UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUAN MARTIN BERNAL GARCIA,
Petitioner,

v.

LADEON FRANCIS, New York Field Office Director for U.S. Immigration and Customs Enforcement; PAUL ARTETA, Director of the Orange County Correctional Facility; ANNA C. LITTLE, Acting Chief Immigration Judge, Executive Office of Immigration Review; SIRCE E. OWEN, Acting Director, Executive Office of Immigration Review; PAMELA BONDI, Attorney General of the United States; KRISTI NOEM, Secretary of Homeland Security, and TODD M. LYONS; Acting Director, U.S. Immigration and Customs Enforcement, Respondents

Respondents.

PETITIONER'S REPLY BRIEF

No. 1:25-cv-07715

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INTRODUCTION

From the moment of his detention on September 15, Respondents have consistently deprived Juan Martin Bernal Garcia ("Petitioner") of statutory, regulatory, and constitutional protections. Respondents' own documents establish that after an initial arrest—consistent with a pattern of targeting queer-presenting individuals—they failed to properly issue him the charging document vesting them with authority to detain him, conduct the individualized assessment necessary to justify his detention, and instruct him of his ability to challenge his detention.

Instead of following the requisite policies, Respondents have moved Petitioner to five different detention facilities. He has been subjected to deplorable detention conditions, including sexualized threats so alarming he has been placed in solitary confinement for protection. Respondents' frequent movements of Petitioner—often just before he was scheduled to speak with potential legal counsel—have frustrated his ability to obtain counsel and communicate with desperately worried friends and family. They have also prevented him from pursuing custody redetermination (or "bond") or immigration relief.

Respondents' asserted basis for Petitioner's detention—a single arrest for lewdness—could not, on its own, justify his detention. However, even that flimsy rationale has fallen away, as the District Attorney's Office declined to prosecute. His detention pursuant to 8 U.S.C. § 1226(a) without any individualized assessment cannot withstand constitutional scrutiny. Petitioner thus respectfully requests that this Court order Respondents to return him to New York, immediately release him from custody, and enjoin him from rearrest without compliance with the procedural requirements of 8 U.S.C. § 1226.

FACTUAL BACKGROUND

Petitioner is a Colombian national and professional dancer. Declaration of Lauren Kostes ¶7 ("Kostes Decl."). He last entered the United States in 2022 on a B1/B2 visa after he was assaulted in Colombia. *Id.* He has remained here since. *Id.* Petitioner is a beloved member of the dance community in New York City. *Id.* ¶9; *see generally* Exh. B. He enjoys long walks, Sunday night dinners with his housemates in Brooklyn, and caring for his cat Sashita. Kostes Decl. ¶9.

On September 15, 2025, Amtrak Police arrested Petitioner at Penn Station. His arrest appears to be consistent with a pattern of Amtrak Police targeting queer-presenting men without probable cause in Penn Station restrooms for "lewdness."[1] In their report, the Amtrak Police attempt to characterize Petitioner's urination in a public bathroom as criminal. Opp. Exh. E. On September 26, 2025, the District Attorney's Office declined to prosecute the charge. Exh. A.

Amtrak Police immediately transferred Petitioner to Immigration and Customs Enforcement ("ICE"), and he has remained in ICE detention since. Kostes Decl. ¶12. According to Petitioner, upon his detention, no one explained why he was being detained or that he could contest his detention. *Id.* Respondents contend that Petitioner was served with a Notice to Appear ("NTA") on September 15. Opp. Declaration of Kareem Johnson ("Johnson Decl."). However, the NTA lacks Petitioner's signature, suggesting that he was never properly served. Opp. Exh. C.

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[1] A similar policy was the subject of recent class action litigation against the Port Authority for "discriminatory practices" of having plainclothes officers falsely arrest queer presenting individuals for public lewdness. *See Holden v. Port Auth. of New York & New Jersey*, 521 F. Supp. 3d 415, 433 (S.D.N.Y. 2021) (denying defendants summary judgment on claims that Port Authority "had a *de facto* policy that caused the targeting of gay or gender non-conforming men with unconstitutional police tactics"). This week, the practice at Penn Station has received substantial coverage. *See, e.g.* The Legal Aid Society, *Statement on Surge of Public Lewdness Arrests by Amtrack Police in Penn Station Bathrooms Allegedly Targeting LGBTQ+ New Yorkers* (Sept. 25, 2025), *available at* https://legalaidnyc.org/wp-content/uploads/2025/09/Statement-on-Surge-of-Public-Lewdness-Arrests-by-Amtrak-Police-in-Penn-Station-Bathrooms-Allegedly-Targeting-LGBTQ-New-Yorkers-.pdf; NYC City Council LGBTQIA+ Caucus, *Statement* (Sept. 25, 2025), *available at* https://www.facebook.com/erikbottchercitycouncil/posts/as-co-chairs-of-the-new-york-city-council-lgbtq-caucus-we-are-greatly-disturbed-/804108215497198/; Ramsey Khalifeh, The Gothamist, *Cruising crackdown in Penn Station bathroom puts at least 20 men in ICE custody* (Sept. 24, 2025), *available at* https://gothamist.com/news/cruising-crackdown-in-penn-station-bathroom-puts-at-least-20-men-in-ice-custody.

Similarly, Respondents contend that Petitioner had an "initial custody determination" whereby they determined that Petitioner would be detained pending removal. Johnson Decl. ¶6. However, like the NTA, the custody determination lacks Petitioner's signature, suggesting that no ICE official explained to him the grounds for his detention or his ability to challenge his detention. Opp. Exh. D.

On September 16, 2025, Petitioner's friends contacted the New York Legal Assistance Group ("NYLAG"). Kostes Decl. ¶15. Over the following week, NYLAG repeatedly attempted to reach him. *See generally id.* During this time, the Respondents transferred him from 26 Federal Plaza in New York City to Delaney Hall, New Jersey, and, notwithstanding a September 18 order from this Court enjoining his transfer, further to Port Isabel, Texas; Florence, Arizona; and Eloy, Arizona. Despite over a dozen requests to schedule legal calls, counsel has had only two brief, unscheduled calls with Petitioner, the first of which was not confidential. *See generally id.* Petitioner reports deplorable conditions in detention, including being denied showers, having his sole change of clothes be taken from him, and receiving sexually threatening comments that forced him into solitary confinement. *Id.* ¶¶40-44.

On September 23, 2025, Respondents finally docketed an NTA, initiating removal proceedings and scheduling him for a Master Calendar Hearing on September 26, 2025. *Id.* ¶¶35-37. This hearing was cancelled hours before it was set to take place. At filing, it has not been rescheduled. *Id.*

ARGUMENT

Petitioner's arrest and detention violate his substantive and procedural due process rights. "Freedom from imprisonment—from government custody, detention, or other physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678,

690 (2001). "Case after case instructs us that in this country liberty is the norm and detention 'is the carefully limited exception.'" *Velasco-Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020) (quoting *U.S. v. Salerno*, 481 U.S. 739, 755 (1987)).

Courts—including this one—routinely recognize that the detention of noncitizens without process violates the due process clause. *See Zhu v. Genalo*, 2025 WL 2452352 at *9–10 (S.D.N.Y. Aug. 26, 2025) (Rochon, J.) (ordering the release of an noncitizen based on due process violations); *Valdez v. Joyce*, 2025 WL 1707737 (S.D.N.Y. June 18, 2025) (same); *Lopez-Benitez v. Francis*, 2025 WL 23713588 (S.D.N.Y. Aug. 13, 2025) (same); *Munoz Materano v. Arteta*, 2025 WL 2630826 (S.D.N.Y. Sept. 12, 2025) (same); *Kelly v. Almodovar*, 2025 WL 2381591 (S.D.N.Y. Aug. 15, 2025) (same).

I. Petitioner's detention without cause violates procedural due process

Contrary to Respondent's contentions, Johnson Decl. ¶6, Petitioner's detention pursuant to 8 U.S.C. § 1226(a) without the proper service of a NTA or any individualized assessment violate his procedural due process rights. A person's liberty cannot be infringed upon without "adequate procedural protections." *Zadvydas*, 533 U.S. at 690-91. The *Mathews* test, which weighs (1) private interest, (2) risk of erroneous deprivation, and (3) Government interest, applies to noncitizens. *Black v. Decker*, 103 F.4th 133, 147 (2d Cir. 2024) (collecting cases) (citing *Mathews v. Eldrige*, 424 U.S. 319 (1976)); *see also Velasco Lopez*, 978 F.3d at 851.

A. Petitioner has a clearly established private interest in being released

As to the first prong, Petitioner invokes "the most significant liberty interest there is—the interest in being free from imprisonment." *Velasco-Lopez*, 978 F.3d at 851 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)); *see also Zadvydas*, 533 U.S. at 690. "These requirements take on particular significance" when a petitioner is "'incarcerated under conditions' that are

substantially worse than 'those imposed on criminal defendants sent to prison following convictions for violent felonies and other serious crimes.'" *Kelly*, 2025 WL 2381591, at *2 (quoting *Boumediene v. Bush*, 533 U.S. 723, 783 (2008)). Just so here: Petitioner has been deprived of basic hygiene, had limited access to food, been forced to endure excessively cold conditions, and been the subject of sexualized threats. Kostes Decl. ¶¶40-44.

Petitioner's private interest is particularly acute because Respondents failed to follow their own obligations. Federal law sets out clear requirements for the steps ICE must take to detain a noncitizen under these circumstances. After a warrantless arrest, the official must determine if there is "*prima facie* evidence" that the arrested noncitizen is present in violation of the immigration laws. 8 C.F.R. § 287.3(a). If the official determines there is such evidence, they "will refer the case to an immigration judge for further inquiry." *Id.* Once an individual is served with an NTA and placed into removal proceedings, section "1226(a) and its implementing regulations require ICE officials to make an individualized custody determination.'" *Lopez-Benitez*, 2025 WL 2371588 at *10 (quoting *Velesaca v. Decker*, 458 F.Supp.3d 224, 241 (S.D.N.Y. 2020)); 8 C.F.R. § 236.1(c)(8).

This requirement flows from the text of § 1226(a), which states the Attorney General "may continue to detain" an arrested noncitizen, as "[t]he Supreme Court has interpreted similar 'may' language in other provisions of the INA to require the Attorney General to make 'some level of individualized determination,'" *Velesaca*, 458 F.Supp.3d at 235, and from the regulations implementing § 1226(a). *Lopez Benitez*, 2025 WL 2371588 at *10. Those regulations instruct that "DHS officers [have] the authority to grant bond or conditional parole, and pursuant to such authority, a DHS officer must make an individualized determination as to the appropriateness of detention based on two factors—whether the noncitizen is a 'danger to

property or persons' and is "likely to appear for any future proceeding.'" *Id.* (quoting 8 C.F.R. § 1236.1(c)(8)). If the ICE official determines that the noncitizen poses a danger or a flight risk and detains him, that noncitizen may request redetermination before an Immigration Judge. 8 C.F.R. §§ 1003.19(d)-(e).

Respondents' own documents confirm that they detained Petitioner without providing him with the opportunity to demonstrate that he was not a flight risk nor danger and held him for over a week without any opportunity to be heard or to challenge his detention. "ICE, like any agency, 'has the duty to follow its own federal regulations." *Zhu*, 2025 WL 2452352 at (citing *Rombot v. Souza*, 2017 WL 5178789 (D. Mass. Nov. 8, 2017). There can be "no dispute" that in exercising its authority under section 1226(a), "ICE is required to adhere to the basic principles of due process." *Kelly*, 2025 WL 2381591 at *4. Respondents did not follow this process for Petitioner. First, they failed to serve him a sufficient NTA, which would initiate removal proceedings and provide the basis for his detention, for eight days. Although Respondents assert that they provided Petitioner with an NTA on September 15, Johnson Decl. ¶6, the NTA itself substantiates this: it lacks Petitioner's signature to indicate he received it. Opp. Exh. C.[2]

Second, they failed to conduct a custody determination analysis or offer Petitioner the opportunity to seek bond. ICE failed to conduct an individualized determination wherein Petitioner had the opportunity to demonstrate that his release would pose neither a danger nor flight risk. *See id. Kelly*, 2025 WL 2381591 at *3. Respondents provided a custody determination

[2] Although Respondents assert that the authority to detain Petitioner was 8 U.S.C. § 1226(a), Opp. at 5, § 1226(a) only permits detention of noncitizens "[o]n a warrant issued by the Attorney General." Because Petitioner's NTA was not docketed until September 23, Johnson Decl. ¶¶ 10-11, § 1226 could not have applied until that date. Respondents do not offer any alternative basis for his detention between September 15 and 23, raising potential Fourth Amendment concerns. *See, e.g., Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (when authorities arrest someone without a warrant, that person must receive a judicial probable cause determination within 48 hours of their arrest).

document, Opp. Exh. D, that neither explains why Petitioner is a danger or flight risk nor contains his signature indicating receipt. They also failed to inform Petitioner that he could appeal an adverse determination to an Immigration Judge. Kostes Dec. ¶12; Opp. Exh. D; *see* 8 C.F.R. §§ 1003.19(d)-(f). As this Court recently held, Respondents' failure to follow its own regulations in detaining the petitioner is, itself, a sufficient basis to grant this Petition. *See Zhu*, 2025 WL 2452352 at *9; *see also Samb v. Joyce*, 2025 WL 2398831 at *3 (S.D.N.Y. Aug. 19, 2025).

Respondents point to Petitioner's single arrest to justify his detention without process. Opp. at 12. But this fact neither demonstrates that Petitioner is a danger to the community, nor that his unlawful detention without any pre-deprivation process is constitutionally permissible. Notably, the District Attorney's Office has declined to prosecute Petitioner. Exh. A. But even prior, the existence of a single misdemeanor charge is insufficient to justify detention. Recently, the Court ordered the petitioner's immediate release based on ICE's failure to comply with the pre-detention process set out in § 1226(a), even where the noncitizen had multiple pending assault charges. *See generally Kelly,* 2025 WL 2381591. *Kelly* explained that not only do noncitizens retain their right to an individualized assessment even if they have pending criminal charges, the "mere 'review' of a RAP sheet [was] not tantamount to an individualized assessment of a suspect's flight risk or dangerousness." *Id.* at *3. There, as here, the mere existence of a (much less serious) pending charge does not absolve ICE of their statutory and constitutional obligations to provide noncitizens with an individualized assessment justifying their detention.

B. There is a high risk of erroneous deprivation of Petitioner's liberty interest

Second, the risk of erroneous deprivation is enormous. *Black*, 103 F.4th at 152 (for the second prong of the *Mathews* inquiry "[t]he only interest to be considered…is that of the detained individuals—not the government"); *see also Mathews*, 424 U.S. at 321. This is particularly true here, where ICE detained, without any modicum of process, a young man with strong community ties and no criminal convictions; Petitioner is neither a flight risk nor a danger to the community. *See, e.g., Lopez v. Sessions,* 2018 WL 2932726, at *12 (S.D.N.Y June 12, 2018). Thus, his detention without any individualized assessment "establishes a high risk of erroneous deprivation of his protected liberty interest." *Lopez Benitez*, 2025 WL 2371588, at *12 (quoting *Valdez*, 2025 WL 1707737, at *4)).

C. The Government has no interest in Petitioner's continued detention

Third, Respondents' detention of noncitizens under 8 U.S.C. § 1226(a) is "valid where it advances a legitimate governmental purpose," such as "ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community." *Valdez*, 2025 WL 1707737 at *4 (quoting *Velasco Lopez*, 978 F.3d at 854). These interests are not advanced by Petitioner's detention. Petitioner is not a danger to the community; he has no criminal convictions and his only arrest—which prosecutors have now declined to prosecute, Exh. A—appears to have been solely of perceived sexuality. *See* n.1, *supra*. Moreover, in the three years since entering the United States on a visa, Petitioner has made significant ties in the community and contributed greatly to the arts in New York City. Kostes Decl. ¶9; *see generally* Exh. B. There is substantial evidence in the record showing that Petitioner is neither a danger to the community nor a flight risk, and none to the contrary. Respondents have no interest in Petitioner's continued detention.

Respondents nevertheless contend that his detention does not violate the substantive due process clause because he overstayed his visa and he had a—now moot—misdemeanor charge. Opp. at 10. This is incorrect. First, overstaying a visa is insufficient to establish flight risk, which requires an individualized determination. Second, contrary to Respondents' assertions, a perfunctory decision based on the existence of a single charge—without any finding of guilt—is wholly insufficient to justify Petitioner's detention. *See Kelly*, 2025 WL 2381591 at *3.

Third, as explained in note 4, *supra*, it is, at best, uncertain whether Petitioner's detention was permissible under § 1226(a) prior to the docketing of his Notice to Appear on September 23. In any event, whether it was *statutorily* permissible to detain him does not speak to whether it was *constitutionally* permissible.

II. Petitioner's continued detention violates his substantive due process rights

Courts have identified only two legitimate purposes for immigration detention: mitigating flight risk and preventing danger to the community. *See Zadvydas*, 533 U.S. at 690; *Velasco Lopez*, 978 F.3d at 853-54. In the absence of any evidence for either of those purposes, detention violates the substantive due process right to be free from purposeless confinement. *See Valdez,* 2025 WL 1707737 at *3. As there is no evidence that Petitioner's detention serves either purpose, *see* Section I, *supra*, his continued detention violates his substantive due process rights.

Petitioner has not been convicted of any crimes. Indeed, as of the filing of this petition, the District Attorney's Office has declined to prosecute Petitioner. Petitioner's detention was and is unwarranted. The existence of a single charge alone—without any conviction—does not justify detention, and that charge exists no more. *See Villiers v. Decker*, 31 F.4th 825 (2d Cir.

2022); *cf. Oyedeji v. Ashcroft*, 332 F. Supp. 2d 747 (M.D. Pa. 2004) (presumption of dangerousness based on criminal history "does not satisfy due process").

Petitioner's detention is not supported by any documented flight risk. He has numerous and deep community ties, as evidenced by the outpouring of support he has received in detention. *See generally* Exh. B. In addition, Petitioner has now secured immigration legal counsel and assistance with filing an application for relief—the two factors most strongly correlated with noncitizens appearing in court.[3] There is therefore no legitimate basis for his ongoing detention, and that detention therefore violates Petitioner's substantive due process rights.

III. Petitioner is not required to exhaust administrative remedies

Petitioner is not required to exhaust administrative remedies. "[A]dministrative exhaustion before immigration detention may be challenged in federal court by a writ of habeas, as a prudential matter, exhaustion is not a statutory requirement." *Quintanilla v. Decker*, 2021 WL 707062 at *2 (S.D.N.Y. Feb. 22, 2021) (internal citations omitted). Exhaustion may be excused where (1) there is no genuine opportunity for adequate relief (2) irreparable injury may occur (3) remedies are futile or (4) Petitioner raises constitutional questions. *Id.* (quoting *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003)). Any of these exceptions, alone, may excuse the exhaustion requirement. Here, all apply.

First and third, exhaustion of administrative remedies would provide "no genuine opportunity for relief" and is "futile." *Joseph v. Decker*, 2018 WL 6075067 at *6 (S.D.N.Y. Nov. 21, 2018); *see also Rodriguez-Figueroa v. Barr*, 442 F. Supp. 3d 549, 561 (W.D.N.Y. 2020). It

[3] *See e.g.* Nina Siulc and Noelle Smart, *Evidence Shows that Immigrants Appear for Most Immigration Court Hearings* (Oct. 2020), *available at* https://vera-institute.files.svdcdn.com/production/downloads/publications/immigrant-court-appearance-fact-sheet.pdf.

would be futile for Petitioner to turn to Immigration Court for constitutional claims. Moreover, as the Court found in *Kelly*, as there was no individualized initial determination in detaining the petitioner, administrative agencies therefore cannot genuinely conduct *re*determination. *See Kelly*, 2025 WL 2381591 at *3. In addition, because of ICE's failure to follow its own policies, Petitioner could not have asked for a custody redetermination hearing as he was never informed of this possibility. This is evidenced by the fact that the very custody determination that Respondents rely upon to justify Petitioner's detention lacks his signature acknowledging receipt. Opp. Exh. D. Finally, ICE has thwarted NYLAG and Petitioner's repeated attempts speak with one another to the point of futility. *See generally* Kostes Decl.

Second, Petitioner is at risk of irreparable injury. He was detained for over a week before the docketing of the charging document. There was no basis to his detention during this time. *See* n.2, *supra*. Unlawful detention is itself irreparable injury. *Arias-Gudino*, 2025 WL 1162488 (M.D.PA. May 30, 2025) at *13; *Chipantiza-Sisalema v. Francis,* 2025 WL 1927931 (S.D.N.Y. Jul. 3, 2025) at *3. Further, Petitioner fears and is at risk of experiencing sexual violence as a queer man in ICE detention.[4] He is currently in solitary confinement as Eloy Detention Center offers no other protection to individuals at risk of violence. Kostes Decl. ¶43.

Fourth, Petitioner raises constitutional questions discussed *supra*, Sections I-II, that cannot be resolved in an administrative proceeding. The Immigration Courts cannot provide a genuine opportunity for relief as they are incompetent to address constitutional questions. *See, e.g., Lopez Benitez*, 2025 WL 2371588 at *13 ("'a [bond] hearing is no substitute for the requirement that ICE engage in a deliberative process prior to, or contemporaneous with, the

[4] *See, e.g.* Immigration Equality, *New Report Finds Widespread Abuse of LGBTQ and HIV-Positive People in ICE and CBP Jails* (June 18, 2024), *available at* https://immigrationequality.org/press/press-releases-2/new-report-finds-widespread-abuse-of-lgbtq-and-hiv-positive-people-in-ice-and-cbp-jails/.

initial decision to strip a person of the freedom"). As such, he is not required to exhaust administrative remedies. *Beharry v. Ashcroft*, 329 F.3d 5 1 at 62; *see also Quintanilla*, 2021 WL 707062 at *2.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court order Respondents to immediately release him from immigration detention, or, in the alternative, that Respondents provide Petitioner with a bond hearing within five days of the Court's order at which ICE bears the burden of establishing by clear and convincing evidence that he poses a danger to the community or is a flight risk.

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 Microsoft Word, and excluding items set forth in the rule, there are 3494 words in this brief.

/s/Melissa Lim Chua