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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

O.C.G.,

Petitioner,

v.

Fred Figueroa, et al.,

Respondents.

No. 2:25-cv-03048-SHD-DMF

ANSWER TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

In this immigration habeas action, Petitioner has been released from custody but now seeks, *inter alia*, the termination of an ankle monitor by arguing that his detention is unconstitutionally prolonged in violation of *Zadvydas*. Petitioner has now withdrawn his claim of unlawful in-custody detention, since he has been released, as well as his claim that the government seeks to remove him to an unknown third country without due process. Doc. 45. Because Petitioner cannot meet his burden to demonstrate indefinite constructive detention with no reasonable likelihood of removability, Petitioner fails the *Prieto-Romero* test even assuming that the ankle monitor constitutes detention. *Prieto-Romero v. Clark*, 534 F.3d 1053 (9th Cir. 2008). His Amended Petition should therefore be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner, a 31-year-old citizen of Guatemala, entered the United States on March 27, 2024, near Santa Teresa, New Mexico. Sealed Exhibit 1 to Doc. 14, Declaration of Ema Peru, ¶ 6.[1] United States Border Patrol agents arrested him and issued a Notice and Order of Expedited Removal, pursuant to the Immigration and Nationality Act ("INA"), specifically, 8 U.S.C. § 1182(a)(7)(A)(i)(I). Sealed Exhibit 1 to Doc. 14, ¶ 6. Immigration and Customs Enforcement ("ICE") officers removed him to Guatemala through air charter operations on April 2, 2024. Sealed Exhibit 1 to Doc. 14, ¶ 7.

Petitioner alleges that he then crossed from Guatemala into Mexico, [redacted] and eventually crossed the United States border for a second time. Doc. 45 at 7. The government believes that Petitioner specifically reentered the United States on May 5, 2024, near Sasabe, Arizona. Sealed Exhibit 1 to Doc. 14, ¶ 8. Border Patrol again arrested him and issued a Notice of Intent/Decision to Reinstate Prior Order, charging him with violation of 8 U.S.C. § 1231(a)(5).[2] Border Patrol transported Petitioner to the Eloy Detention Center in Arizona, at which point ICE resumed custody of his person. Sealed Exhibit 1 to Doc. 14, ¶ 9. ICE requested Petitioner's removal documents from the National Records Center on May 13, 2024. Sealed Exhibit 1 to Doc. 14, ¶ 10. On May 30, 2024, ICE referred his case to an Asylum Pre-Screening Officer for a reasonable fear interview. Sealed Exhibit 1 to Doc. 14, ¶ 11. On June 11, 2024, the Asylum Officer determined that Petitioner had established a reasonable fear of persecution or torture and issued a Notice of Referral to Immigration Judge. Sealed Exhibit 1 to Doc. 14, ¶ 12. On February 19, 2025, an IJ granted Petitioner withholding of removal to Guatemala. Sealed Exhibit 1 to Doc. 14, ¶ 13. ICE removed Petitioner to Mexico

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[1] Because this exhibit is sealed, and because it has been previously filed, the government references it here using its original filed docket number, as opposed to re-filing and re-sealing it. See Doc. 14 (referring to Sealed Exhibit 1).

[2] "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry."

on February 21, 2025. Sealed Exhibit 1 to Doc. 14, ¶ 14.

On March 23, 2025, Petitioner as a named party-plaintiff filed suit in a Massachusetts federal district court. *D.V.D. v. U.S. Dept. of Homeland Security*, No. 1:25-cv-10676, Dkt. 1 (D. Mass. March 23, 2025). The *D.V.D.* lawsuit was filed as a class action and the Massachusetts federal court certified it as such. *D.V.D. v. U.S. Dept. of Homeland Security*, 778 F. Supp. 3d 355 (D. Mass. 2025). Petitioner, however, is not merely a member of the certified class in *D.V.D.* He is one of the four named plaintiffs in the complaint. *Id.* at 369 ("Plaintiff O.C.G. is a native of Guatemala…"). In its ruling dated April 18, 2025, the *D.V.D.* court ruled that:

> … prior to removing any alien to a third country, *i.e.*, any country not explicitly provided for on the alien's order of removal, [the government] must: (1) provide written notice to the alien—and the alien's immigration counsel, if any—of the third country to which the alien may be removed, in a language the alien can understand; (2) provide meaningful opportunity for the alien to raise a fear of return for eligibility for CAT protections; (3) move to reopen the proceedings if the alien demonstrates "reasonable fear"; and (4) if the alien is not found to have demonstrated "reasonable fear," provide meaningful opportunity, and a minimum of 15 days, for that alien to seek to move to reopen immigration proceedings to challenge the potential third-country removal.

Id. at 392-93.

Following this order, ICE returned Petitioner to the United States, paroled him into United States and resumed custody of him on June 5, 2025, and transported him to the Eloy Detention Center. Sealed Exhibit 1 to Doc. 14, ¶ 15. On June 9, 2025, Petitioner expressed fear of removal to Mexico. Sealed Exhibit 1 to Doc. 14, ¶ 16. ICE referred Petitioner to an Asylum Officer. Sealed Exhibit 1 to Doc. 14, ¶ 16. The Asylum Officer determined that Petitioner had a reasonable fear of persecution or torture in Mexico. Sealed Exhibit 1 to Doc. 14, ¶ 17.

Petitioner now states that he "has been released from custody after posting a bond and is residing in California." Doc. 45 at 7. DHS has moved to reopen withholding-only proceedings to designate Mexico as an alternate country of removal, which Petitioner states he did not oppose. Doc. 45 at 10. Petitioner asserts that he has filed an I-589 Application for Asylum, Withholding of Removal, and Protection under the Convention Against Torture

regarding Mexico before an IJ. Doc. 45 at 10.

LAW AND ARGUMENT

A. Statutory Framework.

A noncitizen "may not [be] remove[d] to a country if" he can demonstrate a well-founded fear of persecution if he is returned to such country. 8 U.S.C. § 1231(b)(3)(A). "The burden of proof is on the applicant . . . to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). Any person who has been (1) ordered removed, and (2) found to be entitled to protection under the Convention Against Torture ("CAT") "shall be granted deferral of removal to the country where he or she is more likely than not to be tortured." *Id.* § 1208.17(a). Such CAT relief does *not* "alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention." *Id.* § 1208.17(c).

If a noncitizen is granted withholding of removal or CAT relief, he or she still may be removed to a country where the "government [] will accept the alien into the country's territory." *Id.* § 1231(b)(1)(C). The decision to remove such a person to another country other than his native-born country is within the discretion of the Secretary of the Department of Homeland Security ("DHS"). *See* 8 C.F.R. § 241.15. A noncitizen "may not [be] remove[d] [] to a country if" he can demonstrate a well-founded fear of persecution if he is returned to such country. 8 U.S.C. § 1231(b)(3)(A).

B. Standard Governing Detention of Aliens Ordered Removed.

The detention, release, and removal of noncitizens subject to a final order of removal is governed by § 241 of the INA, 8 U.S.C. § 1231. Pursuant to INA § 241(a), the Attorney General has 90 days to remove a noncitizen from the United States after an order of removal becomes final. During this "removal period," detention of the noncitizen is mandatory. *Id.* After the 90-day period, if the noncitizen has not been removed and remains in the United States, his detention may be continued, or he may be released under the supervision of the Attorney General. INA § 241, 8 U.S.C. § 1231(a)(3) and (a)(6). ICE may detain a noncitizen for a "reasonable time" necessary to effectuate his removal. INA § 241(a), 8 U.S.C. § 1231(a).

However, indefinite detention is not authorized by the statute. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

In *Zadvydas*, the Supreme Court defined six months as a presumptively reasonable period of detention for noncitizens who are detained under section 1231(a). 533 U.S. at 701-702. *Zadvydas* places the burden on the noncitizen to show, after a detention period of six months, that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. If the noncitizen makes that showing, the Government must then introduce evidence to refute that assertion to keep the noncitizen in custody. *Id.*; *see also Xi v. I.N.S.*, 298 F.3d 832, 839-40 (9th Cir. 2002). The court must "ask whether the detention in question exceeds a period reasonably necessary to secure removal. It should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the noncitizen's presence at the moment of removal. *Zadvydas*, 533 U.S. at 699.

C. Petitioner Impermissibly Argues the Same Issue Here and in Massachusetts.

Petitioner is now a named plaintiff-petitioner in two pending, active cases asserting his legal rights in relation to his immigration status. The government does not contend that *every* argument Petitioner raises here is also before the Massachusetts federal court, but to the extent any argument is, this Court should decline to entertain it. In his Massachusetts action, Petitioner through counsel has argued that the government cannot remove him to Mexico without providing him with notice and an opportunity to be heard on his fears of persecution in Mexico. The *D.V.D.* court heard those arguments and has now ruled on them in its order dated April 18, 2025. *D.V.D.*, 778 F. Supp. 3d at 392-93. Judge Murphy ordered, more specifically, that the government must provide Petitioner with due process prior to removing him to the country of Mexico. *Id.*

In addition to the fact that the government is now providing him with that due process, this issue is already before the *D.V.D.* courts.[3] This Court should therefore decline to again litigate that overlapping issue here or at least stay any proceedings seeking to do so. *See,*

[3] On July 3, 2025, the Supreme Court stayed the *D.V.D.* court's injunction. *DHS v. D.V.D.*, --- S. Ct. ---, 2025 WL 1832186, at *1 (U.S. July 3, 2025).

generally, Clinton v. Jones, 520 U.S. 681, 706 (1997) (noting that a district court "has broad discretion to stay proceedings as an incident to its power to control its own docket). As part of district courts' discretion to administer their docket, courts have dismissed, without prejudice, suits brought by individuals whose claims are duplicative of class claims in other litigation. *See, e.g., Griffin v. Gomez*, 139 F.3d 905 (9th Cir. 1998) (in habeas case, discussing prior stay of Fifth Amendment challenge pending completion of pending class action).

In a similar scenario before a California federal court, the court dismissed the duplicative individual claim without prejudice. *Herrera v. Birkholz*, No. 22-cv-07784-RSWL-JDE, 2022 WL 18396018, at *7 (C.D. Cal. Dec. 1, 2022), *report and recommendation adopted*, 2023 WL 319917 (C.D. Cal. Jan. 18, 2023). In a class action to which a federal prisoner, Herrera, was a class member, federal prisoners alleged that the Bureau of Prisons had failed to take adequate safety measures against COVID-19. *Id.* at *5. In Herrera's habeas case, he similarly alleged that prison conditions created unreasonable COVID-19 risks, such as "contaminated surfaces" and a lack of "social distancing." *Id.* at *3. The *Herrera* court held in the individual, habeas action that Herrera's claims were based, in part, on a duplicative class action and were "not property before the court." *Id.* at *4-6 ("Petitioner's allegations regarding the Prison's handling of COVID-19 are duplicative of the allegations in the *Torres* Class Action, of which Petitioner is a member seeking the same relief, and thus, Petitioner is barred from raising these claims by the terms of the settlement agreement.").

The court thus dismissed the habeas claims that were based on the related class action. *See id.; see also Crawford v. Bell*, 599 F.2d 890, 892-93 (9th Cir. 1979) (holding that a district court may dismiss "those portions of [the] complaint which duplicate the [class action's] allegations and prayer for relief"); *McNeil v. Guthrie*, 945 F.2d 1163, 1165-66 (10th Cir. 1991) (finding that individual suits for injunctive and declaratory relief cannot be brought where a class action with the same claims exists); *Gillespie v. Crawford,* 858 F.2d 1101, 1103 (5th Cir. 1988) (once a class action has been certified, "[s]eparate individual suits may not be maintained for equitable relief"); *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) ("If a class member cannot relitigate issues raised in a class action after it has been resolved, a class

member should not be able to prosecute a separate equitable action once his or her class has been certified").

The *D.V.D.* court had entered a nationwide preliminary injunction requiring the government to comply with various procedures prior to removing a class member to a third country. The case remains pending. As both a member of the certified class *and* a named plaintiff, Petitioner here is entitled to and bound by any relief that the *D.V.D.* court ultimately grants, including any applicable injunctive relief. Accordingly, this Court should dismiss his demands that the government provide him with due process prior to removing him to Mexico. The *D.V.D.* court already ruled on this issue and the government is currently complying with the court's order by reopening Petitioner's immigration proceedings before the IJ so that Petitioner can be fully heard on his claims for relief from removal to Mexico. To the extent Petitioner raises these same claims with respect to yet another potential country of removal these claims are subsumed within the issues being actively litigated in *D.V.D.*

D. Petitioner's Supervised Release is Lawful and Constitutionally Permitted.

The Court should dismiss this petition because it fails to make the requisite showing for a *Zadyvdas* claim, under the Ninth Circuit's standard set forth by *Prieto-Romero*, 534 F.3d at 1056-57. In *Zadvydas*, the Supreme Court interpreted the INA's post-removal detention statute, 8 U.S.C. § 1231(a)(6), to mean that once a noncitizen detained for more than six months "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." 533 U.S. at 701. The Supreme Court held that this six-month presumption "of course, does not mean that every alien not removed must be released after six months." *Id.* "To the contrary, an 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.*

At the outset, the government is within the presumptive six month period here. The Border Patrol initially issued a Notice of Expedited Removal to Petitioner on March 27, 2024. Sealed Exhibit 1, ¶ 6. Petitioner was then removed to Guatemala, and traveled to Mexico on his own. It is when ICE paroled Petitioner back into its custody on June 5, 2025, that the Court

should begin its calculation of his post-removal detention period for purposes of *Zadvydas*. As of the date of this filing, Petitioner has been either detained in person or through supervision for 148 days, which is less than five months and short of the presumptive six-month period.

Regardless of when Petitioner's detention period began, there can be no *Zadvydas* violation here, however. In *Prieto-Romero*, the Ninth Circuit provided an example of *Zadvydas*'s "no significant likelihood of removal" standard not applying to a noncitizen who had been detained for longer than six months. The petitioner there was a citizen of Mexico who had been convicted of an aggravated felony, deemed removable for that reason, and detained for three years as of the time of his appeal. *Prieto-Romero*, 534 F.3d at 1056. Arguing that this detention period violated *Zadvydas*, the petitioner sought habeas relief claiming that his detention had become "prolonged and definite." *Id.* at 1057. The Ninth Circuit disagreed and affirmed the district court's rejection of habeas relief, holding that the petitioner's removal had "certainly been delayed" albeit by his own pursuit of legal remedies, but that "he is not stuck in a 'removable-but-unremovable limbo,' as the petitioners in *Zadvydas* were." *Prieto-Romero*, 534 F.3d at 1063. While the petitioner's detention lacked "a certain end date," the "uncertainty alone does not render his detention indefinite in the sense the Supreme Court found constitutionally problematic in *Zadvydas*." *Prieto-Romero*, 534 F.3d at 1063.

Prieto-Romero is controlling here. Petitioner must demonstrate a reasonable likelihood of *indefinite* detention caused by the government's inability to find a country to remove him to. This, he cannot do because the government has affirmatively moved to reopen proceedings before an IJ for the sole purpose of allowing Petitioner due process on his claim of fear of removal to Mexico. Sealed Exhibit 2 to Doc. 14. Petitioner argues here precisely what the petitioner had argued in *Prieto-Romero*, that he "will have multiple hearings before a decision is made," that appeals may follow, and "review by the Ninth Circuit" may occur as well. Doc. 45 at 12. These facts are true, but they are steps in a process that Petitioner willingly chooses to pursue. As such, he is not in the category of "removable-but-unremovable limbo," as a matter of law, under *Prieto-Romero*, 534 F.3d at 1063.

Federal courts have routinely declined to find a *Zadvydas* violation when a noncitizen

has chosen to exercise his or her legal rights, which thereby prolongs their detention until the pending claims can be heard. In *Diaz-Ortega v. Lund*, for example, the Western District of Louisiana held that there was no *Zadvydas* violation where the Board of Immigration Appeals was still in the process of reviewing arguments by a petitioner, even though her post-removal detention period had surpassed six months. No. 1:19-CV-670-P, 2019 WL 6003485 (W.D. La. Oct. 15, 2019). Similarly, in another Western District of Louisiana decision, the court analyzed a *Zadvydas* argument where the petitioner had delayed his own removal by appealing to the Board of Immigration Appeals as follows:

> ... while the presumptively reasonable six-month detention period has indeed expired, Adefemi has not been removed because he filed a motion on January 5, 2006, to reopen his case. On January 24, 2006, shortly after filing his motion, Adefemi received a stay of removal "pending decision on the motion and the adjudication of any properly filed administrative appeal." C.F.R. § 1003.23(b)(iii)(2)(C). Should the Immigration Court reopen Adefemi's immigration case, the order of removal issued against him would no longer be final and the presumptive six-month period under *Zadvydas* would not apply. If the Immigration Court denies Adefemi's request to reopen his proceedings, Adefemi's removal will become reasonably foreseeable because it was imminent on January 25, 2006, when the Consulate General of Nigeria issued a travel document for Adefemi's return to Nigeria, and there is no reason to believe that a new travel document could not be obtained within a reasonable period after the stay is lifted.

Adefemi v. Gonzales, No. CIV.A. 05-1861, 2006 WL 2052120, *2 (W.D. La. Mar. 7, 2006).

The Western District of Washington reached the same conclusion in *Singh v. Clark*, No. C06-1803-TSZ, 2007 WL 3046315 (W.D. Wash. Oct. 16, 2007). The petitioner there was subject to removal after the Department of Homeland Security rescinded a grant of asylum to him. *Id.* at *3. The petitioner then moved to reopen his exclusion proceedings before an IJ, was denied, appealed to the Board of Immigration Appeals, was denied, and filed a Petition for Review and Motion to Stay Deportation/Removal in the Ninth Circuit Court of Appeals. *Id.* at *3. Because the appellate petition had resulted in a temporary stay of removal, the petitioner argued that his detention had exceeded six months in violation of *Zadvydas*. The district court disagreed and held that the petitioner's removal was "reasonably foreseeable." *Id.* at *4. "Once the Ninth Circuit decides his appeal, ICE will remove or release petitioner,"

the court found. *Id.* As such, "petitioner has failed to make a threshold showing of indefinite detention." *Id.*

Petitioner here is similarly situated to the petitioners in *Diaz-Ortega*, *Adefemi*, and *Singh*. As in those cases, the government is actively seeking to remove Petitioner and has a plan for doing so. The only reason Petitioner continues to remain in constructive custody is that he wishes to pursue and fully exhaust his legal remedies with respect to an alternative country of removal. While the government had previously removed him to Mexico without allowing for sufficient time to litigate his withholding-from-removal claim as to that country, that legal dispute is now moot and Petitioner does, now, have such time and an opportunity. Since Petitioner cannot show this Court that his detention is indefinite, *Zadvydas* does not apply here.

E. Since Petitioner Cannot Show a *Zadvydas* Claim, His Three Counts Lack Merit.

All three counts in the Amended Petition are premised on Petitioner's *Zadvydas* theory. Count 1 cites *Zadvydas* and argues that Petitioner's removal "is not reasonably foreseeable." Doc. 45 at 16, ¶ 45. Count 2 again cites *Zadvydas* and similarly asserts that his removal "is not significantly likely to occur in the reasonably foreseeable future..." Doc. 45 at 16, ¶ 47. And Petitioner specifically labels Count 3, his Third Cause of Action, as "Unconstitutionally *Indefinite* Detention." Doc. 45 at 17 (emphasis added). The common thread through all three theories is the notion of indefinite detention with no reasonable prospect of release in the foreseeable future—a notion that the government has amply demonstrated here lacks merit under *Prieto-Romero*. Whatever delay occurs in the time period that Petitioner is ultimately in constructive custody, through his ankle monitor or other supervisory conditions, is a delay caused by the process he chooses to pursue.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Court deny the habeas relief sought by Petitioner.

Respectfully submitted on October 31, 2025.

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