

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

O.R.M.M.,

Petitioner,

v.

Mary De ANDA-YBARRA, in her official
capacity as El Paso Field Office Director for U.S.
Immigration and Customs Enforcement, et. al.,

Respondents.

Case No. EP-26-CV-00094-DB

PETITIONER'S REPLY IN SUPPORT OF PETITIOIN FOR WRIT OF HABEAS
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Petitioner, O.R.M.M., alleges that Immigration and Customs Enforcement (“ICE”) arrested and then detained him in October 2025, in violation of federal statutes, regulations, and the U.S. Constitution because the agency revoked his Order of Supervision (“OSUP”) without prior notice or opportunity to be heard as the operative law, regulations, and Due Process Clause requires. *See generally* Dkt. 1. In their response, Respondents spend exactly one sentence addressing these allegations, stating in conclusory fashion and without any supporting evidence that “ICE denies any allegations related to their adherence to the OSUP revocation regulations”. Dkt. 6, p. 9. Instead of engaging with the merits of Petitioner’s claims, Respondents misconstrue his petition and argue that the inquiry is whether his removal is reasonably foreseeable. That is not the question presented in this case.

District courts from Florida to Oregon – and in this District – considering petitions presenting the same material facts and legal arguments as O.R.M.M.’s have concluded that

detention without adherence to proper procedures is unlawful and violates the regulations and the Constitution. For the reasons stated herein, this Court should follow these well-reasoned decisions and, as numerous other courts have done, order O.R.M.M.'s immediate release.

A. Respondents failed to comply with the agency's regulations and Due Process in arresting and detaining O.R.M.M.

The power of the government to arrest and detain noncitizens is not without limitations. To the contrary, the power of government to act is delineated by a specific set of statutes and federal regulations and subject to the limitations of the United States Constitution. Because ICE's arrest and detention of O.R.M.M. did not comport with the statutory and regulatory requirements and was in violation of the Constitution, this Court should grant his Petition and order his immediate release.

The INA provides Respondents with the authority to arrest and detain a noncitizen with a final removal order. 8 U.S.C. §§ 1231(a)(2), (a)(6). It is undisputed that O.R.M.M. has a final order of removal and that he was granted deferral of removal under the Convention Against Torture. Dkt. 6, p. 2. It is also undisputed that, after his removal order and grant of protection, O.R.M.M. was released from ICE custody in 2017. *Id.*

The statute authorizes release of a noncitizen on an order of supervision after the end of the "removal period," typically 90 days after removal is ordered. 8 U.S.C. §§ 1231(a)(3), (a)(6). Federal regulations specify that ICE may only release individuals and place them on an OSUP if they "demonstrate[] to the satisfaction of the Attorney General . . . that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal." 8 C.F.R. § 241.4(d); *see also id.* § 241.4(e)(6). These requirements—flight risk and danger—reflect constitutional constraints, since only individuals who pose a flight risk or danger may be civilly detained. *See Zadvydas v. Davis*, 533 U.S. 690

(2001). Respondents concede ICE released O.R.M.M. from custody pursuant to 8 U.S.C. § 1231 and placed him on an OSUP eight years ago after necessarily finding him neither a flight risk nor a danger to the community. *See* Dkt. 6, p. 2, 8-9. Once ICE placed O.R.M.M. on an OSUP, regulatory duties and due process requirements attached, allowing revocation only if an authorized ICE official made particular findings, and after affording him meaningful notice and an opportunity to be heard. *See Marquez-Amaya v. Thompson*, No. 5:25-CV-1501-JKP, 2025 WL 3654327, at *6 (W.D. Tex. Dec. 15, 2025) (“Release under an Order of Supervision of a noncitizen who has been ordered removed invokes ‘detailed regulations concerning when and how that Order of Supervision may be revoked.’”); *K.E.O. v. Woosley*, 2025 WL 2553394, at *7 (W.D. Ky. Sept. 4, 2025).

Respondents published regulations to implement 8 U.S.C. § 1231. The relevant regulation here, 8 C.F.R. § 241.4, delineates who can revoke a noncitizen’s supervision; for what reasons supervision can be revoked; and what process is required to comply with due process, given the liberty interest at stake.

By regulation, ICE could have revoked O.R.M.M.’s OSUP if he violated the conditions of release. 8 C.F.R. § 241.4(l)(1). ICE’s Executive Associate Commissioner¹ could have revoked his OSUP in his/her discretion if: “(1) the purposes of release have been served; (2) the alien violates any condition of release; (3) it is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (4) the conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.” 8 C.F.R. § 241.4(l)(2). Finally, ICE’s District

¹ When the Homeland Security Act transferred functions to DHS, the authority for certain functions shifted to the new agency, which had different titles. *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 160 (W.D.N.Y. 2025). Accordingly, Section 241.4(l)(2)’s reference to “Executive Associate Commissioner . . . means conferring the authority on the Executive Associate Director of ICE.” *Id.*

Director² could have revoked his OSUP upon a finding that revocation was in the public interest.

However, Respondents have never argued—or presented any evidence to suggest—O.R.M.M. violated the conditions of his release, ICE’s Executive Associate Commissioner exercised his/her discretion to revoke O.R.M.M.’s OSUP, or ICE’s District Director made a finding that revoking O.R.M.M.’s OSUP was in the public interest. Respondents instead claim, “the revocation of Petitioner’s release and his current detention are both legally permissible because of the change in circumstances relating to the United States’ ability to remove final order aliens from the United States via third country removal options.” Dkt. 6, p. 9. In so arguing, Respondents appear to rely on, but do not cite, the discretionary authority under 8 C.F.R. § 241.4(l)(2). However, their argument fails factually and legally.

First, Respondents cite no evidence to support—and no evidence in the record supports—their contention that ICE exercised discretionary authority to revoke O.R.M.M.’s OSUP “in anticipation of removal.” Dkt. 6, p. 9. None of the evidence proffered by the Respondents suggests ICE was even aware O.R.M.M. was subject to an OSUP when he was arrested, much less evidencing that an authorized official made a discretionary determination to revoke his OSUP based on the regulatory requirements.

Furthermore, the record does not support that ICE detained O.R.M.M. “in anticipation of removal.” Dkt. 6, p. 9. O.R.M.M. was arrested and detained in October 2025. It was not until December 2025, two months after his re-detention, that ICE served O.R.M.M. with a Notice of Intent to remove him to Mexico. Dkt. 1, p. 24. Prior to this notice, ICE attempted to unlawfully remove O.R.M.M. twice, including putting him on a plane to Honduras in violation of his order of

² The regulation’s reference to a “District Director” means the ICE Field Office Director. *Ceesay*, 781 F. Supp. 3d at 160.

protection. *Id.* at p. 22. As courts in this District have recognized, “[t]he Government cannot cure the wrongful commencement of detention through after-the-fact determinations of potential expeditious removal.” *Marquez-Amaya v. Thompson*, No. 5:25-CV-1501-JKP, 2025 WL 3654327, at *6 (W.D. Tex. Dec. 15, 2025); *see also Alnajjar v. GEO Grp., Inc.*, No. 5:25-CV-0822-JKP, 2025 WL 3853217, at *5 (W.D. Tex. Dec. 23, 2025) (“ICE did not commence Petitioner’s current detention because it had located a country willing to accept him. ICE detained him essentially without any explanation and without a removal plan.”). Yet, that is exactly what it has attempted to do here.

Respondents state in a conclusory fashion that they “deny allegations related to their adherence to the OSUP revocation regulations.” Dkt. 6, p. 9. However, Respondents have produced no evidence, not an affidavit, a Notice of Revocation of Release, or anything else, that demonstrates *why* ICE revoked O.R.M.M.’s release. In place of record evidence demonstrating a basis for revoking his release, Respondents’ counsel supplies a justification for the OSUP revocation on behalf of the agency that amounts to nothing more than a post-hoc rationalization that violates the *Chenery* doctrine. *See Mengistu v. Ashcroft*, 355 F.3d 1044, 1046 (7th Cir. 2004) (the “*Chenery* doctrine . . . forbids the lawyers for an administrative agency to defend the agency’s decision on a ground different from that stated or at least discernible in the decision itself”) (citations omitted). The Court “cannot accept . . . counsel’s post hoc rationalizations for agency action; for an agency’s order must be upheld, if at all, on the same basis articulated in the order by the agency itself.” *Fed. Power Comm’n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (internal quotation marks and citations omitted).

Even if ICE had some basis for revoking O.R.M.M.’s OSUP and even if the appropriate official had made the requisite finding required by the regulations (neither happened here), the

Fifth Amendment and the agency's regulations required he be given notice of the reasons for revocation as well as an opportunity to be heard to contest the basis for the revocation. *See K.E.O.*, 2025 WL 2553394, at *6; 8 C.F.R. § 241.4(l). Section 241.4(l) requires that, "[u]pon revocation[, the noncitizen] will be notified of the reasons for revocation of his or her release or parole . . . [and] be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification."³ As discussed in his petition, to comply with these requirements, ICE must provide the noncitizen with a Notice of Revocation of Release describing the individualized basis for the revocation *upon revocation* (not after the fact) and, promptly thereafter, an interview at which the noncitizen can respond to the proffered basis for revocation. Here, O.R.M.M. was not notified of the reasons for revocation or provided a prompt interview at the time of his arrest or anytime in the three months since.

B. Petitioner brings a valid APA claim.

"Just as a state may give its people more legally enforceable rights than a statute or a constitutional provision requires . . . so may a federal agency, by a regulation within its authority to issue, grant persons subject to its authority more legally enforceable rights than a statute or the Constitution gives them." *Samirah v. Holder*, 627 F.3d 652, 664 (7th Cir. 2010) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–68 (1954)). At a minimum, ICE is "required to follow [its] own regulations . . . including those that govern exercises of an agency's discretion." *Zelaya Diaz v. Rosen*, 986 F.3d 687, 690 (7th Cir. 2021); *Accardi*, 347 U.S. 260, 266,

³ Courts have held that revocations under both 8 C.F.R. § 241.4(l)(1) and (l)(2) require notice upon revocation and a prompt interview. *See, e.g. K.E.O.*, 2025 WL 2553394, at *5; *Ceesay*, 2025 WL 1284720; *Orellana*, 2025 WL 2444087; *Zhu v. Genalo*, 2025 WL 2452352, at *9 (S.D.N.Y. Aug. 26, 2025).

268 (1954); *see also* *K.E.O.*, 2025 WL 2553394, at *3. When the government fails to comply with its own federal regulations, the action should be found invalid. *See N.A.L.R. v. Bondi, et al.*, 2025 WL 2987239, at *3 (S.D. Ind. Oct. 23, 2025); *K.E.O.*, 2025 WL 2553394, at *3; *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 166 (W.D.N.Y. 2025); *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017).

The undisputed facts demonstrate that Respondents failed to comply with 8 C.F.R. § 241.4(l) when they revoked O.R.M.M.'s OSUP without providing him with a notice of the reason for the revocation of his release or an opportunity to respond. Respondents cite no evidence that O.R.M.M. was given notice of the reasons for revocation or an opportunity to contest the basis for revocation.

District courts across the country that have considered habeas petitions challenging ICE's arrest and detention of a noncitizen subject to an OSUP in which the agency failed to comply with its own regulations have concluded the arrest and detention constituted an *Accardi* violation and, due to the prejudice of the unlawful arrest and detention, have ordered the noncitizen be released. *See, e.g., N.A.L.R.*, 2025 WL 2987239, at *3; *Grigorian v. Bondi*, 2025 WL 2604573, at *9 (S.D. Fla. Sept. 9, 2025); *Santamaria Orellana v. Baker*, 2025 WL 2444087, at *8 (D. Md. Aug. 25, 2025); *M.S.L. v. Bostock*, 2025 WL 2430267, at *12 (D. Or. Aug. 21, 2025); *Ceesay*, 781 F. Supp. 3d at 165. The same result is appropriate here. This Court should hold that ICE's arrest and detention of O.R.M.M. violated the Respondents' regulations and is invalid. The Court need not reach the constitutional arguments if it finds that the Agency violated its own regulations and release is appropriate on that basis alone.

C. *Zadvydas* is not the proper inquiry, but even if it were, Petitioner is entitled to release.

Respondents' primary argument is that this case is controlled by the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 690 (2001) and that "a § 1231 detainee who fails the *Zadvydas* test fails to prove a due process violation." Dkt. 6, p. 2. In so arguing, Respondents misconstrue and conflate two distinct legal concepts. While *Zadvydas* may control claims challenging a noncitizen's indefinite detention after an order of removal, that is not the claim O.R.M.M. raises in his petition. Rather, as discussed above and in his petition, O.R.M.M. argues that ICE violated its regulations and the Constitution when it arrested and detained him with no notice or opportunity to be heard.

Courts in this District have readily recognized that these are distinct issues. *See e.g.*, *Alnajjar*, 2025 WL 3853217, at *5; *Marquez-Amaya*, 2025 WL 3654327, at *6. For example, in *Alnajjar*, the Court recognized that the petitioner raised both a *Zadvydas* claim and a claim challenging ICE's failure to follow its own regulations. *Alnajjar*, 2025 WL 3853217, at *3. As to the latter, the Court specifically found that "a failure to comply with applicable regulations provides an alternative basis for granting habeas relief and ordering a petitioner's release. [...] the Court finds the failure to comply with 8 C.F.R. § 241.13 provides an alternative basis for granting relief in this case." *Id.* at *5. Similarly here, ICE's failure to follow its regulations is an independent basis sufficient to grant relief.

However, even assuming *Zadvydas* was the proper standard, O.R.M.M. has demonstrated that his removal is not reasonably foreseeable. While ICE served him with a Notice of Intent to remove him to Mexico, O.R.M.M., through counsel, quickly filed a motion to reopen and stay removal efforts to Mexico with the immigration court. Dkt. 1, p. 25-43. The immigration court granted him a stay of removal and recently also granted his motion to reopen proceedings. *Id.* at

44. Thus, ICE cannot remove O.R.M.M. to Mexico at this time, and may well never be able to do so pending the outcome of his reopened proceedings. *Alnajjar*, 2025 WL 3853217, at *5 (finding that “any efforts to remove [Petitioner] to a third country would likely be delayed by proceedings contesting his removal to the third country ... identified. When a petitioner ‘likely will have the opportunity to seek further relief from the Immigration Court, and then potentially file appeals from any adverse rulings,’ the circumstances ‘further demonstrate[] that removal is not likely in the reasonably foreseeable future.’”) (citations omitted); *Marquez-Amaya*, 2025 WL 3654327, at *6 (same).

CONCLUSION

Despite fully complying with his OSUP for eight years, ICE officers unlawfully revoked O.R.M.M.’s OSUP and arrested and detained him in violation of the agency’s regulations and the Fifth Amendment’s Due Process Clause. Because he was unlawfully arrested and detained, causing him irreparable harm, this Court should order his immediate release.

Dated: January 28, 2026

Respectfully submitted,

s/ Colleen Cowgill

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CERTIFICATE OF SERVICE

I, Colleen Cowgill, hereby certify that on January 28, 2026, I filed the foregoing with the Clerk of Court using the CM/ECF system, which sent notice of filing to all parties receiving electronic notice.

s/ Colleen Cowgill

Attorney for Petitioner