ORIGINAL

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Pro Se[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOANI RODRIGUEZ-GUTIERREZ,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, PAMELA JO BONDI, Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

CIVIL CASE NO.: '25CV2726 BAS SBC

Notice of Motion and Memorandum of Law in Support of Temporary Restraining Order

[1] Mr. Rodriguez-Gutierrez is filing this petition for a writ of habeas corpus with the assistance of the Federal Defenders of San Diego, Inc., who drafted the instant motion and simultaneously filed motion for appointment of counsel and habeas petition. Federal Defenders has consistently used this procedure in seeking appointment for immigration habeas cases. The Declaration of Zandra Lopez in Support of Appointment Motion attaches case examples.

Introduction

Petitioner Loani Rodriguez-Gutierrez ("Petitioner") faces immediate irreparable harm: (1) revocation of his release on immigration supervision after more than 30 years of living peacefully in the community, despite ICE's failure to follow its own revocation procedures; (2) indefinite immigration detention with no reasonable prospect of removal in the reasonably foreseeable future to the country designated by the immigration judge ("IJ"); and (3) potential removal to a third country never considered by an IJ. Beyond that, Mr. Rodriguez-Gutierrez's family faces extraordinary hardship during his illegal detention, because he is the main breadwinner in his family and financially and emotionally supports his 18-year-old son with autism. This Court should grant temporary relief to preserve the status quo.

Petitioner has spent the over 25 years living free in the community on an order of supervision. Throughout that time, the government has proved unable to remove him to Cuba. Yet on May 29, 2025, the government re-detained him when he appeared as scheduled at his check-in. ICE gave him no opportunity to contest his re-detention, and there are no apparent changed circumstances justifying it. ICE does not appear to have a travel document in hand. Worse yet, in the likely case that ICE still proves unable to remove Petitioner to Cuva, ICE's own policies allow ICE to remove him to a third country never before considered by an IJ, with either 6-to-24 hours' notice or no notice at all.

Petitioner is therefore facing both unlawful detention and a threat of removal to a dangerous third country without due process. The requested temporary restraining order ("TRO") would preserve the status quo while Petitioner litigates these claims by (1) reinstating Petitioner's release on supervision, (2) prohibiting the government from removing him to a third country without first following the required removal statutory procedures and (2) prohibiting the government from removing him to a third country without an opportunity to file a motion to reopen with an IJ.

In granting this motion, this Court would not break new ground. Several courts have granted TROs or preliminary injunctions mandating release for post-final-removal-order immigrants like Petitioner. *See Phetsadakone v. Scott*, 2025 WL 2579569, at *6 (W.D. Wash. Sept. 5, 2025) (Laos); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *7 (E.D. Cal. July 16, 2025) (Vietnam); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *7 (E.D. Cal. July 16, 2025) (Vietnam); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *29 (W.D. Wash. Aug. 21, 2025) (Vietnam). Several more have ordered release[2] for petitioners whose immigration cases are still pending. *See, e.g.*, *Hinestroza v. Kaiser*, No. 25-CV-07559-JD, 2025 WL 2606983, at *2 (N.D. Cal. Sept. 9, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924, at *12 (D. Mass. Sept. 9, 2025); *R.D.T.M. v. Wofford*, No. 1:25-CV-01141-KES-SKO (HC), 2025 WL 2617255, at *6 (E.D. Cal. Sept. 9, 2025). These courts have determined that, for these long-term releasees, liberty is the status quo, and only a return to that status quo can avert irreparable harm.

[2] Because immigration detainees whose cases have not been adjudicated are entitled only to a bond hearing—not to outright release—some of these TROs require release unless ICE provides that hearing. But because *Zadvydas* requires outright release on supervision, a TRO fitted to Petitioner's claims should order that relief.

Several courts have likewise granted temporary restraining orders preventing third-country removals without due process. *See, e.g., J.R. v. Bostock*, 25-cv-01161-JNW, 2025 WL 1810210 (W.D. Wash. Jun. 30, 2025); *Vaskanyan v. Janecka*, 25-cv-01475-MRA-AS, 2025 WL 2014208 (C.D. Cal. Jun. 25, 2025); *Ortega v. Kaiser*, 25-cv-05259-JST, 2025 WL 1771438 (N.D. Cal. June 26, 2025); *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *7 (E.D. Cal. July 16, 2025); *Phan v. Beccerra*, No. 2:25-CV-01757-DC-JDP, 2025 WL 1993735, at *7 (E.D. Cal. July 16, 2025). Petitioner therefore respectfully requests that this Court grant this TRO.

Statement of Facts

Petitioner simultaneously filed a habeas petition and motion for appointment of counsel. Petitioner incorporates by reference the statements of fact set forth in those pleadings.

Argument

To obtain a TRO, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839-40 & n.7 (9th Cir. 2001) (noting that a TRO and preliminary injunction involve "substantially identical" analysis). A "variant[] of the same standard" is the "sliding scale": "if a plaintiff can only show that there are 'serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips *sharply* in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Immigrant Defenders Law Center v. Noem*, 145 F.4th 972, 986 (9th Cir. 2025) (internal quotation marks omitted). Under this approach, the four *Winter* elements are "balanced, so that a stronger showing of one element may offset a weaker

showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A TRO may be granted where there are "'serious questions going to the merits' and a hardship balance. . . tips sharply toward the plaintiff," and so long as the other *Winter* factors are met. *Id.* at 1132.

Here, this Court should issue a temporary restraining order because "immediate and irreparable injury . . . or damage" is occurring and will continue in the absence of an order. Fed. R. Civ. P. 65(b). Not only have Respondents re-detained Petitioner in violation of his due process, statutory, and regulatory rights. ICE policy also allows them to remove him to a third country in violation of his due process, statutory, and regulatory rights. This Court should order Petitioner's release and enjoin removal to a third country with no or inadequate notice.

I. Petitioner is likely to succeed on the merits, or at a minimum, raises serious merits questions.

A. Petitioner is likely to succeed on the merits of his claim that his detention violates *Zadvydas*.

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court considered a problem affecting people like Petitioner: Federal law requires ICE to detain an immigrant during the "removal period," which typically spans the first 90 days after the immigrant is ordered removed. 8 U.S.C. § 1231(a)(1)-(2). And after that 90-day removal period expires, ICE may detain the migrant while continuing to try to remove them. *Id.* § 1231(a)(6). If that subsection were understood to allow for "indefinite, perhaps permanent, detention," it would pose "a serious constitutional threat." *Zadvydas*, 533 U.S. at 699. In *Zadvydas*, the Supreme Court avoided the constitutional concern by interpreting § 1231(a)(6) to incorporate implicit limits. *Id.* at 689.

As an initial matter, *Zadvydas* held that detention is "presumptively reasonable" for at least six months after the removal order becomes final. *Id.* at 701. This acts as a kind of grace period for effectuating removals.

Following the six-month grace period, courts must use a burden-shifting framework to decide whether detention remains authorized. First, the petitioner must prove that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

If he does so, the burden shifts to "the Government [to] respond with evidence sufficient to rebut that showing." *Id.* Ultimately, then, the burden of proof rests with the government: The government must prove that there is a "significant likelihood of removal in the reasonably foreseeable future," or the immigrant must be released. *Id.*

Here, Petitioner was ordered removed much more than 6 months ago, as his removal order became final in 1996.[3] He has also been detained for over a year cumulatively. Rodriguez-Gutierrez Dec. at ¶¶ 2, 4. Thus, it is clear that the *Zadvydas* grace period has ended.

There is also strong evidence that there is no "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701.

Thus, this Court will likely find that Petitioner warrants *Zadvydas* relief.

B. Petitioner is likely to succeed on the merits of his claim that ICE violated its own regulations.

In addition to *Zadvydas*'s protections, 8 C.F.R. §§ 241.4(*l*), 241.13(i) provide extra process for re-detentions. These regulations permit an official to "return[s] [the person] to custody" because they "violate[d] any of the conditions of release." 8 C.F.R. § 241.13(i)(1); *see also id.* § 241.4(*l*)(1). Otherwise, they permit revocation of release only if the appropriate official (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," *id.* § 241.13(i)(2), and (2) makes that finding "on account of changed circumstances." *Id.*

[3] EOIR, *Automated Case Information*, https://acis.eoir.justice.gov/en/.

No matter the reason for re-detention, the re-detained person is entitled to "an initial informal interview promptly," during which they "will be notified of the reasons for revocation." *Id.* §§ 241.4(*l*)(1), 241.13(i)(3). The interviewer must "afford[] the [person] an opportunity to respond to the reasons for revocation," allowing them to "submit any evidence or information" relevant to re-detention and evaluating "any contested facts." *Id.*

ICE is required to follow its own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established."). A court may review a re-detention decision for compliance with the regulations. *See Phan v. Beccerra*, No. 2:25-CV-01757, 2025 WL 1993735, at *3 (E.D. Cal. July 16, 2025); *Nguyen v. Hyde*, No. 25-cv-11470-MJJ, 2025 WL 1725791, at *3 (D. Mass. June 20, 2025) (citing *Kong v. United States*, 62 F.4th 608, 620 (1st Cir. 2023)).

None of the prerequisites to detention apply here. ICE did not detain Petitioner due to a violation. And there are no changed circumstances that justify re-detaining him. Respondents' intent to eventually complete a travel document request for Petitioner does not constitute a changed circumstance." *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025) (citing *Liu v. Carter*, No. 25-3036-JWL, 2025 WL 1696526, at *2 (D. Kan. June 17, 2025)). Nor has Petitioner received the interview required by regulation. Rodriguez-Gutierrez Dec. at ¶¶ 11. No one from ICE has ever invited him to submit evidence to contest his detention. *Id.*

"[B]ecause officials did not properly revoke petitioner's release pursuant to the applicable regulations," this Court will likely find that "petitioner is entitled to his release" on an order of supervision. *Liu*, 2025 WL 1696526, at *3.

C. Petitioner is likely to succeed on the merits of his claim that ICE may not remove Mr. Rodriguez-Gutierrez to a Third country without following the mandatory consecutive procedures of 8 U.S.C. § 1231(b)(2).

The government may not legally pursue its plan to remove Mr. Rodriguez-Gutierrez to Cuba, because 8 U.S.C. § 1231(b)(2) requires that ICE first seek removal to the Cuba.

"Th[at] statute . . . provides four consecutive removal commands." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005). First, "the Attorney General shall remove the alien to the country the alien so designates." 8 U.S.C. § 1231(b)(2)(A)(ii). Here, the designated country is Cuba.

The Attorney General may "disregard [that] designation if" one of four criteria are met, but none are here. Mr. Rodriguez-Gutierrez did not "fail[] to designate a country promptly." 8 U.S.C. § 1231(b)(2)(C)(i). ICE also has not presented any evidence that Cuba has failed to respond to a request to remove Mr. Rodriguez-Gutierrez to that country. § 1231(b)(2)(C)(ii)-(iv).

This Court should therefore order that Mr. Rodriguez-Gutierrez cannot be removed to a third country prior to the government making efforts for his removal to Cuba. *See Farah v. I.N.S.*, No. CIV. 02-4725DSDRLE, 2002 WL 31866481, at *4 (D. Minn. Dec. 20, 2002) (granting a habeas petition and prohibiting removal in violation of § 1231(b)(2)); *see also Jama*, 543 U.S. at 338 (reviewing a § 1231(b)(2) argument set forth in a habeas petition).

D. Petitioner is likely to succeed on the merits of his claim that he is entitled to adequate notice and an opportunity to be heard prior to any third country removal.

Finally, Petitioner is likely to succeed on the merits of his claim that he may not be removed to a third country absent adequate notice and an opportunity to be heard.

U.S. law enshrines protections against dangerous and life-threatening

removal decisions. By statute, the government is prohibited from removing an immigrant to any third country where a person may be persecuted or tortured, a form of protection known as withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A). The government "may not remove [a noncitizen] to a country if the Attorney General decides that the [noncitizen's] life or freedom would be threatened in that country because of the [noncitizen's] race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; *see also* 8 C.F.R. §§ 208.16, 1208.16. Withholding of removal is a mandatory protection.

Similarly, Congress codified protections enshrined in the CAT prohibiting the government from removing a person to a country where they would be tortured. *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); 28 C.F.R. § 200.1; *id.* §§ 208.16-208.18, 1208.16-1208.18. CAT protection is also mandatory.

To comport with the requirements of due process, the government must provide notice of the third country removal and an opportunity to respond. Due process requires "written notice of the country being designated" and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)." *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019); *accord D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

Due process also requiers "ask[ing] the noncitizen whether he or she fears persecution or harm upon removal to the designated country and memorialize in writing the noncitizen's response. This requirement ensures DHS will obtain the necessary information from the noncitizen to comply with section 1231(b)(3) and avoids [a dispute about what was said]." *Aden*, 409 F. Supp. 3d at 1019. "Failing to

notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which they will be deported violates both INS regulations and the constitutional right to due process." *Andriasian*, 180 F.3d at 1041.

If the noncitizen claims fear, measures must be taken to ensure that the noncitizen can seek asylum, withholding, and relief under CAT before an immigration judge in reopened removal proceedings. The amount and type of notice must be "sufficient" to ensure that "given [a noncitizen's] capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation." *Aden*, 409 F. Supp. 3d at 1009 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132 F.3d 405, 408 (7th Cir. 1998)); *cf. D.V.D.*, 2025 WL 1453640, at *1 (requiring a minimum of 15 days' notice).

"[L]ast minute" notice of the country of removal will not suffice, *Andriasian*, 180 F.3d at 1041; *accord Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016), and for good reason: To have a meaningful opportunity to apply for fear-based protection from removal, immigrants must have time to prepare and present relevant arguments and evidence. Merely telling a person where they may be sent, without giving them a chance to look into country conditions, does not give them a meaningful chance to determine whether and why they have a credible fear.

Respondents' third country removal program skips over these statutory and constitutional procedural protections. According to ICE's July 9 guidance, individuals can be removed to third countries "without the need for further procedures," so long as "the [U.S.] has received diplomatic assurances." Exh. B to Habeas Petition at 1. Petitioner is likely to succeed on the merits of his claim on this fact alone, because the policy instructs officers to provide no notice or opportunity to be heard of any kind. The same is true of the minimal procedures ICE offers when no diplomatic assurances are present. The policy provides no

meaningful notice (6-24 hours), instructs officers *not* to ask about fear, and provides no actual opportunity to see counsel and prepare a fear-based claim (6-24 hours), let alone reopen removal proceedings. In sum, it directs ICE officers to violate the rights of those whom they seek to subject to the third country removal program.

Faced with similar arguments, several courts have recently granted individual TROs against removal to third countries. *See J.R.*, 2025 WL 1810210; *Vaskanyan*, 2025 WL 2014208; *Ortega*, 2025 WL 1771438; *Hoac*, 2025 WL 1993771, at *7; *Phan*, 2025 WL 1993735, at *7.

II. Petitioner will suffer irreparable harm absent injunctive relief.

Petitioner also meets the second factor, irreparable harm. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Where the "alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure*, § 2948.1 (2d ed. 2004)).

Here, the potential irreparable harm to Petitioner is even more concrete. In Mr. Rodriguez-Gutierrez's absence, his wife and 18 year old son with autism will suffer. *See* Exh. A. Furthermore, "[u]nlawful detention" itself "constitutes 'extreme or very serious damage, and that damage is not compensable in damages." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017).

Third-country deportations pose that risk and more. Recent third-country deportees have been held, indefinitely and without charge, in hazardous foreign prisons. *See* Wong et al., *supra*. They have been subjected to solitary confinement. *See* Imray, *supra*. They have been removed to countries so unstable that the U.S. government recommends making a will and appointing a hostage negotiator before

traveling to them. *See* Wong, *supra*. These and other threats to Petitioner's health and life independently constitute irreparable harm.

III. The balance of hardships and the public interest weigh heavily in petitioner's favor.

The final two factors for a TRO—the balance of hardships and public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). That balance tips decidedly in Petitioner's favor. On the one hand, the government "cannot reasonably assert that it is harmed in any legally cognizable sense" by being compelled to follow the law. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Moreover, it is always in the public interest to prevent violations of the U.S. Constitution and ensure the rule of law. *See Nken*, 556 U.S. at 436 (describing public interest in preventing noncitizens "from being wrongfully removed, particularly to countries where they are likely to face substantial harm"); *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019) (when government's treatment "is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction."). On the other hand, Petitioner faces weighty hardships: unlawful, indefinite detention and removal to a third country where he is likely to suffer imprisonment or other serious harm. The balance of equities thus favors preventing the violation of "requirements of federal law," *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014), by granting emergency relief to protect against unlawful detention and prevent unlawful third country removal.

IV. Petitioner gave the government notice of this TRO, and the TRO should remain in place throughout habeas litigation.

When Federal Defenders first started filing TROs in immigration habeas cases, a Federal Defenders attorney called the U.S. Attorney's Office and was put in touch with Janet Cabral. *See* Exhibit B, Declaration of Katie Hurrelbrink, at ¶ 2. Ms. Cabral requested that Federal Defenders provide notice of these motions via

email after the motion has been filed with the court. *Id.* Federal Defenders will do so in this case. *Id.*

Additionally, Petitioner requests that this TRO remain in place until the habeas petition is decided. Fed. R. Civ. Pro. 65(b)(2). Good cause exists, because the same considerations will continue to warrant injunctive relief throughout this litigation, and habeas petitions must be adjudicated promptly. *See In re Habeas Corpus Cases*, 216 F.R.D. 52 (E.D.N.Y. 2003). A proposed order is attached.

Conclusion

For those reasons, Petitioner requests that this Court issue a temporary restraining order.

DATED: 10-14-2025 Respectfully submitted,

LOANI RODRIGUEZ-GUTIERREZ

Petitioner