UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YOK

Ousmane SAVANE, *Petitioner*, v. LaDeon FRANCIS, in his official capacity as Acting Field Office Director of New York, Immigration and Customs Enforcement; Todd LYONS, in his official capacity as Acting Director U.S. Immigrations and Customs Enforcement; Kristi NOEM in her official capacity as Secretary of Homeland Security; Pam BONDI, in her official capacity as Attorney General. *Respondents*.	Case No. 1:25-cv-06666-GHW

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The Court has directed the parties to provide supplemental briefing on the "application of the entry fiction outside of the context of migrants who are coming to our borders and are interacting with immigration officials." Tr. at 75; *see also* Tr. at 70 (welcoming briefing on whether "the entry fiction applies only to a limited group of people and does not apply to people who have not obtained lawful entry and are present in the country without having engaged with the United States government.")

As Petitioner sets forth below, the entry fiction has no applicability to people challenging their custody after an entry, lawful or unlawful, into the U.S. The entry fiction is a limited exception to the general rule that noncitizens present in the United States enjoy all protections accorded by the Constitution. For over a century, it has guided the question of what adjudicatory process is owed to people seeking initial entry to the country. As correctly conceded by Respondents at oral argument, courts have not applied it to noncitizens other than those seeking initial admission at the border or present in the U.S. after a grant of parole at the border. Its extension beyond those two contexts would be without precedent and would contravene long-standing and consistent Supreme Court case law holding that anyone present in the U.S. has due-process rights.

The Petitioner in this case, Ousmane Savane, was *not* paroled.[1] His detention as he left a federal building in lower Manhattan, over eight months after entering the U.S. and establishing a

[1] At oral arguments, Respondents posited that perhaps Mr. Savane was mistakenly released under 8 U.S.C. § 1226 rather than paroled under 8 U.S.C. § 1182(d)(5). There is no evidence in the record to support this supposition. *See Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *4 (S.D.N.Y. Aug. 13, 2025) ("During oral argument, counsel for Respondents initially stated that when Mr. Lopez Benitez was first encountered by CBP in 2023, § 1225 could have been applicable to him and that, in fact, he may have initially been designated for such treatment under § 1225. But Respondents' counsel also acknowledged that there was

life here, was not as he stood on the threshold of entry. An extension of the entry fiction doctrine to him or to *anyone* not admitted to the country, and by extension a per se bar to challenges to 8 U.S.C. § 1225(b), is an "extraordinary request to treat as falling outside of the Constitution's due process guarantee the millions of immigrants who, although they may have entered unlawfully, have established lives here and made this country home." *Make the Rd. New York v. Noem*, No. 25-CV-190 (JMC), 2025 WL 2494908, at *13 (D.D.C. Aug. 29, 2025). The Court should reject it as incompatible with Supreme Court case law. As Petitioner has set forth in his petition and reply brief, his detention is governed by 8 U.S.C. § 1226(a). But even if it were not, he would still enjoy due process rights.

I. For Over Century, The Supreme Court Has Held That Individuals Unlawfully Present in the U.S. Have Due Process Rights.

For over a century, the Supreme Court has consistently held that noncitizens present in the United States are entitled to the full panoply of constitutional rights, regardless of whether their presence is lawful or derives from a lawful entry. In *Yamataya v. Fisher*, the Supreme Court rejected executive officers' authority "arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States." 189 U.S. 86, 101 (1903).[2]

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nothing in the record to reflect that hypothesis. Accordingly, the Court cannot credit that speculation.") (citations omitted)

[2] This case is sometimes captioned *The Japanese Immigrant Case*, 189 U.S. 86 (1903). *E.g. A. A. R. P. v. Trump*, 605 U.S. 91, 94 (2025).

More than 50 years later, the Supreme Court again stated "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking *initial* admission to the United States requests a privilege and has no constitutional rights regarding his application") (emphasis added); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (due process protects all people within the U.S., "[e]ven one whose presence in this country is unlawful, involuntary or transitory"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[noncitizens] who have once passed through our gates, *even illegally*, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law") (emphasis added).

Most recently, in a case challenging prolonged detention, the Supreme Court observed that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). "[O]nce a [noncitizen] enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent." *Id. Zadvydas* concerned a challenge not only to the scope of procedures used to adjudicate admission or removal but to *detention*. It left no doubt that individuals inside the U.S. have a due-process right to challenge their detention by virtue of their presence here, irrespective of the statute of detention. *See Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (holding in a challenge to detention that "the Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful,

temporary, or permanent" and applying the three-prong *Mathews v. Eldridge* test to petitioners' due-process claims) (citing *Zadvydas*, 533 U.S. at 693).

II. The Entry Fiction Developed as A Means to Facilitate Inspection at the Border Without Altering the Processes Used to Adjudicate an Individual's Claims to Remain in the U.S.

The entry fiction is a carefully delineated exception to this principle. Both its origins and precedent confirm that the facts of this case do not compel its application to Mr. Savane nor to anyone else present in the U.S. and challenging their custody.

The entry fiction derived from the federal government's need to offload passengers on arriving ships for inspection, without simultaneously altering the procedures that would govern their claims to remain in the U.S.[3] The doctrine arose in the context of a long-standing distinction in how such claims are adjudicated depending on whether someone has already entered the country. For decades after the country's founding, the government largely lacked the power to deport people at all, and could only exclude those who were newly arriving. *See* Brief of Amici Curiae Immigration Scholars in Support of Respondent at 9, n. 3, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020). When Congress purported to expand summary removal to people of certain races within their first year after entry, the Supreme Court quickly reestablished a distinction between those who are already here and those seeking initial entry. *Yamataya*, 189 U.S. at 101 (holding that a person *in* the U.S. cannot be deported without "an opportunity to be heard upon the questions involving his right to be and remain in the United States").

With the enactment of the INA in 1952, the distinction remained, as entry into the U.S. became determinative of whether one was processed through exclusion or deportation proceedings. *Landon v. Plasencia*, 459 U.S. 21, 28 (1982) ("only "entering" aliens are subject to

[3] Eunice Lee, *The End of the Entry Fiction*, 99 N.C. L. REV. 565, 584-587 (2021).

exclusion"); *Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990) (petitioner was subject to exclusion, rather than deportation, because she "had not effected an 'entry'"). Exclusion proceedings, "usually held at the port of entry," were "the usual means of proceeding against an alien outside the United States seeking admission," while deportation proceedings were accorded to those "already physically in the United States." *Landon*, 459 U.S. at 25. Deportation proceedings accorded a "number of substantive rights" and avenues for relief unavailable in exclusion proceedings. *Id.* at 25-26 (describing differences). Against that backdrop, the fictional withholding of entry restricted parolees to *exclusion* rather than deportation proceedings.[4]

The entry fiction was, at its core, a humanitarian doctrine that facilitated removal from crowded ships, while limiting parolees' rights with respect to their applications to enter the country to would those rights were while still on a ship and outside the territorial jurisdiction of the U.S. First codified in 1891, the doctrine directed that "removal [from ships] shall not be considered a landing during the pendency of such examination." Lee, *supra* n. 3 at 585 (citing Act of Mar. 3, 1891, Pub. L. No. 51-551, , § 8, 26 Stat. 1084, *repealed by* Act of Feb. 5, 1917, ch. 29, § 38, 39 Stat. 874, 897); *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892) (an agreement by the government to keep petitioner in a boarding house, rather than a ship, "pending the decision of the question of her right to land… left her in the same position, so

[4] The Supreme Court mitigated this doctrine somewhat as to Lawful Permanent Residents returning from "innocent, casual, and brief" trips abroad. *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *see also Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953). The Supreme Court's recognition that the entry fiction—if taken too literally or divorced from reality—could yield constitutionally intolerable results rings true here as well, where the question is whether it should be expanded to justify mandatory detention of millions of people who have lived inside the U.S. for years. *See Make the Rd. New York*, 2025 WL 2494908, at *13.

far as regarded her right to land in the United States, as if she never had been removed from the steam-ship").

For over half a century, its use was limited to individuals detained in custody since their initial arrival at the border, pending examination of their right to enter—whether at Ellis Island or a boarding house or aid society. *E.g. Nishimura Ekiu v. United States*, 142 U.S. 651 (1892) (detained at the "Methodist Episcopal Japanese and Chiness Mission"); *Kaplan v. Tod*, 267 U.S. 228, 229 (1925) (detained in the custody of an aid society)[5]; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950) (detained on Ellis Island); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (same).

Six years after Congress enacted the parole statute as part of the INA, the Supreme Court extended the entry-fiction doctrine to individuals initially detained while seeking admission and then released on parole pursuant to then-Section 212(d)(5) of the Act. *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958). In doing so it relied on the language of the parole statute, which (then as now) provided that "after the return to custody the alien's case 'shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.'" *Id.*

None of these cases delineating the entry fiction doctrine concerned detention, but rather the procedures used to determine whether one has the right to enter and remain in the U.S. *See, e.g.*, *Knauff*, 338 U.S. at 540 (petitioner challenged "the right of the Attorney General to exclude her without a hearing for security reasons"). In *Mezei*, the case of a man detained on Ellis Island

[5] The aid society allowed 13-year-old Esther Kaplan "to live with her father," *Kaplan*, 267 U.S. at 229, as the onset of WWI delayed her exclusion, but her age arguably distinguishes this from release of an adult. *Cf. Reno v. Flores*, 507 U.S. 292, 302 (1993) ("juveniles, unlike adults, are always in some form of custody") (quotations omitted).

for four years before finally being allowed to return to his family in Buffalo[6], the petitioner challenged his "continued exclusion." 345 U.S. at 216. The Court couched his ongoing detention as incident to that exclusion: because he had not entered the U.S. and the government alleged his entry would endanger the national security, the Supreme Court held he had no more rights to contest his exclusion than a newcomer still confined to his ship. 345 U.S. at 215-216. Similarly, in *Thuraissigiam*, the petitioner challenged the procedures used to adjudicate his ultimate right to stay in the U.S.—not his detention. *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 117 (2020) (petitioner "did not ask to be released"). In that context, the Supreme Court determined that because he was apprehended only 25 yards from the border, he had not "effected an entry" and the expedited removal procedures available to him under 8 U.S.C. § 1225(b)(1) were all that due process required..

In summary, the entry fiction is applicable to the procedures used to adjudicate the right to remain in the US.—not detention. For individuals like Mr. Savane, who are in removal proceedings pursuant to 8 U.S.C. § 1229a, it has no applicability. *See, e.g., Zheng v. Mukasey,* 552 F.3d 277, 279, 286 (2d Cir. 2009) (finding due process was denied in removal proceedings for respondent apprehended one week after entering the United States).

III. The Entry Fiction Is Applicable Solely to Individuals Granted Parole Pursuant to 8 U.S.C. § 1182 and Its Expansion to All Individuals Present in the U.S. Without Admission Would Raise Serious Statutory and Constitutional Concerns.

Mr. Savane had resided in the U.S. for months at the time he was surrounded and detained leaving immigration court in Manhattan. Even to the extent the entry fiction were

[6] *Alien, Long Held, Freed*, N.Y. Times, Aug. 12, 1954, available at https://www.nytimes.com/1954/08/12/archives/alien-long-held-freed-ellis-islands-man-without-a-country-goes-to.html.

applicable to *detention*, which Petitioner submits it is not, it has never been applied to individuals at liberty inside the United States absent a grant of parole—irrespective of the statutory authority for their detention. *See, e.g.*, *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")[7]. For those who long since entered the U.S., its use would divorce the entry fiction from its humanitarian purpose, which was to permit the government time and geographic flexibility to detain individuals while inspecting them upon initial appearance at the border and determining their suitability for admission. It would also pose insurmountable textual and constitutional problems. An expansion of the entry fiction to anyone present in the U.S. who has not been admitted would effectively abrogate long-standing the Supreme Court and Second Circuit's clear holdings that individuals have due-process rights once they are present inside the country.

A. Parole Is a Distinctive Process and Legal Status That Cannot Be Imputed to Non-Parolees.

First, individuals *paroled* pursuant to 8 U.S.C. § 1182(d)(5) are treated distinctly throughout the INA and its implementing regulations and their unique posture cannot be imputed to non-parolees. To Petitioner's knowledge, and as conceded by Respondents at oral argument, no court has ever held the entry fiction applicable to people at liberty the U.S. unless they were paroled into the country at the border—a legal term of art deriving from the statute. Parole is legally distinguishable from other forms of release from custody, with different procedures (such

[7] In dicta in *Traore v. Ahrendt*, a case that did not reach the question of due-process rights of parolees, another court in this district misstated the holding in *Zadvydas* that it cites. *Traore v. Ahrendt*, No. 18-CV-794 (JMF), 2018 WL 2041710, at *1 (S.D.N.Y. Apr. 30, 2018). In fact, the Supreme Court in *Zadvydas* noted the entry fiction was applicable to someone who had never *entered* the U.S., not who had never been *admitted* to the U.S. *Zadvydas*, 533 U.S. at 693.

as issuance of an I94); requirements (set out by statute); and legal consequences. Among these differing consequences are an exemption from accrual of "unlawful presence" during the period of their parole, 8 U.S.C. § 1182(a)(9)(B)(ii); access to employment authorization, 8 CFR § 274a.12(c)(11); and eligibility to adjust status through an immediate relative who is a Lawful Permanent Resident or U.S. citizen. *See Cruz-Miguel v. Holder*, 650 F.3d 189, 191 (2d Cir. 2011); *Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747, 749–50 (BIA 2023). A grant of parole also triggers particular processes and protections. Among these, termination of parole before its authorized end date requires a finding that "the purpose for which parole was authorized" or that neither "humanitarian reasons nor public benefit warrants the continued presence" of the noncitizen in the U.S." 8 C.F.R. § 212.5(e)(2).

Given this host of distinctions, the Second Circuit has rejected any construction of the phrase "paroled into the United States," as used elsewhere in the INA, that swept beyond a grant of parole pursuant to 8 U.S.C. § 1182(d)(5). *Cruz-Miguel*, 650 F.3d at 199. It is simply not a status that can be conjured or imputed absent an actual grant of parole.

In the absence of such a parole, there is no doctrinal or logical basis to find that a person like Mr. Savane, who was detained in lower Manhattan, or anyone else living freely in the U.S. has not *entered* the country. *Cf. Correa v. Thornburgh*, 901 F.2d 1166, 1171 (2d Cir. 1990) (describing the four-part test for "entry" used to determine applicability of exclusion or deportation proceedings). Even Mr. Savane's initial encounter in California, which distinguishes him from undocumented people within the U.S. who have never had contact with immigration authorities, does not purport to freeze him as "arriving" or undo his obvious physical entry into the country. Indeed, nothing in the record even indicates how long after entry Mr. Savane was detained—such as, for instance, an expedited removal order or a Notice to Appear designating

him as arriving. *Cf.* ECF 12-1 (NTA issued to Mr. Savane). And of course, the detention at issue here happened in a federal building in lower Manhattan, eight months after he entered the U.S. and established a life here. He had still not been *admitted*, but he did not stand on the threshold of entry. *Cf. Munoz Materano v. Arteta*, No. 25 CIV. 6137 (ER), 2025 WL 2630826, at *12, n. 20 (S.D.N.Y. Sept. 12, 2025) (finding petitioner, "who had already been living and working in the U.S. on parole for nearly two years at the time ICE arrested him, is clearly distinguishable from the petitioner in *Thuraissigiam*"). In short, there is no legal nor even factual basis to pretend he is not present within the U.S.

The Court should confine the entry fiction to its sanctioned historical usage. Because Mr. Savane was *not* paroled, it has no applicability to him. *See* Tr. at 36 (conceding Mr. Savane was not paroled); ECF 8-1 (initial release document).

B. Even Assuming the Entry Fiction Were Applicable to Detention, Its Proposed Expansion to People Inside the U.S. Would Contravene Over a Century of Supreme Court Precedent.

Second, and more gravely, to adopt Respondents' suggestion that no one apart from those who have been *admitted* to the U.S. has due process rights beyond those accorded by statute "would be to undermine more than a century of precedent holding that those who have entered the United States have a liberty interest in remaining—no matter how they entered." *Make the Rd. New York v. Noem*, No. 25-CV-190 (JMC), 2025 WL 2494908, at *11 (D.D.C. Aug. 29, 2025). This precedent includes at least two recent Supreme Court decisions reiterating the applicability of the due process clause to all people in the U.S., however they entered. *Trump v. J.G.G.*, 145 S. Ct. 1003, 1006 (2025); *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1367 (2025); *see also Munoz Materano*, 2025 WL 2630826, at *12 (noting "[t] he Supreme Court has repeatedly—and recently—reiterated this principle").

The Second Circuit has repeatedly held that the well-known *Mathews v. Eldridge* test is applicable to deprivations of liberty for those present in the U.S. *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020); *Black v. Decker*, 103 F.4th 133, 143 (2d Cir. 2024). That test is not vitiated by detention pursuant to § 1225(b) nor the entry fiction. Indeed, many federal courts have recognized the due-process rights of individuals noncitizens detained under § 1225(b)[8]. Pet. Reply at 17 (collecting cases); *see also Munoz Materano*, 2025 WL 2630826, at *12; *Rodriguez Orellana v. Francis,* 25-CV-04212 (OEM), 2025 WL 2402780 at *5-6 (E.D.N.Y. Aug. 19, 2025); *Mata Velasquez v. Kurzdorfer,* No. 25-CV-493-LJV, 2025 WL 1953796, at *11 (W.D.N.Y. July 16, 2025); *Borbor v. Garland*, 21-CV-6325, ECF 10 (W.D.N.Y. Sept. 29, 2021). These align with pre-*Thurassigiam* decisions finding due process violations related to § 1225(b) detention. *E.g. Rasel v. Barr*, 455 F. Supp. 3d 38, 49 (W.D.N.Y. 2020).

Respondents' theory that only admitted noncitizens possess constitutional rights with respect to their custody would pose serious dangers. In their view, a noncitizen who entered the U.S. 25 years ago and has built their entire life in this country could be swept into a detention facility and denuded of their constitutional rights as readily as someone who stands at the border. That is not what the Supreme Court held in *Thuraissigiam* and not a result it has ever sanctioned. *Cf. Munoz Materano*, 2025 WL 2630826, at *12. The Court should reject an expansion of the entry fiction as incompatible with Supreme Court case law.

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[8] Mr. Savane has argued that he is not detained pursuant to § 1225(b), both given the facts of his case and the legal authority of the statute. Pet. Reply (ECF 15) at 4-13; *see also* Notice of Supplemental Authority (ECF 18). But as he clarifies here, his constitutional status does not turn on this label—which as this case shows, would place him in the untenable position of having his rights turned on and off at the whim of an agency. *See* Brief of Amici Curiae Immigration Scholars in Support of Respondent at 21, *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) ("Taken to its logical conclusion, this new rule would bind the constitutional due process line to a statutory line of admission, allowing Congress to dictate the reach of a constitutional provision that should instead restrict unfettered power.")

Moreover, in Mr. Savane's case, that expansion threatens to deprive him of a liberty interest in his prior custody determination and release. He was not subjected to either mandatory detention or the entry fiction at the border: he was released on recognizance with a notice that such release was pursuant to 8 U.S.C. § 1226(a). ECF 8-1; *cf. Salcedo Aceros v. Kaiser*, No. 25-CV-06924-EMC (EMC), 2025 WL 2637503, at *8 (N.D. Cal. Sept. 12, 2025) (holding that the Government's decision to "release [petitioner] on conditional parole under § 1226(a), not hold her in detention under § 1225(b)(2)," in 2024 "created a reliance interest in her continued freedom, so long as she abided by the terms of her release"). Respondents have failed to provide any written notice of the alleged change in authority even to this Court a month later, Tr. at 36 (counsel conceding she "does not have the warrant" used to redetain him), much less to Mr. Savane at the time he was redetained. He has received no process nor opportunity to be heard since then—which is constitutionally untenable whatever the authority for his detention today. *See Munoz Materano*, 2025 WL 2630826, at *12-16.

CONCLUSION

For the foregoing reasons, Petitioner urges the Court not to expand the entry fiction beyond its historical usage over the past century and to order Petitioner's immediate release.

Respectfully submitted,

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