IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-02205-WJM-STV

DENNIS AROSTEGUI MALDONADO,

Petitioner,

v.

JUAN BALTAZAR, in his official capacity as Warden of the Aurora Contract Detention Facility,
ROBERT HAGAN, in his official capacity as Field Office Director, Denver, U.S. Immigration and Customs Enforcement,
KRISTI NOEM, in her official capacity as Secretary, U.S. Department of Homeland Security,
TODD LYONS, if his official capacity as Acting Director of Immigration and Customs Enforcement,
PAMELA BONDI, in her official capacity as Attorney General of the United States,

Respondents.

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT PURSUANT TO RULES 12(b)(1) AND 12(b)(6)

Respondents reply to Petitioner's response to the Motion to Dismiss the Amended Petition for Writ of Habeas Corpus and Complaint, ECF No. 48 (the "Complaint"), under Rules 12(b)(1) and 12(b)(6). Petitioner argues in his response that his habeas claims are not moot, that the Court has jurisdiction under the Immigration and Nationality Act ("INA") over his claim regarding third-country removal procedures, and that dismissal based on *D.V.D. v. Department of Homeland Security*, 778 F. Supp. 3d 355 (D. Mass 2025), is not warranted. As explained below, Petitioner's arguments about why his habeas challenges to his detention are not moot are misplaced in the

context of the Motion to Dismiss. In addition, his arguments that the Court has jurisdiction under the INA and his attempts to distinguish his case from *D.V.D.* fail.

I. The Court should not address Petitioner's habeas challenges to his detention through the Motion to Dismiss.

In his response to the Motion to Dismiss, Petitioner argues that his habeas claims are not moot. ECF No. 77 at 4-7. Specifically, he argues that because he is still subject to certain conditions of supervision after his release—such as wearing an ankle monitor and being told to remain at the same address—the habeas claims remain live. *Id.* This argument is misplaced in briefing on the Motion to Dismiss.

Respondents addressed only Petitioner's non-habeas civil claim—challenging third-country removal procedures—in the Motion to Dismiss. *See* ECF No. 68. There is a good reason for this. The habeas rules do not contemplate that respondents can file a motion to dismiss under Federal Rule of Civil Procedure 12 in response to a habeas petition. *See Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 269 n.14 (1978) (explaining that the view that a Rule 12(b)(6) motion to dismiss is procedurally appropriate in a habeas proceeding is "erroneous"); *see also Acosta v. Doerer*, 5:24-cv-01630-SPG-SSC, 2025 WL 725245, at *2 (E.D. Cal. Feb. 6, 2025) ("Respondents' motion to dismiss the petition pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is procedurally improper."). Instead, courts address the merits of a habeas petition through the response to an order to show cause. *See* 28 U.S.C. § 2243.

Because Petitioner filed a hybrid habeas petition and civil complaint, ECF No. 48, this case is proceeding along multiple procedural tracks. The portions of the Complaint that sound in habeas must be addressed through habeas procedures while the portions

that operate as a civil complaint must be addressed under the Federal Rules of Civil Procedure. Thus, Respondents moved to dismiss only the portion of the Complaint that does *not* address Petitioner's detention—his challenge to third-country removal procedures. The Court should proceed with the Motion to Dismiss by addressing only the viability of his claim regarding third-country removal procedures. The parties have addressed Petitioner's habeas challenges to his detention as they were argued in the original petition. *See* ECF Nos. 1 (original petition), 19 (order to show cause), 49 (Respondents' response to order to show cause), 55 (Petitioner's reply to response to order to show cause). Briefing on the habeas challenges is complete and pending before the Court. To the extent that Petitioner believes that he has new allegations regarding his challenge to his past detention, or if he seeks to challenge through habeas the conditions of his current supervision, the procedure for raising those allegations would be through an amended petition, not through the Motion to Dismiss briefing.

II. The Court lacks jurisdiction.

In the Motion to Dismiss, Respondents argued that the INA strips the Court of jurisdiction over Petitioner's claim regarding third-country removal procedures. ECF No. 68 at 9-12. Specifically, Respondents identified 8 U.S.C. §§ 1252(a)(4), (b)(9), and (g) (as well as the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA")), as limiting the Court's jurisdiction here. *Id.* Petitioner argued that none of those provisions stripped the Court of jurisdiction. Below, Respondents address each provision in turn.

8 U.S.C. § 1252(b)(9). As explained in the Motion to Dismiss, § 1252(b)(9) limits "[j]udicial review of all questions of law and fact, including interpretation and application

of constitutional and statutory provisions, *arising from any action* taken . . . to remove an alien from the United States under this subchapter" to "judicial review of a final [removal] order" in the courts of appeals. ECF No. 68 at 10 (emphases added). Respondents explained that because the decision regarding where to remove Petitioner arises from an action taken to remove him from the United States, § 1252(b)(9) strips the Court of jurisdiction over his challenge to the third-country removal procedures. In response, Petitioner argues that because he is not challenging his final order of removal, § 1252(b)(9) does not apply. ECF No. 77 at 10. He argues that a Supreme Court decision, *Jennings v. Rodriguez*, 583 U.S. 281 (2018), suggests that § 1252(b)(9) does not cover his challenge to third-country removal procedures. ECF No. 77 at 10.

The fact that Petitioner is not expressly challenging his removal order does not take his claim outside the scope of § 1252(b)(9). 8 U.S.C. § 1252(a)(5) already provides that courts of appeals have exclusive jurisdiction to review challenges to final orders of removal. Section 1252(b)(9), in turn, addresses not only final orders of removal but "*all* questions of law and fact . . . arising from *any* action taken . . . to remove an alien from the United States." (Emphases added). In short, § 1252(b)(9) provides for exclusive review in the courts of appeals of a wider swath of actions than just removal orders. The decision regarding where to remove a noncitizen falls within the bounds of § 1252(b)(9). *Cf. Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 299 (3rd Cir. 2020) (concluding that where a petitioner challenges an action taken to remove him § 1252(b)(9) "funnels that claim into a petition for review").

In addition, *Jennings* does not provide that a district court faced with a challenge

to third-country removal procedures has jurisdiction over such a claim. In *Jennings*, the Supreme Court declined to interpret § 1252(b)(9) so broadly as to cover categories of claims that had nothing to do with removal (*e.g.*, assault) or could never be "effectively" reviewable in any form (*e.g.*, prolonged detention). 583 U.S. at 293. The Supreme Court indicated, in contrast, that a challenge to "any part of the process by which [] removability will be determined" may ultimately fall within § 1252(b)(9). *Id.* at 294.

Petitioner is bringing that type of process-related challenge here. The decision about what process governs his removal arises from an action taken to remove him from the United States. His challenge to third-country removal procedures must be raised in a petition for review before a court of appeals.

8 U.S.C. § 1252(g). Petitioner's challenge to third-country removal procedures is also barred by § 1252(g). 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 [DHS] to . . . execute removal orders against any alien." Petitioner argues that § 1252(g) does not limit the Court's jurisdiction here because it applies to only three discrete and discretionary actions: commencing proceedings, adjudicating cases, or executing removal orders. ECF No. 77 at 8-9. He argues that because he is challenging non-discretionary procedures about determining the location of removal, rather than discretionary decisions about execution of the removal itself, § 1252(g) does not apply here. *Id.* He also argues that the Court retains jurisdiction over this claim because it is "directly linked to the fact that he is still in the constructive custody of Respondents." *Id.*

Section 1252(g) applies to decisions regarding the destination of Petitioner's

removal. There is no limit in § 1252(g) that limits its scope to discretionary decisions. *See Namgyal Tsering v. U.S. Immigration & Customs Enforcement*, 403 F. App'x 339, 342-43 (10th Cir. 2010) (explaining that § 1252(g) does not apply only to review of discretionary decisions). Instead, § 1252(g) applies to *any cause or claim* related to a decision to execute a removal order. *Cf. Tazu*, 975 F.3d at 298 (explaining that challenges to actions taken to "perform or complete" a removal are barred by § 1252(g)). Here, Petitioner's claim arises from actions taken to execute removal orders—namely, to remove Petitioner to a third country.

There is also no merit in Petitioner's argument that the Court retains jurisdiction because his challenge to third-country removal procedures is linked to the current conditions of his supervised release. Allowing Petitioner to use the possibility of re-detention to evade § 1252(g)'s bar on judicial review of claims about decisions to execute removal would mean that § 1252(g)'s bar on review of such claims would not bar many claims. This is because noncitizens who are subject to removal orders are regularly re-detained briefly to execute the removal order. *See Tazu*, 975 F.3d at 298. So, noncitizens could almost always claim that re-detention is a possibility.

8 U.S.C. § 1252(a)(4) and FARRA. Respondents also explained in the Motion to Dismiss that § 1252(a)(4) and FARRA limit the Court's jurisdiction. ECF No. 68 at 11. Read together, § 1252(a)(4) and FARRA bar the Court from reviewing any claims brought under the Convention Against Torture ("CAT"), instead channeling review of such claims as part of review of a final order of removal before a court of appeals. 8 U.S.C. § 1252(a)(4) ("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]."); FARRA, PL 105–277, § 2242(d), 112 Stat. 2681 (1998) ("no court shall have jurisdiction to review the regulations adopted to implement this section or any other determination made with respect to the application of [CAT] . . . except as part of the review of a final order of removal."). FARRA also assigned to the Executive alone the duty to design procedures to "implement the obligations of the United States" under CAT. § 2242(b), 112 Stat. 2681. Petitioner's challenge to third-country removal procedures thus should be barred under § 1252(a)(4) and FARRA.

Petitioner challenges the Department of Homeland Security's existing procedures for certain CAT claims. *See* ECF No. 48 ¶¶ 97-105. Indeed, he purports to bring his claim under FARRA and the regulations implementing it. *Id.* ¶¶ 9, 105. And he argues that because he does not ask the Court to adjudicate the merits of a specific CAT or withholding claim, the Court retains jurisdiction. ECF No. 77 at 10-11.

But Petitioner has not shown that framing his claim in this way means that his claim does not implicate a cause or claim under CAT or the application of CAT. That is particularly the case here where the regulation addressing withholding of removal under CAT expressly provides that "nothing in this section . . . shall prevent" removal of a noncitizen "to a third country other than the country to which removal has been withheld or deferred." 8 C.F.R. § 208.16(f). Any challenge to the third-country removal procedures must be brought as part of a petition for review before the court of appeals.

III. The Court should allow the *D.V.D.* litigation to resolve these issues.

Respondents also argued that the Court should exercise its discretion to dismiss

Petitioner's claim regarding third-country removal proceedings in light of the nationwide class in *D.V.D.*[1] ECF No. 58 at 12-15. As explained in the Motion to Dismiss, the Court should dismiss Petitioner's claim regarding third-country removal procedures based on concerns about duplicative litigation and comity. ECF No. 68 at 12-15.

Notably, Petitioner does not contest that he is a member of the nationwide class in *D.V.D.* Nor does he contest that he would be bound by a decision in that case.

Rather, Petitioner argues that the fact that the *D.V.D.* court has certified a nationwide class does not mean that his third-country removal claim should be dismissed. ECF No. 77 at 11-15. He argues that individual habeas petitions regarding third-country removal procedures should be allowed to proceed despite the certification of the non-opt-out class in *D.V.D.* *Id.* at 12. According to Petitioner, because he pursues an "as-applied" challenge to third-country removal procedures, his claim should be able to continue. *Id.* at 13-15. He also argues that because he is bringing his APA challenge based on *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), his challenge to the third-country removal procedures is different from the generalized challenge to policy in *D.V.D.* *Id.* at 15-16. And he relies on out-of-circuit district court cases that have addressed claims regarding the procedures for third-country removal despite the certification of the nationwide class in *D.V.D.* ECF No. 77 at 12.

But the Court should not look to those out-of-circuit cases to guide its decision here. The Tenth Circuit has expressly held that "when two courts have concurrent

[1] An appeal of the *D.V.D.* court's order granting a preliminary injunction is pending before the First Circuit and set to be argued on February 3, 2026. *See D.V.D. v. Dep't of Homeland Sec.*, No. 25-1631 (1st Cir. Dec. 23, 2025).

jurisdiction, the first court in which jurisdiction attaches has priority to consider the case." *Hospah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir. 1982). And the Tenth Circuit has further explained that individual suits for injunctive and equitable relief should not be able to proceed where there is an existing class action that covers such claims. *See McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991). Petitioner does not address this Tenth Circuit precedent in his response.

Nor does Petitioner explain how his due process or *Accardi* challenges would fall outside the scope of the claims being addressed in *D.V.D.* The fact that he now refers to his due process challenge as an "as-applied" challenge does not mean that the due process challenge in *D.V.D.* would not control his claim here. The due process challenges in *D.V.D.* and here are almost identical, as can be seen by comparing his claim with the one advanced in that case. *Compare* ECF No. 48 ¶ 103 ("The Fifth Amendment Due Process Clause affords Mr. Maldonado the right to notice and opportunity to be heard on a fear-based claim as to the country designated by the government."), *with D.V.D.*, ECF No. 1, ¶ 114 (Mar. 23, 2025) ("Plaintiffs have a due process right to meaningful notice and opportunity to present a fear-based claim to an immigration judge before DHS deports a person to a third country.").

The same is true of Petitioner's styling of his APA claim as an *Accardi* claim rather than as a general challenge to the at-issue third-country removal procedures. Both the plaintiffs in *D.V.D.* and Petitioner have made the same argument: the third-country removal procedures do not comport with statute and regulation. *Compare* ECF No. 48 at 41 ("The INA, FARRA, and implementing regulations as well as the

Constitution mandate meaningful notice and an opportunity to present a fear-based claim to an immigration judge before DHS deports a person to a third country."), *with D.V.D.*, ECF No. 1, ¶ 110 ("The INA, FARRA, and implementing regulations mandate meaningful notice and opportunity to present a fear-based claim to an immigration judge before DHS deports a person to a third country.").

The fact remains, when the First Circuit renders a decision about the merits of the due process and APA claims in *D.V.D.*, Petitioner will be bound by such a decision because he is a member of the non-opt-out class certified there. Accordingly, the Court should dismiss Petitioner's third-country removal claim in light of *D.V.D.*, as other courts around the country have. *See, e.g.*, *Solis Nolasco v. Noem*, No. GLR-25-3847, 2026 WL 25002, at *7 (D. Md. Jan. 5, 2026) (concluding the petitioner's challenge to third-country removal procedures "is more appropriately addressed in *D.V.D.*" and denying the petition without prejudice); *I.V.I. v. Baker*, No. 25-cv-1572-JKB, 2025 WL 1519449, at *2 (D. Md. May 27, 2025) (denying TRO and granting motion to dismiss claims concerning "the propriety of [petitioner's] removal to a third country" because "the proper forum for the core of Petitioner's claims is the" *D.V.D.* class action)

CONCLUSION

The Court should dismiss Petitioner's claim in the Complaint challenging third-country removal procedures for several reasons. First, the INA deprives the Court of jurisdiction to consider such a claim. Second, the ongoing nationwide *D.V.D.* class action would resolve Petitioner's challenge to third-country removal procedures.

Dated January 23, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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