UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROBERTO CARLOS RODRIGUEZ GUERRA

Petitioner,

v.

PAUL PERRY, *in his official capacity as Warden of the Caroline Detention Facility*; RUSSELL HOTT, *in his official capacity as Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations Washington Field Office*; ALEJANDRO MAYORKAS, *in his official capacity as Secretary of the Department of Homeland Security*; MERRICK GARLAND, *in his official capacity as Attorney General of the United States*,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS

Case No.

INTRODUCTION

1. Petitioner Roberto Carlos Rodriguez Guerra ("Mr. Rodriguez Guerra") remains in ICE custody in Virginia despite winning his immigration case six months ago based on findings by an Immigration Judge (IJ) that he would likely be tortured if deported to his home country. Immigration and Customs Enforcement (ICE) refuses to release Mr. Rodriguez Guerra, claiming that it is looking for alternative countries of removal despite knowing that he lacks citizenship in or a connection to any other country. Mr. Rodriguez Guerra's continued detention is arbitrary and unlawful, and he requests that this Court order his immediate release from ICE custody.

2. Mr. Rodriguez Guerra is detained pursuant to 8 U.S.C. § 1231, which governs the detention of non-citizens with a final order of removal that has been withheld or deferred by an IJ

due to a substantial risk of persecution or torture in their home country. 8 U.S.C. § 1231(a)(1)(B)(i). Mr. Rodriguez Guerra's removal order and accompanying relief grant became final when ICE failed to timely appeal his relief grant. 8 C.F.R. § 1241.1.

3. Mr. Rodriguez Guerra's continued detention violates 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), because his removal is not reasonably foreseeable. He cannot be deported to his home country of [redacted] because he was granted protection under the Convention Against Torture (CAT) with respect to that country. 8 C.F.R. § 1208.17. ICE's half-hearted attempts to remove Mr. Rodriguez Guerra to a random collection of unspecified alternative countries—to which he has no ties, and which have no policy or history of accepting non-citizen deportees—are speculative and futile.

4. Furthermore, the ICE Washington Field Office's across-the-board detention of Mr. Rodriguez Guerra and similarly situated individuals for at least 90 days past their grants of relief without prompt, individualized determinations of whether they should remain detained is inconsistent with ICE's own long-standing policy, thereby violating the Administrative Procedure Act (APA) and due process. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

JURISDICTION & VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 2241 (the general grant of habeas authority to the district court); Art. I § 9, cl. 2 of the U.S. Constitution ("Suspension Clause"); 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 2201, 2202 (Declaratory Judgment Act).

6. Federal district courts have jurisdiction to hear habeas claims by non-citizens challenging the lawfulness of their detention. *See, e.g.*, *Zadvydas*, 533 U.S. at 687.

7. Federal courts also have federal question jurisdiction, through the APA, to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). APA claims are cognizable on habeas. 5 U.S.C. § 703 (providing that judicial review of agency action under the APA may proceed by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus"). The APA affords a right of review to a person who is "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Respondents' continued detention of Petitioner up to and past the 90-day removal period has adversely and severely affected Petitioner's liberty and freedom.

8. Venue is proper in this district and division pursuant to 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 1391(b)(2) and (e)(1) because Petitioner is detained within this district at Caroline Detention Facility. Furthermore, a substantial part of the events or omissions giving rise to this action occurred and continue to occur at ICE's Washington Field Office in Chantilly, Virginia, within this division.

PARTIES

9. Mr. Rodriguez Guerra is a native and citizen of [redacted] who was granted CAT deferral of removal in January 2023. He is currently detained at Caroline Detention Facility.

10. Paul Perry is the Superintendent of Caroline Detention Facility ("Caroline"), a county jail that contracts with ICE to detain non-citizens. He is responsible for overseeing Caroline's administration and management. Mr. Perry is Petitioner's immediate custodian. He is sued in his official capacity.

11. Russell Hott is the Field Office Director of the ICE Enforcement and Removal Operations (ERO) Washington Field Office ("WAS ICE") and is the federal agent charged with

overseeing all ICE detention centers in Virginia, including Caroline. Mr. Hott is a legal custodian of Petitioner. He is sued in his official capacity.

12. Alejandro Mayorkas is the Secretary of the U.S. Department of Homeland Security (DHS). DHS oversees ICE, which is responsible for administering and enforcing the immigration laws. Secretary Mayorkas is the ultimate legal custodian of Petitioner. He is sued in his official capacity.

13. Merrick Garland is the Attorney General of the United States. He oversees the immigration court system, which is housed within the Executive Office for Immigration Review (EOIR) and includes all IJs and the Board of Immigration Appeals (BIA). He is sued in his official capacity.

LEGAL FRAMEWORK

I. WITHHOLDING OF REMOVAL AND RELIEF UNDER THE CONVENTION AGAINST TORTURE.

14. Non-citizens in immigration removal proceedings can seek three main forms of relief based on their fear of returning to their home country: asylum, withholding of removal, and CAT relief. Non-citizens may be ineligible for asylum for several reasons, including failure to apply within one year of entering the United States. *See* 8 U.S.C. § 1158(a)(2). There are fewer restrictions on eligibility for withholding of removal, *id.* § 1231(b)(3)(B)(iii), and no restrictions on eligibility for CAT deferral of removal. 8 C.F.R. § 1208.16.

15. To be granted CAT relief, a non-citizen must show that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). An applicant for CAT relief must show a higher likelihood of torture than the likelihood of persecution an asylum applicant must demonstrate. *See id.*

16. When an IJ grants a non-citizen withholding or CAT relief, the IJ issues a removal order and simultaneously withholds or defers that order with respect to the country or countries for which the non-citizen demonstrated a sufficient risk of persecution or torture. *See Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2283 (2021). Once withholding or CAT relief is granted, either party has the right to appeal that decision to the BIA within 30 days. *See* 8 C.F.R. § 1003.38(b). If both parties waive appeal or neither party appeals within the 30-day period, the withholding or CAT relief grant and the accompanying removal order become administratively final. *See id.* § 1241.1.

17. When a non-citizen has a final withholding or CAT relief grant, they cannot be removed to the country or countries for which they demonstrated a sufficient likelihood of persecution or torture. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(b)(2). While ICE is authorized to remove non-citizens who were granted withholding or CAT relief to alternative countries, *see* 8 U.S.C. § 1231(b); 8 C.F.R. § 1208.16(f), the removal statute specifies restrictive criteria for identifying appropriate countries. Non-citizens can be removed, for instance, to the country "of which the [non-citizen] is a citizen, subject, or national," the country "in which the [non-citizen] was born," or the country "in which the [non-citizen] resided" immediately before entering the United States. 8 U.S.C. § 1231(b)(2)(D)-(E).

18. If ICE identifies an appropriate alternative country of removal, ICE must undergo further proceedings in immigration court to effectuate removal to that country.[1] *See Jama v. ICE*,

[1] ICE itself acknowledges this obligation. In 2020, officials within ICE's Office of the Principal Legal Advisor (OPLA) created and circulated forms—acquired though a Freedom of Information Act (FOIA) request—that were designed to advise non-citizens of ICE's intent to pursue third country removal and afford them the opportunity to seek withholding-only relief for that country. Ex. A, ICE Notice of Third County Removal Form. To counsel's knowledge, no such form has been provided to Petitioner.

543 U.S. 335, 348 (2005) ("If [non-citizens] would face persecution or other mistreatment in the country designated under § 1231(b)(2), they have a number of available remedies: asylum, § 1158(b)(1); withholding of removal, § 1231(b)(3)(A); [and] relief under an international agreement prohibiting torture, *see* 8 CFR §§ 208.16(c)(4), 208.17(a) (2004) . . ."); *Romero v. Evans*, 280 F. Supp. 3d 835, 848 n.24 (E.D. Va. 2017) ("DHS could not immediately remove petitioners to a third country, as DHS would first need to give petitioners notice and the opportunity to raise any reasonable fear claims."), *rev'd on other grounds*, *Guzman Chavez*, 141 S. Ct. 2271.

19. As a result of these restrictions and procedures, "only 1.6% of noncitizens granted withholding-only relief were actually removed to an alternative country" in FY 2017. *Guzman Chavez*, 141 S. Ct. at 2295 (Breyer, J., dissenting). An analysis by undersigned counsel of updated statistics provided by ICE and EOIR for FY 2019 through FY 2020 reveals that this percentage was at most 3.3% during that period.[2]

II. DETENTION OF NON-CITIZENS GRANTED WITHHOLDING OF REMOVAL OR RELIEF UNDER THE CONVENTION AGAINST TORTURE.

a. Statutory Framework

20. 8 U.S.C. § 1231 governs the detention of non-citizens "during" and "beyond" the "removal period." 8 U.S.C. § 1231(a)(2)-(6). The "removal period" begins once a non-citizen's

[2] EOIR data indicates that approximately 386 non-citizens were granted withholding-only relief in FY 2019 and 2020. Ex. B, Data on Post-Relief Detention and Removal at 1. In response to a 2021 FOIA request, the ICE-ERO Statistical Tracking Unit provided data showing that a total of 13 people in "Case Category 5C (Relief Granted - Withholding of Deportation/Removal)" were removed in FY 2019 and 2020. *Id.* at 2. Comparing these data suggests that approximately 3.3% of non-citizens granted withholding or CAT relief were ultimately deported by ICE during that period. To the extent that the ICE data includes non-citizens removed to their home country after their withholding or CAT grant was terminated, the percentage of non-citizens removed to *third* countries following a final withholding or CAT relief grant is even lower.

removal order "becomes administratively final." 8 U.S.C. § 1231(a)(1)(B).[3] The removal period lasts for 90 days, during which ICE "shall remove the [non-citizen] from the United States" and "shall detain the [non-citizen]" as it carries out the removal. 8 U.S.C. § 1231(a)(1)-(2). If ICE does not remove the non-citizen within the 90-day removal period, the non-citizen "*may* be detained beyond the removal period" if they meet certain criteria, such as being inadmissible or deportable under specified statutory categories. 8 U.S.C. § 1231(a)(6) (emphasis added).

21. To avoid "indefinite detention" that would raise "serious constitutional concerns," the Supreme Court in *Zadvydas* construed § 1231(a)(6) to contain an implicit time limit. 533 U.S. at 682. *Zadvydas* dealt with two non-citizens who could not be removed to their home country or country of citizenship due to bureaucratic and diplomatic barriers. The Court held that § 1231(a)(6) authorizes detention only for "a period reasonably necessary to bring about the [non-citizen]'s removal from the United States." *Id.* at 689. Six months of post-removal order detention is considered "presumptively reasonable." *Id.* at 701.

22. But 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 v. Achim*, 542 F. Supp. 2d 897, 903 (E.D. Wis. 2008). "Within the six-month window," the non-citizen bears the burden of "prov[ing] the unreasonableness of detention." *Id.* After six months of detention, if there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the burden shifts to the Government to justify continued detention. *Zadvydas*, 533 U.S. at 701; *see also Cesar*, 542 F. Supp. 2d at 903 ("[T]he presumption

[3] There are two other events that trigger the start of the removal period, which are not applicable here. *See* 8 U.S.C. § 1231(a)(1)(B)(ii)-(iii).

scheme merely suggests that the burden the detainee must carry within the first six months of [post-order] detention is a heavier one than after six months has elapsed").

b. Regulations

23. DHS regulations provide that, before the end of the 90-day removal period that ensues upon a non-citizen's removal order becoming final, the local ICE field office with jurisdiction over the non-citizen's detention must conduct a custody review to determine whether the non-citizen should remain detained. *See* 8 C.F.R. § 241.4(c)(1), (h)(1), (k)(1)(i). If the non-citizen is not released following the 90-day custody review, jurisdiction transfers to ICE Headquarters (ICE HQ), *id.* § 241.4(c)(2), which must conduct a custody review before or at 180 days. *Id.* § 241.4(k)(2)(ii). In making these custody determinations, ICE considers several factors, including whether the non-citizen is likely to pose a danger to the community or a flight risk if released. *Id.* § 241.4(e). If the factors in § 241.4 are met, ICE must release the non-citizen under conditions of supervision. *Id.* § 241.4(j)(2).

24. To comply with *Zadvydas*, DHS issued additional regulations in 2001 that established "special review procedures" to determine whether detained non-citizens with final removal orders are likely to be removed in the reasonably foreseeable future. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967 (Nov. 14, 2001). While 8 C.F.R. § 241.4's custody review process remained largely intact, subsection (i)(7) was added to include a supplemental review procedure that ICE HQ must initiate when "the [non-citizen] submits, or the record contains, information providing a substantial reason to believe that removal of a detained [non-citizen] is not significantly likely in the reasonably foreseeable future." *Id.* § 241.4(i)(7).

25. Under this procedure, ICE HQ evaluates the foreseeability of removal by analyzing factors such as the history of ICE's removal efforts to third countries. *See id.* § 241.13(f). If ICE HQ determines that removal is not reasonably foreseeable but nonetheless seeks to continue detention based on "special circumstances," it must justify the detention based on narrow grounds such as national security or public health concerns, *id.* § 241.14(b)-(d), or by demonstrating by clear and convincing evidence before an IJ that the non-citizen is "specially dangerous." *Id.* § 241.14(f).

c. ICE Policy

26. Consistent with the statutory and regulatory scheme, long-standing ICE policy favors the prompt release of non-citizens who have been granted withholding or CAT relief. In 2000, the then-Immigration and Naturalization Service (INS) General Counsel issued a memorandum clarifying that 8 U.S.C. § 1231 authorizes but does not require the detention of non-citizens granted withholding of removal or CAT relief during the 90-day removal period.[4] Ex. C, ICE Policies on Post-Relief Release at 1. A 2004 ICE memorandum turned this acknowledgment of authority into a presumption, stating that "it is ICE policy to favor the release of [non-citizens] who have been granted protection relief by an immigration judge, absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law to detain." *Id.* at 2.

27. ICE leadership subsequently reiterated this policy in a 2012 announcement, clarifying that the 2000 and 2004 ICE memorandums are "still in effect and should be followed" and that "[t]his policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period." *Id.* at 3. Finally, in 2021, Acting ICE

[4] INS, housed within the Department of Justice, became ICE after the formation DHS in 2002.

Director Tae Johnson circulated a memorandum to all ICE employees reminding them of the "longstanding policy" that "absent exceptional circumstances, . . . noncitizens granted asylum, withholding of removal, or CAT protection by an immigration judge *should* be released. . . " *Id*. at 4 (emphasis added). Director Johnson clarified that "in considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat of danger to the community." *Id.*

STATEMENT OF FACTS

28. Roberto Carlos Rodriguez Guerra,[5] who identifies himself as [redacted] was born in [redacted] in [redacted]. Neither he nor his parents are citizens of any country besides [redacted]. Ex. D, Declaration of Roberto Carlos Rodriguez Guerra at ¶ 1.

29. Mr. Rodriguez Guerra fled [redacted]. *Id.* at ¶ 4. He came to the United States [redacted]. *Id.* at ¶ 2. Prior to his detention, he was living in [redacted]. *Id.* at ¶ 6.

30. On August [redacted] ICE issued Mr. Rodriguez Guerra a Notice to Appear (NTA) charging him as removable under 8 U.S.C. § 1182(a)(6)(A)(i) for being present in the United States without being admitted or paroled. Ex. E, NTA. ICE took Mr. Rodriguez Guerra into custody at Caroline, where he has been ever since. Mr. Rodriguez Guerra promptly retained counsel from Capital Area Immigrants' Rights (CAIR) Coalition.

31. On January [redacted], an IJ granted Mr. Rodriguez Guerra CAT deferral of removal, finding that he would more likely than not be tortured by the [redacted]

[5] ICE and EOIR have Mr. Rodriguez Guerra's [redacted]

[redacted] if returned to [redacted]. Ex. F, IJ Decision Granting CAT Relief at 16-17. Mr. Rodriguez Guerra was ordered removed to, and his removal deferred from, [redacted]. *Id.* at 17.

32. ICE filed a Notice of Appeal of the IJ's decision on February [redacted]. This appeal was untimely because the appeal was due on [redacted]. Ex. G, BIA Decision Dismissing ICE's Appeal at 2. Therefore, Mr. Rodriguez Guerra's CAT relief grant and accompanying removal order became final as of February [redacted], when the appeal period expired. *See* 8 U.S.C § 1231(a)(1)(B)(i); 8 C.F.R. § 1241.1(c). On [redacted], the BIA dismissed ICE's appeal, recognizing that it was untimely. Ex. G at 2.

33. On [redacted], counsel for Mr. Rodriguez Guerra sent a release request to WAS ICE, explaining that he qualifies for release under both ICE policy and the post-order custody review regulations. Ex. H, Release Request. In response an hour later, seemingly without even considering the request, Supervisory Detention and Deportation Officer Matthew Christopherson told counsel that Mr. Rodriguez Guerra "remains a final order of removal and ICE will seek a third country removal." Ex. I, ICE Emails at 2. Officer Christopherson noted that "[o]n or about [redacted], ERO will conduct a post order custody review per 8 CFR 241.4 which will be submitted for management review." *Id.*

34. ICE has not identified any exceptional circumstances warranting Mr. Rodriguez Guerra's continued detention under ICE policy. Nor has ICE charged Mr. Rodriguez Guerra as "specially dangerous" under 8 C.F.R. § 241.14.

35. Mr. Rodriguez Guerra has cooperated fully with ICE's third-country removal efforts. ICE has not informed him to which third countries it is purportedly seeking to remove him. Ex. D at ¶ 9.

36. Mr. Rodriguez Guerra has been diagnosed with [redacted]

[redacted]

37. If released, Mr. Rodriguez Guerra will live with [redacted].

Ex. D at ¶ 15.

ARGUMENT

I. PETITIONER'S CONTINUED DETENTION IS UNLAWFUL UNDER *ZADVYDAS* BECAUSE HIS REMOVAL IS NOT REASONABLY FORESEEABLE, AND THIS COURT SHOULD ACCORDINGLY ORDER HIS IMMEDIATE RELEASE.

A. Mr. Rodriguez Guerra's removal is not reasonably foreseeable under *Zadvydas*.

38. Mr. Rodriguez Guerra's detention is governed by 8 U.S.C. § 1231(a)(6) because he has been detained for more than 90 days since he received a final grant of CAT relief. The 90-day removal period began for Mr. Rodriguez Guerra on February [redacted], when the appeal period expired without either party filing a timely appeal. *See* 8 U.S.C. § 1231(a)(1)(B)(i); 8 C.F.R. § 1241.1(c).[6] Therefore, the *Zadvydas* framework applies to Mr. Rodriguez Guerra's detention, and he has been detained for more than six months since his removal order became final.

39. Mr. Rodriguez Guerra will very likely *never* be deported from the United States, let alone in the reasonably foreseeable future. He cannot be deported to his home country of [redacted] because he has a final grant of CAT deferral of removal. *See* 8 C.F.R. § 1208.17(b)(2).

40. Furthermore, it is exceedingly unlikely that ICE will identify an alternative country to which it can remove Mr. Rodriguez Guerra. ICE only managed to remove to third countries

[6] Even if ICE had filed a timely appeal, Mr. Rodriguez Guerra's removal period arguably still would have begun on [redacted], upon the expiration of *his* appeal period. *See* 8 C.F.R. § 1241.1(c) ("An order of removal . . . shall become final . . . upon expiration of the time allotted for an appeal if the [non-citizen] does not file an appeal within that time . . ."); *Toma v. Adducci*, 535 F. Supp. 3d 651, 656-57 (E.D. Mich. 2021) (finding that non-citizen's removal period began when non-citizen did not appeal removal order, despite DHS' timely appeal of non-citizen's CAT grant).

approximately three percent of non-citizens granted withholding and CAT relief in FY 2019 and 2020, *see* Ex. B, and a significant increase in ICE's third country removals is highly doubtful without a substantial change in diplomatic relationships between the United States and other countries.[7]

41. More specifically, ICE has recently and repeatedly failed to remove similarly situated Central American individuals to alternative countries. For example, CAIR Coalition recently represented two [redacted] citizens who ICE failed to remove to a third country but who nonetheless remained detained in Virginia for more than 90 days past their final relief grants. WAS ICE confirmed that they had received "negative responses" from six alternative removal countries (Honduras, Guatemala, Mexico, Nicaragua, Costa Rica, and Panama) to which ICE had purportedly sought to remove the two individuals. Ex. K, ICE Emails in Similar Cases at 1, 10. ICE nonetheless continued to detain both individuals for months after receiving "negative responses" and only later released the individuals after they each filed federal habeas petitions like this one. *Id.* at 4, 8; *see also Martinez Alfaro v. Perry*, 1:22-cv-1243 (E.D. Va. 2022); *Hernandez Preza v. Perry*, 1:23-cv-200 (E.D. Va. 2023).

42. Similarly, earlier this month, undersigned counsel litigated a habeas petition in this Court on behalf of three Central American men who were detained in Virginia for more than 90 days past their relief grants. ICE released the three men two weeks after the habeas petition was

[7] Foreign countries do not accept the deportation of random non-citizens who lack any connection to their territory. According to a 2019 DHS report on ICE deportation procedures, "foreign governments do not issue travel documents without confirming the identity and citizenship of the [non-citizen]" and "with limited exceptions, require a passport or temporary travel permit to accept their nationals back into the country." DHS Office of the Inspector General, *ICE Faces Barriers in Timely Repatriation of Detained Aliens* (March 11, 2019), at 8 https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf.

filed, ostensibly because ICE HQ finally determined that their removal was not reasonably foreseeable. *See Rios Castro v. Crawford*, 1:23-cv-1011 (E.D. Va. 2023).

43. Finally, in a recent case, WAS ICE submitted requests to Honduras, Costa Rica, and Portugal,[8] asking them to accept the deportation of a Guatemalan citizen with no ties to those or any other countries. Even after each of those countries unsurprisingly declined to accept him, WAS ICE still denied the Guatemalan man's release at his 90-day custody review. Ex. L, Declaration of Katharine Gordon at ¶ 9. Not until his case was reviewed by ICE HQ a month later did ICE finally release him, acknowledging that he "[did] not appear to have lawful status in a third country" and, therefore "no [significant likelihood of removal in the reasonably foreseeable future]. Ex. M, ICE HQ Release Example.

44. Given this history, it strains credulity to think that ICE will be able to remove Mr. Rodriguez Guerra to a random collection of alternative countries that have recently and repeatedly declined to accept the deportation of similarly situated individuals.[9] Like the individuals referenced above, Mr. Rodriguez Guerra is not a citizen of, has never lived in, and has no connection to *any* country besides his home country, let alone the countries to which ICE has purportedly attempted to remove individuals in the past.

45. Even in the highly unlikely scenario that an alternative country notifies ICE of its willingness to accept the deportation of Mr. Rodriguez Guerra, ICE would still be required to obtain travel documents and afford him a Reasonable Fear Interview (RFI) at which he would have the opportunity to articulate a fear of return to the country willing to accept him. *See* 8 C.F.R. § 241.8(e). If an Asylum Officer (AO) were to find that Mr. Rodriguez Guerra demonstrated a

[8] That ICE reached out to Portugal for the deportation of a Guatemalan citizen illustrates the absurdity of ICE's third-country removal practices.
[9] ICE has not informed Petitioner to which specific countries it is attempting to remove him.

reasonable possibility of persecution or torture at the RFI, or an IJ subsequently vacated a negative finding by the AO, he would enter withholding-only proceedings before an IJ in which he would again seek to demonstrate his eligibility for withholding or CAT relief with respect to that country, thereby restarting the process that took several months to complete the first time. *See* Ex. A.

46. Therefore, Mr. Rodriguez Guerra has been detained for more than six months since receiving a final removal order, and his removal is not reasonably foreseeable because 1) he cannot be deported to his home country due to his CAT relief grant; 2) ICE has historically managed to remove only a tiny fraction of non-citizens granted withholding or CAT to alternative countries; 3) WAS ICE failed to remove every similarly situated individual in the last year, leading to their eventual release; 4) any countries to which requests may still be pending have no logical reason to accept Mr. Rodriguez Guerra's deportation and have provided no timeline under which they might decide; and 5) deporting Mr. Rodriguez Guerra to those alternative countries would require additional, lengthy proceedings. *See Hassoun v. Sessions*, No. 18-cv-586-FPG, 2019 WL 78984, at *5 (W.D.N.Y. Jan. 2, 2019) (finding removal not reasonably foreseeable where several countries had declined to issue travel documents and several others had provided no response or timeline for response); *Kacanic v. Elwood*, No. 02-cv-8019, 2002 WL 31520362, at *5 (E.D. Pa. Nov. 8, 2002) (finding removal not reasonably foreseeable where the country of origin had "been in possession of all the information [ICE] is capable of providing to it" but had "never stated that the Petitioner is likely to be granted travel papers" and was "unable to tell the [ICE] when a decision will be reached").

47. Even if this Court finds that Mr. Rodriguez Guerra's removal period did not begin until [redacted], when the BIA dismissed ICE's appeal and recognized it as untimely, Mr. Rodriguez Guerra has still demonstrated that his continued detention is unreasonable under

Zadvydas. Post-removal order detention for less than six months may still be unreasonable in unique circumstances like Petitioner's where he can meet his burden of demonstrating that removal is not reasonably foreseeable. *See Cesar*, 542 F. Supp. 2d at 904 ("The burden might be on the detainee within the first six months to overcome the presumptive legality of his detention, but where a[] [non-citizen] can carry that burden, even while giving appropriate deference to any Executive Branch expertise, his detention would be unlawful."); *Trinh v. Homan*, 466 F. Supp. 3d 1077, 1093 (C.D. Cal. 2020) ("*Zadvydas* established a 'guide' for approaching detention challenges, not a categorical prohibition on claims challenging detention less than six months."); *Ali v. DHS*, 451 F. Supp. 3d 703, 708 (S.D. Tex. 2020) ("Whereas the *Zadvydas* Court established a presumption that detention that exceeded six months would be unconstitutional, it did not require a detainee to remain in detention for six months or to prove that the detention was of an indefinite duration before a habeas court could find that the detention is unconstitutional.").

48. For the reasons stated above, Mr. Rodriguez Guerra has clearly met any burden of proof that this Court may place on him. Unlike *Zadvydas* and the vast majority of its progeny, which analyzed whether ICE will foreseeably remove non-citizens to their home country or country of citizenship, *see, e.g.*, *Zadvydas*, 533 U.S. at 684-85, the question here is whether ICE will be able to deport Mr. Rodriguez Guerra to random third countries to which he has no connection whatsoever. The answer to that question has been no from the moment Mr. Rodriguez Guerra's relief grant became final, and the likelihood of third-country removal has only decreased since then.

B. This Court should order Mr. Rodriguez Guerra's immediate release.

49. Because Mr. Rodriguez Guerra's removal is not reasonably foreseeable, *Zadvydas* requires that he be immediately released. *See* 533 U.S. at 700-01 (describing release as an

appropriate remedy); 8 U.S.C. § 1231(a)(6) (authorizing release "subject to . . . terms of supervision"). To order his immediate release, this Court need only determine that Mr. Rodriguez Guerra's removal is not reasonably foreseeable under *Zadvydas*; it need not analyze whether he poses a danger to the community or a flight risk. *See* 533 U.S. at 699-700 ("[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.").

50. *Zadvydas* explicitly held that flight risk is already baked into the reasonable foreseeability analysis, *see id.* at 690 (observing that the "justification . . . [of] preventing flight . . . is weak or nonexistent where removal seems a remote possibility at best"), and that dangerousness cannot unilaterally justify indefinite civil detention barring "special circumstances," which may include the non-citizen being a "suspected terrorist[]" but do not include the non-citizen's "removable status itself." *Id.* at 691. *See also Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary [civil detention]."). With respect to Mr. Rodriguez Guerra's detention, ICE has not invoked the regulations governing these "special circumstances" determinations. *See* 8 C.F.R. § 241.14.

51. To the extent this Court considers any factors outside of the foreseeability of Petitioner's removal, which it need not do, Mr. Rodriguez Guerra has significant equities that warrant release. Mr. Rodriguez Guerra has lived in the United States for approximately [redacted] years. Ex. D at ¶ 2. [redacted]

52. Additionally, this Court or ICE is free to impose conditions on release to mitigate any potential concerns regarding flight risk or danger. *See Zadvydas*, 533 U.S. at 700 ("[T]he [non-citizen]'s release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.").

II. ICE'S CONTINUED DETENTION OF MR. RODRIGUEZ GUERRA, WITHOUT REVIEWING HIS CUSTODY UNDER ICE POLICY VIOLATES THE APA AND DUE PROCESS.

53. Under the *Accardi* doctrine, which originated in the context of an immigration case and has been developed through subsequent immigration caselaw, agencies are bound to follow their own rules that affect the fundamental rights of individuals, even self-imposed policies and processes that limit otherwise discretionary decisions. *See Accardi*, 347 U.S. at 226 (holding that BIA must follow its own regulations in its exercise of discretion); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required.").

54. The requirement that an agency follow its own policies is not "limited to rules attaining the status of formal regulations." *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991). Even an unpublished policy binds the agency if "an examination of the provision's language, its context, and any available extrinsic evidence" supports the conclusion that it is "mandatory rather than merely precatory." *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977); *see also Morton*, 415 U.S. at 235–36 (applying *Accardi* to violation of internal agency manual); *U.S. v. Heffner*, 420 F.2d 809, 813 (4th Cir. 1969) ("Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labeled a 'Regulation' . . .").

55. When agencies fail to adhere to their own policies as required by *Accardi*, courts typically frame the violation as arbitrary, capricious, and contrary to law under the APA, *see Damus v. Nielson*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018) ("It is clear, moreover, that [*Accardi*] claims may arise under the APA"), or as a due process violation, *see Sameena, Inc. v. United States Air Force,* 147 F.3d 1148, 1153 (9th Cir. 1998) ("An agency's failure to follow its own regulations tends to cause unjust discrimination and deny adequate notice and consequently may result in a violation of an individual's constitutional right to due process.") (internal quotations omitted).

56. Prejudice is generally presumed when an agency violates its own policy. *See Montilla,* 926 F.2d at 167 ("We hold that an alien claiming the INS has failed to adhere to its own regulations . . . is not required to make a showing of prejudice before he is entitled to relief. All that need be shown is that the subject regulations were for the alien's benefit and that the INS failed to adhere to them."); *Heffner*, 420 F.2d at 813 ("The *Accardi* doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict.").

57. To remedy an *Accardi* violation, a court may direct the agency to properly apply its policy, *see Damus*, 313 F. Supp. 3d at 343 ("[T]his Court is simply ordering that Defendants do what they already admit is required."), or a court may apply the policy itself and order relief consistent with the policy. *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 657 (D. Mass. 2018) (scheduling bail hearing to review petitioners' custody under ICE's standards because "it would be particularly unfair to require that petitioners remain detained . . . while ICE attempts to remedy its failure").

58. ICE's long-standing policy (hereinafter "the Policy") is to release non-citizens immediately following a grant of withholding or CAT relief absent exceptional circumstances. *See* Ex. C at 2 ("In general, it is ICE policy to favor the release [non-citizens] who have been granted

protection by an immigration judge, absent exceptional concerns . . .”); *id.* at 4 (“Pursuant to longstanding policy, absent exceptional circumstances . . . noncitizens granted asylum, withholding of removal, or CAT protection by an immigration judge *should* be released . . .”) (emphasis added). The Policy specifically instructs the local ICE field office to make an individualized determination whether to keep a non-citizen detained based on exceptional circumstances. *See id.* at 3 (“[T]he Field Office Director must approve any decision to keep a[] [non-citizen] who received a grant of [asylum, withholding, or CAT relief] in custody.”).

59. The Policy constitutes ICE’s interpretation of the statute and regulations governing post-removal order detention. *See* 8 U.S.C. § 1231; 8 C.F.R. §§ 241.4, 241.13, 241.14. ICE has reasonably concluded that 8 U.S.C. § 1231(a)(2) does not require the detention of non-citizens granted withholding or CAT relief for the entirety of the 90-day removal period and that ICE “has the authority to consider the release of such [non-citizens] during the removal period.” Ex. C at 1. Furthermore, ICE later stated that the release policy established in 2004 “applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period,” thereby explicitly extending the Policy to non-citizens with final removal orders who were granted withholding or CAT relief. *Id.* at 3.

60. Such an application of the Policy is consistent with the broad discretion afforded to ICE by the statute and regulations governing post-removal order detention and is a reasonable interpretation of the ambiguities in that framework. Neither the statute nor regulations specifically contradict the Policy,[10] and the regulatory language suggests that the standard custody review

[10] 8 U.S.C. § 1231(a)(2) does not apply to Mr. Rodriguez Guerra because he has been detained past the 90-day removal period. Even if this Court were to find that Mr. Rodriguez Guerra is still within the 90-day removal period, § 1231(a)(2) would not preclude his release because he has not been charged as removable on the grounds described therein. *See, e.g.,* Ex. E; *see also id.* 8 U.S.C. § 1231(a)(2) (“Under no circumstance during the removal period shall [ICE] release a [non-citizen]

procedures for non-citizens with final removal orders do not apply to non-citizens like Petitioner who have been detained for 90 days or more after being granted withholding or CAT and lack a connection to an alternative country. *See, e.g.*, 8 C.F.R. § 241.4(b)(4) ("The custody review procedures in this section do not apply after the Service has made a determination, under the procedures provided in 8 CFR 241.13, that there is no significant likelihood that [non-citizen] under a final order of removal can be removed in the reasonably foreseeable future.").

61. The Policy and its application to individuals with final grants of withholding or CAT relief are thus entitled to deference. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) ("This Court has often deferred to agencies' reasonable readings of genuinely ambiguous regulations. We call that practice Auer deference . . ."); *Auer v. Robbins*, 519 U.S. 452 (1997) (deferring to Labor Secretary's reasonable interpretation of overtime pay regulations); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that courts should defer to agencies' reasonable interpretations of ambiguous statutes).

62. The Policy is precisely the type of rule ICE is obligated to follow under *Accardi*. In *Damus*, the U.S. District Court for the District of Columbia found that a similarly styled ICE directive from 2009 laying out "procedures ICE must undertake to determine whether a given asylum-seeker should be granted parole" fell "squarely within the ambit of those agency actions to which the [*Accardi*] doctrine may attach," in part because it "establish[ed] a set of minimum protections for those seeking asylum" and "was intended—at least in part—to benefit asylum-seekers navigating the parole process." 313 F. Supp. 3d at 324, 337-38; *see also Pasquini v. Morris*, 700 F.2d 658, 663 n.1 (11th Cir. 1983) ("Although the [INS] internal operating instruction confers

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who has been founded inadmissible [based on certain criminal or terrorism grounds] or deportable [based on similar grounds]).

no substantive rights on the [noncitizen]-applicant, it does confer the procedural right to be considered for such status upon application."). Similarly, the Policy here establishes procedures for reviewing the custody of non-citizens who are granted immigration relief and is clearly intended, at least in part, to benefit those non-citizens. *See* Ex. C at 4 (referring to "ICE policy favoring a non-citizen's release").

63. Furthermore, by reiterating the Policy four times over the last two decades and using mandatory language, ICE leadership has clearly indicated that it intends the Policy to be binding on all field offices and officers. *See, e.g.*, Ex. C at 2 ("In all cases, the Field Office director *must* . . ") (emphasis added); *id.* at 4 ("I am issuing this reminder to ensure that ICE personnel remain cognizant of and continue to follow this Directive"); *see also Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("[A]n agency pronouncement is transformed into a binding norm if so intended by the agency.").

64. WAS ICE has clearly flouted ICE's national policy with respect to Petitioner's detention, in violation of *Accardi*. The available evidence demonstrates that WAS ICE is automatically detaining *every* non-citizen granted withholding or CAT relief, including Petitioner, for at least the 90-day removal period. After the 90-day removal period lapses, WAS ICE conducts a standard custody review pursuant to the factors in 8 C.F.R. § 241.4, without regard to the Policy's requirements. Only after WAS ICE denies release based on these factors does the case transfer to ICE HQ to consider the likelihood of removal under § 241.13. At no point does it appear that WAS ICE is conducting an individualized review under the "exceptional circumstances" standard as required by the Policy.

65. Since the beginning of FY 2023, CAIR Coalition has seen virtually every client with a final grant of withholding or CAT relief—approximately 15 individuals, including

Petitioner—held by WAS ICE for at least the 90-day period following their relief grants.[11] Ex. L at ¶ 7. Conversations with WAS ICE regarding the detention of Petitioner and similarly situated individuals confirm that the deportation officers have consistently and reflexively continued to detain non-citizens for the 90-day period without any individualized review, seemingly pursuant to an office-wide practice. *See, e.g.,* Ex. K at 15 (noting that a non-citizen client "will be released in accordance to policy, close to or on day 90").

66. In Mr. Rodriguez Guerra's case, WAS ICE should have reviewed his custody under the Policy as soon as they decided to appeal his CAT grant, and then again when the BIA dismissed the appeal. *See* Ex. C at 3. Yet they did neither. There is furthermore no evidence that the WAS ICE Field Office Director, who is vested with non-delegable review power under the Policy, approved Petitioner's continued detention at any point after he was granted relief, as required by the Policy. *See* Ex. C at 2-3.[12]

67. WAS ICE's failure to promptly review Petitioner's custody under the Policy is prejudicial to him. Prejudice can be presumed because the Policy implicates Petitioner's fundamental liberty interests and due process rights. *See Delgado-Corea v. INS*, 804 F.2d 261, 263 (4th Cir. 1986) (holding that "violation of a regulation can serve to invalidate a deportation order when the regulation serves a purpose to benefit the [non-citizen]" and the violation affected

[11] This excludes one individual who was in post-order withholding-only proceedings from the outset of his detention and was released about two months after being granted withholding, in part because he had already been held well past the 90-day removal period. *See* Ex. L at ¶ 7.

[12] That WAS ICE is violating ICE policy is not surprising given its history of non-compliance with ICE national directives. In 2021, more than 50% of its enforcement actions were against non-citizens who did not fall within ICE's stated enforcement priorities. Where rank and file officers sought pre-approval from WAS ICE leadership for these non-priority enforcement actions, leadership approved nearly 98% of the requests. *See* American Immigration Council (AIC), *ICE Didn't Follow Federal Enforcement Priorities Set by Biden Administration* (June 27, 2023), https://www.americanimmigrationcouncil.org/foia/ice-enforcement-priorities?emci=b046dc53-8c16-ee11-a9bb-00224832eb73&emdi=ea000000-0000-0000-0000-000000000001&ceid=.

"interests of the [non-citizen] which were protected by the regulation") (internal quotations omitted). The Policy provides Mr. Rodriguez Guerra with a discrete opportunity to win his freedom from detention and that opportunity has thus far been withheld from him. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

68. Conducting the standard 90-day custody review under 8 C.F.R. § 241.4, which WAS ICE has indicated they will do for Mr. Rodriguez Guerra on or about September [redacted], does not suffice to comply with the Policy. 8 C.F.R. § 241.4, which facially applies to all non-citizens subject to an administratively final order of removal, employs a different standard that places the burden of proof on the non-citizen to justify their release. *See* 8 C.F.R. § 241.4(d)(1) ("[ICE] may release a[] [non-citizen] if the [non-citizen] demonstrates to the satisfaction of [ICE] that his or her release will not pose a danger to the community or to the safety of other person or to property or a significant risk of flight . . .").

69. In contrast, the Policy presumes that non-citizens granted withholding or CAT relief will be released "absent exceptional circumstances, such as when the non-citizen presents a national security threat or a danger to the community," and it specifies that "prior convictions alone do not necessarily indicate a public safety threat or danger to the community." Ex. C at 4. If WAS ICE were to review Mr. Rodriguez Guerra's custody under the Policy, he would very likely be released.

70. Therefore, Mr. Rodriguez Guerra has been prejudiced by ICE's failure to review his custody under the Policy's "exceptional circumstances" standard. According to the *Accardi* doctrine, ICE's departure from its own policy is arbitrary, capricious, and contrary to law under the APA and violates Mr. Rodriguez Guerra's due process rights.

71. As a remedy, this Court should review Mr. Rodriguez Guerra's custody under the Policy's "exceptional circumstances" standard and order his release accordingly. *See Jimenez*, 317 F. Supp. at 657 ("In these circumstances, it is most appropriate that the court exercise its equitable authority to remedy the violations of petitioners' constitutional rights to due process by promptly deciding itself whether each should be released."). At the very least, this Court should order that WAS ICE immediately conduct such a review for Petitioner pursuant to the Policy. *See Damus*, 313 F. Supp. 3d at 343.

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1231(a)(6)

72. Petitioner realleges and incorporates by reference the paragraphs above.

73. 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court in *Zadvydas*, authorizes detention only for "a period reasonably necessary to bring about the alien's removal from the United States." 533 U.S. at 689, 701.

74. Petitioner's continued detention has become unreasonable because his removal is not reasonably foreseeable. Therefore, his continued detention violates 8 U.S.C. § 1231(a)(6), and he must be immediately released.

COUNT II

ARBITRARY AND CAPRICIOUS AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A)

75. Petitioner realleges and incorporates by reference the paragraphs above.

76. Courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

77. ICE has deviated from its own policy in continuing to detain Petitioner after he was granted immigration relief, without determining whether exceptional circumstances warrant his continued detention. This is arbitrary, capricious, and contrary to law in violation of the APA.

78. As a remedy, this Court should conduct its own review of Petitioner's custody or, at least, order ICE to review Petitioner's custody under the standard articulated in ICE policy.

COUNT III

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

79. Petitioner realleges and incorporates by reference the paragraphs above.

80. ICE has violated Petitioner's due process rights by denying him an individualized custody review to which he is entitled under ICE policy.

81. As a remedy, this Court should conduct its own review of Petitioner's custody or, at least, order ICE to review Petitioner's custody under the standard articulated in ICE policy.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully request that this Court:

a. Assume jurisdiction over this matter;

b. Declare that Petitioner's continued detention violates the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6); the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); and/or the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

c. Order Petitioner's immediate release;

d. Alternatively, review Petitioner's custody under the standard articulated in ICE policy, or order ICE to review Petitioner's custody accordingly;

e. Grant any other further relief this Court deems just and proper.

Dated: August 29, 2023

Respectfully submitted,

/s/
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VERIFICATION BY SOMEONE ACTING ON PETITIONER'S BEHALF PURSUANT TO 28 U.S.C. § 2242

I am submitting this verification on behalf of the Petitioner because I am the attorney for Petitioner. I or my co-counsel have discussed with the Petitioner the events described in this Petition. Based on those discussions, I hereby verify that the statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: August 29, 2023

Respectfully submitted,

/s/
Sophia Gregg
Pro Bono Counsel for Petitioner

CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that on this date, I filed this Petition for Writ of Habeas Corpus and all attachments using the CM/ECF system. My co-counsel will furthermore mail a copy by USPS Certified Priority Mail with Return Receipts to each of the following individuals:

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Respectfully submitted,

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