**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| **N-N-,** | : | |
| | : | |
| ***Petitioner,*** | : | |
| | : | |
| **v.** | : | **CIVIL NO. 25-5494** |
| | : | |
| **BRIAN MCSHANE, et al.** | : | |
| | : | |
| ***Respondents.*** | : | |

**ORDER**

AND NOW, this ___ day of _____, 2025, upon consideration of Respondents' Response to the Rule to Show Cause and Opposition to Petition for Writ of Habeas Corpus, it is ORDERED that the Petitioner's request for release from an ankle monitor and enhanced electronic surveillance is DENIED. It is FURTHER ORDERED that the Petitioner's request for declaratory and injunctive relief is also DENIED.

BY THE COURT:

_____
HONORABLE KAI N. SCOTT
*Judge, United States District Court*

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**RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS**

## I. INTRODUCTION

Petitioner N-N-, despite his unlawful presence in the United States, not content with release from detention while his removal proceedings are pending, filed a habeas petition asking this Court to remove an ankle monitor used by Immigration and Customs Enforcement (ICE) to monitor his location. Petitioner contends that ICE is prohibited from using an ankle monitor because he posted bond in accordance with an immigration judge's order. Petitioner's claims are misguided and rely entirely on the notion that only an immigration judge can set conditions of release following a bond hearing. Contrary to the central proposition embedded in the numerous arguments raised in the petition, ICE has statutory and regulatory authority to determine if an alien, unlawfully present with pending removal proceedings, is subject to conditions of release. *See* 8 U.S.C. § 1226(a)(2)(A).

Accordingly, N-N-'s conditions of release imposed by ICE are authorized by statute and his Petition should be denied.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Factual Background[1]

Petitioner N-N- is a native and citizen of Nigeria. He entered the United States on a K1 visa on December 3, 2024, with authorization to remain until March 2, 2025. N-N- remained in the United States beyond his authorized period. On April 16, 2025, Upper Darby Police arrested N-N- and he was charged with Simple Assault and Harassment. On May 31, 2025, ICE Enforcement and Removal (ERO) detained N-N-, served him with a Notice to Appear (NTA), and started removal proceedings. On August 5, 2025, an immigration judge ordered N-N-'s release upon posting $3,000 bond. He was released on August 7, 2025, and placed under ICE's Intensive Supervision Appearance Program (ISAP).

ICE created ISAP in 2003 as an alternative to detention. ISAP enables ICE to better ensure that aliens attend their removal proceedings by providing electronic monitoring and regular check-ins.

### B. Procedural History

On September 24, 2025, N-N- filed his Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive relief. (ECF No. 1). On September 29, 2025, the Court issued a Rule to Show Cause why the relief N-N- seeks should not be granted.

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[1] The facts and procedural information are taken from the habeas petition and attached documents.

The Court ordered defendants to be served by the Clerk's office and file their response to the Order to Show Cause by October 1, 2025.

## III. LEGAL STANDARD

The habeas petitioner has the burden to demonstrate that his custody violates the United States' Constitution, laws, or treaties. *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Where, as here, the Supreme Court has found the statute at issue facially constitutional, *see Demore v. Kim*, 538 U.S. 510, 513-14 (2003), a petitioner must make a strong showing to demonstrate that the law is unconstitutional as applied to him, *see United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) ("This Court does and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to execution of that power."); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 254 (E.D. Pa. 1975) ("[D]efendants here carry a heavy burden, for a strong presumption of validity attaches to an Act of Congress.").

N-N- is not seeking release from detention but rather asks for declaratory and injunctive relief ordering ICE to remove his ankle monitor. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). Instead, injunctions "may only be awarded upon a clear showing that the [movant] is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Petitioner is unable to meet his burden.

## IV. ARGUMENT

### A. ICE May Set Conditions of N-N-'s Release.

The question confronting the Court is whether Immigration and Customs Enforcement (ICE) has the authority to place conditions upon an alien's release from custody. That authority is found in 8 U.S.C. § 1226(a)(2) of the Immigration and Nationality Act ("INA") and 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8).

The INA provides distinct sections and regulations that delineate and distinguish between custody determinations by ICE and an immigration judge. ICE's authority is found in 8 U.S.C. § 1226 (INA § 236(a)) and 8 C.F.R. § 1236(c), while the immigration judge's authority is found in 8 C.F.R. § 1236(d). This division is important because an immigration judge has authority to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released. . . ." 8 C.F.R. § 1236(d)(1). And most relevant to this matter — an immigration judge is authorized to review conditions of relief imposed by ICE. *Id.*; *see also Matter of Aguilar-Aquino*, 24 I&N Dec. 747 (BIA 2009); *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009). Conversely, Congress authorized ICE to detain, release on bond and *impose conditions* on that release, or conditionally parole an alien in removal proceedings. 8 U.S.C. § 1226(a)(1)–(2). Consequently, while an immigration judge may release on a bond order, the power to impose release conditions rests solely with ICE – with an opportunity for an IJ to review. Petitioner asks this Court to find ICE lacks that statutory authority. For that reason alone, the Rule to Show cause is satisfied and the habeas petition should be denied.[2]

[2] Due to the brief time allotted to the Respondents to formulate a response to the 30-page petition, Respondent's will—for the purpose of this filing–accept Petitioner's

### B. Petitioner's Arguments Fail Because ICE placing Conditions on Release is Authorized by Statute and Regulation.

Petitioner makes seven distinct arguments that can be grouped into three categories. First, Petitioner argues that placement of the ankle monitor violates both his substantive and procedural Fifth Amendment due process rights. Second, Petitioner argues that his ankle monitor violates the Administrative Procedures Act because it is a) contrary to law, b) arbitrary and capricious, and c) exceeds ICE's statutory authority. Third, Petitioner argues the ankle monitor violates the *Accardi* doctrine because ICE allegedly is not following its own regulations and that requiring the ankle monitor is *ultra vires*.

#### 1. ICE Did Not Violate the Fifth Amendment by Imposing Conditions on Petitioner's Release.

As a threshold matter, Petitioner's broad claim that the ISAP program is generally unconstitutional is refuted by case law. *See Nguyen v. B.I. Inc.*, 435 F. Supp. 2d 1109 (D. Or. 2006) (ISAP does not violate the Constitutional rights of an alien subject to a final removal order). The Due Process Clause requires that no individual may be "deprived of life, liberty, or property, without due process of law." U.S. CONST. AM. V. To the extent that Petitioner is challenging ISAP as applied to him, ICE's authority to apply conditions to an alien released from physical custody is statutory. *See* 8 U.S.C. § 1226(a)(2) [aliens in proceedings] and 8 U.S.C. § 1331 [aliens under final order of removal]. Petitioner relies heavily on the proposition that a bond hearing under 8 C.F.R. § 1003.19(a)(c) & (f) is the sole authority governing an alien's release from pre-removal

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three pages of background information about ICE's Intensive Supervision Appearance Program (ISAP). Respondents do not accept Petitioner's characterizations of the ISAP program or that the "Helland memo" is relevant to the Court's determination of this case.

order detention. That is incorrect. The immigration judge's authority is to grant or deny bond to an alien, but also to review ICE's decision regarding conditions of release. 8 C.F.R. § 1236.1(d).

**a) Petitioner Failed to Exhaust Administrative Remedies.**

In this case, Petitioner attempts to dismiss the value of the administrative process afforded to him – to either file an appeal of the conditions of his release to the immigration judge or request review by the district director. 8 C.F.R. § 1236.1(d)(1)-(2), *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 98 (BIA 2009) ("[S]ection 236(a)(2)(A) of the Act clearly gives the Attorney General authority to place conditions on an alien's release from custody when setting a monetary bond of at least $1,500.").

While exhaustion in this context is not required by statute, the regulatory process affords Petitioner the opportunity to redress his concerns administratively. Moreover, following it would provide this Court a full record to review should Petitioner seek district court review. *See Santos-Zacaria v. Garland*, 598 U.S. 411, 418, 143 S. Ct. 1103, 1113, 215 L. Ed. 2d 375 (2023) ("That is, exhaustion promotes efficiency, including by encouraging parties to resolve their disputes without litigation.") Petitioner's failure to exhaust should cause this Court to dismiss the habeas petition in favor of the administrative process.

**b) Placement in ISAP Does not Violate Substantive Due Process.**

Petitioner's substantive due process argument is easily dismissed. The reasoning of the district court in Nguyen is equally applicable to an alien in removal proceedings. *See Nguyen*, 435 F.Supp.2d at 1114-15 ("The liberty interest at issue in ISAP is not fundamental as applied to final-order aliens.") *citing Demore v. Kim*, 538 U.S. 510, 521 (2003), quoting *Mathews v. Diaz*, 426 U.S. 67, 78–80 (1976) ("In the exercise of its

broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to its citizens").

Petitioner's argument that an ankle monitor is the same as physical custody is not tenable. Respondents do not dispute that Petitioner remains "in custody" for habeas purposes. For example, reporting requirements satisfy the "in custody" requirement for habeas jurisdiction. But ICE's means of monitoring does not render an alien more or less "in custody" for habeas purposes. The use of an ankle monitor does not render an alien "more" in custody.

**c) Placement in ISAP Does not Violate Procedural Due Process**

The Third Circuit established three principles for procedural due process in removal proceedings. It has explained that procedural due process requires "(1) 'factfinding based on a record produced before the decisionmaker and disclosed to him or her'; (2) the opportunity to 'make arguments on his or her own behalf'; and (3) 'an individualized determination of his [or her] interests.'" *Calderon-Rosas v. Att'y Gen. United States*, 957 F.3d 378, 384 (3d Cir. 2020). In this case, procedural due process is satisfied because the Petitioner had the opportunity to appeal to the immigration judge ICE's decision regarding conditions of release. 8 C.F.R. § 1236.1(d); *Matter of Garcia-Garcia*, 25 I&N Dec. 93 (BIA 2009). That Petitioner failed to so do does not alter the fact that he had the administrative opportunity to seek review of the conditions of his release. Therefore, Petitioner's procedural due process claim fails.

### 2. The APA Does not Afford Petitioner an Avenue of Relief.

Petitioner's claims under the APA are without merit because he failed to exhaust administrative remedies and because habeas provides an adequate avenue for relief. APA relief is only available where relief is not otherwise provided by law.

Further, because APA review is limited, the Court requires an administrative record to review the appropriateness of the agency's determination. Courts have long recognized that review of final agency action is sharply limited. *See Zizi v. Bausman*, 306 F. Supp. 3d 697, 702 (E.D. Pa. 2018), *aff'd sub nom. Zizi v. Field Off. Dir.*, 753 F. App'x 116 (3d Cir. 2019) ("Under the APA, a district court may only set aside agency action if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A)."). Ultimately, even if Petitioner could properly present an APA claim, it must fail because the agency's decision is not contrary to law and the Court has not yet reviewed an administrative record to determine if ICE's decision regarding conditions of release was arbitrary or capricious.

### 3. Use of an Ankle Monitor is in Accordance With ICE's Statutory Authority to Set Conditions of Release.

Finally, Petitioner's invocation of the *Accardi* doctrine and allegation that use of an ankle monitor is *ultra vires* fail because, as explained fully above, ICE has statutory and regulatory authority for enhanced supervision and using an ankle monitor. Consequently, ICE's decision to use an ankle monitor is not contrary to regulation and is not contrary to law.

## CONCLUSION

While removal proceedings are pending, ICE is authorized by statute and regulation to set conditions upon an alien's release from physical custody. Petitioner's habeas petition and complaint for declaratory judgment should be denied.

Respectfully submitted,

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Dated: October 1, 2025

**CERTIFICATE OF SERVICE**

I certify that on this date, I caused a copy of the foregoing Response to the Court's Order to Show Cause and the Petition for Writ of Habeas Corpus to be filed with the Clerk of Court via electronic court filing (ECF).

Dated: October 1, 2025

*/s/ Anthony St. Joseph*
Anthony St. Joseph
Assistant United States Attorney