UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RAVIRAJH SIVANANTHARSHA,

Petitioner,

v.

FREDERICK J. ASHKAR II, in his official capacity as Warden of the Broome County Correctional Facility;

JAMES BAUSCH, in his official capacity as Acting Deputy Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement;

PHILIP RHONEY, in his official capacity as Acting Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement;

TODD LYONS, in his official capacity as Acting Director, U.S. Immigration & Customs Enforcement;

PAMELA BONDI, in her official capacity as U.S. Attorney General; and

KRISTI NOEM, in her official capacity as Secretary of Homeland Security,

Respondents.

Civil Action No.
9:26-cv-398 (AJB)

FEDERAL RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2241

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PRELIMINARY STATEMENT

Petitioner Ravirajh Sivanantharsha ("Petitioner") is a citizen and native of Sri Lanka who entered the United States at the southern border in February 2020 without inspection, admission or parole. He is currently in ICE detention pending his removal subject to a final order of removal that has been affirmed by the Board of Immigration Appeals (BIA). Petitioner brings this habeas petition asking the Court to construe his detention as being pursuant to 8 U.S.C. § 1226(a) and order his release. But Section 1226 only applies during removal proceedings, prior to a final order of removal.

The government argues that Petitioner 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 has filed a Petition for Review ("PFR") and a motion for a stay of removal with the Second Circuit, which means that the government is voluntarily and temporarily not pursuing his removal for a limited period of time, under the so-called forbearance policy. Under the forbearance policy, if the government seeks to remove an individual with a pending PFR and stay motion, it need only notify the Second Circuit of its intent to do so, so that the Second Circuit can rule on the motion to stay removal expeditiously. The government has done just that here, asking the Second Circuit to rule on the stay motion by April 1, 2026.

The Petition assumes without discussion or analysis that the forbearance policy is synonymous with a court-ordered stay, thereby delaying the conversion of Petitioner's detention to Section 1231. But that is an open question in the Second Circuit and seemingly a question of first impression in this Court. Other district courts in the Second Circuit are split on the question.

The government submits that reading the forbearance policy to be a stay – particularly here, where the government has notified the Second Circuit of its intent to effectuate removal imminently – flies in the face of the text of the INA and Congress's intent in passing it. Accordingly, the government invites this Court to join the others that have concluded that the forbearance policy does not equate to a court-ordered stay, and an individual subject to the forbearance policy who has not obtained a court-ordered stay of removal is detained pursuant to 8 U.S.C. § 1231.

If Petitioner is detained pursuant to Section 1231, his detention is lawful under *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), as it was presumptively reasonable for six months following the BIA's dismissal of his appeal (i.e., through February 22, 2026), after which Petitioner may challenge continued detention only if he can show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.* He cannot make such a showing here, because DHS is prepared to remove him imminently.

FACTUAL BACKGROUND

Petitioner is a native and citizen of Sri Lanka who entered the United States at the southern border without inspection, admission, or parole and was encountered by a U.S. Border Patrol agent on or about February 11, 2020. Declaration of Mitchell Carosa ("Carosa Decl.") at ¶ 4, Ex. A at 1-3. Petitioner was processed for expedited removal with a claim of fear. *Id.* at ¶ 5, Ex. A at 1-3. On or about March 18, 2020, after an asylum officer determined that Petitioner had demonstrated a credible fear of persecution or torture, Petitioner was served with a Form I-862, Notice to Appear in immigration court. *Id.* at ¶ 5, Ex. A at 4-5.

The Notice to Appear charges Petitioner under Immigration and Nationality Act (INA) § 212(a)(7)(A)(i)(I) as an immigrant who, at the time of application for admission, was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid

entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act; and under INA § 212(a)(6)(A)(i) as being an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* at ¶ 6, Ex. A at 4.

On April 16, 2020, an immigration judge ordered Petitioner released from custody under bond of $6500. *Id.* at ¶ 7, Ex. A at 6. Petitioner subsequently filed a Form I-589 Application for Asylum and Withholding of Removal and for protection under the Convention Against Torture (CAT). *Id.* at ¶ 8. On September 10, 2021, an immigration judge denied Petitioner's application and ordered him removed. *Id.* at ¶ 9, Ex. A at 14. Petitioner filed a Notice of Appeal with the Board of Immigration Appeals. *Id.*

On July 19, 2025, immigration officers took Petitioner back into custody. Ex. A at 7-11. According to From I-213 Record of Deportable/Inadmissible Alien executed by an immigration officer that day, agents and/or officers with ICE Enforcement and Removal Operations (ERO), Homeland Security Investigations (HSI) and the Internal Revenue Service (IRS) were conducting surveillance on a residence in Buffalo, New York during a targeted enforcement action directed at an individual other than Petitioner. Ex. A to Carosa Decl. at 8. An individual matching the description of the target of the investigation was seen leaving the residence with Petitioner. *Id.* Officers approached the two males and identified themselves as law enforcement officers. A records check on Petitioner revealed that he had been ordered removed on September 10, 2021. *Id.* Petitioner was arrested and transported to the Buffalo Field Office for processing. *Id.*

On August 22, 2025, the BIA dismissed Petitioner's appeal. Carosa Decl. ¶ 11, Ex. A at 12-17. On September 12, 2025, Petitioner filed a Petition for Review (PFR) with the United States

Court of Appeals for the Second Circuit. *Id.* at ¶ 12; *Sivanantharsha v. Bondi*, 25-2207 (2d Cir.). On September 22, 2015, he filed a motion for stay of removal pending adjudication of the PFR, *see id.* at Dkt. #8, which the government opposed, *see id.* at Dkt # 12. As of the date of this filing, that motion remains pending.

On September 25, 2025, an immigration judge denied Petitioner's request for bond pursuant to *Matter of Hurtado*, 29 I&N Dec. 216 (BIA 2025) and also because his "case has been heard and denied by both an Immigration Judge and the Board of Immigration Appeals." Carosa Decl. at ¶ 13, Ex. A at 18-19.

On February 11, 2026, ICE issued a "Decision to Continue Detention" stating that it reviewed Petitioner's custody status and determined that he would not be released from ICE custody at that time. *Id.* ¶ 14, Ex. A at 20-23.

DHS has obtained a travel document for Petitioner's removal and is prepared to effectuate his removal to Sri Lanka. *Id.* ¶ 15. Due to the Second Circuit "forbearance agreement," DHS agreed to "forbear" Petitioner's removal due to Petitioner having filed a PFR and stay motion before the Second Circuit. *Id.* As part of the "forbearance agreement," if DHS wishes to remove an individual with a pending PFR and stay motion, the Department of Justice will file a notice with the Second Circuit notifying the Court of DHS's intent to move forward with removal. On March 4, 2026, the Department of Justice filed notice with the Second Circuit notifying the Court of DHS's intent to remove Petitioner and requesting an expedited decision, by April 1, 2026, of Petitioner's motion for a stay of removal. *Id.*; *Sivanantharsha v. Bondi*, 25-2207, at Dkt. #18; Ex. A to Declaration of Karen Folster Lesperance.

STATUTORY AND LEGAL FRAMEWORK

I. Detention Authority During Removal Proceedings: Sections 1225 and 1226

Statutory detention authority for aliens who are in pending removal proceedings can be found in either 8 U.S.C. § 1225 or 8 U.S.C. § 1226. Section 1225 generally mandates detention, without the possibility of bond, for the duration of removal proceedings for certain aliens who come within its scope. Section 1226(a) gives the Government discretion after the arrest of an alien believed to be removeable, but not subject to mandatory detention under Section 1225, to either detain the alien or release him on bond or conditional parole. By contrast, Section 1226(c) mandates detention for the duration of removal proceedings where the alien has committed one of the specifically enumerated offenses identified in that provision.

In *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), and later, in *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), the Second Circuit held that detainees subject to detention under § 1226(a) and § 1226(c), respectively, are entitled to a bond hearing at which the government bears the burden of proof to show that their continued detention is justified, once their original detention has become "prolonged."

II. Detention Authority After Final Notice of Removal: Section 1231

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. 8 C.F.R. § 1241.1(a); *Godfrey v. Ball*, No. 23-7104, 2024 WL 4471571, at *2 (2d Cir. Oct. 11, 2024) (citing *Johnson v. Guzman Chavez*, 594 U.S. 523, 528,

534–35 (2021)). 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); *Lucce v. Freden*, No. 25-CV-6342-MAV, 2025 WL 3214485, at *2 (W.D.N.Y. Nov. 18, 2025).

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). Filing 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") (emphasis added); 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.***") (emphasis added).

Generally, once the order of removal becomes administratively final it will also trigger the "removal period," pursuant to 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 mandated by statute. *Id.* at § 1231(a)(2)(A) ("During the removal period, the Attorney General shall detain the alien."). If, however, 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).

After the initial 90-day removal period, during which detention is mandatory, Section 1231(a)(6) allows the Government to "detain[] beyond the removal period" certain categories of aliens who have been "ordered removed." This includes those who are "inadmissible under section 1182 of this title." 8 U.S.C. § 1231(a)(6); *see also Johnson v. Arteaga-Martinez*, 596 U.S. 573, 579 (2022). "Section 1231(a)(6) does not expressly specify how long detention past the 90-day

removal period may continue for those who fall within the four designated statutory categories." *Arteaga-Martinez*, 596 U.S. at 579. However, the Supreme Court has determined that detention remains presumptively valid for a period of six months. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). In *Zadvydas*, the Supreme Court interpreted § 1231(a)(6) to limit an alien's detention beyond the 90-day to the period "reasonably necessary to bring about the alien's removal from the U.S.," which it found could extend to six months and remain presumptively reasonable. *Id.* Only after the six-month period of detention would an alien be entitled to release, and even then only if they could show "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

ARGUMENT

I. Petitioner's Detention is Authorized by 8 U.S.C. § 1231.

Petitioner's order of removal became "administratively final" on August 22, 2025, when the BIA dismissed his appeal. *See Godfrey v. Ball*, No. 23-7104, 2024 WL 4471571, at *2 (2d Cir. Oct. 11, 2024) ("Once the BIA affirms an immigration judge's [] decision ordering removal and resolving all applications for relief from removal, an order of removal becomes administratively final.") (citing *Johnson v. Guzman Chavez*, 594 U.S. 523, 528, 534–35 (2021)). As such, the authority for his detention transitioned to 8 U.S.C. § 1231 as of that date. *See* 8 U.S.C. § 1231(a)(1)(A); *Wang v. Ashcroft*, 320 F.3d 130, 145 (2d Cir. 2003) (noting that Section 1231 "governs the detention of non-citizens subject to final orders of removal); *Guzman Chavez*, 594 U.S. at 533 ("Section 1231 . . . authorizes detention 'when an alien is ordered removed' and enters the 'removal period'").

Petitioner acknowledges as much but argues that this Court should construe his detention as being under Section 1226(a) because "a stay of removal is currently in place under the

forbearance policy." Petition at ¶ 44, ECF 2 at 11. For all the reasons discussed below, the Court should reject Petitioner's contention that the forbearance policy equates to a court-ordered stay.

A. The Forbearance Policy

The statutory framework described in the preceding section 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). Significantly, prior to the enactment of the IIRIRA, the filing of a PFR resulted in an automatic, statutory stay of removal because an alien would be precluded from seeking judicial review of a removal order upon departing the country. *Dorville v. Searls*, No. 23-CV-6075 (CJS), 2023 WL 4107981, at *5 (W.D.N.Y. June 21, 2023). The IIRIRA changed this process by allowing for adjudication of a PFR even after removal, and thus an automatic stay of removal became unnecessary (and was therefore eliminated by the new law). *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 Decl.[1] at pg. 1.

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[1] Submitted herewith is a Declaration of Brandon M. Waterman, an Assistant United States Attorney for the Southern District of New York, dated August 19, 2016, that was submitted to the Second Circuit in *Rone v. Shanahan*, Dkt. No. 16-1541 (2d Cir. 2016). Attached to the Waterman Declaration are the documents that together comprise the "forbearance agreement" between DHS and the Second Circuit. *See also In re Immigration Petitions for Review Pending in the U.S. Court of Appeals for Second Circuit*, 702 F.3d 160, 162 (2d Cir. 2012).

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 McConnel, 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 policy would continue as described by Judge Newman, but also noted that ICE may unilaterally decide that some petitions fall outside of the policy, 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 policy is so evident as to make any period of automatic forbearance unreasonable. 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.*

B. The Forbearance Policy is Not a Stay.

In *Hechavarria v. Sessions*, 891 F.3d 49 (2d Cir. 2018), the Second Circuit addressed the question whether an immigrant who had a pending PFR challenging his final order of removal was detained under Section 1226 or 1231 – the same question raised by Petitioner here. However,

unlike here, in *Hechavarria* the Second Circuit had granted a motion to stay the order of removal. *See id.* at 52. The Court concluded that Hechavarria's detention could not be pursuant to Section 1231 because, under the plain language of the statute, the Section 1231 removal period "begins at the latest of three possible scenarios, one of which is when ***a court*** issues its final order ***after having issued a stay***. We granted Hechavarria a stay and have not yet issued our final order regarding his petition for review. Thus, Hechavarria is not yet in a position that falls within 8 U.S.C. § 1231 and that statute does not apply." *Id.* at 56 (emphasis added). This is consistent with the language of the statute itself, which delays the start of the removal period (and thus Section 1231 detention) "if a ***court*** orders a stay of the removal of the alien." 8 U.S.C. § 1231(a)(1)(B)(ii) (emphasis added).

The *Hechavarria* court expressly noted that its analysis did not extend to those scenarios in which the Court had not issued a stay but DHS was voluntarily delaying removal pursuant to the forbearance policy: "Because we review Hechavarria's habeas petition after this Court has issued a stay of removal in his underlying petition for review, we need not decide 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. *See also Godfrey v. Ball*, No. 23-7104, 2024 WL 4471571, at *2 (2d Cir. Oct. 11, 2024) (dismissing as moot without deciding whether detention was under § 1231 where an order of removal was administratively final and petitioner had not received a court-ordered stay of removal, where Second Circuit subsequently denied PFR, which would have reverted detention to Section 1231 in any event); *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.").

This is a question of first impression in the Northern District of New York. The government urges this Court to adopt the reasoning of the Western District of New York's recent decision in *Loachamin v. Kurzdorfer*, 792 F.Supp.3d 353 (W.D.N.Y. July 24, 2025). First, as that Court noted, the "plain language of the INA requires that a "stay" must be "court-ordered" *Id.* at 359 (citing 8 U.S.C. § 1231(a)(1)(B)(ii)). Regardless of its practical effects, "an informal, Executive Branch policy not to remove aliens in certain situations" is not a court-ordered stay. *Id.* "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* (citing *Hechavarria*, 891 F.3d at 55 (citing *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.* 469 U.S. 189, 194 (1985))).

Second, the *Loachamin* court correctly concluded that the view espoused by the government is supported by the legislative history of the INA. When Congress passed the Immigration Reform and Immigrant Responsibility Act of 1996, it made the decision to repeal the presumption of an automatic stay pending judicial review of aa PFR. *See id. (*citing *Nken v. Holder*, 556 U.S. 418, 424–25 (2009)). Congress chose to "replace[] that presumption with the *requirement that the court of appeals expressly order a stay.*" *Id.* (quoting *Narain*, 2020 WL 95425, at *4 (emphasis added)).

Several other courts have likewise concluded that the forbearance policy is not the "functional equivalent" of a stay, and is not sufficient in the absence of a court-ordered stay to revert detention authority to Section 1226. *See, e.g., Dorville v. Searls*, No. 23-CV-6075, 2023 WL 4107981, at *4 (W.D.N.Y. June 21, 2023) (noting Court 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."); *Brathwaite v. Barr*, 475 F. Supp. 3d 179, 186 (W.D.N.Y. 2020) ("In sum, this policy, or agreement, or understanding is not and does not purport to be a stay"); *Narain v. Searls*, No. 19-CV-6361, 2020 WL 95425, at *3–4 (W.D.N.Y. Jan. 8, 2020). *See also Jean A. v. Dep't of Homeland Sec.*, No. 19-13951 (SDW), 2019 WL 6318305, at *2 (D.N.J. Nov. 26, 2019) ("As this Court and other courts in this district have consistently held, the forbearance agreement is not a court ordered stay and is therefore insufficient to revert a Petitioner's detention to pre-final order status.") (collecting cases); *Rone v. Aviles*, No. 15-3798 (KM), 2016 WL 158521, at *5 (D.N.J. Jan. 13, 2016) ("Several district courts within the Third Circuit have found that the Second Circuit's forbearance policy does not convert a petitioner's immigration detention status from Section 1231 to Section 1226.") (collecting cases).

To be clear, many district courts within the Second Circuit have concluded otherwise. Indeed, a recent decision from the Eastern District of New York followed what it described as an "overwhelming majority of courts in this Circuit" that have found that the Second Circuit's forbearance policy "amounts to a 'court ordered stay of removal of the alien.'" *Singh v. Francis*, No. 26-CV-00344 (OEM), 2026 WL 507890, at *3 (E.D.N.Y. Feb. 24, 2026) (citing *Rodriguez Sanchez v. Decker*, 431 F. Supp. 3d 310, 314 (S.D.N.Y. 2019); *Falodun v. Session*, 6:18-cv-06133-MAT, 2019 WL 6522855, at *5 (W.D.N.Y. Dec. 4, 2019); *Doe v. Decker*, 21 Civ. 5257 (LGS), 2021 WL 6066015, at *2 n.1 (S.D.N.Y. Nov. 19, 2021) (collecting cases)).

However, most of these cases have based their conclusion on a reading of *Hechavarria* to equate the forbearance policy with a judicially ordered stay of removal. *See, e.g., Sankara v. Whitaker*, No. 18-CV1066, 2019 WL 266462, at *4 (W.D.N.Y. Jan. 18, 2019). The Second Circuit

noted its reliance on "[t]he unambiguous language of the statute," which requires a court-ordered stay. *Hechavarria*, 891 F.3d at 55. The *Hechavarria* court nonetheless 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.* Many 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.

In addition, this Court has described DHS as being "precluded" from removing an alien due to the forbearance policy, 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 policy 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 policy 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). This is particularly so here, where DHS has in fact given the Second Circuit notice of its intent to remove Petitioner, so that the Court may act on Petitioner's motion to stay if it chooses. *See Sivanantharsha v. Bondi*, 25-2207, at Dkt. #18; Ex. A to Declaration of Karen Folster Lesperance.

Thus, this Court should conclude that because Petitioner has not obtained a court-ordered stay of his order of removal, his detention is pursuant to Section 1231. The Petition should be

denied accordingly.

C. In the Absence of a Court-Ordered Stay, Petitioner is Significantly Likely to Be Removed in the Reasonably Foreseeable Future

In *Zadvydas v. Davis*, the Supreme Court held that section 1231(a)(6) "authorizes the Attorney General to detain a removable alien ... only for a period reasonably necessary to secure the alien's removal." *Id.* at 682. "[O]nce removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court recognized a six-month "presumptively reasonable period of detention." *Id.* at 701. "[A]fter that, the alien is eligible for conditional release if he can demonstrate that there is 'no significant likelihood of removal in the reasonably foreseeable future.'" *Clark v. Martinez*, 543 U.S. 371, 378 (2005) (quoting *Zadvydas*, 533 U.S. at 701).

The "6–month presumption, of course, does not mean that every alien not removed must be released after six months." *Zadvydas*, 533 U.S. at 701. "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, *Zadvydas* "places an initial burden on the detainee" to establish that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 701.

Here, Petitioner's order of removal became final on August 22, 2025, when the BIA dismissed his appeal. The six-month "presumptively reasonable" period under *Zadvydas* therefore extended until February 22, 2026. On March 4, 2026 – just ten days later – DHS notified the Second Circuit of its intent to remove Petitioner, indicating it had obtained a travel document to effectuate his removal. *Sivanantharsha v. Bondi*, 25-2207, at Dkt. #18; Ex. A to Lesperance Decl. The Petition does not allege, let alone demonstrate, "good reason to believe," that there is no

significant likelihood of removal in the reasonably foreseeable future. However, even if Petitioner had made the requisite showing, the government's notice of intent to remove rebuts that showing.

At present, the only impediment to immediate removal, other than the Temporary Restraining Order entered in this proceeding, is the Petitioner's filing of a PFR, which triggered application of the forbearance policy. If the Second Circuit denies Petitioner's motion for a stay, or fails to rule on that motion by April 1, 2026, DHS is prepared to effectuate Petitioner's removal thereafter. Carosa Decl. at ¶ 15; *Sivanantharsha v. Bondi*, 25-2207, at Dkt. #18; Ex. A to Lesperance Decl. "For obvious reasons, a noncitizen's use of the American judicial process, to the extent it delays removal, does not warrant release under *Zadvydas*. *Portillo v. Decker*, No. 21 Civ. 9506 (PAE), 2022 WL 826941, at *5 (S.D.N.Y. Mar. 18, 2022). *See also Jimenez v. Searls*, No. 23-CV-379 (JLS), 2024 WL 1286039, at *3 (W.D.N.Y. Mar. 25, 2024) ("Of course, [Petitioner] may pursue the full range of process provided to him. But 'a self-inflicted wound should not establish grounds for [his] Zadvydas claim.'").

II. If the Court Rules That Petitioner is Detained Pursuant to Section 1226, the Appropriate Remedy is a Bond Hearing.

The government maintains that Petitioner's detention is lawful under 8 U.S.C. § 1231, for all the reasons discussed above. However, if this Court disagrees and finds that Petitioner is detained under Section 1226, the appropriate remedy is a bond hearing and not immediate release.

Petitioner argues that he should be released because he had already been released on a $6500 bond that was still in effect. Petition at ¶ 69; ECF 2 at 20. But this bond, set in April 2020, was to secure his appearance in immigration court for his removal proceedings. Carosa Decl. Ex. A. at 6. Those proceedings terminated in the denial of his asylum petition and the issuance of an

order of removal. This was a substantial change in circumstance from his initial detention in February 2020 and release on bond in April 2020.

Petitioner was subject to an order of removal when he was detained in July 2025. He was served with a warrant containing the reasons for his arrest. Ex. A to Carosa Decl. at 11. Section 1226(a) states, in relevant part, as follows: "On a warrant issued by the Attorney General, an alien may be arrested and detained" while removal proceedings are pending, and the Attorney General "(1) may continue to detain the arrested alien; and (2) may release the alien on (A) bond . . . or conditional parole" until removal proceedings conclude. 8 U.S.C. § 1226(a). Section 1226(a) thus is permissive, not mandatory, and affords the Attorney General a choice: to continue to detain the noncitizen, or to allow a bond hearing or conditional parole. *See id.*; *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 526-27 (2021) (recognizing permissive nature of § 1226(a)); *Jennings* v. Rodriguez, 583 U.S. 281, 306 (2018) ("Section 1226(a) creates a default rule . . . *permitting—but not requiring*—the Attorney General to issue warrants . . . [and] release . . . on bond" (emphasis added)). In either event, the statute contemplates that any bond hearing *follows* detention.

The fact that Petitioner was issued a warrant distinguishes this case from *Rodriguez-Acurio v. Almodovar*, No. 2:25-cv-6065 (NJC), 2025 WL 3314420, at *31 (E.D.N.Y. Nov. 28, 2025), upon which this Court relied in *Alvarez v. Philips*, 9:26-cv-0058 (Feb. 17. 2026), Dkt. #11 at 8-9. In that case, the court ordered immediate release because the detention was "unlawful from its inception," as "ICE detained [the petitioner] under the wrong statute and without any notice or opportunity to be heard, *much less the procedures required under Section 1226(a)*." *Id.* (emphasis added). In other words, the *Rodriguez-Acurio* court reasoned that affording the petitioner the procedures due under § 1226(a) was not an adequate remedy when ICE had not followed § 1226(a)'s procedures in the first place. Here, by contrast, even Petitioner – who had been ordered removed --- was arrested

"[o]n a warrant." 8 U.S.C. § 1226(a). Those facts thus distinguish this case from *Rodriguez-Acurio* and Alvarez, and cut against Petitioner's request for immediate release.

CONCLUSION

For these reasons, the Federal Respondents respectfully request that this Court enter an Order denying the Petition for a Writ of Habeas Corpus.

Dated: March 23, 2026

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