IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Leobardo Oviedo Olguin, *Petitioner,* v. **Sam Olson**, et al., *Respondents.*	Case No. 2:25-cv-1822

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Leobardo Oviedo Olguin, was granted withholding of removal on April 28, 2025. Yet despite this order granting him relief from removal, he remains in immigration custody over seven months later, with no end in sight. He has cooperated with efforts to secure his removal, and his primary argument is that release is appropriate because his removal is not reasonably foreseeable. Nothing in Respondents' response undermines that claim. Accordingly, this Court should order Mr. Oviedo's release.

ARGUMENT

I. Mr. Oviedo is entitled to release under *Zadvydas* as he faces indefinite detention, and his removal is not reasonably foreseeable.

In *Zadvydas*, the Supreme Court held that the statute governing the post-removal period, 8 U.S.C. § 1231, does not authorize the Attorney General to detain a noncitizen indefinitely, but only for the period "reasonably necessary to secure the noncitizen's removal." *Zadvydas v. Davis*, 533 U.S. 678 (2001). The period "reasonably necessary to bring about removal is presumptively six months." *Cabrera Galdamez v. Mayorkas*, No. 22 CIV. 9847 (LGS), 2023 WL 1777310, at *8 (S.D.N.Y. Feb. 6, 2023) (citing *Zadvydas*, 533 U.S. at 701). Once the six-month period expires,

and once the noncitizen "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 699.

A noncitizen bringing a *Zadvydas* challenge need not show "the absence of any prospect of removal" but merely that removal is not reasonably foreseeable. *Id.* at 702. The *Zadvydas* Court also recognized that "as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Id.* at 701; *see also Ali v. Byers*, No. CV 23-177-DLB, 2024 WL 188445, *3 (E.D. Ky. Jan. 17, 2024) (recognizing that Petitioner's "continued detention is subject to the due process standards set forth in *Zadvydas*").

Mr. Oviedo has demonstrated that his removal is not reasonably foreseeable, and the government has provided no evidence to rebut that showing. Mr. Oviedo was granted withholding of removal on April 28, 2025. Dkt. 1-1. This order prohibits his removal to Mexico, the only country DHS designated for removal. More than seven months later, DHS has been unable to effectuate his removal to any other country. Indeed, ICE Deportation Officer Podgorni states that, on April 29, 2025, DHS "sent requests for acceptance of [Mr. Oviedo] to the embassies of Guatemala, Honduras and El Salvador", but to date – more than seven months later – no response was received from any of these foreign embassies. Dkt. 9. For the past seven months since his grant of withholding of removal became final, ICE has not requested that Mr. Oviedo fill out applications for travel documents to any country, nor speak to any consulate. Without such requests, and given that the only countries ICE apparently requested removal to have failed to respond for more than seven months, his removal is not reasonably foreseeable and he is entitled to release.

II. Mr. Oviedo has exhausted administrative remedies and Respondents' arguments to the contrary are unpersuasive.

In its response, rather than engage with the merits of Mr. Oviedo's *Zadvydas* claim, Respondents' sole argument is that Mr. Oviedo failed to exhaust administrative remedies. Dkt. 8, p. 13-18. In support of its argument, Respondents point to regulations, 8 C.F.R. § 241.13, that permit a noncitizen detained with a final order of removal to submit a "written request for release" to ICE Headquarters Post-order Detention Unit (HQPDU). This argument fails for several reasons.

First, Respondents fail to contend with the fact that Mr. Oviedo *complied* with the regulations, submitting a "written request for release" to ICE on May 5, 2025. Dkt. 1-4. In a footnote, Respondents attempt to dismiss this request as failing to comply with the regulations, alleging that the request "failed to assert a 'basis for the [noncitizen's] belief that there is no significant likelihood that the [noncitizen] will be removed in the reasonably foreseeable future.'" Dkt. 8, fn. 7. This is unsupported by the record. In the referenced May 5, 2025, email, Mr. Oviedo's counsel explained that Mr. Oviedo was "recently granted Withholding of Removal" and that "[b]oth parties waived appeal." Dkt. 1-4. In support of the request, counsel attached the IJ's decision granting withholding of removal to the email. *Id.* Counsel further explained that, due to Mr. Oviedo's mental illness, he would request the opportunity to "evaluate his fear claim" to any third country. *Id.*[1] Thus, counsel's email demonstrated that Mr. Oviedo's removal was unlikely,

[1] To the extent the government argues that Mr. Oviedo's request for notice and an opportunity to be heard demonstrates failure to comply with removal efforts, such arguments are without merit. Dkt. 8, fn. 7. In the referenced May 5, 2025, email, counsel expressed opposition to "removal to any third country" without the opportunity to "evaluate [Mr. Oviedo's] fear claim" to said country. Dkt. 1-4. Such a statement is consistent with Mr. Oviedo's right to request protection from removal where his life or freedom is in danger, a right protected by the Immigration and Nationality Act, Due Process Clause, and binding treaty obligations. Dkt 1., p. 16-18. There is no evidence to support a contention that Mr. Oviedo has not cooperated with removal efforts.

given his grant of withholding of removal to the only country designated for removal and his lack of ties to any other country. That is all that is required under 8 C.F.R. § 241.13.

Even setting this issue aside, the Seventh Circuit has routinely recognized that "Congress requires exhaustion for certain types of habeas petitions, but not for those petitions, such as [Petitioner's], brought under 28 U.S.C. § 2241." *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004). In considering whether exhaustion is required, the Sevent Circuit has held that

> "Individual interests demand that exhaustion be excused when
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> > (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action; (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested; (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or (4) where substantial constitutional questions are raised." *Id.* (citing *Iddir v. INS*, 301 F.3d 492, 498 (7th Cir. 2002).

Here, all these factors weigh in Mr. Oviedo's favor. As to the first factor, requiring exhaustion would result in prejudice to Mr. Oviedo because the agency has already demonstrated "unreasonable delay or an indefinite timeframe for administrative action." *Gonzalez*, 355 F.3d at 1016. As discussed above, Mr. Oviedo's counsel submitted a written request for release to ICE on May 5, 2025. Dkt. 1-4. In response, the same day, ICE stated that the "request was forwarded to ICE HQ" and that ICE did "not have a timeline for their response." *Id.* More than six months later, neither Mr. Oviedo nor his counsel have received a response to his May 5, 2025, request for release. In its response, Respondents provide no explanation for the lack of decision on Mr. Oviedo's written request for release. This suffices to show unreasonable delay, prejudicing Mr. Oviedo and warranting excuse from any exhaustion requirement.

Further evidencing the government's unreasonable delay and resulting prejudice is the fact that ICE has failed to perform its post-order custody reviews for the past six months. Under 8 C.F.R. § 241.4(k), after an initial 90-day review is conducted and ICE determines that the noncitizen will remain in custody, HQPDU is to perform periodic post-order custody reviews, including an 180-day review. Here, since Mr. Oviedo was granted withholding of removal on April 28, 2025, ICE has failed to conduct *any* post-order custody reviews. In support of its response, Respondents include two post-order custody review decisions, both dated *before* Mr. Oviedo was granted relief – meaning before he was even in his "removal period" as defined by 8 U.S.C. § 1231(a)(1)(A). Dkt. 9-1 (post-order custody review decision dated August 19, 2024); (post-order custody review decision dated February 20, 2025). Respondents provide no evidence that post-order custody reviews were conducted *after* Mr. Oviedo's proceedings concluded and resulted in an "administratively final" decision. *See* 8 U.S.C. § 1231(a)(1)(A); 8 C.F.R. § 241.4.

The failure to properly conduct post-order custody reviews is, itself, a violation of the regulations and Mr. Oviedo's due process rights. 8 C.F.R. § 241.4(d) (stating that post-order custody decisions "shall be provided to the detained" noncitizen); *see also Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641- 42 (D. Mass. 2018) (finding that failure to follow the post-order custody review regulations may constitute a violation of the noncitizen's procedural due process rights); *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 388-402 (W.D.N.Y. 2009) (finding that DHS failed to follow the post-order custody review regulations, in violation of Petitioner's due process rights, and ordering release); *Rodriguez Del Rio v. Price*, No. EP-20-CV-00217-FM, 2020 WL 7680560, at *4 (W.D. Tex. Nov. 3, 2020). Here, ICE's failure to follow its own regulations for

months merits excusing administrative exhaustion due to the prejudice it would cause Mr. Oviedo to endure further delay.

The second and fourth factors discussed in *Gonzalez* also weigh in Mr. Oviedo's favor. In his habeas petition, Mr. Oviedo's primary claim is that his "continued detention bears no reasonable relation to any legitimate government purpose and is therefore unconstitutional." Dkt. 1, p. 1. He raises both substantive and procedural due process claims, arguing that the "due process clause does not permit the government to detain [him] indefinitely while it endlessly pursues removal to a third country." *Id.* at p. 23-26. The Seventh Circuit has recognized that "[a]dministrative agencies lack the authority to deal dispositively with constitutional challenges." *Hodel v. Aguirre*, 260 F. Supp. 2d 695, 698 (N.D. Ill. 2003) (citing *Singh v. Reno,* 182 F.3d 504, 510 (7th Cir.1999)); *Castanada–Suarez v. INS,* 993 F.2d 142, 144 (7th Cir.1993) (stating "due process claims are generally exempt from the exhaustion requirement because the [agency] does not have authority to adjudicate constitutional issues."). Here, ICE cannot "deal dispositively" with Mr. Oviedo's constitutional claims, again tipping the balance in favor of waiving exhaustion.[2]

The out-of-circuit cases Respondents rely on in support of its position are inapposite. *See* Dkt. 8, p. 15-16. In at least three of the cases cited, the court dismissed the *Zadvydas* petitions primarily on the basis that the petition was filed prematurely – that is, before the Petitioner had reached six months of post-final order custody. *See e.g., Parker v. Sessions,* No. H-18-2261, 2018

[2] To the extent that Respondents argue that their expertise is needed to impose "terms of supervision", such arguments are misguided. *See* Dkt. 8, p. 17. If this court grants Mr. Oviedo's petition, it can, as numerous courts have done, order his release subject to conditions of supervision, either imposed by the court or by ICE. Dkt. 1, p. 14-15; *Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 4511933, at *5 (S.D.N.Y. Sept. 18, 2019); *Mathon v. Searls*, 623 F. Supp. 3d 203, 218 (W.D.N.Y. 2022).

WL 11491450, at *2 (S.D. Tex. July 16, 2018) (denying petition based on finding that it was premature where Petitioner had been detained four months at time petition was filed); *Hung Van Le v. Sessions*, No. H-18-1984, 2018 WL 3361515, at *1 (S.D. Tex. July 10, 2018) (same, where Petitioner detained for three months at time of filing); *Kalu v. DHS*, No. 1:10-cv-244, 2010 WL 4366402, at *2 (M.D. Pa. Oct. 28, 2010) (same). As the court in *Parker* recognized, this is significant because, where the Petitioner "has not been in custody past the presumptively reasonable period outlined in *Zadvydas*, he does not demonstrate that his detention violates the Constitution and he does not state an actionable claim for relief." *Parker*, 2018 WL 11491450, at *1; *see also Hung Van Le*, 2018 WL 3361515, at *1 ("Le's reliance on *Zadvydas* is unavailing because he has not been in custody for longer than six months. Under these circumstances, Le does not demonstrate that his detention violates the Constitution and he does not state an actionable claim for relief."). That is not the case here. It is undisputed that Mr. Oviedo has been detained for more than the "presumptively reasonable period outlined in *Zadvydas*". *Parker*, 2018 WL 11491450, at *1; Dkt. 8, p. 15 (Respondents acknowledging that "Petitioner is correct that he has been detained for more than six months since the immigration judge granted him withholding of removal").

For these reasons, Mr. Oviedo has satisfied the exhaustion requirement, or alternatively, demonstrated why exhaustion is not required. As discussed above, the government's own records confirm that travel documents have not been obtained, and no country has agreed to accept Mr. Oviedo. Dkt. 9 (declaration of Deportation Officer Podgorni stating that the three countries solicited for removal, "Guatemala, Honduras and El Salvador", have failed to respond for more than seven months). Under *Zadvydas,* this establishes good reason to believe there is no significant

likelihood of removal in the reasonably foreseeable future. Respondents have failed to rebut that showing, and as a result, Mr. Oviedo's detention is unlawful. Where, as here, the government cannot show that removal from the United States is reasonably foreseeable, release is required.

Faced with similar fact patterns, several courts have ordered release, recognizing that the statute does not permit an individual's indefinite detention. *Munoz-Saucedo v. Pittman*, No. CV 25-2258 (CPO), 2025 WL 1750346, at *6-8 (D.N.J. June 24, 2025) (granting petition and ordering release where the Court found that there was no significantly likelihood of removal in the reasonably foreseeable future because the petitioner was granted withholding of removal, cannot be removed to his country of origin, ICE has historically low success rates in removing similar individuals, and multiple requests to other countries to accept a third-country removal were denied); *Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543, at *8 (D. Md. Sept. 8, 2025) (same). For the reasons discussed here and in his underlying Petition, this Court should do the same and order Mr. Oviedo's immediate release.

III. Mr. Oviedo is entitled to notice and an opportunity to be heard prior to any third country removal efforts.

As discussed above, Mr. Oviedo has established that his removal is not reasonably foreseeable and he is therefore entitled to release. However, to the extent the government continues to pursue removal to a third country, Mr. Oviedo has demonstrated that he is entitled to notice and an opportunity to respond to any such removal efforts. Dkt. 1, p. 16-20, 24-26.

In its response to Mr. Oviedo's third country removal claims, Respondents argue that this Court "should decline to hear Petitioner's claims based on comity principles" due to the pending class action litigation in *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass.).

Dkt. 8, p. 19-20. Alternatively, the government argues that this Court lacks subject matter jurisdiction over such claims. *Id.* at p. 21-22. These arguments fail.

As an initial matter, and as both parties acknowledge, the Supreme Court stayed the class-wide preliminary injunction in *D.V.D.* and that stay remains in effect. *U.S. Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). As a result of the Supreme Court's order, class members are not currently afforded the relief specified in the District Court's preliminary injunction. Thus, *D.V.D.* does not afford Mr. Oviedo the relief he requests here. Indeed, following the Supreme Court's decision, DHS swiftly resumed removals to third countries.[3] Here, Mr. Oviedo is at risk of removal without notice and an opportunity to be heard *before* a decision is reached in *D.V.D.*

Further, Mr. Oviedo seeks relief that is not available through the *D.V.D.* litigation. The *D.V.D.* case was filed on March 23, 2025, and does not challenge ICE's later-issued March 30 and July 9, 2025, memos. As argued in his Petition, both the March and July ICE memos are unlawful because the memos fail to comply with ICE's obligations under the Immigration and Nationality Act (INA), Due Process Clause, the Convention Against Torture and its implementing regulations. Dkt. 1, p. 16-20, 24-26. For example, the July Memo states that, where the country of removal has not provided "assurances," ICE will "generally wait at least 24 hours" before removing a noncitizen, but that "[i]n exigent circumstances, [ICE] may execute a removal order six (6) or more hours after service of the Notice of Removal as long as the [noncitizen] is provided reasonable

[3] *See e.g.*, PBS News, *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; Reuters, *The US said it had no choice but to deport them to a third country. Then it sent them home*, Aug. 3, 2025, https://www.reuters.com/world/americas/us-said-it-had-no-choice-deport-them-third-country-then-it-sent-them-home-2025-08-02/.

means and opportunity to speak with an attorney prior to removal." *Id.* at 18. The *D.V.D.* litigation does not currently challenge either memo, which were both issued after the District Court issued a TRO on March 28, 2025.

In addition, Mr. Oviedo argues that due process and the INA require he has a meaningful opportunity to seek withholding of removal, a claim not at issue in *D.V.D.* Dkt. 1, 24-26 (raising a claim under the INA, in addition to the due process clause and Convention Against Torture). The *D.V.D.* case raises claims only under the Convention Against Torture. *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass.).

Finally, considering the same arguments Respondents present here, courts have recognized that the government's "position contradicts the position they have taken in *D.V.D.* itself." *Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *21 (W.D. Wash. Aug. 21, 2025). In *Nguyen*, the court explained that "the government is arguing in *D.V.D.* that injunctive relief cannot be granted to the class, and may only be pursued (if at all) through individual cases, while arguing here that Petitioner's individual claim should be barred because his injunctive claims should be adjudicated as part of the *D.V.D.* class." *Id.* Accordingly, the *Nguyen* court found that "[t]he contradiction in these arguments" "undermines Respondents' position." *Id.*

Against this backdrop, several district courts have issued the relief requested here, *D.V.D.* litigation notwithstanding. *See e.g.*, *Ortega v. Kaiser*, No. 25-CV-05259-JST, 2025 WL 2243616, at *8 (N.D. Cal. Aug. 6, 2025) (prohibiting the government from "arresting, detaining, or removing" the petitioner to a third country "without notice and a hearing."); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *4 (W.D. Wash. June 30, 2025) (prohibiting the government from removing petitioner to "any third country in the world absent prior approval from

this Court"); *Delkash v. Noem*, No. 5:25-CV-01675-HDV-AGR, 2025 WL 2683988, at *6 (C.D. Cal. Aug. 28, 2025) (prohibiting the government from removing Petitioner "to a third country without notice and an opportunity to be heard"); *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2841886, at *11 (D. Md. Oct. 7, 2025). Mr. Oviedo's claims are further supported by the Supreme Court's decision in *Trump v. J.G.G.*, 604 U.S. ____ (2025), where the Court explained that the putative class plaintiffs there had to seek relief in individual habeas actions (as opposed to injunctive relief in a class action) against the implementation of Proclamation No. 10903 related to the use of the Alien Enemies Act to remove non-citizens to a third country.

Respondents' jurisdictional arguments also fail. Respondents argue that Mr. Oviedo's claims are barred by FARRA, or alternatively, the jurisdiction-stripping provisions of 8 U.S.C. § 1252(b)(9). Such arguments misconstrue Mr. Oviedo's claim. Mr. Oviedo does not ask this Court to review a CAT claim or a removal order. Rather, he asks that, prior to removal to a third country to which he has no ties, he be given notice of the country designated for removal and an opportunity to be heard. Such a request complies with the government's obligations under the INA, Due Process Clause, and binding treaty obligations. Thus, Mr. Oviedo's request is for this Court to enjoin the government from removing him in violation of these obligations, as is permitted under current ICE guidance allowing for third country removals with no notice to the noncitizen.

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 2269796, at *3 (E.D. Tex. July 3, 2025) (finding that the jurisdictional question did not "stand in the way of a temporary restraining order"). This Court should do the same.

Finally, Respondents assert that Mr. Oviedo's fear of removal to a third country is "rather cynical and self-serving", apparently suggesting that removal to a third country such as "Canada, Sweden, or Guatemala" without notice or opportunity to be heard would not be unlawful. This ignores the reality of the government's recent third country removal practices. In recent months, numerous reports have documented that the government has pursued removals to countries with a record of human rights abuses. As discussed in his motion for temporary restraining order (TRO), noncitizens removed pursuant to 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.[4] 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.[5] Others, held in a shipping container while their removal was challenged in court, suffered high temperatures, exposure to malaria, and proximity to burning trash and human waste.[6]

Unfortunately for Mr. Oviedo, there is nothing "cynical" or "self-serving" about his fear of being unlawfully removed with no notice to a country where he may face persecution or torture,

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[4] NPR, *Asylum seekers deported by the U.S. are stuck in Panama unable to return home*, May 5, 2025, 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.

[5] NPR, *Abrego Garcia says he was severely beaten in Salvadoran prison*, July 3, 2025, https://www.npr.org/2025/07/03/g-s1-75775/abrego-garcia-el-salvador-prison-beaten-torture.

[6] NPR, *U.S. Supreme Court allows—for now—third-country deportations*, June 23, 2025, https://www.npr.org/2025/06/23/g-s1-71529/supreme-court-south-sudan-deportation.

as that has become the reality of the government's recent third country removal practices. Further, the government's suggestion that Mr. Oviedo could "move to reopen" proceedings to assert a fear is misplaced. This argument ignores that a detained noncitizen may not seek protection from any theoretical third country until *the government* has *affirmatively designated* that country for removal. The issue here is that the government is no longer routinely designating countries for removal, instead carrying out third country removals with no notice to the noncitizen in certain circumstances. *See* Dkt. 1, p. 3-5; Dkt. 2, p. 12-15. For the reasons set forth in his Petition and Motion for TRO, this practice is unlawful, and Mr. Oviedo requests that this Court order the government to provide him adequate notice and an opportunity to be heard prior to removal to a third country.

CONCLUSION

None of Respondents' arguments prove sufficient to justify Mr. Oviedo's ongoing, unlawful detention in immigration custody. Because Mr. Oviedo's ongoing detention violates the Due Process Clause, the INA, and binding treaty obligations, this Court should grant his Petition and order his immediate release. Further, this Court should declare that if the government purports to identify any third country willing to accept Mr. Oviedo, that the government be required to provide Mr. Oviedo adequate notice and an opportunity to be heard regarding removal to that country

Dated: December 2, 2025

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