UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NASEER AHMED,

Petitioner,

v. 25-CV-06662-EAW

TODD LYONS, Acting Director U.S. Immigrations and Customs Enforcement, et al.,

Respondents.

RESPONDENTS' REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

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Although the government has previously chosen in some cases not to raise "its longstanding disagreement with this Court regarding the government's 'Forbearance Agreement'", *Kamara v. Garland*, No. 24-CV-743-LJV, 2024 WL 4470868, at *2, n.5 (W.D.N.Y. Oct. 11, 2024), the time has come for the government to again try to sway the Court to its point of view. Specifically, the government argues that Petitioner in this case is detained pursuant to 8 U.S.C. § 1231 because he is subject to an administratively final order of removal, triggering the beginning of his removal period and authorizing his detention under § 1231. 8 C.F.R. § 1241.1(a); 8 U.S.C. § 1231(a)(1)(B)(i). This is true even though Petitioner filed a Petition for Review ("PFR") and a motion for a stay of removal with the Second Circuit, which means that the government is unilaterally and voluntarily not actively pursuing his removal at this time, under the so-called forbearance agreement, but may choose to remove him in accordance with the agreement whenever it so chooses. As discussed more fully below, if the government seeks to remove Petitioner, the government can merely file a letter announcing such intent to the Second Circuit, so that the Second Circuit can rule on the motion to stay removal expeditiously. There are no barriers to removal and certainly no "substantive impediments." Indeed, reading the forbearance agreement to be anything close to a stay flies in the face of the text of the statute and Congress's intent in passing it. Accordingly, the government invites the Court to join in its conclusion that the forbearance agreement does not equate to a court-ordered stay, and an individual subject to the forbearance agreement is detained pursuant to 8 U.S.C. § 1231.

Respondents submit this memorandum of law in reply to Petitioner's opposition to Respondents' Motion to Dismiss the Petition for Writ of Habeas Corpus filed by Petitioner. The Declaration of Deportation Officer Kyle Freeman ("Freeman Dec."), and its Exhibit A, and the Declaration of Assistant United States Attorney Brandon M. Waterman ("Waterman

Dec."), and its Exhibits A, B and C, are filed along with this memorandum in further opposition to the Petition.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioner is a citizen and native of Pakistan apprehended by the Department of Homeland Security ("DHS") on January 27, 2016, within approximately 500 yards of the U.S./Mexico International Boundary after unlawfully entering the United States. Freeman Dec. at ¶ 5.

Immigration and Customs Enforcement ("ICE") detained Petitioner pursuant to the mandatory custody provision of 8 U.S.C. § 1225(b)(1)(A)(iii) as a "certain other alien," and initiated Expedited Removal proceedings against Petitioner on January 29, 2016. *Id.* at ¶¶ 6-7.

On March 7, 2016, the Petitioner was issued a Notice to Appear for Removal Proceedings after the United States Citizenship & Immigration Service ("USCIS") determined there was a credible fear of persecution. *Id.* at ¶ 8.

On May 26, 2016, an immigration judge approved the Petitioner's release from custody upon the payment of a $10,000 bond. *Id.* at ¶ 9.

On September 27, 2021, an immigration judge ordered the Petitioner removed from the United States. *Id.* at ¶ 10.

On August 31, 2025, Petitioner was apprehended at Fort Drum, New York and transferred to the Buffalo Federal Detention Facility in Batavia, New York. *Id.* at ¶ 11.

On November 14, 2025, Petitioner filed this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. ECF No. 1.

The Petitioner's appeal of his removal order was dismissed by the Board of Immigration Appeals ("BIA") on November 24, 2025. Freeman Dec. at ¶ 12. This rendered Petitioner's

order of removal administratively final pursuant to 8 C.F.R. § 1241.1(a) and triggered the beginning of his removal period. 8 U.S.C. § 1231(a)(1)(B)(i).

On December 2, 2025, Respondents filed a Motion to Dismiss the habeas petition as premature. ECF No. 14.

On December 2, 2025, Petitioner filed a Petition for Review ("PFR") and motion for stay of removal with the Court of Appeals for the Second Circuit. ECF No. 15.

No court has yet ordered a stay of Petitioner's removal, and he is not detained outside of the immigration process, and thus there is no basis for his detention to be reverted to 8 U.S.C. § 1225(b)(1)(A)(iii).

STATUTORY AND LEGAL FRAMEWORK

With the passage of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, the Secretary of the DHS was authorized to designate "certain other aliens" as being subject to expedited removal procedures, and the Secretary used this authority to include aliens encountered within 100 air miles of the U.S. international land border, apprehended within 14 days of their entry to the United States. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004); *Singh v. Barr*, No. 1:19-CV-01096 EAW, 2020 WL 1064848, at *3 (W.D.N.Y. Mar. 2, 2020) ("In other words, aliens who illegally entered the United States and are detained within 14 days of entry and within 100 miles of the border are treated the same as 'arriving aliens' under the current statutory and regulatory scheme.").

An alien detained under 8 U.S.C § 1225(b)(1) who receives a positive credible fear finding and is placed in removal proceedings remains detained under that statute for the duration of removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(B)(ii).

Generally, the immigration removal process culminates in a removal hearing. If the alien successfully defeats the removal charges against him, or obtains relief from removal, he is released from custody. Otherwise, if the alien is ordered removed and waives appeal, or if the time for appeal elapses and no appeal is filed, the order of removal becomes administratively final. 8 C.F.R. §§ 1241.1(b-c). Similarly, if the alien appeals to the BIA and the appeal is dismissed, the order of removal becomes administratively final pursuant to 8 C.F.R. § 1241.1(a). Once the order of removal becomes administratively final, the authority for an alien's detention transitions to 8 U.S.C. § 1231. 8 U.S.C. § 1231(a)(1)(A).

Upon dismissal of an appeal by the BIA, an alien may still seek review of the order of removal by filing a PFR in the relevant circuit court. 8 U.S.C. §§ 1252(a)(5); 1252(b)(2); 1252(b)(9). Service of a PFR does not stay the removal period or prohibit removal unless the circuit court orders otherwise. 8 U.S.C. § 1231(a)(1)(B)(ii) ("The removal period begins on the latest of the following: . . . 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."); 8 U.S.C. § 1252(b)(3)(B) ("Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.").

Usually, because an alien is in DHS custody while going through immigration removal proceedings, once the order of removal becomes administratively final it will also trigger the "removal period", under which DHS has 90 days to remove the alien from the United States. 8 U.S.C. § 1231(a)(1)(A). Detention during this period is generally mandated by statute. *Id.* at § 1231(a)(2)(A) ("During the removal period, the Attorney General shall detain the alien.").

If a court orders a stay of removal while adjudicating the PFR, the removal period begins only upon the date of the reviewing court's final order. *Id.* at § 1231(a)(1)(B)(ii). If the

alien is detained or confined outside of DHS custody (for example, in criminal incarceration), the removal period only begins upon his release from such custody. *Id.* at § 1231(a)(1)(B)(iii).

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court held that the 90-day removal period could be extended to six-months during which time detention would remain reasonable, and after which time an alien could challenge their continued detention.

ARGUMENT

I. Petitioner Is Detained Pursuant To 8 U.S.C. § 1231 Because The Forbearance Agreement Is Not A Stay.

The forbearance agreement under which ICE choose not to remove an alien who has filed a PFR and a motion for a stay of removal is an agreement between the Second Circuit and the government to not "deport or return an alien who has filed a motion for stay of deportation with the Court until and unless that motion is denied." See Exhibit A to Waterman Dec., at pg. 1. It is not a stay. It is not a substantive impediment to removal. Therefore, aliens subject to the forbearance agreement are detained pursuant to 8 U.S.C. § 1231. Because Petitioner is detained pursuant to § 1231 and the presumptively reasonable period for his removal has only just begun, this Petition should be denied as premature.

The current statutory framework described above is the result of "a unified overhaul" of the Immigration and Nationality Act through the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Nken v. Holder*, 556 U.S. 418, 431 (2009); *Dorville v. Searls*, No. 23-CV-6075 (CJS), 2023 WL 4107981, at *5 (W.D.N.Y. June 21, 2023). Indeed, prior to the enactment of the IIRIRA, the filing of a PFR resulted in an automatic stay of removal because an alien would be precluded from seeking judicial review of a removal order upon departing the country. *Id.* The IIRIRA changed this by allowing for adjudication of a PFR even after removal, and thus an automatic stay of removal

became unnecessary (and was thus eliminated under the statute). *Id.*

The so-called "forbearance agreement" or "forbearance policy" first arose as a result of the 1995 policy of the United States Attorney for the Southern District of New York to instruct the Immigration and Nationality Service ("INS") not to deport or return an alien who has filed a motion for stay of deportation in conjunction with a PFR. *See* Exhibit A to Waterman Dec. at pg. 1.

In 2007, Thomas W. Hussey, the Director of the Office for Immigration Litigation at the time, acknowledged that the government was following the 1995 policy, but that "the Department is considering whether the approach outlined in the memorandum remains the one that it should follow." Exhibit C to Waterman Dec. at pg. 2.

In 2009, the Honorable Jon Newman, Circuit Judge, wrote to David McConnell, the Director of the Office of Immigration Litigation within the Department of Justice, regarding the "voluntary decision on the part of the Department of Justice and the Department of Homeland Security concerning removal of an alien who has filed in the Second Circuit a petition for review of a decision of the Board of Immigration Appeals." Exhibit B to Waterman Dec. at pg. 1. Judge Newman specifically noted the high volume of petitions and the need to minimize extended litigation over motions for stays of removal, and the need to conserve judicial resources. *Id.* at pgs. 1-2. In response, Director McConnel advised that the forbearance agreement would continue as described by Judge Newman, but also noted that ICE may unilaterally decide that some petitions fall outside of the agreement, including where a PFR is filed regarding a nonreviewable order, with regard to a BIA decision that is several years old, or where abuse of the forbearance agreement is so evident as to make any period of automatic forbearance unreasonable agreement. Exhibit C to Waterman Dec. at pg. 2. Director McConnel also noted in such situations, the government stated that it would

"endeavor to inform the court of any scheduled timeframe for removal" so that the circuit court could "decide whether to formally enter a stay before removal occurs." *Id.*

In reviewing the legislative history of the forbearance agreement, Judge Siragusa has noted that he was "disinclined to believe that Congress intended that its significantly more restrictive scheme of judicial review of orders of removal under IIRIRA, which was enacted to allow for more prompt removal of removable aliens, could be disregarded in favor of a procedure devised between a government agency and a federal circuit court in order to address the Circuit Court's expressed concern for docket control and efficient allocation of judicial resources." *Dorville v. Searls*, 2023 WL 4107981, at *5.

Likewise, Judge Sinatra has observed that "the forbearance 'understanding' at issue here—whereby aliens filing PFRs and stay motions will not be removed until the Second Circuit rules—represents a 'voluntary decision' on the part of the Executive Branch, and is subject to change." *Brathwaite v. Barr*, 475 F. Supp. 3d 179, 187 (W.D.N.Y. 2020) (citing Letter from the Hon. Jon O. Newman, United States Circuit Judge, United States Court of Appeals for the Second Circuit, to David M. McConnell, Director, Office of Immigration Litigation (Mar. 16, 2009)). "In sum, this policy, or agreement, or understanding is not and does not purport to be a stay." *Brathwaite*, 475 F. Supp. 3d at 187.

Some courts—including this one—have read the Second Circuit's decision in *Hechavarria v. Sessions*, 891 F.3d 49 (2d Cir. 2018), as amended (May 22, 2018), to equate the forbearance agreement with a judicially ordered stay of removal. *Sankara v. Whitaker*, No. 18-CV-1066, 2019 WL 266462, at *4 (W.D.N.Y. Jan. 18, 2019). This is so despite the fact that the *Hechavarria* court expressly noted that a court-ordered stay of removal had been issued in the petitioner's PFR, and that the court was therefore "not decid[ing] the contours of judicial review during detention pursuant to the government's forbearance policy in this Circuit."

Hechavarria, 891 F.3d at 54, n. 3; *Downer v. Searls*, No. 20-CV-6326-FPG, 2020 WL 13908502, at *4 (W.D.N.Y. Aug. 18, 2020) ("Hechavarria left open the question of which statute authorizes detention where the alien has a pending motion for a stay, and the forbearance agreement between the Second Circuit and DHS/ICE operates to prevent the alien's removal."). The Second Circuit also noted its reliance on "[t]he unambiguous language of the statute," which described "three scenarios that can trigger the start of the removal period. *Hechavarria,* 891 F.3d at 55. Despite this clear language in the statute, the *Hechavarria* court opined in dicta that "[t]he definition of the removal period is dependent upon the assumption that no substantive impediments remain to the immigrant's removal." *Id.* Courts have mistakenly latched onto this "substantive impediments" language even though the Second Circuit relied on the "plain language" of § 1231 in reaching its decision, and the term "substantive impediments" does not appear anywhere in the statute. Such reliance is misplaced.

Importantly, nowhere in §§ 1225, 1226 or 1231 do the words "immediately deportable" or "substantive impediment to removal" appear. And nothing in § 1226 supports interpreting the *Hechavarria* court's dicta as mandating that a forbearance stay renders detention subject to 1231. Section 1225 or 1226 controls until an order of removal is entered by an immigration judge and the latest of one of the triggers of § 1231 are met. The likelihood or timing of removal plays no part in determining which statute applies. The only question is whether the order of removal has become final or not pursuant to § 1231. Judge Vilardo has relied on this "immediately deportable" language in finding that the forbearance agreement both acts as a stay and renders an alien not immediately deportable. *See Tucker v. Searls,* No. 22-CV-608-LJV, 2022 WL 16832642, at *3 (W.D.N.Y. Nov. 9, 2022). The judicially-created question of immediate deportability has thus usurped the real issue that the immigration

statutes are concerned with—finality of the removal order. Because the forbearance agreement can be obviated by a simple letter from the Government advising of its intent to remove an alien, it does not affect whether an alien is immediately deportable, and does not change the authority for an alien's detention. Accordingly, as soon as an order of removal is administratively final, it is a final order of removal (unless a judicial stay of removal is entered or the alien is in custody outside of immigration authority).

Additionally, the Supreme Court's decision in *Johnson v. Guzman Chavez* supports the Government's analysis of how the forbearance agreement interacts with the immigration statutes. In *Guzman Chavez*, the alien habeas petitioners sought orders finding that because the petitioners sought withholding of removal, their prior removal orders were no longer final and they were detained pursuant to § 1226 instead of § 1231. *Johnson v. Guzman Chavez*, 210 L. Ed. 2d 656, 141 S. Ct. 2271, 2283 (2021). This is analogous to the argument made by Petitioner in this case. The Supreme Court looked to the language of § 1231 and noted that petitioners' removal orders were administratively final, no stay of removal had been granted to them, and they were not in detention other than by immigration officials. *Id.,* 210 L. Ed. 2d at 656, 141 S. Ct. at 2285. The petitioners argued that because removal to a certain country is foreclosed during withholding-only proceedings they should be deemed detained under § 1226—a mirror argument to *Hechavarria's* finding of a "remaining barrier" to removal or "substantive impediment." The Supreme Court held, however, that because the order of removal "remains in full force", § 1231 applies. *Id.* In language that could also be used to rebut the overbroad reading of *Hechavarria*, the Court noted that § 1231 must apply, and any argument that § 1226 should apply where removal may be questionable is unavailing, because all questions tied to removal relate to detention under § 1231, not § 1226:

> To begin, it is not plausible that an alien is detained under § 1226 instead of § 1231 while DHS resolves any practical problems associated with the execution of a removal order because § 1231, not § 1226, is the part of the INA that anticipates and addresses those problems. For example, § 1231(a)(1)(C) extends the removal period if the alien fails to timely apply for travel documents and therefore cannot be removed to the relevant country. Section 1231(c)(2)(A) authorizes DHS to stay the immediate removal of certain aliens if it decides that immediate removal "is not practicable or proper." And § 1231(a)(3) allows for supervised release after the 90-day removal period expires "[i]f the alien does not leave or is not removed" during that time period. Those provisions would be unnecessary if questions of how and where an alien is to be removed were bound up in whether the alien was removable at all under § 1226.

Id., 210 L. Ed. 2d at 656, 141 S. Ct. at 2286–87. The Court also noted that the "general structure of the INA" provided further support for its finding:

> Sections 1226 and 1231 both appear in Part IV of Title 8, chapter 12, of the United States Code, entitled "Inspection, Apprehension, Examination, Exclusion, and Removal." The sections within that part proceed largely in the sequential steps of the removal process. Sections 1221 to 1224 address the arrival of aliens. Section 1225 provides instructions for inspecting aliens, expediting the removal of some, and referring others for a removal hearing. Section 1226 authorizes the arrest and detention of aliens pending a decision on whether they are to be removed. Section 1227 explains which aliens are deportable. Section 1228 authorizes the expedited removal of some of those deportable aliens. Sections 1229, 1229a, and 1229b set out the process for initiating and conducting removal proceedings, and they specify the types of relief that an alien can request during those proceedings, such as cancellation of removal. Section 1229c addresses voluntary departure. Section 1230 explains what to do if an alien is admitted. And § 1231 explains what to do if the alien is ordered removed.

In addition, this Court has described DHS as being "precluded" from removing an alien due to the forbearance agreement, but, as described above, DHS is not precluded; it is merely voluntarily deciding not to remove an alien, and, if it chooses to, the sole "impediment" to removal is for DHS to advise the Second Circuit of removal. Exhibit B to Waterman Dec. at pg. 1; *Portillo v. Decker*, No. 21 CIV. 9506 (PAE), 2022 WL 826941, at *5 (S.D.N.Y. Mar. 18, 2022) (noting that pursuant to the forbearance agreement ICE "hold[s] off" on removing an alien, and may simply advise the Second Circuit that it will cease forbearing removal at any time so that the Circuit can take action on the motion for a stay of removal). Thus, not only does the forbearance agreement not amount to the judicially

ordered stay described in 8 U.S.C. § 1231(a)(1)(B)(ii), it falls short of even the "substantive impediment" language mentioned in *Hechavarria* (but not any regulation or statute).

Courts in our district have also cited to the "majority" of courts which have held that the forbearance agreement amounts to a stay in justifying their holdings concluding the same. *Ranchinskiy v. Barr*, 422 F. Supp. 3d 789, 796 (W.D.N.Y. 2019). However, in the Western District of New York, there is an almost even split: this Court, Judge Vilardo, and Judge Geraci have held, post-*Hechavarria,* that the forbearance agreement amounts to a stay. *See, e.g., Barrera Zuniga v. Garland*, No. 6:21-CV-06243 EAW, 2021 WL 5989779, at *3 (W.D.N.Y. Dec. 16, 2021) (Chief Judge Wolford); *Agard v. Searls,* No. 23-CV-91-LJV, 2023 WL 6880474, at *3 (W.D.N.Y. Oct. 18, 2023) (Judge Vilardo); *Abdelwahab v. Barr*, No. 21-CV-6072-FPG, 2021 WL 2550820, at *3 (W.D.N.Y. June 22, 2021) (Judge Geraci). As noted above, Judge Siragusa and Judge Sinatra have held the opposite.[1] In addition, Judge Vacca recently ruled on this very issue and held that Second Circuit's treatment of the Forbearance Agreement compels a finding that the Forbearance Agreement does *not* constitute a stay under 8 U.S.C. § 1231(a)(1)(B)(ii). *Loachamin v. Kurzdorfer,* 792 F.Supp. 3d 353, 358-59 (W.D.N.Y. 2025).

Additionally, ICE treats a BIA decision as a final order of removal even where a PFR that triggers the forbearance policy is pending. Specifically, in conformance with *Zadvydas*, ICE conducts a Post-Order Custody Review ("POCR") prior to the expiration of an alien's removal period under § 1231. 8 C.F.R. §§ 241.4(h)(1), (k)(1). Under this POCR process, ICE determines whether there is a significant likelihood of removal once an alien's detention hits 90 days. 8 C.F.R. § 241.4(i)(7); § 241.13(g). In determining when the removal period is triggered, the regulations track the language of 8 U.S.C. § 1231. 8 C.F.R. § 241.4(g)(i). The

[1] The split was even before Judge Larimer became inactive. He also agreed with the government that the forbearance policy does not equal a stay. *See Samuel v. Searls*, WDNY 21-CV-06451.

regulations contain no language directing that the POCR process is affected by the forbearance agreement in the Second Circuit. Accordingly, the regulations and ICE's practices demonstrate that the forbearance agreement is not the equivalent of a stay. Because ICE is the agency tasked with implementing and enforcing immigration laws, its determination should be given weight by this Court. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) (recognizing the informative value of an agency's expertise).

Having looked to the clear language of § 1231, the history and correspondence that led to the informal forbearance agreement, and having dispelled any arguments regarding the dicta of *Hechavarria* or reference to a majority of courts, it should be apparent that when an alien files a PFR and a motion for stay of removal, but no stay is granted, the alien is detained pursuant to 8 U.S.C. § 1231. "The statute clearly provides that the second scenario for tolling the removal period can be triggered only by a court ordered stay, which, despite the similarities, is different from a government policy of forbearance." *J.L. v. Decker*, No. 1:22-CV-2853-MKV, 2024 WL 232115, at *6 (S.D.N.Y. Jan. 22, 2024). "A court-ordered stay is a court-ordered stay. And no stay has been granted here. The forbearance policy coupled with a pending motion for a stay do not equal such a stay. Close enough is not good enough. Section 1231 applies." *Brathwaite,* 475 F. Supp. 3d at 189. Thus, because Petitioner has moved for—but has not been granted—a stay of removal, he is detained pursuant to 8 U.S.C. § 1231.

II. This Court Should Deny the Petition as Premature

Petitioner argues irreparable harm by ongoing unlawful detention. ECF No. 1, ¶ 15. However, his appeal to the BIA was only dismissed on November 24, 2025, which renders his detention presumptively reasonable under *Zadvydas* through May 23, 2026. Freeman Dec. at ¶ 13. As noted above, the Supreme Court has held that detention after the issuance of an order of removal is presumptively reasonable for six months. *Zadvydas*, 533 U.S. at 701. For

this reason, courts in this district have routinely dismissed petitions alleging prolonged detention pending removal where the six-month mark has not yet passed. *See, e.g., Mbunga v. Freden*, No. 6:24-CV-06478 EAW, 2024 WL 4753235, at *2 (W.D.N.Y. Nov. 12, 2024); *Davis v. Garland*, No. 24-CV-223-LJV, 2024 WL 3361799, at *6 (W.D.N.Y. July 10, 2024); *De Oliveira Jimenez v. Searls*, No. 22-CV-960 (JLS), 2023 WL 11134381, at *5 (W.D.N.Y. Mar. 2, 2023), reconsideration denied, No. 22-CV-960 (JLS), 2023 WL 11137231 (W.D.N.Y. Apr. 17, 2023). In addition, Judge Sinatra dismissed a habeas petition as premature because it was filed before the expiration of the six month presumptively reasonable period. *See Dao v. Bondi,* No. 25-CV-5 (JLS), 2025 WL 1005579, at *1 (W.D.N.Y. Mar. 26, 2025).

Importantly, even where detention exceeded six months at the time of a court's decision, but not at the time the petition was filed, dismissal of the petition has been deemed appropriate. *See, e.g., Dao*, 2025 WL 1005579, at *2 ("[F]ederal courts generally hold that 'the six-month post-removal period must have expired at the time [the detainee's] 2241 petition was filed in order to state a claim under *Zadvydas*."); *Gomez v. Whitaker*, No. 6:18-CV-06900-MAT, 2019 WL 4941865, at *5 (W.D.N.Y. Oct. 8, 2019) (dismissing petition where six-month period had lapsed at time of decision but not at time of filing of petition). Accordingly, the Petition should be denied as premature.

III. Even If This Case Were Not Premature, The Petition Should Be Denied Because Petitioner Extended His Removal Period By Acting To Prevent His Removal Through The Filing Of A Petition For Review.

The removal period for an alien may be suspended if the alien "acts to prevent [his or her] removal subject to an order of removal." 8 U.S.C. § 1231(a)(1)(C). Courts have held that "[f]or obvious reasons, a noncitizen's use of the American judicial process, to the extent it delays removal, does not warrant release under *Zadvydas*." *Portillo*, 2022 WL 826941, at *5 (citing *Guangzu Zheng v. Decker*, 618 F. App'x 26, 28 (2d Cir. 2015) and gathering cases). Thus,

even if Petitioner's challenge to his detention was not premature under *Zadvydas*, he would not be entitled to relief because his continued challenge to his order of removal through the PFR process has suspended the removal period in this instance.

IV. Even If The Court Finds 8 U.S.C § 1231 Detention Does Not Apply, The Petitioner Should Be Detained Pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii).

Even if the Court were to find that the Petitioner is not detained pursuant to 8 U.S.C. § 1231 as a result of a final order of removal as discussed above, Petitioner should be considered to be subject to detention pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii) as that was the detention authority under which the Petitioner was originally detained. *See Aguilar-Villalobos v. Kurzdorfer*, No. 24-CV-1110 (JLS) (W.D.N.Y. Jun. 10, 2025) (*citing DHS v. Thuraissigiam*, 591 U.S. 103, 139-140 (2020), to find that a petitioner was squarely in the category of "certain other aliens" and was to be treated as an "arriving alien" under the statutory and regulatory framework recognized by the U.S. Supreme Court). Inasmuch as the Petitioner might argue that Respondents' changed detention authority by releasing the Petitioner, it must be noted that the bond order issued to the Petitioner by the immigration judge on May 26, 2016, predates the ruling of the Attorney General in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), which now states that any alien transferred from expedited removal proceedings to full removal proceedings is to be detained pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii).

CONCLUSION

For the foregoing reasons, the Petition should be dismissed.

Respectfully Submitted,

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DATED: December 17, 2025

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