UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 25-62402-CIV-ARTAU

ASAEL PEREIRA,

Petitioner,

v.

MITCHELL DIAZ, Assistant Field Office Director for Detention at Broward Transitional Cetner, et al.,

Respondents.
_____/

RESPONDENTS' RESPONSE BRIEF ON SUBJECT MATTER JURISDICTION

Respondents,[1] by and through the undersigned Assistant United States Attorney, file this response brief on subject matter jurisdiction in accordance with the Paperless Sua Sponte Order [DE 3] (Order); and in support thereof, state the following.

In the Order, the Court stated, "it is unclear whether the Court has subject matter jurisdiction over this action," and the Court ordered the parties to "brief the Court's subject matter jurisdiction under 8 U.S.C. § 1252(b)(9), 8 U.S.C. § 1252(g), and/or any other applicable statutory provision." Order.

By way of the Petition for Writ of Habeas Corpus [DE 1] (Petition), Petitioner, Asael Pereira (Petitioner), asks this Court to assume jurisdiction over his challenge to the denial of bond by an Immigration Judge (IJ) pursuant to 8 U.S.C. § 1226(a). As explained below, 8

[1] A writ of habeas corpus must "be directed to the person having custody of the person detained." 28 USC § 2243. In cases involving present physical confinement, the Supreme Court reaffirmed in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), that "the immediate custodian, not a supervisory official who exercises legal control, is the proper respondent." *Rumsfeld*, 542 U.S. at 439. Accordingly, Petitioner's current custodian is the only proper respondent.

U.S.C. § 1226(e) and § 1252(g) preclude judicial review. The Petition should be dismissed for lack of subject matter jurisdiction.

Background

The Petitioner is a native and citizen of Brazil. Declaration of Deportation Officer Jernnette McLaughlin ¶6, Exhibit 1 Form I-213, Record of Deportable/Inadmissible Alien, (Form I-213) dated May 17, 2025. On March 29, 2017, Petitioner entered the United States with a B-2 visitor visa. McLaughlin Dec. ¶7, Exhibit 2 Form I-94, Arrival/Departure Record, (Form I-94). He was authorized to remain in the United States until September 28, 2017. McLaughlin Dec. ¶8, Exhibit 2. Petitioner remained in the United States beyond the authorized period of stay. McLaughlin Dec. ¶9.

When the Petitioner entered the United States, he was under indictment in Brazil for passive corruption in violation of Article 317 of Law 2848/1940 of the Brazilian Penal Code. McLaughlin Dec. ¶10, Exhibit 3 Interpol Fugitive Wanted to Serve a Sentence Notice dated August 27, 2025. Petitioner was convicted of passive corruption and sentenced to 2 years and 8 months of imprisonment in Brazil. McLaughlin Dec. ¶11. At the time of his conviction and sentence, Petitioner was in the United States. *Id.* ¶12. To date, he has not served his sentence. *Id.* ¶13. On August 27, 2025, Interpol issued a Red Notice for Petitioner indicating that he is a fugitive wanted in Brazil to serve a sentence. McLaughlin Dec. ¶14, Exhibit 3.

On May 17, 2025, Petitioner was encountered by Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). McLaughlin Dec. ¶15, Exhibit 4 Form I-200, Warrant for Arrest of Alien dated April 13, 2025, Exhibit 5 Form I-286, Notice of Custody Determination dated May 17, 2025. On May 17, 2025, the Department of Homeland Security (DHS) issued a Notice to Appear (NTA) charging Petitioner with removability under INA §

237(a)(1)(B), as amended, in that after admission as a nonimmigrant under section 101(a)(15) of the Act, he remained in the United States for a time longer than permitted, in violation of this Act or any law of the United States. McLaughlin Dec. ¶16, Exhibit 6 Notice to Appear dated May 17, 2025.

On May 27, 2025, Petitioner, through counsel, requested a custody redetermination hearing. McLaughlin Dec. ¶17. On June 03, 2025, the Immigration Judge conducted a custody redetermination hearing pursuant to section 236(a) of the INA and issued an oral decision denying Petitioner's custody redetermination request after determining that he was a flight risk because he fled Brazil while under indictment for passive corruption. McLaughlin Dec. ¶18, Exhibit 7 Immigration Judge Summary Order denying bond dated June 03, 2025. On June 28, 2025, Petitioner filed a motion requesting that the Immigration Judge reconsider his decision on his request for custody redetermination. McLaughlin Dec. ¶19. On July 01, 2025, the court denied the motion to reconsider holding that nothing in the motion to reconsider changed the Immigration Judge's opinion that Petitioner is a flight risk. McLaughlin Dec. ¶20, Exhibit 8 Immigration Judge Order denying the motion to reconsider dated July 01, 2025. On July 03, 2025, Petitioner appealed the denial of his request for release on bond to the Board of Immigration Appeals (BIA). McLaughlin Dec. ¶21, Exhibit 9 Filing Receipt for Appeal or Motion dated July 7, 2025. On July 22, 2025, the Immigration Judge issued a written decision memorializing his findings at the June 03, 2025 bond hearing pursuant to chapter 9 of the Immigration Court Practice Manual. McLaughlin Dec. ¶22, Exhibit 10 Bond Memorandum dated July 22, 2025. In the Bond Memorandum, the IJ identified the following basis for denial of bond: "Respondents' actions in fleeing from his criminal prosecution in Brazil evidence a

disregard for the law and court proceedings and makes the Respondent a risk of flight." McLaughlin Dec. Exhibit 10 p.3. The appeal before the BIA remains pending. *Id.* ¶23.

To date, Petitioner remains detained at the Broward Transitional Center in Pompano Beach, Florida pursuant to section 236(a) of the INA. McLaughlin Dec. ¶27.

Analysis

8 U.S.C. § 1226(e) proscribes that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review," and "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole." 8 U.S.C. § 1226(e). In this case, the IJ denied Petitioner's bond under § 1226(a). Section 1226(e) precludes review of that decision.

Moreover, Petitioner is attempting to challenge a discretionary determination made by the IJ. The IJ denied bond in this case because "Respondents' actions in fleeing from his criminal prosecution in Brazil evidence a disregard for the law and court proceedings and makes the Respondent a risk of flight." McLaughlin Dec. Exhibit 10 p.3. That discretionary determination—that fleeing from criminal prosecution makes someone a flight risk—cannot be reviewed. *See generally Guyadin v. Gonzales*, 449 F.3d 465, 468 (2d Cir. 2006) ("An assertion that an IJ ... misread, misunderstood, or misapplied the law in weighing factors relevant to the grant or denial of discretionary relief does not convert what is essentially an argument that the IJ ... abused their discretion into a legal question.").[2]

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[2] To the extent Petitioner intended to bring a legal challenge predicated upon the burden of proof assigned at the bond hearing, that challenge should be denied. In *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006), the Bureau of Immigration Appeals held that "[t]he burden is on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond." *Id.* at 40; *see also Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). The IJ was required to place the burden upon the alien under *Matter of Guerra*, 24 I&N Dec. 37, 40 (BIA 2006). The Eleventh Circuit has not ruled directly on the validity of *Matter of Guerra*, or who should bear the burden of proof at a bond hearing held before an IJ, *compare Miranda v. Garland*, 34 F. 4th 338 (4th

Even if § 1226(e) does not preclude judicial review, review is precluded by § 1252(g). Petitioner is currently in detention because removal proceedings commenced against him. Respondents take the position that Petitioner's bond decision arises out of the commencement of his removal proceedings. Section 1226(g) proscribes, in relevant part, that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings." 8 U.S.C. § 1252(g). Accordingly, even if § 1226(e) does not preclude review, § 1252(g) does.

As this Court recently ruled in *Mokanu v. Warden Miami Fed. Det. Ctr., US Dep't of Homeland Sec.*, No. 1:25-CV-24121-EA, 2026 WL 472294 (S.D. Fla. Feb. 19, 2026), § 1252(g) precludes jurisdiction to review "[t]he decision either to grant or deny bond to an alien" because that decision "arises from the decision to commence removal proceedings." *Id.* at *5.

> The decision either to grant or deny bond to an alien ... arises from the decision to commence removal proceedings because the common law considered release on bond to be a form of detention and presents a question of the "method[ ] of retaining control over a defendant's person, not one between seizure and its opposite." *See Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Scalia, J., concurring) (first citing 2 M. Hale, Pleas of the Crown *124; and then citing 4

Cir. 2022) (following *Matter of Guerra* and placing the burden of proof with the alien) *with Black v. Almodovar*, 156 F.4th 171, 172 (2d Cir. 2025) (holding that due process requires a bond hearing for prolonged detention and that the burden of proof at such a bond hearing lies with the government); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 39 (1st Cir. 2021) ("We therefore conclude that the government must bear the burden of proving dangerousness or flight risk in order to continue detaining a noncitizen under section 1226(a)."), but both the Eleventh Circuit and the Supreme Court have referred to *Matter of Guerra*, and it's requirement that the alien bears the burden of proof, favorably, *Sopo v. U.S. Att'y Gen.*, 825 F.3d 1199, 1220 (11th Cir. 2016), vacated, 890 F.3d 952 (11th Cir. 2018) ("Like non-criminal aliens, the criminal alien carries the burden of proof and must show that he is not a flight risk or danger to others."); *Nielsen v. Preap*, 586 U.S. 392, 397–98 (2019) ("the alien may secure his release if he can convince the officer or immigration judge that he poses no flight risk and no danger to the community." (citing Matter of Guerra, 24 I. & N. Dec. 37)); *see also Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 279 (3d Cir. 2018) (perceiving, in dicta, no problem with imposing the burden upon the alien). To the extent Petitioner intended to bring a challenge to the burden of proof, and to the extent the Court finds jurisdiction over such a challenge, that challenge, nonetheless, should be denied. Petitioner should bear the burden of proof at a bond hearing before an IJ under § 1226(a).

> William Blackstone, *Commentaries* *290, *297); *see also Bond*, Black's Law Dictionary (12th ed. 2024) ("The effect of the release on bail bond is to transfer custody of the defendant from the officers of the law to the surety on the bail bond[.]").

Id.

WHEREFORE, for the foregoing reasons, the Petition should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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