

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA**

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**KYAW KYAW,**

*Petitioner,*

v.

**PAMELA BONDI,** Attorney General,  
U.S. Department of Justice;

**KRISTI NOEM,** Secretary, Department  
of Homeland Security;

**TODD LYONS,** Director, Immigration  
and Customs Enforcement;

**SAM OLSON,** Director of Enforcement  
and Removal Operations, St. Paul Field  
Office, Immigration and Customs  
Enforcement;

**RYAN SHEA,** Sheriff, Freeborn County;

*Respondents.*

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**Case No. 25-cv-4237-JWB-SGE**

**MEMORANDUM IN SUPPORT  
OF EMERGENCY MOTION  
FOR TEMPORARY  
RESTRAINING ORDER**

**INTRODUCTION**

Petitioner, Kyaw Kyaw (“Mr. Kyaw” or “Petitioner”), by and through his undersigned counsel, hereby files this motion for a temporary restraining order and preliminary injunction to enjoin the U.S. Department of Homeland Security’s (“DHS”) Immigration and Customs Enforcement (“ICE”) from his unlawful, ongoing immigration detention in its custody. In the alternative, should the Court deny Mr. Kyaw’s request for

injunctive relief, at a minimum it should order Respondents to show cause within three days establishing why Mr. Kyaw's habeas petition should not be granted, in accordance with 28 U.S.C. § 2243. Mr. Kyaw also seeks an order enjoining Respondents from removing him to any third country without first providing him with constitutionally compliant procedures, including adequate notice and an opportunity to be heard.

Undersigned counsel for Mr. Kyaw provides, via email, notice of her intent to file this motion accompanying the habeas petition to counsel for Respondents at the U.S.

Attorney's Office for the District of Minnesota the same day as the filing of this motion.

Mr. Kyaw is a 27-year-old, former lawful permanent resident ("LPR") who was admitted to the United States as a Burmese refugee in 2007. He received an administratively final grant of deferral of removal under the Convention Against Torture ("CAT") by an Immigration Judge ("IJ") on January 27, 2025. Exh. A.<sup>1</sup> That decision became administratively final as of the IJ's decision date when DHS waived appeal. *See* 8 U.S.C. §§ 1231(a)(1)(A), 1231(a)(1)(B), 1101(a)(47)(B)(ii). CAT deferral is a form of protection that prohibits the government from removing a noncitizen to a country where he has demonstrated that it is more likely than not that he would be tortured by or with the acquiescence of the government. 8 CFR §§ 208.18; 1208.18.

On January 27, 2025, Mr. Kyaw received a final order of removal, and grant of deferral of removal to the only country that was designated as the country of removal in

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<sup>1</sup> All citations to exhibits refer to the exhibits filed in support of the Petitioner for a Writ of Habeas Corpus. ECF No. 1-2 – 1-15. Please see the Index of Exhibits for more information, ECF No. 1-1.

his proceedings: Burma. Yet, ICE continues to detain Mr. Kyaw in civil custody 283 days—9 months—after his grant of CAT relief became administratively final. This far exceeds the six-month presumptive limit on post-removal order detention established by the Supreme Court, which cast doubt on the constitutionality of detention past this point. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Moreover, since the IJ’s grant of CAT relief and as of this writing, DHS has not identified any country to which it is considering removing Mr. Kyaw. Mr. Kyaw’s continued detention without any reasonably foreseeable end point violates due process. *See id.* at 690, 700.

Furthermore, removal to a third country without sufficient notice and an opportunity to apply for fear-based relief as to that country would violate the Immigration and Nationality Act (“INA”), due process, and the CAT, which is implemented through binding regulations.<sup>2</sup>

On March 30 and July 9, 2025, ICE issued two independent memorandums purporting to expand its authority as to third country removals. *See* DHS, Guidance Regarding Third Country Removals, March 30, 2025 [hereinafter “March ICE Memo”];<sup>3</sup> ICE, Third Country Removals Following the Supreme Court’s Order in *Department of Homeland Security v. D.V.D.*, No. 24A1153 (U.S. June 23, 2025) [hereinafter “July ICE

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<sup>2</sup> United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading>[hereinafter “UN Convention Against Torture”].

<sup>3</sup> [https://iptp-production.s3.amazonaws.com/media/documents/2025.03.30\\_DHS\\_Guidance\\_Regarding\\_Third\\_Country\\_Removals.pdf](https://iptp-production.s3.amazonaws.com/media/documents/2025.03.30_DHS_Guidance_Regarding_Third_Country_Removals.pdf)

Memo”];<sup>4</sup> *see also* Reuters, *ICE may deport migrants to countries other than their own with just six hours' notice, memo says* (July 14, 2025);<sup>5</sup> NBC News, *“ICE may deport some migrants to ‘third countries’ without assurances they won’t be tortured, memo says”* (July 15, 2025).<sup>6</sup> Both memos fail to uphold DHS’s obligations under the INA, CAT, and Due Process Clause and are therefore unlawful. For example, each memo provides no notice and no opportunity to apply for protection to noncitizens whom DHS seeks to remove to a country that has provided generalized “diplomatic assurances.” *See* March ICE Memo; July ICE Memo. Even without those assurances, the July 9 memo purports to allow ICE to move forward with a third country removal with as little as six hours’ notice to the noncitizen. *See* July 9 ICE Memo. As such, both the March and July memos fail to provide noncitizens with adequate notice and an opportunity to respond, as is required under the INA, CAT, and Due Process Clause. As a result of the March and July memos, and as exemplified by ICE’s recent efforts to expand third country removals, Petitioner is at risk of removal to a third country with little to no opportunity to respond absent this Court’s intervention.

Mr. Kyaw meets the standard for a temporary restraining order. He will continue to suffer immediate and irreparable harm stemming from his unlawful detention absent

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<sup>4</sup> [https://iptp-production.s3.amazonaws.com/media/documents/2025.07.09\\_ICE\\_-\\_Third\\_Country\\_Removals\\_Following\\_Dept\\_of\\_Homeland\\_Sec.\\_v.\\_D.V.D..pdf](https://iptp-production.s3.amazonaws.com/media/documents/2025.07.09_ICE_-_Third_Country_Removals_Following_Dept_of_Homeland_Sec._v._D.V.D..pdf)

<sup>5</sup> <https://www.reuters.com/world/us/ice-may-deport-migrants-countries-other-than-their-own-with-just-six-hours-2025-07-13/>

<sup>6</sup> <https://www.nbcnews.com/news/us-news/ice-deport-migrants-third-countries-assurances-wont-tortured-memo-rcna218990> [hereinafter, “NBC, July 9 ICE Memo”].

intervention from this Court. He will also suffer immediate and irreparable harm if removed to a third country where his life could be in danger, which is a real possibility unless this Court enjoins Respondents from removing him to any third country without first providing adequate notice and an opportunity to assert a fear of removal to any such country. Because holding federal agencies accountable to constitutional demands and protecting constitutional rights is in the public interest, the balance of equities and public interest are also strongly in Mr. Kyaw's favor.

### **FACTUAL BACKGROUND**

Mr. Kyaw first entered the United States in 2007 around the age of nine as a Burmese refugee. Exh. C, Mr. Kyaw's Form I-590. He adjusted status to lawful permanent residency (LPR) in 2010. Exh. E, Notice to Appear. Due to untreated mental illness, an abusive home, and homelessness, Mr. Kyaw has accumulated several criminal convictions. Exh. F, Criminal History Chart. Mr. Kyaw was detained by ICE on or around July 15, 2024, and placed in removal proceedings. Exh. D, I-213. On August 16, 2024, due to his mental illness, the IJ found Mr. Kyaw not competent to represent himself in immigration court and appointed him a Qualified Representative through the National Qualified Representative Program. *See* Exh. H.

The IJ initially designated Thailand as a country of removal for Mr. Kyaw, but at his individual hearing, the IJ revoked the prior designation of Thailand. Exh. A. Although Mr. Kyaw was born in a refugee camp in Thailand, he is not a citizen of Thailand. Thailand considers Mr. Kyaw a refugee, but this is not a permanent immigration status and gives him no right to live and work in the country outside of designated camps. *See* Exh. N, "Ad

Hoc and Inadequate: Thailand's Treatment of Refugees and Asylum Seekers" at 5, 10; Exh. C, Mr. Kyaw's Form I-590 (listing his nationality as "Burmese" and his status in Thailand as "refugee"). And Burmese refugees there face human rights violations, including refoulement to Burma – where an IJ has found Mr. Kyaw faces torture. Exh. N at 13.

On January 27, 2025, Mr. Kyaw appeared for his individual merits hearing before the IJ. Mr. Kyaw claimed a fear of removal to Burma based on his Christian religion, his Karen ethnicity, and his perceived political opinion against Burma's military junta. Exh. B at ¶ 44-46. The IJ ordered Mr. Kyaw removed to Burma and simultaneously granted his application for deferral under CAT as to Burma. Exh. A. DHS waived appeal of the IJ's decision. *Id.* In that decision, the IJ stated Burma was the only country to which removal was designated. *Id.*

Despite waiving appeal of the CAT grant, DHS continues to detain Mr. Kyaw in civil immigration detention, without justification, at the Freeborn Adult Detention Center in Albert Lea, Minnesota. Mr. Kyaw has been detained 283 days, more than nine months after his grant of CAT deferral became administratively final. Mr. Kyaw is detained without any outdoor access, and he sees a mental health professional for only five to ten minutes each week. Exh. L.

Mr. Kyaw has no order of removal to any country other than Burma and has no ties to any country other than Burma, Thailand, and the United States. Upon information and belief, DHS continues to detain Mr. Kyaw so that it can attempt to remove him to an alternative country. However, DHS has not requested that Mr. Kyaw fill out applications for travel documents to any country, nor speak to any consulate. Exh. L. Nor has DHS

indicated any alternative country to which it is purportedly pursuing removal. *Id.* In fact, a DHS officer admitted through email communications in March 2025 that removal to an alternative country is unlikely in Mr. Kyaw's case. Exh. K.

Due to his mental illness, Mr. Kyaw would likely have a fear of removal to any country the government may seek to designate and has a right to notice and an opportunity to be heard regarding any such third country designation. Indeed, there is evidence of abuse of people with mental illnesses in each of the nine countries to which third-country removal has been documented.

DHS conducted a Post Order Custody Review ("POCR") interview of Mr. Kyaw on July 22, 2025, but DHS has not yet provided any notice of a decision. Exh. L; *see* 8 C.F.R. §§ 241.4(h)(1); 241.4(d) ("A copy of any decision. . .to release or to detain a [noncitizen] shall be provided to the detained [noncitizen]."). "At the expiration of the three-month period after the 90-day review or as soon thereafter as practicable," DHS is required by regulation to conduct another custody review. 8 C.F.R. § 241.4(k)(2). Three months after the POCR interview was October 20, 2025, but this review has not occurred, and Mr. Kyaw has not received the required 30-day notice in advance of that review. *Id.* Thus, DHS continues to detain Mr. Kyaw without explanation.

#### **LEGAL STANDARD**

"[F]our factors [are] to be weighed by the district court in deciding whether to grant or deny preliminary injunctive relief: (1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and

(4) the effect on the public interest.” *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 112 (8th Cir. 1981). “[T]he standard for analyzing a motion for a temporary restraining order is the same as a motion for a preliminary injunction[.]” *Turney v. Mycroft AI, Inc.*, 27 F.4th 657, 665 (8th Cir. 2022). The burden rests with the movant to establish that injunctive relief should be granted. *See Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

The Eighth Circuit has held that the first two factors – likelihood of success and irreparable harm – are particularly important as they comprise what is known as the “traditional test” employed to evaluate the necessity of a Temporary Restraining Order. *Dataphase*, 640 F.2d at 112. Considering the four factors in totality, this motion should be granted.

## ARGUMENT

### **I. Petitioner will suffer irreparable harm absent injunctive relief.**

At the outset, “[t]he equitable balancing test a court must conduct using the *Dataphase* factors requires an initial determination that threatened irreparable harm exists.” *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987). It most certainly does in this case.

First, a “loss of liberty” is “perhaps the best example of irreparable harm.” *Matacua v. Frank*, 308 F.Supp.3d 1019, 1025 (D. Minn. 2018). As the Supreme Court has explained, “time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” *Barker v. Wingo*, 407 U.S. 514, 532-32 (1972).

Mr. Kyaw is particularly vulnerable to the harsh conditions of detention due to his PTSD and mental health struggles. His confinement, with no access to the outdoors and very limited access to mental health services, threatens to damage his health further and prevents him from getting the treatment he needs. Noncitizens in immigration detention often lack access to the same medical or mental health treatment they would have otherwise.<sup>7</sup> A third-party inspection of Freeborn Adult Detention Center in August 2024 found four deficiencies in the facility regarding medical care of detained noncitizens.<sup>8</sup> One such deficiency arose due to delays in mental health evaluations, and another arose from a failure to provide all medical staff and correctional officers with required suicide prevention training.<sup>9</sup> Inadequate medical care is also suggested by the fact that Respondent Shea, who is responsible for the operation of the facility, joined a legal action this year seeking to enjoin a Minnesota law that would require jails to administer to inmates and detainees medication they had active prescriptions for before their detention.<sup>10</sup>

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<sup>7</sup> See, e.g., Caitlin Patler, Altaf Saadi, and Paola Langer, “The health-related experiences of detained immigrants with and without mental illness,” *J. Migration & Health*, Vol. 11 (2025), <https://www.sciencedirect.com/science/article/pii/S2666623525000017>, at 3 (finding that 57.1 % of survey respondents had difficulty accessing medical services and 41.4 % had difficulty accessing mental health services).

<sup>8</sup> Office of Professional Responsibility, *Freeborn County Adult Detention Center Inspection (2024-005-413)* (Sep. 27, 2024), [https://www.ice.gov/doclib/foia/odo-compliance-inspections/freebornCoADC\\_AlbertLeaMN\\_Aug6-8\\_2024.pdf](https://www.ice.gov/doclib/foia/odo-compliance-inspections/freebornCoADC_AlbertLeaMN_Aug6-8_2024.pdf), at 6.

<sup>9</sup> *Id.* at 7-8.

<sup>10</sup> CBS News, “Minnesota Sheriffs sue Department of Corrections over new state inmate medication law” (Jul. 2, 2025), available at: <https://www.cbsnews.com/amp/minnesota/news/minnesota-doc-inmate-prescriptions-lawsuit/>.

Further, Mr. Kyaw will suffer clear irreparable harm if he is removed to a third country where he may be persecuted or tortured. Individuals removed to third countries under DHS's recent policies have reported that they are now stuck in countries where they do not have government support, do not speak the language, and have no network.<sup>11</sup> One man, removed in violation of a prior grant of withholding of removal, reported that he faced severe torture at the hands of government agents.<sup>12</sup> Others removed to third countries faced refolement to countries where they had already been found to face persecution or torture.<sup>13</sup> And still others face jail, detention camps, and torture.<sup>14</sup> In addition to the usual harms accompanying third-country removal, Mr. Kyaw would be at a particular risk of harm in many countries due to his mental illness.<sup>15</sup>

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<sup>11</sup> NPR, "Asylum seekers deported by the U.S. are stuck in Panama unable to return home (May 5, 2025), available at: <https://www.npr.org/2025/05/05/nx-s1-5369572/asylum-seekers-deported-by-the-u-s-are-stuck-in-panama-unable-to-return-home>.

<sup>12</sup> NPR, "Abrego Garcia says he was severely beaten in Salvadoran prison" (July 3, 2025), available at: <https://www.npr.org/2025/07/03/g-s1-75775/abrego-garcia-el-salvador-prison-beaten-torture>.

<sup>13</sup> Associated Press, *Judge fails to appear for court hearing in Eswatini over 4 men deported from the U.S. by Trump administration*, PBS News (Sept. 25, 2025). <https://www.pbs.org/newshour/world/judge-fails-to-appear-for-court-hearing-in-eswatini-over-4-men-deported-from-the-u-s-by-trump-administration>

<sup>14</sup> *Id.*; Sarah Kinoshian, *Migrants in limbo in Panama jungle camp after being deported from US*, Reuters (Feb. 27, 2025) <https://www.reuters.com/world/americas/migrants-limbo-panama-jungle-camp-after-being-deported-us-2025-02-27/>; Sergio Martínez-Beltrán and Manuel Rueda, *'Hell on Earth': Venezuelans deported to El Salvador mega-prison tell of brutal abuse*, NPR (July 27, 2025) <https://www.npr.org/2025/07/27/nx-s1-5479143/hell-on-earth-venezuelans-deported-to-el-salvador-mega-prison-tell-of-brutal-abuse>.

<sup>15</sup> *Living in Chains: Shackling of People with Psychosocial Disabilities Worldwide*, Hum. Rts. Watch (Oct. 6, 2020), <https://www.hrw.org/report/2020/10/06/living-chains/shackling-people-psychosocial-disabilities-worldwide> (finding that sixty countries—including El Salvador, Ghana, Honduras, Mexico, and South Sudan—engage

Finally, deprivation of constitutional rights constitutes irreparable harm. *See Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977) (“[Plaintiff’s] showing that the ordinance interfered with the exercise of its constitutional rights ... supports a finding of irreparable injury.”); *Elrod v. Burns*, 427

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in the practice of shackling as a means of controlling people with psychosocial disabilities). For the risks people with mental disabilities face in El Salvador, *see Alvarez-Gomez v. Garland*, 56 F.4th 582, 591-92 (8th Cir. 2022) (granting CAT petitioner’s petition for review where BIA failed to consider findings demonstrating that “stigma, discrimination, and ignorance about disability” contribute to petitioner’s risk of torture in El Salvador). For Panama, *see* U.N. P’ship on the Rts. of Persons with Disabilities & U.N. Panama, *Situational Analysis of the Rights of Persons with Disabilities in Panama 22* (2022) (“Persons with disabilities are victims of constant attitudinal barriers that hinder their effective participation in society . . . , the most vulnerable being persons with intellectual and psychosocial disabilities.”). For Costa Rica, *see Costa Rica Falls Short in Providing Accessible Health Services for Disabled Individuals*, Tico Times (Mar. 31, 2024), <https://ticotimes.net/2024/03/31/costa-rica-falls-short-in-providing-accessible-health-services-for-disabled-individuals> (“[T]he UN underscored the persistent discrimination against persons with disabilities, especially . . . persons with psychosocial and intellectual disabilities, and the lack of accessible complaint and redress mechanisms for victims of discrimination.”). For Honduras, *see Honduras: Events of 2020*, Hum. Rts. Watch, <https://www.hrw.org/world-report/2021/country-chapters/honduras#cb8fe4> (last visited Oct. 10, 2025) (noting that people with disabilities are often institutionalized and often “threatened and subjected to extortion. by criminal gangs). For Ghana, *see* U.S. Dep’t of State, *Ghana 2023 Human Rights Report 27* (“Persons with both mental and physical disabilities, including children, were frequently subjected to abuse and intolerance.”). For South Sudan, *see* U.S. Dep’t of State, *South Sudan 2023 Human Rights Report 52* (“There were no mental-health hospitals or institutions, and persons with mental disabilities were often held in prisons.”). For Eswatini, *see* U.S. Dep’t of State, *Eswatini 2023 Human Rights Report 32-34* (noting cultural stigma against disabled people, denials of disabled people’s freedom of movement, and systematic barriers to access). For Uzbekistan, *see* U.N. P’ship on the Rts. of Persons with Disabilities & U.N. Uzbekistan, *Situational Analysis of the Rights of Persons with Disabilities 12* (2023) (finding “stigma, negative stereotypes and rampant discrimination against persons with disabilities in all areas of life”). For Mexico, *see Guerra v. Barr*, 974 F.3d 909, 917 (9th Cir. 2020) (granting CAT claimant’s petition for review because BIA did not properly consider “evidence of regressive, primitive, and extremely harmful conditions” for people with psychological disabilities in Mexico).

U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). As explained below, Mr. Kyaw faces violation of his statutory rights and Fifth Amendment due process rights in two ways: first, he is currently being detained by the government past the presumptively reasonable six-month limit with no end in sight; second, under current ICE policy, he is deprived of the guarantee of due process—notice and an opportunity to seek relief—that must accompany any third country removal. A temporary restraining order is the only way to prevent these harms.

## **II. Petitioner is likely to succeed on the merits of his claims.**

“While ‘no single factor is determinative,’ the probability of success factor is the most significant.” *Wilbur-Ellis Co., LLC v. Erikson*, 103 F.4th 1352, 1356 (8th Cir. 2024) (citing *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (quoting *Dataphase*, 640 F.2d at 113)). The Eighth Circuit has rejected the rule that a movant must show “a greater than fifty per cent likelihood that he will prevail on the merits.” *Dataphase*, 640 F.2d at 113.<sup>16</sup> Rather, “the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Dataphase*, 640 F.2d at 113. Mr. Kyaw overwhelmingly

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<sup>16</sup> The requirement that to “prevent[] the implementation of a statute” require a more rigorous showing of “a substantial likelihood of success on the merits” does not apply here. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (quoting *Richenberg v. Perry*, 73 F.3d 172, 172-173 (8th Cir. 1995) (citing *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995))). DHS’s continued detention of Mr. Kyaw and new third-country removal policy both violate the INA, rather than implement it, as explained below.

meets that standard here: His continued detention has no foreseeable end and is thus unlawful under *Zadvydas*, and DHS’s current third-country removal policy violates the INA, the CAT, and due process.

*A. Petitioner is likely to succeed on the merits of his claim that his continued detention is unlawful because his removal is not reasonably foreseeable.*

Mr. Kyaw’s continued detention is unlawful: the six-month mark of presumptively reasonable post-removal order detention has long passed, *see Zadvydas*, 533 U.S. at 701, and DHS has not identified any country to which it is considering removing him. Therefore, his detention has become indefinite and lacks a legitimate government purpose, in violation of the INA and the fundamental right to be free from government restraint.

When a noncitizen is ordered removed, the government ordinarily must secure the noncitizen’s removal from the United States within a period of 90 days, known as the “removal period.” 8 U.S.C. § 1231(a)(1)(A). As relevant here, the removal period begins on “[t]he date the order of removal becomes administratively final”. *Id.* § 1231 (a)(1)(B)(i)-(iii). If not removed within the removal period, the noncitizen is normally to be released under the government’s supervision. *Id.* § 1231(a)(3).

Detention beyond the 90-day removal period must comport with a legitimate government purpose. Absent a legitimate government purpose for detention, immigration detention violates a noncitizen’s rights. *See Zadvydas*, 533 U.S. at 689–90; *see also Hussain*, 510 F.3d at 743. The sole purpose of Section 1231 post-final-order detention is to “bring about the [noncitizen’s] removal from the United States.” *Zadvydas*, 533 U.S. at 689. Although the “basic purpose [of] effectuating [a noncitizen’s] removal” is a legitimate

government purpose, *Zadvydas*, 533 U.S. at 697, detention for this purpose may only be for a “very limited time.” *Demore*, 538 U.S. at 529 n.12; *see also Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005). In *Zadvydas*, the Supreme Court cast doubt on the “constitutionality of detention for more than six months” after a removal order became administratively final. 533 U.S. at 701.

Accordingly, if the government is purporting to detain an individual beyond the 90-day period, it must show a legitimate government purpose; namely, that it is seeking to effectuate the individual’s removal and that removal is likely to occur in the “reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 700. Further, “for detention to remain reasonable, as the period of [] postremoval confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Id.* at 701. Where there is no possibility of removal—or only a small possibility of removal—there are statutory and due process concerns in continuing an immigrant’s detention.

And detention must be constitutional as applied to individuals regardless of what is authorized or even mandated by a detention statute. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (explicitly declining to reach “constitutional arguments on their merits” after finding no statutory limit on the length of mandatory immigration detention under 8 U.S.C. § 1226(c)); *see also Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (“Our decision today on the meaning of [section 1226(c)] does not foreclose as-applied challenges—that is, constitutional challenges to applications of the statute as we have now read it.”).

Even under the current administration, it is rare for DHS to remove individuals who have been granted protection from removal to their home country. For example, the

Supreme Court previously noted that in 2017, only 1.6% of noncitizens who were granted withholding of removal (a form of relief with similar consequences to CAT) were removed to an alternative country. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2286 (2021). While there are news reports about removals to third countries, the number of people removed in each instance is usually just a handful, around 5-10 people per country.<sup>17</sup> *See* Exh. L.

Here, the Immigration Court revoked the designation of Thailand, the only country besides Burma considered for Mr. Kyaw's removal. Exh. A. This was proper as Mr. Kyaw has no legal status in Thailand. *See supra* at 4 (discussing Thailand's treatment of Burmese refugees generally and Mr. Kyaw's I-590, which lists his nationality as "Burmese" although he was born in Thailand). Indeed, Mr. Kyaw's status as to Thailand is similar to one of the petitioners in *Zadvydas*. *See Zadvydas*, 533 U.S. at 684 (noting that Zadvydas, born in a German refugee camp to Lithuanian parents, was not accepted by either country as he was a citizen of neither). Mr. Kyaw does not have legal status in any other country.

Since the IJ's grant of CAT relief, and despite binding regulations requiring periodic review of Mr. Kyaw's detention, the government has not so much as sought to designate an alternative country for removal, much less initiate removal proceedings regarding an alternative country. *Supra* at 5, 7. Furthermore, ICE has not requested that Mr. Kyaw

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<sup>17</sup> *See, e.g.,* CNN, *Eswatini receives 10 third-country deportees from US* (Oct. 6, 2025) <https://www.cnn.com/2025/10/06/africa/eswatini-deportees-united-states-intl-latam>; PBS, *U.S. completes deporting 8 men from various nations to South Sudan after weeks of legal battles* (Jul. 5, 2025) <https://www.pbs.org/newshour/politics/u-s-completes-deporting-8-men-from-various-nations-to-south-sudan-after-weeks-of-legal-battles>.

complete any paperwork or meet with consular officials from any alternative country. *Supra* at 5. Without such requests, it is unlikely that DHS intends to try to remove Mr. Kyaw to any other country. And DHS itself has admitted to Mr. Kyaw's counsel that removal to a third country is unlikely. *Supra* at 5. Thus, Mr. Kyaw's continued detention is no longer reasonably related to its statutorily limited purpose and is therefore unconstitutional.

Additionally, even assuming DHS had the ability to remove Mr. Kyaw to a third country, his continued detention is not reasonably related to its stated purpose when alternative conditions of release could mitigate flight risk. *Bell v. Wolfish*, 441 U.S. 520, 536-39 (1979) (observing that pretrial detention not reasonably related to a legitimate government purpose would constitute punishment in violation of Due Process).

DHS regularly utilizes orders of supervision when releasing individuals from its custody when a final order of removal is in place. An order of supervision operates like terms of probation, with the ability to impose "conditions of supervision" on individuals. *See* 8 C.F.R. § 241.5(a). For example, noncitizens released on such orders regularly are prohibited from leaving the state in which they reside without advance permission from an ICE officer. *Id.*(a)(4). They may also be required to report to an ICE officer in person or by telephone on a periodic basis. *See Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 4511933, at \*5 (S.D.N.Y. Sept. 18, 2019) (listing alternatives to detention, "such as home detention, electronic monitoring, and so forth"); *Mathon v. Searls*, 623 F. Supp. 3d 203, 218 (W.D.N.Y. 2022) ("[T]he form used by ICE to list the terms of supervision

(Form I-220B) includes a section for ‘other specified conditions’, which implies that ICE has flexibility in imposing release terms.”).

Such conditions of release would be sufficient to ensure Mr. Kyaw's presence in the unlikely event that removal to a third country becomes possible. If released, Mr. Kyaw will have access to housing. Exh. J.

In sum, because Mr. Kyaw's removal is not reasonably foreseeable and because alternative conditions of release could mitigate any flight risk, his detention does not have a legitimate government purpose. Thus, he is likely to succeed on his claim that his continued detention is unlawful.

*B. Petitioner is likely to succeed on the merits of his claim that he is entitled to constitutionally adequate procedures prior to any third country removal.*

Mr. Kyaw has a right to constitutionally adequate procedures—including notice and an opportunity to respond and apply for fear-based relief—prior to being removed to any third country, in compliance with due process, the INA, and the Convention Against Torture.<sup>18</sup>

The Due Process Clause and the INA require the government to provide a noncitizen notice and a hearing where the immigrant can present evidence to defend against his or her

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<sup>18</sup> Multiple federal courts have found jurisdiction to address such claims. *See, e.g., Aden v. Nielsen*, 409 F. Supp. 3d 998, 1006 (W.D. Wash. 2019) (concluding that claim concerning designation of removal country outside proceedings did not involve review of removal order); *Kong v. United States*, 62 F.4th 608, 618 (1st Cir. 2023) (holding that § 1252(g) insulates only the discretionary decision to commence removal, not related, potentially unlawful acts); *Mahdejian v. Bradford*, No. 9:25-cv-00191, 2025 WL 226796, at \*3 (finding that the jurisdictional question did not “stand in the way of a temporary restraining order”).

removal. *See* U.S. Const., Amend. V; 8 U.S.C. § 1229a(b)(4) (an immigrant in removal proceedings “shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen’s] own behalf, and to cross-examine witnesses presented by the Government”); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (“It is well established that the Fifth Amendment entitles [noncitizens] to due process of law in deportation proceedings.”).

Further, “[n]oncitizens facing removal of any sort are entitled under international and domestic law to raise a claim under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” *U.S. Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2154 (2025) (Sotomayor, J., dissenting) (citing Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 113). The United States is a party to the Convention and passed the Foreign Affairs Reform and Restructuring Act (FARRA) and subsequent regulations “to implement its commands.” *Id.* “Article 3 of the Convention prohibits returning any person ‘to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.’” *Id.*; *see also* UN Convention Against Torture, *supra* n.1. Regulations implementing the Convention provide, among other things, that “[a] removal order . . . shall not be executed in circumstances that would violate Article 3 . . . .” 28 C.F.R. § 200.1 (2024).

As multiple courts have recognized, due process is required as much for third country removals as for removal to a noncitizen’s country of origin. *See Mahdejian v. Bradford*, No. 25-cv-00191, 2025 WL 2269796 (E.D. Tex. July 3, 2025) (issuing temporary restraining order, where petitioner had been granted withholding of removal as

to Iran, prohibiting DHS from removing him to a third country without notice and a meaningful opportunity to establish that his life or freedom would be threatened there); *Kuhai v. INS*, 199 F.3d 909, 913 (7th Cir. 1999) (holding that a noncitizen must be given the opportunity to brief removal to a third country when there was no indication during removal proceedings that the noncitizen could be removed there); *Ortega v. Kaiser*, No. 25-cv-05259, 2025 U.S. Dist. LEXIS 121997 at \*7, 2025 WL 1771438 at \*3 (N.D. Cal. June 26, 2025) (finding that where petitioner was granted CAT relief as to El Salvador, “there are no countries to which [petitioner] could currently be removed without his first being afforded notice and opportunity to be heard on a fear-based claim as to that country, as the Fifth Amendment Due Process Clause requires”); *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1010 (W.D. Wash. 2019) (“ICE's authority to remove a noncitizen to a country not specified in the immigration judge's order of removal” comes with “an affirmative obligation to make a determination regarding a noncitizen's claim of fear before deporting him.”); *Su Hwa She v. Holder*, 629 F.3d 958, 965 (9th Cir. 2010) (“It follows that a failure to provide notice and, upon request, stay removal or reopen the case for adjudication of [the noncitizen's] applications as to Burma would constitute a due process violation if Burma becomes the proposed country of removal (as opposed to an alternative country of removal).”) (superseded by statute on other grounds); *Romero v. Evans*, 280 F. Supp. 3d 835, 847 n.24 (E.D. Va. 2017) (“DHS could not immediately remove petitioner to a third country, as DHS would first need to give petitioner notice and the opportunity to raise any reasonable fear claims.”).

Here, due to his mental illness and particular vulnerabilities, Mr. Kyaw is likely to have a fear of removal to any third country ICE may identify. As the Eight Circuit has recognized, after raising a fear claim, “[a]n applicant for withholding of removal or relief under CAT is entitled to a fair hearing under the Due Process Clause,” and fairness in that hearing requires a neutral arbiter and the opportunity to present evidence, offer arguments, and develop the record. *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007). A fair hearing provides a noncitizen “an adequate opportunity to defend themselves against ... deportation,” including seeking protection from removal to [an] alternative country. *Kossov v. INS*, 132 F.3d 405, 408 (7th Cir. 1998).

Recently announced DHS policy allows ICE to give noncitizens as little as six hours’ notice before removal to a country to which they have no connection whatsoever, or to give no notice at all if the accepting country has made “diplomatic assurances” that deportees will not be persecuted or tortured. *See* March ICE Memo; July ICE Memo. This policy clearly violates the INA, the Convention Against Torture, and due process. Six hours may not be enough time for a detained noncitizen to even reach his counsel from detention, let alone research a third country's conditions. Neither this short notice nor “diplomatic assurances” from a third country can replace the individualized proceedings required by CAT, especially when some nations which have accepted third-country deportees or which the U.S. government has asked or intends to ask to do so are

dangerous, commit human rights violations, or mistreat depoitees while denying them due process and the ability to seek asylum.<sup>19</sup>

Recognizing these violations, a federal district court issued a nationwide preliminary injunction in April precluding Respondents from removing noncitizens to third countries without notice and an opportunity to seek fear-based relief. *D.V.D., et al v. U.S. Dep't of Homeland Sec., et al*, No. 25-10676 (D. Mass. Apr. 18, 2025). The Supreme Court of the United States later stayed that injunction while the case continues to be litigated on the merits. *U.S. Dep't of Homeland Security, et al. v. D.V.D., et al.*, No. 24A1153, 2025 WL 1732103 (June 23, 2025). The stay order is not accompanied by an opinion and was issued just four days before the Court published *Trump v. Casa*, No. 24A884 (June 27, 2025), limiting nationwide injunctions. Thus, the order signals disagreement with the procedure, and not the substance, of the nationwide preliminary injunction.

Because of the stay, individual lawsuits like the instant case are currently the only method to prevent illegal third-country removals. In his individual habeas petition, submitted together with this motion, Mr. Kyaw submits that he cannot be removed to any third country unless he is first provided with adequate notice and a meaningful opportunity to apply for protection under the Convention Against Torture. Several federal district courts have already issued similar relief, further indicating that Mr. Kyaw has

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<sup>19</sup> See generally The New York Times, *Inside the Global Deal-Making Behind Trump's Mass Deportations* (June 25, 2025), <https://www.nytimes.com/2025/06/25/us/politics/trump-immigrants-deportations.html>.

established a likelihood of success on the merits. *See, e.g., J.R. v. Bostock, et al.*, No. 2:25-cv-01161 (W.D. Wash. June 30, 2025); *Mahdejian*, No. 9:25-cv-00191; *Sagastizado v. Noem*, \_\_\_ F.3d \_\_\_, 2025 WL 2957002 (S.D. TX. Oct. 2, 2025).

**II. The balance of equities and the public interest favor granting the temporary restraining order.**

The final two *Dataphase* factors are the balance of equities and the public interest. Both weigh in favor of Mr. Kyaw.

As explained above, Mr. Kyaw will experience significant harm if Respondents continue to detain him and are not enjoined from removing him to a third country without the procedure required by law. As for the government, it “cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.” *Mohammed H. v. Trump*, No. 25-1576, 2025 WL 1170448 at \*4 (D. Minn. Apr. 22, 2025) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). Thus, any burden imposed by requiring the Respondents to release Mr. Kyaw from custody is both *de minimis* and clearly outweighed by the substantial harm Mr. Kyaw will suffer as long as he continues to be detained. Similarly, any burden of requiring Respondents not to remove Mr. Kyaw to any third country without notice and an opportunity to respond is outweighed by the substantial harm he may suffer if removed to a country where he will face persecution or torture.

Furthermore, a temporary restraining order is in the public interest. First and most importantly, it is “always in the public interest to prevent the violation of a party’s constitutional rights.” *D.M. ex rel. Bao Xiong v. Minn. State High Sch. League*, 917 F.3d

994, 1004 (8th Cir. 2019) (quoting *Awad v. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012)); see also *Matacua*, 308 F.Supp.3d at 1025 (agreeing with movant that “it is in the public interest to protect constitutional and legal rights.”). Absent a temporary restraining order, the government would effectively be granted permission to continue detaining Mr. Kyaw without a legitimate purpose or to summarily remove him to any third country in violation of the requirements of due process.

Furthermore, a temporary restraining order is necessary to maintain the status quo. “The status quo is the last uncontested status which preceded the controversy.” *Minnesota Min. & Mfg. Co. V. Meter for and on Behalf of N. L. R. B.*, 385 F.2d 265, 273 (8th Cir. 1967) (quoting *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (7th Cir. 1958)). Here, DHS’s new third-country removal policy is nearly unprecedented and was challenged on a national level, in litigation that remains pending, shortly after its announcement. See *D.V.D.*, No. 24A1153, 2025 WL 1732103. As for Mr. Kyaw’s *Zadvydas* claim, each day of continued, unjustified detention further violates his constitutional rights, thus disrupting the status quo.

### CONCLUSION

For the above reasons, Mr. Kyaw warrants a temporary restraining order enjoining Respondents from continuing to detain him and from removing him to any third country without first providing him with constitutionally compliant procedures.

Dated: November 6, 2025

Respectfully submitted,

/s/ Mary Georgevich

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