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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

SERGEI IZBITSKI, Petitioner, v. Ray Carnes Warden, Torrance County Detention Facility) Marissa Flores, Director of El Paso Field Office, U.S. Immigration and Customs Enforcement; Kristi Noem Secretary of the U.S. Department of Homeland Security; and Pam Bondi, Attorney General of the United States, in their official capacities, Respondents.	Case No. _____ **PETITION FOR WRIT OF HABEAS CORPUS**

INTRODUCTION

1. Petitioner, Sergei Izbitski, is a New Jersey resident who is being unlawfully detained by the Respondents at Torrance County Detention Facility in Escanca, New Mexico. Mr. Izbitski has resided in the United States since 1991. On March 27, 2006, an immigration judge ordered him removed to Kazakhstan. However, Mr. Izbitski could not be removed because

he is not a citizen of Kazakhstan. He was born in the Kazakh Soviet Socialist Republic on [redacted] 1979 and left the republic in September 1991, a year before Kazakhstan declared independence. As recently as May 30, 2023, the Kazakh government has confirmed that Mr. Izbitski is not a Kazakh citizen. See Exhibit A: May 30, 2023 Letter from the Kazakh Consulate. As a result, the Department of Homeland Security ("DHS") has not been able to remove him from the United States and instead placed Mr. Izbitski on an Order of Supervision ("OSUP").

2. On June 9, 2025, DHS abruptly and without notice detained Mr. Izbitski and transferred him from New Jersey to the Torrance County Detention Facility. He never violated his OSUP and there have been no changed circumstances that warrant his detention.

3. Mr. Izbitski is detained pursuant to 8 U.S.C. § 1231(a)(6), which governs the detention of noncitizens with a final order of removal. Mr. Izbitski's final order of removal became final upon the expiration of the appeal period. 8 C.F.R. § 1241.1. Mr. Izbitski's continued detention violates 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), because his removal is not reasonably foreseeable. He cannot be deported to Kazakhstan because he is not a citizen of that country, as confirmed by the Kazakh government.

4. DHS ostensibly detained Mr. Izbitski in order to effectuate his order of removal. But DHS is apparently no closer to removing him now than they were at any point since he became subject to post-final order provisions under 8 U.S.C. § 1231 on April 27, 2006. There is no indication that DHS has obtained a travel document from any country willing to accept Mr. Izbitski. Under these circumstances, detention is unlawful under § 1231(a)(6) because DHS' has failed to demonstrate a reasonable likelihood of removal in the foreseeable future. The statutes

and prevailing case law make it clear that DHS cannot detain noncitizens like Mr. Izbitski without demonstrating this likelihood of removal

5. Mr. Izbitski is a cornerstone of his community. He has no criminal history and is a successful business owner of A Point Painting and Remodeling, LLC. He is also a homeowner. Mr. Izbitski never violated the terms of his OSUP and has never failed to cooperate with efforts to obtain a travel document to effectuate his removal. DHS' arbitrary decision to rip him away from his family, business, and community in New Jersey and detain him in prison-like conditions in New Mexico is merely punitive and serves no function under 8 U.S.C. § 1231. Accordingly, to vindicate Mr. Izbitski's statutory and constitutional rights, this Court should grant the instant Petition for Writ of Habeas Corpus. Absent an order from this Court, Mr. Izbitski faces potentially indefinite detention that clearly violates the Constitution of the United States.

JURISDICTION

6. This action arises under the Constitution of the United States and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*

7. This Court has subject matter jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause).

8. This Court may grant relief under the habeas corpus statutes, 28 U.S.C. § 2241 *et. seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

9. Venue is proper because Petitioner is detained at Torrance County Detention Facility in Estancia, New Mexico, which is within the jurisdiction of this District. Venue is also

proper in this District because Respondents are officers, employees, or agencies of the United States. *See* 28 U.S.C. § 1391(e).

PARTIES

10. Petitioner is currently detained at Torrance County Detention Facility and is in the custody, and under the direct control, of Respondents and their agents.

11. Respondent Ray Carnes is the Warden of Torrance County Detention Facility, and he has immediate physical custody of Petitioner pursuant to the facility's contract with U.S. Immigration and Customs Enforcement ("ICE") to detain noncitizens and is a legal custodian of Petitioner. Respondent Carnes is a legal custodian of Petitioner.

12. Respondent Marissa Flores is sued in her official capacity as the Director of the El Paso Field Office of U.S. Immigration and Customs Enforcement. Respondent Flores is a legal custodian of Petitioner and has authority to release him.

13. Respondent Krisi Noem is sued in her official capacity as the Secretary of the U.S. Department of Homeland Security (DHS). In this capacity, Respondent Noem is responsible for the implementation and enforcement of the Immigration and Nationality Act, and oversees U.S. Immigration and Customs Enforcement, the component agency responsible for Petitioner's detention and custody. Respondent Noem is a legal custodian of Petitioner.

14. Respondent Pam Bondi is sued in her official capacity as the Attorney General of the United States and the senior official of the U.S. Department of Justice (DOJ). In that capacity, she has the authority to adjudicate removal cases and to oversee the Executive Office for Immigration Review (EOIR), which administers the immigration courts and the BIA. Respondent Bondi is a legal custodian of Petitioner.

STATEMENT OF FACTS

15. Petitioner is 46 years old and not a citizen of any country. He has resided in the United States since 1991. He is the owner of a painting business and his home. He has never been charged with a criminal offense.

LEGAL FRAMEWORK

16. 8 U.S.C. § 1231 governs the detention of non-citizens "during" and "beyond" the "removal period." 8 U.S.C. § 1231(a)(2)-(6). The "removal period" begins once a non-citizen's removal order "becomes administratively final." 8 U.S.C. § 1231(a)(1)(B).3 The removal period lasts for 90 days, during which ICE "shall remove the [non-citizen] from the United States" and "shall detain the [non-citizen]" as it carries out the removal. 8 U.S.C. § 1231(a)(1)-(2). If ICE does not remove the non-citizen within the 90-day removal period, the non-citizen "may be detained beyond the removal period" if they meet certain criteria, such as being inadmissible or deportable under specified statutory categories. 8 U.S.C. § 1231(a)(6) (emphasis added).

17. To avoid "indefinite detention" that would raise "serious constitutional concerns," the Supreme Court in *Zadvydas* construed § 1231(a)(6) to contain an implicit time limit. 533 U.S. at 682. *Zadvydas* dealt with two non-citizens who could not be removed to their home country or country of citizenship due to bureaucratic and diplomatic barriers. The Court held that § 1231(a)(6) authorizes detention only for "a period reasonably necessary to bring about the [non-citizen]'s removal from the United States." Id. at 689.

18. But the "Zadvydas Court did not say that the presumption is irrebuttable, and there is nothing inherent in the operation of the presumption itself that requires it to be irrebuttable." Cesar v. Achim, 542 F. Supp. 2d 897, 903 (E.D. Wis. 2008). "Within the six-month

window," the non-citizen bears the burden of "prov[ing] the unreasonableness of detention." Id. After six months of detention, if there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the burden shifts to the Government to justify continued detention. Zadvydas, 533 U.S. at 701; see also Cesar, 542 F. Supp. 2d at 903 ("[T]he presumption scheme merely suggests that the burden the detainee must carry within the first six months of [postorder] detention is a heavier one than after six months has elapsed").

19. DHS regulations provide that, before the end of the 90-day removal period that ensues upon a non-citizen's removal order becoming final, the local ICE field office with jurisdiction over the non-citizen's detention must conduct a custody review to determine whether the non-citizen should remain detained. *See* 8 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). If the noncitizen is not released following the 90-day custody review, jurisdiction transfers to ICE Headquarters (ICE HQ), *id.* § 241.4(c)(2), which must conduct a custody review before or at 180 days. *Id.* § 241.4(k)(2)(ii). In making these custody determinations, ICE considers several factors, including whether the non-citizen is likely to pose a danger to the community or a flight risk if released. *Id.* § 241.4(e). If the factors in § 241.4 are met, ICE must release the non-citizen under conditions of supervision. *Id.* § 241.4(j)(2).

20. To comply with *Zadvydas*, DHS issued additional regulations in 2001 that established "special review procedures" to determine whether detained non-citizens with final removal orders are likely to be removed in the reasonably foreseeable future. See Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001). While 8 C.F.R. § 241.4's custody review process remained largely intact, subsection (i)(7) was added to include a supplemental review procedure that ICE HQ must initiate when "the [noncitizen] submits, or the record contains, information providing a substantial reason to believe

that removal of a detained [non-citizen] is not significantly likely in the reasonably foreseeable future." *Id.* § 241.4(i)(7).

21. Under this procedure, ICE HQ evaluates the foreseeability of removal by analyzing factors such as the history of ICE's removal efforts to third countries. *See id.* § 241.13(f). If ICE HQ determines that removal is not reasonably foreseeable but nonetheless seeks to continue detention based on "special circumstances," it must justify the detention based on narrow grounds such as national security or public health concerns, *id.* § 241.14(b)-(d), or by demonstrating by clear and convincing evidence before an IJ that the non-citizen is "specially dangerous." *Id.* § 241.14(f).

CLAIMS FOR RELIEF

COUNT ONE

Violation of Fifth Amendment Right to Due Process

22. The allegations in the above paragraphs are realleged and incorporated herein.

23. Respondents have violated Petitioner's due process rights under the Fifth Amendment by detaining him with no significant likelihood of removal in the reasonably foreseeable future.

24. As a remedy, the Court should order Petitioner's release on his own recognizance.

COUNT TWO

Violation of Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6)

25. The allegations in the above paragraphs are realleged and incorporated herein.

26. 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas*, authorizes detention only for "a period reasonably necessary to bring about the alien's removal from the United States." 533 U.S. at 689, 701.

27. Petitioner's continued detention has become unreasonable because his removal is not reasonably foreseeable. Therefore, his continued detention violates 8 U.S.C. § 1231(a)(6), and he must be immediately released.

COUNT THREE

Arbitrary and Capricious Agency Action Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)

28. Petitioner realleges and incorporates by reference the paragraphs above.

29. Courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)

30. DHS has deviated from its own policies in detaining Petitioner without having established a significant likelihood of removal in the reasonably foreseeable future. This is arbitrary, capricious, and contrary to law in violation of the APA.

31. As a remedy, this Court should order the immediate release of Petitioner from custody.

PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests this Court to grant the following:

(1) Assume jurisdiction over this matter;

(2) Declare that Petitioner's continued detention violates the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6); the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); and/or the Due Process Clause of the Fifth Amendment to the U.S. Constitution;

(3) Order Petitioner's immediate release;

(4) Restrain any further detention of Petitioner or restrictions on Petitioner's liberties, including "alternatives to detention" such as, but not limited to, GPS monitoring or geographic limitations;

(5) Grant any other further relief this Court deems just and proper.

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Counsel for Petitioner

Dated: Aug. 14, 2025

VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I represent Petitioner, Sergey Izbitski, and submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated this 14 day of August 2025.

/s/ Eric M. Mark
Eric M. Mark, Esq.
Counsel for Petitioner

EXHIBIT A

May 30, 2023

To produce on site requirement:

Herewith, The Consulate General of the Republic of Kazakhstan in New York City announced that Nikolai Izbitski is not a citizen of the Republic of Kazakhstan, as he left Kazakh Soviet Socialist Republic in September 1991 the year before The Declaration of Independence of the Republic of Kazakhstan which was adopted by the December 16, 1991.

Tattaps
Vice Consul
Deka
A. Yessentaeva

Sworn to and subscribed before me
this 30th day of MAY 2023

INNA STAROVOYTOV
Notary Public, State of New Jersey
My Commission Expires 09/12/2026

ҚАЗАҚСТАН РЕСПУБЛИКАСЫНЫҢ БАС КОНСУЛДЫҒЫ
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№_____

«____» _____ 20___

30 мая 2023 г.

Для предъявления по месту требования:

Настоящим Генеральное консульство Республики Казахстан в Нью-Йорке информирует о том, что Избицкий Николай не является гражданином Республики Казахстан, так как он покинул Казахскую Советскую Социалистическую Республику в сентябре 1991 года до объявления независимости Республики Казахстан 16 декабря 1991 года.

Консул **М. Тобаяков**

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

SERGEI IZBITSKI, Petitioner, v. Ray Carnes Warden, Torrance County Detention Facility) Marissa Flores, Director of El Paso Field Office, U.S. Immigration and Customs Enforcement; **Kristi Noem** Secretary of the U.S. Department of Homeland Security; and Pam Bondi, Attorney General of the United States, in their official capacities, Respondents.	Case No. _____ **PETITION FOR WRIT OF HABEAS CORPUS**

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

RELIEF

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INTRODUCTION

Petitioner, Sergei Izbitski, is a New Jersey resident who is being unlawfully detained by the Respondents at Torrance County Detention Facility in Estancia, New Mexico. Petitioner has resided in the United States since 1991. On March 27, 2006, an immigration judge ordered him removed to Kazakhstan. However, Petitioner could not be removed because he is not a citizen of Kazakhstan. He was born in the Kazakh Soviet Socialist Republic on [redacted] 1979 and left the republic in September 1991, a year before Kazakhstan declared independence. As recently as May 30, 2023, the Kazakh government confirmed that Petitioner is not a Kazakh citizen. As a result, the Department of Homeland Security ("DHS") has not been able to remove him from the United States and instead placed Petitioner on an Order of Supervision ("OSUP").

Despite DHS' inability to remove Petitioner, Respondents detained Petitioner on June 9, 2025 in violation of 8 U.S.C § 1231(a)(6) and governing regulations. In other words, upon information and belief there is no end sight for his detention.[1] This prolonged detention is unlawful for the following reasons. First, Petitioner's detention is unlawful under 8 U.S.C. § 1231(a)(6) because there is no significant likelihood of removal in the reasonably foreseeable future. Section 1231 governs detention of noncitizens like Petitioner who are subject to a final order of removal. The Supreme Court in *Zadvydas v. Davis* has held that detention of a noncitizen subject to a final order of removal may not be detained indefinitely. To obtain habeas relief, the petitioner has the initial burden to show "there is no significant likelihood of removal in the reasonably foreseeable future." Here, Petitioner has clearly satisfied that burden by demonstrating that the Kazakhstan government does not consider him a citizen and is unwilling

[1] ICE does not provide contact information for the deportation officer assigned to detainees, does not provide viable contact information on its website, and does not provide any information about whether removal is imminent or not.

to accept his return. DHS cannot rebut this finding because, upon available information and belief, it is no closer to removing Petitioner than at any time before.

Second, DHS has violated its own regulations, 8 C.F.R. § 241.13. Following his final order of removal, Petitioner appears to have been placed on an OSUP because DHS found that there was no significant likelihood of removal in the reasonably foreseeable future. Under these circumstances, 8 C.F.R. § 241.13(i) imposes conditions on when and how DHS can revoke the release of a noncitizen on an OSUP. In fact, DHS cannot revoke the release unless there has been a violation of the terms of release (§ 241.13(i)(1)) or if, on account of changed circumstances, DHS determines that there is a significant likelihood that the noncitizen may be removed in the reasonably foreseeable future (§ 241.13(i)(2)). None of that occurred in this case. Even if one of those things occurred, 8 C.F.R. § 241.13(i)(3) requires that DHS notify the noncitizen of the reasons for the revocation, conduct an initial informal interview after returning to custody to afford the noncitizen an opportunity to respond to the reasons for revocation. In addition, the regulation provides the noncitizen with an opportunity to submit any evidence or information that he or she believes shows that there is no significant likelihood of removal in the reasonably foreseeable future. Instead of following its own governing regulations, DHS instead abruptly detained Petitioner without any notice and ripped him away from his family, business, and community in New Jersey.

For these reasons, Petitioner's detention is unlawful under the Fifth Amendment, 8 U.S.C. § 1231(a)(6), and is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The only appropriate remedy is Petitioner's immediate release from detention.

STATEMENT OF FACTS

Petitioner, Sergei Izbitski, was born on [redacted] 1979 in the Kazakh Soviet Socialist Republic. He left there in September 1991, one month before Kazakhstan declared independence. As recently as May 30, 2023, the Kazakh government has confirmed that he is not a Kazakh citizen and it will not accept him. On March 27, 2006, an immigration judge ordered Mr. Izbitski removed from the U.S. He has been on an Order of Supervision ("OSUP") since then. Mr. Itzbitzki has never been charged with any criminal offense and has not violated the terms of his OSUP in any way. On June 9, 2025, ICE abruptly and without notice detained Mr. Itzbitzki and whisked him from New Jersey to New Mexico.

STATUTORY BACKGROUND

To obtain habeas corpus relief, a petitioner must demonstrate that he is "in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2241(c)(3). This Court has habeas corpus jurisdiction to consider the statutory and constitutional grounds for immigration detention that are unrelated to a final order of removal. *See Demore v. Kim*, 538 U.S. 510, 517-18 (2003).

Upon the entry of a final removal order, the matter enters the "removal period," and the statutory authority for detention shifts to 8 U.S.C. § 1231. After an order of removal becomes administratively final, the Attorney General "shall detain the alien" during the 90-day removal period established under 8 U.S.C. § 1231(a)(2). *See Zadvydas v. Davis*, 533 U.S. 678, 683 (2001); *Morales-Fernandez v. INS*, 418 F.3d 1116, 1123 (10th Cir. 2005). Generally, the

government is required to remove the alien held in its custody within the 90-day removal period. *See* 8 U.S.C. § 1231(a)(1)(A)-(B).

While the government may detain an "inadmissible" or criminal noncitizen beyond the statutory removal period, *see* 8 U.S.C. § 1231(a)(6), DHS may not detain such noncitizens indefinitely. *Zadvydas*, 533 U.S. at 699. Instead, the Supreme Court has found that detention up to six months in such cases is presumptively reasonable in view of the time required to accomplish removal. *Id.* at 701. After this period, if the noncitizen shows 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.* Furthermore, as the period of detention grows, "what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.*

ARGUMENTS

I. PETITIONER'S CONTINUED DETENTION IS UNLAWFUL UNDER *ZADVYDAS* BECAUSE HIS REMOVAL IS NOT REASONABLY FORESEEABLE

Petitioner's detention is governed by 8 U.S.C. § 1231(a)(6) because he is subject to an administratively final order of removal. Therefore, the *Zadvydas* framework applies to Petitioner. Pursuant to *Zadvydas*, Petitioner must demonstrate the existence of either institutional barriers to repatriation or obstacles particular to his removal. *See Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1366 (N.D. Ga. 2002). A petitioner attempting to meet this burden must present evidence beyond "speculation and conjecture." *Idowu v. Ridge*, 2003 U.S. Dist. LEXIS 13503, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003).

Here, there are clear institutional and political impediments to Petitioner's removal. Petitioner was born in the Kazakh Soviet Socialist Republic, which no longer exists. Kazakhstan

declared independence in September 1992, a year after Petitioner left the country. Petitioner was ordered removed to Kazakhstan on March 27, 2006, but DHS could not remove him to that country for the obvious reason that he is not a citizen of Kazakhstan. On May 30, 2023, the Kazakh government confirmed that Petitioner is indeed not a Kazakh citizen. These are clear institutional and political barriers that prevent Petitioner's removal. *See Rajigah v. Conway*, 268 F. Supp. 2d 159 (E.D.N.Y. 2003) (finding that the submission of a letter from an appropriate ambassador which indicates "that the embassy will not issue travel documents to him both because of his pending judicial proceedings and because of his inability to receive adequate medical treatment for his eye disease" in conjunction with medical reports sufficed to carry the petitioner's burden, whereas the government's rebuttal evidence was "speculative at best"); *Gui v. Ridge*, No. 3:CV-03-1965, 2004 U.S. Dist. LEXIS 16959, at *5 (M.D. Pa. Aug. 13, 2004); *Lin v. Ashcroft*, 247 F. Supp. 2d 679, 685 (E.D. Pa. 2003).

DHS, on the other hand, cannot claim that Petitioner has failed to cooperate with efforts to remove him. Upon information and belief, Petitioner has done everything asked of him by DHS in terms of facilitating the issuance of a travel document. Moreover, upon information and belief, DHS is no closer to removing Petitioner than it was in 2006 when he was ordered removed, or in 2023 when the Kazakh government confirmed he was not a citizen of their nation.

DHS also cannot claim that it is empowered to continue detaining Petitioner under 8 U.S.C. § 1231(a)(6), particularly given the apparent impossibility of removal. Here, the 90-day removal period under 8 U.S.C. § 1231(a)(2) began on April 25, 2006, when the appeal period for the immigration judge's decision expired without either party filing an appeal. *See* 8 U.S.C. § 1231(a)(1)(B)(i); 8 C.F.R. § 1241.1(c). Section 1231(a)(1)(B) does not explicitly state whether the 90-day period can be tolled. Admittedly, courts across the country have come down both

ways on this issue. However, the plain reading of the statute dictates that the 90-day removal period is tolled and extended only if the alien fails to or refuses to make timely application in good faith for travel, or other documents necessary for the alien's departure, or conspires or acts to prevent the alien's removal subject to an order of removal. *See Karem Tadros v. Noem*, No. 25cv4108 (EP), 2025 U.S. Dist. LEXIS 113198, at *10 (D.N.J. June 13, 2025). The statute contains no provisions for pausing, reinitiating, or refreshing the removal period after the 90-day clock runs to zero. See id; *see also Ortega v. Kaiser*, No. 25-cv-05259-JST, 2025 U.S. Dist. LEXIS 121997, at *11 (N.D. Cal. June 26, 2025). Therefore, DHS cannot argue that it is entitled to re-detain Petitioner at a whim and get a fresh restart of the 90-day mandatory detention period under § 1231(a)(1)(B).

Additionally, even if the Court were to find that the 90-day removal period restarted after Petitioner's latest detention, Petitioner's detention is still unlawful because there is no reasonable likelihood of removal. Based on the circumstances of Petitioner's nationality, it is very likely he will never be deported from the United States, let alone in the reasonably foreseeable future. Furthermore, DHS is exceedingly unlikely to be able to remove Petitioner to any other country as he is not a citizen of any other nation state. Even in this unlikely scenario, DHS would still be required to obtain travel documents and afford Petitioner a Reasonable Fear Interview ("RFI") at which he would have an opportunity to articulate a fear of return to the country willing to accept him. *See* 8 C.F.R. § 241.8(e).

Based on these facts, Petitioner has still demonstrated that his continued detention is unreasonable under *Zadvydas*. Post-removal order detention for less than six months may still be unreasonable in unique circumstances like Petitioner's where a noncitizen meets his burden of demonstrating that removal is not reasonably foreseeable. *See Cesar v. Achim,* 542 F. Supp. 2d

897, 904 (E.D. Wis. 2008) ("The burden might be on the detainee within the first six months to overcome the presumptive legality of his detention, but where a[] [non-citizen] can carry that burden, even while giving appropriate deference to any Executive Branch expertise, his detention would be unlawful."); *Trinh v. Homan*, 466 F. Supp. 3d 1077, 1093 (C.D. Cal. 2020) ("*Zadvydas* established a 'guide' for approaching detention challenges, not a categorical prohibition on claims challenging detention less than six months."); *Ali v. DHS*, 451 F. Supp. 3d 703, 708 (S.D. Tex. 2020) ("Whereas the *Zadvydas* Court established a presumption that detention that exceeded six months would be unconstitutional, it did not require a detainee to remain in detention for six months or to prove that the detention was of an indefinite duration before a habeas court could find that the detention is unconstitutional."); *Shenxing Zeng v. Tripp*, No. CV 07-0682 JB/WPL, 2007 U.S. Dist. LEXIS 115727, at *15 (D.N.M. Oct. 3, 2007) ("*Zadvydas* contains some language to support the view that an alien need not wait until the expiration of the six-month period to seek release if he can establish that there is not a significant likelihood of his removal in the reasonably foreseeable future.")

Because Petitioner's removal is not reasonably foreseeable, *Zadvydas* requires that he be immediately released. *See* 533 U.S. at 700-01 (describing release as an appropriate remedy); 8 U.S.C. § 1231(a)(6) (authorizing release "subject to . . . terms of supervision"). To order his immediate release, this Court need only determine that Petitioner's removal is not reasonably foreseeable under *Zadvydas*. It does not need to analyze whether he poses a danger to the community or a flight risk. *See* 533 U.S. at 699-700 ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.").

II. DHS' CONTINUED DETENTION OF PETITIONER, WITHOUT REVIEWING HIS CUSTODY UNDER ICE POLICY VIOLATES THE APA AND DUE PROCESS

DHS has enacted regulations concerning how release and detention under § 1231 is implemented at the agency level. *See* 8 C.F.R. § 241.13; 8 C.F.R. § 241.4. Generally speaking, 8 C.F.R. § 241.4 governs the continued detention of post-final order noncitizens and imposes certain requirements and procedures for detention and release beyond the statutory period. On the other hand, 8 C.F.R. § 241.13 concerns determinations of whether there is a significant likelihood of removing a detained noncitizen in the reasonably foreseeable future. Section § 241.13(i) imposes conditions on when DHS can revoke the release of a noncitizen who has been determined not to have a significant likelihood of removal in the reasonably foreseeable future:

> (i) Revocation of release.
>
> (1) Violation of conditions of release. Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.
>
> (2) Revocation for removal. The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.
>
> (3) Revocation procedures. Upon revocation, the alien 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 alien 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.

Here, upon information and belief, Petitioner was placed on an OSUP because there was no significant likelihood of removal in the reasonably foreseeable future. None of the factors apply to Petitioner because: 1) he did not violate any conditions of his release; 2) DHS presented no "changed circumstances" to warrant re-detention; and 3) DHS failed to provide notice of the reasons of his OSUP's revocation and failed to conduct the informal interview and allow Petitioner to respond, as required. Indeed, it appears no procedures were followed at all,

As other courts have noted, "ICE, like any agency, has the duty to follow its own federal regulations." *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017) (cleaned up). As here, "where an immigration regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute . . . and [ICE] fails to adhere to it, the challenged [action] is invalid." *Id.* (cleaned up); *see also Van Nguyen v. Hyde*, Civil Action No. 25-cv-11470-MJJ, 2025 U.S. Dist. LEXIS 117495, at *18 (D. Mass. June 20, 2025) ("Based on ICE's violations of its own regulations, I conclude that Mr. Nguyen's detention is unlawful and that his release is appropriate.").

Under the *Accardi* doctrine, which originated in the context of an immigration case and has been developed through subsequent immigration caselaw, agencies are bound to follow their own rules that affect the fundamental rights of individuals, even self-imposed policies and processes that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that BIA must follow its own regulations in its exercise of discretion); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent

upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

When agencies fail to adhere to their own policies as required by *Accardi*, courts typically frame the violation as arbitrary, capricious, and contrary to law under the APA, *see Damus v. Nielson*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018) ("It is clear, moreover, that [*Accardi*] claims may arise under the APA"), or as a due process violation, *see Sameena, Inc. v. United States Air Force,* 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process.") (internal quotations omitted).

Prejudice is generally presumed when an agency violates its own policy. *See Montilla v.INS*, 926 F.2d 162, 167 (2nd Cir 1991) ("We hold that an alien claiming the INS has failed to adhere to its own regulations . . . is not required to make a showing of prejudice before he is entitled to relief. Allthat need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them."); *U.S. v. Heffner*, 420 F.2d 809, 813 (4th Cir 1969) ("The *Accardi* doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict.").

To remedy an *Accardi* violation, a court may direct the agency to properly apply its policy, *see Damus*, 313 F. Supp. 3d at 343 ("[T]his Court is simply ordering that Defendants do what they already admit is required."), or a court may apply the policy itself and order relief consistent with the policy. *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 657 (D. Mass. 2018) (scheduling bail hearing to review petitioners' custody under ICE's standards because "it would

be particularly unfair to require that petitioners remain detained . . . while ICE attempts to remedy its failure").

Based on DHS' clear violations of its own governing regulations, the only appropriate remedy is the release of Petitioner.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's Petition for Writ of Habeas Corpus and order immediate release.

Respectfully submitted on 14 day of August 2025

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