UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 25-cv-24964-DPG

DIMITRI ALBERT EDOUARD VORBE,

Petitioner,

v.

FIELD OFFICE DIRECTOR,
Miami Field Office,
U.S. Immigration and Customs Enforcement,

Respondent.
_____/

PETITIONER'S TRAVERSE

The Petitioner hereby submits his Traverse in Response to the Respondent's Return [ECF No. 9], and in support of his Petition for Writ of Habeas Corpus [ECF No. 1].

In his Writ of Habeas Corpus [ECF No. 1], the Petitioner makes two claims. *Primarily*, he challenges his designation and subjection to continued mandatory detention under to 8 CFR § 1003.19(h)(2)(i)(C).[1] [ECF No. 1, ¶ 53-56]. He argues that the application of 8 CFR § 1003.19(h)(2)(i)(C) to him impermissibly strips the Immigration Judge (IJ) of jurisdiction to consider his motion for custody redetermination[2] and is *ultra vires* by unlawfully broadening the scope of mandatory detention[3] under 8 U.S.C. § 1226(c), when Congress only proscribed

[1] "[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens: (C) Aliens described in section 237(a)(4) of the Act [8 U.S.C. § 1227(a)(4)]." 8 CFR 1003.19(h)(2)(i)(C).

[2] "An alien requesting a redetermination of his or her custody status under section 236(a) [8 U.S.C. § 1226(a)] must establish to the satisfaction of the Immigration Judge and the Board 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 R-A-V-P*, 27 I&N Dec. 803 (BIA 2020).

[3] "By expressly stating that the covered aliens may be released 'only if' certain conditions are met, the statute expressly and unequivocally imposes an affirmative prohibition on releasing detained aliens under any other conditions." *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018) (alteration added; emphasis and citation omitted; see

mandatory detention for "several enumerated categories involving criminal offenses and terrorist activities," *Jennings v. Rodriguez*, 138 S. Ct. 830, 837-38 (2018) (quoting § 1226(c)(1)), which does **not include** noncitizens, like the Petitioner, charged as removable under § 1227(a)(4)(C) for foreign policy concerns. *Id.* Thus, the Petitioner alleges that his continued detention without a full custody redetermination hearing before an IJ is unlawful, as it violates the INA and the Due Process Clause. U.S. Const. Amend. V. [ECF No. 1, ¶ 73-76]

In the alternative, the Petitioner argues that DHS/ICE has failed to meet its burden that he falls within the scope of 8 CFR § 1003.19(h)(2)(i)(C) as an "alien described in" § 1227(a)(4). [ECF No. 1, ¶ 69-72]. The petitioner hereby withdraws his alternative argument [ECF No. 1, ¶ 69-72] and narrows the issue of this case to the primary argument presented in his petition. [ECF No. 1, ¶ 53-56, 73-76].

In the Return [ECF No. 9], the Respondent fails to directly address the merits of the Petitioner's primary argument, and any contention as to that issue should be deemed waived and forfeited. Instead, the Respondent presents various arguments regarding exhaustion and jurisdiction. [ECF No. 9, pp. 7-18. The Petitioner responds in turn.

I. The Petitioner need not exhaust his administrative remedies by appealing the Immigration Judge's bond determination to the Board of Immigration Appeals.

The Respondent's principal argument is that the Court cannot grant the Petitioner's Writ of Habeas Corpus and order the IJ to consider his custody redetermination request because he has yet to appeal the IJ's bond decision—denying said request because "[t]he Court lacks jurisdiction" [ECF No. 1-3, pp. 25-26; ECF No. 9-11]—to the Board of Immigration Appeals, and has thus failed to exhaust his administrative remedies. This argument is incorrect.

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also *id.*, (holding § 1226(c) "mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings 'only if' the alien is released for witness-protection purposes.").

No exhaustion is statutorily required for the Petitioner's habeas claims because "Section 2241 itself does not impose an exhaustion requirement," *Santiago-Lugo* v. *Warden*, 785 F. 3d 467, 474 (CA11 2015)." Exhaustion in the habeas context is at most a "non-jurisdictional," *id.*, at 475, "judicially-created . . . doctrine," *Haitian Refugee Ctr., Inc.* v. *Nelson*, 872 F.2d 1555, 1561 (CA11 1989) (*HRC* v. *Nelson*), aff'd sub nom. *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U. S. 479 (1991), subject to various exceptions. See *Jaimes* v. *United States*, 168 Fed. Appx. 356, 359, n. 4 (CA11 2006) ("judicially-created exhaustion requirements may be waived by the courts for discretionary reasons") (quoting *Gallo Cattle Co.* v. *U. S. Dep't of Agric.*, 159 F. 3d 1194, 1197 (CA9 1998)); *Richardson* v. *Reno*, 162 F. 3d 1338, 1374 (CA11 1998) (*Richardson I*), cert. granted, judgment vacated on other grounds, 526 U.S. 1142 (1999) ("judicially developed exhaustion requirements might be waived for discretionary reasons by courts").[4] For example, "a petitioner need not exhaust his administrative remedies 'where the administrative remedy will not provide relief commensurate with the claim.' " *Boz* v. *United States*, 248 F. 3d 1299, 1300 (CA11 2001), abrogation on other grounds recognized by *Santiago-Lugo*, 785 F. 3d, at 474–75 n. 5 (quoting *HRC* v. *Nelson*, 872 F. 2d, at 1561).

First, the petitioner's statutory claim challenging the agency's application of 8 CFR § 1003.19(h)(2)(i)(C) is not subject to prudential exhaustion. In addition to the rule that prudential exhaustion is not required " 'where the administrative remedy will not provide relief commensurate with the claim,' " *Boz*, 248 F. 3d, at 1300 (citation omitted), the same is also true where "the nature of [a] challenge [to agency] procedures is such that relief at the administrative review level would [be] unlikely," *HRC* v. *Nelson*, 872 F. 2d, at 1561. This analysis is conducted

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[4] In a revised opinion following remand, the Eleventh Circuit "readopt[ed] and reaffirm[ed] the reasoning in *Richardson I* except to the extent it relied on INA § 242(g) to support its holding." *Richardson* v. *Reno*, 180 F. 3d 1311, 1313 (CA11 1999) (*Richardson II*).

by balancing the nature of a claim against "[t]he policies advanced by allowing the administrative process to run its full course" to determine whether such policies "are not thwarted by judicial intervention in [a] case." *Haitian Refugee Ctr.* v. *Smith*, 676 F. 2d 1023, 1034 (CA5 Unit B 1982) (*HRC* v. *Smith*) (precedential under *Stein* v. *Reynolds Sec., Inc.*, 667 F. 2d 33, 34 (CA11 1982), disapproved of on other grounds by *Jean v. Nelson*, 727 F. 2d 957, 976, n. 27 (CA11 1984) (en banc).

As noted by precedent, "the Supreme Court [has] deemed it insignificant that [an] agency . . . possess[es] the power to change the content of its procedures and thus could . . . pretermit[t] the necessity for judicial intervention." *HRC* v. *Smith*, 676 F. 2d, at 1034 (citing *Mathews* v. *Eldridge*, 424 U. S. 319 (1976)). As "[t]he [Supreme] Court commented: 'It is unrealistic to expect that the [agency head] would consider substantial changes in the current administrative review system at the behest of a single [regulated party] raising a [legal] challenge in an adjudicatory context.' " *Id.*, (quoting *Mathews*, 424 U. S., at 330). In the immigration context, "[an] assumption that the INS or the BIA would . . . substantially revis[e] the procedures established for [a specific] program is equally naive." *Id.*

Citing 8 CFR § 1003.19(h)(2)(i)(C), the Respondent defends the IJ's order denying his custody redetermination request, because "the IJ has no authority to review ICE's custody determination." [ECF No. 9, Respondent's Return, pp. 6-7 ("IJs cannot review ICE's custody determinations for someone like Petitioner, who is described in Section 1227(a)(4) . . .")]. However, the Respondent's exhaustion argument neglects to consider that the BIA is bound by the applicable regulations published by the Attorney General. The "Powers of the Board" states that "[t]he Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act **and regulations**." 8 CFR § 1003.1(d) (emphasis added). This provision

further states that:

> (i) **The Board shall be governed by** the provisions and limitations prescribed by applicable law, **regulations**, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant to section 103 of the Act).

8 CFR § 1003.1(d)(i) (emphasis added).

Here, where the IJ denied the custody redetermination request due to a lack of jurisdiction under 8 CFR § 1003.19(h)(2)(i)(C), without even making a finding as to dangerousness and flight risk, the Petitioner need not exhaust (and waste time) asking the Board to overturn a regulation published by the Attorney General, see 8 U.S.C. § 1103(a), (g)(2), that it is required to follow— a claim that the Board "would not be required even to consider," *Mathews*, 424 U.S., at 330.

Second, no statute, regulation, or other legal source with binding authority exists to provide the remedy that the Petitioner's constitutional claim seeks to remedy. "Because the BIA does not have the power to decide constitutional claims—like the validity of a federal statute— . . . certain due process claims need not be administratively exhausted." *Warsame* v. *U. S. Att'y Gen.*, 796 Fed. Appx. 993, 1006 (CA11 2020); accord *HRC* v. *Nelson*, 872 F. 2d, at 1561 (exhaustion had "no bearing" where petitioner sought to make a constitutional challenge to procedures adopted by the INS); see also *Matter of Punu*, 22 I. & N. Dec. 224, 229 (BIA 1998) ("this Board cannot entertain constitutional challenges") (citations omitted); see also *Matter of Ruiz-Massieu*, 22 I&N Dec 833, 838 (BIA 1999) ("First, we are without jurisdiction to entertain a constitutional challenge..."). The Petitioner urgently seeks and is entitled to habeas relief because he has no meaningful opportunity to challenge the constitutionality of his detention through any available administrative process. See *Boumediene* v. *Bush*, 553 U. S. 723, 783 (2008).

Additionally, Courts in this District have routinely granted habeas petitions and ordered bond hearings in challenges to mandatory detention, without first requiring the petitioner to

exhaust his remedies before the BIA. E.g., *Warsame v. Meade*, 20-cv-22401-ALTONAGA (S.D. Fla. Aug. 18, 2020) [ECF No. 15, Order] (ordering a bond review hearing by an immigration judge in a prolonged § 1226(c) mandatory detention habeas case); *Rogers v. Ripa*, 21-cv-24433-JLK/Becerra (S.D. Fla. Feb. 25, 2022) [ECF No. 29, Order Denying Objections to R&R] (same); *Stephens v. Ripa*, No. 22-cv-20110-MARTINEZ/BECERRA (S.D. Fla. Mar. 3, 2022) [ECF No. 22, Order on R&R] (same).

II. 8 U.S.C. § 1252 (b)(9) does not strip this Court of jurisdiction to review Petitioner's habeas claim.

The jurisdiction bar at 8 U.S.C. § 1252(b)(9) does strip this Court of jurisdiction to review the Petitioner's habeas claim of unlawful detention because his claim does not "aris[e] from any action taken or proceeding brought to remove an alien from the United States." § 1252(b)(9). "Moreover, while the REAL ID Act amended § 1252(b)(9) by adding an explicit bar on habeas jurisdiction **over certain claims**, the Act did not expand the scope of (b)(9) by making it applicable to cases other than those involving 'review of an order of removal.' Because section 1252(b)(9) applies only 'with respect to review of an order of removal,' and this case does not involve review of an order of removal, we find that section 1252(b)(9) does not apply to this case." *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1367 (CA11 2006)[5] (emphasis added); see also *Canal A. Media Holding, LLC* v. *USCIS*, 964 F. 3d 1250, 1257 (CA11 2020) ("The zipper clause is not intended to cut off claims that have a tangential relationship with pending removal proceedings").

The same applies here. The Petitioner is not challenging any action or decision involving

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[5] Although the Respondent contends that the REAL ID Act precluded all habeas corpus relief in the district courts under § 2241 [ECF No. 9, p. 10], Section 106(c) of the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 311, provided for the transfer of pending habeas cases "**challenging a final administrative order of removal**" to the court appeals "in which a petition for review could have properly filed under . . . (8 U.S.C. 1252), as amended by this section." Such challenges to final administrative orders of removal via habeas in district court were common place before the REAL ID Act channeled such final order review to the § 1252 Petition for Review Process.

the "review of an order of removal." *Madu*, 470 F.3d at 1367. Instead, he is only challenging his designation and subjection to continued mandatory detention under 8 CFR § 1003.19(h)(2)(i)(C). [ECF No. 1, ¶ 53-56]. Such a challenge has nothing to do with the review of a removal order, because if the Court grants the Petitioner's habeas, and he is released on bond, his removal proceedings before the immigration court will continue in a non-detained setting.

This reading corresponds with the jurisprudence from the Supreme Court. In *Jennings*, in finding that § 1252(b)(9) did not bar petitioners claims, the Court held that the "arising from" language in that section should not be read in an "extreme way." 138 S. Ct., 839-41, 840. Without "attempt[ing] to provide a comprehensive interpretation," the Court found it "enough to note that [the claimants] are not asking for review of an order of removal; they are not challenging the *decision* to detain them *in the first place or to seek removal*; and they are not even challenging any part of the *process by which their removability will be determined*." *Id.*, at 841 (emphasis added). The same is true here, and §1252(b)(9) does not bar review over the Petitioner's habeas claim.

III. 8 U. S. C. § 1252(g) does not strip this Court of jurisdiction to review Petitioner's habeas claim.

The Respondent contends that 8 U.S.C. § 1252(g) strips this Court to review the legality of the Petitioner's continued mandatory detention. But, that provision does not "cove[r] the universe of deportation claims." *Reno* v. *Am.-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 482 (1999). "In fact, what § 1252(g) says is much narrower." *Id.* "The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders' ." *Id.* (emphasis in original). "There are of course many other decisions or actions that may be part of the deportation process . . . ." *Id.* "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings." *Id.*

As the Supreme Court, the Eleventh Circuit, and Courts in this District have continually made clear, § 1252(g) does not strip district courts of jurisdiction to consider habeas challenges to the "extent of the Attorney General's [ICE's] authority" to detain non-citizens. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (dismissing in a parenthetical any notion that § 1252(g) would bar review of the government's detention authority); *I.N.S. v. St. Cyr*, 533 U.S. 289, 311 n.34 (2001) (dismissing in a footnote any notion that § 1252(g) would bar habeas review of unlawful detention); *Madu*, 470 F.3d at 1368 ("While this provision bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions. . . Here, Madu does not challenge the INS's exercise of discretion. Rather, he brings a constitutional challenge to his detention and impending removal. ... Accordingly, section 1252(g) does not apply."); *Grigorian v. Bondi*, No. 25-CV-22914-RAR, 2025 WL 2604573, at *3 (S.D. Fla. Sept. 9, 2025) ("The Eleventh Circuit has nevertheless distinguished between situations where an alien's claims are founded directly on a decision or action to commence proceedings, adjudicate cases, or execute removal orders, from those where an alien challenges the "underlying legal bases" of those decisions or actions.") (citing *Madu*, 470 F.3d at 1368); see also *Canal A. Media*, 964 F. 3d at 1257–58 ("When asking if a claim is barred by § 1252(g), courts must focus on the action being challenged.")

Here, the Petitioner challenges his designation and subjection to continued mandatory detention pursuant to 8 CFR § 1003.19(h)(2)(i)(C). [ECF No. 1, ¶ 53-56]. He argues that the application of § 1003.19(h)(2)(i)(C) to him impermissibly strips the IJ of jurisdiction to consider his motion for custody redetermination and is *ultra vires* by unlawfully broadening the scope of mandatory detention under 8 U.S.C. § 1226(c), when Congress did not proscribe mandatory

detention under § 1226(c) noncitizens, like the Petitioner, charged as removable under § 1227(a)(4)(C) for foreign policy concerns. *Id.*; *Perez-Sanchez v. U.S. Att'y Gen.*, 935 F.3d 1148, 1155 (CA11 2019) ("Congress alone controls [an agency's] jurisdiction.") (alternations original, citation omitted).

The Petitioner is **not** challenging the initial discretionary decision or action to detain him, nor is he challenging the commencement of his removal proceedings, or the execution of a (non-existent) removal order. Instead, he is the challenging the legality of his continued detention without a full custody redetermination hearing before an IJ. Therefore, his habeas petition constitutes a challenge to the "underlying legal bas[i]s" of his continued detention, *Madu*, 470 F.3d at 1368, and § 1252(g) does not deprive this Court of jurisdiction to consider his habeas claim.

IV. 8 U. S. C. § 1252(e) does not strip this Court of jurisdiction to review Petitioner's habeas claim.

For the same reasons that § 1252(g) does not prohibit judicial review of the Petitioner's claim, nor does § 1226(e). The Respondent's own admission is telling. "Section 1226(e) covers **the initial decision to detain** Petitioner." [ECF No. 9, Return, p. 18] (emphasis added). Again, the Petitioner does not challenge ICE's initial discretionary decision or action to detain him, but instead challenges his designation and subjection to mandatory detention pursuant to 8 CFR § 1003.19(h)(2)(i)(C), when Congress specifically did not designate him as subject to mandatory detention under § 1226(c). Such a challenge is beyond the scope of § 1226(e). E.g., *Demore v. Kim*, 538 U.S. 510, 516–17 (2003) ("But respondent does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail."); see also *Jennings*, 138 S. Ct. at 841 ("Because the extent of the Government's detention authority is not a matter of "discretionary judgment," "action," or "decision,"

respondents' challenge to "the statutory framework that permits [their] detention without bail," falls outside of the scope of § 1226(e).")

V. Additional Points in Response to the Respondent's Return.

The Petitioner reiterates that all the charges set forth in the Haitian criminal arrest warrant were dismissed on June 28, 2022, and he has zero criminal history in either Haiti or the United States. [ECF No. 9, p. 3; 9-2, ¶ 17]; **Exhibit A** – Criminal Background Check from Haiti and Dismissal of Charges in Haiti. Additionally, while the IJ order denying the Petitioner's custody redetermination request for "lack[] [of] jurisdiction" [ECF No. 1-3, pp. 25-26; ECF No. 9-11] also cites to *Matter of Ruiz-Massieu*, that case has nothing to do with the IJ's jurisdiction to consider custody redeterminations for noncitizens charged as removable under § 1227(a)(4)(C).[6]

Lastly, the Respondent contends that the Petitioner can contest any whether he is properly "described in Section 1227(a)(4)" through a "Joseph" hearing before the IJ pursuant to 8 CFR 1003.19(h)(2)(ii). [ECF No. 9, p. 7, n.3.] (citing *Matter of Joseph*, 22 I&N 799 1999 WL 339053 (BIA 1999). However, "[t]his 'Joseph hearing' is immediately provided to a detainee who claims that he is not covered by § 1226(c)." *Demore v. Kim*, 538 U.S. 510, 514, n.3 (2003). Here, there is no dispute that the Petitioner is **not** subject to one of the enumerated mandatory detention grounds in § 1226(c), which does **not include** noncitizens charged as removable under § 1227(a)(4)(C).

For the reasons states herein, the Court should grant the Petitioner's Writ of Habeas Corpus [ECF No. 1], and order that he be provided a custody redetermination hearing before the Immigration Judge within a reasonable time determined by the Court.

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[6] Instead, that case only stands for the proposition that "a letter from Secretary of State conveying the Secretary's determination that an alien's presence in this country would have potentially serious adverse foreign policy consequences for the United States, and stating a facially reasonable and bona fide reasons for that determination, is presumptive and sufficient evidence that the alien is deportable under [§ 1227(a)(4)(C)], and the Service is not required to present additional evidence of deportability." *Matter of Ruiz-Massieu*, 22 I&N Dec. 833 (BIA 1999).

Dated: November 11, 2025

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