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

ROBERTO CARLOS RODRIGUEZ GUERRA; [redacted], *on behalf of themselves and all others similarly situated*,

Petitioners-Plaintiffs,

v.

PAUL PERRY, *in his official capacity as Warden of the Caroline Detention Facility*; JEFFREY CRAWFORD, *in his official capacity as Warden of the Farmville Detention Center;* JOSEPH SIMON , *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-Defendants.

SECOND AMENDED PETITION FOR A WRIT OF HABEAS CORPUS AND CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF

Case No. 1:23-cv-01151-MSN-LRV

INTRODUCTION

1. Petitioners-Plaintiffs [redacted] (collectively, "Petitioners") remain in Immigration and Customs Enforcement ("ICE") custody in Virginia despite winning their immigration cases 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] ICE refuses to release Petitioners, claiming that it is looking for alternative countries of removal despite knowing that they lack citizenship in or a connection to any other country. Petitioners' continued detention is arbitrary and unlawful, and they request that this Court order their immediate release from ICE custody. They challenge their detention on statutory and constitutional grounds, on behalf of themselves and other similarly situated individuals.

2. Petitioners and putative class members 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' and putative class members' removal orders and accompanying relief grants became final when ICE waived appeal or failed to timely appeal their relief grants. 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— , and —because they were each granted withholding of removal ("withholding") under 8 U.S.C. § 1231(b)(3) or protection under the Convention Against Torture ("CAT") with respect to their home countries. ICE's half-hearted attempts to remove Petitioners to a random collection of unspecified alternative countries—to which they have no ties, and which have no policy or history of accepting non-citizen deportees—are speculative and futile.

[1] This amended petition and complaint is filed pursuant to Fed. R. Civ. P. 15(a)(2), adding petitioners-plaintiffs and maintaining the same individual claims for injunctive relief and classwide claim for declaratory relief on behalf of similarly situated individuals. Since Mr. Rodriguez Guerra was released from custody, he does not raise an individual claim for release under *Zadvydas*, but he continues to represent the class for Counts II and III.

4. Furthermore, the ICE Washington Field Office's across-the-board detention of Petitioners and similarly situated individuals for months 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).

5. To remedy these ongoing violations of the law, Petitioners bring this habeas petition and complaint seeking injunctive and declaratory relief on behalf of themselves and declaratory relief on behalf of a class of similarly situated persons.

JURISDICTION & VENUE

6. 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).

7. 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.

8. 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 past their relief grants has adversely and severely affected Petitioners' liberty and freedom.

9. 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 and putative class members are detained within this district at the Caroline Detention Facility or the Farmville Detention Center. 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

10. Mr. Rodriguez Guerra is a native and citizen of [REDACTED] who was granted CAT deferral of removal in January [REDACTED]. He was released from Caroline Detention Facility on September [REDACTED], after the first amended petition and complaint in this case was filed on September 7. Dkt. No. 3.

11. [REDACTED] is a native and citizen of [REDACTED] who was granted CAT deferral of removal in July [REDACTED]. He is currently detained at Caroline Detention Facility.

12. Mr. [REDACTED] is a native and citizen of [REDACTED] who was granted CAT deferral of removal in September [REDACTED]. He is currently detained at Farmville Detention Center.

13. Mr. [REDACTED] is a native and citizen of [REDACTED] was granted withholding of removal in October [REDACTED]. He is currently detained at Caroline Detention Center.

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 Petitioner and individuals detained at Caroline. He is sued in his official capacity.

15. Jeffrey 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 individuals detained at Farmville.

16. Joseph Simon 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. Simon is a legal custodian of Petitioner and individuals detained in Virginia detention centers. He is sued in his official capacity. Respondent Simon is automatically substituted as a party in place of his predecessor, Russell Hott, pursuant to Federal Rule of Civil Procedure 25(d).

17. 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 and similarly situated individuals. He is sued in his official capacity.

18. 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

19. Non-citizens in immigration removal proceedings can seek three main forms of relief based on their fear of return 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.

20. 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*.

21. 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.*

22. 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.

23. 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).

24. 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.

25. 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

[2] ICE itself acknowledges this obligation. In 2020, officials within ICE's Office of the Principal Legal Advisor 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.

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]

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

a. Statutory Framework

26. 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).

27. 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)

[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.

[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).

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.

28. 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 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

29. 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).

30. 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).

31. 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

32. Consistent with the statutory and regulatory scheme, long-standing ICE policy (hereinafter "the 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.

33. ICE leadership subsequently reiterated the ICE 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

I. PETITIONERS

Mr. Rodriguez Guerra

34. Roberto Carlos Rodriguez Guerra,[6] who identifies himself as [redacted] was born in [redacted] in [redacted]. Neither he nor his parents are citizens of any country besides [redacted]. Ex. D1, Declaration of Roberto Carlos Rodriguez Guerra at ¶ 1.

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

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

35. Mr. Rodriguez Guerra fled [redacted] after [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.

36. 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. D2, NTA. ICE took Mr. Rodriguez Guerra into custody at Caroline, where heremained until he was released on September [redacted]. Mr. Rodriguez Guerra promptly retained counsel from Capital Area Immigrants' Rights ("CAIR") Coalition.

37. On January [redacted] an IJ granted Mr. Rodriguez Guerra CAT relief, finding that he would more likely than not be tortured [redacted] if returned to [redacted]. Ex. D3, IJ Decision Granting CAT Relief at 16-17. Mr. Rodriguez Guerra was ordered removed to, and his removal deferred from, [redacted]. *Id.* at 17.

38. 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. D4, BIA Decision Dismissing ICE's Appeal at 2. Therefore, Mr. Rodriguez Guerra's CAT relief grant and accompanying removal order became final as of [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. D4 at 2.

39. On [redacted], counsel for Mr. Rodriguez Guerra sent a release request to WAS ICE, explaining that he qualifies for release under both the ICE Policy and the post-order custody review regulations. Ex. D5, 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. D6, ICE Emails at 2. Officer Christopherson noted that "[o]n or about September [REDACTED], ERO will conduct a post order custody review per 8 CFR 241.4 which will be submitted for management review." *Id.*

40. ICE did not identify any exceptional circumstances warranting Mr. Rodriguez Guerra's continued detention under the ICE Policy. Nor did ICE charg Mr. Rodriguez Guerra as "specially dangerous" under 8 C.F.R. § 241.14.

41. Mr. Rodriguez Guerra cooperated fully with ICE's third-country removal efforts. ICE did not inform him to which third countries it was purportedly seeking to remove him. Ex. D1 at ¶ 9.

42. Mr. Rodriguez Guerra has been diagnosed with [REDACTED]

43. Mr. Rodriguez Guerra was released from ICE custody on September [REDACTED] and is now living [REDACTED] Ex. D1 at ¶ 15.

[REDACTED]

44. [REDACTED] was born in [REDACTED] in [REDACTED]. Neither he nor his parents are citizens of another country besides [REDACTED]. Ex. E1, [REDACTED] at ¶ 1.

45. [REDACTED] came to the United States in the late [REDACTED] when he was a young man. He settled in [REDACTED] and lived there for more than thirty years. *Id.* at ¶¶ 2, 4. Mr. [REDACTED]

46. In 2016, [REDACTED] was [REDACTED]

47. [REDACTED] ICE arrested [REDACTED] and issued an NTA charging him as removable from the United States on March [REDACTED] Ex. E2, IJ Decision Granting CAT Relief [REDACTED] at 1. ICE took [REDACTED] into custody at Moshannon Valley Processing Center ("Moshannon") in Philipsburg, Pennsylvania. [REDACTED] secured counsel through a non-profit organization in [REDACTED].

48. On September [REDACTED], the IJ denied [REDACTED] relief. *Id.* at 2. He timely appealed. On [REDACTED], the BIA remanded the case back to the IJ. *Id.* [REDACTED]

49. On [REDACTED] 2023, the IJ granted [REDACTED] CAT deferral of removal, finding that he would more likely than not be tortured in [REDACTED] due to his [REDACTED] *Id.* at 23.

50. ICE did not timely appeal the IJ's decision, rendering the CAT relief grant and accompanying removal order final as of August [REDACTED]

51. In late August, ICE abruptly transferred [REDACTED] from Moshannon to Farmville, and then again to Caroline. ICE did not inform counsel of the transfers.

52. In early October 2023, counsel for Mr. reached out to the Deportation Officer to inquire about his continued detention. Ex. E3, ICE Emails. Officer Kennedy responded that "ICE will first attempt a third party removal to a country that is willing to accept your client." *Id.* at 1. Counsel responded inquiring about the status of the third country removal requests and the custody review process. Officer Kennedy did not respond. *See id.*

53. On November , ICE served Mr. with a Decision to Continue Detention. Ex. E4, ICE Custody Decision October 2023. ICE did not inform counsel in advance of the review, nor did ICE provide counsel with a copy of the decision. The decision, dated October alleges without basis or explanation that Mr. has an ." *Id.* at 1. It notes that his case "will be immediately referred to ICE Headquarters ERO Removal Division for a custody review." *Id.*

54. ICE has not identified any exceptional circumstances warranting Mr. continued detention under the ICE Policy. Nor has ICE charged Mr. as "specially dangerous" under 8 C.F.R. § 241.14.

55. Mr. 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. E1 at ¶ 10. Since Mr. came to Caroline, neither he nor his counsel have been informed of the status of ICE's third country removal efforts, despite inquiring multiple times. *Id.*

56. At Caroline, Mr.

57. If released, Mr.

Mr.

58. [REDACTED] was born in [REDACTED] in [REDACTED]. Neither he nor his parents are citizens of any other country other than [REDACTED]. Ex. F1, Declaration of [REDACTED] [REDACTED]

59. Mr. [REDACTED] came to the United States in [REDACTED] an unaccompanied minor and settled in [REDACTED]. *Id.* at ¶ 3.

60. On April [REDACTED] ICE issued Mr. [REDACTED] 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. ICE initially took Mr. [REDACTED] into custody at Caroline in 2022. He has been detained at Farmville since January 2023. *Id.* at ¶ 6.

61. On September [REDACTED], the IJ granted Mr. [REDACTED] CAT application, finding that he would more likely than not be tortured in [REDACTED]. Ex. F2, EOIR Case Info.

62. ICE did not appeal the IJ's decision, rendering the CAT relief grant and accompanying removal order final as of October [REDACTED] *Id.*

63. Shortly after he won CAT relief, ICE informed Mr. [REDACTED] it would continue to hold him for 90 days while they sought third-country removal options and that he would have another custody review on January [REDACTED]. Ex. F1 at ¶¶ 9-10.

64. When Mr. [REDACTED] inquired about his detention, his Deportation Officer merely informed him that he was "waiting on word from higher-ups" and that ICE was looking at third countries to which to remove him. *Id.* at ¶ 10.

65. On November [REDACTED], counsel inquired about Mr. [REDACTED] continued detention. ICE officers confirmed that Mr. [REDACTED] would have his 90-day custody review on or around January [REDACTED], and they noted that "[r]egarding the Post Order Custody Review, he will remain in custody until the decision is made to continue detention, or release" and that "your

subject will continue to be detained as we work to try and remove your client to a third country." Ex. F3, ICE Emails at 2, 4.

66. ICE has not identified any exceptional circumstances warranting Mr. [redacted] [redacted]'s continued detention under the ICE Policy. Nor has ICE charged Mr. [redacted] as "specially dangerous" under 8 C.F.R. § 241.14.

67. Mr. [redacted] 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. F1 at ¶ 10.

68. [redacted]. [redacted] had [redacted].

69. If released, Mr. [redacted] would return to his family in [redacted] and return to his employment. Ex. F1 at ¶ 12.

Mr. [redacted]

70. [redacted] was born in [redacted]. Neither he nor his parents are citizens of any country besides [redacted]. Ex. G1, Declaration of [redacted]

71. Mr. [redacted] fled to the United States in [redacted] because the [redacted]

72. Mr. [redacted] lived in [redacted] with his [redacted]. *Id*. at ¶ 6. He worked in [redacted]. *Id*. He had no criminal record during this time apart from a speeding offense in 2022. *Id*. [redacted]

73. [redacted], ICE immediately took him into custody at Caroline, where he has been detained ever since. *Id*.

74. Mr. [redacted] demonstrated a reasonable fear of persecution or torture, and his case was referred to an IJ for withholding-only proceedings. *Id.* at ¶ 8. Mr. [redacted] secured private immigration counsel. *Id*. On October [redacted], the IJ granted Mr. [redacted] withholding under the INA in an oral decision. Ex. G2, IJ Decision Granting Withholding October 2023 at 1. DHS did not appeal the decision, rendering the withholding grant final as of November [redacted]

75. Mr. [redacted] custody review was scheduled for [redacted]. Ex. G1 at ¶ 9. On that day, an ICE officer briefly spoke with Mr. [redacted] without his counsel present. No custody decision has yet been provided to Mr. [redacted] or his counsel.

76. ICE has not identified any exceptional circumstances warranting Mr. [redacted] continued detention under the ICE Policy. Nor has ICE charged Mr. [redacted] as "specially dangerous" under 8 C.F.R. § 241.14.

77. ICE has not informed Mr. [redacted] to which, if any, third countries it is purportedly seeking to remove him. *Id*. at ¶ 9.

78. If released, Mr. [redacted] would return to his family in [redacted] and resume his work in [redacted]. *Id.* at ¶¶ 14-15.

II. CLASS-WIDE ALLEGATIONS

79. Petitioners Rodriguez Guerra, [redacted] bring this action as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), or alternatively as a representative habeas petition, on behalf of themselves and a class of similarly

situated individuals pursuant to a procedure analogous to Rules 23(a) and 23(b)(2). *See Coreas v. Bounds*, No. CV TDC-20-0780, 2020 WL 5593338, at *7 (D. Md. Sept. 18, 2020) ("there is substantial precedent for pursuing habeas actions on a class basis"). *See also Geraghty v. U.S. Parole Commission*, 429 F. Supp. 737, 740 (M.D. Pa. 1977) (noting that "procedures analogous to a class action have been fashioned in habeas corpus actions where necessary and appropriate").

80. There are numerous other individuals who are or will be detained in Virginia who, like Petitioners, have already been granted relief from deportation, and have no connection to any other country to which ICE can deport them, yet nonetheless remain detained arbitrarily by WAS ICE. Each of these similarly situated individuals is or will be entitled to bring a complaint for declaratory relief and a petition for a writ of habeas corpus to obtain relief from unlawful detention.

81. Petitioners bring this declaratory and habeas class action on behalf of themselves and others similarly situated for the purpose of asserting claims alleged in this action on a common basis. They seek to represent a class defined as: all persons who are or will be held in civil immigration detention within the area of responsibility of WAS ICE with an administratively final removal order and a final grant of withholding of removal or CAT relief.

82. The proposed class satisfies the requirements of Fed. R. Civ. P. 23(a)(1) because its members are so numerous that joinder of all members is impracticable. *See Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (holding that there is no specific numerical requirement for maintaining a class action). *See also J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (noting that "classes including future claimants generally meet the numerosity requirement").

83. Since the beginning of 2022, undersigned counsel has identified 32 people who have been continuously detained by WAS ICE for some period after receiving a final grant of

withholding of removal or CAT deferral of removal. Ex. I, Declaration of Katharine Gordon at ¶ 5. Upon information and belief, approximately every month, three people are granted withholding of removal or CAT relief by an IJ, and every month, approximately two of those orders become administratively final. *Id*. at ¶ 11. The members of the class are readily ascertainable through Respondents' records. Additionally, the class is likely to grow over time as detention capacity in Virginia has recently been restored to pre-pandemic levels. *Id*. at ¶ 10.

84. Joinder is also impracticable because putative class members are detained, many are unrepresented by counsel, do not speak English well, and are unable to bring individual litigation because they lack sufficient resources, financial or otherwise, to bring their own cases.

85. The proposed class meets the requirements of Fed. R. Civ. P. 23(a)(2). There are several common questions of law and fact in the action. These include, but are not limited to, the following:

a. Whether WAS ICE has a policy or general practice of detaining non-citizens granted withholding or CAT relief without a determination of whether their continued detention complies with the ICE Policy favoring the prompt release of non-citizens who have been granted withholding or CAT relief;

b. Whether WAS ICE's policy or practice of failing to follow the ICE Policy is in violation of the APA and due process.

c. Whether WAS ICE is bound by the procedural requirements in the ICE Policy, which requires an individualized determination based on exceptional circumstances and Field Office Director approval for any decision that continues the detention of a person granted withholding of removal or CAT relief.

86. The proposed class meets the requirements of Fed. R. Civ. P. 23(a)(3). Petitioners' claims are typical of the claims of putative class members. Like all of the putative class members, Petitioners have been detained after being granted withholding or CAT relief and obtaining an administratively final removal order without an immediate determination of whether their continued detention is justified under the ICE Policy.

87. The proposed class meets the requirements of Fed. R. Civ. P. 23(a)(4). Petitioners have the requisite personal interest in the outcome of this action and have no interests adverse to the interests of the proposed class. They will fairly and adequately represent the interests of all proposed class members. The proposed class is represented by pro bono counsel from the American Civil Liberties Union of Virginia, Capital Area Immigrants' Rights Coalition, and the National Immigration Project of the National Lawyers Guild. Counsel has extensive experience litigating class action lawsuits and other complex cases in federal court, including civil rights and habeas lawsuits on behalf of detained immigrants.

88. The proposed class meets the requirements of Fed. R. Civ. P. 23(b)(2). Respondents have acted on grounds generally applicable to the entire proposed class through their practice of continuing to detain noncitizens, who have administratively final orders of removal and who have won protection from deportation to their home countries, without an immediate determination of whether their continued detention is justified under the ICE Policy. Therefore, declaratory relief is appropriate with respect to the proposed class as a whole.

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*.

89. Petitioners' detention is governed by 8 U.S.C. § 1231(a) because each is detained with a final removal order and a final grant of withholding or CAT relief. The 90-day removal period began for Mr. [REDACTED] on August 6, 2023 and for Mr. [REDACTED] on October 20, 2023, when the appeal period for each 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). Mr. [REDACTED] 90-day removal period began on June 22, 2023, when ICE reinstated his removal order [REDACTED] into ICE custody. 8 U.S.C. § 1231(a)(1)(B)(iii). Therefore, the *Zadvydas* framework applies to Petitioners' detention.

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

91. 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]

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[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.

92. 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. H, 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).

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

94. 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. I, Declaration of Katharine Gordon at ¶ 9. Not until his case was reviewed by ICE HQ a month later

[8] That ICE reached out to Portugal for the deportation of a Guatemalan citizen illustrates the absurdity of ICE's third-country removal practices.

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. J, ICE HQ Release Example.

95. 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 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.

96. 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 to obtain travel documents and afford them a Reasonable Fear Interview ("RFI") at which they would have the opportunity to articulate a fear of return to the country willing to accept them. *See* 8 C.F.R. § 241.8(e). If an Asylum Officer ("AO") were to find that Petitioner demonstrated a 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.

97. Therefore, Petitioners' removal is not reasonably foreseeable because 1) they 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

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[9] ICE has not informed Petitioners to which specific countries it is attempting to remove them.

the last two years, 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 Mr. 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").

98. Even though Petitioners have not yet been detained for six months since receiving final removal orders, they have still demonstrated that their continued detention is unreasonable under *Zadvydas*. 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.").

99. For the reasons stated above, Petitioners have clearly met any burden of proof that this Court may place on them. 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 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 Petitioners' immediate release.

100. 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 ther immediate release, this Court need only determine that Petitioners' 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.").

101. *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 regulations governing these “special circumstances” determinations. *See* 8 C.F.R. § 241.14.

102. 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.

103. 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 AND PUTATIVE CLASS MEMBERS WITHOUT REVIEWING THEIR CUSTODY UNDER ICE POLICY VIOLATES THE APA AND DUE PROCESS.

104. 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, including 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.”).

105. 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’ . . .”).

106. 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).

107. 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.”).

108. 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").

109. The ICE Policy requires release of 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.").

110. The ICE 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 it "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 ICE Policy to non-citizens with final removal orders who were granted withholding or CAT relief. *Id.* at 3.

111. Such an application of the ICE 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.

112. The ICE 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, 461 (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).

113. The ICE 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 no substantive rights on the [noncitizen]-applicant, it does confer the procedural right to be considered for such status upon application."). Similarly, the ICE 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").

114. Furthermore, by reiterating the ICE Policy four times over the last two decades and using mandatory language, ICE leadership has clearly indicated that it intends the ICE 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.").

115. WAS ICE has clearly flouted the ICE Policy with respect to Petitioners' and putative class members' 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 some period past a final grant of withholding or CAT relief. For non-citizens whose removal orders and relief grants become final simulateneously, like Mr. [REDACTED] and Mr. [REDACTED], ICE holds the non-citizen for at least the ensuing 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 ICE Policy's requirements.

116. For non-citizens who enter detention with a final removal order and are subsequently granted withholding or CAT relief, like Mr. [REDACTED], ICE merely waits until the next scheduled custody review under § 241.4, whenever that may be, to determine whether the non-citizen will be released. Only after the review process reaches ICE HQ does ICE consider the likelihood of the non-citizen's removal under 8 C.F.R. § 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 ICE Policy.

117. Since the beginning of 2022, CAIR Coalition has seen every non-citizen with a final grant of withholding or CAT relief—approximately 32 individuals, including Petitioners—held by WAS ICE for some period past their final relief grants. Ex. I at ¶ 7. Conversations with WAS ICE regarding the detention of Petitioners and similarly situated individuals confirm that the deportation officers have consistently and reflexively continued to detain non-citizens for at least the 90-day removal period or until the next custody review under § 241.4, without any individualized review under the national ICE Policy, seemingly pursuant to an office-wide practice. *See, e.g.,* Ex. H at 15 (noting that a non-citizen client "will be released in accordance to policy, close to or on day 90"); Ex. F3 at 2 (noting that Mr. [REDACTED] "will remain in custody until the decision is made [at the 90-day custody review] to continue detention, or release").

118. In Mr. Rodriguez Guerra's case, WAS ICE should have reviewed his custody under the ICE 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. In the case of the other Petitioners, WAS ICE should have reviewed their custody under the ICE Policy as soon as their relief grants became final. Yet they did not. There is furthermore no evidence that the WAS ICE Field Office Director, who is vested with non-delegable review power under the ICE Policy, approved Petitioners' continued detention at any point after he was granted relief, as required by the ICE Policy. *See* Ex. C at 2-3.[10]

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[10] That WAS ICE is violating the 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*

119. WAS ICE's failure to promptly review Petitioners' and putative class members' custody under the ICE Policy is prejudicial. Prejudice can be presumed because the ICE Policy implicates 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 ICE Policy provides Petitioners and putative class members with a discrete opportunity to obtain 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.").

120. Conducting the standard custody reviews under 8 C.F.R. § 241.4, does not suffice to comply with the ICE 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 . . .").

121. In contrast, the ICE 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

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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=*.

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 ICE Policy, they would very likely be released.

122. Therefore, Petitioners and putative class members have been prejudiced by ICE's failure to review their custody under the ICE 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' and putative class members' due process rights.

123. As a remedy, this Court should (1) declare that WAS ICE's failure to promptly review Petitioners' and putative class members' custody under the ICE Policy violates the APA; (2) review Petitioners' custody under the ICE Policy's "exceptional circumstances" standard; and (3) order Petitioners'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 Petitioners pursuant to the ICE 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) ON BEHALF OF PETITIONERS

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

125. 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 [non-citizen's] removal from the United States." 533 U.S. at 689, 701.

126. 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), and they must be immediately released.

COUNT II

ARBITRARY AND CAPRICIOUS AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(A) ON BEHALF OF PETITIONERS RODRIGUEZ GUERRA,

AND SIMILARLY SITUATED INDIVIDUALS

127. Petitioners realleges and incorporates by reference the paragraphs above.

128. 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).

129. ICE has deviated from its own policy in continuing to detain Petitioners and putative class members after they are 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.

COUNT III

VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION ON BEHALF OF PETITIONERS RODRIGUEZ GUERRA,

AND SIMILARLY SITUATED INDIVIDUALS

130. Petitioners reallege and incorporates by reference the paragraphs above.

131. Respondents' continued detention of Petitioners and other putative class members violates Petitioners' and putative class members' due process rights by denying them an individualized custody review to which they are entitled under the ICE Policy.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully requests that this Court:

a. Assume jurisdiction over this matter;

b. Certify a class consisting of all persons who are or will be held in civil immigration detention within the area of responsibility of WAS ICE with an administratively final removal order and a final grant of withholding of removal or CAT relief;

c. Appoint Petitioners Rodriguez Guerra, [redacted] [redacted] as Class Representatives;

d. Appoint undersigned counsel as Class Counsel;

e. Declare that Petitioners' continued detention violates the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(6);

f. Declare that Petitioners' and putative class members' continued detention violates 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;

g. Order Petitioners' immediate release;

h. Alternatively, review Petitioners' custody under the standard articulated in the ICE Policy, or order ICE to review Petitioners' custody accordingly;

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

Dated: December 11, 2023 Respectfully submitted,

/s/

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VERIFICATION BY SOMEONE ACTING ON PETITIONERS' 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: December 11, 2023

Respectfully submitted,

/s/
Sophia Gregg
Pro Bono Counsel for Petitioners-Plaintiffs