IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NELSON ARIEL UMANOR-CHAVEZ	*	
	*	
Petitioner,	*	
	*	
v.	*	No. 8:25-cv-01634-SAG
	*	
NOEM, *et al.*,	*	
	*	
Respondents.	*	

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GOVERNMENT'S RESPONSE TO LETTER ORDER

I. INTRODUCTION

The Government hereby responds to the Court's letter order. ECF 11. Petitioner concedes he did not raise the *Accardi*-related issues in his Petition. ECF 12 at 1. However, the Court should decline to consider these "procedural issues" because the Government has not consented to the addition of these new claims. Moreover, on the substance, the arguments are meritless because the Government did follow applicable policies and procedures. To the extent Petitioner raises a substantive challenge to the wisdom of the Government's decision to revoke his release, such a challenge is not the proper fodder for a habeas petition.

II. RULE 15(B)(2) DOES NOT APPLY BECAUSE THIS MATTER HAS NOT BEEN TRIED.

Because Petitioner concedes he failed to raise his *Accardi* arguments in his initial petition, the Government will instead address his argument that he may now raise those issues pursuant to Rule 15(b)(2). ECF 12 at 1. Federal Rule of Civil Procedure 15(b)(2) is inapplicable here since it applies only to "amendments during and after trial." Fed. R. Civ. P. 15(b). Because there has been no trial in this matter, nor summary judgment briefing on the merits, 15(b) is irrelevant and premature.

The plain text of Rule 15(b) requires consent to unpled issues raised at trial, not at the motion stage. *Id.* Trial means trial, not in a response to a motion. *Garret v. Walker*, No. CIV S-06-1904 RRB EFB P, 2007 WL 3342529, at *1 (Nov. 9, 2007) ("Thus, [Rule 15(b)] applies after trial on the merits."); *id.* (holding Rule 15(b) motion was premature because a motion for summary judgment was pending and recommending denial of the motion); *rept. and rec. approved*, 2008 WL 4372429 (E.D. Ca. Sept. 24, 2008). *C.f. Elmore v. Corcoran*, 913 F.2d 170, 173 (4th Cir. 1990) (reflecting difference between motion proceeding and trial, noting a party "never raised the theory . . . in the pleadings, during the motion proceedings, nor at trial"). Indeed, courts emphasize that Rule 15(b) should be interpreted strictly "because notice to the defendant of the allegations to be proven is essential to sustaining a cause of action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 983 (4th Cir. 2015). *See also*, *Doe #6 v. Miami-Dade Cnty.*, 974 F.3d 1333, 1340 ("Trial of unpled issues by implied consent is not lightly to be inferred. . . ." (internal quotations omitted)).

Admittedly, there appears to be an unresolved circuit split regarding whether Rule 15(b) applies at points earlier than trial. *See New Image Global, Inc. v. United States*, 399 F. Supp. 3d 1257, 1264 (Ct. Int'l Trade 2019), *aff'd*, No. 2019-2444, 2022 WL 1438738 (Fed. Cir. May 6, 2022) ("The Supreme Court has not clarified, and the circuit courts are split as to whether this rule applies at the summary judgment stage."). The Fourth Circuit is one of the courts that has applied Rule 15(b) to summary judgment proceedings. *Id.* at n.9 (noting that Fourth Circuit applied 15(b) to a summary judgment motion in *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001)) [hereafter, *PETA*]. Notably, where the Fourth Circuit applied Rule 15(b) at a point earlier than trial, that point was summary judgment briefing, in which a full factual record

has been developed and is available. *See PETA*, 263 F.3d at 367–68. Undersigned counsel has not yet found a case in which a court applied 15(b) in the motion to dismiss setting.

To the extent this Court considers whether the Government consented to the addition of new issues, the Government argues that its non-acknowledgement of these issues does not amount to consent. *C.f. PETA*, 263 F.3d at 367 (finding Rule 15(b) satisfied where the party opposing the new claims "vigorously defended against the claim."). Here, there was no trial, no evidentiary hearing, and no administrative record. Inferring trial by consent because the government did not object to these new arguments before now is not consistent with the demands of due process. Should the Court consider these new claims, the Government respectfully requests that the Court consider its arguments regarding the merits of the claims, provided below.

III. ON THE MERITS, PETITIONER'S *ACCARDI* ARGUMENTS FAIL.

ICE did not violate any policies or regulations because its Post-Order Custody Regulations do not require an interview to occur within two months of revocation. Moreover, the ICE officer who signed Petitioner's Notice of Revocation of Release had been delegated the authority to execute that document. If Petitioner actually seeks to argue that the Government should not have revoked his release for substantive or merit-based reasons, that argument should have been brought under the Administrative Procedure Act (APA) and not Section 2241.

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

Petitioner's claim that he should have been provided a prompt interview fail to establish a violation of policy. 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. ICE acted consistently with those provisions.

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 7-2. 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 7-2. 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 21, 2025, explaining that ICE was revoking his release pursuant to 8 C.F.R. § 241.4 and 241.13 as it had determined that Petitioner could be removed from the United States pursuant to his final order of removal. *See* ECF 7-2. 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.

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").

To the extent Petitioner seeks this Court to conduct its own custody review or to analyze ICE's custody determinations, as explained by another court, "[s]uch arguments are not proper here. It is ICE's province under 8 U.S.C. 1231(a)(6) to determine whether a removable alien such as [petitioner] should be detained past the 90-day removal period" … as Congress has "eliminated judicial review of immigration-related matters for which ICE [] has discretion—such as flight-risk determinations." *Xie Deng Chen v. Barr*, No. 1:20-CV-00007-SL, 2021 WL 2255873, at *4 (N.D.

Ohio Feb. 5, 2021). *See also Tazu v. Att'y Gen. United States*, 975 F.3d 292, 297 (3d Cir. 2020) (District court lacked jurisdiction over petitioner's "challenge to his short re-detention for removal" concerning whether his release was revoked in accordance with regulation because of 8 U.S.C. § 1252(g)); *Portillo*, 2022 WL 826941, at *7 n.9 (Explaining that the court lacks jurisdiction to review ICE's POCR decisions).

B. Authority to Issue Notices of Revocation of Release has been properly delegated to Nikita Baker, the Acting Baltimore Field Office Director.

Petitioner's argument that his Notice of Revocation of Release is invalid because the Executive Associate Commissioner did not sign it lacks merit because authority to execute notices of revocation has been delegated to immigration officers such as Nikita Baker, the Acting Baltimore Field Office Director who signed Petitioner's Notice of Revocation of Release. ECF 7-2.

On March 1, 2003, the Secretary of the Department of Homeland Security issued a Delegation of Authority. ECF 14-1. This delegation has not been rescinded or revoked. Pursuant to the Delegation of Authority, a deportation officer, such as the one that signed the Petitioner's Revocation of Order of Supervised Release (ECF 7-2), is authorized to execute such documents pursuant to the Delegations of Authority (Section 2 (T)) which has been redelegated to deportation officers (Section 4 (D)(3)). ECF 12-1 at 4, 8.

Section 2 (T) provides:

> Pursuant to the authority vested in the Secretary of Homeland Security by law, including the Homeland Security Act of 2002 ("the Act"), I hereby delegate to the Assistant Secretary of ICE:
>
> (T) Authority under the immigration laws, including but not limited to sections 235, 236, and 241 of the INA (8 U.S.C. 1225, 1226, and 1231), to issue and execute detainers and warrants of arrest or removal, detain aliens, release aliens on bond and other appropriate conditions as provided by law, and removal aliens from the United States.

ECF 12-1 at 4. Moreover, Section 2(H) broadly delegates authority "to enforce and administer the immigration laws." ECF 12-1 at 2. Finally, Section 4 (D)(3) (Re-delegations) re-delegates this authority to any immigration officer within ICE:

> Immigration Officers. The Assistant Secretary of ICE, the Director of Immigration Interior Enforcement, any Regional or District Director for Interior Enforcement, and any deportation officer, detention enforcement officer, detention officer, special agent, investigative assistant, intelligence agent, immigration agent (investigations), or other immigration officer (as described in section 103 of the INA or 8 C.F.R. 103.1(j)), or senior supervisory officer of such employee, within ICE, is designated as an immigration officer authorized to exercise, and hereby delegated, the powers and duties of such officer as specified by the immigration laws and chapter 8 of the Code of Federal Regulations.

ECF 12-1 at 8. As a result, ICE did not violate any laws or regulations in issuing a Notice of Revocation of Release signed by Nikita Baker.

In sum, because Petitioner does not demonstrate that ICE violated any specific procedures under the applicable regulation, his new arguments lack merit and the petition should still 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).

C. A habeas petition is not the proper vehicle to challenge the prudence of the Notice of Revocation of Release

Petitioner's challenge may actually be to the propriety of the Government's decision to revoke Petitioner's release. If this is indeed the crux of the matter, then such claims are not cognizable on review of a habeas petition. *See Hubbard v. Carter*, No. BAH-24-729, 2025 WL 524117 (D. Md. Feb. 18, 2025). Judge Hurson drew this distinction in the prisoner habeas context, noting that a habeas petitioner who seeks to challenge the application of rules, or the "substance

of any eventual decision" must bring an APA action, not a habeas petition. *Id.* at *3 n.1 (quoting *Richmond v. Scibana*, 387 F.3d 602, 605 (7th Cir. 2004)).

Here, Petitioner appears to seek just such an impermissible review. *See* ECF 8 at 13 (arguing that "logic" dictates that due to Petitioner's good behavior on release, the Government should not have detained him); ECF 1 at ¶¶ 28–29 (alleging Petitioner's compliance with conditions of release). The generosity of government discretion falls outside the purview of a habeas petition and this Court should reject those arguments.

IV. CONCLUSION

For these reasons, the Court should either decline to consider the additional claims or should reject them.

Respectfully Submitted,

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By: /s/

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