UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DIEGO DE PAZ VELASCO, *also known as Errik Herrera Dellanos*, Petitioner, v. TAMMY MARICH, *in her official capacity as Acting Field Office Director, Buffalo Field Office, Enforcement and Removal Operations, U.S. Immigration & Customs Enforcement*; JOSEPH FREDEN, *in his official capacity as Warden of the Buffalo Federal Detention Facility*; TODD LYONS, *in his official capacity as Acting Director, U.S. Immigrations and Customs Enforcement*; and KRISTI NOEM, *in her official capacity as U.S. Secretary of Homeland Security*; U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Respondents.	Civil Action No. 1:25-cv-01236-LJV

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Petitioner Diego De Paz Velasco ("Petitioner" or "Mr. De Paz Velasco"), submits this opposition to Respondents' motion to dismiss and memorandum of law. Dkt. 7, 7-1. Seeking to evade review of their unlawful actions, Respondents ("ICE" or "DHS") argue that this Court does not have jurisdiction over the claims raised by Mr. De Paz Velasco and that he has failed to state claims for relief. This Court does have jurisdiction, and he has stated claims for relief due to violations of the Fifth Amendment, the Fourth Amendment, the Administrative Procedure Act ("APA") and *Accardi* doctrine, and the Immigration and Nationality Act ("INA") and its implementing regulations. Mr. De Paz Velasco respectfully requests that this Court deny Respondents' motion to dismiss and grant the requested relief.

ARGUMENT

I. THIS COURT HAS JURISDICTION

Respondents argue: "This case arises out of the execution of Velasco's removal order, and therefore this Court lacks jurisdiction to hear this case." Dkt. 7-1 at pg. 7. In *Zadvydas*, the Supreme Court explicitly held that "habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention." *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S. Ct. 2491 (2001). While detention under or in connection with a final order of removal is related to the execution of an immigration order, courts routinely hear habeas petitions filed by individuals subject to a final order of removal. As the Second Circuit has held, "a suit brought against immigration authorities is not per se a challenge to a removal order; whether the district court has jurisdiction . . . turn[s] on the substance of the relief that a [litigant] is seeking." *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) (italics omitted).

District courts in this circuit have distinguished between challenges to ICE's discretion to execute a removal order, which are barred, and challenges to the manner in which ICE executes the removal order, which are not. *See Torres-Jurado v. Biden*, 2023 U.S. Dist. LEXIS 193725 (S.D.N.Y Oct. 23, 2023) (due process challenge to revocation of ICE stay of removal was not barred by 8 U.S.C. § 1252(g)); *Ahmed v. Freden*, 744 F. Supp. 3d 259, 264 (W.D.N.Y. Aug. 9, 2024) (noting that while "[d]istrict courts do not have jurisdiction over challenges to the legality of final orders of deportation, exclusion, and removal," they retain "jurisdiction to hear immigration-related detention cases"). This case is an example of the latter.

II. MR. DE PAZ VELASCO'S DETENTION VIOLATES HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTH AMENDMENTS, THE APA, AND THE INA AND IMPLEMENTING REGULATIONS

A. Petitioner's constitutional rights were violated

Notably, Respondents do not argue that Petitioner violated the conditions of his release. Nevertheless, Respondents argue that detaining Mr. De Paz Velasco implicates "no constitutionally protected interest" because "ICE 'shall have authority, **in the exercise of discretion**, to revoke release' ". Dkt. 7-1 at 10, 8 C.F.R. § 241.4(l)(2). This statement misleadingly omits the first part of the sentence, which actually specifies "The Executive Associate Commissioner shall have authority, in the exercise of discretion . . ."; for that and other reasons discussed below, the regulation does not establish that the revocation in this case was solely an act of agency discretion. However even if that were the case, "[t]he right to be free from detention can never be dismissed as discretionary." *Sering Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137 (W.D.N.Y. May 2, 2025). This principle has continued to be affirmed in similar cases. *See, e.g.*, *Gamez v. Francis*, 2025 U.S. Dist. LEXIS 230070 at *59 (S.D.N.Y. Nov. 24,

2025) ("the existence of executive discretion does not preclude a procedural due process challenge"), citing *Velasco Lopez v. Decker*, 978 F.3d 842, 849-50 (2d Cir. 2020).

ICE's procedural requirements, such as affording noncitizens an informal interview, derive from the fundamental constitutional guarantee of due process. *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 650 (D. Mass. 2018) (stating that "[section] 241.4 was intended to provide these [noncitizens] the procedural due process courts had found to be constitutionally required"); *see also Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893 (1976). As the Court in *Rombot* explained, "ICE, like any agency, 'has the duty to follow its own federal regulations.' To be sure, not every procedural misstep raises a constitutional issue. However, where an immigration 'regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute,' like the opportunity to be heard, 'and [ICE] fails to adhere to it, the challenged [action] is invalid.'" *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017) (internal citations omitted); *see also Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991) ("fundamental notions of fair play underlying the concept of due process" require that the agency adhere to their regulations impacting individual rights), citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954).

Respondents also argue that, if Mr. De Paz Velasco does have a due process interest here, ICE met and exceeded the regulation's requirements, largely because the procedural requirements described in 8 C.F.R. § 241.4(l)(1) do not apply here, because he did not violate a condition of his release. Dkt. 7-1 at 11-13. This is not true for reasons explained below.

The Fourth Amendment's protections against unreasonable search and seizure apply to civil immigration enforcement and require a showing of probable cause. *See INS v. Delgado*, 466 U.S. 210 (1984). *See, e.g., Gonzalez v. U.S. Immigration & Customs Enf't*, 975 F.3d 788 (9th Cir.

2020) ("Because the Fourth Amendment requires probable cause to seize or detain an individual for a civil immigration offense, it . . . requires a prompt probable cause determination by a neutral and detached magistrate to justify continued detention"). There is generally not probable cause for an agency official to make an arrest or continue detention outside the limits of their valid statutory authority. Without conceding that Petitioner's constitutional rights are limited to the procedures described in these statutes and regulations, they were certainly violated when Respondents violated their own rules, as explained below.

B. Respondents violated the APA and *Accardi* doctrine

Respondents' arguments that Petitioner fails to state an APA claim are generally flawed for the same reasons as their arguments against his constitutional claims: they hinge on the ideas that "revocation of supervised release is within the agency's discretion", and alternatively, that he is not legally entitled to "notification before revocation of release, providing a detailed explanation as to why revocation occurred, or providing an interview after revocation." Dkt. 7-1 at 13. Analysis of the text of the regulations, below, shows the errors in these arguments. Respondents do not dispute that Mr. De Paz Velasco's detention constituted a final agency action subject to APA review. Given that the field office director apparently basedthe notice of revocation on the wrong regulation, Dkt. 6 at 4, citing 8 C.F.R. 241.13, as authorizing his determination, that is further evidence of the arbitrariness of ICE's actions here, and that they prioritized speed over compliance with required procedures.

C. Procedures under 8 C.F.R. § 241(l)(1) and 8 C.F.R. § 241.4(d) apply and were not followed

The Government concedes that ICE must follow certain procedures if it revokes a noncitizen's release pursuant to paragraph (l)(1) for violation of a condition of release, but argues that these procedures do not apply when an order of supervision ("OSUP") is revoked

using paragraph (l)(2). Dkt. 7-1 at 4-5. This argument is in significant tension with the fact that paragraph (l)(2) also covers circumstances where a violation of a condition of supervised release is the basis for revoking a noncitizen's release. *See* 8 C.F.R. § 241.4(l)(2)(ii). This overlap suggests that paragraph (l) sets forth a unified set of procedures for the revocation of removal. *Zongbo Zhu v. Genalo*, 2025 U.S. Dist. LEXIS 166176, at *24 (S.D.N.Y. Aug. 26, 2025), citing *M.S.L. v. Bostock*, No. 25-cv-01204, 2025 U.S. Dist. LEXIS 162519, at *11 (D. Or. Aug. 21, 2025) (Notice of Revocation stated that a "determination was made pursuant to 8 C.F.R. [§] 241.4(l)(2)(ii) that [p]etitioner had violated the conditions of release," rather than citing to 8 C.F.R. § 241.4(l)(1) (citation omitted)).

ICE specifically stated in their Notice of Revocation of Release that Mr. De Paz Velasco would "promptly be afforded an informal interview" and "an opportunity to respond to the reasons for the revocation and to provide any evidence . . ." Dkt. 6 at 4. This tracks the language of 8 C.F.R. § 241.4(l)(1), and indicates ICE's prior practice, which differs from the *post hoc* rationalization they have recently adopted in response to habeas challenges to their unlawful detention practices. *Gamez v. Francis*, 2025 U.S. Dist. LEXIS 230070 at *45-46 (S.D.N.Y. Nov. 24, 2025). Courts in the Second Circuit continue to agree that 8 C.F.R. § 241.4(l)(1) describes procedural protections that apply even when revocation is not based on a noncitizen's violation of OSUP terms. *Id.* at *44.

Notification of the reasons for Petitioner's redetention is also required under 8 C.F.R. § 241.4(d), which provides that "[a] copy of any decision ... to detain an alien shall be provided to the detained alien" and a decision to retain custody must "set forth the reasons" for that detention. 8 C.F.R. § 241.4(d). The failure to provide Petitioner with such notice thwarts his ability to contest the revocation. *Zongbo Zhu v. Genalo*, 2025 U.S. Dist. LEXIS 166176, *24

(S.D.N.Y. Aug. 26, 2025), citing *Orellana v. Baker*, No. 25-cv-01788, 2025 U.S. Dist. LEXIS 164986, 2025 WL 2444087, at *6-8 (D. Md. Aug. 25, 2025) (holding that ICE violated 8 C.F.R. § 241.4(d) by failing to provide noncitizen whose order of supervision was revoked with a notice or any written record as to the basis for the revocation of his release, which in turn violated his due process rights).

i. Lack of notice or explanation

Initially, ICE claimed that their revocation of release was authorized under 8 C.F.R. § 241.13. Dkt. 6 at 4. Respondents' current position is that they gave Mr. De Paz Velasco a Notice of Revocation that listed the wrong regulation as the basis for their determination. Dkt. 7-1 at 5-6, fn. 3. Respondents have not claimed that Mr. De Paz Velasco received more accurate information about the reason for his detention orally, from the deportation officers listed in their provided documents, or from anyone else. Thus, he did not receive meaningful notice of the reasons for revocation of his OSUP, and lacked opportunity to respond before the determinaticn.

8 C.F.R. § 241.4(d)(2) contains a requirement that "[a]ll notices, decisions, or other documents in connection with the custody reviews conducted under this section . . . shall be served on the alien". It is unclear whether this requirement was met here, as the only proof of service provided by DHS states Alec Polchlopek served a copy of an unspecified document on Mr. De Paz Velasco at 2:00pm on November 12, 2025. Dkt. 7-1 at 5. The Notice of Revocation of Release was digitally signed afterwards by Michael K Ball at 2:31pm on the same day, so this signed copy could not have been served on Mr. De Paz Velasco at the stated time.

ii. Lack of interview process

Respondents allege, but still have not established, that an "interview" was provided within the meaning of 8 C.F.R. § 241.4. Respondents submitted a generic declaration signed by a

deportation officer, A. Polchlopek, with no timestamp. Dkt. 6 at 6. There is no record evidence of what ICE Deportation Officers told or asked Mr. De Paz Velasco, if he understood his rights at that time, whether these officers speak Spanish at a level of competency to conduct a constitutionally adequate interview, or whether Mr. De Paz Velasco was provided an interpreter. Petitioner denies that he was interviewed, and Respondents fail to provide any evidence that an "interview" took place at all, let alone prior to the issuance of the Notice of Revocation of Release. Petitioner's allegation that he was not allowed to meaningfully respond to advocate for his due process rights stands. Dkt. 1 ¶¶ 23, 26. Respondents admit that Mr. De Paz Velasco "did not make any oral response regarding the reasons for his revocation and did not provide a written statement or documents either", which does not indicate the kind any two-way exchange of information implied by the term "interview", or any protection of his due process rights. Dkt. 7-1 at 2, Dkt. 6 at 6.

iii. Field Office Director failed to make required findings such as public interest

First, to the extent the government was invoking 8 C.F.R. § 241.4(l)(2), that regulations confers revocation authority on two individuals: (a) the Executive Associate Commissioner and (b) where "circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner" the regulation authorizes a district director revoke release, though only on a finding that it "is in the public interest."

Respondents have not contested Petitioner's allegation that "the official responsible for revoking Petitioner's order of supervision did not first refer the case to the ICE Executive Associate Director or make findings that revocation was in the public interest and that circumstances did not reasonably permit referral to the Executive Associate Director." Dkt. 1 at 7. The relevant notice of revocation bears the signature of Michael K Ball, Field Office Director

for Batavia, NY. Dkt. 6 at 4. Neither the revocation decision nor Respondents' motion to dismiss purported to consider the question of whether revocation of Mr. De Paz Velasco's supervision is "in the public interest." ICE violated its own policies and Petitioner's rights by not making these findings.

D. If 8 C.F.R. § 241.13 procedures apply, they were not followed

The parties agree that 8 C.F.R. § 241.13 likely did not authorize revocation of Mr. De Paz Velasco's OSUP here. An order of supervision may be revoked under § 241.13(i)(2) only when it was issued through the "special review procedures" of § 241.13—procedures requiring a written request, formal review, and a written decision. *E.M.M. v. Almodovar*, 2025 U.S. Dist. LEXIS 219106, at *7–12 (S.D.N.Y. Nov. 4, 2025) (releasing habeas petitioner where OSUP was not issued under 8 C.F.R § 241.13 and so could not be revoked under it, and revocation also did not meet requirements of 8 C.F.R § 241.4).

Respondents mention that "ICE complied with the more stringent requirements of § 241.13 in any event", but this is not true. They did not comply with 8 C.F.R. § 241.4, nor provide Mr. De Paz Velasco or this Court with additional written documentation which would support their revocation of release under § 241.13. For example, revocation would have required written decision finding "changed circumstances" related to the likelihood and imminence of removal. 8 C.F.R. § 241.13(i)(2), (g). The Notice of Revocation and undersigned counsel's email exchange with ICE indicates that no written findings of facts particular to Mr. De Paz Velasco were made in connection with the decision to revoke his OSUP. Dkt. 1-4. Respondents do not argue they made any such findings in their motion to dismiss.

E. 8 C.F.R. § 292.5 procedures apply and were not followed

Respondents allege no facts to contest the allegations that they knew Jose Perez, Esq. represented Mr. De Paz Velasco, and that they failed to notify him, in violation of 8 C.F.R. § 292.5(a). Dkt. 1 ¶¶ 3, 18, 21, 22. This violation highlights the general arbitrary and unfair nature of Respondents' actions. It also independently supports habeas relief. *Hashemi v. Noem*, 2025 U.S. Dist. LEXIS 250316 (C.D. Cal. Nov. 19, 2025) ("Court is especially troubled in this regard by the fact that Petitioner was not permitted access to his legal team during this process"; granting immediate release and noting that 8 C.F.R. § 241 contemplates that the noncitizen may have counsel), *Salad v. Dep't of Corr.*, 769 F. Supp. 3d 913 (D. Alaska Feb. 25, 2025).

CONCLUSION

Respondents have not demonstrated that this case should be dismissed, nor have they disputed the material facts alleged that show Mr. De Paz Velasco's Petition should be granted. Petitioner respectfully requests that Respondents' Motion to Dismiss be denied in its entirety and that the requested relief be granted, in the form of immediate release from custody.

Date: December 10, 2025

RESPECTFULLY SUBMITTED,

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