UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GS,

Petitioner,

- against -

KRISTI NOEM *et al.*,

Respondents.

No. 25 Civ. 8150 (MKV)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO CORRECTED FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND TO MOTION SEEKING IMMEDIATE RELEASE FROM IMMIGRATION CUSTODY

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PRELIMINARY STATEMENT

Respondents, by their attorney, Jay Clayton, United States Attorney for the Southern District of New York, respectfully submit this combined memorandum of law in opposition to the corrected first amended petition for a writ of habeas corpus ("Pet.," ECF No. 8) filed by petitioner G.S. ("Petitioner"),[1] and to his motion seeking immediate release from custody ("Mot.," ECF No. 10).

The Court should deny Petitioner's habeas petition and motion. Petitioner has not established that there were legal faults in the processes and decisions that led to his detention. After Petitioner was taken into custody, U.S. Immigration and Customs Enforcement ("ICE") conducted a custody review of Petitioner, as required, and personally served Petitioner with advance notice of the review and of his ability to make a submission as to the relevant factors. Petitioner made no such submission, and ICE made a determination based on the information it had regarding Petitioner's immigration history—his illegal entry into the county, his failure to attend his removal hearing, and the immigration judge's denial of his motion to reopen his removal proceeding. ICE concluded that Petitioner could not be released because he had failed to demonstrate that he would not pose a danger to the community or to the safety of other persons if he were released. Petitioner also cannot establish that his removal is not foreseeable. The only impediment to Petitioner's removal is the stay of removal he obtained from the Board of Immigration Appeals while he seeks to reopen his removal proceedings. That stay and appeal does not provide a legal basis for Petitioner to obtain relief under *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), particularly when ICE has a valid travel document for Petitioner's removal. Petitioner is also not entitled to any

[1] On September 26, 2025, this Court entered a temporary order in the miscellaneous proceeding in which this action was commenced that permitted Petitioner to proceed in this matter using only his initials. Case No. 25 Misc. 394, ECF No. 9.

injunctive relief or to an order requiring ICE to keep him at the Orange County Jail, which has limited bed space for immigration detainees.

BACKGROUND

Petitioner is a native and citizen of Honduras. *See* Declaration of Deputy Field Office Director William Joyce ("Joyce Decl.") ¶ 6. On December 2, 2019, Petitioner unlawfully entered the United States from Mexico by crossing the border near Hidalgo, Texas, and encountered a United States Customs and Border Protection ("CBP") agent. *Id.* ¶ 7. CBP determined that Petitioner had illegally entered the United States without inspection by an immigration officer and without the necessary legal documents to enter or remain in the United States. *Id.* ¶ 8. CBP arrested Petitioner and transported him to the Texas Border Patrol Station for processing as an unaccompanied alien child, after which he was transferred to the custody of the U.S. Department of Health and Human Services, Office of Refugee Resettlement ("ORR"). *Id.*

On December 3, 2019, CBP served Petitioner with a Notice to Appear, the charging document used to commence removal proceedings, charging him with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 9; Return Ex. 1. The notice indicated that Petitioner's immigration case would be handled by an immigration court in Texas. *See* Joyce Decl. ¶ 9.

On December 26, 2019, ORR released Petitioner to the care of his adult brother, who reported residing at an address in Rhinebeck, New York. *Id.* ¶ 10. On December 30, 2019, ICE sent Petitioner a notice stating that his case would be transferred to the immigration court at 26 Federal Plaza in New York City. *Id.* ¶ 11. A hearing was initially scheduled for November 19, 2020, but was adjourned several times and transferred to the immigration court at 290 Broadway in New York

City, with notices sent each time to Petitioner's Rhinebeck address. *Id.* ¶¶ 12-17. The immigration judge attempted to hold an initial hearing on Petitioner's removal on August 4, 2023, but Petitioner did not appear. *Id.* ¶¶ 16, 18. The immigration judge thus re-noticed the hearing to November 3, 2023, and sent a notice of the new date to Petitioner's address. *See* Joyce Decl. ¶ 18. Petitioner again failed to appear for the November 3 hearing, and the judge ordered him removed *in absentia*. *See* Joyce Decl. ¶ 19; Return Ex. 3.

On July 18, 2025, ICE agents encountered and arrested Petitioner during an operation to arrest another alien, which took place at the same Rhinebeck address where Petitioner resided. *See* Joyce Decl. ¶ 21. ICE transported Petitioner to its office in Newburgh, New York, for processing and issued him a Warrant of Removal/Deportation, Form I-205. *Id.* ¶ 22; Return Ex. 4. ICE transported Petitioner that same day to the agency's hold room space at 26 Federal Plaza to await a determination as to bed space. *See* Joyce Decl. ¶ 22. Since that time, ICE has detained Petitioner in several facilities in New York, New Jersey, and Louisiana; he is currently detained at the Orange County Jail in Goshen, New York, where he has been since August 24, 2025. *Id.* ¶¶ 23-24, 30.[2]

On July 29, 2025, Petitioner filed a motion in immigration court seeking to reopen his removal proceeding, arguing that he had not received adequate notice of the hearing. *See id.* ¶ 25. On August 1, 2025, the immigration judge denied Petitioner's motion. *See id.* ¶ 26; Return Ex. 5. On August 4, Petitioner filed an appeal of the immigration judge's order to the Board of

[2] On July 21, 2025, Petitioner filed a previous petition for habeas corpus and sought a temporary restraining order and a preliminary injunction to stay his removal in order to allow him to file a motion to reopen the proceedings before the immigration court. The court temporarily stayed Petitioner's removal from this district on the same day. *See* No. 25 Civ. 05941 (MMG), 2025 WL 2124129, at *2 (S.D.N.Y. July 29, 2025). The court dismissed the petition for lack of subject-matter jurisdiction on July 29, 2025, and left in place the temporary injunction prohibiting Petitioner's removal from this district until August 1. *See id.*

Immigration Appeals ("BIA"), and on August 6, Petitioner made an emergency motion for a stay of his removal to the BIA. *See* Joyce Decl. ¶¶ 27-28. On August 15, the BIA stayed Petitioner's removal pending the resolution of his appeal. *Id.* ¶ 29; Return Ex. 6. ICE moved to expedite the BIA appeal, and Petitioner filed his brief with the BIA on August 15; as of today's date, the appeal remains pending with the BIA, and the BIA's stay of removal remains in effect. *See* Joyce Decl. ¶ 34.

Meanwhile, on September 3, 2025, Petitioner's counsel submitted a request, which attached various documents and affidavits, to ICE seeking Petitioner's release from detention during his ongoing immigration proceedings. *Id.* ¶ 31. On October 3, 2025, ICE responded, denying the request for Petitioner's release. *Id.* ¶ 35. The agency's decision stated in relevant part:

> I have carefully reviewed [Petitioner's] medical status, immigration, and criminal history, as well as the basis for the charges under which his removal is being sought. In addition, I have carefully considered all supporting documents that you provided in your release request.
>
> The release of an individual from detention is generally justified only on a case-by-case basis for humanitarian reasons or significant public benefit, provided the alien presents neither a security risk nor a risk of absconding.
>
> [Petitioner] is subject to a final order of removal issued by an Immigration Judge. Additionally, his Motion to Reopen was denied. A case appeal remains pending before the Board of Immigration Appeals.
>
> I find no compelling reason to warrant a favorable exercise of discretion in this case. Accordingly, your request for [Petitioner's] release is denied in that [Petitioner] ha[s] not demonstrated that [he is] not a flight risk nor a danger to the community. ICE will continue to review [Petitioner's] case consistent with the existing law and policy.

Return Ex. 8.

Separately, on September 9, 2025, ICE notified Petitioner that it would conduct a 90-day Post Order Custody Review on or about October 16, 2025. *See* Joyce Decl. ¶ 32. This notice was served on Petitioner by hand at the Orange County Jail, but was not served on Petitioner's counsel,

as no attorney had filed an ICE Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, with ICE for Petitioner. *Id.* ¶ 33. The notice notified Petitioner that in order to be released, he would need to "demonstrat[e] to the satisfaction of the Attorney General that [he] WILL NOT pose a danger to the community and WILL NOT present a flight risk," and identified relevant considerations. *Id.* ¶ 32; Return Ex. 7. The notice informed Petitioner that he may submit any documentation he wishes to be reviewed in support of his release and that an attorney may submit materials on his behalf. *See* Joyce Decl. ¶ 32; Return Ex. 7.

On October 14, 2025, ICE reviewed Petitioner's custody status based on an individualized review of his immigration history and related information, and decided not to release him. *See* Joyce Decl. ¶ 36. The stated basis for the determination was that Petitioner had "not demonstrated that, if released, [he] w[ould] not pose a danger to the community or to the safety of other persons." Return Ex. 9 at 1. The decision explained the basis for this conclusion as follows:

> ICE has made such determination based upon a review of your immigration history which reveals that on an unknown date and at an unknown time, you illegally entered the United States without admission or parole by an immigration official. On December 3, 2019, you were encountered and arrested by the United States Border Patrol (USBP) at or near the Rio Grande Valley, TX and served a Form I-862, Notice to Appear, charging inadmissibility pursuant to Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), as an alien present in the United States without admission or parole. You were subsequently released from custody pursuant to a Form I-220A, Order of Release on Recognizance. On November 3, 2023, an Immigration Judge (IJ) ordered you removed from the U.S. to Honduras in absentia after you failed to appear for your hearing. On July 18, 2025, [ICE Enforcement and Removal Operations] ERO NYC arrested you pursuant to an outstanding removal order and a Form I-200, Warrant of Arrest. On July 29, 2025, you filed a Motion to Reopen the IJ's decision and a Stay of Removal. On August 1, 2025, the IJ denied your Motion to Reopen and Stay of Removal. On August 1, 2025, you filed an appeal of the IJ's decision with the Board of Immigrations [*sic*] Appeals (BIA), which remains pending a decision.
>
> Based on the above, you are to remain in ICE custody pending the outcome of your motion to reopen proceedings and or removal from the United States, as ICE is unable to conclude that the factors set forth at 8 C.F.R. § 241.4(e) have been satisfied.

Id. The decision was served on Petitioner by hand at the Orange County Jail on October 15. *Id.* at 3.

Petitioner has a valid travel document for return to Honduras. *See* Joyce Decl. ¶ 37. Once any legal impediment to removal is lifted, ICE intends on moving forward with Petitioner's removal pursuant to the final removal order issued in November 2023. *Id.*

ARGUMENT

The Court should deny Petitioner's habeas petition and his motion for immediate release.

I. Petitioner Is Lawfully Detained Pending Removal Under 8 U.S.C. § 1231(a)(6)

A. Applicable Legal Principles

Pursuant to 8 U.S.C. § 1231(a), ICE has the authority to detain aliens who are subject to final removal orders. *See Wang v. Ashcroft*, 320 F.3d 130, 145 (2d Cir. 2003) ("8 U.S.C. § 1231[] governs the detention of aliens subject to final orders of removal."); *accord Johnson v. Arteaga-Martinez*, 596 U.S. 573, 578 (2022) ("8 U.S.C. § 1231(a)[] governs the detention, release, and removal of individuals 'ordered removed.'"). Section 1231 establishes a 90-day "removal period" within which the government generally must secure removal after a removal order becomes final, and during which the government "shall" detain the alien until such removal, 8 U.S.C. §§ 1231(a)(1)(A), (a)(2)(A).[3] In addition, aliens like Petitioner, who are inadmissible under 8 U.S.C. § 1182, "may be detained beyond the removal period." *Id.* § 1231(a)(6); *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 529 (2021).

[3] For aliens subject to *in absentia* removal orders, this 90-day period begins immediately upon entry of the order. 8 C.F.R. § 1241.1(e). Respondents do not dispute that this 90-day period has already lapsed for Petitioner, whose removal order was entered in November 2023. *Cf.* Mot. at 16-18.

Aliens detained under section 1231(a)(6) receive administrative post-order custody reviews shortly before the expiration of the 90-day removal period, *see* 8 C.F.R. § 241.4(c)(1), (h)(1)-(2), and, if they remain detained beyond the removal period, periodically thereafter, *see id.* § 241.4(c)(2), (k); *Portillo v. Decker*, No. 21 Civ. 9506 (PAE), 2022 WL 826941, at *4 (S.D.N.Y. Mar. 18, 2022). In such reviews, it is the alien's "burden 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.'" *Chavez-Gonsalez v. Ball*, No. 6:23-CV-06238 (EAW), 2024 WL 1268282, at *5 n.6 (W.D.N.Y. Mar. 26, 2024) (quoting 8 C.F.R. § 241.4(d)(1)). "The adjudicator considers a number of factors, and the detainee has the right to submit evidence, [and] to use the services of an attorney or another representative. . . ." *Id.* (citing 8 C.F.R. § 241.4(f)(5), (7), (8)(iii), (h)(2), (i)(3)). Notices of such hearings and the resulting decisions must be provided to the alien, 8 C.F.R. § 241.4(d)(2), and if his legal representative has submitted a notice of appearance to ICE, to the representative as well, *id.* § 241.4(d)(3). *See generally Garcia Uranga v. Barr*, No. 20-3162-JWL, 2020 WL 4334999, at *6 (D. Kan. July 28, 2020).

The Supreme Court has "read an implicit limitation into" section 1231(a)(6) given "the Constitution's demands," and held that the statute authorizes detention only for "a period reasonably necessary to bring about [an] alien's removal from the United States." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Supreme Court has held that six months is a "presumptively reasonable period of detention." *Id.* at 701. After that period passes, to secure release, the alien must first "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," and the government may respond with "evidence to rebut that showing" to prolong the detention further. *Id.*

To implement the *Zadvydas* holding, the U.S. Department of Homeland Security ("DHS") has enacted special review procedures for detained aliens under final orders of removal who "provide 'good reason to believe there is no significant likelihood of [their] removal . . . in the reasonably foreseeable future.'" *Portillo*, 2022 WL 826941, at *4 (quoting 8 C.F.R. § 241.13(a)). ICE will release an alien who successfully makes such a showing (absent special circumstances justifying continued detention), subject to appropriate conditions of release, but continue to detain aliens who have a significant likelihood of removal in the reasonably foreseeable future. *Id.* (citing 8 C.F.R. § 241.13(b)(1), (g)(1), (g)(2)).

B. ICE Did Not Deprive Petitioner of Procedural Due Process

Petitioner first argues that he received inadequate notice of his post-order custody review and was thus not able to make a submission to support his release. *See* Mot. at 9-10. The administrative record belies this assertion. On September 9, 2025, ICE provided Petitioner with a "Notice to Alien of File Custody Review," which indicated that the agency would review his custody status "on or about October 16, 2025." Return Ex. 7. The notice indicated to Petitioner that in order to be released, he would need to "demonstrat[e] to the satisfaction of the Attorney General that [he] WILL NOT pose a danger to the community and WILL NOT present a flight risk." *Id.* It listed several criteria that the Deciding Officer "may consider" in making this determination. *Id.* The notice informed Petitioner that he "may submit any documentation [he] wish[es] to be reviewed in support of [his] release," and that an "attorney or other person may submit materials on [his] behalf." *Id.* The document is addressed to Petitioner, care of the Orange County Jail, and under "Method of Service" indicates that it was served on Petitioner by "Hand," and there is a signature and printed name of an ICE officer, who "certif[ied] that this form was provided to the Alien," along with the date of September 9. *Id.* The service section of the document

also includes a print of Petitioner's right index finger—indicating that he was given the document. *Id.*; *see* Joyce Decl. ¶ 32.

ICE did not send a copy of this notice to Petitioner's counsel, who had not filed a notice of appearance with ICE despite corresponding with the agency about Petitioner. *See* Joyce Decl. ¶¶ 32-33. The applicable regulation provides that ICE will send copies of relevant notices regarding an alien "only to the attorney or representative of record"—that is, an attorney or representative who has "complete[d] Form G-28, Notice of Entry of Appearance as Attorney or Representative." 8 C.F.R. § 241.4(d)(3).

Petitioner was thus timely informed of ICE's plan to conduct a post-order custody review and of his right to make a submission, including with the assistance of counsel, to support his release. While ICE did not provide a copy of the relevant notice to Petitioner's counsel, this was not required as the counsel did not file a notice of appearance with the agency, and nothing prevented Petitioner from communicating or sharing the notice with his attorney.

Even if the agency should have also informed Petitioner's attorney of the upcoming review, the cases Petitioner cites, *see* Mot. at 11-12, would not compel any relief. In one such case, ICE failed to conduct *any* post-order custody review for two aliens who had been detained for more than 90 days, which a district court found violated the aliens' procedural due process rights. *See Jimenez v. Cronen*, 317 F. Supp. 3d 626, 647-56 (D. Mass. 2018). In another case, ICE's decisions denying post-order custody release did not discuss the alien's particular circumstances or evaluate them against the governing release criteria, and one of the decisions may not have been made by an authorized ICE official. *See D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 393-94 (W.D.N.Y. 2009). The final set of cases, only somewhat closer to the facts here, concerns a circumstance in which aliens were not given advance notice of ICE's revocation of their supervisory release and

were not invited to required interviews at which the basis for the revocation could be challenged; the courts concluded that these aliens lacked a constitutionally adequate opportunity to challenge the revocations of their supervised release. *See Zhu v. Genalo*, No. 25 Civ. 06523 (JLR), 2025 WL 2452352, at *5-9 (S.D.N.Y. Aug. 26, 2025); *Rombot v. Souza*, 296 F. Supp. 3d 383, 387-88 (D. Mass. 2017); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 162-66 (W.D.N.Y. 2025).

None of these cases discuss the circumstance in which ICE notified an alien—but not his counsel (who did not file a notice of appearance with the agency)—of the upcoming post-order custody review. The discussion in one of the only cases to address this particular regulatory requirement suggests that a harmless-error analysis is appropriate in this situation. *See Garcia Uranga*, 2020 WL 4334999, at *6. In that case, the alien was served with a notice of his custody review on March 18, 2020, but his counsel was notified by email only on May 1, 2020, that a deportation officer would be interviewing the alien that same day—thus depriving the counsel of any ability to submit materials in support of the alien's release or to assist in the interview. *Id.* The district court nonetheless concluded that "the procedures of § 241.4 were *substantially* followed." *Id.* (emphasis added); *but cf. Doissaint v. Chertoff*, No. C08-0584-MJP, 2008 WL 3978559, at *7 (W.D. Wash. Aug. 26, 2008) (considering ICE's failure to notify alien's counsel of upcoming custody review as one of the predicates for finding that the alien's procedural due process rights had been violated).

Here, any failure by ICE to notify Petitioner's counsel would have been harmless for two separate reasons. First, because Petitioner received notice of the custody review, and of his right to be assisted by an attorney, *see* Joyce Decl. ¶ 32; Return Ex. 7, he could have informed his counsel of the review. Second, Petitioner's counsel had, shortly before the custody review in early September 2025, submitted an independent request to release Petitioner from custody, supported

by various documentation and statements. *See* Joyce Decl. ¶ 31. This presumably is the same material that Petitioner's counsel would have submitted in connection with Petitioner's custody review. ICE carefully considered this separate request, reviewed the materials in question, and declined to release Petitioner less than two weeks before his POCR review. *Id.* ¶ 35; Return Ex. 8 ("I have carefully reviewed [Petitioner's] medical status, immigration, and criminal history, as well as the basis for the charges under which his removal is being sought. In addition, I have carefully considered all supporting documents that you provided in your release request."). There is no reason why this same material would have led to a different result had it been resubmitted a few weeks later in connection with the custody review.

The Court should thus reject the argument that Petitioner did not receive adequate notice of his custody review.[4]

C. ICE Did Not Violate the Administrative Procedure Act

Petitioner next argues that ICE violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, in explaining the basis for its decision to deny him release in the custody review. *See* Mot. at 12-16. Specifically, Petitioner objects to ICE's decision to continue his

[4] Even if it was not harmless—which it was—any procedural error would at most warrant only that the process (*i.e.*, the post-order custody review) be provided. *See, e.g.*, *Rasel v. Barr*, 455 F. Supp. 3d 38, 52 (W.D.N.Y. 2020) (where custody review had procedural errors, ordering that custody review under 8 C.F.R. § 241.4 be provided within 90 days); *Mohammad v. Lynch*, No. 16-cv-28 (PRM), 2016 WL 8674354, at *6 n.6 (W.D. Tex. May, 24, 2016) ("The Court notes that both Petitioner's ninety-day and 180-day custody reviews were tardy. While this likely constitutes a procedural due process violation . . . the appropriate remedy . . . is to order the Government to conduct the required detention review."); *Achouatte v. Holder*, No. 4:11-cv-03977 (VEH) (JEO), 2012 WL 2357711 (N.D. Ala. May 14, 2012), *report and recommendation adopted*, 2012 WL 2358185 (N.D. Ala. June 14, 2012) (same); *Bonitto v. ICE*, 547 F. Supp. 2d 747, 758 (S.D. Tex. Apr. 17, 2008) (report and recommendation adopted by separate order) (concluding that ICE failed to comply with its post-order custody regulations, violating the petitioner's procedural due process rights, but directing ICE to conduct a "meaningful post-removal custody review" within 60 days or otherwise release the petitioner).

detention based on his failure to "demonstrate[] that, if released, [he] w[ould] not pose a danger to the community or to the safety of other persons," because the agency referenced Petitioner's illegal entry into the United States, the pending order of removal entered *in absentia* after Petitioner failed to show up for his hearing, and the immigration judge's denial of Petitioner's motion to reopen his removal proceeding, Return Ex. 9, but not did not cite any criminal or violent misbehavior by Petitioner.

The Court should reject Petitioner's argument. As an initial matter, Petitioner has not explained how or why his APA claim is cognizable in a habeas case. The Supreme Court has recently made clear that where an alien's claims for relief "'necessarily imply the invalidity' of their confinement," those claims "must be brought in habeas." *See Trump v. J.G.G.*, 604 U.S. 670, 672 (2025); *see also id.* at 674 (Kavanaugh, J., concurring) ("[G]iven 5 U.S.C. § 704, which states that claims under the APA are not available when there is another 'adequate remedy in a court,' . . . habeas corpus, not the APA, is the proper vehicle here.").

Courts have thus refused to adjudicate APA claims as part of habeas petitions. *Raspoutny v. Decker*, 708 F. Supp. 3d 371 (S.D.N.Y. 2023), a case involving a petitioner who challenged his detention pursuant to § 1226(a), is instructive. In declining to review the petitioner's APA claim, the court held that "petitioner points to no 'statute' that permits 'review[] of the arrest,'" and an arrest is not a "'final agency action for which there is no other adequate remedy in a court'—because the issuance of a writ of habeas corpus under 28 U.S.C. § 2241 would provide an adequate remedy were the Court to find [the petitioner's] custody to be improper." *Id.* at 381 (quoting 5 U.S.C. § 704) (first alteration in original); *see also Lucas v. Fed. Bureau of Prisons*, No. 17 Civ. 1184 (VB), 2018 WL 3038496, at *2 (S.D.N.Y. June 19, 2018) ("[B]ecause plaintiff could adequately remedy his conditions of confinement claim in a habeas corpus petition, the Court does

not have jurisdiction to decide his APA claim."); *Quintanilla v. Decker*, No. 21 Civ. 417 (GBD), 2021 WL 707062, at *3 n.5 (S.D.N.Y. Feb. 22, 2021) (finding a violation of due process and thus not addressing the petitioner's INA or APA claims). Petitioner cites, *see* Mot. at 12, two cases in which district courts considered APA claims by habeas claimants, but one was decided prior to the Supreme Court's recent *J.G.G.* decision and discusses the APA claim only summarily, *see You v. Nielsen*, 321 F. Supp. 3d 451, 468 (S.D.N.Y. 2018), and the other does not address the question of whether APA claims are available in habeas petitions, *see Petrova v. U.S. Dep't of Homeland Sec.*, No. 2:25-CV-00240, 2025 WL 2772764, at *22-25 (D. Vt. Sept. 26, 2025).

Even if Petitioner's APA claim were cognizable, his argument should be rejected. While ICE's decision denying Petitioner a discretionary release is brief, it represents the agency's considered judgment that an alien who entered the country illegally, failed to appear for his removal hearing, and has been ordered removed poses a danger to the community and the safety of other persons.[5] While there may be other more obvious ways in which an alien could pose a danger to his community—such as a record of committing violent crime—this is not required to sustain a finding like this. Lastly, courts have found that they lack jurisdiction to review discretionary agency determinations such as this. *See, e.g.*, *Portillo*, 2022 WL 826941, at *7 n.9 ("To the extent Portillo means to challenge substantively the agency's [post-order custody review] determination that his continued detention is warranted because his criminal and immigration

[5] While ICE's decision does not say as much, these circumstances are perhaps even more relevant to Petitioner's flight risk, the other factor the agency is to consider in making its discretionary release determinations. *See* 8 C.F.R. § 241.4(d)(1) (ICE "may release an alien if the alien demonstrates . . . 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 such alien's removal from the United States.").

history makes him an "enforcement priority," the Court would not have jurisdiction to review that exercise of agency discretion." (citing 8 U.S.C. § 1252(a)(2)(B)(ii))).

D. ICE Did Not Deprive Petitioner of Substantive Due Process

Petitioner finally argues that his continued detention violates substantive due process because his removal is not reasonably foreseeable. *See* Mot. at 16-19. This argument is meritless.

The Supreme Court has held that detention under § 1231(a)(6) cannot be indefinite,[6] but held that § 1231(a)(6) authorizes immigration detention for "a period reasonably necessary to bring about th[e] alien's removal from the United States." *Zadvydas*, 533 U.S. at 689; *see Arteaga-Martinez*, 596 U.S. at 579. The Supreme Court recognized six months as a presumptively reasonable period of time to allow the government to accomplish an alien's removal. *Zadvydas*, 533 U.S. at 701. However, the Court did not require the government to release every alien whose detention exceeds six months. Rather, the Court held:

> 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. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the "reasonably foreseeable future" conversely would have to shrink. *This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.*

Id. (emphasis added). Thus, the Supreme Court placed the initial burden on the alien. *Id.* If the alien fails to meet that burden, or if the government rebuts the alien's showing, then continued

[6] In *Zadvydas*, 533 U.S. at 684-86, the concern of "indefinite detention" arose where the petitioners could not be removed from the United States because their home countries would not accept their repatriation, yet the government continued to detain them. But "indefinite" does not merely mean of uncertain duration; the concerns animating *Zadvydas* pertained to aliens in a "removable-but-unremovable limbo," where an alien's confinement is "not limited, but potentially permanent." *Jama v. ICE*, 543 U.S. 335, 347 (2005).

detention is permissible. *Id.* Following *Zadvydas*, the government promulgated regulations requiring ICE to conduct custody reviews for non-citizens whose post-removal-order detention has exceeded six months. *See* 8 C.F.R. § 241.13.

Here, Petitioner has been detained only since July 18, 2025—for about four months as of the date of this submission, just over half of the presumptively reasonable six-month period specified by *Zadvydas*.[7] Nor has he sought to avail himself of the administrative avenue available to aliens who wish to argue that their removal is not imminent. The post-*Zadvydas* regulations permit aliens to attempt to "provide 'good reason to believe there is no significant likelihood of [their] removal . . . in the reasonably foreseeable future.'" *Portillo*, 2022 WL 826941, at *4 (quoting 8 C.F.R. § 241.13(a)). If the alien successfully makes such a showing, ICE will release the alien (absent special circumstances justifying continued detention), subject to appropriate conditions of release, but continue to detain aliens who have a significant likelihood of removal in the reasonably foreseeable future. *Id.* (citing 8 C.F.R. § 241.13(b)(1), (g)(1), (g)(2)).

Regardless of the procedural posture, Petitioner has not met his threshold burden of showing that his removal is not reasonably foreseeable. *See Zadvydas*, 533 U.S. at 701; *see also Akinwale v. Aschcroft*, 287 F.3d 1050, 1051-51 (11th Cir. 2002) ("[T]o state a claim under *Zadvydas* the alien not only must show post-removal order detention in excess of six months *but also must provide evidence of a good reason to believe that there is no significant likelihood of*

[7] Because he has not been detained for six months, Petitioner's *Zadvydas* claim is premature. *See, e.g.*, *De Oliveira Jimenez v. Searls*, No. 22 Civ. 960 (JLS), 2023 WL 11134381, at *5 (W.D.N.Y. Mar. 2, 2023) (collecting cases); *see also Agyei-Kodie v. Holder*, 418 F. App'x 317, 318 (5th Cir. 2011) ("challenge to [alien's] continued post removal order detention is premature" because he "has not been in post-removal-order detention longer than the presumptively reasonable six-month period set forth in *Zadvydas*"); *Rodney v. Mukasey*, 340 F. App'x 761, 764-65 (3d Cir. 2009) (challenge to post-removal-order detention within the six-month presumptively reasonable period under *Zadvydas* premature).

removal in the reasonably foreseeable future." (emphasis added)). He argues only that "because he has a stay of removal from the Board of Immigration Appeals, [his] removal is not 'imminent' and in fact there is no likelihood of his removal in the 'reasonably foreseeable future.'" Pet. ¶ 7. But "mere assertions that removal is unforeseeable do not satisfy [the petitioner's] burden [under *Zadvydas*]." *Juma v. Mukasey*, No. 09 Civ. 3122 (PAC)(AJP), 2009 WL 2191247, at *3 (S.D.N.Y. July 23, 2009) (vague, conclusory, and general claims that removal is not foreseeable, and that embassy will not issue travel document in foreseeable future, fails to meet initial burden); *see also id.* at *3 n.4 (collecting cases).

Moreover, the law is clear that Petitioner cannot rely on the BIA's temporary stay of removal, obtained at his request, to satisfy his burden under *Zadvydas*. *See, e.g.*, *Guangzu Zheng v. Decker*, 618 F. App'x 26, 28 (2d Cir. 2015) ("[T]he Government has been prevented from removing Zheng by the BIA's stay of removal (sought by Zheng) and by its own forbearance policy (also resulting from Zheng's pursuit of an additional stay). If this Court denies Zheng's petition for review and pending stay motion, the Government can seek another travel document. Given this record, Zheng has not provide[d] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." (internal quotation marks omitted)); *Abimbola v. Ridge*, 181 F. App'x 97, 99 (2d Cir. 2006) (alien's filing of numerous petitions is a "self-inflicted wound" that does not entitle him to relief under *Zadvydas*); *Agoro v. Dist. Dir. for Immigration Custom Enforcement*, No. 09 Civ. 8111 (SAS), 2010 WL 9976, at *5 & n.72 (S.D.N.Y. Jan. 4, 2010) ("[T]here is a significant likelihood that ICE will be able to procure another travel document for Agoro when he no longer has litigation pending in United States courts. Even if Agoro files additional claims in an effort to prolong the removal process, his removal will still be considered reasonably foreseeable because any resulting delay will be caused by Agoro's own

actions."); *cf. Olajide v. ICE*, 402 F. Supp. 2d 688, 689, 694 (E.D. Va. 2005) ("[F]or like the orphan who sought sympathy after murdering his parents, petitioner cannot claim that his pre-removal detention is unreasonably long when he is the cause of the delay in his removal.").

In any event, even if Petitioner met his initial burden—which he has not—the government easily rebuts it here, as ICE has a travel document for Petitioner's removal and will remove Petitioner as soon as the BIA's stay is lifted. *See* Joyce Decl. ¶ 37. Thus, the Petitioner's removal is significantly likely to occur in the reasonably foreseeable future, and Petitioner's due process claim fails.

II. Petitioner Is Not Entitled to Injunctive Relief or to an Order Keeping Him at the Orange County Jail

Petitioner's request for injunctive relief should be denied as well.[8] Petitioner argues that the mere fact that he has alleged constitutional violations establishes his irreparable harm. *See* Mot.

[8] Petitioner's motion for preliminary injunctive relief should be denied because it improperly seeks to expedite the ultimate relief sought in the case—release. This motion inverts the fundamental purpose of preliminary injunctive relief, which is "merely to preserve the relative positions of the parties until a trial on the merits can be had." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Indeed, generally, "[t]he purpose of a preliminary injunction is not to give the plaintiff the ultimate relief it seeks." *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996); *see also, e.g.*, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (temporary restraining orders "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer"); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment."); *Unicon Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966) ("It is hornbook law that the general purpose of a preliminary injunction is to preserve the status quo *pending final determination* of the action." (internal quotation marks omitted)). Instead, Petitioner improperly asks this Court to completely alter the status quo by granting him the very relief he hopes to obtain through this action. *See, e.g.*, *Powell v. Fannie Mae*, No. 16 Civ. 1359 (LTS) (KNF), 2017 WL 712915, at *2 (S.D.N.Y. Feb. 2, 2017) (report and recommendation) (injunctive relief "is improper where it would give the plaintiff substantially all the ultimate relief [he] seeks"); *Guy v. Tanner*, Civ. Act. No. 13-6750, 2014 WL 2818684, *3 (E.D. La. June 23, 2014) ("Guy's motion is no more than a veiled attempt to expedite the resolution of his habeas petition. This is not a proper basis for issuing an injunction."). Moreover, where, as here, a petitioner seeks release as both

at 19. But, for the reasons explained above, the Court should reject Petitioner's arguments that his constitutional rights have been violated. "[M]uch of the [Petitioner's] irreparable harm argument seems to rely upon [his] less-than-convincing merits arguments. '[S]imply showing some possibility of irreparable injury' is insufficient. Instead, [Petitioner] must 'demonstrate that irreparable injury is *likely* in the absence of' [his] requested relief." *Ozturk v. Hyde*, 136 F.4th 382, 402 (2d Cir. 2025) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009), and *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)) (emphasis in original). Similarly, the balance of equities and the public interest, which are considered together in cases involving the government, *see* Mot. at 19, both favor deferring to the judgment of ICE in determining when aliens should be subject to discretionary detention.

Finally, the Court should reject Petitioner's request that ICE keep Petitioner at the Orange County Jail for the duration of litigation in this case. *See* Mot. at 19-20. The Orange County Jail is the only immigration detention facility within the Southern District of New York, and it has only limited bed space for immigration detainees. These bed spaces are subject to numerous other demands, including court orders in other immigration cases in this District, and aliens who need to be transferred or kept within the District to participate in court or other hearings. It is thus a serious administrative burden on ICE whenever courts require additional detainees to be held within the District. While Petitioner hypothesizes how immigration officials out of state would assess the prospects of releasing him to the community, the local ICE officials in New York have already conducted such an assessment and determined he should not be released. And in terms of

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preliminary and permanent injunctive relief and asserts the same basis for both, the Court need not determine whether the petitioner is entitled to a preliminary injunction because the Court can and should decide the case on the merits and deny the claims contained in the petition pursuant to Federal Rule of Civil Procedure 65(a)(2), thereby mooting the petitioner's motion for preliminary relief.

meeting with his attorneys or visitors, many ICE detention facilities offer videoconferencing options for detainees. Moreover, an injunction preventing ICE from transferring Petitioner outside of the Southern District of New York, particularly when such a transfer would be for purposes of executing Petitioner's removal order, effectively operates as a stay of removal, which the Court lacks jurisdiction to grant. *See* 8 U.S.C. § 1252(g).

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's amended petition for habeas corpus and his motion for immediate release.

Dated: New York, New York
November 21, 2025

Respectfully submitted,

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 6659 words.