United States District Court
Western District of Texas
El Paso Division

Roberto Efrain Perez Castro, Petitioner, v. Kristi Noem, Secretary of United States Department of Homeland Security *et. al.*, Respondents.	No. 3:25-cv-00623-LS

Response in Opposition to
Petitioner's Writ of Habeas Corpus Petition

Federal Respondents[1] timely submit this response per this Court's Order dated December 8, 2025, ordering a response. *See* ECF No. 2. In his petition, Perez Castro ("Petitioner"), requests release from civil immigration detention, or in the alternative an immediate bond hearing claiming that her detention is contrary to statute and the Due Process Clause. *See* ECF No. 1. Petitioner's claims lack merit, and this petition should be denied.

As an initial matter, Petitioners, through counsel, filed this action under habeas (28 U.S.C. § 2241), while also alleging violations of the Administrative Procedure Act. ECF No. 1 at ¶ 13. Despite this, Petitioners paid only the $5 filing fee permitted for habeas applications, as opposed to the $405 filing fee for any other civil suit. *See Ndudzi v. Castro*, No. SA–20–CV–0492–JKP, 2020 WL 3317107 at *2 (W.D. Tex. June 18, 2020) (citing 28 U.S.C. § 1914(a)). The $5 filing fee "relegates this action to habeas relief only," because one "cannot pay the minimal habeas fee and pursue non-habeas relief." *Id.* (collecting cases and further noting the "vast procedural differences between the two types of actions"). Given the differences, the Court should either sever the non-habeas claims or dismiss them altogether without prejudice if severance is not warranted. *Id.* at *3.

[1] The Department of Justice does not represent the Warden.

Petitioner also claims entitlement to attorney fees under the Equal Access to Justice Act ("EAJA"), but the Fifth Circuit no longer recognizes EAJA fees in the habeas context. ECF No. 1 at 21; *see also Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023

Regarding the habeas claims, Petitioner is not entitled to release, because he is subject to a removal order over which he has already waived judicial review. *See* INA 217, 8 U.S.C. 1187. Under 1187(a)(1), an individual seeking admission under the Visa Waiver Program ("VWP") applies for admission as a nonimmigrant and is provided with a waiver of the visa requirement, subject to certain conditions. 8 U.S.C. § 1182(a)(7)(B)(i)(II); *see McCarthy v. Mukasey*, 555 F.3d 450, 459–60 (5th Cir. 2009). The VWP allows qualifying aliens of designated countries to enter the United States temporarily for up to 90 days without first obtaining a visa. 8 USC § 1187. To benefit from the VWP, however, the alien must waive the right to contest any action for removal, other than on the basis of an application asylum. 8 USC § 1187(b)(2). Removal of such an alien "shall be effected without referral … to an immigration judge for a determination of deportability." 8 C.F.R. 217.4(b).

Whether to pause removal for that purpose is within the sole discretion of the Department of Homeland Security (DHS). While the district court has jurisdiction under § 2241 to review a custody challenge, the court lacks jurisdiction to review any issues directly related to a VWP removal order. *See Vargas v. U.S. Dep't of Homeland Sec.*, No. 1:17–CV–356, 2017 WL 962420 at *2–3 (W.D. La. Nov. 10, 2017).

I. Facts and Procedural History

Petitioner is a native of Ecuador and citizen of Spain. ECF No. 1-3 at 1; Exh. A at 1 (VWP documents). He is currently in ICE custody pending his removal under the VWP. Petitioner admits he entered the United States on a visa approximately six years ago and overstayed. *See* ECF No. 1

at 5. On or about December 11, 2025, Respondents notified Petitioner that he would be processed for removal under section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1187, for having overstayed the terms of his 2019 VWP entry. *See* Exh. A at 3–4.

II. Relevant Law

A. Detention Is Lawful Under 8 U.S.C. §§ 1187 and 1231(a)(6).

Petitioner is subject to a final order under the VWP. 8 U.S.C. § 1187. The general authority to detain aliens after the entry of a final order of removal is set forth in 8 U.S.C. § 1231(a). That statute affords ICE a 90-day mandatory detention period within which to remove the alien from the United States following the entry of the final order. 8 U.S.C. § 1231(a)(2). The 90-day removal period begins on the latest of three dates: the date (1) the order becomes "administratively final," (2) a court issues a final order in a stay of removal, or (3) the alien is released from non-immigration custody. 8 U.S.C. § 1231(a)(1)(B).

Not all removals can be accomplished in 90 days, and certain aliens may be detained beyond the 90-day removal period. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Under § 1231, the removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien presents a flight risk or other risk to the community. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is "no significant likelihood of removal in a reasonably foreseeable future." *Zadvydas*, at 533 U.S. at 680.

B. Petitioner Has a Final Order of Administrative Removal Lawfully Issued Under 8 U.S.C. § 1187.

Petitioner is not entitled to release, because he is subject to a final removal order that he waived his rights to contest. *See* INA § 217, 8 U.S.C. § 1187. Under § 1187(a)(1), an individual seeking admission to the United States under VWP applies for admission as a nonimmigrant and

is provided with a waiver of the visa requirement, subject to certain conditions. 8 U.S.C. § 1182(a)(7)(B)(i)(II); *see McCarthy v. Mukasey*, 555 F.3d 450, 459–60 (5th Cir. 2009). The VWP allows qualifying aliens of designated countries to enter the United States temporarily for up to 90 days. 8 U.S.C. § 1187. To benefit from the VWP, however, the alien must waive the right to contest any action for removal, unless he is requesting asylum. 8 U.S.C. § 1187(b)(2). Removal of such an alien "shall be effected without referral … to an immigration judge…." 8 C.F.R. § 217.4(b).

This necessarily means that an alien who remains in the United States longer than the time allotted to him under the VWP may not contest a removal action. While the district court has habeas jurisdiction under § 2241 to review a custody challenge, the court lacks jurisdiction to review any issues directly related to a VWP removal order. *See Vargas v. U.S. Dep't of Homeland Sec.*, No. 1:17–CV–356, 2017 WL 962420 at *2–3 (W.D. La. Nov. 10, 2017).

The authority to detain aliens subject to an administrative removal order under 8 U.S.C. § 1187 is found within the statute itself. *See* 8 U.S.C. § 1187(c)(2)(E). Petitioner argues in error that ICE is holding him without valid statutory authority. *See* ECF No. 1 at 2. The record shows, however, that ICE notified Petitioner of the intent to issue a final administrative order of removal under the VWP. Ex. A (VWP Documents). The records further show that Petitioner declined to sign to acknowledge service and refused to respond to the allegations and charge against him, thereby waiving his right to timely contest the order. *Id.* As such, he is subject to a final order of removal. *See* 8 U.S.C. § 1187(c)(2)(E).

III. Argument

A. Petitioner's Detention Comports with Due Process.

It is uncontested that Petitioner has been in ICE custody since on or about November 5, 2025. ECF No. 1 at ¶ 15. On or about December 11, 2025, ICE issued and served Petitioner with

a final administrative order of removal under the VWP. Ex. A (VWP Documents). The VWP statute plainly states that a participating VWP country must, within three weeks of issuance of a final order, accept the repatriation of any citizen, former citizen, or national of that country against whom that final order is issued. 8 U.S.C. § 1187(c)(2)(E). The statute cautions, however, that there is no duty owed by the United States or any right owed to the alien with respect to removal or release under this provision. *Id.* The statute further notes that the statute creates no cause of action or claim against a United States official "to compel the release, removal, or consideration for release or removal of any alien." *Id.* In other words, the statute mandates Petitioner's detention until his removal is executed.

Courts typically review due process claims regarding immigration detention under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).[2] The *Zadvydas* court reviewed the constitutionality of final order detention as authorized by 8 U.S.C. § 1231. Under § 1231, the first 90 days following the entry of the removal order subjects the alien to mandatory detention. 8 U.S.C. § 1231(a). The removal period can be extended in a least three circumstances. *See Glushchenko v. U.S. Dep't of Homeland Sec.*, 566 F.Supp.3d 693, 703 (W.D. Tex. 2021). Extension is warranted, for example, if the alien presents a flight risk or other risk to the community, or if he fails to comply with removal efforts. *Id.*; *see also* 8 U.S.C. § 1231(a)(1)(C); (a)(6). An alien may be held in confinement until there is "no significant likelihood of removal in a reasonably foreseeable future." *Zadvydas*,

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[2] Respondents do not concede that *Zadvydas*, as opposed to *Thuraissigiam*, for example, is the proper analysis to determine the constitutionality of final order detention under the VWP. For the sake of argument, however, even under *Zadvydas,* Petitioner fails to establish any constitutional violation here.

at 533 U.S. at 680.

The 90-day removal period may also be extended where ICE determines the alien is unlikely to comply with the removal order. *See Johnson v. Guzman-Chavez*, 594 U.S. 523, 528–29, 544 (2021); *see also* 8 C.F.R. § 1231(a)(6); 8 C.F.R. § 241.4. Continued detention under this provision is the "post-removal-period." *Guzman-Chavez*, 594 U.S. at 529. The statute does not specify a time limit on this post-removal period, but the Supreme Court has read an implicit limitation into the statute and held that the alien may be detained only for a period reasonably necessary to remove the alien from the United States. *Id.*; 8 C.F.R. § 241.13. Six months is the presumptively reasonable timeframe in the post-removal context. *Zadvydas*, 533 U.S. at 701. Although the Court recognized this presumptive period, *Zadvydas* "creates no specific limits on detention . . . as 'an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'" *Andrade v. Gonzales*, 459 F.3d 538, 543 (5th Cir. 2006) (quoting *Zadvydas*, 533 U.S. at 701).

To state a claim for relief under *Zadvydas*, Petitioner would have to show that: (1) he is in DHS custody; (2) he has a final order of removal; (3) he has been detained in *post*-removal-order detention for six months or longer; and (4) there is no significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 700. Petitioner does not even allege that he has a final order of removal, but even if he had, there is no dispute that he has been detained less

than 60 days in DHS custody. As such, any claim under *Zadvydas* is premature.[3] Moreover, Petitioner has not shown good cause to believe that Petitioner's removal to the Spain or Ecuador is unlikely. Therefore, even under *Zadvydas*, Petitioners post-order detention comports with due process. This habeas should be denied.

B. 8 U.S.C. § 1252(g) Strips the Court of Jurisdiction to Provide the Relief Sought.

Section 1252(g) precludes review of Petitioner's claims because he directly challenges ICE's decision to execute an administratively final order of removal under VWP. "Judicial review in the removal context is heavily circumscribed by 8 U.S.C. § 1252." *Duron v. Johnson,* 894 F.3d 644, 646 (5th Cir. 2018). Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] *execute*

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[3] Petitioner has been detained in ICE custody for less than six months, meaning that any claim filed under *Zadvydas* to challenge the constitutionality of his post-order detention is premature. In *Zadvydas*, the U.S. Supreme Court held that § 1231(a)(6) "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" but "does not permit indefinite detention." 533 U.S. at 689. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by the statute." *Id.* at 699. The Court designated six months as a presumptively reasonable period of post-order detention but made clear that the presumption "does not mean that every alien not removed must be released after six months." *Id.* at 701. Once the alien establishes that he has been in post-order custody for more than six months at the time the habeas petition is filed, the alien must provide a "good reason" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *See Andrade*, 459 F.3d at 543–44; *Gonzalez v. Gills,* No. 20–60547, 2022 WL 1056099 at *1 (5th Cir. Apr. 8, 2022). Unless the alien establishes the requisite "good reason," the burden will not shift to the government to prove otherwise. *Id.*

removal orders against any alien under this chapter." 8 U.S.C. § 1252(g) (emphasis added); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

This jurisdictional bar has been applied in the Western District of Texas and in the Fifth Circuit multiple times. *See* ECF No. 28 at 5 n.18.; *see also Leger v. Young,* 464 F. App'x 352, 353, 2012 WL 874560 at *1 (5th Cir. 2012) (citing *Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 943 (5th Cir. 1999); *Idokogi v. Ashcroft*, 66 F. App'x. 526, 2003 WL 21018263 (5th Cir. 2003) (per curiam); *Fabuluje v. Immigration and Naturalization Agency*, 244 F.3d 133 (5th Cir. 2000); *Olya v. Garite*, EP–25–CV–00083–DCG, 2025 WL 890180 at *1 (W.D. Tex. Mar. 19, 2025) (citing *Moreira v. Mukasey*, 509 F.3d 709, 712 (5th Cir. 2007)). These cases support the government's position that this Court lacks jurisdiction to provide the relief Petitioner seeks.

Given the plethora of decisions finding consistently that § 1252(g) strips courts of jurisdiction to enjoin the government's execution of a final order of removal, this Court should find the same. Section 1252(g) deprives this Court of providing Petitioner the relief he seeks, even if that relief is sought only for a limited time pending a final ruling on the Petition for Writ of Habeas Corpus.

C. To the Extent Petitioner Challenges the Constitutionality of Her Removal Order, such a Claim Must Be Filed with the Circuit Courts of Appeals.

Even if Petitioner raises a colorable claim here regarding the constitutionality of Petitioner's VWP removal order and his resulting decision, that claim must be brought in the circuit court in a petition for review. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(D). The habeas petition in this case fails to allege any facial or as-applied challenge to the constitutionality of Petitioner's final order of removal under the VWP. *See* ECF No. 1. Indeed, Petitioner did not challenge any aspect of her removal process under the VWP. Even if Petitioner had properly stated a constitutional challenge

to the VWP, this Court lacks jurisdiction to review it, as it must be properly funneled to the Fifth Circuit. *See* 8 U.S.C. § 1252(b)(9).

Under § 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States" is only proper before the appropriate federal court of appeals in the form of a petition for review of a final removal order. *See Reno v. AAADC*, 525 U.S. at 483. Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see also El Gamal v. Noem*, --- F.Supp.3d---, 2025 WL 1857593 at *5 (W.D. Tex. July 2, 2025) (collecting cases and finding that any challenge to ICE's initial decision to detain the alien during removal proceedings is protected from judicial review in district court, because the alien must appeal any order of removal to the BIA and ultimately petition for judicial review of any relevant constitutional claims by the court of appeals); *Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims,

including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law."). These provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]").

Here, Petitioner challenges in district court the government's decision to detain him for the purpose of executing his removal order under the statutes governing the VWP. These actions, however, were taken specifically for the purpose of removing him from the United States, and

therefore, they must be challenged only in the court of appeals. *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95.

Indeed, ICE gave Petitioner an opportunity to contest the VWP removal order within 48 hours of its issuance, but Petitioner declined to do so. *See* Exh. A (VWP Documents). Had he taken that opportunity, he could have sought review through the Fifth Circuit. *See, e.g., Patel v. Barr*, No. CV–20–00229–PHX–DLR (DMF), 2022 WL 12688142 at *14–15 (D. Ariz. Sept. 9, 2020) (analyzing *Thuraissigiam's* impact on the habeas claim of a VWP entrant). Refusing to sign the acknowledgment of service or otherwise waiving the right to contest that removal order does not restore jurisdiction in the district court under § 1252.

Indeed, the fact that Petitioner is challenging initial detention here is enough to trigger § 1252(b)(9) because "detention is an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. 318, 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). In other words, to the extent that Petitioner challenges the legality of the final order of removal under the VWP and resulting detention, those claims are properly raised only through the appropriate federal court of appeals. *See* 8 U.S.C. § 1252(b)(9). Petitioner is lawfully detained with a final order of removal issued under the VWP, and this Court lacks jurisdiction to stay his removal order. *See* INA § 217, 8 U.S.C. § 1187.

IV. Conclusion

Petitioner has been detained less than 60 days, and continued detention until removal is lawful. Accordingly, the Court should deny this petition.

Respectfully submitted,

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