

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

DERWIN CAPUNAY GUZMAN,

Petitioner,

v.

William JOYCE, et al.,

Respondents.

Case No. 1:25-cv-04777

**PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS**

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INTRODUCTION

Over one year ago, government Respondents encountered Mr. Capunay in California, near the U.S.-Mexico border, and detained him in their custody while he was “processed.” Respondents assessed Mr. Capunay and elected to place him in section 1229a “full” removal proceedings before an immigration judge rather than subject him to expedited removal. Respondents then determined that Mr. Capunay—a Peruvian citizen with no criminal history—was neither a flight risk nor a threat to public safety and released him on his own recognizance with a future immigration court date in New York. Now, over a year later and as part of a widely publicized change in enforcement priorities, Respondents abruptly redetained Mr. Capunay at his immigration court hearing and seek to strip Mr. Capunay of the rights the Government already decided to afford him in removal proceedings. Mr. Capunay’s detention, individually and as part of this policy, runs afoul of Mr. Capunay’s statutory, regulatory, and Constitutional rights; he must be released. Respondents offer no support that Mr. Capunay’s redetention was justified; rather, they seek to avoid this Court’s review altogether, asserting the sweeping power of the Executive.

FACTUAL BACKGROUND

Many of the facts of this case are undisputed. Following Mr. Capunay’s entry into the United States in April 2024, DHS placed Mr. Capunay into removal proceedings under 8 U.S.C. § 1229a, and released him on an order of recognizance, whereupon he diligently pursued his legal remedies by filing a timely asylum application and appearing for his scheduled hearings in New York City. Canales Decl. ¶¶ 5-10. At a hearing on May 29, 2025, DHS orally moved to dismiss the proceedings pursuant to 8 C.F.R. § 239.2(a)(7), citing changed circumstances. DHS’s intention was to redirect Petitioner into expedited removal proceedings, *see* Canales Decl. ¶¶ 11, 17—a process that significantly constrains judicial review and procedural protections. The Immigration

Judge instructed DHS to file a written motion and reset the hearing for December 11, 2025. Immigration and Customs Enforcement (“ICE”) agents then detained Mr. Capunay, along with many others, directly outside the courtroom.

Respondents contend that ICE reevaluated Mr. Capunay’s custody status on May 29, the date of Mr. Capunay’s master calendar hearing after which he was detained. Canales Decl. ¶ 11; Opp. at 3.¹ Declarant Officer Canales merely asserts that ICE “redetermined” Petitioner’s custody status; there is no mention that Mr. Capunay was found to be a flight risk or danger upon reassessment. Canales Decl. ¶ 11.

On June 5, 2025, Petitioner challenged both his detention and the related attempted dismissal of proceedings by filing a habeas corpus petition. He was subsequently moved to a detention center in Allen Parish, Louisiana,² and the Immigration Judge granted DHS’s motion to change the venue of Mr. Capunay’s proceedings to Oakdale, Louisiana. Mr. Capunay’s next court date is currently scheduled for June 24, 2025. The Immigration Judge has not yet ruled on the motion to dismiss. ECF 17, Leonetti Decl. ¶ 24; *see* ECF 10, Canales Decl. ¶ 17.

ARGUMENT

I. Mr. Capunay’s Detention Violates His Right to Substantive Due Process.

“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint— lies at the heart of the liberty that Clause protects.” *Zadvydas v. Davis*, 533

¹ Petitioner believes the Court would be served by discovery into that contention. Respondents’ actions are part of a coordinated nationwide campaign to detain thousands of people whose names it provides on lists to ICE attorneys in court and ICE agents waiting immediately outside immigration courtrooms. *See* Ex. D, Rowland-Kain Decl. ¶ 8, filed in *Make the Road N.Y. v. Noem, et al.*, 1:25-cv-00190-JMC (D.D.C. June 10, 2025) (ECF 50-9).

² On the evening of June 13, 2025, this Court granted Petitioner’s Motion to Compel Petitioner’s Return and ordered Respondents to bring Mr. Capunay back to the Southern District of New York.

U.S. 678, 690 (2001). Imprisonment is the exception to the norm and must be carefully circumscribed. Immigration detention serves only two legitimate purposes: mitigating flight risk and preventing danger to the community. *See id.* at 690; *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020). In the absence of any evidence for either of those purposes, detention violates the substantive due process right to be free from purposeless confinement. *Faure v. Decker*, No. 15-CV-5128, 2015 WL 6143801, at *3 (S.D.N.Y. Oct. 19, 2015) (ordering release or a bond hearing where there was “no evidence” that the habeas petitioner “poses a danger to the public or would flee during the pendency of the removal proceedings”); *cf. Padilla v. U.S. Immigr. & Customs Enf’t*, 704 F. Supp. 3d 1163, 1173 (W.D. Wash. 2023) (finding plaintiffs subject to mandatory detention had sufficiently alleged that their detention violated their substantive due process rights).

Mr. Capunay is not a flight risk. The government already determined so when it decided to release him on his own recognizance in April 2024; *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1176 (N.D. Cal. 2017), *aff’d sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018) (“Release reflects a determination by the government that the noncitizen is not a danger to the community or a flight risk.”). Since his release, Mr. Capunay has followed all of the procedures and requirements of the immigration system, including attending his immigration hearings. In that time, he has also deepened his ties to the United States, integrating into his community in New York and finding work. Leonetti Decl. ¶ 5.

Nor is Mr. Capunay a threat to the community. Respondents’ own form I-213 states in narrative section dated April 26, 2024, that “[t]he subject does not appear to be a threat to national security, border security, or public safety. The subject was released from the custody of the Department of Homeland Security (DHS) by “Order of Recognizance” (O.R.) pending their

immigration hearing. This release was authorized through proper channels in accordance with San Diego Sector protocols.” Pet’n ¶ 10; Ex. A, Form I-213. Indeed, the government’s criminal history check of Mr. Capunay returned negative. *See* Form I-213. Mr. Capunay has had no criminal interaction since his arrival. Leonetti Decl. ¶ 5.

Respondents contend that Mr. Capunay’s custody status was “redetermined,” Opp. at 3, Canales Decl. ¶ 11, but this categorical assessment, applied simultaneously to thousands of people around the country and offered to this Court without explanation or evidence, cannot imbue his detention with lawful purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (detention must have a “reasonable relation” to the government’s interests in preventing flight and danger). The government is not detaining Mr. Capunay to serve its legitimate interests in protecting against danger or flight risk. Instead, the government is detaining him, along with countless others swept up in its courthouse arrests, for the blanket and illegitimate purpose of meeting new enforcement priorities and daily arrest quotas. *Cf.* Ex. C, Eugenio Decl., filed in *Make the Road N.Y. v. Noem et al.*, 1:25-cv-00190-JMC (DDC June 10, 2025) (ECF 50-8) (describing how she observed the government move to dismiss proceedings and then detain noncitizens following their hearings in immigration court in New York City); Ex. D, Rowland-Kain Decl. (same). Because Mr. Capunay’s detention basis bears no reasonable relation to the government’s interests in preventing flight and danger, the Court should order his release.

II. Mr. Capunay’s Abrupt Redetention Ran Afoul of His Right to Procedural Due Process.

Mr. Capunay received neither notice nor process before he was suddenly handcuffed, hauled away and booked back into detention. *See* Leonetti Decl. ¶ 9-12; Ex. E, Umana Declaration, filed in *Make the Road N.Y. v. Noem et al.*, 1:25-cv-00190-JMC (DDC June 10, 2025) (ECF 50-3) (describing her observations from the same courtroom as Mr. Capunay on May 29, 2025).

Respondents do not claim otherwise, asserting only that the government has a broad statutory right to detain noncitizens. Opp. at 13. But the government’s discretionary authority to detain individuals for immigration purposes is not limitless; it must comport with the Constitution and it must not be applied in an arbitrary and capricious manner. *Velasco Lopez*, 978 F.3d at 850. Respondents’ abrupt redetention of Mr. Capunay ran afoul of his right to procedural due process.³

“Procedural due process rules are meant to protect against the mistaken or unjustified deprivation of life, liberty, or property.” *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1367 (2025) (cleaned up). The three-factor test articulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976) provides the relevant framework “to determine what process is due to noncitizens in removal proceedings,” *Black v. Decker*, 103 F.4th 133, 147-48 (2d Cir. 2024) (collecting cases). As to the first prong, Mr. Capunay invokes “the most significant liberty interest there is—the interest in being free from imprisonment.” *Velasco Lopez*, 978 F.3d at 851 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)). Mr. Capunay was living peacefully for more than one year in New York when he was handcuffed, redetained and moved to a county jail in upstate New York. Leonetti Decl. ¶¶ 5, 9-12.

As for the second *Mathews* factor, the risk of erroneous deprivation of liberty is enormous. *Black*, 103 F.4th at 152 (for the second prong of *Mathews*, “[t]he only interest to be considered . . . is that of the detained individuals—not the government.”). Notably, Respondents do not claim that

³ Respondents’ contention that Mr. Capunay’s claims regarding his detention are barred by § 1226(e) is squarely contradicted by Second Circuit precedent. *See Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020); *see also Ozturk v. Trump*, No. 2:25-CV-374, 2025 WL 1145250, at *11 (D. Vt. Apr. 18, 2025), amended sub nom. *Ozturk v. Hyde*, 136 F.4th 382 (2d Cir. 2025). As this Court has previously held, “the Supreme Court has clearly rejected those statutes’ applicability to constitutional and statutory-framework arguments like those at issue here.” *Joseph v. Decker*, No. 18-CV-2640 (RA), 2018 WL 6075067, at *5 (S.D.N.Y. Nov. 21, 2018).

any reassessment in Mr. Capunay's case was individualized nor that it took into account the obvious reasons he was still not a flight risk or a danger: he had attended court multiple times, applied for asylum, and has no criminal contacts. Leonetti Decl. ¶¶ 5-9; *see* Canales Decl. ¶¶ 7-10; *Cf. Lopez v. Sessions*, No. 18-CV-4189 (RWS), 2018 WL 2932726 (S.D.N.Y. June 12, 2018) (finding a due process violation when the petitioner was redetained by immigration authorities with no "deliberative process"). Nor do Respondents contend that Mr. Capunay was provided any notice, explanation, or opportunity to contest this custody determination. He was not. Now jailed in Respondents' custody with the threat of expedited removal hanging over him, *see* Opp. 11 (noting that the government intends to place him in expedited removal proceedings); Canales Decl. ¶ 17, he has no effective means to challenge his redetention.

Finally, the third *Mathews* factor—the public interest—also weighs in Mr. Capunay's favor. Respondents have no interest in detaining individuals who pose neither a danger nor a flight risk. *See Velasco Lopez*, 978 F.3d at 854. And the limited administrative burdens do not meaningfully weigh against the process sought. Nor does Respondents' campaign of rounding up noncitizens like Mr. Capunay without notice or process serve the public interest; it undermines faith in government processes and stokes fear. *See, e.g.* Umana Decl. ¶ 12; Eugenio Decl. ¶ 15.

Because all three factors weigh heavily in Mr. Capunay's favor, this Court should find that he is entitled to a prompt hearing where the government has the burden of showing changed circumstances with respect to his risk of flight or any alleged danger. *See infra* Argument IV.

III. The Court Can and Should Find that Respondents' Effort to Dismiss Mr. Capunay's Proceedings at this Point in Time Violates His Statutory, Regulatory and Constitutional Rights

A. This Court Has Jurisdiction to Entertain Mr. Capunay's Claims Related to Respondents' Multi-Step Approach to Secure his Detention and Strip him of his Rights in Removal Proceedings

These claims are properly brought in this habeas action because they are inextricably linked to Respondents' decision to redetain Mr. Capunay and are thus ancillary to his request for release. They are neither premature, nor jurisdictionally barred. "The government's arguments to the contrary rely on the mistaken belief that substantive overlap between a challenge to detention and a challenge to removal is reason enough to conclude that the detention challenge arises from removal. But overlap, even substantial substantive overlap, does not make one claim arise out of the other, or necessitate that one claim controls the outcome of the other." *Ozturk v. Hyde*, 136 F.4th 382, 400 (2d Cir. 2025). Moreover, only this Court can consider the due process claims raised in this petition. *Id.* (recognizing that "neither the IJ nor the BIA has jurisdiction to decide constitutional issues") (internal citations omitted).

First, although Respondents are correct that the motion to dismiss in Mr. Capunay's case remains pending, it is a final agency action subject to collateral review. An agency action is reviewable as a collateral order only if it (1) is "conclusive," (2) "resolve[s] important questions completely separate from the merits," and (3) would be "effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). In *Chehazeh v. Att'y Gen. of U.S.*, the Third Circuit carefully considered its authority to review the Board of Immigration Appeals' sua sponte decision to reopen removal proceedings and concluded that the district court had jurisdiction in habeas to review that reopening under the collateral order doctrine. 666 F.3d 118, 135–37 (3d Cir. 2012); *cf. Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F.2d 918, 924 (2d Cir. 1983) (recognizing that the collateral order doctrine applies to agency decisions generally). Just as in *Chehazeh*, the criteria for collateral review are met here. Respondents' motion to dismiss is conclusive because Mr. Capunay has no other means, now or in the future, to challenge Respondents' decision to *bring* the

motion and because the motion itself resolved an important, indeed life-altering question, namely whether Mr. Capunay would be redetained. Respondents point out that Mr. Capunay “may [] file an administrative appeal to the BIA if he believes the motion is improperly adjudicated,” Opp. at 7, but that does nothing to alter Respondents’ decision to bring the motion, which triggered his detention, loss of rights, and eventual transfer over 1000 miles from home. Accordingly, Mr. Capunay’s claims are reviewable under the collateral order doctrine.

Moreover, contrary to Respondents’ assertion, Mr. Capunay’s claims are not barred by § 1252(a)(2)(A); Respondents’ reliance on *Shunaula v. Holder*, 732 F.3d 143, 146 (2d Cir. 2013) is misplaced. Mr. Capunay does not contest DHS’s authority to invoke expedited removal proceedings generally, nor does he contest a prior expedited removal order; rather, he contests DHS’s bait and switch that resulted in his detention. Mr. Capunay asserts that Respondents cannot initiate full removal proceedings, only to seek to cancel those proceedings over a year later, after Mr. Capunay has filed an asylum application, because the government opts for another, more aggressive path. *See infra* Argument III(B).

Respondents’ claim that 8 U.S.C. § 1252(g) bars this Court’s review likewise fails. While numerous decisions may arise during the deportation process, the statute only precludes review of decisions to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter.” *Id.* Dismissal is not among the enumerated actions insulated by that statute. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). And it would be “untenable” for this statute to encompass “do-overs” like attempting to reset removal proceedings after important rights have attached and a significant amount of time has passed. *Cf. Chehazeh*, 666 F.3d at 135 (“[O]ne can see that the decision to adjudicate a case in the first instance—to indict a criminal and bring him to trial—is considered an act of unreviewable

discretion, but the traditional ambit of that discretion does not include a right for prosecutors to order the relitigation of any case they lose.”).

Unlike the actions enumerated in the statute, Respondents do not have unfettered discretion to move to dismiss proceedings. Their discretion is bounded by a regulation, 8 C.F.R. § 239.2(c), which limits the power to bring motions to dismiss to discrete and enumerated circumstances. 8 C.F.R. § 239.2(a). Because Respondents’ motion has determined Mr. Capunay’s rights, and he has no other means of challenging it, it is reviewable by this Court.

B. Seeking to Dismiss Proceedings Violates Mr. Capunay’s Statutory, Regulatory and Due Process Rights

As an initial and crucial matter, Respondents contend that the decision to place Mr. Capunay in “full” removal proceedings under 8 U.S.C. § 1229a when he was encountered in California in 2024 was “[d]ue to an influx of aliens at the border and resource constraints,” Opp. at 1. Setting aside the question of whether lack of detention bed space was actually the purpose—imagine a noncitizen who Respondents believed to be a danger—Respondents fail to mention that DHS had the option to place Mr. Capunay in expedited removal proceedings during his initial encounter *and then release him* on parole under 8 U.S.C. § 1182(d)(5), obviating the need for “bed space.” See 8 C.F.R. § 235.3(b)(2)(iii); *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018) (“[A]pplicants for admission may be temporarily released on parole for urgent humanitarian reasons or significant public benefit.”).

In removal proceedings, noncitizens are afforded a panoply of rights under the INA that are not available in expedited removal.⁴ Only those noncitizens who are able to articulate a fear of

⁴ Rights in removal proceeds include, “the privilege of being represented . . . by counsel of the alien’s choosing,” 8 U.S.C. § 1229a(b)(4)(A); “a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s own behalf, and to cross-examine witnesses presented by the Government,” 8 U.S.C. § 1229a(b)(4)(B); and the right to appeal, first to the

return to their country of origin may evade being ordered removed in this summary fashion. 8 U.S.C. § 1225(b)(1)(A)(i). While the statute sets out clear, limited pathways by which individuals in expedited removal can be referred to an immigration judge (albeit for proceedings limited to seeking asylum), *see* 8 C.F.R. § 235.6(a)(2)(iii); 8 C.F.R. § 208.2(c)(1), Respondents point to nothing in the INA that grants them discretionary power to attempt to subject an individual to expedited removal after he or she was originally placed in full removal proceedings. Indeed, Section 1229a, which governs removal proceedings in immigration court, states that such proceedings “shall” be the “sole and exclusive” administrative process to determine whether a person is allowed to remain in the United States. Such clear and forceful language suggests there is no discretion to upend those proceedings as a precursor to seek removal through *alternative* means. *Mahdawi v. Trump*, 136 F.4th 443, 453 (2d Cir. 2025) (finding no discretion where statutory text “uses the obligatory ‘shall’ rather than the permissive ‘may.’”). In opting to initially place Mr. Capunay in removal proceedings and then doing an about-face and attempting to initiate expedited removal, the government violates the substantive rights afforded to respondents in removal proceedings enumerated in the INA.

Respondents also violated the regulations governing dismissal because no circumstances have changed in *Mr. Capunay’s case*. *Cf.* 8 C.F.R. § 239.2(a)(7). The regulations permit a motion to dismiss proceedings when, applicable here, circumstances of the case have changed after the notice to appear was issued to such an extent that continuation is no longer in the best interest of the government. 8 C.F.R. § 239.2(a)(7), (c) (emphasis added). As Respondents note, no expedited removal order has yet issued and none will issue unless and until a motion to dismiss is adjudicated

Board of Immigration Appeals, 8 C.F.R. § 1003.38(a), and ultimately to a U.S. Court of Appeals, 8 U.S.C. § 1252.

and granted. Opp. at 6. Absent such an order, however, no circumstances unique to Mr. Capunay's case have changed and Respondents do not attempt to articulate the change. To the extent that Respondents are suggesting that the change is the government's desire to seek expedited removal, evinced by the motion to dismiss itself, that circularity would render the regulation's requirements a nullity.

Due process requires that "notice must be afforded within a reasonable time and in such manner as will allow [noncitizens] to actually seek . . . relief." *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025); *see also Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (notice must "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and "must be of such nature as reasonably to convey the required information"). In moving to dismiss with the intent of seeking expedited removal, Mr. Capunay would receive no advance notice of the charges or of the government's evidence. *See* 8 C.F.R. § 235.3(b)(2)(1)(ii) (notice of charges are issued at the same time and on the same form as expedited removal order).

Finally, while it is correct that Mr. Capunay does not have "a right to pick which process is applied to him," Opp. at 11, he does have vested due process right once DHS selects that process and he relies on it.⁵ *See Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) ("When an agency changes course, as DHS did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.") (cleaned up).

IV. Release of Mr. Capunay is the Appropriate Remedy

⁵ It is well established that a due process claim requires an analysis distinct from a claim related to a statutory violation. *See Black*, 103 F.4th at 144; *contra* Opp. at 11 ("So long as he is afforded the procedures provided by statute, he is not deprived of due process.").

Fundamental to a federal court's habeas authority is the ability to order the release of a petitioner from detention. *See Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he traditional function of the writ is to secure release from illegal custody.”); *Allen v. McCurry*, 449 U.S. 90, 98, n. 12 (1980) (Noting that the “unique purpose” of the writ is “to release the applicant ... from unlawful confinement.”); *see also Ostrer v. United States*, 584 F.2d 594, 596 n. 1 (2d Cir. 1978) (Finding that “[a] district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody.”). “In fact, ordering a petitioner's release is ‘the very essence of habeas relief.’ As the Supreme Court put it: Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him.” *Enoh v. Sessions*, No. 16-CV-85 (LJV), 2017 WL 2080278, at *2 (W.D.N.Y. May 15, 2017) (citing *Phifer v. Warden*, 53 F.3d 859, 864 (7th Cir. 1995), *Fay v. Noia*, 372 U.S. 391, 430–31 (1963)).

In confronting cases of redetention by ICE that did not comport with the requirements of due process, district courts in this Circuit and beyond have ordered release. *See Martinez v. McAleenan*, 385 F. Supp. 3d 349, 365 (S.D.N.Y. 2019); *Lopez*, 2018 WL 2932726, at *7; *Cesay v. Kurzdorfer*, No. 25-CV-267-LJV, 2025 WL 1284720, at *2 (W.D.N.Y. May 2, 2025); *Cakan v. McDonald*, No. 1:25-cv-11094-JEK (D. Mass. May 19, 2025) (Ordering immediate release where noncitizen petitioner “established that his ongoing detention is in violation of the laws of the United States and that he is entitled to immediate release.”) (cleaned up), attached for reference as Ex. B. Given the established and ongoing due process violations in Mr. Capunay's case, release is the appropriate remedy.

A. Alternatively, release is required until a pre-deprivation hearing can be held

Release pending a pre-deprivation hearing is required because Mr. Capunay's liberty cannot be infringed upon without "adequate procedural protections." *See* Pet'n ¶ 39 (*citing Zadvydas*, 533 U.S. at 690-91; *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979)). A long line of Supreme Court caselaw instructs that due process requires notice and an opportunity to be heard *before* the government deprives a person of their conditional liberty. *See* Pet'n ¶ 39-44.

Respondents appear to claim that Mr. Capunay was provided sufficient due process prior to his abrupt redetention, and that a pre-deprivation hearing is not required, asserting—boldly—that ICE made "an individualized assessment to justify his detention." Opp. at 14. However, mere claims without adequate support are not sufficient, especially when considering a person's liberty. *Black*, 103 F.4th at 155 ("Where the government seeks to continue depriving a person of their liberty . . . we must require the government to bear the burden of proving the need for continued detention. Otherwise, the risk of an erroneous deprivation of a detainee's liberty interest would remain unacceptably high.") (internal citations omitted). As Respondents already determined Mr. Capunay is not a danger to the community or flight risk when they released him in April 2024, and Respondents have offered no evidence that would change this assessment, release pending a pre-deprivation hearing is required to comply with procedural due process. *See* Pet'n ¶¶ 36-43.

B. An IJ bond hearing is not adequate to vindicate Mr. Capunay's due process rights

This Court has the authority to order Mr. Capunay's immediate release from his unlawful detention or to hold a bail hearing. Requiring Mr. Capunay to affirmatively seek a bond hearing before an IJ, as suggested by Respondents, risks prolonging Mr. Capunay's *currently unlawful* detention and the government's interests will not ultimately served. *See Velasco Lopez*, 978 F.3d at 855 ("When the Government incarcerates individuals it cannot show to be a poor bail risk . . . it

separates families and removes from the community breadwinners, caregivers, parents, siblings and employees. The Government articulates no public interest that any of this serves and we see none.”).

In this case, ordering a hearing or requiring Mr. Capunay to seek a bond hearing before an IJ will not address the due process concerns raised by Mr. Capunay. As Respondents’ note, Mr. Capunay is currently detained under 8 U.S.C. § 1226(a) while the government awaits a decision on its motion to dismiss the § 1229a removal proceedings so that it can place Mr. Capunay into expedited removal proceedings under § 1225. Opp. at 11. Due to the procedural posture resulting from Respondents’ own efforts, however, Mr. Capunay may or may not be able to access such a hearing before the IJ rules on DHS’s motion to dismiss. Even if the IJ held a bond hearing before adjudicating the motion to dismiss, and, even if Mr. Capunay was ordered released, Respondents might seek to re-detain Mr. Capunay under a different statutory detention authority, § 1225(b), as soon as a decision is rendered on the motion to dismiss. Mr. Capunay would then need to return to this Court to again seek a determination as to the lawfulness of that redetention. Not only does such a process defy common sense, the cyclical nature of Mr. Capunay’s release and redetention thwarts the exact due process that he seeks before this Court in this habeas petition. *See Boumediene v. Bush*, 553 U.S. 723, 783 (2008) (finding that the “writ must be effective.”); *see also Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1055 (N.D. Cal. 2021) (finding a bond hearing after detention to be insufficient process and noting respondents “misapprehend the purpose of a pre-detention hearing: if Petitioner is detained, he will already have suffered the injury he is now seeking to avoid”).⁶

⁶ An IJ bond hearing in this case would also result in an unconstitutional placement of the burden of proof on Mr. Capunay. The Board of Immigration Appeals interprets § 1226(a) to require the non-citizen to bear the burden of proof in bond proceedings. *See Matter of Adeniji*, 22 I. & N. Dec.

Recently, the *Ozturk* court reiterated the federal courts' obligation to ensure due process, stating, "[t]his is an Article III court. It is obligated to conduct an independent and rigorous review of the evidence that is a part of the record in this case. Immigration judges, by contrast, are executive branch employees subject to executive branch orders." *Ozturk v. Trump*, No. 2:25-CV-374, 2025 WL 1420540, at *2 (D. Vt. May 16, 2025), at *9.⁷ As a result, immediate release or a hearing before this Court is required to protect due process for Mr. Capunay.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to order his immediate release from custody.

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Brooklyn, New York

Respectfully submitted,

/s/ Jessica Swensen
Jessica Swensen, Esq.
Elyssa Williams
THE BRONX DEFENDERS
360 East 161st Street
Bronx, New York, 10451
347-842-1218
jessicas@bronxdefenders.org
Counsel for Petitioner

1102, 1114 (B.I.A. 1999). However, courts within this Circuit have repeatedly concluded that the Board's interpretation of § 1226(a) violates due process. *Velasco Lopez*, 978 F.3d at 855; *Quintanilla v. Decker*, No. 21 CIV. 417 (GBD), 2021 WL 707062, at *3 (S.D.N.Y. Feb. 22, 2021) (joining the "overwhelming consensus of judges in this district in concluding that the Government should bear the burden to deny liberty at any Section 1226(a) bond hearing, regardless of the noncitizen's length of detention").

⁷ See also Julia Ainsley, *Trump admin tells immigration judges to dismiss cases in tactic to speed up arrests*, NBC NEWS, June 11, 2025, <https://www.nbcnews.com/politics/national-security/trump-admin-tells-immigration-judges-dismiss-cases-tactic-speed-arrest-rcna212138>.

Exhibits:

- A. Form I-213
- B. *Cakan v. McDonald*, No. 1:25-cv-11094-JEK (D. Mass. May 19, 2025)
- C. Declaration of Rosanna Eugenio, filed in *Make the Road N.Y. v. Noem et al.*, 1:25-cv-00190-JMC (DDC June 10, 2025) (ECF 50-8)
- D. Declaration of Gillian Rowland-Kain Decl., filed in *Make the Road N.Y. v. Noem et al.*, 1:25-cv-00190-JMC (D.D.C. June 10, 2025) (ECF 50-9)
- E. Declaration of Siomara M. Umana, filed in *Make the Road N.Y. v. Noem et al.*, 1:25-cv-00190-JMC (DDC June 10, 2025) (ECF 50-3)