Zandra L. Lopez
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
zandra_lopez@fd.org

Attorneys for Mr. Rodriguez-Gutierrez

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.:
25-cv-02726-BAS-SBC

Traverse in Support of Petition for Writ of Habeas Corpus

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INTRODUCTION

When ICE re-detained Mr. Rodriguez Gutierrez after 25 years of supervision, it did not know when he would be removed, where he would be removed to, or if he would be removed at all. For over five months, Mr. Rodriguez Gutierrez has been made to sleep on the floor of a detention center's reception area for days, detained in four different states, and told to deport to Mexico multiple times. Now, Respondents claim that continued detention is appropriate because there is significant likelihood of removal to Cuba in the reasonably foreseeable future and ICE has been working expeditiously to execute that removal. They say this even though, as of the date of the Return, communication with Cuba had not even begun and no evidence has been presented as to why they believe removal is likely and in the reasonably foreseeable future.

Now having received the government's Return and supporting evidence, this Court should grant Mr. Rodriguez-Gutierrez's petition on all his claims. To do so, the Court need only follow recent decisions in this district and around the country.

First, this Court should grant the petition on Claim One because the government provides no independent evidence to satisfy the success element ("a significant likelihood of removal") or timing element ("in the reasonably foreseeable future") of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Respondents say nothing regarding likelihood of removal or the expected timing of removal. Deportation Officer ("DO") Barroga only asserts that "ICE has been successfully obtaining travel documents for Cuban citizens" and gives a number of less than 4,000 Cubans removed in a span of five years. Doc. 8-1 at ¶¶ 11-12. She says nothing about that number in proportion to the number of removal attempts. She also says nothing whether any of those removed were from prior to the 2017 Joint Agreement. In fact, Respondents, themselves, appear to seriously doubt being

able to remove Mr. Rodriguez-Gutierrez to Cuba since they have tried to get him to agree to be removed to Mexico three times, have never talked to Mr. Rodriguez-Gutierrez about removal to Cuba, and waited to the day the response was due to this Court to make an internal request for headquarters to make the initial contact with Cuba. *Id.* at ¶ 9.

Even if ICE was farther along in the process and had at least requested travel documents, that is not enough. As other judges of this district have held, a travel document request alone—with no evidence of likely success or timing—does not satisfy the government's burden. *See, e.g., Conchas-Valdez,* 2025 WL 2884822, No. 25-cv-2469-DMS (S.D. Cal. Oct. 6, 2025); *Rebenok v. Noem,* No. 25-cv-2171-TWR, ECF No. 13 (S.D. Cal. Sept. 25, 2025); *Alic v. Dep't of Homeland Sec./Immigr. Customs Enf't*, No. 25-CV-01749-AJB-BLM, 2025 WL 2799679 (S.D. Cal. Sept. 30, 2025).

Second, this Court must grant the petition on Claim Two because the government does not claim to have complied with 8 C.F.R. §§ 241.4, 241.13. For persons like Mr. Rodriguez Gutierrez, those regulations permit re-detention only if ICE: (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," *id.* § 241.13(i)(2); (2) makes that finding "on account of changed circumstances," *id.*; (3) provides "an initial informal interview promptly," *id.* §§ 241.4(*l*)(1), 241.13(i)(3); and (4) "affords the [person] an opportunity to respond to the reasons for revocation," *id.* The government provides no evidence that there was a prompt interview. And it claims that a vague statement of "changed circumstances" was sufficient notice to revoke supervision. But "[s]imply to say that circumstances had changed or there was a significant likelihood of removal in the foreseeable future is not enough." *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3, 2025). Moreover, in the last several weeks, multiple judges from this district have ordered release for failure to follow these regulations on records meaningfully

indistinguishable from this one. *See Tran v. Noem*, 25-cv-02391-BTM-BLM (S.D. Cal. Oct. 27, 2025); *McSweeney v. Warden*, 25-cv-02488-RBM-DEB (S.D. Cal. Oct. 24, 2025); *Constantinovici v. Bondi*, __ F. Supp. 3d __, 2025 WL 2898985, No. 25-cv-2405-RBM (S.D. Cal. Oct. 10, 2025); *Rokhfirooz v. Larose*, No. 25-cv-2053-RSH, 2025 WL 2646165 (S.D. Cal. Sept. 15, 2025); *Phan v. Noem*, 2025 WL 2898977, No. 25-cv-2422-RBM-MSB, *3–*5 (S.D. Cal. Oct. 10, 2025); *Sun v. Noem*, 2025 WL 2800037, No. 25-cv-2433-CAB (S.D. Cal. Sept. 30, 2025); *Van Tran v. Noem*, 2025 WL 2770623, No. 25-cv-2334-JES, *3 (S.D. Cal. Sept. 29, 2025); *Truong v. Noem*, No. 25-cv-02597-JES, ECF No. 10 (S.D. Cal. Oct. 10, 2025); *Khambounheuang v. Noem*, No. 25-cv-02575-JO-SBC, ECF No. 12 (S.D. Cal. Oct. 9, 2025).

Third, this Court must grant the petition on Claim Three. Respondents failed to comply with 8 U.S.C. § 1231(b)(2), which requires that ICE first seek removal to the designated country. As the Supreme Court has made clear, § 1231(b)(2) "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). The designated country is Cuba. The Attorney General may "disregard [that] designation" only if certain criteria are met. 8 U.S.C. § 1231(b)(2)(C)(i). Here, ICE did not follow the consecutive commands of § 1231(b)(2) by seeking to removal Mr. Rodriguez Gutierrez to a third country prior the designated country of 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)). The government does not provide a response to this claim.

Fourth, the government does not dispute that ICE's third-country removal policy violates the due process. And the Ninth Circuit has squarely rejected the government's jurisdictional argument, holding that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to

present a fear-based claim before [they] [are] removed," or any other claim asserting a "violation of [ICE's] mandatory duties." *Ibarra-Perez v. United States*, __ F.4th __, 2025 WL 2461663, at *7, *9 (9th Cir. Aug. 27, 2025). The contrary position would leave immigrants without protection from ICE's policy, which allows for a change of plans with minimal or no notice. Multiple judges in this district have granted relief on this ground. *See, e.g.*, *Rebenok v. Noem*, No. 25-cv-2171-TWR at ECF No. 13; *Van Tran v. Noem*, 2025 WL 2770623 at *3; *Nguyen Tran v. Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18, 2025); *Louangmilith v. Noem*, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D. Cal. Oct. 9, 2025). This Court should therefore grant the petition—or at least a temporary restraining order ("TRO")—on all grounds.

ARGUMENT

I. This Court has jurisdiction to consider Mr. Rodriguez Gutierrrez claims.

To begin, this Court has jurisdiction to consider all of Mr. Rodriguez Gutierrez's claims. Contrary to the government's arguments, § 1252(g) does not bar review of "all claims arising from deportation proceedings." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead, courts "have jurisdiction to decide a purely legal question that does not challenge the Attorney General's discretionary authority." *Ibarra-Perez v. United States*, __ F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed," *id.* at *7[1]—the same claim that Mr. Rodriguez Gutierrez raises here with respect to

[1] Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act ("FTCA") case, *id.* at *2, while this is a pre-removal habeas petition. But the analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and Mr. Rodriguez Gutierrez are challenging the same kind of agency action. *See*

third-country removals. The Court reasoned that "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Id.* Instead, § 1252(g) is "limited . . . to actions challenging the Attorney General's discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does not apply to arguments that the government "entirely lacked the authority, and therefore the discretion," to carry out a particular action. *Id.* at 800. Thus, § 1252(g) applies to "discretionary decisions that [the Secretary] actually has the power to make, as compared to the violation of his mandatory duties." *Ibarra-Perez*, 2025 WL 2461663, at *9.

The same logic applies to all of Mr. Rodriguez Gutierrez's claims, because he challenges only violations of ICE's mandatory duties under statutes, regulations, and the Constitution. Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Mr. Rodriguez Gutierrez's] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5.

Other courts agree. *See, e.g.*, *Kong*, 62 F.4th at 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-

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Kong, 62 F.4th at 616–17 (explaining that a decision about § 1252(g) in an FTCA case would also affect habeas jurisdiction).

discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (§ 1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").

In short, Mr. Rodriguez Gutierrez does not challenge whether the government may "execute" his removal under 8 U.S.C § 1252(g)—only whether it may detain him up to the date it does so or remove him to a third country without notice and an opportunity to be heard. This Court thus has jurisdiction.

II. Mr. Rodriguez Gutierrez's claims succeed on the merits.

This Court need not speculate about whether Mr. Rodriguez Gutierrez may succeed on the merits. Because the government's evidence is insufficient to justify Mr. Rodriguez Gutierrez's detention, his petition should be granted outright, or the Court should at least release him on a TRO pending further briefing.

A. Claim One: The government has not proved that there is a significant likelihood of removal in the reasonably foreseeable future.

First, the government provides no evidence that Mr. Rodriguez Gutireez will likely be removed to Cuba at all, let alone in the reasonably foreseeable future.

1. The government cites no authority for the proposition that Mr. Rodriguez Gutierrez has not satisfied the six-month *Zadvydas* grace period.

As an initial matter, the government appears to contend that the six-month grace period starts over every time ICE re-detains someone. Doc. 8 at 6-7. "Courts . . . broadly agree" that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL 6003485, at *7 n.6 (W.D. La. Oct. 15, 2019), *report and recommendation adopted*, 2019 WL 6037220 (W.D. La. Nov. 13, 2019); *see also Sied v. Nielsen,* No. 17-CV-

06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (collecting cases); *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash. Aug. 21, 2025). The government cites no case law to the contrary.

The six-month grace period has therefore ended, and so—contrary to the government's claims—Mr. Rodriguez Gutirerez need not rebut the presumptively reasonable period of detention.

2. The government provides no evidence to support a "significant likelihood of removal" to Cuba.

Because the six-month grace period has passed, this court moves on to the burden-shifting framework. The government does not deny that Mr. Rodriguez Gutireez has provided "good reason" to doubt his reasonably foreseeable removal, thereby forfeiting the issue. *See Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928 (D. Minn. 2006). The burden therefore shifts to the government to prove that there is a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. That standard has a success element ("significant likelihood of removal") and a timing element ("in the reasonably foreseeable future"). The government meets neither.

As an initial matter, the government has not shown that Mr. Rodriguez-Gutierrez's removal to Cuba is "significant[ly] like[ly]." *Zadvydas*, 533 U.S. at 701.

First, DO Barroga's declaration says nothing about removal to Cuba being significantly likely. To the contrary, presumably because the government believed removal to Cuba was not likely, they tried removing Mr. Rodriguez Gutirrez to Mexico first. Doc. No. 1 at 28 ¶¶ 7-9. They tried to remove him to Mexico three separate times. *Id.* The fact that ICE itself tried a third country prior to making any effort gives little confidence that he will be removed in the reasonably foreseeable future. *Conchas-Valdez v. Casey*, No. 25-CV-02469-DMS-JLB, 2025 WL 2884822, at *3 (S.D. Cal. Oct. 6, 2025) (noting the government's "minimal work" on removing petitioner "not instill confidence that it will be able to secure

Petitioner's removal in the reasonably foreseeable future."). Moreover, the only effort made to date was on the day the Return was due, the EOR in San Diego requested that Headquarters to "nominate" Mr. Rodriguez Gutirrez. Doc. 8-1 at 3, ¶ 9. There is no explanation as to what a "nominat[ion]" means but it is unclear if the United States has even communicated with Cuba.

DO Barroga's assertion that ICE has repatriated less than 4,000 Cubans in five years, *Id.* at ¶ 12, does not show that Mr. Rodriguez-Gutirrez's removal is significantly likely. DO Barroga's statement does not suggest that a high *proportion* of Cuban citizens are successfully removed when ICE seeks travel documents. "[I]f the total number of requests that were made to [Cuba] was disclosed, [this Court] might be able to gauge how likely it is that Petitioner would be removed to [Cuba]. If DHS submitted 350 requests and [Cuba] issued travel documents for 328 individuals, Respondents may very well have shown that removal is significantly likely in the reasonably foreseeable future. On the other hand, if DHS submitted 3,500 requests and only 328 individuals received travel documents, Respondents would not be able to meet their burden." *Nguyen*, 2025 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Barroga provides no ratio of requests to travels documents issued, precluding this kind of analysis.

What's more, in the habeas petition, Mr. Rodriguez Gutierrez explained that he entered the United States prior to the 2017 Joint Statement between Cuba and the United States. Doc. 1 at 5-6. Based on the Joint Statement, Mr. Rodriguez Gutierrez would fall under the class of individuals that Cuba is not obligated to repatriate. *Id.* Respondents do not address this issue in its Return. They do not inform the Court if the 3,933 people that have been removed to Cuba in the past five years included pre-2017 arrivals.

Just as importantly, courts have "demanded an individualized analysis" of why *this* person—Mr. Rodriguez Gutireez—will likely be removed. *Nguyen*, 2025

WL 2419288, at *17 (citing *Nguyen*, 2025 WL 1725791, at *4). Because "[t]he government has not provided any evidence of [Cuba's] eligibility criteria or why it believes Petitioner now meets it," the government's evidence is insufficient. *Id.* at *18.

Moreover, even if ICE had submitted a request for travel documents to Cuba—and, to date, it has not —good faith efforts to secure a travel document do not themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a "Fifth Circuit h[olding] [that] [the petitioner's] continued detention [was] lawful as long as good faith efforts to effectuate deportation continue and [the petitioner] failed to show that deportation will prove impossible." 533 U.S. at 702 (cleaned up). The Supreme Court reversed, finding that the Fifth Circuit's good-faith-efforts standard "demand[ed] more than our reading of the statute can bear." *Id.*

Thus, "under *Zadvydas*, the reasonableness of Petitioner's detention does not turn on the degree of the government's good faith efforts. Indeed, the *Zadvydas* court explicitly rejected such a standard. Rather, the reasonableness of Petitioner's detention turns on whether and to what extent the government's efforts are likely to bear fruit." *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5 (W.D.N.Y. Jan. 2, 2019). Accordingly, "the Government is required to demonstrate the likelihood of not only the *existence* of untapped possibilities, but also of a probability of success in such possibilities." *Elashi v. Sabol*, 714 F. Supp. 2d 502, 506 (M.D. Pa. 2010).

Here, then, "[w]hile the respondent asserts that [Mr. Rodriguez Gutierrez's] travel document requests with [the Cuban] Consulate[]" will be lodged in the future, "this is insufficient. It is merely an assertion of good-faith efforts to secure removal; it does not make removal likely in the reasonably foreseeable future." *Gilali v. Warden of McHenry Cnty.*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019). Many courts have agreed that requesting travel documents does not itself make removal reasonably likely. *See,*

e.g., *Andreasyan v. Gonzales*, 446 F. Supp. 2d 1186, 1189 (W.D. Wash. 2006) (holding evidence that the petitioner's case was "still under review and pending a decision" did not meet respondents' burden); *Islam v. Kane*, No. CV-11-515-PHX-PGR, 2011 WL 4374226, at *3 (D. Ariz. Aug. 30, 2011), *report and recommendation adopted*, 2011 WL 4374205 (D. Ariz. Sept. 20, 2011) ("Repeated statements from the Bangladesh Consulate that the travel document request is pending does not provide any insight as to when, or if, that request will be fulfilled."); *Khader v. Holder*, 843 F. Supp. 2d 1202, 1208 (N.D. Ala. 2011) (granting petition despite pending travel document request, where "[t]he government offers nothing to suggest when an answer might be forthcoming or why there is reason to believe that he will not be denied travel documents"); *Mohamed v. Ashcroft*, No. C01-1747P, 2002 WL 32620339, at *1 (W.D. Wash. Apr. 15, 2002) (granting petition despite pending travel document request). That includes Judge Robinson's recent ruling. *See supra*, Introduction (explaining the *Rebenok* ruling).

Finally, the government claims that *Zadydas* only applies if Mr. Rodriguez Gutierrez's removal to Cuba would be "impossib[le]." Doc. 8 at 10. But that is the exact opposite of what *Zadydas* says. In fact, the Supreme Court reversed the Fifth Circuit's finding that continued detention was lawful as long as "good faith efforts to effectuate ... deportation continue" and Zadvydas failed to show that deportation will prove "impossible." *Zadvydas*, 533 U.S. at 702. The Supreme Court reversed finding the Fifth Circuit's "standard would seem to require an alien seeking release to show the absence of any prospect of removal—no matter how unlikely or unforeseeable—which demands more than our reading of the statute can bear." *Id.* It ruled that the standard is that a person can be detained if there is "no significant likelihood of removal in the reasonably foreseeable future." *Id.* Here, detention is not justified as there is "no significant likelihood of removal" to Cuba.

3. The government provides no evidence to support that any such removal will occur "in the reasonably foreseeable future."

Additionally, even if ICE will eventually remove Mr. Rodriguez Gutirrez, the government provides zero evidence that removal will happen "in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. DO Barroga provides no timetable for how long the nomination process takes and how long travel document requests typically take—no statistics, no estimations, no anecdotes, no nothing.

That is fatal. "[D]etention may not be justified on the basis that removal to a particular country is likely *at some point* in the future; *Zadvydas* permits continued detention only insofar as removal is likely in the *reasonably foreseeable* future." *Hassoun*, 2019 WL 78984, at *6. "The government's active efforts to obtain travel documents from the Embassy are not enough to demonstrate a likelihood of removal in the reasonably foreseeable future where the record before the Court contains no information to suggest a timeline on which such documents will actually be issued." *Rual v. Barr*, No. 6:20-CV-06215 EAW, 2020 WL 3972319, at *4 (W.D.N.Y. July 14, 2020). "[I]f DHS has no idea of when it might reasonably expect [Mr. Rodriguez Gutierrez] to be repatriated, this Court certainly cannot conclude that his removal is likely to occur—or even that it *might* occur—in the reasonably foreseeable future." *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102 (W.D.N.Y. 2019).

Courts have routinely granted habeas petitions where, as here, the government does not establish *Zadvydas*'s timing element. *See, e.g.*, *Balza v. Barr*, No. 6:20-CV-00866, 2020 WL 6143643, at *5 (W.D. La. Sept. 17, 2020), *report and recommendation adopted,* No. 6:20-CV-00866, 2020 WL 6064881 (W.D. La. Oct. 14, 2020) ("[A] theoretical possibility of eventually being removed does not satisfy the government's burden[.]"); *Eugene v. Holder*, No.

408CV346-RH WCS, 2009 WL 931155, at *4 (N.D. Fla. Apr. 2, 2009) ("While Respondents contend Petitioner *could* be removed to Haiti, it has not been shown that it is significantly likely that Petitioner *will* be removed in the *reasonably foreseeable* future."); *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 426 (M.D. Pa. 2004) (granting petition because even if "Petitioner's removal will ultimately be effected . . . the Government has not rebutted the presumption that removal is not likely to occur in the reasonably foreseeable future"); *Seretse-Khama v. Ashcroft*, 215 F. Supp. 2d 37, 50 (D.D.C. 2002) (granting petition where the government had not provided any "evidence . . . that travel documents will be issued in a matter of days or weeks or even months").

In sum, then, there could be "some possibility that [Cuba] will accept Petitioner at some point. But that is not the same as a significant likelihood that he will be accepted in the reasonably foreseeable future." *Nguyen*, 2025 WL 2419288, at *16. Mr. Rodriguez Gutireez therefore succeeds under *Zadvydas*, too.

B. Claim Two: As other judges have recently found when granting similar habeas petitions, ICE did not adhere to the regulations governing re-detention.

The government provides no evidence that ICE complied with 8 C.F.R. §§ 241.4, 241.13. The government does not deny that these regulations apply to Mr. Rodriguez Gutireez, that Mr. Rodriguez Gutierrez may challenge them in this habeas case, or that failure to comply with them is grounds for release. *See* Doc. 7 at 5–6. To the contrary, the government agrees that Mr. Rodriguez Gutirerrez's release was revoked under 8 C.F.R. § 241.4(l)(2)(iii) and 8 C.F.R. § 241.13(i)(2). But the government implies that ICE complied with these regulations. *Id.* ICE did not.

First, ICE did not comply with the ***reasons for the revocation***. Beginning with 8 C.F.R. § 241.13(i)(2). That section provides that ICE may "revoke an alien's release under this section and return the alien to custody if, on *account of changed*

circumstances, the Service determines that there is a *significant likelihood that the alien may be removed in the reasonably foreseeable future*." 8 C.F.R. § 241.13(i)(2) (emphasis added). That "regulation require[s] (1) an individualized determination (2) by ICE that, (3) based on changed circumstances, (4) removal has become significantly likely in the reasonably foreseeable future." *Kong v. United States*, 62 F.4th 608, 619–20 (1st Cir. 2023).

In *Rokhfirooz*, Judge Huie determined the fourth requirement was not met on a record materially indistinguishable from this one. 2025 WL 2646165, at *3 (S.D. Cal. Sept. 15, 2025). There, the government failed to produce "any documented determination, made prior to Petitioner's arrest, that his release should be revoked." *Id.* at *3. The only documentation was "an arrest warrant, issued on DHS Form I-200, merely recit[ing] that there is probable cause to believe that Petitioner is 'removable from the United States,' that is, subject to removal, which would be accurate whether or not Petitioner's release was revoked." *Id.*

Here, similarly, the government provides no documented, pre-arrest determination that release should be revoked; it only references an arrest warrant stating that Mr. Rodriguez Gutierrez is removable. Doc. 8-1 at ¶ 6. The I-213 confirms that his arrest was premised entirely on his status as a person who had a final order of removal—not a determination that release should be revoked due to changed circumstances making removal significantly likely.

Judge Huie also remarked in *Rokhfirooz* that the government had produced "no record constitut[ing] a determination even after Petitioner's arrest that there is a significant likelihood that Petitioner can be removed in the reasonably foreseeable future." 2025 WL 2646165, at *3. "In connection with defending [that] lawsuit, Respondents prepared and filed a declaration from a Supervisory Detention and Deportation Officer assigned to the detention center where Petitioner is housed," which stated that "[ICE Enforcement and Removal Operations] determined that there is a significant likelihood of removal and resettlement in a third country in the

reasonably foreseeable future and re-detained Petitioner to execute his warrant of removal." *Id.* Judge Huie deemed that post-hoc determination insufficient, because the declarant did not produce underlying documentation showing that any such determination had actually been made—let alone that it had been made pre-arrest. *Id.* The Court therefore "decline[d] to rely on" those statements. *Id.*

Here, the evidence is even weaker. DO Barroga's declaration reinforces the fact that at the time Mr. Rodrigue Gutierrez was re-detained, despite any information on the significant likelihood that he may be removed in the reasonably foreseeable future.

DO Barroga states that in order "[t]o effectuate Petitioner's removal to Cuba, ERO must nominate him for repatriation to Cuba, obtain travel documents, and schedule a flight Petitioner." Doc. 9-1 at ¶ 9. But no evidence was presented that these efforts were made prior to the re-detention. Instead, DO Barroga declares that the Mr. Rodriguez Gutierrez has not even been nominated for removal to Cuba. *Id.* at ¶ 9. The only thing that has been done, five months after detention, is that San Diego officers asked headquarters to begin the process. *Id.* at ¶ 9. Moreover, apparently doubting that the government would be able to remove Mr. Rodriguez Gutierrez to Cuba, the government has made multiple attempts to get him to voluntarily deport to Mexico. Doc. 1 at 28 at ¶¶ 7-10. There is simply no explanation or any evidence showing why a significant likelihood that Mr. Rodriguez Gutierrez can be removed in the reasonably foreseeable future. There is therefore "no evidence that DHS has made such a determination as to the revocation of Petitioner's release even after the fact of arrest, up to the present day." *Rokhfirooz*, 2025 WL 2646165, at *4.

Additionally, even if ICE *had* revoked release because of a significant likelihood of removal, that is not enough. The regulation requires that the likelihood of removal arise out of "changed circumstances." 8 C.F.R. § 241.13(i)(2). Here, DO Barroga identifies no changed circumstances, nor does she assert that ICE

premised re-detention on any such changes. And "Respondents have not provided any details about why a travel document could not be obtained in the past, nor have they attempted to show why obtaining a travel document is more likely this time around." *Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025). Respondents have announced only their "intent to eventually complete a travel document request for Petitioner," which "does not constitute a changed circumstance." *Id.*

Second, ICE did not comply with the ***revocation procedures***. Subsection 241.13(i)(3) requires that the alien "will be *notified of the reasons for revocation* of his or her release." (Emphasis added). ICE did not provide Mr. Rodriguez Gutierrez notice under 8 C.F.R. § 241.13 of the reasons for the revocation of his release. The Notice of Revocation of Release produced by the government in its Return simply states that this revocation was "based on a review of your official alien file and a determination that there are changed circumstances in your case." Doc. 8-2 at 17[2]. But "[s]imply to say that circumstances had changed or there was a significant likelihood of removal in the foreseeable future is not enough." *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3, 2025). Rather, "Petitioner must be told *what* circumstances had changed or *why* there was now a significant likelihood of removal in order to meaningfully respond to the reasons and submit evidence in opposition, as allowed under § 241.13(i)(3)." *Id.* By "identif[ying] the category—'changed circumstances'—but fail[ing] to notify [Petitioner] of the reason—the circumstances that changed and created a significant likelihood of removal in the reasonably foreseeable future—[ICE] failed to follow the relevant regulation." *Id.*

Sections 241.4(l) and 241.13(i)(3) also mandates additional procedures:

[2] The Notice states that Mr. Rodriguez Gutierrez's case was "under review by Cuba for the issuance of a travel document." Doc. 8-2 at 17. We know that is not true since DO Barroga asserts that the nomination process had not begun. Doc. 8-1 at ¶ 9.

"[B]oth require ICE to provide 'an initial informal interview promptly ... to afford the alien an opportunity to respond to the reasons for revocation.'" *Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (quoting 8 C.F.R. §§ 241.4(*l*)(2), 241.13(i)(3)). Mr. Rodriguez Gutierrez was not provided with a prompt interview, *see* Doc. 1 at 28, ¶ 11. An interview was conducted almost five months after Mr. Rodriguez Gutierrez was re-detained. Doc. 8-1 at 20-22. That is not prompt. *See M.S.L. v. Bostock*, Civ. No. 6:25-cv-01204-AA, 2025 WL 2430267, at *11 (D. Or. Aug. 21, 2025) (finding an informal interview given 27 days after petitioner was taken into ICE custody "cannot reasonably be construed as . . . prompt" and granting habeas petition); *Yang v. Kaiser*, No. 2:25-cv-02205-DAD-AC (HC), 2025 WL 2791778, at *5 (E.D. Cal. Aug. 20, 2025) (finding "the failure to provide an informal interview during that lengthy [two-month] period of time renders petitioner's re-detention unlawful").

ICE failed to comply with all aspects of the regulations.

The government's two remaining arguments on the regulatory claims—that Mr. Rodriguez Gutierrez must show prejudice, and that the regulations do not implement due process and protected liberty interests—also fail.

First, Mr. Rodriguez Gutierrez need not show prejudice from these regulatory claims. But, of course, he can. "There are two types of regulations: (1) those that protect fundamental due process rights, and (2) and those that do not." *Martinez v. Barr*, 941 F.3d 907, 924 n.11 (9th Cir. 2019) (cleaned up). "A violation of the first type of regulation . . . implicates due process concerns even without a prejudice inquiry." *Id.* (cleaned up). Here, "[t]here can be little argument that ICE's requirement that noncitizens be afforded an informal interview—arguably the most bare-bones form of an opportunity to be heard—derives from the fundamental constitutional guarantee of due process." *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 165 n.26 (W.D.N.Y. May 2, 2025). No showing of prejudice is required.

Regardless, a violation of a regulation is prejudicial where, as here, "the merits" of an immigrant's case for relief "were never considered by the agency at all." *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1052 (9th Cir. 2023). Faced with that total deprivation, a petitioner need not point to the specific "evidence [he] would have presented to support [his] assertions" or make "any allegations as to what the petitioner or his witnesses might have said." *Id.* (cleaned up).

And Mr. Rodriguez Gutierrez could "present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (cleaned up). He would have had a very strong argument against re-detention had ICE given him notice and an opportunity to respond. Importantly, ICE was fully capable of trying to get a travel document while Mr. Rodriguez Gutierrez remained at liberty. Detaining him is therefore unnecessary. Mr. Rodriguez Gutierrez deserved a chance to make that case upon his re-detention. Because ICE did not make any of the proper findings, let alone give Mr. Rodriguez Gutierrez timely notice and a chance to contest them, he must be released.

Second, of course § 241.13(i) and § 241.4(*l*)(1) implement the basic due process protections of notice and an opportunity to be heard before being detained indefinitely. Their violation is an enforceable violation of a protected interest in being free from indefinite detention. "When someone's most basic right of freedom is taken away, that person is entitled to at least some minimal process; otherwise, we all are at risk to be detained—and perhaps deported—because someone in the government thinks we are not supposed to be here." *Ceesay*, 781 F. Supp. 3d at 165.

In arguing otherwise, the government "confuses [Mr. Rodriguez Gutierrez's] right to an order of supervision, which ICE indeed has discretion to grant or deny, with his right not to be detained without adequate—in fact, without

any—process. The right to be free from detention can never be dismissed as discretionary." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

"When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it explained that the regulation was intended to provide aliens procedural due process, stating that § 241.4 'has the procedural mechanisms that . . . courts have sustained against due process challenges.'" *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641 (D. Mass. 2018) (quoting Detention of Aliens Ordered Removed, 65 FR 80281-01). And "[s]ection 241.13(i) includes provisions modeled on § 241.4(*l*) to govern determinations to take an alien back into custody," Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, meaning that it addresses the same due process concerns as 241.4(*l*). "The procedures in § 241.4" and § 241.13 therefore "are not meant merely to facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees." *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R. §§ 241.4, 241.13 are "intended to provide due process to individuals in [Mr. Bui's] position," *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

Because the government utterly failed to comply with each requirement of § 241.4 and § 241.13 when revoking Mr. Rodriguez Gutierrez's release, it should, "[l]ike many other district courts within this circuit," "find[] that these failures constitute a violation of Petitioner's due process rights and justif[y] his release." *Bui v. Noem*, No. 25-cv-2111, 2025 WL 2988356, *5 (S.D. Cal. Oct. 23, 2025).

C. Claim Three: 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).

This Court should also prohibit ICE from removing Mr. Rodriguez Gutierrez to a third country without following the statutory procedures in 8 U.S.C. § 1231(b)(2). The government appears to concede this claim as it provides no response.

D. Claim Four: The government does not deny that ICE's third-country removal policy violates due process, and this claim is justiciable.

This Court should also prohibit ICE from removing Mr. Rodriguez-Gutierrez to a third country without adequate notice. The government does not try to defend ICE's third-country removal policy on the merits. Instead, the government says that a third-country removal challenge is nonjusticiable under Article III because Respondents are "not seeking to remove Petitioner to a third country and instead are working on timely to remove Petitioner to Cuba." Doc. 8 at 2. That claim flies in the face of reality. DO Barroga's declaration does not dispute the fact that during the five-month detention, ICE had made no efforts to remove Mr. Rodriguez Gutirrez to Cuba and instead attempted to remove him three times to Mexico. Mexico is a third country.

Even if the facts were as the Respondents claim and ICE is not currently seeking removal to a third country, its arguments continue to fail. "[A]ccording to [Respondents], an individual must await notice of removal before his claim is ripe[.]" *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 389 n.44 (D. Mass. 2025). But under ICE's policy, "there is no notice" for certain removals and inadequate notice for others. *Id.* And if Mr. Rodriguez Gutierrez "is removed" before he can raise this challenge, Respondents will then argue that "there is no jurisdiction" to bring him back to the United States. *Id.*

This Court need not adopt that Kafkaesque view. The government has not denied that "the default procedural structure without an injunction" is "set forth in DHS's March 30 and July 9, 2025 policy memoranda," which provide for third-country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And Mr. Rodriguez-Gutierrez has "point[ed] to numerous examples of cases involving individuals who DHS has attempted to remove to third countries with little or no notice or opportunity to be heard." *Id.*; *see* Doc. 1 at 18. "On balance," then,

"there is a sufficiently imminent risk that [Mr. Rodriguez-Gutierrez] will be subjected to improper process in relation to any third country removal to warrant imposition of an injunction requiring additional process." *Y.T.D.*, 2025 WL 2675760, at *11. And Judge Moskowitz recently issued a TRO prohibiting third-country removal, even though the government claimed there—as here—that ICE had no current plans to remove the petitioner to a third country. *Tran v. Noem*, 25-cv-02391-BTM, Dkt. No. 6.

III. The remaining TRO factors decidedly favor Mr. Rodriguez-Gutierrez.

This Court need not evaluate the other TRO factors—the Court may simply grant the petition outright. But if the Court does decide to evaluate irreparable harm and balance of harms/public interest, Mr. Rodriguez Gutierrez should prevail.

On the irreparable harm prong, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government's arguments,[3] the Ninth Circuit has specifically recognized the "irreparable harms imposed on anyone subject to immigration detention." *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). Furthermore, "[i]t is beyond dispute that Petitioner would face irreparable harm from removal to a third country." *Nguyen*, 2025 WL 2419288, at *26.

On the balance-of-equities/public-interest prong, the government is correct that there is a "public interest in prompt execution of removal orders." *Nken v. Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the government likely cannot remove Mr. Rodriguez Gutierrez in the reasonably

[3] The government cites case law to support the position that illegal immigration detention is not irreparable harm. Doc. 8 at 13-14. The immigrant there was actively appealing to the BIA, but wanted a federal court to intervene before the appeal was done. *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1 (W.D. Wash. Feb. 19, 2021). The court there indicated only that post-bond-hearing detention pending an ordinary BIA appeal was not irreparable harm. *Reyes*, 2021 WL 662659, at *3.

foreseeable future, and even if it could, it is equally "well-established that 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends.'" *Nguyen*, 2025 WL 2419288, at *28 (quoting *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021)). It also "would not be equitable or in the public's interest to allow the [government] to violate the requirements of federal law" with respect to detention and re-detention, *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up), or to imperil the "public interest in preventing aliens from being wrongfully removed," *Nken*, 556 U.S. 418, 436.

CONCLUSION

For all these reasons, this Court should grant the petition, or at least enter a temporary restraining order and injunction. In either case, the Court should (1) order Mr. Rodriguez Gutierrez's immediate release, and (2) prohibit the government from removing Mr. Rodriguez Gutierrez to a third country without following the process laid out in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025).

Respectfully submitted,

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s/ Zandra L. Lopez

Kara Hartzler
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Rodriguez-Gutierrez
Email: Zandra Lopez@fd.org