

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Civil No. 24-cv-01393-SRN-LIB

WALTER A.,

Petitioner,

**FEDERAL RESPONDENTS'  
AMENDED RESPONSE TO  
HABEAS PETITION AND  
RESPONSE TO MOTION  
FOR CONTEMPT**

v.

NOEM, et al,

Respondents.

Petitioner Walter A. is an alien held in civil immigration detention who brings this Petition alleging that his detention pursuant to § 8 U.S.C. § 1231(a)(6) has become unreasonably long, thereby violating his rights under the Fifth Amendment's Due Process Clause. Because Petitioner has not established that his detention violates his due process rights pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001), and for the additional reasons set forth below, the Court should deny the Petition.

Per the Court's order, Federal Respondents provides this amended response and response to the Motion for Contempt.

**STATEMENT OF THE RELEVANT FACTS**

The material facts are not in dispute. Despite claims to the contrary, as the procedural history shows, Petitioner continues to be afforded the process due to him, including a habeas petition which this Court already denied. Federal Respondents respectfully incorporate its statement of facts in its first Response, ECF 11.

As explained by DO Robinson (ECF 12), Petitioner has a valid and unexpired passport from Guatemala, the designated country of removal. Guatemala currently accepts its citizens ordered removed from the U.S. if the individual is confirmed to be a Guatemalan citizen by providing evidence such as a valid unexpired passport. Once the stay of removal is lifted or lapses, DHS will then be able to expeditiously repatriate Petitioner to Guatemala. Further, the U.S. Citizenship and Immigration Services terminated Petitioner's Special Immigrant Juvenile Deferred Action. (ECF 23).

On February 16, this Court ordered that Petitioner be produced for his February 17 biometrics appointment with USCIS. On February 17, DHS transported Petitioner to USCIS to take his biometrics, but USCIS refused to take his biometrics.

On February 19, ERO took Petitioner's biometrics using FD-258 cards and sent the same to the USCIS Vermont Services Center for processing per instructions from USCIS. According to a review of the UPS Tracking Number, the biometrics card arrived at USCIS Vermont Services Center on February 20.

### **JURISDICTION AND BURDEN OF PROOF**

28 U.S.C. § 2241 provides district courts with jurisdiction to hear federal habeas petitions. The burden is on the habeas petitioner to demonstrate that he or she is in custody in violation of the Constitution or laws or treaties of the United States to warrant relief. *See Skaftouros v. United States*, 667 F.3d 144, 158 (2d Cir. 2011).

For immigration detainees, courts must employ a narrow standard of review of decisions made by the Congress or the President regarding immigration and must exercise "the greatest caution" in evaluating constitutional claims that implicate those decisions."

*Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)).

## ARGUMENT

### **I. PETITIONER'S DETENTION IS LAWFUL AND SATISFIES CONSTITUTIONAL DUE PROCESS STANDARDS.**

#### **A. Scope of Review**

Judicial review of immigration matters, including immigration detention issues, is limited. *See I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.”). The Supreme Court has thus “underscore[d] the limited scope of inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of th[e] deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in custody . . . while arrangements were being made for their deportation.”).

The Petition raises statutory and constitutional Fifth Amendment due process challenges to his continued civil immigration detention stemming from the December 2023 date of his re-arrest. Petitioner does not challenge his final order of removal here, nor could he. *See id.* Apart from an administrative appeal of his already-denied motion to reopen, jurisdiction over a challenge to a final order of removal lies exclusively with the appropriate Circuit Court of Appeals. *See* 8 U.S.C. § 1252; *see also Tostado v. Carlson*, 481 F.3d 1012, 1014 (8th Cir. 2007) (exclusive jurisdiction to review final orders of removal is with the circuit, not district, court).

### **B. Detention Authority**

Two main statutory provisions authorize detention of aliens in removal proceedings, depending on whether they are awaiting adjudication (8 U.S.C. § 1226) or are already subject to a final order of removal (8 U.S.C. § 1231). Because Petitioner has been subject to an administratively final removal order since November 13, 2025, his detention is authorized under 8 U.S.C. § 1231.

An alien in the United States may be placed in proceedings before an immigration judge to determine whether the alien is removable from the country. *See* 8 U.S.C. § 1229a (setting out the features of removal proceedings). Depending on the circumstances, an alien placed in removal proceedings may be detained at the agency's discretion, *see id.* § 1226(a), or may be subject to mandatory detention, *id.* § 1226(c).

Once an alien has been ordered removed and finally adjudged to lack any right to remain in the United States, his liberty interest is reduced, and the governing legal rules reflect this. For an alien subject to an administratively final removal order, detention is

governed by 8 U.S.C. § 1231 (and its implementing regulations at 8 C.F.R. pt. 241). Under § 1231, “when an alien is ordered removed,” the Secretary of Homeland Security “shall detain the alien” “[d]uring the *removal period*.” 8 U.S.C. § 1231(a)(1)(A), (a)(2).<sup>1</sup> The “removal period” is the period during which the U.S. Department of Homeland Security (DHS) begins to take steps to execute the alien’s final removal order. *See id.* § 1231(a)(1)(A)-(B). The period begins on the latest of three dates: (i) the “date the order of removal becomes administratively final”; (ii) “[i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court’s final order”; or (iii) “[i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.” *Id.* § 1231(a)(1)(B)(i)-(iii).

Although § 1231 initially provides a 90-day period for the government to execute a final removal order, the removal period may be extended in certain circumstances. For example, certain aliens determined to be “a risk to the community or unlikely to comply with the order of removal” “may be detained beyond the removal period.” *Id.* § 1231(a)(6) (emphasis added); *see also id.* § 1231(a)(1)(C) (suspension of period in certain circumstances). And DHS conducts periodic post-order custody reviews to determine whether an alien subject to a final removal order should continue to be detained beyond the initial removal period. *See* 8 C.F.R. § 241.4 (addressing continued

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<sup>1</sup> Although § 1231 and other provisions of the Immigration and Nationality Act refer to the “Attorney General,” under the Homeland Security Act of 2002 many of those references are now read to mean the Secretary of Homeland Security. *See Straker v. Jones*, 986 F. Supp. 2d 345, 351 (S.D.N.Y. 2013).

detention for inadmissible, criminal, and other aliens). An alien held beyond the removal period may seek release from DHS custody, by showing that “there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.” 8 C.F.R. § 241.13(a). Beyond these statutory and regulatory mechanisms, the Supreme Court has held that an alien subject to a final removal order can file a habeas petition and seek release if he can show that his detention has become prolonged and that there is “no significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

**C. A Significant Likelihood of Petitioner’s Removal Exists in the Reasonably Foreseeable Future.**

Here, a significant likelihood exists of Petitioner’s removal in the reasonably foreseeable future and his continued detention is therefore constitutional and lawful. Petitioner’s current post-final-order detention commenced just over three months ago, 99 days as of this filing, upon his removal order becoming final. Since that time, Petitioner himself has caused his detention to be prolonged by filing multiple motions and appeals, none of which have prevailed, including a prior habeas petition.

Under the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), a person subject to a final order of removal cannot, consistent with the Due Process Clause, be detained indefinitely pending removal. *Id.* at 699-700. *Zadvydas* established a temporal marker: post-final order of removal detention of six months or less is presumptively constitutional. 533 U.S. at 701; *see also Sokpa-Anku v. Paget*, No. 17-cv-1107 (DWF/KMM), 2018 WL 3130681, at \*3 (D. Minn. June 8, 2018) (report and

recommendation) (“Once a person is finally ordered removed from the United States, it is presumptively constitutional for the government to detain him for a 6-month period.”), R&R adopted, 2018 WL 3129002 (June 26, 2018). The *Zadvydas* six-month benchmark, however, does not mean continued detention becomes unconstitutional after six months. To the contrary, detention longer than six months still comports with due process if there is a “significant likelihood of removal in the reasonably foreseeable future.” *Zadvydas*, 533 U.S. at 701. The Court in *Zadvydas* explained:

After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the “reasonably foreseeable future” conversely would have to shrink. *This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.*

*Id.* (emphasis added). Thus, under *Zadvydas*, a habeas petitioner has the initial burden of demonstrating no significant likelihood of his removal in the reasonably foreseeable future exists. *Id.* If the petitioner does so, the government must rebut that showing. *Id.*

Petitioner has not established a due process violation under *Zadvydas* as he has not met his initial burden to “provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future[.]” *See id.* (Emphasis added); *Mehighlovesky v. U.S. Dep't of Homeland Sec.*, No. CIV. 12-902 RHK/JJG, 2012 WL 6878901, at \*4 (D. Minn. Dec. 7, 2012), report and recommendation adopted, No. CIV. 12-902 RHK/JJG, 2013 WL 187553 (D. Minn. Jan. 17, 2013). In his Petition, *see*

*generally*, he admits that once the initial 90-day post-final removal order deadline is passed, DHS has an additional 90 days to conduct a custody review. *See id.*, pg. 19. Here, with only 99 days elapsing, DHS is well within the 180-day deadline to conduct a custody review. And while Petitioner is fully within his rights to appeal the denial of his motion to reopen, the fact of his doing so should not be cause to find a Due Process violation just because Petitioner remains detained during the same.

Petitioner's continued detention serves a clear purpose and has an obvious endpoint: resolution of these proceedings and his appeal, and ultimate removal to Guatemala expeditiously thereafter. Thus, the Court should find Petitioner failed to establish that his detention under 8 U.S.C. 1231(a)(6) violates his due process rights.

Generally, there are five circumstances where courts have found no significant likelihood of removal:

(1) where the detainee is stateless and no country will accept him; (2) where the detainee's country of origin refuses to issue a travel document; (3) where there is no repatriation agreement between the detainee's native country and the United States; (4) where political conditions in the country of origin render removal virtually impossible; and (5) where a foreign country's delay in issuing travel documents is so extraordinarily long that the delay itself warrants an inference that the documents will likely never issue.

*Ahmed v. Brott*, 2015 WL 1542131, \*4 (D. Minn. March 17, 2015) (“In other words, for there to be *no* significant likelihood of removal in the foreseeable future, there must be some indication that the government is either unwilling or, due to seemingly insurmountable barriers, incapable executing an alien's removal.”) (emphasis in original).

Here, none of the factors identified in *Ahmed* are in fact currently present. Indeed, ICE has shown that it is neither unwilling to remove, nor incapable of removing Petitioner to Guatemala once that becomes possible because the BIA denies his pending appeal (assuming it does). See *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (affirming the dismissal of an alien's § 2241 petition where there were no “facts indicating that the INS is incapable of executing his removal to Nigeria and that his detention will, therefore, be of an indefinite nature”); *Khan v. Fasano*, 194 F. Supp. 2d 1134, 1137 (S.D. Cal. 2001) (rejecting a *Zadvydas* claim where there were no institutional or individual barriers to removal, and “[p]rogress, however slow, [was] being made”).

Petitioner has most recently been in detention for 99 days since his removal order became final under § 1231, but “the mere passage of time . . . is not alone sufficient to show that no such likelihood exists” without more. See *Chen v. Banieke*, No. CIV. 15-2188 DSD/BRT, 2015 WL 4919889, at \*4 (D. Minn. Aug. 11, 2015); *Jaiteh v. Gonzales*, No. 07-cv-1727, 2008 WL 2097592 at \*2–3 (D. Minn. Apr. 28, 2008). Accordingly, Petitioner has failed to meet his initial burden under *Zadvydas*. See, e.g., *Chen*, 2015 WL 4919889, at \*5 (“That Chen has now been detained for over nine months, that approximately two months have passed since ICE resubmitted its request for travel documents, and that the Chinese government has yet to respond to that renewed request do not alone show that travel documents will not issue in the foreseeable future. . .”).

Second, even assuming *arguendo* that Petitioner has met his initial burden of proof under *Zadvydas*, Federal Respondents have rebutted any presumption that there is

no significant likelihood of his removal to Guatemala in the reasonably foreseeable future through testimony that should the pending appeal be dismissed, that accomplishing the removal to Guatemala should happen shortly thereafter. *See Zadvydas*, 533 U.S. at 701; *Ahmed*, 2015 WL 1542131, at \*4 (finding that where “ICE has made diligent and reasonable efforts to obtain travel documents,” the alien’s native country “ordinarily accepts repatriation,” and “that country is acting on an application for travel documents,” most courts conclude that there is a significant likelihood of removal in the foreseeable future.”).

Indeed, the Court’s decision in *Zadvydas* “was primarily concerned with situations where ‘removal seems a remote possibility at best,’ is ‘no longer practically attainable,’ and ‘has no obvious termination point’ because the ‘Government finds itself unable to remove’ an alien, not where removal is temporarily impeded by bureaucratic delays, setbacks, and ongoing negotiations with foreign governments.” *Chen*, 2015 WL 4919889 at \*5 citing *Zadvydas*, 533 U.S. at 690, 695, 697.

For the reasons discussed above, Petitioner’s detention for removal purposes has an obvious termination point, is practically attainable, and faces only a temporary and routine impediment – namely this pending action, as no stay of removal exists in his removal proceedings or appeal. To a significant extent the duration of Petitioner’s detention is the result of his own litigation choices, such as several motions and appeals. Petitioner is not being detained for such choices – but rather validly continues to be validly detained under section 1231.

The record thus shows a significant likelihood that Petitioner will be removed

from the United States in the reasonably foreseeable future. The constitutional due process standard set forth in *Zadvydas* is met, and the Petition should be denied.

## **II. USCIS TERMINATED PETITIONER'S DEFERRED ACTION.**

Because USCIS has terminated Petitioner's Deferred Action, any arguments regarding the same are now inapplicable.

SIJS or Special Immigration Juvenile status is granted to juveniles who have been abused, abandoned, or neglected by a parent; the granting of SIJS allows an alien to then apply for lawful permanent residency, but does not in and of itself grant permanent status. *See* 8 CFR § 204.11. Deferred action allows an alien to obtain work authorization but does not provide permanent legal status. *See* 8 C.F.R. § 214.14(d)(3).

"Deferred action" is "an act of administrative convenience to the government that gives some cases lower priority" for removal. 8 C.F.R. § 274a.12(c)(14). In the preamble to the 2007 rulemaking, which created the U-visa regulations in 8 C.F.R. § 214.14, stays of removal were distinguished from deferred action:

A stay of deportation or removal is an administrative decision to stop temporarily the deportation or removal of an alien who has been ordered deported or removed from the United States. *See* 8 CFR 241.6; 8 CFR 1241.6. *Deferred action is an exercise of prosecutorial discretion that defers the removal of the alien based on the alien's case being made a lower priority for removal.* Immigration and Customs Enforcement, Department of Homeland Security, Detention and Deportation Officer's Field Manual, ch. 20.8 (2005). *Deferred action does not confer any immigration status upon an alien.*

72 Fed. Reg. 53014, 53016 n.3 (Sept. 17, 2007) (emphasis added).

While deferred action does not provide immigrant or nonimmigrant status, an individual with deferred action does not accrue unlawful presence in the United States

during the deferred-action period. 8 C.F.R. § 214.14(d)(3). “However, a petitioner may be removed from the waiting list, and the deferred action or parole may be terminated at the discretion of USCIS.” *Id.* It is neither arbitrary, nor capricious for DHS to proceed with removal proceedings after Petitioner received a grant of deferred action; indeed, the Immigration Judge and BIA rejected Petitioner’s motions terminate for the same reason. Nor is it arbitrary or capricious to terminate deferred action, which itself exists merely as an exercise of prosecutorial discretion. And it is telling that Petitioner’s Counsel fails to cite to any legal authority to support such claim that proceeding with removal proceedings is arbitrary and capricious in spite of deferred action. *See* Petition, pg. 43.

As Judge Provinzino recently explained, deferred action is merely an exercise of prosecutorial discretion. *Id.* at 5 n.5. Slip Op., *Domingo M.M. v. Shea, et al.*, No. 25-cv-2830 (LMP/ECW) (D. Minn. August 1, 2025) (ECF 24). Such discretion DHS refused to exercise in this case during removal proceedings, and which the Immigration Judge also denied multiple times. Further, USCIS has now determined to no longer exercise such discretion.

### **III. FEDERAL RESPONDENTS SUBSTANTIALLY COMPLIED WITH THE COURT’S ORDER TO FACILITATE COLLECTION OF PETITIONER’S BIOMETRICS.**

Federal Respondents have substantially complied with the order to collect Petitioner’s biometrics for processing by USCIS. On February 19, ERO took Petitioner’s biometrics and mailed the same to the USCIS Vermont Processing Center, which arrived on February 20. Because DHS collected Petitioner’s biometrics and provided the same to

USCIS for processing, Federal Respondents substantially complied with the Court's order and no contempt should flow from such substantial compliance.

Finally, because Petitioner's biometrics have now been collected and provided to USCIS, no evidentiary hearing regarding such initial alleged failure is therefore needed. And, as no material facts are in dispute regarding the underlying legal issue – whether a significant likelihood of removal in reasonable foreseeable future exists – no evidentiary hearing is therefore necessary. *Toney v. Gammon*, 79 F.3d 693, 697 (8th Cir. 1996); *Ruiz v. Norris*, 71 F.3d 1404, 1406 (8th Cir. 1995).

### **CONCLUSION**

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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