District Judge James L. Robart

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FERDINAND KIPKORIR KIBOR, Petitioner, v. LAURA HERMOSILLO, *et al.*, Respondents.	Case No. 2:26-cv-00390-JLR FEDERAL RESPONDENTS'[1] RETURN MEMORANDUM Noted for Consideration: February 23, 2026

I. INTRODUCTION

This Court should deny Petitioner Ferdinand Kipkorir Kibor's Petition for Writ of Habeas Corpus. Dkt. No. 1 ("Pet."). Petitioner is a noncitizen who is subject to an order of removal that became administratively final on January 5, 2026. While the immigration court has granted Petitioner withholding of removal to Kenya, U.S. Immigration and Customs Enforcement ("ICE") is actively pursuing a third country removal. On February 13, 2026, ICE provided Petitioner with notice of its intent to remove him to Uganda. Petitioner claimed fear of such removal. As a result, ICE has referred Petitioner to U.S. Citizenship and Immigration Services ("USCIS") for the

[1] Respondent Bruce Scott is not a federal official and is not represented by undersigned counsel.

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

reasonable fear screening process. In the interim, ICE lawfully detains Petitioner pursuant to the mandatory 90-day removal period set forth in 8 U.S.C. § 1231(a)(2).

Petitioner first challenges his detention as unreasonable and asserts that "[t]here is no reasonable likelihood that Respondents will be able to remove Petitioner to a third country." Pet., ¶ 46. This challenge is premature as Petitioner is still within the 90-day removal period. Second, Petitioner requests this Court to enjoin the government from removing him "to any third country until and unless Respondents provide Petitioner with notice and an opportunity to respond before an Immigration Court capable of hearing Petitioner's claims for withholding of removal and relief under the Convention Against Torture." Pet., ¶ 51. As described below, Petitioner has received notice of his intended third country removal and will undergo the reasonable fear screening process. If Petitioner wishes to reopen his removal proceedings, nothing prevents him from moving to do so. 8 C.F.R. § 1003.23(b)(4)(i). Furthermore, U.S. Department of Homeland Security's ("DHS") policy addresses protections concerning third country removals, and to the extent that Petitioner seeks additional process, Petitioner should be required to seek that relief as a plaintiff class member in *D.V.D. v. U.S. Dep't of Homeland Sec.*, CV 25-10676-BEM, 2025 WL 942948 (D. Mass. Mar. 28, 2025).

II. BACKGROUND

A. Legal Background

The Immigration and Nationality Act ("INA") contains a complex scheme of authorities governing the detention and release of aliens during and following their removal proceedings. *See Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). These periods are generally referred to as "pre-order" (meaning before the entry of a final order of removal) and, relevant here, "post-order" (meaning after the entry of a final order of removal). *Compare* 8 U.S.C. § 1226 (authorizing pre-order detention) *with* § 1231(a) (authorizing post-order detention). Once a final

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

order of removal has been entered, an alien enters what Congress has called the "removal period." 8 U.S.C. § 1231(a)(1). During this period of 90 days, Congress has directed that the Secretary of Homeland Security "shall remove the alien from the United States." *Id.* To ensure an alien's presence for removal and to protect the community from dangerous aliens while removal is being achieved, Congress directed:

> During the removal period, the [Secretary of Homeland Security][2] shall detain the alien. *Under no circumstance during the removal period* shall the [Secretary] release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(2) (emphasis added). During the removal period, ICE[3] is charged with attempting to effectuate removal of an alien from the United States. 8 U.S.C. § 1231(a)(1).

Unlike Section 1231(a)(2), Section 1231(a)(6) does not mandate detention and does not place any temporal limit on the length of detention under that provision. 8 U.S.C. § 1231(a)(6). If an alien cannot be removed to the country designated in his removal order because the country refuses to accept the alien, the alien has been granted relief from removal to that country, the country refuses to recognize the alien as its citizen, or another reason, Congress has directed ICE to pursue removal to alternate countries. *See* 8 U.S.C. §§ 1231(b)(2)(D), (E); § 1231(b)(3); 8 C.F.R. §§ 241.13(a), 241.15.

The government is prohibited from removing a person to a third country where they may be persecuted or tortured, a form of protection known as withholding of removal. *See* 8 U.S.C. § 1231(b)(3)(A); *see also* 8 C.F.R. §§ 208.16, 1208.16. Similarly, the government cannot remove

---

[2] Although 8 U.S.C. § 1231(a)(2) refers to the "Attorney General" as having responsibility for detaining aliens, the Homeland Security Act of 2002, Pub. L. No. 107-296 § 441(2), 116 Stat. 2135, 2192 (2002), transferred this authority to the Secretary of the Department of Homeland Security. *See also* 6 U.S.C. § 251.

[3] Under 8 C.F.R. § 241.2(b), ICE deportation officers are delegated the Secretary of Homeland Security's authority to execute removal orders.

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

a person to a country where they would be tortured, a form of protection known as protection under the Convention Against Torture ("CAT"). *See* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Public Law 105–277, div. G, sec. 2242, 112 Stat. 2681, 2631–822 (8 U.S.C. § 1231 note); 28 C.F.R. §§ 200.1, 208.16–208.18, 1208.16-1208.18. Withholding of removal and CAT protection are mandatory, but "only restrict *where* the Government may remove a noncitizen to, not *whether* the noncitizen is subject to removal." *Kumar v. Wamsley*, No. C25-2055-KKE, 2025 WL 3204724, at *2 (W.D. Wash. Nov. 17, 2025). "Thus, even if the immigration judge grants such protection, the removal order remains valid and enforceable, albeit not to the identified country or countries of risk." *Id.* (citing 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 1208.16(f); *Johnson*, 594 U.S. at 536; *Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004).

In this case, Petitioner is the subject of an order of removal that became final on January 5, 2026. Pet., ¶ 21. Accordingly, the removal period and the corresponding mandated detention period continue through April 5, 2026. 8 U.S.C. § 1231(a)(1)(B)(i).

B. Petitioner Ferdinand Kipkorir Kibor

Petitioner, a citizen and native of Kenya, was admitted to the United States on a visitor visa with authorization to remain in the United States for a temporary period not to exceed five years. Baz Decl., ¶ 3. But Petitioner did not leave the United States. On May 10, 2025, immigration officers arrested Petitioner in Olympia, Washington, for violation of 8 U.S.C. § 1227(a)(1)(B). Baz Decl., ¶ 4; Lambert Decl., Ex. A, Form I-213; Ex. B, Warrant for Arrest; Ex. C, Notice of Custody Determination. Petitioner was served with a notice to appear, placing him into removal proceedings. Baz Decl., ¶ 5; Lambert Decl., Ex. D, Notice to Appear. Thereafter, ICE transferred him to the Northwest ICE Processing Center. Baz Decl., ¶ 5.

During his removal proceedings, Petitioner admitted the allegations of removal in the notice to appear. Baz Decl., ¶ 6. The immigration judge designated Kenya as the country of

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

removal on DHS's recommendation. Baz Decl., ¶ 6. On June 18, 2025, Petitioner filed various applications for relief from removal. Baz Decl., ¶ 6. The immigration court held a hearing on August 19, 2025. Baz Decl., ¶ 7. On October 29, 2025, the immigration judge denied Petitioner's request for bond, finding that Petitioner was a flight risk. Lambert Decl., Ex. E.

On December 5, 2025, the immigration judge issued a decision that ordered Petitioner's removal to Kenya, but the immigration judge granted Petitioner's application for withholding of removal to Kenya under 8 U.S.C. § 1231(b)(3). Baz Decl., ¶ 8; Dkt. No. 1-2, Decision of the Immigration Judge. The removal order became administratively final on January 5, 2026. Baz Decl., ¶ 8.

ICE is pursuing a third country removal of Petitioner. Thus far, Petitioner has not cooperated with ICE concerning potential third country removal. Baz Decl., ¶¶ 9, 10. For example, he has refused to sign the warnings for failure to depart on three separate occasions. These warnings inform aliens of mandatory requirements to assist in their removal. Lambert Decl., Ex. F, Form I-229a (dated Jan. 8, 2026; Jan. 22, 2026; Feb. 4, 2026).

On February 13, 2026, ICE notified Petitioner of its intent to remove him to Uganda. He claimed fear of removal to Uganda and was referred to USCIS to undergo the reasonable fear screening process. Baz Decl., ¶ 11; Lambert Decl., Ex. G, Form I-229a (dated Feb. 16, 2026).

Until April 5, 2026, Section 1231(a)(2) mandates Petitioner's detention during the removal period.

III. LEGAL STANDARD

"The district courts of the United States … are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allopath Servs., Inc.*, 545 U.S. 546, 552 (2005) (internal quotations omitted). "[T]he scope of habeas has been tightly regulated by statute, from the Judiciary Act of 1789 to the present day." *Dep't of*

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1974 n. 20 (2020). Title 28 U.S.C. § 2241 provides district courts with jurisdiction to hear federal habeas petitions. To warrant a grant of habeas corpus, the burden is on the petitioner to prove that his or her custody is in violation of the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2241(c)(3); *Lambert v. Blodgett*, 393 F.3d 943, 969 n.16 (9th Cir. 2004).

IV. ARGUMENT

A. ICE's detention of Petitioner is lawful under 8 U.S.C. § 1231(a)(2).

Petitioner's challenge to his post-order detention should be denied as premature. The plain language of 8 U.S.C. § 1231(a)(2) requires his detention during the current 90-day removal period. 8 U.S.C. § 1231(a)(2). His removal order became final on January 5, 2026. Dkt. No. 1-2; Pet., ¶ 21. Accordingly, the 90-day removal period designated in 8 U.S.C. § 1231(a)(2) will not end until April 5, 2026. Thus, Petitioner improperly seeks habeas relief during the 90-day removal period. *Khotesouvan v. Morones*, 386 F.3d 1299, 1301 (9th Cir. 2004) (affirming dismissal of habeas petition brought during 90-day removal period).

Considering the limited time and legitimate purpose of the 90-day removal period, the Ninth Circuit has repeatedly found that detention during the removal period "passes constitutional scrutiny," even in cases when an alien's removal "is not reasonably foreseeable." *See Khotesouvan*, 386 F.3d at 1299; *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1116 (9th Cir. 2010) (recalling that "Section 1231(a)(2) poses no due process issues, regardless of whether removal of the detained alien is foreseeable, because the statute authorizes detention for only the ninety-day removal period and therefore does not create any danger of unconstitutionally indefinite detention.").

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

Petitioner attempts to circumvent the mandatory removal period by citing prior ICE policy which allowed ICE to consider release during the removal period of an alien who had been granted withholding of removal. Pet., ¶ 32. However, the policy does not require ICE to release an alien subject to a final order of removal while ICE is actively pursuing third country removal. In fact, even Petitioner acknowledges that under the policies, "ICE may consider release during the 90-day removal period." Pet., ¶ 32. Thus, ICE is under no obligation to release Petitioner during the removal period, especially as ICE is actively pursuing third country removal.

Furthermore, Petitioner cannot demonstrate that his detention is unconstitutionally indefinite. The Supreme Court in *Zadvydas* recognized that as detention becomes prolonged, an alien's liberty interest grows and may eventually outweigh Congress's interest in detaining an alien to facilitate his removal. The six-month period established in *Zadvydas* reflects the earliest moment at which these conflicting interests might raise serious constitutional issues. *See Zadvydas*, 533 U.S. at 701 (directing that "*[a]fter* this six-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, [that] the Government must respond with evidence sufficient to rebut that showing").

For example, in *Jama v. ICE*, 543 U.S. 335 (2005), the Supreme Court considered the complicated removal of an alien to Somalia, a country with no strong central government and continuing instability. The Court discussed the three steps of "the country-selection process" to be followed by ICE in trying to remove Jama, and it also acknowledged that these steps may ultimately fail and force ICE to try its last resort – third country removal. *Id.* In that case, though, where the Supreme Court discussed the potential for aliens being in a "removable-but-unremovable limbo," it never suggested that aliens should be released before ICE had fully explored its "last resort" option. *Jama*, 543 U.S. at 338-348. Instead, the Supreme Court noted

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

approvingly that Jama's potential release "into American society after six months" would be the appropriate protection of his liberty interest. *Id.*, at 347-348 (*citing Zadvydas*, 533 U.S. 678; *Clark v. Martinez*, 543 U.S. 371 (2005)); *see also Bah v. Cangemi*, 548 F.3d 680, 684-685 (8th Cir. 2008) ("Under *Zadvydas* an alien who has been detained for more than six months can obtain release by showing that there is 'no significant likelihood of removal in the reasonably foreseeable future,' which then requires the government to respond with evidence sufficient to rebut that showing." (*quoting Zadvydas*, 533 U.S. at 701)). Therefore, this Court should dismiss Petitioner's argument that he should be released during the removal period.

Because Petitioner's post-order detention has been for a short period and has not exceeded the statutory removal period or the *Zadvydas* six-month threshold, Congress's interest in exploring possibilities for removing aliens is significant enough that Petitioner's liberty interest does not raise a serious constitutional question.

B. Petitioner's claim of fear of removal to a third country is already addressed by existing DHS policy.

Petitioner claims that any third country removal requires meaningful notice to the alien and an opportunity to respond to such removal in reopened removal proceedings. Pet., ¶¶ 47-52. But DHS policy already provides the process Petitioner requests.

On March 30, 2025, and then later, on July 9, 2025, DHS issued guidance regarding third country removals. *See* U.S. Department of Homeland Security, "Guidance Regarding Third Country Removals," Kristi Noem, March 30, 2025, *available at* https://storage.courtlistener.com/recap/gov.uscourts.mad.282404/gov.uscourts.mad.282404.43.1_1.pdf (last visited February 16, 2026) ("DHS Memo"); U.S. Immigration and Customs Enforcement, "Third Country Removals Following the Supreme Court's Order in *Department of Homeland Security v. D.V.D.*, No. 24A1153 (U.S. June 23, 2025)," Todd M.

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

Lyons, July 9, 2025, *available* at https://storage.courtlistener.com/recap/gov.uscourts.mad.282404/gov.uscourts.mad.282404.190.1.pdf (last visited February 16, 2026) (hereinafter "July 9 Memo"); *see also Kumar*, 2025 WL 3204724, at *2-3 (describing contents of these memos and the distinction between the two).

The July 9 Memo discusses DHS's policies and procedures regarding the removal of individuals with final orders of removals to countries other than those designated for removal in those orders (referred to as "third country removals"). According to the guidance outlined in the July 9 Memo, if DHS has not received diplomatic reassurances from the designated country, DHS will first inform the individual that DHS seeks removal to that country. *Id.*, at 2. If the individual expresses that they are afraid of being removed to that country, DHS will refer them to U.S. Citizenship and Immigration Services ("USCIS") for a reasonable fear interview, to screen that person for protection against removal to that country. *Id.*

After the interview is conducted, USCIS will determine whether the individual would more likely than not be persecuted or tortured in the country of removal. *Id.* If USCIS finds that the individual has met this standard, if the person was previously in removal proceedings, USCIS will inform ICE, and ICE can then file a motion to reopen with the Immigration Court. *Id.* Alternatively, ICE can also choose to designate another country of removal. If USCIS finds that the person has not met the standard, according to DHS policy, they will be removed. *Id.* There is nothing in the memo or in ICE policy that prevents an individual from filing a motion to reopen their prior removal proceedings at any time they so choose, based on a request for asylum, withholding of removal, or protection under CAT. *See id.*; *see also* 8 C.F.R. § 1003.23(b)(4)(i).

While Petitioner asserts that he has not been provided an opportunity "to be heard on his claim for withholding or CAT protection as to Uganda, or any other country," (Pet., ¶ 50, ICE has referred him to USCIS for reasonable fear screening. USCIS will conduct a reasonable fear

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

interview to determine whether it is more likely than not that Petitioner would be persecuted or tortured if removed to Uganda. If Petitioner's fear claim is found to be credible, ICE may seek third country removal to another third country. In that scenario, ICE will again provide Petitioner with notice of the intention to remove him to that country, and he will be able to assert a claim of fear to that country. Thus, the main protection Petitioner seeks – notice and opportunity to be heard – is already addressed by existing DHS policy. While this policy does not require that proceedings be reopened automatically as his request for relief seeks, he has the power to move to reopen her removal proceedings on her own. *See* 8 C.F.R. § 1003.23(b)(4)(i). Thus far, he has not chosen to do so.

Accordingly, DHS policy provides Petitioner with notice and opportunity to be heard concerning fear of removal to a third country.

C. Petitioner is a member of the Plaintiff Class in *D.V.D. v. Dep't of Homeland Sec.* and is bound by the proceedings in that case.

Petitioner is a member of the Plaintiff Class in *D.V.D. v. U.S. Dep't of Homeland Sec.*, 778 F. Supp. 3d 355 (D. Mass. 2025), which is litigation concerning third country removal procedures. On April 18, 2025, the district court certified a class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure without a provision for an opt out. *See id.*, at 386. Specifically, the certified class is defined as:

> All individuals who have a final removal order issued in proceedings under Section 240, 241(a)(5), or 238(b) of the INA (including withholding-only proceedings) who DHS has deported or will deport on or after February 18, 2025, to a country (a) not previously designated as the country or alternative country of removal, and (b) not identified in writing in the prior proceedings as a country to which the individual would be removed.

Id., at 378.

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

Because Petitioner is a member of the certified *D.V.D.* class and seeks the same injunctive relief at issue there, principles of comity and docket control counsel against parallel litigation of identical claims. As a member of the plaintiff class in *D.V.D.*, Petitioner is bound by the proceedings in that case the same as all other class members. The plaintiff class in *D.V.D.* sought an injunction precluding their removal to a third country unless they were first afforded essentially the same process that Petitioner asks the Court to order here. The Supreme Court's stay of the preliminary injunction entered in that case is both precedent and the result is binding on Petitioner here by virtue of his status as a member of the *D.V.D.* plaintiff class. *Dep't of Homeland Sec. v. D.V.D.*, 145 S. Ct. 2153 (2025).

Additionally, courts recognize that members of class action lawsuits should not be permitted to bring separate actions where they seek to re-litigate individually issues that were raised in the class action. *See Wynn v. Vilsack*, No. 3:21-cv-514, 2021 WL 7501821, at *3 (M.D. Fla. Dec. 7, 2021) (collecting cases) ("Multiple courts of appeal have approved the practice of staying a case, or dismissing it without prejudice, on the ground that the plaintiff is a member of a parallel class action.") (internal quotations omitted). This prevents class members from avoiding the binding results of the class action. *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982).

This is also the rule in this Circuit. A district court may properly dismiss an individual complaint where the plaintiff is a member in a class action, to the extent the individual action duplicates the claims and seeks the same relief as the class action. *Pride v. Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (discussing *Crawford v. Bell*, 599 F.2d 890, 892 (9th Cir. 1979)). Such a dismissal is within the court's discretion based on its inherent power to control its own docket. *Crawford*, 599 F.2d at 893. But it is "imperative to avoid concurrent litigation in more than one forum whenever consistent with the rights of the parties." *Id.*; *see Frost v. Symington*, 197 F.3d 348, 359 (9th Cir. 1999) ("To the extent that a class action involving the same issues raised by

UNITED STATES ATTORNEY
1201 PACIFIC AVE., STE. 700
TACOMA, WA 98402
(253) 428-3800

[plaintiff] is currently pending . . . [he] may have to bring all of his related claims for equitable relief . . . through . . . class counsel.").

This Court should decline to exercise jurisdiction over Petitioner's third country removal claim as a matter of comity because the District of Massachusetts has certified a class action that includes the same claim Petitioner is pursuing here. *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982) ("There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district.").

V. CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that this Court deny the Petition.

DATED this 17th day of February, 2026.

Respectfully submitted,

s/ Michelle R. Lambert

MICHELLE R. LAMBERT, NYS #4666657
Assistant United States Attorney
United States Attorney's Office
Western District of Washington
1201 Pacific Ave., Ste. 700
Tacoma, WA 98402
Phone: (253) 428-3824
Fax: (253) 428-3826
Email: michelle.lambert@usdoj.gov

Attorney for Federal Respondents

I certify that this memorandum contains 3,505 words, in compliance with the Local Civil Rules.