U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

December 10, 2025

By ECF
The Honorable Arun Subramanian
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Tall v. Joyce et al.*, No. 25 Civ. 9781 (AS)

Dear Judge Subramanian:

This Office represents the respondents in the above-referenced immigration habeas corpus action brought by Abdou Tall ("Petitioner"), an alien in removal proceedings, challenging his detention by U.S. Immigration and Customs Enforcement ("ICE"). The primary legal issue presented in this case concerns the statutory authority for Petitioner's detention—whether it is 8 U.S.C. § 1226(a) or 8 U.S.C. § 1225(b)(2)(A)—and the attendant due process issues stemming from such authority. Petitioner's amended habeas petition seeks an order from this Court directing ICE to release Petitioner from detention. (ECF No. 18 ("Am. Pet.") at 16.)

While reserving all rights, including the right to appeal, respondents submit this letter in lieu of a formal responsive memorandum of law to conserve judicial and party resources, and to expedite the Court's consideration of this case, in light of this Court's recent decision on the principal legal issue in *J.G.O. v. Francis*, No. 25 Civ. 7233 (AS), 2025 WL 3040142 (S.D.N.Y. Oct. 28, 2025), as discussed below.

Relevant Underlying Facts

Petitioner is a native and citizen of Senegal who unlawfully entered the United States near San Luis, Arizona, on or about May 8, 2023, without being admitted or paroled. *See* Declaration of Supervisory Detention and Deportation Officer Nelson Mercado ("Mercado Decl.") ¶ 3. That same day, Petitioner was apprehended by U.S. Customs and Border Protection ("CBP") near the border in Arizona. *See* Exhibit 7 (Form I-213) at 3. On May 12, 2023, CBP served Petitioner with a Notice to Appear ("NTA"), charging him with inadmissibility pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *See* Mercado Decl. ¶ 4; Exhibit 1 (Notice to Appear). The NTA informed Petitioner that he was scheduled to appear before an immigration judge on November 14, 2023, at 290 Broadway in New York City. *See* Mercado Decl. ¶ 4; Exhibit 1. Also on May 12, 2023, CBP released Petitioner on his own recognizance. *See* Mercado Decl. ¶ 5; Exhibit 2 (Order of Release on Recognizance). On January 12, 2024, Petitioner filed an application for relief from removal with the immigration court. *See* Mercado Decl. ¶ 7. On January 30, 2024, Petitioner conceded his

removability, and on February 1, the immigration judge found Petitioner removable, subject to his relief application. *Id.* ¶¶ 10-11. The hearing on Petitioner's relief application has been adjourned several times and remains pending. *Id.* ¶¶ 14, 17, 24-27.

Over the past year and a half, Petitioner has been arrested multiple times by the New York Police Department ("NYPD") for trademark counterfeiting offenses. On August 2, 2024, NYPD arrested Petitioner for trademark counterfeiting in the second degree in violation of New York Penal Law § 165.72. *See* Mercado Decl. ¶ 13; Exhibit 3. On June 26, 2025, NYPD again arrested Petitioner for trademark counterfeiting in the second degree, and on July 23, 2025, NYPD arrested Petitioner for the third time for the same offense. *See* Mercado Decl. ¶¶ 15-16; Exhibit 4. On October 7, 2025, NYPD arrested Petitioner for trademark counterfeiting in the third degree, in violation of New York Penal Law § 165.71. *See* Mercado Decl. ¶ 18; Exhibit 7 at 3. According to the information available to ICE, these charges remain pending. *See* Mercado Decl. ¶¶ 13, 15-16, 18 & n.1; Exhibits 3, 4, 7. On October 7, 2025, the same day as Petitioner's third arrest, ICE lodged an Immigration Detainer – Notice of Action form with NYPD, but NYPD did not honor it and released Petitioner. *See* Mercado Decl. ¶ 19; Exhibit 5 (Immigration Detainer). On October 11, 2025, NYPD again arrested Petitioner for trademark counterfeiting in the third degree. *See* Mercado Decl. ¶ 20; Exhibit 7 at 3. On October 12, 2025, Petitioner was arraigned for this offense and the hearing was adjourned in contemplation of dismissal. *See* Mercado Decl. ¶ 20; Exhibit 7 at 3. NYPD released Petitioner before ICE could file another immigration detainer. *See* Mercado Decl. ¶ 20.

On November 22, 2025, ICE agents arrested Petitioner at the intersection of Lafayette and Canal Streets in Lower Manhattan, pursuant to a Warrant for Arrest of Alien (ICE Form I-200) that had been issued on October 7, after a ground pursuit. *Id.* ¶¶ 21-22; Exhibits 6-8. ICE transported Petitioner to its hold space at 26 Federal Plaza for processing and custody determination. *See* Mercado Decl. ¶ 22. On November 26, 2025, ICE transferred Petitioner to the Metropolitan Detention Center in Brooklyn, where he is currently detained. *Id.* ¶ 23.

Habeas Petition

Petitioner's next friend commenced this action on Petitioner's behalf on November 24, 2025, by filing a petition for habeas corpus and an accompanying motion for a temporary restraining order. ECF Nos. 1, 2. On November 25, 2025, the Court entered an order enjoining respondents from removing Petitioner from the Southern District of New York and requesting the appointment of pro bono counsel for Petitioner. ECF No. 5. On November 26, the Court expanded the geographical area within which respondents may detain Petitioner to include the Eastern District of New York and the District of New Jersey. ECF No. 8. On December 5, 2025, Petitioner's pro bono counsel filed an amended habeas petition on his behalf. ECF Nos. 16, 18.

The amended petition argues that the mandatory detention provision of 8 U.S.C. § 1225(b)(2)(A) does not apply to Petitioner because he had already entered and had been residing in the United States at the time he was arrested by ICE. *See* Am. Pet. ¶¶ 2-3, 31-50. In the first claim for relief, the amended petition argues that Petitioner was deprived of his right to due process because ICE failed to conduct an individualized pre-detention assessment of whether he poses and flight risk or a danger to the community. *Id.* ¶¶ 52-55. In the second claim for relief, the amended petition argues that Petitioner's substantive due process rights were violated because Petitioner's

detention is not necessary to ensure his appearance at future immigration proceedings, and alleges that Petitioner "has no criminal history, nor is he a danger to his community." *Id.* ¶¶ 56-60. The third claim for relief of the amended petition claims that ICE violated 8 U.S.C. § 1226 and its implementing regulations by failing to apply those provisions, which include opportunities for discretionary release, to Petitioner. *Id.* ¶¶ 61-64. The fourth claim for relief argues that ICE acted arbitrarily and capriciously, in violation of the Administrative Procedure Act ("APA"), in detaining Petitioner as part of an "indiscriminate . . . operation" to detain aliens on Canal Street. *Id.* ¶¶ 65-68. And the fifth and final claim for relief asserts that ICE violated Petitioner's right under the Fourth Amendment to be free from unlawful stops and seizures by arresting him without a reasonable suspicion to detain him or without a warrant authorizing his detention. *Id.* ¶¶ 69-75.

In the prayer for relief, Petitioner asks that the Court declare ICE's actions in violation of the Fourth and Fifth Amendments and the APA, and issue a writ of habeas corpus ordering his immediate release.[1] *Id.* at 16.

J.G.O. v. Francis

On October 28, 2025, this Court issued a decision on the principal legal question presented in this action in a similar habeas case challenging an alien's re-detention after prior release on an order of recognizance. The Court concluded that the petitioner in that case, who was initially detained at the border in 2022, served with an arrest warrant referencing 8 U.S.C. § 1226(a), and released on an order of recognizance, and who was arrested again in early 2025 by ICE, was detained pursuant to § 1226(a) and not, § 1225(b)(2)(A) as an applicant for admission.[2] *J.G.O.*, 2025 WL 3040142, at *1. The Court analyzed the language of the relevant statutory provisions and noted that decisions from numerous other judges in this and other districts have reached similar conclusions. *Id.* at *2-4; *see also id.* at *2 ("This Court is far from the first to address this question. Across the country, the government has repeatedly . . . detained noncitizens pursuant to § 1226(a), then, only afterward, argued that they were instead detained under § 1225(b)(2)(A) and ineligible for bond. That has led to a raft of decisions, most of which have rejected the government's position. They are so numerous that only a handful are cited here as illustrative examples. To be sure, not *every* court has rejected this argument—the government identified two that adopted it, along with the BIA." (citations omitted)).[3] Because the immigration judge in the *J.G.O.* case had decided to release the petitioner on bond—a decision later overturned by the Board of Immigration Appeals ("BIA") based on the conclusion that § 1225(b)(2)(A) required mandatory detention in light of the BIA's September 2025 precedential decision *Matter of Hurtado*, 29 I. & N. Dec. 216 (B.I.A.

[1] The amended petition also asked the Court to enjoin ICE from transferring Petitioner outside this District, which the Court has already granted, in modified form, as discussed above. ECF No. 8.

[2] ICE contends that the petitioner's detention in that case was governed by 8 U.S.C. § 1225(b)(2)(A) because, as an alien who entered without inspection or parole, and was initially detained soon after crossing the border, he was an applicant for admission. *See J.G.O. v. Francis*, No. 25 Civ. 7233 (AS), ECF No. 14, at 9-15 (S.D.N.Y. filed Sept. 23, 2025) (gov't brief).

[3] At least two courts within the Second Circuit have concluded that § 1225(b)(2)(A), not § 1226, governs detention under similar circumstances. *See Chen v. Almodovar*, No. 25 Civ. 8350 (MKV), 2025 WL 3484855 (Dec. 4, 2025); *Ferreira Candido v. Bondi*, No. 25 Civ. 867 (JLS), 2025 WL 3484932 (W.D.N.Y. Dec. 4, 2025).

2025)—the Court reinstated the immigration judge's decision and ordered the petitioner released on the terms set by the immigration judge. 2025 WL 3040142, at *5.

Discussion

The amended habeas petition principally argues that ICE violated Petitioner's rights by arresting and detaining him pursuant to its mandatory detention authority under 8 U.S.C. § 1225(b)(2)(A), rather than by assessing whether it needs to detain him discretionarily under § 1226(a) to the extent he poses a danger to the community or is a flight risk. As noted above, this Court has already resolved nearly identical claims in *J.G.O.*, 2025 WL 3040142, at *2-5, holding that an alien in Petitioner's position can be detained only under § 1226(a).

While respondents respectfully disagree with the Court's decision in *J.G.O.*, they acknowledge that this decision would largely control the result in this case if the Court adheres to it, as the relevant facts of this case—as they concern ICE's statutory authority to detain Petitioner—are materially indistinguishable. Thus, to conserve judicial resources and to expedite the Court's consideration of this case, respondents hereby rely upon, and incorporate by reference, the legal arguments the government presented in *J.G.O.*,[4] and the Court can decide this question without further briefing. However, should the Court prefer to receive a formal opposition brief in this matter, we will file such a brief upon the Court's request. Further, notwithstanding their submission of this letter in lieu of a formal brief, respondents reserve all rights, including the right to appeal. Accordingly, for the reasons set forth in the government's brief in *J.G.O.*, respondents respectfully request that the Court deny the amended habeas petition in this case.[5]

Should the Court adhere to its decision in *J.G.O.* on the principal legal issue presented and grant the amended habeas petition, respondents respectfully submit that the appropriate relief that should be afforded to Petitioner is not immediate release as this Court ordered in *J.G.O.*, *see id.* at *5, but an order directing a bond hearing for Petitioner. In *J.G.O.*, an immigration judge had previously held a bond hearing and determined that the petitioner was eligible for release on bond, a determination that was initially upheld by the BIA before the BIA reconsidered its decision based on its subsequent decision in *Matter of Hurtado*. *Id.* at *1-2. Here, Petitioner has only recently been arrested by ICE, and under § 1226(a), he would be entitled to request a bond hearing before an immigration judge. Thus, should the Court grant the amended petition, it should order that an individualized bond hearing be held before an immigration judge. *See, e.g.*, *Perez v. Francis*, No. 25 Civ. 8112 (JGK), 2025 WL 3110459, at *3 (S.D.N.Y. Nov. 6, 2025) (in similar case, holding that "the petitioner should first exhaust his remedies through the § 1226(a) bond hearing that the Court orders before proceeding with this habeas petition"); *see also Sun v. Almodovar*, No. 25 Civ. 9262 (PKC), 2025 WL 3241268, at *3 (S.D.N.Y. Nov. 20, 2025) ("Because petitioner Enbin Sun

[4] Specifically, respondents incorporate by reference all arguments raised in the government's opposition brief in *J.G.O.* *See J.G.O. v. Francis*, No. 25 Civ. 7233 (AS), ECF No. 14 (S.D.N.Y. filed Sept. 23, 2025).

[5] While not material to the question of which statute governs detention, the amended petition is incorrect that ICE arrested Petitioner indiscriminately. *E.g.*, Am. Pet. ¶ 68. ICE lodged a detainer with NYPD after one of Petitioner's criminal arrests and issued an administrative arrest warrant for Petitioner more than a month before arresting him. *See* Mercado Decl. ¶¶ 12, 14; Exhibits 5-6.

is being detained pursuant to section 1226(a) and not section 1225(b)(2)(A), he is entitled to an individualized bond hearing under section 1226(a)."). Requiring a bond hearing is particularly apt here given Petitioner's criminal history, consisting of at least six criminal arrests over the past year and a half.

* * *

Finally, the government notes that the Court has ordered the parties (and Petitioner) to attend a conference scheduled for the morning of December 15, 2025. ECF Nos. 10, 15. Given the foregoing, the government believes the Court can resolve this matter without a conference. *See, e.g.*, *Huang v. Almodovar*, No. 25 Civ. 9346 (DEH), ECF No. 10 (granting petition and cancelling previously scheduled conference based on respondents' submission that prior holding would control the result in the case if the court adheres to it).

I thank the Court for its consideration of this submission.[6]

Respectfully submitted,

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[6] The government has proceeded in this manner in other cases where the presiding judge had already decided the principal legal issue in an immigration habeas corpus matter and where the facts are materially indistinguishable. *See, e.g.*, *Wang v. Genalo*, No. 25 Civ. 9460 (JGK), ECF No. 8; *Huang v. Almodovar*, No. 25 Civ. 9346 (DEH), ECF No. 7; *Martinez Roman v. Decker*, No. 20 Civ. 6752 (AJN), ECF No. 7.