IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

D'AMBROSIO, David

Petitioner,

vs.

Joseph D. McDonald, Jr., Sheriff
Plymouth County Sheriff's Office, MA;

Antone Moniz, Superintendent
Plymouth County Sheriff's Office, MA;

Kristi Noem, Secretary of the Department of
Homeland Security;

Todd Lyons, Assistant Secretary of
Immigration & Customs Enforcement;

Pamela Bondi, U.S. Attorney General;

Patricia Hyde, Boston Field Office Director
for Detention and Removal, Immigration &
Customs Enforcement;

Respondents.

CIVIL ACTION FILE NO.
25-10782-FDS

Agency Case No.: A[redacted]

PLAINTIFF'S MEMORANDUM IN REPLY TO RESONDENTS' OPPOSITION TO PETITIONER'S MOTION TO REOPEN, RESONSIDER, AND VACATE JUGEMENT

Petitioner, David Dambrosio, by and through undersigned counsel, respectfully submits this Memorandum in Reply to the Respondents' opposition to Petitioner's Motion to Reopen, Reconsider, and Vacate Judgment, Doc. No. [28].

RELEVANT FACTS

Petitioner is a 32-year-old native of Venezuela and citizen of Italy who has been in the custody of U.S. Immigration and Customs Enforcement (ICE) at Plymouth Correctional Facility in Massachusetts since February 2025. He was admitted to the United States in April 2016 and has not left since. In August 2019, petitioner married a United States citizen (USC). Petitioner's USC spouse subjected him to physical, emotional, and psychological abuse during their marriage. In 2024, Petitioner hired the Mesa Law Firm to file a VAWA (Violence Against Women's Act) based self-petition (Form I-360) with an adjustment of status application (Form I-485) after enduring this abuse. Mesa Law Firm began preparing his Form I-360 and Form I-485, but was unable to submit the filing prior to his detention by the U.S. Department of Homeland Security (DHS) in February 2025 based on the following events.

On or about February 19, 2025, Petitioner was traveling in Vermont near the United States-Canadian border, made a wrong turn, and mistakenly arrived at the Canadian border. Canadian officials returned Petitioner back to the United States border promptly because he did not have a passport or visa to enter Canada. Upon his return, DHS apprehended and detained Petitioner until transferring him to ICE custody. ICE initially detained Petitioner at NorthWest Correctional Facility in St. Albans, Vermont, but subsequently moved him to Plymouth Correctional Facility in Massachusetts. Petitioner is a law-abiding individual with no criminal history. ICE detained him because he overstayed his admission period. Petitioner has been detained at Plymouth Correctional Facility for over two months among criminal offenders and without access to a bond hearing.

On or about March 2025, Petitioner hired the undersigned counsel to prepare and file for his permanent residency on an expedited basis. ICE issued a Notice of Intent to Issue a Final Administrative Removal Order through the Visa Waiver Program on March 3, 2025, alleging that he overstayed his admission period. In March 2025, undersign counsel filed Petitioner's Form I-360 and Form I-485 with U.S. Citizenship and Immigration Services. Petitioner filed a writ of habeas corpus with the instant Court on April 2, 2025, and the Court set a hearing on the habeas petition for April 7, 2025. Mere hours before this hearing, ICE served Petitioner with a Final Administrative Removal Order.

On April 8, 2025, undersigned counsel filed a petition for review with the United States Court of Appeals for the First Circuit (First Circuit) to contest the Final Administrative Removal Order, as well as an emergency motion for stay of removal pending review with the First Circuit. The First Circuit granted Petitioner's stay of removal on April 9, 2025. Hours later still on April 9, 2025, the Court denied Petitioner's writ of habeas not knowing Petitioner had filed a petition for review with the First Circuit and received an order staying his removal. The next day on April 10, 2025, undersigned counsel filed a motion to reopen, reconsider, and to vacate judgement.

On April 11, 2025, Respondent Bondi then filed an opposition to Petitioner's motion for stay of removal with the First Circuit. Petitioner filed a reply to Respondent Bondi's response to his motion for stay of removal with the First Circuit on April 14, 2025. On April 18, 2025, the First Circuit denied Petitioner's stay of removal. Respondents filed a memorandum in opposition to petitioner's motion to reopen, reconsider, and to vacate judgement before this Court on April 24, 2025, and Petitioner requested leave of the Court on April 26, 2025, to file the instant memorandum in reply to Respondents' opposition to Petitioner's motion to reopen, reconsider, and vacate judgement.

Petitioner filed an emergency motion to reconsider, vacate, or amend the order denying his stay of removal with the First Circuit on April 28, 2025. On April 29, 2025, Respondent Bondi filed an opposition to petitioner's emergency motion to reconsider, vacate, or amend the order denying his stay of removal with the First Circuit. The First Circuit denied Petitioner's emergency motion to reconsider, vacate, or amend the order denying his stay of removal on May 5, 2025.

ARGUMENT

I. Respondents' allegations that Petitioner has not asserted he was detained pursuant to 8 U.S.C. § 1231 because he did not cite to 8 U.S.C. § 1231(a)(1)(B)(ii) multiple times is without merit.

In its memorandum in opposition to Petitioner's motion to reopen, reconsider, and to vacate judgement, Respondents conceded in citing to 8 U.S.C. § 1231(a)(1)(B)(ii) that "further events in connection with a court of appeals' *[sic]* stay of removal could affect both the beginning of a 'removal period' and section 1231 as the operative source of detention authority." However, Respondents allege that Petitioner made "no express argument in that regard—never even citing to subsection (ii), except in a block quote along with the subsection (i)." Based on this false premise, Respondent maintains that Petitioner waived "any claim, that by operation of subjection (ii), authority for his detention reverted to a pre-removal source."

Petitioner has preserved his argument that he is being detained pursuant to 8 U.S.C. § 1226 because the removal period required to trigger detention authority under 8 U.S.C. § 1231 has not commenced, given he has a petition for review pending and obtained an order granting a motion to stay removal from the First Circuit on April 8, 2025. Petitioner need not cite to 8 U.S.C. § 1231(a)(1)(B)(ii) multiple times to argue that he was not being detained under the authority that controls continued detention of a noncitizen post-removal titled "Detention and removal of aliens ordered removed" (i.e., 8 U.S.C. § 1231). The question of whether Petitioner is detained under 8

U.S.C. § 1231 concerns whether the **final** of the enumerated events have occurred in 8 U.S.C. § 1231(a)(1)(B)(i)-(iii), and Petitioner has clearly asserted that the removal period had not commenced **because he had a petition for review pending and obtained a stay of his removal from the First Circuit** at the time the Court issued its decision on April 9, 2025.

Petitioner explained in the motion that the parties to the instant dispute "disagree as to whether Petitioner is detained pursuant to 8 U.S.C. § 1226(a) or 8 U.S.C. § 1231." He noted that 8 U.S.C. § 1231(a)(2)(A) states that the Attorney General "shall detain" the noncitizen *during the removal period*. Then, he cited to 8 U.S.C. § 1231(a)(1)(B)(i)-(iii) in listing the three enumerated events the latest of which marks the beginning of the removal period: (1) The date the order of removal becomes administratively final; (2) **If the order of removal is judicially reviewed and if the court orders a stay of removal of the noncitizen, the date of the court's final order**; and (3) If the noncitizen is detained or confined (except under an immigration process), the date the noncitizen is released from detention or confinement.

Citing to precedent binding on this Court, Petitioner stated 8 U.S.C. § 1231 "makes clear" that the noncitizen is not within the 'removal period' and is *not* detained for purposes of 8 U.S.C. § 1231 until the ***latest*** of the three above identified events specified in the statute. *Reid v. Donelan*, 64 F. Supp. 3d 271, 276-77 (D. Mass. 2014). In his analysis, Petitioner repeated that he filed a petition for review of the final administrative removal order on April 8, 2025, and shortly thereafter, obtained a stay of removal. The petition for review remains pending to date. Therefore, the removal order is not yet final until the First Circuit renders a decision on the Petition for Review. He concluded the analysis in stating, in part, that because "the First Circuit accepted the Petition for Review and stayed Petitioner's removal, the 90-day removal period under 8 U.S.C. § 1231(a)(1)(A) has not begun." Based on the foregoing, Petitioner maintained he has been

detained pursuant to 8 U.S.C. § 1226, not 8 U.S.C. § 1231, and has made an "express argument" that "further events in connection with a court of appeals' *[sic]* stay of removal could affect both the beginning of a 'removal period' and section 1231 as the operative source of detention authority" (*i.e.*, Petitioner having a petition for review pending and obtaining a stay of removal from the First Circuit).

II. Petitioner's removal period has not commenced, thus 8 U.S.C. § 1231 detention has not been triggered, because his removal order is pending judicial review and he obtained a stay of removal.

A. *A stay by a clerk of court is sufficient to demonstrate that the removal period under 8 U.S.C. § 1231(a)(1)(B)(ii) has not begun.*

Respondents cite to no legal authority that expressly states that a clerk's order granting an "administrative" stay of removal is insufficient to prove that the removal period has not begun, and that thus, Petitioner cannot be detained pursuant to 8 U.S.C. § 1226 (i.e., the pre-removal order detention statute). Section 1231(a)(1)(B) provides in pertinent part that:

> The removal period begins from the latest of the following:
> ....
> (ii) **If the removal order is judicially reviewed** and **if a court orders a stay of the removal of the alien**, the date of the court's final order.
> ....

On April 9, 2025, Petitioner obtained a stay of removal for ten business days from a court (*i.e.*, First Circuit). The First Circuit order granting the stay states the "order is issued in accordance with First Circuit Local Rule 18.0." In turn, First Circuit Local Rule 18.0 provides in pertinent part that "[w]hen a first motion for stay of removal is timely filed in this court and notification is transmitted to the government via the court's CM/ECF system, the clerk will enter an administrative order staying removal for ten business days." First Circuit Local Rule 18.0 states this policy "applies to petitions for review and to appeals from district court habeas proceedings."

Pursuant to First Circuit Local Rule 18.0, Petitioner obtained a stay of removal from the First Circuit on April 9, 2025. True, the "Order of Court" issuing a stay of Petitioner's removal is signed by Clerk of Court Anastasia Dubrovsky, but Clerk of Court Anastasia Dubrovsky also signed all the other First Circuit order Petitioner has received in that proceeding, including the order denying his request for stay of removal pending resolution of his petition for review and the order denying petitioner's emergency motion to reconsider, vacate, or amend the order denying his stay of removal pending review.

Respondents claim that the granted stay was issued by a clerk and not by a judge of the court, and therefore claim it is an "invalid" stay pursuant to the statute (8 U.S.C. § 1231). However, the language of 8 U.S.C. § 1231 does not require a stay to be issued by a judge, rather the plain language states a stay issued by a **court**. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). The First Circuit adopted Local Rule 18.0, which mandates an automatic stay when a noncitizen files a petition for review and files a motion for stay. A clerk is certainly employed by the court.

Respondents presuppose without citing to any legal authority that a clerk's order granting a 10-day administrative stay of removal occurs "without any review or action by a judicial officer." At least one federal district court has acknowledged in an unpublished decision that if a federal circuit court deems a motion for stay to be granted under the circuit court's "forbearance policy" pursuant to which ICE will not take steps to remove the noncitizen while an appeal is pending before the circuit court if a formal motion for stay is filed and the clerk's office informs the U.S.

Attorney for the district court that the motion has been filed, the noncitizen's status is pre-removal, and he can be detained at the government's discretion under 8 U.S.C. § 1226(e). *Yang v. Chertoff*, No. 05-73098, 2005 WL 2177097, at *2 (E.D. Mich. Sept. 8, 2005). This clearly is not the type of "stay of removal" accompanying "judicial[] review[]" of the removal order as contemplated by Respondents in their opposition to Petitioner's motion to reopen, reconsider, and vacate judgment. *See In re Immigr. Petitions for Rev. Pending in U.S. Ct. of Appeals for Second Cir.*, 702 F.3d 160, 162 (2d Cir. 2012) (acknowledging the "forbearance policy," which is an informal and unwritten agreement by DHS by which it agrees that once informed by the court that a stay has been filed, the noncitizen will not be removed until the motion for stay is adjudicated). Moreover, Respondents have not contested the validity of these subsequent orders denying Petitioner's continued stay throughout the appeal proceedings that were also signed by the clerk as invalid. Respondents have not alleged that these orders are "administrative" and not accompanied by "judicial review."

Because Petitioner's removal order is being reviewed by the First Circuit and he obtained a stay of removal, the removal period—and as a result detention under 8 U.S.C. § 1231—is only triggered on "the date of the court's final order," which has not occurred in this case as the petition for review remains pending.

B. A stay of removal need not be in effect for the entire appeal proceedings for Petitioner to avoid post-removal order detention under U.S.C. § 1231.

The plain reading of 8 U.S.C. § 1231(a)(1)(B)(ii) does not pose any temporal requirement on when and how long the stay must be in place. **It does not require that the stay be issued for the duration of the entire judicial review period.** Rather, it states in pertinent part that "[t]he removal period begins from the latest of the following" … "[i]f the removal order is judicially reviewed and **if a court orders a stay of removal of the [noncitizen],**

the date of the court's final order." 8 U.S.C. § 1231(a)(1)(B)(ii). The only date referenced in this 8 U.S.C. § 1231(a)(1)(B)(ii) concerns when the removal period begins, and the subsection in question specifies that the removal period begins **the date of the court's final order on the petition for review if a stay was issued by the court**. Hence, the fact that the First Circuit ultimately denied Petitioner's stay of removal pending review and his emergency motion to reconsider, vacate, or amend the order denying his stay of removal pending review is inconsequential.

Again, the plain language of the statute simply states, "if a court orders a stay of removal" – the statute does not say "if a court orders a stay of removal for the entire duration of the judicial review". It just states, "if a court orders a stay" and then states that the "removal period" does not start until "the date of the court's final order" on the petition for review. *See Park 'N Fly, Inc.*, 469 U.S. at 194 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

Here, Petitioner's "removal order is [being] judicially reviewed" and "the court order[ed] a stay of the removal" in relation to the petition for review, pursuant to First Circuit adopted Local Rule 18.0. This was the situation when the Court issued its decision on denying Petition's Writ of Habeas Corpus, erroneously concluding Petitioner was 8 U.S.C. § 1231, not 8 U.S.C. § 1226, because it was unaware that a petition for review of the Final Administrative Order of Removal was pending that that Petitioner had been granted a stay of removal. *See* Doc. No. [26]. Because the First Circuit has not issued a final order on the petition for review, the removal period has not commenced. Thus, Petitioner cannot be detained pursuant to 8 U.S.C. § 1231.

C. *The law differentiates between detention authority and judicial review of orders of removal.*

In its memorandum in opposition to Petitioner's motion to reopen, reconsider, and to vacate judgement, Respondents note that "[i]f a clerk's grant of an administrative stay were sufficient by itself to trigger subsection (ii), then detention authority would continue under section 1226 until the conclusion of the petition for review—possibly even if the judicial officers nevertheless denied the stay on its merits…" They propose that this "would be an absurd result" because the ultimate denial of the stay would allow for removal of the noncitizen while the petition for review is pending; but under Petitioner's interpretation, he could be removed while never subject to a "removal period" and post-removal *detention* authority under 8 U.S.C. § 1231. This result is not absurd because the law differentiates between *detention* authority, authority for *removal* of a non-citizen and judicial review of orders of removal.

Section 1231 titled "Detention and removal of aliens ordered removed" discusses the time period during which the Attorney General shall remove a noncitizen from the United States, when the removal period begins, and states that the Attorney General shall detain the noncitizen during the removal period. However, section 1252 titled "Judicial review of orders of removal" outlines the requirements and procedure for review of orders of removal. It is possible ICE remove a noncitizen without a stay of removal with a pending petition for review without subjecting him to mandatory detention under 8 U.S.C. § 1231. Given detention is an extreme measure that should not normally apply, Petitioner should not be detained. Respondents would still be able to detain Petitioner if they can prove by clear and convincing evidence that he is a flight risk or that he is a risk to the community, *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021), which they have not alleged nor proven.

CONCLUSION

For the reasons set forth above, Petitioner prays the Court grant his motion to reopen, reconsider, and to vacate judgement denying his writ of habeas.

Respectfully submitted on May 7, 2025,

/s/Karen Weinstock
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on May 7, 2025.

/s/Karen Weinstock
Karen Weinstock
Attorney for Petitioner