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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY MUCHACHE NYAMWEYA Petitioner v. CHRISTOPHER J. LAROSE, Senior Warden, Otay Mesa Detention Center; JOSEPH FREDEN, Acting Field Office Director, U.S. Immigration & Customs Enforcement (ICE); TODD LYONS, Acting Director, U.S. ICE; KRISTI NOEM, U.S. Secretary of Homeland Security; PAMELA BONDI, Attorney General of the United States Respondents.	Case No.3:25-CV-03094-BJC-VET Agency No. [redacted] **PETITIONER'S TRAVERSE** Judge: Hon. Benjamin J. Cheeks

ARGUMENT

A. The Government's Jurisdictional Argument Misconstrues the Petitioner's Habeas Claim

In its Return/Opposition to TRO, the Government argues that "*To the extent* Petitioner's claims arise from—or seek to enjoin—the decision to execute his removal order, they are jurisdictionally barred under 8 U.S.C. § 1252(g). Return/Opposition, ECF 6, at 3 (emphasis added). The Petitioner does not disagree with this legal proposition; however, he is not challenging the government's decision to execute his removal order, he is challenging the legality of his detention in furtherance of that order; the revocation of his supervised release and his continued detention. The Supreme Court has observed that the federal habeas corpus statute grants the federal courts authority to determine whether detention is or is not pursuant to statutory authority. *See*, 28 U. S. C. § 2241(c)(3) (granting courts authority to determine whether detention is "in violation of the ... laws ... of the United States). This determination is the "historic purpose of the writ," namely, "to relieve detention by executive authorities without judicial trial" *Zadvydas v. Davis Et Al.*, 533 U.S. 678, 699 (2001)(citing *Brown v. Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring))." Thus, the Court in *Zadvydas* held that "habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas v. Davis Et Al.*, 533 U.S. 678-688 (2001).

This court thus has subject matter jurisdiction over the Petitioner's habeas corpus claim.

B. The Government's Argument for the Legality of Petitioner's Detention Is Premised on a Faulty Understanding of What Constitutes the "Post-Removal Period"

The government's main argument in support of its right to detain Mr. Nyamweya is that it has 90 days from the date of his detention to effect his removal from the United States and can thereafter hold him up to and exceeding an additional six months as long as it is making efforts to remove him. Return/Opposition, at 6-8. This is untrue. The "post-removal period" which the government cites is the 90 days immediately following the final order of removal. As relevant to this case, a final order of removal occurs upon waiver of appeal. 8 CFR § 1241.1 (b). For Mr. Nyamweya, the removal order was final on July 23, 2008, when the Immigration Judge ordered his removal. The 90-day post-removal period thus ended on October 21, 2008. Once that 90-day removal period ended, without the removal order being executed, the government was required to determine if there are special circumstances to justify continued detention or to put Mr. Nyamweya on an order of supervision. 8 C.F.R. § 241.13(g). The government chose to put Mr. Nyamweya on an order of supervision, beginning on August 27, 2008. For the last 17 years, Mr. Nyamweya has fully complied with the terms of his order of supervision. Thus, Mr. Nyamweya is far beyond the 90-day removal period nor is he within the 6-month

period immediately following the 90-day post removal period. Both periods are well in the past.

C. Because the Petitioner is not in the post removal period and has been on supervised release for the last 17 years, the Government Bears the Burden of showing that his removal is Significantly Likely

As Mr. Nyamweya's 90-day post removal period has already passed long ago and he has spent the last 17 years on an Order of Supervision, his detention for removal is subject to different rules. Since the government's policy has changed over the last year, several courts have recognized that noncitizens whose removal orders became final years ago and who have been living in the United States on an order of supervision for those many years, are in a different position from noncitizens who are challenging the length of their immediate post removal order detention. These courts have held that when a non-citizen released pursuant to an OSUP is re-detained for the purposes of removal, it is the government and not the noncitizen who immediately bears the burden to show a substantial likelihood of removal in the now foreseeable future. *Escalante v. Noem*, 2025 WL 2206113 (E.D. Tex. Aug. 2, 2025), *Roble v. Bondi,* No. 25-CV-3196 (LMP/LIB), 2025 WL 2443453, at *4 (D. Minn. Aug. 25, 2025)(applying the 'default rule" that the burden falls on the party who generally seeks to change the present state of affairs and that is ICE that seeks to change the present state of affairs by revocation of an OSUP); *Tadros v. Noem*, 2025 WL 1678501 (D.N.J. June 13, 2025)(finding individual had "the better argument"

that the burden shifts to the government upon re-detention, although individual also presented unrebutted evidence that removal was not likely in the foreseeable future); *Nguyen v. Hyde*, No. 25-cv-11470, 2025 WL 1725791 (D. Mass. June 20, 2025) (finding *Zadvydas* 6-month presumption not applicable where alien is re-detained after having been on supervised release).

In *Escalante*, the court characterized an OSUP revocation as "not your typical first round detainment of an alien awaiting removal. Petitioner was previously detained, then released on supervised release for several years, and his 90-day removal period expired." *Escalante v. Noem*, 2025 WL 2206113, at *3. The court then examined post-removal period regulations that "clearly indicate, upon revocation of supervised release, it is the [government's] burden to show a significant likelihood that the alien may be removed." *Id.* The Court explained that the plain language of the regulations shows the government bears the burden, emphasizing that 8 C.F.R. § 241.13 (i)(2) refers to if "*the Service determines* that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future and § 241.4(b)(4) likewise states "*if the Service subsequently determines ...*" *Escalante v. Noem*, 2025 WL 2206113, at *3 (emphasis in original). Ultimately, the *Escalante court* reasoned that "[i]mposing the burden of proof on the alien each time he is re-detained would lead to an unjust result and serious due process implications." *Escalante v. Noem*, 2025 WL 2206113, at *3.

(1) The Government Has Not Met Its Burden to Show that Removal is Significantly Likely in the Reasonably Foreseeable Future

With regard to the likelihood of removal, the government has only represented that "ERO is *working diligently to locate* a third country for resettlement to effectuate Petitioner's removal to a third country. Rodriguez Decl. at ¶ 12. *Should a third country accept* Petitioner, ICE will provide Petitioner with written notice of this third country." Return/Opposition, at 3 (emphasis added). The revocation of Mr. Nyamweya's OSUP was clearly not based on the prospect of "imminent" removal but only on a hypothetical possibility that ICE would be able to "locate" a third country for removal and then that third country would agree to "accept" the Petitioner. Since a country of removal has not even been identified, Mr. Nyamweya's removal can hardly be said to be reasonably likely for the foreseeable future. This certainly does not justify revoking Mr. Nyamweya's order of supervision and detaining him. *See, Nadarajah v. Gonzales*, 443 F.3d 1069, 1081-82 (9th Cir. 2006) (The government lacks the authority to detain an individual indefinitely under § 1231 where removal was not reasonably foreseeable despite ongoing diplomatic efforts). The cases cited by the Government in which this court determined that the government had provided sufficient "evidence of progress" in removing the noncitizen all concern situations where the evidence of progress was much more substantial than that provided here.

Kim v. Ashcroft, Case No. 02-cv-1524-J-LAB, ECF No. 25 at 8:8–10 (S.D. Cal. June 2, 2003) is distinguishable because the Petitioner had never been released from custody after his order of removal was final and never placed on an OSUP. He was convicted of an assault with a firearm upon a person and second-degree burglary taken into custody, transferred to ICE, ordered removed and remained in detention. Also, the government had taken significant steps to remove him: he had applied for travel documents from his home country and been interviewed by Cambodian government officials. Here, the government is still looking for a country of removal.

The Petitioner in *Marquez v. Wolf*, No. 20-cv-1769- WQHBLM, 2020 WL 6044080, at *3 (S.D. Cal. Oct. 13, 2020) was never on OSUP and had been removed to Peru following convictions for assault with a deadly weapon and domestic violence and had subsequently re-entered the US unlawfully. He was being held for removal after his old order was reinstated. ICE had obtained a travel document and attempted to remove the Petitioner on a charter flight but due to a pending COVID 19 test, he was not permitted to board. Also, on September 23, 2020, ICE had placed him on a manifest for a charter likely to depart in the third week of October 20, 2020.

Sereke v. DHS, Case No. 19-cv-1250-WQH-AGS, ECF No. 5 at 5:4–6 (S.D. Cal. Aug. 15, 2019. Petitioner was not on an OSUP and a travel document to Eritrea had been issued. While ICE had encountered difficulties in executing removal orders to Eritrea, those difficulties were later resolved, and Petitioner's expired travel

document was in the process of renewal, with his removal anticipated in approximately two months.

All these cases are clearly distinguishable from Mr. Nyamweya's. Here, the government has not even identified any specific country of removal or any specific changed circumstances to support the conclusion that there is now a significant likelihood of Petitioner's removal in the reasonably foreseeable future.

As noted in *Zadvydas*, even where "removal is reasonably foreseeable, detention is permitted only if there is a sufficient risk of the [noncitizen]'s committing further crimes." *See* 533 U.S. at 700. Here, no evidence exists that Mr. Nyamweya presents a danger and his lengthy history of compliance with his order of supervision, fixed residence and ties to San Diego area demonstrate he is not a flight risk.

D. An OSUP revocation requires a hearing before a neutral adjudicator

Once a noncitizen is released from ICE detention, as Petitioner was in 2008, their re-detention is limited by regulation, statute, and the constitution. The ability of ICE to simply re-arrest someone following their release from detention is further limited by the due process clause because it is well-established that individuals released from incarceration have a liberty interest in their freedom. Here this means that, prior to any re-detention, Mr. Nyamweya must be provided with notice and a

hearing before a neutral adjudicator at which DHS bears the burden of justifying his re-detention.

Some Courts have recently held that individuals who have been released from ICE custody on bond while removal or withholding-only proceedings are ongoing have a sufficiently strong liberty interest in remaining free to require prior notice and opportunity to be heard before a neutral arbiter before or immediately after being re-detained. *See Guillermo M. R. v. Kaiser*, --- F.Supp.3d ---, 2025 WL 1983677, at *7 n.4 (N.D. Cal. July 17, 2025) (collecting cases); *see also Bermeo Sicha v. Bernal*, 2025 WL 2494530 (D. Me. Aug. 20, 2025) (due process requires hearing before an IJ before revocation of conditional parole). In Guillermo M.R., the court granted a preliminary injunction enjoining the government from re-detaining the Petitioner without notice and a pre-deprivation hearing before an Immigration Judge to evaluate whether re-detention was warranted based on flight risk or a danger to the community. Therefore, at a minimum, in order to lawfully re-arrest Mr. Nyamweya, the government must first establish before a neutral adjudicator that his removal is reasonably foreseeable, and otherwise that he is a danger to the community or a flight risk, such that his re-detention is necessary.

Providing Mr. Nyamweya with a hearing before a neutral adjudicator to determine whether his removal is reasonably foreseeable and if there is otherwise evidence that he is a flight risk or danger to the community would impose only a de

minimis burden on the government, because the government routinely conducts bond hearings.

E. The Respondents' Actions Have Unlawfully Deprived the Petitioner of his Liberty Without Due Process of Law

"Freedom from imprisonment-from government custody, detention, or other forms of physical restraint-lies at the heart of the liberty [the Due Process] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civil detention, including that of a non-citizen, violates due process in the absence of a "special justification" sufficient to outweigh one's "'constitutionally protected interest in avoiding physical restraint.'" *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)) (internal quotation marks omitted).

This interest in freedom from detention is particularly keen for individuals whose release is subject to termination. In *Morrissey v. Brewer*, the Supreme Court held that an individual who is re-detained after being released - has a "valuable" liberty interest notwithstanding the "indeterminate" nature of his freedom. 408 U.S. 471, 482 (1972). Subject to the conditions of his release, a noncitizen released on bond "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Id.* The noncitizen's liberty therefore "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the noncitizen and often others." *Id. See, Carballo v.*

Andrews, No. 1:25-CV-00978- KES-EPG (HC), 2025 WL 2381464, at *4 (E.D. Cal. Aug. 15, 2025)(There is "a meaningful distinction between a challenge to an initial period of detention . . . and a challenge to *re-detention* after a court has previously granted release on bond pending immigration proceedings.")

F. The Respondents' Reasons for Cancelling Petitioner's OSUP Are Ultra Vires to the Statute.

The Respondent's argue that 'A noncitizen who is not removed within the removal period may be released from ICE custody "pending removal . . . subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. §§ 1231(a)(1)(A), 1231(a)(3); *see also* 8 U.S.C.§ 1231(a)(6). An order of supervision may be issued under 8 C.F.R. § 241.4, and the order may be revoked under 8 C.F.R. § 241.4(l)(2)(iii) where "appropriate to enforce a removal order." *See also* 8 C.F.R. § 241.5 (conditions of release after removal period). ICE may also revoke the order of supervision where, "on account of changed circumstances, [ICE] determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future." 8 C.F.R. § 241.13(i)(2). The regulations further provide: Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. 8 C.F.R. § 241.4(l)(1).

The statute, however, provides that there are only two reasons for revoking an order of supervision "danger and flight risk." 8 U.S.C. 1231(a); *You v. Nielse*, 321 F.Supp. 3d. 451, 463 (S.D.N.Y. 2018) (not only was an individual with a final order of removal who was re-detained pending removal entitled to notice and an informal interview under 8 C.F.R. § 241.4(l), but also that 8 U.S.C. §1231(a) barred re-detention absent findings of flight risk or danger) The regulations cited by the government go well beyond what the statute mandates. There is no reason, when a person has fully complied with an OSUP for the last 17 years, to cancel that OSUP and detain him based on a remote possibility of third country removal. The OSUP exists to ensure his removability; it is an alternative to detention and not a required next step.

Prompt execution of removal order is not at issue here. If the government had ever in the last 17 years wanted to promptly execute Petitioner's alternative order of removal to a willing third country, it could have started that process at any time. It did not. The process only began this year. Releasing the Petitioner and continuing his OSUP does not prevent the government from having "an opportunity to complete its diligent efforts to effect Petitioner's removal." The Petitioner has complied with his OSUP for the last 17 years and there is no reason to believe that he would not comply with an orderly notice of removal once it is truly possible within the reasonably foreseeable future.

Moreover, ICE has never explained the basis for the "changed circumstances" justifying Mr. Nyamweya's re-detention, other than to claim that "[t]his decision has been made based on a review of your official alien file and a determination there are changed circumstances in your case." *See* ECF 6 at 7. The Notice of Revocation was insufficient in that it did not contain any specific and individualized changed circumstances for the revocation of Mr. Nyamweya's supervised release. *Carlos Rios*, 25 cv-2866-JES-VET (SD Cal. November 10, 2025) (where the government provided only general information, the notice of revocation was found insufficient because it was impossible for Respondent to meaningfully contest the materiality of any changed circumstances).

CONCLUSION

For the foregoing reasons, the Court should find that the continued detention of Mr. Nyamweya is unlawful and order his immediate release from Respondents' custody and reinstatement of his Order Of Supervised Release.

Respectfully submitted on this 4th day of December 2025

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed on December 4, 2025, through the ECF system and that it will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

Dated: December 4, 2025

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