



U.S. Department of Justice

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May 8, 2026

By ECF

Honorable Ramon E. Reyes
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Pastrana-Beltran v. Mullin, et al.*, No. 26-cv-2657 (Reyes, J.)

Dear Judge Reyes:

This Office represents Respondents in this habeas action, in which Petitioner Fredy Pastrana-Beltran ("Petitioner") challenges his detention by U.S. Immigration and Customs Enforcement ("ICE"). See ECF No. 1. Respondents respectfully write in accordance with the Court's Order to Show Cause dated May 5, 2026 (the "OTSC"), which directed Respondents to show cause why a writ of habeas corpus should not be issued and Petitioner should not be released immediately, pursuant to *Cunha v. Freden*, --- F.4th ---, 2026 WL 1146044, (2d Cir. Apr. 28, 2026) and consistent with the Court's reasoning in *Arango v. Genalo*, No. 25-cv-6720 (RER), 2025 WL 3637500 (E.D.N.Y. Dec. 16, 2025) ("*Arango*") and *Chander v. Maldonado et al.*, No. 26-cv-0021 (RER) (E.D.N.Y. Jan. 13, 2026) ("*Chander*").

As explained below, the Petition for Writ of Habeas Corpus ("Petition") should be denied. Petitioner is properly being detained pursuant to 8 U.S.C. § 1226(a), and the custody determination by Immigration and Customs Enforcement ("ICE") is not subject to district court review.

Background

Petitioner was initially detained pursuant to § 235(b)(2)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225(b)(2)(A). However, on April 28, 2026, the United States Court of Appeals for the Second Circuit issued its decision in *Cunha v. Freden*, --- F.4th ---, 2026 WL 1146044 (2d Cir. Apr. 28, 2026). The Second Circuit held that § 1225(b)(2)(A) does not apply to aliens who are present in the United States after entering the country without inspection and admission, and who were not apprehended at or near the border at the time of entry. *Id.* at *2. Rather, the Second Circuit held that § 236(a) of the INA, 8 U.S.C. § 1226(a) ("Section 1226(a)") would apply in those circumstances.¹ *Id.*

Because Petitioner's circumstances fall under the holding in *Cunha*, Respondents

¹ The Government is still evaluating next steps in *Cunha*. For purposes of a potential future appeal, in the event *Cunha* is vacated, stayed, or overruled, Respondents respectfully preserve their arguments that § 1225(b)(2)(A) applies.

respectfully submit that his detention is pursuant to Section 1226(a). Accordingly, ICE provided Petitioner with an individualized custody determination and concluded that he did not establish that he did not pose a flight risk. *See* INA § 236(a) Notice of Custody Determination, annexed hereto as Exhibit A, at 4.² That determination was provided to Petitioner. Ex. A, at 5. (“I acknowledge receipt of this notification”). Petitioner has requested review of his custody determination by an immigration judge (“IJ”). Ex. A, at 5 (“I do request an immigration judge review of this custody determination.”).

The Habeas Petition Should Be Denied

Petitioner is properly being detained pursuant to § 1226(a), and his remedy, if any, administrative. As noted above, on April 28, 2026, the Second Circuit held in *Cunha* that § 1226(a) applies to aliens who, like Petitioner, entered the United States without inspection and admission and were not apprehended at or near the border at the time of entry. 2026 WL 1146044, at *2.

Under § 1226(a), the Government may arrest and detain an alien during his removal proceedings or release him on bond or conditional parole. Section 1226(a) provides, in relevant part, that:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole;

8 U.S.C. § 1226(a). By regulation, immigration officers conduct custodial determinations and may release aliens if the alien meets his burden of showing that he “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). *See Fontanelli, as Next Friend of Bernal Garcia v. Francis*, No. 25-cv-07715 (JLR), 2025 WL 2773234, at *4 (S.D.N.Y. Sept. 29, 2025) (“The Government’s broad [post-arrest detention] discretion under § 1226(a) has a limitation: before the Government may exercise such discretion to detain a person, § 1226(a) and its implementing regulations require ICE officials to make an individualized custody determination, specifically whether the noncitizen is a danger to person or property or persons and is likely to appear for any future proceeding.”) (citations and internal quotation marks omitted); *Hamilton v. Shanahan*, No. 09-cv-6869 (SAS), 2009 WL 5173927, at *2 (recognizing that the alien bears the burden of proof). *See also Velasco Lopez v. Decker*, 978

² The page numbers referenced herein refer to the ECF pagination.

F.3d 842, 849 (2d Cir. 2020) (referring to “post-arrest custody determination” under § 1226(a).)³

Once ICE makes the individualized custody determination, 8 U.S.C. § 1226(e) jurisdictionally bars courts from reviewing that determination. Section 1226(e) provides that “[ICE]’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by [ICE] under this section regarding the detention of any [noncitizen] or the revocation or denial of bond or parole.” 8 U.S.C. § 1226(e). Thus, “[a] district court has no authority to review ICE’s discretionary determinations made under [Section 1226] or otherwise question their propriety.” *Id.* (citing 8 U.S.C. § 1226(e)). *Fontanelli*, 2025 WL 2773234, at *4.

After ICE makes the initial custody determination, an alien can request a custody redetermination (*i.e.*, a bond hearing) by an immigration judge (“IJ”) at any time before a final order of removal is issued. *See* 8 C.F.R. §§ 236.1(d)(1). If dissatisfied with the IJ decision, the alien can seek review by the Board of Immigration Appeals (“BIA”). *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(F), 1003.38, 1236.1(d)(3). *See also Monterosa v. Decker*, No. 20-cv-02653, 2020 WL 1847771, at *3 (S.D.N.Y. Apr. 11, 2020) (“After ICE makes and initial detention decision, any person who is detained has the right to request a bond hearing before an Immigration Judge.”); *See also Arevalo-Guasco v. Dubois*, 788 Fed Appx. 25, 27 (2d Cir. 2019) (concluding that § 1226(e) precludes judicial review of the IJ’s weighing of evidence and factual findings regarding whether [Petitioner-Appellant] is a danger to the community”); *Hamilton*, 2009 WL 5173927, at *3 (“Section 1226(e) specifically divests [district courts] of jurisdiction to review the decisions of the IJ and the BIA (acting on behalf of the Attorney General) regarding the detention of aliens under Section 1226.”)

Now that the Second Circuit has ruled in its controlling decision that § 1226(a) is the relevant detention authority, ICE is detaining Petitioner during pursuant to that authority. ICE has also made an individualized custody determination that Petitioner did not demonstrate that he is not a flight risk. *See* Ex. A, at 4. Petitioner has requested review of that custody determination by an IJ, but that bond hearing has not yet occurred (let alone BIA review of such IJ decision, if the outcome were to prove unfavorable to Petitioner). Ex. A, at 5. Therefore, Petitioner has not exhausted administrative remedies. Numerous courts in this Circuit have held that to the extent that habeas petitioners want to challenge the initial custody determination, ordinarily they must exhaust administrative remedies before seeking federal court intervention. *See, e.g., Almonte Rojas v. Genalo*, No. 25-cv-6543, 2026 WL 275991, at *1 (E.D.N.Y. Feb. 3, 2026) (Komitee, J.) (citing *Castillo Lachapel v. Joyce*, 786 F. Supp. 3d 860, 864 (S.D.N.Y. 2025)); *accord Fontanelli*, 2025 WL 2773224, at *5-*8. *See also Capunay Guzman v. Joyce*, 786 F.Supp.3d 865, 869 (S.D.N.Y. 2025); *J.C.G. v. Genalo*, No. 24-cv-8755 (JLR), 2025 WL 88831, at *4 (S.D.N.Y. Jan. 14, 2025); *Roman v. Decker*, No. 20-cv-3752 (JGK), 2020 WL 4273823, at * 7 (S.D.N.Y. July 24, 2020); *Michalski v. Decker*, 279 F. Supp. 3d 487, 496 (S.D.N.Y. 2018); *Paz Nativi v. Shanahan*, No. 16-cv-8496,

³ The Court’s OTSC also directed Respondents to address the Court’s reasoning in *Arango v. Genalo*, No. 25-cv-6720 (RER), 2025 WL 3637500 (E.D.N.Y. Dec. 16, 2025) and *Chander v. Maldonado*, No. 26-cv-0021 (RER) (E.D.N.Y. Jan. 13, 2026). First, Respondents respectfully submit that *Chander*, in which the Court rejected the Government’s argument that § 1225(b)(2)(A) governed the detention at issue, has been supplanted in this scenario by *Cunha*, and, as a result, Respondents do not dispute that § 1226(a) applies here. Second, *Arango* is inapplicable because it is undisputed that Petitioner here received a Notice to Appear contemporaneous with his arrest, *see* ECF No. 1-2, and, post-*Cunha*, received an individualized custody determination and will receive a bond hearing before an IJ. *Cf. Arango*, 2025 WL 3637500, at *2 (finding two due process violations where petitioner did not receive an individualized custody determination and was not served with an NTA contemporaneous with arrest.)

2017 WL 281751, at *1 (S.D.N.Y. Jan. 23, 2017) (“before immigration detention may be challenged in federal court . . . exhaustion is generally required as a prudential matter” (collecting cases)). The exhaustion requirement “aims to provide the agency with a chance to correct its own errors, ‘protect[] the authority of administrative agencies,’ and otherwise conserve judicial resources by ‘limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary.’” *Id.* (quoting *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.)).

As Petitioner has received an initial custody determination pursuant to § 1226(a), and he is pursuing his administrative remedies (*i.e.*, a bond hearing before an IJ), the Petition should be denied and this action dismissed. *See, e.g., Portillo Melara v. Tellez*, No. 26-cv-1453, 2026 WL 1146054 (E.D.N.Y. Apr. 28, 2026) (Donnelly, J.); *Almonte Rojas*, 2026 WL 275991, at *1. As the court in *Castillo Lachapel* explained, “[i]f the immigration judge releases [petitioner] on bond, his [habeas petition would be moot . . . And even if the immigration judge denies bond, [the] petition could be mooted if the Board of Immigration Appeals reverses that determination.” 786 F. Supp. 3d at 864 (internal quotation marks and citation omitted).

Nor do any of the recognized exceptions to exhaustion apply here. A district court may in its discretion excuse exhaustion when “(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile and (4) in certain instances a plaintiff has raised a substantial constitutional question.” *See Beharry*, 329 F.2d at 62. Numerous courts in this Circuit have also found that none of these exceptions apply where, as here, an immigration judge or the BIA could release a habeas petitioner detained under 8 U.S.C. § 1226(a) on bond. *See, e.g., Castillo Lachapel*, 2025 WL 1685576 at *3; *Capunay Guzman*, 2025 WL 1696891 at *2-*3; *Monterosa*, 2020 WL 1847771 at *6-*7; *Roman*, 2020 WL 4273823, at *7; *Michalski*, 279 F. Supp. 3d at 496.

With respect to the first exception, as explained above, Petitioner has available administrative remedies—a bond hearing with an immigration judge *and* appeal of the immigration judge’s decision, if adverse, to the BIA. *See Castilla Lachapel*, 2025 WL 1685576, at *3 (describing the two levels of administrative review available to petitioner). “Because [Petitioner]’s [potential] bond hearing may provide him with the relief that he seeks—*i.e.*, his release—this Court concludes in the exercise of its discretion that [Petitioner] must exhaust these avenues before seeking judicial relief.” *Id.* (internal quotations and citations omitted). *See Michalski*, 279 F. Supp. 3d at 496 (finding that a scheduled bond hearing “scuttles” petitioner’s habeas petition because the immigration judge could release him on bond making his habeas petition moot); *Paz Nativi*, 2017 WL 281751, at *2 (“The pendency of a BIA appeal that could potentially moot [petitioner’s] habeas petition counsels for the Court to stay its hand until the exhaustion of administrative review in the name of preserving scarce judicial resources and avoiding the possibility of duplicative or conflicting rulings.”).

The second exception is also inapplicable. Petitioner cannot show irreparable harm at this time. While he has been detained for just over four months, now that the Second Circuit has ruled in *Cunha* that § 1226(a) is the relevant detention authority, he has received an individualized custody determination and will receive a bond hearing. *See Capunay Guzman*, 2025 WL 1696891, at *1, *3 (where petitioner had been detained for nineteen days “[t]he risk of prolonged detention”—as opposed to actual prolonged detention—“does not constitute an irreparable injury that excuses the prudential exhaustion requirement”) (quoting *Roman*, 2020 WL 4273823, at *8).

Similarly, as to the third exception, Petitioner has not shown that a bond hearing would be futile. *See Michalski*, 279 F. Supp. 3d at 496; *Capunay Guzman*, 2025 WL 1696891, at *2 (petitioner's "arguments concerning the futility of any bond motion are similarly premature, as he has not yet made a motion for bond"). *See also Cabral v. Decker*, 331 F. Supp. 3d 255, 263 n. 6 (S.D.N.Y. 2018) ("[T]he question of whether the petitioner's yet-to-happen bond hearing complies with due process is not before this Court.").

With respect to the fourth exception, "[m]ere existence of a constitutional issue . . . does not create an automatic exception to an exhaustion requirement." *Monterosa*, 2020 WL 1847771, at *5. "Thus, when applying this exception, 'courts will endeavor to avoid deciding a constitutional issue if the case might be resolved on a narrower factual basis.'" *Capunay Guzman*, 2025 WL 1696891, at *3 (quoting *Monterosa*, 2020 WL 1847771, at *5). As the court in *Capunay Guzman* noted, only a few courts in this Circuit have excused exhaustion under the fourth exception in cases where the petitioner had been detained and denied bond at the bond hearing, or was not yet detained and sought to prevent re-detention. *See id.* (collecting cases).⁴

Accordingly, Respondents respectfully request that the Petition be denied. Respondents thank the Court for consideration of this submission.

Respectfully submitted,

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⁴ Though this Court in *Arango* excused exhaustion under the fourth exception, Respondents respectfully submit that here, unlike in *Arango*, Petitioner has not done "everything within [his] power to exhaust her administrative remedies and get a custody re-determination hearing before an immigration judge." 2025 WL 3637500, at *3. Indeed, Petitioner's bond hearing has not even occurred yet.