

**UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK**

GS,

Petitioner,

v.

JOHN DOE, et al.,

Respondents.

Case No. 1:25-cv-08150-MKV

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO
SHOW CAUSE SEEKING IMMEDIATE RELEASE FROM IMMIGRATION
CUSTODY**

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INTRODUCTION

Petitioner GS hereby requests a Temporary Restraining Order as well as a preliminary injunction, enjoining Respondents from continuing to detain him while this habeas petition is being decided.

Petitioner is a citizen of Honduras and is subject to a final order of removal dated November 3, 2023. He has been detained by ICE since July 18, 2025, and a motion to rescind the removal order is pending with the Board of Immigration Appeals (BIA), which issued a stay of removal in August, while the motion is pending.

Petitioner is detained pursuant to 8 U.S.C. § 1231, as he is the subject of a final order of removal. However, that order has been stayed by the BIA, and Petitioner is well past the 90-day “removal period” during which detention is mandatory. In a post-order custody review, of which neither Petitioner nor his attorney were given prior notice or an opportunity to make submission, Respondents declined to release Petitioner on the basis that he would pose a danger to the community or to the safety of others. This decision was based solely on his immigration history, which contains nothing in the way of a violent or dangerous act. Indeed, Petitioner has never even been accused of, much less charged with or convicted of, a criminal offense.

Petitioner here shows a likelihood of success on his claims that Respondents’ decision violated his procedural and substantive due process rights, as well as the Administrative Procedures Act, and that it should be set aside. Because the BIA has stayed his removal, and his detention is not likely in the reasonably foreseeable future, he should be released from custody forthwith.

STATEMENT OF FACTS

The facts of this case are simple, and relatively uncontroverted.

Plaintiff is a native and citizen of Honduras, who entered the US on December 2, 2019, by crossing the US-Mexico border. He was initially detained by US Customs and Border Protection, and was served with a Notice to Appear in removal proceedings “at a time and date to be set”. On or about December 28, 2019 he was released to the care of his brother, in Rhinebeck NY, and informed ICE that he would be living at a specified address in Rhinebeck, NY. (First Amended Petition for a Writ of Habeas Corpus (“FAP”), ECF 7, ¶ 26)

The Notice to Appear was then filed with the Immigration Court in New York on April 2020, and a hearing was scheduled for April 9, 2020, but prior to the hearing date the hearing was cancelled and rescheduled several times. A hearing was eventually scheduled for March 17, 2023, which Petitioner attended, but the Immigration Judge (“IJ”) was not present and the case was adjourned. Another hearing was then scheduled for August 4, 2023, but Petitioner did not attend. (*id.*, ¶¶ 27, 28)

It is unclear whether or not notice of that hearing had been sent to him, as the Immigration Judge did not enter a removal order (as would be required if there was proof that the hearing notice had been mailed to him, see 8 U.S.C. § 1229a(b)(5)(A)), but instead rescheduled the case to November 3, 2023. EOIR records indicate that notice of this hearing was mailed to petitioner at his address in Rhinebeck, but he did not receive it and accordingly did not appear at the hearing. As a result, the IJ ordered him removed *in absentia*. Petitioner also did not receive a copy of this removal order, which became “final” thirty days later, on December 3, 2023. (*id.*, ¶ 28)

On July 18, 2025, Petitioner was apprehended by ICE, during an immigration “sweep”, and became aware of the *in absentia* order for the first time. Through previous counsel, he filed a petition for a writ of habeas corpus in the Southern District of New York, Case No. 1:25-cv-05941-MMG, and a temporary order was issued, staying removal from the US and also from the Southern District of New York. That petition was dismissed for lack of jurisdiction on July 29, 2025, Case No. 1:25-cv-05941, ECF 11, 20. (FAP, ¶ 29)

On the same date, July 29, 2025, Petitioner filed a motion with the Immigration Court to rescind the removal order and reopen the proceedings, stating that he intended to apply for asylum and related relief. (ECF 1-7) That motion to reopen was supported by a declaration from Petitioner, in which he stated that he had never received notice of the removal hearing at which he had been ordered deported, as well as a declaration from another person, Yorleny Weigel, who had been living at the same address as Petitioner in 2023. Ms. Weigel stated that she had actually lived at that address for twenty-two years, and that there were repeated problems with receiving mail. She also stated that she had accompanied Petitioner to the March 2023 Immigration Court hearing at which the Immigration Judge did not show up, and that he had never received any further notice of an Immigration Court hearing. The motion was also supported by declarations from other people who lived on the same mail route in Rhinebeck as Petitioner, stating that they too had experienced problems but both receiving and sending mail, and from one person stating that they constantly received mail addressed to other people. (*id.*, ¶ 30)

On August 1, 2025 the IJ denied the motion to reopen, stating that Petitioner had “provided no evidence beyond their self- interested statement that they did not receive the document in the mail” and that he “failed to exercise due diligence” between the date of the

removal order in November 2023 and the date of filing the motion to reopen in July 2025.¹ On August 14, 2025, Petitioner filed an appeal with the Board of Immigration Appeals (BIA) along with a motion to remand the case back to the IJ. On August 15, 2025, the BIA issued an Order staying Petitioner's removal pending the outcome of the appeal, which remains pending. (*id.*, ¶¶ 31, 33)

On September 2, 2025, through his immigration counsel, Petitioner submitted a letter to Respondent ICE, seeking his release, supported by an affidavit of support from a US citizen in Rhinebeck, who offered to ensure his attendance at any future immigration appointments, as well as over fifty declarations from people in the community, attesting to his good nature and character. Petitioner's counsel did not receive any response from ICE to this request. (*id.*, ¶ 34)

On October 14, 2025, Respondents met with Petitioner and gave him a letter ("the Post-Order Custody Review letter") stating that based solely on a review of his immigration history, he had not demonstrated that he would not pose a danger to the community or the safety of other persons if released, and that they would therefore continue him in custody. This letter cited to the regulations governing post-order custody reviews, at 8 C.F.R. § 241.4(e), (f) and (g). However, neither Petitioner nor his attorney received any prior notice of this custody review, nor were they afforded any opportunity to make any submissions in support of his release, both of which are required by the regulations, and Petitioner's immigration history does not contain anything which would even remotely suggest that he is a danger to the community or to the safety of other people. Petitioner also has not criminal arrest history and no history of any disciplinary infractions during his time in custody. (FAP ¶¶ 35, 36)

¹ This is incorrect: the motion was supported by several affidavits showing that people at Petitioner's address, and on his mail route, consistently had problems receiving mail during the time in question.

As a result, Plaintiff now seeks this temporary restraining order (TRO) and preliminary injunction, to release him from custody while this habeas petition is being decided.

Plaintiff readily satisfies the standards for this relief, by showing a likelihood of success on the merits as well as irreparable harm if it is not granted.

Petitioner and his attorney were entitled to advance notice of his post-order custody review, and to be given an opportunity to make written submissions in support of his release from custody. Respondents' failure to provide this violates the Immigration and Nationality Act and its implementing regulations, and also violates Petitioner's Fifth Amendment right to procedural due process. Respondents' detention of Petitioner also violates his right to substantive due process, as there is no legal basis to detain him. The ninety-day post-order "removal period" during which detention is mandatory had long passed by the time he was detained, and he is unlikely to be removed in the reasonably foreseeable future as he is the beneficiary of a stay of removal. Respondent's conclusion that Petitioner poses a danger to the safety of other people and to the community is arbitrary, and unsupported by any evidence whatsoever, and thus violates the relevant sections of the Administrative Procedures Act. Because he is wrongfully detained without the ability to seek release through a bond hearing, Petitioner also shows irreparable harm.

ARGUMENT

1. Standard For Relief

The standards for a TRO and a preliminary injunction are the same. In this Second Circuit, those standards are "(1) 'either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a

balance of hardships tipping decidedly in the movant's favor,' *County of Nassau, N.Y. v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008), and (2) 'irreparable harm in the absence of the injunction,' *id*; *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009). The third and fourth factors, "(3) the balance of equities tips in their favor; and (4) an injunction is in the public interest" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008), have been held to merge when the federal government is a party to the case. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

These factors are satisfied here.

2. Petitioner is likely to succeed on the merits of his claim that his continued detention is unlawful.

8 U.S.C. § 1231(a)(2) mandates the detention of a non-citizen during the 90-day "removal period", which begins on the latest of: (i) the date the order of removal becomes administratively final; (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; or (iii) if the alien is detained or confined (except under the removal process), the date the alien is released from detention or confinement. 8 U.S.C. § 1231(a)(1)(B). A removal order issued by an Immigration Judge becomes administratively final upon the earlier of the expiration of the time to take an appeal to the Board of Immigration Appeals (BIA), or the dismissal by the BIA of such an appeal. 8 U.S.C. § 1101(a)(47)(B), 8 C.F.R. § 1241.1(a) – (c). An exception is for removal orders entered *in absentia*, which become final "immediately upon entry of such order." 8 C.F.R. § 1241.1(e), which in this case was in November 2023.

If the noncitizen is not removed after the 90-day removal period, 8 U.S.C. § 1231(a)(3) provides that, pending removal, they "shall be subject to supervision under regulations

prescribed by the Attorney General.” However, a non-citizen such as Petitioner who has been found inadmissible under 8 U.S.C. § 1182 and who has not been removed within the initial 90-day removal period may be detained beyond it, 8 U.S.C. § 1231(a)(6), subject to a custody review by ICE pursuant to the regulations at 8 C.F.R. § 241.4. These regulations require, inter alia, advance notice to the non-citizen of this review, and an opportunity for written submissions as well as assistance by “a person of his choice”, 8 C.F.R. § 241.4(h)(2).

The review is required to address whether or not the person is a flight risk or a danger to the community, 8 C.F.R. § 241.4(e), (f), and if “immediate removal... is not practicable”, §§ 241.4(e)(1), 241.4(g)(3)(k)(1)(i). If the person is neither a danger nor a flight risk, and if immediate removal is not possible, continued detention is not authorized, and they should be released on supervision pursuant to 8 U.S.C. § 1231(a)(3). Service of the custody review decision shall be on the non-citizen, as well as his legal representative, 8 C.F.R. § 241.4(d)(2), (3). Further, if it is established during the review, that "travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest." 8 C.F.R. 241.4(g)(3).

Finally, even if the non-citizen is denied release after a post-order custody review, such detention is subject to constitutional constraints. If removal is not reasonably foreseeable after six months of post-removal detention, continued detention is unauthorized by statute and presumptively unreasonable, and the non-citizen should be released on supervision in accordance with 8 U. S. C. § 1231(a)(3). And even if removal is reasonably foreseeable, detention should still not be authorized unless there is a risk of the non-citizen committing further crimes.

Zadvydas v. Davis, 533 U.S. 678, 699 – 700 (2001)

Although 8 U.S.C. § 1231(a)(1)(C) tolls the removal period if an alien “conspires or acts to prevent the alien's removal”, this tolling of the removal period requires some action on the part of the non-citizen to prevent his or her removal, by “demonstrat[ing] some sort of bad faith failure to cooperate.” *Rajigah v. Conway*, 268 F.Supp.2d 159, 165 (E.D.N.Y.2003) ; *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 501–02 (S.D.N.Y. 2009).

The FAP asserts four causes of action arising from Petitioner’s detention. Count One asserts that Respondents’ failure to provide him with a proper post-order custody review violates the INA and its implementing regulations. Count Two asserts that it violates his right to procedural due process. Count Three asserts that Petitioner’s detention, long after the 90-day removal period has expired and while he has a stay of removal, which makes his removal unlikely in the reasonably foreseeable future, violates his right to substantive due process. Count Four alleges that Respondents’ decision to continue Petitioner in custody on the basis that he is a danger to the community violates the Administrative Procedures Act (APA) because it is “arbitrary, capricious and an abuse of discretion” and unsupported by substantial evidence.

Petitioner is likely to succeed on each one of these claims.

a. This Court has jurisdiction over the petition.

As a threshold matter, the Court has jurisdiction over the claims raised in this Petition. 8 U.S.C. § 1252(g) states that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). However, this bar “does not preclude jurisdiction over the challenges to the legality of [a noncitizen’s] detention”, which are “collateral to the Government’s decision to

execute the final order of removal, and instead involve whether the Government complied with its own revocation procedures and whether the length of his detention after the removal period is constitutional.” *Zhu v. Genalo*, No. 1:25-cv-06523, 2025 WL 2452352, * 3, (SDNY 2025), citing *Öztürk v. Hyde*, 136 F.4th 382, 396 - 397 (2d Cir. 2025) and *Ceesay v. Kurzdorfer*, 781 F.Supp.3d 137 (W.D.N.Y. 2025) (explaining that “district courts ... have distinguished between challenges to ICE’s discretion to execute a removal order, which are barred, and challenges to the manner in which ICE executes the removal order, which are not”, *id.*, 152). As a result, the Court’s jurisdiction is not barred by section 1252(g).

b. Respondents’ failure to comply with the regulatory framework for post-order custody reviews: Counts One and Two of the Petition.

Regulations require that Petitioner be afforded a post-order custody review at which he can be afforded an opportunity to demonstrate that his release “will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending [his] removal from the United States.”, 8 C.F.R § 241(d)(1). These same regulations require that he be given advance notice of this review, an opportunity to make written submissions, and assistance by “a person of his choice”, 8 C.F.R § 241.4(h)(1) and (2).

Respondents did not comply with any of these regulatory requirements.

As alleged in the FAP, on October 14 Respondents told Petitioner that his detention was being extended after the decision had been made, and handed him a copy of it (FAP, ¶ 34) The decision stated that Petitioner had not demonstrated that if released, he would not pose a danger to the community or to the safety of other persons (See post-order custody decision, FAP Exhibit A). But because neither he nor his attorney had any prior notice of this custody review, he had no opportunity to make such a demonstration. And as stated above, the regulations at 8 C.F.R §

241.4(h) require not just advance notice, but also an opportunity to make a written submission, and assistance by an attorney if he so chose. Respondents knew that Petitioner had an immigration attorney (Paul Grotas), as Mr. Grotas had filed a motion to reopen and received a stay of removal from the BIA (FAP ¶¶ 30 – 33), and had also submitted a written request for release, along with an affidavit of support from a person offering to ensure his attendance at any future immigration appointments as well as over fifty declarations from people in the community attesting to his good name and character (FAP ¶ 34). Respondents did not respond to that request, nor did they notify him of the custody review.

Thus, Petitioner is likely to succeed on Count 1 of the FAP, that Respondents failed to provide him with a proper post-order custody review as required by the INA at 8 U.S.C. § 1231(a)(6) and its implementing regulations at 8 C.F.R. § 241.4.

It is settled law, according to both Supreme Court and District Court decisions, that such a failure constitutes a deprivation of procedural due process, in violation of the Fifth Amendment.

As noted by Justice Kennedy, “Were the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 C.F.R. § 241.4 (2001).” *Zadydas v. Davis*, *supra*, 533 U.S. 678, 724 (Kennedy, J, dissenting). “The Supreme Court has emphasized that [f]reedom from... government custody, detention, or other forms of physical restraint lies at the heart of the liberty that [the Due Process] Clause protects. Because “[t]he Fifth Amendment entitles all ‘persons’ to due process of law ... the Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zhu v. Genalo*, No. 1:25-CV-06523 (JLR), 2025

WL 2452352, at *4 (S.D.N.Y. Aug. 26, 2025) (internal citations omitted), citing *Zadvydias v. Davis*, *supra*, 533 U.S. at 690, and *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020).

“The Fifth Amendment guarantee of due process has two components. The substantive component prohibits restrictions on liberty that are not narrowly tailored to serve a compelling state interest, no matter what process is employed in deciding to impose them. In addition, a person who is detained has a right to procedural due process, meaning a right to a fair process for challenging the reasons for detention.” *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 634 (D. Mass. 2018). The District Court there noted that “8 C.F.R. § 241.4 was promulgated in an effort to provide aliens the procedural due process that courts had found to be constitutionally required.” *id.*, 655, and found that the failure of DHS to, *inter alia*, provide proper notice and an interview in advance of a post-order custody review to two detained non-citizens was a violation of procedural due process, *id.* 635, 656. The Court’s remedy was to schedule a bail hearing, *id.*

Similarly in *D’Alessandro v. Mukasey*, 628 F. Supp. 2d 368 (W.D.N.Y. 2009), the District Court found the failure of DHS to conduct a post-order custody review in accordance with the regulations violated a post-final removal order detainee’s right to procedural due process, *id.* at 394. Other cases have found procedural due process violations in the “revocation of release [from custody] and [re-]detention without providing the required notice and an opportunity to be heard.” *Zhu v. Genalo*, No. 1:25-CV-06523 (JLR), 2025 WL 2452352, at *5 (S.D.N.Y. Aug. 26, 2025), *accord*, *Rombot v. Souza*, 296 F. Supp. 3d 383, 389 (D. Mass. 2017) (“While ICE does have significant discretion to detain, release, or revoke aliens, the agency still must follow its own regulations, procedures, and prior written commitment”, *id.*, 389), *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137 (W.D.N.Y. 2025) (“[B]ecause ICE did not follow its own regulations in deciding to re-detain Ceesay, his due process rights were violated, and he is entitled to release.”, *id.*, 166).

Respondents' failure to comply with the regulations at issue in this case are not some sort of de minimis technical oversight which do not prejudice Petitioner (although, to be clear, Petitioner does not contend that he is required to show prejudice in order to prevail on his due process violation claims, see *Ceesay v. Kurzdorfer*, *supra*, 781 F. Supp.3d 156, holding that "release is an effective remedy even if the government immediately re-detains him in a way that follows the rules.) Instead, as a result of Respondents' failure, Petitioner's detention has been continued on the basis that he is a danger to the public, even though there is no allegation that he has ever even been accused of a crime.² Proper notice to Petitioner and his immigration attorney, well in advance of the post- order custody review, as required by the regulations, would have allowed them the opportunity to point that out to Respondents.

In short, Petitioner is likely to prevail on Count Two of the Petition, that Respondents' failure to comply with the post-order custody review regulations at 8 C.F.R. § 241.4 violated his rights to procedural due process.

c. Respondents' post-order custody decision violates the Administrative Procedures Act.

APA claims are cognizable on a habeas petition, both according to the Administrative Procedures Act itself (5 U.S.C. § 703) as well as case law, see *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 468 (S.D.N.Y. 2018) (finding "likelihood of success on his APA claim" raised in a habeas petition), *Petrova v. U.S. Dep't of Homeland Sec.*, No. 2:25-CV-00240, 2025 WL 2772764, at *22 (D. Vt. Sept. 26, 2025) (addressing APA claims raised in a habeas petition). In the case, the court held that "[A]gency action is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important

² The post-order custody decision bases its "danger to the community" conclusion solely on Petitioner's immigration history, none of which implicates any threat to either persons or property.

aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* at 23, citing *Nat. Res. Def. Council v. U.S. E.P.A.*, 658 F.3d 200, 215 (2d Cir. 2011).

Here, Respondent ICE stated that, based on a review of Petitioner’s immigration record, it found that he had not demonstrated that if released, he would not pose a danger to the community or to the safety of other persons. Respondents then provided the specific facts on which they based their conclusion: that “on an unknown date and that’s an unknown time, you illegally entered the United States without admission or parole by an immigration official.” It then states that he was encountered and arrested by the United States Border Patrol, charged with being inadmissible to the US, and released from custody, that an IJ subsequently ordered him removed from the US after he failed to appear for his hearing, and that he was subsequently arrested based on an outstanding removal order and warrant of arrest, that he subsequently filed a motion to reopen with the Immigration Court, which was denied, and that he filed an appeal with the Board of Immigration Appeals, which remains pending.

Completely absent from this recitation of the facts on which Respondents based their dangerousness assessment is any reference to any actual dangerous conduct. There is no allegation that he committed or is alleged to have committed a crime against persons or property, or that he engaged in any charged or uncharged criminal conduct. Instead, it is a mere recitation of the facts of his immigration history (omitting, as it happens, the fact that the Board of Immigration Appeals granted him a stay of removal), with no allegations of dangerousness or criminal disposition. A seven-page declaration from a supervisory deportation officer Timothy Nevins (ECF 1-2), apparently created in connection with the first habeas petition (Case No. 1:25-

cv-05941-MMG, ECF 15) also recounts Petitioner's history, and it too contains no reference to any criminal or suspected criminal activity or any facts which could even remotely support a finding of dangerousness.

In fact, the only evidence in Petitioner's file relating to his relationship with his community and his interactions with other persons showed that he was the opposite of what Respondents claimed.

On September 2, 2025, Petitioner's immigration attorney, Paul Grotas, submitted a letter to Respondent ICE Enforcement and Removal Operations (ERO) requesting Petitioner's release, supported by a "sponsor" offering to provide him with a place to live if released and to ensure that he attends any future immigration appointments, and over fifty letters of support from people who live in Rhinebeck, where Petitioner has lived since 2019, all attesting to his good character and integrity, and, most importantly, his good standing in the community. (see ECF 1-12 and 1-14)³ The writers of these letters all describe him as hardworking, honest, trustworthy, well known and well-regarded by everyone in his community. Many of the letter writers state that they rely on him to clean driveways in winter and maintain gardens in summer, others say they know him since he enrolled in High School in Rhinebeck and they or their children became friends with him, and consider him part of their families. Several specifically talk about his trustworthiness, and they all mourn the loss to the community from his detention.

In light of this evidence, which was in Respondents' possession at the time they conducted their custody review, Respondents' conclusion in their post-order custody letter, that

³ For reasons that are unclear, several of the exhibits filed with the Petition, including this one, are restricted to counsel herein, even though I am Petitioner's attorney of record, but it would seem that the custody release request is at Exhibit 12, and these supporting letters are at Exhibit 14, which would make them ECF 1-12 and 1-14 respectively. They are also filed on the docket at ECF 5-18 and 5-20 in Case No. 1:25-mc-00394 (which counsel herein also cannot access).

Petitioner cannot be released because he would be a danger to the community and to the safety of others, is “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Petrova v. U.S. Dep't of Homeland Sec.*, *supra*, 2025 WL 2772764, * 23.

Further, the reliance by Respondents on a rote recitation of Petitioner’s immigration history, with no attempt to show how it leads to the conclusion that he is too dangerous to be released, strongly implies that Respondents did not undertake any actual review of Petitioner’s eligibility for release as required by the regulations and the statute. Instead, it is more likely that they merely copied and pasted Petitioner’s immigration history and standard “danger to the community” language into their custody review letter. Their decision thus “entirely failed to consider an important aspect of the problem, and offered an explanation for its decision that runs counter to the evidence before the agency” and thus fails the APA’s arbitrary and capricious test, *id*; see also *Brezler v. Mills*, 220 F. Supp. 3d 303, 328 (E.D.N.Y. 2016) (finding a determination to be “arbitrary and capricious if it is implausible or contrary to the evidence before the agency”, *id* at 328, citing *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)).

For the same reasons, Respondents’ conclusion – that Petitioner cannot be released because of dangerousness, based solely on his immigration history, fails the APA’s “substantial evidence” test at 5 U.S.C. 706(2)(E). “Substantial evidence” under the APA means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion [and] less than a preponderance but more than a scintilla of evidence... [it] requires something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by

substantial evidence.’ *Lab. Council for Latin Am. Advancement v. United States Env’t Prot. Agency*, 12 F.4th 234, 244–45 (2d Cir. 2021) (internal citations and quotations omitted).

Here, there was not even a scintilla of evidence to support Respondents’ dangerousness finding; all it rested on was Petitioner’s immigration history, which contains absolutely nothing to suggest that he is a danger to himself or others. No reasonable mind could conclude from it that he is a danger to the community or to other people. Further, Respondents’ finding ignored completely Petitioner’s overwhelming evidence from the community in which he had lived for the last five years, all showing that he was a trusted and loved member of it. In short, it fails the substantial evidence test at 5 U.S.C. § 706(2)(E).

Thus, Petitioner shows a likelihood of success on the merits of his claim that Respondents’ decision to continue him in custody because he is a danger to the community violates the APA.

d. Respondents’ detention of Petitioner while he has a stay of removal violates his rights to substantive due process: Count Three of the FAP.

Court Three of the FAP asserts that Petitioner’s detention, long after the 90-day removal period has expired and while he has a stay of removal, thus making his removal unlikely in the reasonably foreseeable future, violates his right to substantive due process.

Petitioner’s removal order became final, and the removal period commenced, when he was ordered removed *in absentia* in November 2023, 8 C.F.R. § 1241.1(e). It expired 90 days later, in February 2024. Petitioner did not act to toll the removal period; on the contrary, he remained living at the address of record, had a car registered in his name at that address, and was well-known in his community. These and similar factors have typically been found to support a finding that the person has not tried to frustrate their removal, and thus have not tolled the

removal period. See *Farez-Espinoza v. Chertoff*, *supra*, 600 F. Supp. 2d 488, 501–02 (S.D.N.Y. 2009) (requiring a bad faith failure to cooperate, such as providing the INS with false or inconsistent information regarding identity or country of origin, or refusing to complete travel arrangements or name a country for deportation, before the non-citizen can be found to have frustrated their removal).

Because the removal period has expired, and was not tolled, it is, logically, not subject to being extended. As Petitioner currently has a stay of removal, there is no significant likelihood of removal in the reasonably foreseeable future. Indeed, while the BIA order granting the stay of removal states that it is not opining on the merits of the underlying motion to remand the denial of the motion to reopen, the BIA is unlikely to have granted a stay if it did not think Petitioner showed at least some likelihood of success on the merits of the motion. So while Respondents can detain Petitioner for the purpose of removing him, because the 90-day removal period has expired, and Petitioner has a stay of removal, Petitioner is not subject to the subsequent extensions of the removal period authorized by the INA. If Petitioner’s removal is currently prohibited, which it is, then there is no justification for his continued detention.

The Supreme Court was explicit, that “if removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute.”, *Zadvydas v. Davis*, *supra*, 533 U.S. 678, 699–700, cited by this Court in *J.L. v. Decker*, No. 1:22-CV-2853-MKV, 2024 WL 232115, at *4, n. 4 (S.D.N.Y. Jan. 22, 2024). Later, in *Clark v. Martinez*, 543 U.S. 371 (2005) the Supreme Court interpreted *Zadvydas* as holding that the basic purpose of post-order detention is “effectuating an alien’s removal,” and that “[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized.” *Id.*, at 377, citing *Zadvydas* at 689, 699. The Court further held that the presumptive period during which the detention of an

alien is reasonably necessary to effectuate his removal is six months; after that, the alien is eligible for conditional release if he can demonstrate that there is “no significant likelihood of removal in the reasonably foreseeable future.” Indeed, if Petitioner had a judicial, rather than an administrative, stay of removal (see 8 U.S.C. § 1231(a)(1)(B)(ii)), his detention would be pursuant to 8 U.S.C. § 1126(a) and he would be immediately entitled to a bond hearing before an Immigration Judge, see, e.g., *J.L. v. Decker*, *supra*, 2024 WL 232115, at *7, at which the only issues would be flight risk or dangerousness to the community, and likelihood of removal in the near future would not be an issue.

Courts have split on the question of whether the 90-day removal period and any extensions under 8 U.S.C. § 1231(a)(6) run at the same time as the 180-day *Zadvydas* presumptive period of constitutionally-permissible detention, for people whose detention does not commence immediately once the removal order becomes final. Compare *Farez-Espinoza v. Chertoff*, *supra*, 600 F. Supp.2d 502 (S.D.N.Y. 2009) (“[B]ecause the removal period and any presumptively reasonable detention period has expired, and the removal period was not tolled pursuant to § 1231(a)(1)(C), this Court finds that the Respondents are without statutory authority to detain Farez–Espinoza.”) with *Callender v. Shanahan*, 281 F. Supp. 3d 428 (S.D.N.Y. 2017) (“Callender is confusing the 90–day “removal period” under 8 U.S.C. § 1231(a)(1)(A), which began when his order of removal became final in 2006... with the six-month “presumptively reasonable period of detention” under *Zadvydas*, 533 U.S. at 701, 121 S.Ct. 2491, which could not have begun until he was detained by ICE in 2015.” *Id.* at 435); see *id.* at n. 7 (collecting cases).

The issue does not need to be resolved here, because even assuming that the two time periods did not run simultaneously, there is nonetheless no basis for Respondents to detain

Petitioner while he has a stay of removal because as a matter of law, his removal is not “reasonably foreseeable” and so, under *Zadvydas*, his detention is no longer authorized by the INA. And because it is not authorized, Respondents’ detention of him violates Petitioner’s right to due process as guaranteed by the Fifth Amendment.

2. Plaintiff will suffer irreparable injury if he is not released.

“Where, as here, the petitioner has asserted a constitutional violation, a presumption of irreparable harm attaches. Several courts in this circuit have concluded that the deprivation of an alien's liberty is, in and of itself, irreparable harm.” *Hernandez Aguilar v. Decker*, 482 F. Supp. 3d 139, 149 (S.D.N.Y. 2020) (internal citations omitted), citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). “Ongoing unlawful deprivations of liberty and the threat of unlawful detention and reimprisonment would violate plaintiffs' constitutional rights and therefore constitute quintessential irreparable harm.” *Hardy v. Fischer*, 701 F.Supp.2d 614, 619 (S.D.N.Y. 2010).

3. The balance of equities and the public interest tip in Plaintiff’s favor.

“Where the Government is the opposing party, the final two factors in the temporary restraining order analysis—the balance of the equities and the public interest—merge.” *Coronel v. Decker*, 449 F.Supp.3d 274, 287 (S.D.N.Y. 2020) (internal citations omitted). Petitioner has demonstrated a likelihood of success on the merits of his procedural due process claim, and the public interest is best served by ensuring that the constitutional rights of Petitioner are protected. *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018).

4. Respondents should be enjoined from removing Petitioner from this district while this Petition is being litigated.

Petitioner is currently detained within this Court’s jurisdiction, at the Orange County jail in Goshen, New York. Respondents will not agree to not remove him from the district while this

litigation continues. If Petitioner is removed, it will severely impact his ability to represent himself not just in connection with this case, but also in connection with the underlying immigration case.

All of the evidence, including all of the people relevant to the question of whether or not Petitioner should be released from custody and back into his community in Rhinebeck, and whether he poses a danger to that community, are in New York. If Petitioner is removed from the district, it will most likely be to an immigration detention center in Texas or Louisiana, where most ICE detainees are being sent. Authority over his case would then be transferred to the local ICE officials there, who will be unable to meet with any of the people who have offered to act as a “sponsor” for Petitioner if he is released, or even to properly gauge the nature of that community into which he would return. Further, the Court would have to exercise jurisdiction over actions of ICE officials in that district, which would pose additional, and unnecessary, challenges. Petitioner would be unable to meet with his attorneys in person, and thus properly participate in his case, and would also be unable to see any visitors, which he currently can, and does. On the other hand, there is little to no impact on Respondents keeping Petitioner in this district while this litigation continues.

CONCLUSION

The Court should issue orders (i) enjoining Respondents from moving Petitioner out of this district while this litigation continued; (ii) enjoining Respondents from continuing to detain Petitioner, and instead directing them to release him forthwith, subject to supervision as required by 8 U.S.C. § 1231(a)(3); (iii) such other and further relief as to this Court shall seem just and equitable.

Dated: New York, New York,
November 3, 2025

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