention." *Id.* If "removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by" § 1231. *Id.* at 699–700. Once the alien has been detained for six months after the removal order is issued, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 701.

Here, the government has confirmed what Mr. Aguilar alleged in his amended petition. There is good reason to believe that he will not be removed from the United States in the reasonably foreseeable future. An immigration judge has granted him deferral of removal to Colombia under the Convention Against Torture. The governments of Peru, Argentina, and Chile have refused to accept him for deportation. Mexico has not responded to ICE's telephonic-only request to accept him for removal. Thus Mr. Aguilar has met his burden under *Zadvydas* to show that there is no significant likelihood of removal in the reasonably foreseeable future.

The government has not rebutted this showing. Indeed, it scarcely has adduced any evidence that it can. This is so, for two reasons.

First, the government has miscalculated the endpoint of the presumptively-reasonable *Zadvydas* period. Both parties agree that Mr. Aguilar's removal order became final on January 21, 2025. (Dkt. #12 at 5 ¶ 16; Dkt. #24 at 5) Both parties also agree that the statutory 90-day removal period, *see* 8 U.S.C. § 1231(a)(1)(B)(i), ended on April 21, 2025. (Dkt. #24 at 5) But the government is wrong that the *Zadvydas* period begins only when the removal period ends. *Zadvydas* explains that the six-month presumptively-reasonable-detention period begins when the statutory removal period begins. In *Zadvydas*, the Court interpreted § 1231 to allow for detention only during "a period reasonably necessary to secure removal," a period that is measured "primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal." 533 U.S. at 699. Although in 1996 Congress set the removal period at 90 days believing that "all reasonably foreseeable removals could be accomplished in that time," the Court in *Zadvydas* adopted the more lenient presumption that removals could be accomplished within six months after a removal order becomes final. Thus the government is wrong to assert that Mr. Aguilar's *Zadvydas* claim is premature. (Dkt. #24 at 5) It ripened on July 21, 2025, six months after the removal order became final. The government is thus wrong to say that it will ripen only on October 18. (Dkt. #24 at 5)

Second, in addition to miscalculating the *Zadvydas* period, the government is telling this Court, as it has told Mr. Aguilar, that "his removal is significantly likely in the reasonably

foreseeable future." (Dkt. #24 at 5) But there is no evidence to support this assertion. It has already struck out swinging when the governments of Peru, Argentina, and Chile refused to accept him for removal. The only support for the government's assertion is the declaration of a deportation officer that was included with its response to the amended petition. But the three specific paragraphs of this declaration to which it points (Dkt. #24-2 at 3 ¶ 20, 3–4 ¶ 23, and 4 ¶ 26) say nothing about the likelihood of removal. These paragraphs simply explain (1) that representatives of the governments of Argentina and Chile have refused to accept Mr. Aguilar; (2) that Mr. Aguilar was transferred from Otay Mesa Detention Center to San Luis Regional Detention Center; and (3) that ICE decided to continue to detain Mr. Aguilar.

The government adds that removal is likely in the foreseeable future because ICE "is in contact with the Mexican consulate." (Dkt. #24 at 5–6) This assertion is, at best, an overstatement. The fact that ICE may have made one phone call to one unspecified Mexican official does not mean that it is "in contact" with the Mexican consulate. ICE has no documentation of who it contacted, whether it submitted a formal written request (as it did with the governments of Argentina, Chile, and Peru), and whether it forwarded any required supporting documentation. And respondents' counsel admits that this request has met with radio silence from the Mexican government. Respondents' failure to document its attempt to obtain permission to deport Mr. Aguilar to Mexico beyond a single, vague notation in an ICE-maintained internal database, suggests that its "contact" with the Mexican contact is entirely one-sided. (*See* Dkt. #44 at 3)

In sum, the government has failed to meet its burden to rebut Mr. Aguilar's showing that his removal is not likely in the reasonably foreseeable future. This Court should grant Mr. Aguilar's petition and order him released from detention.

2. The government has not refuted Mr. Aguilar's contention that his detention violates the Due Process Clause because he has not had a meaningful opportunity to challenge his removal to any third country by means of a habeas petition.

In his second ground for relief, Mr. Aguilar contends that his detention violates the Due Process Clause to the extent that it is meant to facilitate his removal to any country other than

Colombia, because he has not received notice of the country and a meaningful opportunity to challenge removal to that country in a habeas proceeding. (Dkt. #12 at 8 ¶¶ 25–27) But the government's attempt to reframe Mr. Aguilar's contentions relies on authority that the Supreme Court has said is unenforceable.

On April 7, 2025, the Supreme Court issued a per curiam decision in *Trump v. J.G.G.*, 604 U.S. 670 (2025). In that case, a district court had provisionally certified a class of "all noncitizens in U.S. custody who are subject to" a presidential proclamation that declared certain Venezuelan nationals who were supposed members of the gang Tren de Aragua to be removable under the Alien Enemies Act. *Id.* at 671. The class members sought review in federal court of their inclusion in the set of detainees who are subject to the proclamation. *Id.* The district court also enjoined the government from removing any of the putative class members from the United States. *Id.* The Supreme Court vacated the injunction and the class certification. It held that a class action was not the proper vehicle for bringing the challenge to their detention and ultimate removal. *Id.* at 672. Even though the class members were not formally contesting their detention, only their classification as members of Tren de Aragua, "because their claims for relief necessarily imply the invalidity of their confinement and removal under the AEA, their claims fall within the core of the writ of habeas corpus and thus must be brought in habeas." *Id.* (citing *Nance v. Ward*, 597 U.S. 159, 167 (2022)). And because the class members were detained in Texas, venue was improper in the District of Columbia, where the suit had been brought. *Id.* (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004)). Based on this holding, Mr. Aguilar contends that his challenge to the validity of his detention, meant to facilitate removal to a third country, is properly before this Court.

The government portrays Mr. Aguilar's claim differently. It says that Mr. Aguilar merely argues "that removing him to other countries would violate the law and contravene 8 U.S.C. § 1231, entitling him to notice in order to contest removal to any third country before it occurs." (Dkt. #24 at 6) It complains that Mr. Aguilar is asking this Court to impose "unspecified, extra-statutory procedures" on ICE, and suggests that his claim "substantially overlaps and conflicts

with an existing nationwide class action entitled *D.V.D. v. U.S. Dep't of Homeland Sec.*," a case pending in the United States District Court for the District of Massachusetts. (Dkt. #24 at 6) It points to an April 18, 2025, order issued in that case; observes that Mr. Aguilar is a member of the class described in the Massachusetts April 18 order; and argues that "class membership is mandatory" such that Mr. Aguilar may not opt out of the class. (Dkt. #24 at 6) The government observes that Mr. Aguilar "fails to mention his class membership" in his amended petition. (Dkt. #24 at 6) The government then suggests that Mr. Aguilar cannot bring his claim before this Court because any ruling this Court might make on it could conflict with the relief that the Massachusetts court might order. (Dkt. #24 at 7)

The difficulty with the government's counternarrative is that it also leaves out an important detail. The Supreme Court fully stayed the Massachusetts April 18 order on June 23, 2025, over a month before the government filed its answer to Mr. Aguilar's habeas petition, thereby rendering the April 18 order "unenforceable." *See DHS v. D.V.D.*, 145 S. Ct. 2627, 2629 (2025). The Massachusetts court's provisional certification of the class has been undone, because the injunction favoring that putative class is unenforceable. *See id.* (explaining that other aspects of the April 18 order were also unenforceable in light of the Supreme Court's action to stay the injunction contained in it). Mr. Aguilar is not the one who has created a risk of undermining "consistency of treatment for similarly situated individuals" by bringing his claim in an individual petition before this Court where venue is unquestionably proper. (Dkt. #24 at 7) The Supreme Court did that when it stayed the Massachusetts April 18 order, effectively dissolving the class that the district court had provisionally certified. Coupled with the Court's ruling in *J.G.G.*, the Supreme Court has directed the putative class members to do exactly what Mr. Aguilar has done here—bring an individual petition in the district of confinement that contains all available direct *and indirect* challenges to the validity of his detention by immigration officials.

Apart from its procedural challenge to the propriety of Mr. Aguilar's bringing this claim before this Court in this habeas action, the government makes no effort to dispute the merits of

his constitutional claim regarding third-country removal. It has thus conceded that that claim should prevail through its silence. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012).

3. The government has not shown how a preliminary injunction is unwarranted.

The government says that Mr. Aguilar's request for a preliminary injunction is improper because he is "not seeking to merely preserve the status quo on a temporary basis," but instead "seeks an injunction that would alter the status quo by providing him the ultimate relief he seeks in this litigation." (Dkt. #24 at 7) But that is no reason not to grant the injunction, because this Court has the discretion to combine a ruling on the preliminary injunction with a ruling on the merits of Mr. Aguilar's claims. *See* Fed. R. Civ. P. 65(a)(2).

Nor has the government refuted Mr. Aguilar's showing that a preliminary injunction is unwarranted under the usual standards. First, he is almost certain to prevail on his claim, because (as he has shown) the government has adduced almost no evidence to rebut his showing that there is no significant likelihood of removal in the reasonably foreseeable future, and the scant evidence that it *has* adduced is not probative of that question. And because of this, he is suffering irreparable harm in the form of illegal detention, as he has previously argued. (Dkt. #13 at 2 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)))

Furthermore, the government's assertion that the public interest and balance of the equities favor it, not Mr. Aguilar, ignores another aspect of *Zadvydas*. The government agrees that these factors merge when a person applies for an injunction against the government. (Dkt. #24 at 9) And then it adds that the "public interest lies in the Executive's ability to enforce U.S. immigration laws and to keep convicted criminal aliens detained pending execution of their removal orders." (Dkt. #24 at 9 (citing *Zadvydas*, 533 U.S. at 699)) But in *Zadvydas* the Court observed that the "plenary power" that Congress has "to create immigration law" "is subject to important constitutional limitations." 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 942–43 (1983)). The statute that authorizes Mr. Aguilar's detention here, 8 U.S.C. § 1231, contains "no clear indication of congressional intent to grant the Attorney General the power to hold

indefinitely in confinement an alien ordered removed." *Id.* at 697. The public has no interest in continuing to imprison a person like Mr. Aguilar, whom the government has almost completely stopped trying to remove from the United States. The Supreme Court has already said that such imprisonment is unauthorized by statute. The public has no interest in seeing its government act unlawfully.

4. Rule 65 does not authorize imposing a bond, because the government will suffer no harm from a preliminary injunction that requires it to release Mr. Aguilar.

Finally, the government has asked the Court, if it should issue a preliminary injunction, to require Mr. Aguilar to post a bond. (Dkt. #24 at 9) Its argument equates the bond described in Fed. R. Civ. P. 65(c) to an appearance bond. But the two kinds of bond serve very different purposes. An appearance bond in this context is meant to "ensur[e] appearance in immigration proceedings." *Martinez v. Clark*, 124 F.4th 775, 786 (9th Cir. 2024). But it is unclear that there will be any future immigration proceedings. And it is equally unclear that there will be any future proceedings before this Court that require Mr. Aguilar's personal presence. The government has not asserted that it will be harmed by the injunction, and so Rule 65 does not authorize the bond. *See Gorbach v. Reno*, 219 F.3d 1087, 1092 (9th Cir. 2000) (no bond required where no evidence that defendants would suffer damages from a preliminary injunction). Accordingly, this Court has no authority to issue a bond that is "parallel" in amount to an "appearance bond." (Dkt. #24 at 9)

Conclusion

This Court should grant Mr. Aguilar's amended habeas petition, and order him released from immigration detention on supervision forthwith.

Respectfully submitted: September 15, 2025.

JON M. SANDS
Federal Public Defender

s/Keith J. Hilzendeger
KEITH J. HILZENDEGER
Assistant Federal Public Defender
Attorney for Petitioner Aguilar Olarte