UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Erika Noemy ALCANTARA DE ERAZO, *et al.*, Petitioners, v. Donald J. TRUMP, in his official capacity as President of the United States, *et al.*, Respondents.	25 Civ. 10098 (ALC)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

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Respondents (the "government"), by their attorney, Jay Clayton, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to the amended petition for a writ of habeas corpus, ECF. No. 20 ("Amended Petition" or "Am. Pet."), filed by Petitioners Erika Noemy Alcantara De Erazo ("Alcantara De Erazo") and her children J.N.E.A. and E.N.E.A. (collectively, "Petitioners").

PRELIMINARY STATEMENT

Petitioners are natives and citizens of El Salvador who unlawfully entered the United States in or around October 2023 and were arrested soon thereafter. In November 2023, they were released on an order of release on recognizance and placed in U.S. Immigration and Customs .Appear, which directed them to appear at an immigration hearing on January 24, 2024. Petitioners failed to appear at the hearing and were ordered removed *in absentia* by an immigration judge. In November 2025, Alcantara De Erazo attended an appointment with ICE, at which time she was instructed to purchase plane tickets for her and her children back to El Salvador. At her subsequent appointment on December 3, 2025, she informed ICE that she had not purchased the plane tickets as instructed, and she was told to report with her children the next day for a check-in with ICE. On December 4, 2025, Petitioners reported for their check-in, their release was revoked, and they were detained pursuant to 8 U.S.C. § 1231(a)(6), for purposes of effectuating their removal.

In this habeas petition, Petitioners assert that their detention is unlawful principally because they do not believe that revocation of their order of release was permissible. The Petition should be denied. First, the Court should reject Petitioners' claim that their detention is not reasonably related to valid immigration purposes. Principally, Petitioners' detention serves the purposes of ensuring that the government can effectuate Petitioners' removal from the United States pursuant to their final order of removal.

Second, Petitioners' separate procedural due process and Administrative Procedure Act ("APA") challenges fail because they received ample notice that their release could be revoked to effectuate their removal, and revocation of their order of release was authorized by 8 U.S.C. § 1226(b). Furthermore, ICE was not required to issue them a separate order of supervision before detaining them under section 1231(a)(6).

Third, Petitioners' claim challenging ICE's discretionary decision to revoke their release is jurisdictionally-barred, and ICE's New York City Field Office does not have, and did not inform Petitioners of, an unwritten policy of not detaining aliens with pending appeals, in particular adults with children, absent national security, terrorism, or public safety risks. Finally, their claims that their detention is in excess of statutory authority or *ultra vires* fail because their detention is explicitly authorized by 8 U.S.C. § 1231(a)(6).

For these reasons, the Petition should be denied.

BACKGROUND

A. Relevant Factual Background

Petitioners, natives and citizens of El Salvador, entered the United States without inspection, admission, or parole on or about October 26, 2023. *See* Ex. A[1] (November 2023 encounter summary) at 2; Declaration of Detention and Deportation Officer Daniel Moreno ("Moreno Decl." at ECF No. 13) ¶ 4; *see also* Am. Pet. ¶ 23. On October 27, 2023, U.S. Border Patrol ("USBP") encountered Petitioners in the Rio Grande Valley, near Hidalgo, Texas, and arrested and transported them to a facility in Donna, Texas, for further processing. *See* Ex. A; Moreno Decl. ¶ 5. Alcantara De Erazo admitted to USBP that she and her children did not have

[1] Unless otherwise noted, exhibits referenced as "Ex. __" refer to the exhibits to the Return to the Amended Habeas Petition, filed contemporaneously herewith.

the necessary legal documents to enter the United States, and to illegally crossing the border without being inspected by an immigration officer at a designated port of entry. *See* Ex. A; Moreno Decl. ¶ 6.

On November 2, 2023, USBP personally served Alcantara De Erazo and her minor children a Notice to Appear ("NTA"), charging them as inadmissible under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as aliens 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. *See* Exs. B & C (NTAs for Alcantara De Erazo and E.N.E.A.);[2] Moreno Decl. ¶ 7. The NTA advised them to appear before an Immigration Judge at 26 Federal Plaza, New York, New York on January 26, 2024. *See* Exs. B & C; Moreno Decl. ¶ 7. On December 18, 2023, that NTA was subsequently served on the Executive Office for Immigration Review in New York, New York, thereby commencing removal proceedings against Alcantara De Erazo and her minor children. *See* Moreno Decl. ¶ 7.

On November 3, 2023, Petitioners were released from custody on an Order of Release on Recognizance, pursuant to INA § 236(a)(2), 8 U.S.C. § 1226(a)(2). *See* Ex. D (Order of Release on Recognizance); Moreno Decl. ¶ 8. The Order of Release on Recognizance allowed for release provided Alcantara De Erazo complied with specified conditions, including, among other things: (i) a requirement to report for any hearing or interview as directed by ICE or the Executive Office for Immigration Review; (ii) a requirement to surrender for removal from the United States, if so ordered; (iii) enrollment in the Alternatives to Detention Program's Intensive Supervision Appearance Program ("ISAP"), (iv) a requirement to report to an ICE duty officer at the New York

[2] ICE has been unable to locate a copy of the NTA issued to J.N.E.A., as of the time of this filing.

Field Office on December 20, 2023;[3] and (v) a requirement to assist ICE in obtaining any necessary travel documents. *See* Ex. D; Moreno Decl. ¶ 8. Alcantara De Erazo acknowledged that the contents of the Order of Release on Recognizance were interpreted and explained to her in Spanish, and that failure to comply with the terms of the Order of Release on Recognizance may subject her to detention. *See* Ex. D at 1; Moreno Decl. ¶ 8.

On January 26, 2024, Alcantara De Erazo and her minor children failed to appear for their first master calendar hearing in immigration court, and were subsequently ordered removed *in absentia*, pursuant to INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A), by an immigration judge in New York. *See* Ex. E (*In Absentia* Removal Order); Moreno Decl. ¶ 10. Alcantara De Erazo asserts that she received notice of the *in absentia* removal order on February 8, 2024. *See* Am. Pet. ¶ 28.

On March 25, 2024, Petitioners filed a motion to reopen with the immigration judge, as well as an asylum application. *See* Moreno Decl. ¶ 11. On April 4, 2024, the Immigration Judge denied the motion to reopen. *See* Ex. F (Denial of Motion to Reopen); Moreno Decl. ¶ 12. On May 1, 2024, Petitioners timely appealed the denial of their motion to reopen to the Board of Immigration Appeals ("BIA"). Their appeal before the BIA is fully briefed and currently remains pending.

Petitioners assert that their counsel had a phone conversation with Deportation Officer Christopher Finnie ("DO Finnie") on June 24, 2024, in which Petitioners claim DO Finnie informed their counsel that "absent any national security, terrorism, or public safety risks, they always let the appeals process play out and in particular wouldn't detain someone with children." Am. Pet. ¶ 33. DO Finnie asserts, under penalty of perjury, that he would never have told

[3] On December 20, 2023, Alcantara de Erazo and her minor children reported to the ICE duty officer at the New York Field Office. *See* Moreno Decl. ¶ 9.

Petitioners' counsel anything to that effect. *See* Declaration of DO Finnie ("Finnie Decl.) ¶ 3. DO Finnie asserts that ICE's New York City Field Office has never had a policy, written or unwritten, of not detaining noncitizens with pending appeals, in particular adults with children, absent any national security, terrorism, or public safety risks. *See id.* ¶ 4.

On November 5, 2025, Alcantara De Erazo attended a regularly scheduled in-person ISAP appointment, where a Case Specialist discussed a departure plan with her and instructed her to provide departure plane tickets to ISAP by November 24, 2025, for herself and her minor children to depart the country. *See* Ex. G (In-Person Office Visit Notes and Individual Service Plan for November 5, 2025); Moreno Decl. ¶ 13; *see also* Am. Pet. ¶ 44.[4] She was informed that she must depart the country by December 12, 2025. *Id.*

On December 3, 2025, Alcantara De Erazo attended another regularly scheduled in-person ISAP appointment, where she informed a Case Specialist that she did not bring her plane tickets to depart the country. *See* Ex. H (In-Person Office Visit Notes and Individual Service Plan for December 3, 2025); Moreno Decl. ¶ 14; *see also* Am. Pet. ¶ 45. She stated that her attorney advised her not to purchase the plane tickets before reporting to 26 Federal Plaza on December 18, 2025. *See* Ex. H at 1; Moreno Decl. ¶ 14 An ICE officer reviewed her case and instructed her to report the next day with her two children and all immigration paperwork to 26 Federal Plaza in Manhattan. *Id.*

[4] The Amended Petition notes that the "Departure Plan" section of Alcantara De Erazo's Individual Service Plan notes that she must "Must submit documentation that she is working on her case before 06/25/25," Am. Pet. ¶ 44; however, that information refers to previous instructions provided to Petitioners at a previous ISAP appointment. *Compare* Ex. G at 1 *with* Ex H at 6. Importantly, Alcantara De Erazo does not dispute that she was instructed to purchase plane tickets for departure on November 4, 2025, but did not do so.

On December 4, 2025, Petitioners reported to ICE offices at 26 Federal Plaza as directed. *See* Ex. I at 7 (December 4, 2025 Record of Deportable/Inadmissible Alien); Moreno Decl. ¶ 15. At that check-in, ICE took Alcantara De Erazo and her minor children into custody for the purpose of effectuating their final order of removal. *See id.* Following their arrest, Petitioners were booked into New York's temporary hold room located at 26 Federal Plaza. *See id.*

During processing, Petitioners were issued Forms I-205 (Warrant of Removal/Deportation), Forms I-294 (Warning to Alien Ordered Removed or Deported), Forms I-229(a) (Warning for Failure to Depart), and ICE officers prepared a record of the encounter on Form I-213. *See* Exs. I, J, K; Moreno Decl. ¶ 16. In addition, Alcantara De Erazo provided a sworn statement to ICE officers concerning her custody and detention, recorded on Form I-215B. *See* Ex. I at 10; Moreno Decl. ¶ 16.

After ICE officers completed processing Petitioners on December 4, 2025, they transferred custody of Petitioners to an ICE contractor for transportation to Dilley Immigration Processing Center, a family residential center in Dilley, Texas ("Dilley FRC").[5] *See* Ex. I at 7; Moreno Decl. ¶ 17. On December 5, 2025, Petitioners were transported to the Dilley FRC, where they remain detained pursuant to INA section 241(a)(6), 8 U.S.C. § 1231(a)(6), while they await removal from the United States. *See* Moreno Decl. ¶ 17.

ICE routinely effectuates removals to El Salvador, and ICE is unaware of any impediments to effectuating Petitioners' removal to El Salvador. *See* Moreno Decl. ¶ 19.

[5] As outlined at 8 C.F.R. § 236.3(h), "DHS's policy is to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources. If DHS determines that detention of a family unit is required by law, or is otherwise appropriate, the family unit may be transferred to an FRC which is a licensed facility and non-secure."

B. Legal Background for Detention Authority

The INA provides specific—and distinct—statutory directives for the detention of aliens before and after final removal orders are issued. *See, e.g.*, *Hechavarria v. Sessions*, 891 F.3d 49, 54 (2d Cir. 2018) ("The government's power to detain an immigrant must be grounded in a specific provision of the INA."). The detention of aliens who are in ongoing removal proceedings is governed by either 8 U.S.C. § 1226 or 8 U.S.C. § 1225(b). Under § 1226(a), ICE may detain an alien who has entered the United States pending a decision in removal proceedings, or may release the alien on bond or conditional parole, *see* 8 U.S.C. § 1226(a)(2)(B).[6] Pursuant to regulations promulgated by the Department of Homeland Security ("DHS"), an ICE officer "may, in the officer's discretion, release an alien not described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act." 8 C.F.R. § 236.1(c)(8). Even after DHS decides to release an alien, it may "at any time" revoke such release, "rearrest the alien under the original warrant, and detain the alien." 8 U.S.C. § 1226(b); *see also* 8 C.F.R. § 236.1(c)(9) ("[S]uch release may be revoked at any time . . . in which event the alien may be taken into physical custody and detained.").

Pursuant to 8 U.S.C. § 1231, ICE has authority to detain an alien subject to a final removal order. 8 U.S.C. § 1231(a)(2); *see Johnson v. Arteaga-Martinez*, 596 U.S. 573, 578 (2022) (noting that § 1231(a) "governs the detention, release, and removal of individuals 'ordered removed'"); *accord 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."). An order of removal that is issued *in*

[6] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security.

absentia becomes administratively final immediately upon entry. *See* 8 C.F.R. § 1241.1(e). However, in the case of *in absentia* removal order, a timely filed motion to reopen shall "stay the removal of the alien pending disposition of the motion by the immigration judge." 8 C.F.R. § 1003.23(b)(4)(ii); *id.* § 1003.23(b)(1)(v); 8 U.S.C. § 1229a(b)(5)(C). If the immigration judge denies the motion to reopen, the stay dissolves and does not extend through any administrative appeal.

Section 1231 establishes a 90-day "removal period" within which the government generally must effectuate removal after a removal order becomes final, and during which the government "shall" detain the alien pending removal. *See* 8 U.S.C. § 1231(a)(1)(A), (a)(2)(A). When the government is unable to secure removal within the 90-day removal period, while detention is no longer mandatory, the government "may" detain "beyond the removal period," four categories of aliens: (1) "inadmissible" aliens; (2) aliens who are "removable" for national-security or foreign-policy reasons or for violating entry conditions, status requirements, or certain criminal laws; (3) aliens who pose a "risk to the community," and (4) aliens who are "unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6). An alien who falls within these categories, and who is detained and subsequently released, is subject to supervision under regulations prescribed by DHS. *See* 8 U.S.C. §§ 1231(a)(6) ("[I]f released, [the alien] shall be subject to the terms of supervision in paragraph (3)."), 1231(a)(3) ("[T]he alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.").

DHS regulations at 8 C.F.R. § 241.4 govern the detention and supervision of aliens post the removal period, and provide that ICE officials will conduct custody determinations, including

decisions to release a detainee.[7] An alien released pursuant to § 241.4 must be released pursuant to an order of supervision. 8 C.F.R. § 241.5. Revocation of release pursuant to an order of supervision is governed by 8 C.F.R. § 241.4(*l*). Those provisions apply where the alien was "previously approved for release under the procedures in this section," 8 C.F.R. § 241.4(*l*)(2)—i.e., pursuant to an order of supervision required by § 241.5.

The Supreme Court addressed ICE's authority to detain aliens after their removal orders become final in *Zadvydas v. Davis*, 533 U.S. 678 (2001). There, the Supreme Court held that 8 U.S.C. § 1231(a)(6) authorizes immigration detention for a period reasonably necessary to accomplish the alien's removal from the United States. 533 U.S. at 699-700. The Supreme Court recognized six months as a presumptively reasonable period of time to allow the government to accomplish an alien's removal. *Id.* 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 "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. Thus, the Supreme Court placed the initial burden on the alien to demonstrate the lack of a likelihood of removal; if the alien fails to meet that burden, or if the government rebuts the alien's showing, then continued detention is permissible. *See id.*

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[7] The detention and supervision regulations at 8 C.F.R. § 241.4 apply where an alien has filed a motion to reopen immigrations proceedings, "unless the motion to reopen is granted." 8 C.F.R. § 241.4(b)(1).

C. Procedural History

On December 4, 2025, Petitioners filed their petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. ECF No. 1. On December 5, 2025, Alcantara De Erazo filed an emergency motion for stay of removal with the BIA, which remains pending. *See* Moreno Decl. ¶ 18. On December 16, 2025, Petitioners filed their Amended Petition. ECF No. 20. At present, Petitioners are detained at Dilley FRC pending removal. *See* Moreno Decl. ¶ 3.

ARGUMENT

I. Petitioners' Detention Does Not Violate Substantive Due Process

Petitioners argue that their detention under section 1231(a)(6) violates due process because it does not serve a legitimate immigration purpose. Am. Pet. ¶¶ 67-71. This claim is without merit.

Petitioners' detention pending their removal from the United States, following the issuance of a final order of removal, is statutorily authorized by 8 U.S.C. § 1231(a)(6). The statute's "basic purpose" is "effectuating an alien's removal." *Zadvydas*, 533 U.S. at 697. Moreover, in detaining noncitizens under § 1231 pending removal, the government also seeks to effectuate additional "regulatory goals" for detention, which include "ensuring the appearance of aliens at future immigration proceedings . . . ." *Id.* at 690 (brackets and quotation marks omitted). The government's interest in "ensuring that noncitizen[s] do not abscond" are "well-established." *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020) (citing *Zadvydas*, 533 U.S. at 690; *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017)). Here, Petitioners are aliens who are inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i). Petitioners' *in absentia* removal order became administratively final on January 26, 2024—the date it was issued. Thus, they were subject to detention pursuant to § 1231(a)(6).

Because Petitioners' detention serves the valid immigration purposes of ensuring that ICE can effectuate their final orders of removal, their substantive due process claim fails. *See Zadvydas*, 533 U.S. at 697; *Velasco Lopez*, 978 F.3d at 854.

II. Petitioners' Detention Does Not Violate Procedural Due Process or the INA and Its Implementing Regulations Governing Supervision

Petitioners next argue that ICE's decision to revoke their order of release without notice or an opportunity to respond does not satisfy the requirements of procedural due process. *See* Am. Pet. ¶¶ 72-78. Here, Petitioners confuse revocation of their order of release on recognizance with revocation of an order of supervision, to which Petitioners have never been subject.

Alcantara De Erazo received ample notice that her release could be revoked for purposes of removal. In fact, when Alcantara De Erazo received and signed the Order of Release on Recognizance, she received notice that Petitioners' release was conditioned on, among other things: (i) reporting for any immigration hearing; (ii) assisting ICE "in obtaining any necessary travel documents"; and (iii) ultimately, "surrender[ing] for removal from the United States." Ex. D; Moreno Decl. ¶ 8. Petitioners failed to report to their first immigration hearing and were issued an *in absentia* removal order. *See* Ex. E; Moreno Decl. ¶ 10. By their own admission, Petitioners did not purchase plane tickets to depart the United States, despite being instructed to do so. *See* Am. Pet. ¶¶ 44-45; *see also* Exs. G & H; Moreno Decl. ¶¶ 13-14. And ICE ultimately decided to detain Petitioners to effectuate their removal pursuant to a final order of removal. *See* Moreno Decl. ¶ 15. As outlined above, ICE has discretionary authority to revoke release on recognizance at any time, pursuant to section 1226(b), and ICE may continue to detain Petitioners pursuant to section 1231(a)(6) to effectuate their removal. Moreover, in this case, ICE's decision to revoke release and detain Petitioners is entirely appropriate because Petitioners failed to follow explicit instructions to purchase plane tickets in furtherance of their final order of removal.

Petitioners argue that the supervision regulations provide additional safeguards of providing "notice and an opportunity to respond prior to revoking an order of release," and should be required, Am. Pet. ¶¶ 76 & 59, but as outlined below, the procedural regulations governing revocation of an order of supervision do not apply to Petitioners. Moreover, even if they did apply, the regulation at 8 C.F.R. § 241.4(*l*), providing for an informal interview and opportunity to respond, would only occur "after his or her return to [DHS] custody," 8 C.F.R. § 241.4(*l*)(1), not notice and a hearing prior to detention. *See also* 8 C.F.R. § 241.13(i)(3) (same).[8] Accordingly, ICE's revocation of their release on recognizance comported with procedural due process.

Petitioners' procedural due process argument largely dovetails with their APA claim that ICE cannot detain them pursuant to section 1231 because they did not issue them an order of supervision after the 90-day removal period, pursuant to 8 U.S.C. § 1231(a)(3), or comply with the regulations concerning notice and revocation of such an order of supervision. Am. Pet. ¶¶ 76-77, 84-88. However, the supervision requirements at section 1231(a)(3) are not a condition precedent to discretionary detention under section 1231(a)(6). Instead, the statutory scheme is best read as applying those supervision requirements to those aliens that are already in detention under

[8] Section 241.13 applies to noncitizens "who have provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future." 8 C.F.R. § 241.13(a). Petitioners have not made that showing. Further, the notice and interview procedures apply where ICE has made a determination that the noncitizen's removal "is not significantly likely in the reasonably foreseeable future" and the noncitizen was released under an order of supervision that was then revoked. *Id.* § 241.13(h). Those circumstances are not present here. As Petitioners note, they were not previously released under an order of supervision. Indeed, they were not previously detained by ICE for purposes of removal. Even if the provisions governing revocation of an order of supervision applied—which they do not—they would simply require ICE to provide notice of the reasons for the revocation and an "informal interview" at which Petitioner could submit "any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future," *id.* § 241.13(i)(3)—not require that Petitioners be released.

1231(a)(2), as the supervision requirements immediately follow that provision. This reading is reinforced by the fact that section 1231(a)(6) applies those same supervision requirements to aliens "if released,"—not before they are detained. *See* 8 U.S.C. § 1231(a)(6) (an alien "may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)").[9]

Petitioners' argument would lead to the absurd result that only aliens who were actually detained during the removal period (section 1231(a)(2)), and then subsequently released on an order of supervision (section 1231(a)(3)), could ever be subject to discretionary detention under section 1231(a)(6). Several courts have rejected that interpretation of the statute:

> This is an interesting argument. The thrust of it seems to be that if the government was going to detain Petitioners at all, it must have done so not only for less than six months, but must have done so during the six months immediately following the dates on which the orders mandating their removal became final. However, there is nothing in the statute, or the caselaw interpreting it, to suggest that such is the case.

Lin v. United States, No. 07 Civ. 26, 2007 WL 951618, at *3 (S.D. Tex. Mar. 28, 2007); *see also Piao v. Lyons*, No. 25 Civ. 1725, 2025 WL 3046783, at *2 (E.D. Va. Oct. 31, 2025) ("[T]he government's failure to detain the Petitioner during the removal period or immediately thereafter does not eliminate the Government's ability to detain Petitioner for the purpose of enforcing that removal order at this time." (citing *Lin v. United States*, 2007 WL 951618, at *3)); *Jiang v. Bondi*, No. 25 Civ. 0922, 2025 WL 3281819, at *2 (D.N.M. Nov. 25, 2025); *Callender v. Shanahan*, 281 F. Supp. 3d 428, 436 & n.7 (S.D.N.Y. 2017) (denying habeas relief where petitioner argued the presumptively reasonable period of detention elapsed six months after the order of removal became

[9] Now that Petitioners are detained pursuant to section 1231, they are entitled to all of the procedural safeguards concerning custody determinations and release on supervision at 8 C.F.R. § 241.4.

administratively final (collecting cases)); *but see Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 499-500 (S.D.N.Y. 2009); *Ulysse v. DHS*, 291 F. Supp. 2d 1318, 1325 (M.D. Fla. 2003).[10] At bottom, "there is nothing in § 1231 to indicate that [ICE] cannot enforce those removal orders 'late.'" *Lin v. United States*, 2007 WL 951618, at *3.

That ICE may initially detain aliens even after the 90-day removal period is further buttressed by the Supreme Court's decision in *Nielsen v. Preap*, 586 U.S. 392 (2019). In *Nielsen v. Preap*, the Supreme Court confronted the issue of whether the mandatory detention provisions at 8 U.S.C. § 1226(c) applied where aliens were not immediately arrested "when the alien [was] released." *Id.* at 396. There, the Supreme Court held that the authority to detain criminal aliens under section 1226(c), does "not evaporate just because officials had transgressed subsection (c)(1)'s command to arrest aliens immediately 'when ... released.'" *Id.* at 412; *see id.* at 411 ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." (internal quotation and citation omitted)); *cf. United States v. Montalvo-Murillo*, 495 U.S. 711 (1990) (holding that the government may detain criminal defendants leading up to trial even if they do not comply with the relevant statute's command that a judicial officer "shall" hold a bail hearing "immediately upon the person's first appearance" before the officer). Similarly, nothing in the statute provides that ICE loses all detention authority under section 1231(a)(6) where an alien is not mandatorily detained during the 90-day removal period or not issued an order of supervision.

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[10] The cases of *Farez-Espinoza* and *Ulysse* are readily distinguishable. In both cases, the petitioners did not receive notice that their removal orders had become final until "they were taken into custody by ICE." *Farez-Espinoza*, 600 F. Supp. 2d at 500; *see Ulysse*, 291 F. Supp. 2d at 1321 (petitioner was unaware that BIA dismissed her appeal and removal order had become final until detained by ICE). Here, Petitioners have been aware of the *in absentia* removal order since February 2024, *see* Am. Pet. ¶ 28, and that the immigration judge had denied their motion to reopen, lifting any stay on the order removal since April 2024, *see* Ex. F; Moreno Decl. ¶ 11.

See, e.g., *Jennings v. Rodriguez*, 583 U.S. 281, 298 (2018) ("After [the 90-day removal period] elapses, . . . § 1231(a)(6) provides only that certain aliens 'may be detained' while efforts to complete removal continue."). Here, ICE decided to detain Petitioners while efforts to complete removal continue.

III. ICE's Discretionary Decision to Revoke Petitioners' Release Is Not Reviewable Under the Administrative Procedure Act, and Their Detention Is Not in Excess of Statutory Authority

Finally, Petitioners argue that the revocation of their order of release on their own recognizance was arbitrary and capricious, Am. Pet. ¶¶ 90-99, was contrary to a purported unwritten policy against detaining families with pending appeals before the BIA, *id.* ¶¶ 107-110, and that their detention is in excess of statutory authority and *ultra vires*, *id.* ¶¶ 100-106. These claims are without merit. As a threshold matter, the Supreme Court has recently held that where an alien's claims for relief "'necessarily imply the invalidity' of their confinement," those claims "must be brought in habeas" and not as APA claims. *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."). In this case, Petitioners challenge their detention and seek release. Thus, Petitioners may not resort to the APA. Regardless, the claims fail as discussed below.

A. Revocation of Petitioners' Release on Recognizance Is Not Subject to Review

Petitioners' Fourth Claim asserts that the revocation of their order of release was arbitrary and capricious because it failed to consider "important aspects of the problem." *Id.* ¶ 83. But this challenge is jurisdictionally barred. Section 1226(e) provides that DHS's "discretionary judgment regarding the application of [§ 1226] shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of

any alien or the grant, *revocation*, or denial of bond or parole." 8 U.S.C. § 1226(e) (emphasis added). As the Supreme Court has explained, "§ 1226(e) precludes an alien from 'challeng[ing] a 'discretionary judgment' by [DHS] or a 'decision' that [DHS] has made regarding his detention or release.'" *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)). While § 1226(e) does not preclude challenges to the statutory framework as a whole or the extent of ICE's detention authority, the discretionary determination to revoke Petitioner's order of release pursuant to § 1226(b) falls squarely within the jurisdiction-stripping provision of § 1226(e). In addition, section 1252(b)(9) precludes judicial review of "all questions of law and fact . . . arising from *any action taken* . . . to remove an alien from the United States," and channels all such judicial review into a petition for review of a final order, filed with a Circuit Court of Appeals, pursuant to § 1252(a)(5). 8 U.S.C. § 1252(b)(9) (emphasis added). While § 1252(b)(9) may not bar claims challenging the conditions or scope of detention of aliens subject to a final order of removal, it does bar claims "challenging the decision to detain them in the first place." *Jennings*, 583 U.S. at 294. Here, Petitioners argue that ICE failed to consider increased administrative burdens, Am. Pet. ¶ 97, and Petitioners' reliance interests, *id.* ¶ 98, when making the operational decision to revoke their order of release. However, they do not challenge the statutory framework for revocation or the extent of ICE's detention authority.[11] Because § 1226(e) precludes review of the discretionary decision to revoke the order of release, Petitioners' APA challenge is barred. *See* 5 U.S.C. § 701(a)(1) (review under the APA is not permitted where "statutes preclude judicial review"). *See, e.g.*, *Williams v. DHS*, No. 22 Civ. 6539, 2023 WL

[11] Petitioners also assert that ICE "failed to consider the serious constitutional concerns raised by revoking Petitioners' release without notice and opportunity to respond." Am. Pet. ¶ 96. This argument repackages their procedural due process claim, and should similarly be denied for the reasons discussed above.

3585849, at *2 (W.D.N.Y. May 22, 2023) ("[T]his Court does not have jurisdiction to review ICE's decision to detain him, rather than release him with an order of supervision.").

The same holds true for Petitioners' *Accardi* claim. Petitioners assert a claim under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), for ICE's alleged failure to follow its own regulations and "unwritten policy" in revoking Petitioners' release on recognizance. *See* Am. Pet. ¶¶ 107-110. This claim should also be denied. "*Accardi* and its progeny teach generally that federal agencies are required to follow their own regulations and some other formally adopted procedures, including those that govern exercises of an agency's discretion." *Diaz v. Rosen*, 986 F.3d 687, 690 (7th Cir. 2021). Petitioners argue that revocation of their release violated agency procedures, specifically a purported unwritten policy of ICE's New York City Field Office of "not detaining noncitizens with pending appeals, in particular adults with children, absent any national security, terrorism, or public safety risks." Am. Pet. ¶ 110; *see also id.* ¶ 33. However, this claim also falls squarely within the preclusion of judicial review at §§ 1226(e) and 1252(b)(9) concerning ICE's decision to detain. Furthermore, ICE (including its New York City Field Office) does *not* have such a policy—whether formally adopted or unwritten—of not detaining noncitizens with pending appeals before the BIA, no matter if they are adults with children, and no matter the public safety risks that may or may not be present. *See* Finnie Decl. ¶ 4. Indeed, ICE "exercises its discretion" when making detention decisions that are not mandatory, and those "custody decisions are made on a case-by-case basis and after considering the totality of circumstances." Finnie Decl. ¶ 5. Accordingly, Petitioners' challenge to ICE's discretionary detention decisions are precluded from review in this habeas matter. *See* 8 U.S.C. §§ 1226(e), 1252(b)(9).

B. Petitioners' Detention Is Permitted by Section 1231(a)(6)

Petitioners' detention is not in excess of statutory authority or *ultra vires* because it is explicitly authorized by statute. The immigration laws authorize ICE to detain aliens subject to

final orders of removal. *See* 8 U.S.C. § 1231(a)(2), (a)(6). As noted above, the Supreme Court has held that aliens subject to final removal orders may be detained for as long as is "reasonably necessary to bring about that alien's removal from the United States." *Zadvydas*, 533 U.S. at 689. The Court concluded that six months was a presumptively reasonable period of time for detention in order to execute a removal order. *Id.* at 701. While it found that this period was presumptively reasonable, the "6-month presumption, of course, does not mean that every alien not removed must be released after six months." *Id.* An alien challenging a post-removal-order detention bears the initial burden of "providing good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future," after which "the Government must respond with evidence sufficient to rebut that showing." *Id.*

Petitioners have been detained for less than two weeks. Thus, any claim that their detention is in excess of statutory authority or *ultra vires* fails. Moreover, Petitioners do not even attempt to meet their threshold burden of showing that removal is not foreseeable. Am. Pet. ¶ 103 (citing *Zadvydas*, 533 U.S. at 699-700). In any event, ICE routinely effectuates removals to El Salvador, and ICE is unaware of any impediments to effectuating Petitioners' removal. *See* Moreno Decl. ¶ 19. Accordingly, Petitioners' claims that their detention is in excess of statutory authority or *ultra vires* should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus should be denied.

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New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c) and Rule 2.B of this Court's Individual Practices, the undersigned counsel hereby certifies that this memorandum complies with the word-count limitations of this Court's Local Civil Rules and the page limits of this Court's Individual Practices. As measured by the word processing system used to prepare it, and excluding the items set forth in the rule, there are 5,987 words in this memorandum.

/s/ David Farber
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