UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

G.F.F,

Petitioner,

v.

LaDeon FRANCIS, New York Field Office Director for U.S. Immigration and Customs Enforcement, *et al.*,

Respondents.

No. 25 Civ. 7368 (JGK)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION FOR A WRIT OF HABEAS CORPUS

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Respondents respectfully submit this memorandum of law in opposition to the petition for a writ of habeas corpus, ECF No. 1, filed by petitioner G.F.F.

PRELIMINARY STATEMENT

G.F.F., an alien without lawful status who is in removal proceedings, brings this habeas action to challenge his detention, which has been ongoing since December 2024. G.F.F. received a hearing in January 2025 at which an immigration judge considered his request for bond. The immigration judge denied the request on the basis that G.F.F. failed to establish that he did not pose a danger to the community and, even if he had, bond would still have been denied because G.F.F. was also a high flight risk. G.F.F. appealed that decision to the Board of Immigration Appeals ("BIA"), which affirmed the order. The immigration judge also denied G.F.F.'s application for relief from removal, and G.F.F. has appealed that decision to the BIA.

In this action, G.F.F. asserts that his detention is unlawful because he is entitled to a bond hearing at which the government must establish grounds for his ongoing detention by clear and convincing evidence. G.F.F.'s Fifth Amendment claim fails because his comparatively short detention pending removal comports with due process and he is not entitled to the relief he seeks in this action. The Second Circuit's decision in *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020), suggests that there is no due process infirmity in an immigration judge's placement of the burden of proof on an alien detained under § 1226(a) at an initial bond hearing. *Velasco Lopez* involved a prolonged detention claim—an individual who had been detained "for fifteen months without an end in sight or a determination that he was a danger or flight risk." 978 F.3d at 855. While G.F.F. attempts to make a prolonged detention argument, his detention of under ten months has been accompanied by adequate procedural safeguards and is not so prolonged as to warrant relief under *Velasco Lopez*. G.F.F. also fails to establish that a new bond hearing must consider

alternatives to detention and his ability to pay, as such considerations would not be relevant following a finding of danger to the community.

G.F.F.'s Administrative Procedure Act ("APA") claim fares no better. He challenges BIA precedent from 1999—*Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)—which held that the alien should bear the burden of proof at a bond hearing to demonstrate that his release would not pose a danger to the community and that he is not a flight risk. G.F.F. contends that this burden allocation was arbitrary and capricious, but the BIA thoroughly explained its reasoning, which was well supported.

G.F.F. also asks that the Court grant him immediate interim release pending the outcome of this case, but he fails to meet the stringent requirements for such extraordinary relief. Accordingly, the Court should deny the habeas petition in its entirety.

LEGAL BACKGROUND

For more than a century, the immigration laws have authorized immigration officials to arrest aliens subject to removal and detain them during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 233-34 (1960). Congress has enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. "Detention during removal proceedings is a constitutionally valid aspect of the deportation process." *Velasco Lopez*, 978 F.3d at 848 (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); *Canals v. Decker*, No. 19 Civ. 3891 (JGK), 2019 WL 3778654, at *4 (S.D.N.Y. Aug. 9, 2019) ("The Supreme Court has held time and again that detention during removal proceedings is constitutional.").

Pursuant to 8 U.S.C. § 1226(a), "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The Attorney

General and the Department of Homeland Security ("DHS") thus have broad discretionary authority to detain an alien during removal proceedings.[1] *See* 8 U.S.C. § 1226(a)(1) (DHS "may continue to detain the arrested alien" during the pendency of removal proceedings); *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (highlighting that § 1226(a) "gives the Secretary broad discretion" regarding arrest and release of aliens).

When an alien is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS "may continue to detain the arrested alien." 8 U.S.C. § 1226(a)(1). "To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings." *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. at 1113). If DHS decides to release the alien, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8).

If DHS determines that an alien should remain detained during the pendency of his removal proceedings, that individual may request a custody redetermination hearing—*i.e.*, a bond

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[1] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General's authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain or authorize bond for aliens under § 1226(a) is "one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings." *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

hearing—before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the alien based on an evaluation as to whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].").

Section 1226(a) grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release an alien during his removal proceedings. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). In the exercise of this discretion and consistent with the DHS regulations, the BIA—whose decisions are binding on immigration judges—has placed the burden of proof on the alien, who "must establish to the satisfaction of the Immigration Judge and [the BIA] that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Matter of Guerra*, 24 I. & N. Dec. at 38; *accord Matter of Adeniji*, 22 I. & N. Dec. at 1114. The BIA's "to the satisfaction" standard is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).

If, after the bond hearing, the immigration judge concludes that the alien should not be released, or the immigration judge has set a bond amount that the alien believes is too high, the alien may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). Moreover, if the alien's circumstances materially change following his initial bond hearing, he may request a subsequent hearing, *see* 8 C.F.R. § 1003.19(e), and the outcome of that hearing is also appealable to the BIA, *see Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989).

FACTUAL BACKGROUND

I. G.F.F.'s Immigration History Prior to His December 2024 Arrest

U.S. Border Patrol encountered G.F.F. near El Paso, Texas, on May 15, 2024, after he unlawfully entered the United States without inspection by an immigration officer. *See* Declaration of Deportation Officer Michael Charles ("Charles Decl.") ¶ 3. DHS determined pursuant to 8 U.S.C. § 1225(b)(1) that G.F.F. was inadmissible and subject to removal. *Id.* ¶ 3; Gov't Return Ex. 1. On May 17, 2024, an asylum officer conducted a credible fear interview with G.F.F. pursuant to 8 C.F.R. § 208.30(d). Charles Decl. ¶ 5. Because G.F.F. established that he had a credible fear of persecution, he was placed into 8 U.S.C. § 1229a removal proceedings pursuant to 8 C.F.R. § 208.30(f). *Id.* ¶ 5; Declaration of Grace Carney Brown ("Brown Decl."), Ex. C, ECF No. 1-4, at 5-7.

On May 19, 2024, CBP issued a Notice to Appear ("NTA") charging G.F.F. as removable 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. Charles Decl. ¶ 6; Brown Decl., Ex. C, ECF No. 1-4, at 5-7. The NTA ordered G.F.F. to appear at the Chicago Immigration Court on November 20, 2024, for his first master calendar hearing and included consequences for any future failure to appear. *Id.* On May 20, 2024, G.F.F. was served with the NTA, enrolled in the Alternative to Detention ("ATD") program, and released from custody. Charles Decl. ¶¶ 6, 7.

In October 2024, G.F.F. was terminated from the ATD program after missing an in-person check-in at an ICE Enforcement and Removal Operations ("ERO") office on July 18, 2024, and additional electronic check-ins on the following dates: August 8, 2024, August 12, 2024, August 21, 2024, August 28, 2024, August 30, 2024, September 3, 2024, September 7, 2024, September 10, 2024, September 14, 2024, September 16, 2024, September 20, 2024, September 23, 2024,

September 27, 2024 and September 30, 2024. *Id.* ¶ 8. He informed ICE ERO that he would be traveling to New York. *Id.* On November 20, 2024, G.F.F. failed to appear for his first master calendar hearing before the Immigration Court in Chicago. ICE submitted an I-213, Record of Deportable/Inadmissible Alien, and orally moved to proceed in absentia. *Id.* ¶ 9.

II. G.F.F.'s Arrest and Detention

On December 5, 2024, Homeland Security Investigations ("HSI") Special Agents encountered G.F.F. at a home in Bronx, New York when executing an arrest warrant for another individual and took G.F.F. into custody. *Id.* ¶ 10. On December 6, 2024, G.F.F. acknowledged receipt of a Notice of Custody Determination, dated December 5, 2024, which stated that he would be detained "pending a final administrative decision in [his] case." *Id.* ¶ 11. Also on December 6, 2024, DHS issued a second Form I-213, which stated that G.F.F. was a member/associate of the Tren de Aragua gang. *Id.* ¶ 12; Brown Decl., Ex. C, ECF No. 1-4, at 9-11.

The Chicago immigration judge granted a motion to change venue for G.F.F.'s removal proceeding to the Varick Street Immigration Court in New York. Charles Decl. ¶ 14. On December 18, 2024, G.F.F. appeared, via video teleconference from the Orange County Jail, for his first master calendar hearing in immigration court in New York. *Id.* ¶ 15. On December 30, 2024, counsel for G.F.F. entered an appearance with the immigration court. *Id.* ¶ 16.

On December 31, 2024, at a calendar hearing, G.F.F., through counsel, requested an adjournment for additional time to prepare, which was granted. *Id.* ¶ 17. On January 24, 2025, G.F.F. filed written pleadings conceding his removability as charged in the NTA and an application for relief from removal. *Id.* ¶ 20. G.F.F. also filed a request for a bond hearing. *Id.* ¶ 21.

The immigration judge held a bond hearing on January 29, 2025, after receiving evidence from G.F.F. and ICE. *Id.* ¶¶ 23, 24. The immigration judge determined that G.F.F. failed to meet his burden to show he was not a danger to the community and denied his request for bond. *Id.* ¶ 24;

Gov't Return Ex. 2. The immigration judge further determined that even if G.F.F. had demonstrated he was not a danger to the community, the Judge would have denied bond because G.F.F. was "a very high flight risk." *Id.* The immigration judge subsequently memorialized that determination in a written decision issued on February 18, 2025. Charles Decl. ¶ 28; Brown Decl., Ex. F, ECF No. 1-7. G.F.F. appealed the decision to the BIA. Charles Decl. ¶ 26. On August 26, 2025, the BIA dismissed the appeal and affirmed the immigration judge's bond order. *Id.* ¶ 63; Brown Decl., Ex. G, ECF No. 1-8.

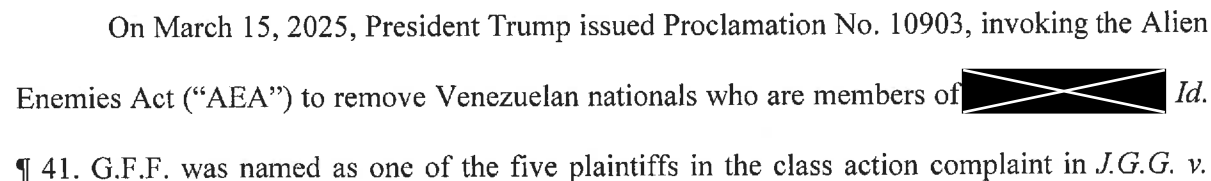
On March 8, 2025, G.F.F. was transferred from Orange County Jail in Goshen, New York, to Moshannon Valley Processing Center in Philipsburg, Pennsylvania. *Id.* ¶¶ 11, 35. On March 9, 2025, G.F.F. was transferred to the El Valle Detention Facility in Raymondville, Texas. *Id.* ¶ 36.

On March 17, 2025, March 25, 2025, and April 2, 2025, G.F.F. appeared for his removal hearings by video teleconference from the El Valle Detention Facility. *Id.* ¶¶ 44, 49, 52. The Court heard testimony from G.F.F. and two experts in support of his application for relief, *id.*, and the parties submitted written closings, *id.* ¶ 60.

On April 4, 2025, G.F.F. was transferred to the Alexandria Staging Facility in Alexandria, Louisiana. *Id.* ¶ 54. On April 5, 2025, G.F.F. was transferred back to the Orange County Jail in Goshen, New York, where he remains detained today. *Id.* ¶ 56.

On June 20, 2025, the immigration judge denied G.F.F.'s application for relief and ordered him removed to Venezuela. *Id.* ¶ 61. On July 9, 2025, G.F.F. filed a Notice of Appeal of the immigration judge's decision with the BIA. *Id.* ¶ 62. That appeal remains pending. *Id.*

III. The Alien Enemies Act Litigation

On March 15, 2025, President Trump issued Proclamation No. 10903, invoking the Alien Enemies Act ("AEA") to remove Venezuelan nationals who are members of  *Id.* ¶ 41. G.F.F. was named as one of the five plaintiffs in the class action complaint in *J.G.G. v.*

Trump, which alleged that G.F.F. was at imminent risk of removal under the AEA. *Id.* ¶ 42. The district court issued a temporary restraining order ("TRO") barring removal of the named plaintiffs. *Id.*; *J.G.G. v. Trump*, No. 25 Civ. 766 (JEB), 2025 WL 940412, at *1 (D.D.C. Mar. 28, 2025). The Supreme Court vacated the TRO on April 7, 2025. Charles Decl. ¶ 57; *Trump v. J.G.G.*, 604 U.S. 670, 671 (2025).

The next day, G.F.F. filed a class action petition for a writ of habeas corpus. Charles Decl. ¶ 58; *see also G.F.F. v. Trump*, No. 25 Civ. 02886 (AKH) (S.D.N.Y.). On April 9, 2025, the court in that action granted the petitioners' motion for a TRO, and in May 2025, the court granted their motion for a preliminary injunction and enjoined the government from, *inter alia*, removing G.F.F. from the United States under Proclamation No. 10903. Charles Decl. ¶ 59; *see also G.F.F. v. Trump*, 781 F. Supp. 3d 195, 202-03, 213 (S.D.N.Y. 2025). The Preliminary Injunction Order expressly provides "that nothing in this Order shall be construed to bar the transfer, removal, or release from immigration detention, of Petitioners pursuant to proceedings held under the Immigration and Nationality Act." *G.F.F. v. Trump*, No. 25 Civ. 02886 (AKH), ECF No. 89. On July 3, 2025, the government filed a Notice of Appeal. *Id.*, ECF No. 96; Charles Decl. ¶ 59.

IV. G.F.F.'s Habeas Petition

On September 5, 2025, G.F.F. filed a habeas petition commencing this action. *See* ECF No. 1 (the "Petition" or "Pet."). He asserts three claims: (1) that the government has violated the Fifth Amendment by detaining G.F.F. without a constitutionally adequate bond hearing; (2) that the bond hearing burden allocation under current BIA practice violates the APA; and (3) that this Court should grant him interim release pending the outcome of this case. Pet. ¶¶ 127-134.

As ultimate relief, G.F.F. requests that the Court order the government to release him from custody unless it "provide[s] him with a constitutionally adequate, individualized hearing within fourteen days before an impartial adjudicator" at which (i) the government bears the burden of

establishing by clear and convincing evidence that continued detention is justified, (ii) the adjudicator considers the least restrictive alternatives to detention, and (iii) the adjudicator considers G.F.F.'s ability to pay in setting any bond. Pet., Prayer for Relief, ¶ 4.

ARGUMENT

I. The Court Should Deny the Petition Because G.F.F.'s Detention Is Lawful and Comports with Due Process

G.F.F. has no right to be released during the pendency of his immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General."). Importantly, "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. And "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). Due process demands only "'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008) (quoting *Zadvydas v. Davis*, 533 U.S. 679, 690-91 (2001)).

During his removal proceedings, G.F.F. has received significant procedural safeguards. He has appeared before an immigration judge numerous times since being taken into government custody in December 2024, and he has received both a constitutionally adequate initial bond hearing and a hearing on his application for relief from removal. After he was denied bond, that determination was affirmed by the BIA. He was also denied relief from removal and has appealed that decision to the BIA. In short, G.F.F. has received ample process.

A. G.F.F. Is Not Entitled to a New Bond Hearing

Contrary to G.F.F.'s assertions, Pet. ¶¶ 93-110, due process does not require that at an initial bond hearing under § 1226(a) the government must bear the burden of establishing that an alien is a flight risk or danger, much less by clear and convincing evidence, nor is he entitled to such a hearing due to the passage of time. *Velasco Lopez*—and its application of the *Mathews* balancing test—confirms that due process does not require the burden always to be placed on the government at a § 1226(a) bond hearing. *See* 978 F.3d at 851-55. When assessing the validity of procedures in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Courts also must consider that Congress "emphatic[ally]" intended the government's discretionary decisions regarding detention to be "presumptively correct and unassailable except for abuse." *Carlson*, 342 U.S. at 540.

In *Velasco Lopez*, the district court agreed with the petitioner's primary claim that, regardless of the length of his detention, his prior bond hearings violated due process because the government had not borne the burden to justify detention by clear and convincing evidence. No. 19 Civ. 2912 (ALC), 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019). On appeal, despite the government squarely presenting the issue of burden of proof at an initial § 1226(a) bond hearing, the Second Circuit affirmed the district court's judgment based solely on its application of the *Mathews* balancing test to the petitioner's alternative prolonged-detention claim. *See Velasco Lopez*, 978 F.3d at 855. In its *Mathews* analysis, the Second Circuit repeatedly emphasized the petitioner's length of detention—15 months—and expressly declined "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." *Id.* at 855 n.13; *Cf. Hylton v. Decker*, 502 F. Supp. 3d 848, 855 (S.D.N.Y. 2020) (*Velasco Lopez* holds "that the Constitution requires that the Government bear the burden

of proof by clear and convincing evidence at bond hearings for aliens held for *prolonged detention* pursuant to § 1226(a)" (emphasis added)). This strongly supports the government's position that placing the burden of proof on the alien at an initial § 1226(a) bond hearing comports with due process.[2] *Cf. Melo v. Arteta*, No. 22 Civ. 9912 (JGK), 2023 WL 5206890, at *5 (S.D.N.Y. Aug. 11, 2023) (concluding in § 1226(c) case where the petitioner was held for 14 months without a bond hearing, that "the length of the petitioner's detention is not unreasonable").

With respect to the first *Mathews* factor—the private interest at stake—the Second Circuit noted the "interest in being free from imprisonment" and emphasized that the petitioner has spent "nearly fifteen months" in detention. *Id.* at 851. "The longer the duration of incarceration, the greater the deprivation," and the Second Circuit stressed that the petitioner did not have an "administrative mechanism" to "challenge[] his detention on the ground that it reached an unreasonable length." *Id.* at 852. But even though freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690 (punctuation omitted), the Supreme Court has explained that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Demore*, 538 U.S. at 522.

While the "Fifth Amendment entitles aliens to due process of law in deportation proceedings," it is also true that "detention during deportation proceedings [is] a constitutionally

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[2] For the reasons discussed in this section, the government respectfully disagrees with the district court decisions that have held that due process requires the government to bear the burden to justify *any* continued detention under § 1226(a), even in the absence of prolonged detention. *See* Pet. ¶ 96 (citing cases).

valid aspect of the deportation process." *Demore*, 538 U.S. at 523. Any assessment of the private interests at stake must therefore account for the fact that the Supreme Court has never held that aliens with no right to remain in the United States have a constitutional right to be released from custody during the pendency of removal proceedings, and in fact has held the opposite. *See id.* at 530; *Carlson*, 342 U.S. at 538. Further, aliens without lawful status are not simply asserting a right to be at liberty, but rather a right to be at liberty in the United States. *Cf. Demore*, 538 U.S. at 522 ("this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens").

Contrary to G.F.F.'s assertion, the facts of his case do not "favor heightened procedural protections." *See* Pet. ¶ 98. While G.F.F. claims that "repeated attempts to summarily deport [him] . . . have also added to the punitive nature of his confinement," *id.* ¶ 100, there is currently a preliminary injunction in place protecting against G.F.F.'s removal pursuant to the AEA, *see* Charles Decl. ¶ 59. G.F.F. does not persuasively explain why this enjoined government action renders his current custody particularly "punitive," *see* Pet. ¶ 100, particularly given the findings at his bond hearing.

In discussing the second *Mathews* factor—the risk of erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards—the Second Circuit in *Velasco Lopez* again emphasized the petitioner's "lengthy" detention. *See* 978 F.3d at 852. In that context, the court acknowledged that, at the beginning of a detention period, the government may have "little to no information about a detained individual," but that rationale becomes less persuasive "the longer detention lasts." *Id.* at 853. And "as the period of . . . confinement grows, so do the required procedural protections no matter what level of due process may have been sufficient at the moment of initial detention." *Id.*

(internal quotation marks omitted). *Velasco Lopez* thus held that "individuals subject to *prolonged detention* under § 1226(a) must be afforded process *in addition to that provided by the ordinary bail hearing*." *Id.* at 854 (emphasis added).

To the extent G.F.F. argues that the burden of proof and standard used his January 2025 bond hearing were constitutionally insufficient, that challenge should be rejected. As explained above, G.F.F.'s detention has received three levels of review: from a DHS officer, an immigration judge, and the BIA. During that process, G.F.F. was permitted to present evidence that might bear on the issues of flight risk or dangerousness, which the immigration judge was able to consider. *See* 8 C.F.R. § 1003.19(d) (immigration judge may consider "any information that is available . . . or that is presented to him or her by the alien or [DHS]"); Charles Decl. ¶ 23. Thus, the January 2025 hearing provided sufficient procedural safeguards, particularly given that G.F.F. had been in custody less than two months.

Nor does the length of G.F.F.'s detention, which has been under 10 months, now mandate a second bond hearing with an altered burden of proof, contrary to G.F.F.'s assertion. *See* Pet. ¶¶ 107-110. The Second Circuit has declined 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. Further, G.F.F. concedes that the duration of his detention is "due to the lengthiness of the appeals process," *id.* ¶ 109. *Cf. Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1210 (9th Cir. 2022) ("Although further review of his removal order would take additional time and could thereby prolong his detention, Rodriguez Diaz in this case has not demonstrated that the fact of the review process following its ordinary course itself created a due process violation."); *Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) (similar).

Moreover, in this case, the immigration judge found that G.F.F. poses "a very high flight risk." *See* Charles Decl. ¶ 24; Gov't Return Ex. 2; *see also* Brown Decl., Ex. F, ECF No. 1-7, at 7. G.F.F. does not explain how that finding would be altered if the burden were shifted to the government. *Cf. Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) (to establish a due process claim, an alien "must, in order to prevail, allege some cognizable prejudice fairly attributable to the challenged process" (internal quotation marks omitted)). Regardless of who has the burden of proof, G.F.F.'s failure to appear for the sole immigration proceeding scheduled prior to his detention and other factors relating to flight risk, such as a low number of close family members in the United States, would still have been before the immigration judge. And G.F.F.'s risk of flight has only grown since his bond hearing, as now the immigration judge has denied his application for relief from removal and G.F.F. may have greater incentive to abscond. *See, e.g.*, *Matter of Andrade*, 19 I. & N. Dec. 488, 490 (BIA 1987) (noting that a respondent more likely to be granted relief from removal has a greater motivation to appear for a removal hearing). Accordingly, given the particular circumstances here, there is less probable value in requiring a burden-shifted bond hearing. *Cf. J.C.G. v. Genalo,* No. 24 Civ. 08755 (JLR), 2025 WL 88831, at *3 (S.D.N.Y. Jan. 14, 2025) (immigration judge did not address whether petitioner posed a flight risk).

Finally, regarding the third *Mathews* factor—the government's interest—the Second Circuit has recognized that the importance of the government's interests in detaining aliens under § 1226(a) to ensure that they do not abscond or commit crimes "is well-established and not disputed." *Velasco Lopez*, 978 F.3d at 854. Indeed, section 1226(a) reflects Congress's intent to afford "broad discretion" to the government in determining which individuals should remain detained during removal proceedings, *Preap*, 586 U.S. at 409, and to increase the probability that

aliens who are ordered removed are in fact removed, H.R. Rep. No. 104-469(I), at 123. The Government's strong interest supports the sufficiency of the process that G.F.F. has received in connection with his detention.

B. G.F.F. Is Not Entitled to the Other Relief He Seeks

Even if the Court were to order the government to provide G.F.F. with a new bond hearing at which ICE bears the burden of establishing danger or flight risk, the Court should not require the immigration judge to consider alternatives to detention and G.F.F.'s ability to pay bond. *See* Pet. ¶¶ 111-116, Prayer for Relief, ¶ 4. G.F.F. concedes that the government has legitimate interests here in preventing danger to the community and ensuring his appearance at future immigration proceedings. Pet. ¶ 112. If an immigration judge determines at a bond hearing that an alien presents a danger to the community, the inquiry concludes, and the alien is not eligible for release. *See, e.g.*, *Carlson*, 342 U.S. at 534, 541-42 (there is no denial of due process in the detention of aliens where there is reasonable cause to believe that their release on bail would endanger safety); *Lantigua v. Decker*, No. 17 Civ. 4880 (LGS), 2017 WL 5054567, at *4 (S.D.N.Y. Oct. 27, 2017) ("Once there is a determination that the alien is a danger to the community, the IJ need not consider whether the alien is a flight risk."). Thus, if at a future bond hearing the immigration judge were again to find that G.F.F. presents a danger to the community, the immigration judge should not be required to consider ability to pay and alternatives to detention before denying bond, as such considerations are relevant to mitigating flight risk, not dangerousness.

Further, an order requiring the immigration judge to consider alternatives to detention and ability to pay would interfere with the "broad discretion" afforded to an immigration judge in determining an alien's eligibility for release on bond. *See Matter of Guerra*, 24 I. & N. Dec. at 40; *see also Carlson*, 342 U.S. at 540. While an alien's financial situation may be one of several discretionary factors that an immigration judge may consider when determining bond, an

immigration judge has discretion to consider various factors depending on the circumstances of the case, and "may choose to give greater weight to one factor over others, as long as the decision is reasonable." *Matter of Guerra*, 24 I. & N. Dec. at 40 (providing non-exhaustive list of discretionary factors immigration judges may consider). Thus, a mandate from this Court requiring the immigration judge to analyze any particular factor would unnecessarily cabin the immigration judge's discretion.

The court in *Velasco Lopez* did not address how and whether an immigration judge must consider alternatives to detention when the government has shown by clear and convincing evidence that the alien is a danger to the public. More recently, the Second Circuit in *Black v. Decker* expressly considered, in the § 1226(c) context, whether and how the immigration judge should consider an alien's ability to pay and any alternatives to detention in the context of dangerousness in order to comport with due process. 103 F.4th 133, 155, 158 (2d Cir. 2024). In *Black*, the Second Circuit squarely held that ability to pay and alternatives to detention only serve to assure the alien's appearance, and such considerations are relevant "only once the IJ has determined that the noncitizen does not pose a danger to the community." *Id.* at 158-59 (citing *Carlson*, 342 U.S. at 539-42; *Matter of Guerra*, 24 I. & N. Dec. at 38 ("An alien who presents a danger to persons or property should not be released during the pendency of removal proceedings.")). It is only after a determination that the alien does not pose a danger to the community that "refusing to consider ability to pay and alternative means of assuring appearance creates a serious risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons." *Black*, 103 F.4th at 158. Indeed, the court further "stress[ed] that a showing of dangerousness by clear and convincing evidence would foreclose any possibility of bond. The IJ would then have no reason to consider financial circumstances or alternatives to detention." *Id.*

at 159. Put simply, the Second Circuit recognized that dangerousness is different from risk of flight, and due process does not require consideration of alternatives to detention when dangerousness is shown.

There is no difference in the degree "dangerousness" required to be shown under *Velasco Lopez* or *Black.* Should the Court order a new bond hearing and the government make that showing, there is no "risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons." *Id.* at 158. Nor is there a risk that an alien will be erroneously detained for an extended period because he or she is "unable to prove that" they are not a danger to the community. *Velasco Lopez*, 978 F.3d at 853. The alien will have already received "process in addition to that provided by the ordinary bail hearing," *id.* at 854; the government will have already shown dangerousness by the heightened "standard of proof [that] provides the appropriate level of procedural protection," *id.* at 856; and due process is thus satisfied under the *Mathews* framework, *Black*, 103 F.4th at 159. In light of *Black*'s clear holding, there is no reason for this Court to decide whether alternatives to detention must be considered for an alien who is shown by clear and convincing evidence to present a danger to society.

II. G.F.F.'s APA Claim Is Without Merit

Contrary to G.F.F.'s assertion that "[t]he burden allocation applied to [his] hearing represents a sharp reversal from contrary agency precedent," Pet. ¶ 117, the immigration judge and BIA applied a burden allocation in keeping with longstanding practice, *see Matter of Guerra*, 24 I. & N. Dec. at 38; *Matter of Adeniji*, 22 I. & N. Dec. at 1112. G.F.F. argues that his bond hearing should not have followed the burden allocation adopted by the BIA over 25 years ago in *Matter of Adeniji* because, in his view, that decision was flawed. Pet. ¶¶ 117-126. There, the BIA determined that, at bond hearings held pursuant to § 1226(a), the alien bears the burden of demonstrating to the satisfaction of the immigration judge (i.e., by a preponderance of the evidence) that the alien's

release would not pose a danger to the community and that the alien is likely to appear for future hearings. *Matter of Adeniji*, 22 I. & N. Dec. at 1112.

G.F.F. argues that the 1999 *Adeniji* decision "represents a sharp reversal from decades of contrary agency precedent," Pet. ¶ 117, and he challenges that decision as arbitrary and capricious under the APA, Pet. ¶¶ 117-126. But *Adeniji* does not reflect an unexplained rule change. Rather, the BIA analyzed the standards governing bond hearings for aliens detained under § 1226(a) and relied on a recently promulgated regulation, 8 C.F.R. § 236.1(c)(8), to find that the alien should carry the burden of proof. 22 I. & N. Dec. at 1112. The BIA recognized that 8 C.F.R. § 236.1(c)(8) did not by its terms apply directly to an Immigration Judge, *id.*, but it held that the standards articulated in that regulation were relevant to bond hearings before an immigration judge because 8 C.F.R. § 3.19(a) (now 8 C.F.R. § 1003.19(a)) provides that "[c]ustody and bond determinations made by [ICE] pursuant to 8 C.F.R. part 236 may be reviewed by an Immigration Judge pursuant to 8 C.F.R. part 236." 22 I. & N. Dec. at 1112. Thus, the BIA concluded that § 3.19(a) permits immigration judges to review an alien's custody under the same standard that governs the initial agency custody review. *Id.*

Further, in outlining its reasons for applying 8 C.F.R. § 236.1(c)(8), the BIA explained why it understood the provision to be part of permanent regulations. *See* 22 I. & N. Dec. at 1112. As noted by a district court addressing an argument that the BIA's reasoning in *Adeniji* amounted to a violation of the APA, the BIA "recognized that it was departing from previous BIA precedent and applied a regulation codifying that shift . . . . That regulation also acknowledged the shift and explained the agency's reasoning." *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 13 n.1 (D. Mass. 2017) (citations omitted), *vacated and remanded on mootness grounds*, No. 17-1918,

2018 WL 11444979 (1st Cir. Mar. 22, 2018). The *Adeniji* decision thus cannot be characterized as arbitrary or capricious, and G.F.F.'s APA claim is without merit.

III. G.F.F. Is Not Entitled to Interim Release

G.F.F. argues that this Court should grant him bail pending the outcome of this case, citing *Mapp v. Reno*, 241 F.3d 221, 230 (2d Cir. 2001), for the principle that federal courts have inherent authority to set bail pending adjudication of a habeas petition. Pet. ¶ 133. But this case does not meet the standard for such relief articulated in *Mapp*, as there are no "extraordinary circumstances . . . that make the grant of bail necessary to make the habeas remedy effective." *Id.* at 230; *see also Elkimya v. Dep't of Homeland Sec.*, 484 F.3d 151, 154 (2d Cir. 2007).

The Second Circuit has made clear that the power of Article III courts to grant bail for aliens in immigration proceedings is, at most, a "limited one, to be exercised in special cases only." 241 F.3d at 226. Such relief is to be granted "only in unusual cases," and the standard "is a difficult one to meet." *Id.* (internal quotation marks omitted). "The petitioner must demonstrate that the habeas petition raise[s] substantial claims and that extraordinary circumstances exist[] that make the grant of bail necessary to make the habeas remedy effective." *Id.* (internal quotation marks omitted).

G.F.F. does not explain why interim release by this Court is necessary to render the habeas remedy (release if the government does not provide a new bond hearing) effective here. *Cf. Reid v. Decker*, No. 19 Civ. 8393 (KPF), 2020 WL 996604, at *13 (S.D.N.Y. Mar. 2, 2020) ("The Court is truly sympathetic to Reid's situation. However, particularly in light of the fact that the Court is granting the relief sought in Reid's Petition [and ordering a bond hearing], Reid has not established the existence of extraordinary circumstances that make the grant of bail necessary to make the habeas remedy effective."). Indeed, when granting relief in habeas cases where the petitioner is held pursuant to § 1226, this Court has directed the Government to provide petitioners with bond

hearings. *See, e.g.*, *Hylton*, 502 F. Supp. 3d at 856 (in § 1226(c) case, ordering respondents to release petitioner or provide a bond hearing); *Gordon v. Shanahan*, No. 15 Civ. 261 (JGK), 2015 WL 1176706, at *5 (S.D.N.Y. Mar. 13, 2015) (same). In short, there is nothing unique about this case or G.F.F.'s circumstances that require the extraordinary interim relief he seeks.

IV. G.F.F.'s Request for an Award of Costs and Fees Should be Denied

Finally, G.F.F. seeks an award of his costs and reasonable attorneys' fees pursuant to the Equal Access to Justice Act ("EAJA"). *See* Pet., Prayer for Relief ¶ 5; 28 U.S.C. § 2412. Although a habeas petition challenging immigration detention constitutes a civil action under the EAJA, *see Vacchio v. Ashcroft*, 404 F.3d 663, 672 (2d Cir. 2005), the statute provides that "a court shall award to a *prevailing party* other than the United States fees and other expenses . . . *unless the court finds that the position of the United States was substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). "Substantially justified" means "justified to a degree that could satisfy a reasonable person[,]" and Respondents' position meets this standard if it "had a reasonable basis in both law and fact." *Vacchio*, 404 F.3d at 674 (internal quotation marks omitted).

Here, G.F.F.'s request for an EAJA award is both premature and unwarranted. G.F.F. is not a prevailing party, and even if the Court were to grant the relief he requests, the government's position is substantially justified. *See, e.g.*, *Arana v. Decker*, No. 20 Civ. 4104 (LTS), 2020 WL 7342833, at *8 (S.D.N.Y. Dec. 14, 2020). There is no binding Supreme Court or Second Circuit authority defining a period past which detention pursuant to § 1226(a) becomes unduly prolonged and additional procedural safeguards become necessary. Further, there is no binding authority as to the allocation of the burden of proof at an initial bond hearing. Accordingly, G.F.F.'s request for an award of costs and attorneys' fees should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny G.F.F.'s habeas petition.

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September 22, 2025

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c) and Section III.D of the Court's Individual Practices, the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules and the Court's Individual Practices. As measured by the word processing system used to prepare it, this memorandum contains 6,818 words.