

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

Case No. 2:26-cv-11-KCD-NPM

DAVID FERRER LESCAILLE,
Petitioner,

v.

KELIE WALKER, et al.

Respondents.
_____ /

PETITIONER'S TRAVERSE

Petitioner respectfully submits this traverse in response to Respondents' Return [ECF No. 12]. This case concerns whether ICE's revocation of Petitioner's long-standing Order of Supervision ("OSUP") and resulting detention violated the Fifth Amendment, the *Accardi* doctrine, and binding federal regulations. See *Ochoa Banega v. Warden of Soft Side South et al.*, No. 2:25-cv-1152-JES-DNF (M.D. Fla. Jan. 29, 2026); *Perez v. Warden, et al.*, No. 2:26-CV-0009-SPC-DNF (M.D. Fla. Jan. 19, 2026). Respondents' return does not meaningfully address these issues and instead relies on regulatory provisions that expressly do not apply to Petitioner. Under such circumstances, this Court should order his release from custody.

I. Introduction

David Ferrer Lescaille (hereinafter "Mr. Ferrer" or "Petitioner") Petitioner is a 70-year-old native and citizen of Cuba who entered the United States during the Mariel boatlift in 1980 and was paroled into the country. After serving criminal sentences and receiving a final order of removal in 2003, the Government was unable to effectuate removal to Cuba or elsewhere. Petitioner was therefore released on an OSUP and complied with all conditions for more than a decade. On November 12, 2025, Petitioner appeared for routine ICE reporting and was taken into

custody at Florida Soft Side South (“Alligator Alcatraz”). ICE purported to revoke his release under 8 C.F.R. §§ 241.4 and 241.13 based on an asserted likelihood of removal, notwithstanding that both provisions exclude Mariel Cubans by their own terms and removal to Cuba is not foreseeable.

Petitioner filed this habeas petition on January 2, 2026. Respondents argue that this Court lacks jurisdiction, that detention is authorized under 8 U.S.C. §1231, and that ICE may revoke an OSUP with unbounded discretion. Respondents’ arguments misread the Immigration and Nationality Act (INA), controlling precedent, and the applicable regulatory framework. Various district court cases throughout the country have found that that individuals like Petitioner are entitled to release and have held that the procedures employed by Respondents to detain them violate their Fifth Amendment right to due process and applicable federal regulations. *See Ochoa Banega v. Warden of Soft Side South et al.*, No. 2:25-cv-1152-JES-DNF (M.D. Fla. Jan. 29, 2026); *Perez v. Warden, et al.*, No. 2:26-CV-0009-SPC-DNF (M.D. Fla. Jan. 19, 2026); *Beltran v. Ripa, et al.*, No. 2:25-CV-01174-SPC-NPM (M.D. Fla. Jan. 5, 2026); *Grigorian v. Bondi*, 2025 WL 2604573 (S.D. Fla. Sept. 9, 2025); *K.E.O. v. Woosley*, 2025 WL 2553394 (W.D. Ky. Sept. 4, 2025); *Zhu v. Genalo*, No. 1:25-cv-6523-JLR, 2025 WL 2452352 (S.D.N.Y. Aug. 26, 2025); *Phan v. Noem*, 2025 WL 2898977 (S.D. Cal. Oct. 10, 2025); *Villanueva v. Tate*, 2025 WL 2774610 (S.D. Tex. Sept. 26, 2025).

II. Argument

a. Jurisdiction and Venue

Respondents again invoke 8 U.S.C. §§ 1252(b)(9) and 1252(g), despite acknowledging that this Court has repeatedly rejected those provisions as jurisdictional bars to challenges to detention authority. [ECF No. 12, p. 3]. Petitioner does not challenge his removal order or its execution; he

challenges the lawfulness of his detention. As the Middle District of Florida held in *Perez v. Warden, et al.*, “judgment in Petitioner’s favor will not impair the government’s ability to execute the removal order.” *Perez v. Warden, et al.*, No. 2:26-CV-0009-SPC-DNF (M.D. Fla. Jan. 19, 2026). This Court’s prior rulings control, and §§ 1252(b)(9) and 1252(g) do not apply. Therefore, the INA does not strip the Court of jurisdiction over this action.

b. Legality of Detention

i. *The INA does not mandate Petitioner’s detention.*

First, the Government argues the Petitioner is “properly detained pursuant to 8 U.S.C. § 1231” because the “Petitioner was ordered removed in 2003 and he remains subject to a final, executable removal order today.” [ECF No. 12, p. 4]. This statement ignores the longstanding and current barriers of repatriation to Cuba that make his final order of removal *not* executable. See *Clark v. Martinez*, 543 U.S. 371 (2005); *Perez v. Warden, et al.*, No. 2:26-CV-0009-SPC-DNF (M.D. Fla. Jan. 19, 2026). Cuba’s steadfast refusal to repatriate Mariel Cubans renders removal in the reasonably foreseeable future effectively impossible.¹ [ECF No. 1, p. 12 n. 3–4].

In addition, the Government relies on *Zadvydas v. Davis*, 533 U.S. 678 (2001) to argue that even after the 90-day removal period expires, the Government may continue, or later resume, detention to carry out the removal, and the federal regulations do not set a time limit on such post-removal detention. [ECF No. 12, p. 5]. Petitioner’s order of removal became final on October 2, 2003. The six-month presumptively reasonable detention period expired more than twenty years ago. As the Eleventh Circuit recognized, “[t]he Supreme Court’s stated rationale for establishing a presumptively reasonable ‘6-month period’ for detention pending removal supports our

¹ Unlike the petitioner in *Valdes-Santovenia v. Ripa et al.*, No. 2:25-CV-01063-JES-DNF (M.D. Fla. Dec. 31, 2025), Petitioner here has consistently demonstrated and maintains that removal to Cuba is not reasonably foreseeable as a Mariel Cuban.

conclusion that this period commences at the beginning of the removal period.” *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.3 (11th Cir. 2002). [The Southern District of Florida recently rejected the Government’s position in an analogous case:

In this case, the Government has had over thirteen years to make such arrangements for Petitioner’s removal. Petitioner’s period of detention did not restart on December 3, 2025: it has been running since December 17, 2013. Most of these arrangements could have “likely be[en] pursued even while the noncitizen [was] on release.” The Government may not sit on its hands for thirteen years before deciding to implement an order of removal and then hold the non-resident in detention while it figures out how to effectuate removal. Such conduct runs afoul of the very danger outlined in *Zadvydas*.

Pierre v. Field Office Director, No. 0:25-cv-62475-WPD (S.D. Fla. Jan. 29, 2026) (internal citations omitted).²

Accordingly, ICE cannot restart that clock by releasing and re-detaining Petitioner at will, nor may it rely on the wrong regulatory authority to justify such detention.

ii. Revocation of Petitioner’s OSUP violated federal regulations.

Next, the Respondents vaguely claim that “[f]ollowing the Supreme Court’s decision in *Clark v. Martinez* guidance was issued to ICE personnel concerning custody review protocol for individuals including those considered to be Mariel Cubans.” [ECF No. 12, p. 5]. Respondents’ contention that 8 C.F.R. § 212.12 “no longer applies” because of an internal ICE guidance

² Courts have found that when a non-citizen “was previously detained, then released on supervised release . . . his 90-day removal period has long expired.” See *Balouch v. Bondi*, No. 9:25-CV-216-MJT, 2025 WL 2871914, at *2 (E.D. Tex. Oct. 9, 2025). That is, Courts have “broadly agree that ‘the six-month period [under *Zadvydas*] does not reset when the government detains an alien under 8 U.S.C. § 1231(a), releases him from detention, and then re-detains him again.’” *Diaz-Ortega v. Lund*, No. 1:19-CV-670-P, 2019 WL 6003485, at *7 n.6 (W.D.La. Oct. 15, 2019) (quoting *Sied v. Nielsen*, 17-CV-06785-LB, 2018 WL 1876907, at *6 (N.D.Cal. Apr. 19, 2018)), report and recommendation adopted, No. 1:19-CV-670-P, 2019 WL 6037220 (W.D.La. Nov. 13, 2019); accord *Villanueva v. Tate*, No. CV H-25-3364, 2025 WL 2774610, at *9 (S.D.Tex. Sept. 26, 2025) (“The government’s contention that it may avoid the holding of *Zadvydas* and re-start the six-month presumptively constitutional detention clock by simply releasing and then re-detaining a noncitizen has no basis in either the statutes, the regulations, or *Zadvydas* itself.”); accord *Escalante v. Noem*, No. 9:25-CV-00182-MJT, 2025 WL 2206113, at *3 (E.D. Tex. Aug. 2, 2025) (finding that “re-detention after release on an Order of Supervision “is not your typical first round detainment of an alien awaiting removal.”); see also *Solis Nolasco v. Noem*, No. CV GLR-25-3847, 2026 WL 25002, at *4 (D. Md. Jan. 5, 2026). Likewise, the Eleventh Circuit speaks in terms of a “removal period,” not “periods,” immediately following the finality of the order of removal. See *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002).

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memorandum is legally incorrect. Agency guidance does not have the force of law and cannot repeal or suspend a duly promulgated regulation. *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979). Repeal of a legislative rule requires notice-and-comment rulemaking under the APA. 5 U.S.C. § 553. No such rulemaking has occurred. Section 212.12 remains codified and binding.

Additionally, Respondents rely exclusively on 8 C.F.R. §§ 241.4 and 241.13. [ECF No. 12, p. 6–7]. Those regulations expressly exclude Mariel Cubans:

(b) Applicability to particular aliens —

...

(2) Parole for certain Cuban nationals. The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

8 C.F.R. § 241.4(b)(2).

(b) Applicability to particular aliens —

...

(3) Limitations. This section does not apply to:

(i) Arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by § 212.12 of this chapter.

8 C.F.R. § 241.13(b)(3)(i).

By invoking § 241.4 to justify detention and attempted removal, Respondents acted beyond their regulatory authority. Any detention premised on those provisions is ultra vires.

The Respondents attempt to evade responsibility by claiming that “[e]ven were 8 C.F.R. § 212.12 applicable...deviation from the stated timeline does not in and of itself amount to a due process violation.” [ECF No. 12, p. 6 n. 4]. The Court should continue to uphold the important

protections established by § 212.12 to ensure the safeguards promulgated by the legacy-INS are not corroded. Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), all factors weigh in Petitioner's favor: his profound liberty interest since he is being detained unlawfully, the high risk of erroneous deprivation absent required procedures since ICE ignored the governing regulation and cited inapplicable authority, and the absence of any countervailing government interest since Petitioner complied with supervision and poses no flight risk. This regulatory "deviation," as the Respondents identify, is not a technical error; it is a violation of Petitioner's due process rights.

Under §212.12, the Government was required to follow specific procedures to revoke parole or deny release, but Respondents have done none of these:

- (i) No Associate Commissioner or formally designated official acted, as required by § 212.12(b), (h).
- (ii) No Cuban Review Panel was convened, as required by § 212.12(d).
- (iii) No record review or personal interview occurred, as required by § 212.12(d)(4).
- (iv) No written recommendation or documentation was issued, as required by § 212.12(d)(4).
- (v) No hearing or procedural safeguards were observed, as required by § 212.12(d), (h).
- (vi) Low-level officers acted without authority, in violation of § 212.12(b), (h).

A recent district court decision in the Middle District of Florida explains: "The Court recognizes significant value in the safeguards required by § 212.12. They ensure immigration detention serves its statutory purposes and is used in accordance with the laws enacted by Congress." *Perez v. Warden, et al.*, No. 2:26-CV-0009-SPC-DNF (M.D. Fla. Jan. 19, 2026). In their response, the Government has failed to rebut any of these regulatory deficiencies.

iii. Petitioner's detention is unlawful under ICE authority.

Respondents rely on 8 U.S.C. § 1357(g), which authorizes limited enforcement functions by state officers but does not authorize long-term detention. [ECF No. 12, p. 10]. Respondents

were evidently unable to provide the Court with any IGSA relating to Florida Soft Side South's operation, despite the Congressional requirement that ICE may only house aliens in state or local facilities pursuant to such agreements. This absence of legal authority is especially troubling given Petitioner's age and prostate cancer diagnosis requiring ongoing treatment.

iv. Petitioner's challenges concerning third country removal can be resolved before this Court.

Respondents' argument ultimately collapses into a circular assertion that because the INA "does not delineate a particular process for carrying out third country removals," the Court should simply presume that whatever process the Executive Branch may someday employ is lawful. [ECF No. 12, p. 11]. Respondents' reliance on *D.V.D. et al. v. U.S. Dep't of Homeland Sec.*, No. 1:25-cv-10676 (D. Mass.), is misplaced because Petitioner does not challenge third-country removal policies under the APA, but rather the lawfulness of his detention. The initial, unlawful revocation of the Petitioner's Mariel Cuban OSUP without legal authority reinforces that his confinement, and any attempted removal, premised on that unlawful revocation cannot be justified.

III. Conclusion

WHEREFORE, Petitioner respectfully requests that the Court grant the writ and order his immediate release under the prior conditions of supervision.

Respectfully submitted,

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