IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

JULIO CESAR SANCHEZ-ACOSTA et al.,	)	
	)	
PETITIONERS-PLAINTIFFS,	)	
	)	
V.	)	
	)	
JEFFERSON B. SESSIONS, III, et al.,	)	
	)	
RESPONDENTS-DEFENDANTS.	)	CIV. NO.: 1:18-CV-00872-LO-IDD

PETITIONERS-PLAINTIFFS' MEMORANDUM IN OPPOSITION TO RESPONDENTS-DEFENDANTS' MOTION TO DISMISS

Petitioners, through their undersigned attorneys and pursuant to Local Civil Rule 7(F), submit this Memorandum in Opposition to Respondents' Motion to Dismiss, Dkt. No. 25.

INTRODUCTION

This lawsuit challenges the government's new policy of continuing to detain immigrants for an additional 90 days, even after those immigrants win a ruling from an Immigration Judge ordering that they not be deported from the United States to countries where they would face persecution. The government's legal justification for this detention rests solely on a statute that authorizes detention only for immigrants who are *about to be deported* from the United States under an executable removal order, and which does not apply to Petitioners here.

Petitioners-Plaintiffs ("Petitioners") are three noncitizens in the custody of Respondents-Defendants ("Respondents"). Petitioners are incarcerated at the ICA-Farmville Detention Facility in Farmville, Virginia. Respondents initiated removal proceedings in Immigration Court against each Petitioner, seeking an order to deport Petitioners to specified countries. An Immigration Judge found that each Petitioner was more likely than not to be persecuted on account of a protected ground in those specified countries, and so granted each Petitioner a type of defense from deportation called "withholding of removal," under 8 U.S.C. § 1231(b)(3)(A) as to all of the countries specified by Respondents. Under the Immigration Judges' orders of withholding of removal, Respondents are now prohibited from deporting Petitioners to the countries Respondents had designated for Petitioners' deportation. Accordingly, Petitioners have final orders of deportation, but only to countries to which the government is prohibited from deporting them. Therefore, the government lacks any authority to deport Petitioners.

Respondents nonetheless now arbitrarily insist on classifying each Petitioner as being in the middle of a "removal period," defined as the 90-day period during which "the Attorney General *shall remove* the alien from the United States[.]" 8 U.S.C. § 1231(a)(1)(A) (emphasis

added). Accordingly, the government insists that it has unreviewable authority to detain the Petitioners during the entire 90-day period, pursuant to 8 U.S.C. § 1231(a)(2), notwithstanding the fact that the purpose of such detention is to complete something that, with respect to Petitioners, cannot lawfully be completed (namely, removal of the Petitioners to countries from which their removal has been legally barred), and notwithstanding the fact that Respondents' well-established previous policies stated a presumption for release of such individuals.

Through their habeas petition and complaint, Petitioners seek this Court's review of Respondents' continuing detention of Petitioners and a proposed class of similarly situated individuals who have also received withholding of removal as to all countries designated for their removal by Respondents.

Petitioners raise statutory and constitutional challenges to their continuing detention in Respondents' custody. To each claim, Respondents' primary argument in their Motion to Dismiss is that Petitioners are in a "removal period" following the Immigration Judges' grants of withholding of removal, that the "removal period" lasts at least ninety days, and that Respondents will continue to incarcerate Petitioners for a full ninety-day period, at a minimum.

Respondents ignore or misinterpret Petitioners' primary position in their habeas petition: where a noncitizen has been ordered removed and then his removal has been withheld as to all countries to which he was ordered removed, he is not within a "removal period" during which he "shall [be] remove[d]." Respondents designated specific countries of removal for each Petitioner. An Immigration Judge ordered that Respondents could not remove Petitioners to those countries Respondents designated. Respondents have not designated any alternative country to which Petitioners should be removed. There is no "removal period," and thus the statutory basis for detention, as well as the legitimate government purpose for detention required under the Due

Process Clause of the Fifth Amendment, are absent. Further, Respondents' new "detain them all for a minimum of 90 days" policy represents a procedurally improper and arbitrary and capricious departure from long-established immigration enforcement practices favoring release from detention for such individuals, in violation of the Administrative Procedure Act.

FACTUAL BACKGROUND

Statutory Framework

The statutory and regulatory framework governing the removal proceedings of noncitizens requires the designation of a primary country for removal and, if applicable, designation of any alternative country during the removal proceedings. *See* 8 U.S.C. § 1231(b)(2); 8 C.F.R. § 1240.12(d). When an individual is ordered removed, the period in which "the Attorney General shall remove the alien" is stated as 90 days, 8 U.S.C. § 1231(a)(1)(A), and starts on one of the alternative dates listed in 8 U.S.C. § 1231(a)(1)(B). 8 U.S.C. § 1231(a)(2) states that "[d]uring the removal period, the Attorney General shall detain the alien." Detention can be extended beyond the removal period for the reasons stated in 8 U.S.C. § 1231(a)(6), but such post-removal-period detention is not mandatory and review of an individual's detention is available under 8 C.F.R. §§ 241.4, 241.13, 241.14.

As incorporated into U.S. law under the Refugee Act of 1980 based on the 1951 Refugee Convention's principle of non-refoulement, 8 U.S.C. § 1231(b)(3) provides relief from these consequences of being ordered removed to a country of persecution. Under that section, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). When established, such relief, commonly referred to as "withholding of

removal," must be provided and prohibits the government from removing the individual to any country as to which removal is withheld. A grant of withholding of removal is an absolute bar to the government's removal of the individual to that country.

During removal proceedings, the government may identify alternative countries to which the individual might be removed, as listed in 8 U.S.C. § 1231(b)(2)(E). If the government decides to remove the individual to an alternative country, the government must provide a notice of the intended country of removal, *id*., *see also* 8 C.F.R. § 1240.10(f), and an opportunity to present evidence and argument against removal to the designated country. 8 U.S.C. § 1229a(b)(4) (in removal proceedings an immigrant shall have "a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the government"); *see also* 8 C.F.R. § 1208.2(c)(3).

Respondents' Policy on Release from Detention

In 2002, the Bush Administration publicly stated a rule that "[i]n general, it is ICE policy to favor release of aliens who have been granted protection relief by an immigration judge ['such as withholding of removal'] absent exceptional concerns such as national security issues or danger to the community and absent any requirement under law." Dkt. No. 10-10. Under the Obama Administration, DHS reiterated in a 2012 memorandum that "it is ICE policy to favor release of aliens who have been granted protection relief by an immigration judge," and stated that the DHS memorandum at Dkt. No. 10-10 is "still in effect and should be followed" and that "[t]his policy applies at all times following a grant of protection [such as withholding of removal], including during any appellate proceedings and throughout the removal process." Dkt. No. 10-11. In the first month of the current Administration, the Secretary of DHS issued a memorandum that confirmed this long-standing practice. Dkt. No. 10-12. (Dkt. Nos. 10-10, 10-

11, and 10-12 are collectively referred to as "DHS Policy on Release from Detention").

Recently, DHS abruptly and without notice changed its Policy on Release from Detention favoring release of individuals granted withholding of removal. Now, Respondents are automatically continuing detention of such individuals for a minimum of ninety days after an Immigration Judge grants relief, *see* Am. Pet. (Dkt. No. 10) at ¶¶ 7-9, 13, 42, 49, 66, 77, and in an increasing number of instances Respondents are continuing detention beyond ninety days. For example, as of the date of this filing, Petitioner Sanchez-Acosta has been detained for 102 days since the Immigration Judge ordered his withholding of removal. Am. Pet. (Dkt. No. 10) at ¶ 25. With respect to Petitioner Sanchez-Acosta, a DHS representative stated that "ICE-ERO Washington policy is to hold Mr. Sanchez-Acosta for the entirety of the removal period." Dkt. No. 10-4. Respondents have provided no reasoned explanation for this change in policy or its new policy to detain beyond the ninety days. Am. Pet. (Dkt. No. 10-10) at ¶ 7-8, 27, 66.

Petitioners

Petitioner Sanchez-Acosta is a native and citizen of El Salvador. Am. Pet. ¶ 13. He was taken into ICE custody on November 16, 2016, charged with removability to El Salvador, and has been in Respondents' custody since. *Id.* ¶ 14. On May 15, 2018, an Immigration Judge ordered Petitioner Sanchez-Acosta removed to El Salvador and simultaneously granted him withholding of removal to El Salvador, ordering that Respondents could not remove him to El Salvador as they charged. Dkt. No. 10-2. Respondents waived appeal of the order. *Id.* Respondents have not initiated proceedings or otherwise given Petitioner notice that they intend to remove him to any other country. Am. Pet. ¶ 26. Petitioner Sanchez-Acosta remains in Respondents' custody, 102 days since the entry of the order withholding his removal as of the date of this Memorandum, under the purported authority of 8 U.S.C. § 1231(a)(2), which has

now been exceeded.[1]

Petitioner Najjar is a native and citizen of Palestine. Am. Pet. ¶ 34. He was taken into ICE custody on April 27, 2017, charged with removability to Palestine, and has been in Respondents' custody since. *Id.* ¶ 36. On June 1, 2018, an Immigration Judge ordered Petitioner Najjar removed to Palestine and simultaneously granted Petitioner withholding of removal to Palestine, ordering that Respondents could not remove him to Palestine as they charged. *Id.* ¶ 37. Respondents waived appeal of the order. *Id*. Respondents have not initiated proceedings for Petitioner's removal to any other country or otherwise given him notice that they intend to remove him to any other country. The period in which Respondents could have appealed the order expired. *Id*. Petitioner Najjar remains in Respondents' custody, eighty-four days since the entry of the order withholding his removal as of the date of this Memorandum, under the purported authority of 8 U.S.C. § 1231(a)(2).

Petitioner Tesfateon is a native and citizen of Ethiopia, admitted to the United States as a refugee in March 1992, taken into ICE custody on August 3, 2017, and charged with removability to Ethiopia, or in the alternative to Eritrea. Am. Pet. ¶¶ 44-46. On June 6, 2018, an Immigration Judge ordered Petitioner Tesfateon removed to Ethiopia, or in the alternative to Eritrea, and simultaneously granted him withholding of removal to Ethiopia and Eritrea, ordering that Respondents could not remove him to those countries as they charged. Dkt. No. 10-8. Respondents waived appeal of the order. *Id.* Respondents have not initiated proceedings for his removal to any other country or otherwise given him notice that they intend to remove him to

[1] As more than 90 days have elapsed, Respondents no longer claim to be detaining Petitioner Sanchez-Acosta under the authority of 8 U.S.C. § 1231(a)(2), but rather under the authority of 8 U.S.C. § 1231(a)(6). Nonetheless, his claim is not moot as he remains in custody, and as set forth below, *infra* section I.D, a ruling as to whether he was ever in the "removal period" would be a material benefit to him.

any other country. Am. Pet. ¶ 50. Petitioner Tesfateon remains in Respondents' custody, 80 days as of the date of this Memorandum since the entry of the order withholding his removal, under the purported authority of 8 U.S.C. § 1231(a)(2).

LEGAL STANDARDS

Respondents move to dismiss Petitioners' claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In considering such a motion, courts must "accept[] as true the well-pled facts in the complaint and view[] them in the light most favorable to the plaintiff." *Brockington v. Boykins*, 637 F.3d 503, 505 (4th Cir. 2011). Dismissal is inappropriate if the plaintiff is able to "state a claim to relief that is plausible on its face." *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where a plaintiff's "[f]actual allegations . . . raise a right to relief above the speculative level," the Court must deny a Rule 12(b)(6) motion to dismiss. *Id.* (requiring that Plaintiffs "nudge [their] claims across the line from conceivable to plausible"). In its analysis of a Rule 12(b)(6) motion, a District Court's review is limited to evaluation of the complaint and attached documents. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc*., 637 F.3d 435, 448 (4th Cir. 2011).[2]

ARGUMENT

I. The INA Does Not Require That Petitioners Be Detained, Because They Are Not Within the "Removal Period" Set Forth in 8 U.S.C. § 1231(a)(1)(A).

The crux of Respondents' motion to dismiss is that Petitioners are or were within a "removal period" codified at 8 U.S.C. § 1231(a)(1)(A). Respondents repeatedly state variations of a broad-brush assertion that "detention is reasonable during the 90-day removal period," Resp.

[2] Respondents filed an Exhibit A, Dkt. No. 25-1, with their joint Memorandum of Law in Support of Respondents-Defendants' Motion to Dismiss and Opposition to Class Certification. Respondents acknowledge that "Respondents' Exhibit A is included for purposes of opposing the class certification only. The Court may disregard it for purposes of ruling on Respondents' Motion to Dismiss." Resp. Mem. (Dkt. No. 25) at 5 n.4.

Mem. (Dkt. No. 25) at 1, and "detention is expressly authorized for at least 90 days following a final order of removal." *Id*. at 4. But Section 1231 is more complex than the "simple precept" to which Respondents seek to reduce it, *id*. at 1. Respondents fail to acknowledge multiple interrelated sections and a key exception to the section's definition and application of the "removal period."

A. The Government Lacks Legal Authority to Remove Any Petitioner or Class Member From the United States, as They Have Been Ordered Removed to No Country.

The government's Motion to Dismiss relies entirely on the fact that each Petitioner has a removal order from the United States, but this explanation is materially incomplete: those removal orders designate no countries of removal other than those from which Petitioners' removal was also ordered withheld, by means of the same order. While the government may theoretically one day be able to remove one or more Petitioners or class members to some third country, *see* 8 C.F.R. § 1208.16(f), the government must first conduct additional legal proceedings to have the legal authority to remove Petitioners. Absent such hypothetical future proceedings, "ICE lacks the present and final legal authority to actually execute that order of removal." *Diaz v. Hott*, 297 F. Supp. 3d 618, 624 (E.D. Va. 2018).

An order of removal must specify the country or countries to which the government may remove an individual. *See* 8 C.F.R. § 1240.10(f) (The "immigration judge shall also identify for the record a country, or countries in the alternative, to which the alien's removal may be made.") (Emphasis added.) To remove a noncitizen to some other country, the government must first formally designate that third country as an additional country of removal, at which time the noncitizen will have the opportunity to seek withholding of removal as to that country as well. 8 U.S.C. § 1231(b)(3)(A) absolutely prohibits removal of a noncitizen to a country where his life or freedom would be threatened on account of a protected ground. The government's contrary

interpretation of the statute and regulations, under which they can forcibly remove noncitizens to countries the government has never designated for removal during removal proceedings, to which those noncitizens have never been ordered removed, and from which those noncitizens have not had an opportunity to seek withholding of removal, would render the designation process meaningless and eviscerate the right to apply for withholding of removal.[3]

Consistent with this legal framework, courts have consistently held that the government must provide a noncitizen notice as to the particular country to which the government intends to remove that person—and the government must subsequently afford the noncitizen the opportunity to request withholding of removal as to that country. *See Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) ("Failing to notify individuals who are subject to deportation that they have the right to apply for asylum in the United States and for withholding of deportation to the country to which they will be deported violates both INS regulations and the constitutional right to due process."); *Kossov v. INS*, 132 F.3d 405, 409 (7th Cir. 1998) (vacating denial of asylum and withholding on the grounds that two aliens were deprived of "a full and fair hearing for their claims" as to such a third country). *See also Diaz*, 297 F. Supp. 3d at 625 ("Although DHS may eventually be able to remove petitioners to some third country even if their application for withholding of removal is granted, third-country removal would require additional proceedings. At the least, DHS would be required to give petitioners notice and the opportunity for a hearing.").

[3] Petitioner Najjar exemplifies this. As an ethnic Palestinian who "speaks fluent Hebrew, studies the Torah, and affiliates with members of the Jewish religion[,] Mr. Najjar fears being killed if returned to Palestine because of his imputed ties to the Jewish religion." Am. Compl., Dkt. No. 10, at ¶ 38. For this reason, an Immigration Judge granted him withholding of removal as to his native Palestine. But Palestine is not the only country in the world where he might have good reason to fear that his "life or freedom would be threatened," 8 U.S.C. § 1231(b)(3)(A), and he has a right to seek withholding of removal from any alternative country to which the government may wish to deport him.

In the case of each Petitioner, the government chose to designate specific countries for Petitioners' removal pursuant to 8 U.S.C. § 1231(b)(2). But each Petitioner also won a grant of withholding of removal as to each such country designated, thus absolutely prohibiting the government from removing the Petitioners to those countries. Accordingly, the Petitioners do in fact have "removal orders"—but they have been ordered removed to no country. Because the government cannot remove them to the middle of the ocean, therefore, the government presently lacks legal authority to remove them.

B. Canons of Statutory Interpretation Lead to the Conclusion that Noncitizens Who Have Been Ordered Removed to No Country are Not Within the Removal Period.

"Removal period" is a term defined in 8 U.S.C. § 1231(a)(1)(A), which states:

> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

The "removal period" is therefore defined as the period of time during which the government "shall remove" a noncitizen. As to noncitizens whom the government legally *cannot* remove from the United States, because the Immigration Judge granted withholding of removal as to every country which the government designated for their removal, it makes no sense whatsoever to categorize them as being in a period during which the government "shall remove" them. In fact, the opposite is true: absent a change in country conditions, the Attorney General shall *not* remove class members to such designated countries.

This interpretation of the "removal period" is consistent with that given by Judge Brinkema in *Diaz v. Hott*, 297 F. Supp. 3d 618, 624 (E.D. Va. 2018), *appeal pending sub nom*. *Chavez v. Hott*, No. 18-6086 (4th Cir. 2018), which notes, "Congress has specifically limited the normal 'removal period' to 90 days, a limitation that makes sense if the removal period is only meant to govern the final logistical steps of physically removing an alien." Where the noncitizen

is not to be physically removed, because such removal is barred by law, the noncitizen is not in a removal period. Indeed, the position adopted by Respondents here—that the *only* relevant consideration is whether Petitioners have an administratively final order of removal, not whether the Respondents have present legal authority to remove Petitioners—was specifically rejected by Judge Brinkema in *Romero v. Evans*, 280 F. Supp. 3d 835, 846 n.22 (E.D. Va. 2017).[4]

The government's position that "detention is expressly authorized for at least 90 days following a final order of removal" also writes out of the statute the opening clause of 8 U.S.C. § 1231(a)(1)(A), "[e]xcept as otherwise provided in this section." Congress's use of the text "this section" (and not, for example, 'this subsection') refers to the entirety of Section 1231 of the statute, which includes not just the removal period definition and requirements at Section 1231(a), but also the statutory framework for withholding of removal at Section 1231(b)(3)(A), which provides, "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." The structure of Section 1231 indicates that withholding of removal under (b)(3)(A) is within the "except as otherwise provided" referred to in (a)(1)(A). In other words, when a noncitizen is ordered removed, the government *shall remove* that person during the 90-day removal period under (a)(1)(A); except where the noncitizen is granted withholding of removal, in which case the government *may not remove* that person under (b)(3)(A). Where withholding of removal is granted as to all countries designated for removal, therefore, the noncitizen falls under the "except as otherwise provided," and is not in the (a)(1)(A) removal period at all.

[4] Within the Eastern District of Virginia, the contrary authority to *Diaz* and *Romero* is *Crespin v. Evans*, 256 F. Supp. 3d 641, 646 (E.D. Va. 2017) (Ellis, J.). Nowhere in *Crespin* does Judge Ellis interpret whether the removal period runs against individuals already granted withholding of removal.

Courts have an interpretive "duty to give effect," whenever possible, to a statute's "every clause and word." *Lara-Aguilar v. Sessions*, 889 F.3d 134 (4th Cir. 2018) (*citing Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Under the "rule against superfluities," "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted). To apply this rule to the definition of "removal period" in Section 1231, the court must also consider the multiple phrases that are not applicable to individuals granted withholding of removal to all countries designated by Respondents. To rule that an individual granted withholding of removal to all countries designated by Respondents is in a removal period would ignore the phrases "when an alien is ordered removed," "the Attorney General shall remove the alien," and "except as otherwise provided." The government's interpretation of Section 1231(a)(1)(A) would render each of those phrases "superfluous, void, and insignificant," contrary to the Supreme Court's clear statement of permissible statutory interpretation.

Petitioners' statement of the proper interpretation of the Section 1231(a)(1)(A) removal period is not foreclosed by the Supreme Court's statutory holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), upon which Respondents repeatedly rely. The *Zadvydas* Court was not called upon to, and did not, interpret the removal period set forth in Section 1231(a)(1)(A); this is because all of the petitioners in *Zadvydas* did in fact have removal orders to specific countries and had *not* been granted withholding of removal as to those countries. The government *was* legally authorized to remove Mr. Zadvydas and Mr. Ma to specific countries; the government was merely encountering grave logistical challenges in doing so. Accordingly, Mr. Zadvydas and Mr. Ma would have been properly categorized as being within the 90-day removal period, immediately following the entry of their orders of removals; and by the time each filed their

habeas petitions, each was well beyond the 1231(a)(1)(A) removal period and well into the post-removal period found in Section 1231(a)(6). It is that subsection of statute that the *Zadvydas* court found to be presumptively limited to an additional 90 days, for a total of 180 days including the 90-day removal period of 1231(a)(1)(A).[5]

For this reason, Judge Ellis's decision in *Ali v. Barlow*, 448 F.Supp.2d 604 (E.D. Va. 2006), the primary precedent upon which Respondents rely for their interpretation of the Section 1231(a)(1)(A) removal period, also does not foreclose Petitioners' interpretation of the statute. The Petitioner in *Ali*, who was not granted withholding of removal, brought his claim under the *Zadvydas* statutory holding, and did not raise the argument that the Section 1231(a)(1)(A) removal period simply did not apply to him.[6] By the time the case was decided, more than 90 days had elapsed, so the Petitioner was being held under the authority of Section 1231(a)(6). Judge Ellis's ruling in *Ali*—that a noncitizen ordered removed cannot bring a *Zadvydas* challenge to their detention until 60 days have elapsed—is a straightforward interpretation of *Zadvydas* and Section 1231(a)(6), albeit one with which Petitioners respectfully disagree. Judge Ellis's statement that "the removal period began to run on May 2, 2006, when the order of removal and grant of [Convention Against Torture] relief became administratively final," 446 F. Supp. 2d at 609, does not reflect a reasoned consideration of whether the statutory "removal period" definition actually applies to such an individual, but rather a mere chronology of the case

[5] Like many Supreme Court opinions deploying the statutory interpretation canon of constitutional avoidance, the *Zadvydas* opinion begins with a statement of general constitutional principles regarding immigration detention – principles upon which Petitioners rely; and then applies those principles to a particular statutory subsection, 8 U.S.C. § 1231(a)(6) – a statutory interpretation holding which Petitioners contend is not relevant to the instant case, as Section 1231(a)(6) detention is separate from and chronologically subsequent to 1231(a)(2) detention. 533 U.S. at 688-702; *see also Clark v. Martinez,* 543 U.S. 371 (2005).

[6] Petitioners are not aware of any case in the Fourth Circuit directly making such an argument and believe this case to be one of first impression for the Court's review.

to date. Since no party asked Judge Ellis to rule on whether the Section 1231(a)(1)(A) removal period actually ran against such an individual, and since consideration of this question was ultimately irrelevant to his determination that *after* 90 days but before 180 days a challenge to Section 1231(a)(6) detention could not yet be brought, his description of the removal period is not relevant here. Likewise, this defeats the government's argument that "[g]iven the Supreme Court's holding in *Zadvydas*, petitions filed prior to the end of the six month removal period—and especially during the 90 day statutory removal period—are premature and must be dismissed." Resp. Mem. at 9. Petitioners are not bringing *Zadvydas* claims under Section 1231(a)(6), but rather a challenge to the government's interpretation of Section 1231(a)(1)(A); a rule holding that Section 1231(a)(6) challenges may not be brought prior to six months in detention would not be relevant to this action.

Petitioners' interpretation also finds support in the purpose of the statute. Where a noncitizen has been ordered removed to a specific country and the government is preparing to carry out that removal, flight risk is at its highest, and so Congress decided that to avoid flight risk such noncitizens should be detained. But where a noncitizen has been granted relief and had his removal withheld and the government "may not remove" him to any country it has designated for removal, there is nothing for the noncitizen to flee from, and the flight risk justification is inapplicable.

C. Respondents' Interpretation of the Section 1231(a) Removal Period Does Not Comply With Canons of Statutory Interpretation.

The opposite interpretation favored by the government—that any noncitizen with an administratively final order of removal is subject to an automatically applied 90 days of detention as a "removal period," even though their order of removal does not legally authorize the government to remove them—would raise serious constitutional concerns set forth in

sections II and III below, which should be avoided under the *Ashwander* doctrine of constitutional avoidance. "[I]t is a cardinal principle" of statutory interpretation, however, that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). A construction of a statute that avoids the statutes' invalidation best reflects congressional will. *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). The Supreme Court has repeatedly read significant limitations into other immigration statutes in order to avoid their potential invalidation under constitutional claims. *See, e.g.*, *United States v. Witkovich*, 353 U.S. 194, 195 (1957).

As the Supreme Court held in *Zadvydas*, immigration detention is nonpunitive in purpose and thus, under the Due Process Clause, must reasonably be related to a legitimate governmental objective—namely, flight risk or danger to the community. 533 U.S. at 690. But "where detention's goal is no longer practically attainable, detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)). If the flight risk justification for immigration detention "is weak or nonexistent where removal seems a remote possibility at best," *id.*, then such justification is absolutely nonexistent where removal is legally barred by withholding of removal—there is simply nothing from which the noncitizen would want to flee, and no legal authority under which the noncitizen may be held.

As to dangerousness, the Supreme Court was clear in *Zadvydas* that "we have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." 533 U.S. at 690–91. For this reason, 8

C.F.R. § 241.14(f) provides that where the government seeks to detain a noncitizen whose removal proceedings are no longer pending on the ground of dangerousness, the government must first go through certain procedures, and will bear the burden of proof to justify continued detention. It is undisputed that the government has not gone through such procedures in this case, and is not therefore authorized to continue detaining petitioners on the basis of dangerousness without beginning formal procedures under the regulation.

Because continued detention is not reasonably related to either legitimate government objective, it raises serious due process concerns. In order to avoid these constitutional concerns, this court should interpret the 1231(a)(1)(A) removal period to cover noncitizens whom the government "shall remove," but not noncitizens whom the government "may not remove" under Section 1231(b)(3).

D. Petitioners' Continued Detention Without Possibility of Review is Neither Mandatory Nor Justified.

For the foregoing reasons, a proper interpretation of the 1231(a)(1)(A) removal period statute shows it to cover only individuals whom the government "shall remove," but not individuals whom the government "may not remove." Since Petitioners have been granted withholding of removal as to every country that the government has designated for removal, they are in the latter category. And once Petitioners are found not to be in a 1231(a)(1)(A) removal period, then the mandatory detention clause of Section 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien") does not apply to them either. Sections 1231(a)(1) and (a)(2) do not authorize Petitioners' continued detention.[7]

Likewise, Petitioners submit that where they are not and were never in a removal period under Section 1231(a)(1)(A), the post-removal period of detention authorized by Section

[7] The government does not argue that Section 1231(a)(1)(C) applies to any Petitioner.

1231(a)(6) also does not apply to them, as that section refers to detention "beyond the removal period." Where there was no removal period, there is no "beyond the removal period." All of the government's arguments based on 8 C.F.R. § 241.13 similarly fail, because that regulation refers to and assumes that the noncitizen was in fact in a "removal period." 8 C.F.R. § 241.13 is the government's regulation implementing the *Zadvydas* statutory holding discussed above; as discussed above, Petitioners here are not bringing a *Zadvydas* statutory challenge to Section 1231(a)(6) detention, so 8 C.F.R. § 241.13 does not control. Indeed, no regulation provides an administrative vehicle by which a noncitizen may challenge the government's designation of them as being within a "removal period."

But the Court need not decide that question in order to enter a judgment for Petitioners here. The government does not dispute that detention under Section 1231(a)(6)—unlike detention under Section 1231(a)(2)—brings with it a right to periodic review under 8 C.F.R. §§ 241.4, 241.13, and 241.14, and the possibility of release. Even were this Court to rule that 8 U.S.C. § 1231(a)(6) detention could apply to a noncitizen who had never been in a removal period, a correct accounting of *when* each Petitioner entered the 1231(a)(6) period would still be a benefit to them, since the periodic reviews under 8 C.F.R. § 241.4 are based on the number of days since the detainee entered 1231(a)(6) detention. Accordingly, a ruling that Petitioners were not subject to detention under Section 1231(a)(2) would be a material benefit to Petitioners, as it would bring with it the possibility of immediate release from custody.

Finally, as set forth in the preceding subsection, the government may not continue detaining individuals preventively based on dangerousness except under very limited circumstances that do not apply in this case.

For the foregoing reasons, Petitioners respectfully request a ruling from this Court

finding that they are not, and never were, in the Section 1231(a)(1)(A) removal period and are thus not subject to Section 1231(a)(2) mandatory detention.

II. Petitioners State Valid Due Process Claims.

Respondents also move to dismiss Petitioners' Second and Third Claims for Relief, which are based on Petitioners' substantive and procedural process rights.[8]

A. Respondents' Continuing Detention of Petitioners Violates their Substantive Due Process Rights.

Respondents' sole defense to Petitioners' substantive due process claim is their argument that because, on their interpretation, the statute permits detention, such detention cannot violate the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Resp. Mem. (Dkt. No. 25) at 15. As an initial matter, Petitioners contend that the government's interpretation of the statute is incorrect, and that the statute does not allow such detention. But even *assuming arguendo* that it did, courts have repeatedly found actions permitted by statute to violate due process. *See, e.g.*, *Robinson v. Calif.*, 370 U.S. 660 (1962) (incarceration pursuant to a state statute criminalizing drug addiction violated due process).

Petitioners have an unquestionable interest in being free from physical restraint, which "lies at the heart of the liberty [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (*citing Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). The substantive component of due process

[8] As set forth above, pursuant to the doctrine of constitutional avoidance, the Court should first reach the Petitioners' statutory interpretation claim, and if the Court agrees with the Petitioners that their interpretation of the statute is plausible, adopt that interpretation of the statute so as to avoid having to rule on Claims II and III. Accordingly, Section II of this Memorandum is argued in the alternative: should the Court find that the government's reading of Section 1231(a)(1)(A) is correct and Petitioners are in fact in a "removal period," then Petitioners would request that the Court find the operation of the statute to violate the Fifth Amendment to the U.S. Constitution, because it would result in a total deprivation of their right to liberty without sufficient procedural protections (procedural due process), and because it would result in a total deprivation of their right to liberty without legitimate government purpose (substantive due process).

forbids the government from infringing in any way upon the fundamental interest of liberty unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *United States v. Salerno*, 481 U.S. 739, 749 (1987). Substantive due process "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746; *see also United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004).

In the context of immigration statutes and regulations, whether the infringement is narrowly tailored to serve a compelling governmental interest is determined by evaluating whether the infringement on liberty: 1) is impermissible punishment or permissible regulation; and 2) is excessive in relation to the regulatory goal Congress sought to achieve. *See, e.g.*, *Galvez v. Lewis*, 56 F. Supp. 2d 637, 646 (E.D. Va. 1999) (Lee, J.) ("the Court will employ the stricter *Salerno* test to determine whether Petitioner's detention is an unconstitutional violation of substantive due process."); *Leader v. Blackman*, 744 F.Supp. 500, 507 (S.D.N.Y. 1990).

Post-final-order immigration detention is constitutional only for "a period reasonably necessary to bring about [an] alien's removal." *Zadvydas*, 533 U.S. at 689. Immigration detention violates due process unless it is reasonably related to a legitimate government purpose. *Zadvydas*, 533 U.S. at 701. "If the government detains the noncitizen for more than a brief time without a legitimate purpose when the government cannot effect removal, the detention violates constitutional guarantees of due process." *Id*.; *Demore v. Kim*, 538 U.S. 510, 553 (2003) ("detention of aliens would not serve a legitimate immigration purpose if there were no 'significant likelihood of removal in the reasonably foreseeable future'"); *see also Mauricio-Vasquez v. Crawford*, 2017 WL 1476349 (E.D. Va. 2017); *Jarpa v. Mumford*, 211 F.Supp.3d 706 (D. Md. 2016). The Supreme Court further stated in *Zadvydas* that "if removal is not

reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized," *id*. at 680. "[W]here detention's goal is no longer practically attainable, detention is no longer 'bear[s] reasonable relation to the purpose for which the individual [was] committed," *id*. at 690, and therefore "raises serious constitutional concerns." *Id*. at 682.

Here, as Respondents have been ordered not to remove Petitioners to the only countries to which Respondents have sought to remove Petitioners, and Respondents have not asserted that Petitioners should be removed to any other countries, there is no reasonably foreseeable expectation of Petitioners' removal, and their continued detention raises serious constitutional concerns. The government is clearly "detain[ing] noncitizen[s] for more than a brief time . . . when the government cannot effect removal," violating Petitioners' due process rights.

In contrast to typical *Zadvydas*-based cases in which habeas petitioners argue that their removal is not reasonably foreseeable, Petitioners here have shown that their removal is not legally permitted, at least not unless and until the government engages in further legal process. An Immigration Judge has ordered that Respondents cannot remove Petitioners to the only countries to which Respondents have attempted to remove Petitioners, and Respondents have not initiated any other legal process to designate a new country of removal for Petitioners.

Statistics provided by Respondents demonstrate the absence of a significant likelihood of Petitioners' removal in the reasonably foreseeable future. In 2017, Immigration Judges granted withholding of removal to countries designated by DHS to 1,511 individuals. *See* Dkt. No. 31-1 at ¶ 7. Of these 1,511 individuals, Respondents ultimately completed removal of only a fraction—well under 2 percent.[9] *Id*. at ¶ 10. In more than 98 percent of cases, therefore, the individual was not removed from the United States, and the detention was without purpose.

[9] Some percentage of the individuals who make up this 1.39% may also be dual nationals or individuals who have legal residence in a third country, neither of which apply to Petitioners.

Where the government detains well over a thousand people per year without accomplishing the ostensible purpose for that detention, such "detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Zadvydas*, 533 U.S. at 690 (2001).

Given the totality of these circumstances, Respondents' continuing detention of Petitioners should "shock the conscience." *Salerno*, 481 U.S. at 746. Petitioners won their cases and Respondents have been ordered not to remove Petitioners to the only countries Respondents have designated for removal. Respondents do not represent that they *will* or even *reasonably expect to* remove Petitioners to any other country, just that they *would like* to one day be able to do so. Under these circumstances, Respondents' continuing and complete deprivation of Petitioners' liberty interests—without designating Petitioners' removal to an alternative country, and with a statistically remote probability of effecting any removal to an alternative country—is a "shocking" application of the authority granted to Respondents in the enforcement of the nation's immigration law. It accordingly violates Petitioners' substantive due process rights.

Respondents' continuing detention of Petitioners is "excessive in relation to the regulatory goal Congress sought to achieve" with respect to individuals granted withholding of removal. Respondents' continuing detention of Petitioners represents the very situation described by the Supreme Court in *Zadvydas* in which "the government detains the noncitizen for more than a brief time . . . when the government cannot effect removal, [and] the detention violates constitutional guarantees of due process." *Zadvydas*, 533 U.S. at 701. On this Claim alone, the Court could rule now in Petitioners' favor and order their release. At a minimum, the Court should deny Respondents' Motion to Dismiss Petitioners' substantive due process claim, finding that the Petitioners have stated a plausible claim for relief.

B. Respondents' Continuing Detention of Petitioners Violates their Procedural Due Process Rights.

Even if this Court should determine that Respondents' deprival of Petitioners' liberty satisfies the substantive due process requirements of being "narrowly tailored to serve a compelling state interest," procedural due process requires that such interference with Petitioners' liberty be implemented fairly through available procedures. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Whether Respondents' procedures are constitutionally sufficient depends on three factors: (1) the private interest to be affected by the action; (2) the risk of erroneous deprivation of that interest through the procedures that were used, and the probable value of added procedures; and (3) the government's interest, including the fiscal and administrative burdens of added procedures. *Mathews*, 424 U.S. at 335. Other than life, there is no private interest more fundamental than freedom from detention. To the contrary, the government's interest in continued detention is minimal, because the only permissible justification for post-final-order detention is to prevent flight risk, and here there is nothing for Petitioners to flee from, as they have won their cases. Applying the *Mathews* balancing test to Respondents' interpretation and implementation of 8 U.S.C. § 1231(a)(1) and 8 C.F.R. Part 241, Petitioners' fundamental right to liberty is not outweighed by the government's asserted interest in continuing Petitioners' detention.

For each Petitioner held in Respondents' custody during this 90-day period, Respondents have not initiated additional removal proceedings or otherwise designated alternative countries for removal, as 8 U.S.C. § 1231(b)(2) would have allowed them to do. Respondents cannot remove any Petitioner to any country without first formally designating such country and providing notice and an opportunity to present evidence and argument concerning removal to the designated country. It is "well settled that a fair hearing to [an] alien is a condition precedent to deportation." *Tassari v. Schmucker*, 53 F.2d 570 (4th Cir. 1931). "[A]ffirming a deportation

order without a fair hearing concerning that deportation violate[s] due process." *Kuhai v INS*, 199 F.3d 909, 913 (7th Cir. 1999); *see also Su Hwa She v. Holder*, 629 958, 965 (9th Cir 2010) ("It follows that a failure to provide notice and, upon request, stay removal or reopen the case for adjudication of [Plaintiff's] applications as to Burma would constitute a due process violation if Burma becomes the proposed country of removal."). Courts within this District have similarly held that "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." *Romero*, 280 F.Supp.3d at 847 n.24; *see also Diaz*, 297 F.Supp.3d at 625 ("At the least, DHS would be required to give petitioners notice and the opportunity for a hearing.").

The only procedure Respondents recognize as potentially permitting Petitioners' release is within 8 C.F.R. §§ 241.4 and 241.13, but that regulatory procedure is applicable only "after expiration of the removal period," and places the burden on Petitioners to "demonstrate no significant likelihood of removal to the country to which he or she was ordered removed." 8 C.F.R. § 241.13(a). Such a procedure provides no due process protections for detention during the first ninety days after an order of removal and withholding of removal.

Respondents' application of the statute and regulations create a situation in which Petitioners are (1) mandatorily detained for a minimum 90-day period; (2) have no available judicial or administrative procedure to apply for release from detention until after the conclusion of that period; (3) are legally prohibited from being removed from the United States to the only countries to which they are removable; and (4) are also not in proceedings to designate any other country of removal. Other than giving up their already-granted claim to withholding of removal and voluntarily returning to a country where their "life or freedom would be threatened," there is literally no means by which Petitioners can leave the detention facilities in which they are

confined: not within the United States, and not on an airplane. Such detention appears to serve not a regulatory purpose but a punitive purpose, akin to a 90-day jail sentence as *punishment* for being removable (if not to any particular country) from the United States. Such treatment violates Petitioners' right to due process.

Though they have not designated any alternative countries for Petitioners' removal and initiated any additional removal proceedings, Respondents assert that they have authority to detain Petitioners during the 90-day removal period because, "as a last resort, . . . DHS may remove an alien to 'another country whose government will accept the alien into that country.'" Resp. Mem. (Dkt. No. 25) at 6. Respondents' continued detention of Petitioners, when Respondents have not initiated even that form of "last resort" removal proceeding, provides Petitioners no opportunity to receive notice of that "last resort" country and to present evidence and argument related to a potential removal. Respondents continuing Petitioners' detention for such a "last resort," unidentified country of removal provides no process for Petitioners to contest removal or to seek release during the removal period to which Respondents claim Petitioners are subject, violating Petitioners' procedural due process guarantees.

III. Petitioners State Valid Claims for Relief under the Administrative Procedure Act.

Petitioners' Fourth and Fifth Claims for Relief are based on the Administrative Procedure Act (the "APA Claims"). Respondents seek dismissal of Petitioners' APA Claims on the arguments that "[a]s an initial matter, there has been no change to DHS's stated 'policy' over time," Resp. Mem. (Dkt. No. 25) at 17; that there is no final agency action subject to APA review, Resp. Mem. (Dkt. No. 25) at 19-21; and that Respondents have not acted arbitrarily and capriciously as APA public notice requirements do not apply to modifications of Respondents' policies on immigration detention. Resp. Mem. (Dkt. No. 25) at 17-18. Each of Respondents'

arguments regarding Petitioners' APA Claims are incorrect, and the Court should deny Respondents' motion to dismiss the APA Claims for the reasons stated below.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). Any person, such as Petitioners, "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA makes clear that "agency action" includes not only agencies' affirmative acts, but also their omissions and failures to act. *Id*.; 5 U.S.C. § 551(13). Under the APA, this Court may set aside and enjoin unlawful agency action, and compel agency action unlawfully withheld, if it is (1) "final agency action," (2) "for which there is no other adequate remedy in a court," so long as (3) there are no "statutes [that] preclude judicial review" and "agency action is [not] committed to agency discretion by law." 5 U.S.C. §§ 701(a), 704. Plaintiffs satisfy each of these criteria here, and APA relief is therefore proper. "The Supreme Court has long instructed that the generous review provisions of the APA must be given a hospitable interpretation such that only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *El Rio Santa Cruz Neighborhood Health Ctr. v. U.S. Dep't of Health & Human Servs*., 396 F.3d 1265, 1270 (D.C. Cir. 2005) (internal citations and quotations omitted)). *See also Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (Congress intended "simply to avoid duplicating previously established special statutory procedures for [agency] review."). Here, no such special procedures have been established, so it is proper for Petitioners to seek relief from this Court under the APA.

A. Petitioners Have Adequately Pled that Respondents Substantially Changed a Policy Affecting Petitioners' Liberty.

Contrary to Respondents' statement that, "[a]s an initial matter, there has been no change

to DHS's stated 'policy' over time," Resp. Mem. (Dkt. No. 25) at 17, Petitioners have adequately pled that Respondents recently and abruptly changed a policy that "favors the release" of individuals granted withholding of removal under 8 U.S.C. § 1231(b)(3) to a policy that such individuals will automatically be held for at least a full 90-day period without possibility of release. Petitioners alleged in non-conclusory detail a long-established policy presuming release of individuals granted withholding of removal, a substantial change to this policy, and attached published documents and communications by Respondents that state the prior and the changed policy. *See* Am. Pet. ¶¶ 63-66, and exhibits cited therein; *see also* Dkt. No. 10-13, Declaration of Kelly White ¶ 9 (describing a "pattern change"). Petitioners also allege that the fact that each of the three Petitioners has been detained past or is nearing the full 90-day removal period indicates that Respondents have a policy to automatically detain individuals granted withholding of removal for a full 90 days without possibility of release.

Those allegations go far beyond Fed.R.Civ.P. 8 pleading requirements of a short and plain statement of Petitioners' claim and the Rule 12 requirement that a plaintiff make "[f]actual allegations . . . [that] raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 570. These factual allegations are more than adequate for the Court to deny Respondents' motion to dismiss.

Moreover, that Respondents' policy may be informal rather than formal rulemaking does not free it from the purview of the APA. *See, e.g.*, *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 382-85 (D.C. Cir. 2002) (holding that guidance documents applied by an agency in a way that indicates they are binding can constitute a rule with the force of law under the APA). Respondents' policy change has binding effects on Plaintiffs and the Agency and constitutes a rule change with the force of law that failed to comply with required notice and comment procedures in violation of

the APA. *Id*. at 380-84. Accordingly, "the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." *Id*. at 382-83 (citing Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?,* 41 Duke L.J. 1311, 1355 (1992)).

B. Respondents' Continuing Detention of Petitioners and Change in Detention Policy Constitutes Final Agency Actions Subject to APA Review.

Respondents' next argument for dismissal of Petitioners' APA Claims is that there is no final agency action subject to this Court's review. Resp. Mem. (Dkt. No. 25) at 19-21. An agency action is final within 5 U.S.C. § 704 where two conditions are satisfied: (1) "the action must mark the consummation of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted); *see also Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006); *Romero*, 280 F.Supp.3d at 847. Respondents have completed final agency action that "mark[s] the consummation of [Respondents'] decisionmaking process" and that affects Petitioners' "rights or obligations . . . and from which legal consequences flow."

As alleged in the complaint, Respondents have adopted a policy that is final and being consistently applied to detain for 90 days individuals granted withholding of removal to all countries designated by Respondents. Respondents' decision to adopt and implement this policy change and relating procedures constitutes final agency action for purposes of the APA. That policy has been acknowledged by Respondents as "ICE-ERO Washington policy to hold [Petitioners] for the entirety of the removal period." Dkt. No. 10-4. Respondents' continued detention of all three Petitioners for a period approaching or exceeding 90 days corroborates that this is a policy Respondents currently apply. *See id*. (asserting the policy in regards to Petitioner

Sanchez-Acosta, who has been detained beyond 90 days); Dkt. No. 10-5 (scheduling Petitioner Najjar for a custody review after 90 days of detention). There is no question that Respondents' policy is an action that affects Petitioners' "rights or obligations . . . and from which legal consequences flow." Respondents' detention of Petitioners affects Petitioners' liberty, an obvious "legal consequence flow[ing]" from Respondents' action. As a result, Respondents' conduct is final agency action subject to this Court's review under 5 U.S.C. § 504.

C. Respondents Failed to Provide Any Public Notice or State Any Rationale for Their Change in Policy Regarding Immigration Detention.

An agency modifying or altering a rule must provide adequate reasons for that change. "One of the basic procedural requirements of administrative rulemaking is than an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 U.S. 2117, 2125 (2016). If the agency "provides an explanation of its decision that includes a rational connection between the facts found and the choice made," a court may uphold the agency's decision. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 136 S.Ct. at 2125 (*citing State Farm*, 463 U.S. at 42–43).

To ensure that agency actions are reasonable and lawful, a court must conduct a "thorough, proving, in-depth review" of the agency's reasoning and a "searching and careful" inquiry into the factual underpinnings of the agency's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971). After undertaking the review, a court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

Agency action should be set aside as arbitrary and capricious if the agency fails to explain the basis of its decision, fails to consider all relevant factors and articulate a "rational connection between the facts found and the choice made," or fails to offer a "reasoned explanation" for departure from preexisting policies. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Meaningful judicial review cannot proceed unless "the grounds upon which the administrative agency acted [are] clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) *(Chenery I*). Accordingly, an agency action must be set aside unless its basis is "set forth with such clarity as to be understandable." *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947) (*Chenery II*). To survive review, an agency must have "demonstrated a rational connection between the facts found and the choice made." *Wawszkiewicz v. Dep't of Treasury*, 670 F.2d 296, 302 (D.C. Cir. 1981). Courts "do not defer to the agency's conclusory or unsupported suppositions." *Standing Rock Sioux Tribe v. U.S. Army Corps of Engs.*, 255 F.Supp. 3d 101, 122 (D.D.C. 2017).

When the government reverses an established policy, it has an even greater burden to justify its actions. The agency must "acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do so acts arbitrarily and capriciously." *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) (internal citation omitted); *see also Encino Motorcars*, 136 S. Ct. at 2126 (an agency cannot depart from prior policy without "explaining its changed position"). Thus, reversing a pre-existing policy requires a "more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

"The same principles apply to a change in agency position" regarding immigration rules and policy. *Jimenez-Cedillo v. Sessions*, 885 F.3d 292, 298 (4th Cir. 2018); *see also Judulang v.*

Holder, 565 U.S. 42, 55 (2011) ("agency action must be based on non-arbitrary, 'relevant factors,'… which here means that the [government's] approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system"). At a minimum, an immigration agency must "display awareness that it is changing position and show that there are good reasons for the new policy." *Jimenez-Cedillo*, 885 F.3d at 298, *quoting Encino Motorcars*, 136 U.S. at 2126. "In explaining its changed position, an agency must also be cognizant that long-standing policies may have engendered serious reliance interests that must be taken into account." *Id*. An "unexplained inconsistency" in agency policy indicates that the agency's action is arbitrary and capricious, and therefore unlawful. *Jimenez-Cedillo*, 885 F.3d at 298; *Judulang*, 565 U.S. at 50 (immigration decisions cannot be a "sport of chance…that is what the APA's 'arbitrary and capricious' standard is designed to thwart.") (citations omitted).

Respondents should have provided a reasoned explanation for their change in the established policy favoring release from detention for individuals granted withholding of removal to countries Respondents designated for removal. Petitioners have adequately pled that Respondents had an established policy that would affect Petitioners' release from Respondents' custody, Am. Pet. (Dkt. No. 10) at ¶¶ 63-66, and exhibits cited therein, that Respondents changed this policy, and that Respondents provided no public explanation and have stated no rationale for changing the policy regarding release from detention. That is all that is required to survive Respondents' motion to dismiss the APA Claims, which this Court should deny.

CONCLUSION

For the reasons stated above, the Court should deny Respondents' motion to dismiss, grant the individual Petitioners the relief they claim, and proceed to evaluate the proposed class of similarly situated individuals the Petitioners represent.

Respectfully submitted,

Dated: August 23, 2018

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Certificate of Service

I, the undersigned, hereby certify that on this 23rd day of August, 2018, I uploaded the foregoing Memorandum in Opposition to Motion to Dismiss to this court's CM/ECF system, which will cause a Notice of Electronic Filing (NEF) to be sent to all counsel of record:

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