

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROMAN ANTATOLEVICH
SUROVTSEV,

Petitioner,

v.

KRISI NOEM, *et al.*,

Respondents.

Case No. 3:25-cv-3065-E

OPPOSITION TO MOTION TO VACATE ORDER PROHIBITING REMOVAL

Petitioner hereby files this Opposition to Respondents' Motion to Vacate the Court's November 11, 2025 Order.

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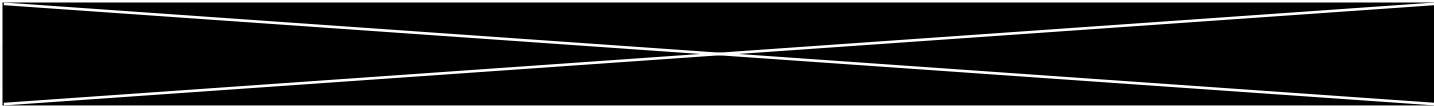
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INTRODUCTION

There is no lawful basis for vacating this Court's November 11 order. Respondents bear the burden to establish an abuse of the Writ, *McCleskey v. Zant*, 499 U.S. 467, 494 (1991), and they have failed to meet their burden here for several reasons.

First, the operative facts upon which this petition is based took place after the first petition was dismissed on October 31 and could not have been raised previously. Respondents only informed Mr. Surovtsev that he would be imminently deported on November 8; they did not reject Mr. Surovtsev's demands for a reasonable fear interview until around that date; and Mr. Surovtsev's immigration counsel did not file Form I-589 Application for Withholding and Convention Against Torture ("CAT") protection vis-a-vis Ukraine until November 10.

Second, none of the claims Mr. Surovtsev makes in the instant petition would have been justiciable before Judge Hendrix. Mr. Surovtsev's claims regarding access to a reasonable fear interview for CAT and withholding of removal would have been nonjusticiable for lack of ripeness, because Respondents had not rejected his requests for a reasonable fear interview yet and Mr. Surovtsev had not yet filed Form I-589. His due process claim related to his post-conviction relief would have likewise been dismissed because, before November 8, Mr. Surovtsev's removal did not appear to be likely to occur for some time. There was no due process issue on this basis until Respondents made clear that Mr. Surovtsev's removal would occur before the immigration court even responded to his motion.

Third, even if Respondents could establish an abuse of the writ (which they cannot), such an abuse does not take place where dismissal would result in a miscarriage of justice. *McCleskey*, 499 U.S. at 495. If this Court's order of November 11, 2025 is vacated, Mr. Surovtsev will be imminently deported to an active warzone, —all without having had the chance to explain his fear of being removed there, and even though his pending motion to reopen his removal proceedings will be granted in a matter of days or weeks.

This Court need not vacate its November 11 order. The motion to vacate should be denied.

RECENT FACTUAL DEVELOPMENTS

At 5:30 a.m. central time on November 13, 2025, Respondents told Mr. Surovtsev that he had to pack his belongings and that he was leaving the facility. He was not informed whether he was being deported and if so, to which country.¹ Mr. Surovtsev asked officers once again for a reasonable fear interview, expressing his fear of being removed to Ukraine or a third country, but officers refused. Mr.

¹ Upon information and belief, it appears that Respondents may be presently attempting to remove a significant number of Ukrainian nationals from the United States, and that they are doing so without providing reasonable fear interviews as a matter of policy. The undersigned are working diligently to acquire more information so they can inform the Court by the November 18 evidentiary deadline set by the Court in its November 11 order, ECF No. 4, as to whether this information can be confirmed, and whether it may give rise to new claims in the instant petition. The information obtained thus far derives from other Ukrainian detainees beyond Mr. Surovtsev detained at other facilities who say ICE officers are telling them they will be removed via military flights to Ukraine or Poland on Monday, November 17. The fact that Respondents' motion to vacate gives Monday, November 17 as the date on which it plans to remove Mr. Surovtsev to Ukraine would seem to corroborate these reports.

Surovtsev told officers he could not be removed or transferred as a step toward removal because of this court's order. According to an eyewitness, an Officer Caldwell told him "there is no court order, the only thing ICE told us is to put you on that bus either by force or willfully, which would you like?" Exh. E. The undersigned contacted the U.S. Attorney at 6:15 central time and stated:

We are informed that ICE officers have taken Mr. Surovtsev out of the facility and are putting him on a bus. When he informed officers that there is a TRO in place, an officer said that ICE denied that one exists. The court ordered your clients not to take any steps toward removing him from the country, please return him to Prairieland and inform us where officers are attempting to move him. I will note that he once again reiterated to officers his demand for a reasonable fear interview, which was once again denied.

Exh. F. At roughly 7 a.m. central, Mr. Surovtsev was apparently removed from the bus and brought back to the bunk area, though it is not yet clear whether this is temporary or whether he will still be transported out of the facility today.

BACKGROUND

Weeks after the dismissal of Mr. Surovtsev's original petition seeking his release pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001), Respondents informed him that he was scheduled for removal to Ukraine within days. Prior to this, Mr. Surovtsev had argued that such a removal was significantly unlikely to occur, given the Government's failure to execute it for over a decade and worsened conditions in Ukraine. Indeed, it is only recently that such removals have become likely. *See Order* at 11-12, *Surovtsev v. Noem*, No. 25-cv-160-H (N.D. Tex. Oct. 31, 2025) (ECF No. 23). Moreover, the Government did not inform Mr. Surovtsev that it had obtained travel

documents allowing his removal to Ukraine until after the original petition was dismissed. Without any reason to believe that his removal was likely, let alone imminent, Mr. Surovtsev sought narrow relief—*Zadvydas* release—from the Court.

Following his re-detention in August, Mr. Surovtsev learned of his eligibility for post-conviction relief in California Superior Court and began the process of obtaining it. While his convictions were vacated on September 3, 2025, his criminal proceedings remain ongoing and will not conclude until he is able to appear before the Superior Court to enter a new plea. His detention complicated this process significantly because the Government would not guarantee his ability to appear before the Superior Court, creating scheduling uncertainties that have yet to be resolved.

Meanwhile, after learning that he would remain detained until removal, but before learning that his removal would, in fact, occur, Mr. Surovtsev began the process of seeking immigration relief in the appropriate forum and venue: Immigration Court in Imperial, California. On November 10, almost immediately after Respondents informed him that he was going to be deported imminently, he applied for withholding of removal and CAT protection.

Mr. Surovtsev's recent legal saga has involved proceedings in immigration court, state criminal court, and federal court. Throughout this process, the Government has failed to provide clarity about its plans, focusing entirely on the fact of Mr. Surovtsev's removal order and the various possibilities as to how it might be executed. Upon Mr. Surovtsev's re-detention in August, the Government did not

inform him of the country to which they would attempt to remove him. Indeed, Immigration and Customs Enforcement (“ICE”) did not provide him with a travel document request until *after* he filed the original petition. That document was written in Ukrainian—a language Mr. Surovtsev does not speak—and was never translated. After the original petition was filed, the Government still did not make clear where Mr. Surovtsev was to be removed and revealed only that it recently began to pursue Ukraine. The Government itself indicated that removal to Ukraine was not certain, stating that, if Ukraine did not agree, ICE would pursue third-country removal. Given the fact that Mr. Surovtsev never received a translated travel document request, it was (and remains) unclear whether Ukraine has located the documents necessary to establish his eligibility for residency. Until today, the Government had not even told him where he would be removed. Mr. Surovtsev simply had no reason to know that his removal was imminent. Respondents’ motion is the *first time* the Government has informed Mr. Surovtsev that he is being removed to Ukraine and not some other country.

Despite this lack of clarity, it has been clear since Mr. Surovtsev was re-detained that relief would require two separate processes. The effort to obtain immediate release from custody—understandably his immediate concern—so that he could be reunited with his wife and young daughters required intervention by this Court, while the effort to secure relief from removal required intervention by the immigration court. In fact, had Mr. Surovtsev sought the latter in this Court, Respondents would likely have pointed this out, along with the fundamental

inconsistency between seeking release because removal was unlikely and seeking delay because a removal is imminent.

There was no indication while the original petition seeking his release based on the *unlikelihood* of his removal was pending, that Mr. Surovtsev would need this Court's intervention to stop a suddenly imminent removal so that his claims in immigration court could be adjudicated. Acknowledging the distinct authorities of this Court and the immigration court, he sought different types of relief from the appropriate forum for each. He sought intervention from this Court only after learning that the Government intended to remove him before the process ran its course, leaving him without any other options.

ARGUMENT

I. The Petition Is Not Subject to Dismissal as an Abuse of the Writ.

This Court need not vacate its November 11 order because the instant petition is plainly not an abuse of the writ. “When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner’s prior writ history, identifies the claims that appear for the first time, and alleges that the petitioner has abused the writ. The burden to disprove abuse then becomes petitioner’s. To excuse his failures to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.” *McCleskey*, 499 U.S. at 494. “[A] showing that the factual or legal basis for a claim was not reasonably available to counsel or that some

interference by officials, made compliance impracticable, would constitute cause.” *United States v. Vargas-Soto*, 35 F.4th 979, 993 (5th Cir. 2022) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

As an initial matter, Respondents fail to “identify the claims that appear for the first time” “with clarity and particularity.” *McCleskey*, 499 U.S. at 494. Rather, they argue that an additional argument was available to Mr. Surovtsev while his original petition was being litigated—that he obtained post-conviction relief before dismissal. ECF No. 6, at 6. But the mere existence of some fact does not necessarily give rise to a legal claim. The claims Mr. Surovtsev raises in this petition were simply either not legally available or only factually supported by information exclusively in the possession of Respondents. *See Vargas-Soto*, 35 F.4th at 993.

A. Petitioner’s New Claims Were Not Available to Him in the Original Petition.

1. Petitioner’s Statutory Withholding and CAT Claims Did Not Arise Until Respondents Refused to Provide Him with a Reasonable Fear Interview.

Mr. Surovtsev’s statutory withholding and CAT claims are based on Respondents’ unlawful acts that took place after the first petition was dismissed. Mr. Surovtsev could not have raised these claims previously as they would have been nonjusticiable for lack of ripeness.

The crux of Respondents’ argument is that “the same arguments [Mr. Surovtsev] raises here were clearly available to him at the time” the first petition was pending. ECF No. 6, at 5. For reasons that should be obvious, this is not so.

For ten years, Respondents have failed to remove Mr. Surovtsev from the United States to Ukraine or a third country. Mr. Surovtsev’s first habeas petition was

based on his belief that Respondents would continue to be unable to remove him. That petition was denied on October 31, 2025.

Then, in the middle of the night on November 6-7, Respondents moved Mr. Surovtsev from the facility where he has been housed since early August to a new facility closer to an international airport. On the morning of November 7, the undersigned wrote to the Assistant U.S. Attorney explaining that Mr. Surovtsev's removal would be unlawful because "none of us has been informed as to what country he is being removed to [and] he is entitled to assessments for withholding and/or CAT protection." Exh. D. The next day, November 8, an ICE officer told Mr. Surovtsev that he would be deported on a commercial flight within days. Mr. Surovtsev began demanding a reasonable fear interview, but his demands were rejected. On November 10, Mr. Surovtsev's immigration counsel filed Form I-589 applying for withholding of removal and CAT protection. He filed the instant petition that same day, asking that this Court halt his imminent removal because he was being unlawfully removed in violation of his right to a reasonable fear interview.

"[S]ubsequent wrongs' by a defendant constitute new causes of action." *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 314 (5th Cir. 2004) (quoting *Blair v. City of Greenville*, 649 F.2d 365, 368 (5th Cir. 1981); see also *Dawkins v. Nabisco, Inc.*, 549 F.2d 396, 397 (5th Cir. 1977) (in civil rights context, a "plaintiff is free to bring successive actions, claiming in each that his employer has taken retaliatory actions against him more recent than the prior lawsuit."); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955) (prior consent judgment in a private antitrust action did

not bar similar action based upon the subsequent acts of the defendant); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970); *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). Because there is no “clairvoyance” requirement for subsequent habeas petitions based on new facts that post-date the prior dismissal and give rise to entirely new claims, the instant petition is not an abuse of the writ.

Respondents assert that “Surovtsev might argue that he had not yet obtained relief from the California state court at the time he filed his earlier petition (On August 20, 2025), so therefore his new habeas petition should not be abusive” and that the instant petition “depends on ultimately receiving favorable relief from the immigration court” ECF No. 6, at 6. These are not Mr. Surovtsev’s arguments. Mr. Surovtsev’s second habeas petition is aimed, above all, at ensuring that Respondents do not unlawfully deport him to an active warzone without providing him with the reasonable fear screening to which he is statutorily entitled. While the September 3 vacatur of Mr. Surovtsev’s carjacking conviction is *relevant* to the extent it helps establish why he is entitled to be screened for withholding of removal, the vacatur itself did not give rise to the instant petition—it was Respondents’ denials of his demands for a reasonable fear interview on November 7-9, as well as the November 10 filing of Form-589, that gave rise to this petition.

Even if a court were to accept Respondents’ argument that Mr. Surovtsev was required to predict their future bad acts, the district court would have correctly dismissed claims on justiciability grounds for lack of ripeness. Article III prohibits

federal courts “from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)); *See also Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006) (“[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969)). Had Mr. Surovtsev argued before the district court in his initial habeas petition that Respondents should be enjoined from doing something they had not done yet, he would have been wasting the court’s time and resources.

Respondents also claim the fact that Mr. Surovtsev “did not appeal or seek reconsideration” is a sign the present petition is an abuse of the writ. ECF No. 6, at 1. Again, Respondents fail to explain how Mr. Surovtsev could have brought claims about being unlawfully denied access to a reasonable fear screening when (a) officers hadn’t denied him such an interview yet and (b) his prior 10 years of experience made it appear extremely unlikely that Respondents were going to be able to deport him to Ukraine.² It would have been improper for Mr. Surovtsev to proceed based on these new claims through a motion to reconsider or through an appeal. A petitioner may not raise entirely new claims based on entirely different arguments in a motion to

² In fact, the first time Respondents have *ever* stated Mr. Surovtsev’s removal is imminent is in *the motion to vacate*. *See* ECF No. 6, at 4 (noting government’s intent “to remove Surovtsev to Ukraine on this coming Monday, November 17, 2025.”).

reconsider, and such new claims and arguments would clearly not be proper to raise in the first instance to the Court of Appeals.

The fact that Mr. Surovtsev did not seek post-conviction relief sooner is immaterial. Mr. Surovtsev was not aware that *Padilla v. Kentucky*, 559 U.S. 356 (2010), meant his Due Process rights had been violated by the fact that his defense counsel had failed to advise him of the immigration consequences of his plea.

Finally, Respondents' argument has startling implications. If ICE is able to evade habeas review of its unlawful actions simply because a prior petition was dismissed on other grounds, they will be given a cart blanche. This consideration is particularly important here, where Mr. Surovtsev is being separated from his U.S. citizen wife and two U.S. citizen daughters to a country where there is a very high likelihood that [REDACTED]

[REDACTED] Mr. Surovtsev is not eligible under Ukrainian law for any deferral or exception to the draft.³

2. Petitioner's Due Process *Pickering* Claim Only Became Available After He Learned of His Imminent Removal.

Likewise, Mr. Surovtsev's Due Process claim related to the availability of relief under *In Re Pickering*, 23 I. & N. Dec. 621 (B.I.A. 2003) in the Ninth Circuit did not arise until Respondents revealed that his removal is imminent. Federal courts

³ Visit Ukraine Today, *Who Is Eligible for Deferment from Mobilisation in 2024: Updated Rules and How to Get an Electronic Deferment Through Reserve+*, (Nov. 21, 2024), https://visitukraine.today/blog/3189/who-is-not-subject-to-conscription-in-2024-and-how-to-get-a-deferment?srsltid=AfmBOoq15pAq4AE1XaSR6MAkq3fnp6oDPqlcz43No8G6ES_C4LLYwZi#who-will-be-eligible-for-a-military-service-deferment-under-the-new-law.

generally lack jurisdiction to review the execution of removal orders. *See* 8 U.S.C. § 1252(g). They can, however, ensure that individuals have an “opportunity to be heard at a reasonable time and in a meaningful manner.” *Mathews v. Elridge*, 424 U.S. 319, 333 (1976).

Mr. Surovtsev’s due process claim did not arise until Respondent’s revealed that he would be removed before the immigration court weighed in. Before then, while his removal remained only a theoretical possibility under the circumstances and his motion to reopen was pending before the appropriate body, there simply was no due process violation related to those proceedings. Had Mr. Surovtsev raised such a claim, the Court would have rightly dismissed it because nothing at the time stopped him from pursuing relief in immigration court while his removal was pending. Mr. Surovtsev’s post-conviction relief gave rise to his immigration relief, but his imminent removal, not his post-conviction relief, gave rise to the claim that his removal would prejudice his ability to obtain that immigration relief.

Furthermore, the only reason Mr. Surovtsev did not have the information necessary to suspect his removal would occur before the immigration court ruled on his motion was because Respondents did not provide it. He was never (despite Respondents’ assurance that he would be) provided the documents he believed were necessary to obtain permission for him to be removed to Ukraine. Indeed, it appears that Respondents did not secure Ukraine’s approval until after Mr. Surovtsev’s original habeas was dismissed. Respondents never suggested that his removal to Ukraine was assured, and even argued that, if it could not be accomplished, they

would pursue third-country removal. Given that any information that would have indicated otherwise was in the exclusive possession of Respondents, Mr. Surovtsev simply had no reason to believe that his removal would occur before his motion to reopen was adjudicated, and therefore no reason to amend the original petition to argue that his due process rights would be violated.

B. Even if Petitioner Has Not Shown Cause, a Fundamental Miscarriage of Justice Would Result from a Failure to Entertain His Claim.

“If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.” *McCleskey*, 499 U.S. at 494-95. This exception serves as “an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.” *Id.* at 495.

Even if Mr. Surovtsev has not established that there was cause for the present claims’ absence in the original petition (he has), a failure to entertain Mr. Surovtsev’s new claims would result in a fundamental miscarriage of justice. He would be denied his right to seek withholding and/or CAT protection, to which he has a statutory right pursuant to 8 U.S.C. § 1231(b)(3)(B), before his removal to a country where he faces a substantial risk of persecution, torture, or death. He may be drafted into a deadly war, killed by a Russian missile, or persecuted as a Russian-speaker. It is not clear that he will have any status in Ukraine given his current lack of and uncertain entitlement to citizenship. The consequence for Mr. Surovtsev is not simply a loss of his due process rights—though that is also the case—but the loss of his freedom or even life.

II. Mr. Surovtsev Has Demonstrated a High Likelihood of Success.

Notably, Respondents do not argue that Mr. Surovtsev would be unlikely to establish withholding or CAT eligibility, nor do they even address the clear irreparable harm he would face if removed on their timeline. They argue simply that Mr. Surovtsev's motion to reopen is unlikely to be granted because he cannot establish equitable tolling. ECF No. 6, at 8-9. But that argument only accounts for one mechanism by which his case can be reopened. There are three. Respondents are correct that Mr. Surovtsev needs to establish tolling to overcome the 90-day deadline in 8 U.S.C. § 1229a(c)(7)(C)(i) (and he can), but his motion can also be granted *sua sponte* and, importantly, on the basis of his request for withholding of removal.

“There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for [withholding] and is based on changed country conditions arising in . . . the country to which removal has been ordered, if such evidence is material and was not available . . . at the previous proceeding.” § 1229a(c)(7)(C)(ii). Mr. Surovtsev moved the immigration court to reopen his case on all three bases and his immigration counsel has presented evidence that conditions in Ukraine have significantly changed for the worse since his original immigration proceedings. Respondents do not dispute that Ukraine is a very different place than it was a decade ago.

Respondents have misapprehended what a likelihood of success means in this case. Mr. Surovtsev's primary claim is that his due process rights will be violated, and he will suffer irreparable harm, if he is removed *before* he can even meaningfully

access his statutory right to seek withholding, for which there is no deadline. Respondents make no argument to the contrary.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Mr. Surovtsev has presented strong arguments to the immigration court that his motion to reopen should be granted, including one that is not subject to the time limitation Respondents center their argument around. It bears emphasizing what Mr. Surovtsev will establish when he succeeds: that he is more likely than not to be persecuted, tortured, or killed in Ukraine. Respondents want to remove him to an active warzone where he has a high likelihood of being persecuted or killed before the immigration judge can decide whether he is entitled to relief. They should not be permitted to do so.

CONCLUSION

For the foregoing reasons, Respondents’ Motion to Vacate should be denied.

Dated: November 13, 2025

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CERTIFICATE OF SERVICE

On November 13, 2025, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Eric Lee
Eric Lee
Attorney for Petitioner