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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID VIKTOROVICH
NIKOLAYEV,

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.

Case No.: 25-cv-3208-LL-BJW

**Reply in Support of
Motion for Temporary
Restraining Order and
Traverse in
Support of
Petition for Writ of
Habeas Corpus**

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I. Introduction

The government's return and opposition includes the following evidence:

- Warrants for Mr. Nikolayev's immigration arrest on the date of his check-in, October 28, 2025, alleging he is "removable from the United States," ECF No. 6, Exhibit A; *accord* ECF No. 6, Exhibit D;
- A written notice of revocation provided to Mr. Nikolayev when he was arrested at his check-in, alleging that the changed circumstance was "a review of your official alien file," ECF No. 6, Exhibit B;
- A record of an informal interview conducted that day, noting Mr. Nikolayev expressed confusion for his arrest because he had "been doing everything ICE has asked for," ECF No. 6, Exhibit C;
- ICE's internal notes on Mr. Nikolayev, which lack any of his "expected but not provided" history from when ICE tried but was unable to remove him to Russia in 2018, ECF No. 6, Exhibit E; and
- A declaration from a San Diego deportation officer explaining that:
 - Seven years ago, ICE tried but was "unable to obtain a travel document to Russia" for Mr. Nikolayev, and so released him on supervision;
 - This year, a San Diego ICE division submitted an internal travel document request to another division a week after Mr. Nikolayev's arrest, on November 5, 2025;
 - On November 25, the San Diego division "resubmitted the travel document request" to the other division in response to its "request for additional information," and that that internal request "is currently pending"; and
 - ICE has removed Russian citizens to Russia this year, ECF No. 6, Declaration of Jason Cole, ¶¶ 5, 13, 14.

1 This evidence does not rebut Mr. Nikolayev’s claim that he was re-detained
2 in violation of his regulatory and due process rights to be notified of “the reasons
3 for revocation.” § 241.13(i)(2)(iii), 241.13(l)(1). “[A] reason is what makes an
4 action intelligible, accounted for, or explained”—“the specific facts supporting
5 ICE’s decision.” *Sarail A. v. Bondi*, __ F. Supp. __, 2025 WL 2533673, *5–*6 (D.
6 Minn. 2025). Those are absent here. Nor does the government’s evidence rebut
7 Mr. Nikolayev’s claim that ICE never made a determination before his re-
8 detention that “there is a significant likelihood that [he] may be removed in the
9 reasonably foreseeable future,” § 241.13(i)(2), or his claim that he was not
10 “afford[ed] . . . an opportunity to respond to the reasons for revocation,” *id.*
11 §§ 241.4(l)(1), 241.13(i)(3)—reasons he was never given.

12 Nor does the government rebut Mr. Nikolayev’s claim that there is not an
13 individualized, significant likelihood of his removal in the foreseeable future. ICE
14 tried and failed to obtain a travel document for Mr. Nikolayev seven years ago
15 because of problems specific to him. “When ICE tried to deport [him before], the
16 Russian consulate said [he] didn’t exist in their records.” ECF No. 1, Exhibit A,
17 ¶ 2. He thinks “it’s because of the chaos after the fall of the Soviet Union”; his
18 family had fled the U.S.S.R. in late 1991 or early 1992. *Id.*

19 The only evidence ICE presents now is that it has succeeded in obtaining
20 travel documents for other Russian immigrants this year. This is not a changed
21 circumstance. ICE has long been able to deport between a hundred and several
22 hundred Russians per year. *See* Exhibit D (compiling steady deportation rates
23 from the United States to Russia of between just under 100 and 400 per year since
24 2003). The year ICE could not deport Mr. Nikolayev, 2018, it successfully
25 deported 116 other Russians, *id.*—people for whom Russia *did* have records.

26 Finally, the government does not defend its third-country removal policy on
27 the merits. Instead, it argues only that because it currently does not intend to
28 remove Mr. Nikolayev to a third country, Mr. Nikolayev’s claim is moot. In light

1 of the evidence Mr. Nikolayev presented in his habeas petition that the
2 government *has* deported immigrants to third countries this year with little-to-no
3 notice, the government’s justiciability argument fails to persuade.

4 This Court should grant Mr. Nikolayev’s petition, or, in the alternative,
5 grant his motion for temporary relief in full.

6 **II. There is no jurisdictional bar to resolution of the petition or TRO.**

7 **A. Mr. Nikolayev’s third-country removal challenge is not moot.**

8 First, the government argues that Mr. Nikolayev’s third-country removal
9 challenge is nonjusticiable under Article III because ICE professes no current
10 plans to remove Mr. Nikolayev to a third country. ECF No. 6 at 3–4.

11 “There, so to speak, lies the rub.” *D.V.D. v. U.S. Dep’t of Homeland Sec.*,
12 778 F. Supp. 3d 355, 389 n.44 (D. Mass. 2025). “[A]ccording to [Respondents],
13 an individual must await notice of removal before his claim is ripe[.]” *Id.* But
14 under ICE’s policy, “there is no notice” for certain removals, and between 6 and
15 24 hours’ notice for all others. *Id.* If Mr. Nikolayev “is removed” before he can
16 raise his third-country removal challenges, Respondents will then argue that
17 “there is no jurisdiction” to bring him back to the United States. *Id.*

18 This Court need not adopt that Kafkaesque view. The government has not
19 denied that “the default procedural structure without an injunction” is “set forth in
20 DHS’s March 30 and July 9, 2025 policy memoranda”—both of which provide
21 for third-country removal with little or no notice. *Y.T.D. v. Andrews*, No. 1:25-
22 CV-01100 JLT SKO, 2025 WL 2675760, at *5 (E.D. Cal. Sept. 18, 2025). And
23 Mr. Nikolayev has “point[ed] to numerous examples of cases involving
24 individuals who DHS has attempted to remove to third countries with little or no
25 notice or opportunity to be heard.” *Id.*; see ECF No. 1 at 6–8. There are still
26 immigrants still being held without charge and without access to counsel in
27 Eswatini, South Sudan, and Rwanda, months after their swift removals to those
28 countries. See Gerald Imray, *A Cuban man deported by the US to Africa is on a*

1 *hunger strike in prison, his lawyer says*, Associated Press (Oct. 23, 2025)¹;
2 Agence France-Press, *Eswatini confirms receiving over \$5m from US to accept*
3 *deportees*, The Guardian (Nov. 17, 2025)²; *see also* ECF No. 1 at 6–7 (citing
4 Nokukhanya Musi & Gerald Imray, *10 more deportees from the US arrive in the*
5 *African nation of Eswatini*, Associated Press (Oct. 6, 2025)³). DHS has publicly
6 stated that they all have serious prior criminal convictions in the United States,
7 *see id.*, like Mr. Nikolayev.

8 “On balance,” then, “there is a sufficiently imminent risk that [Mr.
9 Nikolayev] will be subjected to improper process in relation to any third country
10 removal to warrant imposition of an injunction requiring additional process.”
11 *Y.T.D.*, 2025 WL 2675760, at *11; *accord Rebenok v. Noem*, No. 25-cv-2171-
12 TWR at ECF No. 13; *Van Nguyen v. Noem*, 2025 WL 2770623 at *3; *Nguyen v.*
13 *Noem*, No. 25-cv-2391-BTM, ECF No. 6 (S.D. Cal. Sept. 18, 2025); *Louangmilith*
14 *v. Noem*, 2025 WL 2881578, No. 25-cv-2502-JES, *4 (S.D. Cal. Oct. 9, 2025) (all
15 ordering the government to not remove petitioners to third countries). The issue is
16 not moot.

17 **B. Mr. Nikolayev’s claims are not barred by § 1252(g).**

18 Next, contrary to the government’s arguments, Section 1252(g) does not
19 bar review of “all claims arising from deportation proceedings.” *Reno v. Am.-*
20 *Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead, courts
21 “have jurisdiction to decide a purely legal question that does not challenge the
22 Attorney General's discretionary authority.” *Ibarra-Perez v. United States*, __

23
24 ¹ <https://apnews.com/article/deported-immigration-migrants-trump-eswatini-8d8aad6dd01bf0e72de06480f3c70859>.

25 ² <https://www.theguardian.com/world/2025/nov/17/eswatini-5-m-dollars-us-deportees>.

26 ³ <https://apnews.com/article/eswatini-deportees-us-trump-immigration-74b2f942003a80a21b33084a4109a0d2>.

1 F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

2 In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not
3 prohibit immigrants from asserting a “right to meaningful notice and an
4 opportunity to present a fear-based claim before [they] [are] removed.”⁴ *Id.* at *7.
5 The Court reasoned that “§ 1252(g) does not prohibit challenges to unlawful
6 practices merely because they are in some fashion connected to removal orders.”
7 *Id.* Instead, § 1252(g) is “limited . . . to actions challenging the Attorney General's
8 discretionary decisions to initiate proceedings, adjudicate cases, and execute
9 removal orders.” *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). The
10 statute does not apply to arguments that the government “entirely lacked the
11 authority, and therefore the discretion,” to carry out a particular action. *Id.* at 800.
12 Instead, § 1252(g) applies to “discretionary decisions that [the Secretary] actually
13 has the power to make, as compared to the violation of his mandatory duties.”
14 *Ibarra-Perez*, 2025 WL 2461663, at *9.

15 The same logic applies to Mr. Nikolayev’s claims. He challenges violations
16 of ICE’s mandatory duties under statutes, regulations, and the Constitution.
17 “Though 8 U.S.C § 1252(g) precludes this Court from exercising jurisdiction over
18 the executive’s decision to ‘commence proceedings, adjudicate cases, or execute
19 removal orders against any alien,’ this Court has habeas jurisdiction over the
20 issues raised here, namely the lawfulness of [Mr. Nikolayev’s] continued
21 detention and the process required in relation to third country removal.” *Y.T.D.*,
22 2025 WL 2675760 at *5.

23
24
25
26 ⁴ Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act
27 (“FTCA”) case, *id.* at *2, while this is a pre-removal habeas petition. But the
28 analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and
Mr. Nikolayev are challenging the same kind of agency action. *See Kong*, 62
F.4th at 616–17 (explaining that a decision about § 1252(g) in an FTCA case
would also affect habeas jurisdiction).

Other circuit courts agree. *See, e.g., Kong v. United States*, 62 F.4th 608, 617 (1st Cir. 2023) (“§ 1252(g) does not bar judicial review of Kong’s challenge to the lawfulness of his detention,” including ICE’s “fail[ure] to abide by its own regulations”); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) (“[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]”); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a “claim concern[ing] detention”).

So do courts in this district. As they have explained, the government’s argument that § 1252(g) strips this Court of jurisdiction “has been repeatedly ‘rejected as implausible’ by the Supreme Court.” *Soryadvongsa v. Noem*, No. 25-cv-2663-AGS, ECF No. 11 (S.D. Cal. Nov. 8, 2025) (quoting *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 19 (2020)). The government’s argument “would eliminate judicial review of immigration [detainees’] claims of unlawful detention . . . inconsistent with *Jennings v. Rodriguez* and the history of judicial review of the detention of noncitizens under 28 U.S.C. § 2241.” *Phan v. Noem*, No. 25-cv-2422-RBM, 2025 WL 2898977, *3 (S.D. Cal. Oct. 10, 2025) (collecting cases agreeing on this jurisdictional point).

In short, Mr. Nikolayev 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 or remove him to a third country without notice and an opportunity to be heard. This Court has jurisdiction.

III. Mr. Nikolayev’s claims succeed on the merits.

A. Claim One: ICE did not adhere to key regulations implementing the due process rights to notice and a meaningful opportunity to be heard, warranting release.

1. Mr. Nikolayev did not receive notice of the reasons for his revocation or have an opportunity to contest those reasons.

The government does not claim to have fully complied with 8 C.F.R. §§ 241.4 and 241.13. *See* ECF No. 6 at 10–14. For Mr. Nikolayev, those

1 regulations permit his re-detention only if ICE: (1) “determines that there is a
2 significant likelihood that the alien may be removed in the reasonably foreseeable
3 future,” § 241.13(i)(2); (2) makes that finding “on account of changed
4 circumstances,” *id.*; (3) “upon revocation,” “notifie[s]” the noncitizen “of the
5 reasons for revocation of his or her release,” § 241.13(i)(2), 241.4(l)(1); and
6 (4) “affords the [person] an opportunity to respond to the reasons for revocation,”
7 *id.*

8 As Mr. Nikolayev explained in his petition and motion, ICE did not comply
9 with these requirements.

10 First, the evidence before this Court indicates ICE did not determine that
11 there were “changed circumstances” such that, unlike in 2018, there is now “a
12 significant likelihood that [Mr. Nikolayev] may be removed in the reasonably
13 foreseeable future.” § 241.13(i)(2). ICE’s internal record for Mr. Nikolayev, its I-
14 213, indicates it lacked any information about what happened in 2018. It notes his
15 “immigration record” was “expected but not provided.” ECF No. 6, Exhibit E at
16 1. In its summary of Mr. Nikolayev’s history, the I-213 simply omits that Mr.
17 Nikolayev was detained for over eight months in 2018, that he filed a habeas
18 petition under *Zadvydas*, or that ICE released him in response to that habeas
19 petition because it could not obtain travel documents from Russia. *See id.* at 1–3.
20 And the warrants for his arrest on the day of his re-detention find only that “there
21 is probable cause to believe that NIKOLAYEV, DAVID is removable from the
22 United States.” ECF No. 6, Exhibit A; *accord* ECF No. 6, Exhibit D (noting Mr.
23 Nikolayev is “subject to removal/deportation”). Indeed, ICE did not even begin its
24 *internal* process of requesting travel documents for Mr. Nikolayev until a week
25 after it re-detained him, and it has yet to re-request those documents from Russia.
26 ECF No. 6, Declaration of Jason Cole, ¶ 13.

27 Next, upon Mr. Nikolayev’s revocation, ICE did not notify him of “the
28 reasons for revocation of his . . . release.” § 241.13(i)(2)(iii); § 241.4(l)(1). As he

1 explained in his declaration, “No one has told me what changed to make it more
2 likely that I can be deported to Russia.” ECF No. 1, Exhibit A, ¶ 5. When he was
3 arrested, he remembered only “a piece of paper saying [he] was deportable.” *Id.*
4 ¶ 4. His declaration is consistent with the written notification he received that day.
5 It informed him only that “your order of supervision has been revoked . . . based
6 on a review of your official alien file and a determination that there are changed
7 circumstances in your case.” ECF No. 6, Exhibit B. “ICE has determined that you
8 can be expeditiously removed from the United States pursuant to the outstanding
9 order of removal against you. On December 13, 2017, you were ordered removed
10 to Russia by an authorized U.S. DHS/DOJ official.” *Id.*

11 As Judge Montenegro recently explained as to an identically worded
12 written revocation notification, “ICE’s conclusory explanations for revoking
13 Petitioner’s release ‘did not offer him adequate notice of the basis for the
14 revocation decision such that he could meaningfully respond at the post-detention
15 informal interview.’” *Raskhamdee v. Noem*, No.25-cv-2816-RBM-DEB, 2025
16 WL 3102037, *4 (S.D. Cal. Nov. 6, 2025) (quoting *Diaz v. Wofford*, No. 25-cv-
17 1079-JLT-EPG, 2025 WL 2581575, *8 (E.D. Cal. Sept. 5, 2025)); accord *Quoc*
18 *Anh Nguyen v. Noem*, No. 25-cv-2792-LL-VET, 2025 WL 3101979, *2 (S.D. Cal.
19 Nov. 6, 2025) (holding that a similarly “bare-bones explanation does not contain
20 reasons for the revocation of Petitioner’s release”). “Simply to say that
21 circumstances had changed . . . is not enough. Petitioner must be told *what*
22 circumstances had changed or *why* there was now a significant likelihood of
23 removal in order to meaningfully respond to the reasons and submit evidence in
24 opposition, as allowed under § 241.13(i)(3).” *Sarail A.*, __ F. Supp. 3d __, 2025
25 WL 2533673 at *10 (emphasis in original).

26 Finally, ICE did not “afford[] [Mr. Nikolayev] an opportunity to respond to
27 the reasons for revocation.” 8 C.F.R. §§ 241.13(i)(3); 241.4(l)(1). “[W]hile an
28 informal interview apparently occurred, Petitioner could not have responded to

1 the reasons for revocation, because they were not given.” *Sarail A.*, __ F. Supp.
2 3d __, 2025 WL 2533673 at *10. Instead, Mr. Nikolayev’s informal interview
3 apparently revolved solely around the fact that he had not violated any conditions
4 of his supervision. ECF No. 6, Exhibit C; without reasons for why ICE thought
5 his removal was now likely in the foreseeable future, that was all he could bring
6 up.

7 In the last two months, multiple judges from this district have ordered
8 release for failure to follow these regulations for similar reasons. *See, e.g.*,
9 *Soryadvongsa*, 2025 WL 3125821; *Ghafouri v. Noem*, No. 25-cv-2675-RBM,
10 ECF No. 11 (S.D. Cal. Nov. 4, 2025); *Phan v. Noem*, 2025 WL 2898977, No. 25-
11 cv-2422-RBM-MSB, *3–*5 (S.D. Cal. Oct. 10, 2025); *Constantinovici v. Bondi*,
12 __ F. Supp. 3d __, 2025 WL 2898985, No. 25-cv-2405-RBM (S.D. Cal. Oct. 10,
13 2025); *Truong v. Noem*, No. 25-cv-02597-JES, ECF No. 10 (S.D. Cal. Oct. 10,
14 2025); *Khambounheuang v. Noem*, No. 25-cv-02575-JO-SBC, ECF No. 12 (S.D.
15 Cal. Oct. 9, 2025); *Rokhfirooz v. Larose*, No. 25-cv-2053-RSH, 2025 WL
16 2646165 (S.D. Cal. Sept. 15, 2025); *Sun v. Noem*, 2025 WL 2800037, No. 25-cv-
17 2433-CAB (S.D. Cal. Sept. 30, 2025); *Van Nikolayev v. Noem*, 2025 WL
18 2770623, No. 25-cv-2334-JES, *3 (S.D. Cal. Sept. 29, 2025). This Court should
19 do the same.

- 20 2. Mr. Nikolayev need not show prejudice, although he can,
21 because the regulations implement the core due process
22 guarantees of notice and an opportunity to be heard while
being detained.

23 The government’s two remaining arguments on Mr. Nikolayev’s regulatory
24 claims—that Mr. Nikolayev must show prejudice, and that the regulations do not
25 implement due process and protected liberty interests—also fail.

26 First, Mr. Nikolayev need not show prejudice from these regulatory claims.
27 “[T]he ‘norm’ when ICE fails to conduct an ‘informal interview promptly’ is that
28 ‘courts across the country have ordered the release of individuals stemming from

1 ICE’s illegal detention.” *Soryadvongsa*, 2025 WL 3125821 at *3 (quoting *KEO v.*
2 *Woosley*, No. 4:25-CV-74-RGJ, 2025 WL 2553394, *6–*7 (W.D. Ky. Sept. 4,
3 2025)). As Judge Schopler recently reasoned, “Especially in the context of civil
4 detentions—when constitutional safeguards are at their zenith—this Court is
5 unwilling to import such a prejudice analysis into regulations or binding caselaw
6 that don’t mention it.” *Id.*

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

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

23 And Mr. Nikolayev could “present plausible scenarios in which the
24 outcome of the proceedings would have been different if a more elaborate process
25 were provided.” *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir.
26 2007) (cleaned up). He would have had a very strong argument against re-
27 detention had ICE given him notice and an opportunity to respond. Importantly,
28 ICE is fully capable of trying to get a travel document while Mr. Nikolayev

1 remained at liberty. Mr. Nikolayev has complied with ICE’s requests for more
2 information while he remained at liberty for the last seven years. ECF No. 1,
3 Exhibit A ¶¶ 2–3; *accord* ECF No. 6, Exhibit B (noting that he had not “violated
4 terms of OSUP,” meaning his order of supervision). Detaining him is therefore
5 unnecessary. Mr. Nikolayev deserved a chance to make that case upon his re-
6 detention. Because ICE did not make any of the proper findings, let alone give
7 Mr. Nikolayev timely notice and a chance to contest them, he must be released.

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

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

21 “When the INS published 8 C.F.R. § 241.4 on December 21, 2000, it
22 explained that the regulation was intended to provide aliens procedural due
23 process, stating that § 241.4 ‘has the procedural mechanisms that . . . courts have
24 sustained against due process challenges.’” *Jimenez v. Cronen*, 317 F. Supp. 3d
25 626, 641 (D. Mass. 2018) (quoting Detention of Aliens Ordered Removed, 65 FR
26 80281-01). And “[s]ection 241.13(i) includes provisions modeled on § 241.4(1)
27 to govern determinations to take an alien back into custody,” Continued Detention
28 of Aliens Subject to Final Orders of Removal, 66 FR 56967-01, meaning that it

1 addresses the same due process concerns as 241.4(l). “The procedures in § 241.4”
2 and § 241.13 therefore “are not meant merely to facilitate internal agency
3 housekeeping, but rather afford important and imperative procedural safeguards to
4 detainees.” *Jimenez*, 317 F. Supp. 3d at 642. Because the procedures in 8 C.F.R.
5 §§ 241.4, 241.13 are “intended to provide due process to individuals in
6 [Mr. Nikolayev’s] position,” *Santamaria Orellana v. Baker*, No. CV 25-1788-
7 TDC, 2025 WL 2444087, *6 (D. Md. Aug. 25, 2025), they are enforceable.

8 Because the government failed to comply with core requirements of § 241.4
9 and § 241.13 when revoking Mr. Nikolayev’s release, it should, “[l]ike many
10 other district courts within this circuit,” “find[] that these failures constitute a
11 violation of Petitioner’s due process rights and justif[y] his release.” *Bui v.*
12 *Warden of Otay Mesa Detention Facility*, No. 25-cv-2111-JES, 2025 WL
13 2988356, *5 (S.D. Cal. Oct. 23, 2025).

14 **B. Claim Two: The government has not proved that there is a**
15 **significant likelihood of removal in the reasonably foreseeable**
16 **future under *Zadvydas* and § 1231.**

17 Next, government provides insufficient evidence to meet its burden to show
18 that Mr. Nikolayev will likely be removed to Russia in the reasonably foreseeable
19 future.

- 20 1. The six-month grace period passed in 2018, and
21 Mr. Nikolayev provided good reason to believe his individual
22 removal is not likely in the foreseeable future in light of ICE
23 being unable to remove him for individualized reasons.

24 The government does not dispute that the six-month *Zadvydas* grace period,
25 in which Mr. Nikolayev’s detention is presumptively reasonable, has passed. ECF
26 No. 6 at 8.

27 But the government does dispute that Mr. Nikolayev has provided “good
28 reason” to doubt the likelihood or reasonably foreseeability of his removal. *See*
29 *Moallin v. Cangemi*, 427 F. Supp. 2d 908, 928 (D. Minn. 2006). *See* ECF No. 6 at
30 8–10 (not mentioning the “good reason” standard, but arguing he has not shown
31 there is no significant likelihood of removal in the reasonably foreseeable future).

1 In so doing, the government ignores the two good reasons Mr. Nikolayev
2 provided in his petition: (1) ICE was unable to remove him in 2018 for
3 individualized reasons having to do with poor record-keeping during the fall of
4 the Soviet Union, when he emigrated from Russia, and thus released him; and
5 (2) ICE has remained unable to remove him for the last seven years.

6 The burden has therefore shifted to the government to prove that there is a
7 “significant likelihood of removal in the reasonably foreseeable future.”
8 *Zadvydas*, 533 U.S. at 701. That standard has a success element (“significant
9 likelihood of removal”) and a timing element (“in the reasonably foreseeable
10 future”). The government meets neither.

11 2. The government provides insufficient evidence to support a
12 “significant likelihood of removal” to Russia.

13 The government has not shown that Mr. Nikolayev’s removal to Russia is
14 “significant[ly] like[ly].” *Zadvydas*, 533 U.S. at 701.

15 The government notes that ICE has removed between 68 to 464 Russians in
16 each of the last five fiscal years. ECF No. 6 at 9. Yet the problem has *never* been
17 Russia generally not accepting its nationals from the United States. In 2018, the
18 year the government was unable to deport Mr. Nikolayev, it deported 116 other
19 Russians. *See* Exhibit D (cumulative deportation data from the United States to
20 Russia for each fiscal year from 2003 to part of fiscal year 2024, showing a steady
21 deportation rate of between 100 and 400 most years).

22 Instead, the problem remains specific to Mr. Nikolayev. “When ICE tried to
23 deport [Mr. Nikolayev], the Russian consulate said [he] didn’t exist in their
24 records.” ECF No. 1, Exhibit A, ¶ 2. Mr. Nikolayev thinks it is about when his
25 family left the Soviet Union, in late 1991 or early 1992. *Id.* ¶¶ 1–2. The lack of
26 records may be “because of the chaos after the fall of the Soviet Union.” *Id.* ¶ 2.

27 The government submits no evidence indicating Russia has since found
28 Mr. Nikolayev’s records, or that it now has different criteria than it did in 2018. It

1 does not appear to have any such evidence. ICE has yet to reach out to Russia
2 about Mr. Nikolayev since his arrest. It also apparently lacks information about
3 why Russia rejected Mr. Nikolayev in 2018. *See* Cole Declaration, ¶ 13
4 (explaining that ICE’s internal travel document request from one part of ICE to
5 another “is currently pending”); *see* ECF No. 6, Exhibit E at 1 (under
6 “IMMIGRATION RECORD,” noting “History was expected but not provided”).

7 Courts have “demanded an individualized analysis” of why *this* person—
8 Mr. Nikolayev—will likely be removed. *Nguyen v. Scott*, __ F. Supp. 3d __, 2025
9 WL 2419288, *17 (W.D. Wash. 2025); *see, e.g., Phan v. Warden of Otay Mesa*
10 *Detention Facility*, No. 25-cv-2369-AJB-BLM, 2025 WL 3141205, *4–*5 (S.D.
11 Cal. Nov. 10, 2025) (granting habeas petition under *Zadvydas* because “evidence
12 that Respondents have successfully removed other Vietnamese citizens is
13 insufficient to demonstrate a significant likelihood that *Petitioner* will receive a
14 travel document,” and “Respondents do not cite any chance in circumstances or
15 characteristics *specific to Petitioner*”).

16 Because “[t]he government has not provided any evidence of [Russia’s]
17 eligibility criteria or why it believes *Petitioner* now meets it,” *Nguyen*, 2025 WL
18 2419288 at *18, and because the only individualized evidence indicates Russia
19 has previously declined to provide travel documents to Mr. Nikolayev, ECF No.
20 6, Cole Declaration ¶ 6, the government’s evidence is insufficient.

21 Importantly, good faith efforts to secure a travel document do not
22 themselves satisfy *Zadvydas*. In fact, the petitioner in *Zadvydas* appealed a “Fifth
23 Circuit h[olding] [that] [the petitioner’s] continued detention [was] lawful as long
24 as good faith efforts to effectuate deportation continue and [the petitioner] failed
25 to show that deportation will prove impossible.” 533 U.S. at 702 (cleaned up).
26 The Supreme Court reversed, finding that the Fifth Circuit’s good-faith-efforts
27 standard “demand[ed] more than our reading of the statute can bear.” *Id.*

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

1 not turn on the degree of the government's good faith efforts. Indeed, the
2 *Zadvydas* court explicitly rejected such a standard. Rather, the reasonableness of
3 Petitioner's detention turns on whether and to what extent the government's
4 efforts are likely to bear fruit." *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019
5 WL 78984, at *5 (W.D.N.Y. Jan. 2, 2019). Accordingly, "the Government is
6 required to demonstrate the likelihood of not only the *existence* of untapped
7 possibilities, but also of a probability of success in such possibilities." *Elashi v.*
8 *Sabol*, 714 F. Supp. 2d 502, 506 (M.D. Pa. 2010).

9 Here, then, "[w]hile the respondent asserts that [Mr. Nikolayev's] travel
10 document requests" remain pending, "this is insufficient. It is merely an assertion
11 of good-faith efforts to secure removal; it does not make removal likely in the
12 reasonably foreseeable future." *Gilali v. Warden of McHenry Cnty.*, No. 19-CV-
13 837, 2019 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019).

14 3. The government provides no evidence to support that any
15 removal will occur "in the reasonably foreseeable future."

16 Additionally, even if ICE will eventually remove Mr. Nikolayev, the
17 government provides little evidence that removal will happen "in the reasonably
18 foreseeable future." *Zadvydas*, 533 U.S. at 701. Officer Cole provides no
19 timetable for how long travel document requests like Mr. Nikolayev's typically
20 take.

21 That is fatal. "[D]etention may not be justified on the basis that removal to
22 a particular country is likely *at some point* in the future; *Zadvydas* permits
23 continued detention only insofar as removal is likely in the *reasonably*
24 *foreseeable* future." *Hassoun*, 2019 WL 78984, at *6. "The government's active
25 efforts to obtain travel documents from the Embassy are not enough to
26 demonstrate a likelihood of removal in the reasonably foreseeable future where
27 the record before the Court contains no information to suggest a timeline on
28 which such documents will actually be issued." *Rual v. Barr*, No. 6:20-CV-06215

1 EAW, 2020 WL 3972319, at *4 (W.D.N.Y. July 14, 2020). “[I]f DHS has no idea
2 of when it might reasonably expect [Mr. Nikolayev] to be repatriated, this Court
3 certainly cannot conclude that his removal is likely to occur—or even that it *might*
4 occur—in the reasonably foreseeable future.” *Singh v. Whitaker*, 362 F. Supp. 3d
5 93, 102 (W.D.N.Y. 2019).

6 In sum, there could be “some possibility that [Russia] will accept Petitioner
7 at some point. But that is not the same as a significant likelihood that he will be
8 accepted in the reasonably foreseeable future.” *Nguyen*, 2025 WL 2419288 at
9 *16. Mr. Nikolayev therefore succeeds under *Zadvydas* for this reason, too.

10 **C. Claim Three: The government does not deny that ICE’s third-**
11 **country removal policy violates due process, and this claim is**
12 **justiciable.**

13 This Court should also prohibit ICE from removing Mr. Nikolayev to a
14 third country without adequate notice. The government does not try to defend
15 ICE’s current third-country removal policy on the merits. Instead, the government
16 says that a third-country removal challenge is not relevant because ICE professes
17 no current plans to remove Mr. Nikolayev to a third country. As Mr. Nikolayev
18 explained earlier and in his habeas petition, that does not moot his claim: The
19 extremely fast turn-around of ICE’s current third-country removal policy, of 0-to-
20 24-hours’ notice of ICE’s change of plans to pursue a third-country removal
21 before the removal itself, could realistically happen for him. *See supra* section
22 II.A; ECF No. 1 at 6–8, 16–19, Exhibit B.

23 The government has no other argument on the merits against this Court’s
24 issuance of a temporary restraining order and injunctive relief against third-
25 country removal without adequate notice and an opportunity to be heard. For the
26 reasons identified in Mr. Nikolayev’s petition and motion for temporary relief,
27 this Court should enjoin Respondents from removing him to a third country
28 absent the process identified in his prayer for relief.

IV. The remaining TRO factors decidedly favor Mr. Nikolayev.

This Court need not evaluate the other TRO factors—the Court may simply grant the petition outright. But if the Court does decide to evaluate irreparable harm, the balance of harms, and the public interest, Mr. Nikolayev should prevail.

On the irreparable harm prong, “[i]t is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). And contrary to the government’s arguments,⁵ the Ninth Circuit has specifically recognized the “irreparable harms imposed on anyone subject to immigration detention.” *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Fifth Amendment protects. *Zadvydas*, 533 U.S. at 690. Furthermore, “[i]t is beyond dispute that Petitioner would face irreparable harm from removal to a third country.” *Nguyen*, 2025 WL 2419288, at *26.

On the balance-of-equities/public-interest prong, the government is correct that there is a “public interest in prompt execution of removal orders.” *Nken v. Holder*, 556 U.S. 418, 436 (2009). But that interest is diminished here because the government likely cannot remove Mr. Nikolayev in the reasonably foreseeable future, and even if it could, it is equally “well-established that ‘our system does not permit agencies to act unlawfully even in pursuit of desirable ends.’” *Nguyen*,

⁵ The government cites three cases to support the position that illegal immigration detention is not irreparable harm. ECF No. 8 at 15. All involved immigrants who were actively appealing to the BIA, but wanted a federal court to intervene before the appeal was done. *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *1 (W.D. Wash. Feb. 19, 2021); *Cortez v. Nielsen*, 2019 WL 1508458 (N.D. Cal. Apr. 5, 2019); *Resendiz v. Holder*, 2012 WL 5451162. These courts indicated only that post-bond-hearing detention pending an ordinary BIA appeal, in which administrative exhaustion was available to the petitioner and being pursued, was not irreparable harm. *Id.* The government also cites one case for this proposition in which the court did grant a temporary restraining order ordering an immigration judge to reconsider a request for a bond hearing. *See Lopez Reyes v. Bonnar*, No. 18-cv-07429, 2018 WL 7474861, *10–11 (N.D. Cal. Dec. 24, 2018).

2025 WL 2419288, at *28 (quoting *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 766 (2021)). It also “would not be equitable or in the public’s interest to allow the [government] to violate the requirements of federal law” with respect to detention and re-detention, *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) (cleaned up), or to imperil the “public interest in preventing aliens from being wrongfully removed,” *Nken*, 556 U.S. 418, 436. *See, e.g., Sun*, 2025 WL 2800037 at *4 (explaining this and holding that the “third and fourth *Winter* factors support injunctive relief” enjoining the petitioner’s improper revocation of immigration supervision).

V. Conclusion

For all these reasons, this Court should grant the petition or enter a temporary restraining order and injunction. In either case, the Court should (1) order Mr. Nikolayev’s immediate release; (2) prohibit Respondents from re-detaining Mr. Nikolayev unless and until Respondents obtain a travel document; (3) prohibit Respondents from re-detaining Mr. Nikolayev without first following all regulatory procedures; and (4) prohibit Respondents from removing Mr. Nikolayev to a third country without following the process laid out in his prayer for relief.

Respectfully submitted,

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s/ Jessie Agatstein

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