

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 25-cv-03268-PAB-NRN

FIDEL A. PENA-GIL,

Petitioner,

v.

TODD M. LYONS, in his official capacity as Acting Director, U.S. Immigration and
Customs Enforcement;
ROBERT GUADIAN, Field Director of the Denver Field Office; and
WARDEN, Aurora Contract Detention Facility,

Respondents.

RESPONSE TO ORDER TO SHOW CAUSE (ECF No. 9)

Pursuant to the Court's October 23, 2025 Order, ECF No. 9, Respondents respond to Petitioner Fidel A. Pena-Gil's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, ECF No. 1 (filed October 16, 2025). Petitioner brings claims for (1) violation of 8 C.F.R. § 212.12 (the "Cuban Review Plan") under the *Accardi* doctrine, arguing that Respondents have violated his procedural due process rights by failing to abide by these regulations; (2) violation of his substantive due process rights and the Immigration and Nationality Act ("INA"), as interpreted by the Supreme Court's opinion in *Zadvydas v. Davis*, 533 U.S. 678 (2001), arguing there is no significant likelihood of removal in the reasonably foreseeable future; and (3) violation of his procedural due process rights and the INA by planning to deport him to a third country without

permitting him the opportunity to seek protection from such removal. ECF No. 1 at 10–16.

The Court should deny the Petition. First, Petitioner has not shown that his detention is unlawful based on any deviation by Respondents from following the Cuban Review Plan; indeed, the remedy for any deviation would be an order directing Respondents to follow that plan, not release. Second, Petitioner has not shown that his detention is unreasonable under the presumptively reasonable six-month detention period established in *Zadvydas* for detention of noncitizens who have been ordered removed; even if that period had expired, Petitioner has failed to meet the *Zadvydas* test by showing there is no significant likelihood of his removal in the reasonably foreseeable future. Third, his challenges to third-country removal do not show that his detention is unlawful; also, any challenge to his removal to a third country would need to be raised in an ongoing certified non-opt-out nationwide class action on the same issue.

FACTUAL BACKGROUND

I. Petitioner's background

Petitioner is a native and citizen of Cuba. Ex. A ¶ 4 (Decl. of Rosa Escareno). On May 14, 1980, he came to the United States as part of the Mariel Boatlift and was paroled into the United States at that time. *Id.* ¶ 5. In 1987, while in the United States, he was convicted of providing a false statement in the acquisition of a firearm. *Id.* ¶ 6. That same year, Petitioner was placed in deportation and exclusion proceedings.¹ *Id.* ¶

¹ Prior to the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, immigration terminology in the Immigration and Nationality Act was different. See *Rosales-Garcia v. Holland*, 322 F.3d 386, 391 n.1 (6th Cir. 2003). “[E]xcludable aliens .

7. An immigration judge ordered him excluded and deported from the United States on January 9, 1989. *Id.* ¶ 8. Thus, he is subject to a final order of deportation. *Id.* ¶ 9.

ICE did not execute the deportation of Petitioner at that time. *Id.* ¶ 10. Rather, he was released from custody on an order of supervision on September 28, 1990. *Id.* On June 12, 2025, after reviewing Petitioner's case, ICE determined that circumstances had changed such that it was now practicable to pursue his deportation from the United States. *Id.* ¶ 11. ICE notified Petitioner that it was revoking the order of supervision and would detain Petitioner pending his deportation. *Id.*

Since June 12, 2025, Petitioner has been detained under 8 U.S.C. § 1231, based on his final order of deportation. See Ex. A ¶¶ 11, 12; see also *id.* ¶ 9 (noting that Petitioner is subject to a final order of deportation); 8 U.S.C. § 1231 (providing for the detention and removal of aliens ordered removed). Accordingly, he has been detained for less than five months.

On July 9, 2025, ICE informed Petitioner that he would be deported to Mexico under 8 U.S.C. § 1231(b), which provides for the removal of noncitizens to a "third country" other than their country of origin. *Id.* ¶ 12. ICE has thereafter sought to make arrangements for Petitioner's removal. Petitioner was transferred from the ICE contract detention facility in Aurora, Colorado ("Denver CDF") to a staging facility in El Paso, Texas, in anticipation of the deportation to Mexico. *Id.* ¶ 13. However, his removal to

... were ineligible for admission or entry into the United States" and were subject to exclusion proceedings, in contrast to deportation proceedings, which "were brought against those aliens who had gained admission into the country." *Id.* Post-IIRIRA, aliens who had previously been subject to exclusion proceedings or deportation proceedings are now all subject to removal proceedings. *Id.*

Mexico was cancelled, and ICE transferred him back to the Denver CDF the next day. *Id.* On August 28, 2025, ICE transferred Petitioner to a staging facility in Florence, Arizona, for anticipated deportation to Mexico. *Id.* ¶ 14. This removal was cancelled, and Petitioner was transported back to the Denver CDF on August 31, 2025. *Id.* ICE continues to pursue Petitioner’s deportation from the United States. *Id.* ¶ 19. ICE has nominated Petitioner for deportation to Cuba and has pursued that process through the Cuban government. *Id.* ¶ 15. This process is still pending adjudication. *Id.*

On October 15, 2025, ICE conducted a Post Order Custody Review (“POCR”) for Petitioner under 8 C.F.R. § 241.4. *Id.* ¶ 16. ICE determined that Petitioner had failed to demonstrate that he would not pose a significant flight risk and danger to the community and continued to detain Petitioner pending his deportation from the United States. *Id.* As part of the POCR process, Petitioner requested a personal interview, and ICE is in the process of scheduling that interview. *Id.* ¶ 17. During that interview, Petitioner will be given the opportunity to provide any additional information in support of his release from custody. *Id.*

ICE is also in the process of scheduling Petitioner for parole review under 8 C.F.R. § 212.12, a regulation that provides for a review of whether a Mariel Cuban—a Cuban who, like Petitioner, came to the United States as part of the Mariel Boatlift, *id.* ¶ 5—should be paroled into the United States. *Id.* ¶ 18. Specifically, it provides that when a Mariel Cuban’s parole is revoked, “[t]he review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked,” although the government has

discretion to suspend or postpone that process under certain circumstances. 8 C.F.R. § 212.12(g)(1).

II. Petitioner's habeas application

Petitioner filed this habeas proceeding in the District of Colorado on October 16, 2025, claiming that his current detention violates his constitutional rights, the INA, and the regulations creating the Cuban Review Plan. ECF No. 1 at 2, 3. He challenges his detention, seeking a declaration that his detention violates the regulations, the INA, and the Due Process Clause of the Fifteenth Amendment, as well as an order directing that he be released from custody. *Id.* at 16–17. In addition, beyond challenging his detention, he seeks other relief: an order staying his transfer outside the District of Colorado and his removal from the United States, as well as an order precluding Respondents from removing Petitioner to a third country without following proper procedures. *Id.*

On October 23, 2025, the Court ordered Respondents to show cause by November 3, 2025, why the Petition should not be granted. ECF No. 9.

ARGUMENT

I. Petitioner has not shown that he is entitled to release from custody based on a failure to abide by the Cuban Review Plan.

Petitioner does not dispute that he is detained under a final order of removal. Nor does he dispute that during current period of detention, his custody was reviewed through a Post Order Custody Review (“POCR”) pursuant to 8 C.F.R. § 241.4, and ICE determined that he had failed to demonstrate that he would not pose a significant flight risk and danger to the community. Ex. A ¶ 16. Petitioner argues, however, that he

should be released because Respondents have not yet reviewed his detention under 8 C.F.R. § 212.12. ECF No. 1 at 10–11.

The regulation on which he relies, 8 C.F.R. § 212.12, establishes the Cuban Review Plan. *See id.* “The Cuban Review Plan is a federal regulatory scheme promulgated in 1987 to establish procedures for immigration parole determinations regarding Mariel Cubans”—Cubans who, like Petitioner, came to the United States in 1980 as part of the Mariel boatlift. *See Perez-Diago v. Gunja*, 261 F. Supp. 2d 1246, 1247 (D. Colo. 2003). Because Petitioner is a Mariel Cuban, *see* Ex. A ¶ 5, he is subject to the Cuban Review Plan. *See Sierra v. Immigration & Naturalization Serv.*, 258 F.3d 1213, 1216 (10th Cir. 2001) (noting that “Mariel Cubans who are being detained have their cases reviewed every year to determine whether they should be paroled” and citing 8 C.F.R. § 212.12).

As relevant here, the Cuban Review Plan sets forth regulations for when parole can be withdrawn or revoked for a Mariel Cuban, 8 C.F.R. § 212.12(e), (h). That authority confers broad discretion on the government. *See, e.g., id.* § 212.12(e) (providing that the authorized official may, “in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, *or any other circumstance*, indicates that parole would no longer be appropriate” (emphasis added)). The regulations also establish procedures for periodic review, after a parole revocation, of a Mariel Cuban’s continued detention. *Id.* § 212.12(g) (providing that such review “will *ordinarily* be expected to occur within *approximately* three months after parole is revoked”) (emphasis added)).

Petitioner argues that ICE should not have revoked his parole and that it should have reviewed his detention by now under § 212.12 because it has now been over four months since he was detained. ECF No. 1 at 10–11. He argues that any defects in failing to follow these regulations amount to a due process violation.

This argument fails for multiple reasons. First, Petitioner has not clearly shown any regulatory violation. Section 212.12 grants the government extraordinarily broad discretion granted to the government to revoke parole. Petitioner has not shown that there is no circumstance at all that warrants his detention, especially in light of ICE's clear efforts to effectuate his removal. Nor has Petitioner shown that the timing of the review violates § 212.12. Section 212.12(g) does not set a hard deadline but grants the government some leeway in accomplishing the first review, and ICE is scheduling that first review.

Second, Petitioner has not shown that any deviation from the procedures set forth in 8 C.F.R. § 212.12 is enough to amount to a due process violation. Petitioner relies on *United States ex rel. Accardi v. Shaughnessy*, where the Supreme Court established a doctrine—now known as the “*Accardi doctrine*”—that generally requires an agency to follow its regulations. See 347 U.S. 260 (1954). But the Supreme Court in *Accardi* did not determine the sweeping principle that agencies violate due process any time they fail to follow some regulation in a way that affects a party's rights. As the Supreme Court has clarified, *Accardi* “enunciates[s] principles of federal administrative law rather than of constitutional law.” *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92 n.8 (1978). “*Accardi* is based on administrative law principles, not

constitutional due process requirements.” *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 212 (D.D.C. 2020) (quoting *Vanover v. Hantman*, 77 F.2d 91, 103 (D.D.C. 1935), *aff’d*, 38 F. App’x 4 (D.C. Cir. 2002)) (explaining limits on the *Accardi* doctrine). Here, Petitioner has not shown that any arguable violations of the regulatory provisions at issue amount to a due process violation, since he has not shown that he will be denied any notice and opportunity to be heard on the basis for his parole revocation.

Third, Petitioner has not shown prejudice, as he must to show a violation of due process in the immigration context. *Berrum-Garcia v. Comfort*, 390 F.3d 1158, 1165 (10th Cir. 2004) (“In order to prevail on his due process challenge, Petitioner must show he was prejudiced by the actions he claims violated his Fifth Amendment rights.”). A review of his detention under 8 C.F.R. § 212.12 is being scheduled roughly within the ordinary regulatory timeframe; he is not being denied that process. Also, Petitioner’s detention was reviewed through a POCR pursuant to 8 C.F.R. § 241.4 rather than the Cuban Review Plan, and he was given a reason for his continued detention. Ex. A ¶ 16. Thus, ICE has evaluated Petitioner’s detention, albeit under a different regulation.

Fourth, the proper remedy for lack of procedural due process is additional process, not immediate release. A procedural due process claim concerns the procedures that are required by the Constitution, not the substance of an individual’s detention. Indeed, in *Accardi* itself, the Supreme Court did not order substantive relief (there, the suspension of deportation) but rather ordered the agency to afford the process provided in its regulations. See *Accardi*, 347 U.S. at 268 (ruling that if the petitioner were to succeed in proving BIA’s failure to comply with its regulations, “he

should receive a new hearing before the Board”). Thus, even under *Accardi*, Petitioner should at most be given exactly what the text of the regulation requires. And ICE has already put in motion a plan to do just that—it is in the process of scheduling Petitioner for parole review under 8 C.F.R. § 212.12. See Ex. A ¶ 18.

Consistent with this reasoning, several district courts have declined to grant release to remedy procedural violations of immigration regulations. See, e.g., *Medina v. Noem*, No. 25-cv-1768-ABA, 2025 WL 2306274, at *11 (D. Md. Aug. 11, 2025); *Douglas v. Baker*, No. 25-cv-2243-ABA, 2025 WL 2687354, at *6 (D. Md. Sept. 19, 2025); *Umanzor-Chavez v. Noem*, No. SAG-25-01634, 2025 WL 2467640, at *7–8 (D. Md. Aug. 27, 2025); *Tanha v. Warden, Baltimore Det. Facility*, No. 25-cv-02121-JRR, 2025 WL 2062181, at *6 (D. Md. July 22, 2025); *I.V.I. v. Baker*, No. JKB-25-1572, 2025 WL 1811273, at *3 (D. Md. July 1, 2025); *Doe v. Smith*, No. 18-11363-FDS, 2018 WL 4696748, at *9 (D. Mass. Oct. 1, 2018). The Court should do the same here.

II. Petitioner’s current detention does not violate his substantive due process rights or the INA, as interpreted by *Zadvydas*.

In Count II, Petitioner asserts his ongoing detention by ICE serves no legitimate purpose because ICE is unable to deport him and because he is not a danger to the community or a flight risk, and thus the detention violates his substantive due process rights. ECF No. 1 at 11–13. In Count III, he alleges that his detention violates the INA, as interpreted by the Supreme Court in *Zadvydas*, because the presumptive period of reasonable detention has expired, and his deportation is not reasonably foreseeable.

Id. at 13.² The Court should find that Petitioner's due process rights have not been violated by his ongoing detention.

Petitioner is currently detained under 8 U.S.C. § 1231. See Ex. A ¶¶ 12; see also *id.* ¶ 9 (noting that Petitioner is subject to a final order of deportation); 8 U.S.C. § 1231 (providing for the detention and removal of aliens ordered removed). In *Zadvydas*, the Supreme Court held that the detention of a noncitizen for up to six months under 8 U.S.C. § 1231 is "presumptively reasonable." 533 U.S. at 700–01. The Court determined that detention beyond six months does not, by itself, mean that the noncitizen must be released. *Id.* at 701. Rather, the Court held that after six months, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the [g]overnment must respond with evidence sufficient to rebut that showing." *Id.*; see also *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004) ("The onus is on the alien to 'provide good reason to believe that there is no such likelihood' before 'the Government must respond with evidence sufficient to rebut that showing.'") (cleaned up) (quoting *Zadvydas*, 533 U.S. at 701). While the Court in *Zadvydas* differentiated between noncitizens deemed to have entered the country and "excludable" noncitizens who were legally deemed to have never entered the country, 533 U.S. at 693, like Petitioner, Ex. A ¶¶ 7–8, the Supreme Court later extended *Zadvydas*'s 6-month presumptively reasonable period to the latter group, *Clark v. Martinez*, 543 U.S. 371, 386–87 (2005).

² Because *Zadvydas* provides the operative framework for analyzing due process claims in the context of the detention of aliens ordered removed under 8 U.S.C. § 1231, Respondents address Counts II and III jointly.

Because Petitioner's detention has not yet exceeded six months (as he was taken into custody on June 12, 2025, Ex. A ¶¶ 11), his detention under section 1231 remains constitutional, as the six-month presumptively reasonable period has not yet expired. Under *Zadvydas* and *Clark*, this defeats his argument. *Cf. Bokole v. McAleenan*, 1:18-cv-00583-JB-LF, 2019 WL 2024922, at *5 (D.N.M. May 8, 2019) (finding that the petitioner's claim challenging the constitutionality of his current detention was premature because the presumptively reasonable six month period had not yet expired).

Even if the 6-month presumptively reasonable period had expired, Petitioner still fails to establish a due process violation or violation of the INA under *Zadvydas*, as he has not met his initial burden to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *See Zadvydas*, 533 U.S. at 701. In the Petition, he asserts that Respondents are "unable to deport him" and that "he cannot be deported to Cuba and ICE has not identified a third country to which he could be deported." ECF No. 1 at 11–13. But "circumstances ha[ve] changed" between 1990 and 2025, Ex. A ¶¶ 10–11, and ICE is now pursuing Petitioner's deportation to Cuba through the Cuban government, *id.* ¶ 15. This process is still pending adjudication. *Id.*

Given ICE's ongoing pursuit of deportation to Cuba, and the fact that that process is still pending adjudication (as well as the changed conditions since 1990), Petitioner has not met his burden under *Zadvydas* to show that there is no significant likelihood of his removal in the reasonably foreseeable future. *Cf. Nkwanga v. Maurer*,

No. 06-cv-00262-MSK-MEH, 2006 WL 2475261, at *1 (D. Colo. Aug. 24, 2006) (finding that the petitioner failed to demonstrate that he was entitled to relief under *Zadvydas* where he failed to provide evidence indicating that his continued detention in the foreseeable future was likely).

Moreover, even if Petitioner had met his burden, the Court should find that Respondents' evidence is sufficient to rebut that showing. Specifically, the attached Declaration of ICE Deportation Officer Rosa Escareno shows that Petitioner's removal in the reasonably foreseeable future is significantly likely, as ICE is actively pursuing Petitioner's deportation to Cuba through the Cuban government. Ex. A ¶ 15. Thus, his removal is reasonably foreseeable, and his current detention does not violate his substantive due process rights or the INA under *Zadvydas*.

III. Petitioner's challenges to the possibility of his removal to a third country deportation does not show that his detention is unlawful, and they must be presented in the *D.V.D.* class action.

In Counts IV and V, Petitioner argues that Respondents have violated his procedural due process rights and the INA by failing to provide him with notice of what third countries it is seeking to deport him to, preventing him from the opportunity to seek protection from such removal, including on the basis that deportation to such country may threaten his life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion. ECF No. 1 at 14–16.

First, this challenge to the destination of any removal is not cognizable in this habeas proceeding, because it is not a challenge to his detention. A habeas proceeding is “at its core a remedy for unlawful executive detention” and cannot be

used to bring other challenges. *DHS v. Thuraissigiam*, 591 U.S. 103, 119 (2020) (quotation omitted). Petitioner’s objection to any procedures used to determine a third country to which he might be removed is not a challenge to his detention.

Second, Petitioner’s request for relief relating to third-country removal is encompassed in the claims presented in a certified class action pending in the District of Massachusetts, see *D.V.D. v. DHS*, 778 F. Supp. 3d 355 (D. Mass. 2025), and Petitioner must proceed through that suit instead. The *D.V.D.* court certified a non-opt-out class, which includes:

All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) whom DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

Id. at 378, 394.³

Petitioner seeks to differentiate his claims regarding deportation to a third country from those in *D.V.D.*, arguing that he “primarily seeks relief from detention pending any removal.” ECF No. 1 at 14–15 n.1. But his requested relief belies that claim—he asks the Court to “[p]reclude Respondents from removing [him] to a third country without following proper procedures.” *Id.* at 17. This overlaps squarely with the claims found in *D.V.D.* See *D.V.D.*, 778 F. Supp. 3d at 368 (“[The plaintiffs] are challenging [d]efendants’ policy or practice of designating aliens for removal to any country other

³ While the Supreme Court has stayed the preliminary injunction issued in *D.V.D.*, see *DHS v. D.V.D.*, No. 24A1153 (S. Ct. June 23, 2025), the litigation remains ongoing with the non-opt-out class.

than the country or alternative country of removal designated and identified in writing in their prior immigration proceedings without first providing notice and an opportunity to apply for protection from removal to that 'third' country.").

Third, to the extent that Petitioner seeks a declaration that Respondents have violated the Due Process Clause and the INA by failing to identify a third country which is willing to accept him, thus depriving him of the opportunity to seek protection from removal, such relief would be premature. In evaluating whether a matter is ripe, courts look to "whether the alleged harm[] has matured to a point at which it can be adjudicated," focusing on "whether there are uncertain or contingent future events that may not occur as anticipated, or may not occur at all." *Mallett v. Davis*, No. 10-cv-00085-MSK-MEH, 2010 WL 5056201, at *2 (D. Colo. Dec. 6, 2010) (citing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006)) (analyzing ripeness in the context of a § 2241 habeas petition).

Indeed, ICE is currently pursuing Petitioner's deportation to Cuba, which is Petitioner's home country. Ex. A ¶¶ 4, 15. Previous efforts to deport Petitioner to Mexico were unsuccessful. *Id.* ¶¶ 13–14. Petitioner admits that he is not aware of any current efforts to remove him to a third country and does not claim that, to date, he has been deprived of the opportunity to contest a third country removal. See ECF No. 1 at 9 ("ICE has not provided Mr. Pena any notice that they are considering deporting him to a third country. However, Mr. Pena is fearful that because ICE cannot deport him to Cuba, that it will send him to a third country without being provided an opportunity to assert a fear of deportation or seek protection from going to that country."). Nor does he argue

that he wishes to seek protection from deportation to Mexico, the only third country he identifies as a country to which ICE is attempting to deport him, on the grounds that his life or freedom might be threatened there. *See generally* ECF No. 1. The Court should decline to find that Respondents have violated the INA or Petitioner's procedural due process rights with regard to deportation to a third country because such alleged violation is purely speculative.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition⁴, ECF No. 1.

Dated: November 3, 2025

Respectfully submitted,

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⁴ Should the Court order Petitioner released on an order of supervision, this release would be subject to conditions. 8 U.S.C. § 1231(a)(3) provides the Attorney General with the authority to issue regulations on terms of supervision for an alien released pending removal. The Cuban Review Plan provides that "[a] decision to release [a Mariel Cuban] on parole may contain such special conditions as are considered appropriate." 8 C.F.R. § 212.12(b)(1). Thus, an "alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances." *Zadvydas*, 533 U.S. at 700. Accordingly, if Petitioner is released, his release may be governed by conditions of supervised release set pursuant to the regulations.

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

s/ Alicia Alvero Koski
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