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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

XIAO AO,

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.

CIVIL CASE NO.: 25CV3256 BAS VET

**Petition for Writ
of
Habeas Corpus
[28 U.S.C. § 2241]**

INTRODUCTION

Xiao Ao is a 20-year-old Chinese asylum seeker, who came to the United States fleeing religious persecution. An immigration judge (“IJ”) ordered him removed on July 21, 2025 but granted him withholding of removal to China. In the four months since then, Mr. Ao has heard almost nothing from ICE. An ICE agent met with him once, in August, only to say that he didn’t have time to discuss Mr. Ao’s third-country removal. Since then, Mr. Ao has seen no indications that ICE has even tried to remove him to a third country, let alone made any concrete progress in that direction. That is no surprise. Statistics show that over 98% of persons granted Convention Against Torture (“CAT”) relief and withholding are never removed. *Johnson v. Guzman Chavez*, 594 U.S. 523, 537 (2021). And there is no reasonable prospect that ICE will succeed in removing Mr. Ao where they have so often failed before. Neither he nor his family has any connection to any country other than China.

Because “there is no significant likelihood of removal in the reasonably foreseeable future,” Mr. Ao must be released. *Zadvydas v. Davis*, 533 U.S. 678 (2001). That holds true even though Mr. Ao has been detained for less than six months. **Many courts have held that *Zadvydas*’s six-month presumptively reasonable removal period is “just that—a presumption,” which can be rebutted with sufficiently compelling evidence.** *Hoang Trinh v. Homan*, 333 F. Supp. 3d 984, 994 (C.D. Cal. 2018); *see also Cruz Medina v. Noem*, No. 25-CV-1768-ABA, 2025 WL 2306274, at *7 n.5 (D. Md. Aug. 11, 2025); *Munoz-Saucedo v. Pittman*, 789 F. Supp. 3d 387, 397 (D.N.J. 2025); *Zavvar v. Scott*, No. CV 25-2104-TDC, 2025 WL 2592543, at *5 (D. Md. Sept. 8, 2025); *Sweid v. Cantu*, No. CV-25-03590-PHX-DWL (CDB), 2025 WL 3033655, at *3 (D. Ariz. Oct. 30, 2025); *Puertas Mendoza v. Bondi*, No. SA-25-CA-00890-XR, 2025 WL 3142089, at *2 (W.D. Tex. Oct. 22, 2025); *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641 n.6 (D. Mass. 2018); *Ali v. Dep’t of Homeland Sec.*, 451 F. Supp. 3d 703, 707 (S.D.

1 Tex. 2020); *Villanueva v. Tate*, No. CV H-25-3364, 2025 WL 2774610, at *9 (S.D.
 2 Tex. Sept. 26, 2025); *Douglas v. Baker*, No. 25-CV-2243-ABA, 2025 WL 2687354,
 3 at *3 (D. Md. Sept. 19, 2025); *Jamal v. Sessions*, No. 5:18-06015-CV-RK, 2018
 4 WL 1440609, at *2 (W.D. Mo. Mar. 22, 2018); *Cesar v. Achim*, 542 F. Supp. 2d
 5 897, 902 (E.D. Wis. 2008). Because Mr. Ao can prove that he will not be removed
 6 in the reasonably foreseeable future, he must be released.

7 STATEMENT OF FACTS

8 **I. Mr. Ao came to the United States fleeing religious persecution, and an** 9 **immigration judge granted him withholding of removal.**

10 Xiao Ao fled to the United States from China, where he was persecuted for
 11 being a Christian. *Id.* He arrived in the U.S. on December 26, 2024. Exh. A at ¶ 1.
 12 Border patrol immediately arrested and detained him. *Id.* at ¶ 2.

13 He was placed in removal proceedings, where he made fear-based claims.
 14 *Id.* at ¶ 3. The immigration judge ordered him removed on July 21, 2025, but he
 15 was granted withholding of removal to China. *Id.* Nevertheless, ICE continued
 16 detaining him. *Id.*

17 Since then, Mr. Ao has met with ICE about his removal only once. *Id.* at
 18 ¶ 4. ICE arranged a meeting with Mr. Ao in August, saying that ICE would talk to
 19 him about third-country removal. *Id.* But when the ICE agent arrived at the
 20 meeting, he said that he did not have time to talk to Mr. Ao, so they would have to
 21 talk about it next time. *Id.* ICE never met with him about his removal again. *Id.*;
 22 *see also id.* at ¶ 6 (noting that he received a custody review but that removal was
 23 not discussed).

24 Sometimes, when agents came into Mr. Ao's cell block, he would try to ask
 25 them about his case. *Id.* at ¶ 5. But because he does not speak English, it was hard
 26 to communicate with them. *Id.* Agents did not give him any information but just
 27 told him to wait. *Id.*
 28

1 He has waited now for nearly four months, with no indication that ICE is
2 working on his removal. ICE has never asked him to fill out paperwork for
3 removal to a third country. *Id.* at ¶ 7. He has never had an interview or phone call
4 with any third-country consulate. *Id.* ICE has never identified a third country that
5 might take him. *Id.* He knows of no efforts that ICE is making to remove him to
6 any particular third country. *Id.*

7 He also has strong reasons to doubt that third-country removal is possible.
8 He is not a citizen of any country other than China. *Id.* at ¶ 8. His parents are both
9 Chinese citizens. *Id.* He has never lived in any country other than China. *Id.* And
10 he knows of no other reason why a third country would accept him. *Id.*

11 **II. The government is carrying out deportations to third countries without**
12 **providing sufficient notice and opportunity to be heard.**

13 When immigrants cannot be removed to their home country, ICE has begun
14 deporting those individuals to third countries without adequate notice or a
15 hearing. The Trump administration reportedly has negotiated with at least 58
16 countries to accept deportees from other nations. Edward Wong et al, *Inside the*
17 *Global Deal-Making Behind Trump's Mass Deportations*, N.Y. Times, June 25,
18 2025. On June 25, 2025, the New York Times reported that seven countries—
19 Costa Rica, El Salvador, Guatemala, Kosovo, Mexico, Panama, and Rwanda—
20 had agreed to accept deportees who are not their own citizens. *Id.* Since then, ICE
21 has carried out highly publicized third country deportations to South Sudan and
22 Eswatini.

23 The Administration has reportedly negotiated with countries to have many
24 of these deportees imprisoned in prisons, camps, or other facilities. The
25 government paid El Salvador about \$5 million to imprison more than 200
26 deported Venezuelans in a maximum-security prison notorious for gross human
27 rights abuses, known as CECOT. *See id.* In February, Panama and Costa Rica
28 took in hundreds of deportees from countries in Africa and Central Asia and

1 imprisoned them in hotels, a jungle camp, and a detention center. *Id.*; Vanessa
 2 Buschschluter, *Costa Rican court orders release of migrants deported from U.S.*,
 3 BBC (Jun. 25, 2025). On July 4, 2025, ICE deported eight men, including one
 4 pre-1995 Vietnamese refugee, to South Sudan. *See Wong, supra*. On July 15, ICE
 5 deported five men to the tiny African nation of Eswatini, including one man from
 6 Vietnam, where they are reportedly being held in solitary confinement. Gerald
 7 Imray, *3 Deported by US held in African Prison Despite Completing Sentences*,
 8 *Lawyers Say*, PBS (Sept. 2, 2025). Many of these countries are known for human
 9 rights abuses or instability. For instance, conditions in South Sudan are so
 10 extreme that the U.S. State Department website warns Americans not to travel
 11 there, and if they do, to prepare their will, make funeral arrangements, and appoint
 12 a hostage-taker negotiator first. *See Wong, supra*.

13 On June 23 and July 3, 2025, the Supreme Court issued a stay of a national
 14 class-wide preliminary injunction issued in *D.V.D. v. U.S. Department of*
 15 *Homeland Security*, No. CV 25-10676-BEM, 2025 WL 1142968, at *1, 3 (D.
 16 Mass. Apr. 18, 2025), which required ICE to follow statutory and constitutional
 17 requirements before removing an individual to a third country. *U.S. Dep't of*
 18 *Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025) (mem.); *id.*, No. 24A1153, 2025
 19 WL 1832186 (U.S. July 3, 2025).¹ On July 9, 2025, ICE rescinded previous
 20 guidance meant to give immigrants a “‘meaningful opportunity’ to assert claims
 21

22
 23 ¹ Though the Supreme Court’s order was unreasoned, the dissent noted that the
 24 government had sought a stay based on procedural arguments applicable only to
 25 class actions. *Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025)
 26 (Sotomayor, J., dissenting). Thus, “even if the Government [was] correct that
 27 classwide relief was impermissible” in *D.V.D.*, Respondents still “remain[]
 28 obligated to comply with orders enjoining [their] conduct with respect to individual
 plaintiffs” like Mr. Ao. *Id.* Thus, the Supreme Court’s decision does not override
 courts’ authority to grant individual injunctive relief. *See Ao v. Scott*, No. 2:25-CV-
 01398, 2025 WL 2419288, at *20–23 (W.D. Wash. Aug. 21, 2025).

1 for protection under the Convention Against Torture (CAT) before initiating
2 removal to a third country” like the ones just described. Exh. B.

3 Under the new guidance, ICE may remove any immigrant to a third country
4 “without the need for further procedures,” as long as—in the view of the State
5 Department—the United States has received “credible” “assurances” from that
6 country that deportees will not be persecuted or tortured. *Id.* at 1. If a country fails
7 to credibly promise not to persecute or torture releasees, ICE may still remove
8 immigrants there with minimal notice. *Id.* Ordinarily, ICE must provide 24 hours’
9 notice. But “[i]n exigent circumstances,” a removal may take place in as little as
10 six hours, “as long as the alien is provided reasonably means and opportunity to
11 speak with an attorney prior to the removal.” *Id.*

12 Upon serving notice, ICE “will not affirmatively ask whether the alien is
13 afraid of being removed to the country of removal.” *Id.* (emphasis original). If the
14 noncitizen “does not affirmatively state a fear of persecution or torture if removed
15 to the country of removal listed on the Notice of Removal within 24 hours, [ICE]
16 may proceed with removal to the country identified on the notice.” *Id.* at 2. If the
17 noncitizen “does affirmatively state a fear if removed to the country of removal”
18 then ICE will refer the case to U.S. Citizenship and Immigration Services
19 (“USCIS”) for a screening for eligibility for withholding of removal and
20 protection under the Convention Against Torture (“CAT”). *Id.* at 2. “USCIS will
21 generally screen within 24 hours.” *Id.* If USCIS determines that the noncitizen
22 does not meet the standard, the individual will be removed. *Id.* If USCIS
23 determines that the noncitizen has met the standard, then the policy directs ICE to
24 either move to reopen removal proceedings “for the sole purpose of determining
25 eligibility for [withholding of removal protection] and CAT” or designate another
26 country for removal. *Id.*

CLAIMS FOR RELIEF

Zadvydas v. Davis holds that immigration statutes do not authorize the government to detain immigrants like Mr. Ao, for whom there is “no significant likelihood of removal in the reasonably foreseeable future.” 533 U.S. 678, 701 (2001). Though *Zadvydas* recognized that detention pending removal is “presumptively reasonable” for six months after a removal order becomes final, *id.*, many courts have concluded that that presumption is rebuttable. Mr. Ao has rebutted the presumption here, proving that he will not be removed in the reasonably foreseeable future. Regardless, ICE may not remove him to a third country without notice and an adequate opportunity to make a fear-based claim. This Court should therefore grant the petition on both counts.

I. Count 1: Mr. Ao’s detention violates *Zadvydas* and 8 U.S.C. § 1231.

A. Legal background

Mr. Ao’s indefinite detention violates the statute authorizing detention, 8 U.S.C. § 1231(a)(6). In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court considered a problem affecting people like Mr. Ao. Federal law requires ICE to detain an immigrant during the “removal period,” which typically spans the first 90 days after the immigrant is ordered removed. 8 U.S.C. § 1231(a)(1)-(2). After that 90-day removal period expires, detention becomes discretionary—ICE may detain the migrant while continuing to try to remove them. *Id.* § 1231(a)(6). Ordinarily, this scheme would not lead to excessive detention, as removal happens within days or weeks. But some detainees cannot be removed quickly. Perhaps their removal “simply require[s] more time for processing,” or they are “ordered removed to countries with whom the United States does not have a repatriation agreement,” or their countries “refuse to take them,” or they are “effectively ‘stateless’ because of their race and/or place of birth.” *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1104 (9th Cir. 2001). In these and other circumstances, detained immigrants can find themselves trapped in detention for

1 months, years, decades, or even the rest of their lives.

2 If federal law were understood to allow for “indefinite, perhaps permanent,
3 detention,” it would pose “a serious constitutional threat.” *Zadvydas*, 533 U.S. at
4 699. In *Zadvydas*, the Supreme Court avoided the constitutional concern by
5 interpreting § 1231(a)(6) to incorporate implicit limits. *Id.* at 689.

6 As an initial matter, *Zadvydas* held that detention is “presumptively
7 reasonable” for at least six months. *Id.* at 701. This acts as a kind of grace period
8 for effectuating removals.

9 Following the six-month grace period, courts must use a burden-shifting
10 framework to decide whether detention remains authorized. First, the petitioner
11 must make a prima facie case for relief: He must prove that there is “good reason
12 to believe that there is no significant likelihood of removal in the reasonably
13 foreseeable future.” *Id.*

14 If he does so, the burden shifts to “the Government [to] respond with
15 evidence sufficient to rebut that showing.” *Id.* Ultimately, then, the burden of
16 proof rests with the government: The government must prove that there is a
17 “significant likelihood of removal in the reasonably foreseeable future,” or the
18 immigrant must be released. *Id.*

19 **B. Courts across the country agree that the six-month presumption**
20 **is rebuttable.**

21 Mr. Ao is different from many *Zadvydas* petitioners in that he has not been
22 detained for six months after his removal order became final. But as *Zadvydas*
23 makes clear, detention is only “*presumptively* reasonable” for six months. 533 U.S.
24 at 701 (emphasis added). Numerous courts have concluded that the six-month
25 presumption is “just that, a presumption, one that can be rebutted upon a showing
26 that removal is *not* reasonably foreseeable.” *Cruz Medina v. Noem*, No. 25-CV-
27 1768-ABA, 2025 WL 2306274, at *7 n.5 (D. Md. Aug. 11, 2025); accord *Munoz-*
28 *Saucedo v. Pittman*, 789 F. Supp. 3d 387, 397 (D.N.J. 2025); *Zavvar v. Scott*, No.

CV 25-2104-TDC, 2025 WL 2592543, at *5 (D. Md. Sept. 8, 2025); *Trinh v. Homan*, 466 F. Supp. 3d 1077, 1093 (C.D. Cal. 2020); *Sweid v. Cantu*, No. CV-25-03590-PHX-DWL (CDB), 2025 WL 3033655, at *3 (D. Ariz. Oct. 30, 2025); *Puertas Mendoza v. Bondi*, No. SA-25-CA-00890-XR, 2025 WL 3142089, at *2 (W.D. Tex. Oct. 22, 2025); *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 641 n.6 (D. Mass. 2018); *Ali v. Dep't of Homeland Sec.*, 451 F. Supp. 3d 703, 707 (S.D. Tex. 2020); *Villanueva v. Tate*, No. CV H-25-3364, 2025 WL 2774610, at *9 (S.D. Tex. Sept. 26, 2025); *Douglas v. Baker*, No. 25-CV-2243-ABA, 2025 WL 2687354, at *3 (D. Md. Sept. 19, 2025); *Jamal v. Sessions*, No. 5:18-06015-CV-RK, 2018 WL 1440609, at *2 (W.D. Mo. Mar. 22, 2018). “A close reading of *Zadvydas*” refutes any attempt to turn that presumption into a bright-line rule. *Cesar*, 542 F. Supp. 2d at 902.

Prohibiting all detention challenges before the six-month mark would go against *Zadvydas*’s most fundamental holding: that “if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.” *Zadvydas*, 533 U.S. at 699–700. “The fundamental principle in *Zadvydas* . . . is that where removal is not reasonably foreseeable, detention is unconstitutional.” *Cesar*, 542 F. Supp. 2d at 902. “*Zadvydas* unequivocally held that ‘once removal is no longer reasonably foreseeable, continued detention is no longer authorized.’” *Puerta Mendoza*, 2025 WL 3142089, at *2. It follows that “[i]f there comes a point during the six-month period at which it is ‘no longer reasonably foreseeable’ that a person will actually be removed, then detention ‘is no longer authorized,’” and the petitioner must be released. *Cruz Medina*, 2025 WL 2306274, at *6 (quoting *Zadvydas*, 533 U.S. at 699–700). To hold otherwise would be to render *Zadvydas* “internally inconsistent.” *Zavvar*, 2025 WL 2592543, at *5.

Zadvydas did not back away from that fundamental principle when describing the six-month presumption. “At no point did the *Zadvydas* Court preclude a noncitizen from challenging their detention before the end of the

1 presumptively reasonable six-month period.” *Trinh*, 466 F. Supp. 3d at 1092. To
2 the contrary, the Court said that it was “adopting a *presumption* of reasonableness
3 before the six-month period expires. A presumption is just that: a default, a starting
4 point.” *Cruz Medina*, 2025 WL 2306274, at *5. “The *Zadvydas* Court did not say
5 that the presumption is irrebuttable, and there is nothing inherent in the operation
6 of the presumption itself that requires it to be irrebuttable.” *Cesar*, 542 F. Supp. 2d
7 at 903; *accord Sweid*, 2025 WL 3033655, at *3 (“*Zadvydas* did not hold that this
8 presumption is conclusive in all cases and under all sets of facts.”).

9 Furthermore, when introducing the six-month presumption, the Court “noted
10 that such presumptions are intended to ‘guide lower court determinations.’” *Zavvar*,
11 2025 WL 2592543, at *5. A “guide” is “not a categorical prohibition on claims
12 challenging detention less than six months.” *Trinh*, 466 F. Supp. 3d at 1093.

13 Finally, *Zadvydas* analogized to the “similar” rule in *County of Riverside v.*
14 *McLaughlin*, 500 U.S. 44, 56–58 (1991), in which the Court “adopt[ed] [a]
15 presumption, based on lower court estimate of time needed to process arrestee, that
16 48-hour delay in probable-cause hearing after arrest is reasonable, hence
17 constitutionally permissible.” *Zadvydas*, 533 U.S. at 701 (describing *Riverside*).
18 *Riverside*’s 48-hour rule “is a rebuttable presumption.” *Cesar*, 542 F. Supp. 2d at
19 904. It stands to reason that “the *Zadvydas* presumption, like the *Riverside*
20 presumption, is rebuttable.” *Munoz-Saucedo*, 789 F. Supp. 3d at 397.

21 In short, then, “[t]he presumption of reasonableness is the default, but if a
22 person ‘can prove’ that his removal is not reasonably foreseeable, then he can
23 overcome that presumption.” *Munoz-Saucedo*, 789 F. Supp. 3d at 397 (quoting
24 *Riverside*, 500 U.S. at 56).

1 **C. Several courts have found that petitioners rebutted the**
2 **presumption where, as here, their removal order prohibited their**
3 **deportation to their home country and there was no apparent**
4 **prospect of third-country removal.**

5 Because Mr. Ao must rebut the six-month presumption, he bears the burden
6 to show that “there is no significant likelihood of removal in the reasonably
7 foreseeable future.” *Zadvydas*, 533 U.S. at 701. Multiple courts have found that
8 petitioners met that burden when (1) they received withholding or CAT relief and
9 (2) their individual circumstances otherwise suggested a low likelihood of third-
10 country removal. *Villanueva*, 2025 WL 2774610, at *10; *Puertas Mendoza*, 2025
11 WL 3142089, at *2; *Munoz-Saucedo*, 789 F. Supp. 3d at 399–400. Mr. Ao’s case
12 has both features.

13 First, the IJ’s order prohibits Mr. Ao’s removal to his home country of China,
14 “which is the only country to which he has a claim to citizenship or legal
15 immigration status.” *Villanueva*, 2025 WL 2774610, at *10. “This substantially
16 increases the difficulty of removing him.” *Munoz-Saucedo*, 789 F. Supp. 3d at 398.

17 That’s because “alternative-country removal is rare.” *Johnson v. Guzman-*
18 *Chavez*, 594 U.S. 523, 537 (2021). Between 2020 and 2023, data apparently show
19 that “ICE removed . . . only *five* non-citizens granted withholding or CAT relief to
20 alternative countries.” *Munoz-Saucedo v. Pittman*, 789 F. Supp. 3d 387, 398 (D.N.J.
21 2025) (emphasis in original). In fiscal year 2017, there were at most 21 people of
22 the thousands with withholding of removal deported to *any* country; that number
23 includes dual citizens who only received withholding from one of their two other
24 countries of origin. See American Immigration Council & National Immigrant
25 Justice Center, *The Difference Between Asylum and Withholding of Removal*, 7
26 (Oct. 2020)² (cited in *Guzman-Chavez*, 594 U.S. at 537). That means that “less than

27 ²Available at [https://www.americanimmigrationcouncil.org/wp-](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the-difference-between-asylum-and-withholding-of-removal.pdf)
28 [content/uploads/2025/01/the-difference-between-asylum-and-withholding-of-](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the-difference-between-asylum-and-withholding-of-removal.pdf)
 [removal.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the-difference-between-asylum-and-withholding-of-removal.pdf)

1 two percent of those granted withholding of removal were deported to a third
2 country.” *Puertas-Mendoza*, 2025 WL 3142089 at *3 (citing American
3 Immigration Council & National Immigrant Justice Center, *supra*).

4 “[T]hat is not simply a matter of United States policy—foreign governments
5 ‘routinely deny’ requests to receive people who lack a connection to the would-be
6 receiving country.” *Puertas-Mendoza*, 2025 WL 3142089 at *3. “The reason so few
7 people are deported to third countries is because,” while “customary international
8 law holds that a country has a duty to accept the return of its nationals,” usually,
9 “countries have no incentive to accept non-citizens.” American Immigration
10 Council & National Immigrant Justice Center, *supra*, at 7.

11 Here, Mr. Ao’s individual circumstances strongly suggest that he will not be
12 among the handful of people removed to a third country. Mr. Ao is a Chinese
13 citizen, and he does not have citizenship in any other country. Exh. A at ¶ 8. He
14 lived in China all his life. *Id.* His parents are Chinese citizens, too. *Id.* He knows of
15 no reason why any other country would be incentivized to accept him for removal.
16 *Id.*

17 *Second*, ICE does not appear to have made any progress in removing Mr. Ao
18 to a third country in the four months since he was ordered removed—indeed, it is
19 not clear that ICE has made any effort to do so. Exh. A at ¶ 3. The governing statute
20 provides that ICE “shall remove the alien from the United States within a period of
21 90 days.” 8 U.S.C. § 1231(a)(1)(A). Yet in the four months since he was ordered
22 removed, ICE met with Mr. Ao about his removal only once, in August. *Id.* at ¶ 4.
23 The agent said that he was too busy for the meeting, and they would talk about
24 Mr. Ao’s third-country removal at their next meeting. *Id.* He never came back. *Id.*
25 And no other ICE officer has had any updates about Mr. Ao’s case. *Id.* at ¶ 5. He
26 has not been informed of any efforts that ICE is making to remove him anywhere.
27 *Id.* at ¶ 7.
28

1 “[I]f [a] plaintiff c[an] show . . . that the government [is] not taking steps to
2 effectuate his removal, then . . . removal likely would not be reasonably
3 foreseeable, and detention would therefore be unconstitutional.” *Cesar v. Achim*,
4 542 F. Supp. 2d 897, 905 (E.D. Wis. 2008). Given that third country removal is
5 already exceedingly unlikely, a “lack of effort only reinforces the conclusion that
6 the Petitioner’s removal is not likely to occur in the reasonably foreseeable future.”
7 *Kacanik v. Elwood*, No. CIV.A. 02-8019, 2002 WL 31520362, at *5 (E.D. Pa. Nov.
8 8, 2002); *see also Conchas-Valdez v. Casey*, 25-cv-2469-DMS, Dkt. 9, at 6 (S.D.
9 Cal. Oct. 6, 2025) (granting a petition in part because “the Government’s minimal
10 work on [the] case . . . [did] not instill confidence that it will be able to secure [CAT]
11 Petitioner’s removal in the reasonably foreseeable future”).

12 Even if ICE were making efforts behind the scenes, so far, it appears that
13 none have borne fruit. The third-country removal process has not progressed even
14 to the point that ICE has needed Mr. Ao to fill out any paperwork. *Id.* at ¶ 7. Nor
15 has he been asked to call or interview with any consulate. *Id.* And ICE has never
16 identified a third country that might take Mr. Ao, let alone told him why that other
17 country would agree to take him. *Id.*

18 That matters, because even when Mr. Ao bears the burden, the *Zadvydas*
19 standard remains the same: He must show that removal is not significantly likely in
20 the reasonably foreseeable future. *See Cesar*, 542 F. Supp. 2d at 903. And *Zadvydas*
21 itself made clear that good faith efforts do not themselves show that removal is
22 significantly likely. The petitioner in *Zadvydas* appealed a “Fifth Circuit h[olding]
23 [that] [the petitioner’s] continued detention [was] lawful as long as good faith
24 efforts to effectuate deportation continue and [the petitioner] failed to show that
25 deportation will prove impossible.” 533 U.S. at 702 (cleaned up). The Supreme
26 Court reversed, finding that the Fifth Circuit’s good-faith-efforts standard
27 “demand[ed] more than our reading of the statute can bear.” *Id.*

1 Thus, “under *Zadvydas*, the reasonableness of Petitioner's detention does not
2 turn on the degree of the government's good faith efforts. Indeed, the *Zadvydas*
3 court explicitly rejected such a standard. Rather, the reasonableness of Petitioner's
4 detention turns on whether and to what extent the government's efforts are likely to
5 bear fruit.” *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984, at *5
6 (W.D.N.Y. Jan. 2, 2019). Here, then, it is possible that ICE is making “travel
7 document requests,” *Gilali v. Warden of McHenry Cnty. Jail*, No. 19-CV-837, 2019
8 WL 5191251, at *5 (E.D. Wis. Oct. 15, 2019)—though no evidence of that has
9 filtered through to Mr. Ao. But mere efforts would be “insufficient” to defeat
10 Mr. Ao’s showing that removal is not likely. *Id.* That would be “merely an assertion
11 of good-faith efforts to secure removal; it does not make removal likely in the
12 reasonably foreseeable future.” *Id.*; *see also Zavvar*, 2025 WL 2592543, at *7
13 (finding the presumption rebutted, despite outstanding third-country requests to
14 Australia and Romania, because of “[t]he lack of any sign that Australia or Romania
15 is actively considering accepting [the petitioner]”).

16 *Third*, even if ICE could eventually remove Mr. Ao to a third country, there
17 is no reason to think that that will happen in the reasonably foreseeable future. The
18 difficulty of third-country removal suggests that ICE will not quickly prove
19 successful. And even if ICE received travel documents for a third country, Mr. Ao
20 “would be entitled to seek fear-based relief from removal to that country, which
21 would require additional, lengthy proceedings.” *Munoz-Saucedo*, 789 F. Supp. 3d
22 at 399; *accord Villanueva*, 2025 WL 2774610, at *10 (“[A]ny efforts to remove
23 Villanueva to a third country would likely be delayed by proceedings contesting his
24 removal to the third country finally identified.”).

25 For all of these reasons, Mr. Ao has rebutted the presumption, and he must
26 be released.
27
28

1 **II. Count 2: ICE may not remove Mr. Ao to a third country without**
2 **adequate notice and an opportunity to be heard.**

3 In addition to unlawfully detaining him, ICE's policies threaten Mr. Ao's
4 removal to a third country without adequate notice and an opportunity to be heard.
5 These policies violate the Fifth Amendment, the Convention Against Torture, and
6 implementing regulations.

7 **A. Legal background**

8 U.S. law enshrines protections against dangerous and life-threatening
9 removal decisions. By statute, the government is prohibited from removing an
10 immigrant to any third country where they may be persecuted or tortured, a form
11 of protection known as withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A). The
12 government "may not remove [a noncitizen] to a country if the Attorney General
13 decides that the [noncitizen's] life or freedom would be threatened in that country
14 because of the [noncitizen's] race, religion, nationality, membership in a particular
15 social group, or political opinion." *Id.*; *see also* 8 C.F.R. §§ 208.16, 1208.16.
16 Withholding of removal is a mandatory protection.

17 Similarly, Congress codified protections enshrined in the CAT prohibiting
18 the government from removing a person to a country where they would be tortured.
19 *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231 note) ("It shall be the policy of
20 the United States not to expel, extradite, or otherwise effect the involuntary return
21 of any person to a country in which there are substantial grounds for believing the
22 person would be in danger of being subjected to torture, regardless of whether the
23 person is physically present in the United States."); 28 C.F.R. § 200.1; *id.*
24 §§ 208.16-208.18, 1208.16-1208.18. CAT protection is also mandatory.

25 To comport with the requirements of due process, the government must
26 provide notice of the third country removal and an opportunity to respond. Due
27 process requires "written notice of the country being designated" and "the statutory
28 basis for the designation, i.e., the applicable subsection of § 1231(b)(2)." *Aden v.*

1 *Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019); *accord D.V.D. v. U.S.*
2 *Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D.
3 Mass. May 21, 2025); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

4 The government must also “ask the noncitizen whether he or she fears
5 persecution or harm upon removal to the designated country and memorialize in
6 writing the noncitizen’s response. This requirement ensures DHS will obtain the
7 necessary information from the noncitizen to comply with section 1231(b)(3) and
8 avoids [a dispute about what was said].” *Aden*, 409 F. Supp. 3d at 1019. “Failing to
9 notify individuals who are subject to deportation that they have the right to apply
10 for asylum in the United States and for withholding of deportation to the country to
11 which they will be deported violates both INS regulations and the constitutional
12 right to due process.” *Andriasian*, 180 F.3d at 1041.

13 If the noncitizen claims fear, measures must be taken to ensure that the
14 noncitizen can seek asylum, withholding, and relief under CAT before an
15 immigration judge in reopened removal proceedings. The amount and type of
16 notice must be “sufficient” to ensure that “given [a noncitizen’s] capacities and
17 circumstances, he would have a reasonable opportunity to raise and pursue his
18 claim for withholding of deportation.” *Aden*, 409 F. Supp. 3d at 1009
19 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132
20 F.3d 405, 408 (7th Cir. 1998)); *cf. D.V.D.*, 2025 WL 1453640, at *1 (requiring the
21 government to move to reopen the noncitizen’s immigration proceedings if the
22 individual demonstrates “reasonable fear” and to provide “a meaningful
23 opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening
24 of their immigration proceedings” if the noncitizen is found to not have
25 demonstrated “reasonable fear”); *Aden*, 409 F. Supp. 3d at 1019 (requiring notice
26 and time for a respondent to file a motion to reopen and seek relief).

27 “[L]ast minute” notice of the country of removal will not suffice, *Andriasian*,
28 180 F.3d at 1041; *accord Najjar v. Lunch*, 630 Fed. App’x 724 (9th Cir. 2016), and

1 for good reason: To have a meaningful opportunity to apply for fear-based
2 protection from removal, immigrants must have time to prepare and present
3 relevant arguments and evidence. Merely telling a person where they may be sent,
4 without giving them a chance to look into country conditions, does not give them a
5 meaningful chance to determine whether and why they have a credible fear.

6 **B. The June 6, 2025 memo’s removal policies violate the Fifth**
7 **Amendment, 8 U.S.C. § 1231, the Conviction Against Torture, and**
8 **Implementing Regulations.**

9 The policies in the June 6, 2025 memo do not adhere to these requirements.
10 First, under the policy, ICE need not give immigrants *any* notice or hearing before
11 removing them to a country that—in the State Department’s estimation—has
12 provided “credible” “assurances” against persecution and torture. Exh. B. By
13 depriving immigrants of any chance to challenge the State Department’s view, this
14 policy violates “[t]he essence of due process,” “the requirement that a person in
15 jeopardy of serious loss be given notice of the case against him and opportunity to
16 meet it.” *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (cleaned up).

17 Second, even when the government has obtained no credible assurances
18 against persecution and torture, the government can still remove the person with
19 between 6 and 24 hours’ notice, depending on the circumstances. Exh. B.
20 Practically speaking, there is not nearly enough time for a detained person to assess
21 their risk in the third country and marshal evidence to support any credible fear—let
22 alone a chance to file a motion to reopen with an IJ. An immigrant may know
23 nothing about a third country, like Eswatini or South Sudan, when they are
24 scheduled for removal there. Yet if given the opportunity to investigate conditions,
25 immigrants would find credible reasons to fear persecution or torture—like patterns
26 of keeping deportees indefinitely and without charge in solitary confinement or
27 extreme instability raising a high likelihood of death—in many of the third
28 countries that have agreed to removal thus far. Due process requires an adequate

1 chance to identify and raise these threats to health and life. This Court must prohibit
2 the government from removing Mr. Ao without these due process safeguards.

3 **III. This Court must hold an evidentiary hearing on any disputed facts.**

4 Resolution of a prolonged-detention habeas petition may require an
5 evidentiary hearing. *Owino v. Napolitano*, 575 F.3d 952, 956 (9th Cir. 2009).
6 Mr. Ao hereby requests such a hearing on any material, disputed facts.

7 **IV. Prayer for relief**

8 For the foregoing reasons, Petitioner respectfully requests that this Court:

- 9 1. Order Respondents to immediately release Petitioner from custody;
- 10 2. Enjoin Respondents from re-detaining Petitioner under 8 U.S.C.
11 § 1231(a)(6) unless and until Respondents obtain a travel document
12 for his removal;
- 13 3. Enjoin Respondents from removing Petitioner to any country unless
14 they provide the following process, *see D.V.D. v. U.S. Dep't of Homeland*
15 *Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May
16 21, 2025):
 - 17 a. written notice to both Petitioner and Petitioner's counsel in a
18 language Petitioner can understand;
 - 19 b. a meaningful opportunity, and a minimum of ten days, to raise a
20 fear-based claim for CAT protection prior to removal;
 - 21 c. if Petitioner is found to have demonstrated "reasonable fear" of
22 removal to the country, Respondents must move to reopen
23 Petitioner's immigration proceedings;
 - 24 d. if Petitioner is not found to have demonstrated a "reasonable fear"
25 of removal to the country, a meaningful opportunity, and a
26 minimum of fifteen days, for the Petitioner to seek reopening of his
27 immigration proceedings.
- 28 4. Order all other relief that the Court deems just and proper.

Respectfully submitted,

Dated: November 21, 2025

s/ Katie Hurrelbrink

KATIE HURRELBRINK

Federal Defenders of San Diego, Inc.

Email: Katie_Hurrelbrink@fd.org

PROOF OF SERVICE

I, the undersigned, will cause the attached Petition for a Writ of Habeas Corpus to be emailed to the U.S. Attorney's Office for the Southern District of California at USACAS.Habeas2241@usdoj.gov when I receive the court-stamped copy.

Date: 11/21/2025

/s/ Katie Hurrelbrink
Katie Hurrelbrink