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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ESTEBAN RIVERO,

Petitioner,

v.

KRISTI NOEM; et al.,

Respondents.

Case No.: 26-cv-0148-BJC-JLB

RESPONSE IN OPPOSITION TO AMENDED HABEAS PETITION AND MOTION FOR A TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Petitioner has filed an amended habeas petition and a motion for temporary restraining order. As the amended petition and motion assert the same claims and relief, Respondents respond to both herein for the sake of judicial efficiency. For the reasons set forth below, Respondents ask the Court to deny the habeas petition and injunctive relief.

II. BACKGROUND[1]

Petitioner is a citizen and national of Cuba. ECF No. 1 at page 1; Declaration of Assistant Field Office Director Carlos Nunez ("Nunez Decl.") at ¶ 4. Petitioner originally entered the United States on or about May 20, 1995. *Id.* On December 20, 2006, Petitioner was convicted of racketeering under Fla Stat. §895.03(4) and for filing fraudulent insurance claims pursuant to Fla. Stat §817.234(1). *Id.* at ¶ 5. As a result, he was sentenced to 15 years in prison. *Id.* After completion of his sentence on September 28, 2010, a Notice to Appear issued initiating removal proceedings under Section 237a(2)(A)(iii) of the Immigration and Nationality Act (INA), as an alien who has been convicted of an aggravated felony. *Id.* at ¶ 6. On December 10, 2010, an immigration judge ordered Petitioner removed to Cuba but granted a deferral of that removal and released under an Order of Supervision pending removal to Cuba. *Id.* at ¶¶ 7, 8. Petitioner was released on December 13, 2010. *Id.* at ¶8.

On November 1, 2025, Immigration and Customs Enforcement (ICE) re-detained Petitioner in Miami, Florida to execute his removal order. *Id.* at ¶ 9. Petitioner has remained in ICE custody since that date.

On the same day, ICE provided Petitioner with a Notice of Revocation of Release, which Petitioner refused to sign, providing Petitioner with formal notice of the reason for revocation of his order of supervision. *Id.*, Exhibit 1 (Notice of Revocation

[1] The information below is set forth in the attached Declaration of AFOD Carlos Nunez (Nunez Decl.). The attached exhibits are true copies, with redactions of private information of documents obtained from ICE counsel

of Release). In the Notice of Revocation of Release, ICE informed Petitioner of the changed circumstances in his case:

> ICE has determined that you can be expeditiously removed from the United States. Your case will be reviewed by the government of Mexico for issuance of a travel document. pursuant to the outstanding order of removal against you.

Exh. 1.

Petitioner was provided with an opportunity to respond to the reason for the revocation during an informal interview on November 1. *Id.* ICE also conducted an informal interview with Petitioner regarding his detention status the same day. *Id.* ICE's Miami Enforcement and Removal Operations (ERO) field office provided Petitioner with written notice of his potential removal to Mexico on November 26, 2025. *Id.* at ¶ 10, Exh. 2 (Third Country Notice). On January 8, 2026, San Diego ICE ERO attempted to remove Petitioner to Mexico but Mexico denied Petitioner's entry. *Id.* at ¶ 11 (Due to typo, this refers to the second ¶ 11). ICE-ERO Miami is actively working to identify a third country to which Petitioner may be removed and can do so promptly once this Court lifts its order enjoining removal. *Id.* at ¶ 12.

III. ARGUMENT

"Section 241(a) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1231(a), authorizes the detention of noncitizens who have been ordered removed from the United States." *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 575 (2022). The INA provides that an alien ordered removed must be detained for 90 days pending the government's efforts to secure the alien's removal through negotiations with foreign governments. *See* 8 U.S.C. § 1231(a)(2) (the Attorney General "shall detain" the alien during the 90-day removal period under subsection (a)(1)).

Section 1231(a)(6) "authorizes further detention if the Government fails to remove the alien during those 90 days." *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001). Detention authority under this statute, however, is limited to "a period reasonably necessary to bring about the alien's removal from the United States" and "does not

permit indefinite detention." *Id.* at 689. The Supreme Court has held that a six-month period of post-removal detention constitutes a "presumptively reasonable period of detention." *Id.* at 701. The Supreme Court held in *Zadvydas* that when removal is not accomplished during the 90-day removal period, the statute "limits an alien's post-removal-period detention to a period reasonably necessary to bring about the alien's removal from the United States" and does not permit "indefinite detention." *Zadvydas*, 533 U.S. at 689. Courts have repeatedly declined to grant habeas relief where the presumptively reasonable six-month period has not yet elapsed. *See Ghamelian v. Baker*, No. SAG-25-02106, 2025 WL 2049981, at *4 (D. Md. July 22, 2025) ("The government is entitled to its six-month presumptive period before Petitioner's continued § 1231(a)(6) detention poses a constitutional issue."); *Guerra-Castro v. Parra*, No. 1:25-cv-22487-GAYLES, 2025 WL 1984300, at *4 (S.D. Fla. July 17, 2025) ("The Court finds that the Petition is premature because Petitioner has not been detained for more than six months. Petitioner has been in detention since May 29, 2025; therefore, his two-month detention is lawful under *Zadvydas.*") (citations omitted); *Farah v. INS*, No. Civ. 02-4725(DSD/RLE, 2003 WL 221809, at *5 (D. Minn. Jan. 29, 2013) (holding that when the government releases a noncitizen and then revokes the release based on changed circumstances, "the revocation would merely restart the 90-day removal period, not necessarily the presumptively reasonable six-month detention period under *Zadvydas*").

Petitioner suggests that *Zadvydas* stands for the proposition that any period of non-detention after the issuance of a final removal order applies to the 6 month presumptively reasonable period to execute the removal order. *See* ECF No. 6. *Zadvydas'* presumptively reasonable period is "triggered by detention" and "runs only while the noncitizen is actually detained." *Jian v. Bondi,* 2025 WL 3281819 (D. N.M. Nov. 25, 2025), *citing Callender v. Shanahan,* 281 F. Supp. 3d 428, 435 (S.D.N.Y. 2017); *Ke Chen v. Holder,* 783 F. Supp. 2d 1183, 1192 (N.D. Ala. 2011). In this case, the six month presumptively reasonable period of detention following the final removal

order has not expired. Petitioner has been detained just over 90 days at the time of this filing.

If an individual ordered removed "is not removed to his or her country of choice or citizenship, he or she shall be removed to any of the following countries" listed in 8 U.S.C. § 1231(b)(2)(E). *Hadera v. Gonzales*, 494 F.3d 1154, 1156–57 (9th Cir. 2007). The enumerated countries are:

> (i) The country from which the alien was admitted to the United States
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
> (iv) The country in which the alien was born.
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.

Id. (quoting § 1231(b)(2)(E)(i)–(vi)). "If removal to any of these countries is 'impracticable, inadvisable, or impossible,' the individual shall be removed to 'another country whose government will accept the alien into that country.'" *Id.* (quoting § 1231(b)(2)(E)(vii)).

Here, Petitioner was granted deferral of removal to Cuba—his country of birth and citizenship, as well as the country designated during his removal proceedings. Petitioner has not designated any other country for removal. Apart from Cuba, there appears to be no other country that would meet the definitions under subsections (i) through (vi), and Petitioner has made no showing to the contrary. *See Rokhfirooz v. Larose*, No. 25-CV-2053-RSH-VET, 2025 WL 2646165, at *2 (S.D. Cal. Sept. 15, 2025) ("A prisoner bears the burden of demonstrating that 'he is in custody in violation of the Constitution or laws or treaties of the United States.'") (quoting 28 U.S.C. § 2241(c)(3), brackets omitted). Because removal to the above enumerated countries is "impracticable, inadvisable, or impossible," ICE may remove Petitioner to a third

country that will accept Petitioner's removal. 8 U.S.C. § 1231(b)(2)(E)(vii). In invoking its authority under 8 U.S.C. § 1231(b)(2)(E), ICE continues to detain Petitioner for purposes of executing his removal order to a third country.

Since Petitioner's re-detention, ICE has worked expeditiously to effectuate his resettlement in a third country to include their efforts to remove Petitioner to Mexico. Although ERO is still in the process of identifying countries that may be willing to accept Petitioner for removal, the record indicates that ICE is working diligently. *See also Zadvydas*, 533 U.S. at 700 (instructing district courts "to listen with care when the Government's foreign policy judgments, including, for example, the status of repatriation negotiations, are at issue, and to grant the Government appropriate leeway when its judgments rest upon foreign policy expertise.").

As it stands, it would be premature to conclude that there is no significant likelihood of removal in the reasonably foreseeable future before permitting ICE an opportunity to complete the diligent efforts it has taken to effect Petitioner's removal. ICE has taken the exact steps it needs to take to ensure their removal efforts bear fruit. Evidence of progress, even slow progress, in negotiating a petitioner's repatriation will satisfy *Zadvydas* until the petitioner's detention grows unreasonably lengthy. *See, e.g.*, *Sereke v. DHS*, Case No. 19-cv-1250-WQH-AGS, ECF No. 5 at 5 (S.D. Cal. Aug. 15, 2019) ("The record at this stage in the litigation does not support a finding that there is no significant likelihood of Petitioner's removal in the reasonably foreseeable future."); *Marquez v. Wolf*, Case No. 20-cv-1769-WQH-BLM, 2020 WL 6044080, at *3 (S.D. Cal. Oct. 13, 2020) (denying petition because "Respondents have set forth evidence that demonstrates progress and the reasons for the delay in Petitioner's removal").

Petitioner also suggests that once a third country is identified, ICE will immediately deport him there without being given adequate time to investigate whether he could be persecuted in that country. *See* ECF No. 1 at 8-10. ICE attests, however, that once a third country is identified, it "will provide Petitioner with written notice, and if Petitioner claims a fear of removal to the identified country, he will be referred to an

asylum officer for processing of the fear-based claims." Nunez Decl. at ¶¶ 13-14. The evidence further shows that ICE will generally wait at least 24 hours following the notice of third country removal before executing it, and under no circumstances would removal be executed in less time than that without the noncitizen being provided "reasonable means and opportunity to speak with an attorney prior to removal." *Id.* at ¶ 13. Thus, Petitioner's concern that he will not receive adequate notice and an opportunity to be heard prior to his third country removal is not borne out by the evidence in this case.

As to the regulatory violation claims, Petitioner was provided with a written Notice of Revocation of Release and an informal interview. *See* Exhibit 1. However, even if the agency's compliance with the regulations fell short, Petitioner has not established prejudice nor a constitutional violation. *See Brown v. Holder*, 763 F.3d 1141, 1148–50 (9th Cir. 2014) ("The mere failure of an agency to follow its regulations is not a violation of due process."); *United States v. Tatoyan,* 474 F.3d 1174, 1178 (9th Cir.2007) ("Compliance with . . . internal [customs] agency regulations is not mandated by the Constitution") (internal quotation marks omitted); *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming that the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation). As Petitioner cannot show prejudice under these circumstances, the alleged violation of agency regulations does not warrant the relief he seeks. *See, e.g.*, *Rodriguez v. Hayes*, 578 F.3d 1032, 1044 (9th Cir. 2009), *opinion amended and superseded on other grounds*, 591 F.3d 1105 (9th Cir. 2010) ("While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation 'when, in the opinion of the revoking official . . . [t]he purposes of release have been served . . . [or] [t]he conduct of the alien, or *any other circumstance*, indicates that release would no longer be appropriate.'")

(emphasis in original) (citing 8 C.F.R. §§ 241.4(*l*)(2)(i), (iv)); *Carnation Co. v. Sec'y of Labor*, 641 F.2d 801, 804 n.4 (9th Cir. 1981) ("violations of procedural regulations should be upheld if there is no significant possibility that the violation affected the ultimate outcome of the agency's action" (citation omitted)); *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980) (INS' failure to follow regulations requiring that an arrested alien be advised of his right to speak to his consul was not prejudicial and thus not a ground for challenging the conviction); *United States v. Barraza-Leon*, 575 F.2d 218, 221–22 (9th Cir. 1978) (holding that even assuming that the judge had violated the rule by failing to inquire into the alien's background, any error was harmless because there was no showing that the petitioner was qualified for relief from deportation).

To the extent Petitioner is challenging ICE's decision to detain him for the purpose of removal, such a challenge is precluded by statute. *See* 8 U.S.C. § 1252(g) ("Except as provided in this section and *notwithstanding any other provision of law* (statutory or nonstatutory), *including section 2241 of Title 28, or any other habeas corpus provision*, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this chapter.") (emphasis added); *see also Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of "commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—which represent the initiation or prosecution of various stages in the deportation process."); *Limpin v. United States*, 828 Fed. App'x 429 (9th Cir. 2020) (holding district court properly dismissed under 8 U.S.C. § 1252(g) "because claims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court's jurisdiction").

Because the record shows that Petitioner is not entitled to habeas relief, there is no need for an evidentiary hearing in this matter. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.").

IV. CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court deny the requests for relief and dismiss the petition.

DATED: February 6, 2026

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