UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

YOVANI PEREZ HERNANDEZ, *Petitioner*,	§	
v.	§	CIVIL ACTION NO. 1:25-cv-00195
KRISTI NOEM, U.S. Secretary of Homeland Security, et al. *Respondents*.	§	

RESPONDENTS' MOTION TO DISMISS AND RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Respondents[1], by and through the United States Attorney for the Southern District of Texas, Nicholas G. Ganjei, respectfully submits for consideration its response in opposition to Petitioner's Writ of Habeas Corpus and their motion to dismiss this case for want of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Fed. R. Civ. Proc., Rules 12(b)(1) and (6)

Petitioner's Petition has failed to state a claim upon which this court can exercise jurisdiction or otherwise grant relief. In support of this Motion, Respondents submit the following:

FACTUAL OVERVIEW

Petitioner, a native and citizen of Mexico, entered the United States illegally on several occasions; the first time Respondents first confronted Petitioner was in February 1996. *Declaration of Assistant Field Office Director, Carlos Cisneros, Attached as Ex. A* After this first

[1] The proper respondent in a habeas petition is the person with custody over the petitioner. 28 U.S.C. § 2242; see also § 2243; *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004). That said, it is the named federal respondents, not the named warden in this case, who make the custodial decisions regarding aliens detained in immigration custody under Title 8 of the United States Code.

confrontation, Petitioner was removed to Mexico. *Id.* Over the years, Petitioner continued to enter the country illegally and was arrested and convicted of several crimes between 1998 and 2017 (ranging from making false statements to burglary to sexual assault and indecent exposure). *A-File, pp. 28-29* During that time, Petitioner was removed from the United States to Mexico on no less than three occasions. *Cisneros Declaration, ¶ 8* In July 2017, Petitioner was once again confronted by Respondents while attempting to enter the country illegally at which time he was placed in Expedited Removal proceedings after being deemed inadmissible under 8 U.S.C. §1182 (7)(A)(i)(I) and 8 U.S.C. §1225(b)(1). *A-File, pp. 39-40* However, this time Petitioner expressed a fear of persecution and torture should he be removed to Mexico. *A-File, pp. 4 and 9* Consequently, expedited removal action ceased to allow for a credible fear determination. The Asylum Officer concluded that Petitioner did have a credible fear of persecution at which time Petitioner was placed into removal proceedings in Immigration Court.

On April 25, 2018, an Immigration Judge (IJ) issued an Order directing that Petitioner be removed to Mexico; this Order, however, also granted Petitioner's application for deferral of removal pursuant to Article III of the Convention Against Torture ("CAT"). *A-File, p. 4*

On June 11, 2025, Petitioner was taken back into ICE custody and sent to the El Valle Detention facility on June 22, 2025. *Cisneros Declaration, ¶¶ 12-13* Since his arrival, ERO has been actively pursuing requests to third countries for his acceptance. *Id., ¶¶ 14-15* As of November 12, 2025, ERO's requests for acceptance remain pending.

In the meantime, Petitioner was served with a "Notice of Revocation and Release" advising him that "your case has been reviewed and it has been determined that you will be kept in the custody of U.S. Immigration and Customs Enforcement (ICE) at this time. This decision has been made based on a review of your file and/or your personal interview on account of changed

circumstances in your case. ICE has determined that there is a significant likelihood of removal in the reasonably foreseeable future in your case." A-File, pp. 73-74 On November 1, 2025, ICE officials conducted a review of Petitioner's custody status and determined that he posed "a significant risk of flight" pending his removal from the United States; consequently, it was determined that Petitioner would remain in custody pending his removal. A-File, pp. 65-67 and 8 C.F.R. §241.4(e), (f), and (g)

On September 4, 2025, Petitioner filed this action – a Petition for Writ of Habeas Corpus – arguing (1) that Petitioner's detention past the 90 day removal period and the presumptive 6 month period interpreted in *Zadvydas*[2] violates of 8 U.S.C. § 1231(a)(6); (2) that Petitioner's detention violates the Due Process clause because Petitioner's removal to a third country is not imminent; (3) that writ should be granted because there is "no legal basis to detain Petitioner in immigration custody;" and (4) that the revocation of Petitioner's supervised release violated the requirements of 8 C.F.R. 214.4(l) resulting in a violation of the *Accardi*[3] doctrine.

STANDARD OF REVIEW

In a petition for a writ of habeas corpus, the petitioner is challenging the legality of the restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Here, Petitioner is challenging his detention pending his removal claiming that no final order of removal exists allowing for his detention.

Judicial review of immigration matters, including review of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination*

[2] Referring to the Supreme Court decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001).
[3] *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)

Comm., 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

ARGUMENT

Petitioner claims that his detention is unlawful. Respondents respectfully disagree. Petitioner is not being detained without a purpose; he is being detained to effectuate his removal to a third country. *See Cisneros Declaration* As this Court is aware, this Court's review in a §

2241 habeas proceeding is limited to determining whether Petitioner's detention violates the law or Constitution.

Here, Petitioner is being detained under an April 25, 2018, Final Order of Removal. *Cisneros Declaration* The IJ's Order directed he be removed to Mexico, however, Petitioner qualified for relief under the Convention Against Torture (CAT) and was released on supervision pending his removal to a third country. *Id.* On June 11, 2025, Petitioner was taken back into custody as measures were being taken to remove Petitioner to a third country. *Id.*

The Courts have recognized that continued detention pursuant to 8 U.S.C. § 1231(a)(6) is lawful when removal is reasonably foreseeable or if the Petitioner poses a risk of flight or a danger to the community. *See Zadvydas v. Davis*, 533 U.S. 678 (2001) In the context of a habeas proceeding, the Supreme Court recognized that the alien bears the initial burden to demonstrate the lack of likelihood of removal. *Id.*; *see Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) ("[I]n order to state a claim under *Zadvydas* the alien not only must show post-removal order of detention in excess of six months but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.").

In this case, Petitioner has failed to meet his burden. Rather, Petitioner has merely suggested that he is unlikely to be removed. "[U]nsupported arguments and speculation" regarding the foreseeable likelihood of removal will not suffice to carry Petitioners' initial burden. *James v. Lowe*, No. 23-1862, 2024 WL 1837216, at *3 (M.D. Pa. Apr. 26, 2024). Accordingly, where a petitioner "has not made the required showing of good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the petitioner's claim fails and we proceed no further." *Id.* (internal quotations and citations omitted).

Moreover, as the Supreme Court held in *Zadvydas*, the Government is entitled to a presumption that detention is reasonable if the petitioner is detained less than six months. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Petitioner has been detained less than six months post-final order, and thus his Petition for habeas relief is premature. *See Okpoju v. Ridge*, 115 F.App'x 302 (5th Cir. 2004)("The district court properly denied [][the petitioner's] claim regarding his continued detention as premature because, as the time of the district court's ruling, [][the petitioner] had not yet been in custody longer than the presumptively reasonable six-month post removal order period.") *see also Parker v. Sessions*, 2018 US. Dist. LEXIS 249798, No. H-18-2261, 2018 U.S. Dist. LEXIS 249798, at *3 (S.D. Tex. 2018) (finding that the petitioner's reliance on *Zadvydas* unfounded since the petitioner "has not been in ICE custody for longer than six months."). Since a detention period of less than six months is presumed lawful, this Petition should be dismissed as premature.

In addition, this Court lacks jurisdiction to review Petitioner's due process claims because they are inextricably intertwined with ICE's unreviewable authority to execute a final order of removal. *See, e.g., C.R.L. v. Dickerson, et al*, 4:25-CV-175-DL-AGH, 2025 WL 1800209 at *2-3 (M.D. Ga. June 30, 2025) (denying habeas petition for lack of jurisdiction where alien sought review of ICE's decision to execute his final removal order to a third country, noting that ICE agreed to provide him with notice and opportunity to contest the removal); *Diaz Turcios v. Oddo*, No. 3:25-CVCCase 0083, 2025 WL 1904384 at *5 (W.D. Pa. July 10, 2025) (removal to a third country is closely "bound up with" the removal order such that the court lacks jurisdiction over the TRO motion seeking to enjoin the removal). As such, Petitioner is unlikely to succeed on the merits of his due process claims.

On June 23, 2025, the U.S. Supreme Court granted the Government's application to stay the nationwide preliminary injunction in *D.V.D. v. Dep't. of Homeland Sec.*, No. 25-10676, 2025 WL 1142968 (D. Mass. Apr. 18, 2025), which required ICE to comply with certain procedures before initiating removal to a third country.

On July 9, 2025, the ICE Director issued written guidance to all ICE employees that explicitly rescinded all prior guidance implementing the previously issued preliminary injunction. *Ex. B ("July 9 Guidance").* The July 9 Guidance ordered ICE, effective immediately, to adhere to the Secretary of Homeland Security, Kristi Noem's, March 30, 2025, memorandum, *Guidance Regarding Third Country Removals. Ex. C ("March Guidance").*

The March Guidance provides that aliens may be removed to a "country [that] has provided diplomatic assurances that aliens removed from the United States will not be persecuted or tortured." *Id.* If the State Department finds the representations credible, the "alien may be removed without the need for any further procedures." *Id.*

The process provided in the March Guidance satisfies all Constitutional requirements. The Supreme Court has held that when an Executive determines a country will not torture a person on his removal, that is conclusive. *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008); *see also Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009) (federal courts "may not question the Government's determination that a potential recipient country is not likely to torture a detainee"), *cert. denied*, 559 U.S. 1005 (2010). As now-Justice Kavanaugh explained in concurrence in *Kiyemba*, the "*Munaf* decision applies here a fortiori: That case involved the transfer of *American Citizens*, whereas this case involves the transfer of alien detainees with no constitutional or statutory right to enter the United States." *Kiyemba*, 561 F.3d at 517–18 (Kavanaugh, J., concurring). These cases stand for the proposition that when the Executive decides an alien will not be tortured abroad,

courts may not "second guess [that] assessment," unless Congress has specifically authorized judicial review of that decision. *Id.* at 517 (citations omitted); *Munaf*, 553 U.S. at 703 n.6.

This framework also requires rejection of any argument of entitlement to an individualized determination under the CAT regulations. The law provides for assurances that an alien would not be tortured if removed to a "specific country," but once the Attorney General and the Secretary of State deem those assurances "sufficiently reliable," that is the end of the inquiry. *See* 8 C.F.R. § 1208.18(c)(1)-(3); *see also Munaf*, 553 U.S. at 703 n.6.

If removal is to a third country not covered by adequate assurances, the March Guidance makes clear that DHS will first inform the alien of the intent to remove him to that country and then give him an opportunity to establish that he fears removal there. Ex. C (March Guidance) If the alien affirmatively states a fear, immigration officials from U.S. Citizenship and Immigration Services ("USCIS") will screen the alien, generally within 24 hours, to determine whether he "would more likely than not" be persecuted on a statutorily protected ground or tortured in the country of removal. *Id.* at 2. If USCIS determines that the alien has not met this standard, the alien will be removed. *Id.* If the alien does meet the standard, the alien will be referred to the immigration judge in the first instance, or if previously in proceedings before an immigration judge, USCIS will notify ICE to file a motion to reopen those proceedings, as appropriate, for the sole purpose of determining eligibility for protection under INA § 241(b)(3) and CAT, to the newly designated country of removal. *Id.* Alternatively, ICE may choose another country for removal, subject to the same processes. *Id.*

The March Guidance affords sufficient process to aliens subject to final orders of removal. It confirms that Petitioner will be notified of a third country removal and afforded an opportunity to assert a fear claim. Petitioner has not shown a likelihood that he will be erroneously deprived

of his rights under the March Guidance, such that he is entitled to any additional or substitute procedural safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 355 (1976) (no due process concerns where there is low risk of an erroneous deprivation through the procedures used). As such, it is unlikely that Petitioner will succeed on the merits of his due process claims.

PRAYER

Given the fact the March Guidance affords Petitioner an opportunity to present a fear claim prior to removal to any third country, he is not likely to prevail on the merits of his due process claims, and his petition for relief under habeas should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 12, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sends notice of electronic filing to all counsel of record.

s/Nancy L. Masso
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