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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 RAVIDATH LAWRENCE RAGBIR,

4 Petitioner,

5 v.

18 CV 236 (KBF)

6 JEFFERSON SESSIONS III, ET AL,

7 Respondents.

ARGUMENT

8
9 New York, N.Y.
January 16, 2018
4:02 p.m.

10 Before:

11 HON. KATHERINE B. FORREST,

12 District Judge

13 APPEARANCES

14 WASHINGTON SQUARE LEGAL SERVICES, INC.
15 IMMIGRANT RIGHTS CLINIC

Attorneys for Petitioner

16 BY: ALINA DAS
JESSICA ROFÉ

17 GEOFFREY S. BERMAN,
18 Interim United States Attorney for the
Southern District of New York

19 BRANDON M. WATERMAN
JOSEPH N. CORDARO
20 Assistant United States Attorneys

21 ALSO PRESENT: BRITTANY CASTLE, Legal Intern
JEREMY CUTTING, Legal Intern

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1 (Case called)

2 MS. DAS: My name is Alina Das with Washington Square
3 Legal Services, Immigrant Rights Clinic, for Mr. Ragbir.

4 THE COURT: Good afternoon, Ms. Das.

5 MS. ROFÉ: My name is Jessica Rofé with the immigrant
6 rights, with Washington Square Legal Services, Immigrant Rights
7 Clinic, for petitioner, Mr. Ragbir.

8 THE COURT: Okay.

9 MS. CASTLE: My name is Brittany Castle with
10 Washington Square Legal Services, on behalf of Mr. Ragbir.

11 THE COURT: All right.

12 MR. CUTTING: My name is Jeremy Cutting with
13 Washington Square Legal Services for Mr. Ragbir.

14 THE COURT: All right.

15 Now, let me just make sure that I have the status of
16 Ms. Rofé, Ms. Castle, and Mr. Cutting correctly in mind. Are
17 you three students or are you not all students?

18 Ms. Rofé, you're not? You're on staff?

19 MS. ROFÉ: I'm on staff.

20 THE COURT: Okay. You're on staff.

21 Are you a student, Ms. Castle?

22 MS. CASTLE: Yes, I am.

23 THE COURT: Okay.

24 Mr. Cutting, you are?

25 MR. CUTTING: Yes, I am.

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1 THE COURT: That's fine.

2 Ms. Das, Ms. Rofé, are you folks going to be doing the
3 argument or is it going to be done by either of the two
4 students? Which will be fine, I just want to make sure that I
5 understand how we are going to be proceeding.

6 MS. DAS: For today, your Honor, with the Court's
7 permission, Ms. Rofé and myself will be doing the arguing.

8 THE COURT: Okay. Terrific. It would be fine in any
9 event; I just want to make sure that I have got it correctly in
10 mind. You can take care of that.

11 Now, turning to Mr. Waterman.

12 MR. WATERMAN: Good afternoon, your Honor.

13 Brandon Waterman, Assistant U.S. Attorney.

14 To my left is Joseph Cordaro, Assistant U.S. Attorney,
15 on behalf of the government.

16 THE COURT: Good afternoon, folks.

17 We are here on petitioner's motion to enforce the
18 Court's order of January 11th, 2018.

19 I want to just back up and tell you folks from my
20 review of the filings in this case so far what I think this
21 habeas petition is about and what I think the issues are that
22 are before me. I'm going to give you an initial reaction to
23 them, because I think it will help direct our time.

24 So the habeas petition seeks redress for the
25 revocation of the release status of the petitioner, and that

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1 followed a final order of removal. So there had been a final
2 order of removal, subsequent to which there were a number of
3 stays of that order that had been issued, but there was a final
4 order of removal.

5 The most recent stay was issued in January 2016. That
6 stay of removal, by its terms, would have expired Friday,
7 January 19th, 2018.

8 The current detention of petitioner is really based
9 upon the application of petitioner not to be deported and to
10 prevent that immediately. Therefore, he is put on an airplane,
11 there are issues about the timing. As I understand it, he
12 would have not gone necessarily straight to Trinidad, but would
13 have gone to Trinidad within that day or so. He ended up
14 stopping in Krome and staying in Krome, which is the Florida
15 facility. That detention, as I understand it, is essentially
16 occurring as part and parcel of his petition relating to the
17 revocation of the stay. So you folks will tell me how I've
18 gotten that incorrect, but that is my takeaway from these
19 papers.

20 Now, as I understand it, there's a threshold question
21 as to whether or not I have subject matter jurisdiction. I
22 think I do, because under the procedural posture of this case,
23 this is not an attack on a final order of removal over which I
24 would not have subject matter jurisdiction; that would have to
25 go straight to the Second Circuit.

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1 Because the nature of the due process right that
2 petitioner is seeking redress for is the revocation of his
3 liberty on January 11th; and that because his assertion is that
4 he did not have notice and an opportunity to be heard in
5 connection with that January 11th revocation, he asserts that
6 the Court has subject matter jurisdiction under the All Writs
7 Act, and that this is not at all a collateral attack or an
8 attack on the final order of removal.

9 Given that posture, I think I do have subject matter
10 jurisdiction. But when I do that, I then reach the question of
11 today's motion, which is the petition to enforce the Court's
12 order, which is essentially to get the grant of a mandatory
13 injunction to have the petitioner brought back to New York.
14 For that I need to look at a couple of different factors; of
15 course, likelihood of success on the merits is one, irreparable
16 injury is another, irreparable injury is laid out.

17 Likelihood of success, let me just go to that.

18 I think that in front of me, in light of the history
19 of this case, I think that there is not a high likelihood of
20 success. So let me explain to you why. And that is because at
21 ECF document number 1-17, there is a January 20th, 2016 -- it's
22 the stay order. So the petitioner would have been under an
23 immediate -- he would have been immediately subject to
24 deportation had that January 20th, 2016 stay not been issued.
25 That followed other stays.

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1 So petitioner had notice that on January 19th, 2018,
2 he would be subject to immediate deportation. So he did have
3 notice of that. That's on the face of the letter itself.

4 And then in terms of opportunity to be heard, he put
5 in a submission on November 16th, 2017, that sought to extend
6 that timing. Why DHS ICE needed to do it on January 11th, I
7 don't know. I think that, frankly, if ICE had rendered its
8 decision on January 19th, 2018, we wouldn't be here, at least
9 you wouldn't be in front of me, because if ICE had denied the
10 extension, the petitioner would have been subject to immediate
11 deportation. I don't know that there would have been a liberty
12 interest as to which he had a reasonable expectation of. I do
13 think he had a reasonable expectation of a liberty interest for
14 the period of eight days between January 11th and January 19th.
15 But I think his case is mooted in three days.

16 I think the case in front of me is mooted on the 19th
17 of January. As a result of that, I don't find that when we are
18 looking at all of the factors for the mandatory injunction,
19 before I even get to some of the other issues, I'm not sure --
20 and I'm inclined to say that there's not enough to issue a
21 mandatory injunction.

22 Now, I would also say I've received a copy -- where
23 did we get this from?

24 THE LAW CLERK: That was in the initial petition.

25 THE COURT: In the initial petition. This is the

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1 photograph of the January 11th, 2018, denial by the field
2 office of the stay extension, of the request for the stay
3 extension, which, from my reading of the statute, I think the
4 field office was entitled to make that determination in an
5 exercise of its discretion.

6 So that's where I come out, the bottom line of which
7 is I think that I have jurisdiction because I don't think that
8 this is a collateral attack -- I don't think this is a direct
9 attack; I don't think it's an attack on the final deportation
10 order. I think that has been *de facto* in place since whenever
11 it was put in place.

12 But I do think that there are other serious issues.

13 Ms. Das, it's your motion. That's how I understand
14 this issue. I know the relief that you've sought has been
15 about detention in one place, about revocation of the stay in
16 another place. I'm really putting it in terms of revocation of
17 the stay as the primary issue. The stay there is not the stay
18 I issued; it's not the stay that's now been issued in New
19 Jersey. It's the stay that the U.S. Immigration and Customs
20 Enforcement had issued in 2016 that was set to expire by its
21 own terms on January 19th of this month. So hopefully that
22 gives you some targets to shoot at.

23 MS. DAS: Well, thank you, your Honor. I appreciate
24 that. I appreciate you laying out the points of concern for
25 this Court, because it does help us get to the core issues.

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1 And there are areas in which, respectfully, we disagree.

2 The core issue in this case is about the unlawful
3 arrest and detention of Ravi Ragbir. He's a husband, a
4 father --

5 THE COURT: Let me just ask you about the unlawful
6 arrest and retention.

7 The detention, as I understand it -- let's just assume
8 for the moment -- I want to understand if we have any common
9 ground -- that this was January 20th. Assume it's January 20th
10 and he did not get a stay; and so the January 20th, 2016 stay
11 expires by its own terms. Assume that he's then taken to the
12 airport and put on an airplane. In your view, is that unlawful
13 detention at that point as of January 20th, 2018?

14 MS. DAS: Yes, your Honor. And that's because the key
15 issue is not actually about the ICE stay, which is highly
16 unusual; many people are living in this country with an
17 order -- fight an order of removal and don't have a ICE stay of
18 removal. The key issue is about the revocation of the order of
19 supervision.

20 Mr. Ragbir has been living in this country since 2008,
21 after already being detained for 22 months, far from his family
22 and his loved ones here in New York, when he was given an order
23 of supervision by ICE. That order of supervision states in its
24 own terms that there are conditions that he has to comply with;
25 that he can't be rearrested, that he can't have another problem

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1 with the law. And it also says that they will continue to make
2 good-faith efforts to get a travel document. And at some
3 point, if that is obtained and they decide to actually remove
4 him, he will be required to surrender to ICE for removal, and
5 at that time being given an opportunity to prepare for his
6 orderly departure.

7 THE COURT: I just want to make sure that I follow --
8 I've been trying to thread my way through statutes which you
9 folks are experts in and follow a lot of things.

10 So I'm looking at ECF document 1-17, and then I'm
11 looking at page 1 of 4, 2 of 4, 3 of 4, and 4 of 4, which are
12 the stay orders.

13 So the January 20th, 2016 says that the stay of
14 removal will expire. Is it the statute that provides -- the
15 CFR that provides these other provisions that you're talking
16 about?

17 MS. DAS: There are provisions in the statute as well
18 as in the federal regulations, which I'll point your Honor to.

19 The order of supervision is at Exhibit IM, ECF number
20 14, which is the actual order of supervision. And this is part
21 of a process actually that Supreme Court laid out in *Zadvydas*,
22 when they talked about people who are facing prolonged periods
23 of detention after a final order of removal.

24 It stated that, yes, there is a question as to whether
25 or not removal will be reasonably foreseeable; and that there's

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1 also a question as to whether or not the person is a flight
2 risk or a danger. Those determinations do need to be made.
3 Those determinations were made in 2008; an order was issued by
4 Immigration and Customs Enforcement; and there are specific
5 rules that are specified, particularly in federal regulations 8
6 CFR 241.4(l), as well as 8 CFR 241.13(i), that specify
7 procedures, both in terms of who is allowed to make the
8 decision to revoke an order of supervision -- which actually is
9 not the field office director, it is the executive associate
10 commissioner of the service, which is now ICE -- and what
11 factors they need to consider.

12 THE COURT: Okay. So let me just have you walk me
13 through two separate things, in your view, the difference
14 between a stay of removal and an order of supervision. As I
15 understand it, a stay of removal means that you're under an
16 order of supervision under 241.4, 8 CFR 241.4. And that if
17 you're under a stay, then you have to comply with the various
18 terms and conditions of your supervision; and that that
19 supervision can't be -- it can be withdrawn, but only under
20 certain circumstances.

21 Do I have that right?

22 MS. DAS: No, your Honor.

23 So the administrative stay of removal is provided for
24 in 8 CFR 241.6. It is a discretionary act. It provides an
25 individual with essentially a promise, an understanding, an

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1 ability to rely upon the fact that they won't be removed for a
2 certain period of time.

3 THE COURT: Hold on one second, if you would, Ms. Das.
4 I just want to have -- Joe, I need somebody to print for me --
5 I have 241.4, I've got 241.3. I've got all kinds of 241s, but
6 I don't have 241.6. So I need 241.6, all right?

7 Go ahead.

8 MS. DAS: And that regulation simply states that the
9 immigration service can issue an order that's a stay; and that
10 they can do so for a reasonable period of time; and that's
11 pretty much all it provides. That gives people an opportunity
12 to know that they won't be deported during that period, and
13 they can make plans and such related to that stay.

14 But very few people get an ICE stay of removal; it's a
15 very rare thing. The order of supervised release itself is a
16 separate act. It is a decision that is made when a person is
17 initially detained. And then it says, We are releasing you.
18 We recognize that you are not a danger; we recognize that you
19 are not a flight risk; we recognize that you are pursuing
20 relief from deportation, and so we are going to put conditions
21 on it. Those conditions, again, are laid out at the exhibit
22 that I mentioned and in the regulations. Then there's a
23 separate set of regulations that govern whether or not that
24 order of supervision can be released.

25 And Mr. Ragbir has --

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1 THE COURT: And the regulations that govern whether or
2 not the order of supervision can be revoked, you mean, that is
3 under 241.4, like either (l) or (k) or (i).

4 MS. DAS: Yes. It's 241.4(l), which has to do with
5 revocation of release. And then 241.13(i), which is specific
6 to whether there's a significant likelihood of removing someone
7 who's detained in the reasonably foreseeable future, so the
8 traffic document issue.

9 I should state for the record we have yet to be told
10 or see that there is a travel document in this case; so we
11 certainly don't concede that they would be able to lawfully put
12 him on a plane out of this country tomorrow, because we have
13 not seen any valid travel document. But putting that aside,
14 there are still requirements that are supposed to be followed.

15 THE COURT: Let me just ask you, because I want to
16 understand your view as to what the meaning of the January
17 20th, 2016 letter is. It sounds like, from your perspective
18 for petitioner, once a stay was issued, let alone multiple
19 stays, but once a stay was issued, his supervision could not be
20 revoked without a number of additional procedures. So if
21 that's the case, then what is the effect of the January 20th,
22 2016 -- what could have happened, if anything, on January 20th,
23 2018, based on this letter?

24 MS. DAS: So at that point they could say, We are in a
25 position to remove you because we no longer have a stay of

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1 removal in place, and we decline to extend the stay, so that we
2 can remove you. But that doesn't mean that he has to be
3 detained.

4 THE COURT: So tell me how that would have occurred.
5 Granted that this is an unusual circumstance, but you're
6 arguing that ICE could not take him into custody to bring him
7 to the airport to force him to get on an airplane. ICE would
8 have to just what?

9 MS. DAS: So hundreds of thousands of people -- from
10 our perspective, very unjustly, but hundreds of thousands of
11 people are deported from this country each year, and they are
12 not detained; they are given letters that say that they are
13 ordered to deport by a period of time. ICE officers can go and
14 observe or they sometimes are supposed to report to the
15 consulate after they have been deported. They are given the
16 opportunity to do this because there's a recognition that when
17 there are any manner of kinds of immigration violations, that
18 there's still an opportunity for people to be able to put their
19 affairs in order, to make decisions for their life, and then to
20 deport according to the law.

21 For Mr. Ragbir, again, he is somebody who is facing
22 deportation because of a single criminal conviction that he
23 received as a green card holder. He has never been accused of
24 having any sort of separate immigration violation. He has come
25 to all of his reporting requirements, including this one,

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1 knowing that there were possibilities of these types of
2 actions. He's never not complied with the law. According to
3 ICE's own findings in his case, he is not a flight risk or a
4 danger to the community.

5 So the order to the supervision requirements, the
6 orders of supervised release and the regulations in and of
7 themselves provide for a process by which decisions have to be
8 made that once ICE made a determination to release someone, to
9 say that, We know that you are going to follow our other rules,
10 that detention is unnecessary and unjustified in your case, if
11 they are going to change their mind and say detention is
12 suddenly necessary, they have to go through a process.

13 THE COURT: But he only was detained -- so talk to me
14 about the detention here, because I see it in two pieces.
15 There's the detention on January 11th, between the time that
16 Mr. Ragbir was at the offices of ICE and was brought to the
17 airport, put on the airplane, probably accompanied, I assume,
18 on the airplane, and so was not free to leave during that
19 entire period of time. And then there's the process of
20 detention which has occurred since then as a result of his
21 putting a halt on his deportation.

22 MS. DAS: Well, your Honor, we certainly don't concede
23 that the reason that he's in detention is because we sought a
24 stay from this Court. He's in detention because ICE put him in
25 detention. They haven't actually given us any reasons or

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1 indication to state that they have the ability to remove him.
2 As I stated before, they need a valid travel document. That
3 has not been provided to us and, as far as we know, does not
4 exist. To us it looks very much like they've detained him at
5 this check-in, partially because of the work that he does as an
6 outspoken immigrant rights leader; and that they are going to
7 keep him in detention until they are able to get a travel
8 document.

9 THE COURT: Well, now, at this point in time, the
10 *coram nobis*, this New Jersey court has also acted, so you've
11 got a separate forum where you're also proceeding. But if I
12 were to vacate my order of the other day, I think the effect --
13 and there was nothing else, I think the effect of that would be
14 that he would be then transferred to Trinidad, as opposed to
15 returned to New York. And I think that what you want is
16 returned to New York.

17 MS. DAS: Yes, your Honor, we do want his return to
18 New York, because he is facing irreparable harm by this
19 transfer, particularly because of the difficulties with
20 accessing counsel, as well as his family.

21 Just before I go to that, I just want to underscore
22 that essentially this Court is the only court that can address
23 this concern about the revocation of the order of supervision.

24 A very instructive case on this point that also
25 addressed this right and this due process right to have an

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1 orderly way of being deported, that you don't have to be
2 detained, that you can't be snatched out from your home with no
3 process and no notice, is a recent case out of the District of
4 Massachusetts, *Rombot v. Souza*, which we cite in our memorandum
5 of law that I know there's a lot of papers. It's a recent
6 case, so the Supp. cite isn't out yet; but the Westlaw cite is
7 2017 Westlaw 5178789.

8 And in a similar manner, an individual who had been
9 living in the country for a very long time, having an order of
10 supervision, was suddenly taken into custody and there was an
11 attempt to deport him. In that case he had an order of
12 supervision that had the exact same language as Mr. Ragbir's
13 order. "You will be given an opportunity to prepare for an
14 orderly departure." Not that we will detain you, not that we
15 will take you away from your family, not that we will move you
16 1,000 miles away.

17 In the last four days I have been given one ten-minute
18 legal phone call to speak to Mr. Ragbir, to prepare and learn
19 even what documents he's received. This is causing an
20 irreparable harm to him, as well as to his family. His wife,
21 Amy Gottlieb, who is here, had to pay for a ticket, over \$700
22 for a ticket and hotel, to go to Miami for the one hour on a
23 Sunday morning that she was allowed to see him based on how
24 they categorized family visits by the last name of the
25 detainee, and had to see him through Plexiglas on a phone.

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1 That's what she was given there.

2 While we are figuring out the kind of process that the
3 Constitution requires before an order of supervision is
4 revoked, he deserves to be here in this region, where there are
5 three facilities that ICE could place him in, with minimal cost
6 to them over and above what they are already doing, so that we
7 can make sure that Mr. Ragbir's rights are protected. And the
8 claims that will be addressed at the January 29th hearing
9 before your Honor, those claims deserve to be heard, and those
10 claims can't be brought by any other court. The district court
11 in New Jersey is addressing post-conviction relief. We do have
12 a pending BIA motion. We try and reopen his removal order, but
13 the question of what happens when they want to execute the
14 deportation order, what process he deserves can only be decided
15 by this Court.

16 THE COURT: Analytically it helps me to separate out
17 the various issues.

18 So one is the question of orderly deportation.

19 MS. DAS: Yes, your Honor.

20 THE COURT: What constitutes an orderly deportation
21 and what constitutes a nonorderly deportation.

22 The second is whether or not his supervision was
23 revoked improperly in some manner.

24 And the third -- and I'm not suggesting that these are
25 not related. The third is the legal effect of the expiration

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1 of the stay of removal.

2 Would you agree that these are the three issues that
3 we're trying to sort through?

4 MS. DAS: Yes, your Honor. I think the way we would
5 frame it is, first, whether he's entitled to release because of
6 the constitutional, statutory, and regulatory violations;
7 second, whether the revocation of the order of supervision was
8 proper and, if not, what protections, what type of hearing due
9 process requires.

10 We certainly think the minimal regulations haven't
11 been followed here. We don't concede that those would comport
12 with due process because they are post hoc kinds of review
13 processes that don't involve counsel. So we would be seeking a
14 true hearing in front of an impartial adjudicator on the
15 order -- the revocation of the order of supervision.

16 Finally, if there is a decision that the order of
17 supervision is properly revoked, that would bring us to the
18 question of what kind of opportunity to prepare for an orderly
19 departure -- not deportation, an orderly departure, which is
20 the language of the order -- would be necessary. Would it be
21 we have individuals who are given letters saying that they can
22 report in six months, with an airline ticket, that they report
23 in 30 days. So that would be another set of issues.

24 But they are complicated issues. I understand why
25 they are complicated; they are issues that we certainly would

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1 want to brief and I know the government would want to brief.

2 While that is happening, we agree with your Honor that
3 you have jurisdiction over this case. As part of that
4 jurisdiction, you did have the inherent authority to issue the
5 orders that you did on January 11th. That asking the
6 government to keep someone here so that they have access to
7 their counsel, because that's where they detained him; he did
8 not make a choice to go down to Florida to fight out his case,
9 that was the government's choice after they detained him and
10 after they knew that we would be filing this habeas petition.
11 Even though I see that there is disagreement about the timing
12 of the flight in the judge's order, they certainly knew that
13 this would be what we would be seeking. And that inherent
14 authority also to issue a stay of removal pending this
15 proceeding to protect this Court's jurisdiction because, again,
16 this is the only court that can determine whether Mr. Ragbir, a
17 husband, a father, a community leader, the executive director
18 of the New Sanctuary Coalition of New York City, is somebody
19 who has complied with every rule and regulation, is somebody
20 for whom detention is justified.

21 THE COURT: All right. Thank you. That's been very
22 helpful.

23 Let me turn to the government and hear from
24 Mr. Waterman or Mr. Cordaro, whoever would like to address both
25 the points that I have raised and also those that Ms. Das had

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1 raised.

2 MR. WATERMAN: Yes, your Honor. And I think we jumped
3 around quite a bit, so -- one second.

4 THE COURT: I'll give you my overview again that I
5 have subject matter jurisdiction because this is not an attack
6 on a final order of removal; that what this is instead is an
7 argument that there has been a violation of the petitioner's
8 right to due process, and one can characterize those due
9 process violations in different buckets. One would be the
10 revocation of supervised release; the other would be the
11 detention. Those are related.

12 Based upon that, I think I have subject matter
13 jurisdiction. Then we got to whether or not the Court would
14 issue a mandatory injunction to have the defendant returned to
15 New York. I made some statements relating to various
16 arguments.

17 Does that sort of put you back where we were, where we
18 started?

19 MR. WATERMAN: Sure, your Honor.

20 Let me address your first point, subject matter
21 jurisdiction.

22 I don't think we are disputing that the Court has
23 subject matter jurisdiction over the habeas petition. If it's
24 a habeas petition that's challenging unlawful confinement or
25 detention, clearly the Court would have jurisdiction to

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1 consider those claims.

2 I believe our position is that the Court lacks
3 jurisdiction to grant the injunctive relief, the stay of
4 removal, and enjoining transfer to other districts or locations
5 of confinement.

6 THE COURT: Let's just pause on that.

7 If the Court has subject matter jurisdiction, then I
8 think as a matter of law the Court can issue relief that allows
9 the Court to effect that relief. And if relief is appropriate,
10 then I think that I can issue an order. I think once I've got
11 jurisdiction, I've got jurisdiction.

12 MR. WATERMAN: Unless restricted by Congress, your
13 Honor. The Real ID Act here limits the Court's authority to
14 grant stays of removal and also in limiting or effecting the
15 Attorney General's exercise of their discretion.

16 With respect to enjoining ICE from removing folks to
17 different facilities, the Attorney General, the Secretary of
18 Homeland Security, has the discretion to house aliens in
19 appropriate detention facilities, wherever the Attorney General
20 or Secretary deems appropriate. That is within the Secretary's
21 discretion. The Real ID Act precludes district courts from
22 interfering or reviewing those discretionary decisions. So the
23 Court would not have jurisdiction to interfere with those
24 discretionary decisions.

25 THE COURT: So the argument of your adversary,

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1 petitioner here, is that to the extent that those regulations
2 or statutory provisions would otherwise infringe on the
3 petitioner's constitutional rights, they would have to be put
4 to one side; that it can't be that those statutory provisions
5 could overcome, for instance, a due process right; but to the
6 extent that they are consistent, so be it. And here their
7 argument is that they are inconsistent. I think that that's
8 the argument, not that the statutes don't have the words in
9 them that you are suggesting that they have, but that those
10 words would have different kinds of meaning in a context where
11 there's a due process challenge.

12 MR. WATERMAN: I understand, your Honor.

13 With respect to the challenge to places of
14 confinement, there I believe the petitioner is raising an
15 access to counsel claim. The government has provided a
16 declaration from the ICE deportation officer from Florida to
17 note the availability of a detainee there to communicate with
18 counsel.

19 The right to access to counsel or communication while
20 in detention is not unfettered; there are restrictions, there
21 are restrictions in any facility.

22 Here, the petitioner has a clear ability to
23 communicate with his lawyer, communicate meaningfully. There
24 are a number of different avenues. He could appear in person.
25 I understand here there may be some restrictions on the ability

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1 of counsel to do that, but there's also the ability to
2 communicate via telephone. There is the general telephone
3 line, which is monitored and/or recorded, but there's also the
4 right to have access to a private telephone line or a video
5 teleconferencing ability. Those clearly provide counsel -- the
6 client, the petitioner, the right and access to counsel.

7 THE COURT: Let me ask you, Mr. Waterman, to address
8 specifically what the meaning of the January 20th, 2016 letter
9 is and why you folks chose to act on January 11th versus
10 waiting for the expiration of the stay of removal on January
11 19th.

12 There could be multiple explanations. One is because
13 I am misreading the import of this January 20th, 2016 letter,
14 and therefore, whether it was January 11th, 2018, January 25th,
15 2018, is neither here nor there. It's also possible that wires
16 got crossed and somebody could have waited until January 19th
17 and things would have been a lot easier, but you didn't, or
18 something else.

19 So tell me what the point of this letter is.

20 MR. WATERMAN: I believe your Honor is referencing a
21 January 20, 2016 letter for a stay of removal.

22 THE COURT: Yes. It says: I have reviewed your
23 request for an administrative stay of removal extension. The
24 request has been granted for a period of two years. The stay
25 of removal will expire on January 19th, 2018. And then it goes

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1 on, talks about supervision.

2 Your client has been issued an order of supervision,
3 and his continued compliance with the conditions is required.

4 So what is the impact of the expiration of this
5 letter, if any, on the status of the petitioner?

6 MR. WATERMAN: Sure, your Honor.

7 That order or that letter obviously grants petitioner
8 the understanding that he is permitted to stay in the United
9 States pending the expiration of that stay. ICE has exercised
10 its discretionary authority there to allow the petitioner to
11 remain in the United States, I believe, because he was pursuing
12 post-conviction relief or other matters to try to set aside the
13 removal order.

14 THE COURT: Maybe I've confused you. It is not so
15 much that I care why this was issued, is what is the legal
16 effect of the expiration on January 19th, 2018? Is there any?

17 MR. WATERMAN: Well, your Honor, my understanding is
18 ICE could revoke that earlier, if it chooses to do so; and, in
19 fact, ICE did revoke that stay, I believe, on January 11th. So
20 the day that he was detained, my understanding is ICE issued a
21 revocation of that stay effective January 11th, 2018. I
22 believe that, again, is your Honor --

23 THE COURT: All right. So let me just see if I can
24 put some words around what I think you're saying, but I'm not
25 sure, which is that had ICE waited until January 19th, 2018,

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1 the stay would have expired by its own terms.

2 MR. WATERMAN: Correct.

3 THE COURT: However, for reasons that were within the
4 discretion of ICE, on January 11th, 2018, ICE decided to revoke
5 the stay, petitioner's stay of removal, early, eight days
6 early.

7 MR. WATERMAN: Correct.

8 THE COURT: That January 11th revocation effected the
9 same legal status -- which is TBD -- that would have occurred
10 on January 19th, 2018, without earlier revocation.

11 MR. WATERMAN: Correct, your Honor.

12 THE COURT: In other words, had there been no January
13 11th letter, the petitioner's status would be the same on
14 January 20th as if there had been a January 11th letter. His
15 stay of removal was no longer extended.

16 MR. WATERMAN: Correct, your Honor.

17 THE COURT: Okay.

18 Now, so let's go to this next point, which is
19 supervised release. Because once the petitioner was given any
20 stay of removal -- and this now goes back to 2012, which is at
21 least the first of the letters that I have -- he was placed on
22 supervised release.

23 In the government's view, does petitioner's right to
24 supervised release expire on the day the stay of removal
25 expires or does it expire only when various procedures are

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1 undertaken to terminate supervised release?

2 Do you see what I'm saying?

3 MR. WATERMAN: I do, your Honor.

4 My understanding -- I'd have to look into this
5 further, but my understanding is that ICE can revoke supervised
6 release sooner. And I believe under the same regulation that
7 petitioner's counsel has cited, 8 CFR 241.13(i), my
8 understanding is that regulation provides that ICE may detain
9 an arrest, an alien, on account of changed circumstances where
10 ICE has determined that it has a significant likelihood of
11 removing the alien in the reasonably foreseeable future.
12 That's my understanding of the way that regulation works.

13 Here, ICE clearly had a significant likelihood of
14 removing the individual; they had a travel document in hand and
15 were prepared to remove the alien.

16 THE COURT: Those are the changed circumstances?

17 MR. WATERMAN: I'd have to consult with ICE, your
18 Honor, but that's my understanding, that's what would amount to
19 changed circumstances.

20 THE COURT: All right.

21 So let's move then to another issue.

22 What is the government's position in terms of what
23 rights, if any, the petitioner has to orderly deportation? As
24 you've heard Ms. Das argue, even assuming the stay of removal
25 was gone, even assuming that supervised release wasn't going to

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1 be extended because of that, if he hadn't been shown to be some
2 sort of risk, did he have a right or did he not have a right to
3 an orderly deportation which would involve things like -- as
4 Ms. Das described, it could be any number of things. But it
5 could be, You need to leave by X date; you need to show us a
6 plane ticket, whatever the process is, but allow him to get his
7 affairs in order.

8 MR. WATERMAN: Your Honor, I don't believe we've had
9 an opportunity to explore the merits of the petition in detail,
10 so I don't think I can give your Honor a straight answer on
11 that. But my understanding, your Honor, is that ICE, they can
12 exercise their discretion as to how they detain an alien who is
13 subject to a final removal order. And how they effect that
14 removal, whether they provide a notice in advance, a baggage
15 letter, for instance, that asks the alien to get their bags
16 together and report at a certain date, or whether ICE can
17 detain the individual, arrest and detain the individual, for a
18 period reasonably necessary to effect the removal, my
19 understanding is ICE has the discretion how they choose to do
20 that.

21 THE COURT: Is there a regulation or statutory
22 provision that says something along those lines?

23 MR. WATERMAN: I would need time, your Honor, to
24 provide that.

25 THE COURT: All right.

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1 I interrupted you, Mr. Waterman.

2 MR. WATERMAN: Sure.

3 I think we were just going through points here.

4 THE COURT: Is there any reason why ICE decided to do
5 this on January 11th, versus waiting till January 20th -- 19th?

6 MR. WATERMAN: Your Honor, I don't know for certain
7 the reasons why they did what they did. My understanding is
8 they had a travel document; that travel document may have
9 expired by now, I don't know for certain. But they certainly
10 had -- my understanding is that ICE had a valid travel document
11 for that period of time. I'm not certain exactly when it
12 expires, but my understanding is it is going to expire this
13 week. Whether it was before the 19th or after, I haven't seen
14 the travel document to confirm, but my understanding is it
15 would have expired this week. So they moved forward with what
16 they had at the time.

17 THE COURT: All right.

18 In any event, you're now precluded by the court in New
19 Jersey from -- let me look at the order. I think you attached
20 it to your most recent filing this afternoon.

21 MR. WATERMAN: Yes, your Honor. I believe it's until,
22 at the earliest, January 25th, pending the court's
23 consideration of the motion for a stay.

24 THE COURT: Okay.

25 What other points did you want to make?

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1 MR. WATERMAN: If I may have one moment, your Honor.
2 I'm just looking at my notes.

3 (Pause)

4 MR. WATERMAN: Your Honor, I think at this point we're
5 happy to rest on our papers, unless you have any further
6 questions.

7 THE COURT: Let me just flip through some things that
8 I have.

9 Let's just make sure that we are clear on what the
10 current motion is that's before me versus the petition, the
11 order to show cause that was brought last week.

12 The current motion before me is specifically to return
13 petitioner to this jurisdiction. Is that right, Ms. Das?

14 MS. DAS: That's right, your Honor.

15 THE COURT: Okay.

16 MS. DAS: Oh, and, your Honor, we would like to just
17 quickly address a couple of things, if we may.

18 THE COURT: All right. Why don't you address those
19 matters that you'd like to respond to.

20 MS. DAS: Thank you, your Honor.

21 We just want to clarify again that the order of
22 supervision exists separate and apart from the stays of
23 removal. Mr. Ragbir received his first order of supervision in
24 January of 2008, when he was released from 22 months of
25 detention, when he was first placed in removal proceedings and

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1 after he had a final order of removal. So that order of
2 supervision, the order of supervised release, was in place many
3 years before he got his first stay of removal.

4 The stay of removal is referenced to an order of
5 supervision; it's just referencing the fact that they know he
6 has one and he has to continue to comply with it. And it
7 continues to exist, as far as we know, to this day. We have,
8 again, received no paperwork. And, again, I haven't been able
9 to see my client, but as far as he can recall, there's no
10 paperwork he was given to actually revoke that order of
11 supervised release. So that's why the bulk of our claims about
12 the unlawfulness of his detention versus an orderly departure
13 are still in play.

14 I would note also that the revocation letter of the
15 stay that we received several hours after he was detained did
16 not mention a revocation of the order of supervision that
17 Mr. Ragbir had and continues to have. So I just wanted to
18 clarify that. They are two separate pieces, and that the order
19 of supervision existed prior to the stay; it isn't connected --
20 you don't need a stay of removal to get an order of
21 supervision. Most people don't have stays of removal, but they
22 are entitled to the regulations and the due process
23 requirements that come with having a decision that they should
24 be released under certain conditions and the rules that are
25 provided for when that order of supervision itself can be

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1 revoked.

2 Secondly, I do think it is telling that counsel for
3 the government itself does not know the reasons why Mr. Ragbir
4 was detained that day, given the deprivation of liberty that
5 detaining someone in a prison entails. In particular, in this
6 case, transferring him 1,000 miles away from his family, his
7 counsel, his clergy, and his work for immigrant rights in this
8 city, in this country, is incredibly problematic and, again,
9 underscores the due process concerns here, given the many
10 Supreme Court cases and others that have recognized how
11 fundamental liberty is; that even ICE's own counsel cannot
12 state the reasons for the detention or produce a travel
13 document or otherwise establish that basis.

14 And then I think just briefly Ms. Rofé and I would
15 like to just clarify the jurisdictional issues with respect to
16 the actual orders.

17 The emergency orders on the 11th have to do with
18 temporarily enjoining the government from taking him out of
19 this jurisdiction, as well as temporarily issuing a stay of
20 removal. The statutory provisions that the government cites
21 are not about temporary orders, they are about permanent
22 relief. We are not arguing that this Court can issue a
23 decision that says we may never remove Mr. Ragbir from this
24 country, nor are we arguing that they can say that we can never
25 move him from one place to another under the circumstances.

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1 What we are saying is while this Court is considering
2 the lawfulness of the revocation of his ordered supervision and
3 his subsequent detention, that he then has, under this Court's
4 inherent authority to protect its jurisdiction, as well as to
5 ensure that he has access to the Court and access to counsel,
6 that that inherent authority is not touched by these
7 jurisdiction-driven provisions, which are really about
8 jurisdiction over permanent relief. As this Court said, it has
9 jurisdiction over the case. At the end of the day, once it has
10 jurisdiction over the case, it could issue those types of
11 orders.

12 Mr. Rofé will talk more specifically about the stay,
13 but I did want to point your Honor to another case that we feel
14 that is very instructive, which is a case out of this district,
15 *Ying Fong v. Ashcroft*, 317 F. Supp. 2d, 398 (2004), which is a
16 decision by Judge Hellerstein where an individual was actually
17 removed while the Court was issuing a temporary stay of
18 removal, as he explains in his decision as part of his inherent
19 authority to have issued that original stay and his authority
20 to bring her back.

21 That is what we are seeking today, is that Mr. Ragbir
22 be brought back. I'm not sure why the government believes it
23 has the position to keep him in Krome while this Court is
24 deciding whether or not to vacate the stay. It's been several
25 days since -- my apologies, to vacate the transfer order. It's

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1 been several days since that happened. They have multiple
2 flights going from Miami to New York each day. Upon
3 information and belief, they put Mr. Ragbir in a van, we don't
4 know to where, but they were prepared to take him to the
5 airport. They could have easily brought him back to New York
6 to follow this Court's order. And then if this Court decided
7 to vacate it, transfer him according to this Court's order.

8 I think it's that kind of aggressiveness, in my 16
9 years of representing immigrants who are facing deportation and
10 detention, including people who have criminal convictions, and
11 final orders of removal, I have never seen the government act
12 with such aggressiveness, in violation of even their own
13 regulations, let alone our views about what the Constitution
14 requires in removing this community leader from his community.

15 I know Ms. Rofé has some remarks with respect to the
16 stay that we believe will be helpful to the Court.

17 THE COURT: Yes. Ms. Rofé.

18 MS. ROFÉ: Thank you, your Honor.

19 Just to address the issue of subject matter
20 jurisdiction over the stay of removal, we'd just like to point
21 the Court's attention to *Incan v. Holder*, which notes the
22 distinction between stays of removal and injunctive relief, and
23 notes that a stay of removal is a temporary form of relief that
24 just permits the court to really make an informed decision
25 about the underlying petition, which is what we'd be requesting

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1 here.

2 Moreover, the two statutes that the government cites
3 in its briefing, 1252(g) and 1252(a)(5), the two
4 jurisdiction-stripping provisions do not address stays of
5 removal. Indeed, 1252(g) -- I'm sorry, let me just find it.

6 1252(g) specifies three discrete actions whereby
7 jurisdiction is barred. Those are the commencement of
8 proceedings, the adjudication of cases, and the execution of
9 removal orders. None of those are at issue here in this case.
10 Once again, the habeas is about the unlawful detention, and the
11 stay of removal would just be so that the Court could take its
12 time to adjudicate that petition.

13 With respect to 1252(a)(5), that is with respect, once
14 again, to a review of an order of removal, which we are not
15 requesting that this Court do. So we just argue that this
16 Court does have subject matter jurisdiction, and that the stay
17 of removal is not injunctive relief in any way, shape, or form.

18 Moreover, we'd like to discuss the fact that there is
19 irreparable harm with respect to access to counsel at Krome.
20 We have noted Ms. Das's declaration at ECF 19-1, as well as
21 Ms. Chung's declaration at 19-3, which discussed the fact that
22 there have been no -- there is minimal access to confidential
23 calls. Ms. Das has noted that she's only had one ten-minute
24 call with Mr. Ragbir that has been unrecorded, upon information
25 and belief, and there is no videoconferencing available. All

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1 of that is evidenced in the declarations and the exhibits. So
2 we'd just like to note that as rebuttal evidence to the
3 government's submission which does not address any of those
4 concerns.

5 THE COURT: Thank you.

6 Let me ask Mr. Waterman -- let me put it differently.
7 Will the government just agree on its own to fly Mr. Ragbir out
8 here, since you are already under a court order from New Jersey
9 that he be here for the next 14 days? Is there anything to
10 prevent the government from just returning him to the New York
11 area without an order from the Court that they be required to
12 do so?

13 MR. WATERMAN: Your Honor, I believe the answer is no.
14 ICE has stated that they will keep him in Florida at this time.

15 THE COURT: Okay. You know how one of the ways that
16 courts frequently try to resolve emergency motions is to see
17 whether or not the parties can put themselves in a position
18 where voluntarily they maintain the status quo until the merits
19 of something substantively can be worked out. And that's
20 something which then prevents the Court from having to issue
21 orders which are, of course, immediately appealable; not in all
22 respects, but I think in this instance I think it would be an
23 immediately appealable order one way or the other.

24 Do you both agree? Ms. Das?

25 MS. DAS: Your Honor, it's something that we are

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1 looking into in both respects, since this Court already did
2 issue the order.

3 THE COURT: I think it's in the nature -- I do think
4 it's in the nature of a mandatory injunction. I think that
5 therefore it's immediately appealable as injunctive relief.
6 Mandatory injunctions are immediately appealable. I think it
7 is on either side, so I think the Second Circuit is likely to
8 hear this from either side, but that could be obviated
9 obviously in terms of the immediate issue if he was returned to
10 New York pending the determination of the underlying petition.

11 But you think, Mr. Waterman, it's a no-go?

12 MR. WATERMAN: Your Honor, we can have that
13 conversation with the client again, but as of right now it's a
14 no.

15 THE COURT: I understand the position that it's been
16 done; that he's down at Krome right now; and that there may be
17 a principled position as to why ICE doesn't want to bring him
18 back. But given the amount of resources that ICE is spending
19 on the back-and-forth, I think it would be at least a useful
20 conversation to have.

21 If ICE is very quickly able to say no, so be it; if
22 they are able to see their way to bringing him up here so that
23 at least we don't have to go through that procedural wrangle,
24 that would be, I think, quite helpful; and it would be
25 something that would then result in a savings of judicial

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1 resources because one of you, I think, is going to appeal. So
2 this is just going to go on. It may be that ICE is then not
3 using the resources in that manner.

4 MR. WATERMAN: I understand, your Honor.

5 THE COURT: All right.

6 So let's do this: You'll need to let me know
7 lickety-split, because I'll decide this lickety-split. I was
8 hoping to decide this from the bench today. I won't. Because
9 I do want to re-review and read some of the cases that have
10 been cited. While I had been threading my way through what is
11 a complicated statutory scheme, I think that based upon my
12 remarks and based upon the colloquy from you folks today, your
13 argument, I think that I still need to go back now with what
14 you've said in mind, re-review things. I can do that very
15 quickly. I'm going to expect to get you a decision in the next
16 day or so. So let me do that.

17 But what I would ask, Mr. Waterman, is if you could
18 let me know as soon as possible -- tonight, if possible,
19 tomorrow by midday, if possible -- whether ICE would be willing
20 to reconsider its position, that would be most helpful. Not
21 its position on the merits; I'm not asking that. I'm just
22 asking whether or not they would put him on an airplane.

23 MR. WATERMAN: Understood, your Honor.

24 THE COURT: If it's a money issue, I think that that
25 would be useful to know. What I would not want to have is for

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1 the price of a plane ticket from Miami to New York, to have the
2 expenditure of judicial resources in the manner in which we're
3 expending them. But if it's something else, then so be it.

4 MR. WATERMAN: Understood.

5 Your Honor, if I may make two more quick points.

6 THE COURT: Yes.

7 MR. WATERMAN: One, petitioner's counsel has stated
8 that the government doesn't know why the petitioner was
9 detained. We know why he was he detained. He was detained to
10 effect removal; detained pursuant to his valid removal order
11 and to remove him. What we don't know is why they chose to do
12 it now. So I think those are two very different things.

13 ICE certainly acted well within its authority to pick
14 up the petitioner and execute a valid, enforceable removal
15 order. That's why he is currently detained in Krome. While a
16 stay is in place, he is removable and ICE was seeking to
17 execute that removal order.

18 THE COURT: All right.

19 I'm not going to repeat myself, but I think that the
20 petitioner has the better argument of a reasonable liberty
21 interest in the period of time at least between January 11th
22 and January 19th, 2018, which is when he had that -- his stay
23 of removal was in place. I think that as between the argument
24 that he could be put into detention in order to execute on an
25 order of removal, I think that ICE would have had a different

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1 argument as of January 19th than it had as of January 11th. It
2 really, for reasons best known to itself -- it sounds like
3 nobody in this room, at least nobody here at counsel table or
4 the Court, knows why January 11th was picked. But it was, to
5 say the least, sort of a strange choice, given the expiration
6 of that stay letter. Makes your life harder, Mr. Waterman.

7 MR. WATERMAN: It does, your Honor.

8 If I may make one more quick point.

9 THE COURT: Yes.

10 MR. WATERMAN: I would just point your Honor to a case
11 decided by Judge Karas in this district with respect to the
12 access to counsel claim that petitioner is raising. The case
13 name is *McIntosh*, that's M-C-I-N-T-O-S-H, versus *The United*
14 *States*. The citation is -- it's a Westlaw citation. 2016
15 Westlaw 1274585, decided March 31st, 2016. I believe the
16 access to counsel claim discussion starts around page 22 of
17 that decision. I would just point your Honor to that case.

18 THE COURT: All right. So I think that, as I've said,
19 I'll take this under advisement. I'll get you a decision very
20 quickly. Mr. Waterman, I'd appreciate it if you folks could
21 get back to me on whether there is any room to reduce the
22 expenditure resources that will inevitably follow as well. And
23 then I just would ask the court reporter if she could prepare a
24 transcript for me.

25 We're all set. Thanks. (Adjourned)