

United States District Court
Western District of Texas
San Antonio Division

Esau Ernesto Chicas Ortega,
Petitioner,

v.

No. 5:25-CV-00689-OLG

Kristi Noem, in her official capacity as
Secretary, U.S. Department of Homeland
Security *et al*,
Respondents.

**Federal¹ Respondents' Response to Petitioner's
First Amended Petition for Writ of Habeas Corpus**

Federal Respondents submit this response to Petitioner's Amended Petition. *See* ECF Nos. 5, 9 (granting extension of response deadline to July 23, 2025), 13 (confirming response deadline of July 23). Federal Respondents also incorporate by reference their arguments made in opposition to the TRO motion and the supplement response in support of the same. *See* ECF Nos. 8, 21.

In his First Amended Petition under 28 U.S.C. § 2241, Mr. Chicas Ortega ("Petitioner") seeks immediate release from civil immigration detention, claiming that his post-order detention (less than two weeks at the time he filed his first amended petition) is unlawful. ECF No. 12 at 6. The amended petition is based on three main allegations: (1) procedural due process violation (notice and an opportunity to be heard) regarding third country removal; (2) regulatory violation of 8 C.F.R. § 1208.17(d); and (3) substantive violation of the Fifth Amendment due process clause owing to indefinite detention. *Id.* at 4–6.²

¹ The named warden in this action is not a federal employee. The Department of Justice does not represent him in this action. The Federal Respondents, however, have detention authority over aliens detained under 8 U.S.C. § 1231(a).

² Petitioner also seeks attorney fees in his Prayer for Relief, but EAJA fees are not available to habeas petitioners in the Fifth Circuit. *See Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

To summarize Federal Respondents' briefing to date, Petitioner is lawfully detained with a final order of removal, and his post-order detention is mandatory for the first 90 days of the removal period. 8 U.S.C. § 1231(a); *see also* ECF No. 8 at 2–4. Relief under CAT protects Petitioner from removal only to El Salvador. *See* ECF No. 8 at 7. Newly reestablished ICE policy on third country removals provides adequate notice and an opportunity to be heard prior to removal to any third country. *See* ECF No. 21. Any constitutional challenge to continued detention is not ripe until the alien has been detained in post-order custody for at least six months. *See* ECF No. 8 at 5–7. The remedy for any procedural due process violation is a redo of the process, not release from detention. *Id.* at 10–11.

Petitioner's claims should be denied. In addition to the arguments Federal Respondents have already made and incorporate herein, Federal Respondents provide the following response in opposition to the First Amended Petition:

1. The Department of Homeland Security (DHS) has no obligation to release during the 90-day period until the DHS Headquarters Post-Order Detention Unit has had the opportunity during a six-month period to determine whether there is a significant likelihood of removal in the reasonably foreseeable future. 8 C.F.R. §§ 241.13(b)(2)(ii); 241.13(f). The regulations provide for periodic post-order custody reviews (POCRs) specifically to protect against any due process violations. *Id.* These POCRs provide notice and an opportunity to be heard (with counsel) at the 90-day, 180-day, 270-day, and one-year marks, on whether removal is likely and whether Petitioner is a flight risk or a security risk if released. *Id.*
2. Any substantive due process claim under *Zadvydas* is premature in this case, because Petitioner has been detained less than six months. *Chance v. Napolitano*, 453 F. App'x

535, 2011 WL 6260210 at *1 (5th Cir. Dec. 15, 2011); *Agyei-Kodie v. Holder*, 418 F. App'x 317, 2011 WL 891071 at *1 (5th Cir. Mar. 15, 2011); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 929 n.33 (W.D. Tex. 2018); *Kasangaki v. Barr*, 2019 WL 13221026 at *3 (W.D. Tex. July 31, 2019).

3. Even if the claim were ripe, Petitioner would have to show good reason to believe that removal is unlikely for the burden to shift to ICE to show otherwise. ICE avers that there is significant likelihood of removal in the reasonably foreseeable future. Petitioner's substantive due process claim fails as a matter of law.

Conclusion

Based on these arguments and those contained within Federal Respondents' prior submissions at ECF Nos. 8 and 21, this Court should deny the First Amended petition. Petitioner is lawfully detained by statute on a mandatory basis during the 90-day removal period. His detention comports with the limited due process he is owed as an alien with a final order of removal.

Respectfully submitted,

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