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[redacted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NAHOM HAFTOM BERHE,

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of the Department of Homeland Security, TODD BLANCHE, Acting Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, JEREMY CASEY, Warden at Imperial Regional Detention Center,

Respondents.

CIVIL CASE NO.:
'26CV3289 JES DEB

Petition for a Writ of Habeas Corpus

[8 U.S.C. § 2241]

Introduction

Nahom Berhe came to the United States fleeing persecution in Ethiopia. An immigration judge ("IJ") ordered him removed on December 19, 2025, but granted him withholding of removal. In the four-plus months since then, Mr. Berhe 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. Berhe where they have so often failed before. Neither he nor his family has any connection to any country other than Ethiopia.

Because "there is no significant likelihood of removal in the reasonably foreseeable future," Mr. Berhe must be released. *Zadvydas v. Davis*, 533 U.S. 678 (2001). That holds true even though Mr. Berhe 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. 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); *Cesar v. Achim*, 542 F. Supp. 2d 897, 902 (E.D. Wis. 2008). Because Mr. Berhe can prove that he will not be removed in the reasonably foreseeable future, he must be released.

I. Mr. Berhe came to the United States fleeing persecution, and an immigration judge granted him withholding of removal.

Mr. Berhe came to the United States from his native Ethiopia in April 2016. Exh. A at ¶ 1. He entered on a B-2 visa through a New York airport. *Id.* He then applied for asylum. *See id.* at ¶ 2.

On December 19, 2025, an immigration judge denied his asylum claim but granted him withholding of removal to Ethiopia. *Id.* He reserved appeal but did not end up appealing. *Id.*

Since then, ICE has made no apparent progress in removing him. He met with an ICE officer in January about removal. *Id.* at ¶ 3. The ICE officer initially said that he would be removed to Ethiopia, but when he told the officer that he had withholding, the officer corrected himself. *Id.* The officer then asked what third country he would want to be removed to, but he said that he didn't have ties to any other country. *Id.* The officer did not identify any country that might take him or tell him about any efforts to remove him. *Id.*

Also in January, Mr. Berhe had an informal conversation with an ICE officer in the tank. *Id.* The officer let him know that it was very hard to remove people to a third country, and the officer said he would probably be placed on an ankle monitor instead. *Id.* The officer said he'd never seen an Ethiopian person removed to a third country. *Id.*

As of late April, ICE had not met with him again against for custody reviews. *Id.* at ¶ 4. ICE had not identified a specific third country that might take him. *Id.* at ¶ 5. No one has asked him to fill out any paperwork for third-country removal or to talk to the consulate of any third country. *Id.* Nor does Mr. Berhe know of any reason that a third country would take him. *Id.* at ¶ 6. He is not a citizen of any

country other than Ethiopia. *Id.* He does not have legal status in any other country. *Id.* He has never even been to another country, apart from Ethiopia and the United States. *Id.* Both of his parents are from Ethiopia. *Id.* His wife is American. *Id.*[1]

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

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

The Administration has reportedly negotiated with countries to have many of these deportees imprisoned in prisons, camps, or other facilities. The government paid El Salvador about $5 million to imprison more than 200 deported Venezuelans in a maximum-security prison notorious for gross human rights abuses, known as CECOT. *See id.* In February, Panama and Costa Rica took in hundreds of deportees from countries in Africa and Central Asia and imprisoned them in hotels, a jungle camp, and a detention center. *Id.*; Vanessa Buschschluter, *Costa Rican court orders release of migrants deported from U.S.*, BBC (Jun. 25, 2025). On July 4, 2025, ICE deported eight men, including one pre-1995 Vietnamese refugee, to South Sudan. *See* Wong, *supra*. On July 15, ICE deported five men to the tiny African nation of Eswatini, including one man from

[1] Mr. Berhe financially qualifies for Federal Defenders' services. *Id.* at ¶ 7.

Vietnam, where they are reportedly being held in solitary confinement. Gerald Imray, *3 Deported by US held in African Prison Despite Completing Sentences, Lawyers Say*, PBS (Sept. 2, 2025). Many of these countries are known for human rights abuses or instability. For instance, conditions in South Sudan are so extreme that the U.S. State Department website warns Americans not to travel there, and if they do, to prepare their will, make funeral arrangements, and appoint a hostage-taker negotiator first. *See* Wong, *supra*.

On June 23 and July 3, 2025, the Supreme Court issued a stay of a national class-wide preliminary injunction issued in *D.V.D. v. U.S. Department of Homeland Security*, No. CV 25-10676-BEM, 2025 WL 1142968, at *1, 3 (D. Mass. Apr. 18, 2025), which required ICE to follow statutory and constitutional requirements before removing an individual to a third country. *U.S. Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025) (mem.); *id.*, No. 24A1153, 2025 WL 1832186 (U.S. July 3, 2025).[2] On July 9, 2025, ICE rescinded previous guidance meant to give immigrants a "'meaningful opportunity' to assert claims for protection under the Convention Against Torture (CAT) before initiating removal to a third country" like the ones just described. Exh. B.

Under the new guidance, ICE may remove any immigrant to a third country "without the need for further procedures," as long as—in the view of the State Department—the United States has received "credible" "assurances" from that

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[2] Though the Supreme Court's order was unreasoned, the dissent noted that the government had sought a stay based on procedural arguments applicable only to class actions. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025) (Sotomayor, J., dissenting). Thus, "even if the Government [was] correct that classwide relief was impermissible" in *D.V.D.*, Respondents still "remain[] obligated to comply with orders enjoining [their] conduct with respect to individual plaintiffs" like Mr. Berhe. *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).

country that deportees will not be persecuted or tortured. *Id.* at 1. If a country fails to credibly promise not to persecute or torture releasees, ICE may still remove immigrants there with minimal notice. *Id.* Ordinarily, ICE must provide 24 hours' notice. But "[i]n exigent circumstances," a removal may take place in as little as six hours, "as long as the alien is provided reasonably means and opportunity to speak with an attorney prior to the removal." *Id.*

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

CLAIMS FOR RELIEF

Zadvydas v. Davis holds that immigration statutes do not authorize the government to detain immigrants like Mr. Berhe, 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. Berhe 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. Berhe's detention violates *Zadvydas* and 8 U.S.C. § 1231.

A. Legal background

Mr. Berhe'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. Berhe. 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 months, years, decades, or even the rest of their lives.

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

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

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

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

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

Mr. Berhe is different from many *Zadvydas* petitioners in that he has not been detained for six months after his removal order became final. But as *Zadvydas* makes clear, detention is only "*presumptively* reasonable" for six months. 533 U.S. at 701 (emphasis added). Numerous courts have concluded that the six-month presumption is "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). "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 presumptively reasonable six-month period." *Trinh*, 466 F. Supp. 3d at 1092. To the contrary, the Court said that it was "adopting a *presumption* of reasonableness before the six-month period expires. A presumption is just that: a default, a starting point." *Cruz Medina*, 2025 WL 2306274, at *5. "The *Zadvydas* Court did not say that the presumption is irrebuttable, and there is nothing inherent in the operation

of the presumption itself that requires it to be irrebuttable." *Cesar*, 542 F. Supp. 2d at 903; *accord Sweid*, 2025 WL 3033655, at *3 ("*Zadvydas* did not hold that this presumption is conclusive in all cases and under all sets of facts.").

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

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

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

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

Because Mr. Berhe must rebut the six-month presumption, he bears the burden to show that "there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Multiple courts have found that petitioners met that burden when (1) they received withholding or CAT relief and (2) their individual circumstances otherwise suggested a low likelihood of third-country removal. *Villanueva*, 2025 WL 2774610, at *10; *Puertas Mendoza*, 2025

WL 3142089, at *2; *Munoz-Saucedo*, 789 F. Supp. 3d at 399–400. Mr. Berhe's case has both features.

First, the IJ's order prohibits Mr. Berhe's removal to his home country of Ethiopia, "which is the only country to which he has a claim to citizenship or legal immigration status." *Villanueva*, 2025 WL 2774610, at *10. "This substantially increases the difficulty of removing him." *Munoz-Saucedo*, 789 F. Supp. 3d at 398.

That's because "alternative-country removal is rare." *Johnson v. Guzman-Chavez*, 594 U.S. 523, 537 (2021). Between 2020 and 2023, data apparently show that "ICE removed . . . only *five* non-citizens granted withholding or CAT relief to alternative countries." *Munoz-Saucedo v. Pittman*, 789 F. Supp. 3d 387, 398 (D.N.J. 2025) (emphasis in original). In fiscal year 2017, there were at most 21 people of the thousands with withholding of removal deported to *any* country; that number includes dual citizens who only received withholding from one of their two other countries of origin. *See* American Immigration Council & National Immigrant Justice Center, *The Difference Between Asylum and Withholding of Removal*, 7 (Oct. 2020)[3] (cited in *Guzman-Chavez*, 594 U.S. at 537). That means that "less than two percent of those granted withholding of removal were deported to a third country." *Puertas-Mendoza*, 2025 WL 3142089 at *3 (citing American Immigration Council & National Immigrant Justice Center, *supra*).

"[T]hat is not simply a matter of United States policy—foreign governments 'routinely deny' requests to receive people who lack a connection to the would-be receiving country." *Puertas-Mendoza*, 2025 WL 3142089 at *3. "The reason so few people are deported to third countries is because," while "customary international law holds that a country has a duty to accept the return of its nationals," usually,

[3]Available at https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/01/the_difference_between_asylum_and_withholding_of_removal.pdf

"countries have no incentive to accept non-citizens." American Immigration Council & National Immigrant Justice Center, *supra*, at 7.

Here, Mr. Berhe's individual circumstances strongly suggest that he will not be among the handful of people removed to a third country. Mr. Berhe is a Ethiopian citizen, and he does not have citizenship in any other country. Exh. A at ¶ 6. He lived in Ethiopia all his life. *Id.* His parents are Ethiopian citizens, too. *Id.* He knows of no reason why any other country would be incentivized to accept him for removal. *Id.*

Second, ICE does not appear to have made any progress in removing Mr. Berhe to a third country in the months since he was ordered removed—indeed, it is not clear that ICE has made any effort to do so. Exh. A at ¶¶ 3–4. The governing statute provides that ICE "shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). Yet as of late April, ICE had formally met with Mr. Berhe to talk about his removal only once, in January. *Id.* at ¶ 3. The agent just asked Mr. Berhe to pick a third country for removal, and Mr. Berhe informed the officer that he had no ties to any other country that might guide any such decision. *Id.* Shortly after, another ICE officer told him informally that he had never seen an Ethiopian person removed to a third country and that he would probably be released. *Id.*

Even if ICE were making efforts behind the scenes, so far, it appears that none have borne fruit. The third-country removal process has not progressed even to the point that ICE has needed Mr. Berhe to fill out any paperwork. *Id.* at ¶ 5. Nor has he been asked to call or interview with any consulate. *Id.* And ICE has never identified a third country that might take Mr. Berhe, let alone told him why that other country would agree to take him. *Id.*

That matters, because even when Mr. Berhe bears the burden, the *Zadvydas* standard remains the same: He must show that removal is not significantly likely in the reasonably foreseeable future. *See Cesar*, 542 F. Supp. 2d at 903. And *Zadvydas*

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

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

Third, even if ICE could eventually remove Mr. Berhe to a third country, there is no reason to think that that will happen in the reasonably foreseeable future. The difficulty of third-country removal suggests that ICE will not quickly prove successful. And even if ICE received travel documents for a third country, Mr. Berhe "would be entitled to seek fear-based relief from removal to that country, which would require additional, lengthy proceedings." *Munoz-Saucedo*, 789 F.

Supp. 3d at 399; *accord Villanueva*, 2025 WL 2774610, at *10 ("[A]ny efforts to remove Villanueva to a third country would likely be delayed by proceedings contesting his removal to the third country finally identified.").

For all of these reasons, Mr. Berhe has rebutted the presumption, and he must be released.

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

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

A. Legal background

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

Similarly, Congress codified protections enshrined in the CAT prohibiting the government from removing a person to a country where they would be tortured. *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231 note) ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the

person is physically present in the United States."); 28 C.F.R. § 200.1; *id.* §§ 208.16-208.18, 1208.16-1208.18. CAT protection is also mandatory.

To comport with the requirements of due process, the government must provide notice of the third country removal and an opportunity to respond. Due process requires "written notice of the country being designated" and "the statutory basis for the designation, i.e., the applicable subsection of § 1231(b)(2)." *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1019 (W.D. Wash. 2019); *accord D.V.D. v. U.S. Dep't of Homeland Sec.*, No. 25-cv-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025); *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999).

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

If the noncitizen claims fear, measures must be taken to ensure that the noncitizen can seek asylum, withholding, and relief under CAT before an immigration judge in reopened removal proceedings. The amount and type of notice must be "sufficient" to ensure that "given [a noncitizen's] capacities and circumstances, he would have a reasonable opportunity to raise and pursue his claim for withholding of deportation." *Aden*, 409 F. Supp. 3d at 1009 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132 F.3d 405, 408 (7th Cir. 1998)); *cf. D.V.D.*, 2025 WL 1453640, at *1 (requiring the government to move to reopen the noncitizen's immigration proceedings if the individual demonstrates "reasonable fear" and to provide "a meaningful

opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings" if the noncitizen is found to not have demonstrated "reasonable fear"); *Aden*, 409 F. Supp. 3d at 1019 (requiring notice and time for a respondent to file a motion to reopen and seek relief).

"[L]ast minute" notice of the country of removal will not suffice, *Andriasian*, 180 F.3d at 1041; *accord Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016), and for good reason: To have a meaningful opportunity to apply for fear-based protection from removal, immigrants must have time to prepare and present relevant arguments and evidence. Merely telling a person where they may be sent, without giving them a chance to look into country conditions, does not give them a meaningful chance to determine whether and why they have a credible fear.

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

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

Second, even when the government has obtained no credible assurances against persecution and torture, the government can still remove the person with between 6 and 24 hours' notice, depending on the circumstances. Exh. B. Practically speaking, there is not nearly enough time for a detained person to assess their risk in the third country and martial evidence to support any credible fear—let alone a chance to file a motion to reopen with an IJ. An immigrant may know

nothing about a third country, like Eswatini or South Sudan, when they are scheduled for removal there. Yet if given the opportunity to investigate conditions, immigrants would find credible reasons to fear persecution or torture—like patterns of keeping deportees indefinitely and without charge in solitary confinement or extreme instability raising a high likelihood of death—in many of the third countries that have agreed to removal thus far. Due process requires an adequate chance to identify and raise these threats to health and life. This Court must prohibit the government from removing Mr. Berhe without these due process safeguards.

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

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

IV. Prayer for relief

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

1. Order Respondents to immediately release Petitioner from custody;
2. Enjoin Respondents from re-detaining Petitioner under 8 U.S.C. § 1231(a)(6) unless and until Respondents obtain a travel document for his removal;
3. Enjoin Respondents from removing Petitioner to any country other than Ethiopia, unless they provide the following process, *see D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025):
    a. written notice to both Petitioner and Petitioner's counsel in a language Petitioner can understand;
    b. a meaningful opportunity, and a minimum of ten days, to raise a fear-based claim for CAT protection prior to removal;

c. if Petitioner is found to have demonstrated "reasonable fear" of removal to the country, Respondents must move to reopen Petitioner's immigration proceedings;

d. if Petitioner is not found to have demonstrated a "reasonable fear" of removal to the country, a meaningful opportunity, and a minimum of fifteen days, for the Petitioner to seek reopening of his immigration proceedings.

4. Order all other relief that the Court deems just and proper.

Respectfully submitted,

Dated: May 28, 2026

s/ Katie Hurrelbrink

KATIE HURRELBRINK
Federal Defenders of San Diego, Inc.
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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: 5/28/2026

/s/ Katie Hurrelbrink
Katie Hurrelbrink