U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 1120

May 14, 2026

By ECF
Honorable Natasha C. Merle
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Lopez Menjivar v. Genalo, et al.*, No. 26-cv-2506 (Merle, J.)

Dear Judge Merle:

This Office represents Respondents in this habeas matter, in which Petitioner Juan Carlos Lopez Menjivar ("Petitioner") challenges his detention by U.S. Immigration and Customs Enforcement ("ICE"). *See* ECF No. 1 (the "Petition"). Respondents write respectfully in furtherance of the parties' discussions at the hearing held on May 7, 2024, to submit ICE records relating to Petitioner's encounters with ICE and his removal, *see* Supplemental Declaration of Kerryn Irving ("Supp. Decl."), ¶¶ 3-4, Exhibits C & D, and to address the Court's questions posed at the conference, including " (1) the statutory interpretation of 8 U.S.C. § 1231(a)(6) with citations to caselaw; (2) the due process owed here based on the circumstances of petitioner's case; (3) what procedures are available to the government when detention is not possible during the 90-day removal period because the noncitizen is not accessible but becomes accessible later; and (4) what is necessary and sufficient to demonstrate removal is both imminent and certain." *See* ECF Order dated May 8, 2026.

For the reasons set forth below, and those previously set forth in Respondents' response to the Petition dated May 4, 2026, *see* ECF No. 7—including, but not limited to Respondents' argument that this Court lacks jurisdiction pursuant to 8 U.S.C. §§ 1252(a)(5), (b)(9) and (g)—Respondents respectfully continue to request that the Court deny the Petition and vacate its Order dated April 28, 2026 enjoining Petitioner's removal.

I. PETITIONER IS LAWFULLY DETAINED PURSUANT TO 8 U.S.C. § 1231(a)(6).

As previously argued, the Petition should be denied on the merits: There is an administratively final order of removal for Petitioner, and Petitioner has been lawfully detained to execute that order pursuant to 8 U.S.C. § 1231(a)(6).

Under 8 U.S.C. § 1231(a), ICE has authority to detain an alien subject to a final removal order. *See Johnson v. Arteaga-Martinez*, 596 U.S. 573, 578 (2022) ("8 U.S.C. § 1231(a), governs the detention, release, and removal of individuals 'ordered removed.'"). 8 U.S.C. § 1231(a)(1)(A)

establishes that "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days," (i.e., the "removal period"). *Id.* The statute further provides that during "the removal period, the Attorney General *shall* detain the alien." 8 U.S.C. § 1231(a)(2)(A) (emphasis added). Where, as here, the removal period has expired, "[a]n alien ordered removed who . . . . has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period *and, if released*, shall be subject . . . terms of supervision." 8 U.S.C. § 1231(a)(6) (emphasis added); *see also* § 1231(a)(3) (setting forth the terms of release of an "alien [who] does not leave or is not removed within the removal period.").

These provisions, taken together, provide that an alien who is subject to a final order of removal shall be detained for at least 90 days for purposes of removal, and may be detained longer than 90 days, or released subject to conditions. 8 U.S.C. § 1231(a). While the statute does not explicitly address the situation, such as here, where an alien is inaccessible during the 90-day removal period, the statute *presumes* that accessible aliens shall be detained for purposes of removal. *See Zavydas v. Davis*, 533 U.S. 678, 689 (2001) (interpreting § 1231(a)(6) to include an "implicit limitation" on detention *beyond* the removal period such that detention may last only for "a period reasonably necessary *to bring about that alien's removal* from the United States.") (emphasis added). *See also Lin v. Francis*, No. 25-cv-10001 (PAE), 2025 WL 3751855, at *4 (S.D.N.Y. Dec. 29, 2025) (finding that § 1231(a)(1)(A)'s 90-day period for ICE to remove the noncitizen is "self-evidently addressed to noncitizens accessible to ICE" but because petitioner did not appear for his removal hearing "there is no basis to treat him as having been accessible to ICE, such that it could have removed him during the" removal period.).

Respondents respectfully submit that Judge Engelmayer's decision in *Lin* is on all fours with this case, where Petitioner failed to appear for a hearing in his removal proceedings, was ordered removed *in absentia*, and was not detained by ICE until long after his removal order became final. In *Lin*, Judge Engelmayer determined that Lin failed to establish a statutory or constitutional violation because "[t]he agency had statutory authority to detain [him] without notice" and he "was subject to a final removal order and, having not appeared at his removal hearing or since, had never been released by ICE subject to conditions of supervision." *Lin*, 2025 WL 3751855, at *3. Judge Engelmayer concluded that "[u]nder these circumstances, 8 U.S.C. § 1231(a)(6) gave ICE statutory authority to detain" Lin. *Id.*

In other factually analogous cases, other judges in this Circuit have reached the same conclusion. *See, e.g.*, *Gualpa-Mizhquiri v. Francis*, No. 26-cv-156 (JAV), 2026 WL 396081, at *3 (S.D.N.Y. Feb. 12, 2026) ("The facts here are analogous to *Lin*. Petitioner was not released on supervision following the issuance of his final removal order, and thus the regulations regarding the revocation of supervision are inapplicable. Rather, Petitioner failed to appear for his hearing, violated his bond conditions, and absconded when ICE issued a Warrant of Removal during the removal period. On these facts, Petitioner's detention under Section 1231(a)(6) is lawful."); *accord Romero v. Noem*, No. 26-cv-1884 (MMG), 2026 WL 775847, at *4-5 (S.D.N.Y. Mar. 19, 2026) (same); *Xol-Maas v. Francis*, No. 26-cv-25 (JAV), 2026 WL 457005, at *5 (S.D.N.Y. Feb. 18, 2026) ("[Petitioner] does not, for example, argue that ICE lacked statutory authority to take him into custody. Nor could he. It is undisputed that Petitioner is subject to a final order of removal entered *in absentia*. Accordingly, 8 U.S.C. § 1231(a) authorizes Petitioner's detention for the purpose of effectuating Petitioner's removal.").

Respondents respectfully submit that Judge Subramanian's decision in *Diallo v. Joyce*, 817 F. Supp.3d 202 (S.D.N.Y. 2025) is distinguishable, because ICE is ready and able to remove Petitioner as soon as the Court vacates the stay of removal, as discussed in more detain below. Indeed, Judge Subramanian recognized that his *Diallo* decision would not bar detention of an absconder with an *in absentia* final order of removal—such as Petitioner here—as long as removal is imminent. *Id.* at 208 ("nothing in the Court's holding says that the government may not remove Diallo or that, if removal were *imminent*, the government could not briefly detain Diallo for purposes of effecting that removal") (emphasis in original); *see also Chen v. Noem*, No. 26-cv-1109 (AS), 2026 WL 380712, at *1 (S.D.N.Y. Feb. 11, 2026) (explaining that *Lin* "involved the unique situation of an individual who was subject to a final order of removal after failing to attend his removal hearing and being out of contact with ICE since then, rendering him inaccessible to ICE, a point that the court [in *Lin*] repeatedly emphasized").

Moreover, Petitioner's interpretation of § 1231(a) is misguided: a statute authorizing detention for purposes of removal should not be read to *incentivize* aliens to abscond, and, if they are successful in evading immigration authorities long enough to run out the 90-day clock, then *be rewarded* with freedom from detention *forever*.

In short, 8 U.S.C. § 1231(a)(6) statutorily authorizes Petitioner's detention pending his removal, and Petitioner's assertions regarding notice and process are simply not correct. *Lin*, 2025 WL 3751855, at *3 ("Nor does he offer case law supporting the improbable proposition that—with his not having appeared at his removal hearing or evidently had any contact in the ensuing 12 years with ICE—ICE was required either (1) to give him advance notice, upon encountering him at an airport, before detaining him, or (2) to release him on supervisory conditions after it encountered him."). Accordingly, Petitioner's detention pending his removal is lawful.

II. PETITIONER'S ORDER OF RELEASE ON RECOGNIZANCE WAS LAWFULLY CANCELLED

Respondents respectfully submit that Petitioner's Order of Release on Recognizance ("OREC") was lawfully cancelled. Indeed, ORECs are generally governed by 8 C.F.R. § 236. With respect to revocation or cancellation, 8 C.F.R. § 236.1(c)(9) states:

> "When an alien who, having been arrested and taken into custody, has been released, such release may be revoked at any time in the discretion of the district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer in charge (except foreign), in which event the alien may be taken into physical custody and detained. If detained, unless a breach has occurred, any outstanding bond shall be revoked and canceled."

Id.

Petitioner's argument to the contrary appears to rely on regulations governing an alien's release on an order of supervision. *See, e.g.*, 8 C.F.R.§§ 241.4, 241.5, 241.13, 241.14. Yet these regulations do not apply to Petitioner, who was never released on supervision. *See* ECF No. 7-1,

¶ 10. *See also Lin*, 2025 WL 3751855, at *3 ("The regulations ICE must follow in revoking a noncitizen's supervision do not apply to a noncitizen who has not been on supervision."); *Gualpa-Mizhquiri,* 2026 WL 396081, at *3 (same). As such, because Petitioner's OREC could be canceled, as a discretionary matter, "at any time," it was lawfully cancelled here. 8 C.F.R. § 236.1(c)(9).

III. THE REMAINING IMPEDIMENT TO REMOVAL IS THIS COURT'S APRIL 28, 2026 ORDER

As previously explained, this Court's Order dated April 28, 2026 prohibiting ICE from removing Petitioner is the sole impediment to removal. *See* ECF No. 7, at 3.

And as discussed at the conference, Petitioner's removal is imminent. ICE is in possession of a valid travel document for Petitioner, in the form of a valid Salvadoran passport for Petitioner. *See* Supplemental Declaration of Kerryn Irving ("Supp. Decl.") ¶ 7.[1] Moreover, with respect to Petitioner, El Salvador does not need to be contacted in advance of the removal. Supp. Decl. ¶ 8.

Regarding removal, ICE's general practice for aliens detained at the Metropolitan Detention Center in Brooklyn, New York, being removed to El Salvador is to transfer the alien to a staging location, such as Alexandria, Louisiana, in order to thereafter place the alien on a removal flight from the staging location to El Salvador. Supp. Decl. ¶ 9.[2]

Should the Court vacate its April 28, 2026 Order, and should there be no other impediment to removal, ICE intends to schedule Petitioner for staging for removal and, subsequently, removal from the staging location on a flight to El Salvador. Supp. Decl. ¶ 12.

* * * *

Accordingly, the Petition should be denied, and this Court's Order enjoining Petitioner's removal should be vacated. Respondents thank the Court for consideration of this submission.

Respectfully submitted,

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[1] Even if ICE did not have a valid travel document for Petitioner, obtaining a valid travel document for El Salvador is a quick process, as El Salvador participates in the Electronic Nationality Verification Program. Supp. Decl. ¶ 7.

[2] In fact, Petitioner was scheduled to be transferred to Harlingen, Texas, on April 9, 2026, and then to Alexandria, Louisiana, on April 10, 2026, for the purpose of thereafter effectuating his removal to El Salvador, but Petitioner's since-denied motion to reopen removal proceedings, which triggered an automatic stay of removal, created an impediment to removal such that the scheduled transfers for staging were cancelled. Supp. Decl. ¶ 10.