IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MELGAR HERNANDEZ,	*	
	*	
Petitioner,	*	
	*	No. 1:25-cv-01663-LKG
v.	*	
	*	
BAKER, *et al.*,	*	
	*	
Respondents	*	

PETITIONER'S SUPPLEMENTAL BRIEF

Respondents have held Petitioner in detention for over two months as of the date of this filing. Despite their assertion to the contrary, the circumstances of Petitioner's case have not changed from April 16, 2024. On that date over fifteen months ago, Petitioner was released from ICE custody "[b]ecause the agency ha[d] not effected [his] deportation or removal during the period prescribed by law." Ex. 1. Respondents remain unable to effectuate his removal in the reasonably foreseeable future, rendering his detention indefinite and unconstitutional.

Under international law, Petitioner is entitled to procedural protections prior to his removal to a country where he fears harm, which Respondents did not begin for two-plus months following his re-detention. *See infra* Section I.A. Further, Respondents have proffered no evidence that the United States government will ever successfully arrange for Petitioner's travel to Mexico, much less that he will be entitled to protected status there to prevent his removal to El Salvador, where an Immigration Judge determined he would likely suffer torture. *See infra* Section I.B.

I. ARGUMENT

A. Respondents have not begun to comply with any of the procedural requirements that must precede Petitioner's removal.

The United Nations unanimously adopted the Convention Against Torture ("CAT") on December 10, 1984, and the United States subsequently signed and ratified this international

agreement. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Senate Consideration of Treaty Document 100-20*, CONGRESS.GOV (last visited July 28, 2025) https://www.congress.gov/treaty-document/100th-congress/20/resolution-text. Under CAT, signatory countries have a nonrefoulment obligation—the duty to never "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for the United States Nov. 20, 1994). This obligation persists regardless of whether the nation to which the United States seeks to deport a noncitizen is their country of origin or, as in this case, a third country where the noncitizen possesses no legal status.

As an individual who has declared his fear of removal to Mexico or any other country where he lacks legal status, Petitioner is entitled to procedural protections prior to his removal to ensure the United States complies with its obligations under international law. This section will first describe the three possible procedural scaffolds that could govern the protections that Petitioner must receive before any attempt to remove him from the United States. *See infra* Sections I.A.i–iii. This section will then detail the scant efforts Respondents have made to comply with *any* of these possible paths. *See infra* Section I.A.iv.

i. *D.V.D.* Litigation Results

One possible procedural pathway that could govern the Respondents' actions in this case is the final outcome of the ongoing *D.V.D.* class action litigation. As both Petitioner and Respondents detailed in prior briefing before this Court, Petitioner is a *D.V.D.* class member. *D.V.D v. Dep't of Homeland Sec.*, No. 25-10676-BEM (D. Mass. April 18, 2025) (order granting class

certification); *see also* ECF 12 at 1; ECF 13 at 4. The final outcome of that case has not yet been determined, but if the plaintiffs prevail the remedy will likely be similar to the procedures outlined in the preliminary injunction. *D.V.D v. Dep't of Homeland Sec.*, No. 25-10676-BEM (D. Mass. May 21, 2025) (memorandum on preliminary injunction).

The procedures required by that injunction, which the Supreme Court has stayed pending further litigation, begin with the government's burden to provide written notice "to both the non-citizen and the non-citizen's counsel in a language the non-citizen can understand" regarding the removal to the undesignated third country. *Id.* at *2. Then the government must provide at least ten days for the noncitizen to raise a fear-based claim against removal, and determine whether the noncitizen possesses a "reasonable fear" of removal. *Id.* If the noncitizen establishes their reasonable fear, the government must move to reopen their removal proceedings to allow for the adjudication of the fear-based claim. *Id.* If the noncitizen is not able to establish their reasonable fear in that forum, the government must still provide a minimum of fifteen days for the noncitizen to file their own motion to reopen their removal proceedings. *Id.* Upon reopening, the case would proceed through regular removal proceedings in immigration court, a process which typically takes years to resolve. *See Asylum in the United States*, AM. IMMIGR. COUNCIL (May 9, 2025) https://www.americanimmigrationcouncil.org/fact-sheet/asylum-united-states/ ("Individuals with an immigration court case who were ultimately granted relief such as asylum in FY 2024 waited more than 1,283 days on average for that outcome.").

ii. Procedures outlined in 8 C.F.R. § 208.31

Another procedural structure that could govern Respondents' attempts to remove Petitioner to Mexico is detailed in 8 C.F.R. § 208.31. This Court recently relied on this regulatory provision in its analysis of reasonably foreseeable removal for a similarly situated habeas petitioner. *See Cordon-Salguero v. Noem*, No. 1:25-cv-01626-GLR at *37 (D. Md. June 18, 2025) (motions

hearing) (explaining that a similarly situated petitioner was entitled to a reasonable fear interview under 8 C.F.R. § 208.31).[1] This regulatory provision governs situations similar to the Petitioner's: noncitizens with a final order of removal, who then "express[] a fear of returning to the country of removal." 8 C.F.R. § 208.31(a). After the noncitizen expresses a fear of removal, DHS must refer them to an asylum officer for a reasonable fear interview within ten days, unless DHS can show that there were "exceptional circumstances" preventing this timeframe. *Id.* § 208.31(b). The regulation then provides detailed instructions governing the interview itself, including that the noncitizen "may be represented by counsel . . . at the interview." *Id.* § 208.31(c). If the noncitizen establishes their reasonable fear at this stage, their case must be referred to an immigration judge for full adjudication of their fear-based claim. *Id.* § 208.31(e). And even if the asylum officer determines the noncitizen did not establish a reasonable fear of removal, the noncitizen is entitled to have an immigration judge review that determination and, if the immigration judge reverses the fear determination, advance to full removal proceedings. *Id.* § 208.31(g). As stated above, full adjudication of a noncitizen's fear-based claim typically takes years to complete.

iii. DHS internal memorandum

The final procedural mechanism that could govern Respondents' attempts to remove Petitioner to a country where he fears harm is outlined in an internal DHS memorandum, entitled "Guidance Regarding Third Country Removals," and dated March 30, 2025. *See* Ex. 3. While this internal memorandum does not carry the same force of law as a completely adjudicated class action lawsuit or notice-and-comment rulemaking, *see supra* Sections I.A.i–ii, it does speak directly to Petitioner's situation. Ex. 3. Under this memorandum's guidance, when seeking to effectuate removal to a previously undesignated third country, DHS must first determine whether the country

[1] Attached as Exhibit 10.

of removal "has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured." *Id.* If the United States has received these assurances that no harm will befall its deportees, *and* determines that such assurances are credible, then DHS may remove the noncitizen with no further process. *Id.* However, absent such credible assurances, when a noncitizen facing removal to a third country expresses their fear of removal, DHS must refer them for a fear interview, which should occur "generally . . . within 24 hours of referral." *Id.* If the noncitizen establishes that they will "more likely than not" face torture or persecution in the country of removal, ICE may file a motion to reopen removal proceedings in immigration court, thus restarting the long process of administrative removal proceedings. *Id.* Alternatively, ICE could choose to designate another country for removal, therefore restarting the administrative fear screening process. *Id.*

iv. Respondents' sparse efforts to comply with the international law obligations that must precede Petitioner's removal

For two-plus months following their re-detention of Petitioner, Respondents did not make any meaningful effort to begin the procedural review that must precede Petitioner's removal to a country where he fears harm. Each possible procedural framework begins with the requirement of a fear interview. *See supra* Sections I.A.i–iii. Under 8 C.F.R. § 208.31 it typically must occur within ten days. 8 C.F.R. § 208.31(b). Under the DHS internal memorandum, this determination should generally occur within the shorter timeframe of 24 hours. Ex. 3.

Respondents have not adhered to either framework, and their actions have not been otherwise expeditious. Respondents first attempted several times to interview Petitioner without his attorney present. Ex. 2 at ¶ 11; Ex. 4. After both Petitioner and his counsel insisted on his counsel's presence at the interview, Respondents made their first attempt to schedule a fear interview with Petitioner's counsel on June 20—thirty days after his re-detention. Ex. 4. At this

point, the asylum office (which is part of DHS) scheduled his fear interview for June 23, 2025, at 8:00AM CST. *Id.* However, this interview never happened, and on June 23, 2025, Petitioner's counsel received another email scheduling his fear interview for June 25, 2025. Ex. 5. But less than 24 hours after rescheduling Petitioner's fear interview, the asylum office canceled it without explanation. *Id.* After Petitioner's counsel requested a reason for the additional delay, the office replied that the cancellation was due to "operational logistics." *Id.* Despite counsel's inquiry on July 3, Petitioner received only the bare assurance that the asylum office would "reach out again when time permits for scheduling." *Id.* A month passed with no word regarding Petitioner's fear interview—which accounts for only the *first* step in a maze of procedural requirements. During this time, Petitioner remained in detention.

Yet two days after this Court ordered supplemental briefing on the question of reasonably foreseeable removal, and a month after the last communication Petitioner's counsel had received from the asylum office, the asylum office scheduled Petitioner for an interview on July 28, 2025, at 8AM CST. Ex. 6. Just like his June interview dates, Petitioner's interview did not proceed as scheduled on July 28. The asylum office did not call Petitioner's counsel until two-and-a-half hours after the scheduled time, at which point Petitioner's counsel was no longer available. *Id.*; Ex. 2 at ¶ 11. With newfound diligence, the asylum office rescheduled the interview for the very next day, July 29, 2025. Ex. 7. On July 29, 2025, at 10:30AM CST, Petitioner received his fear interview—sixty-nine days after his re-detention. The asylum officer has not yet made a determination regarding his fear of removal to Mexico.

If Petitioner receives a positive fear determination, he is entitled to enter regular removal proceedings to adjudicate his fear-based claim under the *D.V.D.* injunction and 8 C.F.R. § 208.31—a process that typically takes years to complete. *See supra* Sections I.A.i–ii. Under DHS's internal

memorandum, upon a positive fear determination, ICE could either refer him to the court for removal proceedings or designate a different country of removal. As noted, the former option may take years to complete, while the latter presents a distinctly pernicious form of delay—the indefinite kind. DHS's internal memorandum contains no limit on the number of times ICE can designate a different country for removal. Ex. 3. Under this practice Respondents could simply choose another country each time Petitioner passes a fear interview, rendering his detention indefinite and removal far from reasonably foreseeable—especially considering the fact it took the asylum office 69 days to provide his first fear interview.

B. There is no evidence that Mexico will accept Petitioner in the reasonably foreseeable future.

Even if Respondents are permitted to remove Petitioner to Mexico after complying with the relevant procedural requirements, there is no evidence that Mexico will issue Petitioner a travel document and permit his entry. *See* Ex. 9 (requiring individuals who do not meet the named criteria to possess a visa to enter Mexico). Without Mexico's decision to accept Petitioner, his detention will remain indefinite, regardless of the outcome of his fear-based claim.

The only evidence Respondents have provided to this Court regarding the imminence of Petitioner's removal to Mexico is the Request for Acceptance of Alien, dated the same day as Petitioner's re-detention, with no confirmation of receipt from the Mexican embassy. ECF 12-6; *see also* ECF 13 at 6–7 (outlining the timing of Respondents' purported contact to the Mexican embassy). And during the July 23, 2025, hearing on this matter, Respondents confirmed that they have no updates regarding any progress with the Mexican embassy. Petitioner has further confirmed that during his months-long detention, the U.S. officials responsible for negotiating for his removal to Mexico have not contacted him to request assistance or provide updates. Ex. 2 at ¶ 9. Beyond the inaction on his own case, Petitioner stated that he has heard of Salvadoran detainees

being sent to Port Isabel Detention Center in Southern Texas to effectuate their removal to Mexico, only for those same detainees to return to Winn Correctional Facility in Louisiana because "Mexican officials refused to allow them in, saying that they were not taking any more deportees." Ex. 2 at ¶ 12.

Petitioner's counsel contacted the Mexican embassy on July 24, 2025, to seek more information regarding the possibility of Petitioner's removal to that country. Ex. 9. Approximately thirty minutes after sending the email, Petitioner's counsel received notice that the inquiry would be forwarded to the "Mexican Protection Department." *Id.* As of the time of this filing, Petitioner's counsel has received no further contact from the Mexican embassy in response to the inquiry. It is therefore unclear whether the Mexican embassy even received the Request for Acceptance of Alien, much less whether that request is under active consideration, or will be approved in the reasonably foreseeable future.

Beyond the particularized evidence in this case—most notably the lack of any actions by Respondents, who are best-positioned to act on this issue—history shows that the United States is very rarely able to effectuate the removal of noncitizens to countries where they lack legal status. *See* ECF 13 at 10–11 and Ex. 1 (arguing this point); *see also Johnson v. Guzman Chavez*, 594 U.S. 593, 537 (2021) (noting that "alternative-country removal is rare" given a source showing that "only 1.6% of aliens who were granted withholding of removal were actually removed to an alternative country" in 2017); *id.* at 552 (Breyer, J., dissenting) (explaining that "[s]tudies have . . . found that, once withholding-only relief is granted, the alien is ordinarily not sent to another . . . country. Rather, the alien typically remains in the United States for the foreseeable future."); *Munoz-Saucedo v. Pittman*, No. 25-2258, 2025 WL 1750346 at *10 (D. N.J. June 24, 2025) (reasoning that while "circumstances may evolve and that historical outcomes do not necessarily control the

result in any particular case, the data nevertheless supports the general inference that removal for this particular class of detainees is substantially more difficult" and the court is permitted to consider that evidence in its analysis of whether detention is reasonable).

It is therefore clear that Petitioner will not be removed to Mexico in the reasonably foreseeable future, both due to Respondents' inaction on the matter, and the reality that this type of removal is historically difficult to complete.

II. CONCLUSION

Petitioner's removal is not reasonably foreseeable, both because Respondents have not acted expeditiously to comply with the complex web of procedural requirements which must precede his removal, and because there is no indication that Mexico will ever permit Petitioner's deportation to that country. This reality renders his detention indefinite and unconstitutional. Petitioner respectfully requests this Court to grant his petition and order his immediate release from DHS custody.

Respectfully submitted,

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