

1 **Zandra L. Lopez**
2 Federal Defenders of San Diego, Inc.
3 225 Broadway, Suite 900
4 San Diego, California 92101-5030
5 Telephone: (619) 234-8467
Facsimile: (619) 687-2666
zandra_lopez@fd.org

6 Attorneys for Mr. Rodriguez-Gutierrez
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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 LOANI RODRIGUEZ-GUTIERREZ,
14 Petitioner,

Civil Case No.:
25-cv-02726-BAS-SBC

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

Traverse in
Support of
Petition for Writ of
Habeas Corpus

21 Respondents.
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1 **TABLE OF CONTENTS**

2	Introduction.....	1
3	Argument	4
4	I. This Court has jurisdiction to consider Mr. Rodriguez Gutierrez 5 claims.....	4
6	II. Mr. Rodriguez Gutierrez's claims succeed on the merits.....	6
7	A. Claim One: The government has not proved that there is a 8 significant likelihood of removal in the reasonably foreseeable 9 future.....	6
10	B. Claim Two: As other judges have recently found when granting 11 similar habeas petitions, ICE did not adhere to the regulations 12 governing re-detention.....	12
13	C. Claim Three: ICE may not remove Mr. Rodriguez Gutierrez to 14 a Third country without following the mandatory consecutive 15 procedures of 8 U.S.C. § 1231(b)(2).	18
16	D. Claim Four: The government does not deny that ICE's third- 17 country removal policy violates due process, and this claim is 18 justiciable.....	19
19	III. The remaining TRO factors decidedly favor Mr. Rodriguez-Gutierrez. 20	20
21	Conclusion	21
22		
23		
24		
25		
26		
27		
28		

INTRODUCTION

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

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

18 First, this Court should grant the petition on Claim One because the
19 government provides no independent evidence to satisfy the success element (“a
20 significant likelihood of removal”) or timing element (“in the reasonably
21 foreseeable future”) of *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Respondents
22 say nothing regarding likelihood of removal or the expected timing of removal.
23 Deportation Officer (“DO”) Barroga only asserts that “ICE has been successfully
24 obtaining travel documents for Cuban citizens” and gives a number of less than
25 4,000 Cubans removed in a span of five years. Doc. 8-1 at ¶¶ 11-12. She says
26 nothing about that number in proportion to the number of removal attempts. She
27 also says nothing whether any of those removed were from prior to the 2017 Joint
28 Agreement. In fact, Respondents, themselves, appear to seriously doubt being

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

6 Even if ICE was farther along in the process and had at least requested
7 travel documents, that is not enough. As other judges of this district have held, a
8 travel document request alone—with no evidence of likely success or timing—
9 does not satisfy the government’s burden. *See, e.g., Conchas-Valdez*, 2025 WL
10 2884822, No. 25-cv-2469-DMS (S.D. Cal. Oct. 6, 2025); *Rebenok v. Noem*, No.
11 25-cv-2171-TWR, ECF No. 13 (S.D. Cal. Sept. 25, 2025); *Alic v. Dep’t of*
12 *Homeland Sec./Immigr. Customs Enf’t*, No. 25-CV-01749-AJB-BLM, 2025 WL
13 2799679 (S.D. Cal. Sept. 30, 2025).

14 Second, this Court must grant the petition on Claim Two because the
15 government does not claim to have complied with 8 C.F.R. §§ 241.4, 241.13. For
16 persons like Mr. Rodriguez Gutierrez, those regulations permit re-detention only
17 if ICE: (1) “determines that there is a significant likelihood that the alien may be
18 removed in the reasonably foreseeable future,” *id.* § 241.13(i)(2); (2) makes that
19 finding “on account of changed circumstances,” *id.*; (3) provides “an initial
20 informal interview promptly,” *id.* §§ 241.4(l)(1), 241.13(i)(3); and (4) “affords the
21 [person] an opportunity to respond to the reasons for revocation,” *id.* The
22 government provides no evidence that there was a prompt interview. And it
23 claims that a vague statement of “changed circumstances” was sufficient notice to
24 revoke supervision. But “[s]imply to say that circumstances had changed or there
25 was a significant likelihood of removal in the foreseeable future is not enough.”
26 *Sarail A. v. Bondi*, No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3,
27 2025). Moreover, in the last several weeks, multiple judges from this district have
28 ordered release for failure to follow these regulations on records meaningfully

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

12 Third, this Court must grant the petition on Claim Three. Respondents failed
13 to comply with 8 U.S.C. § 1231(b)(2), which requires that ICE first seek removal
14 to the designated country. As the Supreme Court has made clear, § 1231(b)(2)
15 “provides four consecutive removal commands.” *Jama v. Immigr. & Customs Enf’t*,
16 543 U.S. 335, 341 (2005). First, “the Attorney General shall remove the alien to the
17 country the alien so designates.” 8 U.S.C. § 1231(b)(2)(A)(ii). The designated
18 country is Cuba. The Attorney General may “disregard [that] designation” only if
19 certain criteria are met. 8 U.S.C. § 1231(b)(2)(C)(i). Here, ICE did not follow the
20 consecutive commands of § 1231(b)(2) by seeking to removal Mr. Rodriguez
21 Gutierrez to a third country prior the designated country of Cuba. *See Farah v.*
22 *I.N.S.*, No. CIV. 02-4725DSDRLE, 2002 WL 31866481, at *4 (D. Minn. Dec. 20,
23 2002) (granting a habeas petition and prohibiting removal in violation of
24 § 1231(b)(2)). The government does not provide a response to this claim.

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

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

12 **ARGUMENT**

13 **I. This Court has jurisdiction to consider Mr. Rodriguez Gutierrez
14 claims.**

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

22 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
23 prohibit immigrants from asserting a “right to meaningful notice and an
24 opportunity to present a fear-based claim before [they] [are] removed,” *id.* at
25 *7¹—the same claim that Mr. Rodriguez Gutierrez raises here with respect to

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¹ Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act
28 (“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*

1 third-country removals. The Court reasoned that “§ 1252(g) does not prohibit
2 challenges to unlawful practices merely because they are in some fashion
3 connected to removal orders.” *Id.* Instead, § 1252(g) is “limited . . . to actions
4 challenging the Attorney General’s discretionary decisions to initiate proceedings,
5 adjudicate cases, and execute removal orders.” *Arce v. United States*, 899 F.3d
6 796, 800 (9th Cir. 2018). It does not apply to arguments that the government
7 “entirely lacked the authority, and therefore the discretion,” to carry out a
8 particular action. *Id.* at 800. Thus, § 1252(g) applies to “discretionary decisions
9 that [the Secretary] actually has the power to make, as compared to the violation
10 of his mandatory duties.” *Ibarra-Perez*, 2025 WL 2461663, at *9.

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

19 Other courts agree. *See, e.g., Kong*, 62 F.4th at 617 (“§ 1252(g) does not
20 bar judicial review of Kong’s challenge to the lawfulness of his detention,”
21 including ICE’s “fail[ure] to abide by its own regulations”); *Cardoso v. Reno*, 216
22 F.3d 512, 516 (5th Cir. 2000) (“[S]ection 1252(g) does not bar courts from
23 reviewing an alien detention order[.]”); *Parra v. Perryman*, 172 F.3d 954, 957
24 (7th Cir. 1999) (1252(g) did not apply to a “claim concern[ing] detention”); *J.R. v.*
25 *Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June
26 30, 2025) (1252(g) did not apply to claims that ICE was “failing to carry out non-

27
28 *Kong*, 62 F.4th at 616–17 (explaining that a decision about § 1252(g) in an FTCA
case would also affect habeas jurisdiction).

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

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

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

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

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

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

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

23 As an initial matter, the government appears to contend that the six-month
24 grace period starts over every time ICE re-detains someone. Doc. 8 at 6-7.
25 "Courts . . . broadly agree" that this is not correct. *Diaz-Ortega v. Lund*, 2019 WL
26 6003485, at *7 n.6 (W.D. La. Oct. 15, 2019), *report and recommendation adopted*,
27 2019 WL 6037220 (W.D. La. Nov. 13, 2019); *see also Sied v. Nielsen*, No. 17-CV-
28

1 06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018) (collecting cases);
2 *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *13 (W.D. Wash. Aug.
3 21, 2025). The government cites no case law to the contrary.

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

7 **2. The government provides no evidence to support a
8 “significant likelihood of removal” to Cuba.**

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

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

20 *First*, DO Barroga’s declaration says nothing about removal to Cuba being
21 significantly likely. To the contrary, presumably because the government believed
22 removal to Cuba was not likely, they tried removing Mr. Rodriguez Gutierrez to
23 Mexico first. Doc. No. 1 at 28 ¶¶ 7-9. They tried to remove him to Mexico three
24 separate times. *Id.* The fact that ICE itself tried a third country prior to making any
25 effort gives little confidence that he will be removed in the reasonably foreseeable
26 future. *Conchas-Valdez v. Casey*, No. 25-CV-02469-DMS-JLB, 2025 WL
27 2884822, at *3 (S.D. Cal. Oct. 6, 2025) (noting the government’s “minimal work”
28 on removing petitioner “not instill confidence that it will be able to secure

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

6 DO Barroga's assertion that ICE has repatriated less than 4,000 Cubans in
7 five years, *Id.* at ¶ 12, does not show that Mr. Rodriguez-Gutierrez's removal is
8 significantly likely. DO Barroga's statement does not suggest that a high
9 *proportion* of Cuban citizens are successfully removed when ICE seeks travel
10 documents. "[I]f the total number of requests that were made to [Cuba] was
11 disclosed, [this Court] might be able to gauge how likely it is that Petitioner
12 would be removed to [Cuba]. If DHS submitted 350 requests and [Cuba] issued
13 travel documents for 328 individuals, Respondents may very well have shown
14 that removal is significantly likely in the reasonably foreseeable future. On the
15 other hand, if DHS submitted 3,500 requests and only 328 individuals received
16 travel documents, Respondents would not be able to meet their burden." *Nguyen*,
17 2025 WL 1725791, at *4; *accord Hoac*, 2025 WL 1993771, at *5. DO Barroga
18 provides no ratio of requests to travels documents issued, precluding this kind of
19 analysis.

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

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

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

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

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

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

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

16 Finally, the government claims that *Zadydas* only applies if Mr. Rodriguez
17 Gutierrez’s removal to Cuba would be “impossib[le].” Doc. 8 at 10. But that is the
18 exact opposite of what *Zadydas* says. In fact, the Supreme Court reversed the
19 Fifth Circuit’s finding that continued detention was lawful as long as “good faith
20 efforts to effectuate ... deportation continue” and *Zadvydas* failed to show that
21 deportation will prove “impossible.” *Zadvydas*, 533 U.S. at 702. The Supreme
22 Court reversed finding the Fifth Circuit’s “standard would seem to require an
23 alien seeking release to show the absence of any prospect of removal—no matter
24 how unlikely or unforeseeable—which demands more than our reading of the
25 statute can bear.” *Id.* It ruled that the standard is that a person cannot be detained
26 if there is “no significant likelihood of removal in the reasonably foreseeable
27 future.” *Id.* Here, detention is not justified as there is “no significant likelihood of
28 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.

1 408CV346-RH WCS, 2009 WL 931155, at *4 (N.D. Fla. Apr. 2, 2009) (“While
2 Respondents contend Petitioner *could* be removed to Haiti, it has not been shown
3 that it is significantly likely that Petitioner *will* be removed in the *reasonably*
4 *foreseeable* future.”); *Abdel-Muhti v. Ashcroft*, 314 F. Supp. 2d 418, 426 (M.D.
5 Pa. 2004) (granting petition because even if “Petitioner’s removal will ultimately
6 be effected . . . the Government has not rebutted the presumption that removal is
7 not likely to occur in the reasonably foreseeable future”); *Seretse-Khama v.*
8 *Ashcroft*, 215 F. Supp. 2d 37, 50 (D.D.C. 2002) (granting petition where the
9 government had not provided any “evidence . . . that travel documents will be
10 issued in a matter of days or weeks or even months”).

11 In sum, then, there could be “some possibility that [Cuba] will accept
12 Petitioner at some point. But that is not the same as a significant likelihood that he
13 will be accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL
14 2419288, at *16. Mr. Rodriguez Gutierrez therefore succeeds under *Zadvydas*, too.

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

18 The government provides no evidence that ICE complied with 8 C.F.R.
19 §§ 241.4, 241.13. The government does not deny that these regulations apply to
20 Mr. Rodriguez Gutierrez, that Mr. Rodriguez Gutierrez may challenge them in this
21 habeas case, or that failure to comply with them is grounds for release. *See* Doc. 7
22 at 5–6. To the contrary, the government agrees that Mr. Rodriguez Gutierrez’s
23 release was revoked under 8 C.F.R. § 241.4(1)(2)(iii) and 8 C.F.R. § 241.13(i)(2).
24 But the government implies that ICE complied with these regulations. *Id.* ICE did
25 not.

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

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

7 In *Rokhfirooz*, Judge Huie determined the fourth requirement was not met on
8 a record materially indistinguishable from this one. 2025 WL 2646165, at *3 (S.D.
9 Cal. Sept. 15, 2025). There, the government failed to produce “any documented
10 determination, made prior to Petitioner’s arrest, that his release should be revoked.”
11 *Id.* at *3. The only documentation was “an arrest warrant, issued on DHS Form I-
12 200, merely recit[ing] that there is probable cause to believe that Petitioner is
13 ‘removable from the United States,’ that is, subject to removal, which would be
14 accurate whether or not Petitioner’s release was revoked.” *Id.*

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

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

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

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

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

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

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

8 Second, ICE did not comply with the *revocation procedures*. Subsection
9 241.13(i)(3) requires that the alien “will be *notified of the reasons for revocation* of
10 his or her release.” (Emphasis added). ICE did not provide Mr. Rodriguez Gutierrez
11 notice under 8 C.F.R. § 241.13 of the reasons for the revocation of his release. The
12 Notice of Revocation of Release produced by the government in its Return simply
13 states that this revocation was “based on a review of your official alien file and a
14 determination that there are changed circumstances in your case.” Doc. 8-2 at 17².
15 But “[s]imply to say that circumstances had changed or there was a significant
16 likelihood of removal in the foreseeable future is not enough.” *Sarail A. v. Bondi*,
17 No. 25-CV-2144, 2025 WL 2533673, at *3 (D. Minn. Sept. 3, 2025). Rather,
18 “Petitioner must be told *what* circumstances had changed or *why* there was now a
19 significant likelihood of removal in order to meaningfully respond to the reasons
20 and submit evidence in opposition, as allowed under § 241.13(i)(3).” *Id.* By
21 “identif[ying] the category—‘changed circumstances’—but fail[ing] to notify
22 [Petitioner] of the reason—the circumstances that changed and created a significant
23 likelihood of removal in the reasonably foreseeable future—[ICE] failed to follow
24 the relevant regulation.” *Id.*

25 Sections 241.4(l) and 241.13(i)(3) also mandates additional procedures:
26

27 ² The Notice states that Mr. Rodriguez Gutierrez’s case was “under review by Cuba
28 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.

1 “[B]oth require ICE to provide ‘an initial informal interview promptly ... to afford
2 the alien an opportunity to respond to the reasons for revocation.’” *Rombot v. Souza*,
3 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (quoting 8 C.F.R. §§ 241.4(l)(2),
4 241.13(i)(3)). Mr. Rodriguez Gutierrez was not provided with a prompt interview,
5 *see* Doc. 1 at 28, ¶ 11. An interview was conducted almost five months after Mr.
6 Rodriguez Gutierrez was re-detained. Doc. 8-1 at 20-22. That is not prompt. *See*
7 *M.S.L. v. Bostock*, Civ. No. 6:25-cv-01204-AA, 2025 WL 2430267, at *11 (D. Or.
8 Aug. 21, 2025) (finding an informal interview given 27 days after petitioner was
9 taken into ICE custody “cannot reasonably be construed as . . . prompt” and
10 granting habeas petition); *Yang v. Kaiser*, No. 2:25-cv-02205-DAD-AC (HC), 2025
11 WL 2791778, at *5 (E.D. Cal. Aug. 20, 2025) (finding “the failure to provide an
12 informal interview during that lengthy [two-month] period of time renders
13 petitioner’s re-detention unlawful”).

14 ICE failed to comply with all aspects of the regulations.

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

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

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

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

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

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

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

3 “When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it
4 explained that the regulation was intended to provide aliens procedural due
5 process, stating that § 241.4 ‘has the procedural mechanisms that . . . courts have
6 sustained against due process challenges.’” *Jimenez v. Cronen*, 317 F. Supp. 3d
7 626, 641 (D. Mass. 2018) (quoting *Detention of Aliens Ordered Removed*, 65 FR
8 80281-01). And “[s]ection 241.13(i) includes provisions modeled on § 241.4(l)
9 to govern determinations to take an alien back into custody,” *Continued Detention*
10 *of Aliens Subject to Final Orders of Removal*, 66 FR 56967-01, meaning that it
11 addresses the same due process concerns as 241.4(l). “The procedures in § 241.4”
12 and § 241.13 therefore “are not meant merely to facilitate internal agency
13 housekeeping, but rather afford important and imperative procedural safeguards to
14 detainees.” *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R.
15 §§ 241.4, 241.13 are “intended to provide due process to individuals in [Mr.
16 Bui’s] position,” *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL
17 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

18 Because the government utterly failed to comply with each requirement of
19 § 241.4 and § 241.13 when revoking Mr. Rodriguez Gutierrez’s release, it should,
20 “[l]ike many other district courts within this circuit,” “find[] that these failures
21 constitute a violation of Petitioner’s due process rights and justif[y] his release.”
22 *Bui v. Noem*, No. 25-cv-2111, 2025 WL 2988356, *5 (S.D. Cal. Oct. 23, 2025).

23 **C. Claim Three: ICE may not remove Mr. Rodriguez Gutierrez to a
24 Third country without following the mandatory consecutive
procedures of 8 U.S.C. § 1231(b)(2).**

25 This Court should also prohibit ICE from removing Mr. Rodriguez Gutierrez
26 to a third country without following the statutory procedures in 8 U.S.C.
27 § 1231(b)(2). The government appears to concede this claim as it provides no
28 response.

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

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

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

22 This Court need not adopt that Kafkaesque view. The government has not
23 denied that "the default procedural structure without an injunction" is "set forth in
24 DHS's March 30 and July 9, 2025 policy memoranda," which provide for third-
25 country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-CV-01100
26 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And
27 Mr. Rodriguez-Gutierrez has "point[ed] to numerous examples of cases involving
28 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,

1 “there is a sufficiently imminent risk that [Mr. Rodriguez-Gutierrez] will be
2 subjected to improper process in relation to any third country removal to warrant
3 imposition of an injunction requiring additional process.” *Y.T.D.*, 2025 WL
4 2675760, at *11. And Judge Moskowitz recently issued a TRO prohibiting third-
5 country removal, even though the government claimed there—as here—that ICE
6 had no current plans to remove the petitioner to a third country. *Tran v. Noem*, 25-
7 cv-02391-BTM, Dkt. No. 6.

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

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

12 On the irreparable harm prong, “[i]t is well established that the deprivation
13 of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres*
14 *v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government’s
15 arguments,³ the Ninth Circuit has specifically recognized the “irreparable harms
16 imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872
17 F.3d 976, 995 (9th Cir. 2017). Furthermore, “[i]t is beyond dispute that Petitioner
18 would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL
19 2419288, at *26.

20 On the balance-of-equities/public-interest prong, the government is correct
21 that there is a “public interest in prompt execution of removal orders.” *Nken v.*
22 *Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the
23 government likely cannot remove Mr. Rodriguez Gutierrez in the reasonably
24

25 ³ The government cites case law to support the position that illegal immigration
26 detention is not irreparable harm. Doc. 8 at 13-14. The immigrant there was
27 actively appealing to the BIA, but wanted a federal court to intervene before the
28 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.

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

10 **CONCLUSION**

11 For all these reasons, this Court should grant the petition, or at least enter a
12 temporary restraining order and injunction. In either case, the Court should
13 (1) order Mr. Rodriguez Gutierrez’s immediate release, and (2) prohibit the
14 government from removing Mr. Rodriguez Gutierrez to a third country without
15 following the process laid out in *D.V.D. v. U.S. Dep’t of Homeland Sec.*, No. CV
16 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025).

17 Respectfully submitted,

18 Dated: November 2, 2025

19 s/ Zandra L. Lopez

20 Zandra L. Lopez

21 Federal Defenders of San Diego, Inc.

22 Attorneys for Mr. Rodriguez-Gutierrez

23 Email: Zandra.Lopez@fd.org

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