

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARIO HERNANDEZ ESCALANTE,

Petitioner,

v.

KRISTI NOEM,

In her official capacity as Secretary of
Homeland Security,

TODD M. LYONS,

In his official capacity as Acting Director,
Immigration and Customs Enforcement;

NIKITA BAKER,

In her official capacity as Field Director of
ICE Baltimore Field Office,

Respondents.

Case No: 1:25-CV-1799-PX

REPLY TO RESPONDENTS'
OPPOSITION ON THE MERITS AND
OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS OR STAY THE
MERITS OF THE PETITION

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RESPONDENTS' MOTION TO DISMISS OR STAY THE MERITS OF THE PETITION**

On June 16, 2025, Respondents filed their opposition to the petition on the merits, and also moved to dismiss or stay the petition. ECF 10. But Respondents incorrectly interpret the Immigration and Nationality Act, as well as the relevant facts of the case, to conclude that Respondents lawfully detained Mr. Hernandez or that he is still lawfully detained now. And while Respondents concede Mr. Hernandez is a member of the class in *D.V.D. v. Dep't. of Homeland Sec.*, 1:25-CV-10676 (D. Mass.), *see* ECF 10 at 1, Respondents totally miss the point of Mr. Hernandez's petition in relying on his *D.V.D.* class membership; this proceeding is not parallel and the Court should not stay or dismiss this action because of the *D.V.D.* litigation.

At bar, this is not a very complicated case: 1) Mr. Hernandez is a citizen of El Salvador,

and although he has been ordered removed from the United States, he is protected from removal to El Salvador by order of the immigration court; 2) the statutory period requiring Mr. Hernandez's detention in order to enforce the order of removal expired in or before March 2020; 3) the only lawful basis for Respondents to justify taking Mr. Hernandez into custody on June 3, 2025 would have been a "significant likelihood" that he could be removed to a country other than El Salvador within the "reasonably foreseeable future," *Zadvydas v. Davis*, 533 U.S. 678, 699, 701 (2021); 4) the procedures imposed by the *D.V.D.* injunction preclude a significant likelihood that Mr. Hernandez can be removed before those procedures are followed; and 5) Respondents fail to present any reliable evidence to support Mr. Hernandez's removal to a third country. Therefore, simply, Mr. Hernandez's current detention violates his right to due process.

The appropriate relief is not to stay the case and let him litigate as part of the *D.V.D.* class, or otherwise delay this Court's intervention in the case. The appropriate relief is to do what Mr. Hernandez first requested: "[i]ssue a writ of *habeas corpus* ordering Respondents to immediately release Mr. Hernandez from their custody[.]" ECF 1 at 10 (also noting that any enforcement of *D.V.D.* protections was sought in the alternative).

RELEVANT FACTUAL BACKGROUND

For purposes of the Court's consideration of the merits of his petition, the relevant facts are these: Mr. Hernandez is a citizen of El Salvador. On December 12, 2019, Immigration Judge Karen Donoso-Stevens in Arlington, Virginia, ordered Mr. Hernandez removed from the United States but granted him deferral of removal under the United Nations Convention Against Torture ("CAT") as to El Salvador. ECF 1-2. Both Mr. Hernandez and the government waived appeal of that decision and Mr. Hernandez was released from custody sometime thereafter. *Id.* Following his release in the spring of 2020, Immigration and Customs Enforcement ("ICE") placed Mr.

Hernandez on an order of supervision pursuant to his CAT protection, allowing him to obtain work authorization while requiring him to periodically check in with ICE. By operation of 8 U.S.C. § 1231(a)(1), the period in which the government should have removed Mr. Hernandez expired after 90 days, or on March 11, 2020. Mr. Hernandez was then detained again on June 3, 2025. Based on Supreme Court precedent, the burden shifts to the government to establish that there is a significant likelihood that Mr. Hernandez will be removed within the reasonably foreseeable future.

RESPONDENTS' FACTUAL SUMMARY AND EVIDENCE

To support their opposition, Respondents provide a recitation of Mr. Hernandez's immigration and criminal history in the United States. Much of the summary is irrelevant to this petition, and in any case, the government has failed to provide any citation, evidence, or records to support these summaries.¹ Moreover, as explained here and argued more fully below, Respondents' factual contentions are impossible to verify, as the documents provided to support Mr. Hernandez's detention appear to be contradictory, they are unsigned, and possibly issued without appropriate authorization. Indeed, it appears they could be back-dated to June 3.

The heart of this case is Respondents' claim that Mr. Hernandez's detention is lawful under 8 U.S.C. § 1231(a)(6) because his potential removal to Mexico is under review. *See* ECF 10 at 17. Respondents rely on the Acting Field Office Director's authority under 8 C.F.R. § 241.4 to rescind Mr. Hernandez's order of supervision and detain him for this purpose. *See* ECF 10 at 3-4. The government offers the following documentation to support Mr. Hernandez's detention:

¹ Respondents' factual summary of Mr. Hernandez is detailed in its exact references to dates, suggesting reliance on government records which are available to Respondents, but have not been filed with the Court or provided to Mr. Hernandez. Undersigned counsel has not been able to verify the accuracy of all of Respondents' factual statement.

- ECF 12-1: Notice of Revocation of Release (Resp. Exhibit 1).

This document is dated June 3, 2025. It states that “[o]n 03/06/2019, you were ordered removed to any country other than *Honduras* by an authorized U.S. DHS/DOJ official and you are subject to an administratively final order of removal. Your case is current (*sic*) under review by *El Salvador* for the issuance of a travel document.” See ECF 12-1 at 1 (emphasis added). The document has a signature line for Acting Field Office Director Nikita Baker. ECF 12-1 at 1. However, the document is unsigned. The document also contains a proof of service, signed by Deportation Officer “King, J”, purporting that the document was served on Mr. Hernandez at 7:46 p.m. on 06/03/2025 at the Baltimore, MD Field Office. ECF 12-1 at 2. It also appears that the certificate of service was not provided to Mr. Hernandez’s attorney. See ECF 12-1 at 2.

- ECF 12-2: Notice of Revocation of Release (Resp. Exhibit 2).

This document is also dated June 3, 2025. It states that “[o]n 03/06/2019, you were ordered removed to any country other than *El Salvador* by an authorized U.S. DHS/DOJ official and you are subject to an administratively final order of removal. Your case is under current review by *Mexico* for the issuance of a travel document.” ECF 12-2 at 1 (emphasis added). The document also has a signature line for Acting Field Office Director Nikita Baker. ECF 12-2 at 1. Like ECF 12-1, the document is unsigned. Unlike Exhibit 1, however, this document contains no certificate of service. In their responsive filing, Respondents claim this is an “updated” copy due to the first having “typographical errors,” and that Exhibit 2 “is pending service on Petitioner in Livingston, Texas[.]” ECF 10 at 3.

The following observations, argued more fully below, are noteworthy:

First, both exhibits state that Mr. Hernandez is subject to an order of removal dated March 6, 2019. This is factually untrue, as the order of removal Mr. Hernandez provided with his petition is signed by an immigration judge and dated December 12, 2019. *See* ECF 1-1 at 1. That order is the result of a prior removal order that was reinstated from 1999. *See* ECF 10 at 2-3. Thus, the March 6, 2019 date is ostensibly false in both exhibits.

Second, ECF 12-1 references that Mr. Hernandez is protected from removal to Honduras and instead *El Salvador* is considering his removal. If ECF 12-1 is to be believed, and that as of June 3, El Salvador was considering Mr. Hernandez's removal, the government would be in violation of 8 C.F.R. § 208.6(a) ("Information contained in or pertaining to any [CAT application] . . . shall not be disclosed without the written consent of the applicant[.]"). If ECF 12-1 is not true, then it is not clear what requests had been made and/or to what third country Mr. Hernandez was purportedly going when he was taken into custody on June 3.

Third, both documents are dated June 3, 2025. This cannot be true unless, between 7:46 pm and midnight on June 3, Nikita Baker realized the typographical errors in her first rescission and printed a new one. *Compare* ECF 12-1 at 2 *with* ECF 12-2 at 1. Even if that was the case, there would be no reasonable explanation to wait to serve the corrected record on Mr. Hernandez until after he was transferred to Texas on the evening of June 5. Indeed, if service was pending as of the government's filing on June 16, that would require Nikita Baker to have realized the error on June 3 but then not serve the document for nearly two weeks. *See* ECF 10 at 3. Given these conflicts, Mr. Hernandez avers that ECF 12-2 was not created on June 3 as it states, but may have been backdated to reflect the date Mr. Hernandez was detained. However, ECF 12-2 contains no explanation that it is a correction or update to ECF 12-1.

Fourth, and most importantly, on information and belief, Respondent Nikita Baker may not have been serving as the Field Office Director of the ICE Baltimore Field Office, Acting or otherwise, on June 3, 2025. See Eric Flack, *Exclusive Access: 5 People Arrested In Maryland During ICE Raids As Nationwide Protests Continue*, WUSA9 (June 10, 2025) (quoting Vernon Liggins as the ICE Baltimore acting Field Office Director), available at <https://www.wusa9.com/article/news/investigations/immigration-customs-enforcement-ice-donald-trump-protests-crackdown-vernon-liggins/65-d5195b8b-0756-4a5f-9b76-2c507a911c8d>; Press Release, *ICE Arrests Guatemalan Alien Charged With Girlfriend's Murder; Uncle, An Illegal Alien, Charged With Accessory*, ICE (Apr. 22, 2025) (quoting Vernon Liggins as the ICE Baltimore acting Field Office Director), available at <https://www.ice.gov/news/releases/ice-arrests-guatemalan-alien-charged-girlfriends-murder-uncle-illegal-alien-charged>. Based on these statements, it appears that Nikita Baker may not have been in the Baltimore Field Office, but rather that Vernon Liggins may have been the Acting Field Office Director (or at least performing those functions) on June 3, 2025. If this is the case, Respondent Nikita Baker may not have even made any determinations regarding Mr. Hernandez's custody or any potential removal to a third country. *Contra* ECF 12-1 and 12-2. Thus, Respondents' contention that she made the legal determination that Mr. Hernandez could be likely removed to Mexico is, at best, unlikely, *see* ECF 10 at 16; *infra* Argument Section I.

On their face, both ECF 12-1 and ECF 12-2 appear to be *ultra vires*, unsigned government orders to detain Mr. Hernandez purportedly under the authority of an officer who may not hold the cited role in Baltimore. At best, they are unreliable to meet the government's burden.

RESPONDENT'S DOCUMENTARY EVIDENCE SUBMITTED WITH THIS FILING

The confusion does not end there. Mr. Hernandez provides two additional government

documents with this filing that he received in Texas, which are equally as suspect as those offered by the government:

- Exhibit A: Warning to Alien Ordered Removed or Deported

This document is a Form I-296. It is dated June 3, 2025. The document notifies Mr. Hernandez that he has been ordered removed from the United States and warns that he may be prosecuted if he reenters the United States under 8 U.S.C. § 1326. However, the document is signed by Marcel Crawford in Livingston, Texas where Mr. Hernandez wasn't detained until the night of June 5. *But see* ECF 4-2 at 1 (noting "DO [Deportation Officer] Crawford" booked Mr. Hernandez into the IAH Detention Facility in Livingston, Texas on "06/05/2025" after he was detained in Baltimore from June 3 to June 5).

- Exhibit B: Warrant of Removal/Deportation

This is the first page of a Form I-205.² The document is dated June 3, 2025. It purports to authorize Mr. Hernandez's detention and removal from the United States by "a designated official" under 8 U.S.C. § 1182(a)(9)(A)(i). The document does not indicate an order of removal from an immigration judge. *But see* ECF 1-1. The document also contains signature lines on which "N3612 Baker" and "Acting Field Office Director" are electronically typed, but the document was never actually signed.

STATEMENT OF THE ISSUE FOR THIS BRIEF

Respondents previously moved to dismiss, pursuant to Rule 12(b)(1), asserting that this

² Mr. Hernandez was not provided with the second page of the Form I-205 when it was given to him in Texas.

Court lacks subject matter jurisdiction over Mr. Hernandez's petition. *See* ECF 4-1. Mr. Hernandez has answered the motion, asserting that this Court has jurisdiction. *See* ECF 11. Assuming the Court has jurisdiction, Mr. Hernandez now replies to Respondents opposition on the merits, and in the alternative to their motion to dismiss or stay. ECF 10.

LEGAL FRAMEWORK

8 U.S.C. § 1231(a)(1)(A) requires that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." The removal period begins on the latest of the following:

- (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.

8 U.S.C. § 1231(a)(1)(B).

Under Subsection (a)(1)(C), "the removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal."

During the removal period, a noncitizen "shall" be detained. 8 U.S.C. § 1231(a)(2)(A). After the 90-day removal period runs, if the noncitizen has not been removed, the noncitizen is placed on an order of supervision. 8 U.S.C. § 1231(a)(3). Detention beyond the 90-day removal period is authorized only where there is a danger to the community or the noncitizen is unlikely to comply with the removal order. 8 U.S.C. § 1231(a)(6).

To avoid finding detention under 8 U.S.C. § 1231(a)(6) unconstitutional under the Fifth

Amendment, in *Zadvydas v. Davis* the Supreme Court “read an implicit limitation into the statute[.]” 533 U.S. 678, 689 (2001). “In our view, the statute, 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. It does not permit indefinite detention.” *Id.*

ARGUMENT

Because he has a final order of removal (that cannot be effectuated to El Salvador), Mr. Hernandez may only be held in ICE custody pursuant to Respondents’ authority under 8 U.S.C. § 1231(a)(6). The removal order in this case was issued on December 12, 2019. The removal period therefore expired on March 11, 2020. Detention more than 90 days after the expiration of the removal period is presumptively unlawful. Absent substantial evidence that he will be removed to a country other than El Salvador in the reasonably foreseeable future, Mr. Hernandez’s detention now, more than four years later, is clearly unlawful and he must be released.

I. RESPONDENTS HAVE NOT MET THEIR BURDEN OF ESTABLISHING IT IS SUBSTANTIALLY LIKELY THAT MR. HERNANDEZ CAN BE REMOVED WITHIN THE REASONABLY FORESEEABLE FUTURE.

Both parties agree that the Supreme Court has prescribed the procedures this Court must follow in deciding Mr. Hernandez’s petition:

[F]or the sake of uniform administration in the federal courts, we recognize that period [of six months]. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the ‘reasonably foreseeable future’ conversely would have to shrink. This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, 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.

Zadvydas, 533 U.S. at 701.

A. The Burden Has Shifted To The Government To Establish The Likelihood That Mr. Hernandez Will Be Removed

Here, the government has submitted conflicting, unsigned documents that on June 3, 2025, Mr. Hernandez's removal was "under review" by both El Salvador and Mexico. ECF 12-1, 12-2. Notwithstanding any lack of evidence of service of both documents on Mr. Hernandez, the government claims the document regarding El Salvador contained a typographical error, and that "Mexico is reviewing Petitioner's case for the issue of a travel document." ECF 10 at 13.

This statement is the only evidence offered by Respondents that Mr. Hernandez is likely to be removed to Mexico. The statement is conclusory, offers no dates or specifics to how such a request was made to Mexico, and does not offer any explanation as to why no effort was made to remove Mr. Hernandez to Mexico during the past four years. Combined with Mr. Hernandez's stated fear of going to Mexico because his brother was killed there, and the government's continuing obligations to comply with the injunction in *D.V.D.*, Mr. Hernandez has met his initial burden that he is outside the six-month period contemplated by *Zadvydas* and has established "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future[.]" 533 U.S. at 701. The burden then shifts to Respondents. *Id.* Because Respondents have produced no additional evidence regarding the efforts made to remove Mr. Hernandez to Mexico, they have not met their burden.

B. Based On Significant Errors And Inconsistencies, Respondents Are Owed No Presumption Of Regularity With Regard To Their Evidentiary Submissions.

Ordinarily, government records enjoy the benefit of a presumption of regularity so long as they are authenticated and created during the normal course of government business. *See Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (A Form I-213 is "presumed inherently reliable if

authenticated, and are presumed to contain information from the respondent unless the respondent presents evidence to the contrary.”). However, “[n]o presumption of regularity excuses the government sidestepping its baseline authentication requirements.” *Rogel v. Garland*, No. 21-1163, 2022 U.S. App. LEXIS 25866 at *25 (4th Cir. 2022) (*per curiam*) (Diaz, C.J., concurring). Here, the government’s documents are riddled with inaccuracies, and taken with the lack of signature on any of the documents (apart from proof of service on some of them), they are unauthenticated. Moreover, Mr. Hernandez again notes that absent an evidentiary hearing, this Court must accept the facts in a light most favorable to him, *Grayson v. Anderson*, 816 F.3d 262, 268 (4th Cir. 2016), and based on the records available, there is no evidence regarding Mexico’s consideration of Mr. Hernandez’s removal there.

Specifically, the documents offered by Respondents to justify Mr. Hernandez’s detention and transfer are not signed, may have been created by an official who was not the Field Office Director in Baltimore at the time, and are all dated June 3, 2025—a date which cannot be accurate as one was purportedly signed in Texas when Mr. Hernandez was not transferred out of Maryland until June 5.³ Importantly, none of the documents issued in Maryland are signed except for ECF 12-1, and in that only the proof of service is signed. Therefore, because none of the documents are authenticated and they are facially inaccurate and/or inconsistent, the evidence provided by Respondents is insufficient to meet their burden of proof. Thus, having failed to meet their burden, Mr. Hernandez must be released from custody.

³ Moreover, if Respondents stand by ECF 12-2, which likely was issued after June 5, 2025, it demonstrates that the Baltimore Field Office continued to exercise control over Mr. Hernandez’s case after his transfer to Texas. If this is the case, it lends additional support to Petitioner’s arguments that jurisdiction is proper in the District of Maryland to hear his petition. *See* ECF 11.

II. RESPONDENTS' DEFENSE ON THE MERITS IS UNPERSUASIVE.

Respondents defend the petition primarily on two categories of arguments: 1) by reframing the claim as a “challenge [to] how the Respondents should execute his third country removal.” ECF 10 at 9; and 2) by alleging that 8 U.S.C. § 1231 authorizes detention in this way. Addressing the second category first, Respondents have exceeded their detention authority under 8 U.S.C. § 1231, they are in violation of Mr. Hernandez’s rights under the Fifth Amendment as interpreted in *Zadvydas*, and their own evidence establishes they have not followed the regulatory procedure to revoke Mr. Hernandez’s order of supervision and freedom.

A. 8 U.S.C. § 1231 Only Authorizes Detention For 90 Days After The Order Of Removal, Or On Evidence That Removal Is Likely In The Reasonably Foreseeable Future.

Respondents concede that Mr. Hernandez’s case falls outside the removal period. *See* ECF 10 at 11 (“Because Petitioner’s order of removal was final in 1999, Petitioner is now outside of the 90-day removal period during which the government ‘shall detain’ the individual. 8 U.S.C. § 1231(a)(2).”).⁴ Nevertheless, Respondents claim that his detention is authorized under 8 U.S.C. § 1231(a)(6) “because he is inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i); that is, Petitioner was neither admitted nor paroled in the United States upon entry.” ECF 10 at 11. But Respondents tacitly agree that 8 U.S.C. § 1231(a)(6) only applies “to detain Petitioner *to effectuate his removal order from the United States.*” ECF 10 at 11 (emphasis added). However, none of the government’s records establishing how or where he is being removed are authenticated or reliable.

What is left is an implied defense that § 1231(a)(6) somehow authorizes Mr. Hernandez’s

⁴ In *Johnson v. Guzman Chavez*, there is a discussion of whether the removal period becomes final upon the conclusion of withholding-only proceedings or the underlying removal proceedings, 594 U.S. 523, 539 (2021). Under either interpretation the removal period expired before March 11, 2020.

detention beyond the removal period simply because he is inadmissible, without any need to demonstrate that his detention is necessary. This is particularly problematic because Mr. Hernandez was previously released in 2020 from Respondents' custody, which is exactly why *Zadvydas* sets a six-month limitation after the removal period to hold the non-citizen unless an alternative for removal is clearly available. 533 U.S. at 701. That period has clearly run here.

However, Respondents claim an implied authority to restart the six-month clock upon taking Mr. Hernandez back into custody. See ECF 10 at 14 ("Petitioner's due process claim fails because any *Zadvydas* challenge cannot be raised until Petitioner has been detained for six-months in post-final order custody; Petitioner here has been detained for only 11 days."). But Respondents find support for their tolling or restarting authority argument in cases which are inapposite. See ECF 10 at 14. In *Rodriguez-Guardado v. Smith*, the District of Massachusetts noted that

[The] government avers, without opposition, that ICE detained Rodriguez on July 13, 2017, with the intent of executing the final order of removal. But for judicial intervention [by filing the habeas petition on July 13, 2017 after reporting to custody], ICE would have transferred petitioner out of the District of Massachusetts on July 17, 2017, for removal to El Salvador three days later, on July 20, 2017."

271 F.Supp.3d 331, 333 (D. Mass. 2017).

In that case, the Court agreed with the government's invocation of 8 U.S.C. § 1231(a)(1)(C) for attempting to prevent his lawful removal to his native country and concluded that because the purpose of the detention was to effectuate an "immediate" removal, detention was consistent with 8 U.S.C. § 1231(a)(6). *Id.* at 335. Respondents cannot make a similar claim here.

Julce v. Smith concerns a petitioner who sought to delay his removal to apply for protection under the Convention Against Torture, a claim which should have gone to the Board of Immigration Appeals through a motion to reopen. 2018 U.S. Dist. LEXIS 31510 at *11-12 (D.

Mass. 2018). Unlike *Julce*, Mr. Hernandez exhausted his administrative remedies to seek protection from removal and was *granted* protection under CAT. The length of detention at issue in *Julce* was not really an issue because, the day before the Court's opinion, on "February 26, 2018, the government gave notice that it intend[ed] to transfer Julce to a detention center in New Hampshire for purposes of arranging his removal to Haiti within 72 hours." *Id.* at *7. Therefore, it cannot be said that Julce had met his initial burden under *Zadvydas* that he was unlikely to be removed.

Respondents also rely on *Farah v. U.S. Att'y Gen.*, 12 F.4th 1312 (11th Cir. 2021). But the government provides only a token quote without analysis. In that case, Farah was detained *under 8 U.S.C. § 1226(c)* during review of the merits of his petition for review, which was consolidated with the appeal of the denial of his habeas petition. *Id.* The premature nature of his *Zadvydas* claim was because Farah's removal order did not become administratively final until the day the Court issued its opinion on the petition for review. The Court's conclusion is not that Farah's claim was without merit, only that having now decided the petition, his habeas claim under § 1226(c) was moot and the claim under § 1231 was premature. *See id.* at 1331-33. The case plainly differs from Mr. Hernandez, whose removal order became administratively final on December 12, 2019 when the Department of Homeland Security waived appeal. ECF 1-1.

Moreover, even if there were some argument that the six-month period of reasonable detention were tolled by Mr. Hernandez's release, he is not starting with a new clock. Mr. Hernandez was not released from Respondents' custody on December 12, 2019. Rather, he was held in custody until at least January 21, 2020,⁵ and likely months after he won protection from

⁵ Mr. Hernandez has an order from ICE on January 21, 2020, keeping him in custody following the December 12, 2019 grant of CAT protection. *See* Exhibit C (missing page 2). Undersigned counsel does not know exactly when he was released from post-order custody in 2020.

removal to El Salvador and presumptively beyond the six-month period at that time. Respondents' inability to find a third country to which Mr. Hernandez could be removed at that time only adds speculation to their ability to find a receptive third country at this time, particularly considering the lack of specifics provided by Respondents in this litigation as to any current removal efforts.

Finally, there is also intuitively no basis to conclude that Respondents can hold someone in Mr. Hernandez's circumstances for six months, release him under *Zadvydas*, and then re-detain him with a new six-month time limit on detention. Such a Kafkaesque catch-and-release scheme can certainly not comport with the Supreme Court's requirement that Respondents satisfy an individualized burden of proof to justify detention. The Court should agree with Mr. Hernandez that the removal period expired in 2020, and under the circumstances presented here, his detention is unconstitutional absent evidence from Respondents to justify it.

B. Respondents Did Not Comply With Post-Order Custody Regulations.

Next, Respondents claim that they have followed the procedures in 8 C.F.R. § 241.4(l) to revoke Mr. Hernandez's order of supervision. They did not. Respondents' argument is that regardless of the evidence or process, their "broad discretionary authority" immunizes ICE from any challenge to the revocation of release. *See* ECF 10 at 15 (quoting *Leybinsky v. ICE*, 553 Fed. App'x. 108, 110 (2d Cir. 2014)). But this discretionary authority is provided not to the agency generally, but is vested in one of two people—the Executive Associate Commissioner or the district director. *See* 8 C.F.R. § 241.4(l). Four circumstances justify revocation: "(i) [t]he purposes of release have been served; (ii) [t]he alien violates any condition of release; (iii) [i]t is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (iv) [t]he conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." *Id.*

Here, the only circumstance which is offered to justify revoking Mr. Hernandez's release is to enforce his removal order, *see* ECF 12-2, but as demonstrated above, on June 3, 2025, ICE has offered no evidence it was prepared to remove Mr. Hernandez to Mexico (or any other third country). More importantly, the person who appears to have authorized the revocation (even accepting the order without her signature) is Nikita Baker—who it is unclear is holding the role of the Baltimore Field Office Director.⁶ *See supra*. Thus, the order itself suggests that either Nikita Baker (who may not have been authorized) or some other unauthorized person made the decision to revoke Mr. Hernandez's release. *See U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1945) ("It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." (emphasis in original)).

C. Mr. Hernandez Does Not Ask This Court To Interfere With The Removal Process.

Respondents finally note that "[t]o the extent Petitioner asks this Court to enter an order staying ICE's effectuation of Petitioner's reinstated removal order – *which he does not appear to have done* – this Court is without jurisdiction to offer such relief as 8 U.S.C. § 1252(g) precludes a district court from staying orders of removal." ECF 10 at 19. Mr. Hernandez hopes to clarify

⁶ This runs counter to Respondents arguments that Nikita Baker "issued to Petitioner a written Notice of Revocation of Release on June 3, 2025, explaining that ICE was revoking his release pursuant to 8 C.F.R. § 241.4 as it had determined that Petitioner could be removed from the United States pursuant to his final order of removal." ECF 10 at 16. Respondents rely entirely on the individualized authority of the Field Office Director to make such discretionary decisions, but as Mr. Hernandez and the documents provided by Respondents leave uncertain whether Nikita Baker was in the role of the Field Office Director on June 3, 2025. If not, the documents provide no authority to revoke Mr. Hernandez's release.

he has not done this, *see infra*, and that what he is actually challenging is Respondents' alleged authority to revoke his post-order custody release, detain him, and transfer him 1,400 miles to Texas without any evidence to establish a likelihood of his removal to any third country. *See* ECF 1. However, for clarity's sake, Mr. Hernandez admits that if the government of a third country will accept Mr. Hernandez and if (after adequate notice and opportunity) he fails to establish a claim for protection from removal to that third country, this Court would not have the power to prevent his removal under those circumstances. But those circumstances are far from what is happening here. This Court has jurisdiction over Mr. Hernandez's petition, and because his detention is without cause and inconsistent with the INA, regulation, or due process of law, the Court should order his immediate release.

III. RESPONDENTS' ATTEMPTS TO REFRAME MR. HERNANDEZ'S CLAIM UNDER *D.V.D. v. DHS* IS WITHOUT MERIT.

Mr. Hernandez now turns to the argument raised first in Respondent's opposition, that because Mr. Hernandez invoked the class injunction in *D.V.D. v. DHS* this case should be dismissed or stayed. *See* ECF 10 at 7-10. This reframing of the argument is without merit.

Mr. Hernandez does not dispute the requirements of the *D.V.D.* injunction as outlined by Respondents, nor the general prohibition on entertaining a civil action when the "the plaintiff is a member of a parallel class action." ECF 10 at 7. But Mr. Hernandez's habeas corpus petition is not parallel to the *D.V.D.* litigation, and the relief he has requested is different. *Contra* ECF 10 at 7 ("... requiring ICE to provide the precise relief Petitioner asks this Court to issue to him and other members of the class. Specifically, Petitioner seeks relief from this Court as to how the Respondents should execute his third country removal."). To the extent that Mr. Hernandez sought to invoke the injunction, it is not to ask this Court to order something different under the same circumstances, but rather just to order Respondents to comply with the injunction before rushing

him onto a plane. Such an order could not affect comity with the District of Massachusetts.

Respondents go so far as to claim that “[a]t its core, the Petition challenges how the Respondents should execute his third country removal.” ECF 10 at 9. This is an oversimplification of the petition. Mr. Hernandez believes his present custody is unlawful, and that it has been so since June 3, 2025 when he was taken into custody by Respondents without cause. *See* ECF 1 at ¶¶ 28-38 (outlining *Zadvydas* claim). Mr. Hernandez’s second claim states, in part, that because “it may be that no third country has agreed to accept Mr. Hernandez—[] if that is the case, Respondents must concede that Mr. Hernandez is detained in violation of the Fifth Amendment as interpreted by the Supreme Court in *Zadvydas*—far beyond the removal period and without any likelihood of removing him in the reasonably foreseeable future.” *Id.* at ¶ 43. Thus, at the heart of this case is the requirement that Mr. Hernandez not be detained without due process of law, whether that be to effectuate his removal to a third country or, as Respondents’ evidence at ECF 12-1 and 12-2 suggests, without any cause at all. Regardless of *D.V.D.*, this Court has no reason to dismiss what is a core habeas case challenging unlawful custody within its jurisdiction.⁷ Nor does this Court have cause to stay this case pending resolution in *D.V.D.* *See* ECF 10 at 9. Ordering Mr. Hernandez’s release from custody which is not supported by any reliable evidence has no potential to interfere with or provide an inconsistent decision with the *D.V.D.* litigation.

Finally, it is telling that although Respondents ask this Court to delay review, in a sense because they concede they must comply with the *D.V.D.* injunction. *See* ECF 10 at 10. And yet as of this filing on June 20, 2025 Respondents have not provided Mr. Hernandez with notice in Spanish or a reasonable fear interview as required by the injunction, in spite of being told at least

⁷ It also bears noting that *D.V.D.* is brought as a civil action under the INA, the Administrative Procedure Act, and the Foreign Affairs Reform and Restructuring Act (“FARRA”), *not* a petition for habeas corpus.

twice of his fear of going to Mexico. *But see Memorandum on Preliminary Injunction*, Dkt. 118, *D.V.D.*, No. 1:25-CV-10676-BEM at *2 (D. Mass. May 21, 2025) [appended at Exhibit D] (“All removals to third countries, i.e., removal to a country other than the country or countries designated during immigration proceedings as the country of removal on the non-citizen’s order of removal, see 8 U.S.C. § 1231(b)(1)(C), must be preceded by written notice to both the non-citizen and the non-citizen’s counsel in a language the non-citizen can understand.”).

CONCLUSION

For all those reasons outlined above and those outlined in his responsive brief on jurisdiction at ECF 11, this Court should issue a writ of *habeas corpus* ordering that Mr. Hernandez be immediately released from custody.

Respectfully submitted,

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