IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EDIN PORTELA-HERNANDEZ,	*	
	*	
Petitioner,	*	
	*	
v.	*	No. 1:25-CV-1633-BAH
	*	
DONALD J. TRUMP, *et al.*,	*	
	*	
Respondents.	*	

******

REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS OR STAY, AND MEMORANDUM IN SUPPORT

Petitioner challenges his detention, removal to Mexico, and takes issue with the process due to him throughout these proceedings. However, Petitioner fails to raise any argument justifying a writ of habeas corpus. In the time since the government filed its original motion, the Supreme Court has stayed the preliminary injunction issued in *D.V.D. v U.S. Department of Homeland Security*, Civ. 25-10676-BEM (D. Mass. April 18 and May 21, 2025). *See Dept. of Homeland Sec. v. D.V.D.*, 606 U.S. ___ (2025). Although the preliminary injunction has been stayed, because Petitioner is a member of this non-opt out class, any claim of relief based on third-country removal processes must be brought in Massachusetts.

Furthermore, statutory authority and Supreme Court precedent allow for Petitioner's detention and provide that detention for six months is presumptively reasonable. As such, this Court should deny the Petition.

ARGUMENT

I. Because Petitioner is a member of an already-certified class action and his claims overlap, dismissal or a stay is appropriate.

Petitioner does not dispute that he is a member of the class certified in *D.V.D. v. U.S. Department of Homeland Security*. Mem. Order, No. 1:25-cv-10676-BEM (D. Mass. Apr. 18, 2025), ECF 64 (certifying class); ECF 19 at 9 (conceding class membership). As Petitioner's opposition makes clear, *D.V.D.* covers Petitioner's allegations. The *D.V.D.* class includes *all* individuals with a final removal order who will be sent to a third country. *D.V.D. v. DHS*. No. 12-cv-10767 (BEM) (D. Mass.) [hereafter, "*D.V.D.*"] Doc. 64 at 23 [hereafter, "*D.V.D.* PI"]. *See also*, *DHS v. D.V.D.*, 606 U.S. ___ at 1 (staying preliminary injunction). *D.V.D.* includes challenges to notices of removal and opportunities to raise fear-based claims. *D.V.D. v. DHS*, Doc. 118. Petitioner advances just such challenges here. ECF 19 at 3 (arguing lack of notice); *id.* at 10 (discussing reasonable fear concerns).

On June 23, 2025, the United States Supreme Court stayed the District of Massachusetts' preliminary injunction pending appeal in the United States First Circuit Court of Appeals. *Department of Homeland Security v. D.V.D.*, No. 24-A-1153, 2025 WL 1732103 (2025). That same day, the District Court of Massachusetts ordered that its remedial order granting relief to eight individual class members DHS sought to remove to South Sudan remained in effect. Order, *D.V.D.* (ECF No. 176) Defendants moved to clarify the Supreme Court's Order and, on July 3, 2025, the Supreme Court granted the motion allowing the eight individual aliens to be removed to South Sudan. The class certification in *D.V.D.* remains in effect notwithstanding the Supreme Court's stay. *See id.* As a result, Petitioner's claims fall under the non-opt out class action and belong in Massachusetts.

As explained in Respondent's Initial Response (ECF 15), the District of Massachusetts entered a preliminary injunction prescribing the process to which *D.V.D.* class members were entitled before removal to a third country and certified a non-opt out class of which Petitioner is undisputedly a member. *See* Am. Pet. ¶¶ 19-23 (ECF No. 19). The Supreme Court stayed the preliminary injunction but left certification of the non-opt out class intact, signaling that the *D.V.D.* class members would not succeed on the merits of their claims and the Government would ultimately prevail.

This Court should avoid providing Petitioner with relief that eventually may conflict with the relief, if any, ultimately provided to the *D.V.D.* class. At its core, the Petition challenges how Respondents should implement Petitioner's third country removal. Am. Pet. ¶¶ 19-23 (ECF No.19). That is precisely the challenge brought by the *D.V.D.* class. This Court, therefore, should not wade into Petitioner's claims because such claims are being actively litigated in the *D.V.D.* class action, which is currently before the First Circuit. To do otherwise would cut against the entire purpose of a Rule 23(b)(2) non-opt out class action and risk an order that will conflict with not only the relief, if any, eventually provided to the *D.V.D.* class but also the Supreme Court's rejection of the relief initially temporarily provided to class members by the District of Massachusetts.

Additionally, this Court should avoid providing Petitioner with relief that is likely to be rejected and overturned by the Supreme Court. The District of Massachusetts attempted to set parameters around third country removals, but the Supreme Court, in staying the *D.V.D.* preliminary injunction, effectively rejected those parameters and signaled that ultimately the class members would not succeed on the merits of the case and the Government would prevail. The Supreme Court confirmed that its stay applied to individual class members by granting Defendants' motion for clarification on July 3, 2025. Petitioner cannot now make an end run around the Supreme Court's

stay in *D.V.D.* by seeking relief in this Court. The Supreme Court has already found that Defendants are likely to succeed on the legal arguments presented in response to the instant habeas petition. Allowing Petitioner's habeas petition to proceed on the ground that ICE allegedly failed to follow the procedures set forth in the *D.V.D.* preliminary injunction (including when to conduct the reasonable fear interview) while executing his removal to a third country and continuing to stay his removal to a third country would therefore be directly contrary to the Supreme Court's decision to stay the preliminary injunction in *D.V.D.* As a result, this Court should not require Respondents to provide the degree of process described in the *D.V.D.* preliminary injunction before removing Petitioner to a third country because the Supreme Court will, by all indications, eventually hold that such process is not required under the law.

II. ICE acted consistently with its Post-Order Custody Regulations when ICE arrested Petitioner.

While 8 U.S.C. § 1231(a)(3) is silent as to revocation procedures for an individual released pursuant to an Order of Supervision, ICE issued Post-Order Custody Regulations ("POCR") contained at 8 C.F.R. § 241.4 to set forth mechanisms concerning custody reviews, release from ICE custody, and revocation of supervised release for individuals with final orders of removal.

The regulatory provisions concerning revocation of orders of supervised release are contained at 8 C.F.R. § 241.4(l) and provide significant discretion to ICE to revoke release. *See Leybinsky v. U.S. Immigration & Customs Enf't*, 553 F. Appx. 108, 110 (2d Cir. 2014) (remarking on the "broad discretionary authority the regulation grants ICE" to revoke release."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (explaining that, while the revocation regulation "provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion . . ."). For example, they provide for revocation in additional circumstances such as when ICE's Field Office

Director determines that "[t]he purposes of release have been served," or when "[i]t is appropriate to enforce a removal order . . . against an alien," or when "[t]he conduct of the alien, *or any other circumstance,* indicates that release would no longer be appropriate." 8 C.F.R. § 241.4(l)(2)(i)-(iv) (emphasis added).

When ICE revokes release of an individual under 8 C.F.R. § 241.4(l), ICE must conduct an "informal interview" to advise the individual of the basis for revocation and must also serve the individual with a written notice of revocation. *See* Notice of Revocation of Release, ECF 15-2. If ICE determines revocation remains appropriate after conducting the informal interview, then ICE will provide notice to the individual of a further custody review that "will ordinarily be expected to occur within approximately three months after release is revoked." 8 C.F.R. § 241.4(l)(3); *see also* Notice of Revocation of Release, ECF 15-2. However, ICE is not required to "conduct a custody review under these procedures when [ICE] notifies the alien that it is ready to execute an order of removal." 8 C.F.R. § 241.4(g)(4); *Rodriguez-Guardado*, 271 F. Supp. 3d at 335. Further, if ICE determines in its "judgment [that] travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest." 8 C.F.R. § 241.4(g)(3).

Here, Acting Baltimore ICE Field Office Director ("Baltimore's ICE AFOD") issued Petitioner a written Notice of Revocation of Release on May 20, 2025, explaining that ICE was revoking his release pursuant to 8 C.F.R. § 241.4 as it had determined that Petitioner could be removed from the United States pursuant to his final order of removal. *See* ECF 15-2. Baltimore's ICE AFOD determined the "[Petitioner] can be expeditiously removed from the United States pursuant to the outstanding order of removal against you.... [And] Your case is under current review by the Government of Mexico for issuance of a travel document." *Id.* The notice also

provided the regulatory basis for detention (8 C.F.R. §§ 241.4 & 241.13) and notified Petitioner of the post-order custody review processes afforded him. *Id.* The Notice explained that Petitioner would be given an interview at which he could "respond to the reasons for the revocation" of supervised release and "may submit any evidence or information you wish to be reviewed." *Id.* It explained that ICE would provide notification "within approximately three months" of a new review if Petitioner was not released after his informal interview. *Id.* In making this determination, Baltimore's ICE AFOD necessarily determined that revocation was in the public interest to effectuate a removal order. *See Nken v. Holder,* 556 U.S. 418, 435 (2009) (explaining that "[t]here is always a public interest in prompt execution of removal orders . . .").

In revoking Petitioner's supervised release, ICE complied with the regulation that allows revocation when ICE determines that it "is appropriate to enforce a removal order . . . against an alien" and when ICE finds that the "purposes of release have been served." 8 C.F.R. § 241.4(l)(2). When ICE "determined that revocation was necessary to initiate [] removal ... [n]o further justification was required." *Doe v. Smith*, No. 18-cv-11363-FDS, 2018 WL 4696748, at *11 (D. Mass. Oct. 1, 2018). The regulation does not require the (A)FOD "to make a formal determination that h[is] revocation was in the public interest[,]" instead, the FOD has "discretion to determine when revocation is appropriate." *Id.* The regulation provides a "short and straight path for immigrants whom the government is ready and able to remove." *Alam v. Nielsen*, 312 F. Supp. 3d 574, 582 (S.D. Tex. 2018). ICE has issued a Notice of Removal to a third country to Petitioner, ECF 15-1, and Mexico is currently reviewing Petitioner's case for the issuance of a travel document, ECF 15-2. As such, ICE has ample justification per its regulation to revoke release.

To the extent Petitioner believes ICE should have provided him with advance notice of its intent to revoke his release, such belief is not grounded in regulation or the Constitution. ICE is

not required to provide advance notice of its intent to revoke release for the obvious reason that it could encourage flight or increase law enforcement safety concerns. *See Doe*, 2018 WL 4696748, at *7 (explaining that the "regulation does not require that a petitioner or her counsel be given 30 days' notice prior to the initial informal interview."); *see also Gutierrez-Soto v. Sessions*, 317 F. Supp. 3d 917, 929 (W.D. Tex. 2018) (finding no "due process right to not be snatched off the street without warning" when ICE revoked discretionary parole and returned individual to custody); *Reyes v. King,* No. 19-cv-8674 (KPF), 2021 WL 3727614, at *10 (S.D.N.Y. Aug. 20, 2021) (explaining that "the Due Process Clause of the Fifth Amendment does not entitle [p]etitioner to such a [pre-detetion] hearing at this specified time, and [p]etitioner cites no authority within this Circuit that counsels otherwise."); *Moran v. U.S. Dep't of Homeland Sec.*, No. 20-cv-696-DOC-JDE, 2020 WL 6083445, at *9 (C.D. Cal. Aug. 21, 2020) (expressing skepticism about "the source of any due process right to advance notice of revocation of supervised release or other removal-related detention.").

Courts routinely conclude that compliance with the POCR regulations protect an individual's constitutional rights while detained. *See, e.g.*, *Moses v. Lynch*, No. 15-cv-4168, 2016 WL 2636352, at *4 (D. Minn. Apr. 12, 2016) ("When immigration officials reach continued-custody decisions for aliens who have been ordered removed according to the custody-review procedures established in the Code of Federal Regulations, such aliens receive the process that is constitutionally required."); *Portillo v. Decker*, No. 21-cv-9506 (PAE), 2022 WL 826941, at *6 (S.D.N.Y. Mar. 18, 2022) (collecting cases supporting the conclusion that the POCR framework has routinely been deemed constitutional and noting that petitioner had not "cite[d] legal authority in support of his generalized laments about the administrative process").

Because Petitioner does not demonstrate that ICE violated any specific procedures under the applicable regulation, his petition should be denied. *See, e.g.*, *Perez v. Berg*, No. 24-cv-3251 (PAM/SGE), 2025 WL 566884, at *7 (D. Minn. Jan. 6, 2025), *report and recommendation adopted,* No. 24-cv-3251 (PAM/ECW), 2025 WL 566321 (D. Minn. Feb. 20, 2025) (finding no due process violation "[a]bsent an indication that ICE failed to comply with its regulatory obligations in some more specific way"); *Doe*, 2018 WL 4696748, at *7 (dismissing habeas claim where "there was no regulatory violation" in connection with custody reviews).

As such, Petitioner's claim that ICE's arrest Petitioner violated its regulations or the Constitution fails as ICE properly exercised its ample discretion in revoking Petitioner's release.

III. ICE's detention of Petitioner is lawful under 8 U.S.C. § 1231(a)(6) & *Zadvydas*.

There is no basis for Petitioner's argument that ICE is unable to detain Petitioner at this point. Petitioner's detention is lawful because he is subject to a final order of removal and qualifies for detention under 8 U.S.C. § 1231(a). Second, because he has been detained for less than six months, his detention is presumptively reasonable. Petitioner's assertion that his removal is not reasonably foreseeable is fueled by speculation instead of facts.

As discussed in the government's response/motion (ECF 15), 8 U.S.C. § 1231 provides for the detention and removal of aliens with final orders of removal. Petitioner is outside the 90-day mandatory detention period provided in 8 U.S.C. § 1231(a)(2), but he is still an inadmissible alien subject to detention under 8 U.S.C. § 1182(a)(6)(A)(i). That ICE seeks to remove Petitioner to a third country does not alter the analysis because § 1231(b)(1)(C) authorizes Petitioner's removal to a third country and detention to carry out that removal is lawful under § 1231(a)(6).

Petitioner's current detention, which has lasted well under six months so far, is presumptively reasonable under *Zadvydas v. Davis*, 533 U.S. 678 (2001). Petitioner concedes, as

he must, that *Zadvydas* sets forth the framework for analyzing Petitioner's challenge to his present detention. Opp. at 15. Petitioner further concedes that Petitioner's detention has not yet hit the six-month mark. *Id.* Detentions shorter than six months do not "offend due process." *Rodriguez-Guardado v. Smith,* 271 F. Supp. 3d 331, 335 (D. Mass. 2017) ("As petitioner has been detained for approximately two months as of this date, the length of his detention does not offend due process."); *see also* Dfs' Mot. (ECF 15) at 12 (noting courts routinely deny habeas petitions that are filed with less than six months of detention and citing cases).

Although Petitioner asserts his removal is not reasonably foreseeable, he provides no evidence to bolster this naked assertion. Instead, he complains that he has not received a scheduled flight, country clearance from a foreign government, or travel documents, in the last five weeks. Opp at 15. Petitioner disregards the Notice of Revocation of Release, indicating that "ICE has determined that you can be expeditiously removed from the United States pursuant to the outstanding order of removal against you." ECF 15-2. Petitioner's concern that his third-country removal will exceed six months does not carry the day at this early point in the process. In *Zadvydas* itself, the Supreme Court considered and rejected arguments that the government being "unlikely to succeed in its efforts to remove" a petitioner is sufficient to establish unforeseeable release. 533 U.S. at 685. Instead, the Court explained that the government is due "leeway" to allow for "the status of repatriation negotiations." *Id.* at 700. The "presumptively reasonable period of detention" of six months strikes the balance between the government's interest in enforcing immigration laws and a petitioner's interest in avoiding indefinite detention. *Id.* at 700–01.

Petitioner's claims of unconstitutional detention fail given that he has been detained less than two months and ICE needs time to conduct the necessary processes. *See Castaneda v. Perry*,

95 F.4th 750, 760 (4th Cir. 2024) (explaining that "*Zadvydas*, largely, if not entirely forecloses due process challenges to § 1231 detention apart from the framework it established.").

IV. This Court lacks jurisdiction to stay ICE's execution of lawful removal orders.

Petitioner seems to have misconstrued Respondent's jurisdictional argument and 8 U.S.C. § 1252(g). To be clear, Respondents contend that 8 U.S.C. § 1252(g) forecloses any habeas review under § 2241 that would stay the execution of Petitioner's removal order. Respondents do not otherwise challenge the Court's jurisdiction.

CONCLUSION

In light of Petitioner's membership in the *D.V.D.* class and the legal authority justifying his detention, this Court should deny the Petition.

Respectfully submitted,

Kelly O. Hayes
United States Attorney

By: /s/
Thomas F. Corcoran (Bar No. 24894)
Assistant United States Attorney
36 S. Charles St., 4th Floor
Baltimore, Maryland 21201
410-209-4800
Thomas.corcoran@usdoj.gov

Counsel for Respondents