UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Jhon Lester Garcia Barrientos

Petitioner,

v.

Nikita Baker, *et al.*,

Respondents.

Case No. 1:26-cv-00984-MJM

MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISMISS

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Respondents, by and through undersigned counsel, hereby submit this Memorandum of Law in Support of their Response to the Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 15) (the "Petition"), and move this Court to dismiss the Petition in its entirety.

I. INTRODUCTION

Petitioner, Jhon Lester Garcia Barrientos ("Petitioner") is a citizen and native of Venezuela who was apprehended on or about July 18, 2022, by U.S. Customs and Border Patrol at the Rio Grande Valley Texas Boarder Patrol Sector after he entered the country illegally through Mexico, without a valid entry document. The Petitioner was placed in removal proceedings. The Petitioner is now subject to a final order of removal, and order precluding his removal to Venezuela, based on his claim that he would face torture if returned there. That order *only* precludes her removal *to Venezuela* and does apply to any other country.

On March 5, 2026, at a required check-in, U.S. Immigration and Customs Enforcement ("ICE"), officers determined that Petitioner was inadmissible and subject to a final order of removal, revoked his order of supervision in order to effect his removal based on changed conditions – their ability to remove him to El Salvador. He was arrested, and detained pursuant to a Warrant of Removal/Deportation. He was then provided a Notice of Revocation of his Release based on the decision to re-detain him, as well as a Notice of ICE's intent to remove him to El Salvador.

Petitioner has claimed a fear of removal to El Salvador, and Respondents are currently in the process of scheduling the Petitioner for a third country fear screening with a United States Citizenship and Immigration Services ("USCIS") asylum officer. He is presently detained at the Northwest Detention Center, in Tacoma, Washington.

Respondents incorporate all facts from Respondent's Status Report (ECF 16) regarding Petitioner's physical and mental health and condition. Additionally, Respondents have no reason to doubt the authenticity of what Petitioner's counsel says about his condition. Respondent's have also conferred with ICE and their doctors have indicated that the Petitioner's condition is stable.

On March 6, 2026, Petitioner initiated this habeas action in this Court while detained by ICE in Baltimore. On March 13, 2026, the Petitioner filed his amended habeas action in this Court. Petitioner challenges his detention by ICE and asserts four claims: (1) Violation of the Substantive Due Process Protections of the Fifth Amendment of the Constitution and 8 U.S.C. § 1231(a); (2) Violation of the Convention Against Torture, the Foreign Affairs Reform and Restructuring Act of 1998, and Implementing Regulations; (3) Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A); (4) Violation of the Procedural Due Process Clause of the Fifth Amendment; and (5) Request for Declaratory Judgment, 28 U.S.C. § 2201. The Petition fails for numerous reasons and must be dismissed.

First, the Immigration and Nationality Act ("INA"), its corresponding regulations, and Supreme Court precedent allow for Petitioner's detention and removal outside the 90-day period following the effective date of his final order of removal. Second, his continued detention to effect his removal does not violate his due process rights. Third, he has been legally detained pursuant to a valid Warrant of Removal/Deportation and has not demonstrated entitlement to habeas relief. Fourth, the revocation of Petitioner's release and his re-detention in order to effect his removal are consistent with applicable regulations, and any deviations do not rise to the level of a due process violation. Fifth, Petitioner's claim that his due process rights have been violated by his proposed removal to El Salvador, based on a fear screening that has not yet taken place is premature and speculative. To the extent he wishes to pursue these claims, once ripe, he can do so as a member

of the non-opt-out class in the *D.V.D., et al., v. U.S. Dep't of Homeland Security, et al.*, Case No. 1:25-cv-10676-BEM, in the District of Massachusetts. Alternatively, as this Court well knows, this precise issue is currently being decided by the Fourth Circuit in *Bojorquez v. Baker*, Case Number 25-6996. As such, any challenge to the fear screening process and availability of IJ review should be resolved only after the Fourth Circuit has reached a decision in that case. Finally, Attorney General Pamela Bondi must be dismissed as a respondent because she does not have custody over Petitioner. For all of these reasons, Petitioner's request for relief should be denied, and the case should be dismissed.

II. STATUTORY AND REGULATORY FRAMEWORK

Detention and removal of aliens who are subject to final orders of removal is specifically permitted under 8 U.S.C. § 1231, which provides a specific statutory scheme for the civil detention of aliens once a final order of removal has been entered. Section 1231(a)(1), titled "Detention, release, and removal of aliens ordered removed," provides, that:

> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section, referred to as the "removal period"). . . . The removal period begins on the latest of the following: (i) The date the order of removal becomes administratively final.

Id. § 1231(a)(1)(A), (B). Section 1231 also authorizes removal of aliens to countries other than the ones where they were born, including, where other options are unavailable, to any country willing and able to accept them. 8 U.S.C. § 1231(b)(1)(C). Importantly, section 1231(b)(1)(C)), does not describe a specific *process* to be used to effect removal to a third country after a final order of removal has been issued. Rather, the statute simply specifies that removal to a third country "shall be made" if removal to the alien's country of birth or residence is deemed to be "impracticable, inadvisable, or impossible." *Id.* at § 1231(b)(1)(C)(4).

In the absence of applicable regulations, on March 30, 2025, DHS issued guidance setting forth procedures that would be used in order to effect third country removals, and comply with the statute's prohibition against removal to a third country where the alien would face torture. The guidance provides that the alien is entitled to notice of the third country and if the alien asserts an affirmative fear of removal to the third country, the alien will be referred to USCIS for a third country fear screening, where USCIS will assess the alien's eligibility for protection under the Convention Against Torture. *Id.*

III. FACTUAL BACKGROUND

Petitioner is a citizen and native of Venezuela (ECF 15 at ¶ 15). On January 18, 2022, Petitioner entered the United States near the Texas / Mexico border without valid entry documents and was detained by U.S. Customs and Border Patrol. On or about March 14, 2023, USBP issued and served Petitioner with a Notice to Appear.

On February 6, 2025, an Immigration Judge Hyattsville, Maryland ordered Petitioner removed from the United States. The Immigration Judge denied Petitioner's applications for asylum and withholding of removal but granted Petitioner's application for withholding of removal from Venezuela under the Convention Against Torture. Petitioner was then released and placed on an Order of Supervision.

On March 5, 2026, Petitioner was arrested at the Silver Spring Intensive Supervision Appearance Program ("ISAP") Office pursuant to a Warrant of Removal/Deportation. Petitioner has asserted a fear of removal to El Salvador. Respondents and Petitioner are working to schedule a third country fear screening.

ICE has determined that Petitioner can be expeditiously removed from the United States to El Salvador and routinely conducts third country removals to El Salvador.

IV. LEGAL STANDARDS

A. Dismissal for Lack of Subject-Matter Jurisdiction Under Rule 12(b)(1)

A motion to dismiss based on lack of subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP"), raises the question of whether the court has the authority to hear and decide a case. *See Davis v. Thompson*, 367 F. Supp. 2d 792, 299 (D. Md. 2005). As a result, the court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction). *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007). The plaintiff bears the burden of proving subject-matter jurisdiction. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Subject-matter jurisdiction is "a threshold matter" and addresses the "nature and limits" of judicial power. *Steel Co.*, 523 U.S. at 95. When a defendant challenges subject-matter jurisdiction, the court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment. *Evans*, 166 F.3d at 647. The court may properly grant a motion to dismiss for lack of subject-matter jurisdiction "where a claim fails to allege facts upon which the court may base jurisdiction." *Davis*, 367 F. Supp. 2d at 799.

B. Dismissal for Failure to State a Claim Under Rule 12(b)(6)

Rule 12(b)(6) requires dismissal of a complaint which fails to state a claim upon which relief can be granted. In ruling on such a motion, while a court must accept as true all the well pleaded factual allegations, legal conclusions are not afforded such deference. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the Court "may properly take judicial notice of matters of public record . . . [and] consider documents attached . . . to the motion to dismiss, so long as they are integral to the complaint and authentic." *Philips*, 572 F.3d at 180.

Within this framework, a complaint must contain "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 663.

V. ARGUMENT

A. ICE Is Authorized to Detain and Remove Petitioner.

Petitioner contends that his detention is unlawful and violates applicable statutes, and his right to due process. However, ICE can lawfully detain Petitioner pursuant to 8 U.S.C. § 1231(a)(6) because he is subject to a final order of removal and is inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i).

1. Petitioner is lawfully detained under 8 U.S.C. § 1231(a)(6).

ICE's detention authority stems from 8 U.S.C. § 1231, which defines the removal period as the 90 days following the effective date of a final order of removal (§ 1231(a)(1)(A)), and provides that after the removal period, ICE may either release an alien pursuant to an Order of Supervision (§ 1231(a)(3)) or continue detention under § 1231(a)(6). In addition, as applicable here, 8 U.S.C. § 1231(a)(6) plainly provides that ICE may continue detention beyond the removal period for "[a]n alien ordered removed who is inadmissible under [8 U.S.C. § 1182]. Here, ICE's detention is lawful under 8 U.S.C. § 1231(a)(6) given that Petitioner has been ordered removed by an Immigration Judge and is inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i).

Petitioner points to no authority suggesting the 90-day period immediately following entry of a final removal order or the six-month period after that, is the *only* lawful period during which ICE can detain and remove an individual subject to a final order of removal. Even if he had, this

Court has previously considered and rejected that conclusion. *See Tanha v. Warden*, Civil No. 1:25-cv-02121-JRR, 2025 WL 2062181, at *7 (D. Md. July 22, 2025) ("It strikes this court as an illogical, if not unreasonable, extension of *Zadvydas* [*v. Davis*, 533 U.S. 678 (2001)] to suggest that where the Government, as it did here, issues a non-citizen an OSUP, the 6-month post-removal period clock nonetheless starts to tick while the non-citizen is released. Given that the very reason the Supreme Court imposed the 6-month presumption was to eradicate the 'serious constitutional questions' posed by potentially indeterminate detention, it seems nonsensical to disallow the Government from detaining Petitioner for any period following statutory revocation of his OSUP based on the rote calculation of days that have elapsed since his removal period expired."); *see also Ghamelian v. Baker*, Civil No. SAG-25-02106, 2025 WL 2049981, at *4 (D. Md. July 22, 2025) ("Against that background, this Court considers Petitioner's argument that because the 90-day statutory removal period plus a consecutive additional three-month period expired many years ago, Petitioner cannot be subject to further detention under § 1231(a)(6). This Court finds no support for that reading in *Zadvydas* or the rest of § 1231(a)(6). *Zadvydas* did not (1) address a situation where an alien was released and then re-detained or (2) purport to create some sort of limitations period for § 1231(a)(6) detention.").

Because ICE has statutory authority to detain Petitioner to effectuate his removal order, his detention is lawful, and he cannot establish entitlement to habeas relief on that basis.

2. Petitioner's due process claim regarding his detention is premature - he has only been detained for 11 Days.

Petitioner's claim that his detention violates 8 U.S.C. § 1231(a)(6) lacks merit because he was released on an Order of Supervision, and was not detained after the effective date his removal order became final. Moreover, he cannot establish that his detention violates 8 U.S.C. § 1231(a)(6) in light of Judge Gallagher's decision in *Ghamelian*, which recognized that "[p]ermitting

[p]etitioner to advance a cause of action under that provision would contravene 8 U.S.C. § 1231(h), which expressly provides that 'nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.'" 2025 WL 2049981, at *3.

Petitioner also relies on *Zadvydas* as a basis for his claim that his detention is unlawful and violates due process (ECF 15). In *Zadvydas*, the Supreme Court considered the Government's ability to detain an alien subject to a final order pending removal. 533 U.S. at 699. The Court held that the government cannot detain an alien "indefinitely" after the 90-day removal period and limited post-removal-period detention to "a period reasonably necessary to bring about the alien's removal from the United States." *Id.* at 682, 689. The Court further held that a detention period of six months is "presumptively reasonable." *Id.* at 701. "***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." *Id.* (emphasis added).

Here, Petitioner has been detained for only 11 days since the effective date of his order of removal, and has not yet reached the end of the presumptively reasonable 6-month period established in *Zadvydas*. Any claim that the period began to run at the time his removal order became final, whether he was detained or not, has already been rejected by this Court in *Tanha* and *Ghamelian*, as explained above. Here, the record reflects that Petitioner was released on an Order of Supervision. Because he has been detained for only 11 days, he has not reached the end of the 6-month presumptively reasonable period. Accordingly, his due process claims based on the Supreme Court's decision in *Zadvydas* must fail.

B. ICE's Revocation of Release Comports with the Governing Regulations.

Petitioner contends that Respondents did not comply with applicable regulations when he was re-detained and his release was revoked. Petitioner contends that ICE failed to comply with 8 C.F.R. § 241.4(*l*), and did not conduct provide Petitioner with notice of the reasons for the revocation and an "informal interview" to respond to those reasons. ICE is not required to "conduct a custody review under these procedures when [ICE] *notifies the alien that it is ready to execute an order of removal.*" 8 C.F.R. § 241.4(g)(4) (emphasis added).

Moreover, ICE complied with its regulations in every regard. It served Petitioner with the written Notice of Revocation of Release, which was signed. The Notice of Revocation of Release also informed Petitioner of the reason his release was revoked. With the Notice of Revocation of Release, Petitioner was served with a Notice which notified him in writing that ICE intends to remove him to El Salvador, which constitutes the changed circumstances.

C. Attorney General Pamela Bondi Is Not a Proper Respondent.

The Secretary of DHS, Acting Director of ICE, and Acting Director of the Baltimore Field Office are the only proper Respondents in this habeas action because such actions can only be brough against a person "who has custody over" the petitioner. 28 U.S.C. § 2242; *see also Rumsfeld v. Padilla*, 542 U.S. 426, 434–35 (2004) ("The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is the person who has custody over the petitioner" who is "the person with the ability to produce the prisoner's body before the habeas court" and has "*immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that she may be liberated if no sufficient reason is shown to the contrary." (emphasis in original)). Unlike the Secretary of DHS, Acting Director of ICE, and Acting Field Office Director, Attorney General Pamela Bondi does not have the ability to produce

Petitioner before this Court. The Court should therefore dismiss the Attorney General from this case.

VI. CONCLUSION

For the foregoing reasons, the Petition should be denied and dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Dated: March 17, 2026

Respectfully submitted,

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