UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAVIDATH LAWRENCE RAGBIR, Petitioner, - against - JEFFERSON SESSIONS III, *et al.*, Respondents.	**No. 18 Civ. 236 (KBF)** **ECF Case**

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS

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Preliminary Statement

Respondents (the "government"), by their attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to the amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 filed on January 17, 2018 (Dkt. No. 21), by petitioner Ravidath Lawrence Ragbir ("Mr. Ragbir"). This is an action challenging Mr. Ragbir's current immigration detention; it does not concern whether Mr. Ragbir should be removed from the United States—that decision has already been made, and this is not the proper forum for such a challenge.

Mr. Ragbir, a native and citizen of Trinidad and Tobago, is subject to a valid, final removal order. Although formerly a lawful permanent resident ("LPR") of the United States, Mr. Ragbir lost that status in March 2007 when he received a final order of removal in the immigration courts. Mr. Ragbir has filed extensive challenges to his removal order, but all have been unsuccessful.

ICE repeatedly granted Mr. Ragbir administrative stays of removal, which are entirely discretionary and defer the removal of an alien subject to a final order of removal. On November 16, 2017, Mr. Ragbir submitted a request for another administrative stay of removal. At a meeting with ICE on January 11, 2018, ICE informed Mr. Ragbir and his attorney that his request for another stay of removal had been denied, that his order of supervision was being revoked, and that he would be detained for the purpose of executing his removal order. After that meeting, where Mr. Ragbir's attorney had an opportunity to be heard, Mr. Ragbir was taken into custody and started the process of removing him until this Court issued a stay of removal. Mr. Ragbir remains detained pending his removal.

In taking these actions, ICE acted within its statutory and constitutional authority to enforce Mr. Ragbir's final order of removal. Contrary to Mr. Ragbir's arguments, ICE complied

all applicable statutes and regulations controlling the removal of an alien. Indeed, 8 U.S.C. § 1231 calls for the removal of aliens subject to final orders of removal, and its implementing regulations provide the manner for revoking discretionary stays of removal and orders of supervision. In carrying out the statutory command of § 1231, ICE followed these rules.

Mr. Ragbir's constitutional claims likewise fail. Aliens subject to a final order of removal do not have a protected liberty or property interest in their continued presence in the United States. Any discretionary protection against removal, such as an administrative stay of removal, does not fall within the ambit of the Due Process Clause. Even if Mr. Ragbir could invoke the Due Process Clause, he has received substantial process over his decades in the immigration system. He had full and fair removal proceedings, followed by unsuccessful appeals and a motion to reopen. He received multiple, discretionary administrative stays of removal from ICE. And at the meeting with ICE on January 11, 2018, Mr. Ragbir's attorney had the opportunity to attempt to persuade ICE to reconsider its denial of his final request for administrative stay of removal. Mr. Ragbir has received constitutionally sufficient due process. ICE did not violate any statutory, regulatory, or constitutional by enforcing the outcome of that process.

Accordingly, the Court should deny Mr. Ragbir's amended petition.

BACKGROUND

A. Mr. Ragbir's Immigration Proceedings

Mr. Ragbir is a native and citizen of Trinidad and Tobago. *See* Declaration of Scott Mechkowski, dated January 19, 2018, ("Mechkowski Decl.") ¶ 4. In February 1994, Mr. Ragbir was admitted to the United States as a lawful permanent resident ("LPR"). *Id.* ¶ 5.

In 2001, following a jury trial, Mr. Ragbir was convicted in the U.S. District Court for the District of New Jersey of wire fraud and conspiracy to commit wire fraud. *Id.* ¶ 6. Mr. Ragbir

was sentenced to 30 months' imprisonment and was ordered to make restitution in the amount of $350,001. *Id.* In 2002, the U.S. Court of Appeals for the Third Circuit affirmed his conviction, and the U.S. Supreme Court denied Mr. Ragbir's petition for a writ of certiorari. *Id.*

On May 22, 2006, ICE arrested and detained Mr. Ragbir, and served him with a Notice to Appear ("NTA"), the charging document used to commence removal proceedings. *Id.* ¶ 7. The NTA charged Mr. Ragbir as removable pursuant to two charges of section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien with a conviction for an aggravated felony; specifically, an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000, and an attempt or conspiracy to commit an aggravated felony, as further defined in the INA. *Id.* Mr. Ragbir was represented by counsel at his removal proceedings. On August 4, 2006, an immigration judge issued a decision sustaining the allegations and charges in the NTA, and ordering Mr. Ragbir removed to Trinidad and Tobago. *Id.* ¶ 8. On March 14, 2007, the Board of Immigration Appeals ("BIA") dismissed Mr. Ragbir's appeal, rendering the immigration judge's removal order administratively final.[1] *Id.* ¶ 9.

Mr. Ragbir filed a timely petition for review ("PFR") of the BIA's decision with the U.S. Court of Appeals for the Second Circuit, and the Second Circuit denied Mr. Ragbir's PFR on August 12, 2010. *Id.* ¶¶ 9, 13. On November 22, 2010, the Second Circuit denied Mr. Ragbir's

[1] Once Mr. Ragbir's removal order became administratively final, he lost his LPR status. *See In re: Sandra Carolina Mendoza-Sandino*, 22 I. & N. 1236, 1251 (BIA 2000) ("A lawful permanent resident who commits a removable or deportable offense remains a lawful permanent resident until an administratively final order of removal or deportation deprives him of that status."). Thus, contrary to the characterizations in Mr. Ragbir's amended petition that he is a "longtime Lawful Permanent Resident" and that he "has been a Lawful Permanent Resident since 1994," Am. Pet. ¶ 15, the reality is that Mr. Rabir lost his LPR status effective March 14, 2007.

petitions for rehearing and for a rehearing *en banc*. *Id.* ¶ 16. In October 2011, the U.S. Supreme Court denied Mr. Ragbir's petition for a writ of certiorari. *Id.*

In February 2008, while Mr. Ragbir's PFR was pending before the Second Circuit, ICE released Mr. Ragbir from detention on an order of supervision.[2] *Id.* ¶ 10. While his PFR was pending with the Second Circuit, the government's forbearance policy prevented ICE from removing him. *Id.*

On January 4, 2012, ICE, in its discretion, granted Mr. Ragbir an administrative stay of removal until December 22, 2012, during which Mr. Ragbir was required to continue to report on an order of supervision. *Id.* ¶ 18.

On March 16, 2012, Mr. Ragbir filed with the BIA a motion to reconsider, which the BIA denied on May 15, 2012. *Id.* ¶¶ 21, 23. The BIA also construed Mr. Ragbir's motion as a motion to reopen proceedings and denied the motion as construed. *Id.* ¶ 23. Mr. Ragbir filed a timely PFR of the BIA's decision with the Second Circuit, and the Second Circuit denied the PFR on March 4, 2016. *Id.* ¶¶ 23, 34.

On January 7, 2013, ICE initially denied Mr. Ragbir's request for a renewed administrative stay of removal, but ICE later granted Mr. Ragbir a stay in February 2013, which was effective until February 14, 2014. *Id.* ¶ 27. In January 2014, Mr. Ragbir requested renewal of his administrative stay, which ICE initially approved until February 10, 2015, and later extended until March 10, 2016. *Id.* ¶ 32. In December 2015, Mr. Ragbir submitted another request for an administrative stay of removal, and ICE extended Mr. Ragbir's administrative stay until January 19, 2018.

[2] Mr. Ragbir was detained in pre-removal-order detention under 8 U.S.C. § 1226(c) for 296 days (9 months, 20 days). Mr. Ragbir was detained in post-removal-order detention under 8 U.S.C. § 1231(a) for approximately 10-11 months.

On February 22, 2017, Mr. Ragbir filed a petition for a writ of coram nobis in the District of New Jersey, challenging his wire fraud conviction and sentence. *Id.* ¶ 37. The coram nobis is fully briefed and remains pending. *Id.*

On November 16, 2017, Mr. Ragbir submitted another request with ICE for an administrative stay of removal. ICE denied that request on January 11, 2018. *Id.* ¶¶ 40, 44.

On December 7, 2017, Mr. Ragbir submitted to ICE a second request for a joint motion to reopen his removal proceedings. *Id.* ¶ 41. On January 11, 2018, ICE notified Mr. Ragbir that it declined to join his motion to reopen. *Id.* ¶ 44.

On January 3, 2018, ICE obtained a travel document for Mr. Ragbir from the Consulate of Trinidad and Tobago, which was valid for use until January 14, 2018. *Id.* ¶ 42.

B. The events leading up to January 11, 2018, and thereafter

On January 8, 2018, Mr. Ragbir's attorney met with ICE officials. *Id.* ¶ 43. They informed her that no decision had yet been made on Mr. Ragbir's request for an administrative stay of removal and that ICE was still reviewing the application. *Id.* Mr. Ragbir was to return, with his attorney, to 26 Federal Plaza, New York, NY on January 11, 2018. *Id.*

On January 11, 2018, Mr. Ragbir reported to ICE with his wife and his attorney. *Id.* ¶ 45. At the meeting, ICE informed Mr. Ragbir that, after reviewing Mr. Ragbir's case, including his positive equities and mitigating circumstances, ICE had denied his request for an administrative stay of removal. *Id.*; Gov't Return, Ex. 4. ICE also informed Mr. Ragbir that his order of supervision would therefore be revoked, and that Mr. Ragbir would be taken into custody for the purpose of removal to Trinidad and Tobago. Mechkowski Decl. ¶ 45; Gov't Return, Ex. 3. In response to this information, Mr. Ragbir's attorney raised Mr. Ragbir's pending coram nobis and request for a presidential pardon, as well as a forthcoming motion to reopen at the BIA. Mechkowski Decl. ¶ 45; *see* Gov't Return, Ex. 1. Mr. Ragbir's attorney also asked if ICE would

place Mr. Ragbir on a bracelet. Mechkowski Decl. ¶ 45. Mr. Ragbir's wife also spoke. *Id.* About five to ten minutes into the meeting, Mr. Ragbir apparently lost consciousness, and he was taken to Bellevue Hospital Center for evaluation. *Id.* ¶¶ 45, 46. After he was discharged from the hospital, ICE transported Mr. Ragbir to the Newark Liberty International Airport, where ICE had scheduled him for a 4:13 p.m. flight to Miami, Florida in anticipation of his scheduled removal the next day. *Id.* ¶ 46.

Shortly after his arrest, Mr. Ragbir's attorney filed a petition for a writ of habeas corpus in this Court, and sought an order to show cause. At or about 4:15 p.m., this Court issued an order to show cause, setting an expedited briefing schedule on the petition, staying Mr. Ragbir's removal, and enjoining ICE from transferring Mr. Ragbir out of the jurisdiction.[3]

C. Mr. Ragbir's Amended Habeas Petition

On January 11, 2018, shortly after his arrest by ICE, Mr. Ragbir filed the instant petition for a writ of habeas corpus. On January 17, 2018, Mr. Ragbir filed an amended petition. In his petition, Mr. Ragbir challenges ICE's denial of his administrative stay of removal, the revocation of his order of supervision, and his detention.

ARGUMENT

MR. RAGBIR'S PETITION SHOULD BE DENIED

A. ICE Validly Revoked Mr. Ragbir's Supervised Release and Permissibly Detained Him While Seeking To Execute His Final Removal Order

ICE acted within its authority to revoke Mr. Ragbir's supervised release and deny his administrative stay, and Mr. Ragbir received all the process he was due.

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[3] As explained in the government's reply brief in support of the government's motion to vacate, Mr. Ragbir already was at the airport, and likely already had departed, when the government learned of the Court's order. Accordingly, he was stopped in Miami, before he could take a connecting flight to Trinidad and Tobago. *See* Dkt. No. 20.

1. This Court lacks jurisdiction to review the revocation of Mr. Ragbir's supervised release and the denial of his request for a stay of removal

To the extent that Mr. Ragbir seeks to challenge ICE's discretionary decisions to revoke his supervised release and deny his request for an administrative stay of removal (as opposed to the process), the Court lacks subject-matter jurisdiction by virtue of 8 U.S.C. § 1252(a)(2)(B)(ii). *See, e.g.*, *Bernardo ex rel. M&K Engineering, Inc. v. Johnson*, 814 F.3d 481, 485 (1st Cir. 2016) (holding that the judicial review bar at § 1252(a)(2)(B)(ii) applied as a result of statutory terms suggesting a grant of administrative discretion); *cf. Zadvydas*, 533 U.S. at 695 (supervised release when removal is not likely in the reasonably foreseeable future should be upon conditions "appropriate in the circumstances"). The statutes and regulations make clear that revocation of supervised release and denial of an administrative stay applications are within the agency's discretion. 8 U.S.C. § 1231(a)(6); 8 C.F.R. § 241.4(l)(2), § 241.13(i). Indeed, courts that have considered habeas challenges to post-removal-order orders of supervision have accorded administrative authorities "wide latitude" to impose such orders. *Yusov v. Shaughnessey*, 671 F. Supp. 2d 523, 528 (S.D.N.Y. 2009) (citing cases). Accordingly, to the extent that Mr. Ragbir challenges the substance of ICE's discretionary decisions to revoke his order of supervision and deny his stay request, the Court should decline to consider such challenges, as they lie squarely within the discretion of the agency.

2. Mr. Ragbir received all the process he was due

Even if the Court determines that it has jurisdiction over Mr. Ragbir's challenge, aliens do not have a constitutionally protected interest in discretionary forbearance from removal. The Supreme Court, the Second Circuit, and other circuits have repeatedly held as much, including in proceedings involving Mr. Ragbir. Accordingly, for the reasons explained below, Mr. Ragbir has received all the process he is constitutionally due.

The Due Process Clause does not protect a "benefit . . . if government officials may grant or deny it in their discretion." *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005); *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989); *see Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). The protections of the Due Process Clause categorically do not attach to liberty and property interests that are granted at the discretion of government officials. Mr. Ragbir's supervised release, stay of removal, and work authorization were at the discretion of government officials. *See* 8 U.S.C. § 1231(a)(6) ("An alien ordered removed who is . . . removable under section . . . 1227(a)(2) . . . of this title . . . *may* be detained beyond the removal period . . . .") (emphasis added); *id.* § 1231(a)(7) (explaining that work authorizations for aliens ordered removed depend on the Attorney General making certain findings). Moreover, the fact that Mr. Ragbir's supervised release was revoked rather than denied in the first instance does not alter the analysis. The implementing regulations specifically provide for discretionary revocation of release. *See* 8 C.F.R. § 241.4(l)(2) ("Release may be revoked in the exercise of discretion when, in the opinion of the revoking official: . . . (iii) [i]t is appropriate to enforce a removal order or to commence removal proceedings against an alien; or (iv) [t]he conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate."). As such, Mr. Ragbir's continued stay of removal was a matter of discretionary authority.[4] Because Ragbir's continued stay of removal was at the discretion of government officials, the Due Process Clause did not prohibit its revocation.

[4] The same is true of the other regulation Mr. Ragbir cites, 8 C.F.R. § 241.13(i). Section § 241.13(i)(2) provides that "[t]he 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." In the present case, because ICE had a valid travel document for Mr. Ragbir, there was a significant likelihood that Mr. Ragbir may have been removed in the reasonably foreseeable future, and revocation of Mr. Ragbir's release was within ICE's discretion.

The Second Circuit and other circuit courts have applied the Supreme Court's holdings on the reach of the Due Process Clause in the particular context of discretionary relief for aliens subject to final orders of removal and unequivocally concluded that "[a]n alien has no constitutionally-protected right to discretionary relief or to be eligible for discretionary relief." *Yuen Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008) (quoting *Oguejiofor v. Attorney General of U.S.*, 277 F.3d 1305, 1309 (11th Cir. 2002) (emphasis omitted)); *see Smith v. Ashcroft*, 295 F.3d 425, 430 (4th Cir. 2002) (addressing former statutory immigration scheme). In *Yuen Jin*, three petitioners subject to final orders of removal sought to file successive asylum petitions. Generally, successive asylum petitions are barred, but a successive petition may be considered when "the alien demonstrates [certain circumstances] to the satisfaction of the Attorney General." 8 U.S.C. § 1158(a)(2)(D). In upholding the rejection of petitioners' successive asylum applications, the Second Circuit considered petitioners' statutory claims at length. By contrast, the Court's discussion of petitioners' constitutional due process claims was more direct: petitioners' constitutional claims were defective because the Due Process Clause does not protect discretionary relief for aliens subject to removal orders. *See Yuen Jin*, 538 F.3d at 156-57. Simply put, there were no liberty or property interests to which due process protections attached. In the same way, Mr. Ragbir's constitutional claims because they challenge the revocation of benefits awarded at the discretion of the Attorney General. Because he seeks discretionary protection from a final order of removal, Mr. Ragbir can cite no liberty or property interest to which due process protections attach. *Cf. Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) ("[E]xpectation does not equate with liberty or property, and a constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award."); *Ashki v. INS*, 233 F.3d 913, 921 (6th Cir. 2000) ("Eligibility for suspension is not a right protected by the

Constitution. Suspension of deportation is rather an 'act of grace' that rests in the 'unfettered discretion' of the Attorney General. Because suspension of deportation is discretionary, it does not create a protectible liberty or property interest.") (quoting *Appiah v. INS*, 202 F.3d 704, 709 (4th Cir. 2000)).

The Second Circuit also has specifically held that the Due Process Clause does not protect the revocation of the discretionary release of aliens. *See Wong Hing Fun v. Esperdy*, 335 F.2d 656, 657 (2d Cir. 1964) (Marshall, J.). In *Wong Hing Fun*, the Attorney General had exercised his "discretionary authority" to release two alien petitioners on parole. *Id.* The petitioners claimed that the Attorney General's later "order revoking parole was illegal because it was entered without a full hearing." *Id.* The Second Circuit held that "[t]here is no basis for appellants' contention that due process requires a hearing on revocation of parole, even though Congress did not provide one." *Id.* Despite the initial grant of parole in the Attorney General's discretion, the Fifth Amendment did not protect any liberty interest in continued parole. Although *Wong Hing Fun* arose in the context of parole under a prior version of the INA, its holding applies here: Mr. Ragbir is similarly situated to a paroled alien because he is subject to a final order of removal and removable under 8 U.S.C. § 1227(a)(2)(A)(iii). His continued presence in the United States was a result of the government's "discretionary authority," and revocation of his protection from removal, like revocation of parole, does not fall within the ambit of the Due Process Clause. *Wong Hing Fun*, 335 F.2d at 657.

The Second Circuit recently affirmed its holding that the Due Process Clause does not attach to discretionary relief, in Mr. Ragbir's own case. "[A]n alien has no constitutionally protected liberty or property interest in a grant of discretionary relief." *Ragbir v. Lynch*, 640 F. App'x 105, 108 (2d Cir. 2016) (Summary Order). Mr. Ragbir sought an adjustment of his status,

but, as the Second Circuit observed, "a grant of adjustment of status is discretionary," and so "there [was] no merit to Ragbir's due process claim." *Id.* In *Ragbir*, the Second Circuit relied on *Ahmed v. Gonzalez*, 447 F.3d 433 (5th Cir. 2006), one of a line of cases from the Fifth Circuit that "ha[ve] repeatedly held that discretionary relief from removal, including an application for an adjustment of status, is not a liberty or property right that requires due process protection." *Id.* at 440; *see Ragbir*, 640 F. App'x at 108 (citing *Ahmed*, 447 F.3d at 440); *see also Manzano-Garcia v. Gonzales*, 413 F.3d 462, 471 (5th Cir. 2005) ("[W]hat the Manzanos presuppose is that they have a constitutionally protected right to actual discretionary relief from removal or to be eligible for such discretionary relief . . . . This is incorrect."); *Assad v. Ashcroft*, 378 F.3d 471, 475 (5th Cir. 2004) ("[T]he failure to receive relief that is purely discretionary in nature does not amount to a deprivation of a liberty interest."). As such, several circuit courts, including the Second Circuit, have repeatedly held that there are no constitutionally protected liberty or property interests in protection from removal granted at the government's discretion.

The animating idea behind these decisions is that the Constitution does not protect what "government officials may grant or deny . . . in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). While this principle applies in a variety of contexts, *see, e.g.*, *id.*; *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462–63 (1989), in the immigration context it applies with particular force because of the deference afforded to the political branches. *See Rojas-Reyes*, 235 F.3d 115, 121-22 (2d Cir. 2000). Indeed, the Supreme Court "ha[s] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). In the present case, Mr. Ragbir's stay of removal and supervised release were discretionary benefits bestowed upon him by the

government. The Due Process Clause did not protect them or restrict the government's discretion to revoke them. Accordingly, Ragbir's constitutional claims before this Court fail.

Nevertheless, even assuming *arguendo* that the Due Process Clause extends to Mr. Ragbir's discretionary stay of removal supervised release, he received constitutionally adequate process. In *Yuen Jin*, after deciding that petitioners did not have a protectable interest in discretionary relief, the Second Circuit concluded that, even if they did, petitioners had received due process as a result of their previous immigration proceedings, including "a full and fair removal hearing (which resulted in a final removal order)." *Id.* at 157. So too here: Mr. Ragbir received a full and fair removal hearing, which resulted in a final removal order from which he now seeks discretionary relief. Moreover, Mr. Ragbir has received further process as a result of his stay applications and check-ins with ICE. Mr. Ragbir has had the opportunity to submit evidence, including letters from supporters, as well as legal arguments, such as how his legal status would be affected by pending proceedings in other fora. *See* Das Decl. ¶¶ 8-11. Indeed, in his most recent stay application from November 2017, Mr. Ragbir took the opportunity to again submit letters from his supporters and present arguments about how his immigration status might change as a result of legal developments. *See id.* ¶¶ 12, 21. Although ICE exercised its discretion to revoke Ragbir's stay and deny his most recent stay application, Ragbir did receive an opportunity to present substantial materials on why the stay might have been continued.

Additionally, on January 11, 2017, Mr. Ragbir and his attorney met with ICE officials in person. Mechkowski Decl. ¶ 45. At that meeting, Deputy Field Office Director Mechkowski informed Mr. Ragbir that, "after reviewing his case, including his positive equities and mitigating circumstances," ICE had denied his request for another administrative stay of removal, that Mr. Ragbir's order of supervision was being revoked, and that Mr. Ragbir would

be taken into ICE custody for the purpose of executing the removal order. *Id.* DFOD Mechkowski and those present at the meeting engaged in a discussion regarding the reasons for the denial of the stay request and re-detention for removal, and Mr. Ragbir's counsel raised a number of equities supporting her request to allow Mr. Ragbir to stay (e.g., the pending presidential pardon request, the pending coram nobis, and a forthcoming motion to reopen with the BIA). *Id.* Approximately five to ten minutes into the meeting, Mr. Ragbir appeared to lose consciousness, after which Mr. Ragbir was taken to a hospital for evaluation. *Id.* On this record, it is clear that Mr. Ragbir received sufficient process when ICE exercised its discretion to revoke Mr. Ragbir's supervised release and to deny his administrative stay of removal.

Accordingly, even if the Due Process Clause does protect discretionary protection from removal in some form, the Court should conclude that Mr. Ragbir received constitutionally sufficient process, and that ICE validly revoked Mr. Ragbir's supervised release and denied his administrative stay.[5]

3. ICE did not violate its regulations

Mr. Ragbir suggests that ICE was going violate its regulations (8 C.F.R. § 241.22 and § 241.33(b)) by removing him within the first 72 hours of his arrest. *See* Am. Pet. ¶ 41. However, those regulations do not apply to Mr. Ragbir. Section 241.22 is found in subpart B to part 241, and section 241.33(b) is found in subpart C to part 241; and both sections are limited to the execution of final orders resulting from commenced prior to April 1, 1997. *See* 8 C.F.R. § 241.20. 241.33. Mr. Ragbir's removal proceedings commenced in 2006. In any event,

[5] To the extent that Mr. Ragbir challenges ICE's revocation of his latest grant of an administrative stay of removal, that administrative stay expired today, January 19, 2018, and so there is no longer any administrative stay of removal in place.

Mr. Ragbir was not removed within 72 hours of his detention, and thus ICE did not violate any applicable or inapplicable regulation.

B. Mr. Ragbir's detention is authorized by 8 U.S.C. § 1231

Mr. Ragbir incorrectly claims that no statute authorizes his detention. *See* Am. Pet. ¶¶ 34-39. Mr. Ragbir's detention pending removal from the United States is unquestionably governed by INA § 241, 8 U.S.C. § 1231.

Under the INA, if ICE does not remove an alien subject to a final removal order within 90 days (the "removal period"), 8 U.S.C. § 1231(a)(1)(A), ICE may continue detention if it is "reasonably necessary" to effectuate removal, or ICE may release the alien "subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. § 1231(a)(3); *see Zadvydas*, 533 U.S. at 689; 8 U.S.C. § 1231(a)(3) and (6) (providing that an alien who is subject to mandatory detention, inadmissible, or who has been determined to be a risk to the community or a flight risk, "*may* be detained beyond the removal period") (emphasis added). Those regulations provide, *inter alia*, that supervision orders shall contain various reporting requirements, limitations on travel without prior ICE approval, and a mandate that the alien "continue efforts to obtain a travel document and assist the Service in obtaining a travel document." *See* 8 C.F.R. § 241.5(a). Neither the statute nor the regulations contain a time limit on the period of supervision. The *Zadvydas* Court did not set a time limit and implicitly endorsed supervision for the duration of an alien's presence in the United States when it held that deportable aliens with no foreseeable possibility of deportation should be released under supervision. 533 U.S. at 695-96; *see also Yusov v. Shaughnessey*, 671 F.Supp.2d 523, 527-28 (S.D.N.Y. 2009).

Even though there is no question that the removal period has expired, ICE retains the statutory authority to hold Mr. Ragbir under 8 U.S.C. § 1231(a)(6), which permits detention beyond the "removal period" of an alien found removable under 8 U.S.C. § 1227(a)(2).[6]

That he was previously released on an order of supervision is of no consequence.

C. Mr. Ragbir's detention is lawful and constitutional, and he is not entitled to release

As noted above, Mr. Ragbir's detention is governed by 8 U.S.C. § 1231. The Supreme Court addressed ICE's authority to detain aliens after their removal orders become final in *Zadvydas v. Davis*, 533 U.S. 678 (2001). There, the Court held that 8 U.S.C. § 1231(a) authorizes immigration detention for a period reasonably necessary to accomplish the alien's removal from the United States. *Zadvydas*, 533 U.S. at 699-700. The Court recognized six months as a presumptively reasonable period of time to allow the government to accomplish an alien's removal. *Id.* at 701. However, the Supreme Court did not require the government to release every alien whose detention exceeds six months. Rather, the Court held:

> After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as "reasonably foreseeable future" conversely would have to shrink. *This 6-month presumption, of course, does not mean that every alien not removed must be released after six months. To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.*

Id. (emphasis added).[7]

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[6] 8 U.S.C. § 1231(a)(6) provides that "[a]n alien ordered removed who is . . . removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title . . . may be detained beyond the removal period . . . ." Here, Mr. Ragbir falls under the purview of 8 U.S.C. § 1231(a)(6).

Thus, in a challenge to post-order detention, the Supreme Court placed the initial burden on the alien. *Id.* If the alien fails to meet that burden, or if the government rebuts the alien's showing, then continued detention is permissible. *Id.*

Aliens detained under 8 U.S.C. § 1231 are not entitled to bond hearings before an immigration judge. Instead, such aliens receive periodic custody reviews from ICE, and following *Zadvydas*, the government promulgated regulations requiring ICE to conduct custody reviews for aliens whose post-removal-order detention has exceeded six months. *See* 8 C.F.R. §§ 241.4, 241.13.

As an alien subject to a final removal order, Mr. Ragbir is detained under 8 U.S.C. § 1231. Mr. Ragbir has been detained for just over one week, since January 11, 2018, and thus he is within the presumptively reasonable period of detention authorized by *Zadvydas*. Yet Mr. Ragbir argues that his detention is unconstitutionally prolonged, claiming that he has been detained for more than 22 months by virtue of the fact that he was previously detained nearly ten years ago.[8] The Court should reject Mr. Ragbir's suggestion that he has been detained for 22 months, and instead find that he is currently detained within the six-month, presumptively reasonable period of detention. *See, e.g.*, *Phean v. Holder*, No. 11-cv-535 (CCC), 2011 WL 1257389, at *2 (M.D. Pa. Mar. 30, 2011) ("[T]he presumptively reasonable six month period

[7] In *Zadvydas*, the concern of "indefinite detention" arose where the petitioners could not be removed from the United States because their home countries would not accept their repatriation, yet the government continued to detain them. *See Zadvydas*, 533 U.S. at 684-86.

began running on . . . the date he was taken back into custody."). In any event, even if Mr. Ragbir's detention no longer falls within a presumptively reasonable period of detention, review under the familiar *Zadvydas*-framework demonstrates that Mr. Ragbir's detention is lawful.

As a threshold matter, Mr. Ragbir bears the initial burden of providing good reason to believe that there is no significant likelihood of his removal in the reasonably foreseeable future, and he has not met this threshold burden. *Zadvydas*, 533 U.S. at 701; *see Callender v. Shanahan*, --- F. Supp. 3d ----, 2017 WL 6414152, at *6 (S.D.N.Y. Dec. 13, 2017) ("Regardless of the length of the detention to date, *Zadvydas* places the burden of proving that there is no significant likelihood of removal in the reasonably foreseeable future on the alien." (quotation omitted)); *see also Akinwale v. Aschcroft*, 287 F.3d 1050, 1051-51 (11th Cir. 2002) ("to state a claim under *Zadvydas* the alien not only must show post-removal order detention in excess of six months *but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future*") (emphasis added). Mr. Ragbir argues only that his detention has become prolonged, and that, upon his information and belief, ICE lacked a travel document to execute his removal. *See* Am. Pet. ¶ 53. However, "mere assertions that removal is unforeseeable do not satisfy [the petitioner's] burden [under *Zadvydas*]." *See Juma v. Mukasey*, No. 09 Civ. 3122 (PAC)(AJP), 2009 WL 2191247, at *3 (S.D.N.Y. July 23, 2009) (vague, conclusory, and general claims that removal is not foreseeable,

[8] Mr. Ragbir argues that "he has already been detained for twenty-two months, fourteen of which were post-final order." Am. Pet. ¶¶ 48, 50. The Court should reject Mr. Ragbir's characterization. As noted *supra* note 2, Mr. Ragbir was detained for approximately 10-11 months post-order before being released in February 2008. To the extent Mr. Ragbir seeks to raise a challenge to his nearly 10-month pre-removal-order detention, such a claim is moot. *Wang v. Ashcroft*, 320 F.3d 130, 147 (2d Cir. 2003) ("To the extent that Wang previously may have had a cognizable due process argument under [§ 1226], that claim has been rendered moot" because Wang "is now subject to detention under [§ 1231].").

and that Embassy will not issue travel document in foreseeable future, fails to meet initial burden); *see also id.* at *3 n.4 (collecting cases).

Moreover, Mr. Ragbir's assertion that ICE lacked a travel document is incorrect. ICE obtained a travel document from the Consulate of Trinidad and Tobago on January 3, 2018, and was in the process of executing his removal on January 11, 2018, but temporarily halted that process due to the court-ordered stays of removal by this Court and DNJ. Mr. Ragbir's removal was not only reasonably foreseeable, but it was imminent. On these facts, Mr. Ragbir cannot meet his threshold burden under *Zadvydas*. Additionally, Mr. Ragbir cannot meet his initial burden by merely relying on the length of his detention, because the passage of time without issuance of a travel document, by itself, does not show that there is no significant likelihood of removal within the reasonably foreseeable future. *See, e.g.*, *Beckford v. Lynch*, No. 15-CV-1020 (JTC), 2016 WL 827389, at *6 (W.D.N.Y. Mar. 3, 2016) (collecting cases); *Newell v. Holder*, 983 F. Supp. 2d 241, 248 (W.D.N.Y. 2013) ("[T]he mere passage of time [is] insufficient to meet the petitioner's burden to demonstrate no significant likelihood of removal."); *see also Akinwale v. Aschcroft*, 287 F.3d 1050, 1051-51 (11th Cir. 2002) ("to state a claim under *Zadvydas* the alien not only must show post-removal order detention in excess of six months but also must provide evidence of a good reason to believe that there is no significant likelihood of removal in the

reasonably foreseeable future").[9] Thus, Mr. Ragbir has not met his burden of showing "evidence of a good reason" to believe there is no likelihood of removal. *See Akinwale*, 287 F.3d at 1052.

But even if Mr. Ragbir had sustained his initial burden (which he has not), the government can easily rebut it here by showing that Trinidad and Tobago had actually issued ICE a travel document for Mr. Ragbir's removal, and, as noted above, ICE was in the process of removing Mr. Ragbir on January 11, 2018, until the court-ordered stays were issued. *See* Dkt. No. 24; *see Obikanye v. INS*, 78 F. App'x 769, 772 (2d Cir. 2003) ("Because Obikanye's removal is reasonably foreseeable, his detention does not implicate *Zadvydas*.").

And while Mr. Ragbir is free to pursue whatever efforts he deems appropriate to prevent his removal, such efforts do not make his removal unlikely or entitle him to relief under *Zadvydas*. *See Abimbola v. Ridge*, 181 F. App'x 97 (2d Cir. 2006) (alien's filing of numerous petitions is a "self-inflicted wound" that does not entitle him to protection under *Zadvydas*); *see also Guangzu Zheng v. Decker*, 618 F. App'x 26 (2d Cir. 2015) ("[T]he Government has been prevented from removing Zheng by the BIA's stay of removal (sought by Zheng) and by its own forbearance policy (also resulting from Zheng's pursuit of an additional stay). If this Court denies Zheng's petition for review and pending stay motion, the Government can seek another travel document. Given this record, Zheng has not 'provide[d] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future.'"); *Agoro v. Dist.*

[9] To the extent that the length of Mr. Ragbir's detention bears on the likelihood of his removal, courts have sustained far greater periods of detention where aliens have failed to produce evidence that there is no significant likelihood of removal in the reasonably foreseeable future. *See, e.g.*, *Callender*, 2017 WL 6414152 (nearly two and a half years); *Luna-Aponte v. Holder*, 743 F. Supp. 2d 189, 197 (W.D.N.Y. 2010) (39 months); *Kassama v. Dep't of Homeland Sec.*, 553 F. Supp. 2d 301, 306 (W.D.N.Y. 2008) (21 months); *see also Leslie v. Mule*, 423 F. App'x 29 (2d Cir. 2011) (more than two years); *Abimbola v. Ridge*, 181 F. App'x 97 (2d Cir. 2006) (more than two years).

Dir. for Immigration Custom Enforcement, 09 Civ. 8111 (SAS), 2010 WL 9976, at *5 & n.72 (S.D.N.Y. Jan. 4, 2010) ("[T]here is a significant likelihood that ICE will be able to procure another travel document for Agoro when he no longer has litigation pending in United States courts. Even if Agoro files additional claims in an effort to prolong the removal process, his removal will still be considered reasonably foreseeable because any resulting delay will be caused by Agoro's own actions."). "It is well-settled, however, that an alien cannot, through unilateral action, create the very circumstance that he relies on for relief under *Zadvydas*." *Callender*, 2017 WL 6414152, at *7; *see also Garcia v. Dep't Homeland Security*, 422 F. App'x 7, 8 (2d Cir. 2011) ("Garcia's removal has been stayed at his own request. This self-inflicted wound cannot establish grounds for a *Zadvydas* claim."). Because Mr. Ragbir's removal is reasonably foreseeable, his detention is lawful.

Finally, Mr. Ragbir's challenge to the post-order custody review ("POCR") process is without merit. *Zadvydas* does not require any particular procedural protections in the post-order custody review context, and existing POCR process are adequate. *See, e.g.*, *Chi Thon Ngo*, 192 F.3d 390, 399 (3d Cir. 1999) (considering seven elements of past rules governing POCR and "conclud[ing] that conscientiously applied, [the rules] provide reasonable assurance of fair consideration of a petitioner's application for parole pending removal."); *Joseph v. DHS*, No. 05-5233 (JLL), 2006 WL 1644875, at *4 (D.N.J. June 12, 2006) (considering POCR process in light of Fifth Amendment challenge and "find[ing] that Petitioner is not entitled to any greater custody reviews than that which [ICE] has already provided him); *Harrison v. Hogan*, No. 1:CV-05-1376, 2005 WL 2020711, at *4 (M.D. Penn. 2005).

Moreover, Mr. Ragbir has not been detained for a prolonged period of time. His detention would have lasted for a negligible amount of time—the time it would have taken for

him to be removed—but for the issuance of the temporary court-ordered stays of removal. Ragbir cannot invoke the power of this Court to stay his removal and then simultaneously complain that, because his removal has been stayed, he has been detained without adequate process. As such, the Ninth Circuit cases Ragbir cites are not relevant here. *See* Amended Pet. ¶ 56. In *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), the Ninth Circuit held that "an individual facing *prolonged immigration detention* under 8 U.S.C. § 1231(a)(6) is entitled to release on bond." *Id.* at 1082 (emphasis added). The Ninth Circuit was clear that "§ 1231(6) detainees . . . may be detained without bond when necessary to ensure their availability for removal." *Id.* at 1088.[10] There remains a significant likelihood of Ragbir's removal in the reasonably foreseeable future, and so his detention without a bond hearing remains constitutionally valid.

The Court also should reject Mr. Ragbir's claim that his continued detention without a bond hearing violates due process. Following the Supreme Court's decision in *Zadvydas*, ICE enacted regulations to meet the criteria the Court established to prevent indefinite detention. *See* 8 C.F.R. § 241.4. Under those regulations, a detained alien is entitled to a review of his custody status before his removal period expires, at 180 days, and at annual intervals thereafter, with the right to request interim reviews from headquarters not more than once every three months. *See* 8 C.F.R. §§ 241.4(k)(1), (k)(2). While Mr. Ragbir was previously detained, he received such periodic custody reviews, and the third resulted in his release from custody in February 2008. *See* Am. Pet. ¶¶ 22–23. Thus, because ICE has given him the requisite periodic custody reviews,

[10] The other Ninth Circuit case cited by Ragbir, *Casas-Castillon v. DHS*, 535 F.3d 942 (9th Cir. 2008), is even less relevant: it concerns an alien detained for seven years, first under 8 U.S.C. § 1226(c) and later under § 1226(a). 535 F.3d at 944, 947–48; *see* Pet ¶ 56. Ragbir is detained under 8 U.S.C. § 1231(a) because he is subject to a final order of removal.

and will continue to do so, Mr. Ragbir has been provided the process required by ICE regulations and by *Zadvydas*.

CONCLUSION

For the foregoing reasons, the Court should deny Mr. Ragbir's amended petition.

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Respectfully submitted,

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