UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Willian A. Portillo Melara

Petitioner,

v.

HERIBERTO TELLEZ, Warden of Metropolitan Detention Center; JUDITH ALMODOVAR, Director of ICE New York Field Office; TODD M. LYONS, Acting Director of ICE; KRISTI NOEM, U.S. Secretary of Homeland Security, *in their official capacities.*

Respondents.

Civil Action No.: 26-cv-1453

PETITION FOR A WRIT OF HABEAS CORPUS

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

Petitioner submits the following reply to the Respondents' opposition.

I. Jurisdiction Exists Over Legal Questions

Respondents characterize this habeas petition as a challenge to the weighing of factors by the IJ when, in fact, the petition challenges the use of only one piece of evidence to meet the legal standard for dangerousness. In her decision, the IJ finds dangerousness based only on the police report. ECF 7, Exhibit 9 at lines 210-12. The bare police report, without a criminal complaint, any corroborating statements, and no proof of conviction, was the only evidence submitted by the government at the bond hearing. ECF 1, Exhibit 3. Basing her decision on this piece of evidence was legal error.

The Supreme Court recently held that discretionary decisions that are tethered to a legal standard are review as mixed questions of law and fact. *Wilkinson v. Garland*, 601 U.S. 209 (2024). The Supreme Court then summarily vacated and remanded a case from the Ninth Circuit which had held that 8 U.S.C. § 1226(e) deprived the court of jurisdiction over the dangerousness determination. *Martinez v. Clark*, 144 S. Ct. 1339 (2024). On remand, the Ninth Circuit found that *Wilkinson* compelled the conclusion that an agency finding of "dangerousness for immigration detention purposes" is a mixed question of law and fact and therefore reviewable as a question of law. *Martinez v. Clark*, 124 F.4th 775, 779 (9th Cir. 2024).

Prior to *Wilkinson*, decisions from district courts also found that the question of whether a bond hearing complied with constitutional requirements, specifically the legal standard for dangerousness, was reviewable. *See* ECF 1 at 7 (citing cases); *cf. Enoh v. Sessions*, 16-CV-85(LJV) (W.D.N.Y. May 15, 2017) (analyzing whether the evidence could have shown flight risk clearly and convincingly). After *Wilkinson*, courts have continued to find jurisdiction over legal standards in bond hearings. *See Picado v. Hyde*, No. 26-cv-65-JJM-PAS at *10 (D.R.I. Feb. 9, 2026) (citing to *Wilkinson* in finding the petitioner challenged the legal standard used in the bond hearing); *Y.S.G. v. Andrews*, No. 2:25-cv-1884-SCR at *17 (E.D. Cal. Oct. 22, 2025) (reviewing an IJ's determination as to dangerousness and also noting that "the government's discretion to incarcerate non-citizens is always constrained by the requirements of due process") (quoting *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017)). Under the precedent in *Wilkinson*, the determinations here in the instant petition are legal questions: whether the unproven allegations in the police report can sustain a finding of clear and convincing evidence, and whether the IJ meaningfully applied that standard. The temptation to classify all immigration agency decisions as discretionary can be quelled by the precedential and persuasive decisions that uphold legal standards in bond hearings.

The Respondents in their Opposition claim that this Court lacks jurisdiction by citing to cases involving discretionary determinations for adjustment of status and alternatives to detention. ECF 7, at 6-7 (citing *Sheriff v. Searls*) (whether to use alternatives to detention); *Laing v. Sessions*, 706 Fed. Appx. 704 (2d Cir. 2017) (adjustment of status); *Guyadin v. Gonzales*, 449 F.3d 464 (2d Cir. 2006) (adjustment of status). These decisions do not apply here because the instant petition does not challenge the balancing of positive versus negative factors for discretion.

The Respondents also cite to cases predating *Wilkinson* and *Velasco Lopez* to claim that this Court lacks jurisdiction. ECF at 6-7. *Lantigua v. Decker* dismissed a challenge to the "excessive" weight given to a criminal complaint without corroboration in a bond hearing. *Lantigua v. Decker*, No. 17-cv-4880-LGS, 2017 WL 5054567, at *5 (S.D.N.Y. Oct. 27, 2017). The Court there did not rule on the question of whether a criminal complaint without corroboration would satisfy the standard of clear and convincing evidence. The court noted that several other criminal convictions justified the finding of dangerousness. *Id.* at *2.

In *Hamilton v. Shanahan*, a decision from 2009 which the Respondents cite, the Court found that it lacked jurisdiction over one of the petitioner's challenges to his bond hearing, but it found that it did have jurisdiction over the procedural due process claim. *Hamilton v. Shanahan*, No. 1:09-cv-6869-SAS at *11 (S.D.N.Y. Dec. 30, 2009). The *pro se* petitioner argued that the IJ had not taken one of his pieces of evidence into consideration and the Court determined that this was a challenge to a purely discretionary determination for which there was no judicial review possible under 8 U.S.C. §1226(e). *Id.* However, regarding the challenge to the procedure of the bond hearing, the Court did review the challenge to the deprivation of procedural due process; although it ultimately denied on that ground as well. *Id.* at 12. *Hamilton* therefore supports jurisdiction in this case, recognizing that legal questions arising as to the procedures of a bond

hearing will afford judicial review. "District courts retain jurisdiction over challenges to the legality of detention in the immigration context." *Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007); *see Pensamiento v. McDonald*, 315 F. Supp 3d 684, 68-89 (D. Mass. 2018) ("What § 1226(e) does not bar, however, are constitutional challenges to the immigration bail system." (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018)).

Courts are mindful of the jurisdictional boundary and this Court, doing the same, should find that it has jurisdiction. *See Diaz Calderon*, 535 F.Supp.3d at 676 ("[A] district court sitting in habeas to review due process challenges to immigration bond hearings must proceed carefully, as 'it has no authority to encroach upon an IJ's discretionary weighing of the evidence.'") (quoting *Arellano v. Sessions*, 2019 WL 3387210, at *7 (W.D.N.Y. 2019)) Courts do have jurisdiction to decide whether the IJ relied on evidence that cannot establish dangerousness as a matter of law and whether the correct legal standard was applied. *Id.* Picado, 26-cv-065 at *9-10; *Hechavarria v. Whitaker*, 358 F.Supp.3d 227, 240 (W.D.N.Y. 2019)).

Finally, 8 U.S.C. § 1226(e) "does not deprive the Court of jurisdiction over [petitioner's] constitutional and statutory challenges to his detention." *Enoh v. Sessions*, 16-CV-85(LJV) at*10 (W.D. N.Y. May 15, 2017) (quoting *Vargas v. Davies*, 2016 WL 3044850, at *4 (S.D.N.Y. May 27, 2016) (collecting cases) (quoting *Gordon v. Shanahan*, 2015 WL 1176706, at *2 (S.D.N.Y. Mar. 13, 2015)). "[C]laims that the discretionary process itself was constitutionally flawed are cognizable in federal court on habeas because they fit comfortably within the scope of § 2241." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (quoting *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011).

II. The Court Should Waive Administrative Exhaustion

"[C]ourts in this district frequently excuse the exhaustion requirement when an immigration judge has already applied an unconstitutional bond eligibility standard." *Guzman v. Joyce*, 786 F.Supp.3d 865 (S.D.N.Y. 2025) (citing *J.C.G. v. Genalo*, No. 1:24-CV-08755, 2025 WL 88831, at *6 (S.D.N.Y. Jan. 14, 2025) (collecting cases)). Exhaustion may be waived here based on the exceptions to prudential exhaustion. *See Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

Detention in violation of legal standards constitutes irreparable harm "almost by definition." *Guerrero v. Noem*, No. 25-cv-5881-EK at *15 (E.D.N.Y. Nov. 18, 2025). Actual prolonged detention can constitute an irreparable injury. *Guzman v. Joyce*, at *5 ("'The risk of prolonged detention' – as opposed to actual prolonged detention – 'does not constitute an irreparable injury that excuses the prudential exhaustion requirement.'") (citing *Roman v. Decker*, No. 20-CV-3752, 2020 WL 4273823 at *8 (S.D.N.Y. July 24, 2020). In *Guzman*, the petitioner had not had a bond hearing at the time the petition was filed; therefore, the Court found that prolonged detention and irreparable harm were speculative. *Id.* Actual prolonged detention that is continued while following the administrative process will constitute irreparable harm. *Hechavarria*, 358 F.Supp.3d at 237 ("The Court recognized that because of delays inherent in the administrative process, BIA review would result in the very harm that the bond hearing was designed to prevent: prolonged detention without due process during lengthy and backlogged removal proceedings.") (citing *Enoh v. Sessions*, 2017 WL 2080278, at *3 (W.D.N.Y. May 15, 2017) (quotations omitted)). In the instant case, the Petitioner has been detained for almost eleven months, meaning actual prolonged detention justifies waiver of administrative exhaustion in order to prevent irreparable harm. *Id.*; *see Beharry*, 329 F.3d at 62.

Courts may waive exhaustion where detention does not have a lawful basis. *See Tomas Elias v. Hyde*, No. 1:25-cv-540-JJM-AEM at *8 (D.R.I. Oct. 27, 2025) ("Here, [Petitioner] is being held in an ICE detention facility against his will without clear reason – a severe form of irreparable injury. *Id.* (quotations and citations omitted). The irreparable harm caused by a loss of liberty is not lessened when it is immigration custody. *Romero v. Hyde*, No. 25-11631-BEM at *14 (D. Mass. Aug. 19, 2025) ("[I]t would be perverse to find that loss of liberty somehow suddenly stops being irreparable harm just because it is being considered in the immigration context.").

The first and third factor merge in the instant case. *See Beharry*, 329 F.3d at 62. The Board of Immigration Appeals ("BIA") is both unable to provide an adequate remedy and administrative appeal would be futile. The BIA's bond decisions veer off from the legal standards recognized by federal courts. Under BIA case law, the petitioner bears the burden at a bond hearing and the IJ should have a "reasonable basis" for the decision on bond. *Matter of Guerra*, 24 I&N Dec. 37, 39 (BIA 2006). A string of recent BIA decisions has expanded bases for bond denials based on arbitrary criteria. *See Matter of Z-N-L-*, 29 I&N Dec. 511 (BIA 2026) (flight risk is determined by a totality of the circumstances); *Matter of Dobrotvorskii*, 29 I&N Dec. 211 (BIA 2025) (a valid, reliable and credible sponsor required to show no flight risk); *Matter of E-Y-F-G-*, 29 I&N Dec. 103 (BIA 2025) (a grant of withholding of removal by the IJ appealed by the government increases risk of flight); *Matter of Choc-Tut*, 29 I&N Dec. 48 (BIA 2025) (state court custody order not deserving of deference in a bond hearing).

As an administrative agency, the BIA does not decide constitutional issues. *Arango-Aradondo v. Immigration and Naturalization Serv.*, 13 F.3d 610, 614 (2nd Cir.1994); *Castaneda-Suarez v. I.N.S.*, 993 F.2d 142, 144 (7th Cir. 1993); *Vargas v. U.S. Dept. of Immigration and Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987); *Bagues-Valles v. I.N.S.*, 779 F.2d 483, 484 (9th

Cir. 1985). Constitutional issues raised in a due process challenge to a bond hearing fall outside the BIA's jurisdiction. *Hechavarria*, 358 F.Supp.3d at 238 (collecting cases). The BIA's appellate jurisdiction, 8 C.F.R. § 1003.1(b), does not extend beyond the limits of review of agency decisions under the Immigration and Nationality Act. 8 C.F.R. § 1003.1(d)(1). BIA members are attorneys named by the U.S. Attorney General and are not Article III judges. 8 C.F.R. § 1003.1(a)(1). In exercising appellate jurisdiction, the BIA must follow its own precedent. *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 503 (6th Cir. 2008) ("The BIA's regulations themselves ... require the agency to follow its own precedent except to the extent they are modified or overruled by the BIA or the Attorney General." (citing 8 C.F.R. § 1003.1(g)). "In light of the BIA's scope of review, administrative remedies in this case are not adequate to resolve petitioner's due process challenge to the IJ's bond determination." *Y.S.G.*, No. 2_25-cv-1884-SCR at *15; *see Hechavarria*, 358 F.Supp.3d at 238 (finding that the BIA cannot consider constitutional issues and excusing exhaustion).

The BIA, as a component of an executive agency under the United States Department of Justice, is heavily influenced by executive decision making. Half of the members of the BIA have been fired under the current presidential administration, with the 15 remaining members mostly chosen by the current administration. Ximena Bustillo, Rahul Mukherjee, "An immigration court few have heard of is quietly shaping policy behind the scenes," NPR, Mar. 20, 2026.[1] In the substance of its decisions, there has also been a policy shift resulting in 97% of decisions from 2025 favoring the government and ruling against the noncitizen. *Id.* The BIA falls under the Executive Branch and, therefore, agency rulings reflect supervisory directives. *Romero v. Hyde*, No. 25-11631-BEM (D. Mass. Aug. 19, 2025) "[T]he prospect of an unaffected decisionmaker

[1] available at: https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation (last accessed March 23, 2026).

seems unrealistically thin, and the Court finds little to be gained, in terms of insight into the Executive's point of view, from making Petitioner go through the vain exercise of getting denied once again." *Id.* at *12.

In *Hechavarria*, the Court found that the fourth factor for excusing exhaustion also applied because the challenge to a bond hearing implied a substantial constitutional question. *Hechavarria*. 358 F.Supp.3d at 238.

The Court here may excuse exhaustion under all the factors. *See Beharry*, 329 F.3d at 62.

III. IJ Committed Legal Error in Relying Solely on Uncorroborated Police Report Without Conviction

The evidence submitted by the government during the bond hearing was a Nassau County Police Department arrest report. ECF 1, Exhibit 3. This formed the basis of the IJ's ruling on dangerousness. The incident report did not include a signed witness statement, evidence of the conviction, or a criminal complaint. This evidence was insufficient as a matter of law to show dangerousness and the IJ did not apply the correct legal standard in finding dangerousness based on this evidence.

Two types of challenges exist to whether the adjudicator applied the correct standard of proof. *Hechavarria*, 358 F.Supp.3d at 240. The first is to show that the evidence, as a matter of law, could not support the adjudicator's conclusion. *Id.* The second is to clearly show that the incorrect standard was applied to the facts. *Id.* Here, it is clear under either approach that the IJ did not apply the correct standard.

A. Clear and convincing evidence

Clear and convincing evidence is "an intermediate standard of proof" mandated by the Supreme Court "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Enoh*, 16-CV-85 at *14-15 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979))). The clear and convincing standard requires proof that a factual contention is "highly probable." *Hechavarria*, 358 F. Supp. 3d at 240-41 ("And under no fair reading of the IJ's opinion could it be said that the IJ determined that it was "highly probable" that detention was necessary to serve the government's compelling interest in minimizing danger to the community."); *see Mondaca-Vega v. Lynch*, 808 F.3d 413, 422 (9th Cir. 2015) (en banc). This evidentiary standard does not permit detention based on mere speculation that an individual might possibly pose a danger. *See Addington v. Texas*, 441 U.S. 418, 427, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

B. Legal standard for uncorroborated police reports without proof of conviction

Three federal judicial circuits have recognized that the BIA's decision in *Matter of Arreguin* sets out a legal standard. *See Matter of Arreguin*, 21 I. &N. Dec. 38, 42 (BIA 1995). The Second and Third Circuits additionally have unpublished decisions holding the same. The First Circuit recognizes that, under the BIA precedent in *Arreguin*, the agency may not rely solely on an uncorroborated police report in making a negative discretionary finding in the absence of a conviction or other corroborating evidence. *Rosa v. Garland*, 114 F.4th 1, 17-18 (1st Cir. 2024). This is a consistent holding in the First Circuit, being recently reaffirmed in *Maurice v. Bondi*, 21-1395 at *14 (1st Cir. Oct 02, 2025) ("[A] police report, absent a conviction, must be corroborated before the agency may give the report substantial weight in denying adjustment of status as a matter of discretion." (*citing Rosa*, 114 F.4th at *18 (*citing Matter of Arreguin*, 21 I. &N. Dec. 38,

42 (BIA 1995))). The Fourth Circuit held that the immigration court failed to follow its binding precedent when it gave substantial weight to an uncorroborated arrest report. *Avila-Ramirez v. Holder*, 764 F.3d 717 (7th Cir. 2014); *Rogel v. Garland*, No. 21-1163 at *2 (4th Cir. Sep. 15, 2022) ("We grant the petition for review because the IJ's good moral character determination was based solely on an uncorroborated police report detailing the sexual abuse allegations, in violation of the BIA's contrary directive from *In re Arreguin*") (citation omitted)). Especially important to the instant case, the Sixth Circuit held that an IJ contravenes BIA precedent and commits reversible error when it relies on "consideration of unproven allegations that lack any other corroboration." *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708, 712-13 (6th Cir. 2004).

In *Kim v. Lynch*, the Second Circuit cited to *Arreguin* for its proposition that, absent a conviction or corroborating evidence of the allegations contained therein, the agency is hesitant to give substantial weight to an arrest report. *Kim v. Lynch*, 621 Fed. App'x 80 (2d Cir. Nov. 3, 2015). The Third Circuit's decision also found that an arrest report unsupported by corroborating evidence does not deserve substantial weight. *Toomer v. Att'y Gen. United States*, 810 Fed. App'x 147, 149 (3d Cir. 2020).

Agency precedent has prescriptive effect. The agency must follow the same basic rules for all similarly situated applicants. *Zhang v. Gonzales*, 452 F.3d 167, 173 (2d Cir. 2006) (citing *Henry v. INS*, 74 F.3d 1, 5-6 (1st Cir. 1996)). In *Zhang*, the Second Circuit cited to the First Circuit's decision in *Henry v. INS*, a case that held that the rule set out in Arreguin was a legal standard and that the agency must follow its rules for similarly situated applicants. *Henry*, 74 F.3d at 6. "An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." *Id.*

Based on the BIA precedent and the holdings of these circuits, multiple district courts have found that evidence, which must not be given substantial weight, cannot therefore satisfy the highly probable factual standard under clear and convincing evidence in a bond hearing. *See Picado*, No. 26-cv-65; *Rosa Pineda v. Nessinger*, 1:25-cv-522-MSM-AEM (D.R.I. Nov. 24, 2025); *Diaz Calderon*, 535 F.Supp.3d 669; *Reyes v. Wolf*, 2:19-cv-02086-GMN-EJY (D. Nev. May 8. 2020); *Ortega-Rangel v. Sessions*, 313 F.Supp.3d 993,1004-05 (N.D. Cal. 2018).

The IJ must do more than cite to the correct legal standard in her decision. *See Akinsanya v. Garland*, 125 F.4th 287 (1st Cir. 2025); *Hechavarria*, 358 F.Supp.3d at 241 ("But the mere utterance of the correct standard of proof early in the IJ's decision is insufficient to demonstrate that it was applied when the rest of that decision demonstrates otherwise."); *Enoh*, 2017 WL 2080278, at *6 ("Rubber stamping a [ ] determination with the words 'clear and convincing evidence' is simply insufficient.")

In the instant case, the IJ committed legal error in finding that an uncorroborated allegation in a police report, without proof of conviction, was clear and convincing evidence. It cannot be as a matter of law. The clear and convincing evidence standard requires that the factual findings be highly probable. Here, the Petitioner was charged with public lewdness under N.Y.P.L. § 245.00. The police report is several paragraphs of the police officer's narrative. There is no witness statement attached, no criminal complaint and no proof of conviction. The conviction, as represented by petitioner's counsel, was for N.Y.P.L. 240.20(7). However, the IJ relied exclusively on the allegations of masturbation in front of an elementary school in making her decision. ECF 7, Exhibit 8 at line 244. The IJ found that the allegations behind the charge of public lewdness as stated in the police report were highly probable in the absence of any corroborating evidence or conviction, and this constitutes a legal error. *See Diaz Calderon*, 535 F.Supp.3d 669 (finding that

unproven allegations of being "super drunk" from the police report could not sustain a finding of dangerousness). Furthermore, the IJ's decision does not comport with other BIA precedent regarding the minimal weight that must be given to an arrest report without evidence of corroboration or conviction. *See Zhang*, 452 F.3d 167; *Matter of Arreguin*, 21 I. &N. Dec. at 42.

The IJ also incorrectly applied the legal standard, or, in other words applied the wrong legal standard. The IJ used the correct vocabulary of "clear and convincing evidence" but applied a different standard where there is no requirement that the government meet its burden by clear and convincing evidence. *See Matter of Guerra*, 24 I&N Dec. at 39 (stating that IJ's must only have a reasonable basis). The IJ found a basis for the dangerousness finding, without it constituting clear and convincing evidence. The IJ ignored the legal standard for the weight that should be given to uncorroborated police reports without proof of conviction.

IV. Petition Challenges a Procedural Due Process Violation

Although the habeas petition labels count one of the causes of action as a "violation of substantive due process" in error, the pleadings and attached evidence allege that this violation of due process is procedural. The argument in the pleadings concerns the process afforded to the Petitioner at his second bond hearing and whether the correct legal standard was applied. This is inherently a procedural question, as the procedures at bond hearings have been scrutinized using the factors from *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). *See Velasco Lopez*, 978 F.3d 842.

In the alternative, the violation of due process here can also be construed as substantive. A decision to continue detention for a civil purpose without clear and convincing evidence of dangerousness does shock the conscience. *See e.g. id.* ("[T]he private interest affected by the official action is the most significant liberty interest there is – the interest in being free from

imprisonment.") (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)). The importance and fundamental nature of the individual's right to liberty should not be minimized. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The deprivation of the right to liberty does not violate due process as long as the government can show "an identified and articulable threat to an individual or the community" by clear and convincing evidence. *U.S. v. Salerno*, 481 U.S. 739, 751 (1987). The clear and convincing standard of proof protects against due process violations in civil forms of detention. *See Addington v. Texas*, 441 U.S. 418 (1979). The longer the detention continues the greater the deprivation becomes. *Velasco Lopez*, 978 F.3d at 852.

As detailed *supra*, Courts, including the Courts of Appeals, require that clear and convincing evidence of dangerousness be demonstrated before prolonged and indefinite detention continues. Civil detention in many instances mirrors the conditions of criminal confinement. *Id.* at 850. Civil immigration detention has been conceptualized as a relatively short form of detention, *see Demore v. Kim*, 538 U.S. 510, 529 (2003), lasting two months in most cases. However, the actual period of detention is typically much longer, as in this case where it has lasted almost eleven months and in *Velasco Lopez*, where it lasted ten months. *Velasco Lopez*, 978 F.3d at 852.

Here, the Petitioner has been detained in criminal facilities for almost eleven months without dangerousness shown by clear and convincing evidence. The basis for detention has been bare accusations in a police report without corroboration or conviction. Under the case law, this qualifies as a deprivation of substantive due process as well.

V. Petitioner's Detention Is Unreasonably Prolonged

Count two of the instant petition concerns a due process violation for prolonged detention. Petitioner is in prolonged detention and should be released on this basis in the alternative.

The Supreme Court has upheld detention during immigration removal proceedings emphasizing that detention is short-term. *See Demore*, 538 U.S. at 529 (noting the relative brevity of detention under 8 U.S.C. § 1226(c), which lasts roughly a month and a half in 85% of cases, and an average of four months in the minority of cases in which the noncitizen chooses to appeal); *cf. Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that presumptive limit to reasonable duration of post-removal detention is six months).

Prolonged detention is evaluated case-by-case using several factors. *Sajous v. Decker*, 18-cv-2447 (AJN) at *21 (S.D.N.Y. May 23, 2018). Those factors are the length of detention to date; whether the noncitizen is responsible for the delay; the asserted relief from removal; whether the time in civil detention outweighs the time in criminal custody; and whether the immigration detention facility is meaningfully different from a penal institution for criminal detention. *Id.* While these factors are used to evaluate whether detention without a bond hearing has become prolonged, they have also been applied to individuals in detention under 8 U.S.C. 1226(a), the 'discretionary detention' category. *See Reyes v. Bonnar*, 362 F.Supp.3d 762 (N.D. Cal. 2019).

Here, the Petitioner has been detained since April 26, 2025 – two days short of eleven months. ECF 1. This length of detention is indeed lengthy by any measure. The petitioner is not responsible for the delay. Petitioner requested release on bond for the first time less than a month later on May 14, 2025. ECF 7 at Exhibit 1. On June 4, 2025, he was transferred pursuant to a writ by the state court judge to county custody for the purpose of appearing at this state criminal proceedings. *Id.* On July 22, 2025, he was transferred back to ICE custody and resumed removal proceedings. *Id.* He was again transferred to state custody from September 3 to October 9, 2025. *Id.* Had ICE waited to arrest the Petitioner until after his conviction, he would have been detained approximately six months after the original ICE arrest. During this time, he would have been at

liberty to appear in state criminal court. ICE's discretion to arrest him *before his* conviction therefore caused him to be detained from April 26 to October 9, 2025 (minus the time in state custody). ECF 7 at Exhibit 1. Petitioner's removal hearing occurred on November 25, 2025 and he filed his appeal on December 23, 2025. *Id.* For the past three months, his appeal has been pending. *Id.* Petitioner's second bond hearing was conducted on March 11, 2026. ECF 1 Exhibit 2. These facts clearly show that the lengthy time in detention is due to the government's decision to detain him before a conviction, and the time that the appeal has been pending, not due to Petitioner's delay.

As to the third factor, the Petitioner is appealing the denial of his application for cancellation of removal for nonlawful permanent residents and voluntary departure. ECF 1. Additionally, as stated in the bond hearing, it is likely that he may file a motion to be heard on an application for asylum as well. ECF 7 Exhibit 9. That would be a total of three applications for relief from a removal order.

Lastly, the Petitioner has spent eleven months in ICE custody but was only sentenced to 15 days jail for the violation under N.Y.P.L. § 240.20(7). ECF 7 Exhibit 1. He has been detained at two jails: the Orange County Jail in Goshen, NY and the MDC in Brooklyn, NY. Both jails are for criminal detainees. The conditions of his custody in immigration detention, therefore, do not differ from those of criminal custody and his time in ICE custody has far exceeded his actual sentence.

Under the totality of these factors, the Petitioner is in prolonged detention. As discussed *infra*, the Court should find that release is the proper remedy.

VI. Release is the appropriate remedy

Ordering release is the "very essence of habeas relief." *Phifer v. Warden, U.S. Penitentiary, Terre Haute, Ind.*, 53 F.3d 859, 864 (7th Cir. 1995). "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him." *Fay v. Noia*, 372 U.S. 391, 430-31 (1963). The remedy should not be another, and third, bond hearing. *See Enoh*, No. 16-CV-85 (ordering release because Respondents failed to comply with order for a burden shifted bond hearing); *Judulang v. Chertoff*, 562 F. Supp. 2d 1119, 1127 (S.D. Cal. 2008) (ordering petitioner's release where the "evidence before the IJ failed, as a matter of law, to prove flight risk or danger pursuant to the Court's order.").

Respectfully submitted.

Dated: March 24, 2026

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