**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| Pablo Antonio VILLAVICENCIO CALDERON,<br><br>Petitioner,<br><br>- against -<br><br>Jefferson B. SESSIONS III, *et al.*,<br><br>Respondents. | 18 Civ. 5222 (PAC) |

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

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The government, by its attorney Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to the petition for a writ of habeas corpus (ECF No. 1) filed on June 11, 2018, by petitioner Pablo Antonio Villavicencio Calderon.

**PRELIMINARY STATEMENT**

Petitioner is an Ecuadoran national who unlawfully entered the country in 2008 by wading across the Rio Grande. During removal proceedings in 2010, at Petitioner's own request, an immigration judge granted Petitioner voluntary departure from the United States in lieu of a final removal order. Petitioner failed to depart voluntarily as required, and his grant of voluntary departure automatically converted to a final order of removal to Ecuador. Over the next eight years, despite his final order of removal, Petitioner has resided in this country. He married a U.S. citizen and fathered two U.S.-citizen children. Nevertheless, he remains subject to his removal order. Petitioner presumably is aware of that order; less than four months ago, he unsuccessfully moved in the immigration court to reopen his underlying proceedings.

On June 1, 2018, while working for a restaurant, Petitioner attempted to deliver a food order to the U.S. Army garrison at Fort Hamilton in Brooklyn, New York. In order to enter the post, Petitioner voluntarily submitted to a background check, which showed an outstanding warrant of deportation. After contacting U.S. Immigration and Customs Enforcement ("ICE"), the garrison's police officers held Petitioner until ICE officers arrived and took him into custody. Petitioner has been detained at the Hudson County Jail in Kearny, New Jersey pending removal to Ecuador. While detained in New Jersey, petitioner filed the instant habeas petition. It appears that he seeks a stay of removal, release from ICE custody, and relief under the Administrative Procedure Act ("APA").

As discussed below, this Court lacks jurisdiction over Petitioner's request for a stay of removal. The Immigration and Nationality Act ("INA"), as amended over the years, expressly strips the federal courts of jurisdiction to entertain claims arising from the execution of removal orders, and strips the district courts of jurisdiction to entertain challenges to final removal orders—channeling such challenges to the courts of appeals. Similarly, the Court lacks jurisdiction under the INA to stay the enforcement of Petitioner's final removal order. For the same reason, judicial review of Petitioner's APA claim also is precluded.

To the extent Petitioner challenges his detention, the proper venue for that claim is the District of New Jersey, not this Court. The Supreme Court has held that jurisdiction to entertain a prisoner's habeas challenge to present physical custody lies in one district: the district of confinement. This rule is applicable to a habeas challenge to immigration detention, as the vast majority of Judges in this district have found. In the alternative, Petitioner's detention claim fails on the merits because his detention pending removal, which has lasted less than one month, is permissible under the INA.

The government recognizes that Petitioner's detention has aroused widespread public interest and sympathy, and we acknowledge that in some respects Petitioner's and his family's circumstances are compelling. Nevertheless, Petitioner is in the United States unlawfully, and is already subject to a valid order of removal. He also disregarded a grant of voluntary departure from an immigration judge—a privilege that Petitioner himself requested. And he is not entitled to relief from this Court. Accordingly, the Court should dismiss the petition in its entirety or, in the alternative, dismiss Claims 3, 4, and 5, and transfer the remainder of the petition to the United States District Court for the District of New Jersey.

## STATEMENT OF FACTS

### A. Petitioner's Immigration History

Petitioner is an Ecuador national who was born in 1983. Pet, Ex. 6. He entered the United States unlawfully on December 4, 2008, by wading across the Rio Grande in Texas. Gov't Return ("Ret."), Ex. A at 2 (Form I-213). DHS apprehended Petitioner and neither admitted nor paroled him into the country because he entered without valid entry documentation. Decl. of Deportation Officer Richard E. Brown dated June 25, 2018 ("Brown Decl.") ¶¶ 4-5; Ret., Ex. A at 2. On the next day, December 5, 2008, ICE began detaining Petitioner in Texas. *Id.* ¶ 5.

On January 30, 2009, ICE served Petitioner with a Notice to Appear ("NTA"), the charging document used to commence removal proceedings. Ret., Ex. B (NTA); Brown Decl. ¶ 5. The NTA charged Petitioner under 8 U.S.C. § 1182(a)(7)(A)(i)(I) as a removable alien present in the United States who had not been admitted or paroled, and who lacked valid entry documentation. *Id.* On February 9, 2009, ICE made an initial custody determination and granted Petitioner release on $7,000 bond. *See* 8 U.S.C. § 1226(a)(2)(A); 8 C.F.R. § 236.1; Ret., Ex. C (Form I-286); Brown Decl. ¶ 6. At that time, Petitioner was served with a warrant for arrest, indicating that he was liable to being detained under 8 U.S.C. § 1226(a). *See* Ret., Ex. D (Form I-200). On February 12, 2009, ICE released Petitioner after the bond was posted. Brown Decl. ¶ 6.

On July 2, 2009, Petitioner, who was represented by counsel, filed a pleading in the immigration court in which he conceded the factual allegations and the charge of removability in the NTA, but stated his intention to seek relief from removal. Ret., Ex. E (Motion to Change Venue); Brown Decl. ¶ 7.

By order dated March 17, 2010, Immigration Judge ("IJ") Mary M. Cheng, sitting in New York, New York, determined that Petitioner was removable on the charges in the NTA. Ret., Ex. F (IJ Order). IJ Cheng's order noted that Petitioner had requested voluntary departure in lieu of removal. *Id.*; Brown Decl. ¶ 8. The IJ granted that relief, and ordered Petitioner to depart voluntarily no later than July 15, 2010. *Id.* The IJ's order provided if Petitioner failed to depart voluntarily as required, the grant of voluntary departure would be withdrawn without further notice or proceedings, and Petitioner automatically would be ordered removed to Ecuador on the charges in the NTA. *Id.* Both parties waived appeal of the IJ's order to the Board of Immigration Appeals ("BIA"). *Id.*

Despite requesting, and obtaining, the privilege of voluntary departure, *see Fan Wan Keung v. INS*, 434 F.2d 301, 304 (2d Cir. 1970); *see also, e.g., Garcia-Lopez v. INS*, 923 F.2d 72, 75 (7th Cir. 1991) ("Voluntary departure . . . is a privilege, not a right."), it is undisputed that Petitioner failed to depart the United States after the IJ granted his request. *See* Pet. ¶ 44.[1] Accordingly, Petitioner became subject to a final order of removal to Ecuador. *See* Ret., Ex. F.

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[1] An immigration judge may grant an alien permission to voluntarily depart the United States at his own expense in lieu of a removal order. 8 U.S.C. § 1229c(a)(1). In return for departing within the time afforded for voluntary departure, an alien avoids the adverse consequences of a removal order. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(A)(ii) (2000) (rendering inadmissible for 10 years an alien who has been ordered removed from the United States); *Dada v. Mukasey*, 554 U.S. 1, 11 (2008) (discussing the benefits of voluntary departure). An alien granted voluntary departure who fails to depart within the prescribed period is subject to an alternative order of removal. *See* 8 C.F.R. § 1240.26(d).

On or about February 20, 2018, Petitioner, through counsel, submitted a motion to the immigration court to reopen his removal proceedings. Ret., Ex. G (cover page of motion); Brown Decl. ¶ 10. On March 19, 2018, IJ Alice Segal denied the motion as untimely. Ret., Ex. H (IJ Order); Brown Decl. ¶ 10. In her decision, IJ Segal summarized petitioner's immigration history: "The respondent was last before this Court on March 17, 2010, at which time he applied for voluntary departure. He was ordered to depart the United States on or before July 15, 2010, but failed to depart as ordered." Ret., Ex. H.

**B. ICE Attempts to Execute Petitioner's Final Removal Order**

On June 1, 2018, less than four months after the IJ denied his motion to reopen his proceedings, Petitioner was working as a deliveryman for a restaurant. Pet. ¶ 52. On that day, Petitioner attempted to gain access to U.S. Army Garrison Fort Hamilton, in Brooklyn, New York, to drop off a delivery of meals for a function at the Fort. Decl. of Rodney Stafford, dated June 25, 2018 ("Stafford Decl.") ¶ 3.

When he arrived at the Fort's Visitor Control Center ("VCC"), Petitioner was assisted by Rodney Stafford, a security assistant. *Id.* ¶ 4. Petitioner was provided with a NCIC III-Background Consent/Waiver form and asked to complete it in order to enter the post and complete his delivery. *Id.* ¶ 4. Petitioner completed the background check waiver without objection and signed it. *Id.* ¶ 5 & Ex. A. Mr. Stafford noticed that Petitioner's social security number was missing from the form, and questioned Petitioner regarding the omission. *Id.* ¶ 6. The background-check response indicated an outstanding warrant of deportation from the United States. *Id.* ¶ 8. Mr. Stafford checked the documents that Petitioner gave him, including Petitioner's Maryland driver's license, in order to verify that Petitioner was the same individual referenced in

the result of the background check. *Id.* ¶¶ 7, 9. At that point, Mr. Stafford stepped into another room, telephoned the Fort's Directorate of Emergency Services ("DES"), and informed DES of the situation. *Id.* ¶ 10.

Shortly thereafter, federal police officers Detective Lyndon Inglis and Sergeant Robert Venezia arrived at the VCC. Decl. of Det. Lyndon Inglis, dated June 25, 2018 ("Inglis Decl.) ¶¶ 1, 4. Detective Inglis reviewed the background-check response and then called the ICE Law Enforcement Service Center ("LESC") to discuss the situation. *Id.* ¶¶ 5-6. After receiving a photograph of Petitioner by e-mail from LESC, Sergeant Venezia confirmed that the photograph matched the individual sitting in the waiting area of the VCC. *Id.* ¶ 6. ICE LESC asked Detective Inglis if Petitioner was carrying any New York identification; at that point, another officer asked Petitioner for additional identification, and he produced a New York City identification card. *Id.* ¶ 7. Detective Inglis confirmed Petitioner's identity to the representative from ICE LESC, who informed Detective Inglis to wait for a follow-up call. *Id.* ¶ 8.

Detective Inglis subsequently received a call from an ICE Field Office. *Id.* ¶ 9. The ICE representative informed Detective Inglis that ICE personnel would arrive at the Fort to take Petitioner into custody, and indicated that Petitioner should be held. *Id.* Detective Inglis and another officer drove Petitioner from the VCC to the DES. *Id.* ¶ 11. They placed him in a single-hand restraint in an area not accessible to the general public and waited for ICE officers to arrive. *Id.* ¶ 11.

Meanwhile, LESC informed ICE Deportation Officer ("D.O.") Eriberto Cedeno, who then informed D.O. Richard E. Brown, that Petitioner had been detained at Fort Hamilton. Brown Decl. ¶ 11. D.O. Brown examined an email from LESC containing background information gathered at Fort Hamilton. *Id.* After confirming that the

information matched ICE's records for Petitioner, D.O. Brown verified that Petitioner was subject to a final order of removal. *Id.* D.O. Brown's supervisor then instructed D.O. Brown to take Petitioner into ICE custody. *Id.*

D.O. Brown and D.O. Cedeno drove to Fort Hamilton and met a point of contact who allowed them into the building where Petitioner was being held. *Id.* ¶ 12. After identifying himself, D.O. Brown spoke to Petitioner and verified his name, date of birth, and country of citizenship. *Id.* D.O. Brown asked Petitioner if he knew that he had been granted voluntary removal, and Petitioner replied in the affirmative. *Id.* D.O. Brown informed Petitioner that he would be taken into ICE custody in connection with his final order of removal. *Id.*

The ICE officers then transported Petitioner to the ICE office at 26 Federal Plaza in Manhattan for processing. *Id.* ¶ 13. He then was transported to the Hudson County Jail in Kearny, New Jersey pending execution of his final removal order by removal to Ecuador. *Id.* ¶ 14. Petitioner has been detained there since his arrest. *Id.*

On Saturday, June 9, 2018, Petitioner submitted the instant habeas petition to the Court, which docketed the petition on June 11, 2018 (ECF No. 1). The petition challenges Petitioner's detention under the INA, Due Process Clause, and APA and seeks a stay of removal and release, or a hearing before an immigration judge to challenge his detention. On June 9, the Court heard Petitioner's counsel in person, and, at oral argument in Part One before Judge Nathan, Petitioner's counsel repeatedly confirmed that Petitioner was not challenging his underlying final removal order. *See* Ret., Ex. I (June 9 transcript) 6:20-21, 10:25-11:6, 11:20-22; 14:5-10. Judge Nathan, *inter alia*, temporarily restrained any transfer of Petitioner out of the New York area pending further briefing of the habeas petition (ECF No. 6).

## ARGUMENT

### I. TO THE EXTENT THE PETITION SEEKS A STAY OF REMOVAL, THE COURT LACKS JURISDICTION TO GRANT THE REQUESTED RELIEF

Petitioner seeks a stay of removal in Claims 3 and 4 of the petition and relief under the APA in Claim 5. *See, e.g.*, Pet. ¶ 82, 85, 88. Neither form of relief is legally available. First, as to removal, under the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") and the REAL ID Act of 2005, the Court would lack jurisdiction over a challenge by petitioner to his final removal order, if he were making such a challenge. *See* 8 U.S.C. § 1252(a)(5), (b)(9). To the extent any of the claims in the petition seek an order from this Court staying Petitioner's final order of removal, the Court similarly lacks jurisdiction to grant that relief.

The Supreme Court has explained that "*many* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) ("*AADC*") (emphasis in original). The relevant statutory language stripping the federal courts of jurisdiction to adjudicate challenges to the execution of removal orders could not be clearer:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this chapter.

8 U.S.C. § 1252(g) (emphasis added).[2] By its plain terms, section 1252(g) broadly eliminates subject matter jurisdiction (except as otherwise provided in section 1252) for

[2] The authority discussed in the statute was transferred from the Attorney General to the Secretary of Homeland Security pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, which created DHS and assigned or transferred to

"any cause or claim" "arising from" decisions to commence proceedings, adjudicate cases, or execute removal orders. Any claim in the petition that seeks a stay of removal "aris[es] from" DHS's decision to execute petitioner's final removal order. Accordingly, section 1252(g) bars any request by Petitioner for a judicial stay of removal.

Other provisions of 8 U.S.C. § 1252 also eliminate district court subject-matter jurisdiction over Petitioner's request for a stay of removal. Specifically, section 1252(b)(9) bars district courts from reviewing claims arising from removal proceedings:

> With respect to review of a final order of removal under subsection (a)(1), . . . [j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction . . . to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). This provision is the "unmistakable 'zipper' clause" that "channels judicial review of *all* [claims arising from deportation proceedings]" to a court of appeals in the first instance. *AADC*, 525 U.S. at 483. Section 1252(a)(5), in turn, provides for exclusive jurisdiction in the appropriate court of appeals:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter.

8 U.S.C. § 1252(a)(5). These provisions deprive the Court of jurisdiction to entertain any request by petitioner for a stay of his removal because such a claim "aris[es] from any action taken or proceeding brought to remove an alien from the United States."

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the Secretary many of the functions previously exercised by the Attorney General. *See id.* tit. IV, § 441, 116 Stat. at 2192; *see also* 6 U.S.C. § 251(2) (detention and removal).

8 U.S.C. § 1252(b)(9). Such claims (including any constitutional claims) must be pursued in the court of appeals. *See* 8 U.S.C. §§ 1252(a)(5), (d)(1).

The Supreme Court's interpretation of section 1252(g) as set forth in *AADC* alone requires dismissal for lack of jurisdiction. As here, the question before the Supreme Court was whether the plain language of section 1252(g) deprived the federal courts of jurisdiction over respondents' suit. *AADC*, 525 U.S. at 473. The Court ruled that it did. *Id.* at 485-87. In reaching that conclusion, the Supreme Court interpreted section 1252(g) narrowly, explaining that it does not strip federal court jurisdiction with respect "to all claims arising from deportation proceedings." *Id.* at 482. But with respect to the "three discrete actions" identified in the text of section 1252(g)—commencement of proceedings, adjudication of cases, and execution of removal orders—the Court held that section 1252(g) does indeed strip jurisdiction. *Id.* And with good reason: the actions identified in section 1252(g) are committed to the discretion of the Executive, and section 1252(g) was designed to protect that discretion and avoid the "deconstruction, fragmentation, and hence prolongation of removal proceedings." *Id.* at 487.

Judge Castel's recent ruling in *Ragbir v. Homan*, No. 18 Civ. 1159 (PKC), 2018 WL 2338792 (S.D.N.Y. May 23, 2018), *appeal docketed*, 18-1597 (2d Cir.), reinforces the foregoing interpretation of section 1252(g). In that case, the alien filed a habeas petition seeking to enjoin ICE from taking any action to remove him until the government could demonstrate that its actions were not tainted by unlawful retaliation or discrimination. *Id.* at *1. Denying the alien's motion for a preliminary injunction staying his removal, Judge Castel found that section 1252(g) bars such relief, and rejected the argument that the jurisdictional bar is inapplicable to constitutional claims. *Id.* at *3-*7. As Judge Castel explained, "[r]estraining defendants from 'effectuat[ing] . . . removal' is, in this

context, synonymous with 'execut[ing] an order of removal.'" *Id.* at *3 (citing *Duamutef v. INS*, 386 F.3d 172, 181 (2d Cir. 2004)).

Petitioner hints that his detention for removal resulted from ethnic profiling. *See* Pet. ¶¶ 5, 75, 80, 88. Even if there were any credible factual basis in the petition to support this allegation, which there is not, Judge Castel's *Ragbir* analysis forecloses it:

> Ragbir does not challenge in this proceeding the lawfulness of the order of removal or its finality. . . . His claim is rather that . . . because ICE, purportedly with retaliatory animus, decided to enforce the final order of removal—instead of continue staying his removal—they must continue to forbear unless they prove that any future decision to enforce the order is "untainted" by his speech activities. As the *AADC* Court wrote, "in all cases, deportation is necessary in order to bring to an end *an ongoing violation* of United States law. The contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing." *AADC*, 525 U.S. at 491 (emphasis in original).

2018 WL 2338792, at *5 (emphasis in original). Judge Castel's reasoning applies equally to the instant case. Here, petitioner does not challenge his underlying removal order. ICE took petitioner into custody to execute that order and end an ongoing violation of U.S. law. *See Nken v. Holder*, 556 U.S. 418, 436 (2009) ("The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and 'permit[s] and prolong[s] a continuing violation of United States law.'" (quoting *AADC*, 525 U.S. at 490 (alterations in original))). Even if petitioner's removal has been delayed, "enforcement delays may be the product of enforcement priorities of immigration officials. It is a prominent feature of democracy that enforcement priorities sometimes change with the results of an election." *Ragbir v. Homan*, No. 18 Civ. 1159 (PKC), 2018 WL 3038494, at *3 (S.D.N.Y. June 19, 2018) (denying motion for a stay of removal pending appeal).

Other courts also have recognized that federal law strips district courts of jurisdiction to stay or enjoin an alien's removal. *See, e.g.*, *Lainez v. Osuna*, No. 17 Civ. 2278 (HBP), 2018 WL 1274896, at *5 (S.D.N.Y. Mar. 8, 2018) (denying request to stay removal for lack of jurisdiction); *Adikov v. Mechkowski*, No. 16 Civ. 3793 (JPO), 2016 WL 3926469, at *1 (S.D.N.Y. July 18, 2016); *Vasquez v. United States*, No. 15 Civ. 3946 (JGK), 2015 WL 4619805, at *3-*4 (S.D.N.Y. Aug. 3, 2015) ("District courts within this Circuit and across the country have routinely held that they lack jurisdiction under § 1252 to grant a stay of removal."); *see also Filippi v. President of U.S.*, No. 17 Civ. 459 (PB), 2017 WL 4675744, at *2 (D.N.H. Oct. 16, 2017) (Section 1252 "leave[s] no doubt that [a district] court lacks jurisdiction to consider claims that arise from a removal order."); *Almanzar v. Newland*, No. 08 Civ. 8612 (NRB), 2009 WL 3097203, at *2 (S.D.N.Y. Sept. 28, 2009) ("If a district court lacks the jurisdiction to review a removal order, it follows that the court also lacks the power to stay such orders. Numerous district courts have reached that conclusion."); *Tejada v. Cabral*, 424 F. Supp. 2d 296, 298 (D. Mass. 2006) ("[T]he REAL ID Act . . . emphatically . . . declare[d] that this Court was not in any way to impede orders of removal.").

Petitioner suggests that a stay of removal and release from custody is necessary to enable him to obtain adjustment from status, a process that began when his wife filed a Form I-130 with USCIS. *See* Pet. ¶¶ 50-51, 69.[3] To the extent Petitioner is asserting a constitutional claim in connection with his attempt to adjust status, the Due Process

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[3] Adjustment of status is a multi-step process. Here, the first step, a grant of Petitioner's wife's I-130 petition, would result in a recognition by the government of a qualifying relationship between the applicant and beneficiary. On or about June 12, 2018, USCIS requested additional evidence from Petitioner's wife in connection with the pending I-130 petition, which must be received no later than September 7, 2018.

Clause does not protect a "benefit . . . if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 462-63 (1989); *see Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Adjustment of status is a discretionary form of relief. *See, e.g., Adebola v. Sessions*, 723 F. App'x 41, 43 (2d Cir. 2018) (summary order); *cf. Yuen Jin v. Mukasey*, 538 F.3d 143, 156-57 (2d Cir. 2008). Accordingly, petitioner has no claim under the Due Process Clause for a stay of removal to complete his attempt to obtain adjustment of status.

In addition, petitioner's attempt to formulate his application as an APA challenge to his detention and removal, *see* Pet. ¶¶ 86-91 (Claim 5), fails because it runs afoul of 8 U.S.C. § 1252(a)(5), which channels judicial review of final orders of removal to the courts of appeals, "[n]otwithstanding any other provision of law," as well as 8 U.S.C. § 1252(g). "Because Section 1252(a)(5)'s limitation applies here, it 'precludes judicial review' under the APA." *Singh v. USCIS*, 878 F.3d 441, 446 (2d Cir. 2017) (citing 5 U.S.C. § 701(a)(1)); *see also Pomaquiza v. Sessions*, No. 17 Civ. 1549 (JAM), 2017 WL 4392878, at *3 (D. Conn. Oct. 3, 2017) ("[T]he APA makes clear that it does not apply if 'statutes preclude judicial review.' . . . Because 8 U.S.C. § 1252(g) precludes judicial review, the APA has no role here." (citing 5 U.S.C. § 701)).

Petitioner's reliance on *Judulang v. Holder*, a case that was initiated on a petition for review filed in the Ninth Circuit, reinforces the government's argument that district courts lack jurisdiction over such claims because *Judulang* was, properly given section 1252's limitations, a matter that was initiated in the Court of Appeals. *See* 565 U.S. 42, 51-52 (2011). Moreover, inasmuch as Petitioner's detention and removal are enforcement actions consistent with the existing statutory and regulatory authority and

do not constitute issuance of a new rule, there is no basis to require the government to engage in notice-and-comment rulemaking, as Petitioner alleges without support.

For the foregoing reasons, the Court lacks jurisdiction over any claims by Petitioner for a stay of his removal order, and his APA claim. The Court thus should dismiss Claims 3, 4, and 5 of the petition.

## II. THIS COURT IS AN IMPROPER VENUE FOR PETITIONER'S CHALLENEGE TO HIS DETENTION AND, IN ANY EVENT, HIS CHALLENGE FAILS ON THE MERITS

Petitioner also requests that this Court issue an order releasing him from ICE detention. *See* Pet. ¶¶ 73, 75 (Claims 1 and 2); Prayer for Relief. This request fares no better legally than his request for a stay of removal. As discussed below, Petitioner is not entitled to this relief from this Court because he has brought his challenge to detention in the wrong venue. The proper forum for those claims is his district of confinement: the District of New Jersey. The Court thus should dismiss Petitioner's detention claims or transfer them to the United States District Court for the District of New Jersey. But even if the Court considers the merits of Petitioner's challenge to detention, which it should not, Petitioner's challenge to his detention fails on the merits.

### A. This Court Is Not the Proper Venue for Petitioner's Challenge to His Detention in New Jersey

It cannot be disputed that Petitioner is detained at the Hudson County Jail in Kearny, New Jersey, and was not present in the Southern District of New York on the day his habeas petition was filed. Nor can it be disputed that Petitioner challenges his detention and seeks release from custody. *See* Pet. at Claims 1, 2; Prayer for Relief, ¶¶ 2, 4, 5. Accordingly, the proper venue for the Petitioner's claims challenging his detention is the district of Petitioner's confinement: the District of New Jersey.

The Supreme Court has held, outside the immigration context, that "in habeas challenges to present physical confinement—'core challenges'—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official" and "jurisdiction lies in only one district: the district of confinement." *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 443 (2004). The venue considerations that apply to general civil litigation do not apply to such challenges, and "in the ordinary case of a single physical custody within the borders of the United States, where the objection has not been waived by the Government, the immediate-custodian and territorial-jurisdiction rules must apply." *Id.* at 452, 453-54 (Kennedy, J., concurring).

The *Padilla* Court declined to decide whether the Attorney General is a proper respondent to a habeas petition by a detained alien pending removal, and the Second Circuit has not resolved this question. *See Padilla*, 542 U.S. at 435 n.8; *Henderson v. INS*, 157 F.3d 106, 128 (2d Cir. 1998) (pre-*Padilla* decision). Nevertheless, as the Supreme Court recognized, the majority of courts apply the "immediate custodian" rule to habeas petitions challenging immigration detention. *Padilla*, 542 U.S. at 435 n.8; *see, e.g.*, *Santana v. Muller*, No. 12 Civ. 430 (PAC), 2012 WL 951768, at *1-2 (S.D.N.Y. Mar. 21, 2012) (applying "immediate custodian" rule); *Hoyte v. Holder*, No. 10 Civ. 3460 (PAC) (JLC), 2011 WL 1143043, at *2-*3 (S.D.N.Y. Mar. 25, 2011) (adopting Report and Recommendation) (discussing "core" habeas petition).[4]

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[4] In *Santana*, unlike the instant case, the petitioner was detained at 201 Varick Street, within in the Southern District of New York, on the day he filed his habeas petition. The Court found the Assistant Field Office Director for the Varick Street facility was the petitioner's immediate custodian. *Santana*, 2012 WL 951768, at *1-*2.

The threshold analytical question is whether petitioner's habeas challenge is a "core" challenge to detention, *see Padilla*, 542 U.S. at 443, particularly because Petitioner's counsel repeatedly claimed at the June 9 hearing that Petitioner is not challenging his final removal order in this Court. *See supra* at 7, *infra* at 17 (quoting Ret., Ex. K). Judge Furman analyzed this issue in *Singh v. Holder*, No. 12 Civ. 4731 (JMF), 2012 WL 5878677 (S.D.N.Y. Nov. 21, 2012). There, an alien detained in Alabama who was subject to a removal order filed a habeas petition challenging his detention while his petition for review of the removal order was pending at the Second Circuit. *Id.* at *1. Judge Furman explained that in a "non-core" proceeding, the "petitioner challenges his or her removal order." *Id.* at *1. A "core" proceeding is a challenge to detention itself, not to the merits of the removal order. *Id.*; *see also Zhen Yi Guo v. Napolitano*, No. 09 Civ. 3023 (PGG), 2009 WL 2840400, at *3 (S.D.N.Y. Sept. 2, 2009) (noting that the alien conceded his petition was "core" because he challenged only his present physical confinement, not his underlying immigration decision). Finding the proceeding "core" because the petitioner challenged only his detention, Judge Furman ruled that the habeas petition could be brought only in the district of confinement, the Northern District of Alabama. *Singh*, 2012 WL 5878677, at *2.

The Seventh Circuit engaged in a similar "non-core"/"core" analysis in *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006), also involving an immigration habeas petition filed by an alien outside his district of confinement. Affirming the district court's dismissal of the petition, the Seventh Circuit found that the alien's challenge to detention was "core":

> Notably, unlike the cases that have precipitated disagreement among some of our sister circuits, Mr. Kholyavskiy's petition for habeas corpus does not challenge the validity of his removal order, but instead attacks

> the constitutionality of his confinement while he is awaiting removal. His petition asserts that his "excessive detention" at Kenosha deprives him of his rights to substantive and procedural due process. . . . Because this alleged "excessive detention" is taking place where Mr. Kholyavskiy is currently incarcerated, his habeas challenge is fundamentally no different from the typical "core" challenge described in *Padilla*, in which a prisoner seeks release from present physical confinement.

*Id.* at 952-53 (emphasis in original).

Applying the foregoing reasoning, Petitioner's challenge to detention is a "core" challenge to his detention pending removal, not a "non-core" challenge to his underlying removal order. *See* Pet. ¶ 3 ("Pursuant to this Court's inherent powers in habeas corpus proceedings, [Petitioner] respectfully requests this Court order his release from custody, enjoin respondents from removing him from the New York City area . . . ."); ¶ 73 ("Petitioner's detention . . . violates the INA and its regulations"); ¶ 76 ("Petitioner's detention therefore violates the Due Process Clause . . . ."). In addition, at the June 9, 2018, oral argument before Judge Nathan in Part One, Petitioner's counsel repeatedly confirmed that Petitioner was *not* challenging his underlying removal order. *See* Ret., Ex. K (June 9 transcript) 6:20-21 ("In this particular case, your Honor, we are not challenging the underlying order of removal."), 10:25-11:6 ("Well, the petition here is not challenging his final order of removal . . . . We are not challenging his actual order of removal."); *see also id.* 11:20-22; 14:5-10. Accordingly, the proper venue for that detention challenge is the District of New Jersey, not the Southern District of New York.

In multiple cases similar to this one—where immigration habeas petitioners detained outside of the Southern District of New York nonetheless brought actions in this district challenging their present physical confinement—the Judges of this district routinely either transferred those petitions to the districts in which the petitioners were detained when the petition was filed, or dismissed the petitions without prejudice to

refiling in the proper district. For example, in *Phrance v. Johnson*, No. 14 Civ. 3569 (TPG), 2014 WL 6807590 (S.D.N.Y. Dec. 3, 2014), an alien in ICE detention in the Hudson County Jail (same as Petitioner) filed a habeas petition in the Southern District of New York. Although the petitioner had been to immigration court in New York on five occasions, he was not in the district on the day he filed the petition. *Id.* at *1. Applying the reasoning of *Padilla*, Judge Griesa transferred the petition to the District of New Jersey. *Id.* at 2; *see also Fortune v. Lynch*, No. 15 Civ. 8134 (KPF), 2016 WL 1162332 (S.D.N.Y. Mar. 22, 2016) (similar facts and outcome).[5]

Another analogous decision is *Adikov*, cited *supra*. In that case, the alien was subject to a final order of removal and detained by ICE in the Hudson County Jail in New Jersey (as is Petitioner here). *Adikov*, 2016 WL 3926469, at *1. After rejecting the alien's challenge to his removal order for lack of jurisdiction, Judge Oetken found jurisdiction improper in this district and denied the habeas petition. *Id.* at *1-*2. Judge Oetken noted that the "clear majority" of district courts in the Second Circuit have applied the reasoning of *Padilla* to habeas petitions brought by aliens in ICE detention and found that the proper jurisdiction for such habeas petitions is the district of confinement. *Id.* at *2; *see also Singh*, 2012 WL 5878677, at *2 (same).

Petitioner suggests that the Second Circuit would deviate from the majority rule and find the Attorney General a proper respondent to a habeas petition challenging immigration detention. *See* Pet. ¶¶ 33-34 (quoting *Henderson v. INS*, 157 F.3d 106,

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5 Petitioner suggests that venue is proper in this Court because his underlying removal proceedings eight years ago took place in this district. *See* Pet. ¶ 19. That is irrelevant. *Phrance*, for example, involved a habeas petition filed by an alien detained in New Jersey in the midst of his *ongoing* removal proceedings in Manhattan.

125-26 (2d Cir. 1998) (pre-*Padilla* decision)). Judge Gardephe disposed of this argument in *Zhen Yi Guo*, cited *supra*, another case resulting in the transfer of an immigration-related habeas petition to the district of confinement:

> [A]lthough *Henderson*—issued six years before *Padilla*—discusses at length the Attorney General's role as the "legal custodian" of detained aliens awaiting deportation, . . . this language—even if it were not *dicta*—would be of doubtful force after *Padilla*. The *Padilla* Court's reaffirmation of the immediate custodian rule and rejection of Padilla's "legal control" argument undermines much of the reasoning the *Henderson* court relied upon in presenting arguments suggesting that the Attorney General might be a proper respondent.

2009 WL 2840400, at *4. This Court similarly should reject petitioner's reliance on *Henderson* and those cases that echo the reasoning of *Henderson*.

The Court also should reject petitioner's reliance on *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488 (S.D.N.Y. 2009). *See* Pet. ¶ 34. Notably, Judge Gardephe was not persuaded by *Farez-Espinoza*, finding that the case relied heavily on the reasoning of *Henderson*, which, as discussed above, pre-dated *Padilla* and is now of dubious weight. *See Zhen Yi Guo*, 2009 WL 2840400, at *4-5. Judge Furman reached the same conclusion, finding that the four district court cases upon which *Farez-Espinoza* relied were "non-core" challenges. *Singh*, 2012 WL 5878677, at *2.

Another comparable case that was transferred to the District of New Jersey is *Shehnaz v. Ashcroft*, No. 04 Civ. 2578 (DLC), 2004 WL 2378371 (S.D.N.Y. Oct. 25, 2004), where the alien's circumstances resemble Petitioner's in important respects. In *Shehnaz*, the petitioner was a long-time resident of the United States who became subject to a removal order in 1998. *Id.* at *1-*2. That same year, she married a United States citizen (they later divorced). The petitioner, who was employed, also had a daughter who was a United States citizen. *Id.* at *1. Five years later, in 2003, federal

agents came to the petitioner's house to arrest her brother; at that time, they discovered the outstanding final order of removal against her, arrested her, and detained her in Elizabeth, New Jersey. *Id.* The petitioner filed a habeas petition alleging that she qualified for supervised release and that her detention violated due process. *Id.* at *3. She sought temporary release pending the outcome of immigration proceedings and a Second Circuit appeal. *Id.* at *4. Consistent with the reasoning of the majority of courts, Judge Cote transferred the petition to the District of New Jersey under the "immediate custodian" rule, finding the petition "core" because it challenged physical confinement and did not contest an underlying decision pertaining to potential removal. *Id.*

Time and again, in cases involving challenges to immigration detention where aliens were in removal proceedings, as well as cases (such as Petitioner's) where the alien was subject to a final order of removal and awaiting removal, the Judges of this district have reached the same result. *See Cesar v. Shanahan*, No. 17 Civ. 7974 (ER), 2018 WL 1747989, at *1 (S.D.N.Y. Feb. 5, 2018) (holding that habeas petitioner detained in New Jersey must file his petition in the District of New Jersey); *Chan Lo v. Sessions*, No. 17 Civ. 6746 (GHW), 2017 WL 8786850, at *1 (S.D.N.Y. Sept. 15, 2017) ("Petitioner's habeas petition challenges her present physical confinement and thus, jurisdiction lies only in the district where she is physically confined."); *Bacuku v. Shanahan*, No. 16 Civ. 305 (LGS), 2016 WL 1162330, at *1 (S.D.N.Y. Mar. 1, 2016) (transferring habeas petition to the District of New Jersey); *Rone v. Holder*, No. 15 Civ. 2815 (ER), 2015 WL 13722402, at *1 (S.D.N.Y. June 5, 2015) (applying the "immediate custodian" rule and transferring habeas petition to the District of New Jersey); *Concepcion v. Aviles*, No. 14 Civ. 8770 (AT), 2015 WL 7766228 (S.D.N.Y. Mar. 12, 2015) ("Because Concepcion was detained in and filed his petition from New Jersey, venue lies in the District of New

Jersey."); *Medina-Valdez v. Holder*, No. 12 Civ. 6002 (RA), 2012 WL 4714758, at *1-2 (S.D.N.Y. Oct. 1, 2012) ("Numerous judges in this district have applied this rule to habeas petitions filed by incarcerated aliens challenging their physical detention prior to deportation."); *Allen v. Holder*, No. 10 Civ. 2512 (GBD) (JLC), 2011 WL 70558, at *2 (S.D.N.Y. Jan. 4, 2011) ("Petitioner is not confined in this district. Therefore, the proper venue is where he is confined—that is, in the United States District Court for New Jersey."); *Sikivou v. DHS*, No. 06 Civ. 5530 (PKC), 2007 WL 2141564, at *3 (S.D.N.Y. July 25, 2007) (dismissing petitioner's challenge to his removal order for lack of jurisdiction and transferring portion of petition challenging his detention to the district of confinement); *Washington v. District Dir., INS*, No. 04 Civ. 3492 (RMB) (MHD), 2005 WL 2778747, at *2 (S.D.N.Y. Oct. 19, 2005) ("Since petitioner is not detained in this district, we are bound by [*Padilla*] to recommend transfer of the portion of Washington's petition [seeking his release from immigration detention] to the District of New Jersey where he is currently confined."); *Drakoulis v. Ashcroft*, 356 F. Supp. 2d 367, 370-71 (S.D.N.Y. 2005) (transferring petition to District of New Jersey); *Azize v. Bureau of Immigration and Naturalization Serv.*, No. 04 Civ. 9684 (SHS) (JCF), 2005 WL 3488333, at *1 (S.D.N.Y. Oct. 7, 2005) (noting that "*Padilla* controls," and transferring case to the Western District of Louisiana, where petitioner was detained). There is no reason for this Court to deviate from the reasoning of these cases.

For the foregoing reasons, this Court is not the proper venue for Petitioner's challenge to his detention. The Court thus should dismiss Claims 1 and 2, or transfer them to the United States District Court for the District of New Jersey.[6]

**B. Petitioner's Challenge to His Detention Fails on the Merits**

Even if this Court determines that Petitioner's challenge to his detention may proceed in the Southern District of New York, which it should not, Petitioner's challenge fails on the merits because Petitioner's detention pending execution of his final order of removal is statutorily permissible.

Petitioner's detention commenced less than one month ago. When aliens become subject to a final order of removal, they enter a 90-day removal period during which detention is mandatory. 8 U.S.C. § 1231(a) (1), (2); *Zadvydas v. Davis*, 533 U.S. 678, 683 (2001) ("After entry of a final removal order and during the 90-day removal period . . . aliens must be held in custody."). After the 90-day removal period has expired, ICE may further detain the alien if, *inter alia*, he or she is inadmissible under 8 U.S.C. § 1182 (as Petitioner was). 8 U.S.C. § 1231(a)(6); *see* Ret., Ex. B (charging Petitioner as inadmissible under section 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I)).

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[6] Petitioner's claims pertaining to removal are not a basis for the Court to exercise pendant venue over his claims pertaining to detention because the Court lacks jurisdiction over the claims pertaining to removal. *See supra* at 7-13. As one district court recently explained, "Under certain circumstances, a court may exercise pendent venue based on a claim that is related to a claim properly brought in that court, but it may not exercise pendent venue based on a claim that has been dismissed." *Hamilton v. JP Morgan Chase Bank*, 118 F. Supp.3d 328, 333 (D.D.C. 2015) (citing *Cameron v. Thornburgh*, 983 F.2d 253, 257 (D.C. Cir. 1993)). In any event, the doctrine of pendent venue should not overcome the district-of-confinement rule for "core" habeas challenges articulated in *Padilla*. *See* 542 U.S. at 443. To the extent *Mahmood v. Nielsen*, --- F. Supp. 3d ---, No. 17 Civ. 8233 (AT), 2018 WL 2148439, at *4-*5 (S.D.N.Y. May 9, 2018), came to a contrary conclusion, the government respectfully disagrees with *Mahmood*.

In *Zadvydas*, the Supreme Court established a framework for lower courts to review due process challenges to such aliens' continued post-removal-order detention. *See* 533 U.S. at 700-02. The Supreme Court held that 8 U.S.C. § 1231(a)(6) does not authorize the government to detain a removable alien "indefinitely" after the 90-day removal period, but authorizes detention only for a period "reasonably necessary" to remove the alien. *Id.* at 689, 697. To guide the lower courts, the *Zadvydas* Court recognized six months as a "presumptively reasonable" period for the government to detain an alien while trying to remove him or her. *Id.* at 701. After six months, however, the government is not automatically required to release the alien; the government may continue to detain the alien "until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future." *Id.*

Here, Petitioner is subject to an order of removal that became final when he overstayed his grant of voluntary departure over eight years ago. He presumably was aware of that final removal order as recently as three months ago, after having moved unsuccessfully to reopen his immigration proceedings. *See* Ret., Ex. G, H. Notably, the IJ's order briefly recited Petitioner's immigration history, including his overstay of his grant of voluntary departure. Ret., Ex. H. Even assuming *arguendo* that Petitioner is now outside the 90-day mandatory detention period in 8 U.S.C. § 1231(a)(2), which the government does not necessarily concede at this point, Petitioner clearly falls within the six-month period of presumptive reasonableness under 8 U.S.C. § 1231(a)(6) and *Zadvydas*. *See Callender v. Shanahan*, 281 F. Supp. 3d 428, 435 (S.D.N.Y. 2017) (the six-month presumptively reasonable period of detention under *Zadvydas* could not have begun until the alien was detained by ICE).

In the event Petitioner's post-removal-order detention exceeds six months, he still will not be entitled to release from custody unless he establishes that there is "good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. Here, Petitioner has not met his threshold burden of providing good reason to believe that his removable is not reasonably foreseeable, and even if he did, the government would have an opportunity to submit evidence to rebut that showing. *Id.*[7]

**CONCLUSION**

For the foregoing reasons, the Court should dismiss the habeas petition in its entirety or, in the alternative, dismiss Claims 3, 4, and 5, and transfer the remainder of the petition to the United States District Court for the District of New Jersey.

Dated: New York, New York
June 25, 2018

Respectfully submitted,

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[7] Petitioner seeks the alternative relief of a hearing before an IJ to challenge his detention. Pet. at Prayer for Relief. Petitioner identifies no legal basis for this Court to compel further Immigration Court proceedings. As discussed above, Petitioner's detention is permissible and, in any event, Petitioner already has unsuccessfully moved before the immigration court to re-open his immigration proceedings. Ret., Ex. I, J.