UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TOUNI GHAMELIAN,

Petitioner,

v.

NIKITA BAKER, et al.

Respondents.

PETITIONER'S TRAVERSE AND OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS OR STAY

Case No. 25-02106-SAG

PETITIONER'S TRAVERSE AND OPPOSITION TO GOVERNMENT'S MOTION TO DISMISS OR STAY

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For the reasons that follow, the Court should issue a writ of habeas corpus and deny Respondents' Motion to Dismiss. Dkt. 8.

Introduction

Petitioner's hastily-filed[1] petition for a writ of habeas corpus sought modest relief: notice of the country to which Respondents intend to deport him, and a meaningful opportunity to be heard on a claim that his life or freedom would be threatened in that third country. At the time, Petitioner's counsel was unaware that Respondents had apparently notified Petitioner that they were seeking to deport him to Spain[2] or Mexico. Having learned that Mexico was under consideration, Petitioner did precisely what one would expect a noncitizen to do with such notice: he immediately filed with the Board of Immigration Appeals an emergency motion to reopen his removal proceedings. Exh. 1. The motion and evidence attached to it demonstrates that Mexico would be an unsafe third country to remove Petitioner to, because Mexico engages in chain refoulement – that is, it deports people to their countries of citizenship regardless of whether U.S. immigration authorities have determined that they are more likely than not to be persecuted or tortured in those countries. Petitioner has never before had the opportunity to seek relief from removal to Mexico because Mexico was not designated as the country of removal in his immigration case.[3]

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[1] When the habeas petition was filed, it was unclear whether Petitioner's removal from this jurisdiction and possibly from the United States was imminent. Petitioner's counsel did not have sufficient time to gather all the facts that have now come to light. For this reason, Petitioner is simultaneously filing an amended habeas petition.

[2] The removal order attached to Respondents' opposition reflects that Petitioner was ordered removed to Iran and Spain. Dkt. 8-3. Petitioner does not contend he is more likely than not to face persecution or torture in Spain.

[3] The motion does more than demonstrate that Petitioner has a reasonable fear of persecution or torture if deported to Mexico. It also establishes that circumstances have materially changed in Iran, following the United States' bombing campaign against the country, such that someone like Petitioner, an Armenian Christian who has resided in the United States nearly his entire life, cannot safely return there either. Noncitizens enjoy the right to file a motion to reopen to

What Petitioner seeks is that the Court stay his removal until he can obtain administrative and judicial review of his motion to reopen.[4] Other courts within this district have granted similar relief in similar circumstances. Moreover, and especially if the Court grants this relief, the Court should further order Petitioner's release from custody, because his continued detention would be arbitrary.

Standard

A motion under Federal Rule of Civil Procedure 12(b)(1) should be granted only if the complaint fails to allege facts sufficient to establish subject matter jurisdiction, or if the facts, taken as true, clearly show a lack of jurisdiction. *See Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir. 2009). A moving party may challenge subject matter jurisdiction either by contending that a complaint "fails to allege facts upon which subject matter jurisdiction can be based" or that the "jurisdictional allegations of the complaint [are] not true." *Adams v. Bain*, 697 F.3d 1213, 1219 (4th Cir. 1982). Where a respondent takes the former approach, "the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration[.]" *Kerns*, 585 F.3d at 192 (internal quotations and citations omitted). In other words, the facts alleged in the complaint

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seek asylum, withholding of removal, and protection from removal under the Convention Against Torture, at any time if the motion is based on changed conditions arising in the country of nationality. 8 U.S.C. § 1229a(c)(7)(C)(ii).

Petitioner also advances in his motion to reopen that he should not have been ordered deported in the first place. The records Respondents filed with their motion to dismiss, including the decision of the immigration judge, Dkt. 8-4, show that Petitioner was stripped of his lawful permanent resident status because the immigration judge concluded that the crime Petitioner was convicted of in 1996 qualifies as an "aggravated felony." It happens that in 2015, the Ninth Circuit Court of Appeals, which is the controlling jurisdiction for purposes of Petitioner's removal proceedings, 8 U.S.C. § 1252(b)(2), determined that *the very crime Petitioner was convicted of* is ***not*** in fact an aggravated felony. *Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1306–07 (9th Cir. 2015). If Petitioner prevails on this argument, he should be restored to his lawful permanent resident status.

[4] If Respondents wish to remove Petitioner to any country other than Spain, Mexico, or Iran, Petitioner asks that the Court grant the relief initially sought – an order that Respondents notify him of the identity of the third country and afford him a meaningful opportunity to demonstrate that his life or freedom would be threatened there.

must be taken as true and viewed in the light most favorable to the nonmoving party, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction. *See Jenkins v. Medfor*, 119 F.3d 1156, 1159 (4th Cir. 1997). If instead, the respondent challenges the "factual predicate" of the subject matter jurisdiction, the non-moving party is afforded "less procedural protection[.]" *Kerns*, 585 F.3d at 19.

Here, Respondents do not contest the veracity of the facts in Petitioner's habeas petition; rather, they assert that the facts do not supply this Court with jurisdiction. As such, the facts in the petition should be construed in the light most favorable to him.

Argument

I. The Court has Jurisdiction to Grant the Relief Requested

First, Respondents argue that the Court lacks jurisdiction to interfere with Petitioner's removal, citing 8 U.S.C. §§ 1252(b)(9) and 1252(g). Respondents' expansive reading of these statutes is directly at odds with decisions of the United States Supreme Court and the U.S. Court of Appeals for the Fourth Circuit, which have made clear that district courts sitting in habeas retain jurisdiction to decide constitutional questions and pure questions of law that could not have been raised in removal proceedings.

a. Section 1252(g) Does Not Bar Jurisdiction

Petitioner does not challenge a discretionary decision to commence a proceeding, adjudicate a case, or execute a removal order. Rather, Petitioner challenges as unconstitutional and ultra vires Respondents' attempts to remove Petitioner to Mexico—a country which no immigration judge has ever designated for his removal—without an opportunity to show that his life or freedom would be threatened there. Because this claim arises under the Constitution and constitutes a violation of the INA, it falls squarely within the purview of this Court to review.

The jurisdiction channeling provision at 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and 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, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

The Supreme Court has explained that 8 U.S.C. § 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 & n.9 (1999) (hereinafter "*AADC*") ("Section 1252(g) seems clearly designed to give some measure of protection to . . . discretionary determinations.").

In *AADC*, the Supreme Court emphasized that the provision does not encompass the universe of all possible acts and events arising from removal proceedings, but rather instructs courts to read it as a narrow provision that "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* at 482 (emphases in original) (quoting section 1252(g) and rejecting the government's claims that the statute applied to all claims arising from deportation proceedings). *See also Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (reaffirming *AADC* and stating that the statute does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General").

Here, Petitioner's claims do not arise from Respondents' discretionary decision to execute his removal order to Spain or Iran. What he challenges is Respondents' authority to effectively depart from his removal order by designating new countries for removal outside of his immigration proceedings in circumvention of his due process rights and the carefully crafted scheme that Congress has set forth in the INA. Section 1252(g) plainly does not apply, as the U.S. District

Court for the District of Massachusetts concluded when confronted with the precise argument Respondents advance here. *D.V.D. v. U.S. Dep't of Homeland Security*, __ F. Supp. 3d __, 2025 WL 114968 at *10-11 (D. Mass. 2025).

Respondents cite *Mapoy v. Carroll*, 185 F.3d 224, 230 (4th Cir. 1999) for the proposition this Court cannot intervene in Petitioner's case. They are wrong in doing so. *Bowrin v. I.N.S.*, decided after *Mapoy*, reflects the Fourth Circuit's understanding of the law in this arena. 194 F.3d 483, 490 (4th Cir. 1999). In *Bowrin*, the Fourth Circuit held that notwithstanding the jurisdiction-stripping provisions upon which Respondents rely, "district courts reviewing aliens' habeas petitions filed pursuant to § 2241 may consider both statutory and constitutional questions when presented." Multiple courts within the Fourth Circuit have concluded that when a noncitizen files a habeas petition raising purely legal and constitutional challenges to the legality of a removal, *Bowrin*, not *Mapoy*, controls. *See Siahaan v. Madrigal*, No. PWG-20-02618, 2020 WL 5893638 at *4-*6 (D. Md. Oct. 5, 2020); *Joshua M. v. Barr*, 439 F. Supp. 3d 632, 667 (E.D. Va. 2020) (noting that *INS v. St. Cyr*, 533 U.S. 289 (2001), which found habeas jurisdiction to review questions of law, resolved any dispute over district courts' habeas jurisdiction over legal questions in *Bowrin*'s favor).

Petitioner's case resembles *Siahaan v. Madrigal*, No. PWG-20-02618, 2020 WL 5893638 *1 (D. Md. Oct. 5, 2020) in certain respects. There, a non-citizen ordered removed in 2003 filed a motion to reopen with the BIA in 2020 to request relief based on materially changed conditions in his country of origin that did not exist at the time he was first ordered removed. When ICE attempted to remove him prior to adjudication of his motion to reopen, Judge Grimm determined that the court had jurisdiction over Mr. Siahaan's claims that ICE "violated the law when they

detained him in order to remove him before he [could] complete his exercise of his statutory right to [apply for relief]." *Id.* at 5.

Such is the case here, where Petitioner has, since receiving notice of Respondents' intention to remove him to Mexico—a third country not designated in his removal proceedings—filed an emergency motion to reopen. As in *Siahaan*, Petitioner here does not ask this Court to revisit the underlying removal proceedings. Instead, he seeks to enjoin Respondents from violating his constitutional and statutory rights to contest removal to Mexico, a new country that poses serious risks to his safety.[5] The District of Maryland granted substantially similar relief to that which Petitioner seeks here. *Siahaan*, at *9 ("Accordingly, ICE is enjoined from removing Siahaan until he has completed his pending motion to reopen before the BIA and any appeal he chooses to pursue in the Fourth Circuit.").

b. Section 1252(b)(9) Does Not Bar Jurisdiction

Turning to 8 U.S.C. § 1252(b)(9), entitled "Consolidation of questions for judicial review," Respondents fare no better. They argue that this Court has no jurisdiction under § 1252(b)(9) because Petitioner has a "final order of removal to Spain and if Spain does not accept him, Iran." Dkt.8-1 at 8. This, they argue, "should resolve this claim for itself[,]" because he cannot ask this Court to consider challenges to his removal orders. *Id.* Glaringly absent from Respondents' two-page argument on this point is that the government now seeks to remove him to a country not previously raised in his removal proceedings.

Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this

[5] In the Motion to Reopen, Petitioner also requests re-opening due to changed country conditions in Iran.

> subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). The Supreme Court has explained that the purpose of this clause, known as the "zipper clause," is to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals . . . " *INS v. St. Cyr*, 553 U.S. 289, 313 (2001). While it may appear capacious, the Court has made clear that the words "arising from" in Section 1252(b)(9) must be interpreted narrowly and do not encompass all claims that may result from a potential removal. *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018).

In *Jennings*, which concerned the legality of prolonged mandatory immigration detention, the Court explained that, because the challengers were "not asking for review of an order of removal," "not challenging the decision to detain them in the first place or to seek removal," and "not even challenging any part of the process by which their removability will be determined," the restriction in section 1252(b)(9) did not apply. *Id.* Notably, under *Jennings*, an individual is not required to "cram[ ]" claims into the judicial review of a removal order where doing so would be "absurd." *Id.* In essence, Section 1252(b)(9) clarifies that judicial review of claims that could have been litigated in removal proceedings belong in the court of appeals in connection with petitions for review of removal orders.

And so, the question arises: could the issues Petitioner raises before this Court have been litigated at the court of appeals following the conclusion of his removal proceedings? The answer is a resounding no. Respondents assert that Section 1252(b)(9) bars Petitioner, who was ordered removed *twenty-seven years ago*, from bringing a challenge to actions Respondents are taking

now, under a policy they adopted *this year*, to deport him to a country that was not designated in his immigration case and which he could not have challenged in 1998. In other words, Petitioner is complaining *not* of actions that took place during his removal proceedings, but of actions that are taking place now, twenty-seven years later, which he could not have raised in a petition for review of his removal order. This is the appropriate—and indeed, the only—forum that can provide the relief Petitioner requires to safeguard his rights.[6]

In their Motion to Dismiss, Respondents rely on dicta from *E.O.H.C. v. U.S. Dep't of Homeland Sec.*, 950 F.3d 177 (3d Cir. 2020), a case which supports Petitioner's position that this Court has jurisdiction over the instant habeas petition. Dkt. 8-1 at 8. In *E.O.H.C.*, the Third Circuit held that the district court had jurisdiction over the constitutional and fear-based claims of Guatemalan noncitizens facing removal to Mexico under the Migrant Protection Protocols to await their removal proceedings. The court announced its test for determining whether the jurisdiction-stripping provisions apply:

> [w]e must ask: if not now, when? If the answer would otherwise be never, then 1252(b)(9) poses no jurisdictional bar. In other words, it does not strip jurisdiction

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[6] The Board of Immigration Appeals has the authority to order a stay of Petitioner's removal pending a ruling on his motion. 8 C.F.R. § 1003.2(f). However, the Board retains discretion to deny reopening even where the movant makes out a prima facie claim for relief. 8 C.F.R. § 1003.2(a). Moreover, the Board's emergency stay procedures fail to provide Petitioner the certainty that he can avoid an unlawful removal and attendant irreparable harm. *See generally* Board of Immigration Appeals Practice Manual, Ch. 6 – Stays and Expedite Requests, § 6.3 – Discretionary Stays, https://www.justice.gov/eoir/reference-materials/bia/chapter-6/3. The Board is closed on weekends and does not adjudicate emergency stay motions unless ICE confirms that removal is imminent. EOIR Factsheet: BIA Emergency Stay Requests (Mar. 2018), https://www.justice.gov/eoir/page/file/1043831/dl?inline. But with ICE undertaking rushed third country removals in the dead of night, only this Court, not the Board, can assure that Petitioner will enjoy the rights secured to him by the Due Process Clause, the Immigration and Nationality Act, and the regulations implementing the Convention Against Torture. *See J.G.G. v. Trump*, __ F. Supp. 3d __, 2025 WL 1119481 at *1-*5 (D.D.C. Apr. 16, 2025) (describing third country removals that transpired at "breakneck speed because of the Government's apparent effort to remove individuals more quickly than the judicial proceedings in which it was actively participating could keep pace."); *see also A.A.R.P. v. Trump*, 605 U.S. __, 145 S. Ct. 1364, 1366-67 (May 16, 2025) ("We understood the Government to assert the right to remove the detainees as soon as midnight central time on April 19[,]" a mere day after the district court had denied a TRO and while the detainees were seeking review at the circuit court).

> when aliens seek relief that courts cannot meaningfully provide alongside review of a final order of removal.

Id. at 186. The key holding from that case applies with equal force here: "some immigration-related claims cannot wait. When a detained alien seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar consideration by a district court." *Id.* at 180. *See also J.S.G. ex rel. Hernandez v. Stirrup*, No. SAG-20-1026, 2020 WL 1985041 *5 (D. Md. Apr. 26, 2020) (favorably discussing *E.O.H.C.*).

Like the noncitizens in *E.O.H.C.*, who feared temporary return to Mexico and had no process to challenge it within the removal proceedings to Guatemala, Petitioner faces removal to Mexico and had no process to challenge that removal in his 1998 proceedings as to Iran and Spain. As in *E.O.H.C.*, if this court does not intervene, removal to Mexico could occur before a circuit court could adjudicate a Petition for Review, effectively mooting any opportunity for relief. This is precisely the "now-or-never" situation that *E-O-H-C* contemplated.

II. Petitioner's Removal to Mexico Without an Opportunity to Present a Fear-Based Claim Would Be Unlawful

Removing Petitioner to Mexico, a country never previously designated in his removal proceedings, without the opportunity to challenge his deportation would violate the Immigration and Nationality Act, the regulations implementing the Convention Against Torture, and the United States' treaty obligations. The law could not be clearer. Respondents have statutory, regulatory, and treaty-based obligations to not remove foreign nationals to countries where their life or freedom would be threatened. *See, e.g.*, *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020); U.S.C. §§ 1158(a)(1), 1231(b)(3); FARRA, Pub. L. No. 105-277, Div. G, Title XXII, 112 Stat. 2681 (1998)

(codified as Note to 8 U.S.C. § 1231); 8 C.F.R. § 1208.17(b)(2) (a noncitizen may be removed "to another country where he or she is not likely to be tortured") (emphasis added).[7]

Congress developed an elaborate scheme to ensure that individuals would be afforded notice of the country to which the United States intends to deport them and an opportunity to seek fear-based protection from deportation to that country in the form of asylum, statutory withholding of removal, and withholding and deferral of removal under the Convention Against Torture. *See* ¶¶ 13– 20. Petition for Writ of Habeas Corpus. The right to notice and an opportunity to challenge removal applies with equal force when the government seeks to remove a noncitizen to a third country. Pursuant to 8 U.S.C. § 1231(b)(3)(A), courts have held repeatedly that individuals cannot be removed to a country that was not properly designated by an IJ if they have a fear of persecution or torture. *See Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999); *Kossov v. INS*, 132 F.3d 405, 408-09 (7th Cir. 1998); *El Himri v. Ashcroft*, 378 F.3d 932, 938-39 (9th Cir. 2004); *cf. Protsenko v. U.S. Att'y Gen.*, 149 F. App'x 947, 953 (11th Cir. 2005). Providing such notice and opportunity to present a fear-based claim prior to deportation also implements the United States' obligations under international law.

Removing Petitioner to Mexico without affording him an opportunity to seek fear-based relief would violate both domestic and international law. Mexico was not designated as country of

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[7] Indeed, even where the government seeks to terminate CAT protection and deport a noncitizen to a country where removal was previously deferred, it must first move for a new hearing with evidence regarding the likelihood of torture "in the country to which removal has been deferred and that was not presented at the previous hearing." 8 C.F.R. 1208.17(d)(1). If a new hearing is granted, the IJ must provide notice "of the time, place, and date of the termination hearing," and must inform the noncitizen of the right to "supplement the information in his or her initial [CAT] application . . . within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail)." 8 C.F.R. 1208.17(d)(2). Thus, the noncitizen receives both notice and an opportunity to document their protection claim.

removal during Petitioner's 1998 immigration proceedings and Petitioner was limited to the countries designated in presenting his claims. *See* 8 C.F.R. § 1208.16(b) (IJs have no obligation to consider claims about a country that is not a "proposed country of removal"); *Sadychov v. Holder*, 565 F. App'x 648, 651 (9th Cir. 2014) ("[A]n applicant is not entitled to have the agency adjudicate claims of relief that relate 'to a country that nobody is trying to send them to.'"). Respondents now seek to remove Petitioner to Mexico before he has a meaningful opportunity to have his fear of persecution and torture considered by a neutral decisionmaker.

This procedural end-run could well be deadly for Petitioner. Mexico has a well-documented practice of rapidly deporting third-country nationals to their countries of origin. In Petitioner's case, this could mean an immediate and involuntary transfer to Iran, where he faces a near certainty of persecution and torture.[8] Although Petitioner did not receive protection from removal to Iran when his case was decided in 1998, circumstances have drastically changed over the nearly thirty years that have elapsed. Petitioner, a Christian, now has religious tattoos that would easily reveal his religion in Iran, a country governed by Islamic fundamentalists. Moreover,

[8] In response, Respondents will surely point to the fact that Petitioner unsuccessfully applied for withholding of removal and CAT deferral in 1998 when he was before the immigration judge. However, the immigration judge never reached the merits of Petitioner's withholding claim because he concluded that Petitioner's criminal conviction barred him from that relief. The CAT analysis, moreover, was limited to one sentence of *ipse dixit*: "[T]his Court has considered matters under the torture convention, there is simply nothing that would point to any reasonable expectation that by government auspices, this young man would be subject to torture. . . ." This caliber of decision-making is concerning since Petitioner entered the United States as a refugee from Iran. In any case, at this juncture, one need not look far to know that the risk of persecution and torture Petitioner faces as an Americanized Armenian Christian who fled the country after the revolution is considerable. *See, e.g., See* Center for Human Rights in Iran, *Imprisonment of Christians Jumps Six-Fold in Iran as Persecution Intensifies*, Apr. 1, 2025, available at: https://iranhumanrights.org/2025/04/imprisonment-of-christians-jumps-six-fold-in-iran-as-persecution-intensifies/; Bureau of Consular Affairs, *Iran Travel Advisory*, U.S. Department of State, Mar. 31, 2025, available at: https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/iran-travel-advisory.html ("Iranian authorities continue to unjustly detain U.S. nationals without warning or any evidence they committed a crime. This includes U.S.-Iranian nationals . . . . Having a U.S. passport or connections to the United States can be enough for Iranian authorities to detain someone.").

as his motion to reopen demonstrates, as an Americanized person who has lived in the United States for the vast majority of his life, Petitioner is at significant risk of torture in Iran. Exh. A.

Under the Constitution, INA, implementing regulations, and binding treaties, Petitioner must receive a meaningful opportunity to present these claims before removal to Mexico or onward to Iran may lawfully occur. *See e.g. Vaskanyan v. Janecka*, 25-cv-01475 *11 (C.D. Cal. Jun. 25, 2025) (finding removal to a third country not designated in removal proceedings without adequate notice and opportunity to be heard constitutes "irreparable harm, plan and simple); *Y.J.C. v. Oddo*, 24-cv-179 (W.D. Pa. Jun. 26, 2025) (granting TRO where government sought to deport Haitian citizen to Mexico with insufficient notice and opportunity to be heard regarding his removal). A meaningful opportunity to seek protection requires Petitioner to remain in the country until his emergency motion to reopen is adjudicated.

III. Respondents' Re-detention of Petitioner is Unlawful

Respondents contend that Petitioner's detention is lawful under 8 U.S.C. § 1231(a)(1)(A), which provides immigration authorities with 90 days during which they may effectuate a removal. Once the removal period expires, ICE may only continue detention under certain circumstances. *See* 8 U.S.C. 1231(a)(1)(C); (c)(2)(A); (a)(6). Respondents concede that the 90-day removal period has expired but claim authority to detain Petitioner under § 1231(a)(6) because he is a noncitizen "with a final order of removal who has been convicted of an aggravated felony[.]"[9] Regardless, Petitioner's arbitrary re-detention is unlawful, and this Court should order him released.

a. Petitioner's Re-Detention Violates the Fifth Amendment of the Due Process Clause

[9] In fact, Petitioner has not been convicted of an aggravated felony. *See supra* Note 3.

Respondents argue that Petitioner's Fifth Amendment challenge to his detention is premature because he has only been detained for "eleven days[.]" Dkt. 8-1 at 12. This assertion overlooks a critical fact: the 90-day statutory removal period and six-month presumptively reasonable period for continued removal efforts lapsed long ago, after Petitioner's removal orders to Spain and Iran became administratively final following the BIA's dismissal of his appeal on February 10, 2000. Dkt. 8-1 at 4. The presumptively reasonable six-month period should not be read to allow a new detention every time the government identifies a new country to which it wishes to remove Petitioner, who presents no flight risk or danger to the community.

When a person is ordered removed, 8 U.S.C. § 1231(a) authorizes detention during the 90-day removal period during which "the Attorney General shall remove the [noncitizen] from the United States." 8 U.S.C. § 1231(a)(1)(A). The removal period begins on the latest of three triggering dates: (1) the date the order of removal becomes administratively final; (2) the date of a final judicial order; and (3) the date the noncitizen is released from criminal custody. 8 U.S.C. § 1231(a)(1)(B)(i-iii). Detention beyond that period is subject to constitutional limitations. *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001).

In *Zadvydas*, the Court interpreted § 1231(a)(6) in light of its underlying statutory and constitutional principles. The regulatory goals of the post-order detention statute are to ensure a noncitizen's appearance at future proceedings and to protect the public from danger. *Id.* at 690. But where removal is no longer reasonably foreseeable, detention no longer serves to prevent flight risk. *Id.* (preventing flight risk is a "weak or nonexistent [justification] where removal seems a remote possibility at best"). The Court held that "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699.

Zadvydas did not give the government blanket authority to detain noncitizens for reoccurring six-month periods whenever it might eventually become possible to effectuate a removal. Recognizing that the government could not accomplish all removals within 90 days, the *Zadvydas* Court held that six months is a presumptively reasonable period during which to effectuate a *reasonably foreseeable* removal. *Id.* at 701 (emphasis added). Thus, the analysis that this Court must engage in requires more than simply counting the number of days Petitioner he has sat in detention each time he is re-detained by Respondents. Courts sitting in habeas must consider "whether the detention in question exceeds a period reasonably necessary to secure removal." *Id.* at 699. The touchstone of reasonableness in this calculus depends on the statute's "basic purpose" of "assuring the [noncitizen's] presence at the moment of removal." *Id.* If removal is not reasonably foreseeable, "the court should hold continued detention unreasonable and no longer authorized." *Id.* at 680.

In *Tadros v. Noem*, the U.S. District Court for the District of New Jersey considered the case of a noncitizen subject to a final order of removal issued 16 years prior. 25-cv-4108, 2025 WL 1678501 *1 (D.N.J. Jun. 13, 2025). Despite compliance with post-release supervision requirements, ICE re-detained the noncitizen to attempt to remove him to a third country. *Id.* at *2. The government asserted that the detention, having lasted less than six months, foreclosed a *Zadyvdas* challenge and that its "efforts to facilitate" removal to a third country justified the noncitizen's re-detention. *Id.* (internal quotation marks omitted). In ordering the government to show cause why the habeas petition should not be granted, the court emphasized the government's failure to identify any "change in circumstances" justifying the renewed detention:

> Tadros's release [in 2009] suggests he was determined not to present a flight risk, and that the Government was unlikely to find a third country to accept him in the reasonably foreseeable future. Furthermore, Tadros has demonstrated there is no

> significant likelihood of his removal in the reasonably foreseeable future because *fifteen years have gone by without the Government securing a third country for his removal.* Respondents' sole statement that 'ICE has been making efforts to facilitate Petitioner's removal to a country other than Egypt' is insufficient to rebut the presumption established by Tadros.

Id. (emphasis added). The court granted the habeas petition on June 17, 2025. *Tadros v. Noem*, 2:25-cv-04108 (D.N.J. Jun. 17, 2025). *See also Ortega v. Kaiser*, 25-cv-05259, 2025 WL 1771438 *5 (N.D. Cal. Jun. 26, 2025) (granting TRO enjoining re-detention of noncitizen with final order of removal who had complied supervision requirements).

Likewise here, Respondents have provided no changed circumstances that would justify Petitioner's re-detention or which have made his removal reasonably foreseeable. Respondents present no evidence that Petitioner's removal to Spain or Mexico will occur within the reasonably foreseeable future. In their Opposition, Respondents characterize Petitioner's removal to Mexico or Spain as being "in process," Dkt. 8-1 at 13, but what the Notice of Revocation of Release actually says is that Petitioner's case is "*under review* by the Government of Spain and Mexico for the issuance of a travel document to facilitate your removal from the United States." Dkt. 8-9 (emphasis added). This presumably means nothing more than that Respondents have submitted *requests* for the issuance of travel documents to Spain and Mexico, countries Petitioner has never been a citizen of. Respondents have produced no evidence—not even a sworn declaration from an official with first-hand knowledge of the status of ICE's travel document requests—to suggest that these countries will actually issue travel documents to Petitioner, let alone that his removal is significantly likely in the reasonably foreseeable future.

The possibility that a government with which Petitioner has no ties—especially one, like Spain, that has not issued Petitioner a travel document over the past twenty-seven years—*might* suddenly reverse course and issue him a travel document falls woefully below the requirement that

removal be reasonably foreseeable. *See, e.g. Mahmood v. Nielsen*, 312 F.Supp.3d 417, 424-25 (S.D.N.Y 2018) (holding petitioner's removal to Pakistan not reasonably foreseeable where multiple requests for travel documents were made and where consulate provided no indication that it would issue travel documents); *Vaskanyan v. Janecka*, 25-cv-01475 (C.D. Cal. Jun. 25, 2025) (granting TRO and finding ICE's claims that it would receive a response on third country citizenship application in two weeks to show, "[a]t best . . .'good faith efforts to effectuate'" deportation, a standard which *Zadvydas* "expressly rejected[.]").

Furthermore, insofar as the purpose of post-order detention is to secure an individual's presence at the moment of his removal, Petitioner has consistently demonstrated that confinement is unnecessary to achieve that goal in his case. Like the non-citizen in *Tadros*, he was released from detention decades ago, and since then, he has not been charged with or convicted of any crimes and has complied fully with all supervision and reporting requirements without incident. Respondents offer no evidence to suggest that after twenty-seven years of compliance, Petitioner would abruptly change course and abscond if his removal were scheduled. *See Diaz v. Kaiser*, 25-cv-05071, 2025 WL 1676854 *1 (N.D. Cal. Jun. 14, 2025) (enjoining government from re-detaining non-citizen who complied with post-release supervision).

At bottom, what the Due Process Clause disallows is precisely what Petitioner is enduring here—arbitrary detention. *Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention."). Respondents concede through their evidence that they have not obtained travel documents for Petitioner. Dkt. 8-9 (stating that travel documents to Spain and Mexico are "under review"). There is simply no justification for detaining Petitioner—who has a known residence, perfect compliance with ICE supervision requirements, a soon-to-be-opened brick-and-mortar

restaurant, and no derogatory contacts with law enforcement since 1996—away from his U.S. citizen partner and minor child, while Respondents approach random countries with which Petitioner has no ties to make requests for travel documents, which, needless to say, they are free to do when Petitioner is at liberty. His detention now serves no lawful purpose.

b. Respondents Failed to Comply with § 241.4(l) in Revoking Petitioner's Order of Supervision

Respondents repeatedly assert that revocation of Petitioner's Order of Supervision complied with 8 C.F.R. § 241.4(l) when in fact, they violated their regulations. Principles of due process require an agency to follow its own regulations. *See, e.g. Marshall v. Lansing*, 839 F.2d 933, 943 (3d. Cir. 1988); *see also Arias Gudino v. Lowe*, __F. Supp. 3d__, 2025 WL 1162488 *12 (M.D. Pa. Apr. 21, 2025) (granting preliminary injunction where government failed to follow regulations for revocation of release).

First, the Petitioner's Order of Supervision appears not to have been revoked by the appropriate official. The Notice of Revocation is signed "for" Nikita Baker, who is purportedly the Acting Field Office Director.[10] Dkt. 8-9. The regulations only give authority to a district director to revoke release in limited circumstances:

> The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest *and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner*.

[10] Because DHS does not list the identities of the current field office directors for geographic regions on a public facing website, Petitioner is not in a position to confirm that she is currently the Acting Field Office Director.

8 C.F.R. 241.4(l) (emphasis added).[11] Respondents provide no explanation of the circumstances that did not reasonably permit Petitioner's case to be referred to the Executive Associate Commissioner. *See Ceesay v. Kurzdorfer*, __F. Supp. 3d __, 2025 WL 1284720 *17 (W.D. N.Y. May 2, 2025) (granting release for failure to comply with § 241.4(l) where Assistant Field Office Director signed revocation notice and failed to make the appropriate findings, including as to why circumstances did not reasonably permit referral to the Executive Associate Director); *Rombot v. Souza*, 296 F. Supp. 3d 383, 387 (D. Mass. 2017) (same). Even if Respondents could justify the referral, it is dubious whether they complied with the regulation by having an unknown person sign the revocation of release form "for" Nikita Baker. Dkt. 8-9.

Second, Respondents detained Petitioner despite the fact that his removal is not reasonably foreseeable. Re-detention under § 241.4 requires a "significant likelihood" of removal in the "reasonably foreseeable future." *See* 8 C.F.R. § 241.4(b)(4). As noted above, Respondents make no such showing. The Notice merely states that Petitioner's case is "under current review by the Government of Spain and Mexico for the issuance of a travel document." Dkt. 8-9. Respondents provide no reason to believe either country will issue travel documents, particularly since Spain, presumably, has declined to issue such documents since 1998 and Petitioner is not a citizen of either country. Absent from Respondents' exhibits is any proof—other than a single sentence in the Notice that was signed by an unknown person—that Petitioner's case is actually "under review" by either country. But even if Respondents show that applications are indeed pending

[11] The Homeland Security Act of 2002 dissolved the Immigration and Naturalization Service and created the Department of Homeland Security, which includes ICE. *See Ali v. Mukasey*, 524 F.3d 145, 150 (2d Cir. 2008). Statutory references to the INS in this section refer to DHS. 6 U.S.C. 557. The Executive Associate Commissioner is the Director of U.S. Immigration and Customs Enforcement. *See* 8 C.F.R. 1.2.

before Spain and Mexico, that is insufficient to establish that Petitioner's removal is significantly likely in the reasonably foreseeable future.

Third, Respondents failed to notify Petitioner of the reasons for revocation of his release. Under 8 C.F.R. 241.4(l)(1), a noncitizen "will be notified of the reasons for revocation of his or her release or parole." The Notice sheds no insight into the reasons for revocation—it provides merely a naked conclusion that a review of Petitioner's file resulted in "a determination that there are changed circumstances in [his] case." Dkt. 8-9.[12] Even if Respondents were to provide the reasons for revocation now, it would not remedy the violation. *See, e.g. Arias Gudino v. Lowe*, __F. Supp. 3d__, 2025 WL 1162488 *12 (M.D. Pa. Apr. 21, 2025) (granting preliminary injunction where government supplied reason for revocation three weeks after detaining noncitizen); *see also Jimenez v. Cronen*, 317 F. Supp. 626 (D. Mass. 2018) ("[f]undamental features of procedural due process are fair notice of the reasons for the possible loss of liberty and a meaningful opportunity to address them.").

Fourth, revocation of release is only authorized when (1) the purposes of release have been served; (2) the noncitizen violates a condition of release; (3) it is appropriate to enforce a removal order or to commence removal proceedings against a noncitizen; or (4) the conduct of the non-citizen, or any other circumstance, indicates that release would no longer be appropriate. 8 C.F.R. § 241.4(l)(2)(i-iv). Respondents do not suggest that conditions 1, 2, or 4 apply. Revocation is likewise not appropriate to effectuate a removal order to Spain or Iran. It appears that both

[12] To the extent Respondents contend that the "changed circumstances" consist of Petitioner's case being under review by the governments of Mexico and Spain, that is insufficient to create a reasonably foreseeable likelihood of removal, let alone a "significant likelihood," that would justify revocation of release. *Supra* II.a; 8 C.F.R. 241.4(b)(4).

countries have refused to issue a travel document to Petitioner for the past twenty-seven years.[13] It is moreover inappropriate to effectuate removal to Mexico, a country to which he does not have a final order of removal.

When the government violates regulations intended to protect fundamental constitutional rights, such as the right to be free from arbitrary detention and to be notified of the reasons for loss of liberty, a court sitting in habeas may order relief. *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 655 (D. Mass. 2018), citing *Waldron v. INS*, 17 F.3d 511, 518 (2d. Cir 1994); *see also Alexander v. Att'y Gen.*, 495 Fed.Appx. 274, 277 (3d. Cir 2012) (finding failure to satisfy *Zadvydas* is not fatal to a noncitizen's ability to prevail in habeas where DHS has violated its regulations); *Rombot v. Souza*, 296 F. Supp. 3d. 383, 388 (D. Mass. 2017).

Conclusion

For the foregoing reasons, the Court should issue the writ, deny Respondents' motion to dismiss, stay Petitioner's removal pending judicial and administrative review of his motion to reopen, and order Petitioner's release.

Date: July 14, 2025

Respectfully submitted,

/s/ Sandra Grossman
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[13] Petitioner does not have the benefit of his immigration records to state conclusively what has transpired in his case over the last 27 years. Upon retention, counsels promptly submitted Freedom of Information Act Requests, which are still pending.

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*Admitted to the United States District Court for the District of Maryland on July 11, 2025, awaiting bar number.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of July 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Sandra Grossman
Sandra Grossman