UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MANUEL YAX ZAPETA,

Petitioner,

v. Case No. 2:25-cv-697-JLB-KCD

KEVIN GUTHRIE, et al.,

Respondents.
_____/

Response to Petition and Motion for Temporary Restraining Order

The Federal Defendants Kristi Noem, Zoelle Rivera, Todd Lyons, Sirce Owen, and Garrett Ripa oppose the Petitioner Manuel Yax Zapeta's Amended Petition (Doc. 4) and Motion for TRO (Doc. 12).[1] There is no basis to grant either. In fact, the Court must dismiss because it lacks facial and factual jurisdiction. Fed. R. Civ. P. 12(b)(1).[2]

Background[3]

This is an immigration habeas case. Zapeta is a Guatemalan citizen and national. (Doc. 4 at 3). In 1995, he entered the United States without inspection. (*Id.*;

[1] Respondents are a collection of federal officials in their official capacity. This paper refers to all Respondents collectively as ICE for ease of reference.

[2] Counsel attempted to secure agreement from ICE and ERO regarding a delay of removal. (Doc. 11). Neither could provide sufficient assurances on removal timing that would allow ICE, ERO, or counsel to make a good-faith representation to the Court on that issue.

[3] Given the expedited response deadline, 28 U.S.C. § 2243, ICE has scarce information on hand specific to Zapeta. Counsel does not have Zapeta's A-file or any documentation other than what Zapeta provided with his Amended Petition (Doc. 4). ICE will provide documentation as it becomes available for the Court's review.

Doc. 4-1 at 1).

In 1996, Zapeta filed an I-589, Application for Asylum and Withholding of Removal. (Doc. 4-1). In April 1997, the immigration judge ("IJ") denied Zapeta's I-589 and ordered voluntary departure by late May 1997—with an alternative deportation order to Guatemala. (Doc. 4-3 at 1). Zapeta appealed to the Board of Immigration Appeals ("BIA"), which affirmed and ordered Zapeta to depart within thirty days or otherwise be deported as stated in the IJ order. (Doc. 4-4 at 3).

Zapeta did not depart—making his removal order final in August 1998. (Doc. 4-4 at 2-3); 8 C.F.R. § 1241.1(f). Since then, Zapeta was removable to Guatemala. For many years, however, he remained in the United States. Respondents currently have no information about what happened during the intervening time. Though it does not appear Zapeta took any steps to depart or otherwise remedy his immigration issues.

In March 2020, ICE issued two documents: a (1) Warrant for Arrest of Alien; and (2) Order of Supervision ("OSUP"). (Docs. 4-5; 4-6). Apparently, ICE could not affect removal during that time. (Doc. 4-5 at 1). So it ordered Zapeta released under supervision. (*Id.*). The first condition of that supervision follows:

> Because the agency has not effected your deportation or removal during the period prescribed by law, it is ordered that you be placed under supervision and permitted to be at large under the following conditions:
>
> [x] That you appear in person at the time and place specified, upon each and every request of the agency, for identification and for deportation or removal.

(Doc. 4-5 at 1). A specific condition of release, therefore, was to appear for removal when requested. (*Id.*).

It is unclear when Zapeta married. But in September 2024, his wife filed an I-

130 petition on his behalf. (Doc. 4-7). According to public record, there has been no action on that petition. (Ex. 1 at 1). And the eighty-percent average processing time for such applications right now is roughly sixty-eight months. (Ex. 1 at 2). With everything being equal, that would put Zapeta's I-130 petition on track for a decision in May 2030.

On July 23, 2025, ICE detained Zapeta when he reported in-person to ICE under the OSUP. (Doc. 4 at 2, 5). For a short time, he was held at "Alligator Alcatraz." (Doc. 4 at 1-2). On August 7, ICE transferred Zapeta to Alexandra Staging Facility in Louisiana.

To be frank, it appears Zapeta's removal is imminent. Zapeta is correct that Alexandra is typically a very short, final stop before deportation. ICE seems to have made the decision to remove him, and it is following through with that decision.

This challenge follows.

Legal Standard

The standard for a motion to dismiss is simple:

> Rule 12 (b)(1) of the Federal Rules of Civil Procedure provides for dismissal of an action if a court lacks subject matter jurisdiction, whether as a facial or factual challenge. In a facial challenge, a court must consider the allegations of the plaintiff's complaint as true and merely look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. By contrast, a factual attack challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits are considered.

Clements v. Glass, No. 2:24-cv-197-JES-NPM, 2025 WL 1068822, at *2 (M.D. Fla. Apr. 8, 2025) (cleaned up).

The Court has power to grants writs of habeas corpus where (among other instances) petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). "The burden rests on the person in custody to prove his detention is unlawful." *Benito Vasquez v. Moniz*, No. 25-11737-NMG, 2025 WL 1737216, at *1 (D. Mass. June 23, 2025).

As for a TRO, Zapeta cites the correct general standard. (Doc. 12 at 5). That test is then supplemented by Rule 65(b) and Local Rule 6.01.

Discussion

Zapeta challenges his detention as a violation of the Fifth Amendment due process clause. (Doc. 4 at 13-14). This claim fails. As described below, the Court has no jurisdiction over this action. Even if it did, detention has not extended to a length creating constitutional questions; nor did ICE violate any law in proceeding to remove.

A. Lack of Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). They "possess only that power authorized by Constitution and statute." *Id.* (citations omitted).

In the context of immigration habeas cases related to removal—like here—the Immigration and Nationality Act ("INA") divests this Court's jurisdiction. 8 U.S.C. §§ 1252(b)(9), (g). As discussed, the Court lacks jurisdiction over Zapeta's claims. Regardless of how the filings get dressed up, he challenges his detention to execute a final order of removal.

1. Jurisdiction Stripping Under § 1252(g)

There is no jurisdiction to review "any" claim "arising from the decision or action" to "execute removal orders." 8 U.S.C. § 1252(g). This provision bars habeas review in federal courts when the claim arises from a decision or action to "execute" a final order of removal. *Reno v. American-Arab Anti-Discrimination Committee* (*AADC*), 525 U.S. 471, 482 (1999).

Courts consistently hold that § 1252(g) eliminates subject-matter jurisdiction over challenges—including constitutional claims—to an arrest or detention for the purpose of executing a final removal order. *E.g.*, *Camarena v. ICE*, 988 F.3d 1268, 1273-74 (11th Cir. 2021) ("[W]e do not have jurisdiction to consider 'any' cause or claim brought by an alien arising from the government's decision to execute a removal order."); *Johnson v. U.S. Attorney General*, 847 F. App'x 801, 802 (11th Cir. 2021); *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013).[4] Likewise, § 1252(g) precludes review of the method by which ICE chooses to commence removal proceedings. *Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, the provision bars us from questioning ICE's discretionary decisions to commence removal—and thus necessarily prevents us from considering whether the agency should have used a

[4] *See also Hamama v. Adducci*, 912 F.3d 869, 874 (6th Cir. 2018) ("Under a plain reading of the text of the statute, the Attorney General's enforcement of long-standing removal orders falls squarely under the Attorney General's decision to execute removal orders and is not subject to judicial review."); *Tazu v. U.S. Attorney General*, 975 F.3d 292, 297 (3d Cir. 2020) ("The plain text of § 1252(g) covers decisions about whether and when to execute a removal order."); *Rauda v. Jennings*, 55 F.4th 773, 778 (9th Cir. 2022); *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

different statutory procedure to initiate the removal process.").

Zapeta was detained to execute the final removal order against him. He is well within the presumptively reasonable period of detention (as detailed below). And ICE is in the process of executing removal. This action is an effort to interfere with or halt that legal process. The INA plainly strips the Court's jurisdiction in these instances. 8 U.S.C. § 1252(g).

The Court lacks jurisdiction for a separate reason.

2. Jurisdiction Stripping Under § 1252(b)(9)

There is no jurisdiction to review "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States" outside a case reviewing the final removal order. 8 U.S.C. § 1252(b)(9). This is known as the "zipper clause." *Canal A Media Holding, LLC v. USCIS*, 964 F.3d 1250, 1257 (11th Cir. 2020). The zipper clause is "a jurisdictional bar where" petitioner seeks "review of an order of removal [or] the decision to seek removal." *DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 19 (2020) (cleaned up).

There is a single path for judicial review of removal orders—"a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(5). Reading § 1252(a)(5) and (b)(9) together, courts conclude petitioners must funnel all aspects of challenges to removal proceedings through that avenue. *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) ("The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals."); *see also Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005)

(There is "clear intent to have all challenges to removal orders heard in a single forum (the courts of appeals).").

The zipper clause encompasses more than § 1252(g). *AADC*, 525 U.S. at 483. Under these provisions, "most claims that even relate to removal" are improper in a district court. *E.O.H.C. v. DHS*, 950 F.3d 177, 184 (3d Cir. 2020). There are limitations on how broadly courts interpret the zipper clause. *E.g. Canal A*, 964 F.3d at 1257. But a claim obviously "arises from a removal proceeding when the parties are challenging removal proceedings." *Id.* (cleaned up); *see also Regents of Cal.*, 591 U.S. at 19.

Here, the crux of this case challenges the Government's execution of Zapeta's final removal order to stop the removal process. These are the exact claims barred by the zipper clause. 8 U.S.C. § 1252(b)(9).

3. Conclusion of Jurisdiction Stripping

As discussed above, Zapeta's claims fall squarely within the INA's jurisdiction-stripping provisions of 8 U.S.C. §§ 1252(g) and (b)(9). The Court, therefore, lacks subject-matter jurisdiction and must dismiss.

B. Constitutionally Lawful Detention

Even if the Court disagrees with the above, it must still deny the writ; Zapeta cannot make a claim for unlawfully prolonged detention.

After a final removal order, an alien must be removed within ninety days—i.e., the removal period. 8 U.S.C. § 1231(a)(1); *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001). During the removal period, the alien must be detained. 8 U.S.C. § 1231(a)(2); *Zadvydas*, 533 U.S. at 683. An alien, however, can be detained beyond that removal

period. 8 U.S.C. §§ 1231(a)(1)(C), (a)(6); *Zadvydas*, 533 U.S. at 683. This is called a "post-removal" period. *Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021).

There is no statutory limit on how long ICE can detain an alien during the post-removal period. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). Yet indefinite detention would present obvious constitutional concerns. *Id.* So the Supremes interpret this post-removal period to allow extended detention for "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689. In all, a reasonable length of detention "is presumptively six months." *Guzman Chavez*, 594 U.S. at 529; *see also Akinwale*, 287 F.3d at 1052 (stating six-month period is inclusive of any ninety-day removal period).

If the presumptively reasonable period expires without removal, then a burden-shifting framework comes into play regarding the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 689. But before that six-month period expires, any habeas challenge to the detention itself is premature. *E.g.*, *Akinwale v. Ashcroft*, 287 F.3d 1050, 1051-52 (11th Cir. 2002); *Guo Xing Song v. U.S. Attorney General*, 516 F. App'x 894, 899 (11th Cir. 2013); *Gozo v. Napolitano*, 309 F. App'x 344, 346 (11th Cir. 2009).[5] At bottom, "This presumptively reasonable six month period must have expired at the time of the filing of a petition." *E.g.*, *Jiang v.*

[5] Some districts disagree. *Cesar v. Achim*, 542 F. Supp. 2d 897, 902 (E.D. Wis. 2008). Of course, *Akinwale* binds the Court. Even if it didn't, *Cesar* and any progeny are wrong. *Zadvydas* recognized the presumptive six-month period for the specific "sake of uniform administration in the federal courts." *Zadvydas*, 533 U.S. at 701. That was not an invitation to make up exceptions to this ripeness doctrine—like *Cesar* did.

Mukasey, No. 2:08-cv-773-FtM-29DNF, 2009 WL 260378, at *2 (M.D. Fla. Feb. 3, 2009); *Noel v. Glades Cnty. Sheriff*, No. 2:11-cv-698-FtM-29SPC, 2011 WL 6412425, at *2 (M.D. Fla. Dec. 21, 2011).

Zapeta has only been in detention for roughly sixteen days. He was first detained on July 23 and sued on August 6. At that point, Zapeta had only been detained for fourteen days. Either timeline is well under the 180-day period that is presumptively reasonable. That is fatal to jurisdiction. *Akinwale*, 287 F.3d at 1051-52.

To contend ICE cannot detain him for the purpose of removal, as Zapeta does, would effectively eliminate ICE's ability to ever remove an alien unless it does so within the presumptively reasonable timeframe. *Chun Yat Ma v. Asher*, No. C11-1797 MJP, 2012 WL 1432229, at *3 (Apr. 25, 2012). *Zadvydas* doesn't sweep that broad. It goes without saying an alien must be detained (or otherwise in custody) to effect removal unless the alien leaves voluntarily. Zapeta chose not to leave voluntarily despite the removal order to do so. If the Court accepts his position, it is unclear how ICE would be able to remove Zapeta—which ICE is actively working toward. *But see Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody . . . while arrangements were being made for their deportation.").

Because Zapeta was first detained on July 23, his *Zadvydas* challenges fails. *E.g.*, *Jiang*, 2009 WL 260378, at *2 ("This presumptively reasonable six month period must

have expired at the time of the filing of a petition.").

Even if the Court were to get past the bright-line cutoff, there is no way for Zapeta to show no significant likelihood of removal exists. *See Zadvydas*, 533 U.S. at 689. At this point, it appears removal is imminent—not just "the reasonably foreseeable future." *See id.*

C. Complying with OSUP and Regulations

The bulk of Zapeta's challenge relates to alleged violations of OSUP and immigration regulations. Based on the facts available, it appears ICE complied with its obligations under either theory.

As it relates to OSUP, there was no procedure specified within the document on how it would be revoked. (Doc. 4-5 at 1). Instead, it set out various conditions that Zapeta was required to follow while allowed to stay in America on supervision. One condition was to report in person for deportation or removal when requested. (*Id.*). There is nothing within OSUP or the intervening events that suggest an ICE violation.

Next, Zapeta relies heavily on regulatory compliance—particularly 8 C.F.R. §§ 241.4 and 241.13—contending ICE failed to comply with procedure. Those regulations, however, are either inapplicable or were not violated here.

Section 241.13 plainly does not apply to Zapeta's circumstances. This regulation "establishes special review procedures for those aliens who are subject to a final order of removal and are detained . . . where the alien has provided good reason to believe there is no significant likelihood of removal . . . in the reasonably foreseeable future." 8 C.F.R. § 241.13(a). As explained above, Zapeta cannot show there is no

significant likelihood of removal; quite the opposite, removal appears imminent. So by its own terms, any requirements of § 241.13 do not apply here. *Tran v. Baker*, No. 1:25-cv-01598-JRR, 2025 WL 2085020, at *3-5 (D. Md. July 24, 2025) (rejecting § 241.13 challenge because petitioner failed to make showing).

Section 241.4 is a closer call; but Zapeta fares no better. That provision sets out procedures and "authority to continue an alien in custody or grant release or parole." 8 C.F.R. § 241.4(a). Certain officials "may continue an alien in custody beyond the removal period . . . pursuant to the procedures described in this section." *Id.*

For aliens released on supervision, authorities have broad powers to revoke their status. *Id.* § 241.4(l). Certain procedures apply when ICE revokes release due to violations of the conditions. *Id.* § 241.4(l)(1), (3). Yet one subsection—relevant here—is far different:

> Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:
>
> (i) The purposes of release have been served;
>
> (ii) The alien violates any condition of release;
>
> (iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or
>
> (iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

Id. § 241.4(l)(2).

Markedly different than the regulations surrounding it, § 241.4(l)(2) does not require notice, explanation, or an interview for the alien to respond. *Compare id.*, *with*

id. § 241.4(l)(1); *Tanha v. Warden, Balt. Detention Facility*, No. 1:25-cv-02121-JRR, 2025 WL 2062181, at *6 n.10 (D. Md. July 22, 2025). This "regulation permits the Government extraordinarily broad discretion to revoke an OSUP." *Tran*, 2025 WL 2085020, at *4. In fact,

> the regulation does not compel the Government to demonstrate what facts or factors, if any, it considered in deciding to revoke; nor does the regulation (or any other authority of which the court has been made aware) require the Government to demonstrate what, if any, steps it took to effect or secure removal prior to OSUP revocation.

Id.; *see also Grigorian v. Bondi*, No. 25-CV-22914-RAR, 2025 WL 1895479, at *6 (S.D. Fla. July 8, 2025) (noting differences between both subsections).

True, some courts disagree. *Ceesay v. Kurzdorfer*, No. 25-CV-267-LJV, 2025 WL 1284720, at *18 (W.D.N.Y. May 2, 2025). Such decisions, however, ignore the plain language of § 241.4(l)(2). Courts cannot find ICE violated its own regulations for failing to follow notice and hearing requirements that do not exist. Whoever drafted these provisions specifically chose to exclude such demands from § 241.4(l)(2). "When a deliberative body includes particular language in one section of a [regulation] but omits it in another, it is generally presumed that it acts intentionally and purposely in the disparate inclusion or exclusion." *SEC v. Levin*, 849 F.3d 995, 1004 (11th Cir. 2017) (cleaned up). These regulations are highly nuanced and carefully crafted to incorporate the exact statutes and other regulations they intend to reference. The Court must read those regulations as they are written without engrafting notice and hearing provisions where they were not otherwise provided.

Zapeta's only possible challenge to the lawfulness of detention is based on ICE's

technical compliance with § 241.4(l)(2). Yet that provision does not specify any procedure ICE must follow. Instead, it permits revocation based on a discretionary "opinion" that the time "is appropriate to enforce a removal order or to commence removal proceedings." *Id.* § 241.4(l)(2)(iii). Having detained Zapeta for removal, ICE necessarily made that determination. Put bluntly: courts "will not further scrutinize ICE's discretionary decision" in that regard. *Roe v. Oddo*, No. 3:25-CV-128, 2025 WL 1892445, at *8 (W.D. Pa. July 9, 2025); *Yi Mei Zhen v. ICE*, No. 3:25-cv-01507-PAB, 2025 WL 2258586, at *10 (N.D. Ohio Aug. 7, 2025).

To be sure, the expedited deadlines meant ICE could not retrieve documentation relevant to Zapeta.[6] So it cannot say one way or the other whether any notice or interview occurred. But even if notice and an interview were required and did not occur, nothing would stop ICE from providing those to Zapeta while detained. *Yi Mei*, 2025 WL 2258586, at *10 n.19 (noting "even if these procedures have not yet been completed, courts have found that such procedures may take place after the detention has occurred").

What's more, the remedies sought of transfer to Florida and release from custody are "an overreach and not the appropriate cure." *Tanha*, 2025 WL 2062181, at *6; *see also Tran*, 2025 WL 2085020, at *6-7 (holding errors in notice procedure "do not entitle [petitioner] to release from detention"). The proper remedy for these allegations would be—at most—ordering ICE to provide Zapeta notice and an

[6] Again, ICE will do so when documents are available.

informal interview before removal. *See, e.g.*, *I.V.I. v. Baker*, No. JKB-25-1572, 2025 WL 1811273, at *3 (D. Md. July 1, 2025) ("And while habeas is a proper vehicle to challenge detention that is without statutory authority or violative of the Constitution, it is not a proper vehicle for vindicating every procedural error the Government may have committed along the way.").

In short, ICE did not violate the OSUP or regulations raised in the Petition.

Conclusion

We are beyond fortunate to live in the United States. And Zapeta's desire to remain here is certainly understandable. Yet the Court lacks jurisdiction to stop his removal process, which is well underway. Even if that weren't true, there are no legal violations identified in this case that would warrant granting Zapeta's requested relief.

For those reasons, the Court must deny the writ and TRO then dismiss.

Date: August 8, 2025

Respectfully submitted,

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