UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Chuong Hong Nguyen Petitioner, Kristi Noem, Secretary of Homeland Security; Todd M. Lyons, Acting Director of Immigration and Customs Enforcement; Sylvester Ortega, San Antonio Field Office Director; Bobby Thompson, Warden of South Texas Immigration Processing Center Respondents.	**Civil Case No. 5:25-cv-01763-XR**

PETITIONER'S REPLY TO THE RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONER'S WRIT OF HABEAS CORPUS

The Fifth Amendment's Due Process Clause prohibits the government from depriving any person of liberty without due process of law. That protection extends to all "persons" within the United States, "including [noncitizens], whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citations omitted). Accordingly, courts have long recognized that even individuals subject to final removal orders retain constitutional rights. *See, e.g.*, *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 144 (W.D.N.Y. 2025) ("Noncitizens, even those subject to a final removal order, have constitutional rights . . . [a]nd while [DHS] might want to enforce this country's immigration laws efficiently, it cannot do that at the expense of fairness and due process.").

In *Zadvydas*, the Supreme Court held detention after a final order of removal under 8 U.S.C. § 1231(a)(6) is lawful only while removal is reasonably foreseeable and cannot continue indefinitely. 533 U.S. at 699–701. To implement those constitutional limits, the Department of Homeland Security (DHS) promulgated regulations at 8 C.F.R. § 241.4 and 8 C.F.R. §§ 241.13, which govern the re-detention of individuals previously released on orders of supervision. Under those regulations, DHS may revoke supervised release upon a showing of changed circumstances establishing a significant likelihood of removal in the reasonably foreseeable future, with DHS bearing the burden of proof. In their response, the Respondents have failed to identify any such changed circumstances that would justify revoking the Petitioner's OSUP or his continued detention. Because Respondents have not met their burden, the Court should find that Petitioner's detention is unlawful.

I. FACTUAL AND PROCEDURAL SUMMARY

Petitioner is a native and citizen of Vietnam who has resided in the United States for over 40 years. He has strong ties to the United States, including his U.S. citizen wife. Petitioner arrived to the United States via a long and difficult boat ride as a lawful permanent resident (LPR) in 1985,[1] when he was only seven years old. His father had previously fled Vietnam as a refugee after serving alongside the United States in the Vietnam War. In 1995, when he was only seventeen years old and with his family still recovering from the trauma of the Vietnam War and their journey to the U.S., the Petitioner was arrested and charged with a number of offenses. He eventually pled guilty to robbery and was sentenced to nine years in prison.

In 2000, the Petitioner was released early from state custody and was sent to the custody of Respondents (the former INS). He attempted to apply for relief from deportation in the form of

[1] Respondents erroneously allege that Petitioner entered the U.S. without inspection, admission, or parole. ECF No. 6-1 at 1. However, Petitioner did not enter unlawfully, he was admitted as an LPR in 1985.

a waiver under former 8 U.S.C. § 1182(c) as well as the Convention Against Torture, but both applications were denied, and he was ordered deported on September 20, 2000. Respondents then continued to detain Petitioner and attempted to deport him to Vietnam. Concluding both that the Petitioner's deportation to Vietnam was not reasonably foreseeable and that he posed neither a danger nor a flight risk, he was released and placed on an OSUP on May 7, 2001. *See* Exh. A (Order of Supervision).

For the last 24 years, the Petitioner has dutifully complied with his OSUP. He reports whenever DHS requires it. He has held work authorization and maintained gainful employment. He has had no new criminal arrests and has not violated his OSUP in any way whatsoever.

On November 12, 2025,[2] DHS re-detained the Petitioner during a routine ICE check-in. The following day, DHS served the Petitioner with a notice of revocation asserting, pursuant to 8 C.F.R. §§ 241.4 and 241.13, that the revocation was based on "changed circumstances." *See* Exh. B. The notice, however, fails to identify any such changed circumstances. Records obtained through the Freedom of Information Act (FOIA) further reflect that the Petitioner was allegedly interviewed on the day of his detention. *Id.* Nevertheless, DHS did not provide written notice of the determination and the basis for the revocation until November 13, 2025. *Id.* (Notice of Revocation of Release). Such after-the-fact notice is not meaningful notice under the Fifth Amendment's Due Process Clause.

On December 16, 2025, Petitioner filed the instant petition for a writ of habeas corpus challenging his unlawful detention. On December 29, 2025, Respondents filed their response in opposition. *See* ECF No. 6. In their response, Respondents once again fail to identify any changed

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[2] The declaration by Deportation Officer Celestina Pena states that Petitioner was taken into custody on November 13, 2025. However, as the attached records show, the apprehension was on November 12, 2025. *See* Exh. B (Form I-213).

circumstances that would justify the revocation of Petitioner's OSUP and do not deny the allegation that Petitioner was denied meaningful notice and a meaningful opportunity to respond to the revocation.[3] Instead, Respondents rely on a declaration from Supervisory Detention and Deportation Officer Celestina Pena. *See* Exh. 6-1. Critically, Officer Pena's declaration does not identify any changed circumstances supporting revocation. Nor does it address the lack of notice or opportunity to respond. Further undermining its weight, the declaration also fails to satisfy the requirements of 18 U.S.C. § 1746, which mandates that an unsworn declaration include both (i) an assertion that the statements are true and correct and (ii) an averment that the declaration is made under penalty of perjury. *See Hoang Huynh v. Bondi,* et al., No. C25-2371-KKE, 2025 WL 3718991, at *4 (W.D. Wash. Dec. 23, 2025). Officer Pena does not affirmatively state that her assertions are true and correct; instead, she states only that they are based on "ERO records" and the "Petitioner's A-file." ECF No. 6-1 at 1. This reply now follows.

II. ARGUMENT

A. DHS' redetention of Petitioner violated procedural safeguards, the *Accardi* doctrine, and the Fifth Amendment.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Fifth Amendment's Due Process Clause] protects." *Zadvydas*, 533 U.S. at 690. Petitioner has a significant liberty interest in remaining free from custody. As numerous courts have recognized, once a noncitizen has been released from custody, he or she retains a liberty interest in remaining free from detention. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("We see, therefore, that the liberty of a parolee, although

[3] Respondents attempt to justify the revocation by alleging that Petitioner failed to comply with the terms of his OSUP by not applying for a travel document to a third country, a ground not identified in the revocation notice. ECF No. 6 at 6, 8. Even assuming arguendo that this allegation was true, Respondents offer no contemporaneous evidence that it formed the basis for the revocation decision. Nor could they. Petitioner cannot obtain a travel document from a third country in which he lacks lawful status.

indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."); *Nguyen v. Bondi*, No. EP-25-CV-323-KC, 2025 WL 3120516, at *5 (W.D. Tex. Nov. 7, 2025) ("Parolees thus have a protected liberty interest in their "continued liberty."); *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 969 (N.D. Cal. 2019) ("Just as people on pre-parole, parole, and probation status have a liberty interest, so too does Ortega have a liberty interest in remaining out of custody on bond."). Here, Respondents' process for re-detaining Petitioner—including their failure to follow the required procedures for revocation of supervision—violates the governing regulations, deprives Petitioner of his Fifth Amendment due process rights, and contravenes the *Accardi* doctrine.

1. **DHS's failure to comply with 8 U.S.C. § 241.13 violated procedural safeguards and Petitioner's due process rights.**

i. **Statutory and regulatory framework governing post-order detention and supervision.**

When an individual is ordered removed, 8 U.S.C. § 1231(a) authorizes the government to detain the individual during the "removal period," defined as the 90-day period during which "the Attorney General shall remove the [noncitizen] from the United States." 8 U.S.C. §1231(a)(1)(A). The removal period begins on the latest of the following:

(1) the date the order of removal becomes administratively final;

(2) if the removal order is judicially reviewed and the court orders a stay, the date of the court's final order; and

(3) if the noncitizen is released from non-immigration detention or confinement, the date of that release.

8 U.S.C. § 1231(a)(1)(B)(i-iii). In this case, only 8 U.S.C. §1231(a)(1)(A)(1) is applicable. Critically, § 1231 "contains no provisions for pausing, reinitiating, or refreshing the removal period after the 90-day clock runs to zero." Transcript of Motions Hearing at 32, *Cordon-Salguero v. Noem, et al.*, 1:25-cv-01626-GLR (D. Md. June 18, 2025).

Once the removal period has expired, the government "may" detain a noncitizen only if they fall into one of the four categories under § 1231(a)(6): (1) individuals who are inadmissible; (2) individuals who are removable on specified grounds; (3) individuals determined to be a danger to the community; or (4) individuals determined to be unlikely to comply with the order of removal. However, under § 1231(a)(6) "[o]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute," and the noncitizen must be released. *Zadvydas*, 533 U.S. at 699–701. In *Zadvydas*, the Supreme Court held that six months is a presumptively reasonable for post-order detention. *Id.* Following *Zadvydas*, immigration regulations were revised to establish administrative review procedures for noncitizens detained beyond the removal period, including those re-detained after revocation of supervised release. *See Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025).

Under 8 C.F.R. § 241.4(e), DHS may release a noncitizen under an order of supervision only after determining, among other things, that removal is not practicable, the individual poses no danger to the community, and the individual is not a significant flight risk. Alternatively, 8 C.F.R. § 241.13(b)(1) governs release where the "Service makes a determination … that there is no significant likelihood of removal in the reasonably foreseeable future," in which case the Service may release the noncitizen under an order of supervision if the individual does not pose a danger or flight risk.

If release is revoked under § 241.4(l)(2), the revoking official must determine that one of the enumerated grounds for revocation exists and must notify the noncitizen of the reasons for revocation and provide an informal interview promptly after re-detention.[4] 8 C.F.R. § 241.4(l)(1),

[4] If the Court determines that 8 C.F.R. § 241.4 controls the Petitioner's revocation, then he asserts that the revocation is invalid under § 241.4(l)(2), which only authorizes the Executive Associate Commissioner and district director to revoke the supervision. In this case, it appears that a deportation officer, not either of the officials authorized by regulation, revoked the supervision.

(2). Similarly, under § 241.13(i)(1), (2), release may be revoked only if the noncitizen violates a condition of release or if, on account of changed circumstances, the Service determines that there is now a significant likelihood of removal in the reasonably foreseeable future. In either case, the noncitizen must be notified of the reasons for revocation and afforded an opportunity to respond. 8 C.F.R. § 241.13(i)(3); § 241.4(l)(1). As courts have repeatedly recognized, these regulations place the burden on the government to demonstrate that changed circumstances establish a significant likelihood of removal. *See, e.g.*, *Escalante*, 2025 WL 2206113, at *3; *J.L.R.P. v. Wofford*, No. 1:25-CV-01464-KES-SKO (HC), 2025 WL 3190589, at *4 (E.D. Cal. Nov. 14, 2025); *Abdi v. Trump*, No. 4:25CV3251, 2025 WL 3760669 (D. Neb. Dec. 23, 2025) ("The regulation placing the burden on the government to establish that changed circumstances justify revoking a noncitizen's supervised release pending removal reflects the general principle that the burden of proof falls on the party seeking to change the present state of affairs.").

ii. Respondents have not met their burden to demonstrate changed circumstances or foreseeable removal.

In this case, the notice of revocation states that Petitioner's release was revoked pursuant to both 8 C.F.R. §§ 241.4 and 241.13. The record, however, indicates that § 241.13 is the controlling regulation, as Petitioner's Order of Supervision states that he was released "[b]ecause the Service has not effected your deportation or removal during the period prescribed by law." *See* Exh. A. Courts have found materially identical language to indicate that § 241.13 governs. *See Hernandez-Castro v. Lyons*, No. 1:25-CV-01574-JLT-SAB, 2025 WL 3771344, at *6 (E.D. Cal. Dec. 31, 2025); *see also Trifonov v. Noem*, No. 5:25-CV-03460-DOC-JDE, 2025 WL 3763371, at *3 (C.D. Cal. Dec. 22, 2025).

Even assuming arguendo that § 241.4(l) applies, that regulation likewise requires a determination that, on account of changed circumstances, continued release is no longer

appropriate. Thus, regardless of which regulation governs, Respondents bear the burden of demonstrating that changed circumstances now establish a significant likelihood of removal in the reasonably foreseeable future.

Respondents have not met that burden. A "significant likelihood" requires "something more than a mere possibility." *Vu v. Noem*, No. 1:25-CV-01366-KES-SKO (HC), 2025 WL 311434, at *7 (E.D. Cal. Nov. 6, 2025). Respondents instead rely on generalized statistics asserting that 12 Vietnamese nationals were removed in the first quarter of FY 2025 and 58 in FY 2024. ECF No. 6 at 7. These statistics, however, provide no meaningful insight into the likelihood of Petitioner's removal—particularly where Respondents fail to identify how many of those removals involved pre-1995 Vietnamese nationals.

As the court explained in *Nguyen v. Hyde*, 788 F. Supp. 3d 144, 151 (D. Mass. 2025):

> The Second Declaration asserts that 44 individuals were removed to Vietnam in Fiscal Year 2024, and that 284 have been removed thus far in Fiscal Year 2025. These numbers do not aid in my analysis because I am missing some very pertinent information. For example, if the total number of requests that were made to Vietnam was disclosed, I might be able to gauge how likely it is that Petitioner would be removed to Vietnam. If DHS submitted 350 requests and Vietnam issued travel documents for 328 individuals, Respondents may very well have shown that removal is significantly likely in the reasonably foreseeable future. On the other hand, if DHS submitted 3,500 requests and only 328 individuals received travel documents, Respondents would not be able to meet their burden.

More fundamentally, Respondents do not identify how many of the individuals removed during Fiscal Years 2024 and 2025 were pre-1995 Vietnamese refugees similarly situated to Petitioner. This omission is especially significant given the longstanding difficulty the United States has faced in removing pre-1995 Vietnamese arrivals. *See id.* at 151–52.

Respondents also fail to identify any factors Vietnam considers in deciding whether to issue a travel document for Petitioner. DHS has been unable to secure a travel document for Petitioner for more than 24 years and offers no explanation as to why Vietnam would now issue one—

particularly where courts have recognized that "Vietnam generally does not issue travel documents to pre-1995 immigrants." *Hoang Huynh*, 2025 WL 3718991, at *3; *see also Hoac v. Becerra*, No. 2:25-CV-01740-DC-JDP, 2025 WL 1993771, at *4 (E.D. Cal. July 16, 2025) ("Respondents have not provided any details about why a travel document could not be obtained in the past, nor have they attempted to show why obtaining a travel document is more likely this time around.").

Finally, the record reflects that Petitioner's request for a travel document has been pending since October 29, 2024—well over a year. *See* ECF No. 6 at 7. Accordingly, Respondents have not demonstrated a significant likelihood of removal in the reasonably foreseeable future.

iii. Respondents failed to provide meaningful notice and a meaningful opportunity to respond.

Both § 241.4 and § 241.13 require that, before or upon revocation of supervised release, a noncitizen be notified of the reasons for revocation and afforded a meaningful opportunity to respond. *See Torres-Jurado v. Biden*, No. 19 Civ. 3595 (AT), 2023 WL 7130898, at *4 (S.D.N.Y. Oct. 29, 2023) ("Defendants cannot decide to revoke the ICE stay without affording Plaintiff an opportunity to be heard in a meaningful time and in a meaningful manner.") (internal citation and quotation marks omitted). At a minimum, this includes an opportunity for the petitioner to submit evidence relevant to whether revocation is warranted *before* a revocation decision is made. *Id.* Where notice is provided on the same day as an informal interview, the petitioner is substantially prejudiced in preparing arguments or gathering supporting documentation, resulting in a deprivation of any meaningful opportunity to be heard on the critical issue of continued liberty. *Saengphat v. Noem*, No. 3:25-CV-2909-JES-BLM, 2025 WL 3240808, at *7 (S.D. Cal. Nov. 20, 2025).

Respondents disregarded these requirements by detaining Petitioner first and issuing a notice the following day revoking his supervision based solely on a conclusory "determination that

there are changed circumstances." *See* Exh. B. District courts have repeatedly found such boilerplate language impermissibly conclusory and insufficient to provide meaningful notice. *See*, e.g., *Van Nguyen v. Noem*, No. 3:25-CV-3062-JES-VET, 2025 WL 3251374, at *3 (S.D. Cal. Nov. 21, 2025); *Saengphat*, 2025 WL 3240808, at *7; *J.L.R.P.*, 2025 WL 3190589, at *7.

Moreover, Respondents did not provide Petitioner with a meaningful opportunity to respond, as the notice was issued only after he had already been re-detained.[5] Courts have rejected such after-the-fact attempts to justify detention. *See Marquez-Amaya v. Thompson*, No. 5:25-CV-1501-JKP, 2025 WL 3654327 (W.D. Tex. Dec. 15, 2025). Accordingly, Respondents violated the notice requirements of both regulations and the Fifth Amendment's Due Process Clause.

iv. Respondents' failure to comply with the regulations governing revoking supervised released violates the *Accardi* doctrine.

Government agencies are required to follow their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."). A violation of the *Accardi* doctrine may itself constitute a violation of the Fifth Amendment's Due Process Clause and warrant a noncitizen's release from detention. *See, e.g.*, *Ceesay*, 781 F. Supp. 3d at 160 (citing *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017)).

Here, ICE's failure to comply with the regulations governing revocation of an order of supervision squarely violates the *Accardi* doctrine. Courts across the country have repeatedly held that ICE acts unlawfully when it disregards these mandatory procedures. *See Rokhfirooz v. Larose*,

[5] Even assuming Petitioner was provided notice on the date of the purported interview—which is not reflected in the record, as Officer Pena neither references nor describes such an interview—notice given on the same day as detention is not meaningful. *See Saengphat*, 2025 WL 3240808, at *7.

No. 25-CV-2053-RSH-VET, 2025 WL 2646165, at *4 (S.D. Cal. Sept. 15, 2025) ("Because DHS failed to make the determination required by Section 241.13(i)(2) for revoking Petitioner's release, the Court has no occasion to address the adequacy of the reasons stated for such a determination. The Court cannot conclude that Petitioner was "[u]pon revocation" duly notified of those reasons, or that DHS "conduct[ed] an initial informal interview promptly ... to afford [Petitioner] an opportunity to respond to the reasons for revocation in the notification," as required by Section 241.13(i)(3)."); *Rombot*, 296 F. Supp. 3d at 387–88 (ordering release where "[b]ased on ICE's violations of its own regulations, the Court concludes [the petitioner's] detention was unlawful"); *K.E.O.*, 2025 WL 2553394, at *7 (noting that "courts across the country have ordered the release of individuals" where ICE "violated their own regulations"); *Grigorian v. Bondi*, No. 25-cv-22914-RAR, 2025 WL 2604573, at *10 (S.D. Fla. Sept. 9, 2025) (holding that ICE's failure to provide the required informal interview or a meaningful opportunity to contest revocation "violates both ICE's own regulations and the Fifth Amendment Due Process Clause" and "compels [the petitioner's] release"); *Roble v. Bondi*, No. 25-CV-3196 (LMP/LIB), 2025 WL 2443453, at *5 (D. Minn. Aug. 25, 2025) (same). Because ICE failed to adhere to the regulations that govern its own authority, this Court should likewise conclude that Petitioner's detention is unlawful and order his release from unlawful detention.

2. **Petitioner's continued detention violates the Fifth Amendment because his removal from the United States is not reasonably foreseeable.**

The Respondents assert that Petitioner's detention is lawful under 8 U.S.C. § 1231(a)(6), which authorizes ICE to detain a noncitizen for the 90-day removal period following the entry of a final removal order. ECF No. 6 at 4. However, that 90-day period expired decades ago—90 days after Petitioner's order of deportation became final on October 20, 2000. Accordingly, Respondents' claim that Petitioner's *Zadvydas* challenge is premature, is without merit.

Multiple courts have held that re-detention does not restart the 90-day removal period under § 1231(a)(6). *See Villanueva v. Tate*, No. CV H-25-3364, 2025 WL 2774610 at *9 (S.D. Tex. Sept. 26, 2025) ("The government's contention that it may avoid the holding of *Zadvydas* and re-start the six-month presumptively constitutional detention clock by simply releasing and then re-detaining a noncitizen has no basis in either the statutes, the regulations, or *Zadvydas* itself."); *Nguyen*, 788 F.Supp.3d at 149 (finding *Zadvydas* six-month presumption inapplicable where a noncitizen is **re-detained** after a period of supervised release and the government fails to show a substantial likelihood that removal is reasonably foreseeable); *Tadros v. Noem*, No. 25-cv-4108, 2025 WL 1678501, at *3 (D.N.J. June 13, 2025) (holding that the six-month presumption had long lapsed during supervised release, and the government bears the burden of demonstrating that removal is reasonably foreseeable); *Sied v. Nielsen*, No. 17-cv-06785-LB, 2018 WL 1876907, at *6 (N.D. Cal. Apr. 19, 2018); *Chen v. Holder*, No. 6:14-2530, 2015 WL 13236635, at *2 (W.D. La. Nov. 20, 2015).

Even if the detention period could "restart," the constitutionality of detention does not turn on the passage of time. Rather, it hinges on whether removal is reasonably foreseeable. *See Villanueva*, 2025 WL 2774610, at *10. Here, as explained above, Petitioner has shown that there is no significant likelihood of removal in the reasonably foreseeable future, and Respondents have provided no evidence to rebut that showing. Accordingly, Petitioner's continued detention is unlawful, and habeas relief is warranted under *Zadvydas*.

B. Respondents' waived their response to the Petitioner's claim that DHS's third country removals violate due process by failing to respond.

Pursuant to § 1231(b)(3)(A), courts repeatedly held that individuals cannot be removed to a country that was not properly designated by an IJ if they have a fear of persecution or torture in that country. *See Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Kossov v. INS*, 132 F.3d

405, 408-09 (7th Cir. 1998); *El Himri v. Ashcroft*, 378 F.3d 932, 938 (9th Cir. 2004); *cf. Protsenko v. U.S. Att'y Gen.*, 149 F. App'x 947, 953 (11th Cir. 2005) (per curiam) (permitting designation of third country where individuals received "ample notice and an opportunity to be heard"). Providing such notice and opportunity to present a fear-based claim prior to deportation also implements the United States' obligations under international law. *See* 1951 United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, 19 U.S.T. 6259 (July 28, 1951); United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (Jan. 31, 1967); Refugee Act of 1980, Pub. L. 96-212, § 203(e), 94 Stat. 102, 107 (codified as amended at 8 U.S.C. § 1231(b)(3)); *INS v. Stevic*, 467 U.S. 407, 421 (1984) (noting that the Refugee Act of 1980 "amended the language of [the predecessor statute to § 1231(b)(3)], basically conforming it to the language of Article 33 of the United Nations Protocol"); *see also* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (June 26, 1987); FARRA at 2681–82 (codified at n.8 under U.S.C. § 1231) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."); U.N. Comm. Against Torture, Gen. Comment No. 4, Implementation of Article 3 by States Parties, U.N. Doc. CAT/C/GC/4 at ¶ 12 (2017) ("Furthermore, the person at risk [of torture] should never be deported to another State where he/she may subsequently face deportation to a third State in which there are substantial grounds for believing that he/she would be in danger of being subjected to torture.").

Meaningful notice and opportunity to present a fear-based claim prior to deportation to a country where a person fears persecution or torture are also fundamental due process protections

under the Fifth Amendment. *See Andriasian*, 180 F.3d at 1041; *Protsenko*, 149 F. App'x at 953; *Kossov*, 132 F.3d at 408; *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1004 (W.D. Wash. 2019). Similarly, a "last minute" IJ designation of a country during removal proceedings that affords no meaningful opportunity to apply for protection "violate[s] a basic tenet of constitutional due process." *Andriasian*, 180 F.3d at 1041. The federal government has repeatedly acknowledged these obligations. In 2005, in jointly promulgating regulations implementing 8 U.S.C. § 1231(b), the Departments of Justice and Homeland Security asserted that "[a noncitizen] will have the opportunity to apply for protection as appropriate from any of the countries that are identified as potential countries of removal under [8 U.S.C. § 1231(b)(1) or (b)(2)]." Execution of Removal Orders; Countries to Which Aliens May Be Removed, 70 Fed. Reg. 661, 671 (Jan. 5, 2005) (codified at 8 C.F.R. §§ 241, 1240, 1241). Furthermore, the agencies contemplated that, in cases where ICE sought removal to a country that was not designated in removal proceedings, namely, "removals pursuant to [8 U.S.C. § 1231(b)(1)(C)(iv) or (b)(2)(E)(vii)]," DHS would join motions to reopen "[i]n appropriate circumstances" to allow the noncitizen to apply for protection. *Id.*

Furthermore, consistent with the above-cited authorities, at oral argument in *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021), the Assistant to the Solicitor General represented that the government must provide a noncitizen with notice and an opportunity to present a fear-based claim before that noncitizen can be deported to a non-designated third country. Tr. of Oral Argument at 20-21.[6] Specifically, the following exchange between Justice Kagan and Vivek Suri, Assistant to the Solicitor General, took place:

> JUSTICE KAGAN: . . . [S]uppose you had a third country that, for whatever reason, was willing to accept [a noncitizen]. If -- if -- if that [noncitizen] was currently in withholding proceed -- proceedings, you couldn't put him on a plane to that third country, could you?

[6]Transcript of Oral Argument, *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (No. 19-897), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-897_l537.pdf.

> MR. SURI: We could after we provide the [noncitizen] notice that we were going to do that.
>
> JUSTICE KAGAN: Right.
>
> MR. SURI: But, without notice --
>
> JUSTICE KAGAN: So that's what it would depend on, right? That -- that you would have to provide him notice, and if he had a fear of persecution or torture in that country, he would be given an opportunity to contest his removal to that country. Isn't that right?
>
> MR. SURI: Yes, that's right.
>
> JUSTICE KAGAN: So, in this situation, as to these [noncitizens] who are currently in withholding proceedings, you can't put them on a plane to anywhere right now, isn't that right?
>
> MR. SURI: Certainly, I agree with that, yes.
>
> JUSTICE KAGAN: Okay. And that's not as a practical matter. That really is, as -- as you put it, in the eyes of the law. In the eyes of the law, you cannot put one of these [noncitizens] on a plane to any place, either the -- either the country that's referenced in the removal order or any other country, isn't that right?
>
> MR. SURI: Yes, that's right.

Id.

Notice is only meaningful if it is presented sufficiently in advance of the deportation to stop the deportation, is in a language the person understands, and provides for an automatic stay of removal for a time period sufficient to permit the filing of a motion to reopen removal proceedings so that a third country for removal may be designated as required under the regulations and the noncitizen may present a fear-based claim. *Andriasian*, 180 F.3d at 1041; *Aden*, 409 F. Supp. 3d at 1009 ("A noncitizen must be given sufficient notice of a country of deportation [such] that, given his capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation."). An opportunity to present a fear-based

claim is only meaningful if the noncitizen is not deported before removal proceedings are reopened. *See Aden*, 409 F. Supp. 3d at 1010 (holding that merely giving petitioner an opportunity to file a discretionary motion to reopen "is not an adequate substitute for the process that is due in these circumstances" and ordering reopening); *Dzyuba v. Mukasey*, 540 F.3d 955, 957 (9th Cir. 2008) (remanding to BIA to determinate whether designation is appropriate).

Just as Andriasian's due process was violated by the last-minute designation in removal proceedings, Petitioner's rights are violated by Respondents' third country removal procedures that do not afford him a meaningful opportunity to demonstrate the basis for fear of persecution or torture in that third country.

Although Respondents do not allege that they are actively seeking to deport Petitioner to a third country, ICE can change that decision and attempt to effectuate removal to a third country where Petitioner may be tortured with little or no notice. On July 9, 2025, the ICE Director issued written guidance to all ICE employees to immediately adhere to the Secretary of Homeland Security, Kristi Noem's, March 30, 2025, memorandum, *Guidance Regarding Third Country Removals*. Defs.' Resp. to Habeas Pet. at 3. Justice Sotomayor outlined the procedurally deficient protections of the March 30 guidance as follows:

> On March 30, DHS issued a second guidance document, which contained a two-step process for executing third-country removals. If a country provides the United States with what DHS believes to be "credible" "assurances that aliens removed from the United States will not be persecuted or tortured," then (the policy says) DHS may remove the noncitizen to that country **without any process**. See App. to Application for Stay of Injunction 54a-55a (App.) The Government says this policy permits DHS to change someone's "deportation country to Honduras . . . at 6:00 a. m., put [them] on a plane, and fl[y them] to Honduras" 15 minutes later. ECF Doc. No. 74, p. 12 (Tr. Apr. 10, 2025).
>
> In the absence of credible "assurances" from a foreign country, the policy provides, "DHS will first inform the alien of" her impending removal. App. 55a. Even so, the policy prohibits officers from providing the noncitizen with an affirmative opportunity to raise her fear of torture. Only one who "states a fear of removal" unprompted will be given a screening interview, which will take place "within **24 hours of referral**." *Ibid.* Those who

> cannot establish their eligibility for relief at the screening interview can apparently be deported immediately, without a chance to provide evidence or seek judicial review. See ECF Doc. 74, at 52-53.

Dep't of Homeland Security v. D.V.D., No. 24A1153., 2025 U.S. LEXIS 2487, at *6-7 (S. Ct. June 23, 2025) (emphasis added). Such a "process" falls short of what is required by law.

The March 30, 2025 guidance does not comply with minimal due process requirements. *D.V.D. v. United States Dep't of Homeland Sec.*, No. 25-10676-BEM, 2025 U.S. Dist. LEXIS 74197, at *50 (D. Mass. April 18, 2025) ("The March Guidance provides no process whatsoever to individuals whom DHS plans to remove to a country from which the United States has received blanket diplomatic assurances."). The Massachusetts District court has stated that it "finds it likely that Respondents have applied and will continue to apply the alleged policy of removing aliens to third countries without notice and an opportunity to be heard on fear-based claims—in other words, without due process." *Id.* at *49. Similarly, the District Court of New Jersey entered a temporary restraining order on the same grounds on July 10. *See Servellon Giron v. Noem, et al.*, 2:25-cv-6301 (D.N.J. July 10, 2025). This Court should follow suit.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Petitioner the relief sought in the habeas petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on today's date, January 5, 2026, I electronically filed the above reply by using the Court's CM/ECF system which will automatically send a notice of electronic filing to Respondents' counsel.

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