UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-2677

JAVIER ANDRES GARCIA CORTES,
Petitioner,

v.

KRISTI NOEM, in her official capacity,
PAMELA BONDI, in her official capacity,
TODD M. LYONS, in his official capacity,
JOHN FABBRICATORE, in his official capacity, and
WARDEN DENVER CONTRACT DETENTION FACILITY, whose true name is unknown,

Respondents.

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

INTRODUCTION

1. Petitioner Javier Andres Garcia Cortes ("Mr. Garcia"), a native and citizen of Colombia, challenges his detention in the custody of Immigration and Customs Enforcement ("ICE") to be an unconstitutional and unjustified deprivation of his physical liberty. He seeks immediate relief from this Court.

2. Mr. Garcia has resided in the United States since 2018 and has a pending visa petition and application to adjust status to that of lawful permanent resident. The Department of Homeland Security ("DHS") has given him work authorization and advanced parole, allowing him to travel outside and seek return to the United States while his petition and application remain pending.

3. On August 15, 2025, Mr. Garcia, a professional contractor, appeared for work at the building that contains ICE's Denver Field Office, in Centennial, Colorado . Although he had valid work authorization and United States Citizenship and Immigration Services ("USCIS") has granted him Deferred Action, ICE nevertheless detained him and placed him in removal proceedings.

4. ICE's detention is inconsistent with USCIS's grant of deferred action to Mr. Garcia based on his prima facie approvable visa petition. If anything, Mr. Garcia should be subject to discretionary detention pending his now-initiated removal proceedings and he should be entitled to a bond hearing under 8 U.S.C. § 1226(a).

5. However, in a complete departure from the plain language of the statute, established case law, and DHS's own charging document, DHS argues that Mr. Garcia is subject to a mandatory detention provision reserved for noncitizens who have not been inspected and processed for entry into the United States.

6. Offering no authority for its agreement with DHS, the immigration court held that it had no jurisdiction to consider Mr. Garcia's request for bond.

7. Mr. Garcia brings this suit because he is being unlawfully subjected to mandatory detention by Respondents, despite the facts that he lawfully entered the United States, he has been living in the United States for eight years, and the Department of Homeland Security has found him prima facie eligible to seek permanent resident status in the United States.

APPLICATION FOR ORDER TO SHOW CAUSE UNDER 28 U.S.C. § 2243

8. The Court must grant the petition for writ of habeas corpus or issue an order to show cause to the respondents "forthwith," unless the petitioner is not entitled to relief. 28 U.S.C. § 2243. If an order to show cause is issued, the Court must require respondents to file a

return "within three days unless for good cause additional time, not exceeding twenty days, is allowed." *Id.*

9. Courts have long recognized the significance of the habeas statute in protecting individuals from unlawful detention. *Fay v. Noia*, 372 U.S. 391, 400 (1963).

10. Mr. Garcia requests the Court issue an order to show cause immediately on an emergency basis, with a response due in three days. For the reasons discussed in this petition, his apprehension was unlawful, his continued detention remains unlawful, and his substantive and procedural due process rights have been violated.

JURISDICTION AND VENUE

11. This action arises under the Due Process Clause of the Fifth Amendment and the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, et seq.

12. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1346 (civil actions against the United States), 28 U.S.C. § 1651 (All Writs Act), and 28 U.S.C. § 2201-02 (declaratory relief).

13. Venue is proper because Mr. Garcia is detained at the Denver Contract Detention Facility in Aurora, Colorado, and a "substantial part of the events or omissions giving rise to the claim" occurred in this District. 28 U.S.C. § 1391(e)(1).

PARTIES

14. Petitioner Javier Andres Garcia Cortes is a native and citizen of Colombia. He resides in Denver, Colorado. As of the filing of this petition, ICE is detaining him at the Denver Contract Detention Facility in Aurora, Colorado.

15. Respondent Kristi Noem is the Secretary of Homeland Security, and in that capacity is responsible for DHS and all sub-cabinet agencies of DHS, including ICE. She is also responsible for DHS and ICE policies. She is sued in her official capacity.

16. Respondent Pamela Jo Bondi is the United States Attorney General. She has supervisory authority over the Executive Office of Immigration Review (EOIR), which oversees the immigration courts. She is sued in her official capacity.

17. Respondent Todd M. Lyons is the Acting Director of ICE, responsible for ICE's detention and removal operations and all its other functions. He is sued in his official capacity.

18. Respondent John Fabbricatore, Field Office Director of the ICE Denver Field Office and is responsible for ICE's operations in Colorado where Mr. Garcia is held. He is sued in his official capacity.

19. Respondent, Warden of the Denver Contract Detention Facility, is the immediate custodian of Mr. Garcia. The Warden is sued in his/her official capacity.

LEGAL BACKGROUND

20. The INA limits ICE's authority to arrest noncitizens without a warrant. *See* 8 U.S.C. § 1357(a); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

21. Under the INA, immigration officers are generally required to obtain a warrant prior to arresting and detaining noncitizens. *See* 8 U.S.C. § 1226(a) ("*On a warrant issued by the Attorney General*, a[noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed.").

22. The Immigration and Nationality Act (INA) allows ICE officers to make warrantless arrests. 8 U.S.C. § 1357(a). But its authority is limited to exigent circumstances and constrained by Fourth Amendment principles.

23. Apart from noncitizens observed at the border entering or attempting to enter the United States, the statute only authorizes ICE to "arrest a[noncitizen] in the United States [without a warrant], if he has reason to believe that the [noncitizen] so arrested is in the United States in violation of any [immigration] law or regulation *and is likely to escape before a warrant can be obtained for his arrest.*" *Id.* U.S.C. § 1357(a)(2) (emphasis added).

24. Courts "have consistently held that the 'reason to believe' phrase in § 1357 'must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause." *United States v. Varkonyi*, 645 F.2d 453, 458 (5th Cir. 1981); *see also Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015). *See also United States v. Santos-Portillo*, 997 F.3d 159, 162 (4th Cir. 2021) (holding that probable cause is required for a warrantless arrest under § 1357); *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) ("Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause."); *Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir. 1980) ("The phrase 'has reason to believe' has been equated with the constitutional requirement of probable cause.") (citing *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975)).

25. The likelihood of escape requirement "is always seriously applied." *Cantu*, 519 F.2d at 496-97; *see also Diogo v. Holland*, 243 F.2d 571 (3d Cir. 1957).

26. Courts have repeatedly held, consistent with the statute's plain language, that ICE exceeds its statutory authority under 8 U.S.C. § 1357(a) when it makes a warrantless arrest without a determination that a suspected removable individual is likely to escape before a warrant can be obtained. *De La Paz v. Coy*, 786 F.3d 367, 376 (5th Cir. 2015) ("[E]ven if an agent has reasonable belief, before making an arrest, there must also be a likelihood of the person

escaping before a warrant can be obtained for his arrest.") (internal quotations omitted); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) ("Section 1357(a)(2) requires that the arresting officer reasonably believe that the alien is in the country illegally *and* that she 'is likely to escape before a warrant can be obtained for [her] arrest.'") (quoting 8 U.S.C. § 1357(a)(2)) (emphasis in original); *Westover v. Reno*, 202 F.3d 475, 479-80 (1st Cir. 2000) (noting that an immigration arrest was "in direct violation" of Section 1357(a)(2) because "[w]hile INS agents may have had probable cause to arrest [plaintiff] by the time they took her into custody, there is no evidence that [plaintiff] was likely to escape before a warrant could be obtained for her arrest").

27. Federal regulations track these strict limitations on warrantless arrests. *See* 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.").

Detention Authority

28. For decades, the Supreme Court has recognized a clear distinction between noncitizens who are stopped at our borders and those who have entered the United States, whether legally or illegally. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States* v. *Verdugo Urquidez,* 494 U. S. 259, 269 (1990) (Fifth Amendment's protections do not extend to noncitizens outside the territorial boundaries); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

29. Accordingly, "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of our geographic borders." *Zadvydas*, 533 U.S. at 693. For noncitizens "on the threshold of initial entry,"

"[w]hatever the procedure authorized by Congress is, it is due process as far as a[noncitizen] *denied entry* is concerned." *Mezei*, 345 U.S. at 212. But for noncitizens who have "once passed through our gates, even illegally," they "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.*

30. Indeed, the Supreme Court has stressed that once noncitizens "enter the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent." *Zadvydas*, 533 U.S. at 693.

31. Consistent with that distinction, the INA establishes separates procedures for the removal and detention of arriving or recently arrived noncitizens and those who have entered and established a presence in the United States.

32. For the latter, the INA mandates that "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of a [noncitizen]." 8 U.S.C. § 1229a(a)(1). Removal proceedings under 8 U.S.C. § 1229(a)(1) "shall be the sole and exclusive procedure from the United States" unless otherwise specified in the INA. 8 U.S.C. § 1229a(a)(3).

33. For noncitizens in standard removal proceedings under § 1229a (§ 240 of the INA), the INA mandates detention pending proceedings for certain classes of criminal noncitizens, 8 U.S.C. § 1226(c). For all others, the noncitizen "may be arrested and detained" pending removal "[o]n a warrant issued by the Attorney General." 8 U.S.C. § 1226(a).

34. For noncitizens held under § 1226(a), DHS makes an initial custody determination. 8 C.F.R. §§ 1003.19(a), 1236.1(d). The noncitizen may continue to be detained, released on

conditional parole, or released on a bond of at least $1,500. *See* 8 U.S.C. § 1226(a). The noncitizen may, upon request, have the initial custody determination reviewed by an immigration judge, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), and ultimately by the Board of Immigration Appeals (BIA), *see* 8 C.F.R. § 1236.1(d)(3).

35. Congress created separate, expedited procedures for "arriving aliens"[1] and certain "applicants for admission." 8 U.S.C. § 1225(b). The INA defines an applicant for admission as a noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including a[noncitizen] who is brought to the United States after having been interdicted in international or United States waters)." 8 U.S.C. § 1225(a)(1).

36. Critically, these expedited removal proceedings do not apply to all "applicants for admission." Instead, they may be applied only to: (1) individuals who are arriving in the United States at a port of entry without valid documents; and (2) those without valid documents who have been in the United States for less than two years and have not been admitted or paroled. 8 U.S.C. § 1225(b)(1)(A)(iii)(II); *see Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109 (2020). Further, this second subset of individuals—noncitizens who have been in the United States less than two years and have not been admitted or paroled—only become subject to expedited removal if so designated by DHS.[2]

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[1] "Arriving alien" is a term of art defined by regulation as "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to designated port of entry and regardless of the means of transport." 8 C.F.R. § 1.2.

[2] On January 24, 2025, DHS issued a notice designating the entire subset of noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II) subject to expedited removal: noncitizens "determined to be inadmissible under [8 U.S.C. §§ 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled

See 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (granting discretionary authority to apply expedited removal to any or all noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II)); *Thuraissigiam*, 591 U.S. at 109; *United States v. Texas*, 144 F.4th 632 (5th Cir. 2025).

37. Applicants for admission are subject to detention pursuant to 8 U.S.C. § 1225(b)(2)(A) if an immigration officer determines that noncitizen "is not clearly and beyond a doubt entitled to be admitted."

38. However, "the plain text of Sections 1225 and 1226, together with the structure of the larger statutory scheme, indicates that Section 1225(b)(2) does not apply to noncitizens who are arrested on a warrant issued by the Attorney General while residing in the United States." *Benitez v. Francis*, 2025 U.S. Dist. LEXIS 157214, *15, 17-19 (S.D.N.Y. Aug. 8, 2025) (marks and citations omitted).

39. Courts and the U.S. Government have consistently taken the position that noncitizens who have entered without inspection and are encountered in the United States years after their initial entry are entitled to removal proceedings under § 1229a and subject to detention under § 1226. *See, e.g.*, *Jennings v. Rodriguez*, 538 U.S. 281, 303 (2018) (affirming that "§ 1226 applies to aliens already present in the United States."); IIRIRA Implementing Regulation, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.).

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into the United States and who have not affirmatively shown . . . that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility." Notice, Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139, 8139 (Jan. 24, 2025).

40. Yet on July 8, 2025, the Government abruptly rejected the reading of 8 U.S.C. § 1226(a) it had employed for decades. In a complete reversal, "DHS, in coordination with the Department of Justice (DOJ) . . . revisited its legal position on detention and release authorities," and issued guidance instructing all ICE employees that 8 U.S.C. § 1225 rather than § 1226 "is the applicable immigration detention authority for all applicants for admission." Ex. A, Interim Guidance Regarding Detention Authority for Applicants for Admission.

Advanced Parole

41. The INA provides a material distinction between individuals who have been "admitted" to the United States, i.e., inspected by an immigration officer and authorized to enter, and those who have not been admitted. *See Vartelas v. Holder*, 566 U.S. 257, 261 (2012). Critically, individuals who have been "admitted" are subject to the deportation provisions in 8 U.S.C. § 1227, whereas individuals who have not been admitted are subject to inadmissibility provisions in 8 U.S.C. § 1182. Moreover, there are certain forms of relief—such as adjustment of status—where an applicant must have been admitted or paroled in order to establish eligibility.

42. Nevertheless, the INA provides another avenue for individuals to enter the country without being officially admitted or having entered the United States without inspection. Immigration officers also have the discretionary authority to allow noncitizens to enter the United States without processing them for admission, but instead granting them parole into the United States. 8 U.S.C. § 1182(d)(5)(A).

43. A noncitizen who is in the United States and who has an application for adjustment of status pending may apply for "advance parole," which "authorizes an applicant for

adjustment of status to travel outside the United States without prejudice to his application and to return—even though he isn't a lawful resident and doesn't have a visa—to prosecute it." *Samirah v. Holder*, 627 F.3d 652, 654-55 (7th Cir. 2010).

44. "[T]he use of advanced parole is an outgrowth of administrative practice stemming from the general parole authority" under 8 U.S.C. § 1182(d)(5). USCIS Adjudicator's Policy Manual § 54.1(a), available at: https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm54-external.pdf. An applicant who obtains advanced parole prior to departure from the United States does not abandon their application for adjustment of status. *Id.*; *see also* 8 C.F.R. 245.2(a)(4).

45. A noncitizen who departs the United States under a grant of advanced parole returns to the United States as an applicant for admission, i.e., someone who has not been inspected *and admitted* into the United States. *See Coalition for Humane Immigrant Rights ("CHIRLA") v. Noem*, 2025 U.S. Dist. LEXIS 148615, *74 (D.D.C. Aug. 1, 2025) [3]; *Iredia v. Att'y Gen. of the United States*, 25 F.4th 193, 196-96 (2022).

46. But 8 C.F.R. § 1.2 dictates that any noncitizen who was paroled "pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by the reason of that grant of parole, as an arriving alien" under 8 U.S.C. § 1225(b)(1)(A).

[3] The government has appealed the district court's order in *CHIRLA* and the D.C. Circuit has granted a partial administrative stay pending appeal for individuals who have been in the United States less than two years. *See* Order, *CHIRLA v. Noem*, No. 25-5289 (D.C. Cir. Aug. 18, 2025). The administrative stay is not to be "construed in any way as a ruling on the merits of [the government's stay] motion or the scope of the district court's order." *Id.* Briefing on the government's request for a stay is due to be completed on August 29, 2025. Nevertheless, the principle cited from *CHIRLA* is unrelated to the administrative stay.

Issuance of Charging Documents for Immigration Court

47. Pursuant to 8 C.F.R. § 239.1, only certain immigration officers may issue a Notice to Appear that charges a noncitizen with removability.

48. The regulation enumerates and lists various agents, DHS leadership officials, and supervisory officials.

49. The list does not include attorneys with the DHS Office of the Principal Legal Advisor, such as Assistant Chief Counsel.

50. There is no publicly identifiable delegation of authority under 8 C.F.R. § 2.1 to allow line attorneys for the Office of the Principal Legal Advisor to issue or amend charges in a Notice to Appear.

STATEMENT OF FACTS

51. Javier Andres Garcia Cortes is a native and citizen of Colombia. In April 2018, he traveled to the United States with a B2 visitor visa and was inspected and admitted by immigration officials. *See* Passport, Ex. B.

52. Since his arrival, he has resided continuously in the United States.

53. Mr. Garcia has two sons, ages 15 and 7 years old, both of whom reside in the United States.

54. Shortly after his arrival in the United States, Mr. Garcia met and began dating his now-ex-wife, Julissa Giraldo, a United States citizen. *See* Application for Adjustment of Status, Ex. C.

55. Mr. Garcia and Ms. Giraldo married in 2019. The couple divorced in 2021, after Ms. Giraldo became abusive towards Mr. Garcia.

56. In 2022, Mr. Garcia filed a petition for classification under the self-petitioning provisions of the Violence Against Women Act, and an application for adjustment of status. *See* Ex. C.

57. While his application was pending, USCIS granted his application for and renewal of employment authorization.

58. On May 9, 2025, USCIS determined that Mr. Garcia had established a prima facie case for classification under the self-petitioning provisions of the Violence Against Women Act. DHS granted Mr. Garcia deferred action until May 9, 2026. *See* Prima Facie Determination, Ex. D.

59. In June 2025, Mr. Garcia filed to renew his employment authorization. In August 2025, USCIS accepted that renewal application, extending his employment authorization. *See* Receipt Notices, Ex. E.

60. Subsequently, Mr. Garcia appeared for work to paint the building that contains the ICE Denver Field Office.

61. Upon his arrival, he was apprehended by ICE and placed in custody.

62. Upon information and belief, DHS did not give Mr. Garcia a warrant of arrest when they handcuffed him and placed him in detention. He was later served with a Notice to Appear.

63. In the Notice to Appear, DHS alleged that he had "been admitted to the United States," but was removable because he was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document. DHS accordingly charged him with removability under 8 U.S.C. § 1182(a)(7)(A)(i)(I). *See* Notice to Appear, Ex. F.

64. The Notice to Appear was signed by Assistant Field Office Director Davies. However, a different officer signed the Certificate of Service. No officer witnessed Mr. Garcia's request for a prompt hearing. Ex. F.

65. Although Mr. Garcia was statutorily eligible for bond based on the allegations and charges in the Notice to Appeal, ICE requested to continue the bond hearing so it could amend the charges.[4]

66. On August 22, 2025, ICE filed a Form I-261, Additional Charges of Inadmissibility/Deportability to amend the Notice to Appear. *See* Form I-261, Ex. G.

67. The Form I-261 stated that Mr. Garcia is an arriving alien. The Form alleges that Mr. Garcia was admitted as a B2 visitor on April 17, 2018. The Form alleges that USCIS granted Mr. Garcia advanced parole, under which he traveled outside the United States and returned on November 20, 2024. *Id.* The Form stated that the Notice to Appear, issued on August 15, 2025, terminated his grant of parole. The Form was served by DHS Assistant Chief Counsel, Elizaveta Ivanova Migoya. Ex. G.

68. On August 25, 2025, the immigration judge held a bond hearing and found that although Mr. Garcia had lawfully entered the United States in 2018, his ravel on advance parole rendered him an applicant for admission and, under DHS's theory, an arriving alien ineligible for bond. *See* Bond Order, Ex. H. The immigration judge also ruled that DHS properly issued the Form I-261.

[4] The immigration judge indicated that Mr. Garcia did not oppose this continuance. While there is no transcript of this proceeding yet, this statement is not true; Mr. Garcia argued that a bond hearing should proceed that day.

CLAIMS FOR RELIEF

COUNT ONE
Violation of the INA
(Denial of Bond Under 8 U.S.C. § 1226(a))

69. Mr. Garcia realleges and incorporates by reference the paragraphs above.

70. Prior to the issuance of a removal order, immigration detention is only mandatory for individuals subject to expedited removal under 8 U.S.C. § 1225 and for noncitizens with certain criminal convictions under 8 U.S.C. § 1226(c).

71. Mr. Garcia does not have a criminal record and is not subject to detention under § 1226(c).

72. Detention pursuant to the expedited removal provisions in 8 U.S.C. § 1225 is reserved for noncitizens who are "arriving in" the United States without proper documentation or who are in the United States and are "inadmissible because [they] lack[] a valid entry document" and have not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." *Thuraissigiam*, 591 U.S. at 109; 8 U.S.C. § 1225(b).

73. Mr. Garcia was admitted to the United States in April 2018.

74. After filing his self-petition and application for adjustment of status, Mr. Garcia sought and DHS granted his request for advanced parole. *See* Ex. D.

75. When he re-entered the United States pursuant to USCIS's grant of advanced parole, he was not considered an "arriving alien" under 8 U.S.C. § 1225(b)(1)(A)(i). *See* 8 C.F.R. § 1.2.

76. As ICE's own charging document makes clear, Mr. Garcia was placed in standard removal proceedings under 8 U.S.C. § 1229a and is subject to detention under 8 U.S.C. § 1226(a).

77. Section 1226(a) and its implementing regulations entitle Mr. Garcia to a bond hearing before an immigration judge.

78. Thus, the immigration court and ICE exceeded their statutory authority by detaining Mr. Garcia without the opportunity ro seek release on bond.

COUNT TWO
Violation of Substantive Due Process

79. Mr. Garcia realleges and incorporates by reference the paragraphs above.

80. As a person who has *lawfully* "passed through our gates" and has lived in the United States for eight years, Mr. Garcia is entitled to due process of law. *Mezei*, 345 U.S. at 212; U.S. Const. amend. V; *Zadvydas*, 533 U.S. at 693.

81. The "Fifth and Fourteenth Amendments' guarantee of 'due process of law' [] include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original).

82. Substantive due process "prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

83. The substantive due process right to be free from arbitrary detention extends to noncitizens detained during removal proceedings. *See Zadvydas*, 533 U.S. at 690 (permitting detention in non-punitive circumstances only where "special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint.").

84. Here, DHS abruptly departed from an interpretation and understanding of the INA that it has espoused for three decades and adopted an unlawful and incorrect reading of the expedited removal statute that allows it to subject countless noncitizens, like Mr. Garcia, who have lived continuously in the United States for years to mandatory detention and

summary removal without any opportunity to seek relief or an individualized determination that their continued detention is necessary to prevent their flight and/or protect the community. *See id.*

85. The national policy adopted by DHS in early July 2025 reflects an unconstitutional and arbitrary use of immigration detention that punishes individuals for exercising their right to apply for relief with no consideration of whether detention is necessary to ensure future appearances or protect the community generally. *See Zadvydas*, 533 U.S. at 690. The application of this policy to Mr. Garcia and his continued detention without the opportunity to apply for bond deprives him of substantive due process.

COUNT THREE
Violation of Procedural Due Process
(Bond Ineligibility)

86. Mr. Garcia realleges and incorporates by reference the paragraphs above.

87. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

88. A procedural due process challenge is governed by a three-factor balancing test weighing: (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, or additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

89. Each of these factors weigh in Mr. Garcia's favor and support a finding that he may not be detained without an opportunity to seek release on bond before an immigration judge.

90. Mr. Garcia has a strong private interest in remaining free from detention. Indeed, the Supreme Court has affirmed that even for noncitizens, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. And the Supreme Court, recognizing the strong private interest in remaining free from detention, has held "that detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and narrow non-punitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (cleaned up).

91. While the Government has an interest in ensuring Mr. Garcia's appearance at his removal proceedings and protecting the community, *see id.*, the bond procedures established under § 1226(a) adequately serve both interests by allowing an immigration judge to make an individualized assessment of a noncitizen's flight risk and the danger he may pose to the community.

92. And the Government cannot plausibly justify denying a bond hearing based on "administrative burdens" when it has, for the past three decades, consistently provided bond hearings to noncitizens like Mr. Garcia who lawfully entered, established a presence in the United States, and applied for lawful status in this country.

93. Finally, this case demonstrates the high risk of erroneous deprivation that would result from allowing DHS to summarily detain noncitizens like Mr. Garcia without any opportunity to challenge the detention before the administrative agency. Without a bond hearing, there is a high probability that individuals like Mr. Garcia will be detained even

though their detention is unnecessary to protect the community or ensure their appearance and serves no non-punitive purpose.

94. Thus, Mr. Garcia's continued detention without a bond hearing violates procedural due process.

COUNT FOUR
Violation of Procedural Due Process
(**Accardi** ***Claim)***

95. Mr. Garcia realleges and incorporates by reference the paragraphs above.

96. The Supreme Court's decision in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) established the well-settled principle that agency actions in violation of its own regulations and procedures offends due process. 347 U.S. 260, 267-68 (1954).

97. Since *Accardi*, the Supreme Court and the Fifth Circuit have clarified that a claimant must demonstrate prejudice resulting from the violation, not merely a failure to follow agency regulations. *See Leyva v. Barr*, 838 F. App'x 13, 19 (5th Cir. 2020).

98. The *Accardi* doctrine applies with particular force "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The doctrine's purpose is "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures." *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969).

99. In detaining Mr. Garcia, ICE failed to abide by its own regulations limiting the circumstances under which it may make warrantless arrests.

100. In addition, the charging documents are defective.

101. While the Notice to Appear was signed by a supervisory detention officer, Mr. Garcia's signature was not witnessed.

102. Furthermore, DHS's service of the Form I-261 does not indicate that it was prepared or authorized by a designated official under 8 C.F.R. § 239.1.

103. ICE's failure to follow its own regulations prejudiced Mr. Garcia by subjecting him to unlawful detention. *See* 8 C.F.R. § 241.4(l). Thus, ICE's departure from its own regulations and procedures violated his procedural due process rights.

COUNT FIVE
Violation of the Immigration and Nationality Act
(8 U.S.C. § 1357)

104. Mr. Garcia realleges and incorporates by reference the paragraphs above.

105. ICE may only conduct a warrantless arrest in very limited circumstances. 8 U.S.C. § 1357(a).

106. But the statute only allows ICE to make a warrantless arrest away from the border if officers have probable cause to support their belief that the noncitizen is in the United States in violation of immigration laws *and* (2) is likely to escape before a warrant can be obtained for the noncitizen's arrest. 8 U.S.C. § 1357(a)(2); *United States v. Santos-Portillo*, 997 F.3d 159, 162 (4th Cir. 2021).

107. ICE officers lacked probable cause to support a belief that Mr. Garcia was likely to escape before a warrant could be obtained for his arrest. Mr. Garcia had appeared for work—*at ICE's office*—when he was detained. He has lived in the United States for eight years and has been waiting for DHS to adjudicate his application for adjustment of status to lawful permanent residence. His children also live in the United States. He has deep ties to the community.

108. Mr. Garcia was not engaged in any criminal activity when he was detained and he has never been in removal proceedings. Indeed, upon information and belief, ICE was aware that Mr. Garcia would be working at the building on August 15, 2025.

109. Thus, the arrest failed to comply with statutory requirements of the INA.

PRAYER FOR RELIEF

Based on the foregoing, Mr. Garcia requests that this Court:

(1) Assume jurisdiction over the matter;

(2) Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days;

(3) Declare that Mr. Garcia is not subject to mandatory detention under 8 U.S.C. § 1225;

(4) Declare that Mr. Garcia's arrest and detention by ICE violates procedural due process, and the INA and order his release on that basis;

(5) Declare that Mr. Garcia's continued detention without a bond hearing violates the INA and the Due Process Clause of the Fifth Amendment to the U.S. Constitution;

(6) If it does not order release, issue an order compelling the Executive Office of Immigration Review to conduct a bond hearing for Mr. Garcia under 8 U.S.C. § 1226(a) and its implementing regulations;

(7) Grant attorneys' fees and costs of this suit under the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412(2), et seq.; and

(8) Grant such other relief as the Court deems necessary and proper.

Respectfully submitted,

<u>/s/ Jessica A. Dawgert</u>
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