

United States District Court
Western District of Texas
San Antonio Division

Esau Ernesto Chicas Ortega,
Petitioner,

v.

Kristi Noem, in her official capacity as
Secretary, U.S. Department of Homeland
Security *et al*,
Respondents.

No. 5:25-CV-01229-JKP

**Federal Respondents' Response to
Motion for Temporary Restraining Order
and/or Preliminary Injunctive Relief**

Federal Respondents file this substantive response in opposition to Petitioner's Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction. Petitioner is lawfully detained with a reinstated final order of removal, despite having been granted CAT relief, because such relief extends only to the country where Petitioner was found to have a reasonable fear of being tortured: El Salvador.¹ *See* 8 C.F.R. §§ 208.16–208.17, 1208.16; 1208.17; 208.31(a); 1208.31(a); 8 U.S.C. § 1231(b)(3)(A). In other words, ICE cannot remove Petitioner to El Salvador due to the CAT relief, but nothing prevents ICE from removing Petitioner to a third country. *See e.g., Guzman Chavez*, 594 U.S. at 531–32, 535–36; 8 U.S.C. § 1231(b)(1)(c)(iv); 8 C.F.R. §§ 208.16(f); 1208.16(f); 208.17(b)(2); 1208.17(b)(2). There are numerous removal options for ICE to consider under this statute, including any country willing to accept the alien. *Guzman Chavez*, 594 at 536–37; 8 U.S.C. § 1231(b)(2).

ICE notified Petitioner of the third country removal option to Mexico, but Petitioner

¹ As of October 31, 2025, Petitioner now claims that he prefers removal to El Salvador over Mexico, but there is no indication in the record as to whether he has filed a motion to reopen to withdraw his request for CAT protection to El Salvador. *See* ECF No. 15 at 4, 6.

claimed fear of persecution or torture in Mexico. *See* ECF Nos. 11, 13, 15 ICE processed him for a fear interview with USCIS, and USCIS found he did not establish his fear claim. *Id.* Petitioner stated an intent to seek review by an immigration judge of that decision, but the record contains no information regarding the status of that request or whether the statutes permit such review.

Ultimately, this Court lacks jurisdiction to grant the relief that Petitioner seeks, which is to enjoin the execution of his removal from the United States. *See* ECF No. 4; 8 U.S.C. 1252(g); *see also Westley v. Harper*, No. 25–229, 2025 WL 592788 at *4–6 (E.D. La. Feb. 24, 2025) (denying preliminary injunction and dismissing case for lack of jurisdiction where district court lacked jurisdiction to stay removal). On the merits of his habeas claim, Petitioner is not likely to succeed for several reasons: (1) his post-order detention is authorized by statute, even beyond the 90-day removal period, in the exercise of ICE’s discretion; (2) he concedes that his detention is not prolonged (*i.e.*, that his *Zadvydas* claim is premature); (3) he concedes removal to Mexico is imminent, but for this Court’s order temporarily staying removal; and (4) any remedy to an alleged procedural due process violation is not release from custody but a redo of the process. The stay of removal should be dissolved immediately, and this TRO motion and the underlying habeas petition should be dismissed in their entirety without the need for an evidentiary hearing.²

I. Relevant Background

Petitioner is a native and citizen of El Salvador. ECF No. 2 at 2. He is currently detained in ICE custody with a final order of removal dated October 3, 2023. *Id.* Petitioner has been in ICE custody since June 2025. ECF No. 1 ¶ 19. There is no indication that his final removal order has

² Federal Respondents aver that this Court may deny this motion and the habeas petition without further briefing on the underlying petition, but if the Court does not *sua sponte* deny the petition on or before December 5, 2025, Respondents intend to file a full response to it, as contemplated by this Court’s order dated November 3, 2025. *See* ECF No. 17 (setting a deadline of December 5, 2025)

been vacated. *Id.* The only impediment to the execution of his removal order is this Court's order staying his removal. ECF No. 10.

Petitioner claims that ICE failed to follow its own regulations in revoking his Order of Supervision and bringing him back into custody to effectuate his removal. *Id.* ¶¶ 19–27. Additionally, Petitioner takes issue with ICE's notice and process regarding third country removal. *Id.* ¶¶ 23–29. He makes claims under the Administrative Procedure Act (APA), as well, and argues he should be immediately released from custody. *Id.* ¶¶ 34–35.

II. Legal Standards

The authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes “administratively final,” (2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B). Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien fails to comply with removal efforts or presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is “no significant likelihood of removal in a reasonably foreseeable future.” *Zadvydas*, at 533 U.S. at 680.

A preliminary injunction is an “extraordinary and drastic remedy.” *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As such, it is “not to be granted routinely, but only

when the movant, by a clear showing, carries [the] burden of persuasion.” *Black Fire Fighters Ass’n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). “The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.” *Canal Auth.*, 489 F.2d at 572. A preliminary injunction should be granted only if the movant has “clearly” carried the burden of persuasion on all four of these prerequisites. *Id.* at 573.

III. Argument: Petitioner is Not Entitled to a TRO or Preliminary Injunction.

As a threshold issue, the only relief available to Petitioner through habeas is release from custody. 28 U.S.C. § 2241; *DHS v. Thuraissigiam*, 591 U.S. 103, 118–19 (2020). Petitioner seeks in this TRO Motion an injunction granting him the same ultimate relief he seeks on the merits of this already-expedited habeas proceeding. *See Garcia-Aleman v. Thompson, et al*, 5:25–CV–886–OLG–HJB, ECF No. 20 (W.D. Tex. Oct. 30, 2025) (collecting cases and denying TRO motion). The purpose of a TRO is to preserve the status quo and prevent irreparable injury until the court renders a decision on the merits. *Sambrano v. United Airlines, Inc.*, No. 21–11159, 2022 WL 486610 at *4 (5th Cir. Feb. 17, 2022) (citing *Canal Auth.*, 489 F.2d at 576). Here, the current status quo is that Petitioner is detained in ICE custody pending imminent removal to Mexico, which removal this Court temporarily stayed on October 3, 2025. ECF No. 10. ICE avers that this stay is the only impediment to Petitioner’s removal to Mexico, and Federal Respondents respectfully submit that there is no jurisdiction to grant a stay of removal. *See, e.g., El Gamal, et al, v. Noem, et al*, No. 25–CV–664–OLG, ECF No. 29 at 2 (W.D. Tex. July 2, 2025).

Moreover, Petitioner's request for a stay of removal directly contradicts the relief he seeks in his petition under *Zadvydas*, meaning that he cannot satisfy the first element of the TRO standards. In his habeas petition, Petitioner argues that his removal is not reasonably foreseeable, but in his TRO motion he requests a stay of removal, followed by another motion a few days later advising the Court that removal was imminent. *Compare* ECF No. 1 ¶ 38 *with* ECF No. 7 at 2. This conflict precludes the Court from determining the likelihood of success on either claim. *See Isaiev v. Garcia, et al*, No. 1:25-CV-01698-JE-JPM, ECF No. 7 at 3 (W.D. La. Nov. 6, 2025).

Additionally, Petitioner challenges the government's discretionary decision to revoke his Order of Supervision and detain him pending the execution of his final removal order. ECF Nos. 1, 2, *generally*. Where the alien challenges the discretionary basis for detention authority, that decision is protected from judicial review. 8 U.S.C. § 1252(a)(2)(B). While Petitioner challenges the discretionary OSUP revocation as arbitrary and capricious in violation of the APA, the APA does not permit review of discretionary agency actions. *See* 5 U.S.C. § 701(a). Petitioner fails to point to a discrete agency action that ICE failed to take related to his OSUP or its revocation.

ICE's detention authority under § 1231 is well-settled. *Zadvydas*, 533 U.S. at 701. Petitioner concedes in his filings that he (1) has a reinstated final order of removal with CAT protection only to El Salvador; (2) filed this habeas prematurely within six months of post-order custody following his OSUP revocation; (3) is facing imminent removal to Mexico, but for this Court's order granting a temporary stay of removal; and (4) was given a lengthy fear interview with assistance of counsel regarding his fear or removal to Mexico and was found, nonetheless, to lack the requisite fear to merit protection. *Id.* Nonetheless, Petitioner claims that his detention under 8 U.S.C. § 1231(a) is contrary to statute and to the Constitution. *Id.* at 2–6. Petitioner's claims fail.

A. There Is No Likelihood of Success on the Merits.

Petitioner is detained in ICE custody under 8 U.S.C. § 1231(a), because he has a final order of removal. *See* ECF No. 1. Although Petitioner’s removal order became final in 2023, the 90-day removal period may 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. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* “creates no specific limits on detention . . . as ‘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.’” *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner must show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post-removal-order* detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not and cannot make this showing, as he has been detained less than six months in post-order custody and faces imminent third country removal to Mexico, but for the court-ordered stay of removal. Under *Zadvydas*, Petitioner is lawfully detained, and this Court should dissolve this stay of removal, deny the TRO motion, and dismiss the habeas in its entirety.

1. No Substantive Due Process Violation

Petitioner has been detained in ICE custody for less than six months, meaning that any claim filed under *Zadvydas* to challenge the constitutionality of his post-order detention is premature. In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) “read in light of the Constitution’s demands, limits an alien’s post-removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States” but “does not permit indefinite detention.” 533 U.S. at 689. “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute.” *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption “does not mean that every alien not removed must be released after six months.” *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a “good reason” to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills*, No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite “good reason,” the burden will not shift to the government to prove otherwise. *Id.* There is no dispute that, following his OSUP revocation, Petitioner has been in post-order custody for less than six months.

Even if his claim were ripe, Petitioner has a final order of removal that authorizes his detention under 8 U.S.C. § 1231(a). Despite being granted CAT relief, such relief extends only to the country where Petitioner was found to have a reasonable fear of being tortured. *See* 8 C.F.R. §§ 208.16–208.17, 1208.16; 1208.17; 208.31(a); 1208.31(a); 8 U.S.C. § 1231(b)(3)(A). In other words, nothing prevents DHS from removing Petitioner to a third country. *See e.g., Guzman Chavez*, 594 U.S. at 531–32, 535–36; 8 U.S.C. § 1231(b)(1)(c)(iv); 8 C.F.R. §§ 208.16(f);

1208.16(f); 208.17(b)(2); 1208.17(b)(2). There are numerous removal options for ICE to consider under this statute, including any country willing to accept the alien. *Guzman Chavez*, 594 at 536–37; 8 U.S.C. § 1231(b)(2).

Finally, Petitioner has not shown “good reason” that removal to any third country is unlikely. In fact, he concedes that removal to Mexico is imminent. ECF No. 7. As such, the burden of proof has not shifted to ICE to show that there is significant likelihood of removal in the reasonably foreseeable future. The “reasonably foreseeable future” is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson*, No. 3:21–CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner’s burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03-CV-1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien’s burden of proof. *Nagib v. Gonzales*, No. 3:06-CV-0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03-CV-178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that “the circumstances of his status” or the existence of “particular 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.

Idowu, 2003 WL 21805198, at *4 (citation omitted).

Petitioner relies on only conclusory allegations and inaccurate legal theories to argue that removal is not likely, which are wholly insufficient to meet his burden of proof under *Zadvydas*. *See Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL

6809180, at *3 (N.D. Tex. Dec. 3, 2014). As such, Petitioner cannot meet his burden, and the burden does not shift to ICE to show that there is no significant likelihood of removal in the reasonably foreseeable future. *See Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). Petitioner's substantive due process claim fails here as a matter of law.

2. No Procedural Due Process Violation

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). While an agency is required to follow its own procedural regulations, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). In any event, a remedy for a procedural due process violation is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

Like his substantive due process claim, Petitioner provides only conclusory allegations that fall short of the pleading standards to argue that ICE has failed to provide him with adequate procedural protections. ICE denies that the agency acted contrary to the APA or to their own regulations when revoking the discretionary release on OSUP. Moreover, ICE denies that the

agency failed to comply with the POCR regulations, or any requirements related to notice of third country removals. Indeed, ICE has afforded Petitioner more procedural due process protections than even contemplated by statute and is ready and willing to execute his removal order, but for this Court's order staying removal. Any concerns Petitioner may have had regarding procedural due process have been addressed by substitute process, and Petitioner has not identified anything in that process that would violate the Constitution. Petitioner is unlikely to prevail on his procedural due process claim, and even if he did, it would not result in his release from custody or a stay of his removal order.

Finally, Petitioner is not entitled to declaratory relief under habeas, nor is he entitled to attorney's fees under the Equal Access to Justice Act ("EAJA").

B. Remaining Factors Do Not Favor Relief.

Finally, with respect to the balancing of the equities and public interest, it cannot be disputed that (1) Petitioner has a final order of removal that entitles the government to detain him; and (2) both the government and the public at large have a strong interest in the enforcement of the immigration laws and the removal of aliens with final removal orders. Moreover, Petitioner has provided no basis for this Court to determine that his continued detention (the status quo) pending the execution of his reinstated removal order will cause him irreparable harm. The Court should therefore deny the TRO and dismiss this case in its entirety.

IV. Conclusion

The temporary stay of removal should be dissolved, and the Court should deny both the TRO motion and the habeas petition without the need for an evidentiary hearing.

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