IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GUSTAVO BASURTO OJEDA,

Petitioner,

v.

NIKITA BAKER, Director, Baltimore Field Office, U.S. Immigration and Customs Enforcement,

Respondent.

Case No.: 1-25-cv-01862 (MJM)

REPLY TO RESPONDENT'S MOTION TO DISMISS OR STAY

Petitioner Gustavo Basurto Ojeda ("Mr. Basurto Ojeda") respectfully submits this reply in further support of his petition for a writ of habeas corpus and in opposition to Respondent's motion to dismiss or stay.

INTRODUCTION

The Government's brief misstates key facts and mischaracterizes the legal posture. It cites criminal charges from 2009, but omits that those charges were nolle prosequied, never led to a conviction, and were dismissed without prosecution when Mr. Basurto Ojeda was just 17 years old. The records have since been expunged. *See* Ex. B, *2014 Expungement and Docket*. Yet the Government uses that decades-old juvenile arrest to imply dangerousness, without disclosing that the charges were dropped and never adjudicated. Gov't Br. at 2.

The brief also refers to Mr. Basurto Ojeda as having "only been detained for almost two days." Gov't Br. at 12. This ignores the fact that the Department of Homeland Security ("DHS") previously detained him almost one year from February 26, 2014, until at least February 2, 2015, under the same 2009 removal order. He was released only after an immigration judge granted withholding of removal, and after multiple third countries declined to accept him. *See* Ex. C, *January 9 – February 2, 2015 Emails*. For more than a decade after that release, he complied fully with Immigration and Customs Enforcement ("ICE") supervision; he checked in annually, never missed an appointment, and committed no crimes.

That changed on June 10, 2025, when DHS abruptly re-detained him and issued a Notice of Intent to Remove him to El Salvador, a country never designated in his removal proceedings and never adjudicated by the Executive Office for Immigration Review ("EOIR" or "immigration court"). At that time, DHS had not taken the necessary steps to make removal to El Salvador legally executable.

ARGUMENT

I. This Court Has Jurisdiction Under 28 U.S.C. § 2241

A. § 1252(g) Does Not Bar Habeas Review

The Government argues that 8 U.S.C. § 1252(g) bars jurisdiction because Mr. Basurto Ojeda challenges the "execution" of a removal order. *See* Gov't Br. 14-15. But he challenges only the legality of his continued detention, not any of the discretionary decisions to commence proceedings, adjudicate a case, or execute a *lawful* removal order. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

The Fourth Circuit recently confirmed that a *Zadvydas*-type detention claim "is distinct from challenges to removal orders or their execution;" it "is fundamentally about whether continued detention is lawful." *Vasquez Castaneda v. Garland*, 95 F.4th 750, 763 (4th Cir. 2024). Other courts agree. In *Diaz-Reynoso v. Barr*, the Ninth Circuit held that "§ 1252(g) does not shield the Government from claims that it lacks statutory authority to detain or remove an alien." 968 F.3d 1070, 1083 (9th Cir. 2020).

The Government also cites § 1252(a)(5) and § 1252(b)(9), but those provisions do not apply here. Section 1252(a)(5) limits review of final removal orders, and § 1252(b)(9) channels claims that "arise from" removal proceedings into the courts of appeals. Mr. Basurto Ojeda challenges neither the validity of his removal order nor any step in his long-settled removal proceedings. His claim concerns the legality of continued detention under § 1231(a)(6).

B. The Suspension Clause Preserves This Court's Jurisdiction

Even if § 1252(g) could be read to bar habeas review in this context, that construction would raise serious constitutional concerns. The Suspension Clause prohibits Congress from suspending the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

The Supreme Court has long held that habeas remains available where the Executive acts beyond statutory limits. *See INS v. St. Cyr*, 533 U.S. 289, 298–99, 311 (2001). DHS re-detained Mr. Basurto Ojeda under a removal order that remained stayed by regulation, and sought to remove him to an unadjudicated third country.

In *Trump v. J.G.G.*, the Supreme Court confirmed that judicial review remains available when DHS seeks to remove a person to a country not previously designated in removal proceedings. In *Trump v. J.G.G.*, all nine Justices agreed that removal to a non-designated country is subject to judicial oversight. See 145 S. Ct. 1003, 1005 (2024) (Kavanaugh, J., concurring) ("When DHS seeks to remove an individual to a country not designated in the original removal order, judicial review remains available to ensure compliance with the INA and due process."). Justice Thomas added, "It would be extraordinary if the Executive could evade judicial review simply by changing the destination country." *Id.* at 1006 (Thomas, J., concurring in the judgment). The Court reaffirmed in *Abrego Garcia v. Garland* that § 1252 must be construed narrowly to avoid eliminating habeas review. See 144 S. Ct. 1475, 1485–86 (2024).

II. Res Judicata Bars Renewed Detention

DHS's attempt to re-detain Mr. Basurto Ojeda under the 2009 removal order is also barred by the doctrine of res judicata. In 2014, an Immigration Judge granted withholding of removal to Mexico and issued a stay of removal. *See* Ex. A, *Granting of Withholding and Stay of Removal*, ECF Doc. 1-1. That unappealed decision was a final adjudication on the merits of Mr. Basurto Ojeda's entitlement to remain in the United States unless and until EOIR authorizes removal to another country, and it resolved whether DHS could detain or remove him under the reinstated order.

The doctrine of res judicata bars relitigation where (1) there was a final judgment on the merits, (2) the parties are the same or in privity, and (3) the same

claim or issue was or could have been raised in the earlier proceeding. *See Univ. of Tenn. v. Elliott*, 478 U.S. 788, 797–98 (1986). The parties are identical here, and the claim – whether DHS may detain Mr. Basurto Ojeda under the 2009 removal order – has already been fully litigated and decided against the agency.

At Mr. Basurto Ojeda's January 7, 2015, bond hearing, DHS represented that the hearing could be canceled and that he would be released. However, DHS continued detaining him while pursuing third-country acceptance. See Ex. C. Counsel subsequently filed a stay of removal, and on January 14, 2015, the Immigration Judge issued a stay covering all third-country removals. See Ex. A, ECF Doc. 1-1 at 2. The Immigration Court also rescheduled another individual bond hearing and informed DHS to be be prepared, "to explain why two different DHS attorneys misrepresented to court staff that the respondent would be released by DHS and that the court could cancel the bond hearing it had scheduled." *Id.*

On February 2, 2015, ICE confirmed that "Jamaica, Trinidad, & Nicaragua all rejected him." *See* Ex. C. ICE released Mr. Basurto Ojeda shortly thereafter, before the bond hearing, and placed him under supervision, where he remained for over a decade. That outcome represents a final, implemented adjudication of DHS's removal authority under the existing order. That is precisely the scenario where res judicata applies.

Substituting the country of removal does not create a new cause of action. The INA does not permit DHS to evade final EOIR decisions by renaming the removal

destination. The June 10 detention occurred while the 2014 withholding order and stay remained in force. DHS's belated motion to lift the stay does not change that fact: no new removal order exists. Until EOIR lifts the stay and modifies the designated country, DHS is attempting to illegally "repackage" the same order under a new label to circumvent due process and res judicata.

III. The Petition Is Ripe and Justiciable

This case is ripe because Mr. Basurto Ojeda challenges an ongoing deprivation of liberty, not a speculative or future removal. His claim turns on the facts as they existed on June 10, 2025, when DHS re-detained him without having taken the steps necessary to lawfully effectuate removal. Contrary to the Government's assertion, it is not the petition that was premature. It was DHS's detention that was premature. Gov't Br. at 12. Only after detaining Mr. Basurto Ojeda did DHS file a motion to vacate the stay of removal, an implicit acknowledgment that removal could not lawfully proceed at the time it placed him in custody.

This is not a pre-enforcement challenge or hypothetical harm. The injury occurred the moment DHS acted without legal authority. The Supreme Court has long recognized that habeas review is available where executive detention exceeds statutory bounds. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). Because DHS had no executable removal order to El Salvador on June 10 and no valid authority to re-detain under § 1231(a)(6), Mr. Basurto Ojeda's claim is ripe, justiciable, and properly before this Court under 28 U.S.C. § 2241.

IV. Detention Violates Zadvydas, § 1231(a)(6), and the Due Process Clause

A. DHS Lacked Legal Authority to Remove Petitioner

The Government suggests that DHS may remove Mr. Basurto Ojeda to El Salvador without reopening proceedings, simply because that country is willing to accept him. Gov't Br. at 4. But removal authority under § 1231(a)(6) requires more than acceptance; it requires a removal order that has been lawfully adjudicated by EOIR. On June 10, DHS had taken no steps to reopen proceedings, designate El Salvador, or obtain EOIR authorization. The final removal order still named Mexico, and the 2014 withholding grant and stay remained in force. DHS's own motion to lift the stay implicitly concedes that further adjudication is necessary before any lawful removal can occur.

Section 1231(a)(6) permits detention only where removal is legally executable. That requires not only a facially valid removal order, but one that identifies an adjudicated country of removal. Courts applying *Zadvydas* have held that the government must demonstrate a "significant likelihood of removal in the reasonably foreseeable future," not mere efforts or negotiations. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); cf. *Crespin v. Evans*, 256 F. Supp. 3d 641, 655 (E.D. Va. 2017) (applying *Zadvydas* to evaluate whether detention under § 1231 remained lawful where CAT proceedings delayed removal and ICE asserted it could obtain travel documents from El Salvador). In this case, DHS had no valid removal order naming El Salvador, no EOIR designation, and no executable removal plan. Detention under § 1231(a)(6) is therefore unlawful.

The Ninth Circuit agrees: "The government cannot detain an individual under § 1231(a)(6) where it lacks statutory authority to remove him to the proposed destination." *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1083 (9th Cir. 2020). That principle squarely applies here. DHS cannot hold Mr. Basurto Ojeda while attempting to remove him to a country never adjudicated in his case. He already obtained withholding relief and posed no flight or safety risk during nearly a decade of supervision. DHS now seeks to evade the consequences of a final judgment by naming a new country. But § 1231(a)(6) does not authorize detention as a tool to test undeveloped removal theories. Without valid EOIR authorization, DHS lacks lawful authority to continue detaining him.

B. Removal to El Salvador Is Legally Barred Without EOIR Authorization

In 2014, after reinstating Mr. Basurto Ojeda's 2009 removal order, an Immigration Judge granted withholding of removal under INA § 241(b)(3), codified at 8 U.S.C. § 1231(b)(3), as to Mexico. That decision became final and was not appealed. By regulation, "An order of withholding of removal granted pursuant to this section shall remain in effect until revoked by an immigration judge or the Board of Immigration Appeals." 8 C.F.R. § 208.17(b). Likewise, "[t]he removal of an alien who is subject to a stay of removal shall not be executed during the period of the stay." 8 C.F.R. § 241.6(a). Because that order remains in place, DHS had no authority to remove Mr. Basurto Ojeda to Mexico, or to substitute another country, without further EOIR action.

Under 8 C.F.R. § 241.15(c)(2):

> If removal to the country designated in the removal order is not practicable or permissible, the Service shall identify a country to which removal is practicable and permissible, and shall notify the alien in writing of the country, the basis for the conclusion that removal is practicable and permissible, and the alien's right to submit evidence opposing removal to that country. The alien shall be given a *reasonable opportunity to submit such evidence and the Service shall consider such evidence prior* to making a final decision.

Likewise, under 8 C.F.R. § 208.18(d):

> In the case of an alien subject to an order of removal who asserts a claim for protection under the Convention Against Torture with respect to a country other than the country to which removal has been ordered, and in circumstances in which the alien's removal to that other country is being considered, *an immigration judge shall make a determination* as to whether it is more likely than not that the alien would be tortured in that country

Mr. Basurto Ojeda has yet to receive these procedural protections. Instead, DHS unilaterally issued a Notice of Intent to Remove to El Salvador and initiated a credible-fear interview, acknowledging that removal to El Salvador requires new process. If DHS finds no credible fear, it must wait 15 days for Mr. Basurto Ojeda to move to reopen, which automatically stays removal.

C. Zadvydas and Clark Prohibit Indefinite Detention

The Government implies that the habeas petition should be dismissed because it raises no constitutional violation. Gov't Br. 12. Under 8 U.S.C. § 1231(a)(6), detention is permitted only while removal is reasonably in progress. *Zadvydas* and

Clark make clear that when removal is legally uncertain or not foreseeable, continued detention is unlawful regardless of time in custody.

Zadvydas v. Davis held that § 1231(a)(6) must be read to include implicit time limits, or it would violate due process. 533 U.S. at 690–701. The key question is not how long an individual has been detained, but whether removal is reasonably foreseeable within the "presumptive" six-month period. *Id.* at 699, 701. If not, detention becomes unlawful. At the time DHS detained Mr. Basurto Ojeda, detention was not authorized because removal was not legally possible under the existing order. That is precisely the type of indefinite detention *Zadvydas* prohibits.

The implementing regulations adopted after Zadvydas limit detention to the period "reasonably necessary" to effect removal. *See* 533 U.S. at 699. Here, DHS has just resumed removal efforts, and detention was not necessary. Mr. Basurto Ojeda was not a flight risk and posed no danger to the community. DHS could have initiated notice and removal procedures without re-detaining him. There was no cause for immediate custody.

The Government cites *Johnson v. Arteaga-Martinez*, but *Johnson* only held that § 1231(a)(6) does not require periodic bond hearings. 596 U.S. at 577–78. It did not disturb *Zadvydas's* rule: detention must end when removal is no longer foreseeable. The Government also raises the *D.V.D.* injunction as being a suitable remedy for Mr. Basurto Ojeda. Gov't Br. at 9. But D.*V.D.* concerns the procedures DHS must follow before third-country removal, not whether continued detention is

lawful. Mr. Basurto Ojeda's habeas claim is independent of *D.V.D.* and seeks different relief: release from custody.

V. Continued Detention Inflicts Irreparable Harm and Serves No Legitimate Purpose

Mr. Basurto Ojeda's continued detention inflicts grave harm, including the deprivation of liberty without due process. Although labeled civil, this prolonged detention is punitive in nature and serves no valid removal function. It also imposes significant hardship on his U.S. citizen wife and their three young children—ages 2, 4, and 6—who depend on him for emotional and financial support. Without any lawful basis for continued custody, DHS's actions punish not just Mr. Basurto Ojeda, but his entire family.

The conditions in El Salvador make the risk of removal particularly acute. The U.S. State Department's 2023 Human Rights Report cites credible accounts of torture by security forces and harsh, life-threatening prison conditions. *See* U.S. Dep't of State, *2023 Country Reports on Human Rights Practices: El Salvador* (2024). The report and other sources also document arbitrary arrests and detentions of individuals, especially those with tattoos like Mr. Basurto Ojeda, based solely on appearance or perceived affiliation, rather than actual evidence of gang membership.

> Arbitrary Arrest: As of July 31, the PDDH reported 738 complaints of arbitrary detention, compared with 283 from January to July 2022. Civil society entities also received complaints from the public regarding arbitrary arrests during the state of exception, although fewer than in 2022. Cristosal reported that as of August 9, it received 348 complaints of arbitrary arrest, compared with 3,110 such complaints in 2022. Several human rights organizations asserted that many detainees who remained in pretrial detention

> were arrested arbitrarily in 2022, without evidence of gang affiliation and only for having tattoos or living in a gang-controlled area. Leaked arrest files of 690 persons detained in March – April 2022 showed 50 were charged with being a gang member based on a suspicious or nervous appearance, and 50 for having a tattoo, with no indication if the tattoo was gang-related. *Id.*

Removing Mr. Basurto Ojeda to El Salvador without providing the procedural safeguards required by law would violate both the Convention Against Torture and the Due Process Clause. El Salvador remains under a state of exception that has suspended key constitutional protections, including due process and judicial review of detention. In that context, individuals with tattoos are frequently presumed to be gang-affiliated and detained without meaningful evidence or access to legal counsel. Given these conditions, and the fact that DHS has initiated removal proceedings to El Salvador without EOIR adjudication, Mr. Basurto Ojeda faces a serious risk of arbitrary detention abroad. Continued custody under § 1231(a)(6) is therefore unlawful, particularly where DHS has not lawfully designated a removal destination or followed the required procedures to execute removal.

Mr. Basurto Ojeda prevailed on his immigration claims ten years ago, has no criminal convictions threatening public safety, and has complied with supervision for years. DHS has no concrete plan to remove him safely and lawfully. Instead, he is being held to await a future EOIR hearing that may not occur for months.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Basurto Ojeda respectfully requests that the Court deny Respondent's motion to dismiss or stay and grant the habeas petition.

Specifically, Mr. Basurto Ojeda asks the Court to issue a writ of habeas corpus ordering his immediate release, and to enter any declaration necessary to make clear that DHS lacks authority to continue detaining him in the absence of a valid, executable removal plan.

Dated: June 26, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2025, I electronically filed the foregoing Reply with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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