

United States District Court
Western District of Texas
El Paso Division

Ounheuan Hong,
Petitioner,

v.

Kristi Noem, *et al.*,
Respondents.

No. 3:26-CV-00302-LS

**Federal¹ Respondents' Response in Opposition to
Petitioner's Writ of Habeas Corpus**

Respondents submit this response to Petitioner's Petition for a Writ of Habeas Corpus². See ECF No. 1. In his petition for writ of habeas corpus under 28 U.S.C. § 2241, Mr. Lopez, ("Petitioner"), seeks release from civil immigration detention, claiming unlawful detention and unlawful revocation of his Order of Supervision (OSUP), contrary to statute and the Due Process Clause. See ECF No. 1 at 13 ¶ 43-44. Petitioner's claims lack merit, and this petition should be denied.

Despite his allegation that his detention is "unlawful," Petitioner has a final order of removal, which not only mandated his detention under 8 U.S.C. § 1231(a) during the 90-day removal period but allows for continued detention beyond the removal period in the exercise of ICE's discretion, so long as removal is reasonably foreseeable. 8 U.S.C. § 1231(a)(6); *see*

¹ The named warden in this action is not a federal employee. The Department of Justice does not represent the warden in this action. The Federal Respondents are lawfully detaining Petitioner pursuant to 8 U.S.C. § 1231(a)(6).

² Respondents filed an assumed Opposed Motion to Extend Time on February 25, 2026 (ECF No. 5). Petitioner filed a response in opposition of Respondent's request (ECF No. 6). Respondents requested up until March 4, 2026, to file a response. The Court did not issue an Order or otherwise rule on Respondents motion or Petitioner's motion in opposition. To the extent this filing is deemed untimely, Respondents respectfully apologize to the Court.

Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

Petitioner's constitutional challenge to continued detention is not ripe until he has been detained in post-order custody for at least six months, and there is insufficient reason to believe that removal is unlikely in the foreseeable future. The burden of proof has not shifted to Respondents, but even if it had, Respondents can show that removal is likely in the reasonably foreseeable future. For these reasons, the Court should deny this habeas petition. Any non-habeas claims should be dismissed.³

I. Facts and Procedural History

Petitioner is a native and citizen of Laos United States who was admitted to the United States at Seattle, Washington on or about November 21, 1983. *See* Gov't Exh A (Notice to Appear). On January 23, 1985, Petitioner adjusted his status to Lawful Permanent Resident. *Id.* On January 25, 2007, Petitioner was convicted in the United States District Court District of Minnesota for the offense of, Narcotics and Firearms, in violation of 21 of U.S.C. § 841(a)(1); (b)(1)(B), 846 and 18 U.S.C. § 924(c)(1)(A). *Id.* Petitioner was ordered removed on April 13, 2010. ECF No. 1 at ¶ 32; *see also*, Gov't Exh. B (IJ Removal Order). Petitioner was released on an Order of Supervision ("OSUP"). *See* Pet Exh. 1. On January 18, 2026, Petitioner was placed back in ICE custody. ECF No. 1 at ¶ 38; *see also*, Gov't Exh. C (Warrant of Removal/Deportation). Petitioner is manifested for removal on a charter flight. *See* Exh. D (ERO Declaration) at ¶ 5. The

³ Petitioner did not pay the filing fee for non-habeas claims. *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)). "When a filing contains both habeas and on-habeas claims, 'the district court should separate the claims and decide the [non-habeas] claims' separately from the habeas ones given the differences between the two types of claims. *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.

charter flight is scheduled to depart before April 3, 2026. *Id.* The exact date of departure is **known** but not provided here to protect the integrity of the mission and the safety of the officers and detainees to, from and on the flight. *Id.*

Detention Is Lawful Under 8 U.S.C. §1231(a)(6).⁴

The 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*, 533 U.S. at 701. Under § 1231, the removal period can be extended in at 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.

II. Petitioner’s Substantive Due Process Claim under *Zadvydas* is Premature.

Petitioner’s reliance on *Zadvydas* is premature because he has been detained less than six months. To state a claim for relief under *Zadvydas*, Petitioner must 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*

⁴ Respondents considered the Court’s orders addressing detention under U.S.C. § 1225(b)(1), (b)(2). *See* ECF No. 3 at 1-2.

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 and cannot make this showing, as he has been currently detained less than six months in post-order custody. *Chance v. Napolitano*, 453 F. App'x 535, 2011 WL 6260210 at *1 (5th Cir. Dec. 15, 2011); *Agyei-Kodie v. Holder*, 418 F. App'x 317, 2011 WL 891071 at *1 (5th Cir. Mar. 15, 2011); *Gutierrez-Soto v. Sessions*, 317 F.Supp.3d 917, 929 n.33 (W.D. Tex. 2018); *Kasangaki v. Barr*, 2019 WL 13221026 at *3 (W.D. Tex. July 31, 2019); *Linares v. Collins*, 1:25-CV-00584-RP-DH, ECF No. 14 at 7–16 (W.D. Tex. Aug. 12, 2025). Petitioner has been in custody since January 2026. See ECF No. 1 at ¶ 75; *see also*, Gov't Exh. D Warrant of Removal/Deportation).

III. There Is No Good Reason to Believe That Removal Is Unlikely in the Reasonably Foreseeable Future.

Petitioner cannot show “good reason” to believe that removal is unlikely in the reasonably foreseeable future. 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; *see also Linares*, ECF No. 14 at 8, 10–11.

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. *Id.* at 14–16; *see Andrade v. Gonzales*, 459 F.3d 538, 543–44 (5th Cir. 2006); *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.*

The “reasonably foreseeable future” is not a static concept; it is fluid and country-specific, depending in large part on country conditions and diplomatic relations. *Ali v. Johnson*, No. 3:21–CV–00050-M, 2021 WL 4897659 at *3 (N.D. Tex. Sept. 24, 2021). Additionally, a lack of visible progress in the removal process does not satisfy the petitioner’s burden of showing that there is no significant likelihood of removal. *Id.* at *2 (collecting cases); *see also Idowu v. Ridge*, No. 3:03–CV–1293-R, 2003 WL 21805198, at *4 (N.D. Tex. Aug. 4, 2003). Conclusory allegations are also insufficient to meet the alien’s burden of proof. *Nagib v. Gonzales*, No. 3:06–CV–0294-G, 2006 WL 1499682, at *3 (N.D. Tex. May 31, 2006) (citing *Gonzalez v. Bureau of Immigration and Customs Enforcement*, No. 1:03–CV–178-C, 2004 WL 839654 (N.D. Tex. Apr. 20, 2004)). One court explained:

To carry his burden, [the] petitioner must present something beyond speculation and conjecture. To shift the burden to the government, [the] petitioner must demonstrate that “the circumstances of his status” or the existence of “particular individual barriers to his repatriation” to his country of origin are such that there is no significant likelihood of removal in the reasonably foreseeable future.

Idowu, 2003 WL 21805198, at *4 (citation omitted).

Petitioner argues his detention serves no lawful purpose and violates the Fourth Amendment, the Fifth Amendment’s Due Process Clause, the Administrative Procedure Act, and the *Accardi* doctrine. ECF No. 1 at 2. Further, Petitioner claims revoking a non-citizen’s order of supervision imposes a severe restriction on liberty and triggers both substantive and procedural due process. ECF No. 1 at ¶ 44. Petitioner’s claims are insufficient under *Zadvydas* because he has not shown that he has been in post-order custody for six months, and he has not shown any good reason to believe that removal is unlikely. *See Linares*, ECF No. 14 at 8, 10–11, 14–16; *Nogales*

v. Dept. of Homeland Sec., No. 21-10236, 2022 WL 851738 at *1 (5th Cir. Mar. 22, 2022) (citing *Rice v. Gonzalez*, 985 F.3d 1069, 1070 (5th Cir. 2021)); *Akbar v. Barr*, SA-20-CV-01132-FB, 2021 WL 1345530 (W.D. Tex. Mar. 5, 2021); *see also Andrade*, 459 F.3d at 543–44; *Boroky v. Holder*, No. 3:14-CV-2040-L-BK, 2014 WL 6809180, at *3 (N.D. Tex. Dec. 3, 2014); *Thanh v. Johnson*, No. EP-15-CV-403-PRM, 2016 WL 5171779, at *4 (W.D. Tex. Mar. 11, 2016) (denying habeas relief where government was taking affirmative steps to obtain Vietnamese travel documents). Petitioner has not shown that his continued detention is unreasonable, nor has he shown he is owed any additional due process than what he is currently receiving. *See Hernandezs-Esquivel v. Castro*, No. 5-17-cv-0564-RBF, 2018 WL 3097029, at *8 (W.D. Tex. June 22, 2018). Therefore, the burden of proof does not shift to Respondents to prove significant likelihood of removal in the reasonably foreseeable future.

Even if the burden did shift to ICE, ICE could show Petitioner's removal is likely to occur in the foreseeable future. Petitioner is in fact, manifested for removal on a charter flight. *See* Exh. D (ERO Declaration) at ¶ 5. That his flight is scheduled to depart before April 3, 2026. *Id.* at ¶ 6. Petitioner's substantive due process claim fails here as a matter of law.

IV. ICE Has Afforded Petitioner Procedural Due Process During His Post-Order Custody Pending Removal.

To establish a procedural due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Fifth Circuit has not provided guidance to lower courts, post-*Arteaga-Martinez*, on the appropriate standard for reviewing a procedural due process claim alleged by an alien detained under § 1231, but the Fourth Circuit, post-*Arteaga-Martinez*, used the *Zadvydas* framework to analyze a post-order-custody alien's due process claims. *See Linares*, at 10–14 (discussing *Castaneda v. Perry*, 95 F.4th 750, 760 (4th Cir. 2024)).

This Court should also follow *Zadvydas* to review the procedural claim at issue here. *Id.* Under the *Zadvydas* framework, six months post-order detention is reasonable, and unless that time frame has passed, any procedural due process claim is also premature.

In any event, the Fifth Circuit finds no procedural due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). Even if the Court were to find a procedural due process violation here, the remedy is substitute process. *Mohammad v. Lynch*, No. EP-16-CV-28-PRM, 2016 WL 8674354, at *6 n.6 (W.D. Tex. May 24, 2016) (finding no merit to petitioner's procedural due process claim where the evidence demonstrated that the review had already occurred, thereby redressing any delay in the provision of the 90-day and 180-day custody reviews). Even in the criminal context, failure to comply with statutory or regulatory time limits does not mandate release of a person who should otherwise be detained. *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990).

Petitioner argues that his continued detention is unconstitutional because he is well beyond the six-month presumptive constitutional limit recognized in *Zadvydas*. ECF No. 1 at 24 ¶ 94. He further argues that the DHS's interpretation of the APA is arbitrary and capricious. ECF No. 1 at ¶¶ 106-107. However, the remedy for any procedural due process violation is substitute process, not release. *See Mohammad v. Lynch, supra*. Petitioner's procedural due process claims should be dismissed and do not merit release from custody.

V. Petitioner's alleged violations of the Fourth Amendment is a claim outside habeas

The basis of Petitioner's argument – that his *warrantless arrest* on civil immigration grounds was unlawful – is not cognizable in this habeas petition, which vests jurisdiction in this Court solely to review the legal propriety of Petitioner's *current detention*. The question is not whether his detention was unlawful in the past. “[T]he great and central office of the writ of habeas corpus

is to test the **legality of the prisoner's current detention [emphasis added]**.” *Walker v. Wainwright*, 390 U.S. 335, 336 (1968).

In habeas, the Court does not review all possible previous errors, it asks only whether the confinement is justified. *See Lane v. Williams*, 455 U.S. 624, 631, (1982) (explaining that where detainment or its consequences have expired, a habeas petition is moot); *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (distinguishing between backward-looking remedies and habeas); *Lindh v. Murphy*, 521 U.S. 320, 342, (contrasting backward-looking actions like damages with “the writ of habeas corpus is prospective in nature,” and it “**does not compensate for past wrongful incarceration ..[emphasis added]..**”) (Scalia, J., dissenting). Whatever the circumstances and facts before now, they are thus irrelevant to resolution of the legality of the current detention.

VI. Conclusion

Petitioner’s detention is lawful under 8 U.S.C. § 1231(a)(6) and any due process claim is premature under *Zadvydas*. Petitioner’s continued detention is not unreasonably prolonged, nor is it in violation of the APA or the Constitution. Accordingly, the Court should deny this petition.

Date: March 5, 2026

Respectfully submitted,

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