IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARCO TULIO GONZALEZ OLMEDO,

Petitioner,

v. Case No. 25-3159-JWL

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT and C. CARTER, Warden, FCI-Leavenworth,

Respondents.

RESPONSE TO § 2241 HABEAS PETITION AND ORDER TO SHOW CAUSE

This matter is before the Court on the *pro se* petition of Marco Tulio Gonzalez Olmedo ("Petitioner") for a writ of habeas corpus under 28 U.S.C. § 2241. Petitioner, an alien subject to an order of removal, asks the Court to release him from detention at the Federal Correctional Institution in Leavenworth, Kansas ("Leavenworth FCI"). In Count I, Petitioner alleges that he has been detained more than six months with no significant likelihood of removal in the reasonably foreseeable future, in violation of 8 U.S.C. § 1231(a)(6) and *Zadvydas v. Davis*, 533 U.S. 678 (2001). ECF 1 at 6; ECF 1-1 at 2-3, 5-8. In Counts II and III, Petitioner alleges that his detention violates his rights to substantive and procedural due process under the Fifth Amendment to the Constitution. ECF 1 at 6; ECF 1-1 at 5, 8-9. The Court directed Respondents to show cause why the habeas petition should not be granted. ECF 3.

The habeas petition should be denied. Petitioner seeks to be rewarded for repeated illegal border crossings. He has been removed from the United States at least seven times, and he has been convicted by a federal court of illegal reentry at least four times. Habeas relief is unwarranted for at least three reasons: (1) Petitioner's claim under 8 U.S.C. § 1231(a)(6) and *Zadvydas* is flawed because he has not shown that removal to somewhere other than his home country of El Salvador is unlikely, and even if he had, Respondents can rebut such a showing because they are attempting to remove him to third countries; (2) Petitioner's substantive due process claim is derivative of and suffers from the same deficiencies as his *Zadvydas* claim; and (3) Petitioner's procedural due process claim should be rejected because he is not entitled to a "neutral decision-maker," Respondents substantially complied with the regulations governing post-custody reviews, and any violation of those regulations was harmless or otherwise insufficient to justify release.

STATEMENT OF FACTS

The following facts are part of the Declaration of Raphael Davis, a Deportation Officer for Enforcement and Removal Operations ("ERO") at United States Immigration and Customs Enforcement ("ICE"). Exhibit ("Ex.") 1, Declaration of Raphael Davis ¶¶ 1-3. Some facts alleged in the petition (ECF 1) are included as well.

Petitioner is a native and citizen of El Salvador. *Id.* ¶ 4; *see also* ECF 1-1 at 3. In November 2009, he was encountered by United States Customs and Border Protection ("CBP") near Nogales, Arizona after entering the country without being admitted or paroled. Ex. 1 ¶ 5. That same day, CBP processed Petitioner for expedited removal pursuant to section 235(b)(1) of the Immigration and Nationality Act ("INA"). *Id.* ¶ 6 (citing 8 U.S.C. § 1225(b)(1)). Petitioner was removed from the United States in December 2009. *Id.*

In November 2012, Petitioner was again encountered by United States Border Patrol agents near Nogales, Arizona after entering the country without being admitted or paroled. *Id.* ¶ 7. He was processed for reinstatement of the prior order of removal and presented for prosecution for illegal reentry pursuant to 8 U.S.C. § 1325. *Id.* Petitioner was convicted of illegal reentry in the United States District Court for the District of Arizona and sentenced to 30 days of imprisonment. *Id.* ¶ 8. In January 2013, he was removed, for the second time, from the United States. *Id.* ¶ 9.

In April 2013, Petitioner was again encountered by United States Border Patrol agents near Nogales, Arizona after entering the country without being admitted or paroled. *Id.* ¶ 10. He was processed for reinstatement of the prior order of removal and presented for prosecution for illegal reentry pursuant to 8 U.S.C. § 1325. *Id.* Petitioner was convicted of illegal reentry in the United States District Court for the District of Arizona and sentenced to 75 days of imprisonment. *Id.* ¶ 11. In September 2013, he was removed, for the third time, from the United States. *Id.* ¶ 12.

In October 2013, Petitioner was again encountered by United States Border Patrol agents, this time near Lukeville, Arizona, after entering the country without being admitted or paroled. *Id.* ¶ 13. He was processed for reinstatement of the prior order of removal and his application for relief was referred to an Immigration Judge for a hearing. *Id.* In May 2014, Petitioner appeared before the Immigration Judge, requested that his application for relief be withdrawn, and asked to be removed to El Salvador. *Id.* ¶ 14. The Immigration Judge issued a removal order and both parties waived appeal. *Id.* In June 2014, Petitioner was removed, for the fourth time, from the United States. *Id.* ¶ 15.

In August 2014, Petitioner was again encountered by United States Border Patrol agents near Nogales, Arizona after entering the country without being admitted or paroled. *Id.* ¶ 16. He was processed for reinstatement of the prior order of removal and presented for prosecution for illegal reentry pursuant to 8 U.S.C. § 1325. *Id.* Petitioner was convicted of illegal reentry in the United States District Court for the District of Arizona and sentenced to 180 days of imprisonment. *Id.* ¶ 17. In March 2015, Petitioner was removed, for the fifth time, from the United States. *Id.* ¶ 18.

In July 2015, Petitioner was again encountered by United States Border Patrol agents near Nogales, Arizona after entering the country without being admitted or paroled. *Id.* ¶ 19. He was processed for reinstatement of the prior order of removal and presented for prosecution for illegal reentry pursuant to 8 U.S.C. § 1325. *Id.* Petitioner was convicted of illegal reentry in the United States District Court for the District of Arizona and sentenced to 180 days of imprisonment. *Id.* ¶ 20. In January 2016, Petitioner was removed, for the sixth time, from the United States. *Id.* ¶ 21.

In July 2017, Petitioner was again encountered by United States Border Patrol agents, this time near San Luis, Arizona, after entering the country without being admitted or paroled. *Id.* ¶ 22. He was processed for reinstatement of the prior order of removal and his application for relief was referred to an Immigration Judge for a hearing. *Id.* In October 2017, Petitioner appeared before the Immigration Judge, requested that his application for relief be withdrawn, and asked to be removed. *Id.* ¶ 23. The Immigration Judge issued a removal order and both parties waived appeal. *Id.* In November 2017, Petitioner was removed, for the seventh time, from the United States. *Id.* ¶ 24.

Undeterred by his prior illegal entries and convictions, Petitioner subsequently re-entered the United States at an unknown time and place. *Id.* ¶ 25. In August 2024, Petitioner was encountered at the Boyle County Detention Center in Danville, Kentucky following his arrest for criminal prosecution of a forged instrument. *Id.* ¶ 26. He was taken into ICE custody on or around August 27, 2024. *Id.*; *see also* ECF 1 at 4; ECF 1-1 at 3. In September 2024, he was placed in proceedings before an Immigration Judge to pursue an application for relief. Ex. 1 ¶ 27. On February 10, 2025, an Immigration Judge granted Petitioner's request for relief. *Id.* ¶ 28. The habeas petition alleges the Immigration Judge granted withholding of removal to El Salvador under the Convention Against Torture. ECF 1-1 at 2-3. Neither party appealed, making the Immigration Judge's order final. Ex. 1 ¶¶ 28-29.

Pursuant to 8 U.S.C. § 1231(a)(1)(A), an alien who has been ordered removed shall be removed from the United States within 90 days. *Id.* ¶ 30. If an alien has not been removed at or near 90 days after a removal order, ERO conducts a File Custody Review, also known as a Post-Order Custody Review ("POCR"), to determine the necessity of continued custody. *Id.* When conducting a 90-day POCR, factors to be considered include a detained individual's flight risk, any danger the individual may pose to the community, any threat to national security, and whether there is a significant likelihood of removal in the reasonably foreseeable future. *Id.*

If an alien has been detained pursuant to a final removal order for 180 days, a Transfer Checklist generally is completed with information related to follow-up actions taken to obtain a travel document after the initial 90-day POCR and every 90 days thereafter. *Id.* ¶ 31. The Transfer Checklist is transferred to the ICE/ERO Headquarters POCR Unit, which makes the ultimate decision on the individual's continued detention beyond 180 days, or every 90 days thereafter. *Id.* This decision is based on whether there is a significant likelihood of removal in the reasonably foreseeable future. *Id.*

In December 2024, Petitioner was served with a Notice to Alien of Interview for Review of Custody Status ("Notice"). *Id.* ¶ 32; *see also* ECF 1-2 at 2-3 (attaching a copy of the Notice). The Notice stated Petitioner's custody status would be reviewed in or around February 23, 2025, and advised Petitioner he could "submit any documentation" in advance that he wished to be "reviewed in support of" his release. ECF 1-2 at 2; *see also* Ex. 1 ¶ 32. On or around April 14, 2025, Petitioner was interviewed regarding his custody status. Ex. 1 ¶ 33. A decision on this April 2025 POCR has not yet been made. *Id.* ¶ 34.

Since the February 2025 order of the Immigration Court became final, the United States Department of Homeland Security ("DHS") has attempted to remove Petitioner to alternative third countries with no success. *Id.* ¶ 35. Nevertheless, ICE is continuing its efforts to identify third countries for Petitioner's removal. *Id.* ¶ 38. For example, on August 21, 2025, ERO reached out to ICE's Removal and International Operations ("RIO") Headquarters to request removal to Canada. *Id.* ¶ 36. Approximately six days later, ERO received correspondence from RIO indicating Canada would likely require prospective third country removals to have a nexus with Canada before accepting those individuals. *Id.* ¶ 37.

ARGUMENT

28 U.S.C. § 2241(a) vests each district court with the power to grant a writ of habeas corpus. Such a writ "shall not extend to a prisoner" unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). The Court of Appeals reviews legal issues in connection with a § 2241 habeas petition *de novo*, while factual findings are reviewed for clear error. *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012).

I. Count I fails under *Zadvydas* because Petitioner has not shown removal is unlikely, or alternatively, Respondents can rebut any such showing

Upon the entry of a final removal order, "the Government ordinarily secures the alien's removal during a subsequent 90-day statutory 'removal period,' during which time the alien normally is held in custody." *Zadvydas*, 533 U.S. at 682. If the alien is not removed during this 90-day period, 8 U.S.C. § 1231(a)(6) "authorizes further detention." *Id.* In *Zadvydas*, the Supreme Court held a 6-month period of detention is presumptively reasonable. *Id.* at 701. "After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* The presumption does not mean that "every alien not removed must be released after six months," but instead that the alien may be held in confinement until "it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

Here, Petitioner has not demonstrated "good reason to believe" there is no significant likelihood of removal in the reasonably foreseeable future. He mainly focuses on the Immigration Court order withholding removal to El Salvador based on an alleged threat of persecution there. *See supra* Statement of Facts ("SOF"). "But because withholding of removal is a form of country specific relief, nothing prevents DHS from removing the alien to a third country other than the country to which removal has been withheld or deferred." *Johnson v. Guzman Chavez*, 594 U.S. 523, 531-32 (2021) (citation modified). ICE has been attempting to remove Petitioner to countries other than El Salvador, which includes looking into Canada. *See supra* SOF. Attempts to remove Petitioner to third countries have not yet borne fruit, but ICE is continuing its efforts to identify such countries. *Id.* Petitioner asserts he is unaware of a response from Canada, ECF 1-1 at 2, 4, but he does not show there are no other countries outside of El Salvador to which he could be removed.

In effect, Petitioner is arguing that removal to a third country is unlikely because it hasn't happened yet. That is not enough to shift the burden under *Zadvydas*. *See Masih v. Lowe*, No. 4:24-CV-01209, 2024 WL 4374972, *3 & n.32 (M.D. Pa. Oct. 2, 2024) ("[T]he fundamental basis of [petitioner's] argument appears to be that his removal is unlikely simply because it has not occurred to this point[.]") (citation modified). Stated differently, "[s]peculation and conjecture are not sufficient to carry this burden, nor is a lack of visible progress" in Petitioner's removal "sufficient, in and of itself, to show that no significant likelihood of removal exists in the reasonably foreseeable future." *Tawfik v. Garland*, No. H-24-2823, 2024 WL 4534747, *3 (S.D. Tex. Oct. 21, 2024) (citation modified). "Because ICE is still actively pursuing" Petitioner's removal "and his detention furthers Congress's goal of ensuring his presence for removal," Petitioner "is, therefore, not entitled to release under *Zadvydas*." *Bains v. Garland*, No. 2:23-cv-00369-RJB-BAT, 2023 WL 3824104, *4 (W.D. Wash. May 16, 2023).

In the same vein, a "mere delay" in obtaining travel documents "does not trigger the inference that an [individual] will not be removed in the reasonably foreseeable future because the reasonableness of detentions pending deportation cannot be divorced from the reality of the bureaucratic delays that almost always attend such removals." *Dusabe v. Jones*, No. CIV-24-464-SLP, 2024 WL 5465749, *4 (W.D. Okla. Aug. 27, 2024) (citation modified), *adopted*, 2025 WL 486679, *1-4 (W.D. Okla. Feb. 13, 2025). Indeed, part of the delay in this case is associated with Petitioner's efforts to secure "withholding or asylum," which efforts "do not normally trigger the concerns raised by *Zadvydas*." *Roman v. Garcia*, No. 6:24-CV-01006, *3 (W.D. La. Jan. 29, 2025). And even when the Government "has not identified a specific date by which it expects a travel document to issue," it remains true that "uncertainty as to when removal will occur does not establish that detention is indefinite." *Atikurraheman v. Garland*, No. C24-262-JHC-SKV, 2024 WL 2819242, *4 (W.D. Wash. May 10, 2024).

In sum, Petitioner has not provided competent evidence to show that removal to a country other than El Salvador is unlikely. *See, e.g., Soudom v. Warden*, No. 25-3063-JWL, 2025 WL 1594822, *2 (D. Kan. May 23, 2025) (denying relief where the petitioner did not carry his initial burden, in part because "[t]he letter on which petitioner relies does not foreclose the possibility of his removal"); *Ogole v. Garland*, No. 24-3198-JWL, 2025 WL 548452, *2 (D. Kan. Feb. 19, 2025) (denying relief where the petitioner did not carry his initial burden by asserting "his country has a freeze on deportation," as this argument was "made without supporting evidence" and belied by other facts in the record). Count I should be rebuffed on this basis.

Even if Petitioner had made an initial showing removal is unlikely, Respondents have now rebutted it. ICE has acted diligently by previously removing Petitioner seven times. *See supra* SOF. For Petitioner's eighth removal, ICE is now investigating countries other than El Salvador. *Id.* Current efforts have not yet succeeded, but ICE is continuing to look. *Id.* If it believes all regulatory requirements can be met, ICE also has the option of asking the Immigration Court to lift the withholding order with respect to El Salvador. All of this defeats any assertion there is no significant likelihood of removal. *See, e.g., Soudom*, 2025 WL 1594822, at *2 (finding the respondents "sufficiently rebutted" any initial showing, in part because "[i]mmigration officials have diligently sought the necessary travel documents for petitioner from South Africa since his detention"); *Drame v. Gonzales*, No. 16-3257-JWL, 2017 WL 978120, *3 (D. Kan. Mar. 14, 2017) (finding the respondents met their burden "by showing that the Senegal Embassy now has issued the necessary travel document and that a tentative travel plan is in place to remove petitioner within this month").

II. Count II fails because Petitioner's inability to show non-compliance with *Zadvydas* means he cannot establish a substantive due process violation

Petitioner's substantive due process claim in Count II relies on the same allegations as Count I. ECF 1 at 6. Count II asserts the same "prolonged period" of detention that violates 8 U.S.C. § 1231(a)(6) and *Zadvydas* also violates Petitioner's substantive due process rights because it infringes on his "right to liberty." *Id.* Given the overlap between Petitioner's first two claims, the lack of a viable *Zadvydas* claim in Count I (*see supra* Argument § I) precludes the substantive due process claim in Count II. *See, e.g., Dusabe v. Jones*, No. CIV-24-464-SLP, 2024 WL 5465749, *5-6 (W.D. Okla. Aug. 27, 2024) ("Courts, including this one, have held that a petitioner's failure to establish that his detention violates *Zadvydas* negates a substantive due process claim."), *adopted*, 2025 WL 486679, *1-4 (W.D. Okla. Feb. 13, 2025).

Many other cases support this conclusion. *See H.N. v. Warden*, No. 7:21-CV-59-HL-MSH, 2021 WL 4203232, *3 (M.D. Ga. Sept. 15, 2021) ("As for any separate substantive due process challenges to the length of his detention, *Zadvydas* forecloses those claims."); *Virani v. Huron*, No. SA-19-CV-00499-ESC, 2020 WL 1333172, *7 & n.3 (W.D. Tex. Mar. 23, 2020) ("[T]he record does not support Petitioner's claim that his detention threatens to be either indefinite or potentially permanent so as to implicate *Zadvydas* and substantive due process concerns."); *Singh v. Barr*, No. 19-CV-732, 2019 WL 4415152, *3 (W.D.N.Y. Sept. 16, 2019) ("Conversely, if detention is valid under *Zadvydas*, it cannot violate substantive due process."); *Jovel-Jovel v. Contreras*, No. H-18-1833, 2018 WL 11473467, *4 (S.D. Tex. Oct. 30, 2018) ("[I]f detention is no longer than reasonably necessary to effectuate removal, it will comport with § 1231(a)(6), *Zadvydas*[,] as well as substantive due process protections.") (citation modified); *Nasr v. Larocca*, No. CV 16-1673-VBF(E), 2016 WL 2710200, *5 (C.D. Cal. June 1, 2016) ("[W]here Petitioner has failed to meet his burden to show there is no significant likelihood of removal in the reasonably foreseeable future under *Zadvydas*, Petitioner also has failed to prove that his continued detention violates due process.") (citation modified).

III. Count III fails because Petitioner received procedural due process and any regulatory deviation was harmless or can be remedied by substitute process

Count III asserts "[t]he failure of Respondents to provide a neutral decision-maker to review the continue[d] custody of Petitioner violates Petitioner's right to procedural due process." ECF 1 at 6 (citation modified). The Court considered and rejected a similar argument in *Garcia Uranga v. Barr*, No. 20-3162-JWL, 2020 WL 4334999 (D. Kan. July 28, 2020): "As for Petitioner's claim that procedural due process requires that the POCR be conducted by an unbiased and neutral arbitrator, Petitioner has not demonstrated that he is entitled to habeas relief on that ground, and the Court has found no support for it." *Id.* at *8; *see also id.* (collecting cases rejecting claims of entitlement to a "neutral decision-maker") (citation modified). The same reasoning applies to the case at bar.

Count III then asserts Respondents violated Petitioner's right to procedural due process by neglecting to timely perform a POCR. ECF 1-1 at 9. Petitioner alleges he "has waited over 90 days for ICE to conduct a custody review[.]" *Id.* (citation modified). In particular, he says that as of the date he filed his habeas petition, he "has not received an answer from ICE Headquarters and his custody review has not been conducted." *Id.* (citation modified); *see also id.* (averring that Petitioner "has not received a response" from ERO or "ICE Headquarter[s] POCR" regarding "his release") (citation modified).

As discussed in the SOF, the File Custody Review process is governed in part by 8 C.F.R. § 241.4. An initial 90-day custody determination normally is conducted by the relevant district director or the Director of Detention and Removal Field Office (collectively "Director"). 8 C.F.R. §§ 241.4(c)(1), 241.4(f)(1)-(8), 241.4(h)(1), 241.4(k)(1)(i). During the next 90-day period, the Director may "conduct such additional review of the case as he or she deems appropriate," "release the alien," or refer the alien to the Headquarters Post-Order Detention Unit for "further custody review." *Id.* §§ 241.4(c)(2), 241.4(k)(1)(ii), 241.4(k)(2)(i)-(ii). In the case at hand, ICE provided notice of a File Custody Review in December 2024 and interviewed Petitioner in April 2025. *See supra* SOF. Although a decision based on this review has not been reached, *id.*, Respondents are unaware of cases granting habeas relief following an otherwise proper POCR based solely on a delay in issuing a written opinion.

Regardless, any non-compliance with POCR requirements was harmless or otherwise insufficient to justify release. Respondents are working on removing Petitioner for the eighth time. *Id.* They continue to investigate third countries besides El Salvador for removal. *Id.* As discussed above in Argument § I, Petitioner cannot show that his detention has become indefinite, and even if he could, Respondents can rebut such a showing. "[N]ot every procedural misstep or difficulty raises anything like a constitutional issue. Procedural due process protects a right to a fundamentally fair proceeding; but few proceedings are perfect and one can have real errors, including ones that adversely affect a party's interests, without automatically violating the Constitution." *Matias v. Sessions*, 871 F.3d 65, 71 (1st Cir. 2017).

Even if any alleged non-compliance with POCR requirements was significant, "the remedy for a procedural due process violation is substitute process." *Virani*, 2020 WL 1333172, at *12. As explained in *Virani*:

> Substitute process – as oppose[d] to release – as a remedy for a procedural due process violation also comports with the reasoning of the Supreme Court in the analogous context of the Bail Reform Act, which supplies the procedures for determining whether to detain a suspect in pretrial custody on federal criminal charges. The Supreme Court has made clear that the mere failure to comply with the time limitations set forth in the Act does not mandate release of a person who should otherwise be detained.

Id. (citation modified); *see also Gaona v. U.S. Dep't of Homeland Sec.*, No. 5-20-CV-00473-FB-RBF, 2020 WL 6255411, *3 (W.D. Tex. Sept. 11, 2020) ("[T]he appropriate remedy for a procedural due process violation in these circumstances would not necessarily involve immediate release . . . . Instead, a successful procedural due process claim could very well result in Petitioners receiving additional process.") (citation modified).

In *Virani*, the respondents violated 8 C.F.R. § 241.4 by failing to conduct 90-day or 180-day POCRs. 2020 WL 1333172, at *9-11. In response, the *Virani* court set up an evidentiary hearing to take place in 60 days, so the court could consider (among other things) "any substitute process Petitioner receives between the date of this Order and the hearing[.]" *Id.* at *11-12. Likewise, in *Bonitto v. Bureau of Immigration & Customs Enf't*, 547 F. Supp. 2d 747 (S.D. Tex.

2008) the court found a procedural due process violation based on the respondents' failure to conduct a 180-day POCR. *Id.* at 756-58. Nevertheless, the *Bonitto* court only conditionally granted the habeas petition and afforded the respondents 60 days "within which to provide Petitioner a meaningful post-removal custody review[.]" *Id.* at 758.

Courts have reached similar conclusions with respect to other regulatory procedures. For instance, several tribunals have determined that violations of the "informal interview" requirement or other revocation requirements in 8 C.F.R. § 241.13(i) were harmless or did not warrant release. *See Nguyen v. Noem*, No. 6:25-CV-057-H, ECF 21 at 11, 14-15, 27 (S.D. Tex. Aug. 10, 2025) (holding that "even if the respondents did fail to abide by the procedural requirements" of § 241.13(i)(3), "any error was harmless. And even if it were harmful error, a writ of habeas corpus ordering his release would not be the appropriate remedy.") (CourtLink copy attached as Ex. 2); *Chavez Barrios v. Ripa*, No. 1:25-cv-22644-GAYLES, 2025 WL 2280485, *8 (S.D. Fla. Aug. 8, 2025) ("Even if Petitioner could establish that Respondents violated their OSUP revocation procedures, the Court finds that Petitioner's release from detention, or a stay of removal, would not be appropriate."); *Tanha v. Warden*, No. 1:24-cv-02121-JRR, 2025 WL 2062181, *6 (D. Md. July 22, 2025) ("While the court appreciates that the informal interview has not been done (or scheduled, apparently), release from detention is an overreach and not the appropriate cure."); *Ahmad v. Whitaker*, No. C18-287-JLR-BAT, 2018 WL 6928540, *5 & n.5 (W.D. Wash. Dec. 4, 2018) (finding there was "no apparent reason that ICE's failure to provide an informal interview should result in [the petitioner's] release") (citation modified); *Doe v. Smith*, No. 18-11363-FDS, 2018 WL 4696748, *9 (D. Mass. Oct. 1, 2018) (concurring there was "no apparent reason why a violation of the regulation, even assuming it occurred, should result in release").

The habeas petition does not cite *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), or any cases from this jurisdiction applying *Accardi*. The Tenth Circuit has indicated "*Accardi* stands for the proposition that an agency must adhere to its own rules and regulations when an individual's due process interests are implicated." *Barrie v. FAA*, 16 F. App'x 930, 934 (10th Cir. 2001). The Tenth Circuit at times has declined to consider *Accardi* arguments not expressly raised. *See Nunez-Robles v. Garland*, No. 20-9629, 2021 WL 5710935, *4 n.4 (10th Cir. Dec. 2, 2021) (noting the appellant's contention that "prejudice is not required" when "an agency violates its own promulgated regulations that were designed to protect fundamental statutory or constitutional rights," but concluding the appellant "did not argue per-se prejudice under *Accardi* in his motion, and we therefore cannot consider it") (citation modified). Generally, a court may not "act as Petitioner's advocate," take on the responsibility of "constructing arguments," or "rewrite a petition to include claims that were never presented." *Merryfield v. Howard*, No. 23-3070-JWL, 2023 WL 2562433, *3 (D. Kan. Mar. 17, 2023) (citation modified).

Respondents' research to date has not located a Tenth Circuit case specifically addressing whether a regulatory violation (or a particular type of regulatory violation) under *Accardi* is automatically prejudicial. When an alien challenges removal proceedings conducted by the BIA, he or she "is entitled only to the Fifth Amendment guarantee of fundamental fairness, or in other words, only to procedural due process, which provides the opportunity to be heard at a meaningful time and in a meaningful manner." *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009) (citation modified).[1] In this situation, the Tenth Circuit has stated "[t]o prevail on a due process claim, an alien must establish not only error, but prejudice." *Id.* Accordingly, "[i]n order to prevail on his

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[1] *Alzainati* was abrogated in part on other grounds by *Wilkinson v. Garland*, 601 U.S. 209, 217-18 (2024). *See Torres-Martinez v. Garland*, No. 23-9549, 2024 WL 2076194, *2 & n.2 (10th Cir. May 9, 2024) (explaining the effect of *Wilkinson* on *Alzainati*).

due process challenge" in the BIA context, a petitioner "must show he was prejudiced by the actions he claims violated his Fifth Amendment rights." *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1165 (10th Cir. 2004); *see also Novitskiy v. Holder*, 514 F. App'x 724, 727 (10th Cir. 2013) (relying on *Berrum-Garcia* to conclude a lack of prejudice meant "Petitioner has failed to demonstrate a due process violation"). Petitioner has shown no such prejudice here.

CONCLUSION

For the foregoing reasons, the habeas petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 5, 2025, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will provide notice to all registered parties. I further certify that the foregoing was forwarded by U.S. Mail, postage prepaid, to the following:

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