IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-00732-SBP

JONNY HERNANDEZ-CASTRO,

Petitioner,

v.

KRISTI NOEM, in her official capacity as Secretary of the Department of Homeland Security, et al.,

Respondents.

RESPONSE TO ORDER TO SHOW CAUSE (ECF No. 1)

Pursuant to the Court's Order, ECF No. 4, Respondents hereby respond to the Verified Petition for Habeas Corpus, ECF No. 1.[1]

Petitioner Jonny Hernandez-Castro, a Venezuelan national, has been detained subject to an administratively final order of removal issued in April 2023. In this habeas action, Petitioner asserts that his continued detention by Immigration and Customs Enforcement is unlawful under 8 U.S.C. § 1226(a) and violates the Due Process Clause of the Fifth Amendment. ECF No. 1. Among other things, Petitioner appears to seek a bond hearing. *E.g.*, ECF No. 1, at 19.[2]

The Court should deny the Petition. Petitioner is *not* detained under § 1226(a), but rather under 8 U.S.C. § 1231(a)(6) pending his removal. Furthermore, he has been detained for approximately seven weeks while ICE works to arrange his removal—well within the six-month

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[1] This response is timely. This Court ordered the Response to be filed within seven days of service of process. ECF No. 4. Petitioner completed service of process via email on February 27, 2026.

[2] Petitioner seeks "immediate release on bond." ECF No. 1, at 19. Respondents construe that request as seeking a bond hearing, the remedy under § 1226(a).

detention period recognized as presumptively reasonable by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001). Thus, Petitioner's detention is lawful, and there are no grounds to order his immediate release.

FACTUAL BACKGROUND

Petitioner's entry into the United States and asylum claim: Petitioner is a native and citizen of Venezuela. Ex. A, Decl. of Irma Quinones, at 2, ¶ 4. On April 9, 2021, Petitioner was apprehended by U.S. Customs and Border Protection (CBP) agents shortly after he unlawfully crossed the United States-Mexico border. Ex. A, at 2, ¶ 5. CBP concluded that Petitioner was inadmissible to the United States and processed him for expedited removal proceedings. Ex. A, at 2, ¶ 6. Thereafter, on April 14, 2021, Petitioner was transferred to ICE custody in preparation for his removal to Venezuela. Ex. A, at 2, ¶ 7.

While Petitioner was in ICE custody, he claimed fear of persecution, and he was referred to U.S. Citizenship and Immigration Services for an interview with an asylum officer to determine the credibility of that fear, pursuant to 8 U.S.C. § 1225(b)(1)(A)(ii). Ex. A, at 2, ¶ 8.

ICE released Petitioner on July 13, 2021. Ex. A, at 3, ¶ 9.

Removal proceedings: In September 2021, the Department of Homeland Security (DHS) issued a Notice to Appear (NTA). Ex. A, at 3, ¶ 10. However, removal proceedings did not commence at that time, and the court's system reflects a "failure to prosecute" code from the Executive Office for Immigration Review. Ex. A, at 3, ¶ 10.

On February 24, 2022, DHS issued another NTA, initiating removal proceedings pursuant to 8 U.S.C. § 1229a. Ex. A, at 3, ¶ 11. Petitioner was charged with being inadmissible to the United states under 8 U.S.C. § 1182(a)(7)(A)(i)(I) and (a)(6)(A)(i). Ex. A, at 3, ¶ 11.

Petitioner filed an Application for Asylum and Withholding of Removal on April 8,

2022. Ex. A, at 3, ¶ 12.

Order of removal: An immigration judge held an individual hearing on Petitioner's application on April 18, 2023. Ex. A, at 3, ¶ 13. The IJ concluded Petitioner was inadmissible under § 1182(a)(6)(A)(i), denied Petitioner's application for asylum, and denied withholding of removal under § 1231(b)(3) and the Convention Against Torture (CAT). Ex. A, at 3, ¶ 13. Thus, the IJ ordered Petitioner removed to Venezuela. Ex. A, at 3, ¶ 13. But the IJ granted Petitioner's application for deferral of removal to Venezuela under the CAT. Ex. A, at 3, ¶ 13.

The parties waived their rights to appeal that order, so it became administratively final the same day as the hearing—April 18, 2023. Ex. A, at 3, ¶ 13.

Petitioner's most recent detention under § 1231(a): Petitioner next encountered ICE officers on January 17, 2026. At that time, he was taken into custody to effectuate his removal pursuant to § 1231(b). Ex. A, at 4, ¶¶ 14, 17.

On February 23, 2026, ICE notified Petitioner that he would be removed to Mexico. Ex. A, at 4, ¶ 18.

The habeas application: Petitioner filed this habeas action on February 23, 2026. *E.g.*, ECF No. 1, at 20. In it, he argues he is entitled to a bond hearing because his continued detention violates § 1226(a) and the Due Process Clause of the Fifth Amendment.

ARGUMENT

Petitioner claims that he is entitled to a bond hearing because his continued detention falls under § 1226(a), not 8 U.S.C. § 1225(b)(2). *E.g.*, ECF No. 1, at 3-4, 10-11. But Petitioner's detention falls under neither provision. Instead, because a final order of removal exists, Petitioner is being lawfully detained under § 1231. And Petitioner's detention under that statute—which has not yet even passed the six-month presumptively reasonable duration

recognized by the Supreme Court—does not violate the Due Process Clause. *Cf.* ECF No. 1, at 11-13.

I. Title 8 U.S.C. § 1231 authorizes petitioner's detention, not §§ 1225 or 1226.

The Petition makes much of the distinction between detention pursuant to §§ 1225 and 1226, and whether the Petitioner's detention is lawful under either provision. But those provisions are inapposite here because Petitioner has a final order of removal.

A different provision, § 1231, governs detention in this circumstance. Section 1231(a) provides for the "[d]etention, release, and removal of [noncitizens] ordered removed[.]" Under that statute, the Department of Homeland Security "shall detain" a noncitizen "[d]uring the removal period[.]" § 1231(a)(2)(A). The government is instructed to "remove the [noncitizen] from the United States within a period of 90 days" of the beginning of the removal period. § 1231(a)(1)(A). That 90-day removal period begins on the latest of the following:

> (i) The date the order of removal becomes administratively final[;]
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the [noncitizen], the date of the court's final order[; or]
>
> (iii) If the [noncitizen] is detained or confined (except under an immigration process), the date the [noncitizen] is released from detention or confinement.

§ 1231(a)(1)(B). As relevant here, an order of removal becomes administratively final "[u]pon waiver of appeal by the respondent[,]" 8 C.F.R. § 1241.1(b), in this case, on April 18, 2023. Ex. A, at 3, ¶ 13.

Because Petitioner was determined to be inadmissible under § 1182(a)(6)(A)(i), Ex. A, at 3, ¶ 13; ECF No. 1, at 21, and is subject to an administratively final order of removal, his detention falls under § 1231, not §§ 1225 or 1226.

II. Petitioner's detention is statutorily permitted and within the *Zadvydas* six-month presumptively reasonable period of detention to effectuate removal.

To be sure, it's been more than 90 days since Petitioner's order of removal became final, and he is currently in ICE custody. But he was *not* in custody during that intervening time; he has only been in ICE custody since January 2026. Ex. A, at 3-4, ¶¶ 9, 14. But even assuming *arguendo* that Petitioner's detention beginning on January 17, 2026, exceeds the 90-day removal period, a noncitizen "ordered removed who is inadmissible under section 1182 of this title . . . may be detained beyond the removal period . . . ." § 1231(a)(6). Following expiration of the 90-day removal period, continued detention of noncitizens who have been ordered removed is entrusted to DHS's discretion. *See* § 1231(a)(6).

Petitioner's current detention also comports with due process because it is within the presumptively reasonable six-month period to effectuate removal recognized by the Supreme Court.

In *Zadvydas*, the Supreme Court held that the Due Process Clause limits the detention of non-citizens under § 1231 "to a period reasonably necessary to bring about that [noncitizen's] removal from the United States." 533 U.S. at 689. Specifically, the Court held that § 1231 "contain[s] an implicit 'reasonable time' limitation" for how long a noncitizen may be detained beyond the 90-day removal period. *Id.* at 682. Recognizing that a "statute permitting indefinite detention of [a noncitizen] would raise a serious constitutional problem," *id.* at 690, the Court held that, "once removal is no longer reasonably foreseeable, continued detention is no longer authorized[,]" *id.* at 699.

Moreover, the Supreme Court concluded that detention lasting six months or less is presumptively reasonable. *See id.* at 701; *accord Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021) (explaining that, under *Zadvydas*, the "period reasonably necessary to bring about the

[noncitizen's] removal from the United States is presumptively in six months"). Only *after* the six-month period of detention has concluded should the Court consider releasing the noncitizen for the lack of significant likelihood of removal in the reasonably foreseeable future. *Zadvydas*, 533 U.S. at 701 ("*After this 6-month period*, once the [noncitizen] 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." (emphasis added)); *accord Guzman Chavez*, 594 U.S. at 529.

In other words, *after* the six-month presumptively reasonable detention period passes, the noncitizen can seek to show that his detention violates due process. At that point, "the onus is on the" noncitizen to show there is no significant likelihood of removal in the reasonably foreseeable future. *Soberanes v. Comfort*, 388 F.3d 1305, 1311 (10th Cir. 2004) (citing *Zadvydas*, 533 U.S. at 701). Only if the noncitizen makes that showing does the burden then shift to the government to "respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

Here, Petitioner has been in ICE custody for approximately seven weeks. That is far less than six months, and it's presumptively reasonable under *Zadvydas*. He has not shown that his removal is unlikely in the reasonably foreseeable future, so the burden has not shifted to Respondents to rebut any such showing. *Cf. Bokole v. McAleenan*, 1:18-cv-00583-JB-LF, 2019 WL 2024922, at *5 (D.N.M. May 8, 2019) (finding the petitioner's claim challenging the constitutionality of his current detention was premature because the presumptively reasonable six-month period had not yet expired).

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CONCLUSION

For the reasons stated above, the Court should deny the petition.

DATED at Denver, Colorado this 6th day of March, 2026.

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CERTIFICATE OF SERVICE

I certify that on this 6th day of March, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this case.

s/ Elizabeth S. Ford Milani
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United States Attorney's Office