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

12 XIAO AO,

13 Petitioner,

14 v.

15 KRISTI NOEM, Secretary of the
Department of Homeland Security, *et al.*,

16 Respondents.
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Case No. 25-cv-03256-BAS-VET

**RETURN IN OPPOSITION
TO PETITION FOR WRIT
OF HABEAS CORPUS**

I. INTRODUCTION

Petitioner requests that this Court order Immigration and Customs Enforcement (ICE) to release him from custody because, he alleges, his detention is unlawful and prolonged. He was ordered removed from the United States on July 21, 2025, and was granted withholding of removal to China that same day. Petitioner is subject to a final, executable order of removal, which means that he has no right to remain in the United States. Although he may not be repatriated to China, he may be resettled in a third country. Under 8 U.S.C. § 1231(a), ICE has authority to detain a noncitizen for 90 days to execute removal, and the Supreme Court has held that detention is presumptively reasonable for six months. Here, the presumptively reasonable six-month removal period for ICE to effect removal has not ended. ICE is actively working to effect Petitioner's removal to a third country. Petitioner has not provided good reason to believe that there is no significant likelihood of his removal in the reasonably foreseeable future. Moreover, Petitioner's second claim that ICE be enjoined from removing him to a third country without adequate notice and an opportunity to be heard is unsupported by the evidence in this case. As such, the Court should deny the petition and request for injunctive relief.

II. FACTUAL BACKGROUND

Petitioner is a native and citizen of China. Declaration of Daniel Negrin ("Negrin Decl.") at ¶ 3. On December 26, 2024, he was apprehended by United States Border Patrol agents after he entered the United States near Tecate, California, without inspection. *Id.* Petitioner was processed as an expedited removal under Section 235(b)(1) of the Immigration and Nationality Act (INA) (8 U.S.C. § 1225(b)(1)) and booked into ICE custody at the Otay Mesa Detention Center on January 6, 2025. *Id.*

On January 22, 2025, Petitioner was referred to U.S. Citizenship and Immigration Services (USCIS) for a credible fear interview. *Id.* at ¶ 4. USCIS conducted the credible fear interview on January 29, 2025. *Id.*

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1 On February 4, 2025, a Notice to Appear was served on the Petitioner and filed
2 with the Immigration Court on February 5, 2025, placing the Petitioner in removal
3 proceedings. *Id.* at ¶ 5.

4 On July 21, 2025, Petitioner was denied asylum and ordered removed to China,
5 but the immigration judge granted withholding of removal to China under Section
6 241(b)(3) of the INA. *Id.* at ¶ 6. Petitioner and the Department of Homeland Security
7 waived appeal and the order was final on this date. *Id.*

8 On July 30, 2025, ICE's Enforcement and Removal Operation (ERO) contacted
9 ERO Removal and International Operations (RIO) to seek a third country for removal.
10 *Id.* at ¶ 7. On August 20, 2025, ERO received a passport for Petitioner. *Id.* at ¶ 8. On
11 September 22, 2025, ERO requested an update on finding a third country. *Id.* at ¶ 9. On
12 October 7, 2025, ERO sent a request for an update on a third country. *Id.* at ¶ 10. On
13 October 28, 2025, RIO informed ERO that at that time a third country had not yet been
14 identified. *Id.* at ¶ 11. On November 13, 2025, ERO sent an update on the third country
15 removal request. *Id.* at ¶ 12. ERO is pending further response from RIO on identifying
16 a third country for removal. *Id.* at ¶ 13.

17 Should ERO identify a third country for removal, Petitioner will be notified in
18 writing of the third country at least 24 hours prior to removal. *Id.* at ¶ 14.

19 III. ARGUMENT

20 A. Petitioner is Lawfully Detained.

21 Authority to detain noncitizens who are subject to a final order of removal is
22 governed by 8 U.S.C. § 1231(a). *See* 8 U.S.C. § 1231(a)(2) (the Attorney General “shall
23 detain” the alien during the 90-day removal period); *see also Zadvydas v. Davis*, 533
24 U.S. 678, 683 (2001).

25 Petitioner is subject to a final, executable order of removal, which means that he
26 has no right to remain in the United States. He has a temporary right not to be repatriated
27 to China, but he has no right not to be resettled in a third country. ICE has long-standing
28 authority to remove noncitizens and resettle them in third countries where removal to

1 the country designated in the final order is “impracticable, inadvisable, or impossible.”
 2 8 U.S.C. § 1231(b)(2)(E)(vii); *see also* 8 U.S.C. § 1231(b) (outlining framework for
 3 designation). Accordingly, noncitizens like Petitioner, who have received protection
 4 against removal to the designated country (either withholding of removal under 8 U.S.C.
 5 § 1231(b)(3) or Convention Against Torture protection), may be removed and resettled
 6 in third countries.

7 Section 1231(b)(2)(E) provides that the Secretary of Homeland Security shall
 8 remove the noncitizen to any of the following countries:

- 9 (i) The country from which the alien was admitted to the United States.
- 10 (ii) The country in which is located the foreign port from which the alien
 11 left for the United States or for a foreign territory contiguous to the
 12 United States.
- 13 (iii) A country in which the alien resided before the alien entered the
 14 country from which the alien entered the United States.
- 15 (iv) The country in which the alien was born.
- 16 (v) The country that had sovereignty over the alien’s birthplace when
 17 the alien was born.
- 18 (vi) The country in which the alien’s birthplace is located when the alien
 19 is ordered removed.
- 20 (vii) If impracticable, inadvisable, or impossible to remove the alien to
 21 each country described in a previous clause of this subparagraph,
 22 another country whose government will accept the alien into that
 23 country.

24 *Id.*

25 Accordingly, if the Secretary of Homeland Security is unable to remove a
 26 noncitizen to a country of designation or an alternative country in subparagraph (D), the
 27 Secretary may, in her discretion, remove the noncitizen to any country listed in
 28 subparagraphs (E)(i) through (E)(vi).

29 An alien ordered removed must be detained for 90 days pending the
 30 government’s efforts to secure the alien’s removal through negotiations with foreign
 31 governments. *See* 8 U.S.C. § 1231(a)(2) (the Attorney General “shall detain” the alien
 32 during the 90-day removal period); *see also Zadvydas*, 533 U.S. at 683. The statute
 33 “limits an alien’s post-removal-period detention to a period reasonably necessary to

1 bring about the alien’s removal from the United States” and “does not permit indefinite
2 detention.” *Zadvydas*, 533 U.S. at 689. The Supreme Court has held that a six-month
3 period of post-removal detention constitutes a “presumptively reasonable period of
4 detention.” *Id.* at 683; *see also Clark v. Martinez*, 543 U.S. 371, 377 (2005) (“[T]he
5 presumptive period during which the detention of an alien is reasonably necessary to
6 effectuate his removal is six months”); *Lema v. INS*, 341 F.3d 853, 856 (9th Cir.
7 2003).

8 Release is not mandated after the expiration of the six-month period unless “there
9 is no significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*,
10 533 U.S. at 701; *see also Clark*, 543 U.S. at 377. The Supreme Court limited the statute,
11 allowing “post-removal-period detention to a period reasonably necessary to bring
12 about that alien’s removal from the United States.” *Zadvydas*, 533 U.S. at 689. “[O]nce
13 removal is no longer reasonably foreseeable, continued detention is no longer
14 authorized by statute.” *Id.* at 699. Ultimately, “an alien may be held in confinement until
15 it has been determined that there is no significant likelihood of removal in the
16 reasonably foreseeable future.” *Id.* at 701.

17 The Ninth Circuit has emphasized, “*Zadvydas* places the burden on the alien to
18 show, after a detention period of six months, that there is ‘good reason to believe that
19 there is no significant likelihood of removal in the reasonably foreseeable future.’”
20 *Pelich v. INS*, 329 F.3d 1057, 1059 (9th Cir. 2003) (quoting *Zadvydas*, 533 U.S. at 701);
21 *see also Xi v. INS*, 298 F.3d 832, 840 (9th Cir. 2003). The alien must make such a
22 showing to shift the burden to the government.

23 After this 6-month period, once the alien provides good reason to believe
24 that there is no significant likelihood of removal in the reasonably
25 foreseeable future, the Government must respond with evidence sufficient
26 to rebut that showing. And for the detention to remain reasonable, as the
27 period of prior postremoval confinement grows, what counts as the
28 “reasonably foreseeable future” conversely would have to shrink.

Zadvydas, 533 U.S. at 701.

1 Petitioner’s case is premature as the six-month presumptively reasonable removal
2 period will not end until approximately January 21, 2026. *See Ali v. Barlow*, 446 F.
3 Supp. 2d 604, 609–10 (E.D. Va. 2006) (finding habeas petition was unripe for review
4 where *Zadvydas* six-month period had not expired; dismissing petition without
5 prejudice); *Gonzales v. Naranjo*, No. EDCV 12–1392 DSF (FFM), 2012 WL 6111358,
6 at *4–5 (C.D. Cal. Nov. 5, 2012) (same); *Waraich v. Ashcroft*, No.
7 CVF051036RECSMSHC, 2005 WL 2671406, at *1 (E.D. Cal. Oct. 19, 2005) (same).
8 *But see Trinh v. Homan*, 466 F. Supp. 3d 1077, 1093 (C.D. Cal. 2020) (“At no point did
9 the *Zadvydas* Court preclude a noncitizen from challenging their detention before the
10 end of the presumptively reasonable six-month period.”).

11 Even if the removal period had extended beyond six months, Petitioner cannot
12 show that there is no significant likelihood of removal in the reasonably foreseeable
13 future. ICE is in the process of obtaining travel documents from a third country pursuant
14 to 8 U.S.C. § 1231(b)(2)(E), so it is premature for Petitioner to seek administrative or
15 judicial review of that process. If ICE obtains travel documents for resettlement in a
16 third country, Petitioner will have an opportunity to seek to reopen his removal
17 proceedings. *See* 8 U.S.C. § 1229a(c)(7) (Motions to reopen); 8 C.F.R. § 1003.23(b)
18 (“Reopening or reconsideration before the immigration court”). Movants can also seek
19 an emergency stay of removal. *See generally* 8 C.F.R. §§ 1003.2(f), 1003.23(b)(v).
20 Judicial review of that process will be exclusive to the Ninth Circuit. *See* 8 U.S.C.
21 § 1252(b)(6), (9). ICE is actively working to effect Petitioner’s removal to a third
22 country and his continued detention is not unconstitutionally indefinite. On this record,
23 Petitioner could not sustain his burden, and it would be premature to reach that
24 conclusion before permitting ICE an opportunity to complete its diligent efforts to effect
25 Petitioner’s removal.

26 To the extent Petitioner is challenging ICE’s decision to detain him for the
27 purpose of removal, such a challenge is precluded by statute. *See* 8 U.S.C. § 1252(g)
28 (“Except as provided in this section and *notwithstanding any other provision of law*

(statutory or nonstatutory), *including section 2241 of Title 28, or any other habeas corpus provision*, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this chapter.”) (emphasis added); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (“There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General’s discrete acts of “commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders”—which represent the initiation or prosecution of various stages in the deportation process.”); *Limpin v. United States*, 828 Fed. App’x 429 (9th Cir. 2020) (holding district court properly dismissed under 8 U.S.C. § 1252(g) “because claims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court’s jurisdiction”).

B. Petitioner’s Second Claim is Unsupported.

Petitioner also asserts that he is afraid that once a third country is identified, ICE will immediately deport him there without being given adequate time to investigate whether he could be persecuted in that country. ICE attests, however, that once a third country is identified, “Petitioner will be notified in writing of the third country at least 24 hours prior to removal.” Negrin Decl. at ¶ 14. Thus, Petitioner’s concern that he will not receive adequate notice and an opportunity to be heard prior to his third country removal is not borne out by the evidence in this case.

Moreover, Petitioner’s claim that he may not be removed to a third country without adequate notice and an opportunity to be heard is subject to ongoing litigation, with the Supreme Court staying an injunction imposed by a district court ordering the government to provide notice and an opportunity to be heard like that requested here. *See Dep’t of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025). Given the Supreme Court’s reversal of that injunction, Respondents’ position is that imposition of a similar

injunction would be reversed here.

IV. CONCLUSION

For the reasons stated above, the Court should deny and dismiss the petition.

Dated: December 3, 2025

Respectfully submitted,

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