

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

FIDEL A. PENA-GIL, (A ) <i>Petitioner</i>)	Case No. 1:25-cv-3268
v.)	REPLY TO RESPONDENTS' OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF HABEAS CORPUS
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; WARDEN, Aurora Contract Detention Facility; <i>Respondents</i>)	
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On October 16, 2025, Petitioner Fidel Pena-Gil (“Mr. Pena”) filed a petition for a writ of habeas corpus on the basis that his immigration detention violates the Immigration and Nationality Act as well as his substantive and procedural due process rights. *See* ECF No. 1. Pursuant to the Court’s order to show cause, Respondents filed an opposition to the petition on November 3, 2025. ECF No. 14. Respondents, however, have failed to establish that the Court should not grant the habeas petition. 28 U.S.C. § 2243. Accordingly, this Court should grant Mr. Pena’s habeas petition on each of the counts pled in the petition.

I. Respondents Admit They Did Not Comply With 8 C.F.R. § 212.12 Surrounding Re-Detention of Certain Cuban Nationals (Count One)

This Court should grant the habeas petition on the threshold basis that the government violated Mr. Pena’s due process rights in failing to comply with required regulations when it re-detained him in June 2025. The government “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) (discussing *United States ex. Rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); *Accardi*, 347 U.S. at 267-68 (concluding that an agency action in violation of its own regulations and procedures offends due process).

The Department of Homeland Security (“DHS”) has proscribed specific regulations surrounding the detention, release, and re-detention of individuals like Mr. Pena who entered the United States in 1980 as part of the Mariel Boatlift (also known as “Mariel Cubans”), who are subject to exclusion hearings or deportation to Cuba or another country. *See* 8 C.F.R. § 212.12. This regulation primarily focuses on when Mariel Cubans can be paroled and when DHS can revoke such parole for these individuals. 8 C.F.R. § 212.12(a). Specifically, DHS is authorized to grant parole to a Mariel Cuban under the parole statute, 8 U.S.C. § 1182(d)(5). 8 C.F.R. § 212.12(b). And the regulation defines specific criteria and processes for parole and re-detention of Mariel Cubans. *See generally* 8 C.F.R. § 212.12.

The decision to revoke a Mariel Cuban’s parole may be made by the Associate Commissioner of Enforcement or a district director. 8 C.F.R. § 212.12(h). There are four identified situations in which parole of a Mariel Cuban can be revoked:

- (1) The purposes of parole have been served;
- (2) The Mariel Cuban violates any condition of parole;
- (3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or
- (4) The period of parole has expired without being renewed.

Id.; *Suarez-Tejeda v. United States*, 85 F. App’x 711, 715 n.3 (10th Cir. 2004). Within three months of a parole revocation, the Director must schedule a file review, and the file review can only be postponed or suspended if the noncitizen’s “prompt deportation is practicable and proper.” 8 C.F.R. § 212.12(g)(1).

There is no actual question that Respondents did not comply with these regulations. *Cf.* ECF No. 14 at 7 (arguing that “Petitioner has not clearly shown any regulatory violation.”). In fact, Respondents admit that they have not completed a Cuban Release Plan, either at the time of re-detention or in the five months since he has been re-detained. ECF No. 14-1 ¶¶ 12, 18. To be sure, parole determinations (including revocations) under § 212.12 must include “some individualized facially legitimate and bona fide reason for denying parole, and some factual basis for that decision in each individual case.” *Sierra v. INS*, 258 F.3d 1213, 1218 (10th Cir. 2001); *accord Borges-Brindis v. Gunja*, 97 F. App’x 896, 897 (10th Cir. 2004). Mr. Pena has been in ICE custody for five months without any justification for the revocation of parole and his length of detention far exceeds the anticipated three-month review period for when the government must provide the individualized assessment. 8 C.F.R. § 212.12(g)(1), (h). Thus, it is clear that Respondents have violated the regulation.

Respondents assert that there is no error here because they provided Mr. Pena with a post order custody review under a different regulation. ECF No. 14 at 8. But even if that review was equivalent to the review required by § 212.12 (and Petitioner does not admit that it is), Respondents did not complete that review in the timeline as required by § 212.12. Moreover, the “review” that Respondents conducted is insufficient. In particular, Respondents assert in their declaration (without providing a copy or any details of what was actually included in the review and notice of the review) that Mr. Pena is subject to revocation of his release due to his decades-old criminal history, lack of lawful status, and order of deportation from 1989. *See* ECF No. 14-1 ¶ 16. But every one of the cited reasons for detention in 2025 was present when Mr. Pena was released from custody in 1990, and arguably were far more relevant at that time. Thus, it is not clear how the requirements of any of the parole revocation provisions of § 212.12(h) are met. Further, it is

disingenuous for Respondents to state that Mr. Pena's deportation was imminent at the time of re-detention in June as a country of deportation was not identified for nearly one month, and that country was unwilling to accept Mr. Pena.¹ *Id.* ¶ 12. Ultimately, Respondents' generalized statements asserting that anyone with a criminal history (no matter how old or serious) and lack of legal status justify detention provides "no factual basis or explanation" and "teeters dangerously close to a perfunctory and superficial pretense instead of a meaningful review sufficient to comport with due process standards." *Bonito v. Bureau of Immigr. & Customs Enf't*, 547 F. Supp. 2d 747, 757-58 (S.D. Tex. 2008).

In addition, and contrary to Respondents' assertion, the lack of compliance with the regulation *does* amount to a Constitutional violation. *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 144 (W.D.N.Y. 2025) ("Noncitizens, even those subject to a final removal order, have constitutional rights just like everyone else in the United States" and "while [DHS] might want to enforce this country's immigration laws efficiently, it cannot do that at the expense of fairness and due process."). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). And "ICE, like any agency, 'has the duty to follow its own federal

¹ Moreover, Mexico could not have been a proper country of deportation if, as Respondents now submit, they are seeking to deport Mr. Pena to Cuba, his country of birth and nationality. *See* 8 U.S.C. § 1227(a) (1988). In particular, Respondents fail to acknowledge that "nominating" Cuba as the country of deportation *after* Respondents twice attempted to deport Mr. Pena to Mexico—a third country that is not identified on his order of exclusion and to which he has no connection – entirely violates the deportation statute, 8 U.S.C. § 1227(a) (1988), which outlines the identification of countries of deportation. That statute requires deportation to the country from which the noncitizen arrived in the United States or, if that country will not accept the noncitizen, then the country of which the noncitizen is a citizen or national, the country in which he was born, or the country in which he has a residence. *Id.* Only if those countries are not willing to accept the noncitizen can the government identify any country which is willing to accept the noncitizen. 8 U.S.C. § 1227(a)(2)(D) (1988).

regulations.” *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017) (quoting *Haoud v. Ashcroft*, 350 F.3d 201, 205 (1st Cir. 2003)). Mr. Pena’s detention without compliance with the established and applicable regulation clearly rises to the level of violating his due process rights.

Finally, Mr. Pena has established prejudice. Critically, he has been detained for five months without the required process. *K.E.O. v. Woosley*, 2025 WL 2553394, *7 (W.D. Ky. Sept. 4, 2025) (concluding that “a three plus month gap is not ‘upon revocation’ as required”). Indeed, there is no indication (or allegations) that the purposes of his parole have been served, that he has violated any condition of his parole, that the enforcement of the order is “appropriate” or likely, or that the parole had expired without renewal. 8 C.F.R. § 212.12(h). Rather, Mr. Pena was released on parole in 1990 and thereafter appeared at every annual file review. *See* ECF Nos. 8-1, 14-1. He has not committed any crimes since being release on the order of supervision. *See* ECF No. 14-1. And, as discussed further below, the government has not established that enforcement of the exclusion order is even possible at this time, much less “appropriate.” 8 C.F.R. § 212.12(h).

Finally, Respondents argue that any remedy for this violation cannot be release but instead simply an order requiring the government to comply. ECF No 14 at 2. But if the government lacked the authority to detain Mr. Pena without following the proper process, then “the Government lacks the authority to continue to detain him[.]” *Clark v. Martinez*, 543 U.S. 371, 376 n.3 (2005); *Liu v. Carter*, 2025 WL 1696526, at *2–3 (D. Kan. June 17, 2025) (reversing revocation of release when ICE failed to comply with the regulations). And while Respondents cite several decisions that found release to not be the proper remedy, not all cited decisions are applicable to the issues raised in this petition. *See, e.g., Umanzor-Chavez v. Noem*, 2025 WL 2467640, at *7 (D. Md. Aug. 27, 2025) (concluding that there was no due process violation in having a delegated deportation officer sign the notice of revocation of release). But, more importantly, Respondents also fail to

acknowledge that there are even more decisions holding that release is a proper remedy for a due process violation. *Rombot v. Souza*, 296 F. Supp. 3d 383, 389 (D. Mass. 2017); *Santamaria Orellana v. Baker*, 2025 WL 2444087 (D. Md. Aug. 25, 2025); *K.E.O.*, 2025 WL 2553394, *7; *Nguyen v. Hyde*, 2025 WL 1725791, at *5 (D. Mass. June 20, 2025); *Roble v. Bonde*, 2025 WL 2443453, at *5 (D. Minn. Aug. 25, 2025); *M.S.L. v. Bostock*, 2025 WL 2430267, *11-12 (D. Or. Aug. 21, 2025); *N.A.L.R. v. Bondi*, 2025 WL 2987239, *3 n.2 (S.D. Ind. Oct. 23, 2025) (collecting cases). Because Respondents' failure to comply with the regulatory requirement has resulted in a due process violation, Mr. Pena's detention is unlawful and release is warranted. *Delkash v. Noem*, 2025 WL 2683988, at *6 (C.D. Cal. Aug. 28, 2025).

II. Respondents Have Violated Mr. Pena's Substantive Due Process Rights (Counts Two and Three)

An individual, such as Mr. Pena, who is subject to an exclusion order and remains in immigration detention "may not be 'punished' without being accorded the substantive and procedural due process guarantees of the Fifth Amendment." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981). In *Rodriguez-Fernandez*, the Tenth Circuit recognized that a Cuban whom the government had been unsuccessful in seeking to deport to Cuba was entitled to release after he had been detained for "more than a few months . . . because such detention has become imprisonment." *Id.* This Court should similarly conclude that Mr. Pena's continued detention is unconstitutional.

As a threshold matter, Respondents submit that Mr. Pena is detained under 8 U.S.C. § 1231. ECF No. 14 at 10, ECF No. 14-1 at ¶ 12. However, that is not true. Because Mr. Pena was ordered excluded prior to the 1996 Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), his order of exclusion and deportation authority is governed by the prior statutes, including 8 U.S.C. § 1182(a)(9)(20) (1988) (rendering a noncitizen who is not in possession of a

valid immigrant visa excludable), and § 1227 (1988) (providing for deportation of excludable noncitizens). While courts have applied the Supreme Court’s decision in *Zadvydas* to individuals who have been ordered excluded, *see Arango Marquez v. INS*, 346 F.3d 892, 894, 897-98 (9th Cir. 2003); *Rosales-Garcia v. Holland*, 322 F.3d 386, 415 (6th Cir. 2003), such application does not dictate that Mr. Pena’s deportation is controlled by 8 U.S.C. § 1231, which specifically applies only to orders of removal issued after IIRIRA. *See* 8 U.S.C. § 1231 (“Detention, release, and removal of aliens ordered *removed*”) (emphasis added); *see also Vartelas v. Holder*, 566 U.S. 257, 261-62 (2012) (discussing that IIRIRA changed the INA from focusing on entry to distinguish exclusion and deportation proceedings to providing for “removal” proceedings and corresponding removal orders). The pre-IIRIRA laws, however, did not have the same mandatory detention provisions found in § 1231. *See* 8 U.S.C. § 1225(b) (1988) (mandating detention only when the government was engaging in “further inquiry” as to whether the noncitizen should be entitled to enter the United States).

Because Mr. Pena is not subject to mandatory detention—such as, for example, during the “removal period” described in 8 U.S.C. § 1231(a)(1)(a)²—this Court must evaluate whether his continued detention has become unconstitutional. In *Zadvydas*, the Supreme Court held that a noncitizen may only be detained post-order “for a period reasonably necessary to bring about that [individual’s] removal from the United States.” 533 U.S. 678, 689 (2001). And, critically, those detained for this purpose are nevertheless entitled to constitutional protections. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1252 (10th Cir. 2008). Respondents provide no justification for Mr. Pena’s continued detention, other than a desire to now effectuate an order it could not

² Because Mr. Pena is not subject to removal processing pursuant to 8 U.S.C. § 1231, Respondents application of § 1231 is misplaced. ECF No. 14 at 10-11.

effectuate in the past. While his criminal history is decades old, Mr. Pena has not demonstrated that he is a danger or flight risk since the time the government released him from custody in 1990.

Respondents also argue that “circumstances have changed between 1990 and 2025” such that deportation is now possible. ECF No. 14 at 11. But Respondents provide no explanation for that statement, and thus it is impossible to know, or for them to defend, that there are changed circumstances that somehow justify a five-month period of detention for someone who had previously been found to be neither a danger to the community nor a flight risk.

Additionally, Respondents fail to establish that Mr. Pena’s deportation is significantly likely to occur in the reasonably foreseeable future. Indeed, Respondents did not know where they could deport Mr. Pena at the time they apprehended him in June 2025. Critically, despite an order of exclusion directing Mr. Pena to be deported to Cuba, his native country, ICE twice tried to deport him to Mexico, to no avail. ECF No. 14-1 ¶¶ 11-14. At some point between August 31 and now ICE has decided to “nominat[e]” Mr. Pena “for deportation to Cuba and has pursued that process through the Cuban government.” *Id.* ¶ 15. Notwithstanding the statutory violation that Respondents could and should not have identified Mexico as a country of deportation if they intended to deport him to Cuba, *see* 8 U.S.C. § 1227(a) (1988), Respondents’ generalizations and vague assertions fall far short of establishing the requisite likelihood that deportation will occur in the reasonably foreseeable future. *Nguyen v. Scott*, -- F. Supp. 3d --, 2025 WL 2419288, * 16-17 (W.D. Wash. Aug. 21, 2025) (concluding that generalized comments that removal is likely are insufficient); *accord Kamyab v. Bondi*, 2025 WL 2917522, at *4 (W.D. Wash. Oct. 14, 2025) (concluding that vague statements that a country is processing interview requests and accepting return of its citizens to be insufficient to meet the Government’s burden under *Zadvydas*). As in *Nguyen*, Respondents here have not provided any detail as to why deportation is more likely now

when it was not obtainable in the past, nor have Respondents explained the steps taken outside of noting that a request has been made. *Nguyen*, 2025 WL 2419288, at *17. Indeed, Respondents entirely fail to acknowledge that, historically, Cuba will not accept the return of Mariel Cubans. *See Sierra v. INS*, 258 F.3d 1213, 1216 (10th Cir. 2001). Because Respondents' factual assertions and arguments in the answer to the petition fall far short of demonstrating the requisite need to keep Mr. Pena detained or that his deportation is significantly likely to occur in the reasonably foreseeable future, the Court should grant the petition and order Mr. Pena's release.

III. Respondents Have Not Provided Mr. Pena With Notice And Opportunity to Contest His Deportation to Any Third Country (Count Four)

Respondents currently do not seek to deport Mr. Pena to a third country, as they have alleged that they now seek to deport him to Cuba. ECF No. 14-1 ¶ 15. However, to the extent that Cuba continues to refuse to accept Mariel Cubans, Mr. Pena submits that habeas relief is warranted as described in Count Four.

Moreover, Respondents incorrectly claim that Mr. Pena's claims are subsumed by the *D.V.D.* class action. ECF No. 14 at 12-13. In *D.V.D.*, the plaintiffs challenged two policies and practices relating to third country removals: DHS's policy of removing or seeking to remove individuals to third countries without providing notice and an opportunity to contest that removal if they have a fear of persecution or torture if removed to that third country and DHS's February 2025 policy directive instructing DHS officers to review for re-detention and removal to third countries all cases of individuals who were previously released from immigration detention. *See D.V.D. v. DHS*, No. 25-cv-10676 (D. Mass.). The district court certified a class of

All individuals who have a final removal order issued in proceedings under [8 U.S.C. §§ 1229a, 1231(a)(5), or 1228] 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.

778 F. Supp. 3d 355, 378 (D. Mass. 2025).

As a threshold matter, Mr. Pena has an order of exclusion, not a final removal order issued in proceedings listed in the class certification order. *See* ECF 14-1 ¶ 8; ECF 1-3. Thus, he is not facially covered by the *D.V.D.* class. Moreover, even if the class were to be extended to individuals such as Mr. Pena, he is seeking relief that is not available through the *D.V.D.* litigation. Namely, Mr. Pena cannot obtain injunctive relief through *D.V.D.* because the Supreme Court has stayed the preliminary injunction, and thus Mr. Pena could be deported before a decision in *D.V.D.* Additionally, the *D.V.D.* court cannot enjoin DHS from failing to provide a meaningful opportunity to seek withholding of removal prior to third country removal. *See* 8 U.S.C. § 1252(f)(1) (bring courts from “enjoin[ing] or restrain[ing] the operation of” specified provisions of the INA, “other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated.”). *See Zavvar v. Scott, et al.*, 1:25-cv-2104, 2025 WL 2592543 (D. Md. Sept. 8, 2025). Accordingly, because *D.V.D.* does not include the same facts and claims as raised here, Mr. Pena should be permitted to raise his challenges in this case.

IV. Respondents Have Not Complied With the Statute In Processing Mr. Pena for Deportation (Count Five)

As a threshold matter, Respondents make no attempt to defend against Count Five in the petition, likely because they clearly have not complied with the INA in identifying a country for deportation. *See generally* ECF No. 14.

For individuals subject to deportation prior to 1990, the INA provided a statutory process for identifying a third country for deportation. 8 U.S.C. § 1227(a) (1988). First, the government was required to deport the noncitizen “to the country in which the [noncitizen] boarded the vessel

or aircraft on which he arrived in the United States” unless the noncitizen arrived from a contiguous territory and the noncitizen was not a native or resident in such contiguous territory. 8 U.S.C. § 1227(a)(1) (1988). If the government of the contiguous country described in § 1227(a)(1) will not accept the noncitizen, the noncitizen’s “deportation shall be directed by the Attorney General” to any of the following: “(A) the country of which the [noncitizen] is a subject, citizen, or national; (B) the country in which he was born; (C) the country in which he has a residence; or (D) any country which is willing to accept the alien into its territory, if deportation to any of the foregoing countries is impracticable, inadvisable, or impossible.” 8 U.S.C. § 1227(a)(2) (1988). Under this statute, Respondents must have attempted to remove Mr. Pena to Cuba prior to (repeatedly) seeking his removal to a third country.

When Mr. Pena was first re-detained in June, ICE officers told him that he would be deported to Spain. ECF No. 8-1 at 1. One month after his detention, ICE identified Mexico as the country of deportation and thereafter twice sought to deport him to Mexico. ECF No. 14-1 at ¶¶ 12-14. It was only after these unsuccessful attempts did ICE seek to identify Cuba as a country of deportation. *Id.* at ¶ 15. But this process does not comply with the statute. 8 U.S.C. § 1227(a)(1) (1988). In fact, Respondents admit that they did not follow the statutory order of identifying a country of deportation. *See* ECF No. 14 at 14.

Respondents insinuate that such error is immaterial because now Cuba has been identified. ECF No. 14 at 14, ECF No. 14-1 at ¶ 15. But Respondents provide no justification for this unlawful application of the statute, and such error is not harmless because it has resulted in Mr. Pena’s extended detention for several months. And, as discussed above, Respondents have failed to establish that deportation to Cuba is possible, much less reasonably foreseeable. Accordingly, Respondents’ violation of § 1227(a)(1) (1988) provides yet another basis for this Court to grant

the habeas petition. *K.E.O.*, 2025 WL 2553394, * 7 (“Immigration statutes are complex. The Court acknowledges that the United States has broad discretion to enforce immigration laws But it must follow the law and give every word in the applicable statutes and regulations their full meaning.”).

CONCLUSION

For any and all of these and the reasons presented in Mr. Pena’s petition, the Court should grant the petition for a writ of habeas corpus and order Mr. Pena released from custody.

Respectfully submitted,

November 11, 2025

Respectfully submitted,

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