UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

JOSE ALBERTO AYALA ZALDIVAR,

Petitioner,

Case No. 2:26-cv-01562-SPC-KRH

v.

MARKWAYNE MULLIN, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY; GARRET J. RIPA, MIAMI FIELD OFFICE DIRECTOR OF ENFORCEMENT AND REMOVAL OPERATIONS; MIAMI FIELD OFFICE IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF HOMELAND SECURITY; TODD BLANCHE, U.S. ATTORNEY GENERAL; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; WARDEN OF FLORIDA SOFT SIDE SOUTH DETENTION FACILITY,

Respondents.
_____/

FEDERAL RESPONDENTS' OPPOSITION TO
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Jose Alberto Ayala Zaldivar seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, on the grounds that his prolonged detention is unlawful. (Doc. 1.) His Petition should be denied because it is premature and because he has not met his burden to demonstrate that there is no reason to believe he will be removed

from the United States in the reasonably foreseeable future if he cooperates with removal efforts. His continued detention is therefore tolled and lawful.

BACKGROUND

Petitioner is a 61-year-old male native and citizen of Cuba. (Ex. A, Petitioner's Form I-213, p. 1.) On July 30, 1973, he entered the United States as a Cuban refugee. (Ex. A, pp. 1, 2.) On September 10, 1991, Petitioner was ordered removed to Cuba by an Immigration Judge. (Ex. A, p. 2.) The basis for his removal was a June 22, 1989 conviction for drug trafficking. (*Id.*) Accordingly, he was ordered removed based on a violation of Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), since codified at 8 U.S.C § 1227(a)(2)(A)(iii), which provides that an immigrant who has been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the INA, an offense relating to the illicit trafficking in a controlled substance, as described in Section 102 of the Controlled Substances Act, including a drug trafficking crime as defined in 18 U.S.C. § 924(c), is deportable. (Ex. A, p. 2.) Petitioner was released on an Order of Supervision (OSUP) on July 19, 2002. (Ex. C, Detention History.)

On December 3, 2025, Petitioner was encountered by United States Citizenship and Immigration Services (USCIS) after reporting to his scheduled OSUP appointment. (Ex. A, p. 2.) He was taken into custody in Miramar, Florida, without incident. (*Id.*) That same day he was served with a Notice of Revocation of Release on the grounds that ICE determined that it had become appropriate to enforce Petitioner's removal order. (Ex. B, Notice of Revocation of Release.)

CERTIFIED HABEAS RETURN

ICE is detaining Petitioner under the detention provisions of 8 U.S.C. § 1231(a). *See* 28 U.S.C. § 2243 (stating "[t]he person to whom the writ or order is directed shall make a return certifying the true cause of the detention."). Petitioner bears the burden to prove his custody violates federal law. *Whitfield v. U.S. Sec'y of State*, 853 F. App'x 327, 329 (11th Cir. 2021).

ARGUMENT

I. Petitioner's OSUP was Properly Revoked

Petitioner claims that ICE arbitrarily revoked his OSUP. Not so. "When the Government determines that circumstances have changed and it is finally time to carry out its removal order, the Constitution does not demand a full-dress, pre-deprivation trial." *Tran v. Warden, Fla. Soft Side S. Det. Ctr.*, No. 2:25-CV-1224-KCD-NPM, 2026 WL 672969, at *6 (M.D. Fla. Mar. 10, 2026). Rather, due process is flexible and "calls for such procedural protections as the particular situation demands." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "In the context of revoking a noncitizen's supervised release, ICE's regulations strike that constitutional balance by guaranteeing written notice and an informal interview that allows the individual to respond." *Id.* at *6. Here, Petitioner received a Notice of Revocation of Release. (Ex. B.) Even though the Petition does not raise that ICE failed to provide Petitioner with an informal interview, he "can hardly complain that he is being denied a

meaningful opportunity to be heard *now*." *Id.* at *9 (emphasis in original). "Through this very habeas proceeding, he has had a full chance to review the Government's evidence, file his briefs, and press his legal arguments." *Id.* "He has had his say[,] as "this litigation itself has provided him with the exact procedural safeguards" he is due. *See id.* "Because habeas is not backward-looking, the process provided now renders forward-looking relief separately inappropriate." *Id.*

Moreover, 8 C.F.R. § 241.13(i) "leaves the determination of whether circumstances have changed squarely in the agency's hands." *Id.* at *8. Here, circumstances have changed because the government is pursuing removal to Mexico, not Cuba. "When the government pursues a completely different diplomatic route, it stands to reason that the old obstacles are left behind." *Id.* "For the agency's purposes under the regulations, charting a new court to a new country is the very definition of a changed circumstance." *Id.* According, ICE properly revoked Petitioner's OSUP.

II. Petitioner's *Zadvydas* Claim is Premature

The Petition should also be denied because it is premature. After a final removal order, an alien must be removed within ninety days—this is referred to as the removal period. 8 U.S.C. § 1231(a)(1); *see also Zadvydas*, 533 U.S. at 683. During the removal period, the alien must be detained. 8 U.S.C. § 1231(a)(2); *Zadvydas*, 533 U.S. at 683. An alien, however, can be detained beyond that removal period. 8 U.S.C. §§ 1231(a)(1)(C), (a)(6); *Zadvydas*, 533 U.S. at 683. This is called a "post-

removal" period. *Johnson v. Guzman Chavez*, 594 U.S. 523, 528–29 (2021).

There is no statutory limit on how long ICE can detain an alien during the post-removal period. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). However, in *Zadvydas v. Davis*, the Supreme Court held that detention following a final removal order is presumptively reasonable for six months. 533 U.S. 678, 701 (2001). **"This six month period . . . must have expired at the time [a petitioner's] § 2441 petition [is] filed in order to state a claim under *Zadvydas*."** *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002). Thus, it is contrary to binding law for a court to simply wait until 180 days of detention has passed and then release a petitioner under *Zadvydas*.

Here, Petitioner's detention history reveals that he was taken into ICE custody December 4, 2025. (Ex. C, Detention History.) Crucially, as of the date the instant Petition was filed—May 9, 2026—Petitioner had been detained for 156 days. (*See id.*) As such, his Petition falls short of the six-month presumptively reasonable post-removal order detention length set forth in *Zadvydas*.

If the presumptively reasonable period expires without removal, then a burden-shifting framework comes into play regarding the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. If an alien "provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," the government must either rebut that showing or release the alien. *Id.* But before that six-month period expires, any habeas challenge to

the detention itself is premature. *E.g.*, *Akinwale*, 287 F.3d at 1051–52; *Song v. U.S. Att'y Gen.*, 516 F. App'x 894, 899 (11th Cir. 2013); *Gozo v. Napolitano*, 309 F. App'x 344, 346 (11th Cir. 2009). At bottom, "until the six-month *Zadvydas* period concludes, detention is presumptively reasonable, and any due process claim is not ripe." *Al Ellary v. Noem*, Case No. 2:26-cv-112-KCD-DNF, 2026 WL 548048, at *1 (M.D. Fla. Feb. 27, 2026).

The Court should not aggregate the post-removal order time Petitioner previously spent in detention to calculate whether his current detention falls within the six-month presumptively reasonable period. The undersigned is aware that this Court has taken various positions on how to count the presumptively reasonably six-month period. In some decisions, the Court has aggregated prior periods of detention with the current detention and found that if, in the aggregate, a petitioner's detention exceeds 180 days, it exceeds the presumptively reasonable period set forth in *Zadvydas*. *See, e.g.*, *Alejandro Alvarez v. Mordant*, Case No. 2:26-cv-471-SPC-DNF, 2026 WL 672938, at *1, *2 (M.D. Fla. Mar. 10, 2026). More recently, the Court has counted six months from the removal order, including periods of non-detention. *E.g.*, *Reyes-Portela v. Warden, Fla. Soft-Sided Facility*, 2026 WL 1309038, at *1–2 (M.D. Fla. May 13, 2026). Federal Respondents disagree with both approaches and, for preservation purposes, contend that Petitioner's current period of post-removal order detention is the only period that should be counted towards the presumptively reasonable six-month detention in *Zadvydas* under the circumstances presented in this

case.

As an initial matter, any argument that "the six-month period begins at the start of the removal period, regardless of the petitioner's actual detention status" is untenable. "*Zadvydas* was aimed at the severe, physical deprivation of liberty that comes from sitting in a jail cell indefinitely." *Tran v. Warden, Fla. Soft Side S. Det. Ctr.*, No. 2:25-CV-1224-KCD-NPM, 2026 WL 672969, at *3 (M.D. Fla. Mar. 10, 2026). Indeed, the Supreme Court has "used the words 'detain' and 'custody' to refer exclusively to physical confinement and restraint." *Id.* (citing *Jennings*, 583 U.S. at 311). "Against that backdrop, it is illogical to run a clock designed to prevent indefinite imprisonment while a person is out living freely in the community." *Id.* "Because *Zadvydas* clearly involved *detention* of a petitioner during the presumptively reasonable period, it defies common sense to suggest that *Zadvydas* time can run while a petitioner is not in custody." *Id.* (quoting *Cheng Ke Chen v. Holder*, 783 F. Supp. 2d 1183, 1192 (N.D. Ala. 2011) (emphasis in original)). "The six-month clock measures actual lockup, not supervised freedom." *Id.* (citing *Akinwale*, 287 F.3d at 1052). To be sure, the Eleventh Circuit has stated that "in order to state a claim under *Zadvydas* the alien . . . must show post-removal order *detention* in excess of six months"—not merely post-removal order *passage of time*. *Akinwale*, 287 F.3d at 1052 (emphasis added).

Nor is a blanket rule of aggregation the appropriate approach. Rather, "a blanket rule that all prior periods of confinement automatically aggregate to satisfy the *Zadvydas* six-month clock . . . . is practically unworkable and effectively punishes the

government for its past lawful actions." *Tran*, 2026 WL 672969 at *4. "Instead, the better approach is to afford the government a new six-month presumptively reasonable period for each discrete detention, unless there are facts suggesting the government is acting with an improper motive." *Id.* at *5. "If the record reveals a calculated pattern of catch-and-release designed merely to reset the *Zadvydas* clock or evade judicial review, aggregation may be entirely appropriate." *Id.* "But absent evidence of such bad faith or a deliberate strategy of looping confinement, courts should presume that a subsequent detention is a genuine, independent effort to effectuate removal." *Id.* "This standard strikes the appropriate balance." *Id.* "It alleviates constitutional concerns regarding indefinite, cyclical detention by providing a safeguard against abuse, while simultaneously protecting the government's legitimate, statutory interest in finalizing deportations when logistical or diplomatic circumstances finally permit." *Id.*

Here, there is no such evidence "that officials manipulated [Petitioner's] release and rearrest to bypass the six-month presumption or avoid judicial oversight." *Id.* Indeed, Petitioner was previously released on an OSUP on July 19, 2002, after eighty-eight days in post-removal-order detention. (Ex. C.) He was not detained again until December 4, 2025, on the basis that ICE determined that it was appropriate to enforce his removal order. (Ex. B.) Section 241.13(i) of Title 8 of the Code of Federal Regulations "gives the agency two reasons to revoke an order of supervision: either the noncitizen violated the conditions of his release, or the Government is ready to effectuate his removal." *Tran*, 2026 WL 672969, at *9. In this instance, it was the latter.

"The notice did not hide the ball—it told [Petitioner] exactly why his supervised freedom was ending and why he was returning to custody." *Id.* "There is not much more information a notice could include that would give an alien a more concrete reason for their revocation." *Id.* As such, the Court should decline to aggregate Petitioner's prior post-removal order detention period.

To be sure, regulations under the INA authorized Petitioner's detention following his revocation of release. Under 8 C.F.R. § 241.13(i)(2), a noncitizen's release may be revoked and the noncitizen may be returned to custody if, "on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future." In turn, 8 U.S.C. § 1231 *mandates* detention for the first ninety days following post-removal order detention. 8 U.S.C. § 1231(a)(2)(A). If courts adopt blanket rules to aggregate all periods of pre-removal order detention regardless of the circumstances, such calculations would render meaningless the authorization in 8 C.F.R. § 241.13(i)(2) to revoke a non-citizen's OSUP and re-detain him based on changed circumstances that make removal more likely.

Moreover, "[i]f every prior day spent in immigration custody simply rolled over into the present calculus, the [G]overnment's statutory authority briefly re-detain a noncitizen to finalize a removal would be severely restricted, if not eliminated entirely." *Tran*, 2026 WL 672969 at *4. "The six-month period established in *Zadvydas* was designed to provide the government a functional window to negotiate with foreign

nations, secure travel documents, and coordinate the complex logistics of deportation." *Id.* "A strict aggregation rule ignores the reality that diplomatic circumstances evolve." *Id.* "If a foreign government that previously refused repatriation suddenly agrees to issue travel documents, the United States needs a practical opportunity to effectuate that newly viable removal." *Id.* "Mandating automatic rollover of all past detention would force the immediate release of a noncitizen even when their current custody is driven by an imminent, foreseeable deportation, ultimately frustrating the core purpose of the removal statute." *Id.*

"Because habeas relief is governed by equitable principles, courts are empowered to look beyond a mere mathematically tally to examine the totality of the circumstances." *Id.* at *5. "By inquiring into whether the government has engaged in a deliberate cycle of release and re-detention, the court exercises its equitable discretion to prevent gamesmanship, all while preserving the executive branch's necessary flexibility to enforce immigration laws." *Id.*

"As the Supreme Court has long recognized, detention during deportation proceedings is a constitutionally valid aspect of the deportation process." *Id.* "So the executive branch gets a presumptively reasonable six-month runway to do its job, negotiate with foreign governments, and execute a final removal order." *Id.* "The question is not whether his detention was unlawful in the past." *Nguyen v. Noem*, 797 F. Supp. 3d 651, 669 (N.D. Tex. 2025). "The great and central office of the writ

of habeas corpus is to test the legality of the petitioner's current detention." *Noem*, 797 F. Supp. 3d at 669–700.

Here, the Court should decline to aggregate Petitioner's prior confinement and deny the Petition as premature. Petitioner filed the present petition before the expiration of six months in his current detention. He was detained on December 4, 2025, and filed the present Petition on May 9, 2026. (Ex. B; Doc. 1.) At that time, Petitioner been detained for 156 days and removal had already been attempted. (Doc. 1, ¶ 6.) As previously stated, it is only after six months that the parties can engage in *Zadvydas* burden-shifting related to the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701 (stating that the inquiry is "[a]fter this 6-month period"); *Al Ellary*, 2026 WL 548048, at *1–2 (denying petition when alien had not been detained for six months). Before that time limit runs, neither *Zadvydas* nor any other binding precedent permits a challenge based on reasonable foreseeability of removal. *See Akinwale*, 287 F.3d at 1051–52. Accordingly, the Petition should be denied as premature.

III. Petitioner Has Failed to Meet his Burden to Show that there is no Significant Likelihood of Removal in the Reasonably Foreseeable Future

Even if the Court finds that the six-month presumptively reasonable period has expired under *Zadvydas*, Petitioner has not met his burden to demonstrate that the government cannot remove him in the reasonably foreseeable future. Indeed,

Petitioner has not provided any reason to believe that ICE will not be able to execute his removal order in the reasonably foreseeable future if he cooperates.

As some courts have started recognizing, third-country removal to Mexico has been difficult recently for aliens who refuse departure to that nation. At this time, Mexico generally will not accept non-Mexican individuals who do not consent to removal. *Leyva Lambert v. Warden, ERO El Paso Camp E. Mont.*, Case No. EP-26-CV-00427-DB, 2026 WL 926216, at *2 (W.D. Tex. Apr. 6, 2026); *Gustavo Delgado v. Bondi*, Case No. 2:26-cv-00649-GJL, 2026 WL 914806, at *4 (W.D. Wash. Apr. 3, 2026). But nothing about this is a get-out-of-removal-free-card. Nothing in the record suggests that Mexico will not accept Petitioner if he goes willingly without an ICE agent dragging him across the border. Likely, the only thing stopping removal is Petitioner's refusal to go to Mexico. And where the failure to remove is solely a result of a petitioner's ongoing refusal, detention is still permitted. 8 U.S.C. § 1231(a)(1)(C); *Pelich v. INS*, 329 F.3d 1057, 1060 (9th Cir. 2023).

Noticeably absent from the Petition are the reasons for which removal to Mexico, which Petitioner claims was attempted in January and March of 2026, was unsuccessful. The undersigned is aware of no other circumstance where removal to Mexico was unsuccessful except for where petitioners refused to cross the border. Given that it is both Petitioner's burden to demonstrate that his continued detention is unlawful and that there is reason to believe that ICE will not be able to execute his removal order in the reasonably foreseeable future, Petitioner cannot meet that

burden without stating a constitutionally recognizable reason why the attempted removals were unsuccessful.

To be sure, 8 U.S.C. 1231(a)(1)(C) "extends the removal period if the noncitizen either (1) fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or (2) conspires or acts to prevent the alien's removal." *Singh v. U.S. Att'y Gen.*, 945 F.3d 1310, 1314 (11th Cir. 2019). (citing 8 U.S.C. § 1231(a)(1)(C)) (emphasis in original). Here, Petitioner cannot demonstrate that there is no significant likelihood of removal when "the keys to his freedom" are very likely "in his own pocket"—indeed, it is more likely than not that he would have been removed if he cooperated with prior attempted removal efforts. *See id.* at 1314. As admitted in the Petition, Petitioner knew that ICE intended to remove him to Mexico in March 2026. (Doc. 1, ¶ 6.) And, by Petitioner's own admission, ICE attempted to do so. (*Id.*) However, the removal process was unsuccessful. (*Id.*) Petitioner's silence as to why the removal was unsuccessful is suspect at best. It is more likely than not that Petitioner prevented his removal to Mexico by refusing to cross the border. This Court has already denied several habeas petitions on *Zadvydas* grounds for Cuban petitioners who refused to cooperate with removal to Mexico at the border. *E.g.*, *Jose Duque v. Warden, Fla. Soft Side Facility South*, Case No. 2:26-cv-884-SPC-NPM, 2026 WL 943774, at *1 (M.D. Fla. Apr. 8, 2026); *Ramiro-Monteagudo v. Mordant*, Case No. 2:26-cv-873-SPC-NPM, 2026 WL 937971, at *1 (M.D. Fla. Apr. 7, 2026); *Cabrera Prieto v. Bondi*, Case No. 2:26-cv-746-SPC-DNF, 2026 WL 872590, at

*2 (M.D. Fla. Mar. 31, 2026); *Jimenez Mayea v. ICE*, Case No. 2:26-cv-574-SPC-DNF, 2026 WL 770041, at *2 (M.D. Fla. Mar. 19, 2026). Based on the vagueness of Petitioner's argument, the Court's experience in ruling on many of these cases, and absent clarification from Petitioner as to why the attempts to remove him were unsuccessful, Petitioner cannot meet his burden to show good reason—outside his own refusal to leave—why there is no significant likelihood of removal of him in the new future.

Petitioner states that Respondents have not produced evidence that Mexico has formally accepted Petitioner for repatriation or produced valid travel documents authorizing removal. (Doc. 1, ¶ 24.) But Petitioner has not demonstrated that Mexico requires valid travel documents or formal acceptance. At bottom Petitioner's challenge to his continued detention fails unless he can assert that he complied with removal efforts to Mexico and the deportation still failed. *See Imbert-Marrero v. Warden, ERO El Paso Camp E. Mont.*, Case No. 2:26-CV-922-KCD-DNF, 2026 WL 1223632, at *2 (M.D. Fla. May 5, 2026).

Petitioner's period of post-removal detention should be tolled, as pattern and practice dictates that "the keys to [his] freedom are in his pocket," if he cooperates with removal efforts to Mexico. *See Singh*, 945 F.3d at 1314. Because "[t]he risk of indefinite detention that motivated the Supreme Court's statutory interpretation in *Zadvydas* does not exist when an alien is the cause of his own detention," *id.*, the Petition should be denied. Indeed, continuing to release Cuban immigrants who are

ordered removed but remained detained due Cuba's refusal to accept them and their own refusal to cooperate with removal to Mexico only creates a perpetual cycle that petitioners continue to take advantage of repeatedly in these cases. So, unless Petitioner can meet his initial burden to demonstrate that—absent his refusal to cooperate—there is no significant likelihood of his removal to Mexico, his detention period should be tolled, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Petition for Writ of Habeas Corpus (Doc. 1) be denied.

Dated: May 19, 2026

Respectfully submitted,

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