

**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)

PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF HABEAS

On July 21, 2025, the Court directed supplemental briefing on three unresolved points. It asked when the “removal period” under 8 U.S.C. § 1231(a) began and whether Mr. Basurto Ojeda’s 2025 redetention restarts that period (and the detention authority) under § 1231; how *Zadvydas v. Davis*, 533 U.S. 678 (2001), allocates the burden once detention exceeds six months; and whether Mr. Basurto Ojeda must initiate and exhaust the post-order custody review process in 8 C.F.R. § 241.13 before seeking habeas relief.

The Court and the Parties agree that the issue of the required due process under unadjudicated third country removals falls under the class action suit, *D.V.D. v. DHS*, No. 25-10676, 2025 U.S. Dist. LEXIS 74197, 2025 WL 1142968 (D. Mass. Apr. 18, 2025). I raise that point only to show why removal is not reasonably foreseeable, and therefore unlawful, not to litigate that separate claim on the merits.

I. The Removal Period Under 8 U.S.C. § 1231

When a noncitizen is placed in removal proceedings under INA § 240, detention is governed by 8 U.S.C. § 1226. Mr. Basurto Ojeda was first detained in 2009 under this provision. That case concluded when he was granted voluntary departure and removed from the United States in October 2009. At that point, the 2009 proceedings had terminated and his removal order had been executed.

In early 2014, Mr. Basurto Ojeda reentered the United States and was detained at the Frederick County Detention Center on old criminal charges, which were later dismissed. [ECF No. 15-1]. On February 27, 2014, ICE served Petitioner with a Notice of Intent/Decision to reinstate the previous removal order. Petitioner expressed a credible fear of returning to Mexico and he was placed in withholding-only proceedings before an immigration judge. On December 10, 2014, an immigration judge granted Petitioner's request for withholding of removal to Mexico. [ECF No. 1-1]. Because he had previously been removed and unlawfully reentered, he was treated as inadmissible under 8 U.S.C. § 1182(a)(6)(A), and his detention became governed by 8 U.S.C. § 1231. On May 8, 2014, a nolle prosequi was entered in the criminal case and Mr. Basurto Ojeda was released from criminal custody. [ECF No. 15-1].

The removal period under § 1231(a)(1)(B) begins on the latest of three possible dates:

- (i) The date the order of removal becomes administratively final.
- (ii) If the *removal order is judicially reviewed* and if a court orders a stay of the removal of the alien, the date of the court's final order.
- (iii) If the alien is detained or confined (*except under an immigration process*), the date the alien is released from detention or confinement.

In Mr. Basurto Ojeda's case, clause (i) applied when the reinstated order became final in February 2014. But that date was later superseded by clause (iii), when he was released from state

criminal custody and transferred to ICE custody on May 8, 2014. That transfer started the 90-day *mandatory* detention and removal period under § 1231(a)(2).

Clause (ii) never applied, because that section refers to a stay issued by a federal court during *judicial review of the removal order* (typically in the context of a petition for review filed in the court of appeals). Mr. Basurto Ojeda never sought judicial review of the reinstated removal order, nor could he have. 8 U.S.C. § 1231(a)(5) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and *is not subject to being reopened or reviewed*....

Johnson v. Guzman Chavez, 594 U.S. 523, 529–30, 141 S. Ct. 2271, 2282 (2021) (emphasis added).

The 90-day period under § 1231(a)(2) ended on or about August 8, 2014. After that point, Department of Homeland Security (“DHS”) could continue to detain Mr. Basurto Ojeda only under § 1231(a)(6), which permits discretionary detention, but only while removal remains reasonably foreseeable. That provision is limited by *Zadvydas*, which held that post-order detention becomes presumptively unreasonable after six months. 533 U.S. 678 (2001). In this case, that six-month window expired on or about November 8, 2014. On December 10, 2014, the Immigration Judge granted statutory withholding of removal to Mexico under INA § 241(b)(3), barring DHS from executing the reinstated order to that country.

At a bond hearing in January 2015, DHS counsel informed the Immigration Judge that he would be released imminently, so the hearing was canceled based on that representation. When DHS instead pursued removal to third countries, immigration counsel filed an emergency motion for a stay and requested that the bond hearing be reinstated. The Immigration Judge granted the stay, scheduled the hearing, and ordered DHS to explain why it had misled the Court. [ECF No.

15-2]. DHS confirmed that the case had been referred to Headquarters for post-order custody review. By then, both the 90-day period and the additional three-month *Zadvydas* window had elapsed, confirming that removal was no longer reasonably foreseeable and that further detention was subject to 8 C.F.R. § 241.13.

II. Redetention Does Not Trigger a New Removal Period Under § 1231

DHS now claims that Mr. Basurto Ojeda's 2025 redetention restarts the 90-day removal period. That interpretation is inconsistent with the statute's plain text, structure, and purpose. Section 1231(a)(1)(B) lists only three events that trigger the start of the removal period. The statute does not list ICE redetention as a triggering event. If that were true, DHS could reset the clock at will: release, re-detain, and claim a new period each time it starts coordination with another country.

The only lawful mechanism (in this case) by which a new removal period could begin under § 1231(a)(1)(B)(i) is if EOIR issued or amended the removal order to designate El Salvador (or another third country). For example, if DHS had moved the immigration court (or Executive Office of Immigration Review "EOIR") to amend the removal order to include El Salvador, then the finality of that order would trigger a new removal period under § 1231(a)(1)(B)(i). Redetention alone does not reset the statutory clock.

III. No Alternate Countries Designated on the 2014 Removal Order

DHS's attempt to remove Mr. Basurto Ojeda to El Salvador fails at the threshold: the Immigration Court never designated El Salvador (or any third country) as a country of removal. Under 8 C.F.R. § 1240.12(d), "If the immigration judge issues an order of removal, the immigration judge shall identify the country, or in the alternative countries, to which the respondent's removal is directed *pursuant to section 241(b)(2) of the Act.*"

While the regulation also states that “nothing in this section shall be construed to limit the authority of the Service to remove a respondent to a country other than one listed by the immigration judge,” that clause must be read in conjunction with 8 U.S.C. § 1231(b)(2) (section 241(b)(2) of the Act), which governs DHS’s authority to remove a noncitizen to an alternate country.

The Board’s decision in *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432 (B.I.A. 2008), confirms that the Immigration Judge must enter a removal order that identifies a country or countries of removal. There, the Immigration Judge granted withholding of removal but failed to issue an order of removal to any country. DHS then filed a motion requesting that the immigration judge “amend his order to include language ordering each of the respondents removed to Indonesia or, in the alternative, any other country, prior to granting withholding of removal. In a decision dated September 13, 2006, the Immigration Judge denied DHS’s motion. ...” *Id.* at 433.

The Board reversed, holding that in order to withhold removal there must first be an order of removal that can be withheld. *Id.* at 434. The BIA explained that Immigration Judges must comply with 8 C.F.R. § 1240.12(d), which requires designation of the country (or countries) to which removal is ordered. “[If] there is no final order of removal that can be executed, DHS has no authority to remove an alien to such an alternative country. ...” *Id.* at 434. “When an alien is ordered removed, 8 C.F.R. § 1240.12(d) requires the Immigration Judge to identify a country, or countries in the alternative, to which the alien may be removed. Thus, the regulations contemplate that an Immigration Judge will enter an order that leads to a final conclusion of the removal proceedings....” *Id.* at 433.

DHS could have asked the Immigration Judge to designate “any third country willing to accept” Mr. Basurto Ojeda as an alternative to Mexico, either during the withholding proceedings

or at any time in the last ten years. Instead, it allowed the final order to Mexico to stand and only years later pursued removal to a country never designated and never lawfully added under § 1240.12(d) or § 1231(b)(2). Thus, while the final clause of § 1240.12(d) permits DHS to remove a noncitizen to a country “other than one listed by the immigration judge,” that authority exists only when DHS has complied with the requirements of § 1231(b).

IV. 8 C.F.R. §§ 241.13 and 241.4

In 2015, DHS processed Mr. Basurto Ojeda’s detention under the custody-review procedures in 8 C.F.R. § 241.13. After finding no significant likelihood of removal in the reasonably foreseeable future, DHS released him under supervision.

In June 2025, DHS revoked Mr. Basurto Ojeda’s release and redetained him. Under 8 C.F.R. § 241.13(i)(2), “[t]he Service may revoke an alien’s release ... if, on account of *changed circumstances*, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future.” After revocation, § 241.13(i)(3) requires DHS to (1) notify the person of the reasons, and (2) conduct “an initial informal interview promptly after his or her return to Service custody” so the person can respond and submit evidence showing there is no significant likelihood he or she will be removed in the reasonably foreseeable future.

V. No Actual “Changed Circumstances” Under § 241.13(i)(2).

ICE’s notice states: “ICE has determined that you can be expeditiously removed from the United States pursuant to the outstanding order of removal against you.” It also states: “Your case is currently under review with the Government of El Salvador for issuance of a travel document.” And, “Based on the above, and pursuant to 8 C.F.R. §§ 241.4 and 241.13, you are to remain in ICE custody at this time.” These statements repackage the same 2009 reinstated order and a speculative

inquiry to a third country. They do not identify any new factual developments that would increase the likelihood of removal.

DHS cannot manufacture changed circumstances by declaration and ignore the statute. Each “removal period” is a distinct frame of time that opens only when one of the events in 8 U.S.C. § 1231(a)(1)(B) occurs. Real changes would include: (1) a violation of supervision followed by release from new criminal custody (triggering § 1231(a)(1)(B)(iii)), or (2) an amended removal order naming El Salvador (triggering § 1231(a)(1)(B)(i)).

ICE also stated that Mr. Basurto Ojeda “will promptly be afforded an informal interview, at which you will be given an opportunity to respond to the reasons for your detention.” It has now been over a month and no interview has occurred. DHS has provided no evidence that such an interview occurred or that it allowed Mr. Basurto Ojeda to submit evidence challenging his redetention as required by § 241.13(i)(3).

On July 22, 2025, Mr. Basurto Ojeda submitted a written request for review under § 241.13, asserting there is no significant likelihood of removal. See Exhibit D, *July 22, 2025 Email from Immigration Counsel to ICE*. Under § 241.13(a), DHS “shall” conduct such a review where the alien states a good reason to believe removal is not reasonably foreseeable.

VI. Exhaustion of § 241.13 Is Not Required Under 28 U.S.C. § 2241

Unlike habeas petitions filed under 28 U.S.C. § 2254, which include an express statutory exhaustion requirement, § 2241 contains no such mandate. The Supreme Court has emphasized that, where Congress has not specifically required exhaustion, courts have discretion to reach the merits of constitutional claims. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

The Supreme Court in *McCarthy v. Madigan*, 503 U.S. 140, 146–49 (1992), recognized three broad circumstances where the individual’s interests outweigh the requirement to exhaust

administrative remedies. First, exhaustion may cause undue prejudice to later judicial relief—particularly where the administrative process imposes an unreasonable or indefinite timeframe for resolution. Second, exhaustion is not required where there is doubt as to whether the agency is empowered to grant effective relief. Third, exhaustion may be excused if the administrative process is inadequate due to bias or a predetermined outcome.

In Mr. Basurto Ojeda’s case, requiring exhaustion of the post-order custody review process would serve no meaningful purpose. First, he is currently being held without lawful authority under a removal order that cannot be executed, and further delay only prolongs that unlawful detention. Second, while ICE may technically have the power to release him under § 241.13, its actions make clear that it has no intent to do so. Third, that refusal to follow the required procedures and the agency’s insistence that removal is “reasonably foreseeable” despite the lack of lawful authorization suggests the outcome has already been predetermined.

VII. DHS Bears the Burden to Justify Continued Detention Under Zadvydas

Under the Supreme Court’s decision in *Zadvydas*, the Government may detain a noncitizen beyond the 90-day removal period only if removal is reasonably foreseeable. The Court established a clear, burden-shifting framework. After the 6-month period, once an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence sufficient to rebut that showing. 533 U.S. at 701.

This standard is not a high bar. The Court chose the phrase “good reason to believe,” not “proof” or “evidence” to indicate that the initial burden on the detainee is modest. The Court adopted that standard precisely because the detainee cannot realistically prove what only DHS knows about its efforts to effectuate removal. This burden would “occasion undue prejudice,” on Mr. Basurto Ojeda, especially where the agency controls the timeline and the information.

McCarthy, 503 U.S. at 147. The Government, not the detainee, ultimately bears the burden of demonstrating that removal is likely in the near future.

Here, Mr. Basurto Ojeda has easily met the low threshold required to trigger the Government's burden. He has now been detained over six months under the same reinstated removal order. The six-month *Zadvydas* period expired in 2014. Since then, DHS has failed to secure removal, failed to obtain travel documents, and failed to designate an alternative country through EOIR procedures. DHS now claims that removal is "reasonably foreseeable" because El Salvador is reviewing the case. But communication with a foreign government is not evidence of likelihood of removal. It is speculation and insufficient under *Zadvydas*. 533 U.S. 678 (2001)

Moreover, on July 21, 2025, Mr. Basurto Ojeda filed a motion to recalendar his immigration proceedings and has previously expressed a credible fear of removal to El Salvador. If EOIR follows the proper procedures under 8 C.F.R. § 1240.12(d), 8 U.S.C. § 1231(b)(2) and (3), that process alone could take weeks or months. The fact that proceedings must be reopened to designate a new country of removal shows that removal is not imminent.

Zadvydas is about the limits on civil detention. Once the removal period has run and DHS cannot show a significant likelihood of removal, the law requires release. Here, DHS detained Mr. Basurto Ojeda first and only then began its coordination with El Salvador. Starting that process without following the statutory and regulatory steps is not a changed circumstance that makes removal reasonably foreseeable. This case is not about whether Mr. Basurto Ojeda will ever be removed; it is about whether DHS can detain him while it ignores the processes the law requires.

CONCLUSION

Prior to January 2025, DHS rarely pursued third country removals in cases like this. Congress made the removal period finite: it begins and ends. 8 U.S.C. § 1231(a)(1)(B). It does not restart whenever DHS selects a new country.

Mr. Basurto Ojeda is entitled to due process, not indefinite detention while DHS tests new theories of removal. He has lived in the United States for more than a decade since his 2014 release, reporting as required and supporting his U.S.-citizen wife and two children. As the Supreme Court put it, “as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink.” *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). DHS has shown no “changed circumstances” under 8 C.F.R. § 241.13(i)(2), provided no prompt interview, and never obtained an EOIR designation of El Salvador under 8 C.F.R. § 1240.12(d) or 8 U.S.C. § 1231(b)(2).

Freedom from physical restraint is a core liberty interest, and due process applies to “all persons” in the United States. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The Court should grant the writ and order Mr. Basurto Ojeda’s immediate release. In the alternative, the Court should require DHS to produce evidence that rebuts his showing under *Zadvydas* and demonstrates a reasonably foreseeable, lawful plan for removal.

Dated: July 24, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2025, I electronically filed the foregoing supplemental brief 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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