UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW MEXICO

Luis Eduardo PEREZ PARRA, *et al*., *Petitioners,* v. DORA CASTRO, *et al*., *Respondents.*	No.1:24-cv-00912-KG-KRS

PETITIONERS' REPLY

I. Introduction

Petitioners Luis Eduardo Perez Parra, Leonel Rivas Gonzalez, and Abrahan Josue Barrios Morales are entitled to immediate release under *Zadvydas* and the Due Process Clause. Because Petitioners have been confined in ICE custody for over six months since their removal orders became administratively final, Respondents are no longer entitled to a presumption that Petitioners' post-removal period detention remains reasonable. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The record now before the Court shows that Petitioners' detention is not, in fact reasonable, and runs afoul of both the post-removal order detention statute and due process. Neither Respondents' alleged efforts at third country removal nor their vague and unsubstantiated allegations of public safety risk are sufficient to justify Petitioners' continued detention.

First, Respondents do not even attempt to rebut Petitioners' showing that there is "good reason to believe that there is no significant likelihood of [their] removal [to Venezuela] in the reasonably foreseeable future." *Id*.; *see generally* Doc. 32 (Respondents' Response to the Court's Order to Show Cause). Nor could they, since Venezuela has not accepted a deportation flight for

almost a year and diplomatic relations between the United States and Venezuela have only deteriorated since. Doc. 1 (Petition) at ¶¶ 42-49; *accord* Doc. 32 at 4, 7, 11-12. Instead, Respondents argue that they have met their burden of demonstrating the likelihood and foreseeability of that Petitioners' removal to an unspecified country in Europe or the "Pacific region," or to Mexico, or some other third country. *See* Doc. 32 at 14-16. But Respondents' entreaties to Mexico have so far gone unanswered, *id*. at 5, 9, 12, and diplomatic negotiations with other countries remain unresolved and, as Respondents' State Department declarant admits, "inherently uncertain." Doc. 32-1 at 65 (Resp. Ex. N, Verma Decl. ¶ 11). Respondents' late-blooming attempts at third country removal are vaguely alleged, uncorroborated, and insufficient to justify Petitioners' continued detention.

Second, Respondents also cannot justify Petitioners' indefinite detention based on alleged dangerousness or other special circumstances. Respondents fail to allege—much less prove—that they have complied with the stringent substantive limitations and procedural safeguards required by due process and the government's own regulations in order to justify post-removal period detention on these grounds. Neither Respondents' unsubstantiated allegations of Mr. Perez Parra and Mr. Rivas Gonzalez's suspected gang affiliation—which Petitioners vigorously refute—nor Mr. Barrios Morales's single, non-violent conviction or Petitioners' disciplinary records, come close to demonstrating that they are among the "small segment of particularly dangerous individuals" whose detention may be justified beyond the six-month-mark. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1251 (10th Cir. 2008) (citing *Zadvydas*, 533 U.S. at 690-92).

Accordingly, Petitioners are entitled to release under 8 U.S.C. § 1231(a)(6), as interpreted by the Supreme Court is *Zadvydas*. Because their lengthy and indefinite detention without

adequate review also violates the substantive and procedural guarantees of the Due Process Clause, they are also entitled to release on constitutional grounds.

II. Factual Background

The parties do not dispute the following facts: Petitioners are three Venezuelan nationals who are being detained in ICE custody based on final orders of removal to Venezuela. Doc. 32-1 at 4[1] (Resp. Ex. A, AFOD Gonzalez Decl. re: Perez Parra ¶ 9), 12 (Resp. Ex. B, AFOD Gonzalez Decl. re: Rivas Gonzalez ¶ 10), 20-21 (Resp. Ex. C, AFOD Gonzalez Decl. re: Barrios Morales ¶¶ 15, 17). Each of the Petitioners has been detained for over six months after his removal order became administratively final. *See* Doc. 32-1 at 4 (¶ 9), 12 (¶ 10), 21 (¶ 17). Petitioners' total time in ICE custody has already reached between one year and fourteen months. Doc. 32-1 at 3 (¶ 4), 11 (¶ 5), 19 (¶ 7). Respondents do not allege that any of the Petitioners are impeding the government's efforts to remove them or failing to cooperate in any way. *See generally* Doc. 32. Respondents acknowledge that they have been unable to remove Petitioners to Venezuela because Venezuela is not currently accepting—and has not for many months accepted—deportations from the United States. *See* Doc. 32-1 at 4 (¶ 11), 12 (¶ 12), 20 (¶ 15); *see also* Doc. 1 (Petition) ¶¶ 42-49.

In their attached declarations, Petitioners Perez Parra and Rivas Gonzalez attest—contrary to Respondents' unsubstantiated assertions, *see* Doc. 32 at 3, 5-6, 9, 21-22—that they are not members of or in any way affiliated with the Tren de Aragua gang or any other criminal gang or organization. Ex. A (Perez Parra Decl.) ¶ 3; Ex. B (Rivas Gonzalez Decl.) ¶¶ 3-6. Mr. Perez Parra and Mr. Rivas Gonzalez further confirm that they have no criminal convictions, Ex. A, ¶ 5; Ex. B ¶ 7, and Petitioner Abrahan Josue Barrios Morales confirms that he has only the one criminal conviction alleged in Respondents' Response. Ex. C (Barrios

[1] Citations to Doc. 32-1 are to the PDF page numbers rather than internal page numbers.

Morales Decl.) ¶¶ 4-5; Doc. 32-1 at 19, ¶ 6. Mr. Barrios Morales began cooperating with federal officials soon after his arrest, and his cooperation led to the arrest of two other people. Ex. C ¶ 4. He has no other criminal history. *Id.* ¶ 5.

Prior to receiving the government's Response and attached exhibits, Petitioners were not made aware by Respondents or by anyone else of the government's efforts to secure their removal to a country other than Venezuela, Mexico, or (with respect to Mr. Rivas Gonzalez and Mr. Barrios Morales) Colombia. *See* Ex. A ¶ 6; Ex. B ¶¶ 8-11; Ex. C ¶ 9. As Respondents concede, the Mexican government has not agreed to accept any of the Petitioners or provided any positive indication that they would do so. *See* Doc. 32 at 5, 9, 12. Mr. Perez Parra informed ICE officials that he fears for his life if he is deported to Mexico because Mexican cartels target deported migrants. Ex. A ¶ 7. *Id.* Nevertheless, in October 2024, Respondents asked Mexico three times if it will accept Mr. Perez Parra, and Mexico has not provided a response. Doc. 32-1 at 6-7 (¶¶ 23-25). An ICE official told Mr. Rivas Gonzalez that he does not qualify to be deported to Mexico, but even if he did, Mr. Rivas Gonzalez is afraid to be deported to Mexico because when he was previously in Mexico, he was beaten and his cellphone was stolen. Ex. B ¶ 9. Nevertheless, in October 2024, Respondents asked Mexico three times if it will accept Mr. Rivas Gonzalez, and Mexico has not provided a response. Doc. 32-1 at 14 (¶¶ 24-26). An ICE official also told Mr. Rivas Gonzalez that he does not qualify to be deported to Colombia. Ex. B ¶ 10. Mr. Barrios Morales does not want to be deported to Mexico or Colombia where he has no ties, but he would rather be sent there than to a country he has never been to. Ex. C ¶ 10. In October 2024, Respondents asked Mexico twice if it would accept Mr. Barrios Morales, and Mexico has not provided a response. Doc. 32-1 at 22 (¶¶ 22-23).

Respondents admit they failed to conduct the required ninety-day post-order custody reviews for all three Petitioners, and did not realize their error until October 2024, after this habeas litigation was initiated. *See* Doc. 32-1 at 6 (¶ 20), 13 (¶ 21), 21-22 (¶ 21). Respondents did not begin asking Mexico if it would accept Petitioners until October 2024. *Id.* at 6-7 (¶¶ 23-25), 14 (¶¶ 24-26), 22 (¶¶ 22-23). And Respondents did not ask the Department of State to assist with identifying other third countries until October 2024, after this habeas litigation was initiated. *Id.* at 63 (Resp. Ex. N, Verma Decl.) ¶ 5. So far, no third country has agreed to accept Petitioners. *See generally id.*

Each of the Petitioners plans to live with immediate family or close friends in the United States if released from detention, and each of them pledges to comply with any requirements imposed on them as a condition of their release. Ex. A ¶ 10; Ex. B ¶ 14; Ex. C ¶ 11.

III. Argument

A. Petitioners Are Entitled to Release Under *Zadvydas* Because the Government Has Failed to Rebut Petitioner's Showing That There is No Significant Likelihood That They Will Be Removed in the Foreseeable Future

1. Zadvydas*'s Burden-Shifting Framework for Post-Removal Period Detention*

In *Zadvydas v. Davis*, the Supreme Court held that 8 U.S.C. § 1231(a)(6), when "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689. A "habeas court must [first] ask whether the detention in question exceeds a period reasonably necessary to secure removal." *Id.* at 699. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized . . . ." *Id.* At this point, the government must release the individual because her continued detention would violate both the statute and

the Due Process Clause of the Constitution. *Id.* at 701; *see also Morales-Fernandez v. I.N.S.*, 418 F.3d 1116, 1118, 1124 (10th Cir. 2005).

The *Zadvydas* Court adopted a "presumptively reasonable period of detention" of 180 days. *Id*. "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.* Thus, after 180 days, the government bears the burden of disproving a detained person's "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*; *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (granting habeas relief to Cuban petitioners whose detention lasted beyond 180 days post-removal order and whose removal to Cuba was not reasonably foreseeable because the government conceded that it was "no longer even involved in repatriation negotiations with Cuba").

The government's mere *belief* or unsubstantiated assertion that someone will be removed in the reasonably foreseeable future is simply not enough to meet its burden. *See McKenzie v. Gillis*, No. 5:19-cv-139, 2020 WL 5536510, at *3 (S.D. Miss. July 30, 2020) ("Six months have passed since [the ICE declarant] stated that Petitioner's removal was imminent. Yet, Petitioner remains in ICE custody, and nothing in [another ICE official's] declaration demonstrates that Petitioner will be removed anytime soon. Neither ICE's *belief* that Petitioner will be removed nor the information provided by Respondent satisfy the government's burden to rebut Petitioner's showing that he will not be removed in the foreseeable future."); *Singh v. Whitaker*, 362 F. Supp. 3d 93, 102 (W.D.N.Y. 2019) ("[I]f [ICE] has no idea of when it might reasonably expect [petitioner] to be repatriated, this Court certainly cannot conclude that his removal is likely to occur—or even that it *might* occur—in the reasonably foreseeable future."); *Andreasyan v.*

Gonzalez, 446 F. Supp. 2d 1186, 1189-90 (W.D. Wash. 2006) (finding that respondent had not rebutted petitioner's showing that he would not be removed when respondent repeatedly asked for "a few more weeks" to obtain travel documents).

2. *Respondents Have Failed to Rebut Petitioners' Showing That Their Removal is Unlikely*

Petitioners made an initial showing that their removal is not significantly likely in the reasonably foreseeable future, highlighting the absence of removal flights to Venezuela since January 2024 and the unlikeliness, given relations between the United States and Venezuela, that removals will resume in the reasonably foreseeable future. Doc. 1 ¶¶ 1, 42-49. Indeed, Respondents effectively concede that Petitioners cannot be removed to Venezuela in the reasonably foreseeable future, instead focusing their entire argument and factual submissions to this Court on the prospects of removing Petitioners to Mexico or other, unspecified third countries. *See generally* Doc. 32.[2] Respondents also do not contend that Petitioners have in any way obstructed or delayed their own removal. *See Abiodun v. Mukasey*, 264 F. App'x 726, 729 (10th Cir. 2008) (concluding petitioner not entitled to habeas relief because "[t]he main reason [petitioner] still remains in the United States is his repeated court challenges to removal and refusal to cooperate with ICE officials in obtaining a Nigerian passport and other necessary travel documents").

Respondents thus bear the burden to provide evidence that Petitioners' removal is significantly likely in the reasonably foreseeable future, and they have not met their burden.

[2] Respondents correctly point out that the Petition makes no mention of third country removal. Doc. 32 at 19. This is because, at the time the Petition was filed, Respondents had not made any efforts to pursue third country removal. *See generally* Doc. 1; Doc. 32-1 at 6(¶ 21) (first third country removal efforts not initiated until October 2024); *id*. at 13 (¶ 22) (same); *id*. at 22 (¶ 22) (same); *id*. at 63 (¶ 5) (ICE asked State Department for help with third country removals in October 2024). And Petitioners are not required under *Zadvydas* to forecast the government's future last-ditch third country removal efforts, or to show that the government, with unlimited time and resources, could never secure their removal to any country in the world, but rather to provide good reason to believe that their removal is not significantly likely in the reasonably foreseeable future.

Critically, Respondents have not moved with any sense of urgency since Petitioners received removal orders, and there is no reason to believe they will now. Respondents admit that they did nothing between March and October 2024 to effectuate Petitioners' removal. ICE attempted to place Petitioners on a removal flight in February or March 2024, but Venezuela refused to accept the flights. Doc. 32-1 at 4 (¶ 11), 12 (¶ 12). For approximately seven months, ICE took no steps to pursue removal, until October 2024, a month after this habeas action was initiated, when ICE finally began pursuing third country removal. *Id*. at 4-6 (¶¶ 11-21), 12-13 (¶¶ 12-22), 20-22 (¶¶ 15-22), 63 (¶ 5). Respondents also admit that they failed to calculate the amount of time each of the three Petitioners had been detained post-removal order and thus deprived all three Petitioners of post-order custody reviews required by ICE's own regulations for months. *Id*. at 6 (¶ 20), 13 (¶ 21), 21 (¶ 21).

Offering no explanation for their lackadaisical approach to removing Petitioners, Respondents contend that Petitioners will be removed to third countries in the reasonably foreseeable future. Doc. 32 at 20-21. Yet, they have not come forward with any concrete evidence to support that belief.

Respondents have outlined the steps they have taken—after this habeas petition was filed—to remove Petitioners to third countries, but none of those steps have led to any developments sufficient to show a significant likelihood of removal in the reasonably foreseeable future. *See Anyimu v. Dep't of Homeland Sec.*, No. 16-3232-JWL, 2017 WL 193180, at *3-4 (D. Kan. Jan. 18, 2017) (finding government had not yet rebutted petitioner's showing where respondent "set forth ICE"s attempts to contact the Kenya Consulate, [but] there is no evidence that the Consulate has actually responded or indicated that it is taking steps to provider Petitioner's travel documents"). As an initial matter, third country removals are extremely rare.

Cf. Am. Immigr. Council & Nat'l Immigr. Justice Ctr., *The Difference Between Asylum and Withholding of Removal* (Oct. 2020), https://perma.cc/5A7S-7F4Q ("[I]n FY 2017, just 21 people in total granted withholding of removal were deported to a third country. That is just 1.6 percent of the 1,274 people granted withholding of removal that year."). Indeed, of the eight countries Respondents have asked to accept Petitioners, five have already declined. *See* Doc. 32 at 4-16 (discussing DHS's requests to Mexico and the State Department's requests to seven other countries).

Next, Respondents' repeated requests to the Mexican government to accept the Petitioners have so far gone unanswered, and Mexico is unlikely to accept Petitioners for several reasons. Mexico said, on October 24 as to Mr. Perez Parra and on October 27 as to Mr. Rivas Gonzalez and Mr. Barrios Morales, that it would consider the requests and provide a response. Doc. 32-1 at 6-7, (¶¶ 23-25), 14 (¶¶ 24-26), 22 (¶¶ 22-23). Mexico has not yet provided a response. Respondents do not tell the Court what, if anything, they plan to do to continue following up with Mexico, offer any insight into how long Mexico typically takes to review and decide on requests such as these, indicate how often Mexico agrees to accept removals of people with no ties or legal status in Mexico, or suggest how long they think the detention statutes and the Constitution allow them to continue detaining Petitioners while awaiting a response from Mexico. *See generally* Doc. 32.

As it stands, nearly two months ago, ICE asked Mexico—a country where none of the Petitioners has any ties, Ex. A ¶ 8; Ex. B ¶ 11; Ex. C ¶ 10—to accept Petitioners, and Mexico has not yet responded. Meanwhile, Mexico is already attempting to negotiate with the incoming Trump Administration to ensure it does not receive people from third countries deported from the United States. Kylie Madry & Ted Hesson, *Mexico seeks deal with Trump to avoid deported*

migrants from other countries, Reuters (Dec. 5, 2024), https://bit.ly/41xfz8R. Respondents have not met their burden to show that any of the Petitioners' removal to Mexico is significantly likely in the reasonably foreseeable future.

Additionally, Respondents allege that they are also engaged in "active negotiations" with two other countries, via the State Department, after initially asking seven other countries to accept Petitioners. One of those other countries is in the "Pacific region," and one is in Europe, though Deputy Secretary of State Verma does not even assert that the State Department is speaking with the European country specifically about Petitioners, or even Venezuelans more generally. Doc. 32-1 at 63-64 (¶¶ 7-9). As an initial matter, Respondents should be required to disclose to the Court and Petitioners' counsel, at a minimum and under seal if justified, which countries it is negotiating with. Without knowing which countries Respondents are engaging, the Court cannot assess the likelihood of removal. As with Mexico, Respondents give the Court no basis for finding it significantly likely that a country in the Pacific or a country in Europe will agree to accept Venezuelans who have no ties there and whom the United States government alleges are gang members or otherwise too dangerous to release into the United States. This is insufficient to meet their burden. *See Yusupov v. Lowe*, No. CIV. 4:CV-06-1804, 2007 WL 5063231, at *4 (M.D. Pa. Jan. 12, 2007) ("Respondents' admission that removal to Uzbekistan is not feasible and that eleven (11) additional countries have likewise refused to accept the Petitioner undermines their argument that removal is still possible within the reasonably foreseeable future.").

Moreover, even if Respondents are able to reach an agreement with one of these three countries for the removal of Petitioners, Respondents are obligated by the Convention Against Torture to provide Petitioners notice of their removal destination and an opportunity to raise any

fear of torture claims as to the third country. 8 C.F.R. § 1208.17(a) (2019) ("An alien who: has been ordered removed; has been found under §1208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under §1208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured."); *see also* Sarah Sherman-Stokes, *Third Country Deportation*, 53 Ind. L. Rev. 333, 341-42, 348-49, 351-52 (2020). Indeed, Respondents note Mr. Perez Parra has already indicated to ICE that he has a fear of being deported to Mexico. Doc. 32-1 at 5 (¶ 13); *see also* Ex. A ¶ 7. Mr. Rivas Gonzalez is also afraid of being deported to Mexico. Ex. B ¶ 9. Without knowing whether Petitioners even have such fear of torture claims as to the other third countries Respondents are considering—since Respondents have not disclosed them—the Court cannot assess the extent to which Petitioners' removal to those countries will be further prolonged by additional immigration court proceedings to determine whether the Convention Against Torture protects them from removal to those countries.

Deputy Secretary Verma's declaration best sums up the unreliability of the third country removals Respondents are pursuing: "The ultimate timing and success in finding a removal country will, of course, depend on diplomatic discussions, which are inherently uncertain." Doc. 32-1 at 65 (¶ 11). Inherent uncertainty is miles away from the significant likelihood in the reasonably foreseeable future required under *Zadvydas*.

3. The Government Has Not Met Its Burden to Prove that Petitioners' Continued Detention is Justified Based on Dangerousness or Other Special Circumstances

Because there is no significant likelihood of Petitioners' removal in the reasonably foreseeable future, the government must release them unless it proves that certain narrow circumstances apply and complies with heightened procedural requirements.

Hernandez-Carrera, 547 F.3d at 1242-43, 1251-52; *see also Abuya v. Dorneker*, No. 17-2293-JWL, 2017 WL 3267650, at *3 (D. Kan. Aug. 1, 2017) (explaining that a habeas petitioner who had been detained based on a final removal order for approximately ten months and "does not fall within the special circumstances set forth in the regulation" would be entitled to release if the government fails to rebut his showing that there is no significant likelihood of removal in the reasonably foreseeable future). These substantive limitations and procedural protections are required by the Due Process Clause, *see Hernandez-Carrera*, 547 F.3d at 1251 (citing *Zadvydas*, 533 U.S. at 690-92; *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997)), and by the government's own regulations, promulgated under 8 U.S.C. § 1231(a)(6) in the wake of the Supreme Court's *Zadvydas* decision. *Id*. at 1242 (citing 8 C.F.R. § 241.14). Specifically, Respondents must show that: (1) Petitioners fall within "a small segment of particularly dangerous individuals," or that other narrowly-delineated "special circumstances" apply; and (2) Petitioners have been afforded "meaningful procedural protections," including placing the burden of proof on the government. *Id.* at 1243, 1251. Respondents have failed to satisfy either requirement.

Respondents have not met their burden of demonstrating that Petitioners present a "special danger" to the public under 8 C.F.R. § 241.14(f), or that any of the other special circumstances enumerated under the regulation (*i.e*., highly contagious disease, serious adverse foreign policy consequences of release, suspected terrorism) are present here. *See* 8 C.F.R. § 241.14(b)-(d). To meet the "specially dangerous" standard, the government must show that the individual has committed a crime of violence, that they are likely to engage in future violent acts, and that no conditions of release can reasonably ensure the public's safety. *Id*. § 241.14(f)(1); *see also Quintana Casillas v. Sessions*, No. CV-17-01039-DME-CBS, 2017 WL 3088346, at *10 (D.

Colo. July 20, 2017) (noting that "the record does not reflect whether the immigration agency has considered whether Petitioner committed a 'crime of violence' within the meaning of 18 U.S.C. § 16" for purposes of determining whether she presented a special danger under § 241.14(f)). Even accepting Respondents' allegations as true, they have failed to satisfy this standard.

Respondents' claims of dangerousness are based solely on Mr. Barrios Morales's conviction for one count of conspiracy to transport under 8 U.S.C. § 1324, Mr. Rivas Gonzalez's arrests for two relatively minor and nonviolent offenses in Colombia for which he was never convicted, and his disciplinary infractions incurred during his lengthy confinement in ICE custody, and vague and unsubstantiated allegations that Mr. Perez Parra and Mr. Rivas Gonzalez are affiliated with the Tren de Aragua gang. *See* Doc. 32 at 21-22.[3] The only evidence Respondents provide in support of their allegations of gang affiliation is an ICE official's statement, unsupported by documentary evidence and without any further factual details, that "record checks conducted by ERO revealed Perez Parra is a suspected member of an international criminal organization known as the Tren de Aragua gang," *id*. at 3 (citing Doc. 32-1 at 10 (¶ 8)), and that Mr. Rivas Gonzalez purportedly admitted during a border interrogation to "having multiple tattoos on his body associated with an international criminal organization known as the Tren de Aragua gang." *Id*. at 6 (citing Doc. 32-1 at 10 (¶ 3)); *id.* at 68 (Resp. Ex. O, Rivas Gonzalez Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act)).

[3] Respondents argue that ICE's determinations that Petitioners "pose a threat to public safety" should impact this Court's analysis of the core questions in this case: whether "Petitioners' post-removal-period detention exceeds the time reasonably necessary to secure their removal or that there is no significant likelihood of Petitioner's removal in the reasonably foreseeable future." Doc. 32 at 21. Respondents confuse two distinct legal inquiries. Allegations of dangerousness have nothing to do with the likelihood of one's removal. Instead, as described in this section, they come into play under limited circumstances *after* the government (or this Court) determines that there is no significant likelihood of removal. While the government may also consider a variety of factors, including whether the individual poses a "threat to the community," when deciding whether to exercise its discretion to release an individual pending efforts to secure their removal, 8 C.F.R. § 214.4(e)-(f), those provisions no longer apply once removal is deemed unlikely. *Id*. § 214.4(b)(4).

Mr. Perez Parra and Mr. Rivas Gonzalez vigorously refute the government's gang allegations in their attached declarations, made under penalty of perjury. *See* Ex. A ¶¶ 3-4; Ex. B ¶¶ 3-6. Further, it is well documented that the Record of Sworn Statement taken at the border by Border Patrol officers, which Respondents rely on to show Mr. Perez Parra is associated with the Tren de Aragua gang, is often fabricated or mistaken. *See* Human Rights Watch, *"They Treat you like you are Worthless" Internal DHS Reports of Abuses by US Border Officials* (Oct. 21, 2021), https://perma.cc/GKQ6-YPJ5; *see also* John Washington, *BAD INFORMATION: Border Patrol Arrest Reports are Full of Lies that can Sabotage Asylum Claims,* The Intercept (Aug. 11, 2019), https://perma.cc/ESD9-MSHD. Mr. Barrios Morales does not contest the government's allegations regarding his conviction; what Respondents neglect to state is that Mr. Barrios Morales cooperated significantly with federal officials beginning soon after his arrest, contributing to the arrests of two other individuals. *See* Ex. C ¶ 4. Petitioners have no other criminal history. *See* Ex. A ¶ 5; Ex. B ¶ 7; Ex. C ¶ 5. None of the Petitioners has committed a crime of violence, and the government has not alleged—much less proven—that Petitioners are likely to engage in future violent acts, or that any risk they pose cannot be mitigated by appropriate conditions of release, as required by 8 C.F.R. § 241.14(f).

Even if Respondents' allegations were enough to demonstrate special danger—which they are not—"a finding of dangerousness, standing alone, is ordinarily not a sufficient ground" to justify potentially indefinite civil confinement. *Hernandez-Carrera*, 547 F.3d at 1251 (quoting *Hendricks*, 521 U.S. at 358). Instead, "due process demands the presence of some other special circumstance, such as mental illness, that helps to create the danger." *Id*. (quoting *Zadvydas*, 533 U.S. at 691). *Compare id*. at 1243 (noting that the two petitioners, whose post-removal period detention the Tenth Circuit upheld, had been convicted of forcible rape and sexual assault on a

seven-year-old child, respectively, and of other crimes, and had both been diagnosed with a serious mental illness or disorder and deemed likely to commit future violent acts by mental health evaluators), *with Morales-Fernandez*, 418 F.3d at 1118-1119, 1122-1125 (holding that petitioner, who had been convicted of felony drug possession with intent to sell and disciplined for assault on BOP staff and refusal to obey an order, was entitled to relief under *Zadvydas*). Respondents do not even come close to demonstrating that Petitioners fall within the "small segment of particularly dangerous individuals," *Zadvydas*, 533 U.S. at 691, whose continued detention may be justified where there is no significant likelihood of removal.

Additionally, Respondents do not even allege that they have afforded Petitioners any of the procedural protections to which they are entitled in order to justify their detention based on special circumstances. Respondents have not notified Petitioners of the factual basis for their alleged gang affiliation (with respect to Mr. Perez Parra and Mr. Rivas Gonzalez) or other factors bearing on dangerousness, or provided Petitioners with written notice of their rights and a list of free legal service providers. *See* 8 C.F.R. § 241.14(g). Nor have Respondents provided Petitioners with a hearing before an immigration judge where they have the opportunity to present evidence and cross-examine witnesses, and where the government bears the burden of proof by clear and convincing evidence. *See id*. § 241.14(g)(3)(iii) and (i)(1); *see also Hernandez-Carrera*, 547 F.3d at 1253 (emphasizing importance of placing the burden on the government to prove special circumstances). Respondents' bare, untested allegations that Petitioners "pose a threat to public safety" fall far short of the "meaningful procedural protections," *Hernandez-Carrera*, 547 F.3d at 1251, required by due process and the government's own regulations.

Accordingly, Respondents have failed to meet their heavy burden to demonstrate that special circumstances justify Petitioners' indefinite post-removal period civil detention.

B. Petitioners' Continued Detention Violates Due Process

1. Petitioners' Detention No Longer Bears a Reasonable Relation to the Post-Removal Order Detention Statute's Purposes, Thus Violating the Substantive Guarantees of the Due Process Clause

Petitioners' continued detention violates substantive due process. Civil immigration detention runs afoul of the due process clause when it no longer bears a reasonable relation to the detention statute's purpose. The purposes of post-order detention under 8 U.S.C. § 1231 are to ensure an individual's presence for her imminent removal and, secondarily, to prevent danger to the community. *See Zadvydas*, 533 U.S. at 690, 697. As discussed above, *supra* Part III.A.2, because of the length of time Petitioners have already been detained pursuant to final orders and the fact that ICE is unlikely to execute their removal in the near future, their detention is no longer reasonably related to the purpose of ensuring their presence for imminent removal. And Respondents have failed to show why Petitioners' continued detention is reasonably related to the goal of preventing danger to the community. *See supra* Part III.A.3. Thus, Petitioners' detention violates the substantive guarantees of the Fifth Amendment's Due Process Clause.

Respondents provide no justification for why continuing to confine Petitioners for over six months since their removal orders became final—and for over a year in total—could be considered reasonable in light of Section 1231's purpose and Petitioners' countervailing liberty interest. *See generally* Doc. 32. Petitioners are at risk of and have suffered harm in detention. For example, they have been placed in solitary confinement, for up to 45 days at a time for Mr. Rivas Gonzalez, and their mental health is declining. Ex. A ¶ 9; Ex. B ¶¶ 12-13.

Respondents do not provide any evidence or argument for why ICE is unable to achieve the statutory purpose—ensuring Petitioners' presence for their removal, once ICE is able to carry it out—by less restrictive means, such as releasing them under appropriate conditions of supervision. ICE has these means at its disposal, and they have proven highly effective. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (ICE's ISAP alternatives to detention program has resulted in appearance rates close to 100 percent). They are also far less costly than incarceration, and much safer for Petitioners and the general public. Immigr. & Customs Enf't, *Alternatives to Detention* (June 24, 2024), https://www.ice.gov/features/atd ("The daily cost per [ICE's alternatives to detention program] participant is less than $8 per day – a stark contrast from the cost of detention, which is around $150 per day."); Am. Immigr. Lawyers Ass'n, *Featured Issue: Immigration Detention and Alternatives to Detention* (Sept. 9, 2024), https://perma.cc/8CRH-C8D9 ("Immigration detention facilities . . . have been the sites of serious and repeated allegations of abuse, including allegations of sexual assault, violations of religious freedom, medical neglect, and the punitive use of solitary confinement."); Daniella Silva, *The number of deaths in ICE custody is already more than double all of last year*, NBC News (June 1, 2024), https://perma.cc/8RQ4-8PPN.

Moreover, as discussed above, *supra* Part III.A.3, Respondents have not shown that Petitioners' continued detention is reasonably related to the goal of community safety on the basis that they are "particularly dangerous individuals." *Zadvydas*, 533 U.S. at 691. Respondents have no evidence that any of the Petitioners is accused of any of "the most serious of crimes," suffering a present mental condition that might render them dangerous, or a suspected terrorist. *Id.*

2. ICE's Rubber-Stamp Internal Custody Review Process Falls Far Short of the Minimal Procedural Protections Required by the Due Process Clause

Petitioners' continued detention without bond or other meaningful processes for review violates procedural due process. Respondents contend that Petitioners' procedural due process claim fails because they have not made the requisite showing under *Zadvydas* and because they have been afforded post-order custody reviews (POCRs). Doc. 32 at 22-23. However, not only did ICE fail follow its own POCR regulation for months with respect to Petitioners, but when it did, the custody reviews the ICE did provide to Petitioners lacked basic procedural safeguards.

ICE's POCR regulation, 8 C.F.R. § 241.4, requires custody reviews every ninety days after a removal order becomes administratively final. The regulation sets out some procedural protections, such as notice to the detained person and the opportunity to submit information. 8 C.F.R. § 241.4(h)(2). Respondents admit they did not conduct POCRs for Petitioners until after this habeas litigation was initiated and Mr. Perez Parra's removal order had been final for nearly eight months, Mr. Rivas Gonzalez's for nearly seven months, and Mr. Barrio Morales's for nearly five months. Doc. 32 at 3, 5, 7, 9, 11-12. This failure, coupled with ICE's "demonstrated . . . inability to perform lawfully and to decide fairly whether detention is justified" for Petitioners, should be remedied through a grant of Petitioners' habeas petition. *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 655-56 (D. Mass. 2018) (granting habeas relief where ICE failed to comply with 8 C.F.R. § 214.4).

When ICE finally conducted POCRs for Petitioners, those reviews lacked basic procedural safeguards such as the opportunity to be heard before a neutral decision-maker, cross-examine witnesses, have counsel present argument on their behalf, create a contemporaneous record of proceedings, or appeal an erroneous determination. *See* 8 C.F.R. § 214.4 (setting out procedures and standards for POCRs). Indeed, Respondents point out that POCRs are not substantively different from the internal custody management reviews provided

to "arriving" immigrants detained under 8 U.S.C. § 1225, who are typically afforded fewer due process protections. Doc. 32 at 23 n.6; *see Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138-39 (2020).

These custody reviews thus fall far short of the minimum requirements of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (holding that notice and a meaningful opportunity to be heard are the fundamental features of procedural due process); *Diouf v. Napolitano*, 634 F.3d 1081, 1092 (9th Cir. 2011) (holding that POCR procedures under 8 C.F.R. § 241.4 do not meet minimum due process requirements); *see also Zadvydas* at 690-91 (comparing *Hendricks*, 521 U.S. at 364-69 (upholding involuntary civil commitment for periods of one year at a time, in light of "strict procedural safeguards" such as right to jury trial and the government's burden of proof beyond a reasonable doubt) and *United States v. Salerno*, 481 U.S. 739, 750–752 (1987) (in upholding pretrial detention, stressing "stringent time limitations," the fact that detention is reserved for the "most serious of crimes," the requirement of proof of dangerousness by clear and convincing evidence, and the presence of judicial safeguards), with *Foucha v. Louisiana*, 504 U.S. 71, 81–83 (1992) (striking down insanity-related detention system that placed burden on detained person to prove non-dangerousness)). Thus, the reviews have proven "perfunctory in fact," *Chi Than Ngo v. I.N.S.*, 192 F.3d 390, 399 (3d Cir. 1999), and lack even a semblance of procedural due process.

Moreover, if Respondents intend to rely on their authority to detain "specially dangerous" individuals beyond six months even when removal is unlikely, then they must provide Petitioners the more robust procedural due process protections outlined in 8 C.F.R. § 241.14(g)-(k). Respondents have not done so, and are thus violating Petitioners' procedural due process rights.

C. This Case Is Ripe for Decision Without Further Proceedings; In the Alternative, Petitioners Request an Evidentiary Hearing

An evidentiary hearing is not necessary to resolve this petition and grant Petitioners the relief to which they are entitled under *Zadvydas* and the Due Process Clause: immediate release from government custody. However, if this Court determines that there is a material factual dispute, Petitioners are entitled to an evidentiary hearing. *See Milton v. Miller*, 744 F.3d 660, (10th Cir. 2014) (holding that an evidentiary hearing is required to resolve factual disputes in a habeas petition); *Beckett v. Hudspeth*, 131 F.2d 195 (10th Cir. 1942); *see also Singh v. U.S. Att'y Gen.*, 945 F.3d 1310, 1315 (11th Cir. 2019) ("It is well established that a court may not decide a habeas corpus petition based on affidavits alone when there are factually contested issues."). If this Court determines a hearing is necessary, it should hold one swiftly as required by the federal statutes governing habeas petitions. *See* 28 U.S.C. §§ 2241 et seq.; *see also Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973) (explaining that "seeking immediate release or a speedier release from confinement" is "the heart of habeas corpus").

IV. Conclusion

The government is detaining Petitioners in violation of 8 U.S.C. § 1231(a)(6) and the substantive and procedural guarantees of the Due Process Clause. This Court should grant them a writ of habeas corpus ordering their immediate release.

Dated: December 16, 2024

Respectfully submitted,

s/ Jessica Vosburgh

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*Appearing *pro hac vice*

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, this 16th day of December, 2024, I filed a copy of the foregoing Supplement to Motion for Order to Show Cause electronically through the CM/ECF system, which gave service to all counsel of record.

s/ Jessica Vosburgh
Jessica Myers Vosburgh

Counsel for Petitioners

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW MEXICO

Luis Eduardo PEREZ PARRA, e*t al*., *Petitioners,* v. DORA CASTRO, *et al.*, *Respondents.*	Case No. 1:24-cv-00912-KG-KRS

DECLARATION OF LUIS EDUARDO PEREZ PARRA

I, Luis Eduardo Perez Parra, under penalty of perjury, declare as follows:

1. I am currently incarcerated in Otero County Processing Center in Chaparral, New Mexico.

2. I have been detained in ICE custody since October 2, 2023.

3. I am not a member of or otherwise affiliated with Tren de Aragua or any other gang. I do not have any family members, friends, or associates who are affiliated with any gang. I had never even heard of Tren de Aragua until I arrived in the United States.

4. I have a single tattoo of a rose and a clock on my left forearm. It is a very common tattoo in Venezuela. It signifies beauty and the need to enjoy life When I was detained after entering the United States, an immigration official asked about the tattoo. For me, this tattoo has no connection to Tren de Aragua.

5. I have no criminal history. I have never had any problems with the law in Venezuela or anywhere else. I work hard, I try to be honorable. I have never hurt anyone.

6. Immigration officials have never spoken to me about the possibility of my deportation to any country other than Venezuela or Mexico.

7. My deportation officer has spoken to me several times about being deported to Mexico. The most recent time was a few weeks ago. Each time, I have explained that I fear for my life if I am deported to Mexico. The cartels target deported migrants for kidnapping, torture, and murder. Two people I was detained with were deported to Mexico—one was kidnapped and disappeared, the other was shot. I am terrified that the same thing could happen to me.

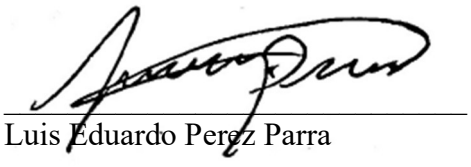
8. I am not a citizen or resident of any country other than Venezuela. I have never lived in another country for more than a few months besides Venezuela, or the fourteen-plus months I have spent detained in the United States.

9. I am desperate to be released from detention. I feel depressed, especially when I see new detained people get released first while I've been waiting for so long.

10. If I am released, I will live with a close family friend in Matthews, North Carolina. I will comply with any requirements imposed on me as a condition of my release.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 12th day of December, 2024 in Chaparral, New Mexico.

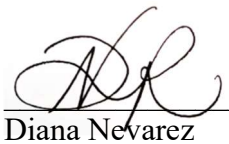


Luis Eduardo Perez Parra

INTERPRETER DECLARATION

I, Diana Nevarez, swear and certify under penalty of perjury under the law of the United States that I am fluent in both Spanish and English and that I read the preceding declaration in Spanish with Petitioner Luis Eduardo Perez Parra, who affirmed the truth of its contents.

Signed this 12th day of December, 2024.



Diana Nevarez

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW MEXICO

Luis Eduardo PEREZ PARRA, e*t al*., *Petitioners,* v. DORA CASTRO, *et al.*, *Respondents.*	Case No. 1:24-cv-00912-KG-KRS

DECLARATION OF LEONEL RI AS ONZALEZ

I, Leonel Rivas Gonzalez, under penalty of perjury, declare as follows:

1. I am currently incarcerated in Otero County Processing Center in Chaparral, New Mexico.

2. I have been detained at Otero since about December 5, 2023. I have been in immigration detention since December 1, 2023.

3. I have never stated to any United States government official that my tattoos are associated with the gang Tren de Aragua. I understand the Government has asserted this and that it is recorded on the Form I-867A in my immigration file, but I did not say this to a border official or any other government official. I was asked to sign the Form I-867A but was not provided a copy in Spanish or told in Spanish what it said. I signed the form because I did not know the interviewer had changed what I said.

4. I have eight tattoos, none of which have anything to do with Tren de Aragua or any other gang: an anime cartoon an avocado tattoo a half tiger, half woman a ermuda triangle a serpent a cross with an angel a crown and a dragon.

5. During my immigration proceedings, the government stated that it believes my crown and triangle tattoos are related to Tren de Aragua. My crown tattoo has my initials "LR" and my date of birth on it which represents someone who enjoys life and likes to work for their things. My triangle tattoo represents the pyramid on the U.S. dollar and wanting to work hard to have a good life.

6. I am not a member of or otherwise affiliated with Tren de Aragua or any other gang. I do not have any family members, friends, or associates who are affiliated with Tren de Aragua.

7. I disclosed to a border official that I was arrested twice in Colombia, once for possession of a stolen cell phone and one for possession of an illicit substance. Each time, I was detained for 24 hours. I was not convicted of any crimes related to these arrests. I have no other criminal history.

8. I have only spoke to immigration officials about the possibilities of my deportation to Colombia and Mexico.

9. In October 2024, an ICE official told me in person that I do not qualify to be deported to Mexico. I am afraid to be deported to Mexico because when I was there before I was beaten and my cellphone was stolen.

10. On November 15, 2024, I asked ICE on the detention center tablet if I could be deported to Colombia. On November 20, 2024, ICE responded on the tablet that Colombia only accepts Colombian citizens.

11. I have not discussed being deported to any other country with any government officials. I do not have ties to any countries other than Venezuela and Colombia.

12. I have been placed in solitary confinement three times at Otero. The first time I was in solitary for 45 days, the second time for five days, and the third time for 21 days. The first time

was because I was accused of hitting an officer and because I participated in a strike to protest conditions at Otero. I did not hit an officer. The second time I was placed in solitary was because I was playing a game during recreation with a medicine ball. Another detained person made a hole in the wall when he moved out of the way when someone threw the ball at him. I did not throw the ball at him that caused the hole on the wall, but I received a disciplinary citation for being in the same recreation room at the time the other detained people made a hole. The third time I was placed in solitary was because I was accused of participating in a fight between Venezuelans and Mexicans, but I did not participate the fight.

13. I am desperate to be released from detention. I have been detained for almost one year equal to a term of imprisonment. I am depressed, I do not want to eat, and I think about harming myself.

14. If I am released, I will live with my partner and our baby in Chicago, Illinois. I also have two brothers in Dallas, Texas. I will comply with any requirements imposed on me as a condition of my release.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 11th day of December, 2024 in Chaparral, New Mexico.

LEONEL RIVAS GONZALEZ

INTERPRETER DECLARATION

I, Diana Nevarez, swear and certify under penalty of perjury under the law of the United States that I am fluent in both Spanish and English and that I read the preceding declaration in Spanish with Petitioner Leonel Rivas Gonzalez, who affirmed the truth of its contents.

Signed this 11th day of December, 2024

Diana Nevarez

UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW MEXICO

Luis Eduardo PEREZ PARRA, e*t al*., *Petitioners,* v. DORA CASTRO, *et al.*, *Respondents.*	Case No. 1:24-cv-00912-KG-KRS

DECLARATION OF A RAHAN OSUE ARRIOS MORALES

I, Abrahan osue arrios Morales, under penalty of perjury, declare as follows:

1. I am currently incarcerated in Otero County Processing Center in Chaparral, New Mexico.

2. I have been detained in ICE custody since October 20, 2023.

3. I was previously detained in immigration custody in late September and early October 2022, after I entered the United States. I was released after about eight days.

4. On uly 20, 2023, I pled guilty to one count of conspiracy to transport aliens. I began cooperating with the federal officials soon after my arrest. The officials told me that as a result of my cooperation, they had been able to arrest two people and stop other criminal activity.

5. I have no other criminal history.

6. I have a Venezuelan passport, but it is expired. It is with my family who live in El Paso. I told ICE that I have a passport, but ICE officials never asked me for it. I would have given it to them if they had. Earlier this year, ICE officials asked me for my Venezuelan national ID

c dula number. I did not know the number. They never asked me to fill out any forms or speak to anyone from the Venezuelan government to try to get a travel document.

7. About two months ago, I spoke to an ICE official over the phone about the possibility of being deported to Colombia. I lived in Colombia for about seven years, although I do not have any sort of permanent resident status there, to my knowledge. I told that to the ICE official. They said they would get back to me.

8. About a month and a half ago, I sent a message to ICE via my tablet to ask about the possibility of being deported to Mexico and to ask about when I would receive my next custody review. And ICE official responded that they would inform my deportation officer about my question about Mexico, and that my next custody review would be in February. I have not heard anything else since then.

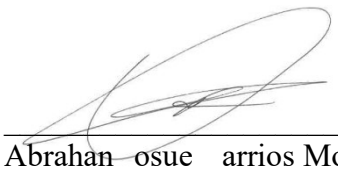
9. Immigration officials have never spoken to me about the possibility of my deportation to any country other than Venezuela, Mexico, or Colombia.

10. I do not want to be deported to Mexico or Colombia, where I have no family or other ties, but I would rather be sent there than to some other country where I have never been in my life.

11. If I am released from ICE custody, I will live with my mother, stepfather, and two younger brothers in El Paso, Texas. I will comply with any requirements imposed on me as a condition of my release.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 12th day of December, 2024 in Chaparral, New Mexico.



Abrahan osue arrios Morales

INTERPRETER DECLARATION

I, Diana Nevarez, swear and certify under penalty of perjury under the law of the United States that I am fluent in both Spanish and English and that I read the preceding declaration in Spanish with Petitioner Abrahan osue arrios Morales, who affirmed the truth of its contents.

Signed this 12th day of December, 2024.

Diana Nevarez