UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

Pui Sun HO, *Petitioner*, v. Kristi NOEM, et al., *Respondents*.	Case No. 2:25-cv-02222-RSM-MLP TRAVERSE AND RESPONSE TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF HABEAS CORPUS Noted for Consideration: November 18, 2025

INTRODUCTION

The central claim in this case is that the Due Process Clause requires Respondents to afford Petitioner a hearing *prior to his re-detention* before a neutral decisionmaker where Immigration and Customs Enforcement ("ICE") is required to justify his re-detention. Respondents did not provide these required procedures upon re-detaining Petitioner, thus violating his due process rights, as several judges in this district have recognized, and as courts around the country have held. *See, e.g.*, *E.A. T.-B. v. Wamsley*, --- F. Supp. 3d ---- No. C25-1192-KKE, 2025 WL 2402130

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(W.D. Wash. Aug. 19, 2025); *Ramirez Tesara v. Wamsley*, --- F. Supp. 3d ----, No. 2:25-CV-01723-MJP-TLF, 2025 WL 2637663 (W.D. Wash. Sept. 12, 2025); *Kumar v. Wamsley*, No. 2:25-CV-01772-JHC-BAT, 2025 WL 2677089 (W.D. Wash. Sept. 17, 2025). As a result, and as the cases above explain, Petitioner's immediate release is warranted.

The Respondents' return rests on a single mistaken premise: that Petitioner is subject to a "final" removal order and therefore detained under 8 U.S.C. § 1231. That premise is wrong as a matter of statute and record. Both sides agree that Petitioner's current removal proceedings are on appeal to the Board of Immigration Appeals. A removal order is not "administratively final" while a timely appeal is pending. 8 U.S.C. § 1101(a)(47)(B). The Respondents' own filing concedes that his "case is currently pending appeal at the BIA." Dkt. 9 at p. 4; Dkt 10 at p. 4 ¶ 24.

Because there is no administratively final order of removal, § 1231's post-order detention framework does not apply. The entire structure of the government's return—the asserted "change" from pre-order to post-order status, the invocation of § 1231, and the claim that mandatory post-order detention eliminates any right to a pre-deprivation hearing—collapses on its own terms.

The Court should grant the petition and order Petitioner's immediate release, with appropriate prospective relief to ensure that any future attempt to re-detain him complies with due process.

STATEMENT OF FACTS

The parties agree on critical facts in this case. In short, Petitioner entered the United States as a lawful permanent resident as a teenager and has lived here for decades. In 2022, ICE sent a letter to Petitioner to present himself at ICE's Portland Field Office. When Petitioner presented himself at the Field Office, ICE issued a Notice to Appear, took him into custody, and then released

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him under an Order of Release on Recognizance (OREC). The OREC required regular reporting while his removal case proceeded; he complied fully.

During this round of removal proceedings, Petitioner lived with his family, worked, and attended every ICE check-in and every immigration-court hearing. Respondents do not claim he missed a single appearance, committed any new crime, or violated any condition of release.

On January 1, 2025, an Immigration Judge ("IJ") ordered denied Petitioner's motion to terminate his removal proceedings and applications for relief. However, Petitioner timely filed an appeal to the Board of Immigration Appeals. Respondents admit that "Petitioner's case is currently pending appeal at the BIA." Dkt. 9 at p. 4; Dkt 10 at p. 4 ¶ 24.

On November 5, 2025—months before his next scheduled ICE check-in, and while his BIA appeal remained pending—ICE officers waited outside Petitioner's home, surrounded his vehicle, pulled him from the car, revoked his OREC, and transported him to the Northwest ICE Processing Center. He was given no prior written notice, no statement of alleged violations, and no opportunity to contest the re-detention before a neutral adjudicator. Petitioner now challenges only this present confinement and the manner in which ICE revoked his conditional liberty.

ARGUMENT

Petitioner's habeas petition presents one claim: he is being detained in violation of the Fifth Amendment's Due Process Clause because Respondents re-detained him without first justifying that decision before a neutral decisionmaker. Respondents devote almost their entire return to a different question—whether Petitioner is now detained under 8 U.S.C. § 1231. Petitioner did not put that statutory question at issue, and it does not control the outcome. The petition rests on a constitutional requirement: before seizing a person from the community and revoking years of conditional liberty, the government must provide notice and a fair procedure.

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Judge Evanson confronted this same maneuver in *E.A. T.-B. v. Wamsley*, where the government tried to reframe a due-process challenge as a fight over statutory provisions. She rejected that effort, explaining that "[p]etitioner does not claim to be entitled to a hearing consistent with a particular statute: he argues that the Due Process Clause requires it." *E.A. T.-B. v. Wamsley*, --- F. Supp. 3d ----, No. C25-1192-KKE, 2025 WL 2402130, at *4 (W.D. Wash. Aug. 19, 2025). The same is true here. The relevant question is whether the Due Process Clause requires Petitioner's release when Respondents have never afforded him a pre-deprivation hearing.

Courts in this District and across the country have answered that question in one direction. As ICE has begun to re-arrest people who have lived for years on recognizance or parole, federal judges have held—repeatedly—that due process requires the government to justify re-detention before a neutral decisionmaker. *See E.A. T.-B.*, 2025 WL 2402130 (ordering release due to lack of pre-deprivation hearing); *Ramirez Tesara v. Wamsley*, --- F. Supp. 3d ----, No. 2:25-cv-01723-MJP-TLF, 2025 WL 2637663 (W.D. Wash. Sept. 12, 2025); *Kumar v. Wamsley*, No. 2:25-cv-01772-JHC-BAT, 2025 WL 2677089 (W.D. Wash. Sept. 17, 2025); *Valdez v. Joyce*, No. 25 Civ. 4627 (GBD), 2025 WL 1707737 (S.D.N.Y. June 18, 2025); *Mata Velasquez v. Kurzdorfer*, No. 25-CV-493-LJV, --- F. Supp. 3d ----, 2025 WL 1953796 (W.D.N.Y. July 16, 2025); *Pinchi v. Noem*, No. 5:25-CV-05632-PCP, --- F. Supp. 3d ----, 2025 WL 2084921 (N.D. Cal. July 24, 2025); *Maklad v. Murray*, No. 1:25-CV-00946 JLT SAB, 2025 WL 2299376 (E.D. Cal. Aug. 8, 2025); *Garcia v. Andrews*, No. 1:25-CV-01006 JLT SAB, 2025 WL 2420068 (E.D. Cal. Aug. 21, 2025); *Hernandez v. Wofford*, No. 1:25-CV-00986-KES-CDB (HC), 2025 WL 2420390 (E.D. Cal. Aug. 21, 2025). This case fits squarely within that line, and the Court should grant the petition.

Courts addressing this issue have applied the three-factor test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and Respondents do not meaningfully contest that framework. *See*, *e.g.*,

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Hernandez v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (applying *Mathews* to determine what process is due in immigration detention). Petitioner addresses *Mathews* below, but first explains why Respondents' threshold statutory premise fails.

I. Respondents' "Final Order" Premise Collapses Under 8 U.S.C. § 1101(a)(47)

Congress has defined when a removal order becomes "final," and the statute leaves no room for the government's position in this case.

A removal order "shall become final upon the earlier of—(i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B).

The Ninth Circuit has applied this definition repeatedly: a removal order is final only if the BIA has affirmed it or the time to appeal has run without a filing. *See Cui v. Garland*, 13 F.4th 991, 996 (9th Cir. 2021) (explaining that "[a]n order of removal becomes final upon the earlier of" BIA affirmance or expiration of time to seek BIA review (quoting § 1101(a)(47)(B))); *Go v. Holder*, 640 F.3d 1047, 1051–52 (9th Cir. 2011) (order not final, and petition-for-review clock did not run, until the BIA resolved all claims, including CAT issues remanded to the IJ).

Respondents' own return acknowledges that Petitioner filed a BIA appeal and that his "case is currently pending appeal at the BIA." Dkt. 9 at p. 4. A case pending on BIA appeal is, by definition, not one in which the BIA has "affirm[ed] such order" or the period to seek review has expired. *See* 8 U.S.C. § 1101(a)(47)(B). Petitioner's removal order is on direct administrative appeal. Until the BIA acts, it is not "administratively final."

Respondents' repeated description of the January 1, 2025 IJ decision as a "final removal order" is therefore inaccurate as a matter of statutory text and procedural history.

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II. Because There Is No Administratively Final Order, 8 U.S.C. § 1231 Does Not Authorize Petitioner's Detention

8 U.S.C. § 1231 governs detention and removal "when an alien is ordered removed." 8 U.S.C. § 1231(a)(1)(A). The "removal period" begins on the latest of three dates, the first being "[t]he date the order of removal becomes administratively final." *Id.* § 1231(a)(1)(B)(i). The structure of § 1231 presupposes the existence of a valid, administratively final order.

Respondents assert that "[b]ecause Petitioner's case status had changed from pre-removal to post-removal order, Petitioner's OREC was revoked and he was taken into custody pursuant to 8 U.S.C. § 1231, which requires mandatory detention." Dkt. 9 at p. 5. That assertion depends entirely on the contention that Petitioner's removal order is final. It is not.

Nor has any court entered a final order following judicial review, which would trigger § 1231(a)(1)(B)(ii). And Petitioner is not "detained or confined (except under an immigration process)" within the meaning of § 1231(a)(1)(B)(iii) in any way that would alter the analysis. The only plausible statutory hook for post-order detention is § 1231(a); that provision applies only when an administratively final order exists.

Petitioner therefore remains in the pre-final-order phase, governed, if at all, by § 1226's pre-order detention framework—not § 1231's removal-period regime. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008) (explaining that § 1226 governs pre-order detention and § 1231 governs post-order detention).

This is not a minor drafting error. Respondents build their entire return on § 1231: their claim that noncitizens have "no right" to a pre-deprivation hearing; their reliance on post-order "mandatory" detention; and their attempt to distinguish this Court's recent re-detention decisions on the ground that those petitioners were in a "pre-removal" posture. *See*, *e.g.*, Dkt. 9 at p. 2

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("Under these facts, Petitioner *was* provided notice—namely, that his removal order had become final— thus his authorities provide no support for the relief he seeks.") (emphasis in the original); *id.* at p. 4 ("Because Petitioner's case status had changed from pre-removal to post-removal order, Petitioner's OREC was revoked and he was taken into custody pursuant to 8 U.S.C. § 1231, which requires mandatory detention."); *id.* at pg. 6 ("final removal order constituted a material change in circumstances warranting revocation of Petitioner's OREC."); *id.* at p. 9 ("First, noncitizens have no right to a pre-deprivation hearing before an immigration judge under Section 1231…"; *id.* at p. 10 ("Here however, Petitioner *had* exactly the kind of material change in circumstances warranted re-detention (i.e., a final removal order)" (emphasis in original). Because Petitioner does not fall within § 1231 at all, those arguments fail at the threshold.

III. ICE's Own Release Terms Undercut Its Claim of a "Material Change in Circumstances"

Respondents next argue that ICE "had cause to revoke Petitioner's release" because the IJ's decision created a "material change in circumstances" justifying re-detention months later, and that Petitioner was "on notice" that his OREC could be revoked once his "removal order had become final." Dkt. 9 at p. 5–6, 8–9. ICE's own documents undercut both assertions.

When ICE released Petitioner on OREC, one of the written conditions required him to "surrender for removal from the United States if so ordered." That condition presupposes two things: (1) that removal proceedings might at some point reach an administratively final stage at which removal is actually feasible, and (2) that ICE would then issue a specific order directing surrender for removal. That is what occurred in 2018, when Petitioner complied and surrendered for removal after DHS obtained a BN(O) travel document.

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On November 5, 2025, by contrast, ICE did not order Petitioner to surrender for removal. It did not contend that travel documents were available. It did not identify any violation of the OREC conditions. Instead, officers carried out a surprise seizure outside his home at approximately 6:00 a.m., months before any scheduled check-in, without notice or hearing, based on a legal theory—that § 1231 applied—that is incompatible with the ongoing BIA appeal.

The OREC's language demonstrates that ICE knows how to proceed when removal is genuinely imminent: issue a surrender order and effectuate removal. ICE did not take that path here because it could not plausibly argue that removal was imminent. It instead treated the IJ's decision alone as a "change in circumstances" to re-detain a noncitizen whose case remains on appeal and whose removal is not reasonably foreseeable. Moreover, ICE provided a thorough written set of instructions of when an OREC may be revoked, and a removal order by an IJ while an appeal is pending is not one that ICE placed as a reason to revoke or terminate the OREC.

IV. The Due Process Clause Forbids Revoking Petitioner's Conditional Liberty Without a Pre-Deprivation Hearing

Even if Respondents statutory characterization were correct—and it is not—the Constitution independently prohibits what ICE did in this case.

A. Petitioner Has a Protected Liberty Interest in His Conditional Release

The Supreme Court has long held that conditional release from physical custody—whether labeled parole, probation, or preparole—creates a protected liberty interest. Before the government may revoke that conditional liberty, it must provide due process. *See Morrissey v. Brewer*, 408 U.S. 471, 482–84 (1972) (parole); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation); *Young v. Harper*, 520 U.S. 143, 147–49 (1997) (preparole program).

Morrissey explained why. Conditional liberty "enables [the parolee] to do a wide range of things open to persons" never imprisoned, including to live at home, work, and "be with family

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and friends and to form the other enduring attachments of normal life." 408 U.S. at 482. Revocation "inflicts a 'grievous loss,'" and the parolee "has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.* Revocation thus implicates a substantial liberty interest in "continued liberty." *Id.* at 481–84.

Courts applying *Morrissey* in the immigration context have held that release from immigration detention creates the same kind of protected interest. *See Guillermo M. R. v. Kaiser*, No. 25-cv-05436-RFL, 2025 WL 1983677, at *4 (N.D. Cal. July 17, 2025) (holding that "the liberty interest that arises upon release [from immigration detention] is inherent in the Due Process Clause"); *Ortega v. Kaiser*, No. 25-cv-05259-JST, 2025 WL 1771438, at *3 (N.D. Cal. June 26, 2025) (collecting cases recognizing a "strong liberty interest" for released noncitizens).

Petitioner's experience fits squarely within that framework. After being taken into custody and placed in removal proceedings, he was released on OREC, returned to his family, worked, and lived under ICE supervision for nearly three years. His daily life—employment, family relationships, and community ties—depended on the premise that his liberty would not be revoked absent a violation of conditions or a legitimate, demonstrated need for detention. That is the "continued liberty" *Morrissey* protects.

B. <u>Mathews v. Eldridge</u> Requires a Pre-Deprivation Hearing Before a Neutral Adjudicator

Under *Mathews*, the Court weighs three factors: (1) the private interest affected; (2) the risk of erroneous deprivation under existing procedures and the value of additional safeguards; and (3) the government's interest, including administrative burdens. *Mathews*, 424 U.S. at 335; *Hernandez*, 872 F.3d at 993. Each factor favors Petitioner.

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1. Private interest

Petitioner has an exceptionally strong interest in remaining free from confinement and in receiving a hearing before his liberty is revoked. As Judge Evanson observed, a person re-detained after release from ICE custody is "undoubtedly deprive[d] . . . of an established interest in his liberty." *E.A. T.-B.*, 2025 WL 2402130, at *3. Other courts have echoed that conclusion. *See, e.g.*, *Ramirez Tesara*, 2025 WL 2637663, at *3 ("When he was released from his initial detention on parole, Petitioner took with him a liberty interest which is entitled to the full protections of the due process clause."); *Garcia*, 2025 WL 2420068, at *10; *Pinchi*, 2025 WL 2084921, at *4; *Maklad*, 2025 WL 2299376, at *8.

These decisions rest on settled principles. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Detention violates due process if there are not "adequate procedural protections" or "special justification[s]" sufficient to outweigh the individual's "constitutionally protected interest in avoiding physical restraint." *Perera v. Jennings*, 598 F. Supp. 3d 736, 742 (N.D. Cal. 2022) (alterations omitted) (quoting *Zadvydas*, 533 U.S. at 690). The Ninth Circuit has held that, in the immigration-detention context, "due process requires adequate procedural protections to ensure that the government's asserted justification for physical confinement outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Hernandez*, 872 F.3d at 990 (quoting *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011)).

This interest is especially weighty where, as here, an individual has already been living in the community. The D.C. Circuit has explained that, in multiple contexts, "a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest

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that entitles him to constitutional due process before he is re-incarcerated." *Hurd v. District of Columbia*, 864 F.3d 671, 683 (D.C. Cir. 2017) (discussing *Young*, *Gagnon*, and *Morrissey*). Some courts have observed that, because immigration detention is civil, a noncitizen's liberty interest is "arguably greater" than that of the parolees in *Morrissey. Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019).

Petitioner's history underscores the point. He has lived in the United States for decades; he has been steadily employed; he has complied with every requirement, including ICE check-ins and court appearances. These facts establish a substantial due-process interest in not being re-detained without notice and a hearing.

Respondents offer no substantive answer to this private interest. They invoke Congress' broad power over immigration, but that argument speaks, at most, to the government's interest—not Petitioner's. The first *Mathews* factor weighs heavily in Petitioner's favor.

2. Risk of erroneous deprivation and value of additional safeguards

The risk of error is substantial when ICE can unilaterally decide—incorrectly—that a noncitizen's order is "final," that removal is reasonably foreseeable, and that revocation of release is warranted, all without neutral review. The OREC framework provides no mechanism for the released person to challenge revocation before an impartial adjudicator. ICE acts as investigator, prosecutor, and decisionmaker.

This Court has already identified that problem in a series of re-detention cases. In *E.A. T.-B.*, *Ramirez Tesara*, *Kumar*, *Ledesma Gonzalez*, and *Ramos Nevarez*, this Court held that revoking release and re-detaining someone without a pre-deprivation hearing created an unacceptably high risk of erroneous deprivation, especially where ICE misapplied its own authorities or failed to make an individualized assessment of danger or flight risk. *See, e.g.*, *E.A. T.-B.*, 2025 WL 2402130,

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at *4–5; *Ramirez Tesara*, 2025 WL 2637663, at *3–4; *Kumar*, 2025 WL 2677089, at *3–4; *Ledesma Gonzalez v. Wamsley*, 2025 WL 2841574, at *7–9 (W.D. Wash. Sept. 29, 2025); *Ramos Nevarez v. Wamsley*, 2025 WL 3062680, at *3 (W.D. Wash. Oct. 3, 2025).

The Ninth Circuit has likewise recognized that internal DHS custody reviews are not adequate substitutes for hearings before an immigration judge. In *Diouf v. Napolitano*, the court described how DHS's unilateral custody decisions led to prolonged detention based on flawed assessments that were only corrected when an immigration judge ordered release on bond, underscoring the need for neutral adjudication. 634 F.3d 1081, 1092 (9th Cir. 2011). The same reasoning applies with particular force where, as here, ICE has misidentified the controlling statutory regime and misread the status of Petitioner's proceedings.

Petitioner's case exemplifies the risk. ICE revoked his release based on the mistaken belief that his removal order was "final" and that § 1231 mandated detention. The statute and Respondents' own return demonstrate that belief is wrong. Yet, absent habeas relief, that error would sustain a serious loss of liberty. A pre-deprivation hearing before an immigration judge—where ICE must prove by clear and convincing evidence that Petitioner presents a danger, a flight risk, or has materially violated conditions—would sharply reduce the risk of erroneous deprivation.

3. <u>Government's interest</u>

The government has an interest in enforcing the immigration laws. But its interest in doing so without a pre-deprivation hearing in this context is limited. As courts have recognized, immigration custody hearings are routine and impose modest administrative burdens compared to the liberty at stake. *See Ortega*, 415 F. Supp. 3d at 970 (describing the government's interest in

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detention without a hearing as "low" where bond hearings are standard practice); *Doe v. Becerra*, No. 2:25-cv-00647-DJC-DMC, 2025 WL 691664, at *6 (E.D. Cal. Mar. 3, 2025).

Nothing in Petitioner's record suggests that providing a hearing would impede removal or public safety. His unbroken record of compliance shows that a brief, pre-deprivation hearing would likely have exposed ICE's mistake about finality and removal foreseeability, avoiding unlawful detention altogether.

In Petitioner's case, all three *Mathews* factors point in the same direction. Due process requires, at a minimum, a pre-deprivation bond hearing before a neutral adjudicator at which ICE bears the burden, by clear and convincing evidence, to show that re-detention is justified by danger, flight risk, or imminent removal. By seizing Petitioner without such a hearing, the government violated the Due Process Clause.

That conclusion is consistent with the Supreme Court's repeated statement that "'the root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing before he is deprived of any significant protected interest.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); *see Zinermon v. Burch*, 494 U.S. 113, 127 (1990) (under *Mathews*, the Court has "usually" held that "the Constitution requires some kind of a hearing before the State deprives a person of liberty"). The Supreme Court has held that due process requires a pre-deprivation hearing before revocation of parole and probation. *See Morrissey*, 408 U.S. at 480–86; *Gagnon*, 411 U.S. at 782. Numerous district courts have extended those principles to immigration re-detention. *See*, *e.g.*, *Yang v. Kaiser*, No. 2:25-CV-02205-DAD-AC (HC), 2025 WL 2791778, at *7–10 (E.D. Cal. Aug. 20, 2025); *Ramirez Clavijo v. Kaiser*, No. 25-CV-06248-BLF, 2025 WL 2419263, at *4–6 (N.D. Cal. Aug. 21, 2025); *Garcia*, 2025 WL 1927596, at *5; *Pinchi*, 2025 WL 1853763, at *1; *Ortega*,

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415 F. Supp. 3d at 970; *Doe*, 2025 WL 691664, at *6; *Diaz v. Kaiser*, No. 3:25-cv-05071, 2025 WL 1676854, at *2 (N.D. Cal. June 14, 2025); *Romero v. Kaiser*, No. 22-cv-02508-TSH, 2022 WL 1443250, at *4 (N.D. Cal. May 6, 2022); *Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 WL 5074312, at *4 (N.D. Cal. Aug. 23, 2020). Petitioner's re-detention without such a hearing is unconstitutional.

V. Even If § 1231 Applied, Respondents Have Not Shown That Petitioner's Removal Is Reasonably Foreseeable

Respondents also argue that Petitioner's detention is "presumptively reasonable" under *Zadvydas v. Davis*, 533 U.S. 678 (2001), because it has lasted 13 days . Dkt. 9 at p. 1–2, 10–11. That reading of *Zadvydas* ignores the specific history here.

Zadvydas construed § 1231(a)(6) to avoid serious constitutional problems by reading it to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal." 533 U.S. at 689. The Court identified six months as a presumptively reasonable period; after that, a noncitizen who "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" shifts the burden to the government to "respond with evidence sufficient to rebut that showing." *Id.* at 701.

Petitioner's history with removal efforts is exactly the kind of record that defeats a claim of reasonably foreseeable removal, even assuming § 1231 applied. ICE tried for years to remove him to Hong Kong, failed to obtain travel documents from Hong Kong itself, and removed him in 2018 only by relying on a British National (Overseas) document. As the petition explains, Hong Kong no longer recognizes BN(O) documents as valid for immigration screening or travel. Dkt 1 at p. 19 (citing official Hong Kong announcement that BN(O) passports "cannot be used for

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immigration clearance and will not be recognised [*sic*] as any form of proof of identity in Hong Kong").

Respondents do not dispute this change in law and practice. They identify no alternative travel document, no agreement with Hong Kong to accept Petitioner, and no concrete steps toward removal. They rely instead on generalized statements about an interest in detaining noncitizens who have been ordered removed. Dkt. 9 at p. 6–7, 10–11.

In similar re-detention cases where ICE invoked purportedly "changed circumstances" to justify renewed detention after prior failed removal efforts, courts have held that the government bears the burden to show a significant likelihood of removal in the reasonably foreseeable future. *See, e.g.*, *Escalante v. Noem*, No. 9:25-cv-00182-MJT, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025); *Nguyen v. Hyde*, 788 F. Supp. 3d 144, 150 (D. Mass. 2025). Those decisions recognize that where experience demonstrates that removal is practically impossible, a bare assertion of "mandatory" detention cannot justify renewed incarceration.

In Petitioner's case, even under § 1231 and *Zadvydas*, Respondents have not met their burden. Petitioner's removal is not reasonably foreseeable given Hong Kong's refusal to accept BN(O) documents and the absence of any alternative pathway. Detention that is no longer tethered to a realistic prospect of removal is arbitrary under the Due Process Clause.

CONCLUSION

For all the foregoing reasons, due process requires Respondents to afford Petitioner a hearing before a neutral decisionmaker where ICE must justify re-detention by clear and convincing evidence before re-detaining him. Because Respondents have not provided that constitutionally-required process, immediate release is warranted, and the Court should grant the habeas petition. In so ordering, the Court should specify that Petitioner must be released on the

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same conditions of release that Respondents had imposed upon him prior to his re-arrest on November 5, 2025.

Dated: November 18, 2025

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Luis Cortes Romero, certify that this traverse and response contains 4,345 words, in compliance with the Local Civil Rules.

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