UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Edgardo Maravilla Martinez,	)	
Petitioner,	)	Civ. No. 1:25-cv-1856 (AJT/WEF)
v.	)	
Joseph Simon, *et al.*,	)	
Respondents.	)	

REPLY MEMORANDUM IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS

On November 7, 2022, Petitioner Edgardo Maravilla Martinez won an order of deferral of removal from an Immigration Judge granting him protection under the Convention Against Torture ("CAT") and barring his removal to El Salvador, the one country on earth in which he holds any claim to citizenship or legal immigration status. Dkt. No. 6-1 ¶ 13. Recognizing that meant they could not remove him from the United States, Respondents released Petitioner from immigration custody on an Order of Supervision two months later. *Id.* ¶ 14; Dkt. No. 1-1. In March 2023, Respondents reaffirmed their conclusion that Petitioner could not be removed from the United States, and accordingly issued him an Employment Authorization Document. *See* Ex. A hereto.

Now, after two and a half years of supervised release without any violations,[1] Respondents have re-arrested and re-detained Petitioner without any forewarning, but the individual ICE officer

[1] Although Respondents make reference to Petitioner's serious criminal conviction, Petitioner was convicted and served his sentence prior to Respondents releasing him from immigration custody on an Order of Supervision in December 2022. Dkt. No. 6-1 at ¶¶ 8-9, 14. Respondents do not claim to have re-arrested Petitioner based on any violation of his Order of Supervision, *id.* at ¶ 15; *see also* Ex. B.

who revoked his Order of Supervision lacked authority to do so. *See* Ex. B hereto. The purpose of arresting Petitioner was supposedly to remove him, *id.*; yet two months after his arrest, Respondents have made no move to set aside Petitioner's order of protection from removal to El Salvador, nor have they even named any third country to which they would like to remove Petitioner, much less have any reason to believe that any specific country will accept him. Dkt. No. 6-1 ¶ 18. There is no significant likelihood of removal in the reasonably foreseeable future.[2]

LEGAL STANDARD

Deferral of removal under 8 C.F.R. § 1208.17 prohibits the government from removing a noncitizen to a country where it is more likely than not that the individual would be tortured by or at the acquiescence of a public official. This form of relief is mandatory if the applicant meets the burden of proving that it is more likely than not that he would be tortured if returned to his country of origin. The government may not remove an individual with a valid deferral of removal order to that country unless the order is formally terminated following the procedures set forth in the regulations. *See* 8 C.F.R. § 1208.17(d).

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[2] Should Respondents identify any third country of removal, then if Petitioner fears removal to that country he will state a claim of fear of removal. At that time, Respondents would implement their third-country removal procedures, which begin with a fear interview. Dkt. No. 6-1 at 8 ("In cases where the alien affirmatively states a fear, USCIS will generally screen the alien within 24 hours of referral from the immigration officer. This screening may be done remotely. USCIS will determine whether the alien would more likely than not be persecuted on a statutorily protected ground or tortured in the country of removal.").

If Petitioner passes the fear interview, he cannot be removed to the designated country of removal without further process; but if he fails the interview, Respondents claim the right to remove him without further process. Petitioner's Third Claim for Relief (Dkt. No. 1 ¶¶ 38-40) contend that this would violate his right to due process.

This claim is far from being ripe, since it requires (1) a designation of a particular country of removal; (2) Petitioner claiming fear of removal to that country; and (3) a USCIS officer deciding that Petitioner has not adequately stated a basis for his claim of fear. None of these three thirds have happened. Should these three events occur, Petitioner will present this claim by motion.

If a noncitizen is granted protection from removal, "DHS may not remove the alien to the country designated in the removal order unless the order of withholding is terminated." *Johnson v. Guzman Chavez*, 594 U.S. 523, 531 (2021). But like withholding of removal, deferral of removal is a country-specific form of relief. Should the government wish to remove an individual with deferral of removal to some other country, it must first provide that individual with notice and an opportunity to apply for protections as to that country as well. *Guzman Chavez v. Hott*, 940 F.3d 867, 880 (4th Cir. 2019) ("And precisely because withholding of removal is country-specific, as the government says, if a noncitizen who has been granted withholding as to one country faces removal to an alternative country, then she must be given notice and an opportunity to request withholding of removal to that particular country."), *rev'd on other grounds*, 594 U.S. at 523.

When an individual is ordered removed, 8 U.S.C. §1231(a) permits the government to detain them during the "removal period," which is defined as the 90-day period during which "the Attorney General shall remove the alien from the United States." 8 U.S.C. §1231(a)(1)(A). With two exceptions not relevant here, the removal period begins on "[t]he date the order of removal becomes administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The 90-day removal period is tolled and extended only if "the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal." 8 U.S.C. § 1231(a)(1)(C). The statute contains no other provision for pausing, re-initiating or refreshing the removal period after the 90-day clock to zero.

After the removal period expires, the government may continue to detain certain noncitizens. 8 U.S.C. § 1231(a)(6). However, this broad authority is subject to an important constitutional limitation, which the Supreme Court has read into the statute: detention beyond the removal period is permissible only where reasonably related to a legitimate government purpose, namely, securing the noncitizen's physical removal from the United States. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001). Where there is no possibility of removal, detention presents due process concerns because "the need to detain the noncitizen to ensure the noncitizen's availability for future removal proceedings is "weak or nonexistent." *Id.* at 690-92. Detention is lawful only when "necessary to bring about that alien's removal." *Id.* at 689. Because the *Zadvydas* Court understood Congress to have recognized that not all removals can be accomplished in 90 days, the Court established a rebuttable presumption that six months could be deemed a "presumptively reasonable period," after which the burden shifts to the government to justify continued detention by means of evidence if the noncitizen provides a "good reason to believe that there is not significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701.

ARGUMENT

I. Since Petitioner's removal is not reasonably foreseeable, his detention is no longer permissible under *Zadvydas* or due process.[3]

The government absolutely may detain a noncitizen with a final order of removal in order to actually remove that noncitizen, no matter how long ago the removal order was entered. This much is not in doubt. Petitioner's contention in this litigation is a modest one: once the removal period has passed, *Zadvydas* requires that the government have some objective reason to believe that removal is significantly likely within the reasonably foreseeable future, before it can lock up a person by surprise without any due process review.

Here, the government has not bothered to put forward one shred of evidence that it actually

[3] Respondents correctly explain that in the Fourth Circuit, "the *Zadvydas* standard *is* due process[.]" Dkt. 6 at 10, quoting *Castaneda v. Perry*, 95 F.4th 750, 756. Accordingly, Counts 1 and 2 of the Petition for Writ of Habeas Corpus, Dkt. No. 1 ¶¶ 30-37, both require this Court to carry out the same legal test, that set forth in *Zadvydas*.

expects to be able to remove Petitioner.[4] Respondent makes no argument on the facts regarding likelihood of removal, their sole argument is a jurisdictional one: that a *Zadvydas* analysis is premature since 180 days have not yet elapsed since Petitioner was re-detained. If the Court rejects that argument, therefore, Respondents are left with no defense on the merits.

A. This habeas petition, filed more than two years after the expiration of the removal period, is not premature.

1. The removal period has not reset due to re-detention.

Here, the 90-day removal period set forth in 8 U.S.C. § 1231(a)(1)(A) commenced upon the final removal order against Petitioner on November 7, 2022, and ran through February 5, 2023. The 180-day presumptively reasonable period under 8 U.S.C. § 1231(a)(6) as interpreted by *Zadvydas* expired on May 6, 2023, more than two years ago. Respondents' contention that Petitioner's habeas claim is premature because he has not spent a cumulative 180 days behind bars in ICE detention since his removal order misreads the statute and *Zadvydas*.

First, the plain text of the statute makes clear that the removal period has not reset in this case. As 8 U.S.C. § 1231(a)(2)(B) states,

> **Beginning of period**
>
> The removal period begins on the latest of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

[4] Why, then, did Respondents even arrest Petitioner? Sworn testimony from a high-level ICE official in another case shows that ICE's practice in cases of this nature is to arrest first and come up with a reason thereafter: third-country removal plans are determined only after a noncitizen is taken into custody. *Abrego Garcia v. Noem*, No. 8:25-CV-00951-PX, 2025 WL 2062203, at *5-*6 (D. Md., July 23, 2025). In other words, ICE's strategy is to lock them up first, and then figure out removal later.

In other words, once the 90-day removal period has run, the only thing that can reset it to its beginning is (i) a new administratively final removal order, or the prior order being reopened and then reentered; (ii) a final order from a reviewing Court of Appeals that had entered a stay of removal; or (iii) the noncitizen's release from criminal detention or confinement. None of these have occurred in this case.

Additionally, 8 U.S.C. § 1231(a)(1)(C) provides the only reason for the removal period to be tolled: "if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal." Again, this did not occur here.

For this reason, courts agree that re-detention for the purpose of removal, without more, does not reset the removal period. *See, e.g.*, *Diaz-Ortega v. Lund*, 2019 WL 6003485, at *8 (W.D. La. Oct. 15, 2019), *R&R adopted*, 2019 WL 6037220 (W.D. La. Nov. 13, 2019), citing *Bailey v. Lynch*, 2016 WL 5791407, at *2 (D.N.J. Oct. 3, 2016) ("The removal period does not restart simply because an alien who has previously been released is taken back into custody.").

Second, while "[t]he question of whether the six-month period has expired is not clearly answered by *Zadvydas*," *Zavvar v. Scott*, 2025 WL 2592543, *4 (D. Md. Sept. 8, 2025), the reasoning of *Zadvydas* explains why the 180-day period does not reset simply because a noncitizen is re-detained. As the *Zadvydas* court explained, the basic responsibility of the habeas court is to "ask whether the detention in question exceeds a period reasonably necessary to secure removal." *Zadvydas*, 533 U.S. at 699. In so doing, the habeas court "should measure reasonableness primarily in terms of the statute's basic purpose, namely, assuring the alien's presence at the moment of removal. Thus, if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699-700. Under *Zadvydas*, after 180 days have elapsed since the start of the removal period, even just one day of additional detention could be found unreasonable if not justifiable by the statute's basic purpose of assuring the noncitizen's presence at the moment of removal.

Because the *Zadvydas* Court understood Congress to have recognized that not all removals can be accomplished in 90 days, the Court allowed an additional 90 days of detention as a "*presumptively* reasonable period," *id.* at 701 (emphasis added). But a presumption is just that, and does not mean that a habeas petitioner *must* be detained for a total of six months, spread over three years, as if it were a matter of punching enough holes on a punchcard to earn a free sandwich. Of course, the government is entitled to 180 days to try to effectuate removal, but Respondents' argument that each of those 180 days only counts if spent behind bars presupposes that removal efforts can take place only while a noncitizen is detained. Although this may well be current ICE practice, thus explaining why Respondents arrested Petitioner *before* determining whether any country on earth would accept him for removal, it is certainly not a legal requirement. Here, Respondents have had nearly three years to work on removal, with Petitioner on close supervision throughout. As the District of Maryland explained in *Zavvar*:

> *Zadvydas* contemplated only the situation in which a noncitizen was continuously detained from the issuance of the removal order while efforts to execute the removal were ongoing, and did not directly address the situation presented here, where a noncitizen was not detained upon the issuance of the removal order, remained on release for 17 years, and only then was subjected to post-removal order detention for the first time. This distinction is significant because *Zadvydas* appears to have sought to balance the length of time a noncitizen would be held in detention against the need to afford the Government some time immediately following the issuance of the removal order to make and execute arrangements for removal. Because some if not most of those arrangements, such as securing approval from a foreign country to remove an individual to that nation, can likely be pursued even while the noncitizen is on release, that balance may well differ in circumstances where, before the period of detention began, the Government had a period of time . . . to make the arrangements for removal. Thus, there is, at a minimum, a reasonable argument that the six-month period runs continuously from the beginning of the removal period, even if the noncitizen is not detained throughout that period.

2025 WL 2592543 at *3 (internal citations omitted). *See also Tadros v. Noem*, 2025 WL 1678501, *3 (D.N.J. June 13, 2025) ("The 90-day removal period under 8 U.S.C. § 1231(a)(1)(B) was triggered [when the grant of relief under the CAT became administratively final]. Tadros was released two days later."); *Alam v. Nielsen*, 312 F. Supp. 574, 581-82 (S.D. Tex. 2018) (rejecting the argument that the Section 1231(a)(1)(A) removal period is restarted when a noncitizen is re-detained for the purposes of removal); *Escalante v. Noem*, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025), citing *Nguyen v. Hyde*, 2025 WL 1725791 (D. Mass. June 20, 2025); *Villanueva v. Tate*, 2025 WL 2774610, at *9 (S.D. Tex. Sept. 26, 2025) ("The Court therefore rejects the government's contention that Villanueva must remain in detention for six months before the Court may consider whether his continued detention violates his due process rights.").

Under Respondents' view of the 180-day clock, if the government releases a noncitizen from custody after 181 days on a finding that he cannot be removed to country A, then re-arrests him the following morning in order to attempt removal to country B, the holding of *Zadvydas* does not allow him to file a habeas corpus petition until he spends *another* 181 days in detention. With 195 countries on earth, if the government could simply reset the removal period by designating one of them, this would completely devastate the holding of *Zadvydas*. (In any event, here, Respondents have not even designated country B.)

For the foregoing reasons, this Court should find that the 90-day Section 1231(a)(1) removal period, and the additional 90-day Section 1231(a)(6) post-removal period, both expired more than two years ago, and did not reset upon Petitioner's re-detention on September 24, 2025.

2. <u>The *Zadvydas* presumption of reasonableness may be rebutted within the initial 180-day period of detention.</u>

Moreover, even if the *Zadvydas* six-month presumptively reasonable period only counts days spent behind bars in detention, that presumption of reasonableness would still be nonetheless rebuttable prior to that period's expiration. *Zadvydas* does not prohibit the filing of a habeas petition for 180 days, it merely gives the government a *presumption* that 180 days' worth of detention is reasonable. 533 U.S. 678, 701 (recognizing a "presumptively reasonable period of detention"). *See Munoz-Saucedo v. Pittman*, 2025 WL 1750346, at *10 (D.N.J. Jun. 24, 2025). *Zadvydas* did not announce a bright-line prohibition on challenges prior to the six-month mark. *Id.* at *10 (citing *Hoang Trinh v. Homan*, 333 F. Supp. 3d 984, 994 (C.D. Cal. 2018) and *Cesar v. Achim*, 542 F. Supp. 2d 897, 903 (E.D. Wisc. 2008)). Rather, "the presumption scheme merely suggests that the burden the detainee must carry within the first six months . . . is a heavier one than after six months has elapsed." *Cesar*, 542 F. Supp. 2d at 903-04. *See also Zavvar*, 2025 WL 2592543 at *5 (rejecting the concept of an unrebuttable presumption before six months of detention have elapsed).

Recently the District of Maryland considered the question of whether the *Zadvydas* presumption was rebuttable and held that it was. *Medina*, 2025 WL 2306274, at *6 ("But regardless of which *type* of presumption applies to a *Zadvydas* claim, which this Court need not decide, what *Zadvydas* did make clear was that it was adopting a presumption—not a conclusive bar to adjudication of whether continued detention is authorized that lifts only after six months have elapsed."). The *Medina* court explained that the presumption of reasonableness was merely the "default." *Id.* "But if a petitioner 'claim[s] and *prove[s]* . . . that his removal is not reasonably foreseeable'—including during the six-month period—the petitioner 'can overcome that presumption' and detention is no longer authorized." *Id.*, citing *Munoz-Saucedo*, 2025 WL 1750346 at *6. *See also Zavvar*, 2025 WL 2592543, at *6 ("[E]ven if the presumption is not rebuttable in the standard situation under which, as in *Zadvydas*, the six-month period consisted of continuous detention beginning on the date of the removal order, it must be rebuttable when, as here, the noncitizen was not initially detained and there was thus a substantial pre-detention period during which Respondents could have arranged for the removal."); *Villanueva*, 2025 WL 2774610, at *10 ("even if the government can 'reset' the six-month presumptively constitutional detention period by releasing the noncitizen and then re-detaining him, that would not require dismissal of Villanueva's habeas petition because the presumption of constitutionality during that six-month period is rebuttable.").

The District of New Jersey also agreed in *Munoz-Saucedo* that the presumption of reasonableness is rebuttable within the initial 180 days: "Although the Supreme Court established a six-month period of presumptively reasonable detention, it did not preclude a detainee from challenging the reasonableness of his detention before such time." 2025 WL 1750346, at *5. The *Munoz-Saucedo* court went on to explain, "Although some courts have read *Zadvydas* as creating a bright-line rule—one that effectively allows the government to detain a person for at least six months without judicial review, even if there was no possibility of removal—a close reading of *Zadvydas* does not support that interpretation. . . . The Court described the six-month mark as a 'guide,' not a rigid threshold. The Court did not say that the presumption is irrebuttable, and there is nothing inherent in the operation of the presumption that requires it to be irrebuttable." *Id.* (internal citations omitted). The *Munoz-Saucedo* court concluded, "Thus, the *Zadvydas* presumption . . . is rebuttable. The presumption of reasonableness is the default, but if a person 'can prove' that his removal is not reasonably foreseeable, then he can overcome that presumption. In practical terms, before the six-month period elapses, the government bears no burden to justify detention, and the petitioner must claim and prove, that his removal is not reasonably foreseeable." *Id.* at *6 (internal citations omitted). *See also Ali v. DHS*, 451 F. Supp. 3d 703, 706-07 (S.D. Tex.

2020) ("This six-month presumption is not a bright line, . . . and *Zadvydas* did not automatically authorize all detention until it reaches constitutional limits."); *Hoang Trinh*, 333 F. Supp. 3d at 994 ("The six-month *Zadvydas* presumption is just that—a presumption . . . not a prohibition on claims challenging detention less than six months." (internal quotation marks omitted)); *Cesar*, 542 F. Supp. 2d at 903 ("The *Zadvydas* Court did not say that the presumption is irrebuttable."); *Ortega v. Kaiser*, 2025 WL 1771438, at *4 (N.D. Cal. June 26, 2025); *Puertas-Mendoza v. Bondi*, 2025 WL 3142089 (W.D. Tex. Oct. 2, 2025).

For the foregoing reasons, this Court should not credit Respondents' argument that this petition was filed prematurely and should find jurisdiction over the matter and determine the merits of the habeas petition under *Zadvydas*.

B. The evidence in the record establishes no significant likelihood that Petitioner will be removed in the reasonably foreseeable future.

The Supreme Court in *Zadvydas* rejected the Fifth Circuit's holding that detention remained "lawful as long as good faith efforts to effectuate deportation continue[.]" 533 U.S. at 702 (internal citations omitted). As the *Zadvydas* Court explained, "this standard would seem to require an alien seeking release to show the absence of any prospect of removal—no matter how unlikely or unforeseeable—which demands more than our reading of the statute can bear." *Id.* Instead, to prevail under *Zadvydas*, Petitioner need only show that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. *See also Hassoun v. Sessions*, 2019 WL 78984, at *5 (W.D.N.Y., Jan. 2, 2019) ("under *Zadvydas*, the reasonableness of Petitioner's detention does not turn on the degree of the government's good faith efforts . . . Rather, the reasonableness of Petitioner's detention turns on whether and to what extent the government's efforts are likely to bear fruit.").[5]

Respondents do not argue that there is any significant likelihood that Petitioner will be removed in the reasonably foreseeable future; their sole argument on the *Zadvydas* claim is that the habeas petition was filed too early. They make no attempt to show that "progress, however slow, is being made" towards removal. *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1137 (S.D. Cal. 2001). Should this Court credit Petitioner's argument *supra* that the 90- and 180-day periods do not reset, then Respondents have no defense on the merits of the *Zadvydas* test, namely whether there exists a significant likelihood of removal in the reasonably foreseeable future.

Going to the substance of the *Zadvydas* test, Respondents do not present any evidence that any country has accepted Petitioner for removal, or has even been *asked* to do so. They provide no articulable basis for this Court to conclude that removal is reasonably foreseeable. *See Singh v. Whittaker*, 362 F. Supp. 3d 93, 101-102 (W.D.N.Y. 2019) (finding petitioner's continued detention unreasonable where the court was left to guess "whether deportation might occur in ten days, ten months, or ten years."). *See also Escalante*, 2025 WL 2206113, at *3 (citing 8 C.F.R. § 241.4(b)(4) for the proposition that "upon revocation of supervised release, it is the Service's burden to show a significant likelihood that the alien may be removed.").

Petitioner has shown that his removal is not likely in the reasonably foreseeable future. The government concluded as much on December 30, 2022, when they issued Petitioner's Order of Supervision. Dkt. No. 1-1. Indeed, as recently as March 31, 2023, Respondents issued Petitioner

[5] This case bears no resemblance to *Euceda v. Evans*, 2017 WL 1534179 (E.D. Va. Apr. 24, 2017), in which Judge Brinkema discussed "the ordinary delays associated with processing an alien's claim for withholding or asylum[.]" Here, there *is* no "claim for withholding" to process, since no country of removal has even been designated. Nearly all the cases cited by Respondents, Dkt. No. 6 at 14-16, are distinguishable on this basis.

an Employment Authorization Document ("EAD"). *See* Ex. A hereto. Pursuant to 8 U.S.C. § 1231(a)(7), "No alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that—(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or (B) the removal of the alien is otherwise impracticable or contrary to the public interest." As shown in Ex. A, Petitioner's EAD category is C18, referring to 8 C.F.R. § 274a.12(c)(18), which provides that "[a]n alien against whom a final order of deportation or removal exists and who is released on an order of supervision under the authority contained in section 241(a)(3) of the Act may be granted employment authorization in the discretion of the district director only if the alien cannot be removed due to the refusal of all countries designated by the alien or under section 241 of the Act to receive the alien, or because the removal of the alien is otherwise impracticable or contrary to the public interest." Accordingly, as recently as two years ago, Respondents still understood that removal was either impossible or impracticable.

In sum: over the course of the last three years, the government twice concluded that Petitioner could not be removed from the United States. That conclusion was correct then and remains correct now. Nothing has changed other than the government's *desire* to remove him, but a desire does not create a *significant likelihood*. This does not suffice to meet the government's burden to "respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

Since the 90-day removal period and the 180-day presumptively reasonable post-removal-period detention elapsed many years ago, Respondents lacked legal basis to re-detain Petitioner absent newly obtained means to actually remove him from the United States, which, again, they do not claim. *See You v. Nielsen*, 321 F. Supp. 3d 451, 462 (S.D.N.Y. 2018) (after the removal period, where a noncitizen is released on supervision, he cannot be re-detained except upon a finding of danger to the community or flight risk); *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 502 (S.D.N.Y. 2009) ("because the removal period and any presumptively reasonable detention period has expired, and the removal period was not tolled pursuant to § 1231(a)(1)(C), this Court finds that the Respondents are without statutory authority to detain Farez-Espinoza.").

The facts of this case are similar to *Zavvar*: Petitioner here has been granted deferral of removal to the only country to which he has a claim to citizenship or legal immigration status. *Zavvar*, 2025 WL 2592543 at *7. For a period of nearly three years, Respondents made no efforts to remove him, and twice during that period affirmatively determined that they could not do so. *Id.* "To the extent that no such efforts were made, it is thus reasonable to infer . . . that any such efforts likely would have been unsuccessful." *Id. See also Phongsavanh v. Williams*, 2025 WL 3124032, at *3-*4 (S.D. Iowa Nov. 7, 2025) ("Even assuming Phongsavanh bore the initial burden, he has satisfied it. He alleges that his CAT deferral remains in place, that no third country willing to accept him has been identified, and that the Government has been unable to secure travel documents for his removal in the past 25 years.").

Petitioner has met his burden under *Zadvydas* to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," and Respondents have failed to "respond with evidence sufficient to rebut that showing." 533 U.S. at 701. Continued detention is impermissible, and the writ of habeas corpus should issue.

II. Petitioner's Order of Supervision was revoked by an official who lacked authority to do so, thus violating the *Accardi* doctrine.[6]

Independent of the *Zadvydas* argument, Respondents improperly revoked Petitioner's Order of Supervision. Petitioner's Notice of Revocation, Ex. B hereto, was signed by an Assistant

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[6] Respondents' Opposition (Dkt. No. 6) entirely omits any response to Petitioner's Fourth Claim for Relief.

Field Office Director, without any apparent involvement from the responsible ICE headquarters-level official, and without the Field Office Director making the required finding that the headquarters-level official could not be involved in the decision.

The regulation governing revocations of an Order of Supervision, 8 C.F.R. § 241.4(*l*)(2), could not be more specific about who is empowered to revoke supervised release:

> The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest **and** circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner.

(Emphasis added.) Contrast this subsection with another subsection in the same regulation, 8 C.F.R. § 241.4(h)(5), regarding periodic custody reviews of already-detained noncitizens. That subsection allows high-level ICE officials to designate custody review authority to a long list of other officials with other job titles, including the catch-all ". . . or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service." The absence of such a catch-all provision in subsection (*l*)(2) is no less meaningful than its presence in subsection (h)(5). *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' . . . rather than to emasculate an entire section, as the Government's interpretation requires."); *United States v. Young*, 989 F.3d 253, 259 (4th Cir. 2021) ("[T]he 'canon against surplusage' is at its 'strongest' in cases like this one, where one party's interpretation 'would render superfluous another part of the same statutory scheme . . . In such cases, we favor 'competing interpretations' that give 'effect to every clause and word of a statute.'"). Respondents cannot come up with a justification for the Notice of Revocation of Release having been signed by an Assistant Field Office Director, where no specific findings of "revocation is in the public interest

and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner" were made, that does not read Subsection (*l*)(2) out of the regulation entirely.

Of course, Petitioner is not arguing that this Court would have the authority to second-guess a determination by the Field Office Director that "revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner," had such finding been made. But this Court does have the authority to ascertain *whether* the Field Office Director actually made such a determination. Here, he did not. This distinguishes the instant case from *Tanha v. Warden*, 2025 WL 2062181 (D. Md. July 22, 2025), in which the petitioner sought substantive review of the reasons for the revocation of the Order of Supervision. *Id.* at 9-10. The *Tanha* petitioner did not challenge the regulatory authority of the individual who revoked his Order of Supervision. *See also Bonitto v. ICE*, 547 F. Supp. 2d 747, 756 (S.D. Tex. 2008) ("It is important to emphasize that the Court here is not reviewing and reversing the *manner* in which agency discretion was exercised, but is instead dealing with DHS's failure to exercise its discretion altogether and provide aliens with the applicable process contrary to valid existing regulations. As the Supreme Court has made clear, there is a 'strong tradition in habeas corpus law' that subjects an agency's failure to exercise discretion, unlike an agency's unwise exercise of given discretion, to habeas corpus review.").

Under the *Accardi* doctrine, "when an agency fails to follow its own procedures or regulations, that agency's actions are generally invalid." *Nader v. Blair*, 549 F.3d 953, 962 (4th Cir. 2008), citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954). As the District of Maryland explained in *Sanchez v. McAleenan*, 2024 WL 1256264, at *7 (D. Md., Mar. 25, 2024), holding:

> Defendants' violation of their own regulations violates the *Accardi* doctrine and, in turn, due process. . . . The *Accardi* opinion implies that any violation by an agency

> of its own regulations, at least one that results in prejudice to a particular individual, offends due process even where the Court engaged in no independent analysis of the nature of Accardi's interest. The *Accardi* doctrine provides that when an agency fails to follow its own procedures and regulations, that agency's actions are generally invalid. The *Accardi* doctrine applies with particular force where the rights of individuals are affected. The doctrine's purpose is to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures.

(Internal citations omitted.) Indeed, the Supreme Court has stressed the importance of the government following the very regulation that was violated here. "Federal law governing detention and removal of immigrants continues, of course, to be binding as well." *Noem v. Abrego Garcia*, 145 S. Ct. 1017, 1019 (2025) (Sotomayor, J., concurring), *citing* 8 C.F.R. § 241.4(*l*).

Several federal district courts have applied *Accardi* to hold that where ICE revokes release and rearrests a noncitizen without following the procedures set forth in Section 241.4(*l*), such revocation violates due process and requires that the revocation be set aside and the Order of Supervision restored. *See Salgar v. Noem*, Civ. No. 4:25-cv-04797, Dkt. No. 11 (S.D. Tex. Nov. 14, 2025); *C.M. v. Maples*, 2025 WL 3091623, at *3 (S.D. Ind. Nov. 5, 2025); *E.M.M. v. Almodovar*, 2025 WL 3077995 (S.D.N.Y. Nov. 4, 2025); *McSweeny v. Warden*, 2025 WL 2998376 (S.D. Cal. Oct. 24, 2025); *N.A.L.R. v. Bondi*, 2025 WL 2987239 (S.D. Ind. Oct. 23, 2025); *Santamaria Orellana v. Baker* ("*Santamaria I*"), 2025 WL 2841886 (D. Md. Oct. 7, 2025); *K.E.O. v. Woosley*, 2025 WL 2553394 (W.D. Ky. Sept. 4, 2025); *Santamaria Orellana v. Baker* ("*Santamaria II*"), 2025 WL 2444087, at *7-*8 (D. Md. Aug. 25, 2025); *M.S.L. v. Bostock*, 2025 WL 2430267 (D. Or. Aug. 21, 2025); *Zhu v. Genalo*, 2025 WL 2452352 (S.D.N.Y. Aug. 26, 2025); *Ceesay v. Kurzdorfer*, No. 25-cv-267-LJV, 2025 WL 1284720, at *20-*21 (W.D.N.Y. May 2, 2025); *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017).

Santamaria II is directly on point to the case at bar. In *Santamaria II*, the notice of revocation of release "was not signed by either an ICE Executive Associate Director or an ICE

Field Office Director," but rather a lower-ranking ICE officer. 2025 WL 2841886, at *3. The court found that the authority to revoke an order of supervision had not properly been delegated or exercised, and that such violation implicated due process rights: "While it is correct that not every technical failure to comply with policies or procedures violates the Constitution, the requirement that an Executive Associate Director make the determination to revoke release—that is, to restrict a person's liberty—is not merely a housekeeping requirement. A statutory or regulatory provision requiring that a decision affecting personal rights be made only by a designated senior official is fairly deemed to be an important procedural safeguard." *Id.* at *5. Likewise, in *E.M.M.*, the Southern District of New York held that "an Assistant Field Office Director is not authorized under Section 241.4 to revoke an OSUP," and granted habeas relief on that basis alone. 2025 WL 3077995, at *5-*6. And in M.S.L., where a Deputy Field Office Director signed the notice of revocation of release, the court concluded that "Petitioner's release was not lawfully revoked and that she is entitled to release on that basis alone." 2025 WL 2430267, at *10.

A fundamental tenet of due process is that the jailer himself cannot be the neutral and detached magistrate. Requiring that the decision be made by a high-ranking ICE official—indeed a headquarters-level official, absent specific circumstances—provides certain due process protections to noncitizens like Petitioner. *Santamaria II*, 2025 WL 2841886, at *5 ("[T]he requirement that only an ICE Executive Associate Director make a determination to revoke release in the ordinary course ensures that an individual's right to liberty is not restricted without consideration by a senior ICE official exercising mature judgment and thus is fairly deemed to be part of a procedural framework, designed to insure the fair processing of an action affecting an individual, a violation of which can be deemed to be prejudicial and thus to implicate due process." (Internal citations omitted.)). The regulations at 8 C.F.R. § 241.4 were written in the aftermath of

Zadvydas, precisely to vindicate the due process rights of noncitizens set forth in that landmark Supreme Court decision. *See Bonitto*, 547 F. Supp. 2d at 756 ("Detention beyond the removal period may be maintained only upon compliance with applicable process. . . . The regulations promulgated in response to *Zadvydas* aim to provide such safeguards. DHS cannot constitutionally continue to detain Bonitto without complying with the procedures laid out in the regulations.").

Finally, ICE knows how to follow 8 C.F.R. § 241.4(l)(2), and does so in other cases. *See* Ex. C hereto (Notice of Revocation of Release signed by ICE Executive Associate Director); Ex. D hereto (Notice of Revocation of Release signed by Acting Field Office Director, but containing a written determination that "revocation of your order of supervision is in the public interest and that circumstances do not reasonably permit referral of the case to the Executive Associate Director, Enforcement and Removal Operations." They simply chose not to do so here.

For the foregoing reasons, pursuant to the *Accardi* doctrine, Respondents' actions violated regulations as well as Petitioner's due process rights, and should therefore be set aside. Petitioner's notice of revocation of release should be vacated, and his Order of Supervision restored.

CONCLUSION

For the foregoing reasons, Petitioner has met his burden of showing that his detention lacks any factual basis, since Respondents have not shown a significant likelihood of removal in the reasonably foreseeable future. Respondents have not yet even determined whether any country will accept Petitioner for removal, much less when. Petitioner has furthermore shown that his Order of Supervision was revoked by an official who lacked authority to do so, violating required procedures and due process. The writ of habeas corpus should issue, and this Court should order that Petitioner be released from detention forthwith and restored to his order of supervision.

Respectfully submitted,

<u>/s/ Simon Y. Sandoval-Moshenberg</u>

Date: November 16, 2025

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Certificate of Service

I, Simon Sandoval-Moshenberg, hereby certify that on this date, I uploaded the foregoing, with all attachments thereto, to this court's CM/ECF system, which will send a Notice of Electronic Filing (NEF) to all case participants.

Respectfully submitted,

<u>/s/ Simon Y. Sandoval-Moshenberg</u>

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