Jessie Agatstein
Cal. Bar No. 319817
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
jessie_agatstein@fd.org

Attorneys for Mr. Esmaeili

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AMIN ESMAEILI,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, PAMELA JO BONDI, Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

No.: 26-cv-203-GPC-MSB

Traverse in support of petition for writ of habeas corpus

[Civil Immigration Habeas, 28 U.S.C. § 2241]

I. Introduction

In their return, Respondents do not dispute that Amin Esmaeili should be released if his "removal is not reasonably foreseeable." *Puertas-Mendoza v. Bondi*, No. SA-25-CA-890-XR, 2025 WL 3142089, *4 (W.D. Tex. Oct. 22, 2025) (citing *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001)). Instead, Respondents submit a declaration that states that:

- Mr. Esmaeili was ordered removed to Iran and granted deferral of removal from Iran under the Convention Against Torture in 2018;
- He was released on an order of supervision the next day;
- He was arrested at the San Ysidro Port of Entry on January 6, 2025, and has remained in ICE custody for the last year;
- "ICE does not intend to remove [him] to Iran";
- Between January and September 2025, local ICE sent travel document requests for Mr. Esmaeili to Panama, the UAE, Mexico, and Qatar;
- Panama formally rejected the request and the other countries have not responded;
- Local ICE sought the help of a division of ICE at headquarters on September 22, 2025, "for assistance to identify a third country for removal";
- The headquarters ICE division informed local ICE that it was working with the Department of State to "identify an alternate country" on October 30, 2025;
- Local ICE has requested updates in November, December, and January, and has not heard back;
- When ICE identifies a third country, it will follow its "standard ICE guidance and procedures," which as summarized in the declaration match several details in the more fulsome third-country removal policy Mr. Esmaeili submitted to this Court as Exhibit D.

ECF No. 3, Declaration of Ramon Meraz, ¶¶ 8–18; *see* ECF No. 1, Exhibit D.

None of this evidence rebuts Mr. Esmaeili's claim that he was re-detained in violation of his regulatory and due process rights. He has never been given notice of why his supervision was revoked, nor an "informal interview," nor "afford[ed] . . . an opportunity to respond to the reasons for revocation." §§ 241.13(i)(3), 241.4(l)(1). He has been held for longer than the maximum "six months" authorized "to effect the conditions under which he [had] been released" for purposes of any violations of his conditions. 8 C.F.R. § 241.13(i)(1).

Nor does this information rebut Mr. Esmaeili's showing—based on his year in detention, his receipt of deferral of removal, the extremely small number of people who received such relief who have been removed in the last decade, the lack of ICE's progress in his case, and the process to which he is entitled if ICE ever does identify a third country—that there is no significant likelihood of his removal in the reasonably foreseeable future. *See* ECF No. 1 at 12–17.

Further, Respondents have no legal response to Mr. Esmaeili's argument that ICE's current third-country removal policy—to which they intend to subject Mr. Esmaeili, and the contents of which they agree with Mr. Esmaeili on—does not provide him "with adequate notice and an opportunity to be heard before removing him to a third country." *Azzo v. Noem*, No. 25-cv-3122-RBM-BJW, 2025 WL 353208, *8 (S.D. Cal. Dec. 10, 2025) (granting habeas petition and enjoining the respondents from removing the petitioner absent the process outlined in *DVD v. U.S. Dep't of Homeland Sec.*, No. 25-10676-BEM, 2025 WL 1453640 (D. Mass. May 21, 2025)). Respondents have no legal response to Mr. Esmaeili's argument that it is proper for this Court to prohibit Respondents from removing him to a third country without first providing him notice of his statutory rights to apply for asylum and withholding from those third countries and a meaningful opportunity to be heard on those claims. *See* ECF No. 1 at 18–21.

II. This Court has jurisdiction.

The government suggests in a paragraph that this Court lacks jurisdiction under 8 U.S.C. § 1252(g). *See* ECF No. 3 at 4–5. Section 1252(g) does not bar review of "all claims arising from deportation proceedings." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Courts still "have jurisdiction to decide a purely legal question that does not challenge the Attorney General's discretionary authority." *Ibarra-Perez v. United States*, 154 F.4th 989, 996 (9th Cir. 2025).

In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed." *Id.* at 997. The Court reasoned that "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Id.* Instead, § 1252(g) is "limited . . . to actions challenging the Attorney General's discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). The statute does not apply to arguments that the government "entirely lacked the authority, and therefore the discretion," to carry out a particular action. *Id.* at 800. Instead, § 1252(g) applies to "discretionary decisions that [the Secretary] actually has the power to make, as compared to the violation of his mandatory duties." *Ibarra-Perez*, 2025 WL 2461663, at *9.

The same logic applies to Mr. Esmaeili's claims. He challenges violations of ICE's mandatory duties under statutes, regulations, and the Constitution. "Though 8 U.S.C § 1252(g) precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Mr. Esmaeili's] continued detention . . . ." *Y.T.D.*, 2025 WL 2675760 at *5.

In short, Mr. Esmaeili does not challenge whether the government may "execute" his removal under 8 U.S.C § 1252(g)—only whether it may detain him up to the date it does so. This Court has jurisdiction.

III. Claim 1: ICE failed to comply with its own regulations while re-detaining Mr. Esmaeili, violating his rights under applicable regulations and due process.

A. Mr. Esmaeili did not receive notice of the reasons for his revocation or have an opportunity to contest them.

The government does not claim to have complied in any way with 8 C.F.R. §§ 241.4 and 241.13. *See* ECF No. 3 at 8.

For Mr. Esmaeili, those regulations permit his re-detention only if ICE: (1) "determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future," "on account of changed circumstances," § 241.13(i)(2); (2) "upon revocation," "notifie[s]" the noncitizen "of the reasons for revocation of his or her release," § 241.13(i)(2)(iii), 241.4(*l*)(1); and (3) "conduct[s] an initial informal interview promptly after his or her return to Service custody to afford the [person] an opportunity to respond to the reasons for revocation stated in the notification." *Id.* If it holds him for a violation of his supervision, it must follow these same notice and an opportunity to respond steps, and then it may hold him only for up to "six months." § 241.13(i)(1).

As both Mr. Esmaeili and the government agree, he "was not provided a notice of revocation or informal interview." ECF No. 3 at 8. This was an utter failure of the government to "follow [its] own regulations." *Rokhfirooz v. Larose*, __ F. Supp. 3d __, 2025 WL 2646165, *4 (S.D. Cal. 2025) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)).

B. Mr. Esmaeili need not show prejudice, although he can, because the regulations implement the core due process guarantees of notice and an opportunity to be heard while being detained.

The government's two remaining arguments on Mr. Esmaeili's regulatory claims—that Mr. Esmaeili must show prejudice, and that the regulations do not

implement due process and protected liberty interests—also fail.

First, Mr. Esmaeili need not show prejudice from these regulatory claims. "[T]he 'norm' when ICE fails to conduct an 'informal interview promptly' is that 'courts across the country have ordered the release of individuals stemming from ICE's illegal detention." *Soryadvongsa v. Noem*, No. 25-cv-2663-AGS-DDL, 2025 WL 3126821, *3 (S.D. Cal. Nov. 8, 2025) (quoting *KEO v. Woosley*, No. 4:25-CV-74-RGJ, 2025 WL 2553394, *6–*7 (W.D. Ky. Sept. 4, 2025)). "Especially in the context of civil detentions—when constitutional safeguards are at their zenith—this Court is unwilling to import such a prejudice analysis into regulations or binding caselaw that don't mention it." *Id.*

"There are two types of regulations: (1) those that protect fundamental due process rights, and (2) and those that do not." *Martinez v. Barr*, 941 F.3d 907, 924 n.11 (9th Cir. 2019) (cleaned up). "A violation of the first type of regulation . . . implicates due process concerns even without a prejudice inquiry." *Id.* (cleaned up). Here, "[t]here can be little argument that ICE's requirement that noncitizens be afforded an informal interview—arguably the most bare-bones form of an opportunity to be heard—derives from the fundamental constitutional guarantee of due process." *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 165 n.26 (W.D.N.Y. May 2, 2025). No showing of prejudice is required.

Regardless, a violation of a regulation is prejudicial where, as here, "the merits" of an immigrant's case for relief "were never considered by the agency at all." *Arizmendi-Medina v. Garland*, 69 F.4th 1043, 1052 (9th Cir. 2023). Faced with that total deprivation, a petitioner need not point to the specific "evidence [he] would have presented to support [his] assertions" or make "any allegations as to what the petitioner or his witnesses might have said." *Id.* (cleaned up).

And Mr. Esmaeili could "present plausible scenarios in which the outcome of the proceedings would have been different if a more elaborate process were provided." *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007)

(cleaned up). He would have had a very strong argument against his year's re-detention had ICE given him notice and an opportunity to respond.

For one, if Mr. Esmaeili was informed he was being detained for a violation of his supervision conditions, he would have already been released more than six months ago. If Mr. Esmaeili was informed he was being detained while ICE looked for a third country to deport him to, he could have responded that ICE remained capable of trying to "identify" a third country while Mr. Esmaeili remains at liberty—and it could have done so at any point in the last eight years in which it had released Mr. Esmaeili on an order of supervision.

Second, of course § 241.13(i) and § 241.4(l)(1) implement the basic due process protections of notice and an opportunity to be heard before being detained indefinitely. Their violation is an enforceable violation of a protected interest in being free from indefinite detention. "When someone's most basic right of freedom is taken away, that person is entitled to at least some minimal process; otherwise, we all are at risk to be detained—and perhaps deported—because someone in the government thinks we are not supposed to be here." *Ceesay*, 781 F. Supp. 3d at 165.

In arguing otherwise, the government "confuses [Mr. Esmaeili's] right to an order of supervision, which ICE indeed has discretion to grant or deny, with his right not to be detained without adequate—in fact, without *any*—process. The right to be free from detention can never be dismissed as discretionary." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

"When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it explained that the regulation was intended to provide aliens procedural due process, stating that § 241.4 'has the procedural mechanisms that . . . courts have sustained against due process challenges.'" *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641 (D. Mass. 2018) (quoting Detention of Aliens Ordered Removed, 65 FR 80281-01). And "[s]ection 241.13(i) includes provisions modeled on § 241.4(1)

to govern determinations to take an alien back into custody," Continued Detention of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, meaning that it addresses the same due process concerns as 241.4(*l*).

"The procedures in § 241.4" and § 241.13 therefore "are not meant merely to facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees." *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R. §§ 241.4, 241.13 are "intended to provide due process to individuals in [Mr. Esmaeili's] position," *Santamaria Orellana v. Baker*, No. CV 25-1788-TDC, 2025 WL 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

Because the government failed to comply with core requirements of § 241.4 and § 241.13 when revoking Mr. Esmaeili's release, it should, "[l]ike many other district courts within this circuit," "find[] that these failures constitute a violation of Petitioner's due process rights and justif[y] his release." *Bui v. Warden of Otay Mesa Detention Facility*, No. 25-cv-2111-JES, 2025 WL 2988356, *5 (S.D. Cal. Oct. 23, 2025).

IV. Respondents have not met their burden in response to Mr. Esmaeili's showing that there good reason to believe there is no significant likelihood of his removal in the reasonably foreseeable future.

"[M]ere generalizations, divorced from any documentary support," do not "suffice for *Zadvydas* purposes." *Azzo*, 2025 WL 3535208 at *4 n.3. The government has offered no more than mere generalizations in this case.

ICE began the process of Mr. Esmaeili's third-country removal in January 2025. ECF No. 3, Declaration of Ramon Meraz, ¶ 12. It has not gotten far. It has asked four countries to accept Mr. Esmaeili in the last year; one has said no, and the other three have not responded. *Id.* ¶¶ 12–13. One part of ICE asked for help from another part of ICE, who asked for help from the Department of State. Since October 2025, ICE has not heard back. It has no timetable for when it will. *Id.* ¶¶ 8–14.

Azzo is instructive. There, the district court received a similar declaration, also for a habeas petitioner who had received relief from removal to his only country of citizenship under the Convention Against Torture. *Id.* at *1. Upon surveying relevant case law, the court noted that the declaration resulted in an "even weaker evidentiary showing" than in other cases that had still granted *Zadvydas* petitions and ordered immediate relief. *Id.* *4 (discussing, among other cases, *Kamyab v. Bondi*, No. C-25-389RSL, 2025 WL 2917522 (W.D. Wash. Oct. 14, 2025), and *Phan v. Warden of Otay Mesa Detention Facility*, No. 25-cv-2369-AJB-BLM, 2025 WL 3141205 (S.D. Cal. Nov. 10, 2025)). There, as here, with "'little more than generalizations regarding the likelihood that removal will occur,'" Respondents "have not met their burden to 'respond with evidence sufficient to rebut' Petitioner's showing." *Id.*

To be more specific, as the government does not dispute, Mr. Esmaeili's receipt of "withholding of removal 'substantially increases the difficulty of removing him.'" *Marquez-Amaya v. Thompson*, No. 5:25-cv-1501-JKP, 2025 WL 3654327, *6 (W.D. Tex. Dec. 15, 2025) (quoting *Munoz-Saucedo v. Pittman*, 789 F. Supp. 3d 387, 398 (D.N.J. 2025)); *see* ECF No. 1 at 5–6, Exhibits B, C.

As Mr. Esmaeili noted, and again as the government does not dispute, historical data back up how unlikely his removal is. Of the thousands of noncitizens who receive withholding of removal every year, in recent years, only a handful have been removed. ECF No. 1 at 5–6, Exhibits B, C.

Mr. Esmaeili's individual circumstances strongly confirm he will not be among the handful of people granted withholding of removal the U.S. removes to a third country. He is an Iranian citizen, who was born in Iran, and who has only ever had immigration status in the United States and Iran. Exhibit A ¶ 9. He has no connections to any other country. *Id.*

As a result, ICE has yet to identify a new third country to try to remove Mr. Esmaeili to since it last tried four countries nearly a year ago. ECF No. 3,

Declaration of Ramon Meraz, ¶¶ 8–18. "Even when ICE has 'identified a third country,' noncitizens like Petitioner 'would be entitled to seek fear-based relief from removal to that country, which would require additional, lengthy proceedings." *Marquez-Amaya*, 2025 WL 3654327 at *6 (quoting *Munoz-Saucedo*, 789 F. Supp. 3d at 399)); *see Jama v. ICE*, 543 U.S. 335, 348 (2005) ("If [non-citizens] would face persecution or other mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); [and] relief under an international agreement prohibiting torture."); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (holding that "last minute" designation of alternative country without meaningful opportunity to apply for protection "violate[s] a basic tenet of constitutional due process").

Like in *Munoz-Saucedo*, here, "Petitioner has alleged that he cannot be removed to his country of origin, that removing similarly situated individuals has been historically rare, that ICE tried and failed to find a third country willing to accept him during the initial 90-day detention period, and that there is presently no country in the world willing to accept him." 789 F. Sup. 3d at 399. Like in *Munoz-Saucedo*, then, Mr. Esmaeili's showing has "more than suffice[d] to demonstrate that Petitioner's removal is not reasonably foreseeable." *Id.*

Finally, contrary to the government's suggestions, *Zadvydas* itself made clear that good faith efforts do not themselves show that removal is significantly likely. The petitioner in *Zadvydas* appealed a "Fifth Circuit h[olding] [that] [the petitioner's] continued detention [was] lawful as long as good faith efforts to effectuate deportation continue and [the petitioner] failed to show that deportation will prove impossible." 533 U.S. at 702 (cleaned up). The Supreme Court reversed, finding that the Fifth Circuit's good-faith-efforts standard "demand[ed] more than our reading of the statute can bear." *Id.*

Thus, "under *Zadvydas*, the reasonableness of Petitioner's detention does

not turn on the degree of the government's good faith efforts. Indeed, the *Zadvydas* court explicitly rejected such a standard. Rather, the reasonableness of Petitioner's detention turns on whether and to what extent the government's efforts are likely to bear fruit." *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5 (W.D.N.Y. Jan. 2, 2019).

Here, then, even if the headquarters part of ICE has made new "travel document requests" since it last sent an update to local ICE in October 2025, that would be "insufficient" to defeat Mr. Esmaeili's showing that his removal is not likely. *Gilali v. Warden of McHenry Cnty. Jail*, No. 19-CV-837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019). That would be "merely an assertion of good-faith efforts to secure removal; it does not make removal likely in the reasonably foreseeable future." *Id.*; *see also Zavvar*, 2025 WL 2592543, at *7 (finding the presumption of reasonableness rebutted before petitioner was detained for a full six months, despite outstanding third-country requests to Australia and Romania, because of "[t]he lack of any sign that Australia or Romania is actively considering accepting [the petitioner]").

This Court should grant Mr. Esmaeili's petition and order his release.

V. Respondents have no argument for how ICE's third-country removal process complies with existing Ninth Circuit law regarding the process due to noncitizens in third-country removal proceedings.

This Court should also prohibit ICE from removing Mr. Esmaeili to a third country without adequate notice and a meaningful opportunity to be heard regarding his statutory and related rights to seek asylum, withholding of removal, and Convention Against Torture relief as to that third country.

The government identifies certain components of the third-country removal policy challenged in his habeas petition. Compare ECF No. 3 at 4 with ECF No. 1 at 7–8, 18–22, Exhibit D. But the government does not explain how this policy complies with due process or Ninth Circuit law.

As Mr. Esmaeili explained in his habeas petition, "This policy contravenes Ninth Circuit law." *Nguyen*, __ F. Supp. 3d __, 2025 WL 2419288 at *19. "It would be impossible to comply both with Ninth Circuit precedent and the policy." *Id.* "'Failing to notify individuals who are subject to deportation that they have the right to apply . . . for withholding of deportation to the country to which they will deported violates both INS regulations and the constitutional right to due process.'" *Id.* at *18 (quoting *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999). Yet that is exactly what existing ICE policy allows for. ECF No. 1 at 7–8, 18–22, Exhibit D. The government has no response on this point.

Nor does the government articulate any reason why this Court cannot order it to provide Mr. Esmaeili with notice and a meaningful opportunity to be heard before deporting him to an as-yet unidentified third country. *See* ECF No. 9 at 6. "This relief has been granted in similar matters." *Azzo*, 2025 WL 3535208 at *8 n.6. Indeed, just this summer, the Supreme Court confirmed that habeas petitioners may raise claims regarding the process due to them in removal proceedings, and that district courts should use those habeas petitions to articulate "in the first instance the precise process necessary to satisfy the Constitution." *AARP v. Trump*, 605 U.S. 91, 95 (2025).

VI. Conclusion

This Court should order Mr. Esmaeili's immediate release. It should also order the Respondents to provide the process identified in the habeas petition before removing Mr. Esmaeili to an unidentified third country.

Respectfully submitted,

Dated: January 21, 2026

s/ Jessie Agatstein
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Esmaeili
Email: jessie_agatstein@fd.org