UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DONG, Shi Huan

Petitioner,

v.

Case No. 25 Civ. 7630 (JPC)

Judith C. Almodovar, *et al.*,

Respondents.

REPLY TO OPPOSITION MEMORANDUM

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U.S. Supreme Court: "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491, 2498, 150 L. Ed. 2d 653 (2001)

Border Czar Thomas Homan: "The target number's arresting as many people as we can possibly arrest with the resources I have," Homan said. "This operation isn't going to stop. We've got four years to continue this operation. ... If you're in the country illegally, you've got a problem."[1]

INTRODUCTION

Here, following the May 22, 2014 final administrative order, the Government did not detain Mr. Dong during the 90 day post-order removal period, and did nothing whatsoever to attempt to obtain a travel document until October 1, 2025, when an application for a travel document was supposedly submitted.

The Court should reject the Government's claim that 8 U.S.C. § 1231(a)(6) authorizes detention where there is no concrete showing that a travel document will in fact issue, particularly in light of the long period in which no effort had been made to obtain such a document. Detention based on such generalized assurances without any concrete timeline becomes both indeterminate and potentially indefinite.

Moreover, removal is not "reasonably foreseeable" where, for decades, China has refused to accept the repatriation of its citizens from the United States;

[1] CNN, Trump's Border Czar Says He'll Need Funding and at Least 100K Beds to Carry Out Deportation Plans (Dec. 18, 2024) https://www.cnn.com/2024/12/18/politics/border-czar-homan-trump-deportation-plans/index.html.

the claim in the Waters Declaration that "since January 2025 China has accepted its citizens" fails due to the vagueness as to the number of Chinese nationals have been removed this year, compared to the tens of thousands of Chinese nationals who have final removal orders, or how long obtaining those travel documents has taken.

FACTUAL BACKGROUND

Respondents do not dispute the essential facts. Mr. Dong entered the United States in 2010, applied for asylum, and has been subject to a final order of removal since May 22, 2014, when the Board of Immigration Appeals affirmed the removal order.

Immigration and Customs Enforcement ("ICE") took no steps to detain him during the 90-day statutory removal period, nor at any time during the ensuing decade.

In September 2025, over eleven years later, ICE detained Mr. Dong near his home in Brooklyn, New York.

As of October 1, 2025, the Waters Declaration avers that "ERO-ATL expect[ed] to submit travel document request ... before close of business today." A copy of that submission has not be provided to the Court.

The Declaration does not indicate how long the process of obtaining a travel document might take after "submission," what the likelihood of actually obtaining such a document might be, and even failed to indicate how and to whom the submission was intended to me made.

If an I-130 based on Mr. Dong's marriage to his U.S. citizen wife is approved, he will become eligible to seek a Provisional Unlawful Presence Waiver under 8 C.F.R. § 212.7(e), which would permit him to complete consular processing abroad and lawfully return to the United States as a permanent resident. https://www.uscis.gov/family/family-of-us-citizens/provisional-unlawful-presence-waivers.

ARGUMENT

A. SECTION 1231 AUTHORIZES POST-PERIOD DETENTION, BUT ONLY AS LIMITED BY DUE PROCESS AND *ZADVYDAS*

The DHS has an affirmative duty to effect removal during the removal period. *Xi v. U.S. I.N.S.*, 298 F.3d 832, 840, n. 6 (9th Cir. 2002).

After the 90-day removal period, treatment of noncitizens is provided for in INA § 241(a)(6), which provides: "An alien ordered removed who is inadmissible under section 1182 of this title, … may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3). 8 U.S.C.A. § 1231 (West).

"After the 90 days, authorizes the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal." *Zadvydas v. Davis*, 533 U.S. 678, 682, 121 S. Ct. 2491, 2495, 150 L. Ed. 2d 653 (2001).

The Government is correct that § 1231(a) governs detention following a final order and that § 1231(a)(6) permits continued detention past the 90-day removal period for certain noncitizens. However, that is not the end of the analysis. *Zadvydas* reads § 1231(a)(6) to include an "implicit limitation": detention may last only for a period "reasonably necessary" to effect removal, and after six months, if the noncitizen gives "good reason" to believe removal is not significantly likely in the reasonably foreseeable future, the Government must rebut that showing with evidence. 533 U.S. at 689, 701.

The Government characterizes Mr. Dong's petition as "premature" because he has been in ICE custody for about two weeks when the Opposition was filed, citing cases that treat the six-month period as a bright-line waiting rule. But *Zadvydas* imposes no categorical bar to relief before day 181. Courts routinely look to whether removal is *reasonably foreseeable now*, not on a fixed calendar, where record evidence shows no realistic prospect of removal or where the Government's showing is purely conclusory. See, e.g., *Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543 (D. Md. Sept. 8, 2025) slip op. at 6–9 (finding that

"there is ... a reasonable argument that the six-month period runs continuously from the beginning of the removal period, even if the noncitizen is not detained throughout that period."); *See also Tadros v. Noem*, No. 25-4108-EP, 2025 WL 1678501, at *3 (D.N.J. June 13, 2025) (finding that the removal period began upon the affirmance of the removal order even though the petitioner was immediately released, rather than when he was detained 16 years later, and rejecting the argument that the petitioner could not obtain habeas relief because he had not yet been in detention for six months); *Cordon-Salguero v. Noem*, No. 25-1626-GLR, Mot. Hr'g Tr. at 33–34 (D. Md. June 23, 2025) (Dkt. No. 21) (finding that the six-month period was not tolled upon release from detention); *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 500 (S.D.N.Y. 2009) (concluding that, where the Government was aware of a noncitizen's address but failed to pursue her removal until more than 15 months after the removal order was entered, "the removal period, as well as any presumptively reasonabl[e] six-month period of removal to which the Government may have been entitled" had expired six months after the entry of the removal order). The six-month presumption protects the Government when it can show active, meaningful steps toward removal and realistic prospects; it is not a license for detention where the record reveals only speculation.

In *Zavvar*, the court granted habeas relief where the government relied on "active efforts" and "continuing communications" with a foreign consulate but

could not show concrete, case-specific progress indicating a significant likelihood of removal in the reasonably foreseeable future. The court required more than assurances of anticipated cooperation; it required evidence of actual movement, such as acknowledged submissions, timeframes, and steps toward securing transportation. The Government's showing here is weaker: ICE had only "gathered" materials and "expects to submit" the request as of October 1, 2025, with no embassy acknowledgment, no estimate, and no booked travel. Waters Decl. ¶¶ 17–19.

Nor does the Government's reliance on *Callender v. Shanahan*, 281 F. Supp. 3d 428 (S.D.N.Y. 2017), change the analysis. *Callender* confirms the six-month "presumptively reasonable" benchmark but does not hold that courts must deny relief whenever detention is shorter. Here, the undisputed facts, including Respondents had a substantial pre-detention opportunity to arrange Mr. Dong's removal, that ICE's admission that it had no travel document in hand, that Mr. Dong's passport is unavailable, and that ICE was only *preparing to submit* an application as of October 1, 2025, Waters Decl. ¶¶ 16–18, demonstrate the Government has not carried its rebuttal burden. General assertions of consular communications absent concrete progress or timeline is insufficient.

B. THE GOVERNMENT HAS NOT SHOWN A "SIGNIFICANT LIKELIHOOD OF REMOVAL IN THE REASONABLY FORESEEABLE FUTURE"

The Opposition Memorandum asserts removals to China have occurred "since January 2025" and that ICE "expects" issuance of a travel document after it "submits" a packet to ICE Headquarters for transmittal to the PRC Embassy. Waters Decl. ¶¶ 17–21. That showing is inadequate under *Zadvydas* and persuasive district-court authority.

First, general assurances are not evidence. Assertions that an embassy "will issue" a document, without identification of a consular contact, processing stage, typical processing times, or evidence of an individualized green light, are insufficient. *Zavvar*, slip op. at 7–8 (Respondent could not point the Court to any evidence when "no information showing that ICE has sent any such inquiries, or that it has taken any additional steps to effectuate the removal"). Government's continuing communication and expectations did not establish foreseeability absent concrete proof of impending repatriation.

Second, the Government provides no concrete timeline. ICE has not identified a target flight date, a confirmed request number with the Chinese Embassy, acknowledgement of receipt, or any consular follow-up. See *Zadvydas*, 533 U.S. at 701 (government must respond with *evidence* sufficient to rebut).

Third, the Government failed to present a timeline for document gap and conceded cooperation. ICE concedes Mr. Dong lacks a passport but is cooperating to obtain a document Waters Decl. ¶ 16. Cooperation eliminates any argument that Petitioner himself impedes removal; yet the Government still cannot present a timeline.

Detention is not justified where removal is not *reasonably foreseeable* or not *reasonably likely in the foreseeable future*, *Ali v. Dep't of Homeland Sec.*, 451 F. Supp. 3d 703, 706 (S.D. Tex. 2020).

A Bloomberg article from January 2025 noted that while China has pledged to accept undocumented nationals after specific diplomatic pressure from the United States – such as the threat of tariffs – this cooperation appears reactive and politically motivated, rather than routine or reliable.[2]

A review of the recent history of removals from the U.S. to China underscores why the answers to these questions are far from clear and shows that removal is certainly not "reasonably foreseeable."

In February 2025, a Chinese national, Zheng, Lijuan, was one of "299 migrants – from China, Afghanistan, Iran and other countries with which the US lacks extradition agreements" who were deported in shackles to Panama. She escaped the hotel in Panama City where they were held, avoiding being sent to a

[2] Colum Murphy, *China Promises to Take Back Illegal Migrants After US Pressure*, Bloomberg (Jan. 27, 2025), https://www.bloomberg.com/news/articles/2025-01-27/china-promises-to-take-back-illegal-migrants-after-trump-threats.

"concentration camp" like facility near the Darien Gap.[3] If repatriation to China were truly feasible and imminent, it raises a glaring question: Why was Zheng – along with other Chinese nationals – deported to a third country instead of directly repatriated? The government has provided no answer. This situation reflects a broader incapacity to consistently repatriate Chinese nationals, suggesting that such deportations remain irregular and unpredictable. How many other Chinese nationals have been routed through third countries due to inability to repatriate them directly?

The issue of difficulty of repatriating Chinese nationals is long-standing, and it is not necessary to go back to the period 1949 to 1972 when there were no diplomatic relations between the two countries. Let us look at the period 2010-2020.

In September 2015, Reuters reported that approximately 39,000 Chinese nationals were under final orders of removal but could not be repatriated, *see* FN 2 above. That figure has not substantially improved. On the contrary, the number of Chinese nationals encountered at the border or subject to enforcement actions has skyrocketed.

[3] Police search for woman who escaped Panama hotel where US deportees are being held, The Guardian, February 19, 2025, https://www.theguardian.com/world/2025/feb/19/migrants-panama-city-darien.

According to the America First Policy Institute, apprehensions of Chinese nationals by U.S. authorities increased by over 1,400 percent between 2021 and 2024.[4] Yet the pace of actual removals remains miniscule.

Indeed, ICE data from November 2024 identified over 37,000 Chinese nationals who were believed to be removable from the United States but had not yet been detained.[5] This massive inventory of unenforced removal orders demonstrates the deep disconnect between administrative designation and execution.

Furthermore, during the fiscal year of 2024, only 517 Chinese nationals were removed from the United States out of tens of thousands subject to removal orders.[6] Removal is procedurally fraught and functionally delayed, particularly for Chinese nationals in recent years. Thus, the evidence presented above overwhelmingly supports a finding that Mr. Dong's removal is not "reasonably foreseeable," and continued detention is therefore unjustified under *Zadvydas v. Davis*.

C. THE GOVERNMENT'S "PREMATURITY" ARGUMENT MISREADS *ZADVYDAS.*

[4] America First Policy Institute, *The Trojan Horse at the Southern Border: Malign CCP Infiltration* (Feb. 14, 2024), https://www.americafirstpolicy.com/issues/the-trojan-horse-at-the-southern-border-malign-ccp-infiltration.

[5] Lin Yang & Victoria Macchi, *US Deportations to China Continue Amid Shifts in Immigration Crackdown*, Voice of America (June 11, 2025), https://www.voanews.com/a/us-deportations-to-china-continue-amid-shifts-in-immigration-crackdown/7958862.html.

[6] Lin Yang & Victoria Macchi, *supra* note 6.

The Opposition treats the six-month benchmark as jurisdictional or dispositive. It is neither. *Zadvydas* describes a presumption, not a safe harbor. Where the record shows that removal is not reasonably foreseeable at present, and the Government cannot offer concrete and individualized evidence to the contrary, continued detention is not "reasonably necessary to bring about removal," 533 U.S. at 689, and violates due process even before six months. *Zavvar*, slip op. at 9 (granting relief without waiting out an arbitrary clock because the government's showing was speculative).

This is especially true where ICE allowed the statutory removal period to lapse in 2014 without custody, then initiated detention more than eleven years after finality without any new removal-related development other than a proposed paperwork submission. The due-process inquiry asks whether detention today is reasonably related to its legitimate purpose; on this record it is not.

D. THE GOVERNMENT'S REMAINING POINTS DO NOT JUSTIFY CONTINUED DETENTION.

The Government calls DHS's long-standing knowledge of Mr. Dong's whereabouts "irrelevant." It is relevant to due process because it undercuts any suggestion that detention is needed to prevent flight or to facilitate removal where ICE took no action for over a decade and still lacks a travel document.

The Opposition notes a July 2025 arrest with misdemeanor and traffic charges "pending." (Waters Decl. ¶ 9.) The Government identifies no conviction,

no public-safety rationale, and no individualized risk assessment. Section 1231 detention must be tied to removal, not used as preventive detention unrestricted to concrete removal prospects.

The Government also reports an I-130 denial (Jan. 28, 2025) and I-485 denial (Aug. 15, 2025). (Waters Decl. ¶ 8.) Those adjudications do not convert speculative removal into a foreseeable one, and they do not diminish Mr. Dong's cooperation. Nor do they authorize detention where ICE has not shown a realistic, near-term removal path. Should any petition be reopened or refiled, the statutory scheme (including provisional-waiver consular processing) reinforces that prolonged detention serves no removal purpose.

The Government further cites 8 C.F.R. §§ 241.4 and 241.13. Those regulations underscore that when removal is not significantly likely in the reasonably foreseeable future, release under appropriate conditions is required. See 8 C.F.R. § 241.13(g)(1), (i)(2). On this record, ICE has not applied those standards to Mr. Dong with the individualized analysis *Zadvydas* demands.

CONCLUSION

Because Respondents have not shown that Mr. Dong's removal is significantly likely in the reasonably foreseeable future, his detention is no longer reasonably related to its sole permissible purpose and violates § 1231(a)(6) as construed by *Zadvydas* and due process.

Dated: October 8, 2025

Respectfully submitted,

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