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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NESTER PAUL HERNANDEZ-MORALES,

Petitioner,

v.

PAM BONDI, Attorney General of the United States, in her official capacity; KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity; TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; PATRICK DIVVER, ICE Field Office Director for San Diego County, in his official capacity; WARDEN OF OTAY MESA DETENTION CENTER,

Respondents.

Case No.: 25-cv-02629-BJC-MMP

RESPONDENTS' SUR-REPLY

I. BACKGROUND

Following the hearing on Petitioner's amended habeas petition, the Court ordered Respondents to file a sur-reply "to address Petitioner's argument that the Department of Homeland Security's failure to comply with mandatory custody review procedures under 8 C.F.R.§ 241 renders his detention unlawful." ECF No. 14 at 1. For the reasons

set forth below, Respondents maintain that Petitioner is lawfully detained under 8 U.S.C. § 1231(a) and his late-asserted regulatory violation claims are unavailing.

II. DISCUSSION

Petitioner's amended habeas petition requests that the Court declare him subject to discretionary detention under 8 U.S.C. § 1226(a) and order him released on bond that an Immigration Judge erroneously granted. *See* ECF No. 6 at 15. But the record makes clear that from the time of his re-detention on May 28, 2025, Petitioner has been lawfully detained under 8 U.S.C. § 1231(a). That a Department of Homeland Security attorney mistakenly argued during the bond proceedings that Petitioner is subject to § 1225(b)(2) does not change what the record in this case establishes—Petitioner is no longer in removal proceedings and is subject to a final, executable order of removal to El Salvador.[1] Thus, the correct, and indeed, only detention authority supported by the record lies, not in §§ 1225(b)(2) or 1226(a), but rather, § 1231(a). All of Petitioner's claims concerning § 1226(a) in his petition are therefore irrelevant and inapplicable here.

Realizing that the arguments in his petition cannot prevail, Petitioner raised, for the first time in his reply brief, regulatory violation claims under 8 C.F.R. § 241.4(l)(1) and § 241.13(i)(3). *See* ECF No. 11 at 11, 15. But these claims fail too.

Sections 241.4(l) and 241.13(i) do not apply to this case for several reasons. First, these regulations concern a revocation of release following a post-final order detention. Petitioner, however, has never been detained (until now) post-final order of removal. There is thus no release from post-final order detention to revoke under these regulations. *See* 8 C.F.R. § 241.4(a) (defining the scope of the regulations as covering

[1] Petitioner argued at the hearing that he is subject to both § 1226(a) and § 1231(a). Not so. The authority for discretionary detention under § 1226(a) ends when removal proceedings have concluded. *See* 8 U.S.C. § 1226(a) (permitting detention "pending a decision on whether the alien is to be removed from the United States). Because Petitioner's removal proceedings have concluded and he is subject to final order of removal to El Salvador, § 1226(a) no longer applies.

continued detention or release from post-final order detention under 8 U.S.C. § 1231(a)(6)).

Second, § 241.13 does not apply because that regulation is triggered only where the government has determined that there is no significant likelihood of removal in the foreseeable future. No such determination was made here. *See* 8 C.F.R. § 241.13(a) ("Section 241.4 shall continue to govern the detention of aliens under a final order of removal . . . unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future.").

Third, Petitioner's contention that he is entitled to the notice and interview provisions under §§ 241.4(l)(1) and 241.13(i)(3) fails because these regulations deal with revoking an order of supervision or other conditions imposed upon a noncitizen who was released from a post-final order of detention. *See* 8 C.F.R. § 241.4(l)(1) (stating that a noncitizen "who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody."); 8 C.F.R. § 241.13(i) (similar). Because Petitioner was never released following a post-final order detention, he was never under such an order of supervision or other conditions. Despite bearing the burden of establishing his entitlement to habeas relief, Petitioner has not provided any evidence to the contrary.

As explained at the hearing, Petitioner was released on bond in 2003, while his removal proceedings were pending. And although Petitioner's removal order became final in 2012, the government did not deem his case an enforcement priority and exercised its discretion not to detain him and execute his removal order at that time. Because Petitioner's operative release was not predicated on an order of supervision or other post-final order conditions, the regulations governing the revocation of release under those conditions do not apply here. Thus, 8 C.F.R. §§ 241.4(l)(1) and 241.13(i)(3) cannot save Petitioner's habeas petition, and the Court should deny it accordingly. [2]

[2] Petitioner also claims that an individualized custody review was a prerequisite to his post-final order detention but offers no specific authority to support his contention.

Even if the Court found that Petitioner was entitled to notice and interview, Respondents did provide Petitioner notice of why he was being taken into ICE custody. At the time of his arrest, Deportation Officer Castaneda told Petitioner that he was being arrested for purposes of executing his removal order and provided him with a Form I-294, Warning to Alien Ordered Removed or Deported. *See* ECF No. 8-5 at 6 ("DO Castaneda informed HERNANDEZ [he] was placed under arrest due to having a final order of removal" and noting that he was being transferred to Otay Mesa "pending repatriation back to El Salvador."); Exh. 8 at 2.[3] Officer Castaneda also conducted an informal interview with Petitioner concerning the execution of his removal order. *See* Exh. 8 at 3–4.

Even assuming this evidence of notice and interview under the regulations fall short, Petitioner has not established prejudice nor a constitutional violation. *See Brown v. Holder*, 763 F.3d 1141, 1148–50 (9th Cir. 2014) ("The mere failure of an agency to follow its regulations is not a violation of due process."); *United States v. Tatoyan,* 474 F.3d 1174, 1178 (9th Cir. 2007) ("Compliance with . . . internal [customs] agency regulations is not mandated by the Constitution") (internal quotation marks omitted); *Bd. of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 92 n.8 (1978) (holding that *Accardi* "enunicate[s] principles of federal administrative law rather than of constitutional law").

At the time of his re-detention, Petitioner knew he was subject to a final order of removal and had no right to remain in the United States. And as demonstrated in Respondent's prior briefing, ICE had, and continues to have, authority to detain Petitioner under 8 U.S.C. § 1231(a)(6) based on the six-month presumptively

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Petitioner cites only 8 C.F.R. §§ 241.4(l) and 241.13(i), which as discussed above, do not apply here.

[3] This exhibit contains true copies of documents obtained from ICE counsel, with limited redactions to protect against unauthorized disclosures of personally identifiable information that federal agencies maintain under the Privacy Act, 5 U.S.C. § 552a.

reasonable period of detention under *Zadvydas* and the government's irrefutable showing that there is a significant likelihood of Petitioner's removal to El Salvador in the reasonably foreseeable future.[4] Thus, any challenge Petitioner would have made during an informal interview after his re-detention would have failed. *See, e.g.*, *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming that the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation).

Moreover, the regulations addressing revocation of release here do not provide substantive rights that override the statutory detention authority. *See Morales Sanchez v. Bondi*, No. 5:25cv02530 AB DTB, at *4 (C.D. Cal. Oct. 3, 2025) ("While the regulations cited by Petitioner, 8 C.F.R. §§ 241.13(i)(1)–(2) and 241.4, establish procedural safeguards—including the requirements that revocation be based on a condition of release violation or on a significant likelihood of removal, and that the noncitizen receive notice and an informal interview—they do not create independent substantive rights that override the statutory grant of detention authority.") (citing *Jane Doe 1 v. Nielsen*, 357 F.Supp.3d 972, 1000 (N.D. Cal. 2018) (concluding that agency rules must prescribe substantive law, not merely procedural or policy guidance, to be enforceable)).

Further, Petitioner does not have a protected liberty interest in remaining free from detention where ICE has exercised its discretion under a valid removal order. *See Moran v. U.S. Dep't of Homeland Sec.*, No. EDCV2000696DOCJDE, 2020 WL 6083445, at *9 (C.D. Cal. Aug. 21, 2020) (dismissing claim that § 241.4(l) was a violation of the petitioners' procedural due process rights and noting that they "fail to point to any constitutional, statutory, or regulatory authority to support their contention

[4] Petitioner's claim that Respondents have not shown a significant likelihood of removal to El Salvador in the reasonably foreseeable future is belied by admissions in his earlier habeas petition that removal was "imminent."

that they have a protected interest in remaining at liberty i n the United States while they have valid removal orders."). Although the regulation provides detainees some opportunity to respond to the reasons for revocation, "it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation when, in the opinion of the revoking official, the purposes of release have been served or the conduct of the alien, *or any other circumstance*, indicates that release would no longer be appropriate.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2010) (citing §§ 241.4(l)(2)(i), (iv)) (simplified and emphasis in original).[5]

In *Ahmad v. Whitaker*, for example, the government revoked the petitioner's release but did not provide him an informal interview. *See* No. C18-287-JLR-BAT, 2018 WL 6928540, at *6 (W.D. Wash. Dec. 4, 2018), *rep. & rec. adopted*, 2019 WL 95571 (W.D. Wash. Jan. 3, 2019). The petitioner argued that the revocation of his release was unlawful because the regulations prohibited re-detention without, among other things, an opportunity to be heard. *Id.* In rejecting his claim, the court held that although the regulations called for an informal interview, petitioner could not establish "any actionable injury from this violation of the regulations" because the government had procured a travel document for the petitioner, and his removable was reasonably foreseeable. *Id.*

Similarly, in *Doe v. Smith*, the district court held that even if the petitioner had not received a timely interview following her return to custody, there was "no apparent reason why a violation of the regulation . . . should result in release." No. CV 18-11363-FDS, 2018 WL 4696748, at *9 (D. Mass. Oct. 1, 2018). The court elaborated, "[I]t is difficult to see an actionable injury stemming from such a violation. Doe is not challenging the underlying justification for the removal order. . . . Nor is this a situation where a prompt interview might have led to her immediate release—for example, a case

[5] This case was abrogated on other grounds as recognized by *Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022).

of mistaken identity." *Id.*

The same is true here. Petitioner does not challenge his removal order, nor could he. And again, ICE has demonstrated a significant likelihood of Petitioner's removal in the reasonably foreseeable future. Whatever procedural deficiencies may have occurred, they do not warrant Petitioner's release, and indeed, could be cured by means well short of release. *See Jane Doe 1*, 357 F.Supp.3d at 1000 (concluding that agency rules must prescribe substantive law, not merely procedural or policy guidance, to be enforceable); *accord Morales Sanchez*, No. 5:25cv02530 AB DTB, at *4 (finding that 8 C.F.R. §§ 241.13(i)(1)–(2) and 241.4 "do not create independent substantive rights that override the statutory grant of detention authority.").

III. CONCLUSION

For the reasons stated here and in their return to the amended petition, Respondents respectfully request that the Court deny Petitioner's amended habeas petition.

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