



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

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June 1, 2026

By ECF

Honorable Judge LaShann DeArcy Hall
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *D.M.F. v. Genalo, et al.*, No. 26-cv-03122 (LDH)

Dear Judge Hall:

This Office represents Respondents in this habeas action, in which Petitioner D.M.F. ("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 26, 2026 (the "OTSC"), which directed Respondents to show cause why the Petition for Writ of Habeas Corpus should not be granted.

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. Petitioner asserts that he is improperly detained 8 U.S.C. § 1225(b)(2)(A). Petition, ¶¶ 3-4. Petitioner is mistaken as to the basis of his detention and mistaken as to whether he received process.

Background

Respondents respectfully submit that petitioner's detention is pursuant to Section 1226(a). Accordingly, ICE provided Petitioner with a custody determination and concluded that he would be detained as Petitioner violated the terms of his Order of Release on Recognizance and for failing to notify ICE of his change of address. See Declaration of Dmitry Rousseau ("Decl.") ¶17, Ex. D (Form I-286). That determination was provided to Petitioner. *Id.* Petitioner refused to sign the form. *Id.* Petitioner has not yet requested a review of the ICE custody determination by an immigration judge. Decl. ¶28. Petitioner's recourse is his extensive administrative recourse.

I. The Habeas Petition Should Be Denied

A. Petitioner Has Failed to Exhaust His Administrative Remedies

Petitioner is properly being detained pursuant to § 1226(a), and his remedy, if any, administrative.

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

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.” *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). Under 8 C.F.R. § 1003.19(h)(3), an alien may seek a redetermination of custody conditions set by ICE before an immigration judge must “first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview.” *See Hylton v. Shanahan*, 2015 WL 3604328 (S.D.N.Y. June 9, 2015) (declining to shift burden of proof onto government in a bond hearing in immigration court where respondent was detained under § 1226(a)).

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 an initial detention decision, any person who is detained has the right to request a bond hearing before an Immigration Judge.”). The BIA and IJ decisions are not reviewable for their substantive determinations. See *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.”)

Here, ICE is detaining Petitioner pursuant to § 1226(a). See Decl. ¶ 20. ICE has also made an individualized custody determination that Petitioner would be detained and that Petitioner’s OREC would be revoked for violating its terms by failing to notify ICE of his change of address. Decl. ¶ 17. Petitioner was served with a Notice of Custody Determination and was informed of his right to request a review of his custody determination with an IJ. Decl. ¶ 17, Ex. D. Petitioner indicated that he did not wish to request such a review and subsequently refused to sign the form. *Id.* As such, Petitioner has not yet requested review of that custody determination by an IJ, thus no bond hearing has occurred (let alone BIA review of such IJ decision, if the outcome were to prove unfavorable to Petitioner). *Id.* Petitioner has so far appeared multiple times before an IJ with his counsel and at no time has he requested a bond hearing be scheduled. Decl. ¶¶ 22, 24, 25, 28.

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 2773234, at *5-*8. See also *Capunay Guzman v. Joyce*, 786 F.Supp.3d 865, 869-871 (S.D.N.Y. 2025); *Roman v. Decker*, No. 20-cv-3752 (JGK), 2020 WL 4273823, at * 7 (S.D.N.Y. July 24, 2020); *Paz Nativi v. Shanahan*, No. 16-cv-8496, 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.’” *Guzman*, 786 F.Supp.3d at 869-871 (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 has failed to exhaust administrative remedies at his disposal (*i.e.*, a bond hearing before an IJ), the Petition should be denied and this action dismissed. 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 [BIA] 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*, 786 F. Supp. 3d at 870; *Monterosa*, 2020 WL 1847771 at *6-*7; *Roman*, 2020 WL 4273823, at *7.

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 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. Petitioner has been detained for one month 19 days at the time of this filing. The risk of prolonged detention does not constitute an irreparable injury that excuses the prudential exhaustion requirement. *See Michalski v. Decker*, 279 F. Supp. 3d 487, 496 (S.D.N.Y. January 4, 2018); *Capunay Guzman*, 786 F. Supp. 3d at 871; *Roman*, 2020 WL 4273823, at *8.

Similarly, as to the third exception, Petitioner has not shown that a bond hearing would be futile. *See Capunay Guzman*, 786 F. Supp. 3d at 870 (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. September 21, 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*, 786 F. Supp. 3d at 871 (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). Indeed, where Petitioner has not even sought bond, his claims can be mooted by the possibility of being released on bond after exhausting his administrative remedies, and thus [he] has failed to show that the fourth exception to the prudential exhaustion requirement applies. *See id.*

In sum, Petitioner does have recourse available to him, but that recourse is administrative. Despite multiple opportunities, he has not once tried to use that process before running to this Court. Therefore, the Petition should be denied.

Petitioner's Arrest by ICE Comports with the Fourth Amendment

Petitioner argues that ICE agents seized him in violation of his Fourth Amendment rights. Pet. ¶78-81. Petitioner's Fourth Amendment claim fails because his civil detention was a reasonable and lawful exercise of federal immigration authority. As the Supreme Court recognized in *Abel v. United States*, 362 U.S. 217 (1960), administrative arrests for deportation have a long-standing statutory history and are distinct from arrests for criminal offenses. The Supreme Court held that that "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long-sanctioned practice of government at the behest of a party who not only did not challenge the exercise of authority below, but expressly acknowledged its validity." *Abel*, 362 U.S. at 230. Petitioner's arrest was not a criminal arrest requiring a judicial warrant or probable cause of a new crime; rather, it was a civil, administrative arrest carried out pursuant to the broad authority granted by Congress to enforce the nation's immigration laws. The INA grants the executive branch the authority to arrest and detain noncitizens during the course of removal proceedings. Petitioner's arrest was a straightforward exercise of this statutory power.

Petitioner argues that ICE agents seized him in violation of his Fourth Amendment rights. Pet. ¶78-81. Petitioner more specifically alleges that ICE had no legitimate reason to stop him and could not have obtained an independent reasonable suspicion during the stop as they did not elicit any information from Petitioner until after he was already in their custody. *Id.* ¶81.

The allegations are belied by the facts of Petitioner's arrest. ICE officers did not derive reasonable suspicion from the stop. Rather, on March 7, 2026, ICE Supervisory Detention and Deportation Officer Frank Franco found probable cause to believe that Petitioner was removable from the United States on the basis of the execution of a charging document and the pending of ongoing removal proceedings and issued a Form I-200, Warrant for Arrest of Alien. Decl. ¶15, Ex. C. *See also*, Decl. ¶ (IJ found Petitioner removable). Subsequently, on April 14, 2026, at approximately 3:00 P.M., ICE officers observed Petitioner enter a Kia Sportage vehicle, approached, and positively identified Petitioner by his most recent photos. Decl. ¶16, Ex. C. *See also* Exhibit E, Form I-213. ICE then arrested Petitioner pursuant to the Form I-200 and took Petitioner into custody. *Id.*

In sum, ICE did have probable cause to believe Petitioner was removable and issued a warrant prior to his arrest.

* * * *

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

Respectfully submitted,

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