UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Peymon Haidari, Plaintiff, Kristi Noem, Secretary of Homeland Security; Todd M. Lyons, Acting Director of Immigration and Customs Enforcement; Mary De Anda-Ybarra, El Paso ICE Field Office Director; ICE Facility Administrator (name currently unknown) at El Paso Enhanced Hardened Facility. Defendants.	No. 3:25-cv-00250-LS

PLAINTIFF'S REPLY TO THE DEFENDANTS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

The Fifth Amendment's Due Process Clause prohibits the government from depriving an individual of life, liberty, or property without due process of law. The Due Process Clause applies to all "persons" within the borders of the United States, "including [noncitizens], whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted); *Ceesay v. Kurzdorfer,* No. 25-CV-267-LJV, 2025 U.S. Dist. LEXIS 84258, *1 (W.D.N.Y. May 2, 2025) ("Noncitizens, even those subject to a final removal order, have constitutional rights . . . [a]nd while [DHS] might want to enforce this country's immigration laws efficiently, it cannot do that at the expense of fairness and due process."). Courts will engage in a two-step process to determine whether a procedural due process claim occurred: first, whether a protected liberty interest is at stake; and second, whether the procedures used to deprive that interest are constitutionally adequate. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted)).

Peymon Haidari was in Immigration and Customs Enforcement's (ICE) detention with an order of removal to Iran from March 16, 2000, until April 8, 2002, a period of time that far exceeds the 90-day removal period provided by 8 U.S.C. § 1231. *See* Exh. A (Report and Recommendation, *Haidari v. U.S*, 5:02-cv-00108-WEA (W.D. Ok. May 7, 2002)). After ICE determined that Haidari's removal was not reasonably foreseeable, they released him—as they were required to do—on an order of supervision, which Haidari has dutifully complied with for the last 23 years. ICE's re-detention of Haidari is not premised on any change in circumstances and does not restart the 90-removal period. ICE's actions in re-detaining Haidari violates procedural due process because it was done without fair procedures or legal justification.

Furthermore, ICE now asserts authority to remove Haidari to a third country if removal to Iran is not feasible without providing him meaningful notice and a fair opportunity to raise a fear-based claim prior to deportation to a third country. This approach violates the Fifth Amendment, the Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act 2 of 1998, and the treaty obligations of the United States.

At its core, this case presents exactly the type of unlawful government action the Fifth Amendment was designed to prevent. As the Fourth Circuit recently emphasized, due process is not dispensable, it is the "foundation of our constitutional order," and its absence "should be shocking not only to judges but to the intuitive sense of liberty that Americans far removed from courthouses still hold dear." *Abrego Garcia v Noem*, 2025 WL 11351112 (4th Cir. April 17, 2025). Accordingly, the Court should declare Haidari's re-detention unlawful and order his release from ICE custody.

I. FACTUAL AND PROCEDURAL BACKGROUND

Haidari is a citizen and national of Iran who immigrated to the United States in 1984 when he was approximately 14 years old. He is married to a U.S. citizen and has two minor U.S. citizen children. Haidari was granted lawful permanent resident (LPR) status shortly after his admission. In or around April 1999, Haidari entered a plea of no contest to charges of possession of a controlled substance with intent to distribute and resisting, evading, or obstructing an officer. He was represented by counsel who advised him to plead guilty to the offense. As a result of his conviction, the immigration authorities detained Haidari and initiated a removal proceeding against him under 8 U.S.C. § 1229a (hereinafter "Section 240"). During this proceeding, Iran was designated as the country of removal. The IJ decided, and the Board of Immigration Appeals (BIA) affirmed, that Haidari should be deported to Iran. No other country was designated as the country of removal throughout the process.

Subsequently, Haidari sought post-conviction relief based on his trial counsel's admitted failure to advise him about the consequences of pleading guilty to the controlled substance offense. The court recognized that Haidari was the victim of ineffective assistance of counsel but denied relief for lack of prejudice. One of the reasons provided by the judge was that since Iran does not accept its deportees, Haidari was not affected by the deficient performance by his lawyer. The ruling failed to recognize the possibility of a third country removal and did not consider that part of the prejudice was the deprivation of the legal process—a jury trial—to which he was entitled. *Lee v. U.S.*, 137 S. Ct. 1958, 1965 (2017). Haidari has retained attorney Scott Davidson to seek a rehearing over the matter. *See* Exh. B (Davidson's affidavit). Davidson's detailed affidavit outlines multiple, substantive problems with the conviction, which is the root cause for ICE's unlawful re-detention of Haidari.

Under 8 U.S.C. § 1231(a)(1)(A), the government "shall remove" a noncitizen "from the United States within a period of 90 days." The 90-day removal period, in this case, started on March 16, 2000, which was the day when Haidari's appeal to the Board was dismissed. 8 U.S.C. § 1231(a)(1)(B)(i). While § 1231(a)(6) permits detention beyond the removal period in certain situations, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Zadvydas*, 533 U.S. at 699.

The government was unable to remove Haidari during the § 1231 removal time-period, so Haidari filed a writ of habeas corpus on January 29, 2002, arguing that his continued detention was unconstitutional because his removal to Iran was not reasonably foreseeable. *See* Exh. A. Thereafter, on April 8, 2002, the government released Haidari on an order of supervision (OSUP). Accordingly, on May 7, 2002, the District Court dismissed the Plaintiff's habeas action as moot. *Id.* For the last 23 years, Haidari has dutifully complied with this OSUP. He reports whenever DHS requires it. He has held work authorization and maintained gainful employment. He has no further arrests, has complied with the laws of the United States, and has not violated his OSUP in any way whatsoever.

Section 1231 does not permit the Defendants to re-detain Haidari to restart the removal period without process of law. Yet, that is exactly what they have done. On or around July 1, 2025, ICE re-detained Haidari based on the near 24-year-old order of removal. Although there has been no change in the diplomatic relationship between the U.S. and Iran, and they have previously failed to remove Haidari to Iran, the Defendants arrested Haidari for removal to Iran. Haidari's removal to Iran is still not reasonably foreseeable and the government has not shown otherwise.

This Court ordered the Defendants to show cause for its continued detention of Haidari by July 21, 2025. On July 21, 2025, the Defendants filed a response to the Court's order but failed to offer any factual evidence that removal was reasonably foreseeable or any legal basis justifying Haidari's re-detention. Instead, the Defendants argue that the (1) the Court lacks jurisdiction to consider Plaintiff's due process claim regarding third country removals; (2) ICE's current policies provide sufficient notice of any third country removal; (3) Plaintiff's challenge to his detention is premature under *Zadvydas*; (4) Plaintiff's detention is not in violation of any substantive or procedural due process right; and (5) EAJA fees are not available in a writ of habeas petition. *See* Defs.' Resp. to Habeas Pet., ECF No. 4. As explained below, these arguments are meritless, and the Court should grant Haidari the relief he seeks.

II. ARGUMENT

A. ICE's re-detention of Haidari is unlawful insofar as it violates the Fifth Amendment's Due Process Clause and fails under the *Zadvydas'* burden-shifting framework.

i. Haidari's re-detention violates the due process clause of the Fifth Amendment.

Haidari was released under an order of supervision over twenty years ago and has fully complied with his OSUP without incident. As part of his release, he was authorized to work, live freely with his U.S. citizen wife and U.S. citizen children, and build a stable life in the United States. He reasonably relied on ICE's representations that his supervised released would continue unless he violated the terms of his release or removal to Iran became reasonably foreseeable.[1] As such, Haidari has a protected liberty interest in his continued release and its termination must comply with due process. *See, e.g., Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Fifth Amendment's Due Process Clause] protects."); *Morrisey v. Brewer*, 408 U.S.

[1] Even in the unlikely scenario that removal to Iran becomes reasonably foreseeable, there is no reason to re-detain Haidari while ICE attempts to obtain a travel document. His past 23 years of law-abiding compliance on his OSUP, substantial family and community ties should assure any reasonable person that he is neither a danger nor a flight risk such that his detention is necessary while ICE's attempts to procure a travel document.

471, 482 (1972); *see also Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019) ("Just as people on pre-parole, parole, and probation status have a liberty interest, so too does Ortega have a liberty interest in remaining out of custody on bond."). As explained below, the process—or lack thereof—used by the Defendants to re-detain Haidari fails to satisfy even minimal due process under the Fifth Amendment.

In its response to the Court's order, the Defendants argue that Haidari's due process claim is premature under *Zadvydas* because he has not been detained for six months. This argument misunderstands the nature of Haidari's claim. Haidari was detained for *over two years* while ICE attempted to remove him. His long detention period far exceeds the 6 month-rule established in *Zadvydas*. *See* Exh. A. Nothing in § 1231 allows ICE to re-detain Haidari without due process. The government errs because Haidari is not challenging an initial post-order detention as in *Zadvydas*; he is challenging ICE's authority to re-detain him without notice and opportunity to be heard, in violation of the Fifth Amendment. *See Nguyen v. Hyde*, No. 25-cv-11470-MJJ, 2025 U.S. Dist. LEXIS 117495, *11 (D. Mass. June 20, 2025) (finding *Zadvydas* inapplicable to Petitioner's re-detention).

When an individual is ordered removed, 8 U.S.C. § 1231(a) authorizes the government to detain the individual during the "removal period," defined as the 90-day period during which "the Attorney General shall remove the [noncitizen] from the United States." 8 U.S.C. §1231(a)(1)(A). The removal period begins on the latest of the following:

> (1) the date the order of removal becomes administratively final;
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> (2) if the removal order is judicially reviewed and the court orders a stay, the date of the court's final order; and
>
> (3) if the noncitizen is released from non-immigration detention or confinement, the date of that release.

8 U.S.C. § 1231(a)(1)(B)(i-iii). In this case, only 8 U.S.C. §1231(a)(1)(A)(1) is applicable.

Once the removal period has expired, the government "may" detain a noncitizen only if they fall into one of the four categories under § 1231(a)(6): (1) individuals who are inadmissible; (2) individuals who are removable on specified grounds; (3) individuals determined to be a danger to the community; or (4) individuals determined to be unlikely to comply with the order of removal. However, under § 1231(a)(6) "[o]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute," and the noncitizen must be released. *Zadvydas*, 533 U.S. at 699. In *Zadvydas*, the Supreme Court held that six months is a presumptively reasonable for post-order detention. *Id.*

Upon release, a noncitizen subject to a final order of removal is typically placed under an order of supervision with conditions. 8 U.S.C. § 1231(a)(3), (6). Revocation of such release is governed by 8 C.F.R. § 241.13(i). The regulation purports to allow ICE to revoke supervised released only if "on account of changed circumstances," there is a "significant likelihood that the [noncitizen] may be removed in the reasonably foreseeable future." 8 C.F.R. § 241.13(i)(2). Upon such a determination:

> [T]he [noncitizen] will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The [noncitizen] may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

Id. § 241.13(i)(3).

In its response to the Order to Show Cause, the Defendant's fail to provide any "changed circumstances" suggesting that Haidari's removal to Iran is reasonably foreseeable. The government alleges that it is attempting to remove Haidari to Iran but provides no reason to believe that the Iranian government is accepting its citizens. Indeed, it is difficult to believe that relations between the countries have softened since the U.S. bombed Iran in June 2025.[2] Absent any intervening developments, there are no changed circumstances justifying Haidari's re-detention. Haidari's continued detention is neither authorized by statute nor consistent with due process.

While the Defendants have not identified the legal basis for their decision to re-detain Haidari, to the extent they purport to rely on 8 C.F.R. § 241.13(i)(2), the Defendants have failed to demonstrate that they followed the regulatory procedures under § 241.13(i)(3). Indeed, the Defendants did not provide Haidari with any notice about the reason for the revocation of his release, did not conduct any interview, and did not provide him an opportunity to rebut their claim that removal is now foreseeable or that he has violated the order of supervision, as required by regulations. *See* 8 C.F.R. 241.13(i)(2), (3). Courts have recognized that when ICE revokes supervised release, it must follow the process prescribed by regulation, including providing notice, conducting an interview, and allowing the noncitizen to respond. *See, e.g.*, *Ceesay*, 2025 U.S. Dist. LEXIS 84258 at *48 – 52 (finding petitioner was not afforded even minimal due process protections when ICE failed to provide petitioner an informal interview upon his re-detainment); *Hoac v. Becerra*, No. 2:25-cv-01740-DC-JDP, 2025 U.S. Dist. LEXIS 136002, *9 (E. D. Cal. July 16, 2025) ("Government agencies are required to follow their own regulations. Because there is no indication that an informal interview was provided to Petitioner, the court finds Petitioner is likely to succeed on his claim that his re-detainment was unlawful.") (internal citations omitted); *Liu v. Carter*, No. 25-cv-03036-JWL, 2025 U.S. Dist. LEXIS 115275, 2025 WL 1696526, at *2 (D. Kan. Jun. 17, 2025) ("The Court finds that officials did not properly revoke petitioner's release

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[2] Julian E. Barnes, et al., *New Assessment Finds Site at Focus of U.S. Strikes in Iran Badly Damaged*, N.Y. TIMES (July 17, 2025), https://www.nytimes.com/2025/07/17/us/politics/iran-nuclear-sites.html.

pursuant to Section 241.13, for multiple reasons."); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 U.S. Dist. LEXIS 136000, *8 – 9 (E.D. Cal. July 16, 2025) ("Petitioner has shown he is likely to succeed on his claim that Respondents did not properly revoke Petitioner's release pursuant to § 241.13."); *Tang v. Noem*, No. 2:25-cv-04638-MRA-PD, 2025 U.S. Dist. LEXIS 102445, *13 (C.D. Cal. May 29, 2025) (finding due process violation where petitioner was "not notified of the reasons for the revocation, nor was he promptly interviewed or otherwise afforded an opportunity to respond to the government's purposes reasons for redetention."); *Torres-Jurado v. Biden*, No. 19 Civ. 3595 (AT), 2023 U.S. Dist. LEXIS 193725, * 14 (S.D.N.Y Oct. 29, 2023) ("Defendants cannot decide to revoke the ICE stay without affording Plaintiff an opportunity to be heard in a meaningful time and in a meaningful manner.") (internal citation and quotations omitted). Defendant's failure to provide any notice for Haidari's re-detention and opportunity to submit evidence to challenge his re-detention, renders such action unlawful under both constitutional and regulatory standards.

Moreover, even if the Defendants were to demonstrate a changed circumstance, Haidari asserts that 8 C.F.R. § 241.13(i)(2) is invalid and *ultra vires* to 8 U.S.C. § 1231(a)(6), which contains no allowance for re-detention upon a finding of changed circumstances. The Court should refuse to apply a regulation mandating re-detention without bail without a clear statement in the statute reflecting a Congressional intent for such an extreme interpretation.

ii. *Zadvydas*' burden-shifting framework does not apply because the presumptively reasonable removal period lapsed long ago, and even if it did, Haidari has met the burden.

The Defendants erroneously claim that it is Haidari's burden to demonstrate "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. Defs.' Resp. to Habeas Pet at 7. This argument is misplaced. Haidari's removal order became administratively final on March 16, 2000, when the BIA dismissed his appeal. On April 8, 2002, ICE determined that Haidari's removal to Iran was not reasonably foreseeable and released him on an order of supervision. Defendants have failed to identify any change in circumstances that supports its finding that Haidari's removal to Iran is reasonably foreseeable.

The presumptively reasonable six-month detention period under *Zadvydas* began on March 16, 2000—when the removal order became final—and expired long ago. Critically, § 1231 "contains no provisions for pausing, reinitiating, or refreshing the removal period after the 90-day clock runs to zero." Exh. C, Transcript of Motions Hearing at 32, *Cordon-Salguero v. Noem, et al*, 1:25-cv-01626-GLR (D. Md. June 18, 2025). Therefore, the burden now rests with ICE to demonstrate that removal has become reasonably foreseeable. *See Tadros v. Noem*, No. 25cv4108 (EP), 2025 U.S. Dist. LEXIS 113198, *9 (Dist. N.J. June 13, 2025) (agreeing with Petitioner that the burden shifted to ICE to "show that removal is now likely in the foreseeable future" after the presumptively removal period had lapsed). Consistent with the overarching theme of *Zadvydas* that immigration detention is for the purpose of removal and that continued detention must be reasonably foreseeable, the Defendants must be required to articulate and prove removal is foreseeable in a situation like this where Haidari was already detained over two years and then released. ICE has not met their burden.

Even if the burden were on Haidari, he has presented more than a "good reason" to believe removal is not reasonably foreseeable. ICE released him in 2002 after determining his removal to Iran was not reasonably foreseeable. The agency was unable to remove Haidari to Iran for over two decades. There have been no diplomatic developments between the United States and Iran that would make removal now reasonably foreseeable.

B. The Court has jurisdiction to review Haidari's due process claim regarding third country removals.

28 U.S.C. § 2241 authorizes a district court to grant a writ of habeas corpus whenever a petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The Defendants erroneously claim that the Court lacks jurisdiction to review Haidari's due process claim regarding third country removal because "it is inextricably intertwined with the ICE's unreviewable authority to execute his final order of removal." Defs.' Resp. to Habeas Pet. at 2. The Defendants rely on two district court decisions from the Western District of Pennsylvania and the Middle District of Georgia. *Id.* (citing *C.R.L. v. Dickerson, et al*, 4:25-CV-175-DL-AGH, 2025 U.S. Dis. LEXIS 123454, *3 – 5 (M.D. Ga. June 30, 2025) and *Diaz Turcios v. Oddo*, No. 3:25-CVC-0083, 2025 U.S. Dist. LEXIS 131382, * 6 – 12 (W.D. Penn. July 10, 2025)). These courts wrongly concluded that the court lacked jurisdiction to consider a third country removal claim because 8 U.S.C. § 1252(b)(9) and § 1252(a)(5) bar district courts from reviewing final orders of removal. Both courts' reliance on those statutes is misplaced.

Section 1252(b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove a [noncitizen] from the United States under this subchapter shall be available only in judicial review of a final order." 8 U.S.C. § 1252(b)(9). Section 1252(a)(5) states that "a petition for review . . . shall be the sole and exclusive means for judicial review of an order of removal . . . ." As such, the cited provisions govern review of final orders of removal and constrain those challenges to the courts of appeals. "[A]ctions that do not challenge final orders of removal are not subject to this channeling scheme." *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-10676-BEM, 2025 U.S. Dist. LEXIS 74197, *14 – 15 (D. Mass. April 18, 2025) (citing *J.D.F.M. v. Lynh*, 837 F.3d 1026 (9th Cir. 2016)).

Haidari is not asking the Court to review his final order of removal, and therefore, the Court should reject the Defendants' argument that jurisdiction is not available. Instead, Haidari is asking the Court to determine whether the Defendants have violated his due process rights by failing to provide him with meaningful notice and opportunity to present a fear-based claim before ICE deports him to a third country. Indeed, ICE is purporting to make fear determinations outside of the context of removal proceedings, further showing why 8 U.S.C. § 1252, which addresses review of immigration court decisions in removal proceedings, is inapplicable. *See, e.g.*, *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 11 (1st Cir. 2007) (clarifying that section 1252(a)(9) is limited to claims that arise out of removal proceedings). As such, the court has jurisdiction to hear Haidari's petition challenging the lawfulness and constitutionality of his detention pending potential removal to a third country. *See Jennings v. Rodriguez*, 583 U.S. 281, 292–96 (2018) (concluding that section 1252(b)(9) did not apply because the respondents were "not asking for review of an order of removal," "not challenging de decision to detain them in the first place or to seek removal," and "not challenging any part of the process by which their removability will be determined."); *Zadvydas*, 533 U.S. at 687–88 ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal period detention.").

i. **DHS' third country removal procedures are in violation of federal law because they fail to provide timely notice about what third country the government intends to remove the Plaintiff and provides inadequate opportunity to contest removal to those third countries.**

Pursuant to § 1231(b)(3)(A), courts repeatedly held that individuals cannot be removed to a country that was not properly designated by an IJ if they have a fear of persecution or torture in that country. *See Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Kossov v. INS*, 132 F.3d 405, 408-09 (7th Cir. 1998); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004); *cf. Protsenko* *v. U.S. Att'y Gen.*, 149 F. App'x 947, 953 (11th Cir. 2005) (per curiam) (permitting designation of third country where individuals received "ample notice and an opportunity to be heard"). Providing such notice and opportunity to present a fear-based claim prior to deportation also implements the United States' obligations under international law. *See* 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 19 U.S.T. 6259 (July 28, 1951); United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967); Refugee Act of 1980, Pub. L. 96-212, § 203(e), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1231(b)(3)); *INS v. Stevic*, 467 U.S. 407, 421 (1984) (noting that the Refugee Act of 1980 "amended the language of [the predecessor statute to § 1231(b)(3)], basically conforming it to the language of Article 33 of the United Nations Protocol"); *see also* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (June 26, 1987); FARRA at 2681–82 (codified at n.8 under U.S.C. § 1231) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); U.N. Comm. Against Torture, Gen. Comment No. 4, Implementation of Article 3 by States Parties, U.N. Doc. CAT/C/GC/4 at ¶ 12 (2017) ("Furthermore, the person at risk [of torture] should never be deported to another State where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing that he/she would be in danger of being subjected to torture.").

Meaningful notice and opportunity to present a fear-based claim prior to deportation to a country where a person fears persecution or torture are also fundamental due process protections under the Fifth Amendment. *See Andriasian*, 180 F.3d at 1041; *Protsenko*, 149 F. App'x at 953;

Kossov, 132 F.3d at 408; *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1004 (W.D. Wash. 2019). Similarly, a "last minute" IJ designation of a country during removal proceedings that affords no meaningful opportunity to apply for protection "violate[s] a basic tenet of constitutional due process." *Andriasian*, 180 F.3d at 1041. The federal government has repeatedly acknowledged these obligations. In 2005, in jointly promulgating regulations implementing 8 U.S.C. § 1231(b), the Departments of Justice and Homeland Security asserted that "[a noncitizen] will have the opportunity to apply for protection as appropriate from any of the countries that are identified as potential countries of removal under [8 U.S.C. § 1231(b)(1) or (b)(2)]." Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 Fed. Reg. 661, 671 (Jan. 5, 2005) (codified at 8 C.F.R. §§ 241, 1240, 1241). Furthermore, the agencies contemplated that, in cases where ICE sought removal to a country that was not designated in removal proceedings, namely, "removals pursuant to [8 U.S.C. § 1231(b)(1)(C)(iv) or (b)(2)(E)(vii)]," DHS would join motions to reopen "[i]n appropriate circumstances" to allow the noncitizen to apply for protection. *Id.*

Furthermore, consistent with the above-cited authorities, at oral argument in *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), the Assistant to the Solicitor General represented that the government must provide a noncitizen with notice and an opportunity to present a fear-based claim before that noncitizen can be deported to a non-designated third country. Tr. of Oral Argument at 20-21.[3] Specifically, the following exchange between Justice Kagan and Vivek Suri, Assistant to the Solicitor General, took place:

> JUSTICE KAGAN: . . . [S]uppose you had a third country that, for whatever reason, was willing to accept [a noncitizen]. If -- if -- if that [noncitizen] was currently in withholding proceed -- proceedings, you couldn't put him on a plane to that third country, could you?

[3]Transcript of Oral Argument, *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (No. 19-897), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-897_l537.pdf.

> MR. SURI: We could after we provide the [noncitizen] notice that we were going to do that.
>
> JUSTICE KAGAN: Right.
>
> MR. SURI: But, without notice --
>
> JUSTICE KAGAN: So that's what it would depend on, right? That -- that you would have to provide him notice, and if he had a fear of persecution or torture in that country, he would be given an opportunity to contest his removal to that country. Isn't that right?
>
> MR. SURI: Yes, that's right.
>
> JUSTICE KAGAN: So, in this situation, as to these [noncitizens] who are currently in withholding proceedings, you can't put them on a plane to anywhere right now, isn't that right?
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> MR. SURI: Certainly, I agree with that, yes.
>
> JUSTICE KAGAN: Okay. And that's not as a practical matter. That really is, as -- as you put it, in the eyes of the law. In the eyes of the law, you cannot put one of these [noncitizens] on a plane to any place, either the -- either the country that's referenced in the removal order or any other country, isn't that right?
>
> MR. SURI: Yes, that's right.

Id.

Notice is only meaningful if it is presented sufficiently in advance of the deportation to stop the deportation, is in a language the person understands, and provides for an automatic stay of removal for a time period sufficient to permit the filing of a motion to reopen removal proceedings so that a third country for removal may be designated as required under the regulations and the noncitizen may present a fear-based claim. *Andriasian*, 180 F.3d at 1041; *Aden*, 409 F. Supp. 3d at 1009 ("A noncitizen must be given sufficient notice of a country of deportation [such] that, given his capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation."). An opportunity to present a fear-based claim is only meaningful if the noncitizen is not deported before removal proceedings are reopened. *See Aden*, 409 F. Supp. 3d at 1010 (holding that merely giving petitioner an opportunity to file a discretionary motion to reopen "is not an adequate substitute for the process that is due in these circumstances" and ordering reopening); *Dzyuba v. Mukasey*, 540 F.3d 955, 957 (9th Cir. 2008) (remanding to BIA to determinate whether designation is appropriate).

Just as Andriasian's due process was violated by the last-minute designation in removal proceedings, Haidari's rights are violated by Defendant's third country removal procedures that do not afford him a meaningful opportunity to demonstrate the basis for fear of persecution or torture in that third country.

In their response, the Defendants represent that ICE is not actively seeking to deport Haidari to a third country. Defs.' Resp. to Habeas Pet. at 2. Nonetheless, under its current policy, ICE can change that decision and attempt to effectuate removal to a third country where Haidari may be tortured with little or no notice. Specifically, the Defendants state that on July 9, 2025, the ICE Director issued written guidance to all ICE employees to immediately "adhere to the Secretary of Homeland Security, Kristi Noem's, March 30, 2025, memorandum, *Guidance Regarding Third Country Removals*," and that such guidance provides "sufficient notice and opportunity to be heard." Defs.' Resp. to Habeas Pet. at 3. Justice Sotomayor outlined the procedurally deficient protections of the March 30 guidance as follows:

> On March 30, DHS issued a second guidance document, which contained a two-step process for executing third-country removals. If a country provides the United States with what DHS believes to be "credible" "assurances that aliens removed from the United States will not be persecuted or tortured," then (the policy says) DHS may remove the noncitizen to that country **without any process**. See App. to Application for Stay of Injunction 54a-55a (App.) The Government says this policy permits DHS to change someone's "deportation country to Honduras . . . at 6:00 a. m., put [them] on a plane, and fl[y them] to Honduras" 15 minutes later. ECF Doc. No. 74, p. 12 (Tr. Apr. 10, 2025).
>
> In the absence of credible "assurances" from a foreign country, the policy provides, "DHS will first inform the alien of" her impending removal. App. 55a. Even so, the policy prohibits officers from providing the noncitizen with an affirmative opportunity to raise

> her fear of torture. Only one who "states a fear of removal" unprompted will be given a screening interview, which will take place "within **24 hours of referral**." *Ibid.* Those who cannot establish their eligibility for relief at the screening interview can apparently be deported immediately, without a chance to provide evidence or seek judicial review. See ECF Doc. 74, at 52-53.

Dep't of Homeland Security v. D.V.D., No. 24A1153., 2025 U.S. LEXIS 2487, at *6-7 (S. Ct. June 23, 2025) (emphasis added). Such a "process" falls short of what is required by law.

Contrary to the Defendants' claim, the March 30, 2025 guidance does not comply with minimal due process requirements as the Defendants allege. *D.V.D. v. United States Dep't of Homeland Sec.*, No. 25-10676-BEM, 2025 U.S. Dist. LEXIS 74197, at *50 (D. Mass. April 18, 2025) ("The March Guidance provides no process whatsoever to individuals whom DHS plans to remove to a country from which the United States has received blanket diplomatic assurances."). The Massachusetts District court has stated that it "finds it likely that Defendants have applied and will continue to apply the alleged policy of removing aliens to third countries without notice and an opportunity to be heard on fear-based claims—in other words, without due process." *Id.* at *49. Similarly, the District Court of New Jersey entered a temporary restraining order on the same grounds on July 10. *See Servellon Giron v. Noem, et al.*, 2:25-cv-6301 (D.N.J. July 10, 2025). This Court should follow suit.

C. The EAJA does allow for attorney fees.

Undersigned counsel recognizes the Fifth Circuit's decision in *Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023) ruling that fees are not available to be awarded in 28 U.S.C. § 2241. Nonetheless, the issue is ripe for redetermination at the Fifth Circuit. At least two Circuit Courts and two district courts have disagreed with *Barco*. *See Vacchio v. Ashcroft,* 404 F.3d 663, 670-72 (2d Cir. 2005); *In re Petition of Hill,* 775 F.2d 1037, 1040-41 (9th Cir. 1985); *Abioye v. Oddo*, 2024 U.S. Dist. LEXIS 174205 (W. D. Penn. 2024): *Arias v. Choate*, 2023 U.S. Dist. LEXIS 119907 (Dist. Colo.

2023). Given ICE's recent actions in detaining individuals without substantial justification, EAJA fees are needed to ensure attorneys can confront detention that is unconstitutional.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Plaintiff the relief sought in the habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on today's date, July 29, 2025, I electronically filed the above reply by using the Court's CM/ECF system which will automatically send a notice of electronic filing to Defendants' counsel.

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