

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G.F.F.,

Petitioner,

v.

LaDeon FRANCIS, *et al.*,

Respondents.

Case No. 25-CV-7368 (JGK)

ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

There is no dispute that U.S. Immigration and Customs Enforcement (“ICE”) has incarcerated G.F.F., a twenty-two-year-old Venezuelan young man with no criminal history, for nearly 10 months without ever demonstrating why his detention is necessary. Here, the government does not dispute that the evidence of alleged gang membership that served the basis of the immigration judge’s (“IJ”) previous dangerousness finding at G.F.F.’s initial bond hearing was later determined by the same IJ to be insufficient to support gang membership allegations, yet the government continues to detain G.F.F. As set forth in G.F.F.’s petition, ICE’s actions violate *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020) and are compounding the harm that G.F.F. suffered as a result of the government’s attempts to summarily deport G.F.F., without a removal order, to a maximum security prison in El Salvador to be indefinitely detained and tortured. G.F.F.’s harrowing experience illustrates why due process demands that the government justify detention.

In their opposition, the government fails to show why this case is materially distinguishable from *Velasco Lopez* and why G.F.F. is a danger to the community or flight risk, considering that he has no criminal history, has two legal teams supporting him, and is a lead plaintiff in a class action challenging the government’s use of the Alien Enemies Act of 1798 (“AEA”). This Court should direct the government to provide G.F.F. the constitutionally-adequate bond hearing to which he is plainly entitled.

ARGUMENT

I. **The Government Fails to Distinguish *Velasco Lopez*, Which Controls This Case.**

- a. *The government fails to explain why G.F.F.'s case does not fall squarely under Velasco Lopez.*

The government's assertion that nearly ten months of detention is not sufficiently prolonged to trigger heightened procedural protections, *see* Resp'ts Mem. of Law in Opposition to Petition for Writ of Habeas Corpus ("Opp."), ECF No. 10, at 1, 15–18, is inconsistent with the text and reasoning of *Velasco Lopez* and *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024). In *Velasco Lopez*, the Second Circuit issued a clear rule that "individuals subject to prolonged detention under [8 U.S.C.] § 1226(a) must be afforded process *in addition* to that provided by the ordinary bail hearing." 978 F.3d at 854 (emphasis added). The Court observed that "a presumptively constitutional period of detention does not exceed six months," *id.* at 855 n.13 and held that fifteen months exceeds this threshold "[o]n any calculus." *Id.*

The Second Circuit's decision in *Black* reinforces this conclusion. In *Black*, the court addressed the constitutionality of prolonged detention under a mandatory immigration detention statute, 8 U.S.C. § 1226(c). The Second Circuit declined to issue a bright-line rule as to when detention becomes prolonged, but held that Mr. Black's seven-month detention had reached this mark. *Black*, 103 F.4th at 151. In so holding, the court observed that Mr. Black had been detained "for far longer" than the typical 1.5-to-4-month detention periods described in *Demore v. Kim*, 538 U.S. 510 (2003), and indicated that detention exceeding six months without adequate safeguards raises "serious due process concerns." *Black*, 103 F.4th at 150–51.

In *Black*, the Second Circuit also affirmed the district court's determination that at the court-ordered bond hearing, the burden should be on ICE to justify the petitioner's continued detention by clear and convincing evidence, and the immigration court should consider his ability to pay and alternatives to detention when setting bond, *id.* at 155–59—precisely the relief that G.F.F. seeks here. See Verified Petition for Writ of Habeas Corpus (“Pet.”), ECF No. 1. Taken together, *Velasco Lopez* and *Black* indicate that, absent special circumstances, an individual detained for over seven months under 8 U.S.C. § 1226(a) is entitled to a bond hearing with heightened procedural protections. G.F.F.—whose detention has passed the seven-month mark and is unlikely to end any time soon—is entitled to additional procedural safeguards.

Furthermore, the government does not dispute that the majority rule in this District is that due process requires additional procedural protections at bond hearings under 8 U.S.C. § 1226(a), even absent prolonged detention, *see* Pet. ¶ 96 (collecting cases), but only “respectfully disagrees with the district court decisions,” Opp. 10 n.2, and fails to engage with their reasoning.

Instead, the government incorrectly infers an implicit rejection of the District's majority rule in *Velasco Lopez*. Opp. 15. In doing so, the government mischaracterizes both the procedural posture of the case and the Second Circuit's decision. In *Velasco Lopez*, the Second Circuit was addressing the appropriate burden under § 1226(a) for the first time, and it was doing so in a case involving extremely prolonged detention where the petitioner did not challenge the lawfulness of his detention when first

imposed. *See Velasco Lopez*, 978 F.3d at 850 (“Velasco Lopez raises a due process challenge not to his initial detention but to the procedures that resulted in his prolonged incarceration without a determination that he poses a heightened bail risk.”). The Second Circuit opted for a narrower ruling based on the record before it, explaining that “[t]his case does not require us to establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden.” *Velasco Lopez*, 978 F.3d at 855 n.13.

At the same time, however, the Second Circuit cited approvingly district court cases that had endorsed a broader ruling. *Id.* at 855 n.14 (collecting cases); *see also J.C.G. v. Genalo*, No. 1:24-cv-08755 (JLR), 2025 WL 88831 *9 (S.D.N.Y. Jan. 14, 2025). It also explained that “[t]he Supreme Court has consistently held the Government to a standard of proof higher than a preponderance of the evidence where liberty is at stake, and has reaffirmed the clear and convincing standard for various types of civil detention.” *Velasco Lopez*, 978 F.3d at 856. The Court rejected “[t]he Government’s claim that these precedents are inapplicable in an immigration context [a]s unpersuasive.” *Id.*

Several judges in this District have declined to read into *Velasco Lopez*’s holding the government’s suggestion that placing the burden on the noncitizen at the initial bond hearing does not violate due process. *See, e.g., J.C.G.*, 2025 WL 88831, at *9 (acknowledging that, “[s]ince the lawfulness of Velasco Lopez’s detention when first imposed was not challenged, the Second Circuit constrained its holding to the facts of the case and the record before it,”); *B.S. v. Joyce*, No. 22-cv-9738 (PKC), 2023

WL 1962808, at *4 (S.D.N.Y. Feb. 13, 2023) (same). Contrary to the government's arguments, the Second Circuit's analysis in *Velasco Lopez* and the weight of district court case law support a heightened evidentiary standard for all § 1226(a) bond hearings. See Pet. ¶¶ 93–98. The government's citation to this Court's decision in *Perez Melo* for the proposition that placing the burden on a non-citizen at an initial § 1226(a) bond hearing comports with due process is misguided given the specific factual circumstances of that case. *Perez Melo v. Artera*, No. 22-CV-9912 (JGK), 2023 WL 5206890 (S.D.N.Y. Aug. 11, 2023) (finding petitioner's conviction for attempted homicide and aggravated theft and subsequent jail time as significant when considering whether continued detention under § 1226(c) was unreasonable); Opp. 15. First, G.F.F. is subject to non-mandatory § 1226(a) detention which falls squarely under *Velasco Lopez* and the three-factor balancing test laid out by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See Pet. ¶¶ 97–98. In contrast, *Perez Melo* was a 1226(c), pre-*Black* case, and there this Court applied a multi-factor analysis and held that “the particularly violent nature of [petitioner's] criminal conduct weighs heavily against a finding that continued detention is unreasonable.” *Perez Melo*, 2023 WL 5206890 at *7. This Court's rationale in *Perez Melo* actually supports a finding that G.F.F.'s continued detention under § 1226(a) is unreasonable given that G.F.F. has no criminal history and has never spent any time in prison for a criminal conviction. See *Id.*

b. *The government's argument that G.F.F. received “ample process” is inapposite given Velasco Lopez's clear applicability.*

Contrary to the government's argument, the *Mathews* test and not an "ample process" test is the standard test that this Court should use when evaluating whether G.F.F.'s "ongoing incarceration posed due process concerns at the time of his habeas filing and whether additional procedural protections then became necessary." *Velasco Lopez*, 978 F.3d at 851; *Mathews*, 424 U.S. at 335. "The three *Mathews* factors are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Velasco Lopez*, 978 F.3d at 851 (internal citations omitted).

With respect to factor one, the private interest, the government acknowledges G.F.F.'s "interest in being free from imprisonment" but then argues that the private interest assessment should take into account that the Supreme Court has never held that non-citizens have a constitutional right to be released during proceedings. Opp. 17. But here, G.F.F. is not challenging the constitutionality of the detention statute on its face but rather arguing that due process demands that additional procedures are necessary to justify his detention. *Velasco Lopez*, 978 F.3d at 851. And just like Mr. Velasco Lopez, G.F.F.'s deprivation has been substantial because "he [is] locked up in jail. He [cannot] maintain employment or see his family or friends or others outside normal visiting hours. The use of a cell phone [is] prohibited, and he [has] no access to the internet or email and limited access to the telephone." *Velasco Lopez*,

978 F.3d at 851–52; Pet. ¶¶ 99–100; Declaration of G.F.F. (“G.F.F. Decl.”), ECF No. 1-2, at ¶ 24. In addition to experiencing the same deprivations that Mr. Velasco Lopez endured, G.F.F. has experienced the government’s repeated attempts to summarily deport him without a removal order to an El Salvadoran prison and the resulting trauma, a physical attack by a detainee, deteriorating mental health while in continued detention, all when he poses no flight risk and the justification for the IJ’s dangerousness finding was later found lacking by the same IJ. Pet. ¶¶ 99–100. The “deprivation he [is experiencing] while incarcerated is, on any calculus, substantial.” *Velasco Lopez*, 978 F.3d at 851.

Despite the fact G.F.F. has experienced even greater deprivations than Mr. Velasco Lopez, the government argues that the facts of G.F.F.’s case do not warrant heightened procedural protections. Opp. 17. First, the punitive conditions that G.F.F. has faced, such as the numerous attempted AEA summary removals, do relate to the first and second *Mathews* factors as procedural factors “take on particular significance when we consider what actually happened to [G.F.F.].” *Velasco Lopez*, 978 F.3d at 850. Second, the government argues that G.F.F. does not persuasively explain why the government’s attempts to remove him pursuant to the AEA render his custody punitive given that his removal under the AEA is enjoined. Opp. 17. But the government does not dispute that an earlier court order barring G.F.F.’s removal pursuant to the AEA did not stop government officials from forcibly pulling G.F.F. from his cell, despite his pleas that he was part of a federal lawsuit, and strapping him to a stretcher, bringing him to the airport for summary removal under the AEA,

then without explanation returning him to jail and arbitrarily punishing him in solitary confinement for a week. G.F.F. Decl. ¶ 48; *J.G.G. v. Trump*, CV 25-766 (JEB), 2025 WL 1119481 (D.D.C. April 16, 2025).

With respect to the second *Mathews* factor, the risk of erroneous deprivation, contrary to the government's assertions, *see* Opp. 14, G.F.F. does explain in his petition how the finding of flight risk would be altered if the burden were shifted to the government. Pet. ¶ 103, 116. Specifically, G.F.F. argues that had the government properly been required to bear the burden of proof, the IJ would not have made the incorrect finding that G.F.F. was a flight risk. *Id.* ¶ 103. Under a proper burden of proof allocation, the government would have had to prove – by clear and convincing evidence – that G.F.F. posed a flight risk that could not be mitigated by alternatives to detention, a tall order considering G.F.F.'s status as a lead plaintiff in *G.F.F. v. Trump* to vindicate the rights of all class members in the Southern District of New York who can be or have been subject to AEA, and considering his two teams of legal representation, his two brothers who live in the United States, his interest in gaining legal status in the United States, and his previous compliance with prior terms of supervision. *See G.F.F. v. Trump*, 781 F. Supp. 3d 195 (S.D.N.Y. 2025) (“[In] March 2025, more than 200 [noncitizens] were removed from this country to El Salvador's Terrorism Confinement Center (“CECOT”), with faint hope of process or return. The sweep for removal is ongoing, extending to the litigants in this case and others, thwarted only by order of this and other federal courts.”); Nina Siulc and Noelle Smart, *Evidence Shows That Most Immigrants Appear for Immigration Court*

Hearings, Vera Institute of Justice (Oct. 2020) (noting that 98% of noncitizens released from immigration custody who had legal representation appeared for their court hearings), attached as Exhibit A to the Declaration of Amy Pont (“Pont Decl.”); Supplemental Declaration of G.F.F. (“G.F.F. Supp. Decl.”) ¶ 3–6, attached as Exhibit B to Pont Decl.; *see infra*, at 14–15 (discussion of alternatives to detention).

The government’s argument that G.F.F.’s flight risk has only grown is inconsistent with what has transpired since the initial bond hearing, and most importantly G.F.F.’s status as a lead plaintiff in *G.F.F. v. Trump*. The fact that G.F.F. missed only 14 of approximately 136 daily check-ins (assuming daily check-ins from May 20th through October 3rd), a nearly 90% rate of compliance of an onerous daily check-in requirement, demonstrates that he made his best efforts to comply despite maintaining steady employment and is therefore not a flight risk. Opp. 10–11. During the time that G.F.F. was required to complete daily check-ins, he was working in construction and delivery and had only a narrow window of minutes to complete the daily check-ins. G.F.F. Supp. Decl. ¶¶ 3–5. G.F.F. also does not recall being informed of an in-person check-in appointment. *Id.* ¶5. Placement of the burden properly on the government would therefore necessarily have impacted the IJ’s analysis, especially since the IJ did not consider alternatives to detention (ATD) and the government does not argue that any flight risk G.F.F. poses could not be mitigated by ATDs. Declaration of Grace Carney (“Carney Decl.”), ECF No. 1-1, at ¶ 32.

Importantly, the government does not argue that shifting the burden is unlikely to disturb the IJ’s dangerousness finding. This omission is critical since the

government has provided no new evidence to support a dangerousness finding beyond what it provided at the initial bond hearing. The IJ later found that same evidence to be insufficient to substantiate allegations that G.F.F. was a member of [REDACTED] [REDACTED] – the allegations that led to the incorrect finding of dangerousness. Carney Decl. ¶ 81. Furthermore, the government does not challenge the expert testimony of Dr. Young, who testified at G.F.F.’s individual merits hearing that there would be no openly gay members of [REDACTED] because the gang is known to actively target members of the LGBTQ community like G.F.F. Carney Decl. ¶ 81.

The government further suggests that G.F.F.’s continued detention is simply a function of the “lengthiness of the appeals process” and therefore does not merit additional procedural protections. Opp. 18. This argument is inconsistent with *Velasco Lopez*, as there the Second Circuit explained that “[d]etention under § 1226(a) is frequently prolonged because it continues *until all proceedings and appeals are concluded.*” 978 F.3d at 852 (comparing lengthy detention that lasts “through the initial removal determination proceedings . . . and all inter-agency and federal court appeals” with the brief periods described in *Demore v. Kim*) (emphasis added); see also *O.F.C. v. Decker*, No. 22-CV-2255 (JPC), 2022 WL 4448728, at *9 (S.D.N.Y. Sept. 12, 2022) (rejecting the same argument and noting that “the stage of the removal process was not a factor in the Second Circuit’s conclusion that Velasco Lopez’s detention violated due process”).

G.F.F.’s particular circumstances reinforce the conclusion that he is entitled to additional safeguards. The government does not dispute that G.F.F. is detained in a

carceral setting. *See* Pet. ¶ 99; Declaration of Deportation Officer Michael Charles (“Charles Decl.”) ECF No. 9, ¶ 56. Nor does the government assert that it is unable to obtain information about G.F.F.’s background, such that imposition of the burden would be unfair. *See* Opp. 17–19; *see also Velasco Lopez*, 978 F.3d at 852 (finding burden-shifted bond hearing warranted because the government has “substantial resources to deploy,” including “computerized access to numerous databases and to information collected by DHS, DOJ, and the FBI, as well as information in the hands of state and local authorities,” as well as broad regulatory authority to obtain any necessary information not “at its fingertips”). Moreover, if G.F.F. prevails on his merits appeal, he will likely face many more months of detention when the Board of Immigration Appeals (“BIA” or “Board”) remands the case back to the IJ. Carney Decl.” ¶ 87; *see also J.C.G.*, 2025 WL 88831, at *10. And if the Board dismisses the appeal and enters a removal order, G.F.F. will likely seek judicial review in the Second Circuit—a process that takes months or even years. Carney Decl. ¶ 87; *J.C.G.*, 2025 WL 88831, at *10.

Despite a clear mandate from the Second Circuit that an “individual subject to prolonged detention under § 1226(a) must be afforded process *in addition* to that provided by the ordinary bail hearing,” 978 F.3d at 854 (emphasis added), the government argues that G.F.F. received “ample process” and therefore should not receive the additional process required by the Constitution. This argument was already rejected by the Second Circuit in *Velasco Lopez*. The Second Circuit held that even though the Mr. Velasco Lopez had received two bond hearings, the “procedures

underpinning [petitioner's] lengthy incarceration markedly increased the risk of error.” 978 F.3d at 852. Additionally, G.F.F. did not receive “ample process.” The first level of review of his detention by a DHS officer was constrained by DHS’s “no-release policy.” See *Velesaca v. Decker*, 20-CV-1803 (AKH), Order Granting Mot. to Enf. the Sett.. Agmt. (S.D.N.Y. Aug. 7, 2025) (noting that during the period of March 2022 to February 2025, DHS officers conducting initial custody evaluations released 0.8% of noncitizens detained compared to 2% during June 2017 to September 2019 when the court first made an initial determination that a “no-release policy” likely existed.), attached as Exhibit C to Pont Decl. Second, as noted in Legal Argument Section I.a., *supra*, the IJ placed the burden on G.F.F. to prove flight risk and danger and did not consider alternatives to detention; as a result, the hearing did not comply with due process. The BIA’s decision only affirms the infirmities of the IJ’s decision. See Pet. ¶ 58.

With respect to the third *Mathews* factor, the government points to its interest in detaining those who might commit crimes or pose a flight risk in order to defend unlawful agency action but does not actually argue that G.F.F., who has no criminal history, would be likely to commit a crime or that any flight risk that he might pose could not be mitigated by alternatives to detention. Opp. 19; Pet. ¶ 105. “It is evident that ‘[t]here is generally no public interest in the perpetuation of unlawful agency action.’ *Planned Parenthood of N.Y.C., Inc. v. U.S. Dep’t of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018) (”) (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)); see also *Make the Road N.Y. v. Pompeo*, 475

F. Supp. 3d 232, 269 (S.D.N.Y. 2020) (“It is axiomatic that the President must exercise his executive powers lawfully. When there are serious concerns that the President has not done so, the public interest is best served by ‘curtailing unlawful executive action.’”) (quoting *Hawaii v. Trump*, 878 F.3d 662, 700 (9th Cir. 2017), *rev’d and remanded on other grounds*, 585 U.S. 667 (2018)).

II. The Government Does Not Meaningfully Challenge G.F.F.’s Requested Relief with Respect to Alternatives to Detention and Ability to Pay.

The government argues that even if this Court grants this petition and orders a burden-shifted bond hearing, mandating consideration of alternatives to detention and G.F.F.’s financial circumstances would interfere with the “broad discretion” afforded to an IJ. Opp. 20–21. The Second Circuit rejected this argument in *Black*, explaining that while the agency has broad discretion to consider “a multitude of relevant factors[,] [r]equiring that two of those factors be alternatives to detention and the noncitizen’s ability to pay does nothing to constrain its discretion.” *Black*, 103 F.4th at 159.

The government also argues that the IJ should not be required consider alternatives to detention or ability to pay bond if the government demonstrates that G.F.F. is dangerous. Opp. 14. But the government’s reliance on dicta in *Black* is misplaced. In *Black*, the Second Circuit considered whether due process required individualized bond hearings for individuals who were subject to prolonged mandatory detention under 8 U.S.C. § 1226(c), on the basis of disqualifying criminal convictions. 103 F.4th 133. The Second Circuit addressed whether it was appropriate for the district court, in Petitioner Black’s case, to have required “the IJ [to] consider

Petitioner's ability to pay and the availability of alternative means of *assuring his appearance*." *Id.* at 158–59 (quoting *Black v. Decker*, No. 20 Civ. 3055 (LGS), 2020 WL 4260994, at *9 (July 23, 2020)) (emphasis in original). The Second Circuit explained that the district court's finding in Petitioner Black's case was correct, because "a bond amount would be at issue only once the IJ has determined that the noncitizen does not pose a danger to the community." *Id.* at 158.

This language in *Black* does not preclude a finding here that alternatives to detention that are relevant to dangerousness—such as conditions of release, community supervision, and electronic monitoring—must be considered. Although *Black* stated that once an individual is shown by clear and convincing evidence to be a danger, bond would be inappropriate, *Black* did not address the threshold question of whether such relevant evidence includes the types of alternatives to detention that mitigate safety risks in the first place. And as sister courts have found, due process requires such consideration. *See Cantor v. Freden*, 761 F. Supp. 3d 630, 637–38 (W.D.N.Y. 2025) (holding that, because "[d]ue process . . . mandates particularized findings . . . to sustain the prolonged detention of a noncitizen . . . the government is required, in a full-blown adversary hearing, to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, . . . [and] a neutral decisionmaker cannot possibly make that determination without considering less restrictive alternatives to detention.") (cleaned up); *Marroquin-Lima v. Freden*, No. 6:25-CV-06090 (EAW), 2025 WL 1380410, at *1 (W.D.N.Y. Apr. 21, 2025) ("In order to continue Petitioner's

detention after any bond hearing, the IJ must find by clear and convincing evidence and make findings that no condition or combination of conditions of release can reasonably ensure Petitioner’s appearance and the safety of the community—that is, even with conditions, Petitioner presents an identified and articulable risk of flight or a threat to another person or the community.”) (cleaned up); *Da Silva Luciano v. Bondi*, No. 6:25-CV-06106 (EAW), 2025 WL 1380327 (W.D.N.Y. Apr. 18, 2025) (same); *Kebede v. Freden*, No. 6:24-CV-06713 (EAW), 2025 WL 1380411 (W.D.N.Y. Apr. 18, 2025) (same); *L.G.M. v. LaRocco*, No. 25-CV-2631 (PKC), 2025 WL 2173577, at *3 (E.D.N.Y. July 31, 2025) (“The discussion Government Respondents cite to in *Black* is focused on the process for setting the *amount* of bond and not the *availability* of bond Thus, the Court does not find that *Black* precludes the Court’s consideration of mitigating measures in determining whether Government Respondents have shown by clear and convincing evidence that Petitioner poses a risk of danger to the community.”) (emphasis in original).

Accordingly, due process requires that, to justify G.F.F.’s continued detention, the government must show, by clear and convincing evidence, that no alternatives to detention can ameliorate any risk of danger or flight risk that may be found by the IJ.

III. The Government’s Challenge to G.F.F.’s APA Claim Does Not Withstand Scrutiny.

In the alternative, this Court should grant G.F.F.’s APA challenge for the reasons set forth in his Petition, Pet. ¶¶ 117–126, and in Judge Lynch’s dissent in *Hernandez-Lara*. 10 F.4th at 47–53 (Lynch, J., dissenting) (finding the BIA’s

allocation of the burden on the noncitizen, under *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999), to constitute arbitrary and capricious action because the Board: (1) relied on an erroneous interpretation of regulations; (2) failed to consider Congress’s intention to “continue the customary view that detention authorizations must be carefully limited,” and (3) “offered an explanation for its decision”—namely, an inapposite Inspector General report—“that runs counter to the evidence before the agency”). In defending the Board’s precedents, the government alternates between reiterating the agency’s erroneous interpretation of the relevant regulation, 8 C.F.R. § 236.1(c)(8) (as “intended to be part of permanent regulations and would apply to immigration judges”), *see* Opp. 24–25, and offering a different interpretation of the regulation (as simply “permit[ting]” the agency to place the burden on noncitizens), *id.* at 24. This is not a viable defense against an arbitrary-and-capricious challenge and should be rejected.

IV. G.F.F.’s Case Squarely Presents Substantial Claims and Extraordinary Circumstances to Warrant Release.

Contrary to the government’s assertions, G.F.F.’s case presents substantial claims and extraordinary circumstances that warrant release under *Mapp* while G.F.F. awaits a final decision on his habeas petition. *Mapp v. Reno*, 241 F.3d 221, 230 (2d Cir. 2001). Under *Mapp*, this Court has the “inherent authority” to set bail pending the adjudication of a habeas petition when the petition has raised (1) substantial claims and (2) extraordinary circumstances that (3) “make the grant of bail necessary to make the habeas remedy effective.” *Id.*

Here, the government does not dispute that G.F.F. makes substantial claims. Opp. 24. The first *Mapp* factor is thus not in contention.

With respect to the second *Mapp* factor, the government argues that G.F.F.'s case is not extraordinary, but fails to explain why. The government does not explain how the psychological harm that G.F.F. has suffered related to the government's attempts to summarily deport him to an El Salvadoran prison, the unsafe detention conditions that he is currently enduring, including the attempted sexual assault and a physical assault he experienced in detention, and his deteriorating mental health as result of all he has suffered, would not amount to extraordinary circumstances. Opp. 24.

In terms of the third *Mapp* factor, ensuring the effectiveness of the habeas remedy of a bond hearing, release is necessary so that G.F.F. can meaningfully participate in his bond hearing. While numerous courts have found that the grant of the habeas petition with the remedy of a bond hearing negates the need for interim release, release is appropriate when it is necessary "to secure a meaningful bond hearing and therefore preserve the effectiveness of the remedy sought on habeas." *Coronel v. Decker*, 449 F. Supp. 3d 274, 290 (S.D.N.Y. 2020) (granting *Mapp* release on both substantive and procedural due process grounds independently where the relief sought was a constitutionally adequate bond hearing). Release pending the adjudication of the habeas would make the habeas remedy, a bond hearing, effective because allowing G.F.F. to be released for his bond hearing would increase the likelihood that he would receive a fair hearing and have the opportunity to

meaningfully participate in his case. *See Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982) (The Due Process Clause “protects [noncitizens] in removal proceedings and includes the right to a full and fair hearing”).

Given the government’s undisputed actions of nearly deporting G.F.F. summarily, without a removal order, to a notorious El Salvadoran prison and then forcing him to proceed with his final merits hearing a day later, and forcibly sending him to the airport in violation of a court order to protect him from removal to El Salvador, combined with G.F.F.’s deteriorating mental health as of result of the government’s actions and the physical and verbal abuse that he is facing as a young LGBTQ detainee, it would be difficult for G.F.F. to meaningfully participate in his bond hearing and to testify if necessary while still in detention. *Matter of Tomas*, 19 I&N Dec. 464, 465 (BIA 1987) (for removal proceedings to be fair, “respondents must be able to participate meaningfully”). G.F.F. Supp. Decl. ¶ 7 (Noting that he wakes up confused as to his location and fearful of being put on a plane again to El Salvador); Declaration of Ariel Shidlo, PhD (Shidlo Decl.), ECF No. 1-10, at ¶ 86–92 (explaining the psychological harm to G.F.F. of attempted sexual assault and physical and verbal abuse during detention); Carney Decl. ¶ 67–69.

While several courts have found that release under *Mapp* is not necessary because they were ultimately granting the habeas relief with the remedy of a bond hearing, a decision on *Mapp* and a decision on habeas relief are not always simultaneous. *See Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 3889800, at *4 (S.D.N.Y. Aug. 19, 2019) (simultaneously granting habeas relief and

denying *Mapp* release); *Reid v. Decker*, No. 19-CV-8393 (KPF), 2020 WL 996604, at *13 (S.D.N.Y. Mar. 2, 2020) (same); cf, *S.N.C. v. Sessions*, No. 18-CV-7680 (LGS), 2018 WL 6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (releasing under *Mapp* where detention contributed to mental health deterioration such that petitioner had to be released “before her health decline[d] past the point at which she [was] unable” to pursue her habeas claim); *Mahdawi v. Trump*, 781 F. Supp. 3d 214, 235 (D. Vt. 2025) (petitioner ordered released pending habeas proceedings). And here, “[i]f this Court does not release [him] pending adjudication of that claim and [he] prevails, [his] habeas remedy will be ineffective as it will have failed to prevent [him] from the very unlawful detention to which [he] is objecting.” *Vasquez Salgado v. Francis*, No. 25-CV-6524 (VEC), 2025 WL 2806757, at *8 (S.D.N.Y. Oct. 1, 2025) (petitioner ordered released pending habeas proceedings).

Finally, as a result of the detention conditions and his near removal to a notorious high-security prison in El Salvador, G.F.F.’s mental health has significantly deteriorated while in detention. “The balance of hardships also favor releasing [G.F.F.]. There is undisputed evidence in the record that his health is deteriorating, a deterioration that is only exacerbated by continuing detention.” *D’Alessandro v. Mukasey*, No. 08CV914RJAVEB, 2009 WL 799957, at *5 (W.D.N.Y. Mar. 25, 2009), *modified*, No. 08-CV-914 RJA VEB, 2009 WL 10194901 (W.D.N.Y. Mar. 26, 2009), and *aff’d*, No. 08-CV-914 RJA VEB, 2009 WL 931164 (W.D.N.Y. Apr. 2, 2009).

V. The Government's Challenge to G.F.F.'s Award of Fees is Premature.

The government's arguments that G.F.F. is ineligible for an award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), are premature given the current procedural posture of these proceedings. Should the Court grant this petition, G.F.F. intends to make a proper EAJA motion to this Court. Nevertheless, as stated *supra*, Sections I-III, given clear Second Circuit precedent under *Velasco Lopez* and *Black*, the agency's conduct that gave rise to this litigation and the government's litigation position are not substantially justified. *Commissioner, INS v. Jean*, 496 U.S. 154, 158-160 (1990).

CONCLUSION

For the foregoing reasons, G.F.F. respectfully requests that the Court grant his petition.

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Respectfully submitted,

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