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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 Frandy Joseph,

10 Petitioner,

11 vs.

12 David R. Rivas, Warden, et al.,

13 Respondent.
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No. 2:25-cv-3754-PHX-DJH (CDB)

15 **Reply in Support of Motion for a**
16 **Preliminary Injunction**

17 Discovery provided by respondents has confirmed what Mr. Joseph alleged in his petition
18 for a writ of habeas corpus—there is no significant likelihood that he will be removed from the
19 United States in the reasonably foreseeable future, such that his present detention in immigration
20 custody is not authorized by 8 U.S.C. § 1231(a)(6) as interpreted in *Zadvydas v. Davis*, 533 U.S.
21 678 (2001). In fact, discovery shows a complete lack of evidence that ICE has tried obtain travel
22 documents for Mr. Joseph from the Haitian government. This Court should grant Mr. Joseph's
23 petition on his *Zadvydas* claim after consolidating a hearing on his request for a preliminary
24 injunction with the merits of his habeas petition as authorized by Fed. R. Civ. P. 65(a).
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Background

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2 Mr. Joseph was born in 1975 in Port-au-Prince, Haiti. (DHS-217)¹ On January 9, 1995, he
3 applied for lawful permanent residence in the United States at the U.S. Embassy in Port-au-
4 Prince. (DHS-210) He was eligible for permanent residence in the United States because his
5 father had permanent residence status. (DHS-214) He settled with his father in the Miami area.

6 On May 5, 2008, Mr. Joseph pleaded guilty in Fulton County, Georgia, Superior Court to
7 misdemeanor criminal trespass, in violation of Ga. Code § 16-7-21(a), and misdemeanor simple
8 battery, in violation of Ga. Code § 16-5-23(a)(2). (DHS-93 to DHS-96) Under the terms of the
9 plea agreement, he was sentenced to a year in the county jail. (DHS-91) On August 2, 2023, Mr.
10 Joseph was charged in Palm Beach County, Florida, Circuit Court with one count of grand theft
11 of a motor vehicle, in violation of Fla. Stat. § 812.014(1) and (2)(c); one count of possession of
12 cocaine, in violation of Fla. Stat. § 893.13(6)(a); and one count of driving on a suspended license,
13 in violation of Fla. Stat. § 322.34(2). (DHS-101) He pleaded guilty to all three counts on August
14 31, 2023. (DHS-104) He was sentenced to 57 days on the driving-on-a-suspended-license charge,
15 and judgment was withheld on the theft and cocaine counts. (DHS-106)

16 On January 18, 2022, Mr. Joseph applied for naturalization. (DHS-427) On June 15, 2022,
17 Mr. Joseph appeared for an interview, but did not pass the component of the examination that
18 required him to write in the English language. (DHS-169) He was allowed to re-take this
19 component of the examination on October 24, 2022, but did not pass this “second and final
20 test.” (DHS-434) On October 12, 2023, U.S. Citizenship and Immigration Services informed
21 Mr. Joseph that he was ineligible for naturalization. (DHS-427) USCIS relied on Mr. Joseph’s
22 inability to “write a sentence in ordinary usage of the English language” (DHS-428) and the
23 Georgia battery conviction (DHS-429) as two bases for its decision.
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26 ¹ Along with this document, Mr. Joseph is filing for the record all of the discovery provided by
27 respondents pursuant to this Court’s order of October 14, 2025. These documents will be
28 submitted separately under seal. These documents, consisting of 462 pages of documents, will be
submitted as a single pdf file. An index will be available for the public docket. The documents will
be referenced here as “DHS-xxx,” where xxx is the pdf page of the filing.

1 Mr. Joseph soon appeared on ICE's radar. According to the report of his arrest by
2 immigration officials, the U.S. Marshals Service notified ICE that he was a "deportable criminal
3 alien with an outstanding criminal state warrant" in October 2023. (DHS-310) The report noted
4 that his naturalization application had been denied, and that he had been arrested by Miami
5 police at his home on October 18, 2023. (DHS-311) After his release from state custody, he was
6 taken into ICE custody on March 17, 2024. (DHS-309)

7 Mr. Joseph was placed in removal proceedings on March 18, 2024, based on his
8 convictions for battery in Georgia (DHS-320) and possession of cocaine in Florida (DHS- 323),
9 both of which were alleged to be deportable offenses. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (controlled
10 substance conviction is a deportable offense), (a)(2)(A)(iii) (aggravated felony conviction is a
11 deportable offense). After a hearing, an immigration judge sustained both charges in the notice to
12 appear and found him ineligible for both cancellation of removal and voluntary departure on
13 account of his conviction for battery in Georgia. (DHS-12 to DHS-14) *See Talamantes-Enriquez v.*
14 *U.S. Attorney General*, 12 F.4th 1340 (11th Cir. 2021) (holding that a conviction for misdemeanor
15 simple battery under Georgia law is an aggravated felony). The immigration judge also noted that
16 he was ineligible to readjust his status to that of a lawful permanent resident because he was
17 unmarried, his son was not old enough to petition for him as an immediate family member, and
18 his cocaine conviction made him ineligible for a waiver under section 212(h) of the Immigration
19 and Nationality Act. (DHS-15) The Board of Immigration Appeals affirmed the removal order on
20 the ground that the Georgia battery conviction is an aggravated felony, citing *Talamantes-*
21 *Enriquez*. (DHS-2, DHS-3 n.2) The Eleventh Circuit denied him a stay of removal and later
22 dismissed his petition for review of the Board's decision. (Dkt. #1 at 4 ¶¶ 13-14)

23 Mr. Joseph was transferred from the Krome Service Processing Center in Miami to the
24 San Luis Regional Detention Center in San Luis, Arizona, in late March 2025. Based on a review
25 of the discovery provided by respondents and their response to the requests for production, ICE
26 has no record of ever requesting a travel document from the Haitian government for Mr. Joseph.

Argument

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2 1. The government has failed to show that Mr. Joseph is not likely to succeed on his
3 claim under *Zadvydas*.

4 Mr. Joseph contends that his present detention in immigration custody is unauthorized by
5 statute and unauthorized under *Zadvydas v. Davis*, 533 U.S. 678 (2001). “To determine whether
6 Congress has authorized his detention,” this Court must “first identify that purports to confer
7 such authority.” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008).

8 Under 8 U.S.C. § 1231(a)(2), an alien must be detained during the “removal period.”
9 This is a 90-day period of time, § 1231(a)(1)(A), that, as relevant here, began on February 26,
10 2025, when the Board of Immigration Appeals dismissed Mr. Joseph’s appeal of the removal
11 order. *See* 8 U.S.C. § 1231(a)(1)(B)(i) (removal period begins when the removal order becomes
12 administratively final), (a)(1)(B)(ii) (removal period begins when a federal appeals court issues a
13 final order only if that court stays removal). There is no evidence that Mr. Joseph has “failed or
14 refused to make timely application in good faith for travel documents necessary to the alien’s
15 departure.” 8 U.S.C. § 1231(a)(1)(C). The removal period thus expired on May 27, 2025.

16 Because the removal period has expired, Mr. Joseph’s present detention is no longer
17 mandatory under § 1231(a)(2), but instead discretionary under § 1231(a)(3) and (a)(6). Detention
18 under § 1231(a)(6) is limited “to a period reasonably necessary to bring about that alien’s
19 removal from the United States.” *Zadvydas*, 533 U.S. at 689. If “removal is not reasonably
20 foreseeable,” a habeas court should “hold continued detention unreasonable and no longer
21 authorized by statute.” *Id.* at 699-700. The Supreme Court recognizes that after six months of
22 total detention, “once the alien provides good reason to believe that there is no significant
23 likelihood of removal in the reasonably foreseeable future, the Government must respond with
24 evidence sufficient to rebut that showing.” *Id.* at 701.

25 The government has not shown that Mr. Joseph is not likely to succeed on his *Zadvydas*
26 claim. Instead, both the evidence that the government has produced in discovery and its
27 responses to Mr. Joseph’s requests for production point in the opposite direction. Respondents
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1 have produced no evidence that ICE has ever tried to obtain travel documents for Mr. Joseph.
2 Respondents informed Mr. Joseph that the discovery they provided contained all documents in
3 the government's possession involving ICE's communications with officials of the Haitian
4 government regarding requests for travel documents for Mr. Joseph. The discovery contained no
5 such documents. If ICE has never requested travel documents from the Haitian government even
6 though it has had over eight months to do so, then Mr. Joseph's removal is not likely at all.

7 The government nevertheless insists that "ICE is actively working on effectuating
8 Petitioner's removal to Haiti." (Dkt. #11 at 1) This assertion has no basis in the evidence. The
9 declaration provided by deportation officer Jorge Hernandez instead shows that this assertion is
10 nothing more than wishful thinking. Mr. Hernandez made the following assertions:

- 11 1. "To effectuate Petitioner's removal to Haiti, ERO [Enforcement and Removal
12 Operations, a component of U.S. Immigration and Customs Enforcement] must first
13 receive approval from the government of Haiti for removal. Once ERO has approval,
14 the field generates an I-296, and that I-296 is then used as the ID document and travel
15 document (TD) for removal. ERO will then schedule a flight for petitioner. Since
16 Petitioner's removal became final, ERO has worked expeditiously to effectuate
17 Petitioner's removal to Haiti. These removal efforts remain ongoing." (Dkt. #11-1 at 4
18 ¶ 21)
- 19 2. "Based on my experience and having reviewed the progress of ERO's request for the
20 Haitian government to approve the removal of Petitioner, there is a significant
21 likelihood that he will be removed to Haiti in the reasonably foreseeable future." (Dkt.
22 #11-1 at 4 ¶ 22)
- 23 3. "ICE has been routinely obtaining approval for removal of Haitian citizens by the
24 Haitian government and ICE routinely has flights to Haiti." (Dkt. #11-1 at 4 ¶ 23)
- 25 4. "Once ERO receives approval for removal from the Haitian government, the field will
26 generate his I-269 [*sic*] and his removal can be effectuated promptly." (Dkt. #11-1 at
27 4-5 ¶ 24)
- 28 5. "I declare under penalty of perjury under the law of the United States that the
foregoing is true and correct." (Dkt. #11-1 at 5)

Zadvydas requires the government to produce evidence that it is taking steps to effectuate
Mr. Joseph's removal. *See* 533 U.S. at 701. The steps that Mr. Hernandez describes that ICE will
take in the course of removing Mr. Joseph to Haiti begin with the Haitian government expressly
approving the removal. Mr. Hernandez does not explain how the Haitian government would go

1 about approving the removal of a person whom ICE has not asked for approval to remove. There
2 is simply no evidence of “progress” on the part of ICE or its component agency ERO on any
3 “request for the Haitian government to approve the removal” of Mr. Joseph. ICE has not even
4 taken the first step that Mr. Hernandez says it would take to bring about Mr. Joseph’s removal.
5 Furthermore, as Mr. Joseph pointed out in his petition, whether or not ICE has been able to
6 remove *other people* to Haiti says nothing about whether ICE is able—or indeed, willing—to
7 remove *Mr. Joseph* to that country. *See Senor v. Barr*, 401 F. Supp. 3d 420, 431 (W.D.N.Y. 2019)
8 (“The government observes that many other individuals have been removed to Haiti. Docket
9 Item 11-1 at 5.[²] That might well be true, but it sheds little light on why *Senor’s* removal has been
10 delayed and what that means for *Senor’s* prospects for removal occurring in the reasonably
11 foreseeable future.”).

12 Counsel for respondents repeats Mr. Hernandez’s assertions essentially verbatim. (Dkt.
13 #11 at 7) But Mr. Hernandez’s unsupported assertions are not evidence of anything at all. For
14 that reason, the government has not rebutted Mr. Joseph’s evidence that his removal is not likely
15 in the reasonably foreseeable future. Contrary to the government’s argument, Mr. Joseph’s claim
16 does not rest on the passage of time alone. (Dkt. #11 at 7 (citing *Prieto-Romero*)) His claim relies
17 on the fact that he has been detained for five months past the statutory period during which ICE
18 was required to remove him, and in all that time there is no evidence that ICE has lifted a finger
19 to begin the process of removing him. This Court should not countenance the government’s
20 effort to treat wishful thinking as valid rebuttal evidence.

21 **2. The government has not shown that preliminary relief is unwarranted.**

22 The parties agree on the governing standard for issuing a preliminary injunction (and a
23 temporary restraining order). “A plaintiff seeking a preliminary injunction must establish that he
24 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
25 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
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27 ² This is the citation given in the report of the *Senor* decision; it is merely a coincidence that Mr.
28 Hernandez’s declaration in this case has the same docket number.

1 public interest.” *Planned Parenthood Great Northwest v. Labrador*, 122 F.4th 825, 843–44 (9th Cir.
2 2024) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)).

3 “Alternatively, a preliminary injunction may issue where serious questions going to the merits
4 were raised and the balance of hardships tips sharply in plaintiff’s favor if the plaintiff also shows
5 that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.*
6 at 844 (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1135).

7 The government cannot overcome Mr. Joseph’s strong showing that all four of these
8 factors favor him. He has already explained why there is no likelihood that he will be removed
9 from the United States in the reasonably foreseeable future, such that he is likely to prevail on his
10 *Zadvydass* claim. The government posits that Mr. Joseph cannot show irreparable harm because
11 he “has provided no particularized facts showing that concrete, imminent harm” is occurring “in
12 light of the governments’ recent efforts to effectuate removal to Haiti.” (Dkt. #11 at 9) But, as
13 Mr. Joseph has repeatedly stressed, there is no evidence that ICE has done anything to
14 accomplish his removal to Haiti. There is thus no basis to believe that the government’s
15 supposition has any evidentiary support. *Cf.* Fed. R. Civ. P. 11(b)(3). Mr. Joseph is being illegally
16 detained. For that reason, each day that passes in which this illegal detention continues inflicts an
17 irreparable harm.

18 Furthermore, the government’s assertion that the public interest and balance of the
19 equities favor it, not Mr. Joseph, ignores a different aspect of *Zadvydass*. The government agrees
20 that these factors merge when a person applies for an injunction against the government. (Dkt.
21 #11 at 9) Then it adds that the “public interest lies in the Executive’s ability to enforce U.S.
22 immigration laws and to keep convicted criminal aliens detained pending execution of their
23 removal orders.” (Dkt. #11 at 9) But in *Zadvydass* the Court observed that the “plenary power”
24 that Congress has “to create immigration law” “is subject to important constitutional
25 limitations.” 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 942–43 (1983)). The statute
26 that authorizes Mr. Joseph’s detention here, 8 U.S.C. § 1231, contains “no clear indication of
27 congressional intent to grant the Attorney General the power to hold indefinitely in confinement
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1 an alien ordered removed.” *Id.* at 697. The public has no interest in continuing to imprison a
2 person like Mr. Joseph, whom the government apparently does not want to remove from the
3 United States, and whom the government is not making any effort to do so. The Supreme Court
4 has already said that such imprisonment is unauthorized by statute. The public has no interest in
5 seeing its government act unlawfully.

6 **Conclusion**

7 The government has no evidence that it is seeking to remove Mr. Joseph to Haiti. His
8 detention is unlawful, and this Court should order his immediate release from custody.

9 Respectfully submitted:

November 3, 2025.

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