United States District Court
Western District of Texas
San Antonio Division

AMM,
Petitioner,

v.

Kristi Noem, Secretary of United States Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-01210-FB-HJB

Respondents' Supplemental Brief

Pursuant to the Court's order dated November 4, 2025, Federal Respondents file this supplemental brief to address the relevance of two Supreme Court cases to Respondents' argument that detention is mandatory after a removal order has become administratively final. *See* ECF No. 37. The parties disagree on which statute governs Petitioner's detention while she is in asylum-only proceedings. Federal Respondents argue that Petitioner is detained with an administratively final order of removal that was issued[1] September 16, 2025, under the Visa Waiver Program (VWP) under 8 U.S.C. §§ 1187 and 1231. *See* ECF No. 15 at 5; *see also* ECF No. 15-1 at 3. Petitioner, however, argues that the governing statute is § 1226(a), because she has been permitted to seek asylum in asylum-only proceedings before an immigration judge following the issuance of her final administrative order of removal. *See, e.g.*, ECF No. 38 at 1–2. Because she is permitted to seek asylum and not just withholding, Petitioner distinguishes herself from the aliens in both *Guzman Chavez* and *Riley*. *Id.* As outlined in the brief below, the problem with Petitioner's

[1] In the exercise of discretion, Respondents agreed to re-serve Petitioner with a copy of the Final Order to allow her to request (*nunc pro tunc*) asylum-only proceedings. *See, e.g.*, ECF No. 18. This exercise of discretion did not, however, modify the finality of the administratively final order; it simply allowed Petitioner to request an asylum-only hearing after she had previously failed to request one. *See* ECF No. 15-1 at 4–5.

argument is that it wholly ignores the finality of the September 2025 final order of removal. *See* ECF No. 38 at 3. As the Supreme Court held in *Guzman Chavez* and reaffirmed in *Riley,* the qualifying final order of removal is the one in which the agency notifies the alien that she is removable and directs her removal. *Riley v. Bondi*, 606 U.S. 259, 267 (2025). The Court reasoned that where "an alien in streamlined removal proceedings cannot seek review of his [final administrative order of removal] before an IJ or the BIA, the period to seek review 'expir[es]' as soon as the FARO is issued—meaning that the order becomes final immediately upon issuance." *Id.* The same reasoning applies in this case to the final administrative order issued under the VWP. *See, e.g.*, ECF 15-1.

To be clear, Federal **Respondents do not concede and have not conceded** that a final order of removal issued under the VWP is anything other than final, regardless of whether the alien is permitted to seek additional review of a fear claim by an immigration judge. *See* ECF No. 38 at 4 (erroneously representing that "Respondents agree" that a final order of administrative removal under the VWP statute when a noncitizen has been referred to asylum-only proceedings is not a final, executable order of removal). Where an alien, like Petitioner, claims fear following the issuance of a final administrative order of removal, the order is nonetheless final, even if the alien is permitted to seek limited relief based on that fear claim prior to the execution of her removal order. *Riley v*, 606 U.S. at 267; *Guzman Chavez*, 594 U.S. at 527–28. Whether the proceedings are "asylum-only" or "withholding-only," they are nonetheless post-order proceedings based on a fear claim that do not allow for any agency review of the underlying removal order. *Id.* The governing statute for aliens detained with a final order of removal issued under the VWP is 8 U.S.C. § 1231(a).

Petitioner is detained on a mandatory basis during the 90-day removal period. 8 U.S.C.

§ 1231(a). In their Response to Petitioner's Petition for Writ of Habeas Corpus, Respondents argued in relevant part:

> The 90-day removal period may also be extended where ICE determines the alien is unlikely to comply with the removal order. *See Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 544 (2021); *see also* 8 C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the "post-removal-period." *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13.

ECF No. 15 at 6–7. In *Guzman-Chavez*, the Supreme Court reviewed the scope of detention authority over aliens with reinstated orders of removal. *Guzman-Chavez*, 594 U.S. at 528–29. DHS may reinstate a prior order of removal for an alien it finds "has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal." 8 U.S.C. § 1231(a)(5). When DHS reinstates an order of removal, the final order is not subject to being reopened or reviewed. *Id.* During reinstatement, aliens are barred from pursuing nearly all avenues of relief from removal, except for withholding of removal and CAT. *Id.* § 1231(b)(3); 8 CFR §§ 238.1(f)(3), 241.8(e). If the alien demonstrates a reasonable fear of persecution or torture, the alien is placed in "withholding-only" proceedings before an immigration judge where she can seek only withholding of removal or CAT protection. 8 C.F.R. §§ 208.31(b),(e). Even if an alien prevails on his withholding or CAT claim, the removal order remains valid and enforceable, just not to the specific country as to which the alien demonstrated a likelihood of persecution or death. 8 U.S.C. § 1231(b)(2)(E); 8 C.F.R. § 1208.16(f); *Guzman Chavez*, 594 at 535.

Recently in *Riley*, the Supreme Court reviewed whether a filing deadline for a circuit court petition for review was jurisdictional or simply a claims-processing rule. *Riley*, 606 U.S. at 263. To answer that question, the Court had to first address a question like the one raised in *Guzman Chavez*: whether an order from the Board of Immigration Appeals (BIA) on an application for

withholding of removal, filed by an applicant in withholding-only proceedings, constitutes a final order of removal. *Id.* The *Riley* Court held that it did not, finding that the qualifying order, instead, is the administratively issued final order of removal. *Id.* The statutory definition of a final order of removal, the Court reasoned, ties finality to agency review. *Id.*; 8 U.S.C. § 1101(a)(47)(B). Petitioner cannot seek review of her final order of removal during her "asylum-only" proceedings, so the qualifying final removal order is the streamlined September 16, 2025, administrative order of removal under the VWP.

In *Riley*, the alien had been convicted of an aggravated felony, which allowed DHS to order him removed administratively on a streamlined track under 8 U.S.C. § 1228 through the issuance of a "Notice of Intent" to deport. *Id.* at 264; 8 C.F.R. § 238.1(b)(1). The alien may challenge that determination in writing within 10 days of the notice's issuance, but if the alien fails to challenge removability, the officer issued a final order of administrative removal. *Id.* The alien may then petition a court of appeals for review of that order. 8 U.S.C. § 1228(b)(3). Riley, however, did challenge his removal by expressing a fear of returning to Jamaica. *Id.* at 265. The officer found he had not demonstrated a reasonable fear of persecution, but after seeking review of that adverse decision by an immigration judge, the judge vacated that negative fear finding and placed him into "withholding-only" proceedings to decide whether he should be removed to his home country. *Id.* Ultimately, the immigration judge granted relief to Riley in his withholding-only proceedings, and DHS appealed that decision to the BIA. *Id.* The BIA reversed and allowed the final order to be enforced. *Id.* When Riley filed a petition for review of the BIA's reversal with the circuit court, the circuit court erroneously dismissed the petition, finding the petition untimely for not having been filed within 30 days of his final order of administrative removal. *Id.* at 265–66. The Supreme Court granted certiorari and decided that because the adverse decision Riley sought to review in

circuit court was not a final order of removal, the circuit court had wrongfully dismissed his petition for review. *Id.* at 266–67. The Court identified the qualifying final order of removal, instead, as the administrative order that DHS issued to him under § 1228, holding him deportable and directing his removal from the United States. *Id.* at 267. That order, the Court reasoned, was the Executive's final determination on the question of removal. *Id.*

The *Riley* Court bolstered its reasoning by citing its reasoning in *Guzman Chavez*–that because an alien in streamlined removal proceedings cannot seek review of his final order of removal by an immigration judge or the BIA, the order is final immediately upon issuance. *Riley*, 606 U.S. at 269 (citing *Guzman Chavez*, 594 U.S. at 527–28); *see also Romero-Lozano v. Bondi*, 150 F.4th 375, 376–77 (5th Cir. 2025) (citing *Riley* and reiterating that the BIA's order denying withholding of removal to an alien in withholding-only proceedings is not the qualifying final order of removal for purposes of a timely-filed petition for review). In other words, the finality of the removal order does not depend on the outcome of the withholding-only proceedings. *Id.*

Applied here in the VWP context, both *Guzman Chavez* and *Riley* show that the qualifying final order of removal in this case was issued on September 16, 2025. *See* ECF No. 15 at 5; *see also* ECF No. 15-1 at 3. Aliens detained with final orders of removal are detained under 8 U.S.C. § 1231, as Respondents argued in their briefing. *See* ECF No. 15 at 3–5. Any challenge to the constitutionality of her removal order must have been brought in the circuit court of appeals within 30 days of issuance. *See id.* at 9–12; *see also Vargas v. U.S. Dep't of Homeland Sec.*, No. 1:17–CV–356, 2017 WL 962420 at *2–3 (W.D. La. Nov. 10, 2017); *Patel v. Barr*, No. CV–20–00229, 2020 WL 12688142 (D. Ariz. Sept. 9, 2020). The immigration judge has no authority in asylum-only proceedings to review the underlying administrative removal order. It is, therefore, a final order of removal.

Petitioner is not entitled to release from custody or a bond hearing, as her detention is governed by a final order of removal. 8 U.S.C. § 1231(a). That she is pursuing her fear claim before an immigration judge in asylum-holding proceedings does not disturb the finality of this removal order or permit her to seek a bond. To the extent that Petitioner lodges a *Zadvydas* claim, such claim is not ripe, as she has been detained for less than six months[2] in post-order removal custody. The only reason her detention is ongoing is because she is pursuing the limited relief available to her under the statute based on her fear claim. She cannot use this due process as both a shield and a sword. This petition should be denied.

Respectfully submitted,

Justin R. Simmons
United States Attorney

By: */s/ Lacy L. McAndrew*
Lacy L. McAndrew
Assistant United States Attorney
Florida Bar No. 45507
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
(210) 384-7325 (phone)
(210) 384-7312 (fax)
lacy.mcandrew@usdoj.gov

Attorneys for Federal Respondents

[2] The 90-day removal period mandating Petitioner's post-order detention expires December 15, 2025, but detention can be continued beyond that time in certain circumstances. *See* 8 U.S.C. § 1231(a). The six-month mark is March 16, 2026. Petitioner's next hearing before the immigration judge is set for November 24, 2025. *See* Automated Case Information (last accessed Nov. 10, 2025). If Petitioner remains detained past the 90-day mark, she will be afforded periodic custody reviews consistent with the regulations where she receives notice and an opportunity to be heard regarding continued detention. *See* 8 C.F.R. § 214.4. Her asylum-only proceedings will eventually conclude, so her detention is not indefinite.