**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF KENTUCKY**
**NORTHERN DIVISION AT COVINGTON**

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| **Mor Maty Ndiaye**,<br><br>*Petitioner,*<br><br>v.<br><br>**Sam Olson**, et al.,<br><br>*Respondents.* | Case No. 2:25-cv-145-DCR |

**PETITIONER'S SECOND REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

## INTRODUCTION

Petitioner, Mor Maty Ndiaye, was granted withholding of removal on February 14, 2025. Yet despite this order granting him relief from removal, he remains in immigration custody over 8 months later, with no end in sight. He has cooperated with efforts to secure his removal, and his primary argument is that release is appropriate because his removal is not reasonably foreseeable. Nothing in Respondents' response undermines that claim. Accordingly, this Court should order Mr. Ndiaye's release.

## ARGUMENT

### I. Mr. Ndiaye is entitled to release under *Zadvydas* as he faces indefinite detention, and his removal is not reasonably foreseeable.

In *Zadvydas*, the Supreme Court held that the statute governing the post-removal period, 8 U.S.C. § 1231, does not authorize the Attorney General to detain a noncitizen indefinitely, but only for the period "reasonably necessary to secure the noncitizen's removal." *Zadvydas v. Davis*, 533 U.S. 678 (2001). The period "reasonably necessary to bring about removal is presumptively six months." *Cabrera Galdamez v. Mayorkas*, No. 22 CIV. 9847 (LGS), 2023 WL 1777310, at *8 (S.D.N.Y. Feb. 6, 2023) (citing *Zadvydas*, 533 U.S. at 701). Once the six-month period expires, and once the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 699.

A noncitizen bringing a *Zadvydas* challenge need not show "the absence of any prospect of removal" but merely that removal is not reasonably foreseeable. *Id.* at 702. The *Zadvydas* Court also recognized that "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* at 701; *see also Ali v. Byers*,

No. CV 23-177-DLB, 2024 WL 188445, *3 (E.D. Ky. Jan. 17, 2024) (recognizing that Petitioner's "continued detention is subject to the due process standards set forth in *Zadvydas*").

Mr. Ndiaye has demonstrated that his removal is not reasonably foreseeable, and the government has provided no evidence to rebut that showing. Mr. Ndiaye was granted withholding of removal on February 14, 2025. Dkt. 1-3. This order prohibits his removal to Senegal, the only country DHS designated for removal. And, more than eight months later, DHS has been unable to effectuate his removal to any other country. Indeed, a non-final ICE memorandum indicates that in February 2025 – more than seven months ago – DHS received confirmation that three countries declined to accept Mr. Ndiaye for removal. Dkt. 1-7, p. 38. For the past eight months since his grant of withholding of removal became final, ICE has not requested that Mr. Ndiaye fill out applications for travel documents to any country, nor speak to any consulate. Without such requests, and given that the only countries ICE apparently requested removal to declined to accept Mr. Ndiaye, his removal is not reasonably foreseeable.

Notably, in its response, the government does not indicate which countries, if any, the government is currently pursuing for removal. Dkt. 11-1. Nor does the government provide the final decisions from Mr. Ndiaye's post-order custody reviews. The only document Mr. Ndiaye received following either his 90-day or 180-day review was an internal memorandum dated September 4, 2025, that the government acknowledged was *mistakenly* provided to him and did not constitute a final decision. Dkt. 1-7 (email communications where Officer Wiet stated, on September 17, 2025, that "[t]he document [Mr. Ndiaye] received was not the final decision" from ICE headquarters, but instead an "internal memo mistakenly" given to Mr. Ndiaye). The failure to properly conduct a post-order custody review, including providing a final decision regarding Mr.

Ndiaye's custody status, is itself a violation of the regulations and Mr. Ndiaye's due process rights. 8 C.F.R. § 241.4(d) (stating that post-order custody decisions "shall be provided to the detained" noncitizen); *see also Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641- 42 (D. Mass. 2018) (finding that failure to follow the post-order custody review regulations may constitute a violation of the noncitizen's procedural due process rights); *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 388-402 (W.D.N.Y. 2009) (finding that DHS failed to follow the post-order custody review regulations, in violation of Petitioner's due process rights, and ordering release); *Rodriguez Del Rio v. Price*, No. EP-20-CV-00217-FM, 2020 WL 7680560, at *4 (W.D. Tex. Nov. 3, 2020).

However, even relying on this non-final, internal memorandum, the government's own records confirm that travel documents have not been obtained, and no country has agreed to accept Mr. Ndiaye. Dkt. 1-7, p. 38. Under *Zadvydas,* this establishes good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future. Respondents have failed to rebut that showing, and as a result, Mr. Ndiaye's detention is unlawful. Where, as here, the government cannot show that removal from the United States is reasonably foreseeable, release is required.

**II. Mr. Ndiaye is neither a danger to the community nor a flight risk.**

Respondents argue that for individuals removable under 8 U.S.C. § 1227(a)(2), as Mr. Ndiaye is here, ICE may continue detention beyond the six month period set forth in *Zadvydas* if the government determines that the individual is "a risk to the community or unlikely to comply with the order of removal." Dkt. 11, p. 4. Respondents then turn their assessment to whether Mr. Ndiaye is considered a danger to the community or a flight risk, and rely on a single statement from the internal, mistakenly provided ICE memo, which states the "panel recommends he be

detained in ICE custody" because "the criteria for release set forth at 8 C.F.R. § 241.4(e)(1) has not been met[.]" *Id.* From this, Respondents contend that "ICE has determined that Mr. Ndiaye does present a public safety risk" and as such, "ICE may continue to detain him pursuant to § 1231(a)(6)." *Id.*

This analysis fails for several reasons. First, as discussed above, the record Respondents rely on is an internal ICE memo, not a final decision. Dkt. 1-7. Further, the non-final memo cites 8 C.F.R. § 241.4(e)(1) as the basis for denying release. *Id.* Failure to meet "the criteria set forth at 8 C.F.R. § 241.4(e)(1)" does not establish that Mr. Ndiaye is a "public safety risk" – it instead demonstrates that he was denied release based on *lack of travel documents*. 8 C.F.R. § 241.4(e)(1) ("Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that: Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest"); Dkt. 11, p. 4. Findings regarding public safety or flight risk are set out in separate subsections under 8 C.F.R. § 241.4(e)(2)-(6), none of which are referenced in the non-final ICE memo Respondents rely on. Respondents' reliance on this single sentence as proof of a public-safety concern is therefore inaccurate and unsupported by the evidence.

To the extent the government now asserts that Mr. Ndiaye is a danger to the community or flight risk, that claim is wholly unsupported. Mr. Ndiaye's convictions stem from a single incident that occurred during a severe mental health crisis. Dkt 1-1. He has no other convictions. Prior to that incident, Mr. Ndiaye did not have access to appropriate mental health care. *Id.* It was only during his detention at Clark County Jail that he received a formal diagnosis of bipolar disorder

and began prescribed medication for the first time. *Id.* He now reports that his mental health is significantly more stable, and he has not had any episodes since. *Id.* Mr. Ndiaye served his sentence, accepts full responsibility for his past, and does not deny he made mistakes. *Id.* But those mistakes do not define who he is today, nor do they indicate that he is a present danger to the community.

Mr. Ndiaye is also not a flight risk. He has lived in the United States since the age of seven. Dkt 1-1. His entire family resides in the United States, including his mother, brother, foster father, and family friends. *Id.* He has no meaningful connection to any country besides the United States, and he has already been granted protection from removal to Senegal. *Id.* Thus, Mr. Ndiaye has every reason to remain in the United States lawfully and comply with any supervision conditions ICE may impose. *Id.*

Mr. Ndiaye also has a strong release plan that mitigates any risk of flight. Upon release, he will reunite with his family, including his mother, brother, foster father, and family friends, who have all expressed their willingness to support his reentry into society and help with his commitment to recovery. Dkt. 1-1; Dkt. 1-5, p. 1. Mr. Ndiaye plans to live with his mother in Gaithersburg, Maryland, and will have access to numerous organizations that will provide him with a range of mental health and medical support. Dkt. 1-1; Dkt. 1-5.

Faced with similar fact patterns, several courts have ordered release, recognizing that the statute does not permit an individual's indefinite detention. *Munoz-Saucedo v. Pittman*, No. CV 25-2258 (CPO), 2025 WL 1750346, at *6-8 (D.N.J. June 24, 2025) (granting petition and ordering release where the Court found that there was no significant likelihood of removal in the reasonably foreseeable future because the petitioner was granted withholding of removal, cannot be removed

to his country of origin, ICE has historically low success rates in removing similar individuals, and multiple requests to other countries to accept a third-country removal were denied); *Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543, at *8 (D. Md. Sept. 8, 2025) (same). For the reasons discussed here and in his underlying Petition, this Court should do the same and order Mr. Ndiaye's immediate release.

## III. Mr. Ndiaye is entitled to notice and an opportunity to be heard prior to any third country removal efforts.

As discussed above, Mr. Ndiaye has established that his removal is not reasonably foreseeable and he is therefore entitled to release. However, to the extent the government continues to pursue removal to a third country, Mr. Ndiaye has demonstrated that he is entitled to notice and an opportunity to respond to any such removal efforts. Dkt. 1, p. 16-20, 22-23.

In its response to Mr. Ndiaye's third country removal claims, the government argues that this Court lacks jurisdiction over such claims due to the pending class action litigation in *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass.). Dkt. 11, p. 7-8. Alternatively, the government argues that this court should "stay this matter pending resolution of *D.V.D.*" *Id.* at p. 9. These arguments fail.

As an initial matter, and as both parties acknowledge, the Supreme Court stayed the class-wide preliminary injunction in *D.V.D.* and that stay remains in effect. *U.S. Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). As a result of the Supreme Court's order, class members are not currently afforded the relief specified in the District Court's preliminary injunction. Thus, *D.V.D.* does not afford Mr. Ndiaye the relief he requests here. Indeed, following the Supreme Court's

decision, DHS swiftly resumed removals to third countries.[1] Here, Mr. Ndiaye is at risk of removal without notice and an opportunity to be heard *before* a decision is reached in *D.V.D.*

Further, Mr. Ndiaye seeks relief that is not available through the *D.V.D.* litigation. The *D.V.D.* case was filed on March 23, 2025, and does not challenge ICE's later-issued March 30 and July 9, 2025, memos. As argued in his Petition, both the March and July ICE memos are unlawful because the memos fail to comply with ICE's obligations under the Immigration and Nationality Act (INA), Due Process Clause, the Convention Against Torture and its implementing regulations. Dkt. 1, p. 16-20, 22-23. For example, the July Memo states that, where the country of removal has not provided "assurances," ICE will "generally wait at least 24 hours" before removing a noncitizen, but that "[i]n exigent circumstances, [ICE] may execute a removal order six (6) or more hours after service of the Notice of Removal as long as the [noncitizen] is provided reasonable means and opportunity to speak with an attorney prior to removal." *Id.* at 18. The *D.V.D.* litigation does not currently challenge either memo, which were both issued after the District Court issued a TRO on March 28, 2025.

In addition, Mr. Ndiaye argues that due process and the INA require he has a meaningful opportunity to seek withholding of removal to a third country, a claim not at issue in *D.V.D.* Dkt. 1, p. 22-23 (raising a claim under the INA, in addition to the due process clause and Convention

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[1] *See e.g.*, PBS News, *U.S. completes deporting 8 men from various nations to South Sudan after weeks of legal battles*, Jul. 5, 2025, https://www.pbs.org/newshour/politics/u-s-completes-deporting-8-men-from-various-nations-to-south-sudan-after-weeks-of-legal-battles; Reuters, *The US said it had no choice but to deport them to a third country. Then it sent them home*, Aug. 3, 2025, https://www.reuters.com/world/americas/us-said-it-had-no-choice-deport-them-third-country-then-it-sent-them-home-2025-08-02/.

Against Torture). The *D.V.D.* case raises claims only under the Convention Against Torture. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass.).

Finally, considering the same arguments Respondents present here, courts have recognized that the government's "position contradicts the position they have taken in *D.V.D.* itself." *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *21 (W.D. Wash. Aug. 21, 2025). In *Nguyen*, the court explained that "the government is arguing in *D.V.D.* that injunctive relief cannot be granted to the class, and may only be pursued (if at all) through individual cases, while arguing here that Petitioner's individual claim should be barred because his injunctive claims should be adjudicated as part of the *D.V.D.* class." *Id.* Accordingly, the *Nguyen* court found that "[t]he contradiction in these arguments" "undermines Respondents' position." *Id.*

Against this backdrop, several district courts have issued the relief requested here, *D.V.D.* litigation notwithstanding. *See e.g.*, *Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 2243616, at *8 (N.D. Cal. Aug. 6, 2025) (prohibiting the government from "arresting, detaining, or removing" the petitioner to a third country "without notice and a hearing."); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *4 (W.D. Wash. June 30, 2025) (prohibiting the government from removing petitioner to "any third country in the world absent prior approval from this Court"); *Delkash v. Noem*, No. 5:25-CV-01675-HDV-AGR, 2025 WL 2683988, at *6 (C.D. Cal. Aug. 28, 2025) (prohibiting the government from removing Petitioner "to a third country without notice and an opportunity to be heard"); *Santamaria Orellana v. Baker,* No. CV 25-1788-TDC, 2025 WL 2841886, at *11 (D. Md. Oct. 7, 2025). Mr. Ndiaye's claims are further supported by the Supreme Court's decision in *Trump v. J.G.G.*, 604 U.S. ____ (2025), where the Court explained that the putative class plaintiffs there had to seek relief in individual habeas actions (as

opposed to injunctive relief in a class action) against the implementation of Proclamation No. 10903 related to the use of the Alien Enemies Act to remove non-citizens to a third country.

Respondents offer no argument on the merits of Mr. Ndiaye's claim that he is entitled to notice and an opportunity to be heard prior to removal to a third country. And with good reason. The Due Process Clause, the INA, and binding international treaty obligations require the government to provide such protections. Dkt. 1, p. 16-20. As such, Mr. Ndiaye requests that this Court order the government to provide him adequate notice and an opportunity to be heard prior to removal to a third country.

## CONCLUSION

None of Respondents' arguments prove sufficient to justify Mr. Ndiaye's ongoing, unlawful detention in immigration custody. Because Mr. Ndiaye's ongoing detention violates the Due Process Clause, the INA, and binding treaty obligations, this Court should grant his Petition and order his immediate release. Further, this Court should declare that if the government purports to identify any third country willing to accept Mr. Ndiaye, that the government be required to provide Mr. Ndiaye adequate notice and an opportunity to be heard regarding removal to that country.

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Respectfully submitted,

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