IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IRAKLI ZHUZHIASHVILI,

Petitioner,

v. Case No. 25-3189-JWL

CRYSTAL CARTER, Warden, FCI-Leavenworth; RICARDO WONG, Field Office Director, ICE ERO Chicago; TODD LYONS, Acting Director, USCIS; KRISTI NOEM, Secretary, DHS; and PAMELA BONDI, U.S. Attorney General,

Respondents.

RESPONSE TO § 2241 HABEAS PETITION AND ORDER TO SHOW CAUSE

This matter is before the Court on the petition of Irakli Zhuzhiashvili ("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"). He asserts claims (1) under 8 U.S.C. § 1231(a) and *Zadvydas v. Davis*, 533 U.S. 678 (2001), alleging that there is no likelihood of removal in the reasonably foreseeable future; (2) under the procedural component of the Due Process Clause of the Fifth Amendment, alleging that his detention is indefinite and unsupported; and (3) under the Administrative Procedure Act ("APA"), alleging that his custody reviews have not complied with 8 C.F.R. § 241.4 in terms of timing and result. ECF 1 at 21-24. The Court has ordered a response from the individuals named in the habeas petition (collectively "Respondents"). ECF 3.

The habeas petition should be denied. The claims under 8 U.S.C. § 1231(a), *Zadvydas*, and the Fifth Amendment fail because Petitioner has not shown there is no significant likelihood of

removal in the reasonably foreseeable future. Petitioner currently has an order of withholding precluding removal to his home country of Georgia, but he provides no competent evidence demonstrating that removal to a third country is unlikely. The crux of his argument is that removal to a country other than Georgia is not foreseeable simply because it hasn't happened yet. That is not enough to shift the burden under *Zadvydas*. Even if Petitioner had made an initial showing that removal is unlikely, Respondents have now rebutted it. ICE has conducted an initial custody review, advised Petitioner it expects to receive travel documents, reached out to another component of the agency about possible removal locations, reached out to the Department of State for assistance in that regard, conducted a second custody review, and reiterated to Petitioner that the agency is seeking third country alternatives.

The claim under the APA and 8 C.F.R. § 241.4 fails as well. Petitioner cannot invoke the APA because (1) an adequate remedy already exists under 28 U.S.C. § 2241; and (2) custody review decisions do not constitute final agency actions. Assuming *arguendo* that Petitioner can proceed under the APA, his claim falters on the merits because ICE substantially complied with § 241.4 and any regulatory deviation was harmless or otherwise insufficient to justify his release. ICE performed two custody reviews and issued written statements notifying Petitioner or his counsel that Petitioner's detention would continue. Any non-compliance with § 241.4 should be remedied by substitute process, rather than by release. This is especially true given Petitioner's inability to show prejudice stemming from his file custody reviews.

STATEMENT OF FACTS

The following facts are part of the Declaration of Eric Swanson, a Deportation Officer for Enforcement and Removal Operations ("ERO") at United States Immigration and Customs

Enforcement ("ICE"). Exhibit ("Ex.") 1, Declaration of Eric Swanson ¶¶ 1-4. Some facts alleged in the habeas petition (ECF 1) are included as well.

Petitioner is a native and citizen of Georgia. Ex. 1 ¶ 5; *see also* ECF 1 ¶ 12. He unlawfully entered the United States in or around June 2024 near Otay Mesa, California. Ex. 1 ¶ 6. He was later encountered by Customs and Border Protection, taken into custody, and detained pending expedited removal pursuant to section 235(b)(1) of the Immigration and Nationality Act ("INA"). *Id.* (citing 8 U.S.C. § 1225(b)(1)). In July 2024, he was placed in removal proceedings through the issuance of a Notice to Appear charging him as inadmissible to the United States under INA sections 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I). *Id.* ¶ 7 (citing 8 U.S.C. §§ 1182(a)(6)(i) and 1182(a)(7)(A)(i)(I)).

In October 2024, Petitioner filed an application for relief with an Immigration Court. *Id.* ¶ 8. On February 10, 2025, after holding a hearing, the Immigration Court ordered Petitioner's removal but granted his application for relief. *Id.* ¶ 9; *see also* ECF 1 ¶ 2. The habeas petition alleges that Petitioner's request for asylum was denied due to a Presidential Proclamation, while his request for withholding of removal to Georgia under 8 U.S.C. § 1231(b)(3) was granted. ECF 1 ¶ 30; ECF 1-1 at 1-3, 5-6. Both parties reserved the right to appeal to the Board of Immigration Appeals ("BIA") within 30 days. Ex. 1 ¶ 9; *see also* ECF 1-1 at 6. Neither party ultimately appealed, which resulted in the Immigration Court's order becoming final on March 12, 2025. Ex. 1 ¶¶ 9-11; *see also* ECF 1 ¶¶ 2, 31.

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. Ex. 1 ¶ 12. 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.* ¶ 13. 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.*

On or around April 23, 2025, ERO served Petitioner with a Notice to Alien of File Custody Review indicating his custody status would be reviewed on June 25, 2025. *Id.* ¶ 14. On or around July 22, 2025, ERO reached out to ICE's Removal and International Operations ("RIO") headquarters to inquire about other potential countries to which Petitioner could be removed. *Id.* ¶ 15. On or around July 31, 2025, ERO issued a Decision to Continue Detention letter advising Petitioner that a decision had been made to continue detention. *Id.* ¶ 16. In this official document, ICE stated it was "in receipt of or expects to receive the necessary travel documents to effectuate [Petitioner's] removal, and removal is practicable, likely to occur in the reasonably foreseeable future, and in the public interest." ECF 1-3 at 1 (citation modified). Petitioner was served with a copy of the letter on or around August 15, 2025. Ex. 1 ¶ 16; *see also* ECF 1-3 at 3 (indicating Petitioner refused service).

On or around September 9, 2025, RIO headquarters reached out to the Department of State for assistance in identifying alternative countries to which Petitioner can be removed. Ex. 1 ¶ 17.

On or around September 12, 2025, ERO issued another Decision to Continue Detention letter advising Petitioner that a decision had been made to maintain detention. *Id.* ¶ 18. The September 12 letter confirmed that "ICE continues to seek a third country alternative" for Petitioner's "removal from the United States." Ex. 2 at 1. Petitioner's counsel was provided with a copy of the letter on September 15, 2025, and Petitioner was served with a copy on or around September 25, 2025. Ex. 1 ¶ 18; Ex. 2 at 2. Consistent with the July 31 and September 12 letters, ICE is continuing its efforts to identify alternative countries to which Petitioner can be removed. Ex. 1 ¶ 19.

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. Counts I and II fail because Petitioner has not shown removal is unlikely, or alternatively, Respondents can rebut any such showing

In Count I, Petitioner claims his detention violates "8 U.S.C. § 1231(a), as interpreted by *Zadvydas*." ECF 1 ¶ 70. Relying principally on his order of withholding and email chatter, he asserts "Respondents either cannot or will not remove him in the reasonably foreseeable future, particularly given that Respondents are not legally allowed to send him to Georgia and he has no citizenship or ties to any other country." *Id.* ¶ 71. Count II is captioned as a claim for "Procedural Due Process." *Id.* at 22 (citation modified). Petitioner alleges his detention violates the "Due Process Clause of the Fifth Amendment[.]" *Id.* ¶ 74 (citation modified). He claims he has been denied due process because his detention (1) has no "reasonably foreseeable end point" under

Zadvydas, *id.* ¶ 78; and (2) is not reasonably related to any legitimate purpose, including "ensuring his appearance or protecting the community." *Id.* ¶¶ 76-77, 79.

Although Count I is styled as a claim under 8 U.S.C. § 1231(a)(6) and Count II is styled as a Fifth Amendment claim, the reality is that both claims are covered by *Zadvydas*. *See Al-Shewaily v. Mukasey*, No. CIV-07-0946-HE, 2007 WL 4480773, at *6 (W.D. Okla. Dec. 18, 2007) ("Petitioner fails to elaborate on the details of any procedural due process claim; rather, he appears to base such claim on an entitlement to release pursuant to *Zadvydas*, which has already been rejected in addressing his statutory claim."); *see also Nasr v. Larocca*, No. CV 16-1673-VBF(E), 2016 WL 3710200, at *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).[1] Significantly, Petitioner does not base Counts I and II on any supposed violations of 8 C.F.R. § 241.4, emphasizing those allegations in Count III. *Compare* ECF 1 ¶¶ 69-79 (Counts I and II) *with id.* ¶¶ 80-83 (Count III).

Under *Zadvydas*, 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." 533 U.S. at 682. If the alien is not removed during this

[1] To the extent Petitioner is asserting a substantive due process claim, the same analysis applies. *See, e.g., Dusabe v. Jones*, No. CIV-24-464-SLP, 2024 WL 5465749, at *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, at *1-4 (W.D. Okla. Feb. 13, 2025); *Singh v. Barr*, No. 19-CV-732, 2019 WL 4415152, at *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, at *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).

90-day period, 8 U.S.C. § 1231(a)(6) "authorizes further detention." *Id. Zadvydas* held that a six 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. Focusing on stray comments in emails, Petitioner notes he has an order of withholding of removal to Georgia and "does not have citizenship in any other country, nor ties to any other country." ECF 1 ¶ 54. Yet "withholding of removal is a form of country specific relief," so "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). Petitioner does not discuss – let alone provide competent evidence regarding – any third country to which he might be removed. Moreover, if they believe all regulatory requirements can be met, ICE and other covered Services have the option of seeking to lift the withholding order. Withholding can be terminated by an Immigration Judge or the BIA upon an appropriate showing, or after the United States Customs and Immigration Service ("USCIS") provides an alien with a notice of intent to terminate. 8 C.F.R. § 208.24(f); *see also id.* §§ 208.24(b)-(c) (describing the conditions and procedures for USCIS to terminate withholding of removal).

Several of the cases cited by Petitioner highlight his failure to shift the burden under *Zadvydas*. For example, in *Hassoun v. Sessions*, No. 18-CV-586-FPG, 2019 WL 78984 (W.D.N.Y.

Jan. 2, 2019), the petitioner was "a Palestinian who, while born in Lebanon, [was] not a citizen of Lebanon." *Id.* at *1 (citation modified). The court concluded the petitioner met his burden under *Zadvydas* because he demonstrated the countries or territories with which he had any possible affiliation would not accept him. *Id.* at *4. This included not just Lebanon, but also Sweden, the United Arab Emirates, and the West Bank (which in turn required evidence relating to Israel and Jordan). *Id.* Petitioner in this matter has not made an equivalent showing, saying little more than he cannot go back to Georgia while the order of withholding is in place.

Petitioner cites a handful of cases where refoulement was an issue, ECF 1 ¶ 58, but provides no evidence or authority to show that he is at risk of being re-routed to Georgia by an eastern European country or any other relevant third country. He also asserts no claim for relief premised on the notion that "due process requires notice and opportunity to raise issues" under the Convention Against Torture "before removal to a third country." *Manago v. Carter*, No. 25-3183-JWL, 2025 WL 2576755, at *2 (D. Kan. Sept. 5, 2025). This creates "a fatal disconnect between the claims asserted" in the petition and the authorities he cites. *Id.* And in the Massachusetts class action where a district court issued an injunction in favor of the petitioners, the Supreme Court stayed the injunction pending further appeals, sending a "strong signal" that ordering such injunctive relief at this time "is not appropriate." *Id.* at *2-3 (citing *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass. 2025), *appeal filed* (1st Cir. Apr. 22, 2025), *stay granted*, 145 S. Ct. 2153 (June 23, 2025)).

In effect, Petitioner is arguing that removal to a third country is unlikely because it hasn't happened yet. That is not enough. *See Masih v. Lowe*, No. 4:24-CV-01209, 2024 WL 4374972, at *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, at *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, at *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*, 2024 WL 5465749, at *4 (citation modified). 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, 2025 WL 1441101, at *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, at *4 (W.D. Wash. May 10, 2024).

In sum, Petitioner has not provided competent evidence to show that removal to a country other than Georgia is unlikely. *See, e.g., Soudom v. Warden*, No. 25-3063-JWL, 2025 WL 1594822, at *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, at *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). Counts I and II should be denied on this basis alone.

Respondents acknowledge that the Court previously has been presented with the foregoing legal authorities in cases where habeas petitions were granted. *E.g., Diaz-Cruz v. Noem*, No. 25-cv-3162 (D. Kan. Oct. 2, 2025), ECF 7 at 1-6; *Vargas v. Noem*, No. 25-3155-JWL, 2025 WL 2770679, at *2-3 (D. Kan. Sept. 29, 2025). Given the facts in *Diaz-Cruz* and *Vargas*, however, the Court was not required to decide which authorities (the petitioners' or the respondents') best reflected what it takes to shift or satisfy the burden of proof under *Zadvydas*. Petitioner's cited cases confirm the existence of a conflict on this legal issue. *See, e.g., Hassoun*, 2019 WL 78984, at *4 (citing cases to show "some evidence of progress is required" but acknowledging authority indicating "mere 'lack of visible progress or the government's inability to provide a concrete timeframe for removal does not necessarily establish that removal is unlikely in the reasonably foreseeable future") (citation modified). As discussed in the Statement of Facts ("SOF") and further summarized below, the facts in the case at bar are stronger than the facts in *Diaz-Cruz* and *Vargas*, making it important to address this unanswered legal question.

In any event, even if Petitioner had made an initial showing that removal is unlikely, Respondents have now rebutted it. ICE reached out to RIO headquarters about potential removal locations and conducted a custody review in July 2025. *See supra* SOF. After conducting the file custody review, ICE advised Petitioner that the agency expected to receive travel documents to effectuate removal. *Id.* In September 2025, RIO headquarters reached out to the Department of State for assistance in identifying third country candidates. *Id.* That same month, ICE concluded

another file custody review and reaffirmed the agency was seeking third country alternatives. *Id.* ICE is continuing its efforts to find third countries to which Petitioner may be removed. *Id.* 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 "immigration officials have diligently sought the necessary travel documentation for petitioner from South Africa since his detention"); *Drame v. Gonzales*, No. 16-3257-JWL, 2017 WL 978120, at *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"). Counts I and II should be denied on this ground as well.

II. Count III fails because Petitioner's claim is not cognizable under the APA and any alleged regulatory deviation is insufficient to justify release

In Count III, Petitioner invokes 5 U.S.C. § 706 to challenge ICE's compliance with the file custody review regulations set forth in 8 C.F.R. § 241.4. ECF 1 ¶¶ 81, 83. Petitioner alleges that ICE (1) has not conducted a 180-day POCR at all; (2) did not timely issue a decision in his first POCR within 90 days; and (3) decided to continue detention "based on spurious, pretextual, or boilerplate reasons[.]" *Id.* ¶ 82 (citation modified).

A. Petitioner cannot assert a stand-alone APA claim

1. 28 U.S.C. § 2241 provides an adequate remedy

The APA provides that "final agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704. Petitioner's APA-based claim in Count III should be denied because an adequate remedy already exists in the form of 28 U.S.C. § 2241. For instance, in *O'Banion v. Matevousian*, 835 F. App'x 347 (10th Cir. 2020), the petitioner sought review under the APA based on alleged violations of prison regulations. *Id.* at 348-50. Citing APA

§ 704, the Tenth Circuit held that habeas actions under § 2241 (like the one brought by the *O'Banion* petitioner) provided "an adequate remedy to review alleged abuses" of regulations associated with an Inmate Financial Responsibility Plan, also known as an IFRP. *Id.* at 350. The Tenth Circuit thus concluded the district court "correctly dismissed" the habeas petitioner's APA claim. *Id.*

O'Banion is not the only case indicating that an APA claim cannot proceed when relief is theoretically available under 28 U.S.C. § 2241. *See, e.g., Trump v. J.G.G.*, 604 U.S. 670, 674 (2025) ("Especially given the history and precedent of using habeas corpus to review transfer claims, and given 5 U.S.C. § 704, which states that claims under the APA are not available when there is another 'adequate remedy in a court,' I agree with the Court that habeas corpus, not the APA, is the proper vehicle here.") (Kavanaugh, J., concurring); *Raspoutny v. Decker*, 708 F. Supp. 3d 371, 381 (S.D.N.Y. 2023) (citing § 704 and rejecting an APA claim because "the issuance of a writ of habeas corpus under 28 U.S.C. § 2241 would provide an adequate remedy were the Court to find Raspoutny's custody to be improper"); *Stern v. Federal Bureau of Prisons*, 601 F. Supp. 2d 303, 305 (D.D.C. 2009) ("Thus, the plaintiff's challenge to the Bureau's use of the IFRP may be brought under habeas corpus; and the plaintiff, in turn, may not bring his challenge under the APA because the habeas corpus proceedings provide an adequate remedy in court.").

2. Custody review decisions do not constitute final agency actions

"A party may bring a claim under the APA only if the agency's decision is final." *N. New Mexicans Protecting Land, Water & Rights v. United States*, 704 F. App'x 723, 726 (10th Cir. 2017) (citing 5 U.S.C. § 704). Agency action is final if it satisfies two requirements: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or

obligations have been determined, or from which legal consequences will flow." *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 692 F.3d 1057, 1065 (10th Cir. 2012) (quoting *Bennett v. Spear*, 520 U.S., 154, 177-78 (1997)). The Tenth Circuit has not hesitated to affirm dismissals of APA claims involving non-final actions. *See, e.g., N. New Mexicans*, 704 F. App'x at 726, 728; *Los Alamos*, 692 F.3d at 1065-66, 1068.

Custody review decisions are necessarily non-final because they are part of an ongoing process and subject to reconsideration. As summarized in the SOF, an initial 90-day custody determination is conducted by the relevant district director or the Director of Detention and Removal Field Office (collectively "Director"). 8 C.F.R. § 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 ("HQPDU") for "further custody review." *Id.* § 241.4(k)(1)(ii). Upon referral to the HQPDU, a review "will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as possible." *Id.* § 241.4(k)(2)(ii). Then, "subsequent review shall ordinarily be commenced for any detainee within approximately one year" of a decision declining to grant release. *Id.* § 241.4(k)(2)(iii).

Tribunals in cases with similar circumstances have dismissed APA claims for lack of finality under 5 U.S.C. § 704. *See, e.g., Garcia v. U.S. Citizenship & Immigration Servs.*, No. 3:21-CV-2233-G, 2022 WL 3349151, at *4, 6-8 (N.D. Tex. Aug. 12, 2022) (dismissing an APA challenge to a denial of an application to adjust status because the petitioner could renew the application later); *Ms. L v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149, 1167-68 (S.D. Cal. 2018) (dismissing an APA challenge to a decision to separate parents from children in immigration detention because the plaintiffs "failed to allege facts sufficient to show 'final agency

action' subject to review under the APA"); *Bhatia v. Warden*, No. 1:16-CV-576, 2016 WL 4573971, at *2 (W.D. La. June 23, 2016) ("Even if Petitioner's temporary detention was based on an administrative decision, it would be tentative in nature, not a 'final agency action' as required for judicial review."). The same result is warranted here.

B. ICE substantially complied with 8 C.F.R. § 241.4, and any deviation was harmless or otherwise insufficient to warrant release

On its face, Count III does not allege an actionable substantive claim. Petitioner asserts the decision flowing from his 90-day POCR was 51 days late (the 90th day after March 12, 2025, was June 10, 2025, and the decision came 51 days after that, on July 31, 2025). ECF 1 ¶¶ 41, 65, 82. But Petitioner cites no authority holding that release is required just because a decision is not issued within 90 days of a timely-initiated and otherwise proper File Custody Review. *See* ECF 1-3. Petitioner asserts that no 180-day POCR was conducted, ECF 1 ¶¶ 65, 82, yet ICE did perform another File Custody Review, issuing a decision on September 12, 2025. *See supra* SOF & Ex. 2 at 1. Petitioner's counsel received a copy of the decision that day, and Petitioner was served his own copy on September 25, 2025. *See supra* SOF & Ex. 2 at 2. September 12, 2025, is 184 days after March 12, 2025. Petitioner's opinion that the decisions to continue custody were "spurious" or "pretextual" is just that – a personal belief unsupported by the text of the letters or other forms of probative evidence. *See supra* SOF & Exs. 1-2; *see also Garcia Uranga v. Barr*, No. 20-3162-JWL, 2020 WL 4334999, at *6 (D. Kan. July 28, 2020) (denying habeas relief where it was undisputed 8 C.F.R. § 241.4 was "substantially" followed).

Regardless, "not 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). It follows that even if Petitioner could show some material deviation from the 90-day or 180-day POCR requirement in 8 C.F.R. § 241.4, "the remedy for a procedural due process violation is substitute process." *Virani v. Huron*, No. SA-19-CV-00499-ESC, 2020 WL 1333172, at *12 (W.D. Tex. Mar. 23, 2020). 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, at *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 and 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. This is the remedy embraced in most of the cases cited by Petitioner too. To illustrate, 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; *see also Misirbekov v. Venegas*, No. 1:25-cv-00168, 2025 WL

2451030, at *1-2 (S.D. Tex. Aug. 25, 2025) (rejecting a *Zadvydas* claim but following *Bonitto* and conditionally granting a habeas petition to give the respondents 60 days "within which to provide Petitioner a meaningful post-removal custody review, as contemplated in 8 C.F.R. § 241.4").[2] Likewise, if Petitioner is complaining about an alleged lack of one or more custody reviews, the remedy under the APA is to "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1) (citation modified).

Petitioner contends that a violation of 8 C.F.R. § 241.4 should lead to his release under *Jimenez v. Cronen*, 317 F. Supp. 3d 626 (D. Mass. 2018). ECF 1 ¶ 68. *Jimenez* is tied to its facts. The *Jimenez* court underscored that an equitable remedy should be "adaptable" and "tailored" to the situation. 317 F. Supp. 3d at 656 (citation modified). And in *Jimenez* the Court found the following facts: (1) ICE continued one petitioner's detention before her attorneys had a chance to provide information in support of her release, *id.* at 635, 646, 648; (2) ICE made "a series of false or misleading statements" relating to the detention of this petitioner, including a false sworn statement by an ICE Deputy Field Office Director, *id.*; (3) ICE initially said it would release another petitioner but reversed that decision, *id.* at 635, 647, 648; (4) ICE "repeatedly demonstrated an inability to perform lawfully and to decide fairly whether detention [was]

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[2] Courts have determined that other regulatory violations, including failures to provide the "informal interview" referenced in 8 C.F.R. § 241.13(i), were harmless or did not warrant release. *See, e.g., 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. 3); *Tanha v. Warden*, No. 1:24-cv-02121-JRR, 2025 WL 2062181, at *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, at *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).

justified" for the two petitioners, *id.* at 656 (citation modified); (5) both petitioners had "ties to the United States" which included "close relatives residing here lawfully," plus track records of living here "for more than fourteen years" with spouses and children who were American citizens, *id.* at 657; and (6) the ICE Field Office that processed the petitioners admitted it had detained 30-40 other individuals without providing procedural due process, after which 20 of these individuals were released, *id.* at 637, 658. None of those circumstances are present in the case before this Court.

Citing cases from the Third and Fourth Circuits, Petitioner also maintains that any deviation from 8 C.F.R. § 241.4 – no matter how slight – is automatically and materially prejudicial. ECF 1 ¶ 66.[3] Petitioner cites no on-point decision by the Tenth Circuit. The Tenth

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[3] One of Petitioner's cited cases, *Leslie v. Attorney Gen.*, 611 F.3d 171 (3d Cir. 2010), held that (1) "violations of regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief;" and (2) a regulation requiring an Immigration Judge to advise a respondent of the availability of free legal services, which was designed to protect the respondent's right to counsel, fit the bill. *Id.* at 178-82. The Third Circuit subsequently explained that precious few regulations suspend the rule of harmless error:

> *Leslie* also took aim at "fundamental unfairness," typified by denial of the right to counsel. . . . But we have declined to extend *Leslie* any further. Our reluctance fits *Leslie* and *Weaver*'s rationale: the question is not just how important the right is in the abstract, but also whether the violation undermines the structure of the hearing and necessarily prejudices the outcome.
>
> So to clarify *Leslie*, we hold that for a regulation to protect a fundamental right, a violation must be a structural error that necessarily makes proceedings fundamentally unfair. Very few rights will fit this extraordinary category. By analogy to [*Weaver v. Massachusetts*, 582 U.S. 286 (2017)], these include the rights to counsel and to an unbiased judge. But rights outside this category are not fundamental enough to trigger *Leslie*'s "presumption of prejudice."

Aquino v. Attorney Gen., 53 F.4th 761, 766 (3d Cir. 2022) (citation modified). The other case cited by Petitioner, *Delgado-Corea v. INS*, 804 F.2d 261 (4th Cir. 1986), affirmed a BIA decision insisting on a showing of prejudice despite the respondents' violation of a regulation requiring the disclosure of the availability of free legal services. *Id.* at 262-63. The quotation presented in

Circuit has acknowledged *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), which "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). Still, when an alien challenges removal proceedings conducted by the BIA, to prevail on a due process claim he or she "must establish not only error, but prejudice." *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009), *abrogated in part on other grounds*, *Wilkinson v. Garland*, 601 U.S. 209, 217-18 (2024). In this context, therefore, an alien "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").

Regardless, Petitioner has brought Count III under the APA, which requires a showing of prejudice. The statute specifies that in making any determination listed in 5 U.S.C. § 706, "due account shall be taken of the rule of prejudicial error." *Id.* § 706(2)(F). "The duty of establishing prejudice rests upon" the party presenting an APA claim; it is insufficient for a claimant merely to assert "its statutory and due process rights were violated." *St. Anthony Hosp. v. United States Dep't of Health & Human Servs.*, 309 F.3d 680, 698-99 (10th Cir. 2002); *see also Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1290, 1295 n.12 (10th Cir. 2024) (stating that "an agency's violation of the APA does not require reversal unless the appellant demonstrates prejudice resulting from the error") (citation modified). Petitioner has shown no such prejudice in the matter at hand.

Petitioner's habeas petition comes from a Ninth Circuit case that the *Delgado-Corea* court distinguished. *Id.*

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 6, 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, including:

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