UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELISA FONTANELLI, as Next Friend of JUAN MARTIN BERNAL GARCIA, Petitioner, - v - LADEON FRANCIS, New York Field Office Director for U.S. Immigration and Customs Enforcement, *et al.*, Respondents.	25 Civ. 7715 (JLR)

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

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Respondents (the "government"), by their attorney, Jay Clayton, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to the petition for a writ of habeas corpus filed on September 16, 2025, Dkt. No. 1 ("Petition"), by petitioner Juan Martin Bernal Garcia ("Petitioner").[1]

PRELIMINARY STATEMENT

Petitioner is a citizen of Colombia who overstayed a travel visa that authorized him to stay in the United States only until April 2023. On September 15, 2025, Petitioner was arrested by Amtrak Police on a misdemeanor charge of public lewdness and a related violation. He was subsequently turned over by Amtrak Police to U.S. Immigration and Customs Enforcement ("ICE"), Enforcement and Removal Operations ("ERO"). Also on September 15, ICE served Petitioner with a notice to appear ("NTA") alleging that Petitioner was not a citizen or national of the United States and was removable because he had overstayed his visa. In the exercise of its discretion, ICE opted to detain Petitioner under 8 U.S.C. § 1226(a) pending removal proceedings. Petitioner's removal proceedings—through which he may request and receive a custody redetermination hearing, also known as a bond hearing—were commenced when the NTA was filed with the immigration court on September 23, 2025.

In this habeas petition, which was filed one day after he was arrested, Petitioner asserts that his detention is unlawful, claiming that it violates the substantive and procedural due process protections of the Fifth Amendment to the Constitution. The petition should be denied. First, Petitioner's substantive due process challenge fails because Petitioner's detention is reasonably related to the valid immigration purposes of preventing the risk of flight, ensuring his appearance

[1] The petition was originally filed *pro se* by Elisa Fontanelli, as Petitioner's next friend, but counsel have subsequently appeared for Petitioner. *See* Dkt. Nos. 1, 17-18.

at future immigration proceedings, and preventing danger to the community. After Petitioner's arrest, ICE made an individualized custody determination and reasonably chose to detain Petitioner after he was charged with public lewdness and ICE determined that he was removable.

Second, Petitioner's procedural due process claim also fails. Petitioner can point to no deprivation of process, and so he fails to state a claim. Moreover, because he is in removal proceedings and detained under Section 1226(a), Petitioner is entitled to seek his release before an immigration judge at a bond hearing, if he requests one in immigration court. A bond hearing constitutes constitutionally adequate process through which Petitioner may challenge his detention. Furthermore, Petitioner should be required to exhaust the available administrative remedy of a bond hearing, before seeking to challenge his detention through a habeas petition. While Petitioner claims in his habeas petition that he is not a flight risk and poses no danger to the community, the appropriate venue for those arguments in the first instance is the immigration court, not this Court.

For these reasons, the petition should be denied.

BACKGROUND

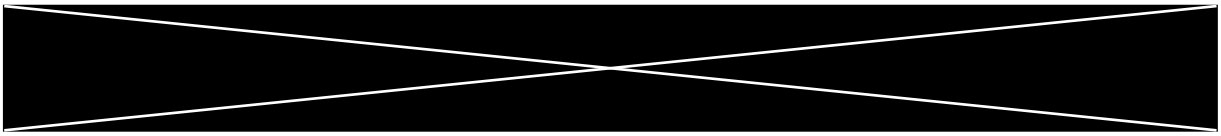
A. Petitioner's Entry, Criminal Arrest, and Detention by ICE

Petitioner, a native and citizen of Colombia, was admitted to the United States on October 3, 2022, on a B-2 nonimmigrant visitor visa. *See* Ex. A[2] (Form I-213) at 1, 3; Declaration of Supervisory Detention and Deportation Officer Kareem Johnson ("Johnson Decl.") ¶¶ 3-4. That visa provided Petitioner with authorization to remain in the United States until April 2, 2023. Johnson Decl. ¶ 4; Ex. A at 3. However, Petitioner overstayed his visa and

[2] Unless otherwise noted, exhibits referenced as "Ex. __" refer to the exhibits to the Return to Habeas Petition, filed herewith.

failed to depart the country after the visa expired in April 2023. Johnson Decl. ¶ 4; Ex. A at 3.

On September 15, 2025, Petitioner was arrested by Amtrak Police on a misdemeanor charge of public lewdness, in violation of New York Penal Law § 245.00, and a violation for exposure of a person pursuant to New York Penal Law § 245.01. Johnson Decl. ¶ 5; Ex. A at 3; Ex. E (Amtrak Police Department report), Ex. G (NYPD complaint record), Ex. H (NYPD arrest record). According to an Amtrak Police investigation report, officers "conducting plainclothes surveillance of the men's bathroom within the main concourse of New York Penn Station"



public view for approximately 1-minute," after which Petitioner was arrested. Ex. E at 3. After his arrest, Petitioner was issued a Desk Appearance Ticket instructing him to appear in New York City Criminal Court on October 1, 2025. Johnson Decl. ¶ 5; Ex. F (Desk Appearance Ticket).

During arrest processing, Amtrak Police contacted ICE ERO, and after his criminal arrest processing was completed, Amtrak Police transported Petitioner to ICE's New York City Field Office at 26 Federal Plaza, where Petitioner was turned over to ICE. Johnson Decl. ¶ 5; Ex. E at 3; Ex. A at 2-3. After receiving Petitioner in custody on September 15, ICE confirmed that Petitioner was in the United States in violation of the immigration laws because he overstayed his B-2 nonimmigrant visitor visa, and ICE prepared and served Petitioner with a Warrant of Arrest of Alien, Form I-200. Johnson Decl. ¶ 6; Ex. A at 3; Ex. B (DHS Warrant). ICE also served Petitioner with a Notice to Appear ("NTA"), the charging document used to commence removal proceedings, charging Petitioner as removable pursuant to 8 U.S.C. § 1227(a)(1)(B), because he had overstayed his nonimmigrant visitor visa and had unlawfully remained in the

United States. Johnson Decl. ¶ 6; Return Ex. A at 4, Ex. C (NTA).

Also during processing on September 15, ICE conducted an initial custody determination and determined that Petitioner would be detained pending removal proceedings pursuant to 8 U.S.C. § 1226(a), because he had not established a lack of danger to the public (due to the criminal conduct for which he was arrested earlier that day) or that he was not a flight risk. Johnson Decl. ¶ 6; Ex. D (ICE Notice of Custody Determination). Thus, Petitioner's detention is governed by 8 U.S.C. § 1226(a). Johnson Decl. ¶ 6.

B. Procedural History

On September 16, 2025, Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 through next friend Eliza Fontanelli. Dkt. No. 1. At the time, Petitioner was held at ICE's temporary hold room at 26 Federal Plaza, New York, New York. Johnson Decl. ¶ 7. However, at approximately 6:11 p.m. on September 16, Petitioner was transferred to Delaney Hall Detention Facility in Newark, New Jersey. *Id.*

The following day, the Court issued an Order to Show Cause dated September 17, 2025, which set a schedule for the response to the petition and also provided that "Pending consideration, Respondents ARE HEREBY RESTRAINED from transferring the Petitioner out of the Southern District of New York." Dkt. No. 3 ¶ 4. However, as noted above, by the time of the issuance of the order, Petitioner was held at Delaney Hall Detention Facility in the District of New Jersey, where he remained until September 20.[3] Johnson Decl. ¶¶ 7-8. On September 20,

[3] As the government noted in a previous filing, *see* Dkt. No. 19, this Court continues to have jurisdiction over this petition. Petitioner's challenge to his detention is a "core" habeas matter that must be filed in the district of confinement and name the immediate custodian as respondent. *See Khalil v. Joyce*, 771 F. Supp. 3d 268, 280 (S.D.N.Y. 2025). At the time Petitioner filed his petition for writ of habeas corpus, he was held within the Southern District of New York, albeit temporarily. Consequently, habeas jurisdiction properly vested in this Court, and Petitioner's

Petitioner was transferred out of Delaney Hall and through interim stops at two other detention facilities in Texas and Arizona before being admitted to Eloy Detention Center in Eloy, Arizona, on the evening of September 23, 2025, where he remains at present. *Id.* ¶ 10.

On September 23, 2025, ICE filed the NTA with the immigration court in Florence, Arizona, which accepted the NTA, thereby commencing removal proceedings against Petitioner. *Id.* ¶ 11.[4] Petitioner's initial master calendar hearing is currently scheduled to occur on September 26, 2025. *Id.*; Ex. J (Notice of Hearing).

Following the commencement of removal proceedings, Petitioner is eligible to request and receive a bond hearing before an immigration judge, as his detention is authorized by 8 U.S.C. § 1226(a). Johnson Decl. ¶ 12. At this time, there is no indication that Petitioner has requested a bond hearing from the immigration court, although he can do so at any time during removal proceedings. *Id.*; 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Petitioner has no known application for immigration relief pending and no final order of removal has been issued. *Id.* Johnson Decl. ¶ 13.

ARGUMENT

Petitioner asserts that his detention violates both substantive and procedural due process. *See* Petition ¶¶ 23-38. These claims should be rejected. First, Petitioner's substantive due process claim fails because his detention is reasonably related to the valid immigration purposes of preventing the risk of flight, ensuring his appearance at future immigration proceedings, and

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subsequent transfer out of the district does not deprive this Court of jurisdiction. *See Khalil*, 771 F. Supp. 3d at 279, 290 (citing *Ex Parte Endo*, 323 U.S. 283 (1944)).

[4] ICE initially attempted to file the NTA with the Varick Street Immigration Court in New York, to commence removal proceedings against Petitioner, but the NTA was rejected by the Immigration Court for procedural reasons on September 21, 2025, because it was missing a form). Johnson Decl. ¶ 9.

preventing danger to the community. ICE made an individualized determination following Petitioner's arrest that he should be detained because he had not established that he was neither a flight risk or a danger to the public, in light of the criminal charges against him. Second, Petitioner's procedural due process claim fails because he has not been deprived of any process that he claims is due. He is lawfully detained under 8 U.S.C. § 1226(a) during the pendency of removal proceedings, and is provided with robust process during such proceedings, including an initial custody determination by ICE and the right to seek a custody redetermination before an immigration judge, which he has not yet sought. Furthermore, this petition is premature: it was filed just a day after Petitioner first came into contact with ICE. Petitioner has not exhausted the administrative remedies available to him by seeking a bond hearing from the immigration court before filing this petition.

Accordingly, the petition should be denied.

I. LEGAL PRINCIPLES

For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 523-26 (2003); *Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). In the Immigration & Nationality Act ("INA"), Congress 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 v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020) (citing *Demore*, 538 U.S. at 523); *see Demore*, 538 U.S. at 523 n.7 ("[P]rior to 1907 there was no provision permitting bail for

any aliens during the pendency of their deportation proceedings."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of [the] deportation procedure."). Indeed, removal proceedings "'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Section 1226 "generally governs the process for arresting and detaining . . . aliens pending their removal." *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). Section 1226(a) does not provide an alien with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. 572, 575 (A.G. 2003) (citing *Carlson*, 342 U.S. at 534); *cf. 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."). Nor does the Constitution. *Velasco Lopez*, 978 F.3d at 848. Section 1226(a) provides that "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) (emphasis added). The Attorney General and the Department of Homeland Security ("DHS") thus have broad discretionary authority to detain an alien during removal proceedings.[5] *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

[5] 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 section 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. at 574 n.3.

"subsection (a) creates authority for *anyone's* arrest or release under § 1226—and it gives the Secretary [of Homeland Security] broad discretion as to both actions").

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. 1102, 1113 (BIA 1999)). 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, the alien may request a bond 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 a variety of factors that account for the alien's ties to the United States and evaluate whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);[6] *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

[6] The BIA has identified the following non-exclusive list of factors the immigration judge may consider: "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties to the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." *Matter of Guerra*, 24 I. & N. Dec. at 40.

or her by the alien or [DHS]."). The immigration judge may also "consider the amount of bond that is appropriate." *Matter of Guerra*, 24 I. & N. Dec. at 40.

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 within 30 days of the order. *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).

II. PETITIONER'S DETENTION SERVES VALID IMMIGRATION PURPOSES AND DOES NOT VIOLATE HIS SUBSTANTIVE DUE PROCESS RIGHTS

Petitioner argues that his detention, for even one day, violates substantive due process because it does not serve a lawful purpose, is unrelated to the purposes justifying it (preventing danger or flight), and is not narrowly tailored. Pet. ¶¶ 24-30. This claim is without merit.

"[T]o trigger a violation of substantive due process, official conduct must be outrageous and egregious under the circumstances; it must be truly 'brutal and offensive to human dignity." *Guo Hua Ke v. Morton*, No. 10 Civ. 8671 (PGG), 2012 WL 4715211, at *9 (S.D.N.Y. Sept. 30, 2012) (citing *Lombardi v. Whitman*, 485 F.3d 73, 81 (2d Cir. 2007)). "In gauging the shock, negligently inflicted harm is categorically beneath the threshold, while conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lombardi*, 485 F.3d at 82 (quotation marks omitted). Nothing in Petitioner's petition alleges or implies conduct toward him that constitutes "outrageous and egregious" acts deliberately intended to injure him in some way. And even if there were such allegations, they lack any factual support.

The crux of Petitioner's substantive due process claim is that his detention allegedly services no governmental purpose. That is incorrect. Petitioner unlawfully remained in the United States beyond the authorized period permitted by his visa; on September 15, 2025, he was arrested and charged with a criminal offense by Amtrak Police; and having come to the attention of ICE, he has been detained and placed in removal proceedings. *See* Johnson Decl. ¶¶ 4-6. His detention pending removal proceedings is statutorily authorized by 8 U.S.C. § 1226(a). *See* 8 U.S.C. § 1226(a) (providing that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States"); *see also Demore*, 538 U.S. at 523 ("[D]etention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.").

Moreover, "the Attorney General's discretion to detain individuals under § 1226(a) is valid where it advances a legitimate governmental purpose." *Velasco Lopez*, 978 F.3d at 854. The government has valid "regulatory interests in detaining noncitizens under § 1226(a)," which include "(1) ensuring that noncitizen do not abscond and (2) ensuring they do not commit crimes." *Id.* "The importance of these interests is well-established and not disputed." *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Hernandez v. Sessions*, 872 F.3d 976, 990-91 (9th Cir. 2017)); *see Zadvydas*, 533 U.S. at 690 (discussing governmental "regulatory goals" of "ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community" (quotation marks and brackets omitted)).

As noted above, on the date of Petitioner's arrest on September 15, ICE made an initial custody determination that Petitioner should be detained. Johnson Decl. ¶ 6; Ex. D (ICE Notice of Custody Determination). In particular, ICE concluded that Petitioner had not established he was not a danger to the public (due to his criminal conduct for which he was arrested that same

day) or that he was not a flight risk.[7] *Id.* Therefore, because Petitioner's detention serves the valid immigration purposes of preventing the risk of flight and danger to the public, his substantive due process claim fails. *See Velasco Lopez*, 978 F.3d at 854.[8] And to the extent Petitioner argues that his detention violates due process because it is not the least restrictive mechanism for accomplishing legitimate government interests, this contention is without merit and has been rejected by the Supreme Court. *See Demore*, 538 U.S. at 528 ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.").

III. PETITIONER FAILS TO STATE A PROCEDURAL DUE PROCESS CLAIM

Petitioner's procedural due process claim is premised on the assertion that "there is no indication that there has been any individualized determination that [Petitioner] presents a flight risk or a danger to the extent that detention is necessary," and so, he argues, "Respondents have failed to provide him with the minimal procedural safeguards mandated by the Fifth Amendment." Petition ¶¶ 36, 38. This claim, like the first, is without merit.

As set forth above, after Amtrak Police turned Petitioner over to ICE on September 15, ICE promptly conducted an initial custody determination and, in a valid exercise of its discretion, determined that Petitioner would be detained pending his removal proceedings, as he failed to demonstrate that he was not a danger to the community or a flight risk. Johnson Decl. ¶ 6; Ex. D

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[7] The petition relies in part on the claim that "Mr. Bernal Garcia has no prior arrests or criminal history," Petition ¶ 15—but that is inaccurate as the petition does not acknowledge Petitioner's September 15 arrest by Amtrak Police, *see* Johnson Decl. ¶ 5; Ex. E, Ex. F, Ex. G, Ex. H.

[8] As further addressed below, Petitioner may request a bond hearing before an immigration judge if he wishes to challenge ICE's custody determination. Johnson Decl. ¶ 12; *see infra* Section III. As explained below, that process provides the appropriate forum for Petitioner's claims that he "poses no danger to the community" and "is not a flight risk and has strong interest in being able to pursue affirmative relief," Petition ¶ 27.

(Notice of Custody Determination). Part of that determination rested on the fact that Petitioner was arrested and charged by Amtrak Police for criminal conduct that same day. Johnson Decl. ¶ 6. Thus, contrary to Petitioner's claim that his detention has been unaccompanied by any individualized determination that he presents a danger or flight risk, ICE conducted such an individualized custody assessment when it first took custody of him and decided that he would be detained upon an evaluation of danger and flight risk.[9]

Moreover, as explained above, an alien such as Petitioner who has been denied release by ICE may seek a *de novo* individualized custody review by an immigration judge, which occurs through a bond hearing in immigration court. *See* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d), 1003.19. Those regulations that provide for such review specifically provide that the authority in 8 U.S.C. § 1226 is delegated to the immigration judge for the purposes of making custody determinations for individuals like Petitioner who are in removal proceedings. *See, e.g.*, 8 C.F.R. § 1236.1(d)(1) ("Prior to [a] final [removal] order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in [8 U.S.C. § 1226] to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the [alien] may be released[.]"). Petitioner has only recently been detained and placed into removal proceedings, and so he has not yet sought a bond hearing before an immigration judge, which would provide him with another individualized custody assessment. Because he is indisputably detained under 8 U.S.C. § 1226(a), Petitioner has a right to seek a bond hearing with the immigration court, at which he can present evidence and arguments in favor of release, which

[9] To the extent Petitioner disagrees with ICE's discretionary custody determination, it is not subject to judicial review. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to judicial review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.").

satisfies due process. *Cf. Reno v. Flores*, 507 U.S. 292, 309 (1993) ("due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge").

To the extent that Petitioner argues that the fact that he has not yet received a bond hearing before an immigration judge violates procedural due process (despite the fact that he has not submitted a request to the immigration court for such a hearing yet), his petition provides no legal support for such a claim. Nor is there any dispute or impediment to him receiving such a hearing after he submits such a request to the immigration court.[10]

Moreover, Petitioner should be required to exhaust his administrative remedies in immigration court. "A habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention." *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018). "While § 2241 does not include a statutory exhaustion requirement, district courts in this Circuit have recognized such a requirement as a prudential matter 'before immigration detention may be challenged in federal court by a writ of habeas corpus.'" *Id.* (quoting *Paz Nativi v. Shanahan*, No. 16 Civ. 8496 (JPO), 2017 WL 281751, at *1 (S.D.N.Y. Jan. 23, 2017) (collecting habeas cases involving a pending BIA appeal of a bond determination that imposed a prudential exhaustion requirement)); *cf. Ceballos v. Ridge*, No. 04 Civ. 7304 (LAK), 2004 WL 2849604, at *2 (S.D.N.Y. 2004) (alien's request for release from ICE custody was unexhausted and would not be considered by district court). Indeed, judicial exhaustion "serves myriad purposes, including limiting judicial interference in agency affairs, conserving judicial resources, and preventing the frequent and deliberate flouting of administrative processes that could weaken the

[10] Petitioner only recently retained counsel, who ostensibly will also be representing him in his removal proceedings, and so counsel may request a bond hearing with the immigration court once they are ready to do so. Bond hearings are not automatically scheduled.

effectiveness of an agency." *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (brackets and quotation marks omitted).

Where the exhaustion requirement is "judicially imposed instead of statutorily imposed," several exceptions permit courts "to excuse a party's failure to exhaust administrative remedies." *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003). Such exceptions include when (1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question." *Id.* However, "[e]xhaustion is the rule, waiver the exception." *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992).

In light of the extensive process available to Petitioner while he is detained under Section 1226(a), his detention challenge is premature. Petitioner, who has been detained for approximately ten days, can seek a custody redetermination with the immigration court. To the extent the petition asserts that Petitioner's detention before first receiving a bond hearing violates his right to procedural due process, Petition ¶¶ 32-38, it is without merit both because (i) ICE made an individualized determination to detain Petitioner here, Johnson Decl. ¶ 6; Ex. D; and (ii) Petitioner is eligible for a bond hearing and has not requested one, *see* Johnson Decl. ¶ 12. As explained above, Petitioner is eligible for a bond hearing because, as an alien who was admitted to the United States and overstayed his visa, he is detained under Section 1226(a). *Id.* ¶¶ 6, 12. Consequently, the Court should require that Petitioner exhaust his administrative remedies before resorting to a habeas petition, as two other judges in this district recently held for aliens detained under § 1226(a). *See Capunay Guzman v. Joyce*, --- F.3d. ---, 25 Civ. 4777 (RA), 2025 WL

1696891, at *2-3 (S.D.N.Y. June 17, 2025); *Castillo Lachapel v. Joyce*, --- F. Supp. 3d. ---, 25 Civ. 4693 (JHR), 2025 WL 1685576, at *3-4 (S.D.N.Y. June 16, 2025).[11]

Furthermore, none of the exceptions to exhaustion applies here. To date, Petitioner has been detained for approximately ten days, and there is no indication that he has requested and been denied a bond hearing by an immigration judge. He cannot demonstrate that requesting a bond hearing would be futile or that it would not provide a genuine opportunity for adequate relief. Rather, because the immigration judge's determination at a bond hearing "could potentially moot the habeas petition counsels for the Court to stay its hand until the exhaustion of administrative review in the name of preserving scarce judicial resources and avoiding the possibility of duplicative or conflicting rulings." *Capunay Guzman*, 2025 WL 1696891, at *2 (brackets and quotation marks omitted); *accord Castillo Lachapel*, 2025 WL 1685576, at *3.

Nor can he avoid the requirement of exhaustion merely by invoking the language of due process. *See, e.g.*, *United States v. Gonzalez-Roque*, 301 F.3d 39, 47 (2d Cir. 2002) ("'Due process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal."). In short, Petitioner should be required to exhaust his request for a bond hearing with the immigration court in the first instance. *Cf. Michalski v. Decker*, 279 F. Supp. 3d at 496-97 ("Because [petitioner's] bond hearing may provide him with

[11] In *Valdez v. Joyce*, the court excused the petitioner from exhausting his administrative remedies in a case where the petitioner "may not be entitled to a bond hearing" because ICE had moved to dismiss that petitioner's removal proceedings on the ground he was an applicant for admission. *Valdez v. Joyce*, No 25 Civ. 4627 (GBD), 2025 WL 1707737, at *1 n.1 (S.D.N.Y. June 18, 2025). This is not the case here, where Petitioner is indisputably detained under § 1226(a) and unquestionably entitled to request and receive a bond hearing. Johnson Decl. ¶ 12. Several other courts in this district have also recently excused exhaustion, but those cases are likewise distinguishable, as there was also a dispute concerning which detention provision applied, and those cases also involved challenges to ICE's decision to re-detain the aliens, who had all been previously released, which is also not at issue here.

the relief he seeks . . . this Court concludes in the exercise of discretion that [petitioner] must exhaust these avenues before seeking judicial relief.").

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus should be denied.

Dated: September 25, 2025
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c) and Rule 3(C) of the Individual Rules of Practice in Civil Cases of the Hon. Jennifer L. Rochon, the undersigned counsel hereby certifies that this memorandum complies with the word-count limitations of this Court's Local Civil Rules and Judge Rochon's Individual Practices. As measured by the word processing system used to prepare it, and excluding the items set forth in the rule, there are 5,150 words in this memorandum.

/s/ Samuel Dolinger
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