UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RENE ALBA FERNANDEZ

Petitioner, Case No. 2:26-cv-1674-SPC-KRH

v.

WARDEN, FLORIDA SOFT SIDE
DETENTION CENTER, et al.,

Respondents.
___________________________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Rene Alba Fernandez seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging the lawfulness of his detention by U.S. Immigration and Customs Enforcement ("ICE") as unreasonably prolonged. The Court lacks jurisdiction, and ICE contends that petitioner has prevented his own removal. Therefore, the petition should be denied.

BACKGROUND

Petitioner is a national and citizen of Cuba, who first entered the United States on November 28, 1993 through Key West Florida as a Parolee. (Composite Exhibit, Ex. A at 2.) He was ordered removed from the United States on April 7, 1997. *Id.* He was not released, but was placed on an Order of Supervision. *Id.* at 6. In October 2024, he was convicted of armed burglary, felon in possession of a firearm, aggravated battery with a firearm, and aggravated assault with a deadly weapon. *Id.* at 2-3. His Order of Supervision was revoked on October 26, 2025, and he was taken into ICE custody on October 27, 2025. *Id.* at 1-3, 6, 9.

On May 18, 2026, Petitioner filed a petition seeking habeas corpus relief. Doc. 1. The Court issued an order directing Respondents to show cause why the petition should not be granted no later than May 28, 2026. Doc. 2. For the reasons set forth below, Respondents respectfully assert that the petition should be denied.

LEGAL STANDARD AND CERTIFIED HABEAS RETURN

The Court has the power to grant a writ of habeas corpus where a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *Walker v. Johnston*, 312 U.S. 275, 286 (1941). "The burden rests on the person in custody to prove his detention is unlawful." *Benito Vasquez v. Moniz*, No. 25-11737-NMG, 2025 WL 1737216, at *1 (D. Mass. June 23, 2025). ICE is detaining Petitioner under the mandatory post-removal detention provisions of 8 U.S.C. § 1231.[1] *See* 28 U.S.C. § 2243 ("The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.").

ARGUMENT

I. 8 U.S.C. § 1252(g) Precludes Review of Petitioner's Claims

[1] The Record of Deportable/Inadmissible Alien (Form I-213, Ex. A at 1-2) states that petitioner's current administrative charge is under Section 212(a)(1)(A)(i) of the INA, but ICE has represented to undersigned counsel that this is likely an error.

There is no jurisdiction to review "any cause or claim . . . 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); *Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013). This provision bars habeas review in federal courts when the claim arises from "discrete acts of commencing proceedings, adjudicating cases, and executing removal orders." *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483 (1999) ("*AADC*") (cleaned up). These activities "represent the initiation or prosecution of various stages in the deportation process" that Congress had "good reason" to withhold from judicial review. *Id.*

This bar is subject to limitations and must be applied "to just those three specific actions" listed. *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018). In doing so, "courts must focus on the action being challenged." *Canal A Media Holding, LLC v. USCIS*, 964 F.3d 1250, 1258 (11th Cir. 2020). Here, Petitioner is subject to a final order of removal and he challenges ICE's detention for the purpose of executing that order. This matter thus falls squarely within the specific actions *Jennings* contemplated, namely the discrete action of executing a removal order, and this Court lacks jurisdiction to hear Petitioner's claims. *See e.g.*, *Rivera-Amador v. Rhoden*, No. 3:25-CV-1460-WWB-SJH, 2025 WL 3687452, at *2 (M.D. Fla. Dec. 19, 2025); *see also Barrios v. Ripa*, No. 1:25-CV-22644, 2025 WL 2280485, at *4 (S.D. Fla. Aug.

8, 2025) (finding 8 U.S.C. § 1252(g) to bar habeas petitioner's claims that OSUP had been improperly revoked).

II. 8 U.S.C. § 1252(b)(9) Also Bars This Court's Review

The Court also lacks jurisdiction on separate grounds. The INA precludes the Court's review of "all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States" except when brought pursuant to judicial review of a final order of removal. 8 U.S.C. § 1252(b)(9). This is known as the "zipper clause" and applies where a petitioner seeks "review of an order of removal [or] the decision to seek removal." *Canal A*, 964 F.3d at; *DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 19 (2020) (cleaned up). In reading this subsection alongside 8 U.S.C. § 1252(a)(5)—the subsection that provides the single, proper path for judicial review of removal orders—courts have concluded that petitioners must funnel all aspects of challenges to removal proceedings through the avenue set forth in Section 1252(a)(5), which takes place after a final order of removal has issued. *Nasrallah v. Barr*, 590 U.S. 573, 580 (2020) ("The REAL ID Act clarified that final orders of removal may not be reviewed in district courts, even via habeas corpus, and may be reviewed only in the courts of appeals."); *see also Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005) (There is "clear intent to have all challenges to removal orders heard in a single forum (the courts of appeals)."). The zipper clause's restrictions are broad, but not without limitation. *See, e.g.*, *Canal A*, 964 F.3d at 1257. However, a claim that arises from actions or proceedings brought to remove an alien clearly falls within its parameters. *See Regents of Cal.*, 591 U.S. at 19 (finding the bar inapplicable where parties did not challenge removal proceedings).

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that "§1252(b)(9) [did] not present a jurisdictional bar" in situations where "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at 294-95. Here, the crux of this case challenges ICE's execution of Petitioner's final removal order to stop the removal process. These are the exact claims barred by the zipper clause. 8 U.S.C. § 1252(b)(9). The fact that the Petitioner is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. at 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the Petitioner's claims for lack of jurisdiction under 8 U.S.C. § 1252(b)(9).

III. Petitioner's Detention is Lawful

A. <u>Statutory and Regulatory Framework</u>

An alien with a final order of removal is subject to the detention and removal standards set forth at 8 U.S.C. § 1231. The statute directs that an alien ordered removed be removed within 90 days of his order becoming final and that he remain detained during that timeframe. 8 U.S.C. § 1231 (a)(1)(A); (a)(2)(A). Where the removal period elapses without the alien's departure, the INA and regulations give DHS the authority to grant an order of supervision pending his removal. 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5(a).

B. Petitioner's Order of Supervision Has Been Lawfully Revoked for the Purpose of Effecting His Removal From the United States.

An order of supervision is not indefinite; rather, the regulations permit the government to revoke the order for a variety of reasons. 8 C.F.R. § 241.4(*l*). Among the reasons for which supervision may be revoked are violation of the conditions of release—in which the alien must be notified of those reasons and given the opportunity to respond—and at DHS's discretion when: "(i) the purposes of release have been served; (ii) the alien violates any condition of release; (iii) it is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (iv) the conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate." 8 C.F.R. § 241.4(*l*)(1)-(2).

Should the Court determine that it retains jurisdiction over Petitioner's habeas claims, he still cannot establish eligibility for habeas relief because his detention is lawful. Petitioner is subject to final order of removal. Ex. A at 8. While he was released on an order of supervision, that order remained revocable. *See* 8 C.F.R. § 241.4(*l*). Here, on October 26, 2025, ICE lawfully exercised its discretion to revoke

Petitioner's supervision under 8 C.F.R. § 241.4(*l*)(2)(iii) for the purpose of executing his final order of removal. ICE was within its authority to revoke Petitioner's order of supervision and it did so in accordance with the regulations.

Section 241.4(l)(2) does not require notice, explanation, or an interview for the alien to respond. *Compare id.*, *with id.* § 241.4(l)(1); *Tanha v. Warden, Balt. Detention Facility*, No. 1:25-cv-02121-JRR, 2025 WL 2062181, at *6 n.10 (D. Md. July 22, 2025). This "regulation permits the Government extraordinarily broad discretion to revoke an OSUP." *Tran*, 2025 WL 2085020, at *4. In fact, the regulation does not compel the Government to demonstrate what facts or factors, if any, it considered in deciding to revoke; nor does the regulation (or any other authority of which the court has been made aware) require the Government to demonstrate what, if any, steps it took to effect or secure removal prior to OSUP revocation. *Id.*; *see also Grigorian v. Bondi*, No. 25-CV-22914-RAR, 2025 WL 1895479, at *6 (S.D. Fla. July 8, 2025) (noting differences between both subsections).

C. <u>ICE's Removal Efforts</u>

As discussed *supra* the INA requires that an alien ordered removed be detained for the 90-day removal period after his order of removal becomes final. 8 U.S.C. § 1231 (a)(1)(A); (a)(2)(A). But even where removal is not effected on that schedule, the government is permitted to continue to detain an alien—or to detain him again in the future for the purpose of executing the order—and there is no statutory limit on how long that post-removal detention period may last. *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). However, due to constitutional concerns, the U.S. Supreme Court has nevertheless interpreted the post-removal period to allow extended detention for "a period reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689. In all, a reasonable length of detention "is presumptively six months." *Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021); *see also Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) (stating six-month period is inclusive of any ninety-day removal period).

If the presumptively reasonable period expires without removal, then a burden-shifting framework comes into play that considers the "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 689. 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; *Guo Xing Song v. U.S. Attorney General*, 516 F. App'x 894, 899 (11th Cir. 2013); *Gozo v. Napolitano*, 309 F. App'x 344, 346 (11th Cir. 2009).

Here, Petitioner's 90-day removal period elapsed in the 90-days immediately following his 1997 removal order becoming final. Petitioner's present period of detention is 213 days as of the date of this filing, meaning that the burden-shifting framework comes into play. To that end, though Petitioner is a national of Cuba, ICE is considering third country removal,[2] which is permissible under the INA. *See* 8 U.S.C. § 1231(b). This authority is broad. The United States may remove aliens to various countries including, where other options are unavailable, to any country willing and able to accept them. *See* 8 U.S.C. § 1231(b)(2); *see also Jama v. ICE*, 543 U.S. 335, 338-41 (2005). Such countries are referred to as "third countries" for removal. While the INA authorizes the removal of aliens who have received a final order of removal to a third country, *see* 8 U.S.C. § 1231(b)(1)(C), (2), it does not delineate a particular process for carrying out third country removals to ensure that they remain consistent with the United States' obligations under the Convention Against Torture.[3] Instead, Congress delegated the decision regarding the appropriate process entirely to the Executive Branch. *See* 8 U.S.C. § 1231 note (providing that the "heads of the appropriate agencies shall prescribe regulations to implement" the United States' CAT obligations).

In other words, Respondents need not demonstrate that Cuba is willing to issue travel documents to Petitioner or agree to his repatriation, rather third country removal is indeed available. Furthermore, the process for implementing

[2] Undersigned has requested documentation as to specific removal plans from ICE but as of this filing has not received anything beyond the agency's intention to remove Petitioner to Mexico, leaving little to offer on significant likelihood of removal in the reasonably foreseeable future.

[3] The Convention Against Torture regulations prohibit an alien's removal to a country where he faces a clear probability of torture—*i.e.*, the extreme scenario where the alien is likely to face severe pain or suffering intentionally inflicted by or with the consent of the public official. *See* 8 C.F.R. §§ 208.16(c), 208.18(a), 1208.16(c), 1208.18(a) (2020).

third country removal has been delegated exclusively to the Executive Branch. Whether third country removal is pursued remains within the realm of duties allowable by statute and Petitioner has demonstrated no violation of statute or precedent to the contrary.

Additionally, ICE contends that Petitioner has failed to comply with ICE's attempted removal to Mexico, and that Petitioner is therefore the cause of his current detention. *See* Ex. A at 11-12, ¶ 3 (Declaration of Deportation Officer Juan Cuevas). An alien may continue to be detained where he has acted to prevent his removal. 8 U.S.C. § 1231(a)(1)(C) states:

> The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

The courts have generally taken two different approaches when applying § 1231(a)(1)(C) in the context of a *Zadvydas* claim:

> Many courts conduct an analysis using the burden-shifting framework from *Zadvydas*, considering an alien's failure to cooperate in determining whether the alien can show "good cause" to believe that there is no significant likelihood of removal in the reasonably foreseeable future. Other courts contend that an alien's failure to cooperate precludes an analysis under *Zadvydas* altogether. Finally, some courts find an alien's failure to cooperate or filing of litigation equitably tolls, possibly indefinitely, the six-month removal period. In fact, a couple of courts covered both bases finding obstruction tolled the removal period, and in the alternative, the alien did not meet the *Zadvydas* standard.

Glushchenko v. United States Dep't of Homeland Sec., 566 F. Supp. 3d 693, 705-06 (W.D. Tex. 2021) (footnotes omitted). In *Akinwale*, the Eleventh Circuit recognized that the six-month period may be tolled if the alien "'acts to prevent [his] removal'" by filing litigation "challeng[ing] issues related to his removal order and his post-removal period detention." *Akinwale*, 287 F.3d at 1052 n.4 (quoting 8 U.S.C. § 1231(a)(1)(C)). More recently, the Eleventh Circuit noted that "if the removal period was extended by operation of § 1231(a)(1)(C), then ICE can continue to detain [the petitioner] because 'the keys to [the petitioner's] freedom [are] in his pocket and [he] could likely effectuate his removal by providing the information requested,' so he 'cannot convincingly argue that there is no significant likelihood of removal.'" *Singh*, 945 F.3d at 1314 (quoting *Pelich v. Immigration & Naturalization Serv.*, 329 F.3d 1057, 1060 (9th Cir. 2003)); *see Vaz v. Skinner*, 634 F. App'x 778, 782 (11th Cir. 2015) ("Because Petitioner is responsible for thwarting his removal, he cannot show that there is no reasonable likelihood that he will not be removed in the reasonably foreseeable future if he cooperates with DHS and voluntarily signs for the travel document."); *Oladokun v. U.S. Att'y Gen.*, 479 F. App'x 895, 897 (11th Cir. 2012) ("Oladokun fails to 'provide[ ] good reason to believe that there is no significant likelihood of [his] removal in the reasonably foreseeable future,'" because his "non-cooperation is the only barrier to his removal." (quoting *Zadvydas*, 533 U.S. at 701)).

CONCLUSION

Federal Respondents acknowledge that this Court has rejected arguments that are similar to those made in this response, both as to jurisdiction and as to the impact of a petitioner's purported failure to comply with ICE's removal efforts on a *Zadvydas* challenge. *See, e.g.*, *Zaldivar v. Mullin*, 2026 WL 1463502 at *2 (M.D. Fla. May 26, 2026). While Federal Respondents assert that this Court is barred from considering Petitioner's claims under the INA and that Petitioner's detention for the purpose of executing his final order of removal is proper under 8 U.S.C. § 1231, should the Court determine that inadequate process has been provided or that detention has been unlawfully extensive, Federal Respondents respectfully defer to the Court as to the appropriate remedy.

DATED this 28th day of May, 2026.

Respectfully submitted,

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