

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:25-cv-2748 (NEB/JFD)

Banyee, Nyynkpao

Petitioner,

RESPONSE TO PETITION

v.

Donald J. Trump, in his official capacity as
President of the United States, *et al.*,

Respondents.

The federal respondents, Donald J. Trump, in his official capacity as President of the United States; Pamela Bondi, in her official capacity as United States Attorney General; Kristi Noem, in her official capacity as Secretary of the United States Department of Homeland Security; Todd Lyons, in his official capacity as Acting Director and Senior Official Performing the Duties of the Director, United States Immigration and Customs Enforcement; Pete Hegseth, in his official capacity as Secretary of Defense; Peter Berg¹, in his official capacity as the St. Paul Field Office Director for United States Immigration and Customs Enforcement, hereby submit this Response to Mr. Banyee's habeas Petition (ECF 1).

Mr. Banyee's detention, for just over six months, while ICE has worked diligently to execute his final removal order is constitutional under *Zadvydas v. Davis*, 533 U.S. 678,

¹ Tauria Rich is the acting Field Office Director of the St. Paul Field Office and should be substituted automatically for Mr. Berg under Fed. R. Civ. P. 25(d).

701 (2001). While Mr. Banyee would like this Court to wade in to his allegations of due process concerns related to his removal to a third country, those very claims are pending in a class action suit before the District of Massachusetts and the First Circuit, and Mr. Banyee is a class member. Even if they were not, he has not shown any violation of statute or the constitution. This Court's review of his habeas petition should focus on the core of habeas – whether he is properly detained. There is no question that he is. This Court should deny his Petition.

I. Factual Background

a. Mr. Banyee's Immigration History & Removal Proceedings

On January 29, 2004, Petitioner Banyee entered the United States as a refugee. Declaration of James L. VanDerVaart (“VanDerVaart Decl.”) ¶ 4. On November 15, 2005, Petitioner Banyee adjusted his status to lawful permanent resident (RE8). VanDerVaart Decl. ¶ 5.

On June 8, 2016, the Fargo Municipal Court convicted Petitioner Banyee of theft, court file  VanDerVaart Decl. ¶ 6.

On June 24, 2016, the Cass County District Court convicted Petitioner Banyee for false report to law enforcement, court file  VanDerVaart Decl. ¶ 7.

On July 19, 2017, the Municipal Court of the city of Bozeman County of Gallatin, State of Montana accepted a plea agreement from Petitioner Banyee acknowledging the charges of partner or family member assault, 1st offense, and criminal possession of drug paraphernalia with a plea of guilty to criminal possession of drug paraphernalia. VanDerVaart Decl. ¶ 8.

On October 20, 2017, the Fargo Municipal Court convicted Petitioner Banyee of possession of marijuana, court file  VanDerVaart Decl. ¶ 9.

On June 1, 2018, the Cass County District Court convicted Petitioner Banyee of robbery – with a firearm, dangerous weapon or destructive device, court file 
 VanDerVaart Decl. ¶ 10.

On June 6, 2018, ICE officers encountered Petitioner Banyee at the Cass County jail. Petitioner Banyee was awaiting transfer to the North Dakota State Penitentiary. ICE officers interviewed Petitioner Banyee and determined that Petitioner Banyee was amenable to removal proceedings. ICE officers faxed form I-247 Immigration Detainer Notice of Action and form I-200 Warrant of Arrest to the Cass County Jail. These forms followed Petitioner Banyee to the North Dakota State Penitentiary. VanDerVaart Decl. ¶ 11.

On March 31, 2021, ICE officers arrested Petitioner Banyee upon his release from the North Dakota State Penitentiary and served form I-862 Notice to Appear charging Petitioner Banyee under section 237 (a)(2)(B)(i) (controlled substance offense) of the Immigration and Nationality Act (INA), INA section 237 (a)(2)(A)(iii) to wit INA section 101(a)(43)(F) (crime of violence), and INA section 237 (a)(2)(A)(ii) (two crimes involving moral turpitude after admission – based upon his theft and robbery convictions). ICE officers also served form I-286 Notice of Custody Determination which informed Petitioner Banyee that he would be held without bond and his right to request a review of this custody determination with a judge. Petitioner Banyee requested an immigration judge review this custody determination. VanDerVaart Decl. ¶ 12.

On May 20, 2021, the Immigration Judge (IJ) sustained the INA section 237(a)(2)(A)(iii) to wit INA section 101(a)(43)(F) charge of removability as well as the INA section 237(a)(2)(A)(ii) charge of removability. The IJ did not sustain the INA section 237(a)(2)(B)(i) charge of removability, and the Department did not appeal that ruling. VanDerVaart Decl. ¶ 13.

On June 22, 2021, the IJ called into question the May 20, 2021, ruling on the INA section 237(a)(2)(A)(iii) to wit INA section 101(a)(43)(F) charge of removability due to a development in the law, specifically the case of *Borden v. United States*, No. 19-5410, 2021 WL 2367312 (U.S June 10, 2021). The IJ opened the issue for briefing and reset the matter to permit the Petitioner Banyee time to submit an application for Cancellation of Removal under Section 240A(a) of the Act, for certain permanent residents. VanDerVaart Decl. ¶ 14.

On June 22, 2021, the government filed form I-261 additional charges of inadmissibility / deportability, adding the charge of removability pursuant to INA section 237 (a)(2)(A)(iii) to wit INA section 101(a)(43)(U) and (G) (aggravated felony – attempted theft). VanDerVaart Decl. ¶ 15.

On June 23, 2021, the government submitted a brief in support of the aggravated felony - attempted theft offense set forth in the Form I-261. In that brief, the Department withdrew the crime of violence charge of removability due to the *Borden* case. VanDerVaart Decl. ¶ 16.

On July 15, 2021, the IJ at Fort Snelling, Minnesota, issued an oral decision in this matter. In her decision, the Immigration Judge ruled against the Department by not

sustaining the INA section 237(a)(2)(A)(iii) to wit INA section 101(a)(43)(U) and (G) charge of removability set forth in the Form I-261. The IJ May 20, 2021, ruling sustaining the 237(a)(2)(A)(ii) two crimes of moral turpitude charge was maintained, thus the Petitioner Banyee was found removable pursuant to INA section 237(a)(2)(A)(ii). The IJ ruled against the respondent by denying his Asylum, Withholding of Removal, Withholding of Removal under the Convention Against Torture, and Deferral of Removal under the Convention Against Torture. The Immigration Judge ruled in favor of the respondent by granting his application for Cancellation of Removal under Section 240A(a) of the Act, for certain permanent residents. VanDerVaart Decl. ¶ 17.

On July 21, 2021, the Government filed a timely case appeal with the BIA. The Government appealed the IJ ruling on the aggravated felony attempted theft offense, and the grant of Cancellation of Removal. VanDerVaart Decl. ¶ 18.

On January 31, 2022, the BIA sustained part of the appeal and dismissed part of the appeal and remanded the case to the immigration judge for further proceedings. VanDerVaart Decl. ¶ 19.

On March 25, 2022, an IJ at Ft. Snelling issued a written decision ordering Banyee removed from the United States to the Ivory Coast. VanDerVaart Decl. ¶ 20. On April 22, 2022, Banyee appealed the decision to the BIA. The appeal was rejected due to an address error. VanDerVaart Decl. ¶ 23. On May 9, 2022, Banyee filed a motion to accept appeal by certification. VanDerVaart Decl. ¶ 26.

On December 11, 2024, the BIA dismissed Banyee's appeal. ECF 2-6. On that day, Banyee's removal order became final under 8 C.F.R. § 1241.1 VanDerVaart Decl. ¶ 36.

On December 23, 2024, Banyee filed a Petition for File Review (PFR). *Banyee v. Bondi*, 25-3490 (8th Cir.). VanDerVaart Decl. ¶ 37. On July 10, 2025, Banyee's petition for review was fully briefed before the Eighth Circuit. 24-3490 (8th Cir.).

b. Banyee's Bond Proceedings and Judicial Review of those Proceedings

i. Banyee's First Habeas Petition

As Banyee and DHS were litigating his removability, he was held in detention under 8 U.S.C. § 1226(c) because of his criminal convictions. Banyee challenged his detention in district court in habeas. *Banyee v. Bondi, et al.*, No. 21-1817 (WMW/BRT). In his first habeas, Banyee argued that his detention under 1226(c) for over four months (at the time of filing) without a bond hearing before an immigration court violated the Due Process Clause of the Fifth Amendment. Petition, *Banyee v. Bondi, et al.*, No. 21-1817 (WMW/BRT) (D. Minn. Aug. 9, 2021) (ECF 1).

On April 14, 2022, Judge Wilhelmina Wright issued an order granting in part Banyee's first habeas petition and requiring the IJ to hold a bond hearing. Order, *Banyee v. Bondi, et al.*, No. 21-1817 (JRT/BRT) (Apr. 14, 2022) (ECF No. 16). VanDerVaart Decl. ¶ 21.

A bond hearing was held in immigration court, and on April 21, 2022, IJ Sarah Mazzie set a bond of \$7,500. DHS reserved appeal. VanDerVaart Decl. ¶ 22. On April 25, 2022, Banyee posted bond and was released from ICE custody. VanDerVaart Decl. ¶ 24. On April 28, 2022, DHS filed a timely appeal of the IJ's bond order to the Board of Immigration Appeals (BIA). VanDerVaart Decl. ¶ 25.

The United States also appealed Judge Wright's habeas decision to the Eighth Circuit. Notice of Appeal, No. 21-1817 (D. Minn. June 10, 2022) (ECF 18). VanDerVaart Decl. ¶ 21.

While the bond appeals were proceeding, on September 27, 2023, the Fargo police department arrested Banyee for preventing arrest. VanDerVaart Decl. ¶ 27.

On September 17, 2024, the Eighth Circuit reversed the district court's decision bond decision on Banyee's first habeas, holding that detention during deportation proceedings is constitutionally valid and remanded for denial of Banyee's Habeas petition. *Banyee v. Garland, et al.*, 115 F.4th 928 (8th Cir. 2024). VanDerVaart Decl. ¶ 28. Banyee petitioned for rehearing en banc or by the panel. Petition for Rehearing, *Banyee v. Garland, et al.*, No. 22-2252 (8th Cir. Dec. 2, 2024). That petition was denied. Order, *Banyee v. Garland, et al.*, No. 22-2252 (8th Cir. Mar. 18, 2025). The Eighth Circuit issued its Mandate on March 31, 2025. Mandate, *Banyee v. Garland, et al.*, No. 22-2252 (8th Cir. Mar. 31, 2025).

On remand, Judge Tunheim denied Banyee's habeas petition. Order, *Banyee v. Bondi, et al.*, No. 21-1817 (JRT/BRT) (June 13, 2025).

ii. ICE's Redetention of Banyee

After the Eighth Circuit decision finding that ICE could detain Banyee lawfully during the course of his removal proceedings (which were still ongoing in fall 2024), ICE moved to bring Banyee back into custody under 8 U.S.C. § 1226(c).

On October 24, 2024, DHS sent from I-340, bond demand to the Minnesota

Freedom Fund, the obligor that posted the immigration bond. VanDerVaart Decl. ¶ 31.

On October 29, 2024, the Fargo police department arrested Banyee for felony theft of a motor vehicle. VanDerVaart Decl. ¶ 32. On October 30, 2024, ICE took custody of Banyee when he was released from the Cass County jail in North Dakota. VanDerVaart Decl. ¶ 33. DHS canceled the delivery bond. VanDerVaart Decl. ¶ 34.

Because his removal proceedings were still ongoing, Banyee was held in custody under 8 U.S.C. § 1226(c). When the BIA issued a decision on his removal proceedings, his 2022 removal order became final. 8 C.F.R. § 1241.1. The authority for Banyee's detention switched at that point to detention pending removal under 8 U.S.C. § 1236.

c. DHS's Efforts to Remove Banyee after his Final Order.

On December 30, 2024, ICE sent form I-229a Warning for Failure to Depart and Notice to Alien of File Custody Review to Banyee via certified mail. ECF 2-7 at 1-4. VanDerVaart Decl. ¶ 38. That same day, ICE submitted an electronic Travel Document Request (TDR) to Head Quarters – Removal and International Operations (HQ-RIO). VanDerVaart Decl. ¶ 39. The next day, ICE sent the TDR packet to HQ-RIO via UPS. VanDerVaart Decl. ¶ 40.

On January 23, 2025, the Eighth Circuit denied a motion for stay of removal filed by Banyee in his PFR. Order, *Banyee*, 25-3490 (8th Cir. Jan. 23, 2025). VanDerVaart Decl. ¶ 41.

On February 4, 2025, the embassy of Ivory Coast sent an email stating that Banyee is not a citizen of the Ivory Coast but requested further documentation. HQ-RIO was informed. VanDerVaart Decl. ¶ 42.

On February 6, 2025, ICE sent form I-241, request for acceptance of alien to the embassies of Liberia, Mali, and Ghana. VanDerVaart Decl. ¶ 43.

On February 6, 2025, the embassy of Mali denied acceptance of Banyee. VanDerVaart Decl. ¶ 44. On February 14, 2025, HQ-RIO received confirmation from the Ambassador of the Ivory Coast that Banyee was not a citizen of the Ivory Coast. ICE has determined that removal to Ivory Coast is impracticable at this time. VanDerVaart Decl. ¶ 45. On February 27, 2025, ICE sent form I-241 to the embassy of Costa Rica. Costa Rica declined acceptance of Banyee. VanDerVaart Decl. ¶ 47.

On February 18, 2025, ICE sent a travel document request packet to the embassy of Liberia because Banyee's mother is a Liberian national. VanDerVaart Decl. ¶ 46.

On March 6, 2025, ICE conducted a file custody review and submitted the recommendation to the Supervisory Detention and Deportation Officer (SDDO). VanDerVaart Decl. ¶ 48. On March 11, 2025, ICE served a continued detention letter on Banyee via certified mail. A courtesy copy was sent to Banyee's attorney of record. ECF No. 2-8. VanDerVaart Decl. ¶ 49; Declaration of Ana H. Voss, Ex. 2.

In March 2025, the Department of Homeland Security ("DHS") issued guidance detailing its policy related to removals to third countries. VanDerVaart Decl. ¶ 50, Ex. 1.

On April 28, 2025, a nationality verification interview was completed with the embassy of Liberia. VanDerVaart Decl. ¶ 51. On April 30, 2025, HQ-RIO sent supporting documentation to the embassy of Liberia. VanDerVaart Decl. ¶ 52.

On May 7, 2025, ICE sent Banyee notice of his 180-day custody interview. ECF

No. 2-10. VanDerVaart Decl. ¶ 53.² On May 29, 2025, ICE conducted a 180-day custody interview with Banyee. The interview was in person at the Ft. Snelling ICE office. VanDerVaart Decl. ¶ 55.

On June 11, 2025, ICE served Banyee with a notice of third country removal. Banyee refused to sign the document. ECF 2-11 at 1. VanDerVaart Decl. ¶ 56.

On June 13, 2025, Banyee claimed a fear of return to Liberia. VanDerVaart Decl. ¶ 57. On June 23, 2025, ICE submitted a Reasonable Fear (RF) packet to U.S. Citizen and Immigration Services (USCIS) Asylum District 3 (ZAP). VanDerVaart Decl. ¶ 58.

On June 24, 2025, ZAP District 3 accepted and receipted the RF packet. USICS is in the process of scheduling a reasonable fear interview for Banyee.. VanDerVaart Decl. ¶¶ 59-61.

On July 8, 2025, ICE received a Liberian travel document valid to June of 2026. VanDerVaart Decl. ¶ 60.

d. *D.V.D* nationwide non-opt out class action.

In March 2025, three plaintiffs instituted the *D.V.D.* case in the District of Massachusetts, a putative class action suit challenging their third country removals. *D.V.D. v. DHS*, No. 25-10676-BEM (D. Mass.). On March 28, 2025, that Court entered a Temporary Restraining Order (ECF No. 34) enjoining DHS and others from “[r]emoving any individual subject to a final order of removal from the United States to a third country, *i.e.*, a country other than the country designated for removal in immigration proceedings”

² This document erroneously lists the date of his interview as 5/28/2024.

unless certain conditions are met. On April 18, 2025, the *D.V.D.* Court issued an order (ECF No. 64) granting the Plaintiff's motion for class certification (ECF No. 4) and motion for preliminary injunction (ECF No. 6). That Preliminary Injunction was national in effect, certified a non-opt out class, and established certain procedures that DHS was required to follow before removing an alien with a final order of removal to a third country. Relevant to this case, the class is defined as:

All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) who DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

Order at 23, *D.V.D.* (ECF No. 64).

On May 21, 2025, the *D.V.D.* Court issued a Memorandum on Preliminary Injunction (ECF No. 118) offering the following summary and clarification of its Preliminary Injunction:

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. Dkt. 64 at 46-47. Following notice, the individual must be given a meaningful opportunity, and a minimum of ten days, to raise a fear-based claim for [Convention Against Torture] protection prior to removal. *See id.* If the non-citizen demonstrates "reasonable fear" of removal to the third country, Defendants must move to reopen the non-citizen's immigration proceedings. *Id.* If the non-citizen is not found to have demonstrated a "reasonable fear" of removal to the third country, Defendants must provide a meaningful opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings. *Id.*

The *D.V.D.* Court indicated that the Order applied “to the Defendants, including the Department of Homeland Security, as well as their officers, agents, servants, employees, attorneys, any person acting in concert, and any person with notice of the Preliminary Injunction.” *Id.*

On June 23, 2025, the United States Supreme Court stayed the District of Massachusetts’ preliminary injunction pending appeal in the United States First Circuit Court of Appeals. *DHS v. D.V.D.*, No. 24-A-1153, 2025 WL 1732103 (2025). The United States filed its opening brief in the First Circuit on June 30, 2025. *D.V.D.*, et al., *DHS*, No. 25-1393 (1st Cir.)

e. Procedural History

Banyee filed his Petition in this case on July 1, 2025. In the Petition, Banyee acknowledges that he is detained under 8 U.S.C. § 1231(a)(6) following his final order of removal of December 11, 2024. ECF 1 ¶ 2. Banyee makes four claims. Claims I and II in his Petition challenge his detention directly, arguing that it violates the INA and that it is unconstitutionally prolonged. Claims III and IV focus on alleged statutory and due process violations Banyee says are inherent in ICE’s process for removing individuals to third countries. Because Banyee’s ongoing detention is lawful, this Court should deny his habeas petition.

II. Argument

a. Scope of Review

Judicial review of immigration matters, including immigration detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *see also Hampton v. Mow*

Sun Wong, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”). The Supreme Court has thus “underscore[d] the limited scope of inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.”).

b. Legal framework governing removal of aliens, who have received final orders of removal, to third countries.

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, provides the Executive Branch with the authority to execute orders of removal and to ensure that aliens who have been ordered removed are in fact removed from the United States. This authority is broad. The United States may remove aliens to various countries including, where other

options are unavailable, to any country willing and able to accept them. *See* 8 U.S.C. § 1231(b). Of course, under the statute and regulations implementing the Convention Against Torture (“CAT”), the United States will not remove any alien to a country where the United States has found he is likely to be tortured. Section 1231 provides, “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(A). The standard for “torture” is a high bar, *i.e.*, the extreme scenario where the alien is likely to face severe pain or suffering intentionally inflicted by the hand or with the consent of the public official. Showing “torture” sufficient to warrant CAT relief is a standard not easily met

Although the INA authorizes removal of aliens who have received a final order of removal to a third country, it does not provide any additional, specific process that aliens must receive under CAT after a final order of removal has been issued but prior to removal to a third country. Congress has delegated the decision regarding the appropriate process entirely to the Executive Branch. *See* 8 U.S.C. § 1231 note. In March 2025, The Department of Homeland Security (“DHS”) issued guidance detailing its policy in this context following President Trump’s Executive Order 14165, 90 Fed. Reg. 8467. VanDerVaart Decl., Ex. 1.

The DHS Guidance establishes a two-track system to address aliens who have been ordered removed but for various reasons cannot be sent to a country specifically designated in their removal orders. First, where the United States has received a sufficient assurance

from a third country that no aliens will be tortured upon removal there, the Executive may remove the alien to that country without any further process. *See* Ex. 1, Guidance at 1–2. A section applies for countries where the United States has not received such an assurance. In that case, the DHS policy provides that the alien is entitled to notice of the third country and an opportunity for a prompt screening of any asserted fear of being tortured there. *Id.* at 2. As noted above, Banyee has asserted a fear of removal to Liberia, and USCIS is planning to schedule him for an interview to assess his reasonable fear claim. His habeas petition should be denied.

c. This Court lacks jurisdiction to review Petitioner’s removal from the United States.

It appears that Petitioner’s underlying challenge seeks to stay ICE’s effectuation of his removal order. To the extent that is the effect of Petitioner’s requested relief, the Court lacks jurisdiction to provide such relief as 8 U.S.C. § 1252(g) precludes a district court from staying orders of removal. Section 1252(g) states that “no court shall have jurisdiction to hear any cause or claim by . . . any alien arising from the decision or action by [ICE] to . . . *execute removal orders against any alien.*” (emphasis added). This provision applies “notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title.” *Id.* Section 1252(g) is “directed against a particular evil: attempts to impose judicial constraints upon [certain categories of] prosecutorial discretion.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n.9 (1999). Indeed, stopping removal “would necessarily impose a judicial constraint on immigration authorities’ decision to execute the

removal order, contrary to the purpose of § 1252(g).” *Viana v. President of United States*, No. 18-cv-222-LM, 2018 WL 1587474, at *2 (D.N.H. Apr. 2, 2018), *aff’d sub nom. Viana v. Trump*, No. 18-1276, 2018 WL 11450369 (1st Cir. June 18, 2018); *Idokogi v. Ashcroft*, 66 Fed.App’x. 526, *1 (5th Cir. 2003) (“The relief sought by Idokogi in the district court is connected ‘directly and immediately’ with the Attorney General’s decision to commence removal proceedings against him. The district court therefore correctly determined that it lacked jurisdiction to stay the order of removal.”) (internal citations omitted); *Cardoso v. Reno*, 216 F.3d 512, 517 (5th Cir. 2000) (“Because this challenge is tantamount to a challenge to the execution of a removal order, section 1252(g) bars courts from exercising jurisdiction.”); *Fabuluje v. Immigration and Naturalization Agency*, 244 F.3d 133, 133 (5th Cir. 2000) (unpublished); *Mapoy v. Carroll*, 185 F.3d 224 (4th Cir. 1999).

Mapoy is instructive. There. The petitioner filed a habeas petition pursuant to 28 U.S.C. § 2241 and sought a preliminary injunction staying his removal while he attempted to reopen proceedings before the Board of Immigration Appeals (“BIA”) and adjust his status based on his marriage to a United States citizen. *Mapoy*, 185 F.3d at 225–26. The Fourth Circuit reversed the lower court’s grant of an injunction, holding that “Congress could have hardly been more clear and unequivocal that courts shall not have subject matter jurisdiction over claims arising from the actions of the Attorney General enumerated in § 1252(g) other than jurisdiction that is specifically provided by § 1252.” *Id.* at 230. The Court further noted that Section 1252(b) provided the only avenue for review, but even then, only allowed review from the BIA to the courts of appeal. *Id.*; *Nasrallah v. Barr*, 590 U.S. 573, 579 (2020) (noting how, with the passage of the REAL ID Act of 2005, Section

1252(b) was amended to funnel all “issues arising from a final order of removal” to the immigration courts with “direct review in the courts of appeals,” and thereby “eliminating review in the district courts”). In sum, the statutory scheme here forecloses any habeas review under section 2241 in district courts which seeks to stay the execution of a removal order. *Id.*; *see also Fernandez v. Keisler*, 502 F.3d 337, 346 (4th Cir. 2007) (holding that the provision of the INA channeling judicial review through courts of appeal “expressly eliminate[s] district courts’ habeas jurisdiction over removal orders”); *Loera Arellano v. Barr*, 785 Fed. Appx. 195 (4th Cir. 2019) (affirming dismissal of habeas action seeking stay of removal); *Futeryan-Cohen v. U.S. Immigration & Naturalization Svc.*, 34 Fed. Appx. 143, 145 (4th Cir. 2002) (reversing district court’s grant of habeas relief to stay order of deportation and ordering dismissal).

This statutory scheme is directly applicable to Petitioner’s case because it restricts the availability of judicial review of removal orders by expressly precluding habeas corpus jurisdiction and channeling review of such orders to the courts of appeal as “the sole and exclusive means for judicial review of an order of removal.” 8 U.S.C. § 1252(a)(5). The statute provides that review of all questions “arising from any action taken or proceeding brought to remove an alien” shall be available, *if at all*, only through a petition for review in the appropriate court of appeals. *Id.* § 1252(b)(9).

Additionally, Petitioner’s claims, which seek additional procedures not already provided by the Convention Against Torture (CAT), are likewise barred by Foreign Affairs Reform and Restructuring Act’s (FARRA) bar on challenges to the implementation of CAT. The INA provides that “a petition for review filed with an appropriate court of

appeals * * * shall be the sole and exclusive means for judicial review of any cause or claim under [CAT].” 8 U.S.C. 1252(a)(4). Likewise, FARRA confirms that “no court shall have jurisdiction to review * * * any * * * determination made with respect to the application of [CAT] * * * except as part of the review of a final order of removal.” § 2242(d), 112 Stat. 2681-822; see 8 C.F.R. 208.18(e). FARRA also bars judicial review of the “regulations adopted to implement [CAT],” and assigns to the Executive alone the duty to design procedures to “implement the obligations of the United States” under that treaty. § 2242(d), 112 Stat. 2681-822.

Banyee’s claims run afoul of these limits. Banyee’s challenges to DHS’s existing procedures for certain CAT claims—both concerns the “application” of CAT, and is a “cause or claim under [CAT].” Critically, CAT is not a self executing treaty and FARRA bars any action seeking to implement the treaty in a different way than provided by regulation. Accordingly, Petitioner’s claims seeking additional process to make additional fear claims that are not already provided by statute or regulation is barred by FARRA. Those claims, to the extent they are cognizable at all, must be brought in a petition for review. *See* 8 U.S.C. 1252(a)(4).

d. The Court should dismiss this matter and deny relief on Claims III and IV pending resolution of the already-certified class action in *D.V.D.*

Petitioner is a member of the non-opt out *D.V.D.* certified class. He is an individual subject to a final order of removal who ICE plans to deport to a third country. Because Petitioner is bound as a member of the non-opt out class of the *D.V.D.* nationwide injunction, which the Supreme Court has now stayed the injunction, and this Court should

dismiss the action. Simply put, Petitioner is not entitled to another bite at the apple before this Court to obtain relief that has already been stayed by the Supreme Court. Dismissal of Banyee’s Claims III and IV that are being litigated in D.V.D. is required.

“Multiple courts of appeal have approved the practice of staying a case, or dismissing it without prejudice, on the ground that the plaintiff is a member of a parallel class action.” *Wynn v. Vilsack*, No. 3:21-CV-514-MMH-LLL, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021) (collecting cases) (internal quotations omitted). As the Eighth Circuit stated,

After rendition of a final judgment, a class member is ordinarily bound by the result of a class action If a class member cannot relitigate issues raised in a class action after it has been resolved, a class member should not be able to prosecute a separate equitable action once his or her class has been certified.

Goff v. Menke, 672 F.2d 702, 704 (8th Cir. 1982). Thus, dismissal of this action in light of Petitioner’s membership in the *DVD* class is warranted. *See Horns v. Whalen*, 922 F.2d 835 (table), No. 90-6068, 1991 WL 78, at *2, 2 n.2 (4th Cir. Jan. 2, 1991) (holding that the district court was correct to avoid the risk of inconsistent adjudications); *see also McKinney v. Vilsack*, No. 2:21-00212-RWS, ECF No. 40 (E.D. Tex. Aug 30, 2021) (staying case pending resolution of the class action when according to defendants, plaintiff was a member of the two certified classes).

This Court should decline to exercise jurisdiction over Petitioner’s Petition also as a matter of comity because the District of Massachusetts has certified a class of people that will cover the same claim Petitioner is pursuing in the District of Minnesota. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982) (“There is a generally

recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.”). Multiple courts of appeal have held that it is not an abuse of discretion for a district court to decline to exercise jurisdiction over an issue pending in another court, particularly if the other case is a class action. *Goff*, 672 F.2d at 704); *Brown v. Vermillion*, 593 F.2d 321, 322-23 (8th Cir. 1979); *see also Horns*, 1991 WL 78, at *2, 2 n.2 (holding that the district court did not abuse its discretion in declining to decide issue that was subject of class action) (collecting similar district court cases); *McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991) (holding that individual suits for injunctive and declaratory relief cannot be brought where class action exists); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (same); *Groseclose v. Dutton*, 829 F.2d 581, 582 (6th Cir. 1987) (same); *Bennett v. Blanchard*, 802 F.2d 456 (6th Cir. 1986) (holding that duplicative suits should be dismissed once a class action certified); *Green v McKaskle*, 770 F.2d 445, 446-47 (5th Cir. 1985), *on reh’g*, 788 F.2d 1116 (5th Cir. 1986) (holding that class member should not be permitted to pursue an individual lawsuit seeking equitable relief within subject matter of class action); *Bryan v. Werner*, 516 F.2d 233, 239 (3d Cir. 1975) (finding that the district court did not err in refusing to consider an issue pending in a separate class action).

At its core, the Petition challenges how the Respondents should implement his third country removal. This Court should decline to wade into the petition’s claims regarding third country removal that are already being actively litigated before the First Circuit and upon which the Supreme Court has already stayed. To do otherwise would cut against the

entire purpose of a Rule 23(b)(2) non-opt out class action and risk an order that will conflict with the Supreme Court's stay. Moreover, class counsel in *D.V.D.* have already litigated several emergency motions related to the process given to several class members within the class action certified in the district of Massachusetts. Petitioner provides no conceivable reason why his case should proceed in this Court as a member of this non-opt out class. Thus, dismissal is warranted.

e. Respondents have not violated the INA or the CAT's implementing regulations in pursuing Banyee's removal.

Petitioner's removal does not violate the INA and regulations implementing the CAT. ECF No. 1 ¶¶ 78-83. At their core, Banyee's arguments are that the INA and CAT implementing regulations require the government provide notice to an alien subject to a final order of deportation of the third country to which he will be removed and additional process that does not appear in the law. *See generally id.* But that is not the case and the government's procedures for implementing CAT in cases involving removal to a third country are entirely consistent with due process.

First, Banyee concedes he is subject to an order of final removal. ECF No. 1 ¶ 2; ECF No. 2-6. In this regard, Banyee has already been presented the opportunity to voice his fear as to any countries of removal. In fact, Banyee asserted claims for asylum, withholding of removal and CAT relief as to the Ivory Coast, but these were denied by the IJ. ECF 1 ¶ 47. At that time, Petitioner did not identify fears with respect to any other countries of removal. But his failure to do so does not mean he has been denied the opportunity.

Second, as explained above, DHS' March Guidance satisfies all Constitutional requirements. The March Guidance makes clear that DHS will first inform the alien of removal to that country and then give him an opportunity establish that he fears removal there. VanDerVaart Decl., Ex. 1. DHS has done that here. Immigration officials will then screen Banyee to determine whether he "would more likely than not" be tortured in that country. *Id.* If not, he will be removed. If so, he will be placed in further administrative proceedings or the government may choose another country for removal, and the same protections will be implicated.

f. Petitioner's procedural due process claim fails.

Removing Petitioner without prior notice of the destination country does not violate his procedural due process rights under the Fifth Amendment rights. *See* ECF 1, Claim IV ¶¶ 84-87. The thrust of Petitioner's argument is removal without prior notice of the third country would deprive him of an opportunity to assert a fear claim and would therefore violate due process. *Id.* Banyee's concerns are inconsistent with the March Guidance, which affords him all process required. The DHS policy provides that the alien is entitled to notice of the third county and an opportunity for a prompt screening of any asserted fear of being tortured there. *Id.* at 2. Thus, the March Guidance does provide that Petitioner will be notified of the third country and afforded the ability to assert a fear claim. Given the fact the March Guidance affords Petitioner an opportunity to present a fear claim, which he has done, he is receiving due process.

Banyee's due process claim is at best premature. The Eighth Circuit has always required that an individual asserting a due process claim establish prejudice, which Banyee

fails to do. “[I]t is axiomatic in this Circuit that an alien’s due process claim must demonstrate both a fundamental procedural error *and* prejudice.” *Ramirez v. Sessions*, 902 F.3d 764, 772 (8th Cir. 2018). Here, Banyee has asserted a reasonable fear and will be scheduled for a reasonable fear interview. Banyee has not yet experience any deprivation of rights, and this Court should decline to presume he will be prejudiced.

g. Plaintiff cannot establish a violation of 8 U.S.C. § 1231(a)(6) because his detention is reasonable.

Banyee’s detention for just over 6 months under 8 U.S.C. § 1231(a)(6) is reasonable, and this Court should deny his habeas petition. The United States Supreme Court set forth a framework for evaluating the constitutionality of post-final order detention under 8 U.S.C. § 1321(a)(6) in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).). Under the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a person subject to a final order of removal cannot, consistent with the Due Process Clause, be detained *indefinitely* pending removal. 533 U.S. at 699-700. *Zadvydas* established a temporal marker: post-final order of removal detentions of six months or less are presumptively constitutional. 533 U.S. at 701. Detentions longer than six months comport with due process if a “significant likelihood of removal in the reasonably foreseeable future” exists. *Id.* As the Supreme Court explained:

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.

Id. (emphasis added).

Thus, under *Zadvydas*, a habeas petitioner has the initial burden of demonstrating that that there is no significant likelihood of his or her removal in the reasonably foreseeable future. *Id.* If the petitioner does so, the government must rebut that showing. *Id.*

After the Court's decision in *Zadvydas*, the U.S. Department of Homeland Security promulgated comprehensive regulations to implement the *Zadvydas* mandate. See 8 C.F.R. §§ 241.4, 241.13, 241.14, 66 Fed. Reg. 56967-01, 56969 (Nov. 14, 2001). Accord *Alexander v. U.S. Attorney General*, 495 F. App'x 274, 277 (3d Cir. 2012) ("*Zadvydas* is not the only word on post-removal detention; regulations promulgated around the time of, and after, the *Zadvydas* decision established a series of processes for determining whether an alien should be released from custody after the expiration of the ninety-day removal period."). These regulations govern immigration detention of aliens subject to a final order of removal and establish a systemized process for detention reviews.

Section 241.4 of the regulations requires that a detainee be given a post-order custody review before the 90-day statutory removal period expires, if removal cannot be accomplished during the 90-day period. 8 C.F.R. § 241.4(k)(1)(i). Numerous considerations factor into this initial custody review, including the detainee's criminal history. 8 C.F.R. § 241.4(f). To release a detainee at this point, DHS must conclude, among

other things, that he or she is “not likely to pose a threat to the community following release.” 8 C.F.R. § 241.4(e).

Section 241.13 addresses the substantial likelihood of removal in the reasonably foreseeable future standard established in *Zadvydas*. It provides numerous factors relevant to the standard, including the “ongoing nature of the Service’s efforts to remove this alien,” and states that “[w]here the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien’s removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.” 8 C.F.R. § 241.13(f).

1. Banyee has not met his burden under *Zadvydas*.

Banyee has not met his *Zadvydas* burden. Rather than showing that there is no significant likelihood of his removal in the near future, Banyee simply argues that his cumulative detention has lasted more than six months under a final removal order and that on information and belief, ICE is unlikely to produce a travel document to Liberia. ECF 1 ¶ 4. *Zadvydas*, however, establishes no such bright line rule regarding length of detention. Rather, the Court in *Zadvydas* explicitly recognized that detention longer than six months is constitutional if removal will be accomplished reasonably soon. 533 U.S. at 701. *See also* 8 C.F.R. § 241.13(f); *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (detainee must “present any facts indicating that the INS is incapable of executing his removal . . . and that his detention will, therefore, be of an indefinite nature”); *Gahamanyi v. Baniecke*, No. 07-cv-4007 (RHK/RLE), 2008 WL 5071098, at *11 (D. Minn. Nov. 24, 2008) (same). Banyee cannot discharge his burden by doing nothing more than citing the

total length of his detention post-removal order. *See Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1365-68 (N.D. Ga. 2002) (mere passage of time insufficient to meet alien's burden of proof); *Lema v. U.S. I.N.S.*, 214 F. Supp. 2d 1116, 1118 (W.D. Wa. 2002) (same).

The United States does have a valid travel document for Banyee's removal to Liberia. As a result, Banyee has not met his burden under *Zadvydas*; this Court should dismiss his Petition for this reason alone.

2. There is a significant likelihood that Banyee will be removed in the reasonably foreseeable future.

But even if Banyee had met his burden under *Zadvydas*, immigration officials have solidly rebutted any such showing. The Declaration of Deportation Officer John VanDerVaart lays out the basis for detaining Banyee and the ongoing process of removing him. VanDerVaart details the extensive efforts immigration officials have made since December 2024 to effectuate Banyee's removal. *See, supra*, Factual Background, § I.c.

Through those efforts, ICE has found a country that is willing to accept Banyee. Removals to Liberia have occurred routinely. ICE's publicly available removal statistics show that in FY2025, Liberia repatriated 16 individuals with criminal convictions, and 29 individuals in FY2024. *See* ICE Removal Statistics, available at <https://www.ice.gov/statistics> (last visited July 14, 2025)(sorted by Country of Citizenship). Upon resolution of Mr. Banyee's reasonable fear claim (the substance of which is, of course, not before the Court), removal is likely. Due to the ongoing efforts by immigration officials, Banyee's removal is substantially likely to occur in the reasonably foreseeable future.

This satisfies *Zadvydas*. See, e.g., *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1136 (S.D. Cal. 2001) (new repatriation procedure in place was sufficient to show removal substantially likely in reasonably foreseeable future); *Jaiteh v. Gonzales*, No. 07-cv-1727 (PJS/JJG), 2008 WL 2097592, at *3 (D. Minn. Apr. 28, 2008), *report and recommendation adopted*, 2008 WL 2074163 (May 14, 2008) (“[W]here a foreign country ordinarily accepts repatriation, and that country is acting on an application for travel documents, most courts conclude the alien fails to show no significant likelihood of removal.”). Cf. *Zadvydas*, 533 U.S. 684-85 (detainee was stateless); *Jama v. ICE*, 01-cv-1172 (JRT/AJB), 2005 WL 1205160, at *4 (D. Minn. May 20, 2005) (habeas relief granted where failed deportation attempt occurred and court concluded that it “may well be impossible” under the conditions in Somalia at that time). Here, Banyee is not stateless, and, far from “impossible,” his removal is likely, given the progress ICE has made in effectuating his removal.

The Southern District of California denied a habeas petition under similar circumstances. In *Gubanov v. Archambeault*, 2021 WL 242959, at *4 (S.D. Cal. 2021), Petitioner was in detention awaiting a travel document from Russia, the country to which he had been ordered removed, and of his supposed citizenship. Six months after he was detained, ICE received notice that Russia did not recognize him as a citizen. *Id.* at *2. ICE then made requests to Kazakhstan, Uzbekistan and the Kyrgyz Republic for acceptance as a deportee. *Id.* The Court denied the habeas petition, citing the progress that had been made and the reasons for the delay, even though no travel document had been procured. *Id.* at *4.

Here, ICE has a travel document for Banyee. There is no delay at all; Banyee has been in detention just over 7 months. Mr. Banyee has asserted reasonable fear, and it is entirely reasonable for him to remain in detention as that progresses. This Court should allow that process to play out.

As Magistrate Judge Thorson noted in a similar case, there are generally five circumstances where courts have found no significant likelihood of removal: “(1) where the detainee is stateless, and no country will accept [him]; (2) where the detainee’s country of origin refuses to issue a travel document; (3) where there is no repatriation agreement between the detainee’s native country and the United States; (4) where political conditions in the country of origin render removal virtually impossible; and (5) where a foreign country’s delay in issuing travel documents is so extraordinarily long that the delay itself warrants an inference that the documents will likely never issue.” *Ahmed v. Brott*, No. 14-cv-5000 (DSD/BRT), 2015 WL 1542131, at *4 (D. Minn. Mar. 17, 2015), *report and recommendation adopted*, 2015 WL 1542155 (Apr. 7, 2015).

Banyee does not fall into any of these categories. His continued detention satisfies constitutional due process, as explained in *Zadvydas*. He is not being detained indefinitely, and he is likely to be removed upon resolution of his reasonable fear process. *See, e.g., Joseph K. v. Berg*, No. 18-cv-3125 (DWF/HB), 2019 WL 13254377, at *3-4 (D. Minn. Mar. 15, 2019), *report and recommendation adopted*, 2019 WL 13254378 (May 3, 2019); (recommending denial of habeas petition while removal to Liberia had taken ten months); *Nadin K. v. Barr*, No. 18-cv-3223 (PJS/BRT), 2019 WL 13254351, at *3 (D. Minn. Mar. 11, 2019), *report and recommendation rejected as moot*, 2019 WL 23387804 (May 17,

2019) (same). Thus, even if Banyee could meet his burden under *Zadvydas*, Respondents have adduced evidence showing a significant likelihood of removal in the reasonably foreseeable future. Accordingly, his Petition should be denied.

III. CONCLUSION

For the foregoing reasons, the Court should deny Banyee's habeas petition.

Respectfully submitted,

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