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 13 UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

14 Mohamed Hassan Barka,  
 15  
 16 Petitioner,

17 v.

18 John Mattos, NSDC Warden; Michael  
 Bernacke, Field Director, West Valley City  
 19 Office of ICE ERO; Todd Lyons, ICE  
 Acting Director; Kristi Noem DHS  
 20 Secretary; Pam Bondi, U.S. Attorney  
 General

21 Respondents.

Case No. 2:25-cv-01781-GMN-MDC

**First Amended § 2241 Petition**

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## INTRODUCTION

Mohamed Hassan Barka, a citizen of Egypt, has been in immigration custody since he arrived in this country in September 2024.<sup>1</sup> He was granted withholding of removal on January 15, 2025.<sup>2</sup> Both sides waived appeal.<sup>3</sup> Accordingly, Barka's removal order and grant of withholding of removal became final on January 15, 2025. Because of his withholding of removal grant, Barka cannot be removed to Egypt. The statutory 90-day window to remove Barka (potentially to a third country, since Egypt is not an option) expired on April 15, 2025. However, Barka has now been in custody for nearly **eight months** past that date, for a total of **eleven months** since the order of removal became final. Barka's continued detention beyond the removal period is unconstitutional and in violation of the Immigration and Nationality Act (INA) as well as the Administrative Procedure Act (APA). He must be released.

## JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. §2241 (granting general habeas authority to district courts); Art. 1 § 9, cl. 2 of the U.S. Constitution (the "Suspension Clause"); 28 U.S.C. §1331 (federal question jurisdiction); and 28 U.S.C. § 2201, 2202 (Declaratory Judgment Act).

Federal district courts have jurisdiction to hear habeas claims by non-citizens challenging the lawfulness of their detention. *See e.g. Zadvydas v. Davis*, 533 U.S. 678 (2001). Federal courts also have federal question jurisdiction, through the APA to "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).

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<sup>1</sup> ECF No. 13-1 at 12.

<sup>2</sup> ECF No. 13-1 at 13.

<sup>3</sup> ECF No. 13-1 at 16.

1 APA claims are cognizable in habeas. 5 U.S.C. § 703. The APA affords a right of  
2 review to a person who is “adversely affected or aggrieved by agency action.” 5  
3 U.S.C. § 702. Petitioner’s continued detention violates his constitutional due process  
4 rights, and constitutes arbitrary and capricious agency action, and is an abuse of  
5 discretion.

6 Venue is proper in this district pursuant to 28 U.S.C. § 2241(c)(3) and 28  
7 U.S.C. § 1391(b)(2) and (e)(1) because Petitioner is detained within this district at  
8 Nevada Southern Detention Center.

9 Accordingly, Petitioner’s habeas petition is properly before this court.

10 **PARTIES**

11 Barka is a native and citizen of Egypt who was granted withholding of  
12 removal under the INA on January 15, 2025. He is currently detained at the  
13 Nevada Southern Detention Center in Pahrump, Nevada.

14 John Mattos is the warden of Nevada Southern Detention Center. He was  
15 named to this position in July of 2025, replacing Christopher Chestnut. Mattos, in  
16 his official capacity, is the immediate custodian of Barka.

17 Michael Bernacke is the Field Director of the West Valley City Office of ICE  
18 Enforcement and Removal Operations, which has jurisdiction of enforcement and  
19 removal operations over detention facilities in Nevada, including Nevada Southern  
20 Detention Center where Barka is detained. Bernacke, in his official capacity, is a  
21 legal custodian of Barka.

22 Todd Lyons is the Acting Director of Immigration and Customs Enforcement,  
23 which is responsible for administering and enforcing immigration laws, including  
24 the detention and removal of immigrants. Lyons, in his official capacity, is a legal  
25 custodian of Barka.

1 Kristi Noem is the Secretary of the Department of Homeland Security, which  
2 oversees ICE. Noem, in her official capacity, is the ultimate legal custodian of  
3 Barka.

4 Pam Bondi is the Attorney General of the United States. She oversees the  
5 immigration court system, which is housed within the Executive Office for  
6 Immigration Review (EOIR) and includes all immigration courts and the Board of  
7 Immigration Appeals (BIA). She is named in her official capacity.

## 8 LEGAL FRAMEWORK

### 9 I. Withholding of Removal under the Immigration and Nationality Act.

10 Noncitizens in removal proceedings have three primary forms of relief from  
11 removal based on a fear of returning to their home country: asylum, withholding of  
12 removal, and protection under the Convention Against Torture (CAT). An applicant  
13 may be ineligible for asylum for several reasons such as failing to apply within one  
14 year of entering the United States. *See* 8 U.S.C. §1158(a)(2). There are fewer  
15 restrictions on eligibility for withholding of removal under the INA, and no  
16 restrictions on eligibility for deferral of removal under the CAT. *See* 8 U.S.C.  
17 §1231(b)(3)(B); 8 C.F.R. § 1208.16.

18 To be granted INA withholding, an applicant must show that “his life or  
19 freedom would be threatened in the country to which he would be removed on  
20 account of one of the five protected grounds [race, religion, nationality, political  
21 opinion, and membership in a particular social group].” *Boer-Sedano v. Gonzales*,  
22 418 F.3d 1082, 1092 (9th Cir. 2005) (internal quotations omitted). The burden  
23 required to win withholding of removal is higher than what is required to win  
24 asylum. *Id.* When a noncitizen wins withholding of removal the IJ simultaneously  
25 enters a removal order to the person’s country of origin but withholds that order  
26 with respect to the country of removal for which the noncitizen established a  
27 likelihood of persecution. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 531–532

1 (2021). The withholding grant and accompanying removal order become final on the  
2 date they are issued if both parties waive appeal, or at the conclusion of the 30-day  
3 period to file an appeal if no appeal is filed. 8 C.F.R. §1241.1. A noncitizen who has  
4 been granted withholding cannot be removed to the country for which they  
5 demonstrated a likelihood of persecution.

## 6 **II. Removal to a Third Country for Individuals granted Withholding of** 7 **Removal**

### 8 **A. Statutory guidance on third country removals**

9 A noncitizen who has been granted withholding cannot be removed to the  
10 country for which they demonstrated a likelihood of persecution. However, ICE can  
11 arrange for removal to another country. This is known as a “third country” because  
12 it is a country other than the one designated on the noncitizen’s removal order. 8  
13 C.F.R. § 1208.16(f). Specific criteria for identifying a third country for removal are  
14 prescribed by statute. For example, the law provides that a noncitizen with a  
15 removal order may be removed to a non-designated country of which the noncitizen  
16 is a “subject, national or citizen.” 8 U.S.C. §1231(b)(2)(D). ICE may also remove a  
17 noncitizen with a removal order to the country from which they were admitted to  
18 the U.S.; the country from which the noncitizen departed for the U.S. or a foreign  
19 territory contiguous to the U.S.; a country in which the noncitizen resided before  
20 entering the country from which they entered the U.S.; the noncitizen’s country of  
21 birth; the country that had sovereignty over the place of birth at the time of birth;  
22 the country in which the birthplace is located at the time of the removal order; and,  
23 “if impracticable, inadvisable, or impossible to remove the [noncitizen] to each  
24 country described [above],” ICE may remove a noncitizen to “another country whose  
25 government will accept the [noncitizen] into that country.” 8 U.S.C. §1231(b)(2)(E).

26 Notwithstanding the criteria for removal to a third country, ICE may not  
27 remove a noncitizen to a country where the noncitizen’s life or freedom would be

1 threatened on the basis of the five protected grounds. 8 U.S.C. §1231(b)(3)(A). The  
2 Supreme Court has emphasized the importance of existing avenues of relief from  
3 removal (such as applications for asylum, withholding of removal, and protection  
4 under the convention against torture) for providing protection against removal to a  
5 third country where a noncitizen would be in danger. *See Jama v. Immigr. &*  
6 *Customs Enf't*, 543 U.S. 335, 348 (2005) (“If aliens would face persecution or other  
7 mistreatment in the country designated under § 1231(b)(2), they have a number of  
8 available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A);  
9 relief under an international agreement prohibiting torture, see 8 CFR §§  
10 208.16(c)(4), 208.17(a) (2004); and temporary protected status, 8 U.S.C. §  
11 1254a(a)(1)”; *see also A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1368 (2025) (recently  
12 holding that non-citizens “must receive notice” that “they are subject to removal” to  
13 a third country and that such notice must be provided “within a reasonable time  
14 and in such a manner as will allow the[] [non-citizen] to actually seek . . . relief.”)  
15 (quoting *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025)).

16 The government itself has previously acknowledged this limitation on  
17 removal to a third country. In oral argument before the Supreme Court in the case  
18 *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) the following exchange took place  
19 between the then-Assistant to the Solicitor General, Vivek Suri, and Justice Kagan:

20 JUSTICE KAGAN: ...suppose you had a third country  
21 that, for whatever reason, was willing to accept [a  
22 noncitizen]. If...that [noncitizen] was currently in  
23 withholding proceed--proceedings, you couldn't put him on  
24 a plane to that third country, could you?

25 MR. SURI: We could after we provide the [noncitizen]  
26 notice that we were going to do that.

27 JUSTICE KAGAN: Right.

MR. SURI: But, without notice –

1 JUSTICE KAGAN: So that's what it would depend on,  
2 right? That – that you would have to provide him notice,  
3 and if he had a fear of persecution or torture in that  
4 country, he would be given an opportunity to contest his  
5 removal to that country. Isn't that right?

6 MR. SURI: Yes, that's right.

7 JUSTICE KAGAN: So, in this situation, as to these  
8 [noncitizens] who are currently in withholding  
9 proceedings, you can't put them on a plane to anywhere  
10 right now, isn't that right?

11 MR. SURI: Certainly, I agree with that, yes.

12 JUSTICE KAGAN: Okay. And that's not as a practical  
13 matter. That really is, as -- as you put it, in the eyes of the  
14 law. In the eyes of the law, you cannot put one of these  
15 [noncitizens] on a plane to any place, either the -- either  
16 the country that's referenced in the removal order or any  
17 other country, isn't that right?

18 MR. SURI: Yes, that's right.

19 *See* Transcript of Oral Argument at 20–21, *Johnson v. Guzman Chavez*, 594  
20 U.S. 523 (2021).

21 **B. Trump Administration policies on third country removal**

22 Until recently, it was exceedingly rare that the government would pursue  
23 removal to a third country for an individual granted INA withholding of removal or  
24 CAT protection. This information is not routinely released by ICE, but data  
25 obtained through a Freedom of Information Act request revealed that in fiscal year  
26 2017 just 21 people who had been granted withholding of removal were removed to  
27 a third country.<sup>4</sup> That is 1.6% of the people granted withholding that year. But,

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<sup>4</sup> American Immigration Council, *The Difference Between Asylum and Withholding of Removal*, at 7, available at <https://www.americanimmigrationcouncil.org/wp->

1 based on the data, the individuals removed were not necessarily people who had  
2 been granted withholding in 2017 – just 21 people out of all the people with  
3 withholding of removal grants in the U.S., granted at any time, were removed.  
4 Further, it's likely that some of those people had some form of permanent  
5 immigration status in the country they were removed to.

6 On March 30, 2025, Respondent Kristi Noem, the Secretary of the  
7 Department of Homeland Security, issued guidance to ICE and other DHS agencies  
8 regarding third country removals. This memo states that, prior to a noncitizen's  
9 removal to a third country, "DHS must determine whether that country has  
10 provided diplomatic assurances that aliens removed from the United States will not  
11 be persecuted or tortured."<sup>5</sup> The memo continues that, where a country has  
12 provided such assurances and the U.S. government believes them to be a credible, a  
13 noncitizen may be removed to that country "without the need for further  
14 procedures." In other words, an individual may be removed without providing notice  
15 or an opportunity to contest removal to that third country.

16 The March 30th memo also states that DHS will remove noncitizens even to  
17 third countries that have not provided diplomatic assurances that noncitizens  
18 deported from the U.S. will not be persecuted or tortured.<sup>6</sup> In such cases, DHS will  
19 inform the noncitizen of removal to the intended country but will not affirmatively  
20 ask the noncitizen if they fear being removed to that country.<sup>7</sup> DHS will refer any  
21 noncitizen that affirmatively states a fear of removal to a third country to USCIS  
22 for a screening for eligibility for withholding of removal and/or CAT protection as to  
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[content/uploads/2025/01/the\\_difference\\_between\\_asylum\\_and\\_withholding\\_of\\_removal.pdf](https://www.dhs.gov/sites/default/files/2025/01/the_difference_between_asylum_and_withholding_of_removal.pdf) (last visited August 21, 2025).

25 <sup>5</sup> Petitioner's Exhibit ("P. Ex.") 3 at 3.

26 <sup>6</sup> P. Ex. 3 at 4

27 <sup>7</sup> P. Ex. 3 at 4.

1 the intended third country.<sup>8</sup> USCIS will then make a determination about whether  
2 the noncitizen has established that they will “more likely than not be persecuted on  
3 a statutorily protected ground or tortured in the country of removal.”<sup>9</sup> If USCIS  
4 determines that the noncitizen did not meet that burden, they will be removed.<sup>10</sup> If  
5 the noncitizen does make a showing to the satisfaction of USCIS, USCIS will notify  
6 ICE and the ICE Office of the Principal Legal Advisor (OPLA) may reopen  
7 immigration court proceedings for the noncitizen to seek withholding or CAT  
8 protection from removal to the third country.<sup>11</sup> “Alternatively, ICE may choose to  
9 designate another country for removal.”<sup>12</sup> The memo provides no limitation on how  
10 many times ICE could designate a new third country for removal upon a  
11 noncitizen’s showing of a well-founded fear of removal to a particular country.

12 On July 9, 2025, Respondent Todd Lyons sent additional guidance to ICE  
13 employees regarding third country removals (“July 9 Directive”).<sup>13</sup> The directive  
14 was issued in light of the Supreme Court’s decision to stay the injunction in the case  
15 *D.V.D. v. Department of Homeland Security*, No. 25-10676 (D. Mass.). It reiterated  
16 the procedures from the March 30 memo and provided additional details regarding  
17 how to deal with third country removals to countries that have not provided credible  
18 assurances that U.S. deportees will not be persecuted or tortured. It added that, in  
19 such cases, an ICE officer will serve the noncitizen with a Notice of Removal  
20 including the intended country and that the notice must be read in a language the  
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23 <sup>8</sup> P. Ex. 3 at 4.

24 <sup>9</sup> P. Ex. 3 at 4.

25 <sup>10</sup> P. Ex. 3 at 4.

26 <sup>11</sup> P. Ex. 3 at 4.

27 <sup>12</sup> P. Ex. 3 at 4.

<sup>13</sup> P. Ex. 4.

1 noncitizen understands.<sup>14</sup> ICE “will generally wait at least 24 hours following  
2 service of the Notice of Removal before effectuating removal” but that in “exigent  
3 circumstances” ICE may remove a noncitizen to a possible-torture third country in  
4 as little as six hours after service of the Notice of Removal “as long as the  
5 [noncitizen] is provided reasonable means and opportunity to speak with an  
6 attorney prior to removal.”<sup>15</sup> Generally, if a noncitizen does not affirmatively state a  
7 fear of persecution or torture within 24 hours of service of the Notice of Removal,  
8 ICE may proceed with removal to the identified third country.<sup>16</sup>

### 9 **III. Detention of Noncitizens Granted Withholding of Removal**

#### 10 **A. Statutory framework**

11 Section 1231 of the INA governs the detention of noncitizens during and  
12 beyond the “removal period.” The removal period begins once a noncitizen’s removal  
13 order becomes administratively final and lasts for 90 days, during which ICE “shall  
14 remove the [noncitizen] from the United States” and “shall detain the [noncitizen]”  
15 as it carries out the removal. 8 U.S.C. § 1231(a)(1)-(2). If ICE does not remove the  
16 noncitizen within the 90-day removal period, the noncitizen “*may* be detained  
17 beyond the removal period.” 8 U.S.C. § 1231(a)(6) (emphasis added).

18 The Supreme Court considered the issue of indefinite detention under 8  
19 U.S.C. §1231(a)(6) in the case *Zadvydas v. Davis*, 533 U.S. 678 (2001). In that case,  
20 the Court acknowledged that allowing a noncitizen to be detained indefinitely after  
21 the statutory removal period would raise “serious constitutional concerns” and, as a  
22 result, held that 8 U.S.C. §1231(a)(6) contains an implicit time limit. *Id.* at 682. The  
23 Court further held that 8 U.S.C. §1231(a)(6) authorizes detention only for “a period  
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25 <sup>14</sup> P. Ex. 4 at 2.

26 <sup>15</sup> P. Ex. 4 at 2.

27 <sup>16</sup> P. Ex. 4 at 3.

1 reasonably necessary to bring about the [noncitizen]’s removal from the United  
2 States” and that six months of detention after the removal order is final is  
3 “presumptively reasonable.” *Id.* at 689, 701.

4       Importantly, the *Zadvydas* court did not say the presumption is irrebuttable,  
5 and a variety of courts across the country that have considered the issue have found  
6 the presumption of reasonableness during the first six months of post-removal order  
7 detention can be rebutted. *See Munoz-Saucedo v. Pittman*, No. CV 25-2258 (CPO),  
8 2025 WL 1750346, at \*5 (D.N.J. June 24, 2025) (analyzing the issue and collecting  
9 case). “Within the six-month window,” the noncitizen bears the burden of “prov[ing]  
10 the unreasonableness of detention.” *Cesar v. Achim*, 542 F. Supp. 2d 897, 903 (E.D.  
11 Wis. 2008). After six months, there is “good reason to believe that there is no  
12 significant likelihood of removal in the reasonably foreseeable future,” and the  
13 burden shifts to the government to justify continued detention. *Zadvydas*, 533 U.S.  
14 at 701. “Whether detention is ‘reasonably necessary to secure removal is  
15 determinative of whether the detention is, or is not, pursuant to statutory  
16 authority...The basic federal habeas corpus statute grants the federal courts  
17 authority to answer that question.” *Medina v. Noem, et al., Respondents*, No. 25-  
18 CV-1768-ABA, 2025 WL 2306274, at \*6 (D. Md. Aug. 11, 2025) (citing *Zadvydas*,  
19 533 U.S. at 699).

## 20       **B. DHS Regulations**

21       DHS regulations provide that, before the end of the 90-day removal period,  
22 the local ICE field office with jurisdiction over the noncitizen’s detention must  
23 conduct a custody review to determine whether the noncitizen should remain  
24 detained. *See* 8 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). If the noncitizen is not released  
25 at the end of the removal period or in the three months that follow, jurisdiction  
26 transfers to ICE headquarters (ICE HQ), which must conduct a custody review  
27 before or at 180 days. 8 C.F.R. §241.4(c)(2), (k)(2)(ii).

1 To comply with *Zadvyas*, DHS issued additional regulations in 2001 that  
2 established “special review procedures” to determine whether detained noncitizens  
3 with final removal orders are likely to be removed in the reasonably foreseeable  
4 future. See *Continued Detention of Aliens Subject to Final Orders of Removal*, 66  
5 Fed. Reg. 56, 967 (Nov. 14, 2001). Subsection (i)(7) was added to 8 C.F.R. §241.4,  
6 which added a supplemental review procedure that ICE HQ must initiate when “the  
7 [noncitizen] submits, or the record contains, information providing a substantial  
8 reason to believe that removal of a detained [noncitizen] is not significantly likely in  
9 the reasonably foreseeable future.” 8 C.F.R. §241.4(i)(7). Under this procedure, ICE  
10 HQ evaluates the foreseeability of removal by analyzing factors such as the history  
11 of ICE’s removal efforts to third countries. See 8 C.F.R. §241.13(f). If ICE HQ  
12 determines that removal is not reasonably foreseeable but nonetheless seeks to  
13 continue detention based on “special circumstances,” it must justify the detention  
14 based on narrow grounds such as national security or public health concerns or by  
15 demonstrating by clear and convincing evidence before an IJ that the noncitizen is  
16 “specially dangerous.” 8 C.F.R. §241.14(b)-(d), (f).

### 17 C. ICE Policy

18 Consistent with the statutory and regulatory scheme, long-standing ICE  
19 policy favors the prompt release of noncitizens who have been granted withholding  
20 or CAT relief. In 2000, the then-Immigration and Naturalization Service (INS)<sup>17</sup>  
21 General Counsel issued a memorandum clarifying that 8 U.S.C. § 1231 authorizes  
22 but does not require the detention of noncitizens granted withholding of removal or  
23 CAT relief during the 90-day removal period.<sup>18</sup> A 2004 ICE memorandum turned  
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26 <sup>17</sup> INS, housed within the Department of Justice, became ICE after the  
formation DHS in 2002.

27 <sup>18</sup> P. Ex. 1 at 2.

1 this acknowledgment of authority into a presumption, stating that “it is ICE policy  
2 to favor the release of [noncitizens] who have been granted protection relief by an  
3 immigration judge, absent exceptional concerns such as national security issues or  
4 danger to the community and absent any requirement under law to detain.”<sup>19</sup> ICE  
5 leadership subsequently reiterated this policy in a 2012 announcement, clarifying  
6 that the 2000 and 2004 ICE memorandums are “still in effect and should be  
7 followed” and that “[t]his policy applies at all times following a grant of protection,  
8 including during any appellate proceedings and throughout the removal period.”<sup>20</sup>  
9 Finally, in 2021, Acting ICE Director Tae Johnson circulated a memorandum to all  
10 ICE employees reminding them of the “longstanding policy” that “absent  
11 exceptional circumstances, . . . noncitizens granted asylum, withholding of removal,  
12 or CAT protection by an immigration judge should be released. . . .”<sup>21</sup> Director  
13 Johnson clarified that “in considering whether exceptional circumstances exist,  
14 prior convictions alone do not necessarily indicate a public safety threat of danger to  
15 the community.”<sup>22</sup>

16 On February 18, 2025, ICE issued a directive to agents encouraging them to  
17 seek to re-detain noncitizens with final removal orders who had been previously  
18 released from custody for the purpose of removal to previously recalcitrant countries  
19 of origin, or to third countries.<sup>23</sup> The directive did not provide justification as to why  
20 detention of noncitizens complying with orders of supervision would be necessary to  
21 effectuate removal to country of origin or otherwise.

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24 <sup>19</sup> P. Ex. 1 at 3.

25 <sup>20</sup> P. Ex. 1 at 4.

26 <sup>21</sup> P. Ex. 1 at 5.

27 <sup>22</sup> P. Ex. 1 at 5.

<sup>23</sup> P. Ex. 2.

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**STATEMENT OF FACTS**

Petitioner Mohamed Hassan Barka is a citizen of Egypt. On information and belief, he is not a citizen of any other country.

Barka is 37 years old. On information and belief, he has no criminal history and, until his current detention, has never been held in custody at any point in his life. On information and belief, he predominantly lived with his father in Italy from 2005 to September 2024. His father was granted residency in Italy but is not a citizen of that country. Rather, on information and belief, his parents are both citizens of Egypt and have no citizenship claims to any other country.

On information and belief, Barka came to the United States to avoid potential persecution and harm in Egypt for [REDACTED]

[REDACTED] He surrendered himself at the port of entry in San Diego in September 2024 and sought asylum.<sup>24</sup> He has remained in custody since that time.

On January 15, 2025, an immigration judge granted Barka withholding of removal from Egypt under 8 U.S.C. § 1231(b)(3).<sup>25</sup> As an alternative, he was ordered removed to Italy.<sup>26</sup> Both sides waived appeal.<sup>27</sup> Accordingly, Barka's removal order became final on January 15, 2025. The 90-day removal period ended on April 15, 2025.

Due to the withholding of removal, Barka cannot be deported to Egypt. On information and belief, the ICE officer overseeing his case told him that Italy has refused to accept him because he is not a citizen of that country. He was also told

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<sup>24</sup> ECF No. 13-1 at 12.

<sup>25</sup> ECF No. 13-1 at 13.

<sup>26</sup> ECF No. 13-1 at 15.

<sup>27</sup> ECF No. 13-1 at 16.

1 that ICE has sought to remove him to other third countries—Canada, Spain, and  
2 France—but no other country has agreed to take him.<sup>28</sup> On information and belief,  
3 he was recently told that they are still trying to find another country that will take  
4 him.

5 Barka has supposedly been given two custody reviews. However, no actual  
6 review took place. On information and belief, both times, Barka was given and  
7 required to sign a notice that denied him release, did not provide any reasons for  
8 his continued detention, and informed him he would remain in detention until his  
9 next custody review in 90 days. Subsequently he received a third notice, given to  
10 him about a month ago that he was required to sign, but it did not contain an end  
11 date on how long ICE planned to detain him or when they planned to conduct his  
12 next review.

13 As of the filing of this amended petition, Barka has been detained for **eleven**  
14 **months and one day** since his removal order and grant of withholding of removal  
15 became final. At this point, his deportation is not reasonably foreseeable. There is  
16 no indication that ICE has any intent to claim that Barka is “specially dangerous”  
17 or exhibits any of the other characteristics of noncitizens meriting extended  
18 detention after a grant of withholding of removal.

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27 <sup>28</sup> ECF No. 13-1 at 12.

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## GROUNDS FOR RELIEF

**I. Ground One: The continued indefinite detention of Barka violates his Fifth Amendment right to due process because his removal is not reasonably foreseeable.**

Petitioner incorporates the above paragraphs by reference as if fully set forth herein.

The INA requires mandatory detention of individuals with final removal orders only during the 90-day removal period. 8 U.S.C. § 1231(a)(2). A noncitizen who is not removed within that period “shall be subject to supervision under regulations prescribed by the Attorney General.” 8 U.S.C. § 1231(a)(3). If ICE does not remove the noncitizen within the 90-day removal period, the noncitizen “*may* be detained beyond the removal period.” 8 U.S.C. § 1231(a)(6) (emphasis added). However, in *Zadvydas, supra*, the Supreme Court concluded that due process imposes an “implicit limitation” upon 8 U.S.C. § 1231(a)(6). *Zadvydas*, 533 U.S. at 689. Specifically, the Court held that 8 U.S.C. § 1231(a)(6) authorizes detention only for “a period reasonably necessary to bring about the [noncitizen]’s removal from the United States” and that six months of detention after the removal order is final is “presumptively reasonable.” *Id.* at 701. The Court further determined that “once the alien 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.” *Id.*

Barka’s detention is governed by 8 U.S.C. § 1231(a)(6) because he has been detained for more than 90 days since he received a final grant of withholding of removal. Here, the 90-day removal period began on March 10, 2025, when the appeal period that followed the order in Barka’s removal proceedings expired without either party filing a timely appeal. *See* 8 U.S.C. § 1231(a)(1)(B)(i); 8 C.F.R. § 1241.1(c). Therefore, the *Zadvydas* framework applies.

1           Petitioner’s continued detention is unreasonable and his removal is not  
2 reasonably foreseeable. As of the filing date of this Amended Petition, **eleven**  
3 **months and one day have passed since the removal order became final.**  
4 Barka cannot be removed to Egypt due to the grant of withholding. Barka is not a  
5 citizen of *any* country besides his home country. While Italy was listed as an  
6 alternative removal country, Italy has refused to take him because he is not an  
7 Italian citizen. ICE has not been able to find a third country that will accept him.  
8 Barka was recently told that, at this point, no third country designation has been  
9 made. There is no indication that there is a reasonable likelihood of removal to Italy  
10 or any third country.

11           The Due Process Clause of the Fifth Amendment forbids the government  
12 from depriving any “person” of liberty “without due process of law.” U.S. Const.  
13 amend. V. Petitioner has a liberty interest in remaining free from physical  
14 confinement where removal is not reasonably foreseeable. Respondents have  
15 violated the Due Process Clause of the Fifth Amendment because Petitioner’s  
16 removal is not reasonably foreseeable. As provided above, *Zadvydas* requires that  
17 Petitioner be immediately released. *See* 533 U.S. at 700-01 (describing release as an  
18 appropriate remedy); *Cavieres Gomez v. Mattos*, No. 2:25-cv-00975-GMN-BNW,  
19 2025 WL 3101994 (D. Nev. Nov. 6, 2025) (ordering release from custody based on  
20 *Zadvydas* violation); 8 U.S.C. § 1231(a)(6) (authorizing release “subject to . . . terms  
21 of supervision”).

22           **II. Ground Two: Barka’s continued detention violates the**  
23 **Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6).**

24           Petitioner incorporates the above paragraphs by reference as if fully set forth  
25 herein.

26           As provided in Ground One, above, Barka’s detention is governed by 8 U.S.C.  
27 § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas, supra*. Barka’s

1 continued detention violates 8 U.S.C. § 1231(a)(6) because it is both unreasonable  
2 and because removal is not reasonably foreseeable. As further discussed in Ground  
3 Three, incorporated herein by reference, Barka poses neither a risk of flight nor a  
4 danger to the community. Rather, his continued detention under 8 U.S.C. §  
5 1231(a)(6) is driven by sweeping and arbitrary DHS policies. Moreover, and as  
6 discussed in Ground One, Barka's removal is not reasonably foreseeable. This Court  
7 should order that Barka be released.

8 **III. Ground Three: ICE's continued detention of Barka, without**  
9 **providing an individualized custody assessment pursuant to ICE**  
10 **policy, violates the Administrative Procedures Act, 5 U.S.C.**  
11 **§706(2)(A).**

12 Petitioner incorporates the above paragraphs by reference as if fully set forth  
13 herein.

14 Under the Administrative Procedures Act (APA), a court must hold unlawful  
15 and set aside agency action found to be "arbitrary, capricious, an abuse of  
16 discretion, or otherwise not in accordance with law" or "without observance of  
17 procedure required by law." 5 U.S.C. §706(2). An agency action is "arbitrary and  
18 capricious if the agency has relied on factors which Congress has not intended it to  
19 consider, entirely failed to consider an important aspect of the problem, offered an  
20 explanation for its decision that runs counter to the evidence before the agency, or is  
21 so implausible that it could not be ascribed to a difference in view or the product of  
22 agency expertise." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*  
23 *Ins. Co.*, 463 U.S. 29, 43 (1983). Courts "defer to an agency's determinations so long  
24 as the agency 'gives adequate reasons for its decisions, in the form of a satisfactory  
25 explanation for its action including a rational connection between the facts found  
26 and the choice made." *Nat. Res. Def. Council, Inc. v. United States Env't Prot.*  
27 *Agency*, 961 F.3d 160, 170 (2d Cir. 2020) (cleaned up).

1 As noted in 8 C.F.R. §241.4, before the end of the 90-day removal period, the  
2 local ICE field office with jurisdiction over a noncitizen's detention must conduct a  
3 custody review to determine whether the noncitizen should remain detained. *See* 8  
4 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). A copy of any decision to release or continue to  
5 detain a noncitizen "shall be provided to the detained [noncitizen]." 8 C.F.R.  
6 §241.4(d). Where ICE decides that a noncitizen will stay detained, the decision  
7 provided to the noncitizen "shall briefly set forth the reasons for the continued  
8 detention." *Id.* The criteria for determining if continued detention is warranted  
9 mainly concerns whether the noncitizen presents a risk of flight or danger to the  
10 community. 8 C.F.R. §241.4(e). The review panel members must also determine that  
11 travel documents are not available or that "immediate removal, while proper, is  
12 otherwise not practicable or not in the public interest." *Id.*

13 On information and belief, Barka has never been informed of the reasons why  
14 he remains detained. There is also no evidence that an actual review has taken  
15 place. He has only received notices that he will remain in custody without any  
16 indication as to the reasons why. This break with protocol suggests that ICE never  
17 actually performed an individualized assessment of whether continued detention  
18 was warranted in Barka's case. It is likely that an individualized custody  
19 determination would have resulted in the release of Barka because there is no  
20 significant evidence to establish that he presents either a flight risk or a danger to  
21 the community. Furthermore, he cannot be removed to Egypt, and has no legal  
22 status in any other country, so he does not have any travel documents that ICE  
23 could use to remove him. There has also been no indication that ICE has attempted  
24  
25  
26  
27

1 to obtain travel documents from any third country to effect a third country  
2 removal.<sup>29</sup>

3 Because there is no evidence that Respondents found Barka to be a danger or  
4 a flight risk, or that he had travel documents, the decision to continue detaining  
5 him violates DHS's own regulations. "It is a familiar rule of administrative law that  
6 an agency must abide by its own regulations." *Fort Stewart Schs. v. Fed. Lab. Rels.*  
7 *Auth.*, 495 U.S. 641, 654 (1990); *see also United States ex rel Accardi v.*  
8 *Shaughnessy*, 347 U.S. 260 (1954) (holding that government agencies are required  
9 to follow their own regulations). In addition, continuing to detain Barka is contrary  
10 to ICE's longstanding policy of releasing individuals granted withholding of removal  
11 absent an exceptional reason not to do so. Even the new directives regarding  
12 removal to third countries, which on their face are unconstitutional and in violation  
13 of the INA because they fail to provide the requisite due process and comply with the  
14 regulations, do not provide any reason that a noncitizen in Barka's position should  
15 not be released. Accordingly, Barka's continued detention violates the APA because  
16 it is arbitrary and capricious and not in accordance with law.

17 This Court should order that Barka be released because Respondents have  
18 not demonstrated that he was afforded proper procedures related to his continued  
19 detention, or that he warrants continued detention under the regulations.  
20 Accordingly, his continued detention is unlawful.

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22  
23 <sup>29</sup> Compare with *Medina v. Noem*, No. 25-CV-1768-ABA, 2025 WL 2306274, at \*1  
24 (D. Md. Aug. 11, 2025) (ICE informed Honduran petitioner in writing of intent to  
25 remove him to El Salvador and that his case was "under current review by El  
26 Salvador for the issuance of a travel document"); *I.V.I. v. Baker*, No. CV JKB-25-  
27 1572, 2025 WL 1811273, at \*1 (D. Md. July 1, 2025) (ICE informed Honduran  
petitioner in writing of intent to remove him to Mexico).

1       **IV. Ground Four: ICE’s policy to remove noncitizens to a third**  
2       **country with no notice or opportunity to seek fear-based**  
3       **protection constitutes arbitrary and capricious agency action in**  
4       **violation of the Due Process Clause and the Administrative**  
5       **Procedure Act, 5 U.S.C. § 706.**

6       Petitioner incorporates the above paragraphs by reference as if fully set forth  
7       herein.

8       The APA entitles “a person suffering legal wrong because of agency action, or  
9       adversely affected or aggrieved by agency action . . . to judicial review.” 5 U.S.C. §  
10       702. Further, the APA compels a reviewing court to “hold unlawful and set aside  
11       agency action, findings, and conclusions found to be . . . arbitrary [or] capricious, . . .  
12       otherwise not in accordance with law,” *id.* § 706(2)(A), or “short of statutory right,”  
13       *id.* § 706(2)(C). The APA also compels a reviewing court to “hold unlawful and set  
14       aside agency action, findings, and conclusions found to be . . . without observance of  
15       procedure required by law.” 5 U.S.C. § 706(2)(D).

16       Barka has a due process right to meaningful notice and opportunity to  
17       present a fear-based claim to an immigration judge before DHS deports him to a  
18       third country. *See Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Aden v.*  
19       *Nielsen*, 409 F. Supp. 3d 998, 1004 (W.D. Wash. 2019). Barka also has a due process  
20       right to implementation of a process or procedure to afford these protections. *See,*  
21       *e.g., McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491 (1991).

22       The Government however, has adopted a policy—set forth in the March 30  
23       memo and July 9 directive—that is arbitrary and capricious and deprives Barka of  
24       meaningful notice and an opportunity to present a fear-based claim to an  
25       immigration judge prior to his deportation to a third country. Moreover, the  
26       government’s policy also violates the INA and implementing regulations which  
27       mandate that the government refrains from removing Barka, and similarly situated  
individuals, to a third country where they will likely be persecuted or tortured, thus

1 requiring the government to provide meaningful notice of deportation to a third  
2 country and the opportunity to present a fear-based claim to an immigration judge  
3 before deporting an individual to a third country. In this case, the March 30 memo  
4 and July 9 directive demonstrate the government does not intend to observe those  
5 protections.<sup>30</sup>

6 The APA empowers federal courts to “compel agency action unlawfully  
7 withheld or unreasonably delayed.” 5 U.S.C. § 706(1). This Court should hold that  
8 the government’s actions and policy are unlawful and compel that—before any  
9 attempt is made to deport him to a third country—Barka be provided with  
10 meaningful notice and opportunity to present a fear-based claim to an immigration  
11 judge. *Cavieres Gomez v. Mattos*, No. 2:25-cv-00975-GMN-BNW, 2025 WL 3101994  
12 (D. Nev. Nov. 6, 2025) (concluding that Government’s failure to provide notice and  
13 opportunity to present fear-based claim to immigration judge prior to deportation to  
14 a third country was due process violation).

15 **V. Ground Five: Petitioner’s detention in immigration custody**  
16 **pursuant to recent ICE policy regarding third country removal**  
17 **violates the Due Process Clause of the Fifth Amendment.**

18 To the extent that Petitioner’s continued detention is meant to facilitate his  
19 removal to a third country, his detention is unlawful because, as argued in Ground  
20 Four (incorporated here by reference), ICE’s procedure for third country removal is  
21 arbitrary and capricious and does not comply with due process. Any such future  
22 removal would be accomplished in violation of his due process rights, rendering his  
23 detention on that basis unlawful. *See generally Garcia v. Noem*, No. 8:25-cv-02780-  
24 PX, \_\_ F. Supp. 3d \_\_, 2025 WL 3558125 at \*15 (D. Md. Dec. 11, 2025) (ordering

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25 <sup>30</sup> *See also* Gerald Imray, 3 deported by U.S. held in African prison despite  
26 completing sentences, lawyers say, PBS NEWS (Sept. 2, 2025),  
27 <https://www.pbs.org/newshour/amp/nation/3-deported-by-u-s-held-in-african-prison-despite-completing-sentences-lawyers-say>.

1 release when purpose of detention was, in part, to facilitate unlawful third-country  
2 removal). Accordingly, this Court should order Barka's immediate release.

3 **PRAYER FOR RELIEF**

4 Accordingly, Mohamed Hassan Barka respectfully requests that this  
5 Court:

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

10 2. Order Petitioner's immediate release;

11 3. Prohibit Respondent's from re-detaining Petitioner in the future  
12 absent proof of changed circumstancing making his removal reasonably foreseeable;

13 4. Prohibit Respondents from removing petitioner to a third  
14 country without providing Petitioner and Petitioner's counsel with adequate notice  
15 of intent to seek removal to a third country and due process in the form of an  
16 opportunity to seek to reopen Petitioner's immigration court proceedings to seek  
17 fear-based relief from removal; and

18 5. Grant such other and further relief as, in the interests of justice,  
19 may be appropriate.

1 Dated December 16, 2025.

2 Respectfully submitted,

3 Rene L. Valladares  
4 Federal Public Defender

5 /s/ Jonathan M. Kirshbaum  
6 Jonathan M. Kirshbaum  
7 Assistant Federal Public Defender

8 /s/ Alicia R. Itriago  
9 Alicia R. Itriago  
10 Assistant Federal Public Defender



**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been filed on December 16, 2025. I personally served a true and correct copy of the foregoing index and exhibits in support of the first amended petition by CM/ECF to the following individuals:

Summer Allegra Johnson DOJ-USAO 501 Las Vegas Blvd. South Ste # 1100 Las Vegas, NV 89143 Email: sigal.chattah@usdoj.gov	Sigal Chattah First Assistant, US Attorney for the District of Nevada 501 Las Vegas Blvd, South Las Vegas, NV 89101 Email: summer.johnson@usdoj.gov
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I further certify that some of the participants in the case are not registered electronic filing system users. I have mailed the foregoing document by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following person:

Mohamed Hassan Barka,  Nevada Southern Detention Center 2190 E Mesquite Avenue Pahrump, NV 89060	Kristi Noem Secretary, United States Department of Homeland Security 245 Murray Lane SW Washington, DC 20528
John Mattos Warden Nevada Southern Detention Center 2190 E. Mesquite Ave., Pahrump, NV 89060	Pam Bondi Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-001
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*/s/ Victoria Lenzi*

\_\_\_\_\_  
 An Employee of the  
 Federal Public Defender