IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-00829-SBP

JUAN MANUEL LOPEZ MARQUEZ,

Petitioner,

v.

JUAN BALTAZAR, Warden, Denver Contract Detention Center, in his official capacity,
GEORGE VALDEZ, Acting Field Office Director,U.S. Immigration and Customs Enforcement, in his official capacity,
TODD LYONS, Acting Director of Immigration and Customs Enforcement, in his official capacity
KRISTI NOEM, Secretary, U.S. Department of Homeland Security, in her official capacity,
PAMELA BONDI, Attorney General, U.S. Department of Justice, in her official capacity, and
DAREN MARGOLIN, Director of the Executive Office of Immigration Review, in his official capacity,

Respondents.

RESPONSE TO ORDER TO SHOW CAUSE

Respondents hereby respond to the Court's Order to Show Cause (ECF No. 4), directing them to respond to Petitioner's petition for a writ of habeas corpus. ECF Nos. 1, 4.[1]

INTRODUCTION

Petitioner—a noncitizen undisputedly detained under 8 U.S.C. § 1226(a)—received not one, but two bond hearings before an immigration judge, but did not succeed in obtaining bond

[1] The Court ordered Petitioner to serve Respondents by "e-mail and overnight mail" and ordered Respondents to file their response within seven days of service. ECF No. 4. The U.S. Attorney's Office received paper service via overnight mail on March 5. *See* ECF No. 6-1. This response, filed seven days later, is thus timely.

(he's appealed to the Board of Immigration Appeals (BIA), which has not yet ruled). In this petition, he seeks a third bite at the apple, this time with a thumb on the scale: an order from this Court imposing the burden at a third bond hearing on the government by clear and convincing evidence.

In the petition, he argues (1) that his continued detention violates due process under the six factors of *Singh v. Choate*, No. 19-cv-00909-KLM, 2019 WL 3943960 (D. Colo. Aug. 21, 2019) (claim 1); (2) that due process requires the government to bear a clear-and-convincing burden at bond hearings under § 1226(a) (claim 2); and (3) that his detention is invalid because his purportedly warrantless arrest did not comply with the Fourth Amendment, the APA, or the statute governing such arrests (claims 3-5).

The petition should be denied. As to prolonged detention, the remedy provided in every case Petitioner cites from this district applying the six factors of *Singh* is a bond hearing, of which he has already had two—he is entitled to no further relief than he has already been given. As to the bond hearing burden, Petitioner hasn't exhausted this claim by seeing the BIA process through, and in any event due process does not require that the government bear the burden—clear and convincing or otherwise—at immigration bond hearings. And as to the warrantless-arrest claim, Tenth Circuit precedent requires that argument to be made as part of his removal proceeding, and thus (1) the claim is not exhausted, and (2) this Court lacks jurisdiction to consider that argument in habeas.

BACKGROUND

Petitioner is a citizen of Mexico. ECF No. 1 ¶ 23; Declaration of Gregory Davies ¶ 4. He originally entered the United States in 2018 under an H-2B visa, but he overstayed that

authorization. ECF No. 1 ¶ 24; Davies Dec. ¶ 5-6. He has three U.S. citizen children, one of whom has special needs. ECF No. 1 ¶¶ 25-26.

Petitioner was encountered by ICE on February 5, 2025, in the course of an operation targeting another individual. ECF No. 1-4 at 2. In a consent interview, Petitioner admitted to the visa overstay and to a lack of any other authorization to remain in the United States. *Id.* The Form I-213 attached to the petition recounts the circumstances of Petitioner's arrest. ECF No. 1-4. Upon transport to an ICE facility, Petitioner was issued a Notice to Appear charging him with being removable from the United States. ECF No. 1-5; Davies Dec. ¶ 9. Petitioner is currently in custody at the Denver Contract Detention Facility. ECF No. 1-2.

Because he originally entered the United States pursuant to a visa but lacks a criminal history requiring mandatory detention, Petitioner is detained under 8 U.S.C. § 1226(a). ECF No. 1-5; Davies Dec. ¶ 8. Petitioner requested a custody redetermination before an immigration judge but withdrew that request on February 11, 2025. Davies Dec. ¶ 11.

On April 16, 2025, in the course of his removal proceedings, Petitioner filed an I-485 application to register permanent residence or adjust status. Davies Dec. ¶ 14. This application did not include a Form I-130 that would have established a qualifying relationship with a U.S. citizen, however. *Id.*

Petitioner requested a custody redetermination again in August, Davies Dec. ¶ 18, and on August 28, 2025, Petitioner was provided a bond hearing before an immigration judge. ECF Nos. 1 ¶ 33, 1-6. The judge denied bond because Petitioner "did not meet his burden to establish that he would not be a flight risk." ECF No. 1-6 at 1. Petitioner did not appeal this determination. Davies Dec. ¶ 19.

On September 24, while in detention, Petitioner married a United States citizen. ECF No. 1-11. Petitioner's purported spouse then filed an I-130 petition for alien relative with U.S. Citizenship and Immigration Services. ECF No. 1-12. On the strength of this claimed change in circumstances, Petitioner sought another bond hearing, and one was held on October 24. ECF No. 1-7; Davies Dec. ¶ 26. The immigration judge received sixteen exhibits from Petitioner purporting to establish his changed circumstances. ECF Nos. 1-8 at 3, 1-10 at 2. The judge did not take live testimony but invited Petitioner's counsel to proffer "what you'd like me to know about your client." *Id.* at 4. Counsel referred to Petitioner's U.S. residence, children, and his new spouse and I-130 petition. *Id.* The immigration judge again denied bond, again because Petitioner did not establish lack of flight risk. *Id.*

Petitioner appealed to the BIA, ECF No. 1-9, Davies Dec. ¶ 29, and the immigration judge prepared a written order denying bond. ECF No. 1-10. In the order, the judge recognized that Petitioner's U.S. citizen children and their needs weighed in favor of granting bond. *Id.* at 2. But while the judge recognized that Petitioner was married to a citizen, the recency of the marriage (which occurred while Petitioner was detained) and the lack of information concerning Petitioner's pre-detention relationship with his wife and their potential living situation if he were released gave the judge pause. *Id.* at 2-3. Petitioner also did not provide information concerning his defenses to removal, or his history of employment or financial situation. *Id.* at 3. Petitioner also did not present any information establishing community ties other than his children and spouse. *Id.* On balance, then, the judge found that Petitioner had not established lack of flight risk. *See id.*

Petitioner remains in removal proceedings pending the adjudication of his wife's I-130 by

USCIS. Davies Dec. ¶¶ 34-35. His appeal of the immigration judge's order denying bond remains pending before the BIA. *Id.* ¶ 29.

ARGUMENT

I. Because Petitioner has already obtained the only relief available for a *Singh*/prolonged detention claim—a bond hearing before an immigration judge—that claim can afford him no additional relief.

Petitioner first argues that his detention has become "unreasonably prolonged" and thus violates due process under the six factors articulated in *Singh*. ECF No. 1 ¶¶ 62-73. But in *Singh* itself, in every *Singh* case cited in the petition, and in every case in this district citing *Singh* that undersigned counsel has located, the remedy provided for a due process/*Singh* violation is a bond hearing. Because Petitioner has already been provided two such hearings, the *Singh* claim is simply a prelude to the core issue in this case: the proper burden allocation at bond hearings.

The petitioner in *Singh* was subject to mandatory detention under § 1226(c). *See* 2019 WL 3943960, at *3 (petitioner's "detention is mandatory"). Because he had no statutory right to a bond hearing, the court was forced to fashion a constitutional test. *See id.* at *5. Crucially, though, the question the *Singh* factors were designed to test was whether a petitioner's "continued, lengthy detention *without any individualized bond hearing*" violates due process. *Id.* at *7 (emphasis added). Where the six factors were met, the remedy was a bond hearing. *See id.*

Every *Singh* case cited in the petition is to the same effect. *See Juarez v. Choate*, No. 24-cv-00491-CNS, 2024 WL 1012912, at *4 & 9 (D. Colo. Mar. 8, 2024) (post-removal detention under 8 U.S.C. § 1231(a)(6) with no statutory right to a bond hearing; remedy is a bond hearing); *Viruel Arias v. Choate*, No. 22-cv-02238-CNS, 2022 WL 4467245, at *1 & 5 (D. Colo. Sep. 26, 2022) (mandatory detention under § 1226(c); remedy is a bond hearing); *Singh v. Garland*, No.

21-cv-00715-CMA, 2021 WL 2290712, at *2 & 5 (D. Colo. June 4, 2021) (mandatory detention under § 1226(c); remedy is a bond hearing); *Villaescusa-Rios v. Choate*, No. 20-cv-03187-CMA, 2021 WL 269766, at *2 & 5 (D. Colo. Jan. 27, 2021) (mandatory detention under § 1226(c); remedy is a bond hearing). By the same token, undersigned has been unable to locate any case from this district applying the *Singh* factors and granting any relief other than a bond hearing.

This makes sense. Where there is no statutory right to a bond hearing (as under §§ 1226(c) and 1231(a)(6)) a court may seek out such a right in the Constitution. Where, though, a petitioner has a *statutory* right to a bond hearing—as under § 1226(a)—there is no need to do so. The statute already sets forth the process whereby a detainee may challenge their continued detention. Here, Petitioner has availed himself of this statutory procedure via two bond hearings before an immigration judge. ECF No. 1 ¶¶ 34, 39-43. To be sure, he is not satisfied with the *outcome* of those hearings, so he has accordingly taken advantage of the administrative procedure for appealing to the BIA. *Id.* ¶¶ 44, 46. But there is no absence of statutory procedure—as is arguably the case for detainees under § 1226(c) and § 1231(a)(6)—that would require the Court to grant relief to Petitioner under the Constitution. So the *Singh* framework does not afford Petitioner any greater relief than he has already been provided under § 1226(a).

II. Petitioner has received two bond hearings that comport with due process, and the Court should not order a third with an enhanced burden on the government.

Next, Petitioner claims that his two bond hearings do not satisfy due process because the immigration judge placed the burden on him, rather than on the government by clear and convincing evidence. Because Petitioner's bond eligibility is still under review before the BIA, this claim is not exhausted. Even if the Court considers it, however, the Court should hold that due process does not require the burden allocation requested by Petitioner.

A. Petitioner has not exhausted his administrative remedies.

Ordinarily, a petitioner must exhaust administrative remedies before seeking habeas corpus under § 2241. *See Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). Though § 2241 does not expressly require administrative exhaustion, courts regularly require, as a prudential matter, that immigration detainees exhaust the available administrative remedies before seeking habeas relief. *See, e.g.*, *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011) (habeas review of the IJ's adverse bond determination before appealing to the BIA was an "improper" "short cut"); *Torres v. Decker*, No. 18-CV-10026 (VEC), 2018 WL 6649609, at *1-2 (S.D.N.Y. Dec. 19, 2018) (staying habeas case brought by § 1226(a) detainee pending the BIA's disposition of his appeal of the IJ's bond denial); *Bravo v. Green*, No. 16–4937 (JLL), 2017 WL 2268315, at *3 (D.N.J. May 24, 2017) ("A district court may not review the merits of an immigration detainee's habeas claims unless and until he has properly exhausted his administrative remedies." (citing cases)); *see also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs.").

Here, Petitioner appealed the IJ's bond determination to the BIA, *see* 8 C.F.R. §§ 236.1(d)(3), 1236.1(d)(3), 1003.38, but he did not wait for the BIA to decide the matter before filing this case. *See* ECF No. 1 ¶¶ 44, 46; Davies Dec. ¶ 29. Instead, Petitioner argues that requiring exhaustion would be futile because the BIA lacks jurisdiction to decide his constitutional claims and because waiting on the BIA would further prolong his detention. A "narrow exception" to administrative exhaustion may apply where exhaustion would be futile. *Garza*, 596 F.3d 1203. Not so here, though, because the burden allocation adopted by the immigration judge does not preclude the BIA from ruling for Petitioner. Even assuming

arguendo that Petitioner's constitutional claims are foreclosed before the BIA, Petitioner has not established that his appeal to the BIA is guaranteed to lose. The immigration judge recognized that Petitioner submitted some favorable evidence but was not satisfied that his community ties were extensive enough to mitigate a risk of flight. *See id.* The BIA could weigh those factors differently, and if Petitioner prevails on appeal, that decision will moot the constitutional question before the Court. *See Torres*, 2018 WL 6649609, at *2 ("Regardless of who has the burden of proof, if the BIA is persuaded by [Petitioner's other arguments], then it could grant Petitioner release on bond—thereby mooting the constitutional and statutory challenges Petitioner raises here." (citing cases)).

B. Petitioner received two bond hearings that comported with due process.

If the Court excuses the failure to exhaust, Petitioner still has not established that the immigration judge's allocation of the burden to him at the bond hearing violates due process.

1. Due process does not require allocating the burden to the government at immigration bond hearings.

Section 1226(a) is silent on the burden at bond hearings, simply stating that the government "*may* continue to detain" an arrested noncitizen, or it "*may* release" him on bond. 8 U.S.C. § 1226(a) (emphases added). As the Supreme Court has observed, nothing in that statutory delegation of discretion "even remotely supports" imposing a clear-and-convincing burden of proof on the government at a bond hearing. *Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018). Moreover, the implementing regulations make clear that the burden of proof should fall on the noncitizen. *See* 8 CF.R. § 236.1(c)(8) ("*[T]he alien must demonstrate* to the satisfaction of the [DHS] officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." (emphasis added)).

The Supreme Court has long affirmed the constitutionality of detention pending removal proceedings without placing the burden to justify detention on the government. In *Zadvydas v. Davis*—involving noncitizens detained under 8 U.S.C. § 1231 for extended periods—the Supreme Court placed the initial burden on the noncitizen to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. 678, 701 (2001). Likewise, in *Demore v Kim*, the Supreme Court rejected a due-process challenge to § 1226(c) detention, even though § 1226(c) does not allow for any bond hearings and expressly puts the burden on the noncitizen in the only situation in which release is permitted under that provision. *See* 538 U.S. 510, 531 (2003); *see also* 8 U.S.C. § 1226(c)(2) (providing that a § 1226(c) detainee may be released if it is "necessary" for witness protection and the detainee "satisfies the Attorney General" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding"). And in *Carlson v. Landon*, the Supreme Court rejected a due process challenge by noncitizens detained pending removal proceedings under the predecessor to § 1226(a), reasoning that Congress intended the government's discretionary detention decisions to be treated as "presumptively correct and unassailable except for abuse." 342 U.S. 524, 540 (1952); *see also Nielson v. Preap*, 586 U.S. 392, 397-98 (2019) (a § 1226(a) detainee "may secure his release *if he can convince* the officer or [IJ] that he poses no flight risk and no danger to the community" (emphasis added)).

Accordingly, the Third, Fourth, and Ninth Circuits have concluded that the Constitution does not require the government to bear the burden of proof at § 1226(a) bond hearings. *See Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022) (holding § 1226(a)'s procedures satisfy due process and petitioner was not entitled to a second bond hearing at which the

government bore the burden); *Miranda v. Garland*, 34 F.4th 338, 361-65 (4th Cir. 2022) (rejecting the argument that due process requires the government to bear the burden at § 1226(a) bond hearings); *Borbot v. Warden Hudson County Corr. Fac.*, 906 F.3d 274, 279 (3d Cir. 2018) ("perceiv[ing] no problem" with placing burden on the noncitizen at § 1226(a) bond hearings).

Courts in this district have similarly concluded that due process does not require the government to bear the burden to justify detention at § 1226(a) bond hearings. *See De la Cruz v. Baltazar*, No. 26-cv-360-PAB, 2026 WL 439217, at *4 (D. Colo. Feb. 17, 2026) (declining to impose clear-and-convincing burden on government at bond hearing under § 1226(a), noting that just because the statute is "silent as to whether the applicant or the Government carries the burden of proof," the court should not "preemptively fill the gap"); *Basri v. Barr*, 469 F. Supp. 3d 1063, 1066, 1073-74 (D. Colo. 2020) (detainee had two bond hearings at which he bore the burden of proof; the court held those procedures comported with due process in light of *Demore* and *Jennings* and "the Supreme Court's broad view of congressional and executive power in immigration proceedings"); *Molina v. Choate*, No. 19-cv-00207-LTB-GPG, 2019 WL 13214049, at *3 (D. Colo. Mar. 22, 2019) (noting that, in the pre-removal-order context, "detention is pending adjudication of [the detainee's] removability from the country and, as such, it is not 'indefinite'" (citing *Demore*, 538 U.S. at 529)).

Petitioner relies on *Diaz-Ceja v. McAleenan*, No. 19-cv-00824-NYW, 2019 WL 2774211 (D. Colo. July 19, 2019), in which the court held the burden of proof should fall on the government. *See* ECF No. 1 ¶ 75. In *Diaz-Ceja*, though, the court analogized to "the burdens and protections applicable in non-immigration contexts," such as the Bail Reform Act. *Diaz-Ceja*, 2019 WL 2774211, at *8. But this reasoning fails to acknowledge that the process due

noncitizens in removal proceedings is less than in other detention contexts. *See Rodriguez Diaz*, 53 F4th at 1213; *Miranda*, 34 F.4th at 358; *Basri*, 469 F. Supp. at 1072. In the immigration context, "any policy toward [noncitizens] is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore*, 538 U.S. at 522 (citation omitted). Consequently, "[i]n the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 521 (citation omitted). The reasoning in *Basri*—and *Rodrigez Diaz*, *Miranda*, and *Borbot*—is far more consistent with the special considerations in the immigration context and applicable Supreme Court precedent than *Diaz-Ceja* and other cases that have imposed the burden of proof on the government.[2]

2. *Mathews* does not apply in the immigration context, and the existing § 1226(a) bond procedures pass the *Mathews* test.

Petitioner argues that under the three-part test of *Mathews v. Eldridge*, 424 U.S. 335 (1976), the burden must be allocated to the government. But that case does not apply where immigration detention is concerned. The Supreme Court has never used the framework set forth in *Eldridge* to evaluate due process for noncitizens. Indeed, just four months after the Supreme Court decided *Eldridge* (which concerned the process due Social Security beneficiaries), it decided *Mathews v. Diaz*, 426 U.S. 67 (1976), a case concerning the due process rights of

[2] Respondents recognize that this Court recently allocated a clear-and-convincing burden to the government in *Ekenge v. Baltazar*, No. 26-cv-630-SBP, 2026 WL 617341, at *8 (D. Colo. Mar. 5, 2026). In that case, however, the respondents did not oppose that request and did not address the proper burden allocation in their brief, so the Court's reasoning was appropriately truncated. *See id. Ekenge* should not preclude the Court from accepting Respondents' fully-presented arguments in this case.

noncitizens to Medicare benefits, without even mentioning the three-part test of *Eldridge*. The Supreme Court has long maintained that the procedural due process analysis for noncitizens is deferential. In considering procedural due process, "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).[3]

But even under *Eldridge*, allocating the burden to the Petitioner passes muster. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Eldridge*, 424 U.S. at 333 (citation omitted); *see also Trump v. J.G.G.*, 604 U.S. 670, 673 (2025) ("[immigration] detainees are entitled to notice and opportunity to be heard appropriate to the nature of the case"). In assessing whether a procedural framework affords due process, courts typically look at three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest. *See Eldridge*, 424 U.S. at 335.

Private interest. Petitioner has a recognizable liberty interest in connection with his pre-removal detention. But because Petitioner is a noncitizen in removal proceedings, "that liberty interest is limited." *Rojas v. Olson*, No. 25-cv-1437-BHL, 2025 WL 3033967, at *13 (E.D. Wis. Oct. 30, 2025) (rejecting a due process challenge to the automatic stay provision of 8 C.F.R. § 1003.19(i)(2)); *Miranda*, 34 F.4th at 359-61. In particular, Petitioner does not have a strong interest in avoiding the burden of proof at a bond hearing, given that he has the right to present

[3] Respondents similarly recognize that the Court has applied the *Eldridge* factors to analyze a different provision of the regulations governing immigration detention. *See Merchan-Pacheo v. Noem*, No. 25-cv-03860-SBP, 2026 WL 88526, at *13-16 (D. Colo. Jan. 12, 2026).

evidence and have a neutral IJ assess it and rule in his favor if the preponderance supports release. Further, the private interest must also account for the fact that the Supreme Court has never held that noncitizens have a constitutional right to be released from custody pending removal proceedings. *See Demore*, 538 U.S. at 530.

Risk of erroneous deprivation. As to the second factor, the procedural safeguards under § 1226(a) are "extensive," and there is no need to impose the burden on the government to provide additional protection to detainees. *Rodriguez Diaz*, 53 F.4th at 1202. First, DHS makes an individualized custody determination and may release a noncitizen if it determines that the noncitizen is not a danger and is likely to appear at removal proceedings. *See* 8 C.F.R. §§ 236.1(c)(8); 1236.1(c)(8). A noncitizen may request review of DHS's decision by an IJ at a bond hearing. *See id.* §§ 236.1(d)(1), 1236.1(d)(1). At the hearing, the IJ decides whether to release the noncitizen based on the evidence presented, with the noncitizen bearing the burden of proof that he is neither a danger to the community or a flight risk. *See id.* § 1003.19(d); *Matter of Guerra*, 24 I. & N. Dec. at 38, 40. If the IJ denies bond, the noncitizen may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1236.1(d)(3), 1003.38. Lastly, if the noncitizen's circumstances materially change, he may request another bond hearing. *See* 8 C.F.R. § 1003.19(e). These procedures ensure that the risk of erroneous deprivation is "relatively small." *Rodriguez Diaz*, 53 F.4th at 1210 (citation omitted).

Government's interest. As to the third factor, the government has an important interest in maintaining the existing burden-of-proof framework. The noncitizen is often in the best position to provide evidence relevant to his lack of dangerousness. The government may have little to no information about a detained noncitizen apart from the fact that he is not a citizen and

is not in the country legally. Placing a clear-and-convincing burden of proof on the government at § 1226(a) bond hearings—a higher burden than noncitizens currently have—would put the government in an untenable position at many bond hearings. That shift of the burden and elevated proof standard could lead to the release of an inadmissible noncitizen, even where a neutral IJ determines the preponderance of the evidence shows he poses a danger or flight risk. *See generally Miranda*, 34 F.4th at 361-62.

More generally, "the government clearly has a strong interest" in preventing noncitizens from "remain[ing] in the United States in violation of our law." *Rodriguez Diaz*, 53 F.4th at 1208 (quoting *Demore*, 538 U.S. at 518). Detention during the removal process serves a valid governmental purpose by avoiding the risk of noncitizens "skipping their hearings and remaining at large in the United States unlawfully." *Demore*, 538 U.S. at 528. It promotes the prompt execution of removal orders, in which "[t]here is always a public interest." *Nken v. Holder*, 556 U.S. 418, 436 (2009) (citation omitted). Detention also increases the chance that, if ordered removed, the noncitizen will be successfully removed. *See Rodriguez Diaz*, 53 F.4th at 1208. "These are interests of the highest order that only increase with the passage of time" because as removal becomes imminent, the likelihood of absconding increases. *Id.* at 1208-09.

In short, the *Eldridge* balancing test does not require that the government bear the burden—by clear and convincing evidence or otherwise—at bond hearings.

III. Petitioner's warrantless-arrest claims do not justify release.

Finally, Petitioner challenges his original arrest, claiming that he was subjected to a warrantless arrest without a determination that he was likely to escape in violation of 8 U.S.C. § 1357(a)(2), the Fourth Amendment, and the APA. ECF No. 1 ¶¶ 103-119. This Court lacks

jurisdiction over this unexhausted claim, and even if Petitioner had been subject to an invalid warrantless arrest, that does not require release.

A. The Court lacks jurisdiction to consider this claim, and it is not exhausted.

First, the arrest claims are beyond the Court's jurisdiction. Congress has consolidated "[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States," 8 U.S.C. § 1252(b)(9), into "a single proceeding: the petition for review." *Nken v. Holder*, 556 U.S. 418, 424 (2009) (citing, among other provisions, 8 U.S.C. § 1252(b)(9)). Petitions for review must be filed in the courts of appeals, not the district courts, and may only be filed after a removal order has been entered and become final. 8 U.S.C. § 1252(a)(5), (b)(1). No other court has jurisdiction "to review such an order or such questions of law or fact." 8 U.S.C. § 1252(b)(9).

The Tenth Circuit has held that "the legality of [an alien's] arrest and search challenges are customarily tested . . . when a deportation order is received." *Min-Shey Hung v. United States*, 617 F.2d 201, 202 (10th Cir. 1980). In *Min-Shey Hung*, an alien who was arrested without a warrant filed a habeas petition shortly after his arrest, seeking his release based on the allegedly unlawful arrest. *Id.* at 201. The Tenth Circuit held that the alien could not bring an immediate challenge to the arrest in habeas. *Id.* at 202–03. Rather, the alien could seek review of the arrest later as part of review of his deportation order (if one was issued).[4] *Id.* Accordingly, the propriety of Petitioner's arrest is a "question[] of law [or] fact . . . arising from [an] action taken . . . to remove [him] from the United States." *See* 8 U.S.C. § 1252(b)(9).

[4] *Min-Shey Hung* predated the modern petition for review process, which explains why the court refers to review of deportation orders occurring in district court. *See* 617 F.2d at 202-03. As described, however, petitions for review must now be filed in the courts of appeals.

Jurisdiction thus lies only in the court of appeals upon a petition for review.

Second, the Court should decline to address Petitioner's arrest claims because he has not administratively exhausted them. Here, Petitioner can challenge the legality of his arrest within his removal proceedings and can seek to terminate those proceedings based on the purported illegality of the arrest. *See Aguayo v. Garland*, 78 F.4th 1210, 1217 (10th Cir. 2023) (in the context of an allegedly unlawful arrest, "assum[ing], without deciding, that termination of removal proceedings is an appropriate remedy for egregious statutory or regulatory violations") (citing *In re Garcia-Flores*, 17 I & N Dec. 325 (BIA 1980)).

In *Aguayo*, ICE issued a detainer to the county jail where the alien was held and then took him into custody when the county jail released him. *Id.* at 1213. In the removal proceedings that followed, the alien asked the immigration judge to terminate the proceedings based on his contention that the arrest was unlawful. *Id.* Specifically, he claimed that the arrest "violated the Fourth Amendment, the INA, and agency regulations" because (among other things) ICE "t[ook] him into . . . custody without a warrant or reason to believe he would likely escape before a warrant could be obtained." *Id.* The immigration judge, the BIA, and the Tenth Circuit all found that terminating the removal proceedings was not warranted. *Id.* at 1213-16, 1221.

Petitioner's claims about his arrest are similar to the non-citizen's claims in *Aguayo*. It follows that he can use the same pathway to challenge his arrest and seek to terminate the ensuing removal proceedings. For this reason, he has not exhausted his administrative options, and the Court should therefore deny his habeas petition. *Soberanes*, 388 F.3d at 1309; *see also Reyes v. Lynch*, No. 15-cv-00442-MEH, 2015 WL 5081597, at *3 (D. Colo. Aug. 28, 2015) ("[F]ederal courts must await exhaustion of all administrative appeals before reviewing

immigration decisions, whether by a habeas corpus action or a petition for review.").

B. The Court should reject these claims because even an invalid warrantless arrest does not require release and/or dismissal or removal proceedings.

Even if Petitioner was subject to an initial warrantless arrest lacked some required finding, that does not require his release now. In *Min-Shey Hung*, the Tenth Circuit held that when immigration authorities promptly make a probable cause determination after an allegedly unlawful arrest, the alien cannot challenge the arrest in habeas and obtain release based upon the arrest itself. 617 F.2d at 202–03. There, the alien was arrested without a warrant and was then issued an order to show cause why he should not be deported the next day. *Id.* at 201–02. Five days later, he filed a habeas petition seeking his release based on his allegedly unlawful arrest. *See id.* at 202.

Observing that the alien "was . . . well along the deportation proceedings when the petition for habeas corpus was filed challenging his arrest," the Tenth Circuit found that despite the warrantless arrest, probable cause had been determined when the order to show cause was issued. *Id.* And it held that the district court could not "consider[] the arrest challenge while the [removal] proceedings were in progress and had passed the probable cause stage." *Id.* at 203. Rather, it concluded that "[t]he custody of the [alien] during the course of the [removal] proceedings, the releases, bonding and appearances[,] should be under control of the [government]." *Id.*

Other courts, including the Supreme Court, have long applied the same rule. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 662 (1892) (stating that the "object" of a habeas proceeding "is to ascertain whether the prisoner can lawfully be detained," and holding that "if sufficient ground for . . . detention . . . is shown, [the prisoner] is not to be discharged for defects

in the original arrest or commitment" (citations omitted)); *Arias v. Rogers*, 676 F.2d 1139, 1143 (7th Cir. 1982) (Posner, J.) (applying the rule to an immigration arrest and observing that "detention [may] be legal although the arrest was not"); *Chavez de Vasquez v. Baker*, No. SAG-25-03657, 2025 WL 3713773, at *2 (D. Md. Dec. 23, 2025) (finding "no authority" to support granting "individual habeas relief as a result of a warrantless immigration arrest after the individual's immigration proceedings had begun").

This approach is not inconsistent with the protections afforded by the Fourth Amendment. Indeed, in *Min-Shey Hung*, the Tenth Circuit found support for its reasoning in *Gerstein v. Pugh*, 420 U.S. 103 (1975), a seminal Fourth Amendment case in which the Supreme Court observed that it "ha[d] never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Id.* at 113 (citations omitted); *see also Min-Shey Hung*, 617 F.2d at 202 (discussing *Gerstein*).

Further, the Supreme Court has held that in the immigration context, the Fourth Amendment does not demand voiding removal proceedings that follow from an improper arrest as a suppressive remedy. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984) (declining to adopt a broad exclusionary rule for civil immigration proceedings, and finding that suppression leading to "release would clearly frustrate the express public policy against an alien's unregistered presence in this country"); *see also United States v. Garcia-Beltran*, 443 F.3d 1126, 1132 (9th Cir. 2006) ("In essence, the Court [*in Lopez-Mendoza*] declined to hold that the consequence[] of an illegal arrest, search, or interrogation is to let the defendant go free because of the unlawfulness of the arrest, search, or interrogation.").

Here, Petitioner's Form I-213 arrest record indicates that after his arrest on February 5,

2025, he was transported to the ICE field office in Centennial, CO, where he was questioned and issued a Notice to Appear charging him with overstaying his visa. *See* ECF Nos. 1-4 at 2 (Form I-213, describing post-arrest processing); 1-5 (Notice to Appear dated February 5, 2025). He did not file his habeas petition until more than a year later, in February of 2026. *See* ECF No. 1. Petitioner was thus "well along" in removal proceedings following a probable cause determination when he filed his habeas petition. *See Min-Shey Hung*, 617 F.2d at 203. Nor has Petitioner alleged any deficiency in his NTA or other processing documents that would implicate the APA. Accordingly, even if the arrest warrant was deficient, neither the INA nor the Fourth Amendment nor the APA demand Petitioner's release from detention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2026, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. All participants in that system will receive service via e-mail.

s/ Kyle Brenton
KYLE BRENTON
Assistant United States Attorney