UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AISSATOU DIALLO, Petitioner, v. WILLIAM JOYCE, New York Field Office Director, *et al.*, Respondents.	No. 25 Civ. 9909 (AS)

RESPONDENTS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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Respondents (the "Government") respectfully submit this memorandum of law in further opposition to the Petition for Writ of Habeas Corpus, ECF No. 1 (the "Petition" or "Pet."), filed by petitioner Aissatou Diallo ("Petitioner"), and in response to the Court's order that the parties submit supplemental briefing by December 12, 2025, Dkt. No. 14.

PRELIMINARY STATEMENT

It is undisputed that Petitioner is subject to a final order of removal. And while Petitioner was granted withholding of removal to Guinea, the law permits her removal to a third country. Pursuant to 8 U.S.C. § 1231(a), U.S. Immigration and Customs Enforcement ("ICE") has authority to detain a noncitizen subject to a final removal order. This is so regardless of when ICE detains the individual, and regardless of whether she was previously detained during the 90-day removal period. Nothing in the statute withdraws the Executive's authority to detain a noncitizen for purposes of pursuing removal.[1]

In the Petition, Petitioner does not argue that she could never be detained to effectuate her removal, *see, e.g.*, Pet. ¶¶ 5, 40-41, but instead challenges her detention on the basis that her removal is not reasonably foreseeable and ICE failed to comply with regulations applicable when an order of supervision is revoked.[2] In its opposition to the Petition, Dkt. No. 11, the Government

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[1] Specifically, as discussed below, Petitioner is subject to detention beyond the initial 90-day removal period specified in section 1231(a)(1)(A) pursuant to section 1231(a)(6) because she is inadmissible under section 1182(a)(6)(A)(i) as an "[a]lien present in the United States without being admitted or paroled." *See also* 8 C.F.R. § 241.4 (providing that ICE "may continue an alien in custody beyond the removal period described in section 241(a)(1) of the [Immigration and National Act ("INA"), 8 U.S.C. § 1231(a)(1)] pursuant to the procedures described in this section"). At the hearing held on December 5, 2025, the Government mistakenly stated in response to questions from the Court that it was not directly relying on section 1231(a)(6) and also that it did not think that 8 C.F.R. § 241.4 directly applied. *See* Tr. 14:25-15:3, 21:9-11. The Government apologizes for these errors.

[2] Petitioner's counsel also agreed at the hearing that, if Petitioner was granted release from detention, Petitioner was not seeking any other relief. Tr. at 24:20-23.

addressed that argument. At the hearing on December 5, 2025, the Court granted the Petition and released the Petitioner. Tr. 35:2-3; Dkt. No. 15. The Court has, however, raised additional issues concerning whether ICE may ever exercise its statutory authority to detain Petitioner or place Petitioner on an order of supervision. The law permits ICE to do both. While ICE did not previously detain Petitioner during the removal period or place her on an order of supervision, there is no legal authority that deprives ICE of the authority set forth in section 1231. To hold otherwise would render the entire statutory and regulatory scheme inapplicable and lead to absurd results. In short, ICE maintains the lawful authority to detain Petitioner for purposes of pursuing removal, and is required by law to place Petitioner on an Order of Supervision now that she has been released. ICE may later revoke such an Order of Supervision in compliance with the regulations in order to effectuate a reasonably foreseeable removal.

LEGAL FRAMEWORK

Pursuant to 8 U.S.C. § 1231, ICE has authority to detain a noncitizen subject to a final removal order. 8 U.S.C. § 1231(a). Section 1231 establishes a 90-day "removal period" within which the government generally must secure removal after a removal order becomes final, and during which the government "shall" detain the noncitizen until such removal. *See* 8 U.S.C. §§ 1231(a)(1)(A), (a)(2) ("During the removal period, the Attorney General shall detain the alien."). When the government is unable to secure removal within the removal period, while detention is no longer mandatory, the government "may" continue to detain certain categories of aliens, including an "alien who is inadmissible under section 1182 of this title." *Id.* § 1231(a)(6). Aliens who fall outside those categories, or who fall within them but are released, are subject to supervision upon release. *Id.* § 1231(a)(3) & (6). For its part, 8 U.S.C. § 1182(a)(6)(A)(i) provides that "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney

General, is inadmissible."

The Supreme Court addressed the Government's authority to detain noncitizens after their removal orders become final in *Zadvydas v. Davis*, 533 U.S. 678 (2001). The Court held that 8 U.S.C. § 1231(a)(6) authorizes immigration detention for a period reasonably necessary to effectuate the noncitizen's removal from the United States, and that six months is a presumptively reasonable period of time for the Government to effectuate the removal. *Id.* at 699-701.

Department of Homeland Security regulations also address the detention of noncitizens during the removal period. 8 C.F.R. § 241.4 provides that ICE "may continue an alien in custody beyond the removal period described in [8 U.S.C. § 1231(a)(1)] pursuant to the procedures described in this section" or may grant release. *Id.* § 241.4(a). "A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service." *Id.* § 241.4(d). 8 C.F.R. § 241.13 "establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has 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." *Id.* § 241.13(a). Section 241.13 also provides that "the Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future." *Id.* § 241.13(i)(2).

Courts have rejected the proposition that the clock for calculating the reasonable period of detention pending removal under *Zadvydas* begins to run as soon as the noncitizen's order of

removal becomes final, even if the noncitizen was not detained at that time. In *Lin v. United States*, No. 5:07-CV-26, 2007 WL 951618 (S.D. Tex. Mar. 28, 2007), for example, the court rejected that argument, reasoning that "Supreme Court decisions such as [*Clark v. Martinez*, 543 U.S. 371, 378 (2005)] and *Zadvydas* do not claim to inform when the government's power to detain aliens ordered removed must be exercised. Rather, they simply establish the duration of detention 'reasonable' under the statute." *Id.* at *3. The court explained that, while it was unclear "why the government did not detain Petitioners immediately after they were ordered removed, . . . the government now seeks to enforce removal orders issued some time ago, and there is nothing in § 1231 to indicate that the Attorney General cannot enforce those removal orders 'late.'" *Id.* And, "[i]f indeed the government may do so, it enjoys the corresponding power to detain Petitioners for a term reasonably necessary to effectuate removal." *Id.* *Lin* also implicitly rejected the proposition that a noncitizen who is not released subject to an order of supervision is no longer governed by section 1231 and its implementing regulations. *Id.* at *1 (noting that after their orders of removal became final, there followed "a significant time gap in which Petitioners were apparently living in the United States uninhibited until they were taken into custody by the Bureau of Immigration and Customs Enforcement (ICE), on November 10, 2006").

Judge Moses likewise rejected the argument that the *Zadvydas* clock begins to run immediately following an order of removal regardless of detention status in *Callender v. Shanahan*, 281 F. Supp. 3d 428 (S.D.N.Y. 2017), in which the petitioner argued that the "presumptively reasonable" period of detention elapsed six months after his order of removal became final nearly a decade earlier. Judge Moses explained: "Callender is confusing the 90–day 'removal period' under 8 U.S.C. § 1231(a)(1)(A), which began when his order of removal

became final in 2006, *see id.* § 1231(a)(1)(B), with the six-month 'presumptively reasonable period of detention' under *Zadvydas*, . . . which could not have begun until he was detained by ICE in 2015." *Id.* at 435. Judge Moses explained that "[t]his result is compelled not only by the language of *Zadvydas* but also by its logic" because "[i]t is the prospect of indefinite 'detention' that led the Supreme Court to create the six-month presumption." *Id.*

In *Jiang v. Bondi*, No. CIV 25-0922 KG/GBW, 2025 WL 3281819 (D.N.M. Nov. 25, 2025), similarly, the petitioner argued that, because his removal order became final in 2004, his presumptively reasonable detention period expired six months later and his detention by ICE in August 2025 was therefore unlawful. The court rejected this argument, explaining that "[b]ecause the *Zadvydas* period is triggered by actual detention, . . . Mr. Jiang's three-month confinement [in 2025] remains well within the six-month presumptively reasonable period." *Id.* at *2. The court addressed two cases in which judges had reached a contrary conclusion, *Ulysse v. Department of Homeland Security*, 291 F. Supp. 2d 1318, 1325 (M.D. Fla. 2003), and *Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 499 (S.D.N.Y. 2009), and disagreed with their reasoning. The court explained that "Mr. Jiang confuses the 90-day 'removal period,' which began when his order of removal became final in 2004, *see* § 1231(a)(1)(B), with the six-month 'presumptively reasonable period of detention' under *Zadvydas*, which could not have begun until he was detained by ICE." *Id.* (citing *Ke Chen v. Holder*, 783 F. Supp. 2d 1183, 1192 (N.D. Ala.) ("Because *Zadvydas* clearly involved detention . . . it defies common sense to suggest that *Zadvydas* time can run while a petitioner is not in custody."); *Chun Yat Ma v. Asher*, No. C11–1797 MJP, 2012 WL 1432229, at *3 (W.D. Wash. Apr. 25, 2012) (same); *Callender*, 281 F. Supp. 3d at 435 (same))).

ARGUMENT

I. ICE's Statutory Authority to Detain a Non-Citizen Pending Removal Does Not Expire

ICE may detain a noncitizen like Petitioner who was ordered removed on inadmissibility grounds at any time for purposes of pursuing removal. The statutory authority for that arrest and detention does not expire, whether by failure to detain during the removal period or otherwise.

ICE has—and retains—authority to detain Petitioner pending her removal pursuant to 8 U.S.C. § 1231(a)(6), because she is inadmissible under section 1182(a)(6)(A)(i) as an "[a]lien present in the United States without being admitted or paroled." *See* Dkt. No. 9, Ex. A (NTA charging Petitioner as inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(A)(i)); *id.* Ex. B (Warning to Alien Ordered Removed or Deported indicating that the Petitioner was "inadmissible under section 212 of the [INA] and ordered removed from the United States by an immigration judge in proceedings under section 240 of the [INA] initiated as a result of . . . having been present in the United States without admission or parole"); *id.* Ex. C (Warrant of Removal/Deportation indicating that Petitioner is "subject to removal/deportation from the United States" based upon a final order by an immigration judge pursuant to INA 212(a)(6)(A)(i)).

The Court has raised an issue of whether ICE may now (or ever) detain Petitioner under section 1231(a) given the fact that it did not detain Petitioner during the 90-day removal period and did not issue her an order of supervision at any point after her removal order became final. The answer is that ICE retains the authority to detain Petitioner, regardless of whether it detained her during the removal period, and regardless of whether she was previously released on an order of supervision. Reading the statute to withdraw the Executive's authority if ICE fails to take certain action would lead to the absurd result that only noncitizens 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). As discussed above, several courts have rejected that interpretation of the statute. *See Lin*, 2007 WL 951618, at *3 (rejecting argument "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" because "there is nothing in the statute, or the caselaw interpreting it, to suggest that such is the case"); *Piao v. Lyons*, No. 25 Civ. 1725 (AJT), 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*, 2007 WL 951618, at *3)); *Jiang*, 2025 WL 3281819, at *2; *Callender v. Shanahan*, 281 F. Supp. 3d at 436 & n.7 (S.D.N.Y. 2017) (collecting cases)); *but see Farez-Espinoza*, 600 F. Supp. 2d at 499-500; *Ulysse*, 291 F. Supp. 2d at 1325.[3] At bottom, "there is nothing in § 1231 to indicate that [ICE] cannot enforce those removal orders 'late.'" *Lin*, 2007 WL 951618, at *3.

That ICE may initially detain noncitizens 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 *Preap*, the Supreme Court confronted the issue of whether noncitizens could be subject to mandatory detention without bond pursuant to 8 U.S.C. § 1226(c), which applies to noncitizens convicted of certain crimes, where they were not arrested immediately after their release from criminal custody. *Id.* at 396. 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

[3] Petitioner also cites *You v. Nielson*, 321 F. Supp 3d 451 (S.D.N.Y. 2018), Dkt. No. 16 at 5. However, the court in *You* did not hold that the petitioner could never be detained pursuant to section 1231(a), but that ICE would have to make certain findings before doing so. *Id.* at 462-63.

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. *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.").

Indeed, in *Preap*, the Supreme Court explained that assuming subsection 1226(c)(1) requires immediate arrest, "the Secretary's failure to abide by this time limit would not cut off her power to arrest under subsection (c)(1)" because as the Court had "held time and again, an official's crucial duties are better carried out late than never." *Preap*, 586 U.S. at 411 (citing *Sylvain v. Attorney General of U.S.*, 714 F.3d 150, 158 (3d Cir. 2013) (collecting cases)). "Or more precisely," the Court added, "a statutory rule that officials 'shall' act within a specified time does not by itself preclude action later." *Id.* (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (internal quotation marks and brackets omitted)); *see also id.* at 412 ("[W]e do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time." (quoting *Barnhart*, 537 U.S. at 160 (relying on *Brock v. Pierce County*, 476 U.S. 253 (1986))).

The same principles apply here. The fact that section 1231 provides that "[d]uring the [90-day] removal period, the Attorney General shall detain the alien," 8 U.S.C. § 1231(a)(2)(A), and that an alien who is released "shall be subject to supervision," *id.* § 1231(a)(3), does not suggest that, if the noncitizen was not detained after their order of removal became final and was not placed under an order of supervision, Congress intended to strip ICE of the authority ever to detain them. Accordingly, even though she was not detained upon her order of removal becoming final and was not subject to an order of supervision while released, Petitioner may permissibly be subject to detention pending removal pursuant to section 1231.

II. Release on an Order of Supervision Is Statutorily Required

A corollary of the Court's question of whether Petitioner can ever be detained under Section 1231(a) is whether ICE may ever place Petitioner on an order of supervision. The answer is yes. When a noncitizen with a final removal order is arrested and detained by ICE under § 1231(a), the statute requires ICE, if it releases the noncitizen, to place the noncitizen on an order of supervision.

As relevant here, section 1231(a)(6) provides that a noncitizen ordered removed, "if released, *shall be subject to the terms of supervision* in paragraph (3)." 8 U.S.C. § 1231(a)(6) (emphasis added). Section 1231(a)(3) provides that, if a noncitizen is not removed and is released from detention, "the alien, pending removal, *shall be subject to supervision* under regulations prescribed by the attorney general" and lists several required provisions. 8 U.S.C. § 1231(a)(3) (emphasis added). The statute thus mandates that ICE place a noncitizen on an order of supervision when that noncitizen is released from section 1231 detention. Indeed, in *Zadvydas*, which concerned detention and possible release of noncitizens who are subject to final

removal orders (where removal was not reasonably foreseeable), the Supreme Court recognized that release of a removable noncitizen would be subject to supervision:

> [Here], we focus upon those [constitutional] limitations [to Congressional and Executive decision-making power in the immigration area]. In doing so, we nowhere deny the right of Congress to remove aliens, *to subject them to supervision with conditions when released from detention*, or to incarcerate them where appropriate for violations of those conditions. . . . *The choice, however, is not between imprisonment and the alien "living at large." It is between imprisonment and supervision under release conditions that may not be violated.*

533 U.S. at 695-96 (internal citations omitted) (emphasis added).

Thus, given that the Court has already ordered Petitioner released, it should not prevent ICE from following Congress's express mandate to impose an order of supervision on Petitioner. *See, e.g.*, *Doe v. Barr*, 479 F. Supp. 3d 20, 27-28 (S.D.N.Y. 2020) ("It is beyond dispute that the immigration laws provide the agency authority to impose conditions of supervision on certain aliens. . . . [T]he immigration laws mandate that aliens like Doe be released only if an order of supervision is imposed.").

CONCLUSION

For the foregoing reasons, ICE has lawful authority to detain Petitioner under 8 U.S.C. § 1231(a) for purposes of pursuing removal, and the law mandates that Petitioner, upon release, be subject to an order of supervision.

Dated: New York, New York
December 12, 2025

Respectfully submitted,

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