UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YOK

Ousmane SAVANE, *Petitioner*, v. LaDeon FRANCIS, *et. al.*, *Respondents*.	Case No. 1:25-cv-06666-GHW

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORP

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INTRODUCTION

Respondents do not contend they had any individualized reason to re-detain Petitioner, Ousmane Savane ("Petitioner" or "Ousmane") as he left his immigration court hearing on August 12, 2025, expecting to return home. Respondent also do not contend nor is there any evidence to suggest that Ousmane poses either a flight risk or a danger to the community. Finally, Respondents do not dispute that Ousmane was previously released on his own recognizance pursuant to 8 U.S.C. §1226.

Instead, Respondents cloak Ousmane's sudden re-detention by masked agents on August 12, 2025 in the presumption of regularity, couching it as nothing more than business as usual. But there is nothing usual about this case. Ousmane was not given any prior notice or warning that he would be re-detained following his immigration court hearing. He had done absolutely nothing to warrant re-detention following his earlier release on his own recognizance pursuant to 8 U.S.C. §1226—to the contrary, he had applied for asylum and was attending court as directed. Respondents argue that they now possess the power to detain him notwithstanding his previous release solely because they have invoked a new, inapplicable statute ostensibly authorizing his *mandatory* detention. *See* Respondents' Memorandum of Law in Opposition, ("Resp. Opp.") ECF No. 11. This untenable interpretation of Respondents' statutory authority is wrong. It runs counter to the facts of Ousmane's case; the plain text and structure of the statute; and decades of established judicial and agency precedent.

Respondents began to put forward this new statutory basis for their detention authority only a few weeks ago: prior to that, the Department of Justice presented a directly contrary argument to

courts in this District.[1] Since their sudden shift, a growing number of courts have rejected Respondents' contention that entrants without inspection previously released pursuant to § 1226(a) are now subject to mandatory detention under § 1225(b). *Lopez Benitez v. Francis*, --- F.Supp.3d ---, 2025 WL 2371588 at *9-12 (S.D.N.Y. August 13, 2025) ("*Lopez Benitez*"); *Kelly v. Almodovar et al*, 25-cv-06448 (AT), 2025 WL 2381591 (S.D.N.Y. Aug. 15, 2025); *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *8 (D. Mass. July 24, 2025); *Gomes v. Hyde*, No. 25 Civ. 11571 (JEK), 2025 WL 1869299 (D. Mass. July 7, 2025); *Rodriguez v. Bostock*, No. 3:25-CV-05240-TMC, 2025 WL 1193850, at *14 (W.D. Wash. Apr. 24, 2025). Ousmane was released on his own recognizance and is outside the purview of the cases Respondents rely upon to suggest he lacks any due process rights.

Respondents offer no justification for Ousmane's sudden re-detention apart from their erroneous argument about the new statutory authority for his confinement. But as a growing number of courts have recognized, including those listed above, sudden re-detention, without any notice, individualized basis, nor review by a neutral adjudicator, cannot survive constitutional scrutiny. *Chipantiza-Sisalema v. Francis*, No. 25 Civ. 5528, 2025 WL 1927931 (S.D.N.Y. July 13, 2025); *Valdez*, No. 25 Civ. 4627, 2025 WL 1707737, at *3. Ousmane is not confined "pending the inquiry into [his] true character," *cf.* Resp. Opp. at 12, he is confined because Respondents have acted without reference to his "true character" or any individualized facts in his case. That is unlawful.

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[1] *E.g. Valdez v. Joyce*, No. 25 CIV. 4627 (GBD), 2025 WL 1707737 (S.D.N.Y. June 18, 2025) at *3 (noting, in factually indistinguishable circumstances from those at bar here, "Respondents make much of the Government's statutory right to detain noncitizens under 8 U.S.C. § 1226(a) in arguing that Petitioner's detention is lawful").

Finally, Respondents' argument that he must first seek a bond hearing, despite their own contention he is ineligible for bond and the agency's (newly promulgated) binding precedent rendering him ineligible for bond, is a meritless attempt at delay. Seeking bond—other than before this Court—would be futile and it would also be inappropriate given the substantial constitutional violations at issue. Accordingly, Ousmane asks the Court to order his immediate release.

FACTUAL BACKGROUND

In their opposition, Respondents assert that Ousmane was encountered by government agents on or about January 17, 2024, detained, issued and Notice to Appear ("NTA") and then released on his own recognizance. Resp. Opp. at 3; Declaration of Jason Mascia, ("Decl. Mascia"), ECF No. 12. However, as is set for in Ousmane's Amended Petition ("Petition"), ECF No. 8, and his own release documents, Ousmane came to the United States seeking safety on or about December 21, 2023, and was taken into custody by government agents the same day. *See* First Am. Pet'n (ECF No. 8) at ¶¶ 1-2. He was then detained in the custody of Immigration and Customs Enforcement (ICE) until his release on recognizance (ROR) on January 18, 2024. *Id.* at ¶ 2.

As is set forth *supra,* Respondents do not dispute that Ousmane was released from detention on a ROR pursuant to 8 U.S.C. § 1226(a). Exh. 1 to First Am. Pet'n (ECF 9-1). Moreover, Respondents do not dispute that Ousmane was issued an NTA which does not designate him as an arriving alien and which charges him with removability under 8 U.S.C. § 1182(a)(6)(A)(i), Immigration and Nationality Act (INA) § 212(a)(6)(A)(i), a charge applicable to individuals who entered without inspection and are "present in the United States without admission or parole." It does not designate him as an "arriving alien." *Id.* at ¶ 3; Exh. 2 to First Am. Pet'n (ECF No. 9-2).

Respondents contend that Ousmane was released from detention on January 18, 2024 pursuant to a ROR "[d]ue to resource constraints, DHS opted at that time to place Petitioner in

Section 1229a removal proceedings and release him in the interim on his recognizance." *See* Resp. Opp. at 9. But Respondents do not dispute that noncitizens can be released from custody *only* "if they demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8); *see Velesaca v. Decker*, 458 F. Supp. 3d 224, 241 (S.D.N.Y. 2020) ("8 U.S.C. § 1226(a) and its implementing regulations require ICE officials to make an individualized custody determination"). In releasing Petitioner, Respondents necessarily conducted that analysis and determined he posed neither a danger nor a flight risk.

As is detailed in his First Am. Pet'n, following his ROR, Ousmane came to New York City where he remained until his sudden re-detention on August 12, 2025 as he left a regularly scheduled Immigration Court appearance. *See* First Am. Pet'n at ¶¶ 22 and 25-27. Respondents do not claim to have provided Ousmane any notice or opportunity to be heard prior to his re-detention on August 12, 2025. Respondents also fail to provide a copy of the administrative arrest warrant or to allege pursuant to what statute it was issued, but in other cases with similar facts, Respondents' warrants for re-detention have revealed that Section 1226 was the stated basis. *Lopez Benitez*, --- F.Supp.3d ----, 2025 WL 2371588, at *4 (noting the administrative warrant that Respondents filed with respect to petitioner's re-detention listed Section 1226 as the authority); *Gomes,* No. 1:25-CV-11571-JEK, 2025 WL 1869299, at *5 (same).

ARGUMENT

I. Respondents Are Wrong About the Statute of Detention.

Respondents' argument that Ousmane is lawfully detained pursuant to §1225(b) is wrong. As is set forth *supra* and in Ousman's First Am. Pet'n, since the Department of Justice began to advance the agency's new, baseless theory, numerous courts have rejected it. This Court should

also reject Respondents' atextual statutory interpretation and its claim that Ousmane is subject to mandatory detention and instead hold that it is the prior, well-established case law that remains applicable to his detention.

A. Respondents' Contention That Entrants Without Inspection Are Detained Pursuant to Section 1225 Is a Departure from Decades of Settled Practice.

For decades, courts and the agencies Respondents lead have recognized that the detention of individuals who entered the U.S. without inspection is governed by 8 U.S.C. § 1226(a). Regulations promulgated nearly thirty years ago provide that "[d]espite being applicants for admission, [noncitizens] who are present without having been admitted or paroled (formerly referred to as [noncitizens] who entered without inspection) will be eligible for bond and bond redetermination" under Section 1226. 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). Until now, Respondents consistently adhered to this interpretation. *See, e.g., Matter of Garcia-Garcia*, 25 I&N. Dec. 93 (BIA 2009); *Matter of D-J-*, 23 I&N. Dec. 572 (A.G. 2003); *see also* Transcript of Oral Argument at 44:24–45:2, *Biden v. Texas*, 597 U.S. 785 (2022) (No. 21-954) ([Solicitor General]: "DHS's long-standing interpretation has been that 1226(a) applies to those who have crossed the border between ports of entry and are shortly thereafter apprehended.").

It is only in the past three months that first the agencies and now their counsel in habeas litigation have pivoted to a new theory entirely: noncitizens who entered the U.S. without inspection are "applicants for admission," still "seeking admission" years after their release on conditional parole or bond, and as a result are subject to indefinite mandatory detention under 8 U.S.C. § 1225(b)(2)(A), without access to a bond hearing. *See Martinez*, No. CV 25-11613-BEM, 2025 WL 2084238, at *4 (describing DHS's major shift in position just weeks ago).

B. The Record Demonstrates Ousmane's Detention Is Pursuant to Section 1226.

Ousmane's case predates Respondents' recent reimagining of the detention statutes. There is no dispute between the parties that Ousmane was released pursuant to a ROR which stated it was granted "[i]n inaccordance with section 236 of the Immigration and Nationality Act," i.e. 8 U.S.C. § 1226, *see* Exh. 1 to First Amended Pet'n (ECF 9-1), and that he was charged with removability pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), Exh. 2 to First Amended Pet'n (ECF 9-2), which is a statute applicable to noncitizens who are already present in the U.S., not to noncitizens who are considered "arriving." *See Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007); *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (detention of those "already in the country pending the outcome of removal proceedings" is governed by § 1226).

Respondents, however, argue that the facts of this case do not matter because Ousmane-even if he was released pursuant to 8 U.S.C. § 1226 (ECF No. 8-1)-"remains" an applicant for admission. *See* Resp. Opp. ECF No. 11 at 13-18. In support of this argument, Respondents cite to the Supreme Court's decision in *Jennings*, 583 U.S. at 287 (2018). Resp. Opp. at 14. But the Supreme Court in *Jennings* directly contradicted Respondents' position here. There, the Court held that "U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). *It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c).*" *Jennings*, 583 U.S. at 289 (emphasis added). The Court went on to explain that it is Section 1226 that "applies to aliens already present in the United States"—in short, petitioners like Ousman. *Jennings*, 583 U.S at 303; *see also Lopez Benitez*, --- F.Supp.3d ----, 2025 WL 2371588 at *8 (noting that the court could not "identify any authority" supporting Respondents'

interpretation of Section 1225(b)); *see also Martinez*, 2025 WL 2084238 at *8 (reaching a similar conclusion and citing *Jennings*, 583 U.S. at 288-89).

Respondents also cite to *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020). But, *Thuraissigiam* does not support Respondents' argument. The Petitioner, unlike Ousmane, was literally at the threshold seeking admission to the United States and had never been released pursuant to a ROR. Ousmane, by contrast, was released pursuant to § 1226(a) and was living in the United States and dutifully attending his Immigration Court dates at the time of his re-detention. As the Court in *Lopez Benitez* explained in addressing *Thuraissigiam* "a noncitizen cannot be subject to both mandatory detention under § 1225 and discretionary detention under § 1226, a point that Respondents conceded. It therefore follows that if Mr. Lopez Benitez was detained pursuant to one provision, he cannot be subject to the other." --- F.Supp.3d ----, 2025 WL 2371588 at 4 (internal citations omitted). *See also Martinez,* No. CV 25-11613-BEM, 2025 WL 2084238, at *3 ("[r]elease on recognizance is not humanitarian or public benefit parole into the United States' under section 1182(d)(5)(A) but rather a form of conditional parole from detention upon a charge of removability, authorized under section 1226.") (quotations omitted)

Respondents cite to *United States ex. rel. Kordic v. Esperdy* 386 F.2d. 232, 235 (2d Cir. 1967) but this case also does not support the government's arguments for the same reason: as in in *Lopez Bentinez* and *Martinez*, the record in this case is clear that Ousmane was released pursuant to a ROR and therefore is not subject to mandatory detention as a "parolee". *See* Resp. Opp. at 15. Respondents also rely extensively on *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But *Mezei* does not support Respondent's position. First, Ousmane is not a "parolee" or otherwise "arriving" at all but in fact a regular entrant to the U.S., determined to be present without authorization and released ROR pursuant to § 1226(a). *Cf. Thuraissigiam*, 591

U.S. at 139 ("aliens *who arrive at ports of entry*—even those paroled elsewhere in the country for years pending removal—are treated for due process purposes as if stopped at the border") (quoting *Mezei*, 345 U.S. at 215). Second, in *U.S. ex rel. Paktorovics v. Murff,* 260 F.2d 610 (2d Cir. 1958), the Second Circuit distinguished *Mezei* because the Petitioner and his family were not similarly situated to the Petitioner in *Mezei* who had been excluded on national security grounds. Here, beyond the fact that Ousmane is not a "parolee", he was not excluded from the United States on national security grounds but rather found to be neither a flight risk nor a danger to the community and released on recognizance. Ousman has not been "denied entry," *Mezei*, 345 U.S. at 212; he was detained in the interior, *cf. id.* at 216; and his release from custody poses no national security concerns, such that release would defeat the very objective of Respondents in excluding him. For these reasons, Ousmane's re-detention is reviewable and violates his constitutional rights.

C. Respondents' Interpretation of Its Detention Authority Runs Counter to the Statute.

As Respondents acknowledge, several courts, including courts in this District have recently found the government's assertion that Ousmane is "lawfully" detained under Section 1225(b)(2) is completely at odds not just with the record, *see supra* at B, but also with the plain meaning and overall structure of the federal laws that govern civil immigration detention.

"[T]he longstanding practice of the government—like any other interpretive aid—can inform [a court's] determination of what the law is." *See Loper Bright v. Raimondo*, 603 U.S. 369, 386 (2024) (cleaned up). That practice was consistent over decades until the government took a statutory U-turn that does not make sense. This Court has the authority to decide whether Respondents have lawfully invoked one detention provision instead of another. *Hechavarria v. Sessions*, 891 F.3d 49, 54 (2d Cir. 2018), *as amended* (May 22, 2018). In making this determination, the Court must ensure that "no clause, sentence, or word shall be superfluous, void,

or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Moreover, the Court may properly consider the statutory scheme's structure, contextual factors, relevant legislative history, and Congress's purpose. *See, e.g., Gundy v. United States*, 588 U.S. 128, 140-41 (2019).

Using those interpretive tools, a growing list of courts have recently concluded that any invocation of Section 1225(b)(2) against an individual originally released "pursuant to Section 1226" fails as a matter of statutory interpretation. *See supra* at 2 (collecting cases). The Court should reach the same conclusion here.

First, by its own terms, Section 1225(b)(2)'s language does not apply to the circumstances presented here. While Respondents spend much of their time arguing that Petitioner is an "applicant for admission," they fail to grapple with the rest of Section 1225(b)(2), which says it applies to individuals who "are *seeking* admission." (emphasis added). *See Martinez*, 2025 WL 2084238, at *2 (Section 1225(b)(2), by its terms, requires that an individual is "(1) an applicant for admission; (2) seeking admission; and (3) not clearly and beyond a doubt entitled to be admitted.") (quotations omitted). "The phrase 'seeking admission' is undefined in the statute but necessarily implies some sort of present-tense action." *Id.* at *6. But when Respondents arrested Ousmane, he was *already* inside the United States, both when he was first detained in California in December 2023 and certainly when he was re-detained him in New York City on August 12, 2025.[2] As someone who was no longer in the act of "seeking" admission, but is instead already here (and indeed living in New York City following release on conditional parole), Ousmane does fall within the scope of Section 1225(b)(2).

[2] As is set forth *supra,* Ousman's NTA confirms this: he was charged with a removability charge, 8 U.S.C. § 1182(a)(6)(A)(i) which is applicable to someone who is *already present* in the U.S. *See* NTA, ECF No. 8-2.

Second, Respondents' attempted substitution of Section 1225(b)(2) for Section 1226 contravenes the fundamental rule that courts must strive to harmonize statutes by giving "effect, if possible, to every clause and word of a statute," while respecting their overall logic and structure. *Hechavarria*, 891 F.3d at 55. Under Respondents' theory, Section 1226 would be rendered meaningless. *Lopez Benitez*, --- F.Supp.3d ----, 2025 WL 2371588 at *8 ("If, as Respondents contend, anyone who has entered the country unlawfully, regardless of how long they have resided here, is subject to mandatory detention under § 1225(b)(2)(A), then it is not clear under what circumstances § 1226(a)'s authorization of detention on a discretionary basis would ever apply.") (citations omitted)

To start, Section 1226(a) provides a comprehensive framework for determining whether someone who falls within its ambit—i.e. someone who was detained pursuant to an administrative warrant—may be subjected to mandatory detention or released. Its structure is straightforward. For individuals detained "[o]n a warrant" pending removal proceedings under Section 1226, Respondents: (1) "*may* continue to detain the arrested [noncitizen]"; (2) "*may* release the [noncitizen] on ... bond"; or (3) "*may* release the [noncitizen] on ... conditional parole." 8 U.S.C. §§ 1226(a)(1), (a)(2)(A), (a)(2)(B) (emphases added). The repeated use of "may" plainly signals Congress' intent to establish a discretionary detention framework for noncitizens arrested pursuant to a warrant. Critically, Section 1226(a) also expressly excludes certain "criminal" noncitizens from its discretionary framework—but it contains no similar exclusion for anyone else. *See* 8 U.S.C. § 1226(a) ("*Except* as provided in subsection (c)") (emphases added). "That express exception" to Section 1226(a)'s discretionary framework "implies that there are no other circumstances under which" detention is mandated for noncitizens subject detained pursuant to an administrative warrant. *Jennings*, 583 U.S. at 300 (*citing* A. Scalia & B. Garner, Reading Law 107

(2012)). Notably missing is any textual escape hatch that allows Respondents to funnel someone who was detained and released under Section 1226 into subsequent mandatory detention under Section 1225(b)(2). *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) ("that Congress has created specific exceptions" to a statute's applicability "proves" that the statute generally applies absent those exceptions).

Respondents' interpretation of Section 1225(b)(2) would also render superfluous a recent statutory amendment to Section 1226. Section 1226(c)(1)(E)—added to Section 1226 in 2025 by the Laken Riley Act[3]—makes a noncitizen subject to mandatory detention if he (i) is inadmissible under for having entered without inspection, engaging in fraud, or lacking entry documents; "*and*" (ii) is charged with, arrested for, convicted of, or admits to committing certain crimes. 8 U.S.C. § 1226(c)(1)(E) (emphasis added). The conjunction "and" establishes that detention is mandatory only when both criteria are satisfied. Under Respondents' theory, Section 1226(c)(1)(E)'s mandatory detention for inadmissible noncitizens who are implicated in certain crimes, including those "present in the United States without being admitted or paroled," would be meaningless since, in Respondents' view, "all noncitizens who have not been admitted" would already be under Section 1225(b)(2)'s mandatory detention authority. *Bostock*, 2025 WL 1193850, at *14 ; *Lopez Benitez*, --- F.Supp.3d ----, 2025 WL 2371588 at *7. If Congress deemed it necessary to amend Section 1226 to include a mandatory detention provision triggered not merely by unauthorized entry but also by specific criminal conduct, it means Congress knew that Section 1225(b)(2) alone could not achieve that outcome.

[3] Pub. L. No.119-1, 139 Stat. 3 (2025).

D. Respondents' Interpretation Would Raise Serious Retroactivity Concerns.

Moreover, Respondents' belated switch in Ousmane's statute of detention would raise serious retroactivity concerns, particularly insofar as Respondents contend that through this shift they have wiped out all of his constitutional rights. *See* Resp. Opp. at 18-20. In this circuit, courts must weigh five factors to determine whether an agency may apply a new rule, whether through adjudication or rulemaking, retroactively:

> "(1) whether the case is one of first impression, (2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order places on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."

Obeya v. Sessions, 884 F.3d 442, 445 (2d Cir. 2018).

All five factors overwhelmingly favor Ousmane. Starting with the first, as set forth above, Respondents' interpretation of the interplay between Sections 1225 and 1226 upends decades of legal status quo. For that reason, Respondents' invocation of Section 1225(b)(2) against Ousmane undoubtedly presents an "abrupt departure" under the second and third factors. Furthermore, under the fourth factor, Mr. Ousmane is suffering a substantial burden. Respondents have unexpectedly detained him and now contend that he cannot be released during removal proceedings. Resp. Opp. at15 ("His further release pending the resolution of his removal proceedings has not been authorized by ICE, and thus he remains detained.") Even more damningly, they contend that—through the retroactive application of their new rule—all of Ousmane's constitutional rights beyond those accorded him by statute have simply vanished. *Id.*

As for the fifth factor, the government's interest in applying their new interpretation uniformly cannot outweigh the significant burden currently imposed on Ousmane, particularly

given Respondents' newly "demonstrated willingness to depart from [their] own precedent." *Obeya,* 884 F.3d at 449.

For the foregoing reasons, the Court should reject Respondents' assertion that Ousmane is subject to mandatory detention.

II. Ousmane's Constitutional Rights Have been Violated.

Respondents continue their argument that Ousmane is properly subjected to mandatory detention pursuant to §1225(b) and ask this Court to conclude his right to due process has not been violated. The Court should reject this argument.

Respondents' sole defense of Ousmane's ongoing confinement is that he is now detained under a new statute authorizing mandatory detention. Resp. Opp. at 18. Apart from that, Respondents make no effort to address the constitutional violations that he alleges Respondents committed in re-detaining him. Importantly, Ousmane seeks his release due to these constitutional violations *even if* the Court agrees he is detained pursuant to § 1226(a), as that is the remedy warranted by the severity of the violations and the lack of any evidence that Petitioner should be detained. *See Lopez Benitez*, --- F.Supp.3d ----, 2025 WL 2371588 at *15 (Ordering Petitioner's release and concluding that "[i]n practice, Respondents seem to be detaining some arbitrary portion of such individuals as they leave their regularly-scheduled immigration court proceedings. But treating attendance in immigration court as a game of detention roulette is not consistent with the constitutional guarantee of due process."); *Chipantiza-Sisalema*, 2025 WL 1927931, at *3 (ordering immediate release); *Valdez*, 2025 WL 1707737, at *4 (same); *Kelly*, 2025 WL 2381591 at *3 (same).

First, Respondents do not allege that Ousmane's re-detention was due to an assessment of either danger or flight risk, the sole two lawful bases for immigration detention. *See Zadvydas v.*

Davis, 533 U.S. 678, 690 (2001); *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020). Nor could they, as there is absolutely no indication that he is either a danger or a flight risk. He filed a timely asylum application; and he has attended immigration court. In the absence of a justification, his re-detention violates his right to due process. *See Padilla v. U.S. Immigration and Customs Enforcement,* 704 F. Supp. 3d 1163, 1171 (finding noncitizen asylum applicants subjected to mandatory detention had credibly alleged violations of their right to substantive due process).

Second, Respondents do not claim to have provided him notice—in fact, they cite not a single document he was served—nor to have accorded him any process whatsoever in re-detaining him. Although the Second Circuit has held that the well-known test for constitutionality of process set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is applicable to due-process challenges, Respondents fail to address that test at all. But as Ousmane set out in his First Am. Pet'n a growing body of case law confirms, the deprivation of his most essential interest—that of liberty—without so much as a word of explanation, nor an opportunity to be heard, does not pass constitutional muster. *See Valdez*, 2025 WL 1707737, at *4 ("Respondents' ongoing detention of Petitioner with no process at all, much less prior notice, no showing of changed circumstances, or an opportunity to respond, violates his due process rights"); *Chipantiza-Sisalema*, 2025 WL 1927931, at *3 (same). The risk of erroneous deprivation, in the absence of any individualized custody determination, is enormous—and the public interest in detention nonexistent.

Respondents' argument that Ousmane's detention violates his substantive due process rights does not meaningfully engage with the cases cites by Petitioner in his First Am. Pet'n. *See* Resp. Opp. at 19. Rather, Respondents' argument is a continuation of their assertion that because Ousmane is subject to mandatory detention under §1225 there is no violation of his right to substantive due process. But, as is set forth in Ousmane's First Am. Pet'n at ¶¶51-57 and not

contested by Respondents, Petitioner was detained with any process and without a finding that his is a flight risk or danger to the community. Rather, as is the case throughout their opposition, Respondents caste away Ousmane's substantive due process claim as nothing to see because the government acted with regularity when he was detained, without notice or warning, by masked government agents following his appearance in the Immigration Court. As is set forth in Ousmane's First Am. Pet'n, his re-detention and continued detention bears "no reasonable relation to the government's interests in preventing flight and danger, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (quotations omitted), *See also Padilla,* 704 F. Supp. 3d at 1172 ("Due process protects against immigration detention that is not reasonably related to the legitimate purpose of effectuating removal or protecting against danger and flight risk").

Third, Respondents contend that the Fourth Amendment is inapplicable because administrative arrests are permissible. Resp. Opp. ECF No. 20-21. But Respondent fail to address the crux of Ousmane's claim, which is that his re-detention impermissibly relied on the same basis as his first detention in 2023. Respondents have not produced the administrative warrant and Ousmane was not provided a copy of the administrative warrant at the time of his re-detention on August 12, 2025. *See* First Am. Pet'n at ¶ 27. Respondents nonetheless argue that an administrative arrest provides a valid basis for detention of a noncitizen Resp. Opp. at 20 (citing *Abel v. United States*, 362 U.S. 217, 233 (1960)), but the agency has never interpreted that case to mean administrative warrants can be successively issued against the same person on the same basis and without new cause. "[A]dministrative warrants raise serious due process and Fourth Amendment questions when used in this way." *Lopez v. Sessions*, No. 18 CIV. 4189 (RWS), 2018 WL 2932726, at *14 (S.D.N.Y. June 12, 2018); *see also Saravia*, 280 F. Supp. 3d at 1196 ("Absent some compelling justification, the repeated seizure of a person on the same probable cause

cannot, by any standard, be regarded as reasonable under the Fourth Amendment.") (citation omitted).

Respondents further assert that "DHS may revoke release" and return Ousmane to custody, but that is not what happened. Resp. Opp. at 20-21. Ousamne was detained pursuant to a new administrative warrant. *See* First Am. Pet'n at ¶ 27. Respondents have conspicuously chosen not to file that warrant, but they offer no reason to think any new basis for detention existed.

Rather than confront these core violations, Respondents contend simply that Ousmane has no constitutional right to challenge his detention. That is wrong as a statutory matter. *See supra* at I(B). And even if it were not, courts have concluded that re-detention must comport with the precepts of due process even for noncitizens who (unlike Ousmane) are *credibly* deemed "arriving." *See Lopez*, 2018 WL 2932726, at *7 (ordering release of "arriving" noncitizen who was unlawfully re-detained); *Mata Velasquez v. Kurzdorfer,* No. 25-CV-493-LJV, 2025 WL 1953796, at *11 (W.D.N.Y. July 16, 2025) (same and ordering immediate release from detention); *Rodriguez Orellana v. Francis,* 25-CV-04212 (OEM), 2025 WL 2402780 at *5-6 (E.D.N.Y. Aug. 19, 2025) (same and ordering immediate release from detention).

For Ousmane, for whom the "arriving" label strains credulity, *see supra* at I, the due-process right to notice of the basis for detention is even greater. *See Martinez v. McAleenan*, 385 F. Supp. 3d 349, 368 (S.D.N.Y. 2019) (ordering release of petitioner who was detained without written notice and "blindsided and unknowingly deprived of the most sacred things he enjoyed – his liberty" through government "conduct [that] reeks of arbitrariness and carelessness").

Respondents' attempt to extinguish Ousmane's constitutional rights through application of a new statutory label fails irrespective of the statute under which he is detained lacks any support

in the cases in support thereof. *See supra* at I(B). In neither *Thuraissigiam* nor *Mezei*, nor any other case Respondents offer to suggest that individuals in Ousmane's situation lack due-process rights, was the petitioner not a parolee or otherwise "arriving" at all but in fact a regular entrant to the U.S., determined to be present without authorization and released on conditional parole under § 1226(a). *Cf. Thuraissigiam*, 591 U.S. at 139 ("aliens *who arrive at ports of entry*—even those paroled elsewhere in the country for years pending removal—are treated for due process purposes as if stopped at the border") (quoting *Mezei*, 345 U.S. at 215); *Poonjani v. Shanahan*, 319 F. Supp. 3d 644, 648 (S.D.N.Y. 2018) ("The entry fiction applies to aliens – like Petitioner – who are stopped at the border and subsequently paroled into the United States.").

Ousmane was not paroled. He was released pursuant to an ROR and instructions to appear in court, which he did."[4] This crucial distinction renders the cases that Respondents point to inapposite. Even if that were not the case, numerous courts have concluded that individuals deemed arriving are protected by the right to due process. *See, e.g.*, *Padilla*, 704 F. Supp. 3d at 1170–72; *A.L. v. Oddo*, 761 F. Supp. 3d 822, 825–26 (W.D. Pa. 2025); *Leke v. Hott*, 521 F. Supp. 3d 597, 604–05 (E.D. Va. 2021); *Bermudez Paiz v. Decker*, 2018 WL 6928794, *10 (S.D.N.Y. Dec. 27, 2018) (collecting cases). *Thuraissigiam* does not change this, as it did not concern a challenge to detention at all but rather to the procedures dictating admission—a distinct issue. 591 U.S. at 107 (noting petitioner "did not ask to be released"); s*ee Padilla,* 704 F. Supp. 3d at 1171 (discussing this distinction).[5]

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[4] The distinction between parole and conditional parole has given rise to litigation in several circuits on the ancillary question of eligibility to adjust status. *See Cruz-Miguel v. Holder*, 650 F.3d 189, 198 (2d Cir. 2011).

[5] Petitioner asks the Court to grant his First Am. Pet'n. But to the extent the gravity of these issues merits further briefing, Petitioner renews his request for release pursuant to *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). *See* First Am. Pet'n at ¶¶74-77.

III. Exhaustion is Unnecessary Because Respondents' Own Binding Precedent Forecloses Petitioner's Eligibility for Bond.

Respondents next urge the Court in the alternative to sidestep the significant constitutional issues in this case by imposing a prudential exhaustion requirement, notwithstanding their own exegesis on his ineligibility for bond. Resp. Opp. at 21-25. Respondents attempt to elide their own constitutional violations by noting that Ousmane has "been detained for less than two weeks". *Id.* at 25. But the length of his detention has no bearing on the proper remedy here. Seeking bond would be futile and inappropriate given the illegality of Respondents' actions.

First, the Executive Office of Immigration Review (EOIR) which includes the Office of the Immigration Judge and the Board of Immigration Appeals (BIA) cannot not consider the constitutional claims raised by Ousmane. *See Ozturk v. Hyde*, 136 F.4th 382, 400 (2d Cir. 2025), (quoting *Rabiu v. Immigr. & Naturalization Serv.*, 41 F.3d 879, 882 (2d Cir. 1994)); *see also* 8 U.S.C. § 1252(b)(4)(A) (BIA can only decide matters in the administrative record, which would be insufficient for constitutional claims at issue here). In addition, prudential exhaustion is inappropriate here for several reasons, including futility; the serious constitutional questions he raises; and the irreparable harm resulting from his ongoing detention. *Lopez Benitez*, --- F.Supp.3d ----, 2025, WL 2371588 at *14 (concluding that "given the nature of the constitutional violation Mr. Lopez Benitez sustained here—i.e., Respondents' failure to conduct any kind of individualized assessment *before* detaining him—any post-deprivation review by an immigration judge would be inadequate.). Respondents have violated his constitutional, statutory and regulatory rights by jailing him without *any* individualized custody determination, *cf.* 8 C.F.R. § 1236.1(c)(8), and invoking an erroneous authority to do so; it is not now for him, wrongly deprived of his liberty, to spend weeks or months more in detention attempting to correct their error.

Respondents point to two other cases in this district requiring exhaustion. Resp. Opp. at 18 (citing *Castillo Lachapel v. Joyce*, No. 25 CIV. 4693 (JHR), 2025 WL 1685576, at *1 (S.D.N.Y. June 16, 2025); *Capunay Guzman v. Joyce*, 25-CV-4777 (RA), 2025 WL 1696891, at *2-3 (S.D.N.Y. June 17, 2025)). However, the facts in those cases differed significantly. Most importantly, in both of those cases Respondents *conceded* that the petitioners were detained pursuant to § 1226(a), rendering further action by the courts unnecessary to ensure a bond hearing. Here Respondents have zealously contended Ousmane is not bond eligible, a question this Court now must squarely confront. Moreover, should this Court agree that Ousmane is detained pursuant to Section 1226(a), that would invalidate Respondents' sole basis for re-detaining him. In the absence of any justification for his detention, he should not remain in custody even one more day.[6]

IV. Ousmane Should be Released Pending the Adjudication of his Habeas Petition.[7]

Petitioner asks the Court to grant his habaes petition. But to the extent the gravity of these issues merits further briefing, Petitioner renews his request for release pursuant to *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001). *See* First Am. Pet'n at ¶¶74-77. Respondents argue that Ousmane's request to be released pursuant to *Mapp* should be denied. Resp. Opp. at 27. Respondents argue that Ousmane has not raised substantial claims, that there are no extraordinary circumstances and that release is not necessary to make the habeas remedy effective.

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[6] The issue of futility in light of *Matter of Q. Li*, 29 I. & N. Dec. 66 (BIA 2025) was also not at issue in either *Castillo Lachapel v. Joyce* or *Capunay Guzman*. In *Castillo*, that was because the petitioner was not detained for more than two years after initial entry into the U.S. and in *Capunay Guzman*, Petitioner did not allege that seeking bond would be futile based on binding BIA's precedent.

[7] To the extent the Court is inclined to order a bond hearing, Petitioner asks that it either be conducted by the district court, *L.G.M. v. Laroco*, 2:25-cv-02631-PKC, Docket No. 30 (E.D.N.Y. June 25, 2025), or that an Immigration Judge be directed to place the burden on the government to justify Ousmane's continued detention by clear and convincing evidence. *Velasco Lopez*, 978 F.3d at 855-856.

As set forth *supra* at Sections I-II *supra*, Ousmane has raised substantial claims. With respect to the argument that there are no extraordinary circumstances, the Court should reject Respondents' reasoning which is again a continuation of their assertion that all that happened to Petition was in the regular course of business and within Respondents' legal authority. But, as is set forth *supra,* there is nothing regular about the government actions in this case and this Court should follow the reasoning of other Courts in this District and outside of this District to find that Respondents acted unlawfully.

In addition, Respondents attempt to distinguish "exceptional circumstances" by creating a hierarchy of constitutional rights that somehow make violations of the First Amendment paramount and distinguishable from other constitutional violations. Resp. Opp. ECF No. 27. Doing so misses the mark because the upshot of those cases is that release is necessary when an alleged substantial and meritorious constitutional violation is coupled with the fact that an immigrant in civil detention is neither a flight risk, nor a danger to the community. It is the combination of these three factors together that amount to an exceptional and extraordinary circumstance, as is the case here. *See, Mohammed H. v. Trump,* No. CV 25-1576 (JWB/DTS), 2025 WL 1334847, at *7 (D. Minn. May 5, 2025) (finding extraordinary circumstances included uncontested lack of dangerousness and "shifting post hoc explanations to justify the arrest"). This is so because the habeas remedy itself is ineffective when a petitioner is unconstitutionally detained—be that for a moment, a day, a month or longer. *Id.* Right now, Ousmane is alleging that he has been unconstitutionally re-detained and the record contains no lawful basis for that re-detention. His detention is therefore exceptional and out of the ordinary (*i.e.*, extraordinary).

A district court's holding in *Mahdawi v. Trump*, illustrates this point. No. 2:25-CV-389, 2025 WL 1243135, at *12 (D. Vt. Apr. 30, 2025). There, the court did not find extraordinary

circumstances solely based on the First Amendment; rather the court's determination was premised on both an alleged constitutional violation *and* the lack of any legitimate purpose for petitioner's detention. *Id.* This is because immigration detention can only have two legitimate government purposes: ensuring appearance at future immigration proceedings and preventing danger to the community pending completion of removal. *See Zadvydas*, 533 U.S. at 691. There is "no interest in the continued incarceration of an individual who [Respondents] cannot show to be either a flight risk or a danger to his community," *Ozturk v. Trump*, No. 2:25-CV-374, 2025 WL 1420540, at *5 (D. Vt. May 16, 2025)—a proposition that stands regardless of the alleged constitutional violation at issue.

It cannot be the case that Respondents can detain any immigrant that does not suffer from a health risk or does not have a First Amendment claim even when their due process rights have allegedly been violated—because that defeats the very effectiveness of the habeas remedy. What release does is ensure the habeas remedy remains effective *if* the Court ultimately determines in adjudicating the habeas petition that petitioner's constitutional rights have been violated.

CONCLUSION

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

Dated: August 28, 2025
New York, New York

Respectfully submitted,

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules.[8] As measured by the word processing system used to prepare it, this memorandum contains 6,613 words.

[8] Petitioner's request for leave to file reply that is up to 7,000 words in length was granted by the Court. *See* ECF Nos. 13 and 14.