

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Ft. Myers Division**

Case: 26-cv-00836-KCD-NPM

DAMIEN ESCOBAR GAMES,
Petitioner,

v.

WARDEN, Kevin Guthrie Florida Division of
Emergency Management ;
Garrett J. Ripa, Miami Field Office Director
U.S. Immigration and Customs Enforcement;
KRISTI NOEM, Secretary of the U.S. Department
of Homeland Security; and **PAMELA J. BONDI**,
Attorney General of the United States,
in their official capacities,

Respondents.

**PETITION FOR WRIT OF
HABEAS CORPUS**

Alien #



PETITIONERS REPLY TO FEDERAL DEFENDANTS'

OPPOSITION MEMORANDUM

INTRODUCTION

Petitioner Damien Escobar Games, through undersigned counsel, respectfully submits this Reply to the Federal Respondents' Response to Petition for Writ of Habeas Corpus (ECF No. 7). The Government's Response rests on three flawed pillars: (1) that this Court lacks subject-matter jurisdiction under 8 U.S.C. § 1252(g); (2) that Petitioner's detention is presumptively reasonable because it has not yet reached six months; and (3) that the revocation of Petitioner's Order of Supervision ("OSUP") was a lawful exercise of discretion. Each argument fails as a matter of law and fact.

Critically, the Government ignores the constitutional bedrock of this case: the Fifth Amendment's Due Process Clause applies to all persons within the United States, including noncitizens subject to final orders of removal. The Supreme Court has long and consistently so held. Petitioner has resided in the United States for over thirty years, has a U.S. citizen wife and three U.S. citizen children, spent more than twenty-two years in compliance with his OSUP without a single violation, and was detained anew on a removal order that is nearly twenty-six years old. His detention is not a legitimate effort to effectuate removal—it is indefinite civil confinement untethered from any realistic prospect of removal to Cuba. The writ should issue.

I. THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CONSTITUTIONAL DETENTION CLAIMS

The Government invokes 8 U.S.C. § 1252(g) as a wholesale bar to this Court's jurisdiction, arguing that Petitioner's habeas action is simply an attempt to "interfere with" execution of a removal order. This argument proves too much and is inconsistent with governing Supreme Court precedent.

A. Section 1252(g) Does Not Strip Jurisdiction Over Constitutional Challenges to the Legality of Detention

Section 1252(g) strips courts of jurisdiction over claims "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). The Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), clarified that § 1252(g) targets the three specific actions enumerated in the statute and should not be read as a "zipper clause" eliminating all immigration-related judicial review. *Id.* at 482-83.

Petitioner does not challenge ICE's discretionary decision to pursue removal. He challenges the constitutionality of his ongoing civil detention—a distinct and well-recognized habeas claim. The Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), expressly held that federal district courts retain habeas jurisdiction under 28 U.S.C. § 2241 to review constitutional challenges to post-removal-order detention. *Id.* at 687-88. The Court in *Zadvydas* reached the merits of a detention challenge arising in the very same post-final-order context present here. Section 1252(g) was no barrier.

The Government's reliance on *Camarena v. ICE*, 988 F.3d 1268 (11th Cir. 2021), is misplaced. *Camarena* addressed a challenge to the government's enforcement priorities and the selection of which aliens to pursue for removal—a paradigmatic exercise of prosecutorial discretion. By contrast, Petitioner challenges not whether ICE may pursue his removal, but whether the Constitution permits indefinite civil detention while that removal remains uncertain. These are categorically different claims. Habeas jurisdiction lies for the latter. See *Zadvydas*, 533 U.S. at 688 ("[H]abeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.").

B. The Suspension Clause Independently Preserves This Court's Jurisdiction

Even if § 1252(g) were read as broadly as the Government urges, it could not constitutionally strip this Court of jurisdiction over a substantive constitutional claim. The Suspension Clause, U.S. Const. art. I, § 9, cl. 2, guarantees the availability of habeas corpus to persons within the United States unless Congress suspends it under conditions of rebellion or invasion. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). Congress has not suspended the writ here. Where no alternative remedy adequately substitutes for habeas review of a constitutional detention claim, the writ cannot be stripped away. *Boumediene v. Bush*, 553 U.S. 723, 771-72 (2008).

Petitioner presents a cognizable constitutional challenge: that his prolonged detention, on a decades-old removal order, without any realistic prospect of removal to Cuba, violates the Due Process Clause. No petition to the BIA or appeal to the circuit court can provide the swift release remedy that habeas affords. Jurisdiction is proper under 28 U.S.C. § 2241 and the Constitution itself.

II. THE DUE PROCESS CLAUSE PROTECTS PETITIONER REGARDLESS OF IMMIGRATION STATUS

The Government's Response proceeds on an implicit premise that Petitioner's constitutional protections are attenuated by his status as a noncitizen subject to a final removal order. That premise is wrong under longstanding Supreme Court authority that the Government conspicuously does not address.

A. The Fifth Amendment Applies to All Persons Present in the United States

The Due Process Clause of the Fifth Amendment provides that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has consistently held that this protection extends to all persons within the territorial jurisdiction of the United States—citizens and noncitizens alike, regardless of the lawfulness of their presence. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("[E]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to [constitutional] protection."); *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Supreme Court applied these principles in the immigration detention context in *Zadvydas* itself, finding that "freedom from imprisonment" lies at "the heart of the liberty" that the Due Process Clause protects, even for aliens subject to final orders of removal. 533 U.S. at 690. It

further held in *Clark v. Martinez*, 543 U.S. 371 (2005), that Zadvydas's construction of § 1231(a)(6) applies with equal force to inadmissible aliens—precisely the posture of Mr. Escobar Games, who was paroled into the United States and never formally admitted. *Clark*, 543 U.S. at 378-82.

The Government's response does not meaningfully engage with this constitutional foundation. Instead, it seeks to foreclose all inquiry by arguing the detention is not yet six months old. But the six-month presumption of *Zadvydas* is a floor, not a ceiling. It was established to provide administrative certainty, not to immunize constitutionally infirm detention from any scrutiny whatsoever simply because a calendar threshold has not elapsed.

B. Petitioner's Unique Circumstances Compel Constitutional Review

The Government presents Petitioner's case as routine post-removal detention. It is not. Petitioner was ordered removed in October 2000—nearly twenty-six years ago. He was detained in 2002 and released after 89 days under an OSUP because ICE itself determined there was no significant likelihood of removal to Cuba in the reasonably foreseeable future. For over twenty-two years thereafter, Petitioner complied fully with every check-in obligation. He built a life in the United States: he is the husband of a U.S. citizen, Elaine Suris, and the father of three U.S. citizen daughters, all adults.

Cuba has historically refused to accept the repatriation of Cuban nationals under removal orders. ICE's own decision to place Petitioner on OSUP in 2002 was a tacit acknowledgment that his removal was not reasonably foreseeable at that time. Nothing in the record suggests the repatriation landscape has changed so fundamentally that removal is now imminent. The Government's response offers no evidence of renewed repatriation negotiations, travel document requests, or

other concrete steps toward removal. Under *Zadvydas*, once there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the burden shifts to the government to rebut that showing. 533 U.S. at 701. That burden cannot be perpetually deferred by invoking a six-month countdown reset after decades of non-detention.

III. THE GOVERNMENT'S SIX-MONTH ARGUMENT FAILS UNDER THE SPECIFIC FACTS OF THIS CASE

A. Aggregation of Detention Periods Is Appropriate and Consistent with *Zadvydas*

The Government argues that Petitioner's current 121-day detention period should be analyzed in isolation, disregarding the 89-day detention he served in 2002 under the same removal order. Respondents cite no binding authority requiring this approach, and it is inconsistent with the rationale of *Zadvydas*.

Zadvydas's six-month presumption was designed to measure whether removal has been practically accomplished within a reasonable time after a final removal order becomes administratively final. 533 U.S. at 701. The removal order here became final on October 25, 2000. ICE had a full 90-day removal period to execute it and failed to do so. It then detained Petitioner again in 2002, held him for 89 days, and again failed to remove him—releasing him under OSUP upon its own determination that removal was not reasonably foreseeable. Now, twenty-two years later, it has detained him a third time on the same order, without any new basis for believing Cuba will accept his return.

Allowing the Government to indefinitely re-start the *Zadvydas* clock after each unsuccessful detention cycle would render the six-month presumption meaningless as applied to Cuban nationals and others whose countries historically refuse repatriation. It would permit unlimited

cycles of detention and supervised release, each below the six-month threshold, with no constitutional remedy ever maturing. This Court should reject that approach. See *Tran v. Warden*, No. 2:25-cv-1224-KCD-NPM (M.D. Fla. Mar. 10, 2026) (acknowledging need for circumstantial balancing in evaluating successive detention periods).

B. Even Under the Six-Month Framework, Petitioner Is Entitled to Relief

Respondents acknowledge that as of the filing of their Response, Petitioner has been detained for 121 days. This petition was filed on March 23, 2026. By the time this Court rules on the merits, Petitioner will have been in continuous detention for well over four months. The six-month Zadvydas presumption, measured from the December 10, 2025 re-detention date, will expire in June 2026—and with it, the government's presumption of reasonable detention.

Petitioner respectfully requests that this Court set this matter for hearing in advance of or promptly upon the expiration of the six-month period so that the government is required to demonstrate, on the record, a significant likelihood of removal in the reasonably foreseeable future. The record as it stands—no repatriation agreement with Cuba, no travel document pending, no history of successful Cuban removals under this order—strongly suggests that no such showing can be made.

IV. THE REVOCATION OF PETITIONER'S OSUP WAS ARBITRARY AND UNLAWFUL

The Government argues that ICE's OSUP revocation is entitled to broad deference and is effectively unreviewable. Even accepting that the decision to revoke is discretionary, the manner of revocation must comply with applicable regulations—and this Court retains jurisdiction to review procedural compliance. *Navarro v. Bondi*, No. 8:25-cv-3213-KKM-NHA, 2025 WL 3275944, at *2 (M.D. Fla. Nov. 25, 2025).

The revocation notice (Ex. D) is substantively bare. It states only that "circumstances" permit enforcement of the removal order without identifying what changed after twenty-two years of compliant supervision. Petitioner was provided no written statement of reasons, no identification of what new evidence or changed circumstances justified immediate re-detention, and no meaningful opportunity to contest the factual predicate for revocation before being taken into custody. At the informal interview conducted the same day as his arrest, he was given no opportunity to present evidence in advance. The interview was perfunctory by design.

The regulations at 8 C.F.R. § 241.13(i) require ICE, upon OSUP revocation, to afford the alien a genuine opportunity to "respond" and "submit any evidence" regarding the significant likelihood of removal in the reasonably foreseeable future. An informal interview held minutes after arrest, with no advance notice of the specific factual basis for revocation, does not satisfy this regulatory requirement. Petitioner respectfully submits that procedural due process demands more, and that at minimum this Court should order ICE to provide him with a meaningful and properly noticed custody review.

V. PETITIONER'S APA AND MANDAMUS CLAIMS ARE NOT PRECLUDED

The Government argues that habeas is the exclusive remedy and therefore forecloses Petitioner's APA and Mandamus claims. Petitioner does not contest that habeas is the primary vehicle for his detention challenge. However, Count Three of the Petition—raising the APA—is directed at the Government's unreasonable delay in completing removal, not at the detention itself. This is a distinct cognizable claim over which the APA and mandamus jurisdiction may lie even where habeas is available for the underlying custody challenge. To the extent the Court agrees that habeas subsumes these claims, Petitioner respectfully preserves the arguments raised in Counts Three and Four as alternative bases for relief.

CONCLUSION

For the foregoing reasons, Petitioner Damien Escobar Games respectfully requests that this Court:

1. Deny Respondents' request to dismiss the Petition and assert jurisdiction over Petitioner's constitutional claims;
2. Schedule an evidentiary hearing on the significant likelihood of removal in the reasonably foreseeable future, to occur no later than the expiration of Petitioner's six-month Zadvydas period in June 2026;
3. Order Respondents to demonstrate on the record a concrete basis for Petitioner's continued detention, including evidence of repatriation negotiations with Cuba or pending travel documents;
4. In the alternative, grant the writ of habeas corpus and order Petitioner released under appropriate conditions of supervision; and
5. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF electronic filing system, which will furnish copies of these documents to all registered counsel of record.

Dated: April 20, 2026

By: /s/ Lorenzo J. Palomares
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