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

[redacted] GERMAN CANO FUENTES; *and* CARLOS GUZMAN LOPEZ

Petitioners,

v.

JEFFREY CRAWFORD, *in his official capacity as Warden of the Farmville Detention Center*; 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.

FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

Case No. 1:23-cv-1011

INTRODUCTION

1. Petitioners [redacted], German Cano Fuentes, and Carlos Guzman Lopez are three Central American men who remain in ICE custody in Virginia despite winning their immigration cases three or more months ago based on findings by an Immigration Judge (IJ) that they would likely be persecuted or tortured if deported to their home countries.[1] Immigration and Customs Enforcement (ICE) refuses to release Petitioners, claiming that it is looking for alternative countries of removal despite knowing that Petitioners lack citizenship in or a connection to any

[1] Mr. [redacted] files this amended habeas petition pursuant to Fed. R. Civ. P. 15(a)(1)(A), adding two additional petitioners and additional claims.

other country. Petitioners' continued detention is arbitrary and unlawful, and they request that this Court order their immediate release from ICE custody.

2. Petitioners are 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). Petitioners' removal orders and accompanying relief grants became final when ICE waived appeal or failed to appeal within the allotted time period for each Petitioner. 8 C.F.R. § 1241.1.

3. Petitioners' 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 their removal is not reasonably foreseeable. They cannot be deported to their home countries—El Salvador and Honduras—because they have been granted withholding of removal ("withholding") under 8 U.S.C. § 1231(b)(3) or relief under the Convention Against Torture ("CAT relief"). 8 C.F.R. § 1208.17. ICE's half-hearted attempts to remove Petitioners to a random collection of alternative countries—to which they have 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 Petitioners and similarly situated individuals for at least 90 days past their grants of relief without prompt, individualized determinations of whether each 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 Petitioners up to and past the 90-day removal period has adversely and severely affected Petitioners' 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 Petitioners are detained within this district at Farmville Detention Center and Caroline Detention Facility. Furthermore, a substantial part of the events or omissions giving rise to this action occurred and continue to occur within this division at ICE's Washington Field Office in Chantilly, Virginia.

9. Petitioners are properly joined in this action because they jointly assert a right to release from custody and raise *at least* one "question of law or fact common to all plaintiffs," namely whether their removal is reasonably foreseeable under *Zadvydas* and whether ICE has followed its own policy in continuing their detention. Fed. R. Civ. P. 20(a)(1).

PARTIES

10. Petitioner [redacted] is a native and citizen of Honduras who was granted withholding of removal in April 2023. He is currently detained at Farmville Detention Center.

11. Petitioner German Cano Fuentes ("Mr. Cano Fuentes") is a native and citizen of El Salvador who was granted CAT deferral of removal in March 2023. He is currently detained at Farmville Detention Center.

12. Petitioner Carlos Guzman Lopez ("Mr. Guzman Lopez") is a native and citizen of El Salvador who was granted CAT deferral of removal in May 2023. He is currently detained at Caroline Detention Facility.

13. Jeffery Crawford is the Director of the Farmville Detention Center ("Farmville"), which is owned and operated by Immigration Centers of America (ICA) and contracts with ICE to detain non-citizens. Mr. Crawford is the immediate custodian of [redacted] and Mr. Cano Fuentes. He is sued in his official capacity.

14. 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 the immediate custodian of Mr. Guzman Lopez. He is sued in his official capacity.

15. 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 and Farmville. Mr. Hott is a legal custodian of Petitioners. He is sued in his official capacity.

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

17. Merrick Garland is the Attorney General of the United States. He oversees the immigration court system, 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.

18. 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.

19. To be granted withholding of removal under 8 U.S.C. § 1231(b)(3), a non-citizen must demonstrate that it is "more likely than not" that their life or freedom would be threatened in their home country on account of a protected ground, such as political opinion or membership in a particular social group. *Camara v. Ashcroft*, 378 F.3d 361, 367 (4th Cir. 2004) (citing 8 U.S.C. § 1231(b)(3)(A) and 8 C.F.R. § 208.16(b)). An applicant for withholding of removal must show a higher likelihood of persecution than an asylum applicant. *See id.*

20. 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.*

21. 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.

22. When non-citizens have 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).

23. If ICE identifies an appropriate alternative country of removal, ICE must undergo further proceedings in immigration court to effectuate removal to that country.[2] *See Jama v. ICE*, 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.

24. 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.[3]

---

[2] 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 Petitioners.

[3] 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.

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

a. Statutory Framework

25. 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 removal order "becomes administratively final." 8 U.S.C. § 1231(a)(1)(B).[4] 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).

26. 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.

27. 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

[4] 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).

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

b. Regulations

28. 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).

29. 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).

30. 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

31. 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.[5] 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.

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

32. 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 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

[redacted]

33. [redacted] was born in Honduras in [redacted]. Neither he nor his parents are citizens of any country besides Honduras. Ex. D1, Declaration of [redacted].

34. [redacted] He entered the United States in 1996 and has lived here ever since. *Id.* at ¶ 1.

35. [redacted]

36. [redacted]

37. ICE issued [redacted] 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. D2, Notice to Appear. [redacted] represented himself before the immigration court, with pro se assistance from CAIR Coalition. Ex. D1 at ¶ 5.

38. On April 28, 2023, an IJ granted [redacted] withholding of removal under 8 U.S.C. § 1231(b)(3). Ex. D3, IJ Decision at 1. [redacted] was ordered removed to, and his removal was withheld from Honduras. *Id.* at 3. Both parties waived appeal at the hearing, rendering the removal order and withholding grant final. *Id.* at 4.

39. On May 23, 2023, ICE served [redacted] with a Notice to Alien of File Custody Review, scheduling his 90-day custody review on or about July 27, 2023. Ex. D4, Notice of Custody Review.

40. On July 28, 2023, ICE served a Decision to Continue Detention on [redacted]. Ex. D5, ICE Custody Review Denial. [redacted] It also states that [redacted] has "limited ties" to the United States despite the fact that he has lived here for more than 25 years. *Id.* The decision does not allege that [redacted]'s removal is reasonably foreseeable, nor does it identify a third country for which ICE has acquired travel documents. *Id.*

41. ICE has not identified any exceptional circumstances warranting [redacted]'s continued detention under ICE policy. [redacted]

42. [redacted] has cooperated fully with ICE's third-country removal efforts. ICE has not informed him to which third country or countries it is seeking to remove him.

43. [redacted]

44. [redacted]

45. [redacted]

Mr. Cano Fuentes

46. Mr. Cano Fuentes was born in El Salvador in 1994. Neither he nor his parents are citizens of any country besides El Salvador. Ex. E1, Declaration of German Cano Fuentes at ¶ 1.

47. Mr. Cano Fuentes fled El Salvador to escape persecution and torture by gangs and the Salvadoran police. *Id.* at ¶ 3. [redacted] Mr. Cano Fuentes entered the United States in September 2021. *Id.* at ¶ 2.

48. In August 2022, ICE arrested Mr. Cano Fuentes during a traffic stop. *Id.* at ¶ 8. ICE issued Mr. Cano Fuentes an 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 and took him into custody at Caroline in Virginia. Ex. E2, IJ Decision Granting CAT Relief at 1.

49. On March 23, 2023, an IJ granted Mr. Cano Fuentes CAT deferral of removal, finding that he would more likely than not be tortured by the Salvadoran police, military, and gang members if returned to El Salvador. *Id.* at 16. Mr. Cano Fuentes was ordered removed to, and his removal deferred from, El Salvador. *Id.* at 17. ICE did not appeal within the 30-day period, rendering the removal order and CAT relief grant final as of approximately April 24, 2023.

50. On April 27, 2023, ICE served Mr. Cano Fuentes with a Notice to Alien of File Custody Review, scheduling his 90-day custody review for on or about July 23, 2023. Ex. E3, Notices of Custody Review at 1. In an email responding to counsel's release request and forwarding the custody review notice, an ICE officer said, "Mr. Cano-Fuentes's removal order with CAT [became] final on April 24, 2023. Mr. Cano-Fuentes will be offered a post-order custody review on or about July 23, 2023 . . ." Ex. E4, ICE Emails at 1.

51. ICE later changed the date of Mr. Cano Fuentes' custody review two times, finally scheduling it for July 29, 2023, a Saturday. Ex. E3 at 2. In advance of the review, Mr. Cano Fuentes' counsel sent ICE a post-release plan, a copy of his medical records, and a letter of support from his sister. Ex. E5, Excerpt of Medical Records; Ex. E6, Post-Release Plan.

52. On or about July 12, 2023, ICE transferred Mr. Cano Fuentes from Caroline to Farmville. Ex. E1 at ¶ 2.

53. On July 24, ICE informed Mr. Cano Fuentes' counsel that his case had been "referred to ICE HQ for release," an ambiguous statement suggesting that WAS ICE had already decided to deny his 90-day custody review. Ex. E4 at 3. On July 26, Mr. Cano Fuentes' counsel received a copy of the 90-day custody review decision by fax from Farmville, confirming that WAS ICE had, in fact, denied Mr. Cano Fuentes' release. Ex. E7, ICE Custody Review Denial. Because the Proof of Service section was left blank, it is unclear whether this decision was served on Mr. Cano Fuentes himself. *Id.* at 3.

54. The custody review decision, dated July 24 and signed by Acting Deputy Field Office Director Erik Weiss, states that continued detention is warranted because Mr. Cano Fuentes purportedly "[h]as not demonstrated that, if released, [he] will not . . . pose a danger to the community . . . [and] pose a significant risk of flight pending [his] removal from the United States."

Id. at 1. The decision does not allege that Mr. Cano Fuentes' removal is reasonably foreseeable, nor does it identify a third country for which ICE has acquired travel documents. *Id.*

55. ICE has not identified any exceptional circumstances warranting Mr. Cano Fuentes' continued detention under ICE policy. Mr. Cano Fuentes has no criminal record in the United States. Ex. E1 at ¶ 11.

56. Mr. Cano Fuentes has cooperated fully with ICE's third-country removal efforts, including by providing a copy of his passport. ICE has not informed him which alternative country or countries it seeks to remove him to. *Id.* at ¶ 10.

57. Mr. Cano Fuentes has a serious kidney disease that requires consistent monitoring and treatment. Ex. E5.

58. If released, Mr. Cano Fuentes would live with his sister in Virginia and seek mental health services with the support of CAIR Coalition. Ex. E6.

Mr. Guzman Lopez

59. Mr. Guzman Lopez was born in El Salvador in 1995. Neither he nor his parents are citizens of any country besides El Salvador. Ex. F1, Declaration of Carlos Guzman Lopez at ¶ 1.

60. Mr. Guzman Lopez fled El Salvador to escape persecution and torture by the Salvadoran government and the gangs. *Id.* at ¶¶ 5-6. He entered the United States in February 2017. *Id.* at ¶ 7.

61. [redacted]

62. ICE issued Mr. Guzman Lopez an 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. F2, IJ Decision Granting CAT Relief December 2022 at 1. Mr. Guzman Lopez retained counsel from the Georgetown University Center for Applied Legal Studies. *Id.*

63. On December 13, 2022, an IJ granted Mr. Guzman Lopez CAT deferral of removal, finding that he would more likely than not be tortured by the Salvadoran police, military, and gang members if returned to El Salvador. *Id.* at 10. ICE appealed the IJ's decision to the BIA.

64. On April 24, 2023, the BIA dismissed ICE's appeal, finding that the IJ did not err in granting CAT relief. Ex. F3, BIA Decision Dismissing ICE's Appeal at 2. For procedural reasons, the case was remanded to the IJ for re-entry of the order granting CAT relief. *Id.*

65. On May 2, 2023, the IJ re-issued her previous CAT relief grant. Ex. F4, IJ Decision Re-Granting CAT Relief May 2023 at 1. Mr. Guzman Lopez was ordered removed to, and his removal deferred from, El Salvador. *Id.* at 3. Both parties waived appeal at the hearing, rendering the removal order and CAT relief grant final. *Id.* at 4.

66. On May 9, 2023, counsel for Mr. Guzman Lopez sent a release request to WAS ICE. Ex. F5. In response, seemingly without even considering the request, an ICE officer told counsel that "ICE will look for an alternate country for 90 days" and "[a]fter 90 days a Post Order Custody review will be completed to determine if your client can be released." Ex. F6 at 1. ICE informed counsel that the custody review would occur "on or about July 31, 2023." *Id.*

67. On July 18, an ICE officer interviewed Mr. Guzman Lopez, asking basic questions such as where he would live if released. Ex. F1 at ¶ 10. As of this filing, neither Mr. Guzman Lopez nor his counsel have been informed of the result of the custody review.

68. ICE has not identified any exceptional circumstances warranting Mr. Guzman Lopez's continued detention under ICE policy [redacted]

69. Mr. Guzman Lopez has cooperated fully with ICE's third-country removal efforts. ICE has not informed him to which third country or countries it is seeking to remove him. *Id.* at ¶ 11.

70. If released, Mr. Guzman Lopez will return to live with his spouse in Virginia. Ex. F5 at 4.

ARGUMENT

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

A. Petitioners' removal is not reasonably foreseeable under *Zadvydas*.

71. Petitioners' detention is governed by 8 U.S.C. § 1231(a)(6) because each has been detained for more than 90 days since they received a final grant of withholding or CAT relief. At the latest, the 90-day removal period ended for Mr. Cano Fuentes on July 23, 2023, for [redacted] on July 27, 2023, and for Mr. Guzman Lopez on July 31, 2023.[6] *See* 8 U.S.C. §

[6] Mr. Guzman Lopez's removal period arguably began on or about January 14, 2023, upon the expiration of the 30-day period in which Mr. Guzman Lopez could have appealed the IJ's removal order issued in conjunction with his CAT grant. *See* 8 C.F.R. 8 C.F.R. § 1241.1(a); *Toma v. Adducci*, 535 F. Supp. 3d 651, 656-57 (E.D. Mich. 2021) (finding that petitioner's removal period began when petitioner did not appeal removal order, despite DHS' appeal of petitioner's CAT grant). DHS appealed the CAT grant and that appeal was later dismissed by the BIA. Ex. F3 at 2; *see also Toma,* 535 F. Supp. 3d at 657. To the extent that Mr. Guzman Lopez's removal order became final on January 14, he has not only been detained well past the 90-day removal period but also past the presumptively reasonable six-month period under *Zadvydas*. *See Toma,* 535 F. Supp. 3d at 658-59.

1231(a)(1)(B); 8 C.F.R. § 1241.1(a). Therefore, the *Zadvydas* framework applies to Petitioners' detention.

72. Petitioners will very likely *never* be deported from the United States, let alone in the reasonably foreseeable future. Petitioners cannot be deported to their home countries because each has a final grant of withholding or CAT deferral of removal with respect to their home country. *See* 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.17(b)(2).

73. Furthermore, it is exceedingly unlikely that ICE will identify an alternative country to which it can remove any of the Petitioners. ICE only managed to remove to third countries 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]

74. 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 Salvadoran citizens whom 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. G, ICE Emails in Similar Cases at 1, 10.

[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.

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).

75. Similarly, 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. H, 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. I, ICE HQ Release Example.

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

77. Even in the highly unlikely scenario that an alternative country notifies ICE of its willingness to accept the deportation of one or more of the Petitioners, ICE would still be required

[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 any of the Petitioners to which specific countries it is purportedly attempting to remove them.

to obtain travel documents for that Petitioner 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 the Petitioner demonstrated a reasonable possibility of persecution or torture at the RFI, or an IJ subsequently vacated a negative finding by the AO, the petitioner 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.

78. Therefore, Petitioners' removal to alternative countries is not reasonably foreseeable because 1) Petitioners cannot be deported to their home countries due to their withholding and CAT relief grants; 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 Petitioners' deportation and have provided no timeline under which they might decide; and 5) deporting Petitioners 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").

79. Under *Zadvydas*, it is "presumptively reasonable" for ICE to detain a non-citizen for six months after a removal order in order to carry out the deportation process. 533 U.S. at 689. Yet post-removal order detention for less than six months may still be unreasonable in unique circumstances like Petitioners' where they can meet their 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.").

80. For the reasons stated above, Petitioners have clearly met their burden, even if they have not been in post-order detention for more than six months. Unlike *Zadvydas* and the vast majority of its progeny, which analyzed whether ICE will foreseeably be able to remove the petitioner 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 Petitioners to random third countries to which they have no connection whatsoever. The answer to that question has been no from the moment Petitioners' relief grants became final, and the likelihood of third-country removal has only decreased since then.

B. This Court should order the immediate release of Petitioners.

81. Because Petitioners' removal is not reasonably foreseeable, *Zadvydas* requires that they 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 Petitioners' immediate release, this Court need only determine that their removal is not reasonably foreseeable under *Zadvydas*; it need not analyze whether they pose 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.").

82. *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 Petitioners' detention, ICE has not invoked the regulation governing these "special circumstances" determinations, nor could they reasonably do so because Petitioners clearly do not present a national security or public health concern and do not have criminal convictions qualifying them as "specially dangerous." *See* 8 C.F.R. § 241.14.

83. To the extent this Court considers any factors outside of the foreseeability of Petitioners' removal, which it need not do, Petitioners have significant equities that warrant release. [redacted], for example, has lived in the United States for more than 25 years and

owns a home and a business in Virginia. Ex. D1 at ¶ 1, 6. [redacted]

84. 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 PETITIONERS WITHOUT REVIEWING THEIR CUSTODY UNDER ICE POLICY VIOLATES THE APA AND DUE PROCESS.

85. 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.").

86. 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 manual or 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' . . .").

87. 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).

88. 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.").

89. 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").

90. 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.").

91. 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 4.

92. 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 procedures for non-citizens with final removal orders do not apply to non-citizens like Petitioners 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."). The Policy and its application to Petitioners 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).

93. 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

[10] Even if 8 U.S.C. § 1231(a)(2) was construed to require the detention of certain individuals granted withholding or CAT for the 90-day removal period, the Court need not reach this issue to resolve Petitioners' *Accardi* claim. First, Petitioners have all been detained past the 90-day removal period. Secondly, none of the Petitioners have been charged as removable on the grounds described in § 1231(a)(2). *See, e.g.,* Ex. D2; *see also id.* 8 U.S.C. § 1231(a)(2) ("Under no circumstance during the removal period shall [ICE] release a [non-citizen] who has been founded inadmissible [based on certain criminal or terrorism grounds] or deportable [based on similar grounds]).

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 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").

94. 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.").

95. WAS ICE has clearly flouted ICE's national policy with respect to Petitioners' detention, in violation of *Accardi*. The available evidence demonstrates that WAS ICE is automatically detaining *every* non-citizen granted withholding or CAT relief, including Petitioners, 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.

96. Since the beginning of FY 2023, CAIR Coalition has seen virtually every client with a final grant of withholding or CAT relief—approximately 13 individuals, including Petitioners—held by WAS ICE for at least the 90-day period following their relief grants.[11] Ex. H at ¶ 7. Conversations with WAS ICE regarding the detention of Petitioners and other 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. G at 15 (noting that a non-citizen client "will be released in accordance to policy, close to or on day 90."); Ex. F6 at 1 ("ICE will look for an alternate country for 90 days. After 90 days a Post Order Custody review will be completed to determine if your client can be released."). There is furthermore no evidence that the WAS ICE Field Office Director, who is vested with non-delegable review power under the Policy, approved the continued detention of each Petitioner after their relief grants became final, as required by the Policy. *See* Ex. C at 2-3.[12]

97. WAS ICE's failure to promptly review Petitioners' custody under the Policy is prejudicial to Petitioners. Prejudice can be presumed because the Policy implicates Petitioners'

[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. H 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=.

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 "interests of the [non-citizen] which were protected by the regulation") (internal quotations omitted). The Policy provides Petitioners with a discrete opportunity to win their freedom from detention and that opportunity has thus far been withheld from them. *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.").

98. Conducting the standard 90-day custody review under 8 C.F.R. § 241.4 does not suffice to comply with the Policy because 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 . . .").

99. 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 Petitioners' custody under the Policy, Petitioners would very likely be released, as they have only minor criminal convictions and clearly do not pose a national security threat.

100. Therefore, Petitioners have been prejudiced by ICE's failure to review their 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 Petitioners' due process rights.

101. As a remedy, this Court should review Petitioners' custody under the Policy's "exceptional circumstances" standard and order their 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 reviews for each 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)

102. Petitioners reallege and incorporate by reference the paragraphs above.

103. 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.

104. Petitioners' continued detention has become unreasonable because their removal is not reasonably foreseeable. Therefore, their continued detention violates 8 U.S.C. § 1231(a)(6) they must be immediately released.

COUNT II

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

105. Petitioners reallege and incorporate by reference the paragraphs above.

106. 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).

107. ICE has deviated from its own policy in continuing to detain Petitioners after they were granted immigration relief without determining whether exceptional circumstances warrant their continued detention. This is arbitrary, capricious, and contrary to law in violation of the APA.

108. As a remedy, this Court should conduct its own review of Petitioners' custody or, at least, order ICE to review Petitioners' 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

109. Petitioners reallege and incorporate by reference the paragraphs above.

110. ICE has violated Petitioners' due process rights by denying them an individualized custody review to which they are entitled under ICE policy.

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

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court:

a. Assume jurisdiction over this matter;

b. Declare that Petitioners' 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 Petitioners' immediate release;

d. Alternatively, review Petitioners' custody under the standards articulated in ICE policy, or order ICE to review Petitioners' custody accordingly;

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

Dated: August 3, 2023

Respectfully submitted,

/s/
Sophia Leticia Gregg
VSB No. 91582
American Civil Liberties Union of Virginia
P.O. Box 26464
Richmond, VA 23261
Tel: (804) 774-8242
sgregg@acluva.org
Pro Bono Counsel for Petitioners

Amber Qureshi
National Immigration Project (NIPNLG)
2201 Wisconsin Ave. NW, Suite 200
Washington, DC 20007
Tel: (202) 470-2082
Fax: (617) 227-5495
amber@nipnlg.org
Pending pro hac vice admission

Ian Austin Rose
Capital Area Immigrants' Rights Coalition
1025 Connecticut Ave NW, Ste. 701
Washington, DC 20036
Tel: (202) 788-2509
Austin.rose@caircoalition.org
Pending pro hac vice admission

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

I am submitting this verification on behalf of the Petitioners because I am the attorney for Petitioners. I or my co-counsel have discussed with the Petitioners 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 3, 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:

Jeffrey Crawford, Warden
Farmville Detention Center
P.O. Drawer N
508 Waterworks Road
Farmville, VA 23901

Paul Perry, Warden
Caroline Detention Facility
P.O. Box 1460
Bowling Green, VA 22427

Russell Hott, Field Office Director
U.S. Immigration and Customs Enforcement, Washington Field Office
c/o DHS Office of the General Counsel
2707 Martin Luther King Jr. Ave, SE
Washington, DC 20528-0485

Alejandro Mayorkas, Secretary
U.S. Department of Homeland Security
c/o DHS Office of the General Counsel
2707 Martin Luther King Jr. Ave, SE
Washington, DC 20528-0485

Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Jessica D. Aber, U.S. Attorney
c/o Civil Process Clerk
Eastern District of Virginia, Alexandria Division
2100 Jamieson Avenue
Alexandria, VA 22314

Dated: August 3, 2023

/s/
Sophia Leticia Gregg
Pro Bono Counsel for Petitioner

EXHIBIT A

[Alien Name and A#]

Notice of Removal to Other than Designated Country

In a decision dated _____, the Immigration Court ordered you removed to _____, but subsequently granted withholding of removal to that country under section 241(b)(3) of the Immigration and Nationality Act (Act). By this notice, the Department of Homeland Security (DHS) formally advises you that it is pursuing your removal to _____as an alternate country pursuant to section 241(b)(2) of the Act.

If you believe that your life or freedom would be threatened in the alternate country of removal, due to your race, religion, nationality, membership in a particular social group, or political opinion, or that you would be tortured in that country, you may wish to apply with the Immigration Court for withholding of removal under section 241(b)(3) of the Act, or protection pursuant to the regulations implementing the U.S. obligations under Article 3 of the Convention Against Torture.[1]

Accordingly, assuming that you do so within fifteen (15) days of the date of service of this notice, DHS will not oppose your filing of a motion to reopen with the Immigration Court for this purpose accompanied by a properly completed Form I-589 and any supporting documentation. DHS reserves the right to contest your applications for protection from removal on the merits.

If you believe that you need more time to prepare and file any such motion to reopen, please contact the undersigned immediately and explain why you need additional time and how much additional time is needed.

If you fail to file a motion to reopen as set forth above, DHS will assume that you do not wish to seek protection from removal to the alternate country of removal and will proceed with your removal.

[OPLA Signature Bloc]

[cc: Immigration Court]

[Certificate of Service on Alien's Counsel]

[1] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the removal context in principal part at 8 C.F.R. §§ 1208.16(c) - .18).

Exhibit B

Source: EOIR CASE database (as of June 30, 2020)
Filters: Case Type Withholding Only, Detained, Last Proceeding, Cases Completed Oct 1, 2018 through June 30, 2020

Decision on the Merits	
Abandonment (A)	48
Conditional Grant (C)	8
Deny (D)	2,554
Grant (G)	386
Other (O)	54
Withdraw (W)	901
Other Completion	
Administrative Closing - Other (A)	10
Other Administrative Completion (O)	8
Prosecutorial Discretion - Admin Close (Y	2
Total Cases Concluded FY2019 - FY2020 (thru June)	3,971

ERO-LESA Statistical Tracking Unit

~~**For Official Use Only (FOUO)/Pre-decisional**~~

2020-ICFO-57084

FY2018 - FY2020 YTD ICE Removals with Case Category 5C (Relief Granted - Withholding of Deportation / Removal) as of 09/19/2020

Fiscal Year	Total
2018	12
2019	4
2020 YTD	9

Exhibit C

U.S. Department of Justice
Immigration and Naturalization Service

HQCOU 50/1.1

Office of the General Counsel

425 I Street NW
Washington, DC 20536

APR 21 2000

MEMORANDUM FOR Regional Counsel
For Distribution to District and Sector Counsel

FROM: /s/ Bo Cooper
General Counsel

SUBJECT: Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal

Section 241(a)(1) of the Immigration and Nationality Act (INA) establishes a 90-day "removal period" that generally commences on the date a removal order becomes administratively final. Certain aliens are subject to mandatory detention by the INS during this removal period. This memorandum addresses the authority of the Immigration and Naturalization Service (INS) under certain circumstances to release an alien who has a final order of removal, and who has also been granted withholding or deferral of removal, before the 90 day removal period has expired.

Under INA section 241(a)(2), once the removal period has begun, the INS may -- but is not required to -- detain a non-criminal alien until removal is effected. Section 241(a)(2) generally requires the INS to detain all terrorists, all aggravated felons, and most other criminal aliens during the removal period and during any extension of the removal period. Please see HQCOU's March 16, 2000 memorandum entitled " Detention and Release of Aliens with Final Orders of Removal" for a more detailed interpretation of these provisions. Under certain circumstances, however, there is authority for the INS to release an alien who has been finally granted withholding or deferral of removal when the INS is not actively pursuing the alien's removal, even though the alien would otherwise be subject to mandatory detention.

An alien who has been finally granted withholding of removal to a specific country under INA section 241(b)(3), or who has been granted either withholding or deferral of removal to a specific country under the Convention Against Torture, remains an alien who is subject to a final

order of removal. Generally, the INS may execute that order to any country other than the country to which removal has been withheld or deferred. Thus, if the INS is actively pursuing removal to an alternate country, there is no authority during the removal period to release an alien who is subject to mandatory detention. The purpose of the removal period, however, is to facilitate the execution of the removal order. If, therefore, an alien has been finally granted withholding or deferral of removal and the INS is not actively pursuing the alien's removal to an alternate country, the INS has authority to consider the release of such an alien during the removal period. This means only that there is authority to consider release of such aliens; it does not mandate their release. The decision whether or not to release such an alien must take into consideration all appropriate factors, including whether the alien poses a threat to the community or flight risk.

Office of the Assistant Secretary
U.S. Department of Homeland Security
425 I Street, NW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

FEB 9 2004

MEMORANDUM FOR: Anthony Tangeman
Deputy Executive Associate Commissioner
Office of Detention and Removal

FROM: Michael J. Garcia
Assistant Secretary

SUBJECT: Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed

This memorandum reiterates the U.S. Immigration and Customs Enforcement (ICE) policy where the immigration court has granted asylum (or other protection relief, such as withholding of removal or protection under the Convention Against Torture) and ICE has entered an appeal of the decision which is pending before the Board of Immigration Appeals.

In general, it is ICE policy to favor release of aliens 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.

For cases where a bond has been required but not posted, the bond should be reviewed following an immigration judge's grant of asylum so that an alien can be released in accordance with this ICE policy. Arriving aliens should be considered for parole.

In all cases, the Field Office Director must approve a decision to keep an alien granted protection relief in custody pending appeal, in consultation with the Chief Counsel. This review cannot be delegated beyond the Field Office Director or anyone acting in that capacity.

If you have any questions regarding this memorandum, please contact your local Chief Counsel.

cc: Victor Cerda
Acting Principal Legal Advisor

Strait, Andrew R

From: ERO Taskings

Sent: Tuesday, March 06, 2012 12:15 PM

Subject: Reminder on Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal or CAT

The following message is being sent on behalf of Gary Mead, Executive Associate Director, Enforcement and Removal Operations:

To: Assistant Directors, Field Office Directors, Deputy Field Office Directors, and Assistant Field Office Directors

Subject: Reminder on Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal or CAT

This Field Guidance is sent as a reminder that the April 21, 2000 Immigration and Naturalization Service Memorandum by General Counsel Bo Cooper (*Detention and Release during the Removal Period of Aliens Granted Withholding or Deferral of Removal*) and the February 9, 2004 ICE Memorandum by Assistant Secretary Michael Garcia (*Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed*) are still in effect and should be followed.

The memorandum provides guidance that "[i]n general, it is ICE policy to favor release of aliens 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." Protection relief includes asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, and withholding or deferral of removal under the regulations implementing U.S. obligations under Article 3 of the U.N. Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, *see* 8 C.F.R. § 1208.16(d) – 1208.18. This policy applies at all times following a grant of protection, including during any appellate proceedings and throughout the removal period.

Per the April 21, 2000 and February 9, 2004 Memoranda, the Field Office Director must approve any decision to keep an alien who received a grant of any of the aforementioned protections in custody. This includes situations where the Office of the Chief Counsel (OCC) is appealing the grant of relief. Additionally, any decision to continue to hold an alien should be done in consultation with the local OCC.

Any questions should be directed to your local OCC.

From: ICE Office of the Director
Sent: Mon, 7 Jun 2021 13:41:47 +0000
To: Undisclosed recipients:
Subject: REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed

A Message from Tae D. Johnson, Acting Director, U.S. Immigration and Customs Enforcement

To All ICE Employees
June 04, 2021

REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed

On February 9, 2004, then-Assistant Secretary Michael J. Garcia issued U.S. Immigration and Customs Enforcement (ICE) Directive 16004.1, Detention Policy Where an Immigration Judge has Granted Asylum and ICE has Appealed, establishing ICE policy favoring a noncitizen's release in instances in which ICE has appealed the decision of an immigration judge granting asylum, withholding of removal, or protection pursuant to the regulations implementing the Convention Against Torture (CAT protection). I am issuing this reminder to ensure that ICE personnel remain cognizant of and continue to follow this Directive, which supports our commitment to ensuring that our limited detention resources are utilized appropriately.

Pursuant to this longstanding policy, absent exceptional circumstances, such as when the noncitizen presents a national security threat or a danger to the community, or any legal requirement to detain, noncitizens granted asylum, withholding of removal, or CAT protection by an immigration judge should be released pending the outcome of any DHS appeal of that decision.

In considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat or danger to the community. Rather, the individual facts and circumstances of the case, including extensiveness, seriousness, and recency of the criminal activity, along with any evidence of rehabilitation, should be considered in making such determination.

Consistent with Office of the Principal Legal Advisor (OPLA) policy implementing ICE Directive 16004.1, OPLA attorneys are reminded that, in any detained case in which a noncitizen is granted asylum, withholding of removal, or CAT protection but DHS intends to appeal, Enforcement and Removal Operations (ERO) must be immediately advised of the protection grant so that the noncitizen may be immediately considered for release.

In instances in which a bond was set but not posted by the noncitizen, ERO should conduct a custody redetermination; additionally, "arriving aliens" should be considered for parole. Field

Office Director approval is required to continue detention for those affected noncitizens, and such decisions must be made in consultation with the local OPLA Field Location and appropriately documented.

Questions regarding ICE policy on this issue should be directed to the Office of Policy and Planning at ICEOfficeofPolicy@ice.dhs.gov through the chain of command and Directorate or Program Office leadership. Please note, however, that case-specific questions should be addressed by Directorate or Program Office leadership.

Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement