UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

JAIME EDUARDO VILLANUEVA HERRERA, Petitioner, v. RANDALL TATE Warden, *et al.*, Respondents.	§ § § § § § § § § § §	Case No. 4:25-cv-03364

RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Petitioner, Jaime Eduardo Villanueva Herrera, submits this response and opposition to the Government's motion for summary judgment. Respondents' motion, and the declaration filed in support of said motion, establish that they are currently detaining Petitioner with no cause and in violation of his due process rights. Petitioner was granted withholding of removal to Mexico in 2017. The Department of Homeland Security ("DHS") did not appeal that decision nor have they since sought to reopen it. Following unsuccessful attempts to remove him to a third country, he was released from DHS custody in March of 2017. Petitioner had been under an order of supervision, with no violations and no further criminal arrests, for over eight years before Respondents arrested him by surprise while he was walking his dog on July 20, 2025.

Respondents claim that they are actively working to remove Petitioner to a third country but provide no evidence that removal is likely in the foreseeable future. They do not even identify the proposed third country of removal. In sum, Respondents have yet to identify any factual basis for Petitioner's arrest and detention. A full month after arresting Petitioner, they are still in the process of determining whether he might be removable to a third country—a determination they were required to make before arbitrarily arresting him, separating him from his family, and keeping him behind bars. Petitioner's detention violates the law, and this Court should deny the motion for summary judgment and the writ of habeas corpus should issue.

I. Petitioner's Detention is Unlawful

Respondents posit that Petitioner is lawfully detained pursuant to 8 U.S.C. § 1231 and that his petition is premature as it has been less than 90 days since his *re-detention*. (Dkt. 12 at 6,8-9). Further, they cite to *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), for the presumption that post-removal-period detention of six months is reasonable to allow the United States to effectuate removal. Thus, they allege, the Petitioner's detainment since July 20, 2025, is well within that time frame and the claim is premature at this time. (Dkt. 12 at 2-3). However, they cite to no authority that Petitioner *must* be detained for six months before his detention is unreasonable or unlawful.

Here, the 90-day removal period set forth in 8 U.S.C. § l23l(a)(l)(A) expired on April 20, 2017 or over eight years ago. Petitioner was placed on an Order of Supervision on March 23, 2017. (Dkt.1 at Exh.2). Respondents' contention that Petitioner's habeas claim is premature because he has not spent 90-180 days detention since he was re-detained misreads *Zadvydas.* As *Zadvydas* explained, after the 90-day removal period ends, the government "may" continue to detain a noncitizen or release them under supervision. 533 U.S. at 683. The Supreme Court's decision put limits on the option of continuing to detain—the detention could only *continue* for "a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. But the decision does not curtail the rights of those already previously subjected to the latter option, having been released under supervision. In fact, in cases of re-detention, numerous courts have held that such detention did not fall under *Zadvydas* nor did they give the government the benefit of a six-month presumption. *See Nguyen v. Hyde*, No. 25-cv-11470, 2025 WL 1725791 (D. Mass. June 20, 2025) (finding *Zadvydas* 6-month presumption not applicable where alien is "re-detained" after having been on supervised release and that respondents failed to meet their burden to show a substantial likelihood of removal is now reasonably foreseeable); *Tadros v. Noem*, No. 25-cv-4108, 2025 WL 1678501 (D. N.J. June 13, 2025) (finding 6-month presumption had long lapsed

while petitioner was on supervised release and it is respondent's burden to show removal is now likely in the reasonably foreseeable future).

The basic responsibility of the habeas court is to "ask whether the detention in question exceeds a period reasonably necessary to secure removal." *Zadvydas*, 533 U.S. at 699. In so doing, the habeas court "should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the noncitizen's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699-700. Here, it is immediately evident that removal is not reasonably foreseeable. Respondents' own evidence is as good an indicator as one might hope for as it memorializes repeated, unsuccessful efforts to obtain third country travel documents in 2017, 2023, and over the past month. (Dkt. 12 at Exh.1 ¶ 9). The Government does not even identify the "serval [sic]" countries they have recently contacted (and received denials from) but assures the Court that they will keep sending requests. Id. By their own admission, there is not even a pending request to a third country concerning Petitioner's removal. There is simply no way that removal is reasonably foreseeable under the circumstances.

Moreover, there is no authority for the proposition that the Government may only work to remove Petitioner while he is detained. This may well be current DHS *practice,* thus explaining why Respondents arrested Petitioner

before determining that removal to a third country was likely, but it is not the law. Their own actions in requesting third country travel documents or otherwise attempting to negotiate removal in 2023, when Petitioner was not detained, belie the need to detain him now in order to effectuate removal. It was his re-detention that was premature, not the pending petition for habeas relief. His detention is unlawful because the removal period has long run and removal is not likely in the foreseeable future. "A remote possibility of an eventual removal is not analogous to a significant likelihood that removal will occur in the reasonably foreseeable future." *Kane v. Mukasey*, No. CV B-08-037, 2008 WL 11393137, at *5 (S.D. Tex. Aug. 21, 2008), *superseded by*, 2008 WL 11393094 (S.D. Tex. Sept. 12, 2008) (a new report and recommendation was entered denying the petition as moot because petitioner was deported prior to the order adopting), *R & R adopted*, 2008 WL 11393148 (S.D. Tex. Oct. 7, 2008). Respondents have made no showing that their continued detention of Petitioner is justified.

In short, over a month after detaining him, Respondents have no idea if or when a third country might agree to accept Petitioner; they don't have any specific reason to believe they will be able to remove him, but they haven't given up hope that they might be able to. Notably, they have provided no documents to the Court, absent the statements in the declaration attached to their motion, regarding any of their efforts to effectuate removal. This does not suffice to meet the government's

burden to "respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

II. Petitioner is Not a Danger to the Community

Petitioner's detention is justified by Respondents as a result of a policy change and based on their determination that he is a danger to the community. (Dkt. 12 at 6,9). They make this assertion on the basis of a criminal history that was *known to them when he was first released.* Moreover, while listing his arrests and convictions in both their motion and the attached affidavit, their filings are completely silent as to the most salient fact: that he has not been arrested, charged, or convicted of any offense since his release in 2017. How he could now be considered a danger to the community after eight years under their supervision, in perfect compliance with the order of supervision they themselves placed him on, is beyond comprehension.

While an order of supervision is subject to revocation, there was no basis for revocation here as there was no change in circumstances. 8 C.F.R. § 241.4(b)(4) states that after release under § 241.13, "if the Service subsequently determines, because of a *change of circumstances*, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to...a third county, the alien shall again be subject to the custody review procedures under this section." The use of Petitioner's prior criminal record to determine that he is a danger to the community *now* after eight years of supervised release does not constitute a change

in circumstances nor does the change to the Government's enforcement priorities. Merely stating that Petitioner is dangerous does not make him so and Respondents offer nothing beyond conclusory statements and without acknowledging the eight years of successful supervision *by them* that clearly contradicts their assertions.

III. Respondents Deprived Petitioner of Due Process

Respondents do not point to any facts and have not submitted any evidence regarding the reasons for the revocation of Petitioner's order of supervision other than an executive order and his alleged dangerousness. (Dkt. 12 at 9). However, the regulations provide specific factors to be considered when revoking an order of supervision and there is no evidence that those factors were considered prior to purportedly revoking Petitioner's.

A determination of re-detainment focuses on the following factors: 1) history of the noncitizen's efforts to comply with removal order; 2) history of the Service's efforts to remove noncitizens to the country in question; 3) ongoing nature of the Service's efforts to remove this noncitizen and the noncitizen's assistance; 4) reasonably foreseeable results of those efforts; and 5) the views of the Department of State regarding the prospects for removal of noncitizens to the country in question. 8 C.F.R. § 241.13(f). Here, factors 2 and 5 cannot possibly have been considered as no allowable country of removal was even identified at the time of re-detention and still has not been. Factors 1, 3, and 4 clearly weigh in favor of Petitioner as he has

always been in compliance with all directives of DHS, there is no indication at all that he has ever been uncooperative, and all prior third country requests were denied. Additionally, the prospects for the timeliness of removal must be reasonable under the circumstances and it is clear that the prospects here are quite dim. Id. DHS did not follow their own regulations in making the purported revocation decision.

The regulations also provide that upon revocation of an order of supervision, the noncitizen is afforded an "initial informal interview promptly after his or her return to Service custody to afford the noncitizen an opportunity to respond to the reasons for revocation stated in the notification." 8 C.F.R. § 241.4(l). Thereafter, a records review is done, and an interview is scheduled "within approximately three months after release is revoked." *Id.* Petitioner has never been served with a notice of termination nor was he afforded the informal interview required by law. Instead, he was served with a notice of intent to restate his order of removal to Mexico—an order that cannot be reinstated or executed because he has been granted withholding of removal to Mexico.[1] The failure to provide Petitioner with even the meager procedural protections provided by regulation is further evidence that Respondents violated the law in purportedly revoking the order of supervision and deprived Petitioner of due process.

[1] Petitioner would note that the reinstatement order is also the subject of litigation as Petitioner was forced to file a petition for review with the US Court of Appeals for the Fifth Circuit in order to preserve his rights to challenge said order. That matter is currently pending under Fifth Circuit case number 25-60448.

Under the *Accardi* doctrine, "when an agency fails to follow its own procedures or regulations, that agency's actions are generally invalid." *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260, 268 (1954). The Fifth Circuit has likewise recognized that an agency's violation of its regulations may support a procedural due process claim. *Ayala Chapa v. Bondi*, 132 F.4th 796, 799 (5th Cir. 2025) (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)). Here, Respondents violated regulations that were clearly put in place to protect the due process rights of individuals like Petitioner, and this violation prejudiced Petitioner as set forth herein. The *ultra vires* re-arrest of Petitioner violated his due process rights and must be set aside under *Accardi.*

Several federal district courts have held that where ICE revokes an order of supervision without following the procedures set forth in these regulations, such revocation violates due process and the post-removal-period statute. *See Ceesay v. Kurzdorfer,* 2025 WL 1284720, at *20-*21 (W.D.N.Y. May 2, 2025); *Rombot v. Souza,* 296 F. Supp. 3d 383, 388 (D. Mass. 2017). In *Ceesay,* the court explained, "This case raises the question of whether a noncitizen subject to a final order of removal and released on an order of supervision is entitled to due process when the government decides—in its discretion—to revoke that release. The Court answers that question simply and forcefully: Yes." 2025 WL 1284720, at

* l. This Court should find similarly that Petitioner was deprived of due process and his arrest and re-detention are unlawful.

IV. Jurisdiction is Clear

Respondents argue that this Court does not have jurisdiction to hear Petitioner's claims because the decision to revoke an order of supervision is discretionary. (Dkt. 12 at 7-8). This argument fails to address clear precedent that negates the Government's contentions. The United States Supreme Court has specifically held that 28 U.S.C. § 2241 confers jurisdiction to challenge detention that is without statutory authority, as well as constitutional challenges to post-removal-period detention. *Zadvydas v. Davis,* 533 U.S. 678, 687- 88 (2001); *see also Virani v. Huron,* No. SA-19-CV-00499-ESC, 2020 WL 1333172, at *1 (W.D. Tex. Mar. 23, 2020) ("Federal courts have jurisdiction, however, to adjudicate claims challenging the constitutionality of an alien's continued detention.") (citing *Gul v. Rozos*, 163 F. App'x 317, 2006 WL 140540, at *1 (5th Cir. 2006)).

Petitioner's challenge as to the unreasonableness of his current detention as well as the due process violations created by the Respondents failing to follow the law are both clearly within this Court's jurisdiction. Petitioner is not challenging his removal order, which is already stayed by virtue of his being granted withholding of removal, or the specific discretionary decision which was

apparently made to revoke his order of supervision—a decision he has never received notice of or an opportunity to challenge—but rather the due process violations committed in revoking the order and the resulting unlawful detention.

V. Conclusion

Based on the foregoing, Petitioner asks this Court to deny the Respondents' motion for summary judgment and issue an order for his release from detention or, alternatively, schedule a hearing on this matter.

Respectfully submitted,

Date: August 31, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Notice of Voluntary Dismissal with the Court and on Defendants via the Court's electronic filing system and via electronic mail on August 31, 2025.

/s/ Amanda Waterhouse
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