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June 25, 2026

VIA CM/ECF
Hon. Brenda K. Sannes
U.S. District Judge
Federal Building and U.S. Courthouse
P.O. Box 7255
Syracuse, NY 13261-7255

RE: *De Rocha v. Akshar et al.*
Civil Action No. 9:26-cv-1263 (BKS)

Dear Judge Sannes:

This Office represents respondent Todd Blanche ("Respondent" or the "government") in this habeas corpus action, in which Petitioner Agnaldo Carvalho De Rocha ("Petitioner") challenges his detention by U.S. Immigration and Customs Enforcement ("ICE").

Petitioner is a native and citizen of Brazil. Ex. A.[1] He entered the United States without inspection, admission or parole at an unknown date and time[2] and had no contact with immigration officials prior to the encounter that resulted in his current detention. *Id.* On December 10, 2025, Border Patrol agent(s) in the Watertown, New York area conducted targeted surveillance related to two vehicles of interest—one registered to an individual wanted in Brazil and another registered to an individual with a final order of removal issued by an Immigration Judge. Agents conducted an immigration inspection of the vehicles, including one in which Petitioner was a passenger. *Id.* at 3. In response to questioning by the agents, Petitioner voluntarily admitted that he is a citizen of Brazil and he lacked lawful status in the United States. He was unable to produce any documentation authorizing him to enter or remain in the United States. *Id.* Petitioner was arrested and taken into custody. *See id.*

On December 11, 2025, Petitioner was served with a Form I-826, Notice of Rights and Request for Disposition. Petitioner requested a removal hearing before the immigration court. *See* Ex. B.

[1] Exhibits A through G were provided to me by counsel for ICE.

[2] According to Form I-213, Petitioner told a Border Patrol Agent that he entered into the United States in 2003 from Mexico without inspection. Ex. A at 1.

On February 20, 2026, the Petitioner received a bond hearing before an Immigration Judge,[3] who denied bond after determining that the Petitioner presents a flight risk. Ex. C. Petitioner did not appeal the denial of bond. On March 30, 2026, the Immigration Judge issued an order for removal. Ex. D. On April 10, 2026, Petitioner filed a notice of appeal with the Board of Immigration Appeals (BIA). Ex. E. That appeal remains pending.

On May 4, 2026, Petitioner requested custody re-determination (i.e., a bond hearing). See Ex. F. However, the request was erroneously filed with the BIA, where his appeal from his order of removal is pending, rather than with the Executive Office of Immigration Review (EOIR). The BIA cannot direct or provide bond hearings. The misfiling was discovered in reviewing Petitioner's file in connection with the instant petition. Accordingly, on June 24, 2026, ICE re-filed the request with EOIR, who then scheduled a bond hearing for June 30. Ex. G.

I. The Petition should be denied for failure to exhaust administrative remedies.

The Petition should be dismissed for failure to exhaust administrative remedies. The INA and its accompanying regulations provide a two-level administrative review process for aliens detained pursuant 8 U.S.C. § 1226(a). A detainee may request, as Petitioner here did, a "custody redetermination hearing" (also referred to as a "bond hearing") before an immigration judge (see 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)). Should the immigration judge set a bond amount that he believes is too high or conclude that the detainee should not be released, he may appeal to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3)). *See also Castillo Lachapel*, 2025 WL 1685576 at *3 ("even if the immigration judge denies bond, [Petitioner]'s petition could be mooted if the Board of Immigration Appeals reverses that determination.").

Here, Petitioner had a bond hearing in February 2026, the results of which he did not appeal, and has another bond hearing scheduled next week. He will have the right to appeal the results of that hearing as well. "A habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention." *See Castillo Lachapel v. Joyce, et al.*, No. 25-cv-4693, 25 WL 1685576, at *3 (S.D.N.Y. June 16, 2025); *see also 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

[3] Petitioner received a bond hearing because the Central District of California vacated *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (B.I.A. 2025), on February 18, 2026. *Maldonado Bautista v. Noem*, Case No. 5:25-cv-01873-SSS-BFM (C.D. Cal. Feb. 18, 2026), *appeal filed* No. 26-1044 (9th Cir. Feb. 20, 2026). On March 6, 2026, the Ninth Circuit stayed the Central District of California's order vacating *Yajure Hurtado* pending adjudication of the motion to stay pending appeal. Ninth Cir. Dkt. No. 5.1, at 1. On March 31, 2026, the decision was stayed pending appeal. Ninth Cir. Dkt. 14.1, at 1 & 4. But, for 16 days—from February 18, 2026 until March 6, 2026—immigration judges could still decide for themselves, without applying *Yajure Hurtado*, whether § 1225(b)(2)(A) or § 1226(a) applied notwithstanding the Government's position that § 1225(b)(2) authorized detention. The immigration judge handling Petitioner's proceeding conducted a bond hearing as if § 1226(a) applied.

federal court . . . exhaustion is generally required as a prudential matter") (collecting cases). Generally, "a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself." *See Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 740 (2d Cir. 1992); see also *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003); *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998).

The Petition alleges that exhaustion would be futile because "the detention statute does not provide for a bond hearing when an individual is held pursuant to 8 U.S.C. § 1226(c) and [immigration judges] lack jurisdiction to render an individualized custody determination for individuals incarcerated pursuant to that statute. Petition, Dkt. #1, at ¶ 15. But, Petitioner is not detained under § 1226(c), which mandates detention of certain criminal aliens. Rather, his detention is pursuant to § 1226(a), as discussed below. He further argues that exhaustion would be futile because "EOIR lacks authority to rule on the constitutionality of the immigration statutes." *Id.* ¶17. But he does not challenge the constitutionality of any provision of the INA.

Thus, the Court should require that Petitioner exhaust the administrative avenues available to him before seeking judicial relief. Until that process is complete, his habeas petition is premature for failure to exhaust administrative remedies.

II. Petitioner has been provided the process he is due.

As an initial matter, the government notes that Petitioner was detained in December 2025 pursuant to the government's position that he was subject to mandatory detention under 8 U.S.C. § 1225(b),and acknowledges that the Second Circuit subsequently rejected that position. *Barbosa Da Cunha v. Freden*, 175 F.4th 61 (2d Cir. 2026). *Barbosa Da Cunha* held that 8 U.S.C. § 1226(a), not § 1225(b)(2)(A), applies to aliens, like Petitioner here, 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. Although the government disagrees and reserves all rights,[4] it acknowledges that *Barbosa Da Cunha* controls here. Respondents also acknowledge that Your Honor's prior jurisprudence would, regardless of *Barbosa Da Cunha*, result in the conclusion that Section 1226(a), rather than 1225(b)(2)(A), governed Petitioner's detention. *See, e.g., Gaspar v. Ashkar, et al.*, No. 9:26-cv-00118 (BKS), Dkt. # 13 at 12-15 (N.D.N.Y. 2026).

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[4] On June 22, 2026, the government filed a petition in the United States Supreme Court seeking a writ of certiorari from the Sixth Circuit's decision in *Lopez-Campos v. Raycraft*, No. 25-1965 (May 11, 2026). *See Raycraft v. Lopez-Campos*, No. 25-1545 (Sup. Ct. June 22, 2026). The petition asks the Supreme Court to resolve a deepening Circuit split, of which *Barbosa da Cunha* is part, by addressing: (1) whether 8 U.S.C. § 1225(b)(2)(a) mandates the detention pending removal proceedings of aliens who are present in the United States without having been admitted, and (2) whether detaining such aliens without a bond hearing during their removal proceedings comports with due process.

However, the government respectfully submits that there is no remedy available to Petitioner because he already received the process that he was due under § 1226(a). He was given a bond hearing in February 2026 while *Yajure Hurtado* was temporarily vacated, and a second request for a bond hearing has been granted and a bond hearing scheduled. Accordingly, even though *da Cunha* dictates that 8 U.S.C. § 1226(a) applies, Petitioner has already received the individualized custody review to which he in entitled to under that statute.

Petitioner argues that his detention has become unreasonably prolonged, entitling him to immediate release unless he receives a bond hearing before an immigration judge that shifts the burden to the government to justify his continued detention. But a bond hearing before an immigration judge has already been scheduled. And the cases upon which he relies were all decided in the context of § 1226(c) mandatory detention of criminal aliens or § 1231 mandatory detention following a final order of removal, and expressly discussed the due process concerns associated with prolonged detention *without the right to a bond hearing*. Petition at ¶ 24 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001) (addressing § 1231's post-removal mandatory detention period); ¶¶ 24, 26, 30 (citing *Demore v. Kim*, 538 U.S. 510 (2003) (addressing § 1226(c)'s mandatory detention of criminal aliens); ¶ 28-33 (citing *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024) (§ 1226(c)). Indeed, much of Petitioner's argument appears to be based on the incorrect understanding that Petitioner is being held pursuant to § 1226(c). *Id.* at ¶¶ 15, 26-33.

Indeed, many of the cases in this Circuit finding that a due process violation based on "prolonged" detention have addressed months-long detention *without* a bond hearing. *See, e.g., M.P.L. v. Arteta*, No. 25 Civ. 5307, 2025 WL 2938993, at *3 (S.D.N.Y. Oct. 16, 2025) (finding due process violation based on seven-month detention *without bond hearing*); *J.M.P. v. Arteta*, 804 F. Supp. 3d 387, 393 (S.D.N.Y. 2025) (same); *Veletanga v. Noemi*, No. 25 Civ. 9211, 2025 WL 3751865, at *5–7 (S.D.N.Y. Dec. 26, 2025) (same as to three-month detention without bond hearing); *Cabral*, 331 F. Supp. 3d at 261 (same as to seven-month detention without a bond hearing). Here, Petitioner has had a bond hearing and is scheduled for a second. His due process rights have not been violated so as to trigger yet another bond hearing with a shift in the burden of proof.

While the Second Circuit has recognized that prolonged detention may implicate due process concerns absent adequate custody review, it has done so in the context of ensuring constitutionally sufficient bond procedures—not requiring multiple or duplicative hearings once meaningful review has been provided. *Hechavarria v. Sessions*, 891 F.3d 49, 56–57 (2d Cir. 2018); *Velasco Lopez v. Decker*, 978 F.3d 842, 852–53 (2d Cir. 2020). *Velasco Lopez* held that prolonged detention required that the petitioner in that case be given a bond hearing at which the government bears the burden of proof, it did not establish a bright-line rule, but rather reached a case-specific conclusion based on the particular facts presented. *See, e.g., Mahmodi v. Marich*, No. 25-CV-6762-MAV, 2026 WL 113473, at *7 (W.D.N.Y. Jan. 15, 2026). Here, Petitioner has been detained far less than the fifteen months at issue in *Velasco Lopez*. And in that case, the petitioner had been denied bail because he was found to be a danger based on his arrest on state charges just prior to his immigration detention, but was unable to overcome this impediment to bond because ICE failed

to arrange his appearance in court on the state charges. *See Velasco Lopez*, 978 F.3d at 852-53. By contrast, Petitioner here does not allege that ICE impeded his ability to secure bail.

The government concedes that this Court previously ordered a burden-shifted bond hearing under similar facts in *Gunes v. Warden*, 9:26-cv-0525 (BKS), Dkt. #11. The government maintains that it is constitutionally permissible to place the burden of proof on the alien in these proceedings, as it has long done. *E.g.*, *Matter of Guerra*, 24 I&N Dec. 37 (B.I.A. 2006); *Matter of Fatahi*, 26 I&N Dec. 791, 795 n.3 (B.I.A. 2016); *Matter of R-A-V-P-*, 27 I&N Dec. 803 (B.I.A. 2020). Because Petitioner has had a bond hearing already and is scheduled for a second, and because he has not alleged any constitutional deficiencies in the process that has been afforded him, the government submits that the Petition should be denied.

The government further submits that this matter may be decided without a hearing. However, if the Court determines that a hearing would be helpful, the government is fully prepared to appear and present Respondent's position.

Thank you for your consideration of this matter.

Respectfully Submitted,

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