

transferred to Jackson Parish Correctional Center, where he is currently detained. Mr. Kesete is not a flight risk, has no criminal record, is in no way a danger to national security or the community more generally. His prolonged detention is no longer justified under the Constitution or the Immigration and Nationality Act (INA). He therefore seeks an order from this Court declaring his continued and prolonged detention unlawful and ordering Respondents to release him forthwith from their custody.

CUSTODY

4. Petitioner is in the physical custody of Respondents and U.S. Immigration and Customs Enforcement (“ICE”). Petitioner is detained at the Jackson Parish Correctional Center in Jonesboro, Louisiana. Petitioner is under the direct control of Respondents and their agents.

JURISDICTION

5. This action arises under the Constitution of the United States, 28 U.S.C. §2241(c)(1), and the Immigration and Nationality Act (“INA”), 8 U.S.C. §1101 et seq. This Court has subject matter jurisdiction under 28 U.S.C. §2241, Art. I §9, cl. 2 of the United States Constitution (“Suspension Clause”); and 28 U.S.C. §1331, as Petitioner is presently in custody under color of the authority of the United States, and such custody is in violation of the Constitution, laws, or treaties of the United States. *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (“We conclude that §2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.”); *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“at its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”) *Clark v. Martinez*, 543 U.S. 371 (2005) (holding that *Zadvydas* applies to aliens found inadmissible as well as removable).

VENUE

6. Venue lies in the United States District Court for the Western District of Louisiana,

because Petitioner is currently detained in the territorial jurisdiction of this Court, at the Jackson Parish Correctional Center in Jonesboro, Louisiana. *See* 28 U.S.C. §1391.

EXHAUSTION OF REMEDIES

7. Petitioner has exhausted his administrative remedies to the extent required by law, and his only remedy is by way of this judicial action. After the Supreme Court's decision in *Zadvydas*, the Department of Justice issued regulations governing the custody of aliens removed. *See* 8 C.F.R. § 241.4. Petitioner's removal order became administratively final on April 3, 2024. Upon information and belief, ICE decided, as part of any custody review, to continue detaining Mr. Kesete. The custody review regulations do not provide for appeal from a custody review decision. *See* 8 C.F.R. § 241.4(d).

8. No statutory exhaustion requirements apply to Petitioner's claim of unlawful detention.

STATEMENT OF FACTS

PARTIES

9. Petitioner Mr. Kesete is a national and citizen of Eritrea who entered the United States on April 6, 2023 and was taken into custody at that time. He has remained in ICE custody ever since. After undergoing a successful credible fear interview, Mr. Kesete was placed in removal proceedings. He was denied asylum but granted relief under the Convention Against Torture and withholding of removal and ordered removed on October 26, 2023; he appealed the decision, and the Board of Immigration Appeals dismissed the appeal, rendering his order of removal administratively final, on April 3, 2024. Petitioner is detained by Respondents pursuant to 8 U.S.C. § 1231, which permits the DHS to detain aliens, such as Petitioner, pending the execution of the alien's removal order. Petitioner has been continuously detained by ICE for over thirty-one months.

10. Upon information and belief, Respondent Heriberto Tellez is Warden of Jackson Parish Correctional Center, where Petitioner is currently detained under the authority of ICE,

alternatively may be considered to be Petitioner's immediate custodian.

11. Respondent Brian Acuna is the Acting New Orleans ICE Field Office Director and therefore is responsible for ICE policies and operations in the New Orleans District, which stretches across Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. *See Vásquez v. Reno*, 233 F.3d 688, 690 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001).

12. Respondent Todd Lyons is Acting Director of ICE. As the senior official performing the duties of Director of ICE, he is responsible for the administration and enforcement of the immigration laws and as such is a custodian of Petitioner. He is sued in his official capacity.

13. Respondent Kristi Noem is the United States Secretary of Homeland Security, which oversees ICE. As such, she is responsible for the administration and enforcement of the immigration laws, and is a custodian of Petitioner. She is sued in her official capacity.

21. Mr. Kesete remains in ICE custody today despite more than 31 months having

STATEMENT OF FACTS

passed since he was first taken into custody upon arriving in the United States.

14. Petitioner Mr. Kesete is a national and citizen of Eritrea who fled his country at the age of 15, after being hunted, detained, and tortured by the Eritrean government, following an unsuccessful attempt to cross the border in order to avoid being conscripted as a child soldier. Mr. Kesete was eventually able to escape detention in Eritrea, cross the Ethiopian border, and make his way to Germany, where he sought asylum.

15. But having received asylum, Mr. Kesete faced persistent uncertainty about his ability to obtain permanent residency in Germany, as well as severe discrimination, causing him to leave Germany for the United States in April 2023.

16. Mr. Kesete arrived in the United States near the San Diego Border on April 6, 2023, and was immediately placed in removal proceedings and taken into ICE custody.

17. On October 26, 2023, Immigration Judge Eric Schultz granted Mr. Kesete's applications for relief under the Convention Against Torture and withholding of removal, ordered

Mr. Kesete removed to Eritrea, and denied his application for asylum.

18. Mr. Kesete filed a timely appeal, and the Board of Immigration Appeals affirmed the Immigration Court's decision on April 3, 2024.

19. Mr. Kesete has never been arrested or committed a crime anywhere in the world, and there is no basis to conclude that he poses a threat of any kind to his community, or to national security.

20. Mr. Kesete has consistently cooperated with ICE in their removal operation, repeatedly reached out to ICE and sought to assist in their efforts to effectuate his deportation to a third country, and has never refused to give ICE any information or documents required in order to remove him. Despite ICE's past indications that they were working to effectuate his deportation, they have not done so.

21. Mr. Kesete remains in ICE custody today, despite more than 31 months having passed since he was first taken into custody upon arriving in the United States.

LEGAL FRAMEWORK FOR RELIEF SOUGHT

22. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the U.S. Supreme Court held that 8 U.S.C. §1231(a)(6), when “read in light of the Constitution’s demands, limits an alien’s post-

removal-period detention to a period reasonably necessary to bring about that alien’s removal from the United States.” 533 U.S. at 689. A “habeas court must [first] ask whether the detention in question

exceeds a period reasonably necessary to secure removal.” *Id.* at 699. If the individual’s removal “is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by the statute.” *Id.* at 699-700. In *Clark v. Martinez*, 543 U.S. 371 (2005), the U.S. Supreme Court held that *Zadvydas* applies to aliens found inadmissible as well as removable.

23. In determining the length of a reasonable removal period, the Court adopted a “presumptively reasonable period of detention” of six months. *Id.* at 701. After six months, the

government bears the burden of disproving an alien's "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." See *Zhou v. Farquharson*, 2001 U.S. Dist. LEXIS 18239, *2-*3 (D. Mass. Oct. 19, 2001) (quoting and summarizing *Zadvydas*). Moreover, "for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Zadvydas*, 533 U.S. at 701. ICE's administrative regulations also recognize that the HQPDU has a six-month period for determining whether there is a significant likelihood of an alien's removal in the reasonably foreseeable future. See 8 C.F.R. §241.4 (k)(2)(ii).

24. Respondent was taken into custody by ICE on or about April 6, 2023, roughly 31 months ago. He was granted withholding of removal and relief under the Convention Against Torture, but order removed to Eritrea on October 26, 2023, more than 24 months ago. And his removal order became administratively final on April 3, 2024, some 19 months ago. The government's ability to rebut the presumption "that there is no significant likelihood of removal in the reasonably foreseeable future" has effectively vanished. The government having failed to date to effectuate Mr. Kesete's removal order, Mr. Kesete should be released forthwith.

CLAIMS FOR RELIEF

COUNT ONE STATUTORY VIOLATION

25. Petitioner re-alleges and incorporates by reference paragraphs 1 through 24 above.

26. Petitioner's continued detention by Respondents is unlawful and contravenes 8 U.S.C. § 1231(a)(6) as interpreted by the U.S. Supreme Court in *Zadvydas*. Petitioner's ninety-day statutory removal period and six-month presumptively reasonable period for continued removal efforts have both passed. Respondents are apparently unable to remove Petitioner to Germany. In *Martinez*, the U.S. Supreme Court held that the continued indefinite detention of someone like Petitioner under such circumstances is unreasonable and not authorized by 8 U.S.C. §1231(a)(6).

COUNT TWO

SUBSTANTIVE DUE PROCESS VIOLATION

27. Petitioner re-alleges and incorporates by reference paragraphs 1 through 26 above.

28. Petitioner's continued detention violates Petitioner's right to substantive due process through a deprivation of the core liberty interest in freedom from bodily restraint. *See e.g., Tam v. INS*, 14 F.Supp.2d 1184 (E.D. Cal 1998) (aliens retain substantive due process rights).

29. The Due Process Clause of the Fifth Amendment requires that the deprivation of Petitioner's liberty be narrowly tailored to serve a compelling government interest. While Respondents would have an interest in detaining Petitioner in order to effectuate removal, that interest does not justify the indefinite detention of Petitioner, who is not significantly likely to be removed in the reasonably foreseeable future. The U.S. Supreme Court in *Zadvydas* thus interpreted 8 U.S.C. §1231(a) to allow continued detention only for a period reasonably necessary to secure the alien's removal, because any other reading would go beyond the government's articulated interest – to effect the alien's removal. *See Kay v. Reno*, 94 F.Supp.2d 546, 551 (M.D. Pa. 2000) (granting writ of habeas corpus, because petitioner's substantive due process rights were violated, and noting that "If deportation can never occur, the government's primary legitimate purpose in detention – executing removal – is nonsensical."). Because Petitioner is unlikely to be removed, his continued indefinite detention violates substantive due process.

COUNT THREE

PROCEDURAL DUE PROCESS VIOLATION

30. Petitioner re-alleges and incorporates by reference paragraphs 1 through 29 above.

31. Under the Due Process Clause of the Fifth Amendment, an alien is entitled to a timely and meaningful opportunity to demonstrate that he should not be detained. Petitioner in this case has been denied that opportunity. There is no administrative mechanism in place for the Petitioner to

obtain a decision from a neutral arbiter or appeal a custody decision that violates *Martinez*. See generally 8 C.F.R. §212.12. A number of courts have identified a substantial bias within ICE toward the continued detention of aliens, raising the risk of an erroneous deprivation to constitutionally high levels. See, e.g., *Phan v. Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) (“INS does not meaningfully and impartially review the Petitioners’ status.”); *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996) (“Due to political and community pressure, INS, an executive agency, has ever incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences, on the suspicion that they may continue to pose a danger to the community.”); see also *Rivera v. Demore*, No. C 99-3042 THE, 199 WL 521177, *7 (N.D. Cal. Jul. 13, 1999) (procedural due process requires that aliens release determination be made by impartial adjudicator due to agency bias).

* Motion to Appear Pro Hac Vice Pending

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief: 1) Assume jurisdiction over this matter; 2) Order Respondents to show cause why the writ should not be granted “within three days unless for good cause additional time, not exceeding twenty days, is allowed,” and set a hearing on this Petition within five days of the return, pursuant to 28 U.S.C. § 2243; 3) Grant Petitioner a writ of habeas corpus directing the Respondents to immediately release Petitioner from custody, under reasonably conditions of supervision; 4) Order Respondents to refrain from transferring the Petitioner out of the jurisdiction of the ICE New Orleans Field Office Director during the pendency of these proceedings and while the Petitioner remains in Respondent’s custody; and 5) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act (“EAJA”), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and 5) Grant any other and further relief that this Court deems just and proper. I affirm, under penalty of perjury, that the foregoing is true and correct.

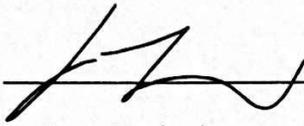
VERIFICATION OF COUNSEL

ATTORNEYS FOR PETITIONER

I, Jesse Levine, hereby certify that I am familiar with the case of the named petitioner and that the facts as stated above are true to the best of my knowledge and belief.

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** Motion to Appear Pro Hac Vice Pending*

VERIFICATION OF COUNSEL

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Jesse Levine