

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

Arish Rustami,	)	
	)	
Petitioner,	)	
	)	Case No. 25-3160-JWL
v.	)	
	)	
Kristi Noem, Todd M. Lyons, Sam Olson, and	)	
Pamela Bondi,	)	
	)	
Respondents.	)	
	)	

**PETITIONER’S SECOND TRAVERSE**

**I. Introduction**

Respondents’ Supplemental Response introduces new factual assertions that are both inaccurate and inconsistent with the Government’s own record. Most notably, Respondents now claim that ICE conducted a custody interview with Petitioner on September 12, 2025. (Swanson Decl. ¶ 6.) That assertion is incorrect. As Petitioner’s declaration explains, no interview—formal or informal—occurred on that date or on any other date since ICE revoked his Order of Supervision. Petitioner was never informed of the asserted “changed circumstances,” never asked any questions, and never given any opportunity to respond. The Supplemental Response therefore does not “cure” the procedural defects; it confirms them.

The Government’s filings also reveal a second critical point: DHS still lacks a viable country of removal. Pakistan has now affirmatively denied DHS’s travel-document request, and DHS concedes that it must “continue its efforts to identify alternative countries.” (Swanson Decl. ¶ 10.) This is not evidence of foreseeable removal; it is the opposite of that.

Because (a) ICE failed to follow mandatory procedures for revocation and post-revocation custody review, (b) DHS initiated third-country removal without providing the required reasonable-fear process with IJ review, and (c) removal is not reasonably foreseeable under *Zadvydas v. Davis*, Petitioner’s detention remains unlawful. The Supplemental Response gives the Court no basis to reach a different conclusion.

## II. Factual Corrections: No Interview Has Occurred

Respondent state in their response that “it not known” whether Mr. Rustami was given the statutorily required interview when they revoked his order of supervision. Response p. 3. But it is known – the respondent offers his testimony, and the respondents offer nothing to refute it, that no such interview occurred. *See* Exhibit A, Rustami Declaration p. 1-2.

Respondents’ Supplemental Response rests heavily on a new factual assertion: that “on or about September 12, 2025, Petitioner was interviewed regarding his custody status.” (ECF No. 9-1, Swanson Decl. ¶ 6.) That is, rather than conduct the required revocation interview in June, they now claim that they conducted a 90-day custody review interview in September. *Id.* But that too is false, and Petitioner’s sworn declaration directly contradicts this claim. On that date, a staff member merely asked Petitioner whether he “wanted” an interview. Exhibit A, Rustami Declaration p. 1-2. Petitioner answered “yes.” *Id.* No officer ever returned. *Id.* Petitioner was not taken anywhere, asked any questions, or engaged in any form of substantive conversation. No interview occurred.

This factual discrepancy is material. The “initial informal interview” about the revocation itself is required by 8 C.F.R. §§ 241.4(i)(1) and 241.13(i)(3). It is the core procedural safeguard in the post-revocation process. It must inform the individual of the asserted reasons for revocation and permit a response. ICE’s position that the regulation is satisfied by a single question—“do you want an interview?”—followed by no interview at all, is untenable. Respondents claim that it is “not known” whether that interview occurred is essentially an admission.

Because the revocation interview never occurred:

- ICE did not comply with 8 C.F.R. §§ 241.4(l)(1) or 241.13(i)(3);
- Petitioner remained unaware of the asserted “changed circumstances”;
- Petitioner was deprived of any opportunity to respond; and
- The violation is ongoing today.

And Respondents’ harmless-error theory therefore collapses on the facts.

### **III. The Failure to Provide a Revocation Interview Was Not Harmless.**

Respondents now argue that any failure to comply with the interview requirement was harmless. But harmless doctrine does not apply where the very process designed to test ICE’s authority to detain was never provided.

Here, ICE never explained its asserted “changed circumstances,” never afforded Petitioner an opportunity to rebut them, and never conducted the required interview. Nor do the cases the respondents cite help them at all.

For example, Respondents cite *Olmedo v. United States Immigr. & Customs Enf’t*, No. 25-3159-JWL, 2025 WL 2821860, at \*3 (D. Kan. Oct. 3, 2025) for its harmless error argument. But there the Court held that refusal to give a required interview was *not* harmless error. *Id.* at \*3. And more importantly, that case was about failure to conduct a 90-day custody review, not failure to conduct the initial revocation interview required by 8 C.F.R. §§ 241.4(l)(1) and 241.13(i)(3). *Id.* So it’s noteworthy both that in *Olmedo* the Court granted the requested relief and found the lack of an interview was not harmless *and* that *Olmedo* wasn’t about the revocation process at all. Respondents offer no meaningful justification for revoking Mr. Rustami’s order of supervision and taking him into custody, and they have not provided even the minimal due process that the regulations require.

Further, roughly six months following Mr. Rustami’s arrest, he *also* hasn’t been given a 90-day custody interview – the kind that *Olmedo* discussed. As outlined in Mr. Rustami’s

declaration, although an officer asked him if he wanted to be interviewed, and he said yes, nobody has since actually him. Exhibit A, Rustami Dec. p. 1-2. Nor does the Respondents' new declaration of Erik Swanson give the Court much reason to find otherwise. It merely states, passively, that "on or about September 12, 2025, Petitioner was interviewed regarding his custody status." Doc. 9-1 Swanson Decl. p. 2. It doesn't say that Swanson himself did the interview or identify who did. Mr. Rustami is certain that he still hasn't been interviewed and swears to the same in his affidavit. Exhibit A, Rustami Dec. p. 1-2.

Meanwhile, the respondents confirm through their submission that:

- Pakistan has denied DHS's travel-document request;
- DHS has not identified any alternative country;
- DHS is still only "exploring" removal; and
- No evidence shows consular engagement, document preparation, visa processing, or logistical arrangements.

In these circumstances, the interview requirement is not a technicality. It is the only procedural mechanism for Petitioner to contest detention based on supposed "changed circumstances." Where detention is justified solely by those circumstances, the absence of an interview cannot be harmless. Petitioner should not be left to languish in custody based on unilateral assertions ICE never subjected to the process its own regulations require.

#### **IV. The Third-Country Removal Claim is Ripe**

Respondents also seek to dismiss Petitioner's reasonable-fear/IJ-review claim as "not ripe" because he hasn't yet been denied due process. But their own concessions refute their claim. DHS concedes it has begun exploring removal to Pakistan and Afghanistan. (Saenz Decl. ¶ 19.) It has gone further - it formally requested travel documents from Pakistan, which Pakistan then denied. (Swanson Decl. ¶ 9.) Those are concrete removal actions; not hypotheticals.

Due process requires reasonable-fear procedures *before* DHS advances third-country removal. As *Cruz-Medina* explains, due process requires that noncitizens threatened with removal to a new country receive (1) a reasonable-fear interview and (2) immigration-judge review of any negative determination before DHS proceeds with third-country removal. No. 25-cv-1768, slip op. at 2-3 (D. Md. Oct. 7, 2025) (attached to traverse at Doc. 7-2). DHS’s unilateral steps to pursue Pakistan or Afghanistan triggered these protections. Petitioner has asserted fear of persecution and torture in both countries. DHS has not provided any reasonable-fear interview, and it has not offered IJ review. The ongoing omission is a live constitutional injury, not a speculative one.

Accordingly, Petitioner’s due process arguments about the lack of reasonable fear review are ripe, justiciable, and well-founded.

**V. On the Prolonged Detention Issue, the Respondents Have Not Made the Required Foreseeability Showing Under *Zadvydas*.**

Respondents’ Supplemental Response confirms that DHS cannot meet the *Zadvydas* standard for two reasons.

**A. Removal is not reasonably foreseeable.**

Respondents’ submission is brief, but the affidavit of Eric Swanson confirms that Pakistan has refused to issue travel documents. Respondents only commit to, in theory, exploring for other removal countries but offers the Court nothing concrete about where those countries might be or when they might do that. But Respondents have the burden under *Zadvydas* to show that removal is reasonably foreseeable. Mr. Swanson’s declaration doesn’t claim anything of the sort.

Respondents do not claim to have contacted Afghanistan despite writing in September that it would explore the idea. DHS identifies *no* country willing to take Petitioner. And DHS concedes it must “continue efforts to identify” a country—meaning at this point none exists. And it offers no alternative. Realistically, with no country of removal identified, Mr. Rustami’s detention could be

indefinite. That is exactly the kind of outcome that *Zadvydas* cautioned against.

**B. Even if the Government believes the *Zadvydas* clock “restarted,” foreseeability remains the governing rule.**

*Zadvydas* makes clear that detention is permissible only for time “reasonably necessary” to secure removal, and that the standard hinges not on an arbitrary six-month rule but on principally on whether removal is significantly likely in the reasonably foreseeable future. 533 U.S. at 699–701. Where DHS has no removal country after months of detention, let alone documents permitting Mr. Rustami to be deported to that country, no amount of “exploring” satisfies its burden.

Petitioner has provided good reason to believe removal is not significantly likely. DHS provides no evidence to the contrary. Release is therefore appropriate under *Zadvydas*.

**VI. Targeted Discovery Is Necessary and Appropriate**

Respondents argue that Petitioner has not shown “good cause.” But the Government itself created the factual disputes necessitating discovery.

**A. Custody-review and interview records are necessary.**

Respondents now assert that an interview occurred. Petitioner denies it. ICE’s internal POCR/241.13 file is the only objective record of what occurred. Without it, the Court cannot resolve this core factual issue.

**B. Travel-document records are directly relevant to *Zadvydas*.**

DHS claims removal is foreseeable, yet Pakistan has denied documents and no other country has been identified. Discovery of:

- requests,
- consular communications, and
- country responses

is necessary to evaluate DHS’s claims and meet the *Zadvydas* evidentiary burden.

**C. *Bracy v. Gramley* authorizes discovery where factual development may establish entitlement to relief.**

Respondents cite *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), for the proposition that habeas litigants “normally” do not receive discovery. That is true in the abstract—but it is only half of the *Bracy* rule. *Bracy* is also the Supreme Court’s clearest recognition that discovery is appropriate precisely where the petitioner’s allegations, if true, would entitle him to relief and where the existing record contains factual inconsistencies that cannot be resolved without limited evidentiary development. See *id.* at 908–09. In other words, *Bracy* does not erect a categorical bar to habeas discovery; it establishes the standard Petitioner meets here.

In *Bracy*, the Court authorized discovery because the petitioner had offered “specific allegations” supported by “reasonably detailed” facts suggesting that the state-court judge who presided over his trial was engaging in widespread corruption in other cases. *Id.* at 908. The Court held that where such allegations create “reason to believe” that the petitioner may be entitled to relief *if the facts are fully developed*, targeted discovery is proper. *Id.* at 909. The Supreme Court emphasized that a habeas court’s role includes ensuring that constitutional claims are not decided on an incomplete or distorted factual record—especially where the Government’s own conduct has obscured the relevant facts.

That is exactly the situation here. Respondents’ two declarations contradict each other and Petitioner’s account on the central fact at issue: whether ICE ever conducted the “initial informal interview” that the post-revocation regulations make mandatory. Respondents now assert that it is “not known” whether a revocation interview occurred but claim a custody review interview occurred on September 12, 2025; Petitioner’s sworn declaration states that no such interview ever happened; and the record contains no

contemporaneous documentation resolving this conflict. Likewise, Respondents assert that removal is “reasonably foreseeable” while simultaneously acknowledging that Pakistan has denied travel documents and that no other country has been identified—an inconsistency that can be resolved only through production of the relevant custody-review and consular correspondence files. These factual disputes bear directly on Petitioner’s constitutional claims. Without discovery, the Court cannot assess Respondents’ harmless-error theory, their assertion that revocation was justified by “changed circumstances,” or their claim that removal is reasonably foreseeable.

Under *Bracy*, these are the very circumstances in which discovery is appropriate: Petitioner has made specific, credible factual allegations; the Government’s own filings create inconsistencies material to the legal issues; and targeted discovery is necessary to “fully develop” the facts that determine whether Petitioner’s detention is lawful. 520 U.S. at 908–09. This is not an impermissible fishing expedition but a request for a narrow set of documents—the POCR/§ 241.13 file, interview records, and travel-document communications—that are both uniquely in the Government’s possession and essential to resolving the claims before the Court.

Accordingly, good cause exists for narrowly tailored discovery.

## VII. Remedy

For the reasons stated above and in Petitioner’s initial traverse, Petitioner respectfully requests the following relief:

1. Immediate release under supervision; or
2. Reinstatement of supervision while DHS complies with mandatory procedures;
3. An order requiring DHS, within seven days, to:
  - Conduct the “initial informal interview” required by 8 C.F.R. §§ 241.4(l)(1), 241.13(i)(3);

- Produce the complete custody-review record from the interview it claims occurred on September 12, 2025;
- Provide written notice identifying any proposed third-country;
- Conduct a reasonable-fear interview and provide immigration-judge review of any negative determination; and
- Produce all travel-document requests, consular communications, and responses.

4. Any further equitable relief the Court deems appropriate.

Respectfully submitted,

//s// Matthew Lorn Hoppock

Date: 12/04/2025

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 12/04/2025, 2025, I served this Petitioner's Traverse via electronic filing through CM ECF on the following individuals:

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