UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA

JABA PATARAIA, *Petitioner*, v. KRISTI NOEM, et al. *Respondents*.	Civil Action No. 1:25-cv-1188 Judge Drell Magistrate Judge Perez-Montes

PETITIONER'S REPLY

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INTRODUCTION

Despite securing relief from removal[1] nearly a year ago, Jaba Pataraia ("Jaba") remains subject to indefinite detention by Respondents—who claim that his ongoing detention is justified because his removal at this juncture is not impossible. But this loose standard is not the law. In fact, Respondents concede that the Supreme Court rejected this very standard in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). ECF No. 14, Respondents' Response to Petition ("Resp.") at 7 (Court rejected standard that detention was constitutional where "'good faith efforts to effectuate deportation' exist alongside Petitioner's inability to show deportation not "'impossible'").

Without more than a single declaration—proclaiming that seven months after making removal requests to Armenia, Kazakhstan, and Azerbaijan, Respondents are still waiting—Jaba has established that the burden falls to Respondents to rebut his showing that his removal is not reasonably foreseeable. *Zadvydas,* 533 U.S. at 701. Respondents have failed to do so as their rebuttal evidence responding to Jaba's 8 U.S.C. § 1231(a)(6) detention is the very timeline on which Jaba relies. Resp.at 5; ECF No. 14-1, Decl. of Asst. Field Office Dir. J. Williams ("Williams Decl."), ¶ 5; *Id.* Tautological arguments have no place at law when liberty interests are at stake.[2]

Respondents' ongoing detention of Jaba has no end in sight, in violation of his statutory and substantive due process rights under *Zadvydas*. Additionally, Respondents' continued failure to provide him with notice of any intended third country removal efforts further prolongs his detention in violation of his procedural due process rights. Moreover, Respondents' wholesale

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1 There is no dispute that Jaba was granted withholding of removal under 8 U.S.C. § 1231(b)(3). Resp. at 2, n. 1. To the extent the Petition provides legal context on the Convention Against Torture ("CAT"), that framework is provided in light of Jaba's argument that he is entitled to procedural due process protections under CAT prior to third country removal. *See* ECF No. 1, Petition for Writ of Habeas Corpus ("Pet.") at ¶¶ 34-39.

2 *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (Rehnquist, J., dissenting) ("The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology.").

failure to provide Jaba with the custody review he is entitled to under their own Fear-based Grant Release policy (the "Policy")—limiting him to insufficient, cursory reviews under the Post-Order Custody Review ("POCR") process—violates his rights under the APA and the *Accardi* doctrine. As such, Jaba is entitled to immediate release.

STATEMENT OF RELEVANT FACTS

Jaba, a citizen of Georgia and Russia, was granted withholding of removal to both countries on September 23, 2024. Pet. at ¶¶ 26–28. That grant became administratively final over six months ago on February 6, 2025, and Jaba's detention statute shifted to §1231(a)(6). *Id.* at ¶ 28. The government thereafter submitted requests for third country removal to Armenia, Kazakhstan, and Azerbaijan around seven months ago—on or about February 13, 2025. *See* Williams Decl. at ¶ 5. The government received no response from any of the countries and resubmitted its requests on April 3, 2025 and again on April 25, 2025. *Id.* On May 14, 2025, the government received correspondence from Kazakhstan stating that the "request was submitted to the relevant authorities." *Id.* at ¶ 6. As of September 3, 2025, the government "has not received a response from Armenia, Kazakhstan, or Azerbaijan as to whether they would accept Petitioner." *Id.* at ¶ 8.

ARGUMENT

I. Jaba's Ongoing, Indefinite Detention Is Unlawful.

Due process and the "Constitution[] demand[]" that detention during the post-removal-period is limited to "a period reasonably necessary to bring about the [noncitizen's] removal from the United States. It does not permit indefinite detention." *Zadvydas*, 533 U.S. at 689. Nor does the Constitution require the noncitizen "to show the absence of any prospect of removal" or that removal is an "impossib[ility]." *Id.* at 702. In fact, the Supreme Court underscored that "Congress previously doubted the Constitutionality of detention for more than six months." *Id.* at 701; *id.* at 708 (Kennedy, J., *et. al*, dissenting) ("Under the majority's view. . . it appears the [noncitizen]

must be released in six months even if presenting a real danger to the community.").

In short, a noncitizen's continued detention post final order of removal ("FOR") is only presumptively reasonable for six months. *Zadvydas*, 533 U.S. at 701. After that time, if a noncitizen provides "good reason to believe there is no significant likelihood of removal in the reasonably foreseeable future," the burden shifts to the government, which "must respond with evidence sufficient to rebut the showing." *Id.*; *see also Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (stating that after six months, a noncitizen may attack the reasonableness of continued detention, bearing the initial burden of proof). "Good reason to believe" is akin to the "reasonable grounds to believe" probable cause standard, which requires demonstrating a substantial, objective basis for believing that an assertion is true. *See United States v. Antone*, 753 F.2d 1301 (5th Cir. 1985).[3] Jaba survives the "more than bare suspicion standard" as the lack of any substantive response from Armenia, Kazakhstan, and Azerbaijan underscore that he has good reason to believe his removal is remote. *See Haggerty*, 391 F.3d at 656; *see also United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999) (stating that "fair probability" is "something more than bare suspicion, but need not reach the fifty percent mark"); *Lijadu v. Gonzalez*, 2006 WL 3933850, *2 (W.D. La. Dec. 18, 2006) (granting petition where "[n]one of ICE's efforts to obtain travel documents thus far have borne fruit, and there is no indication that any further efforts will yield a different result"). Jaba's showing is sufficient because the requirement is not akin "to show[ing] the absence of any prospect of removal." *Zadvydas*, 533 U.S. at 702.

Importantly, reasonableness of detention beyond six months is measured by "the statute's basic purpose, namely, assuring the alien's presence *at the moment of removal*"—in short, imminent (as opposed to "remote") removal. *Zadvydas*, 533 U.S. at 679, 699 (emphasis added).

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[3] *See also Haggerty v. Texas Southern University*, 391 F.3d 653, 656 (5th Cir. 2004) (probable cause "requires more than a bare suspicion but less than a preponderance of evidence").

Because Respondents have not presented any rebuttal evidence showing that Jaba's removal is more than remote—let alone that he is a flight or danger risk—there is a presumption of release subject to reasonable conditions. *Id.* at 679 (flight risk is "weak or nonexistent where removal seems a remote possibility" and danger rationale applies only to the "specially dangerous").

Where, as here, the foreign nations to which the Respondents seek to remove a noncitizen have taken more than six months to respond to barebones removal requests, the reasonably foreseeable test cannot be met. *Zadvydas*, 533 U.S. at 696, 702 (holding that general concern about involving courts in "'sensitive' repatriation negotiations" is not enough to prevent federal courts from assessing evidence and determining "likelihood of successful future negotiations"). Significantly, courts distinguish between detention with an "obvious termination point" and detention that is "potentially permanent." *See, e.g.*, *Wilson v. Mukasey*, 2010 WL 456777, at *10 (W.D. La. Feb. 2, 2010); *see also Andrade*, 459 F.3d at 538; *Thompson v. Holder*, 374 F. App'x 522, 523 (5th Cir. 2010). This case concerns the latter category of detentions.

Because Jaba has established that the burden falls on Respondents to justify his detention, and they offer no evidence to rebut the potentially permanency of his detention, Supreme Court precedent dictates he be released. *Zadvydas*, 533 U.S. at 701.

A. *Respondents' burden-shifting analysis is wrong.*

Respondents misstate the *Zadvydas* analysis. Despite Respondents assertions, in order to meet his burden, the *Zadvydas* test does not require Jaba to prove that his removal is *impossible*—but rather that it is not *reasonably foreseeable*. *Zadvydas*, 533 U.S. at 702 ("[T]his standard would seem to require [a noncitizen] seeking release to show the absence of *any* prospect of removal — no matter how unlikely or unforeseeable — which demands more than our reading of the statute can bear."). "In fact, courts have consistently granted habeas relief where: (1) petitioners acted in

good faith and attempted to cooperate with DHS to secure travel documents to finalize their removal; and (2) diplomatic barriers outside of petitioners' control hampered their removal." *Fuentes-De Canjura v. McAleenan*, 2019 WL 4739411, *8 (W.D. Tex. Sept. 26, 2019).

Ironically, Respondents argue that to meet his burden, Jaba must present "something beyond speculation and conjecture," demonstrating "that the 'circumstances of his status' or the existence of 'particular and individual barriers to his repatriation' to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future." Resp. at 4 (citing *Idowu v. Ridge*, 2003 WL 21805198, *4 (N.D. Tex. Aug. 4, 2003)). But, Jaba has done so. Indeed, Jaba was granted relief from removal to his countries of origin (Georgia and Russia), rendering his withholding status one that presents a distinct barrier to his removal. This sets him apart from each of the cases relied on by Respondents, where the petitioners were ordered removed to their home countries. Resp. at 4-5. Thus, the concerns raised by Respondents regarding the need for courts to consider delays inherent to "the bureaucracies" of a noncitizen's country of origin are wholly inapt. Resp. at 5 (citing *Fahim v. Ashcroft*, 227 F. Supp. 2d 1359, 1367 (N.D. Ga. 2002)).

Unsurprisingly, sister courts have found that a petitioner's initial burden is met where, as here, there was "no assurance" from a receiving country "that a travel document is forthcoming." *Butt v. Holder,* 2009 WL 1035354, *5 (S.D. Ala. March 19, 2009); *Khader v. Holder*, 843 F. Supp. 2d 1202, 1207 (N.D. Ala. 2011) (petition granted where petitioner did nothing to obstruct removal, but had not been removed because home country failed to issue travel document); *Khan v. Gonzales*, 481 F. Supp. 2d 638, 642 (W.D. Tex. 2006) (same).

All parties here agree that Jaba's grant of withholding of removal is final and his detention is therefore untethered to any future decision or event. Resp. at 1. Respondents concede (by omitting any reference to the contrary) that Jaba has acted in good faith and has fully cooperated

with Respondents' efforts to remove him. Resp. at 1-2; *Khader*, 843 F. Supp. 2d at 1207. They also concede that, as of this date, no travel documents have been issued for Jaba, and indeed no confirmation or assurances have been made that such travel documents are remotely forthcoming. *See generally,* Williams Decl.; *Lijadu*, 2006 WL 3933850 at *2. Against this backdrop, Jaba's removal in the reasonably foreseeable future is unlikely because: (1) he cannot be deported to either Georgia or Russia by law because he was granted withholding of removal; (2) he does not have citizenship, status, or any ties to any other country; and (3) should the government seek to remove Jaba to any third country, as discussed *infra*, it must afford Jaba mandatory protections.

Because Jaba has *no* legal status or connection to the countries Respondents have identified, "lack of visible progress" in obtaining travel documents means something. Resp. at 5 (citing *Fahim*, 227 F. Supp. 2d at 1366). Instead of indicating to-be-expected delays in coordinating with one's native country, the wholesale lack of progress is sufficient evidence that Armenia, Kazakhstan, and Azerbaijan have not accepted Jaba at the seventh-month mark of his detention—a detention that has no end in sight under Respondents' reasoning. As such, Jaba has met his initial burden under *Zadvydas*. *See Vaskanyan v. Janecka*, 2025 U.S. Dist. LEXIS 137846, at *16 (C.D. Cal., Jul 18, 2025) (ordering petitioner's release where countries designated for removal would not accept petitioner and "ICE d[id] not know whether and when the information requested by the [alternate third country] Consulate can be obtained or when it can expect to receive a response from the [alternate third country] consulate"); *Andreasyan v. Gonzales,* 446 F. Supp. 2d 1186, 1190 (W.D. Wash. 2006) (petitioner satisfied initial burden where his travel document application was simply "still under review and pending a decision").

In sum, Jaba's assertions that his removal is not reasonably foreseeable are not "conclusory" because they are based on the six-month failure of Respondents to effectuate his

removal to a third country, where his ongoing detention is "not limited, but potentially permanent." *Zadvydas*, 533 U.S. at 691. As such, he satisfies the "good reason to believe" standard because he has provided a substantial, objective basis that his removal will not occur in the foreseeable future. *Haggerty*, 391 F.3d at 656. The burden thus shifts to Respondents to rebut this presumption.

B. *Respondents' rebuttal evidence is insufficient.*

Because Jaba has met his initial burden, the burden now shifts to Respondents to justify Jaba's detention. *Zadvydas*, 533 U.S. at 701. They cannot. Respondents assert that "while the Government has proceeded diligently and in good faith to effectuate Petitioner's removal the key issue in this case is that the Government cannot control the time in which the removal countries make their decision." (Resp. at 7). But this is the precise logic explicitly rejected in *Zadvydas*, where the Court was clear that ongoing, "good faith efforts to effectuate . . . deportation" *do not* demonstrate the lawfulness of continued detention. 533 U.S. at 702.

Courts have found that the government's burden is met where it presents evidence of ongoing consular engagement—as demonstrated by *specific consular actions*, not general intent—and the absence of diplomatic resistance. For example, the issuance of a valid travel document and scheduled removal within a defined timeframe is sufficient rebuttal evidence. *See Ademfemi v. Gonzalez*, 2006 WL 2052120, at *2 (W.D. La. Mar. 7, 2006), *subsequently aff'd*, 228 Fed. Appx. 415 (5th Cir. 2007) (finding government met its burden where it had obtained travel documents); *Galtogbah v. Sessions*, 2019 WL 3766280, at *2 (W.D. La. June 18, 2019), *R&R adopted*, 2019 WL 3761637 (W.D. La. Aug. 8, 2019) (similar because flight arranged and interviews were conducted with Petitioner). By contrast, "[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*, 2008 WL 11393137, at *5 (S.D. Tex. Aug. 21, 2008), *superseded by* 2008 WL 11393094 (S.D. Tex. Sept. 12, 2008) *R & R adopted*, 2008 WL 11393148 (S.D. Tex. Oct. 7, 2008).

Thus far, Respondents can only present what they aspire to do with Jaba—nothing more. In short, they aspire to remove him to Armenia, Kazakhstan, and Azerbaijan, but offer only conclusory statements about steps taken to remove him without any evidence that removal is foreseeable. Crucially, Respondents hopes of removal have been met with silence after seven months. As of September 3, 2025, the government "has not received a response from Armenia, Kazakhstan, or Azerbaijan as to whether they would accept Petitioner." *Id.* at ¶ 8. The fact that Respondents "sent a request to ERO Headquarters for assistance with third country removal" does not provide any indication of the likelihood of Jaba's removal. *Id.* at ¶ 6. And as discussed *infra,* their assertions that Jaba's ongoing detention is somehow justified by the mere existence of the POCR process alone also fail. Resp. 7-9; *Zadvydas*, 533 U.S. at 685 (noting Fifth Circuit's reliance on the mere existence of periodic administrative reviews is not sufficient). Because Respondents' cursory and unsubstantiated explanations for Jaba's detention are precisely the justifications rejected by *Zadvydas*, they have failed to meet their burden and release is required.

II. Respondents' Failure to Identify Prospective Third Countries Violates Jaba's Procedural Due Process Rights.

In asserting that Jaba's prospective third country removal should not be addressed, Respondents mischaracterize Jaba's procedural due process claim. Resp. at 9. Here, Jaba does not challenge his removal to Armenia, Azerbaijan, or Kazakhstan—where he has indeed been provided with notice of intended removal. Resp. at 9. Instead, Jaba asserts that Respondents' failure to put forward *additional* prospective third countries violates his right to notice and a meaningfully opportunity to respond—where the third country removal process itself will further prolong his indefinite detention and limit the prospect of foreseeable removal. *See* Pet., ¶¶ 55–70, 85–88. Surely it is not the case that reasonable foreseeability is satisfied up until the point Respondents have asked the more than 190 countries in the world whether they will accept a

particular individual who is not their own citizen. By this calculation, Respondents will only exhaust the possibilities of third-country removal after approximately 95 years have passed[4]—in short, upon someone's death. That cannot be (and is not) the law under *Zadvydas*.

Nor can it be the law that Respondents can deport Jaba wherever they choose absent any notice whatsoever. But, Jaba has every reason to fear they will, because the government is currently removing noncitizens to third countries with as little as six hours' notice by way of a single sheet of paper. *See* Pet., ¶ 5, n. 2. Jaba has the right to ask this Court to ensure that he receive "notice . . . within a reasonable time and in such a manner as will allow [him] to actually seek . . . relief . . . before such removal occurs." *Trump v. J.G.G.*, 604 U.S. —, 2025 WL 1024097, at *2 (Apr. 7, 2025) (per curiam) (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993)). Absent this notice, he cannot raise a fear-based claim under the provisions that enshrine his rights to do so, placing his right to procedural due process—to which he is entitled—in jeopardy. *See, e.g.*, 8 U.S.C. § 1231(b), 8 U.S.C. 1225(b)(1)(A)(ii); 8 C.F.R. § 208.16; 8 C.F.R. § 208.31; *Reno*, 507 U.S. at 306.

A. *No jurisdictional bar precludes Jaba's challenge to his indefinite detention.*

Respondents assert that Jaba's challenge to unknown third countries where he may be sent is barred by § 1252(g) because it goes "to the execution of a [FOR], i.e., detention pending his removal to Armenia, Azerbaijan or Kazakhstan." Resp. at 11. But this position directly contradicts Supreme Court and Fifth Circuit precedent clearly preserving this Court's jurisdiction over detention claims. *See Zadvydas*, 533 U.S. at 688 (stating that when a petitioner challenges "the extent of the Attorney General's authority under the post-removal-period detention statute," § 2241 habeas proceedings are available for "statutory and constitutional challenges" to such detention). Jaba does not ask this Court to stay the government's execution of his removal order. Rather, he

[4] Six-month removal period per country multiplied by approximately 190 countries = 1,140 months = 95 years.

challenges the legality of his indefinite detention pending effectuation of his removal order.

Over two decades ago, the Supreme Court held that the jurisdiction-stripping provision § 1252(g) "applies only to three discrete actions"—a decision "to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("*AADC*"); *see also Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 591 U.S. 1, 19 (2020) (calling 1252(g) "narrow," imposing no "general jurisdictional limitation" nor covering "all claims arising from deportation proceedings").[5] The Supreme Court has further clarified that, in interpreting the language of subsection (g), it "did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions" but instead read the language "to refer to just those three specific actions themselves." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (citing *AADC*, 525 U.S. at 471).

Significantly, district courts across the country have found that they have jurisdiction over third country removal claims identical to the one presented here. *Escalante v. Noem*, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025) (finding jurisdiction where Petitioner "is merely asking to be placed back on supervised release pending his removal . . . ."); *Santamaria Orellana v. Baker*, 2025 WL 2444087, at *3 (D. Md. Aug. 25, 2025) ("[Petitioner] challenges the legality of his detention pending the effectuation of his removal order.").

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[5] In line with *AADC*, the Fifth Circuit consistently applies § 1252(g) narrowly. *See, e.g., Texas v. United States,* No. 23-40653, 2025 U.S. App. LEXIS 1132, at *37-38 (5th Cir. Jan. 17, 2025) (holding that the issue of whether §1252(g) applies is not a "sort of 'zipper' clause that says "no judicial review in deportation cases unless [the § expressly provides for it]"); *Kale v. United States*, No. 01-10921, 2002 U.S. App. LEXIS 29129, at *7-8 (5th Cir. May 10, 2002) (holding that §1252(g) was inapplicable because the claims did not arise from "the decision[ ] to commence proceedings, to adjudicate cases, and to execute removal orders"); *Cardoso v. Reno*, 216 F.3d 512, 516-17 (5th Cir. 2000) (§ 1252(g) does not prevent plaintiffs from challenging 'other decisions or actions that may be part of the deportation process . . . .'"). Sister circuits have likewise recently reiterated that where, as here, a petitioner's claims do not challenge the government's discretion to decide or take action to execute a removal order, they do not "arise from" execution of that order. *See Kong v. United States,* 62 F.4th 608, 614 (1st Cir. 2023) ("Among such 'collateral' claims" not subject to the § 1252(g) bar on judicial review are "claims seeking review of the legality of a petitioner's detention"); *Ozturk v. Hyde,* 136 F.4th 382, 397 (2d Cir. 2025) (holding an unlawful detention challenge to be unrelated to the jurisdiction-stripping provisions of § 1252(g)).

Respondents alternatively argue that jurisdiction is barred by the channeling provisions of §§ 1252(a)(5) and (b)(9). Resp. at 11-12. But again, Respondents rely on a fundamental mischaracterization of Jaba's claims. He does not challenge his FOR—but rather his ongoing detention in light of Respondents' refusal to disclose potential third countries for removal. *Ozturk*, 136 F.4th at 401 (holding these Sections do not strip jurisdiction of habeas challenges to unlawful detention). Section "1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." *Regents*, 591 U.S. at 19 (cleaned up); *Jennings*, 583 U.S. at 293 (rejecting "expansive interpretation" of § 1252(b)(9)).

B. *Jaba's challenge to his indefinite detention is not disturbed by D.V.D.*

Instead of engaging with the substance of Jaba's third country removal claims, Respondents argue that these claims should be dismissed or stayed because he is a class member under *D.V.D. v. DHS*, 778 F.Supp.3d 355 (D. Mass. Apr. 18, 2025) ("*D.V.D.*")—all the while simultaneously acknowledging that "the Supreme Court, however, has stayed the injunction." Resp. at 10. The Supreme Court's stay of the nationwide *D.V.D.* injunction *supports* Jaba's claims for relief because those protections are no longer in place and his habeas claim lacks the jurisdictional obstacles presented by claims for class-based injunctive relief. *See* Pet. at ¶¶ 66–70.

Further, *D.V.D.* does not address whether or when a person may be detained while the government attempts to effectuate a third-country removal. *See Santamaria Orellana*, 2025 WL 2444087, at *3 (finding that even if petitioner "is a member of the certified class in *D.V.D.*, in the Petition, he is not seeking . . . relief only from his present detention).[6] Jaba's petition is a request

[6] *See also Medina v. Noem*, 2025 WL 2306274 (D. Md. Aug. 11, 2025) (same); *E.D.Q.C. v. Warden, Stewart Detention Ctr.*, 2025 WL 1575609 (M.D. Ga. June 3, 2025) (declining to dismiss or stay proceedings pending the resolution of *D.V.D.* because "*D.V.D.* is not a habeas action and release from custody is not one of the remedies requested.")

for relief from prolonged post-FOR detention, which cannot and will not be addressed by the *D.V.D* litigation.

III. Respondents' Failure to Abide By Their Own Fear-based Grant Release Policy Violates the Administrative Procedure Act and the *Accardi* Doctrine.

For noncitizens like Jaba who have won relief from removal, the government has established specific procedures pursuant to its Fear-based Grant Release Policy ("ICE Directive 16004.1" or the "Policy"): individualized review that requires the release of the noncitizen pending final removal unless other exceptional circumstances compel continued detention. *See* Pet. at ¶¶ 50–54; ECF No. 1-3, Pet., Exh. B (the Policy). This policy creates a common-sense distinction between (a) the ongoing detention of noncitizens ordered removed to their country of origin and (b) the narrow category of those whose removal to their countries of origin has been withheld because they would face grave risk of persecution or torture if returned. *Id.* As of September 23, 2024—the date Jaba was granted withholding of removal—he was entitled to the immediate review of his custody pursuant to the Policy.[7]

Here, Jaba raises an APA cause of action under the *Accardi* doctrine, which recognizes that agencies are bound to follow their own rules that affect the fundamental rights of individuals—including self-imposed policies and processes that limit otherwise discretionary decisions. *See Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954); *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 389–90 (5th Cir. 1966) (same). An agency's failure to follow its own policies, as required by the APA pursuant to the *Accardi* doctrine, is arbitrary, capricious, and contrary to law under the APA. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 337 (D.D.C. 2018); *Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007); *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000).

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[7] Petitioner apologizes for the typographical error contained at ¶ 96 of his Petition. As stated elsewhere in the Petition, the date at which Petitioner was eligible for an immediate review of his custody was September 23, 2024. *See* Pet. at ¶¶ 2, 9.

Jaba is "challenging an overarching agency action as unlawful—in this case, Respondents' systematic failure to follow the [ICE Policy] and to instead impose detention without its safeguards and individualized determinations." *Damus*, 313 F. Supp. 3d at 327 (citation modified). Instead of engaging with the substance of the Policy, Respondents state that "the APA simply offers no relief in this case," asserting that this Court lacks jurisdiction, and making the disgenuous claim that Petitioner has not identified which policy ICE has violated.[8] Resp. at 18. Both arguments fail.

A. *No jurisdictional bar precludes Jaba's APA challenge.*

Respondents' argument that this Court lacks jurisdiction over his APA claim boils down to a false assertion that the government's failure to review Jaba's custody under the Policy is not a final agency action.[9] Resp. at 16-18. Here, Respondents continue to detain Jaba, who has been indisputably granted withholding, without making an individualized determination as to whether his continued detention is justified by exceptional circumstances. That decision is a final agency action that is cognizable under the APA. *Damus*, 313 F. Supp. 3d at 317, 337.

Respondents erroneously assert that Jaba's APA claim is barred by § 1252(g) because "the decision as to the method by which removal proceedings are commenced, which is the genesis of Petitioner's detention, is a discretionary one that is not reviewable . . . ." Resp. at 17 (citing *AADC*, 525 U.S. at 487). As addressed *supra*, this position contradicts binding precedent and would create a remarkable result—a bar on *all* habeas claims challenging a noncitizen's detention. Respondents incorrectly attempt to analogize Jaba's claims to those brought in *AADC*. *Id.* There, the noncitizens directly challenged the government's decision to commence removal proceedings. Here, Jaba

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8 The government admitted the existence and applicability of the same directive at issue here in *Rodriguez Guerra v. Perry*, 2024 WL 4024047 (E.D. Va. Sept. 3, 2024).

9 Even if this Court finds that Jaba has not properly pleaded an APA claim due to the purported lack of a final agency action, the *Accardi* claim would still be properly pleaded under the Due Process Clause, which does not require a "final agency action."

narrowly challenges his ongoing detention and the denial of his custody review under the Policy. Because a challenge to one's detention is outside the bounds of a "decision to execute, commence, adjudicate" removal proceedings, Respondents arguments concerning jurisdiction fail.

B. *The POCR process is the wrong tool for reviewing Jaba's ongoing custody.*

Respondents seek to justify Jaba's detention because his custody "was reviewed within 90 days of the Board's decision." Resp. at 18. But the government's 90-day POCR process is the incorrect vehicle for Respondents' review of Jaba's ongoing detention because it carries a different and lower standard than that of the Policy. The regulations implementing § 1231 provide for only limited custody review before ICE officials, who must state why the noncitizen poses a threat to the community, is a significant flight risk, or both. *See* 8 C.F.R. § 241.4(k)(l)(i). This is a wholly different and lesser standard than outlined in the Policy, which distinguishes those who have won immigration relief by way of a thumb on the scale in favor of release.

Here, Respondents have not produced any evidence supporting Jaba's continued detention on the basis of "exceptional circumstances." Jaba has no criminal history and the 90-day POCR is boilerplate and pretextual—finding Jaba presents a flight risk based solely on his irregular manner of entry and his FOR. *See* Pet. at ¶ 29.[10] But *Zadvydas* says that is not enough. 533 U.S. at 690. The review provided to Jaba thus far flouts the Policy and places him at risk of indefinite detention.

IV. Alternatively, Limited Discovery May Be Appropriate In This Case.

Respondents have failed to demonstrate that third country removal is possible as a matter of law. Because the *Zadvydas* test is an inherently fact-intensive inquiry, should this Court question

[10] *See Bonitto v. Bureau of Immigration & Customs Enf't*, 547 F.Supp.2d 747, 755 (S.D. Tex. 2008) (finding that a petitioner's procedural due process rights were violated by the POCR because "[c]onclusory statements that removal is 'expected in the reasonable foreseeable future' or that an alien would 'pose a danger to society' if released, with no factual basis or explanation, teeters dangerously close to a perfunctory and superficial pretense instead of a meaningful review sufficient to comport with due process standards.").

the factual possibility of third country removal, Petitioner requests an evidentiary hearing or limited discovery. *See Zadvydas*, 533 U.S. at 686 (referencing district court's reliance on evidentiary hearing to determine the factual feasibility of removal).

While it is true that a habeas petitioner, "unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course," *Bracy v. Gramley*, 520 U.S. 899, 904 (1997), in *Hamdi v. Rumsfeld*, the Supreme Court explained that "[th]e simple outline of §2241 makes clear that both Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process." 542 U.S. 507, 526 (2004).[11] The essential element of Jaba's *Zadvydas* claim concerns the feasibility of his removal to a third country. The only evidence produced is the Williams Declaration, which does not contain any facts beyond cursory assertions of requests to a limited set of third countries. *See generally*, Willaims Decl. The declaration does not contain evidence of any prior agreement or arrangement with these countries accept noncitizens and provides no indication that a travel document can be processed. *Id.* Thus, there is a factual dispute as to whether Jaba's removal to a third country is possible. Limited discovery could clear up the dispute, *see* Exh. A (Proposed Requests for Discovery), as could an evidentiary hearing. *See Gaitan-Campanioni v. Thornburgh*, 777 F. Supp. 1355, 1356 (E.D. Tex. 1991) (granting discovery request).

CONCLUSION

Jaba asks this Court to grant the Petition and order his immediate release.

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[11] 28 U.S.C. § 2246 states in full that "[i]f affidavits are admitted any party shall have the right to propound written interrogatories to the affiants." *See also Harris v. Nelson*, 394 U.S. 286, 290 (1969) ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry."); *Gibbs v. Johnson*, 154 F.3d 253, 258 (5th Cir. 1998) (same); *Murphy v. Davis*, 901 F.3d 578, 590 (5th Cir. 2018) (same).

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Dated: September 12, 2025

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