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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ESTEBAN RIVERO,

Petitioner,

v.

KRISTI NOEM, Secretary of the Department of Homeland Security, PAMELA JO BONDI, Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center

Respondents.

CIVIL CASE NO.:
26-cv-00148-BJC-JLB

Traverse

INTRODUCTION

Mr. Rivero, a Cuban national, was granted deferral of removal to Cuba many years ago. He cannot be sent to Cuba. Mexico will not accept him. Despite not having any country to remove him to, Mr. Rivero's order of supervision was revoked and he sits detained in immigration custody for over three months.

This Court should grant Mr. Rivero's petition on all three grounds.

First, the Court should grant immediate release on *Zadvydas* grounds. Mr. Rivero cannot be removed to Cuba because of an immigration judge order and he cannot be removed to Mexico, because Mexico will not accept him. The government has not provided any evidence that Mr. Rivero can be removed in the reasonably foreseeable future to any country.

Second, the government's response does not rebut that ICE committed regulatory violations in the course of re-detaining Mr. Rivero. The government does not point to any changed circumstances at the time of revocation that justified detention. In fact, the evidence shows that Mr. Rivero cannot be removed to Cuba because he was granted deferral of removal. And at the time of the revocation, the government had not even reached out to Mexico to see if he could be removed to that country. When the government finally reached out to Mexico, *after* detaining Mr. Rivero, it turned out that Mexico will not accept him.

Finally, if—despite all evidence to the contrary—ICE is able to remove Mr. Rivero to a third country, ICE must at a minimum give him the process set forth in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025). Twenty-four hours' notice is not near enough to satisfy the Constitution.

This Court should therefore grant this petition on all three counts. This Court should order immediate release and order that ICE provide Mr. Rivero due process before removing him to a third country in the future.

ARGUMENT

I. Count 2: Mr. Rivero's detention violates *Zadvydas* and 8 U.S.C. § 1231.

A. The six-month grace period has long expired.

In his Petitioner, Mr. Rivero argued that the six-month grace period under *Zadvydas* has long since ended following his order of removal and grant of deferral of removal to Cuba under Convention Against Torture. Doc no 6-1 at ¶2. The government's return does not say anything about this and thus does not dispute the passing of the grace period.

B. The government has not even identified a third country that could possibly take Mr. Rivero, let alone established a significant likelihood that that will happen in the reasonably foreseeable future.

Mr. Rivero's continued detention violates 8 U.S.C. § 1231 as interpreted in *Zadvydas*, because there is no significant likelihood of his removal in the reasonably foreseeable future.

The government provides no evidence that Mr. Rivero can be removed to *any* third country. Petitioner's petition provided good reason to think that he would not be removed in the reasonably foreseeable future, because the evidence showed that he could not be removed to Cuba or any third country. The government now admits that Mexico declined to accept him for removal. Doc. 8-1 at ¶ 11 ("ICE attempted to remove the Petitioner to Mexico on January 8, 2026, but the Mexican government denied repatriation."). The government does not identify any other country that might take him. *Id.* at ¶ 12. The government has not even asked any other country to do so. *Id.* at ¶ 12-13.

A petition should be granted on *Zadvydas* grounds where "Respondents have not even identified a third country to which they plan to remove Petitioner, much less submitted a travel document or provided an estimate for how long it would take this unidentified third country to respond." *Azzo v. Noem*, No. 3:25-CV-03122-RBM-BJW, 2025 WL 3535208, at *4 (S.D. Cal. Dec. 10, 2025). Because

Respondents have "offered little more than generalizations regarding the likelihood that removal will occur," *Kamyab v. Bondi*, Case No. C25-389RSL, 2025 WL 2917522 (W.D. Wash. Oct. 14, 2025), this Court should find that they have not met their burden to "respond with evidence sufficient to rebut" Petitioner's showing. *Zadvydas*, 533 U.S. at 701.

II. Count 1: Government has not produced any evidence that Mr. Rivero's re-detention was on account of changed circumstances or that he received a prompt interview in connection with his re-detention.

Mr. Rivero's petition alleged several regulatory violations, any one of which would offend due process and require his release. The government does not rebut any of them.

First, the government lacks regulatory authority to revoke a noncitizen's release, and violates its own regulations, when it is unable to show sufficient evidence that a determination took place *before, or at, the time it re-detained* petitioner, based on changed circumstances, which justified the revocation of petitioner's release. *Rokhfirooz v. Larose*, --- F.Supp.3d ----, 2025 WL 2646165, at *3 (S.D. Cal. 2025); *Tran v. Noem*, No. 3:25-CV-02391-BTM-BLM, 2025 WL 3005347, at * 2 (S.D. Cal. Oct. 27, 2025). Although the Notice of Revocation noticed an intent to try to remove Mr. Rivero to Mexico, that is not a "changed circumstances" such that there is now "a significant likelihood that [Petitioner] may be removed in the reasonably foreseeable future." § 241.13(i)(2).

ICE did not even begin the process of requesting travel documents from Mexico until after it re-detained him. Doc. No. 8-2, Nunez Dec., ¶ 11.

Furthermore, ICE did not "afford[] [Mr. Rivero] an opportunity to respond to the reasons for revocation." 8 C.F.R. §§ 241.13(i)(3); 241.4(*l*)(1). The government does not have documentation of an informal interview occurring. Doc. No. 8-1 at ¶9. DO Nunez declares that an information interview was given but does not state the basis for that knowledge. *Id.* But even if an informal interview was

given here, "Petitioner could not have responded to the reasons for revocation, because they were not given." *Sarail A.*, __ F. Supp. 3d __, 2025 WL 2533673 at *10. In fact, it appears that, even if ICE had afforded Mr. Rivero an opportunity to respond, it would not have "evaluat[ed] . . . any contested facts relevant to the revocation" regarding the likelihood he may be removed and "determine[ed] whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.13(i)(3).

If Mr. Rivero did need to show prejudice, however, he could. As his petition shows, he has good reason to contest that circumstances have changed or that ICE can remove him in the reasonably foreseeable future. And even if changed circumstances justified re-detention, that would give ICE only the *discretion* to detain him. 8 C.F.R. § 241.13(i)(2). The informal interview process gave Mr. Rivero a chance to persuade ICE not to exercise that option.[1]

He would have had a strong argument against re-detention had ICE given him a prompt interview. Petitioner was a model releasee, always checking in and never violating conditions. Exhibit A, Doc. 6-1 at ¶ 3. And ICE was fully capable of trying to get a travel document while Mr. Rivero remained at liberty. ICE agents could simply have asked him to check in whenever they need additional signatures or information from him. There is therefore a "plausible scenario[] in which the

[1] The government has sometimes claimed that a re-detained individual can contest only whether there is a significant likelihood of removal in the reasonably foreseeable future. But that limitation appears nowhere in the regulation. To the contrary, the regulation provides an "opportunity to respond to the reasons for revocation stated in the notification" and charges the interviewer with making "a determination whether the facts as determined warrant revocation and further denial of release." 8 C.F.R. § 241.13(i)(3). A valid "respon[se] to the reasons for revocation" is to ask for discretionary release. *Id.* And an interviewer could validly "determine[e] [that] the facts" do not "warrant revocation and further denial of release" based on the immigrants reasons for requesting a favorable exercise of discretion.

outcome of the proceedings would have been different if a more elaborate process were provided," *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 495 (9th Cir. 2007) (cleaned up): A reasonable interviewer might well have decided not to detain a model releasee when detention was unnecessary to effectuate ICE's goals.

Accordingly, for this reason alone, this Court must order Mr. Rivero's immediate release.

III. Count 3: ICE may not remove Mr. Rivero to a third country without adequate notice and an opportunity to be heard.

The record therefore reflects that Petitioner will not be removed to a third country in the reasonably foreseeable future. But ICE would remove him to a third country if it could, and something could unexpectedly change to make that feasible. To protect against that possibility, this Court should require the government to provide the notice set forth in *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025), before removing Petitioner to any other third country. The government's three arguments to the contrary are meritless.

First, the Supreme Court's decision in *D.V.D.* does not affect this Court's authority to order injunctive relief in this individual case. In *D.V.D.*, the government sought a stay based on procedural arguments applicable only to class actions. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153, 2160 (2025) (Sotomayor, J., dissenting). But "even if the Government [was] correct that classwide relief was impermissible" in *D.V.D.*, Respondents still "remain[] obligated to comply with orders enjoining [their] conduct with respect to individual plaintiffs" like Petitioner. *Id.* Thus, the Supreme Court's decision does not override this Court's authority to grant individual injunctive relief. *See Nguyen v. Scott*, No. 2:25-CV-01398, 2025 WL 2419288, at *20–23 (W.D. Wash. Aug. 21, 2025).

Second, Petitioner can seek this relief in this habeas petition despite the pending class action. The Ninth Circuit held as much in analogous circumstances

in *Pride v. Correa*, which permitted a detained person to individually challenge his own inadequate medical care despite a pending class action challenging medical care at the facility. 719 F.3d 1130, 1137 (9th Cir. 2013). The Ninth Circuit reasoned that "[i]ndividual claims for injunctive relief related to medical treatment are discrete from the claims for systemic reform addressed in" a class action. *Id.* "Consequently, where an inmate brings an independent claim for injunctive relief solely on his own behalf for medical care that relates to him alone, there is no duplication of claims or concurrent litigation." *Id.* Otherwise, individual plaintiffs "would be powerless to petition the courts for redress of the violation until" a class action, which can take years to finish, "has been fully resolved." *Id.* The Court therefore rejected the contention that "an individual claim for injunctive relief may be delayed because a pending class action seeks systemic reform relating to the same general subject matter." *Id.*

So too here. Petitioner brings individual claims related to him alone, rather than asking for the systemic reforms sought in *D.V.D.* And per the government's arguments in *D.V.D.*, these claims must be brought on an individual basis; they cannot be brought in a class action. The government's position therefore would bar Petitioner from seeking relief individually, even while the government argues in *D.V.D.* that he cannot get that relief as part of a class. This Court should reject that "heads, I win; tails, you lose" reasoning. Under *Plata*, "[t]he class certification order in *D.V.D.* does not prevent this Court from adjudicating Petitioner's claims regarding third-country removal." *Nguyen v. Scott*, 796 F. Supp. 3d 703, 730 (W.D. Wash. 2025).

Third, 24 hours' notice is not near enough to satisfy due process. Petitioner may not even have heard of the third country to which ICE intends to deport him, let alone have extensive information about the dangers he could face there. He will need time to research the country conditions before he can make a fair, intelligent decision about whether he fears removal. And if he does fear removal, but ICE does

not consider his fear reasonable, he will need time to obtain an attorney and file a motion to reopen. That is why the court in *D.V.D.* laid out a two-step timeline for receiving notice about third countries: Petitioners need 10 days to decide whether to raise a fear-based claim and, if ICE decides that they do not have a reasonable fear, an additional 15 days to move to reopen. *D.V.D. v. U.S. Dep't of Homeland Sec.*, No. CV 25-10676-BEM, 2025 WL 1453640, at *1 (D. Mass. May 21, 2025). This Court should follow suit.

IV. Section 1252(g) does not deprive this Court of jurisdiction on any issue in this petition.

Finally, contrary to the government's arguments, § 1252(g) does not bar review of "all claims arising from deportation proceedings." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Instead, courts "have jurisdiction to decide a purely legal question that does not challenge the Attorney General's discretionary authority." *Ibarra-Perez v. United States*, __ F.4th __, 2025 WL 2461663, at *6 (9th Cir. Aug. 27, 2025) (cleaned up).

In *Ibarra-Perez*, the Ninth Circuit squarely held that § 1252(g) does not prohibit immigrants from asserting a "right to meaningful notice and an opportunity to present a fear-based claim before [they] [are] removed," *id.* at *7[2]—the same claim that Petitioner raises here with respect to third-country removals. The Court reasoned that "§ 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders." *Id.* Instead, 1252(g) is "limited . . . to actions challenging the Attorney General's discretionary decisions to initiate proceedings, adjudicate cases, and execute removal orders." *Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018). It does not apply to arguments

[2] Mr. Ibarra-Perez raised this claim in a post-removal Federal Tort Claims Act ("FTCA") case, *id.* at *2, while this is a pre-removal habeas petition. But the analysis under § 1252(g) remains the same, because both Mr. Ibarra-Perez and Petitioner are challenging the same kind of agency action. *See Kong*, 62 F.4th at 616–17 (explaining that a decision about § 1252(g) in an FTCA case would also affect habeas jurisdiction).

that the government "entirely lacked the authority, and therefore the discretion," to carry out a particular action. *Id.* at 800. Thus, § 1252(g) applies to "discretionary decisions that [the Secretary] actually has the power to make, as compared to the violation of his mandatory duties." *Ibarra-Perez*, 2025 WL 2461663, at *9.

The same logic applies to all of Petitioner's claims, because he challenges only violations of ICE's mandatory duties under statutes, regulations, and the Constitution. Accordingly, "[t]hough 8 U.S.C § 1252(g), precludes this Court from exercising jurisdiction over the executive's decision to 'commence proceedings, adjudicate cases, or execute removal orders against any alien,' this Court has habeas jurisdiction over the issues raised here, namely the lawfulness of [Petitioner] continued detention and the process required in relation to third country removal." *Y.T.D.*, 2025 WL 2675760, at *5. Many courts agree. *See, e.g.*, *Kong*, 62 F.4th at 617 ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention," including ICE's "fail[ure] to abide by its own regulations"); *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000) ("[S]ection 1252(g) does not bar courts from reviewing an alien detention order[.]"); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (1252(g) did not apply to a "claim concern[ing] detention"); *J.R. v. Bostock*, No. 2:25-CV-01161-JNW, 2025 WL 1810210, at *3 (W.D. Wash. June 30, 2025) (1252(g) did not apply to claims that ICE was "failing to carry out non-discretionary statutory duties and provide due process"); *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355, 377–78 (D. Mass. 2025) (1252(g) did not bar review of "the purely legal question of whether the Constitution and relevant statutes require notice and an opportunity to be heard prior to removal of an alien to a third country").

Respectfully submitted,

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s/ Zandra L. Lopez

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