UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Tajdinali MOMIN Petitioner, Kristi Noem, Secretary of Homeland Security; Todd M. Lyons, Acting Director of Immigration and Customs Enforcement; Miguel Vergara San Antonio Field Office Director; Charlotte Collins, Warden of T. Don Hutto Residential Center Respondents.	**Civil Case No. 5:25-cv-01017**

PETITIONER'S REPLY TO THE RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONER'S WRIT OF HABEAS CORPUS

The Fifth Amendment's Due Process Clause prohibits the government from depriving an individual of liberty 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). As courts have repeatedly recognized, even individuals subject to final removal orders retain constitutional rights. *See, e.g.*, *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 144 (W.D.N.Y. 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.").

This case exemplifies exactly the type of unlawful government action the Fifth Amendment's Due Process Clause was designed to prevent. Petitioner was ordered excluded on July 5, 1994. His order became administratively final that same day, and the 90-day removal period

under 8 U.S.C. § 1231(a) began and concluded decades ago. The Respondent, U.S. Immigration and Customs Enforcement (ICE), initially detained Petitioner in September 2009 but released him on May 24, 2010, under an order of supervision (OSUP), which he has complied with for over fifteen years. *See* Exh. A.

Yet on June 6, 2025, Respondents abruptly re-detained him, without identifying any change in circumstances, without providing notice of the basis for his re-detention, and without affording an interview and opportunity to contest the revocation of his supervised release. The Respondents are presently holding the Petitioner in custody while they attempt to arrange his removal to Pakistan. When that effort fails, Respondents may attempt to remove him to a third country without meaningful notice about what country they intend to deport him to and inadequate process of law for him to challenge removal to such third country, all in violation of the Due Process Clause of the Fifth Amendment. 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." *Garcia v Noem*, No. 25-1404, 2025 WL 1135112, at *1 (4th Cir. Apr. 17, 2025). Accordingly, the Court should declare Petitioner's re-detention unlawful and order his immediate release from ICE custody.

I. FACTUAL AND PROCEDURAL SUMMARY

Petitioner was ordered excluded *in absentia* on July 6, 1994. On September 4, 2009, ICE detained Petitioner but was unable to secure a travel document for removal. After approximately eight months in custody, ICE released Petitioner on May 24, 2010 on an OSUP after it determined that removal was not foreseeable. *See* Exh. A. Petitioner has complied with the conditions of supervision for over fifteen years. Petitioner has a pending application for adjustment of status

based on an immediate relative petition filed by his U.S. citizen daughter on July 9, 2025. *See* ECF No. 1-2.

On June 6, 2025, Respondents redetained Petitioner without providing any notice of the basis for his redetention. To date, Respondents have not interviewed Petitioner nor given him an opportunity to challenge the purported revocation of his OSUP, as they have not disclosed the reason for the revocation.

On October 27, 2025, this Court issued an order directing Respondents to show cause for Petitioner's continued detention. *See* ECF. No. 11. On November 7, 2025, Respondents filed their answer. *See* ECF No. 14. In their response, Respondents do not provide documentation of any formal revocation of Petitioner's order of supervision or indicate whether any revocation, if any, followed the procedures set forth in 8 C.F.R. § 241.13. They also do not provide evidence regarding the foreseeability of Petitioner's removal. Instead, they claim that: (1) "Petitioner is lawfully detained with a final order of removal," (2) "his constitutional challenge to continued detention is not ripe until he has been detained in post-order custody for at least six months," (3) "there is insufficient reason to believe that removal is unlikely in the foreseeable future; and (4) EAJA fees are not available in a writ of habeas petition. As explained below, these arguments are meritless, and the Court should grant Petitioner the relief he seeks.

II. ARGUMENT

A. Respondents' non-compliance with 8 C.F.R. § 241.13(i) violates Petitioner's due process rights under the Fifth Amendment and amounts to a violation of the *Accardi* doctrine.

"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." *Zadvydas*, 533 U.S. at 690. 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)). Petitioner has a significant liberty interest in remaining free from custody. As numerous courts have recognized, once a noncitizen has been released from custody, he or she retains a liberty interest in remaining free from detention. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."); *Nguyen v. Bondi*, No. EP-25-CV-323-KC, 2025 WL 3120516 (W.D. Tex. Nov. 7, 2025) ("Parolees thus have a protected liberty interest in their "continued liberty."); *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 Respondents to redetain Petitioner, including their failure to provide notice and follow the required procedures for revocation of supervision, fails to satisfy even minimal due process under the Fifth Amendment and violates the *Accardi* doctrine.

1. **Respondents failed to comply with the procedural safeguards governing the revocation of an order of supervision.**

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;

(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. Critically, § 1231 "contains no provisions for pausing, reinitiating, or refreshing the removal period after the 90-day clock runs to zero." Transcript of Motions Hearing at 32, *Cordon-Salguero v. Noem, et al.*, 1:25-cv-01626-GLR (D. Md. June 18, 2025).

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.* "After *Zadvydas*, the immigration regulations were revised to implement administrative review procedures for those aliens detained beyond the removal period, including those who are re-detained upon revocation of their supervised release." *Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025).

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 an order of supervision is governed by 8 C.F.R. § 241.13(i). *Id.* The regulation purports to allow ICE to revoke supervised released only if the noncitizen "violates any of the conditions of release" or 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)(1)–(2); *see also* 8 C.F.R. § 241.4(b)(4). "These regulations clearly indicate, upon revocation of supervised release, it is the Service's burden to show a significant likelihood that the [noncitizen] may be removed." *Escalante*, 2025 WL 2206113, at *3.

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 Respondents provide no facts concerning whether Petitioner' OSUP has ever been revoked—much less whether it has been legally revoked for a permissible reason under 8 C.F.R. § 241.13(i)(1)–(2). Instead, Respondents submitted a declaration from Deportation Officer Nicholas P. Bassett, who states that Petitioner was detained "due to his final exclusion order." *See* ECF No. 14-1. The declaration contains no facts demonstrating that ICE complied with the statutes or regulations governing noncitizens subject to an order of supervision, nor does it identify the reasons for revocation or show that Petitioner was afforded the required informal interview.[1]

[1] Bennett states that on June 24, 2025, ERO served the petitioner with a notice of alien of file custody review, which indicated his custody would be reviewed on September 4, 2025. *See* ECF No. 14-1 at 3. However, such review occurred prematurely on August 27, 2025, without any notice to Petitioner or counsel in violation of 8 C.F.R. § 241.4(h)(2).

While Respondents have not identified a legal basis for Petitioner's redetention, to the extent they purport to rely on 8 C.F.R. § 241.13(i)(1) (violation of conditions of release), they fail to show any connection between the alleged noncompliance and the sudden redetention. In his declaration, Bennett suggests that Petitioner did not comply with travel document requests from ICE between 2011 and 2014.[2] Even assuming arguendo that this is true, Respondents provide no revocation notice, no contemporaneous documentation, and no explanation demonstrating that ICE actually relied on this allegation in revoking Petitioner's OSUP—much less that the revocation complied with the mandatory procedures set forth in 8 C.F.R. § 241.13(i).[3]

Moreover, to the extent Respondents rely on 8 C.F.R. § 241.13(i)(2), they fail to identify any "changed circumstances" indicating that Petitioner's removal to Pakistan is reasonably foreseeable. Respondents note that 132 Pakistani nationals were removed from the United States over the past four years, including 15 in 2025. ECF No. 14 at 7. These figures, however, do not help the Respondents' position. In fact, this date does not identify the countries to which these individuals were removed, nor do they indicate the total number of Pakistani nationals subject to final removal orders in the United States. In fact, an ICE report shows that at least 7,760 Pakistani nationals remained on the non-detained docket with final orders of removal as of November 24, 2024—strongly indicating that actual removals constitute only a small fraction of the population ICE purports to be able to remove. *See* Exh. C. This same report states that ICE considers Pakistan

[2] Bennett also reports that Petitioner recently refused to sign his travel document application. However, Petitioner declined to sign on July 5, 2025, only because ICE presented him with legal documents without first contacting undersigned counsel, despite counsel having a G-28 on file. On the advice of counsel, Petitioner did not sign any documents until he had the opportunity to review them with his attorney. ICE provided the documents to counsel on July 5, 2025, and after reviewing them together on July 8, 2025, Petitioner was prepared to sign. *See* Exh. B.

[3] Respondents do not contend that the revocation of Petitioner's supervision was conducted pursuant to 8 C.F.R. § 241.4(l). However, even under this regulation, revocation requires that the noncitizen be provided with notice of the reasons for revocation and "afforded an initial informal interview promptly after his or her return" to have "an opportunity to respond to the reasons for revocation stated in the notification." § 241.4(l)(1).

to be "uncooperative." *Id.* at 7. Thus, the statistics cited by Respondents do nothing to show that Petitioner's removal is reasonably foreseeable.

Further, the practical reality is that Pakistan has been unable to issue Petitioner a travel document for over 15 years—including as recently as September 2025, when Petitioner was removed from an airplane after Pakistan was unable to confirm his identity. *See* ECF No. 14-1 at 4. Respondents did not even submit a travel document request until a month after redetaining him, and they have offered no evidence or timeline indicating when, if ever, Pakistan is likely to issue one. They have also failed to provide Pakistan's criteria for issuing a travel document or to explain why ICE believes Petitioner now meets those criteria when he has not met them for decades. *See, e.g.*, *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at 17–19 (W.D. Wash. Aug. 21, 2025); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025) ("Respondents have not provided any details about why a travel document could not be obtained in the past, nor have they attempted to show why obtaining a travel document is more likely this time around.").

Petitioner has lived in the United States since 1994. He has no remaining immediate family or place to reside in Pakistan, while all of his immediate family members live in the United States. He also has a pending application for adjustment of status before USCIS, which affords him a period of authorized stay while the application is pending[4] and would confer lawful permanent resident status if granted. Respondents have offered nothing that would allow the Court to conclude when—or even whether—a travel document might be issued. And critically, nothing prevents ICE from continuing its efforts to obtain a travel document while Petitioner remains on supervised release, as he did for more than fifteen years without incident. Indeed, he consistently complied

[4] *See* USCIS, Policy Manual, Vol. 7, Pt. B, Ch. 3, *Unlawful Immigration Status at the Time of Filing*, https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-3 (last visited Aug. 11, 2025).

with supervision, most recently reporting on September 4, 2024, with his next report scheduled for September 3, 2025, before ICE abruptly detained him. *See* Exh. A. These facts demonstrate that nothing material has changed regarding Petitioner's removability—and that his removal remains not reasonably foreseeable.

In the absence of any evidence that Petitioner's OSUP was revoked for a legally permissible reason under 8 C.F.R. § 241.13(i)—and that ICE provided the required interview and meaningful opportunity to contest the revocation—Respondents have failed to demonstrate that Petitioner received the procedural due process the Fifth Amendment requires before depriving him of his liberty interest. Numerous courts that have considered the issue have determined that ICE's actions do not comport with procedural due process. *See, e.g.*, *Villanueva v. Tate*, No. CV H-25-3364, 2025 WL 2774610 (S.D. Tex. Sept. 26, 2025); *Misirbekov v. Venegas*, No. 1:25-CV-00168, 2025 WL 3033732 (S.D. Tex. Oct. 29, 2025); *Vinh Duong v. Charles et al.*, No. 1:25-CV-01375-SKO, 2025 WL 3187313 (E.D. Cal. Nov. 14, 2025); *Phan v. Noem*, No. 3:25-CV-02422-RBM-MSB, 2025 WL 2898977 (S.D. Cal. Oct. 10, 2025); *Rombot v. Souza*, 296 F. Supp. 3d 383 (D. Mass. 2017); *K.E.O. v. Woosley*, No. 4:25-CV-74-RGJ, 2025 WL 2553394 (W.D. Ky. Sept. 4, 2025). The Court should similarly find that ICE's actions in this case violate the Fifth Amendment's Due Process Clause.

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

The Respondents assert that Petitioner's detention is lawful under 8 U.S.C. § 1231(a)(6), which authorizes ICE to detain an alien for a 90-day period following the entry of a final removal order. *See* ECF No. 14 at 4. However, as discussed above, that 90-day period expired decades

ago—90 days after Petitioner's order of exclusion became final on July 5, 1994.[5] Accordingly, Respondents' claim that Petitioner's *Zadvydas* challenge is premature is without merit. *See id.* at 4. Multiple courts have held that re-detention does not restart the 90-day removal period under § 1231(a)(6). *See Villanueva*, 2025 WL 2774610, at *9 ("The government's contention that it may avoid the holding of *Zadvydas* and re-start the six-month presumptively constitutional detention clock by simply releasing and then re-detaining a noncitizen has no basis in either the statutes, the regulations, or *Zadvydas* itself."); *Nguyen v. Hyde*, No. 25-cv-11470, 2025 WL 1725791, at *149 (D. Mass. June 20, 2025) (finding *Zadvydas* six-month presumption inapplicable where a noncitizen is **re-detained** after a period of supervised release and the government fails to show a substantial likelihood that removal is reasonably foreseeable); *Tadros v. Noem*, No. 25-cv-4108, 2025 WL 1678501, at *3 (D.N.J. June 13, 2025) (holding that the six-month presumption had long lapsed during supervised release, and the government bears the burden of demonstrating that removal is reasonably foreseeable); *Sied v. Nielsen*, No. 17-cv-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018); *Chen v. Holder*, No. 6:14-2530, 2015 WL 13236635, at *2 (W.D. La. Nov. 20, 2015). Even if the clock could "restart," the six-month period is not a bright line rule. The constitutionality of detention "hinges on whether his removal from the United States is reasonably likely in the foreseeable future, not how long the noncitizen has been detained." *Villanueva*, 2025 WL 2774610, at *10.

The Respondents further err in claiming that Petitioner bears the burden of demonstrating "good reason" to believe that removal is not reasonably foreseeable. ECF No. 14 at 5. However,

[5] Pursuant to 8 U.S.C. § 1229b(b)(5)(C), the in absentia order becomes final immediately upon issuance. *See Matter of Guzman*, 22 I&N Dec. 722 (BIA 1999) (finding the "Board of Immigration Appeals lacks jurisdiction to consider an appeal from an in absentia order in removal proceedings where section 240(b)(5)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(5)(C) (Supp. II 1996), provides that such an order may only be rescinded by filing a motion to reopen with the Immigration Judge.").

consistent with the overarching principle in *Zadvydas*—that immigration detention is justified only to effectuate removal and must be reasonably foreseeable—ICE cannot lawfully detain Petitioner without proving that his removal is likely. ICE has not met this burden. *See, e.g., Trejo v. Warden of ERO El Paso East Montana*, No. EP-25-CV-401-KC, 2025 WL 2992187 (W.D. Tex. Oct. 24, 2025) (finding that Respondents cannot meet their burden in demonstrating removal is reasonably foreseeable based upon pending requests for a travel document).

Even if the burden remained with Petitioner, he has presented more than sufficient evidence that his removal is not reasonably foreseeable, as explained above. ICE itself determined in 2010 that removal to Pakistan was not reasonably foreseeable and released him accordingly. Over the ensuing fifteen years, the ICE has repeatedly failed to obtain travel documents or otherwise effectuate the Petitioner's removal. Indeed, Respondents' own evidence shows that in September 2025 Pakistan was unable to verify Petitioner's identity, making removal impossible.

Furthermore, as discussed above, Respondents' reliance on the fact that 15 Pakistani nationals were removed in 2025 is unavailing when contrasted with the thousands of Pakistani nationals in the United States who have final removal orders in the non-detained docket as of November 2024. *See* Exh. C. The data does not establish that Petitioner's removal is likely. These facts confirm that Petitioner's continued detention is neither justified nor lawful under § 1231(a)(6).

3. ICE's noncompliance with its own regulations renders Petitioner's detention unlawful under the *Accardi* doctrine.

Government agencies are required to follow their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will

strike it down."). A violation of the *Accardi* doctrine may itself constitute a violation of the Fifth Amendment's Due Process Clause and warrant a noncitizen's release from detention. *See, e.g.*, *Ceesay*, 781 F. Supp. 3d at 160 (citing *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017)).

Here, ICE's failure to comply with the regulations governing revocation of an order of supervision squarely violates the *Accardi* doctrine. Courts across the country have repeatedly held that ICE acts unlawfully when it disregards these mandatory procedures. *See Rokhfirooz v. Larose*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165, at *4 (S.D. Cal. Sept. 15, 2025) ("Because DHS failed to make the determination required by Section 241.13(i)(2) for revoking Petitioner's release, the Court has no occasion to address the adequacy of the reasons stated for such a determination. The Court cannot conclude that Petitioner was "[u]pon revocation" duly notified of those reasons, or that DHS "conduct[ed] an initial informal interview promptly ... to afford [Petitioner] an opportunity to respond to the reasons for revocation in the notification," as required by Section 241.13(i)(3)."); *Rombot*, 296 F. Supp. 3d at 387–88 (ordering release where "[b]ased on ICE's violations of its own regulations, the Court concludes [the petitioner's] detention was unlawful"); *K.E.O.*, 2025 WL 2553394, at *7 (noting that "courts across the country have ordered the release of individuals" where ICE "violated their own regulations"); *Grigorian v. Bondi*, No. 25-cv-22914-RAR, 2025 WL 2604573, at *10 (S.D. Fla. Sept. 9, 2025) (holding that ICE's failure to provide the required informal interview or a meaningful opportunity to contest revocation "violates both ICE's own regulations and the Fifth Amendment Due Process Clause" and "compels [the petitioner's] release"); *Roble v. Bondi*, No. 25-CV-3196 (LMP/LIB), 2025 WL 2443453, at *5 (D. Minn. Aug. 25, 2025) (same). Because ICE failed to adhere to the regulations that govern its own

authority, this Court should likewise conclude that Petitioner's detention is unlawful and order his release from unlawful detention.

B. **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 Petitioner 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.[6] 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?
>
> 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?
>
> 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.

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[6]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.

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, Petitioner's rights are violated by Respondents' 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 Respondents represent that ICE is not actively seeking to deport Petitioner to a third country. *See* ECF No. 14 at 9. Nonetheless, under its current policy, ICE can change that decision and attempt to effectuate removal to a third country where Petitioner may be tortured with little or no notice. 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.* 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.

The March 30, 2025 guidance does not comply with minimal due process requirements. *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 Respondents 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 Petitioner the relief sought in the habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on today's date, November 17, 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 Respondents' counsel.

/s/ Alejandra Martinez
Alejandra Martinez