

Katie Hurrelbrink
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
katie_hurrelbrink@fd.org

Attorneys for Mr. Ao

**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.: 25-cv-3256-BAS

**Traverse in Support of
Petition for Writ
of Habeas Corpus**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

Mr. Ao's habeas petition explained that courts across the country have deemed *Zadvydas*'s six-month presumption rebuttable. The petition then described in detail why a close reading of *Zadvydas* leads to that conclusion. The return does not respond to any of those arguments. Instead, it cites exactly one case finding, with little analysis, that the presumption is not rebuttable. Having heard little if any reason to think that *Zadvydas* established an irrebuttable presumption, this Court should adopt the majority view and hold that the presumption can be rebutted.

The evidence submitted with the return only reinforces the notion that Mr. Ao has rebutted it. The government does not dispute that very few immigrants with withholding are ever removed to a third country. And all signs point to the conclusion that Mr. Ao will not among the small handful of people who can be removed elsewhere. It has been four-and-a-half months since Mr. Ao was ordered removed, yet ICE has not asked even one third country to take Mr. Ao. Indeed, ICE has not identified any third country whom it could plausibly ask. Nor does ICE seem to be making much effort to identify one. Local employees have sent a few emails asking for updates about Mr. Ao's third-country removal. They have received only one response, which says that ICE has not identified a third-country placement. Finally, there is no reason to think that that will change, as Mr. Ao has no connection to any third country that might plausibly take him. He has therefore rebutted the presumption and must be released.

Out of an abundance of caution, however, this Court can and should order ICE to provide due process in the unlikely event that they are able to remove Mr. Ao to a third country. As many courts have concluded, 24 hours' notice does not satisfy the Constitution. This Court should therefore grant this petition on both counts.

ARGUMENT

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

A. The government provides no reasoned argument for why the six-month presumption is irrebuttable.

Mr. Ao's habeas petition showed that courts across the country have treated *Zadvydas*'s six-month presumption as "just that, a presumption, one that can be rebutted upon a showing that removal is *not* reasonably foreseeable." *Cruz Medina v. Noem*, No. 25-CV-1768-ABA, 2025 WL 2306274, at *7 n.5 (D. Md. Aug. 11, 2025); accord *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); *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). The petition explained why these courts reached that conclusion: They reasoned that to hold otherwise would conflict with *Zadvydas*'s baseline holding and its analogy to the rebuttable presumption in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

The government provides no reasoned response to any of these arguments. Instead, the government asserts that Mr. Ao cannot challenge his detention before the six-month mark and cites three cases. Doc. 5 at 6. Two do not discuss whether the six-month presumption is rebuttable—the petitioner in those cases did not argue that the presumption was rebuttable or claim that they had evidence to rebut it, and

1 the court did not address the issue on its own. *Gonzales v. Naranjo*, No. EDCV 12–
2 1392 DSF (FFM), 2012 WL 6111358, at *4–5 (C.D. Cal. Nov. 5, 2012); *Waraich*
3 *v. Ashcroft*, No. CVF051036RECSMSHC, 2005 WL 2671406, at *1 (E.D. Cal. Oct.
4 19, 2005). Those cases are therefore not relevant.

5 Only *Ali v. Barlow* addresses whether the *Zadvydas* presumption is
6 rebuttable. 446 F. Supp. 2d 604, 609–10 (E.D. Va. 2006). But *Ali* suffers from the
7 exact same problem as the government’s briefing: It relies on three cases dismissing
8 *Zadvydas* petitions before six months. But none of the cases on which it relies
9 discuss whether the presumption is rebuttable—in none of them did the petitioner
10 argue that presumption was rebuttable or claim to be able to rebut it. *See Akinwale*
11 *v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002); *Uyur v. Hogan*, No. CIV. 3:06-
12 CV-1277, 2006 WL 4498156, at *2 (M.D. Pa. July 28, 2006); *Morena v. Gonzales*,
13 No. 4:CV 05 0895, 2005 WL 3277995, at *3 (M.D. Pa. Dec. 2, 2005) (holding that
14 the removal order was not even final, meaning that the petitioner was detained
15 under § 1226 rather than § 1231 and *Zadvydas* did not apply at all). *Ali* engages in
16 no analysis of *Zadvydas* itself and provides no other reason why the presumption
17 would be irrebuttable. *Ali* and the government’s briefing are therefore insufficient
18 to overcome the detailed analysis in the cases cited in the petition, which show that
19 the presumption is rebuttable.

20 **B. The government’s evidence confirms that there is no reasonable**
21 **likelihood of removal in the reasonably foreseeable future, further**
22 **rebutting the six-month presumption.**

23 The evidence included with the government’s Return confirms that Mr. Ao
24 has rebutted the presumption, because it provides further evidence that “there is no
25 significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*,
26 533 U.S. at 701. The government does not deny that removals to third countries are
27 exceedingly rare, occurring in only a handful of cases each year. Doc. 1 at 10–11.
28 ICE’s third-country removal efforts—or lack thereof—in Mr. Ao’s case confirm
that he will not be among that handful.

1 Over the last four-and-a-half months, the sum total of ICE's third-country
2 removal efforts consists of a few emails between local Enforcement and Removal
3 Operations ("ERO") employees and the Removal and International Operation
4 ("RIO") subdivision charged with making third-country placements. Doc. 5-1 at
5 ¶¶ 7–13. ERO has emailed RIO four times to request Mr. Ao's third-country
6 removal and follow up on that request. *Id.* at ¶¶ 7, 9, 10, 12. RIO has answered only
7 one of those emails, to say that "a third country had not yet been identified." *Id.* at
8 ¶ 11. To date, "ERO is pending further response from RIO on identifying a third
9 country for removal." *Id.* at ¶ 13. As this evidence shows, ICE has not identified
10 even one plausible candidate for third-country removal or asked for any third
11 country to take Mr. Ao.

12 Given that (1) ICE has not been able to identify any plausible placement for
13 Mr. Ao in four-and-a-half months, (2) Mr. Ao has no connection to any other
14 country that might eventually lead to a third country placement, Doc. 1-2 at ¶ 8, and
15 (3) over 98% of people like Mr. Ao are never removed to a third country, *Puertas-*
16 *Mendoza*, 2025 WL 3142089 at *3 (citing American Immigration Council &
17 National Immigrant Justice Center, *supra*), Mr. Ao has proved that there is no
18 significant likelihood of removing him. Furthermore, given that ICE has not even
19 started any third-country removal process with any country and any future
20 placement could well result in lengthy credible fear proceedings, *see* Doc. 1 at 13,
21 Mr. Ao has proved that removal will not occur in the reasonably foreseeable future.
22 Like other courts, this Court should find that Mr. Ao has rebutted the six-month
23 presumption and grant this petition. *Villanueva*, 2025 WL 2774610, at *10; *Puertas*
24 *Mendoza*, 2025 WL 3142089, at *2; *Munoz-Saucedo*, 789 F. Supp. 3d at 399–400.

1 **II. Count 2: Twenty-four hours' notice before third country removal does**
2 **not satisfy due process.**

3 **A. ICE's policy does not satisfy due process.**

4 The government also contests Count 2, claiming that ICE will comply with
5 due process by providing Mr. Ao with 24 hours' notice of any third country
6 removal. Doc. 5 at 7. There are at least two major problems with that argument.

7 First, the government provides no reasoned argument for why 24 hours'
8 notice would satisfy the Due Process Clause. It clearly does not.

9 "The fundamental requirement of due process is the opportunity to be heard
10 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S.
11 319, 333 (1976). In the context of a third-country removal, a meaningful
12 opportunity to be heard requires "sufficient notice of a country of deportation that,
13 given [the petitioner's] capacities and circumstances, he would have a reasonable
14 opportunity to raise and pursue his claim for withholding of deportation." *Aden v.*
15 *Nielsen*, 409 F. Supp. 3d 998, 1009 (W.D. Wash. 2019). Providing a "last minute
16 designation of . . . a country of deportation" therefore "violate[s] a basic tenet of
17 constitutional due process: that individuals whose rights are being determined are
18 entitled to notice of the issues to be adjudicated, so that they will have the
19 opportunity to prepare and present relevant arguments and evidence." *Andriasian*
20 *v. I.N.S.*, 180 F.3d 1033, 1041 (9th Cir. 1999); *see also Najjar v. Lynch*, 630 F.
21 App'x 724 (9th Cir. 2016) ("In the context of country of removal designations, last
22 minute orders of removal to a country may violate due process if an immigrant was
23 not provided an opportunity to address his fear of persecution in that country.").

24 Twenty-four hours is not near enough time to satisfy due process. An
25 immigrant may know nothing about a country like Eswatini when ICE notifies them
26 that they will be sent there. But to challenge their third-country removal, the
27 immigrant would have to (1) investigate country conditions to determine whether
28 they would be safe there, (2) accumulate any evidence to show that they will not be

1 safe, (3) present that evidence to ICE, and (4) if ICE does not agree that they have
2 a credible fear, file a motion to reopen with a neutral IJ. Courts agree that that
3 cannot be done in 24 hours. *See, e.g., Kumar v. Wamsley*, No. C25-2055-KKE,
4 2025 WL 3204724, at *6 (W.D. Wash. Nov. 17, 2025) (collecting cases); *G.A.A. v.*
5 *Chestnut*, No. 1:25-CV-01102-EPG-HC, 2025 WL 3251316, at *7 (E.D. Cal. Nov.
6 21, 2025); *Vu v. Noem*, No. 1:25-CV-01366-KES-SKO (HC), 2025 WL 3114341,
7 at *9 (E.D. Cal. Nov. 6, 2025).

8 Second, though DO Negrin claims that ICE will provide 24 hours' notice,
9 Doc. 5-1 at ¶ 14, ICE's official policy permits removal to some countries with no
10 notice at all, Doc. 1-3. A "voluntary promise by the Government" in a line officer's
11 declaration therefore does not overcome the risk to Mr. Ao of a removal without
12 due process. *Abubaka v. Bondi*, No. C25-1889RSL, 2025 WL 3204369, at *6 (W.D.
13 Wash. Nov. 17, 2025); *accord Hambarsonpour v. Bondi*, No. C25-1802-RSM,
14 2025 WL 3251155, at *4 (W.D. Wash. Nov. 21, 2025).

15 For both reasons, this Court should follow the example of Judge Robinson in
16 *Reyes-Albenas v. Noem*, 25-cv-3184-TWR, Doc. 10 (S.D. Cal. Dec. 4, 2025), and
17 order the process provided in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-
18 10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025), namely,

- 19 a. written notice to both Petitioner and Petitioner's counsel in a language
20 Petitioner can understand;
- 21 b. a meaningful opportunity, and a minimum of ten days, to raise a fear-
22 based claim for CAT protection prior to removal;
- 23 c. if Petitioner is found to have demonstrated "reasonable fear" of removal
24 to the country, Respondents must move to reopen Petitioner's
25 immigration proceedings;
- 26 d. if Petitioner is not found to have demonstrated a "reasonable fear" of
27 removal to the country, a meaningful opportunity, and a minimum of
28

1 fifteen days, for the Petitioner to seek reopening of his immigration
2 proceedings.

3 **B. The *D.V.D.* class action does not preclude this claim.**

4 Finally, Mr. Ao can bring this claim despite the pending *D.V.D.* class action.

5 As an initial matter, the Supreme Court's decision in *Dep't of Homeland Sec.*
6 *v. D.V.D.*, 145 S. Ct. 2153 (2025), does not prevent this Court from granting relief.
7 Though the Supreme Court's order was unreasoned, the dissent noted that the
8 government had sought a stay based on procedural arguments applicable only to
9 class actions. *Id.* at 2160 (Sotomayor, J., dissenting). But those arguments would
10 not defeat Mr. Ao's claims, because "even if the Government [were] correct that
11 classwide relief was impermissible," the government would still "remain[]
12 obligated to comply with orders enjoining [their] conduct with respect to individual
13 plaintiffs." *Id.*

14 This Court therefore cannot assume that the Supreme Court issued a stay in
15 *D.V.D.* because the Court disagreed with *D.V.D.*'s due process holding. The
16 Supreme Court may well have simply accepted the government's procedural
17 arguments relevant only to class actions. *See Nguyen v. Scott*, No. 2:25-CV-01398,
18 2025 WL 2419288, at *20–23 (W.D. Wash. Aug. 21, 2025). On the other hand, the
19 Ninth Circuit's reasoned decisions interpreting due process in the third-country
20 removal context remain binding on this Court. *Id.* at *23. Because Ninth Circuit
21 authority is the only authority clearly on point, this Court must follow those
22 decisions and grant relief. *Id.*

23 Additionally, Mr. Ao can still bring an individual claim for relief even while
24 a class action is pending. While a district court "may properly dismiss an individual
25 complaint 'because the complainant is a member in a class action seeking the *same*
26 *relief*,'" *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (quoting *Crawford*
27 *v. Bell*, 599 F.2d 890, 89 (9th Cir. 1979)), the Ninth Circuit has made clear that a
28 class member in a pending class action may pursue individual claims for injunctive

1 relief where the individual relief sought is “discrete from the claims for systemic
2 reform” addressed in the class action. *Id.* at 1137.

3 In *Pride*, the Ninth Circuit held that an class member’s individual claim for
4 prison medical care could proceed where declining to exercise jurisdiction over his
5 claim due to his membership in a pending class action seeking systemic medical
6 care reform “would lead to unwarranted delay” and render an individual “powerless
7 to petition the courts for redress of [their individual] violation until [the class
8 action], which has been pending now for twelve years, has been fully resolved.” *Id.*
9 The court concluded that the injunctive relief the individual sought was not
10 duplicative of the class action, which sought systemic relief, because the plaintiff’s
11 claim “relates solely to his individual need for medical treatment.” *Id.* at 1138.

12 The same rationale applies here. Petitioner seeks only individualized relief
13 against any effort by ICE to remove him to a third country without satisfying the
14 procedural requirements of the statute and due process. He does not challenge or
15 seek systemic relief against ICE’s third country removal policy. *See Pride*, 719 F.3d
16 at 1137. And, as in *Pride*, he cannot obtain relief against third country removal in
17 *D.V.D.* because the district court injunction is stayed. That is, absent relief here, he
18 could be removed to a third country long before the resolution of the litigation in
19 *D.V.D.*, rendering him “powerless to petition the courts for redress.” *See id.* This
20 Court should not submit to judicial paralysis but should grant individual relief here.
21

22 Respectfully submitted,

23
24 Dated: November 21, 2025

s/ Katie Hurrelbrink

KATIE HURRELBRINK

Federal Defenders of San Diego, Inc.

Email: Katie_Hurrelbrink@fd.org