UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Chunbiao Xu,

Petitioner,

v.

Pamela Bondi, *et al.*,

Case No. 2:25-cv-16274

Respondents.

PETITIONER'S REPLY
TO THE RESPONSENTS' ANSWER (DKT.5)

Theodore N. Cox, Esq.
Law Office of Theodore N. Cox
325 Broadway, Suite 201
New York, New York 10007
(212) 925-1208
(347) 400-1212
tedcoxecf@gmail.com

INTRODUCTION

Petitioner Chun Biao Xu respectfully submits this Reply to Respondents' Opposition ("Opp."). The Government still has not provided a single piece of individualized, concrete evidence establishing that removal to China is significantly likely in the reasonably foreseeable future, as required by *Zadvydas v. Davis*, 533 U.S. 678 (2001). The Opposition relies on mischaracterizations of the record, shifts the burden contrary to binding law, and invokes discretionary-review bars that do not apply to constitutional detention challenges under § 2241. For the reasons below, the habeas petition should be granted.

LEGAL STANDARD

The Supreme Court established the fundamental principle governing immigration detention: Once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). The Court defined "reasonably foreseeable" to mean significantly likely in the reasonably foreseeable future, not merely theoretically possible. *Id.* at 701. This standard requires concrete evidence of progress toward removal, not abstract hope that removal might eventually occur.

Zadvydas incorporates a critical temporal principle. The Court explained that "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* What might

constitute reasonable foreseeability on day one of detention becomes unreasonable as weeks turn to months without progress.

Respondents have not met their burden.

ARGUMENT

A. There Is Substantial Evidence That Removal to China Is Not Reasonably Foreseeable.

Zadvydas requires evidence that this petitioner's removal is significantly likely in the reasonably foreseeable future. 533 U.S. at 701. Courts repeatedly reject reliance on national statistics divorced from individual circumstances. The Supreme Court established the fundamental principle governing immigration detention: Once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). The Court defined "reasonably foreseeable" to mean significantly likely in the reasonably foreseeable future, not merely theoretically possible. Id. at 701. This standard requires concrete evidence of progress toward removal, not abstract hope that removal might eventually occur.

Mr. Xu has been in ICE custody since March 28, 2025, with no evidence that the Chinese consulate has issued or even agreed to issue travel documents.

Since Mr. Xu received a final order of removal on April 25, 2002, China has not issued a travel document for her removal and is very unlikely to do so now. Mr. Xu has been detained since March 26, 2025, now for more than seven months.

There are two types of documents which can be used to remove a Chinese national from the US to China, (i) a valid unexpired passport, or (ii) a valid travel document issued by the government of China. When repatriation is allowed at all, then a person can be returned on a commercial flight with a valid passport. Barring that, a return requires a valid travel document, also issued by the Chinese government. In any event, China must agree to accept the return of any of its nationals, and can slow-walk acceptance by prolonged or indefinite procedures checking its sources to confirm the Chinese nationality of any particular individual before issuing a travel document.

China has maintained a decades long policy of refusing or slow-walking issuance of travel documents for its nationals subject to removal from the United States, resulting in a large buildup of such nationals, a buildup which still persists. The impasse over Chinese removals came to a head after the August 2022 visit to Taiwan by then House Speaker Nancy Pelosi, igniting massive military exercises by the PRC, and also an outright ban on acceptance of any Chinese nationals by that country. "China halts high-level military dialogue with U.S., suspends other cooperation," Reuters, August 5, 2022, https://www.reuters.com/world/beijing-halts-high-level-military-dialogue-with-us-suspends-other-cooperation-2022-08-05/.

After active fence-mending by the Biden administration, that ban was partially lifted, leading to a period at the end of the Biden term in which apparently five deportation flights were able to take place. "US deported Chinese migrants on charter flight, Homeland Security says," Reuters, July 2, 2024, https://www.reuters.com/world/us/us-deported-chinese-migrants-charter-flight-homeland-security-says-2024-07-02/?utm_source=chatgpt.com. Since January 20 of this year, there have been some removals, including possibly one chartered flight, a level far below what occurred in the final Biden months. "Trump announced mass expulsions, but the pace of deportation flights has been slower than Biden's, " NBC News, March 13, 2025, https://www.nbcnews.com/news/latino/trump-announced-mass-expulsions-deportation-flights-slower-bidens-rcna195223. The "likelihood" of repatriation of any particular individual is entirely dependent on the current state of play in US-China relations, which are now still very tense, even after the recent Trump-Xi meeting in South Korea. Given the slowdown in removals since January 20, 2025 compared to the immediately prior Biden period, and since the ever-fluctuating US-China relationship context largely determines China's willingness to accept returnees from the US, Mr. Xu's removal is far from foreseeable.

According to a 2015 Reuters article, there was a more than decade long pause in deportations to China because China simply did not accept the return of

its nationals: "U.S. to China: Take back your undocumented immigrants," Reuters, https://www.reuters.com/article/world/exclusive-us-to-china-take-back-your-undocumented-immigrants-idUSKCN0RB0D0/. This long pause is corroborated by US government sources.

A January 12, 2021 "DHS Strategic Action Plan to Counter the Threat Posed by the People's Republic of China," notes that "approximately 40,800 PRC nationals in the United States are subject to final orders of removal. .... the PRC has ignored more than 1,300 ICE requests for travel documents since October 2017." https://www.dhs.gov/sites/default/files/publications/21_0112_plcy_dhs-china-sap.pdf.

In November 2023, the New York Times quoted an anonymous Biden administration official as saying that "Of the 1.3 million people in the United States with final orders to be deported, about 100,000 are Chinese." Eileen Sullivan, ``Growing Numbers of Chinese Migrants Are Crossing the Southern Border," New York Times, November 24, 2023, https://www.nytimes.com/2023/11/24/us/politics/china-migrants-us-border.html. However, this information is not corroborated by official government sources.

A December 2024 district court case cites US government sources which point to ongoing difficulty in obtaining travel documents for Chinese nationals with removal orders:

> Petitioner cites various government reports describing difficulties obtaining travel documents from China spanning two decades. First, Petitioner cites a 2004 report by the United States General Accounting Office that notes ICE described "significant problems" obtaining travel documents from China which "consistently refused to issue travel documents." Traverse at 2–3, 3 n2 (citing United States General Accounting Office, *Immigration Enforcement: Better Data and Controls are Needed to Assure Consistency with the Supreme Court Decision on Long-Term Alien Detention* 21 (2004), http://www.gao.gov/assets/250/242498.pdf). Next, Petitioner points to a 2019 report by the Office of the Inspector General identifying China as one of a handful of countries that had been "consistently categorized" as uncooperative in executing removal orders. *Id.* at 3 & n3 (citing Office of the Inspector General, *ICE Faces Barriers in Timely Repatriation of Detained Aliens* 19 n 32 (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf).
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> *Chan v. Mayorkas*, No. 24-CV-1315 JLS (MSB), 2024 WL 5159900, at *3 (S.D. Cal. Dec. 18, 2024)

U.S. House Speaker Nancy Pelosi's August 2022 visit to Taiwan immediately impacted repatriation to China, resulting in extensive Chinese military exercises around Taiwan, and the suspension or cancellation of most cooperation channels between the US and China. "How Pelosi's Taiwan Visit Has Set a New Status Quo for U.S-China Tensions," Carnegie Endowment August 17, 2022, https://carnegieendowment.org/posts/2022/08/how-pelosis-taiwan-visit-has-set-a-new-status-quo-for-us-china-tensions?lang=en.

Relevant here, the consequence was (for the first time) public announcement by the Chinese government of cancellation of repatriation agreements with the US:

> Petitioner cites a 2022 announcement by the Embassy of People's Republic of China, indicating China suspended "cooperation on the repatriation of illegal immigrants" with the United States. (citing Embassy of People's Republic of China, The Ministry of Foreign Affairs Announces Countermeasures in Response to Nancy Pelosi's Visit to Taiwan (August 5, 2022), http://us.china-embassy.gov.cn/eng/zmgx/zxxx/202208/t20220805_10735706.htm).
>
> *Chan v. Mayorkas*, No. 24-CV-1315 JLS (MSB), 2024 WL 5159900, at *3 (S.D. Cal. Dec. 18, 2024)

President Biden undertook several initiatives to reset the US China relationship, including meeting Xi in November 2022 at the G20 meeting in Bali, "4 takeaways from President Biden's 'very blunt' meeting with China's Xi Jinping" NPR, November 14, 2022, https://www.npr.org/2022/11/14/1136459450/biden-xi-meeting.

By April 2024, in advance of a June visit by Secretary of State Blinken, a Chinese official would describe US China relations as "stable despite US 'interference'" "China-US relations stable despite US 'interference', Chinese official says," Reuters, April 23, 2024, https://www.reuters.com/world/china/china-us-relations-stable-despite-us-interference-chinese-official-says-2024-04-23/?utm_source=chatgpt.com.

For repatriation, the results of this active diplomacy was dramatic: in the last seven months of the Biden administration, five repatriation flights to China were carried out, according to Voice of America. https://www.voanews.com/a/us-

deportations-to-china-continue-amid-shifts-in-immigration-crackdown/7958862.html.

Indeed, recent reporting confirms the continuing impossibility of consistent removals to China. In February 2025, *Voice of America* reported that Chinese nationals deported from the United States were rerouted to Panama rather than China, underscoring renewed difficulties in obtaining direct repatriation clearance. See *Migrants in Panama Deported from U.S. Moved to Darién Jungle Region*, VOA News (Feb. 2025), https://www.voanews.com/a/migrants-in-panama-deported-from-us-moved-to-darien-jungle-region/7981522.html.

And as the *New York Times* documented, that only one flight, with 122 Chinese nationals, arrived in China from the United States since President Trump took office. See *Chinese Stay, Flee, or Fear Return Under Trump Crackdown*, *N.Y. Times* (Aug. 3, 2025), https://www.nytimes.com/2025/08/03/us/politics/chinese-stay-flee-united-states-trump.html.

The information about this repatriation flight, however, was not sourced from the DHS, which previously loudly trumpeted each successful repatriation flight.

Where the chances of removal to China are not dependent on bureaucratic procedures, the timing of which can be ascertained with some modicum of predictability, but rather on the constant see-saw of U.S.-China relations, the

probability of any one individual being "accepted" by China is a throw of the dice at best. The recent meeting of President Trump and Chairman Xi Jinping in South Korea by no means evinces smooth sailing in US-China relations.

These facts confirm what courts and observers alike have recognized: removals to China remain sporadic, opaque, and politically constrained. The probability that Petitioner will be accepted by Chinese authorities is speculative at best, and the timing of such acceptance depends entirely on shifting bilateral relations, not on any ascertainable administrative process. As *Zadvydas v. Davis*, 533 U.S. 678 (2001), held, such indefinite and unpredictable detention violates due process when removal is not reasonably foreseeable.

ICE arrested Mr. Xu over three decades after his final order, yet offers no concrete timeline or consular cooperation. Respondents' own silence on current diplomatic engagement is dispositive: absent an active travel-document process, continued detention violates § 1231(a)(6) as construed in *Zadvydas*.

Here, as stated above, ICE offers no evidence of (a) a pending travel-document request; (b) responses from Chinese authorities; or (c) scheduled removal transport. Conclusory review decisions to continue detention cannot carry the government's burden.

Given the lack of evidence of current removal efforts, the absence of a concrete timeline, and Petitioner's long record of full cooperation, ICE's continued

detention is unlawful under both the statute and the Constitution. The Court should therefore require Respondents to produce concrete evidence, including travel document requests, consular communications, and current repatriation data, or, absent such evidence, order Petitioner' immediate release under supervision.

B. The Government's "Failure to Cooperate" Argument Is Unsupported

Respondents assert that Mr. Xu "failed to cooperate" in obtaining travel documents and thus extended his removal period under 8 U.S.C. § 1231(a)(1)(C). That assertion is unsupported by the record and is legally insufficient. Courts interpreting § 1231(a)(1)(C) hold that the provision applies only where the Government can demonstrate an affirmative act of non-cooperation that actually prevents removal, not mere inaction or unsupported allegations. *Lema v. INS*, 341 F.3d 853, 856–57 (9th Cir. 2003) (non-cooperation requires refusals that actually prevent removal); *Ngarurih v. Ashcroft*, 371 F.3d 182, 190 n.13 (4th Cir. 2004) (failure-to-cooperate extension applies only where the noncitizen commits an affirmative act that impedes removal).

More broadly, the Supreme Court has emphasized that, once a detainee meets his burden under *Zadvydas*, the Government must rebut with actual evidence, not speculation or conclusory assertions. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); *Clark v. Martinez*, 543 U.S. 371, 378–79 (2005).

Here, Respondents provide no evidence that Mr. Xu ever refused to sign a travel-document application, withheld information, or otherwise obstructed removal. Nor do they offer any proof that ICE submitted a travel-document request to Chinese authorities, received any response, or engaged in any consular communication about Mr. Xu. ICE's own supervision records reflect fourteen years of consistent reporting and compliance.

Because the Government has not produced any affirmative evidence of obstruction, it cannot rely on § 1231(a)(1)(C) to justify continued detention.

C. The Government's Reliance on § 1226(e) Is Misplaced

The Government argues that this Court lacks jurisdiction to review "discretionary" determinations of danger or flight risk under 8 U.S.C. § 1226(e). (Dkt. 5 at 6). That argument fails for a straightforward reason: Mr. Xu is detained under 8 U.S.C. § 1231(a)(6), not § 1226. Section 1226(e) is therefore irrelevant. Nothing in § 1231 restricts this Court's habeas authority to review the legality or constitutionality of post-order detention.

Moreover, even if § 1226(e) were somehow implicated, the Supreme Court has made clear that such provisions do not bar federal courts from adjudicating constitutional and statutory challenges to detention itself. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (habeas review remains available to test the legality of detention); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (same). Section 1226(e)

precludes review only of individualized discretionary judgments, not challenges to the Government's authority to detain. Because Mr. Xu's petition challenges the legality of prolonged post-order detention under Zadvydas, not a discretionary custody assessment, § 1226(e) provides no jurisdictional bar.

D. The Government's attempt to rely on Mr. Xu's 2011 conviction is legally irrelevant.

Under *Zadvydas*, criminal history does not bar relief, does not change the standard, and does not exempt ICE from the obligation to prove that removal is significantly likely in the reasonably foreseeable future.

Mr. Xu's 2011 conviction has no bearing on the legality of his continued detention under § 1231(a)(6). The Supreme Court made clear in *Zadvydas v. Davis* that even individuals with criminal histories may not be detained indefinitely absent evidence that their removal is significantly likely in the reasonably foreseeable future. 533 U.S. 678, 690–701 (2001). *Clark v. Martinez* further held that § 1231(a)(6) must be applied uniformly as "it cannot justify giving the *same* detention provision a different meaning when such aliens [with criminal record] are involved", and that the statute contains no "dangerousness" or "criminal-alien" exception allowing extended detention without a realistic prospect of repatriation. 543 U.S. 371, 378 (2005). The Third Circuit has applied these same constitutional limits to all § 1231(a)(6) detainees, including those with prior convictions. *Guerrero-Sanchez v. Warden*, 905 F.3d 208, 219–20 (3d Cir. 2018).

Despite alleged existence of collateral consequences flowing from conviction rendering Mr. Xu removable, his conviction fully had expired when he filed the habeas petition. *Jobe v. Commissioner of Correction*, 334 Conn. 636, 656, 224 A.3d 147 (2020). Because Respondents provide no evidence that China will issue a travel document for Mr. Xu, his 14-year-old conviction is legally irrelevant to the *Zadvydas* analysis and cannot justify continued detention.

CONCLUSION

When removal becomes speculative, detention becomes punishment, violating due process. Petitioner respectfully requests the Court to grant the habeas petition.

Dated: December 3, 2025

Respectfully submitted,

s/ Theodore N. Cox

Theodore N. Cox, Esq.
Law Office of Theodore N. Cox
325 Broadway, Suite 201
New York, New York 10007
(212) 925-1208
tedcoxecf@gmail.com