

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DERWIN CAPUNAY GUZMAN,

Petitioner,

v.

WILLIAM P. JOYCE, *et al.*,

Respondents.

Case No. 25 Civ. 4777 (RA)

**RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION
TO THE PETITION FOR WRIT OF HABEAS CORPUS**

JAY CLAYTON
United States Attorney
Southern District of New York
86 Chambers St., 3rd Floor
New York, New York 10007
Telephone: 212-637-2810
Facsimile: 212-637-2786
Attorney for Respondents

ANTHONY J. SUN
Assistant United States Attorney
Of Counsel

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The government respectfully submits this memorandum of law in petition for writ of habeas corpus filed by petitioner Derwin Capunay Guzman (“Petitioner”) on June 5, 2025. ECF No. 1.

PRELIMINARY STATEMENT

Petitioner is an applicant for admission from Peru who was apprehended by officers of the U.S. Department of Homeland Security (“DHS”) shortly after he unlawfully crossed the United States/Mexico border near Tecate, California. Because he is an alien who entered the United States without inspection or admission, was apprehended within 100 miles of the border and within 14 days of an illegal entry, and deemed inadmissible at that time, DHS had the discretion either to place Petitioner into § 1229a removal proceedings or to issue an expedited removal order. Due to an influx of aliens at the border and resource constraints, DHS opted at that time to place Petitioner in § 1229a removal proceedings and release him in the interim. In May 2025, U.S. Immigration and Customs Enforcement (“ICE”) exercised its prosecutorial discretion and moved to dismiss Petitioner’s removal proceedings due to changed circumstances, and after making that motion, opted to detain him. The immigration judge has not yet granted ICE’s motion to dismiss, so removal proceedings remain pending. Should the immigration judge grant ICE’s motion, ICE will place Petitioner into expedited removal proceedings, through which Petitioner will receive the process afforded by statute, which includes the potential to pursue his application for asylum.

Petitioner filed this habeas petition principally to challenge ICE’s efforts to dismiss his removal proceedings and invoke the expedited removal procedures against him. He asserts that subjecting him to the expedited removal process violates the Immigration and Nationality Act as well as due process. He also argues that his detention is unlawful. But all of Petitioner’s claims fail. He cannot challenge ICE’s decision to dismiss his removal proceedings and to invoke the

expedited removal procedures against him, and in any event, ICE's actions violate neither the statute nor due process. Nor has Petitioner demonstrated that his detention is unlawful.

BACKGROUND

Petitioner is a native and citizen of Peru who unlawfully entered the United States on or about April 24, 2024. ECF No. 10, Declaration of Walter S. Canales dated June 11, 2025 ("Canales Decl."), ¶¶ 3, 4. Petitioner admitted to Border Patrol that he unlawfully entered the United States, was not admitted or paroled, and did not possess valid entry documents. *Id.* ¶ 4. Consequently, United States Customs and Border Protection ("CBP") placed Petitioner in custody that same day. *Id.* On April 26, 2024, CBP served Petitioner with a Notice to Appear ("NTA"), the charging document used to commence removal proceedings, charging him with removability pursuant to INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 5. The NTA advised Petitioner to appear before an immigration judge in New York, New York, for a hearing scheduled for August 25, 2024. *Id.* After completing proceeding, on April 26, 2024, CBP released Petitioner on his own recognizance due to lack of bed space at the border. *Id.* ¶ 6.

On August 26, 2024, Petitioner filed a change of address with the immigration court, and the court subsequently reset his initial master calendar hearing for October 31, 2024. *Id.* ¶ 7. On October 31, 2024, Petitioner appeared without counsel at his initial master calendar hearing before an Immigration Judge at the Varick Street Immigration Court in New York, New York. *Id.* ¶ 8. The immigration judge provided Petitioner with the initial advisals, including the right to an attorney at no cost to the government, and the matter was reset for a master calendar on May 29, 2025, to allow Petitioner an opportunity to obtain counsel. *Id.* On March 12, 2025, acting pro se,

Petitioner filed with the Immigration Court an I-589 application for asylum, withholding, and protection under the Convention Against Torture. *Id.* ¶ 9.

On May 29, 2025, Petitioner appeared without counsel for his second master calendar hearing at the Varick Immigration Court. *Id.* ¶ 10. At that hearing, ICE made an oral motion to dismiss the removal proceedings pursuant to 8 C.F.R. § 239.2(c) based on the grounds set forth in 8 C.F.R. § 239.2(a)(7). *Id.* The Immigration Judge requested ICE put the motion in writing to give Petitioner a chance to respond and set the next master calendar hearing for June 3, 2025. *Id.*

Also on May 29, 2025, ICE Enforcement and Removal Operations (“ERO”) determined Petitioner was amenable to expedited removal under INA § 235, 8 U.S.C. § 1225. *Id.* ¶ 11. ERO redetermined Petitioner’s custody status, ICE arrested and detained Petitioner on May 29, 2025. *Id.* Petitioner was initially detained in this district at 26 Federal Plaza while ICE attempted to locate available bedspace at his risk classification level in the region. *Id.*

At the next master calendar hearing on June 3, 2025, Bronx Defenders appeared as a friend of the court on behalf of Petitioner, who was present in court. The Immigration Judge suggested that Bronx Defenders file a motion for bond once it formalized its representation of Petitioner, and the court reset the case for another master calendar hearing on June 12, 2025. *Id.* ¶ 12.

Because Orange County Jail in Goshen, New York — ICE’s only detention facility in this district — was over capacity for detainees with Petitioner’s risk classification, on June 5, 2025, ICE notified Petitioner that it planned to transfer him to ICE’s Allen Parish Public Safety Complex in Louisiana. *Id.* ¶ 13. This decision on account of bedspace limitations was made prior to the filing of the instant petition for habeas corpus. *Id.* With knowledge of the impending transfer, Petitioner filed his habeas petition in this Court after 11:00 p.m. on June 5, 2025.

On June 6, 2025, ICE transferred Petitioner to the Allen Parish Public Safety Complex, departing New York at around 5:15 a.m., and he remains detained at that facility at this time. *Id.* ¶¶ 15, 17. In light of the transfer, ICE also moved the Varick Immigration Court to transfer venue of the removal proceedings to the Oakdale Immigration Court in Louisiana, which the Immigration Judge granted on June 9, 2025. *Id.* ¶ 16. ICE’s motion to terminate proceedings is still pending; if the Immigration Judge grants the motion, ICE will place Petitioner in expedited removal proceedings pursuant to 8 U.S.C. § 1225. *Id.* ¶ 17.

In this habeas petition, Petitioner asserts five counts, asserting violations of the INA, its implementing regulations, the Administrative Procedure Act (“APA”), and due process. ECF No. 1, ¶¶ 47–63. He seeks his immediate release from custody on his own recognizance.

ARGUMENT

I. PETITIONER’S CHALLENGES TO HIS IMMIGRATION PROCEEDINGS FAIL

A. The Court Lacks Jurisdiction Over Expedited Removal Issues

As a threshold matter, Petitioner’s claims challenging matters relating to removal proceedings and expedited removal are not properly presented in this habeas corpus action seeking release from custody, as they are not challenges to detention. “At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.” *INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see Munaf v. Geren*, 553 U.S. 674, 693 (2008) (“Habeas is at its core a remedy for unlawful executive detention. The typical remedy for such detention is, of course, release.”); *see also* 28 U.S.C. § 2241 (authorizing federal courts to grant a writ of habeas corpus whenever a petitioner is “in custody in violation of the Constitution or laws or treaties of the United States”).

Further, Petitioner's challenge to ICE's decision to place him in expedited removal proceedings is jurisdictionally barred by 8 U.S.C. § 1252(a)(2)(A). The Second Circuit has explained that, subject to exceptions not relevant here, "§ 1252(a)(2)(A) deprives [the] court[s] of jurisdiction to hear challenges relating to the Attorney General's decision to invoke expedited removal, his choice of whom to remove in this manner, his procedures and policies, and the implementation or operation of a removal order." *Shunaula v. Holder*, 732 F.3d 143, 146 (2d Cir. 2013) (quotations omitted). Petitioner's challenges to ICE's decision to invoke expedited removal against him is thus barred.

Separately, 8 U.S.C. § 1252(g) deprives courts of jurisdiction to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Here, Petitioner's challenges are barred to the extent he challenges decisions and actions to commence proceedings and to adjudicate cases. The Supreme Court explained in *Reno v. American-Arab Anti-Discrimination Committee* ("AADC") that § 1252(g) was "designed to give some measure of protection" to immigration authorities' discretionary decisions regarding the commencement of removal proceedings: Congress provided that if those decisions "are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed." 525 U.S. 471, 485 (1999); *see also id.* at 485 n.9 ("Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion. It does not tax the imagination to understand why it focuses upon the stages of administration where those attempts have occurred."); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (observing that the decision to

prosecute or enforce a case, whether civil or criminal, is “generally committed to an agency’s absolute discretion” and not amenable to judicial review).

And to the extent that Petitioner challenges a policy, statute, or regulation concerning expedited removal under the APA, *see* Count Three, this is not the proper forum. Such challenges must be filed in the U.S. District Court for the District of Columbia. *See* 8 U.S.C. § 1252(e)(3)(A).

B. ICE Has Not Violated the INA or Its Implementing Regulations

In Count One, Petitioner is correct that, at present, he is in § 1229a removal proceedings. ICE’s motion to dismiss those removal proceedings is currently pending before an immigration judge, who will independently decide how to adjudicate ICE’s motion. Until the immigration judge grants ICE’s motion, and pending any appeal to the BIA, Petitioner will remain in § 1229a removal proceedings. Indeed, ICE has affirmed that it would place Petitioner in expedited removal proceedings only if the immigration judge dismisses § 1229a removal proceedings. *See* Canales Decl. ¶ 17.

Petitioner has pointed to nothing in any statute that prevents ICE from moving to dismiss removal proceedings. Nor has Petitioner pointed to anything in the statute that prevents ICE from applying the expedited removal process to him, particularly where Petitioner was apprehended near the border on or close to the day that he unlawfully entered and was deemed inadmissible at that time. Nor could he. Simply put, ICE’s actions have not violated any statute.

Petitioner also asserts that ICE’s action of seeking to dismiss his removal proceedings violates the INA and implementing regulations because there has allegedly been no change of circumstance in Petitioner’s case. *See* Pet. ¶ 49. He argues that ICE “cannot lawfully dismiss or move to dismiss Petitioner’s proceedings absent a change in the circumstances of *his case*,” presumably referring to 8 C.F.R. § 239.2(a)(7). This argument is unavailing. Nothing in the

regulation precludes ICE from filing a motion to dismiss when it believes that circumstances have changed and that continuation of the proceedings is not in the best interest of the government.¹ In any event, this is a matter exclusively for the immigration court. If the immigration judge determines that ICE's motion to dismiss is not in accordance with 8 C.F.R. § 239.2(c), such motion "shall be deemed a motion to terminate" and adjudicated pursuant to the appropriate standards, which include consideration of a party's opposition to the motion. 8 C.F.R. § 1239.2(b). Further, Petitioner may also file an administrative appeal to the BIA if he believes the motion is improperly adjudicated. Thus, because the immigration judge will evaluate ICE's motion and adjudicate it according to the applicable standard, any alleged violation of the regulation is harmless, and Petitioner has not shown any prejudice required to make out relief under *Accardi*. See, e.g., *United States v. Schiller*, 81 F.4th 64, 71 (2d Cir. 2023) ("Although an agency's failure to follow its own regulations or procedures can require its action to be invalidated, see *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954), our precedent requires a showing of prejudice to the

¹ Under this regulation, an ICE officer may cancel an NTA unilaterally prior to commencing proceedings, but once the NTA is filed with the immigration court and jurisdiction is vested with the immigration judge (as is the case here), the regulations provide that ICE counsel may only move the immigration court for dismissal of the proceedings. See 8 C.F.R. §§ 239.2(a), (c); accord 8 C.F.R. § 1239.2. Notably, dismissal is not automatic; rather, an immigration judge evaluates the motion and any opposition and makes an independent decision. See, e.g., *Matter of G-N-C-*, 22 I. & N. Dec. 281, 284 (BIA 1998) (explaining that the language of 8 C.F.R. § 239.2(a) (1998) and § 239.2(c) (1998) "marks a clear boundary between the time prior to commencement of proceedings, where [DHS] has decisive power to cancel proceedings, and the time following commencement, where [DHS] merely has the privilege to move for dismissal of proceedings" and that, based on the distinction, "the regulation presumably contemplates not just the automatic grant of a motion . . . , but an informed adjudication by the Immigration Judge . . . based on an evaluation of the factors underlying [DHS's] motion").

rights protected where the subject regulation ‘does not affect fundamental rights derived from the Constitution or a federal statute,’ *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993).”).

C. Petitioner Has Suffered No Due Process Violation

In Count Two, Petitioner asserts that ICE’s efforts to dismiss his § 1229a removal proceedings in favor of the expedited removal process violates due process. *See* Pet. ¶¶ 52–53. Not so. As explained below, applicants for admission at the threshold of entry into the United States like Petitioner have limited due process rights and he can point to nothing to support a violation under the facts of this case; his claim is also premature and he can show no cognizable prejudice on the current record.

The Supreme Court has long recognized that Congress exercises “plenary power to make rules for the admission of foreign nationals and to exclude those who possess those characteristics which Congress has forbidden.” *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Pursuant to that longstanding doctrine, “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.” *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The broad scope of the political branches’ authority over immigration is “at its zenith at the international border.” *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004). Accordingly, “certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

The Supreme Court has explained that applicants for admission lack any constitutional due process rights with respect to admission aside from the rights provided by statute: “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned,” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and “it is not within the

province of any court, unless expressly authorized by law, to review [that] determination,” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court reaffirmed “[its] century-old rule regarding the due process rights of an alien seeking initial entry” in *Thuraissigiam*, explaining that an individual who illegally crosses the border—like Petitioner—is an applicant for admission and “has only those rights regarding admission that Congress has provided by statute.” *DHS v. Thuraissigiam*, 591 U.S. 103, 139-40 (2020).

As explained by the Supreme Court, “[w]hen an alien arrives at a port of entry—for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered the country.” *Thuraissigiam*, 591 U.S. at 139. Stated further, “aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are ‘treated’ for due process purposes ‘as if stopped at the border.’” *Id.* (quoting *Mezei*, 345 U.S. at 215). The Supreme Court held that this same “threshold” rule applies to individuals, like Petitioner, who are apprehended after trying “to enter the country illegally” because by statute, such individuals are also defined as applicants for admission. *Id.* at 139-40. Treating such an individual in a more favorable manner than an individual arriving at a port of entry would “create a perverse incentive to enter at an unlawful rather than a lawful location” and therefore the Supreme Court rejected the argument that an individual who “succeeded in making it 25 yards into U.S. territory before he was caught” should be entitled to additional constitutional protections. *Id.* at 140.

Instead, applying the “century-old rule regarding the due process rights of an alien seeking initial entry[.]” the Court explained that aliens arrested after crossing the border illegally, such as Petitioner, have “only those rights regarding admission that Congress has provided by statute.” *Id.* at 140. The Court was clear: “the Due Process Clause provides nothing more” than the procedural

protections set forth in 8 U.S.C. § 1225 that allow an individual to seek protection from removal if he fears return to his home country and also seek parole from the agency. *Id.*

The Supreme Court’s decision in *Thuraissigiam* is instructive. In relevant part, *Thuraissigiam* concerned a due process challenge raised by an alien apprehended 25 yards from the border, which he crossed illegally. 591 U.S. at 139. DHS detained and processed him for expedited removal because he lacked valid entry documents. *Id.* at 114. An asylum officer then determined that Mr. Thuraissigiam lacked a credible fear of persecution. *Id.* Mr. Thuraissigiam petitioned for a writ of habeas corpus, asserting a fear of persecution and requesting another opportunity to apply for asylum. *Id.*

In its decision, the Supreme Court delineated the boundaries of due process claims that can be made by applicants for admission. Specifically, the Court held that for such aliens stopped at the border, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Id.* at 131 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Guerrier v. Garland*, 18 F.4th 304, 313 (9th Cir. 2021) (“In concluding that *Thuraissigiam*’s due process rights were not violated, the Supreme Court emphasized that the due process rights of noncitizens who have not ‘effected an entry’ into the country are coextensive with the statutory rights Congress provides.”).

In short, because Petitioner is an inadmissible applicant for admission seeking initial entry into this country, he therefore “requests a privilege and has no constitutional rights regarding his application[.]”² *See Landon*, 459 U.S. at 32; *UKnauff*, 338 U.S. at 542 (“At the outset we wish to

² It is well-settled that “an alien who tries to enter the country illegally is treated as an ‘applicant for admission,’ and an alien who is detained shortly after unlawful entry cannot be said to have

point out that an alien who seeks admission to this country may not do so under any claim of right.”). Instead, Petitioner has “only those rights regarding admission that Congress has provided by statute.” *See Thuraissigiam*, 591 U.S. at 140. That is, Petitioner is entitled only to the protections set forth by statute and “the Due Process Clause provides nothing more.” *Thuraissigiam*, 591 U.S. at 140; *cf. Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997) (the rights of excluded aliens “are determined by the procedures established by Congress and not by the due process protections of the Fifth Amendment”).

The statutory framework enacted by Congress permits DHS, in its sole discretion, to place Petitioner in § 1229a removal proceedings so that he may pursue an application for relief, or to instead invoke the expedited removal process, which also provides a potential opportunity to pursue asylum in proceedings before an immigration judge.³ As an applicant for admission, Petitioner has no constitutional or statutory right to pick which process is applied to him. So long as he is afforded the procedures provided by statute, he is not deprived of due process. Here, Petitioner can identify no statutory violation, and, thus, no due process violation. At the discretion of DHS, Petitioner was placed in § 1229a removal proceedings—which remain pending as of today’s date—and while ICE has expressed its intent to dismiss those proceedings and to instead invoke the expedited removal process, even then Petitioner would not be left without process. Petitioner would then receive the process provided by § 1225(b), which is all that he would be

‘effected an entry.’” *Thuraissigiam*, 591 U.S. at 140. Petitioner indisputably falls within this category and is an applicant for admission treated at the threshold of entry.

³ Petitioner here filed an asylum application in the immigration court within one year of entry. Even if he is placed in expedited removal proceedings and must re-apply for asylum, if the asserted basis for asylum relief is the same as the initial application, then the date of filing of the initial application will control. *See Matter of M-A-F-*, 26 I. & N. Dec. 651, 655 (BIA 2015).

entitled to in that scenario. But his due process claim is premature because he has not yet been subjected to that process and thus cannot point to any process he has not received that he was due.

And even if Petitioner could invoke additional due process protections greater than those discussed above—of which, for the reasons discussed above, there are none—his due process claim would still fail. In the context of challenges to removal proceedings—which this plainly is—the Second Circuit has explained that, “[t]o establish a violation of due process, an alien must show that she was denied a full and fair opportunity to present her claims or that the IJ or BIA otherwise deprived her of fundamental fairness.” *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (quotation marks omitted). Importantly, “[p]arties claiming denial of due process in immigration cases must, in order to prevail, allege some cognizable prejudice fairly attributable to the challenged process.” *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) (quotation marks omitted). Petitioner cannot meet these standards. In short, Petitioner remains in § 1229a removal proceedings while an immigration judge considers ICE’s motion to dismiss the proceedings, and even if dismissed, he will be afforded ample process through the expedited removal statute, which includes the potential for him to pursue an asylum application in removal proceedings before an immigration judge. *Cf. Garcia-Villeda*, 531 F.3d at 149 (explaining that “despite the lack of a formal hearing, the fast-track reinstatement process . . . is not devoid of procedural safeguards”). He has not shown the prejudice required to state a due process claim, let alone identified any cognizable prejudice that he has suffered as a result of the complained-of actions. Simply put, Petitioner cannot identify any deprivation of due process at this time.

II. PETITIONER’S CHALLENGES TO HIS DETENTION FAIL

A. Petitioner’s Due Process Challenge to His Detention Fails

In Count Four, Petitioner argues that his detention violates due process, asserting that he was not accorded any pre-deprivation process (citing to the standard for revoking parole in the criminal context), there was no change in his case compelling a change in his custody status, his detention is not rationally related to any immigration purpose or statutorily authorized, and that it is not the least restrictive mechanism for accomplishing any legitimate government purpose. *See* Pet. ¶¶ 57–59. Petitioner’s challenge fails.

For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 523–26 (2003); *Abel v. United States*, 362 U.S. 217, 232–37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. “Detention during removal proceedings is a constitutionally valid aspect of the deportation process.” *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020) (citing *Demore*, 538 U.S. at 523); *see Demore*, 538 U.S. at 523 n.7 (“prior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of [the] deportation procedure.”). Indeed, removal proceedings ““would be in vain if those accused could not be held in custody pending the inquiry into their true character.”” *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)); *cf. Reno v. Flores*, 507 U.S. 292, 306 (1993) (“Congress eliminated any

presumption of release pending deportation, committing that determination to the discretion of the Attorney General.”).

Moreover, Petitioner’s contention that his detention violates due process because it is not the least restrictive mechanism for accomplishing legitimate government interests, has been rejected by the Supreme Court. *See Demore*, 538 U.S. at 528 (“[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.”). Also without support is his claim that ICE failed to make an individualized assessment to justify his detention. *See Canales Decl.* ¶ 11 (noting that ICE “redetermined Capunay Guzman’s custody status” before it decided to detain him).

In this case, because Petitioner remains in his § 1229a removal proceedings at this time, his detention is governed by 8 U.S.C. § 1226(a). Section 1226 “generally governs the process of arresting and detaining . . . aliens pending their removal.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) provides that “an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a) (emphasis added). The Attorney General and DHS thus have broad discretionary authority to detain a noncitizen during removal proceedings.⁴ *See* 8 U.S.C. § 1226(a)(1) (DHS “may continue to detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*, 139

⁴ Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General’s authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for noncitizens under section 1226(a) is “one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings.” *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

S. Ct. 954, 966 (2019) (highlighting that “subsection (a) creates authority for *anyone’s* arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions”). When a noncitizen is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280–81 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999)). If DHS decides to release the noncitizen, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8).

If DHS determines that a noncitizen should remain detained during the pendency of his removal proceedings, the noncitizen may request a custody redetermination hearing (*i.e.*, a “bond hearing”) before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the noncitizen, based on a variety of factors that account for the noncitizen’s ties to the United States and evaluate whether the noncitizen poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) does not provide a noncitizen with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Furthermore, § 1226(a) grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release a noncitizen during his removal proceedings. *See id.* In the exercise of this broad

discretion, and consistent with the DHS regulations, the BIA—whose decisions are binding on immigration judges—has placed the burden of proof on the noncitizen, who “must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” *Matter of Guerra*, 24 I. & N. Dec. at 38; *accord Matter of Adeniji*, 22 I. & N. Dec. at 1114. The BIA’s “to the satisfaction” standard is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).

If, after the bond hearing, the immigration judge concludes that the noncitizen should not be released, or the immigration judge has set a bond amount that the noncitizen believes is too high, the noncitizen may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

In light of this extensive process available to him while detained under § 1226(a) pending resolution of ICE’s motion to dismiss so that it may place him in expedited removal proceedings — a material changed circumstance — Petitioner’s detention challenge is premature because he has been detained for roughly two weeks, and there is no indication that he has sought a custody redetermination with the immigration court despite an express encouragement to his counsel by the immigration judge. Canales Decl. ¶ 12. While it is true that “[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention [in federal court],” *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014), exhaustion in this context should be required as a prudential matter, *accord Paz Nativi v. Shanahan*, No. 16 Civ. 8496 (JPO), 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)).

B. Petitioner’s APA Challenge to His Detention Fails

In Count Five, Petitioner argues that his detention violates the APA, asserting that he was not provided with procedural protections and without establishing material changed circumstances justifying redetention. *See* Pet. ¶¶ 60–63. But the APA is not available to challenge the validity of one’s detention, and for that reason alone, Petitioner’s APA challenge fails.

The Supreme Court recently held that, for an action bringing claims for relief, under statutes including the APA and the INA,⁵ that necessarily imply the invalidity of a detainee’s confinement, regardless of whether a detainee formally requests release from confinement, such “claims fall within the ‘core’ of the writ of habeas corpus and *must be brought in habeas.*” *Trump v. J.G.G.*, 143 S. Ct. 1003, 1005 (2025) (emphasis added). Here, Petitioner seeks “immediate[] release . . . from custody on his own recognizance,” either outright or pending a pre-deprivation hearing. This is a core habeas claim — that fails on the merits for the reasons already discussed — and it is simply not cognizable under the APA. Petitioner’s challenge to his detention premised on the APA, then, must fail.

⁵ The plaintiffs in *J.C.G.* brought nine claims for relief pursuant to various federal statutes, including the Alien Enemies Act, the Administrative Procedure Act, various provisions of the Immigration and Nationality Act, the Due Process Clause, and habeas corpus. *See* Compl., ECF No. 1, *J.G.G. v. Trump*, No. 25-cv-00766 (D.D.C. Mar. 15, 2025).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of habeas corpus.

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Respectfully submitted,

JAY CLAYTON
United States Attorney
Southern District of New York
Attorney for Respondents

By: s/ Anthony J. Sun
ANTHONY J. SUN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: 212-637-2810
anthony.sun@usdoj.gov

Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 5,064 words.