UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Aissatou Diallo,

Petitioner,

v.

WILLIAM JOYCE,
as Field Office Director,
New York City Field Office,
U.S. Immigration & Customs Enforcement;

KRISTI NOEM,
as Secretary,
U.S. Department of Homeland Security;

Respondents.

Each Respondent is sued in his/her official capacity.

Civil Action No. 1:25-cv-09909

PETITIONER'S SUPPLEMENTAL BRIEF

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I. Respondents do not have statutory authority to detain Petitioner

The authority of the United States government to detain noncitizens who are subject to final orders of removal is governed exclusively by 8 U.S.C. § 1231. *Johnson v. Guzman Chavez*, 594 U.S. 523, 542-544 (2021) (holding that the statutory text and structure make clear that § 1231 governs the detention of those with final removal orders). And while generally granted significant leave to effectuate removal orders in the manner it sees fit, including the ability to remove individuals to third countries, 8 U.S.C. § 1231 limits the government's power as to *when* it may detain a person subject to a final order.

Section 1231(a) explicitly requires the detention of people subject to final removal orders for 90 days, a period known as the "removal period". 8 U.S.C. § 1231(a)(2). That 90-day period commences upon the date the removal order becomes final. 8 U.S.C. § 1231(a)(1)(B) ("the removal period begins, [*inter alia*], on …(i) the date the order of removal becomes administratively final"). Specifically, 8 USC § 1231(a)(2)(B) states: "*During* the removal period, the Attorney General shall detain the [non-citizen]." (emphasis added). Section 1231 also contemplates "post-removal period" detention, such that a person, under enumerated circumstances, "*remains* detained after 90 days have passed." *Guzman Chavez*, 594 U.S. at 528 (emphasis added). A noncitizen "may remain in detention during [an] extended period if the [noncitizens] fails or refuses to make timely application in good faith for travel or other documents necessary to the [their] departure or conspires or acts to prevent [their] removal subject to an order of removal." 8 USC § 1231(a)(1)(C). This "post-removal period" describes an extension—not an initiation—of the removal period, as well as a justification for extended detention wholly irrelevant to the Petitioner. *See Farez-Espinoza v. Chertoff*, 600 F. Supp. 2d 488, 502 (S.D.N.Y. 2009) ("[I]t is the responsibility of DHS to make a bona fide attempt to [remove a noncitizen] within the removal period. Where ICE does not fulfill its responsibility,

§ 1231(a)(1)(C) does not apply.")

Section 1231 also governs the release of individuals who are not or cannot be removed during the removal period, requiring their release under an order of supervision ("OSUP"). The conditions of such release are governed by § 1231(a)(3) and 8 CFR § 241.4, and generally require periodic appearances before an immigration officer, continued good conduct (no criminal arrests or association with gang members), and cooperation with attempts to obtain authorization to travel to a third country. Section 241.4l of the Code of Federal Regulations governs revocation of an OSUP, detailing what steps—including adequate notice coupled with enumerated justifications—the government must take to remand someone who is at liberty back into custody. *See Funes Gamez v. Francis*, 25 Civ. 7429 (PAE) 2025 WL 3263896 (S.D.N.Y. Nov. 24, 2025).

The statutory framework is thus very specific and clear as to when a person subject to a final removal order is to be detained, the circumstances under which that detention may be extended, and the steps to take if removal does not materialize. Nowhere does section 1231 contemplate the detention of an individual with a final order of removal who was not detained during the removal period, and it certainly does not authorize it. *See You v. Nielson*, 321 F. Supp 3d 451 (S.D.N.Y. 2018) (the plain text of the statute did not allow the Government to detain a noncitizen whose removal period expired 16 years earlier and who was not subject to an OSUP); *Farez-Espinoza*, 600 F. Supp. 2d 488, 499 (the statute did not allow the Government to detain a noncitizen whose removal period expired a year prior to her arrest).

Section 241.4 of the Federal Regulations provides more evidence that the statutory scheme does not allow for initial detention after the conclusion of the removal period where an individual has not been subject to an OSUP. First, the section is entitled "*Continued* detention of inadmissible, criminal, and other [noncitizens] *beyond* the removal period," indicating that the

regulations govern when detention is to be extended, not initiated. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (statutory titles and section headings are tools available to understanding statutory meaning). Second, 241.4(a) explains who has "the authority to [decided to] *continue* a [noncitizen] in custody…beyond the removal period," again presuming an extension or continuation of detention. 8 CFR 241.4(a). Third, remand into custody is contemplated only in the context of a violation of conditions of release or when the government is able to effectuate a removal order imminently. Section 241.4l, which governs remand into custody, is also premised on initial detention during the removal period, referring as it does to 241.4(a), which describes "continu[ing] a [noncitizen] in custody beyond the removal period as described in [8 USC 1231(a)]," and release from custody following the removal period and pursuant to conditions. The entire regulatory framework thus presumes that detention is initiated at the beginning of the removal period—as it should given that that is what is required by the statute—and describes the conditions under which custody can be extended.

Under the plain language of the statute, Petitioner's removal period began on November 15, 2012, the date she was simultaneously ordered removed and granted Withholding of Removal, and expired 90 days later on February 15, 2012, a fact not disputed by Respondents. Absent issuance of an OSUP and a violation of her conditions of release, neither the statute nor regulations authorize detention of someone like Ms. Diallo, whose removal period ended long ago. The statute simply does not allow Respondents to,

> arbitrarily trigger commencement of the removal period by simply waiting to take a [noncitizen] into custody. This interpretation [of 8 USC 1231] flies in the face of the plain reading of the statute and Congress' intent that removal of the [noncitizen], or at least a bona fide attempt to remove [them], should be done within 90 days of the removal order being final. If Respondents are allowed the liberty to decide when they will comply or even attempt compliance with the statutes that they are charged with enforcing, the statutory scheme will be rendered a nullity and Congress' intent to remove illegal aliens as quickly possible will be thwarted. Federal agencies should not and do not have such power.

Farez-Espinoza, 600 F. Supp. 2d 488, 499 (quoting *Ulysse v. Dep't of Homeland Security*, 291 F.Supp.2d 1318 (M.D.Fla.2003) (holding that because the removal period and any presumptively reasonable detention period had expired, the Government was without statutory authority to detain the Petitioner, who had been ordered removed *in absentia* a year before her detention.))

This Court should be persuaded by the plain language of the statute, the statutory and regulatory framework, and *Farez Espinoza*, that Respondents have no statutory authority to detain Ms. Diallo. Much like the Petitioner in *Farez Espinoza*, Respondents have long been aware of Ms. Diallo's whereabouts "and the Government has shown no reason why it did not pursue [her] removal until more than" 13 years after her order of removal was entered. *Id.* The Respondents "cannot arbitrarily trigger the removal period by its unilateral action of choosing not to pursue" Ms. Diallo's removal during the statutorily required removal period. *Id.* For these reasons, the Government's arrest and detention of Ms. Diallo was in violation of the statute and the regulations.

This unauthorized and illegal detention also violated Petitioner's substantive and procedural due process rights. *See* Dkt. No 1, Petition for Writ at *8, 13; Dkt. No. 12, Pet's Reply at *2. "[D]ue process affords individuals with protection against arbitrary governmental action, including 'the exercise of power without any reasonable justification in the service of a legitimate governmental objective.' Courts have likened violations of substantive due process to that of arbitrary and capricious exercise of state power." *Schulkers v. Kammer*, No. 17-CV-76 (WOB-CJS), 2022 WL 879361, at *14 (E.D. Ky. Mar. 23, 2022) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998)); *see also Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (substantive due process "forbids the government to infringe certain "fundamental" liberty

interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.")

Here, Ms. Diallo "invokes the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020); *see also Demore v. Kim*, 538 U.S. 510, 549 (2003) ("the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual."); *Reno,* 507 U.S. 292, 316 (O'CONNOR, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"). The Government's sudden, admittedly unjustified, and statutorily unauthorized arrest and detention of Ms. Diallo where they had no actual plans to remove her, failed to serve any of the purposes of civil detention. It was an egregious "arbitrary and capricious exercise of … power," thereby violating her substantive due process rights. *Schulkers*, 2022 WL 879361, at *14.

CONCLUSION

For the foregoing reasons, this Court should find that Respondents had no authority to arrest and detain Ms. Diallo and violated her due process rights in doing so.

Respectfully submitted,



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