UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 25-cv-01945-ECT-ECW

WAHEBA DAIS,

Petitioner,

v.

ERIC TOLLEFSON, Sheriff, Kandiyohi County; KRISTI NOEM, Secretary, Department of Homeland Security; PAM BONDI, Attorney General; TODD LYONS, Acting Director, Immigration and Customs Enforcement; PETER BERG, Field Office Director, St. Paul Field Office, Immigration and Customs Enforcement,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents (1) Kristi Noem, Secretary, Department of Homeland Security; (2) Pam Bondi, Attorney General; (3) Todd Lyons, Acting Director, Immigration and Customs Enforcement; and (4) Peter Berg, Field Office Director, St. Paul Field Office, Immigration and Customs Enforcement (collectively, the "Federal Respondents") respectfully file this Response to Petitioner Waheba Dais's Petition for a Writ of Habeas Corpus. In her Petition, Dais argues that her detention after a final order of removal is unconstitutional because there is not a significant likelihood of her removal in the reasonably foreseeable future. Dais's Petition should be denied, however. Not only is her removal reasonably foreseeable, but her removal to Israel and the Palestinian Territories is scheduled to occur later this month.

FACTUAL BACKGROUND

Dais is a native of Israel and a citizen of the Palestinian Territories. Declaration of Thomas Murphy ("Murphy Decl.") at ¶ 4. Dais entered the United States on or about November 13, 1992, as a CR-1 Conditional Resident. *Id.* On February 22, 1995, the former Immigration and Naturalization Service approved Dais's petition to remove the conditions on her residence. *Id.* at ¶ 5.

On August 24, 2020, Dais pleaded guilty in the Eastern District of Wisconsin to Attempting to Provide Material Support to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B(a)(1). *Id.* at ¶ 5, Ex. A. Dais was sentenced to 90 months in prison. *Id.* Subsequently, on December 11, 2020, ICE Enforcement and Removal Operations ("ERO") St. Paul encountered Dais at FCI Waseca. Murphy Decl. ¶ 7. ERO St. Paul lodged an immigration detainer at that time. *Id.*

On December 16, 2020, ERO St. Paul issued Dais a Notice to Appear ("NTA") in immigration removal proceedings.. *Id.* at ¶ 8, Ex. B. Dais was charged under Section 237(a)(4)(B) of the Immigration and Nationality Act as having engaged in terrorist activity by (1) soliciting an individual to engage in terrorist activity, (2) soliciting an individual for membership in a terrorist organization, (3) providing material support to an individual who has committed or plans to commit a terrorist activity, and (4) providing material support to a terrorist organization or to any member of that organization. *Id.* at ¶ 8, Ex. B. On February 8, 2022, while Dais was still in BOP custody, an immigration judge ("IJ") at Fort Snelling ordered Dais removed to Israel and the Palestinian Territories. Murphy Decl. ¶ 9, Ex. C. Dais did not appeal the IJ's decision. Murphy Decl. ¶ 9.

Dais was released from BOP custody on November 1, 2024, and was arrested by ERO St. Paul and taken into ICE custody. *Id.* at ¶ 10. On November 12, 2024, ERO St. Paul received Dais's valid Palestine passport. *Id.* at ¶ 11. On April 29, 2025, ERO St. Paul received instructions from ICE headquarters to schedule a removal flight for early June. *Id.* at ¶ 13. On May 5, 2025, ERO St. Paul received an approved itinerary for Dais's removal from the Assistant Attaché of Removals in Tel Aviv. *Id.* at ¶ 15. The removal plan has also been approved by ICE HQ-Domestic Operations. *Id.* at ¶ 16. Dais's removal, via charter flight, is scheduled for later this month. *Id.* at ¶ 15.

On May 1, 2025, exactly six months after she was arrested and detained pending removal, Dais filed a Petition for Writ of Habeas Corpus, alleging that her immigration detention had become unconstitutional. ECF No. 1. This Court ordered the Federal Respondents to respond by June 2, 2025. ECF No. 6.

ARGUMENT

A. Scope of Review

Judicial review of immigration matters, including immigration detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review."). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The plenary power of Congress and the Executive Branch over

immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.").

Here, Dais's sole challenge is to her continued civil immigration detention pending her removal. Dais does not challenge her final order of removal, nor could she. Jurisdiction over a challenge to a final order of removal lies exclusively with the appropriate circuit court of appeals. *See* 8 U.S.C. § 1252; *see also Tostado v. Carlson*, 481 F.3d 1012, 1014 (8th Cir. 2007) (exclusive jurisdiction to review final orders of removal is with the circuit, not district, court).

B. Dais's post-final removal order detention is constitutional.

Dais argues that her detention pending her removal to Israel and the Palestinian Territories is unconstitutional. Dais is detained, however, because immigration officials, who have reviewed her ongoing custody, have specifically determined that there is a significant likelihood of Dais's removal to Israel and the Palestinian Territories in the reasonably foreseeable future. Dais has a valid Palestine passport, and ICE has received

necessary approvals for her removal itinerary. Murphy Decl. ¶¶ 11, 15-16. ICE has scheduled her removal, via charter flight, for later this month. *Id.* at ¶ 15.

1. Legal Standard

Dais has been in post-removal-order detention since November 1, 2024, when ICE took custody of her after she was released from BOP custody. *See* 8 U.S.C. § 1231(a)(2) (detention in cases of post final order of removal). Under the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a person subject to a final order of removal cannot, consistent with the Due Process Clause, be detained *indefinitely* pending removal. 533 U.S. at 699-700. *Zadvydas* established a temporal marker: post-final order of removal detentions of six months or less are presumptively constitutional. 533 U.S. at 701. Detentions longer than six months comport with due process if a "significant likelihood of removal in the reasonably foreseeable future" exists. *Id.* As the Supreme Court explained:

> After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. *This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.*

Id. (emphasis added).

Thus, under *Zadvydas*, a habeas petitioner has the initial burden of demonstrating that that there is no significant likelihood of his or her removal in the reasonably foreseeable future. *Id.* If the petitioner does so, the government must rebut that showing. *Id.*

After the Court's decision in *Zadvydas*, the U.S. Department of Homeland Security promulgated comprehensive regulations to implement the *Zadvydas* mandate. *See* 8 C.F.R. §§ 241.4, 241.13, 241.14, 66 Fed. Reg. 56967-01, 56969 (Nov. 14, 2001). *Accord Alexander v. U.S. Attorney General*, 495 F. App'x 274, 277 (3d Cir. 2012) ("*Zadvydas* is not the only word on post-removal detention; regulations promulgated around the time of, and after, the *Zadvydas* decision established a series of processes for determining whether an alien should be released from custody after the expiration of the ninety-day removal period."). These regulations govern immigration detention of aliens subject to a final order of removal and establish a systemized process for detention reviews.

Section 241.4 of the regulations requires that a detainee be given a post-order custody review before the 90-day statutory removal period expires, if removal cannot be accomplished during the 90-day period. 8 C.F.R. § 241.4(k)(1)(i). Numerous considerations factor into this initial custody review, including the detainee's criminal history. 8 C.F.R. § 241.4(f). To release a detainee at this point, DHS must conclude, among other things, that he or she is "not likely to pose a threat to the community following release." 8 C.F.R. § 241.4(e).

Section 241.13 addresses the substantial likelihood of removal in the reasonably foreseeable future standard established in *Zadvydas*. It provides numerous factors relevant to the standard, including the "ongoing nature of the Service's efforts to remove this alien," and states that "[w]here the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but

the prospects for the timeliness of removal must be reasonable under the circumstances." 8 C.F.R. § 241.13(f).

2. Dais has not met her burden under *Zadvydas.*

Dais has not met her *Zadvydas* burden. Rather than showing that there is no significant likelihood of her removal in the near future, Dais simply argues that her cumulative detention has lasted more than six months under a final removal order, and that "upon information and belief, Israel will not consent to her return." ECF No. 1, at 2. *Zadvydas*, however, establishes no such bright line rule regarding length of detention. Rather, the Court in *Zadvydas* explicitly recognized that detention longer than six months is constitutional if removal will be accomplished reasonably soon. 533 U.S. at 701. *See also* 8 C.F.R. § 241.13(f); *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (detainee must "present any facts indicating that the INS is incapable of executing his removal . . . and that his detention will, therefore, be of an indefinite nature"); *Gahamanyi v. Baniecke*, No. 07-cv-4007 (RHK/RLE), 2008 WL 5071098, at *11 (D. Minn. Nov. 24, 2008) (same). Dais cannot discharge her burden by doing nothing more than citing the total length of her detention post-removal order and speculating that Israel will not consent to her return. *See Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1365-68 (N.D. Ga. 2002) (mere passage of time insufficient to meet alien's burden of proof); *Lema v. U.S. I.N.S.*, 214 F. Supp. 2d 1116, 1118 (W.D. Wa. 2002) (same). As a result, Dais has not met her burden under *Zadvydas*; this Court should dismiss her Petition for this reason alone.

3. There is a significant likelihood that Dais will be removed in the reasonably foreseeable future.

But even if Dais had met her burden under *Zadvydas*, immigration officials have solidly rebutted any such showing. The Declaration of Deportation Officer Thomas Murphy lays out the basis for detaining Dais and the ongoing process of removing her to Israel and the Palestinian Territories. Dais has been detained under a final removal order since November 2024, and Murphy details what immigration officials have done since then, culminating in the imminent removal itinerary approved by both Israeli and ICE officials, and the scheduling of a removal charter for June 2025. Due to the ongoing efforts by immigration officials, Dais's removal is substantially likely to occur in the reasonably foreseeable future.

This satisfies *Zadvydas*. *See, e.g., Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001) (new repatriation procedure in place was sufficient to show removal substantially likely in reasonably foreseeable future); *Jaiteh v. Gonzales*, No. 07-cv-1727 (PJS/JJG), 2008 WL 2097592, at *3 (D. Minn. Apr. 28, 2008), *report and recommendation adopted*, 2008 WL 2074163 (May 14, 2008) ("[W]here a foreign country ordinarily accepts repatriation, and that country is acting on an application for travel documents, most courts conclude the alien fails to show no significant likelihood of removal."). *Cf. Zadvydas*, 533 U.S. 684-85 (detainee was stateless); *Jama v. ICE*, 01-cv-1172 (JRT/AJB), 2005 WL 1205160, at *4 (D. Minn. May 20, 2005) (habeas relief granted where failed deportation attempt occurred and court concluded that it "may well be impossible" under the conditions in Somalia at that time). Here, Dais is not stateless, and, far from "impossible," her removal

to Israel and the Palestinian Territories is likely, given the progress ICE has made in effectuating her removal.

As Magistrate Judge Thorson noted in a similar case, there are generally five circumstances where courts have found no significant likelihood of removal: "(1) where the detainee is stateless, and no country will accept [her]; (2) where the detainee's country of origin refuses to issue a travel document; (3) where there is no repatriation agreement between the detainee's native country and the United States; (4) where political conditions in the country of origin render removal virtually impossible; and (5) where a foreign country's delay in issuing travel documents is so extraordinarily long that the delay itself warrants an inference that the documents will likely never issue." *Ahmed v. Brott*, No. 14-cv-5000 (DSD/BRT), 2015 WL 1542131, at *4 (D. Minn. Mar. 17, 2015), *report and recommendation adopted*, 2015 WL 1542155 (Apr. 7, 2015).

Dais does not fall into any of these categories. Her continued detention satisfies constitutional due process, as explained in *Zadvydas*. Dais is not being detained indefinitely, has a valid passport and an approved removal itinerary, and immigration officials have shown that she is likely to be removed in the near future, with a charter flight scheduled this month. *See, e.g., Joseph K. v. Berg*, No. 18-cv-3125 (DWF/HB), 2019 WL 13254377, at *3-4 (D. Minn. Mar. 15, 2019), *report and recommendation adopted*, 2019 WL 13254378 (May 3, 2019); (recommending denial of habeas petition while removal to Liberia had taken ten months); *Nadin K. v. Barr*, No. 18-cv-3223 (PJS/BRT), 2019 WL 13254351, at *3 (D. Minn. Mar. 11, 2019), *report and recommendation rejected as moot*, 2019 WL 23387804 (May 17, 2019) (same). Thus, even if Dais could meet her burden

under *Zadvydas*, Respondents have adduced evidence showing a significant likelihood of removal in the reasonably foreseeable future. Accordingly, her Petition should be denied.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that this Court deny the Petition without an evidentiary hearing.

Dated: June 2, 2025

JOSEPH H. THOMPSON
Acting United States Attorney

/s/ Adam J. Hoskins

BY: ADAM J. HOSKINS
Assistant United States Attorney
Attorney ID Number 393157
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600
adam.hoskins@usdoj.gov