

**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 REPLY TO  
RESPONDENTS' OPPOSITION TO PETITIONER'S ORDER TO SHOW  
CAUSE**

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## INTRODUCTION

This is Petitioner's reply to Respondents' response to Petitioners' Order to Show Cause seeking his immediate release from immigration custody.

In his Order to Show Cause (ECF 9, 10), Petitioner argued that the Court has jurisdiction over the petition, and that Respondents failure to comply with the regulatory framework for post-order custody reviews violates the INA and its implementing regulations, as well as his right to procedural due process. He argued that the decision to not release him violated the Administrative Procedures Act (APA), and that the decision to continue detaining him, when the statutory removal period has long since expired, there is no evidence that he is a danger to people or property, and he has a stay of removal, violates his rights to substantive due process.

In opposition (ECF 16 – 18), Respondents do not question the Court's jurisdiction, but argue that they have fully complied with the regulatory requirements for a post order custody review, and that any errors they may have committed are harmless. Respondents also argue that an APA action is not cognizable on a habeas petition, that their reason for not releasing him – that he didn't show that he is not a danger to the community – is a non-reviewable discretionary determination, and that in any event it is justified by his immigration history, namely, his entering the US without inspection and failing to attend an immigration court hearing.

Respondents' contentions lack any merit either in fact or in law. The Court should find that Respondent has satisfied the requirements for a preliminary injunction and order his immediate release, or else grant the petition and order his release.

## ARGUMENT

**Point 1. Respondents did not comply with the regulatory requirements for post order custody review, and their errors were not harmless.**

*i. Respondents' failure to comply with the regulations*

Petitioner argued that the post-order custody review (POCR) regulations at 8 C.F.R § 241(d)(1) and 8 C.F.R § 241.4(h)(1) and (2) entitle him to an opportunity to demonstrate his eligibility for release, including advance notice to both him and his attorney, an opportunity for written submissions, and assistance by a person of choice, and that he received none. He argued that this violated both the INA at 8 U.S.C. § 1231 and Respondents' own regulations, as well as his right to procedural due process. (Pet'r Memo, ECF 10, pp. 9 – 12)

In response, Respondents submit a “Notice to Alien of File Custody Review” (ECF 16-7) which they say was provided to Petitioner on September 9, 2029 as evidenced by his fingerprint on the lower part of the document, and which invited him to submit documentation in support of his custody review on or before October 16, 2025. Thus, according to Respondents, they provided him with the requisite advance notice and opportunity for written submission. Respondents also submit a declaration from William Joyce, the New York City ICE Field Office Director (ECF 18), stating that ICE did not provide this notice to Petitioner's immigration attorney because he had not filed a required Notice of Appearance (Form G-28) with ICE (*id.*, ¶ 33).

This is simply not true. Petitioner's immigration attorney, Paul Grotas, filed a G-28 signed by both himself and Petitioner with ICE on September 3, 2025 as part of a request for his release from custody. A copy of the letter in support of that request along with the signed G-28 is

attached as Exhibit A. A September 3, 2025 email from Mr. Grotas's office to ICE containing this release request reads "Our office represents the above named Respondent. Please find attached a release request along with a G-28." (see Exhibit B) A response to Mr. Grotas from ICE the same day reads "I was able to open it, but it took a very long time. Your email has been forwarded to the Detained Case Management Unit, specifically to Deportation Officer Pardo." (see Exhibit C) That same release request, including the G-28, was also filed with this Court as an exhibit to the petition (see ECF 1-13).

ICE obviously knew that there was a G-28, because it considered the release request and denied it, in a letter to Mr. Grotas on October 3, 2025 (ECF 16-8). ICE could not have done this if there was no G-28 on file, see 8 C.F.R. § 292.4(a) (mandating a notice of appearance by each representative on a case). Indeed, as pointed out by Respondents' attorney, "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)." (Resp. Memo, ECF 17, at 9)

Thus, Respondents' statement, that they did not notify Petitioner's counsel of the POCR because he had not filed a G-28 Notice of Appearance with ICE is simply untrue.

Joyce also states that the POCR was "based on an individualized review of [Petitioner's] immigration history and related documents and information", yet then acknowledges in a footnote that it did not consider any of the voluminous evidence Petitioner submitted in September 2025 in support of his release request because "The Post Order Custody Review is separate from other agency reviews, including Petitioner's request for release." (ECF 18, ¶ 36, n. 2) This explanation is neither credible nor plausible, and undermines completely the POCR review which was conducted.

The POCR decision states that the decision to continue detention was “based on a review of your file” (ECF 16-9). The September 2025 release request, which is part of Petitioner’s file, consisted of a letter from Petitioner’s immigration attorney summarizing his equities and the supporting documents; an affidavit of support from a US citizen and resident of Rhinebeck offering room and board and financial support and a commitment to ensuring that Petitioner would attend “all court proceedings and that he abides by all laws of the United States” along with her financial information, and declarations from about fifty residents of Rhinebeck, many of them homeowners for whom Petitioner had worked for the last five or six years, all attesting to his good reputation and trustworthiness in the community. See ECF 1-13. It was the only evidence in Petitioner’s file other than the Immigration Judges’ removal order directly relevant to the issues ICE is required to consider in the POCR as set forth at 8 C.F.R. § 241.4(e) and (f) (generally relating to risk of flight and dangerousness to the community, including any criminal history, and “ability to adjust to life in the community”). Thus, according to Joyce, ICE made a conscious decision to not consider relevant and favorable evidence in Petitioner’s file in conducting the POCR review. Further, the ICE letter to Petitioner advising him of the custody review stated that it would be held on October 16 (ECF 16-7), yet the POCR decision letter denying release is dated and signed October 14 (ECF 16-9), two days prior to then.

All of this – the refusal to acknowledge that Petitioner’s attorney had filed a notice of appearance with ICE, the failure to notify Petitioner’s attorney of the POCR review, the refusal to consider relevant and favorable materials his attorney had already submitted addressing his release, the issuance of a decision denying release days prior to the date on which Petitioner had been told the POCR would be held – shows that the POCR review was conducted in violation of

the procedures for such a review which are set forth in the regulations specifically for Petitioner's benefit. This is tantamount to conducting no review at all.

As argued in Petitioner's Order to Show Cause, violation of "these regulations [which] confer important rights upon aliens ordered removed" and which "do not merely facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees" is a denial of due process, *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368, 395 (W.D.N.Y. 2009), citing *Bonitto v. Bureau of Immigration and Customs Enforcement*, 547 F.Supp.2d 747, 757 (S.D. Tex. 2008) and *Government of Canal Zone v. Brooks*, 427 F.2d 346, 347 (5th Cir. 1970) (holding that it is a denial of procedural due process for any government agency to fail to follow its own regulations providing procedural safeguards to persons involved in adjudicative processes before it)).

*ii. The violations were not harmless*

Respondents argue that any violations of the POCR requirements are harmless, and that in the event the Court were to find a procedural due process violation, the remedy is not release but instead a properly-conducted POCR (ECF 17, pp. 10 – 11, n. 4).

These violations are not harmless. On the contrary, they violated significant parts of the regulations governing POCR which exist for the benefit of Petitioner.

First, no notice was provided to Petitioner's attorney, as is required by 8 C.F.R. § 241.4(d)(3). Respondent states that this is because Petitioner's attorney never filed a G-28 Notice of Appearance with ICE, but as shown above, that is demonstrably false. Thus, ICE were fully aware that Petitioner's attorney had a G-28 on file with them since early September, a full

week before ICE issued the POCR review notice to Petitioner.<sup>1</sup> ICE's refusal to provide notice of the POCR to Petitioner's attorney on the basis that there was no G-28 by him is not only incorrect, but it is also a deliberate and intentional omission, and it is not harmless.

The obvious purpose of providing notice of a POCR to the detainee's attorney is so that they can have the benefit of representation in the process. Depriving Petitioner of that right cannot be characterized as "harmless".<sup>2</sup> Even according to the cases Respondents cite, "The provisions of 8 C.F.R. § 241.4 reflect the concerns of the Zadvydas Court and provide necessary procedural safeguards to ensure the detention of an alien beyond the removal period comports with due process requirements. [They] are not meant merely to facilitate internal agency housekeeping, but rather afford important and imperative procedural safeguards to detainees." *Garcia Uranga v. Barr*, No. 20-3162-JWL, 2020 WL 4334999, at \*6 (D. Kan. July 28, 2020), citing *Bonitto v. Bureau of Immigration and Customs Enforcement*, 547 F. Supp. 2d 747, 757–58 (S.D. Tex. 2008) (ECF 17, at 10).

In *Doissaint v. Chertoff*, No. C08-0584-MJP, 2008 WL 3978559 (W.D. Wash. Aug. 26, 2008), as here, the petitioner's counsel was not notified of the POCR even though he had a G-28 on file, and when he learned of it and went to submit evidence by the due date, it transpired that the review had already been conducted. The Court found that "ICE cannot constitutionally continue to detain petitioner without complying with the procedures laid out in the regulations." and granted the petition, *id.*, \* 8. In short, violation of a regulation whose purpose is to ensure

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<sup>1</sup> Petitioner, for his part, had no reason to believe that ICE would not provide this notice to his attorney, or to think that ICE would refuse to consider the materials which had been submitted for his release as part of their POCR process.

<sup>2</sup> The right to counsel in immigration proceedings has long been recognized as a fundamental right under the Fifth Amendment's due process clause, *Montilla v. I.N.S.*, 926 F.2d 162, 166 (2d Cir. 1991)

that the POCR process comports with due process by ensuring that non-citizens have legal representation cannot be said to be harmless.

Respondents' fail in their attempts to distinguish the cases Petitioner cited which found a procedural due process violation in connection with the POCR process (see Resp. Memo, ECF 17, at 9, Pet'r Memo, ECF 10, at 10 - 11). Their characterization of *Jimenez v. Cronen*, 317 F. Supp. 3d 626, 647-56 (D. Mass. 2018) as a case where ICE had failed to conduct any POCR, is inaccurate. One of the petitioners received notice on April 23 of a POCR interview on April 30, but ICE never notified the attorney, and then made a decision to continue detention on April 27, before the attorney (who had found out about the review) had any opportunity to make a submission. For the other detainee, the POCR took place a month later than it should have, and only then in response to litigation (*id*, 635). The Court noted that "The presumption created by *Zadvydas*, that up to six months of detention is reasonable, is based on the assumption that ICE followed the process prescribed by its regulations to ensure that continued detention was justified.", *id*, 636.<sup>3</sup> Similarly, in *D'Alessandro v. Mukasey*, 628 F. Supp. 2d 368 (W.D.N.Y. 2009), ICE conducted a POCR but, as with the case at bar, it failed to comply with many of the procedural safeguards for such a review, and its conclusions in denying release on the basis that the petitioner was a danger to the community were "patently unreasonable", warranting habeas relief, in the form of release from custody. *Id*, 406.

Because Respondents had violated "a regulation intended to protect a fundamental right derived from the Constitution or a federal statute, such as the Fifth Amendment right to notice

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<sup>3</sup> Rebutting any notion that this was a once-off inadvertent oversight, the court listed several similar cases where non-citizens had been detained without procedurally-proper POCRs, *id*, at 656- 657, and noted that ICE had identified about another 40 similar cases. *Id*, 658.

and an opportunity to be heard”, the petitioners were entitled to habeas relief. Far from being distinguishable, these cases are precisely on point.

Nor is it an adequate response to their refusal to comply with the regulatory requirement to Petitioner’s counsel of the POCR to say, as Respondents do, that Petitioner “could have informed his counsel of the review” (ECF 17 at 10). If that were an adequate alternative, the regulation would not explicitly require notice to the non-citizen’s counsel. In fact, Petitioner assumed, logically, that ICE had provided the review letter to his attorney, and also assumed that it was written in response to the release request which had been submitted days earlier, and that therefore the review letter had already been responded to and so there was no need to submit anything further.<sup>4</sup>

Similarly, it is inadequate to say that the outcome would have been the same even if Petitioner’s attorney had notification and an opportunity to submit evidence in support of the POCR, because Respondents had already denied Petitioner’s request for release. (ECF 17 at 11) If that were the case, the entire review could be skipped.

The request for release submitted on behalf of Petitioner consisted of a short letter from his attorney addressing Petitioner’s equities generally, and in particular his standing in the community in Rhinebeck, supported by numerous sworn statements attesting to his good nature and trustworthiness. (ECF 1-13; Exhibit A hereto) And while it could (and should) have warranted Petitioner’s release, the items to be addressed in a POCR are far more specific and detailed. 8 C.F.R. § 241.4(e) lists six criteria to be satisfied, three of which address propensity for violence and danger to the community, while § 241.4(f) lists twelve factors to be addressed in

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<sup>4</sup> See O’Dwyer declaration annexed hereto, at ¶¶ 3, 4.

satisfying these criteria. A submission from counsel would have addressed each criterion individually, marshalled all available evidence including some which presumably was not included with the release request, such as the lack of any disciplinary history while in custody (8 C.F.R. § 241.4(f)(1)), highlighted his lack of any criminal history, and made appropriate legal arguments in support of his eligibility for release. Given that Respondents' conclusion that Petitioner posed a danger to the community was unsupported by any evidence whatsoever, a submission by counsel to address that precise issue can only have been helpful.

Second, Respondents refused to consider any of the voluminous evidence Petitioner's attorney had already submitted to ICE in support of his request for release, even though it addressed the very factors they are required to consider in a PO CR such as flight risk, danger to others, and involvement in the community. Respondents' explanation is that the PO CR review is separate from Petitioner's request for release (Joyce declaration, ECF 18, ¶ 36, n. 2). If this explanation is true (and it seems more likely that Respondents did not do any file review at all, and instead just generated a denial letter), then it is remarkably petty. Whether true or not, their decision still violates the regulations at 8 C.F.R. § 241.4(h)(1), which require a PO CR to consider the non-citizen's file *and* any evidence submitted on behalf of the non-citizen, not just that submitted in response to the PO CR letter. Common sense as well as regulation also instructs this; after all, Respondents would have to review the non-citizen's file to determine if they have a criminal history or are a threat to public safety. Deliberately refusing to consider evidence favorable to Petitioner on the basis that it was submitted prior to the PO CR review period violates not just the spirit of the regulations but also basic notions of fairness and due process.

Third, Respondents failed to even observe their own timetable for conducting the PO CR: the letter provided to Petitioner stated that it would be conducted on October 16, yet the PO CR

decision to deny release was made two days earlier, on October 14, and served on Petitioner on October 15. So even if Petitioner had submitted evidence on October 15 – within the timetable Respondents had provided – it would have been pointless, because Respondents had already conducted their review and made their decision. See 8 C.F.R § 241.4(h)(2) (requiring ICE to give the non-citizen an opportunity to submit information in writing in support of release).

The remedy for these violations is not a belated procedurally-correct POCR custody review. Respondents’ intentional violations of the regulations, along with their misrepresentations to this Court in defense of those violations, undermine any notion that Petitioner will receive a fair and procedurally-complaint custody review. Further, Respondents have already conducted a POCR, and allowing them a second go-around would only reward their unlawful conduct. Instead, the proper and only remedy is release. That was the outcome in *Jimenez v Cronen*, 317 F.Supp.3d 626 (D. Mass. 2018), where ICE was found to have violated the petitioners’ due process rights throughout the POCR process. The Court ordered release, holding that “It would be particularly unfair to require that petitioners remain detained for another 30 days while ICE attempts to remedy its failure to follow its regulations and to provide each of them due process.” *id*, 657, and neither of them had a criminal history nor were they a flight risk, *id*.

**Point 2. Respondents violated the Administrative Procedures Act (APA).**

Respondent argues that “Petitioner has not explained how or why his APA claim is cognizable in a habeas case.” (Resp. Memo at 12). This is not true: the FAP at ¶¶ 9 and 10 cites the APA itself, 5 U.S.C. § 703, which explicitly authorizes an APA action by way of habeas petition (“The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy

thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.”) It is settled law that the APA “allows challenges to agency action to be brought in habeas petitions” if it has “some relationship to the prisoner's release.”, *Thieme v. Warden Fort Dix FCI*, 154 F.4th 115, 123 (3d Cir. 2025); *Brown v. Lundgren*, 528 F.2d 1050, 1054 (5th Cir. 1976). See also, *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006) (considering an APA challenge to a Bureau of Prisons policy raised through a habeas petition, *id.*, 79).

Respondent misunderstands the Supreme Court’s ruling in *Trump v. J.G.G.*, 604 U.S. 670 (2025), that a claim by non-citizen detainees in immigration custody challenging their transfer out of the country pursuant to the Alien Enemies Act (AEA) must be brought in a habeas action and not an action under the APA, as suggesting that a habeas petition always excludes a claim under the APA. The basis for the Supreme Court’s decision was that the AEA was beyond judicial review and so the only vehicle to challenge its application to the plaintiffs was in habeas. At most, the Supreme Court held that habeas is the proper *vehicle* for a claim challenging confinement, *id.*, 673, but did not limit the causes of action which could be raised on a habeas petition, so long as they constitute challenges to confinement. Justice Kavanaugh’s concurrence is just that – a concurrence, which by definition lacks any precedential authority, and as it attracted no other justices, any persuasive value.

But the dispute Respondents raise here is more spectral than real. A habeas petition is a vehicle for raising a claim that detention, or conditions of detention, violates the constitution or laws of the United States. 8 U.S.C. § 2241(c)(3). Here, Petitioner alleges that Respondents decided to keep him in custody on the basis that he is a danger to the community without following the required regulations, which renders their decision “arbitrary, capricious, [or] an

abuse of discretion” in violation of the APA at 5 U.S.C. § 706(2)(A) (FAP, Count Four, ¶¶ 50 – 52). He also alleges at Count Five that there is no evidence to support the conclusion that he is a danger to the community, and ample evidence to contradict it, and so it violates the APA at 5 U.S.C. § 706(2)(E) (authorizing a court to set aside agency action which is unsupported by substantial evidence). Of course, he also alleges that the decision, and the manner in which it was reached, violates his rights to both substantive and procedural due process, but that cannot be read to preclude an APA challenge also. Otherwise, no claim arising alleging unlawful detention could ever be raised as an APA claim, yet the APA itself at 5 U.S.C. § 703 authorizes claims raised in habeas, which in turn is limited to challenges to unlawful detention.

With regard to the merits of the APA claim, Respondents only argue that the fact that Petitioner entered the US illegally and was ordered removed in absentia is an adequate basis for their conclusion that he poses a danger to the community and to the safety of other people (Resp. Memo at 13), but they fail to explain exactly how that evidence supports such a finding. Words matter, and Respondents’ decision (which mirrors the language of the regulations) makes very specific findings: that Petitioner would be a danger to the community, and to the safety of other people. It is not necessary to plumb the outer bounds of what type or level of evidence would justify such a finding; suffice to say, there should be at least *some* evidence from Petitioner’s history that he is likely to either pose a danger to his community or to the safety of other people, and the record contains nothing. The regulations plainly anticipate some such evidence, as it specifies consideration of disciplinary infractions or incident reports, criminal conduct, convictions and other criminal history, psychiatric reports, and evidence of rehabilitation (8 C.F.R. § 241.4(f)(1) – (4)) and then separately lists factors relative to flight risk (8 C.F.R. § 241.4(f)(5) – (7)).

Entering the US illegally doesn't threaten Petitioner's community in Rhinebeck (on the contrary, his community seems enamored of him), nor has he ever done anything, or been accused of doing anything, which poses a danger to the safety of another person. As Respondent points out (Resp. Memo, p. 13, n. 5), Petitioner's immigration history might have supported a finding that he is a flight risk (although it is unclear if that alone, without more, could suffice, but that question is not before the Court).<sup>5</sup> But if immigration infractions, standing alone, could be a basis for a finding of dangerousness, then the regulations would not have required consideration of specific criminal history factors for making such a finding. In fact, the regulations would not have had to have listed anything, as everyone in post-removal order detention has an immigration infraction, else they would not have a removal order.

Respondent also argues that their decision is discretionary and thus immune from APA review (Resp. Memo at 13, citing *Portillo v. Decker*, No. 21 CIV. 9506 (PAE), 2022 WL 826941, at \*4 (S.D.N.Y. Mar. 18, 2022), but in his APA claim, Petitioner does not challenge Respondents' ultimate decision to not release him. Instead, he challenges Respondents' non-discretionary obligation to comply with the applicable regulations, consider all of the available evidence, and make a decision which is supported by substantial and relevant evidence. If, as Respondent argues, the ultimate decision to release is discretionary, then Respondents may well make that decision, but they have to follow the prescribed procedure before reaching it.

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<sup>5</sup> The Court should decline Respondents' invitation to find that Petitioner should be denied release on the alternate ground that he poses a flight risk (ECF 17, p. 13, n. 5). "Courts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (internal citations omitted).

**Point 3. Petitioner’s substantive due process claim.**

The Petition alleges that Respondents’ detention of Petitioner violates his substantive right to due process for two reasons. First, because the removal period has expired, and there is no evidence whatsoever that he is a danger to the community or that he poses any danger to people or property. Second, because there is no likelihood of his removal in the reasonably foreseeable future because he has a stay of removal issued by the BIA (FAP, Count Three, ¶¶ 46 – 49).

In his motion for a preliminary injunction, Petitioner argued that the removal period in his case expired in February 2024, was not tolled, and is thus not subject to being extended (ECF 10, at 16 – 17). He also argued that because he has a stay, there is no significant likelihood of removal in the reasonably foreseeable future, and that “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.” (*id.*).

In response, Respondents argue that because the Supreme Court in *Zadvydas v. Davis*, *supra*, 533 U.S. 689, set six months as a “presumptively reasonable” time within which to effect a non-citizens removal, after which they are eligible for relief if there is no significant likelihood of removal in the reasonably foreseeable future, and because Petitioner is essentially preventing his own release by obtaining a stay of removal, he cannot satisfy his burden under *Zadvydas* (ECF 17 at 15 – 17). This sidesteps completely Petitioner’s argument that as the removal period had long expired at the time Petitioner was detained, it was not subject to being extended for an additional ninety days, and so the only basis on which to detain Petitioner was if his removal was

likely. Thus, Respondents should be deemed to have waived any argument and to have conceded the issue, *Zhong v. U.S. Dep't of Just.*, 480 F.3d 104 (2d Cir. 2007) (deeming “the Attorney General's silence” on a particular issue “to constitute a waiver.”, *id.*, 123).

Respondent instead argues that Petitioner had an opportunity to rebut this presumption (that removal is likely in the reasonably foreseeable future) but simply didn't avail himself of it (see ECF 17 at 15, citing 8 C.F.R. § 241.13). This argument is specious, as Respondents were well aware that Petitioner had a stay of removal. After all, ICE is the opposing party on Petitioner's BIA appeal, in which the stay was issued.

Respondents also argue that that in any event, a stay of removal does not mean that there is no significant likelihood of removal in the reasonably foreseeable future (*id.*, at 16 – 17), relying on two non-precedential Second Circuit decisions and district court decisions which conflate likelihood of removal with the reason for non-removal. According to these decisions, a stay of removal makes removal likely in the reasonably foreseeable future because the non-citizen has delayed their removal by obtaining the stay. See *Olajide v. ICE*, 402 F. Supp. 2d 688, 689, 694 (E.D. Va. 2005) (comparing a person who, like petitioner, cannot be deported because of a stay of removal, to a “the orphan who sought sympathy by murdering his parents”). But the reason removal is unlikely in the reasonably foreseeable future should have no bearing on whether or not it is, in fact, unlikely.<sup>6</sup> And the decisions Respondents cite are not persuasive.

The Court of Appeals in *Guangzu Zheng v. Decker*, 618 F. App'x 26, 28 (2d Cir. 2015) (ECF 17 at 16) provided no explanation for its conclusion that removal was likely in the

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<sup>6</sup> Unless, of course, the person has refused to cooperate in obtaining travel documents or engaged in similar acts of obstruction, see 8 C.F.R. § 241.13(d)(2), (e)(2), *Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 501–02 (S.D.N.Y. 2009) (citing examples).

reasonably foreseeable future because the only impediment to removal was a court-ordered stay. But whether it is because of a stay, or some other reason such as unavailability of travel documents, the fact remains that in this case, removal remains currently impossible, and in the absence of some indication from the BIA that it plans to rule in the near future, there is no basis to conclude that it will become likely in the reasonably foreseeable future. The Court in *Abimbola v. Ridge*, 181 F. App'x 97 (2d Cir. 2006) was clearly unwilling to reward what it viewed as “Abimbola's consistent pattern of seeking and/or receiving numerous judicial stays and filing his numerous petitions for reconsideration and appeals.”, *id*, 99, which is not the case here, and in *Olajide v. ICE*, 402 F. Supp. 2d 688 (E.D. Va. 2005) removal was delayed, not because of a stay, but instead because the petitioner refused to get travel documents unless he first received specialized dental treatment while in detention, also clearly not the case here (“Olajide informed the Nigerian Embassy that he would not return to Nigeria until a dentist of his choosing performs the necessary surgery for the injury to his jaw. As a result, the Embassy decided not to issue the travel documents” *id*, 693).

It is hard not to see Respondents' position as punishment for obtaining a stay of removal, but that is not consistent with congressional intent. 8 U.S.C. § 1231(a)(1)(B)(ii) provides that the removal period does not commence until after the conclusion of judicial review of a removal order if a stay of removal is ordered, and so detention under those circumstances is governed by 8 U.S.C. §§ 1225 or 1226, thus potentially making the person eligible for a bond hearing before an immigration judge (see *J.L. v. Decker*, No. 1:22-CV-2853-MKV, 2024 WL 232115, at \*4 (S.D.N.Y. Jan. 22, 2024) (“where there is a petition for review of the removal order and the appellate court orders a stay of the removal... the noncitizen remains “detained pending a decision” on removal and is held under Section 1226(a), not Section 1231.” *Id*, \* 4). If Congress

intended that a non-citizen who obtains a stay of removal should be subject to mandatory detention under § 1231 without the possibility of release, it would not have enacted this statutory provision providing the exact opposite. And while Petitioner does not have a judicial stay of removal in connection with a petition for review (he has an administrative stay from the BIA pending adjudication of his motion to reopen), this statutory provision should counsel against treating stays of removal generally as a “self-inflicted wound” which prevents release.

**Point 4. The request to enjoin Respondents from moving Petitioner outside the district is moot.**

Petitioner’s Order to Show Cause asked for an Order enjoining his transfer outside of the Southern District of New York while this litigation is pending (ECF 10 at pp. 19 – 20). However, Petitioner was transferred outside the district (to the Brooklyn Metropolitan Detention Center) earlier this week, and so this relief is now moot.

Respondent also argues that Petitioner cannot establish irreparable harm because he cannot prove that his constitutional rights have been violated (ECF 17 at 17 – 18). Obviously, Petitioner disagrees, for the reasons outlined above, but it is not necessary for detention to be unconstitutional for it to constitute irreparable harm. “The deprivation of [ ] liberty is, in and of itself, irreparable harm.” *Peralta-Veras v. Ashcroft*, No. CV 02-1840IRR), 2002 WL 1267998, at \*6 (E.D.N.Y. Mar. 29, 2002). Respondent also argues that “the balance of equities and the public interest... both favor deferring to the judgment of ICE in determining when aliens should be subject to discretionary detention.”. (ECF 17 at 18) However, detention by ICE of non-citizens has always been subject to judicial oversight to ensure that it complies with the law and the constitution (see, e.g., *Zadvydas v Davis*, *supra*, 533 U.S. 678), and in any event, Respondent is challenging Respondents’ non-discretionary obligation to comply with the law and the constitution when making its decisions, and in particular decisions which implicate liberty.

**CONCLUSION**

For any and all of the foregoing reasons, the Court should grant Petitioner's Order to Show Cause, and the Petition itself, and direct Respondents to release Petitioner from custody forthwith, subject to supervision as required by 8 U.S.C. § 1231(a)(3).

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