

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

ASSANE DIOUF,

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Petitioner,

vs.

**KEVIN RAYCRAFT, Acting Director of
Enforcement and Removal Operations
Detroit Field Office *et al.*,**

Respondents.

Case No. 1:25-cv-834

District Judge Susan J. Dlott

Magistrate Judge Chelsey M. Vascura

PETITIONER'S REPLY TO RESPONDENTS' RETURN OF WRIT

Petitioner, Mr. Assane Diouf, by and through undersigned Counsel, respectfully submits this Reply to Respondents' Return of Writ. The Court should grant the Petition for Writ of Habeas Corpus filed by Petitioner, Mr. Diouf, under 28 U.S.C. § 2241.

INTRODUCTION

Mr. Diouf is a native and citizen of Mauritania. Petitioner fled Mauritania and entered the United States around 2002. Despite building a productive life in the United States with his U.S. citizen family members, he now is unlawfully detained. Contrary to the Government's characterization, this Petition is not a straightforward effort to challenge a final removal order. Instead, the Petition seeks to challenge post-order detention actions that violate statutory and constitutional protections.

Specifically, the Petition challenges the continued detention of Petitioner when removal is not reasonably foreseeable. There is no meaningful alternative to judicial review because Petitioner has exhausted administrative remedies. Thus, absent federal court review, Petitioner is at risk of indefinite detention.

As such, this Court is the only venue that can address the issues raised in Petitioners' case and has authority to address these issues and order the requested relief. This includes review of whether the Government's post-order detention violates the Petitioner's constitutional and statutory rights.

LAW AND ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CLAIMS

Respondents fundamentally mischaracterize Petitioner's claim. Petitioner does not challenge his years-old removal order to Mauritania, but rather, he challenges Respondents' post-proceeding actions, including detention where removal is not reasonably foreseeable. Because Petitioner raises only post-removal-order-based claims, this Petition is outside the jurisdiction-stripping provisions set forth in 8 U.S.C. § 1252. As such, this Court should assume jurisdiction over this Petition pursuant to 28 U.S.C. § 2241.

A. 8 U.S.C. § 1252(g) Does Not Preclude Review of Petitioner's Claims

Section 1252(g) does not preclude district court habeas review of unlawful detention by ICE. The statute's plain text limits jurisdictional stripping to claims, "arising from any decision or action ... to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g); *see also* REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231 (May 11, 2005), Title I, Section 106(c) (amending INA §§ 242(a)(2)(A)-(C), 242(g)). The Supreme Court has "narrow[ly]" construed this provision to apply only to these "three discrete actions." *Reno v. Am-*

Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999); see also *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (plurality opinion) (“Section 1252(g) does not sweep broadly. It reaches only these three specific actions, not everything that arises out of them.”).

Moreover, the Sixth Circuit has explained that 8 U.S.C. § 1252(g) does not suspend habeas review as to challenging the “authority to indefinitely detain a non-citizen following the execution of a removal order.” *Moussa v. Jenifer*, 389 F.3d 550, 554 (6th Cir. 2004) (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001)); see also *Karki v. Jones*, No 1:25-cv-281, 2025 WL 1638070, at *8 (S.D. Ohio June 9, 2025) (holding that § 1252(g) does not suspend habeas review of post-removal-order detention under Sixth Circuit precedent); *Al Shimary v. Rayborn*, No. 2:24-CV-11646, 2024 WL 3625169, at *2 (E.D. Mich. July 31, 2024) (denying stay of removal on jurisdictional grounds but allowing detention-based claims to proceed); *Mingrone v. Adducci*, No. 2:17-CV-11685, 2017 WL 4909591, at *8 (E.D. Mich. July 5, 2017) (addressing merits of detention-based claim because petitioner “could be released and ICE could still proceed to remove him”).

Petitioner’s claims fall outside the scope of 8 U.S.C. § 1252(g). Here, the Petition explicitly stated: “Petitioner is not challenging the removal order itself or the Attorney General’s decision to execute it. Instead, Petitioner challenges his continued detention when removal is not reasonably foreseeable.” (Petition, ECF 1, PageID 3, at ¶ 9). Respondents are in no way prohibited from executing the removal order. Because Petitioner challenges only the lawfulness of indefinite detention—not any action to commence, adjudicate, or execute removal—8 U.S.C. § 1252(g), as amended by the REAL ID Act, does not strip this Court of jurisdiction.

Ultimately, Respondents' reliance on § 1252(g) fails because Petitioner challenges the lawfulness of post-proceeding actions, not discretionary execution decisions. Specifically, Petitioner challenges the lawfulness of Respondent's scheme to deprive him of his statutory and constitutional rights by detaining him when removal is not reasonably foreseeable. This Court should therefore exercise jurisdiction to review Petitioner's detention.

B. Sections 1252(a)(5) and (b)(9) Apply Only to Challenges to Removal Orders

Respondents' invocation of §§ 1252(a)(5) and (b)(9) is misplaced for a simple reason: Petitioner does not challenge his removal order, but rather is seeking to challenge unlawful post-proceeding actions taken by DHS. Section 1252(a)(5) channels "judicial review of a removal order" to the court of appeals, while § 1252(b)(9) consolidates review of questions "arising from any action taken or proceeding brought to remove an alien." 8 U.S.C. §§ 1252(a)(5), (b)(9).

As the statute is written, section 1252 applies to judicial review of the decisions made by Immigration Judges and the Board of Immigration Appeals in removal proceedings. It is not designated to apply to collateral decisions made by administrative officials outside the context of removal proceedings. Accordingly, 8 U.S.C. §§ 1252(a)(5) and (b)(9) do not reach post-proceeding decisions. Moreover, in the Ninth Circuit, the court found jurisdiction despite 1225(a)(5) because the petitioner's "claims [were] independent of his removal order" since he "[did] not challenge the IJ's determination that he is removable or claim any deficiency in the removal order itself." *Aden v. Nielson*, 409 F. Supp. 3d 998, 1006 (9th Cir. 2019).

Here, Petitioner is not requesting a review of his removal order from this Court, nor is he seeking judicial intervention to determine whether he is more likely than not to experience persecution or torture if ultimately returned to Mauritania. Instead, Petitioner is seeking a

determination that, based on the evidence, his removal is not reasonably foreseeable, and that he is therefore entitled to release from detention pursuant to *Zadvydas*.

The jurisdictional framework is clear: challenges to removal orders go through the standard appeals process (BIA, Sixth Circuit) and challenges to the constitutional and statutory authority to detain pending removal come to this Court via habeas. Petitioner brings only the latter. Neither §§ 1252(g), (a)(5), or (b)(9) strip habeas jurisdiction over *Zadvydas* detention challenges. Accordingly, this Court should exercise jurisdiction and proceed to the merits of Petitioner's claims.

II. EXHAUSTION IS NOT REQUIRED

Respondents did not contest Petitioner's exhaustion arguments. The primary question to be decided by this Court—whether Mr. Diouf's detention, following his removal order becoming final, violates the Constitution or the INA—is a legal question routinely addressed by federal habeas courts. Exhaustion is not statutorily required and should not be prudentially required in order for Petitioner's claims to be heard before this Court.

Nevertheless, Petitioner reasserts that exhaustion is not statutorily required for *Zadvydas* relief. See *Hamama v. Adducci*, 946 F. Supp. 3d 665, 701 (E.D. Mich. 2018), *vacated on other grounds*, *Hamama v. Adducci*, 946 F.3d 875 (6th Cir. 2020); *Shurney v. INS*, 201 F. Supp. 2d 783, 788 (N.D. Ohio 2001) (“Under the INA, exhaustion of administrative remedies is only required for appeals of final orders of removal.” (citing 8 U.S.C. § 1252(d)(1)); *Nassar v. Clausen*, No. 1:07-cv-1066, 2008 WL 314698, at *1 (W.D. Mich. Feb. 4, 2008) (“[T]here is no administrative exhaustion requirement as to this kind of habeas challenge.” (citation omitted)). Here, Petitioner is not appealing a final order of removal. Instead, Petitioner challenges his post-removal order

detention when removal is not reasonably foreseeable. Thus, Petitioner's detention-based claims are not barred by any statutory exhaustion requirement.

While there is no statutory requirement, exhaustion may be judicially required as a prudential matter unless specific exceptions apply. *See, e.g., Salad v. Department of Corrections*, 769 F. Supp. 3d 913, 921 (D. Alaska 2025) ("Administrative exhaustion is prudential rather than a jurisdictional requirement for habeas review under § 2241.") (citing *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004)). The Supreme Court has recognized three "broad sets of circumstances in which the interests of an individual weigh heavily against requiring administrative exhaustion: (1) where such requirement would subject an individual to an unreasonable or indefinite time frame for administrative action; (2) where the administrative agency lacks competence to resolve the particular issue presented; or (3) the exhaustion of administrative remedies would be futile because the administrative body is shown to be biased or has predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 146-48 (1992); *see also Shurney*, 201 F. Supp. 2d at 788-89. Petitioner is unable to access administrative remedies because his removal order was finalized over twelve (12) years ago. Thus, Petitioner is no longer in proceedings before the Immigration Court. Accordingly, Petitioner is unable to pursue alternative avenues for relief and requiring exhaustion would impose undue delay.

In sum, Petitioner's challenge to his detention falls outside the scope of any statutory exhaustion requirement, as he does not contest the validity of his removal order but rather the lawfulness of his detention when removal is not reasonably foreseeable. Even if prudential exhaustion were otherwise applicable, requiring it here would subject Petitioner to an unreasonable or indefinite timeline, as Petitioner has no pending proceedings through which to seek relief and no available administrative forum to adjudicate his post-removal-order detention-

based claims. This Court has jurisdiction to reach the merits of Petitioner's habeas claims without requiring exhaustion of remedies that are neither statutorily mandated nor practically available.

III. PETITIONER IS ENTITLED TO RELIEF

A. Violation of the Immigration and Nationality Act

To avoid serious constitutional concerns about indefinite civil detention, the Supreme Court construed § 1231(a)(6) to hold that detention is justified only when removal is reasonably foreseeable. *Zadvydas v. Davis*, 533 U.S. 678, 699-700 (2001) (“[I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”). Petitioner's continued detention violates 8 U.S.C. § 1231(a), because his removal to Mauritania is not reasonably foreseeable in the near future.

Section 1231 also provides: “Except as otherwise provided in this section, when [a noncitizen] is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).” 8 U.S.C. § 1231(a)(1)(A). The removal period begins on the date the order of removal becomes administratively final. 8 U.S.C. § 1231(a)(1)(B)(i). Once the removal period begins, DHS has 90 days to obtain travel documents and execute the final order of removal. If the individual is not removed by the end of the 90-day removal period, then they shall be released subject to supervision. 8 U.S.C. § 1231(a)(3).

8 U.S.C. § 1231(a)(2) provides as follows: “During the removal period, the Attorney General shall detain the [noncitizen]. Under no circumstances during the removal period shall the attorney general release an alien who has been found inadmissible under section 1182(a) or 1182(a)(3)(B) of this title.” 8 U.S.C. § 1231(a)(2). This, however, does not apply to Petitioner

because he is not inadmissible under 8 U.S.C. § 1182(a)(2) (relating to inadmissibility for serious criminal convictions) or 8 U.S.C. § 1182(a)(3)(B) (relating to inadmissibility for terrorist activities). Respondents have not detained Petitioner for either of the aforementioned reasons and he is not subject to detention under this provision. Instead, Petitioner is detained to effectuate his removal, and the applicable statutory provision is 8 U.S.C. § 1231(a)(6).

Detention of certain noncitizens beyond the statutory 90-day removal period is permitted only when removal is reasonably foreseeable. 8 U.S.C. § 1231(a)(6); *Zadvydas*, 533 U.S. at 699; *see also, Martinez v. Larose*, 968 F.3d 555, 560 (6th Cir. 2020) (finding that post-removal period detention is permissible if the noncitizen is removable and considered “unlikely to comply with the order of removal”). Rather than authorizing “indefinite detention,” this statute has been read to “limit[] [a noncitizen’s] post-removal-period detention to a period reasonably necessary to bring about that alien’s removal.” *Zadvydas*, 533 U.S. at 689.

Petitioner’s removal order became final on August 29, 2013. It is unclear whether Respondents detained him during the 90-day removal period. Nonetheless, shortly after the expiration of the statutory 90-day removal period, without his removal having been effectuated, Respondents issued an order of release on supervision pursuant to § 1231(a)(3). He was not, at that time, detained beyond the 90-day removal period as § 1231(a)(6) allows for certain detainees. Respondents conceded that Petitioner, at the time of his arrest, had been in compliance with his supervision order. Respondent’s Return of Writ, ECF 7, PageID 18 (“There are no claims that Diouf violated the conditions of his release.”).

Further, the District Court of New Jersey applied *Zadvydas* and ordered release where ICE re-detained a petitioner years after proceedings ended. *See Munoz-Saucedo v. Pittman*, 2025 WL 1750346, Case 25-2258, *9 (D.N.J. June 24, 2025). Despite that petitioner’s detention being

under 180 days, the court granted the writ of habeas corpus and ordered supervised release, reaffirming that prolonged detention without a viable removal plan could not be justified. *Id.* at *6 (“[T]he Court rejects Respondents’ argument that *Zadvydas* precludes Petitioner from challenging his detention prior to the six-month mark.”).

In the present case, Petitioner was re-detained by ICE over 12 years after his final removal order. At the time of Petitioner’s was taken into ICE custody on October 28, 2025, he had been on a supervision order for approximately 12 years. In that time, Respondent was not able to obtain travel documents or to effectuate his removal to Mauritania. After Petitioner’s arrest on October 28, 2025, Respondent has still not been able to effectuate Petitioner’s removal.

Respondent did not provide information to corroborate that removals to Mauritania are taking place; for example, documents establishing the number of noncitizens removed from the U.S. to Mauritania this year. Without stating the date and time of any scheduled flight, and without any travel document, Respondent asserts that there is no reason to believe that ICE will be unable to remove Respondent. Respondent’s Return of Writ, ECF 7, PageID 17. In the absence of a travel document and the date and time of a scheduled flight, it remains unclear the exact day and time that Petitioner’s removal will be effectuated. It is also unclear whether Mauritania would accept Petitioner’s return on a commercial flight. These factors affirm that Petitioner’s removal is not reasonably foreseeable.

For these reasons, the Court should find that there is no significant likelihood of removal in the reasonably foreseeable future. Under these circumstances, continued detention violates 8 U.S.C. § 1231, as well as constitutional safeguards recognized in *Zadvydas* and reaffirmed by district courts. Petitioner should be released under appropriate conditions of supervision because his removal is not reasonably foreseeable. Petitioner’s detention without a substantive removal

plan puts him at risk for prolonged or indefinite detention in violation of the INA as interpreted by *Zadvydas*.

B. Violations of Due Process

Petitioner's continued detention without a significant likelihood of removal in the reasonably foreseeable future violates his due process rights guaranteed by the Fifth Amendment of the United States Constitution. "[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects." *Id.* at 690.

Under substantive due process doctrine, a restraint on liberty is only permissible if it serves a "legitimate nonpunitive objective." *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). The Supreme Court has only recognized two legitimate objectives of immigration detention: preventing danger to the community or preventing flight prior to removal. *See Zadvydas v. Davis*, 533 U.S. 678, 690-92. When ICE issued Petitioner an order of supervision, it found that he was neither a danger to the community nor a flight risk. No change in circumstances warranted the order's revocation upon the October 28, 2025 arrest. Petitioner's detention therefore does not bear a reasonable relationship with the two regulatory purposes of immigration detention: preventing danger to the community or flight prior to removal.

Mathews v. Eldridge, 424 U.S. 319, 333, instructs courts to balance three factors to determine whether procedural due process is satisfied: (1) the private interest at issue; (2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value, if

any, of additional procedural safeguards; and, (3) the government's interest, including fiscal and administrative burdens that additional or substitute procedural requirements entail.

Under *Zadvydas*, "the serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious." *Zadvydas* 533 U.S. at 692. The Constitution does not permit the government to indefinitely detain an individual who presents no flight risk or danger to the community, particularly where removal is not reasonably foreseeable. To hold otherwise would render Petitioner's detention punitive rather than regulatory, in violation of due process.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Habeas Corpus, and order the requested relief pursuant to 28 U.S.C. § 2241, including declaring that Respondents' actions violate statutory and constitutional protections and order Petitioner's immediate release from ICE custody.

Respectfully submitted,

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