United States District Court
Western District of Texas
San Antonio Division

Esau Ernesto Chicas Ortega, Petitioner, v. Kristi Noem, in her official capacity as Secretary, U.S. Department of Homeland Security *et al*, Respondents.[1]	No. 5:25-CV-00689-OLG

Response in Opposition to
Petitioner's Motion for Temporary Restraining Order
and/or Preliminary Injunctive Relief

Petitioner, through counsel, filed a habeas petition with this Court on or about June 18, 2025. ECF No. 1. The Court ordered service on Respondents and a response within three (3) days of that service. ECF No. 5. As such, Respondents have calendared their habeas response as due on July 3, 2025. *See* ECF No. 6 (showing service sent by CMRRR to U.S. Attorney's Office, but not yet confirming delivery).

Concurrently with the habeas petition, Petitioner filed a Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction, requesting, *inter alia*, that the Court enjoin Respondents from removing him from the United States. ECF No. 4 at 1. Additionally, Petitioner requested immediate release from custody. *Id.* at 2. This Court preliminarily granted the TRO in part on June 27, 2025, by enjoining Respondents from "deporting Petitioner from the United States until this Court orders otherwise." *See* ECF No. 7 at 2. In that order, the Court also set a hearing

[1] Respondents note that the warden of the detention facility is not named as a respondent in this Petition. The named Respondents, nonetheless, are authorized under Title 8 of the U.S. Code to detain this alien in anticipation of removal and to release him from custody should release become appropriate in the exercise of their unreviewable discretion.

for July 9 and ordered Respondents to file a response to the TRO motion by July 2, 2025. *Id.* On July 2, 2025, the undersigned AUSA conferred with Petitioner's counsel and with ICE to confirm that Petitioner remains detained in ICE custody Pearsall, Texas, and that ICE is aware of the partial TRO issued in this case. Respondents submit the following response to the order:

Contrary to his allegations, Petitioner is lawfully detained with a final order of removal, despite having been granted CAT relief, because such relief extends only to the country where Petitioner was found to have a reasonable fear of being tortured. *See* 8 C.F.R. §§ 208.16–208.17, 1208.16; 1208.17; 208.31(a); 1208.31(a); 8 U.S.C. § 1231(b)(3)(A). In other words, ICE cannot remove Petitioner to El Salvador due to the CAT relief, but nothing prevents ICE from removing Petitioner to a third country. *See e.g.*, *Guzman Chavez*, 594 U.S. at 531–32, 535–36; 8 U.S.C. § 1231(b)(1)(c)(iv); 8 C.F.R. §§ 208.16(f); 1208.16(f); 208.17(b)(2); 1208.17(b)(2). There are numerous removal options for ICE to consider under this statute, including any country willing to accept the alien. *Guzman Chavez*, 594 at 536–37; 8 U.S.C. § 1231(b)(2).

Moreover, this Court lacks jurisdiction to grant the relief that Petitioner seeks, which is to enjoin the execution of his removal from the United States. *See* ECF No. 4; 8 U.S.C. 1252(g); *see also Westley v. Harper*, No. 25–229, 2025 WL 592788 at *4–6 (E.D. La. Feb. 24, 2025) (denying preliminary injunction and dismissing case for lack of jurisdiction where district court lacked jurisdiction to stay removal). On the merits of his habeas claim, Petitioner is not likely to succeed for several reasons: (1) his post-order detention is authorized by statute, even beyond the 90-day removal period, in the exercise of ICE's discretion; (2) he concedes that his detention is not prolonged (*i.e.*, that his *Zadvydas* claim is premature); (3) he has not shown good reason to believe that imminent removal from the United States is unlikely; and (4) any remedy to an alleged procedural due process violation is not release from custody but a redo of the process. *See, e.g.,*

Quiroz-Zapata v. Anda-Ybarra, et al, No. 3:25–CV–148–LS, ECF No. 18 (W.D. Tex. June 25, 2025) (denying habeas petition filed by detained alien with a CAT grant to Colombia because she was lawfully detained with a final order of removal and had not shown that her removal was not reasonably foreseeable). The partial TRO should be dissolved immediately, and the habeas petition should be dismissed in its entirety.[2]

I. Relevant Background

Petitioner is a native and citizen of El Salvador. ECF No. 4 at 1. He is currently detained in ICE custody with a final order of removal dated October 3, 2023. *Id.* at 2, 5 (acknowledging that a removal order is in place). Petitioner has been in ICE custody since June 18, 2025, and there is no mention of a stay of removal in effect beyond this Court's partial TRO grant. *Id.*; ECF No. 1. Finally, there is no indication that his final removal order has been vacated.

Petitioner claims that ICE failed to provide him with due process when ICE decided in the exercise of discretion to revoke his Order of Supervision and bring him back into custody to effectuate his removal. ECF No. 4 at 1–2. Additionally, Petitioner takes issue with ICE's process leading up to the execution of his final removal order, arguing that he has not been notified of specific removal efforts and erroneously claiming that ICE cannot remove him to any country. *Id.* at 2–5. He argues his detention is not constitutionally protected and that he should be immediately released from custody. *Id.*

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[2] In good faith compliance with this Court's June 27, 2025, order, Respondents timely respond herein to both the TRO and the habeas petition, despite having an additional 24 hours to respond to the habeas petition. *See* ECF Nos. 5, 7. Due to the emergency nature of this response, however, Respondents respectfully request to supplement this record with additional documentation, should the Court require it, leading up to the response deadline of July 3, 2025. Additionally, if the Court requires further briefing on either the TRO or the habeas petition, Respondents respectfully request an additional 20 days to prepare and file the brief, as contemplated by this Court's service order. *See* ECF No. 5.

II. Legal Standards

The authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes "administratively final," (2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B). Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien fails to comply with removal efforts or presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is "no significant likelihood of removal in a reasonably foreseeable future." *Zadvydas*, at 533 U.S. at 680.

A preliminary injunction is an "extraordinary and drastic remedy." *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As such, it is "not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion." *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). "The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Auth.*, 489 F.2d at 572. A

preliminary injunction should be granted only if the movant has "clearly" carried the burden of persuasion on all four of these prerequisites. *Id.* at 573.

III. Argument: Petitioner is Not Entitled to a TRO or Preliminary Injunction.

Petitioner's TRO motion ultimately seeks relief that this Court lacks jurisdiction to grant: a stay of removal or release from lawful custody. *See, e.g., El Gamal, et al, v. Noem, et al,* No. 25–CV–664–OLG, ECF No. 29 at 2 (W.D. Tex. July 2, 2025). Additionally, Petitioner challenges the government's discretionary decision to revoke his Order of Supervision and detain him pending the execution of his final removal order. ECF No. 4, *generally.* Where the alien challenges the discretionary basis for detention authority, that decision is protected from judicial review. 8 U.S.C. § 1252(a)(2)(B). ICE's detention authority under § 1231 is well-settled. *Zadvydas*, 533 U.S. at 701.

In his filings, Petitioner concedes that he has (1) a final order of protection from removal to El Salvador under the Convention Against Torture (CAT) issued by an Immigration Judge in 2023; (2) been previously released from custody, but remained subject to an Order of Supervision with Immigration and Customs Enforcement (ICE) prior to his re-detention on June 18, 2025; and (3) been detained in ICE custody less than 30 days with his final order of removal. *Id.* Nonetheless, Petitioner claims that his detention under 8 U.S.C. § 1231(a) is contrary to statute and to the Constitution. *Id.* at 2–6.

A. There Is No Likelihood of Success on the Merits.

Petitioner is detained in ICE custody under 8 U.S.C. § 1231(a), because he has a final order of removal. *See* ECF No. 1. Although Petitioner's removal order became final in 2023, the 90-day removal period may be extended where ICE determines the alien is unlikely to comply with the removal order. *See Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 544 (2021); *see also* 8

C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the "post-removal-period." *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* "creates no specific limits on detention . . . as '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.'" *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner must show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post*-removal-order detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not and cannot make this showing, as he has been detained less than six months in post-order custody. Moreover, Petitioner has not shown good cause to believe that his imminent removal to any country other than El Salvador is unlikely. Under *Zadvydas*, Petitioner is lawfully detained, and this Court should dissolve this partially granted TRO and dismiss the habeas in its entirety.

1. No Substantive Due Process Violation

Petitioner has been detained in ICE custody for less than six months, meaning that any claim filed under *Zadvydas* to challenge the constitutionality of his post-order detention is premature. In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably

necessary to bring about that alien's removal from the United States" but "does not permit indefinite detention." 533 U.S. at 689. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption "does not mean that every alien not removed must be released after six months." *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills,* No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite "good reason," the burden will not shift to the government to prove otherwise. *Id.* There is no dispute that Petitioner has been in post-order custody for only two weeks. *See* ECF No. 1 at ¶ 6 (alleging that Petitioner was taken into custody at his check-in appointment with ICE on June 18, 2025).

Even if his claim were ripe, Petitioner has a final order of removal that authorizes his detention under 8 U.S.C. § 1231(a). Despite being granted CAT relief, such relief extends only to the country where Petitioner was found to have a reasonable fear of being tortured. *See* 8 C.F.R. §§ 208.16–208.17, 1208.16; 1208.17; 208.31(a); 1208.31(a); 8 U.S.C. § 1231(b)(3)(A). In other words, nothing prevents DHS from removing Petitioner to a third country. *See e.g.*, *Guzman Chavez*, 594 U.S. at 531–32, 535–36; 8 U.S.C. § 1231(b)(1)(c)(iv); 8 C.F.R. §§ 208.16(f); 1208.16(f); 208.17(b)(2); 1208.17(b)(2). There are numerous removal options for ICE to consider under this statute, including any country willing to accept the alien. *Guzman Chavez*, 594 at 536–37; 8 U.S.C. § 1231(b)(2).

Finally, Petitioner has not shown "good reason" that removal to any third country is

unlikely. As such, the burden of proof has not shifted to ICE to show that there is significant likelihood of removal in the reasonably foreseeable future. The "reasonably foreseeable future" is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson*, No. 3:21– CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner's burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03-CV-1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien's burden of proof. *Nagib v. Gonzales*, No. 3:06-CV-0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03-CV-178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

> To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that "the circumstances of his status" or the existence of "particular individual barriers to his repatriation" to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future.

Idowu, 2003 WL 21805198, at *4 (citation omitted).

Petitioner relies on only conclusory allegations and inaccurate legal theories to argue that removal is not likely, which are wholly insufficient to meet his burden of proof under *Zadvydas*. *See* ECF No. 1 at 5 (alleging erroneously that Petitioner's detention is not "constitutionally justified" and that ICE may not remove Petitioner to any country without compliance with a nationwide injunction that is no longer in effect[3]). *See Nogales v. Dept. of Homeland Sec.*, No. 21-10236, 2022 WL 851738 at *1 (5th Cir. Mar. 22, 2022) (citing *Rice v. Gonzalez*, 985 F.3d 1069,

[3] The Supreme Court stayed this injunction on June 23, 2025. *See DHS v. DVD*, 606 U.S. ____ (2025).

1070 (5th Cir. 2021)); *Akbar v. Barr*, SA-20-CV-01132-FB, 2021 WL 1345530 (W.D. Tex. Mar. 5, 2021); *see also Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL 6809180, at *3 (N.D. Tex. Dec. 3, 2014). As such, Petitioner cannot meet his burden, and the burden does not shift to ICE to show that there is no significant likelihood of removal in the reasonably foreseeable future. *See Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). Petitioner's substantive due process claim fails here as a matter of law.

2. No Procedural Due Process Violation

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). While an agency is required to follow its own procedural regulations, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). In any event, a remedy for a procedural due process violation is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

Like his substantive due process claim, Petitioner provides only conclusory allegations that fall short of the pleading standards to argue that ICE has failed to provide him with adequate

procedural protections. Additionally, Petitioner misstates the law by arguing that only an immigration judge can order third country removal. *See* ECF No. 4 at 2–4 and *compare to* 8 U.S.C. § 1231(b)(2)(C)–(F) (outlining the government's ability to disregard country designations and select an alternative country of removal). For these reasons, Petitioner is unlikely to prevail on his procedural due process claim, and even if he did, it would not result in his release from custody or a stay of his removal order.

B. Remaining Factors Do Not Favor Relief.

Finally, with respect to the balancing of the equities and public interest, it cannot be disputed that (1) Petitioner has a final order of removal that entitles the government to detain him unless and until Petitioner shows good cause that his removal is unlikely; and (2) both the government and the public at large have a strong interest in the enforcement of the immigration laws and the removal of aliens with final removal orders. The Court should therefore dissolve the partial TRO and dismiss this case in its entirety.

Respectfully submitted,

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