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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SOL DE LA ROSA GUARIN,

Petitioner,

v.

CHRISTOPHER J. LAROSE, Warden, Otay Mesa Detention Center; PATRICK DIVVER, Field Office Director, San Diego Field Office, United States Immigration and Customs Enforcement; TODD M. LYONS, Acting Director, United States Immigration and Customs Enforcement; KRISTI NOEM, Secretary of Homeland Security; PAMELA JO BONDI, United States Attorney General, *in their official capacities,*

Respondents.

Case No.: 25-CV-3085-DMS-VET

TRAVERSE IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

TRAVERSE IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner respectfully submits this traverse to Respondents' responses in accordance with the Court's order, ECF No. 9. Petitioner incorporates by reference each and every argument included in Petitioner's Reply, ECF No. 8. Both Respondents' responses confirm that the Court should grant Petitioner's petition for a writ of habeas corpus.

In their supplemental response, Respondents seek only to incorporate the same arguments they included in their response to the Temporary Restraining Order (TRO) motion and affirmatively indicated they "have no supplemental information at this time." ECF No. 11. With the Court's TRO grant, Petitioner had already established that he is likely to succeed on the merits, and Respondents have not been able to submit any evidence to the contrary since the Court's order, ECF No. 9. Nothing has changed to call into question the appropriateness of release. In light of the government's responses, Petitioner succeeds on the merits.

As such, the Court should grant the petition on all five grounds because Petitioner has shown that his prolonged detention violated both substantive and procedural due process, in addition to violating the Immigration and Nationality Act (INA) at 8 U.S.C. § 1231 and the Administrative Procedure Act (APA) at 5 U.S.C. § 706(2).

II. PETITIONER'S CLAIM SUCCEEDS ON THE MERITS

A. Petitioner has established "there is no significant likelihood of removal in the reasonably foreseeable future" and Respondents did not rebut this showing.

First, as to Petitioner's due process claims, Petitioner has sufficiently raised a "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future" and as the Court correctly noted, "Petitioner has not been told when a third-country removal might occur and it appears that the Government does not have a third-country removal underway, nor an answer as to when Petitioner will be removed." ECF No. 9 (citing *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001)). Accordingly, Respondents were not able to rebut Petitioner's showing, and the government has not met its burden to lawfully maintain Petitioner's prolonged detention.

B. Petitioner has established that Respondents' failure to follow their own regulations and policy is arbitrary and capricious.

Second, pursuant to Respondent's claim under the Administrative Procedure Act (APA), Respondents do not disagree that ICE failed to conduct a proper post-order custody review under 8 C.F.R. § 241.4, or that the tactics ICE used on Petitioner after realizing their failure could amount to malfeasance. These violations further support granting the writ of habeas corpus.

The only challenge Respondents' have raised concerns prejudice, but no prejudice showing is required in these circumstances because the regulations protect his fundamental due process rights. *See Martinez v. Barr*, 941 F.3d 907 (9th Cir. 2019). "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). *See also, e.g., Leslie v. Att'y Gen. of U.S.*, 611 F.3d 171, 178-79 (3d Cir. 2010) ("dispensing with the prejudice requirement for violations of regulations that protect fundamental constitutional or statutory rights").

Furthermore, ICE has abandoned its policy of presumptively releasing individuals like Petitioner who have been granted WOR without providing any justification for the abandonment, and Respondents, likewise, did not address this point in either of their responses. ICE is required to follow its own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies is well-established."). Thus, Petitioner's claim succeeds on this count as well.

C. Petitioner has established that adequate notice and an opportunity to be heard must be provided before third-country removal is effectuated as required by 8 U.S.C. § 1231.

Petitioner has also established his right to "court-imposed procedures (requiring notice, an opportunity to be heard, or an opportunity to file a motion to

reopen with an IJ)[.]" ECF No. 9. As this Court aptly pointed out, "such an order directs the Government to implement procedures it would 'not otherwise have held' absent the Court's direction." *Id.* (citing *Hernandez v. Sessions*, 872 F.3d 976, 998–99 (9th Cir 2017)).

Contrary to what Respondents' response may intimate, it is important to note that the legal standard in question for issuing the TRO is different from the standards required to grant Petitioner's habeas petition. As the Court indicated, "[A] [petitioner] must demonstrate *immediate* threatened injury as a prerequisite to preliminary injunctive relief." ECF No. 9 (citing *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis added) (citation modified)).

Based on the injunctive relief requirements, this Court denied in part Petitioner's application for a TRO based on threat of third-country removal because Petitioner showed there was no significant likelihood of removal to a third country at the time and, therefore, no immediate threatened injury in that regard. Here, in contrast, the immediacy of the threatened injury is no longer at the forefront. Rather, the focus now shifts to the petitioner's lawful rights under 8 U.S.C. § 1231(b)(3)(A).

Respondents' argument regarding removal to an alternate country under 8 U.S.C. § 1231(b)(2)(E) is unresponsive to the pertinent question. Petitioner has the right to claim fear to any country where DHS may send him if he fears his life or freedom would be threatened there under 8 U.S.C. § 1231(b)(3). The question at hand, therefore, is not whether the Secretary of Homeland Security has the authority

to remove Petitioner to a country whose government will accept him, but whether, in the process, he is given adequate notice and opportunity to claim fear of removal to said third country under 8 U.S.C. § 1231(b)(3) before removal is effectuated. *See also* 28 C.F.R. § 200.1; *id.* §§ 208.16-208.18, 1208.16-1208.18.

Under 8 U.S.C. § 1231(b)(3)(A), the government "may not remove [a noncitizen] to a country if the Attorney General decides that the [noncitizen's] life or freedom would be threatened in that country because of the [noncitizen's] race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; *see also* 8 C.F.R. §§ 208.16, 1208.16. This is known as withholding of removal (WOR). WOR is a mandatory protection. Congress also codified protections enshrined in the Convention Against Torture prohibiting the government from removing a person to a country where they would be tortured. *See* FARRA 2681-822 (codified as 8 U.S.C. § 1231). CAT protection is also mandatory.

Petitioner does not dispute that "DHS may designate a removal country outside of removal proceedings but … it must provide due process and comply with 8 U.S.C. § 1231(b) when doing so[.]" *Aden*, 409 F. Supp. 3d at 1004. Thus, if a noncitizen claims fear of persecution or torture if facing removal to a particular country, measures *must* be taken to ensure that the noncitizen can seek WOR and relief under CAT before an immigration judge in reopened removal proceedings. The amount and type of notice must be "sufficient" to ensure that "given [a noncitizen's] capacities and circumstances, he would have a reasonable opportunity to raise and pursue his

claim for withholding of deportation." *Id.* at 1009 (citing *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) and *Kossov v. I.N.S.*, 132 F.3d 405, 408 (7th Cir. 1998)); *see also D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025), *reconsideration denied sub nom. D.V.D v. U.S. Dep't of Homeland Sec.*, 786 F. Supp. 3d 223 (D. Mass. 2025) (requiring the government to move to reopen the noncitizen's immigration proceedings if the individual demonstrates "reasonable fear" and to provide "a meaningful opportunity, and a minimum of fifteen days, for the non-citizen to seek reopening of their immigration proceedings" if the noncitizen is found to not have demonstrated "reasonable fear"); *Aden*, 409 F. Supp. 3d at 1019 (requiring notice and time for a respondent to file a motion to reopen and seek relief). "[L]ast minute" notice of the country of removal will not suffice." *Andriasian v. INS*, 180 F.3d 1033, 1041 (9th Cir. 1999) (a "last minute" IJ designation of a country during removal proceedings that affords no meaningful opportunity to apply for protection "violate[s] a basic tenet of constitutional due process."); *accord Najjar v. Lunch*, 630 Fed. App'x 724 (9th Cir. 2016).

As such, any attempts by Respondents to remove Petitioner to a fourth country—to which Petitioner has no ties and that was not designated for removal by

the immigration judge—would violate 8 U.S.C. § 1231 unless Respondents first provide Petitioner adequate notice and an opportunity to be heard as required by law.[1]

III. RESPONDENTS SHOULD BE ENJOINED FROM FURTHER UNLAWFUL DETENTION OR RE-DETENTION OF PETITIONER

In the habeas petition, Petitioner requested the Court enter "permanent injunctive relief enjoining Respondents from further unlawful detention or re-detention of Petitioner." ECF No. 1.

In compliance with this Court's TRO, Respondent was released from the Otay Mesa Detention Center under terms and conditions of supervised release. ECF No. 9 and 10. In the TRO, this Court further ordered that "Respondents are enjoined from re-detaining Petitioner . . . without prior leave of this Court." ECF No. 9. This order continues to be warranted with a grant of the habeas petition.

Under 8 C.F.R. § 241.4(l), ICE may re-detain a noncitizen on supervision *only* after conducting an interview and affording the individual an opportunity to contest re-detention. Moreover, where—as here—a noncitizen is released following prolonged detention that amounted to a constitutional violation, ICE may revoke

[1] Litigation regarding the process due to noncitizens at risk of third-country removal is ongoing in *D.V.D. v. U.S. Department of Homeland Security*, No. CV 25-10676-BEM, 2025 WL 1142968, 3 (D. Mass. Apr. 18, 2025). However, Petitioner is seeking relief that is not available through the current litigation. At the time of writing, the Petitioner cannot obtain injunctive relief through *D.V.D.* because the Supreme Court has stayed the preliminary injunction; thus, the Petitioner would be removed before a decision in *D.V.D.* Further, the complaint in *D.V.D.* does not seek preliminary or permanent classwide injunctive relief on the basis of DHS failing to provide a meaningful opportunity to seek withholding of removal prior to third country removal, as is the case here. *Id.*

release and return the individual to custody *only* if the noncitizen fails to comply with the conditions of release, 8 C.F.R. § 241.13(i)(1), or if, "on account of changed circumstances, the Service determines that there is a significant likelihood that the [noncitizen] may be removed in the reasonably foreseeable future" *id.*, § 241.13(i)(2). If these determinations are properly made, ICE must follow the requirements in § 241.13(i)(2) to lawfully re-detain the noncitizen. To reiterate, ICE is required to follow its own regulations. *See Accardi*, 347 U.S. at 268; *Alcaraz*, 384 F.3d at 1162.

Accordingly, in granting the petition for writ of habeas corpus, Petitioner respectfully requests that the Court give full effect to the writ by enjoining Respondents from re-detaining him without prior leave of the Court after first complying with their regulatory requirements, as well as an explanation of the grounds supporting re-detention. Such relief is authorized under the All Writs Act, which empowers federal courts to impose affirmative obligations on parties where "necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

A. 24-hour Monitoring is not a reasonable condition of supervised release and violates this Court's TRO.

In addition, although Petitioner has been released from physical detention, ICE has imposed 24-hour GPS ankle monitoring, frequent reporting, and geographic restrictions under its Intensive Supervision Appearance Program ("ISAP"). Contrary to this Court's ruling requiring "reasonable conditions of supervised release," short

of detention, this is the utmost extent of supervised released possible. In fact, at least one court has found that a person in supervised release is considered "in custody" for habeas jurisdiction. *Romero v. Secretary, DHS*, 20 F.4th 1374, 1378-80 & n.4 (11th Cir. 2021) (person under supervised release is "in custody" for habeas purposes and court has jurisdiction under §2241). These conditions materially constrain Petitioner's liberty, particularly for an individual who has been granted WOR and is lawfully permitted to reside in the United States pursuant to that relief.

Habeas corpus is intended to be a flexible remedy, administered in a manner that ensures judicial relief is meaningful and effective. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006). Consistent with that flexibility, courts granting the writ may, in their discretion, include relief sufficient to prevent collateral restraints amounting to continued custody from undermining the judgment. As reflected in Petitioner's request for permanent injunctive relief, clarifying the scope of release in the Court's final order granting the petition would ensure that the writ's protections are fully implemented and that the Court's judgment is given full effect. *See, e.g.*, *Orellana Juarez v. Moniz*, 788 F. Supp. 3d 61, 70 (D. Mass. 2025); *N-N- v. McShane*, No. CV 25-5494, 2025 WL 3143594 (E.D. Pa. Nov. 10, 2025). *See also Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other *forms of physical restraint*—lies at the heart of the liberty that Clause protects.") (emphasis added).

IV. CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of habeas corpus and enter an order effectuating that relief. In so doing, the Court should provide that Respondents shall not re-detain Petitioner absent strict compliance with the regulatory and constitutional requirements governing third-country removal and re-detention and can include any additional measures this Court deems appropriate to give full effect to the writ. Such measures could include additional orders on the reasonable conditions of supervised release sufficient to ensure the writ's protections are fully implemented and that the due process violations the writ is designed to remedy are effectively prevented.

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Respectfully submitted,

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