UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CIVIL ACTION

YESSIMKHAN YELESHEV,
A# [redacted]

Petitioner,

v.

ANTHONY J. LA ROCCO, Sheriff of Nassau
County, in his official capacity; et al.,

Respondents.

Case No. 26-cv-02294 (SJB)

PETITIONER'S REPLY **MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

28 U.S.C. § 2241

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

PRELIMINARY STATEMENT

The Government's letter response (Dkt. No. 8) does not distinguish the controlling EDNY authority, does not engage the statutory tolling provision of 8 U.S.C. § 1182(a)(9)(B)(iii)(II) that defeats the only § 1357(a)(2) predicate offered, and does not address the Accardi violation at the heart of Count II. The May 7, 2026 Scheduling Order has now identified *Gopie v. Lyons* and *Benitez v. Genalo* as the framework against which the chronology in the Vrahnas Declaration will be measured. On the face of that Declaration, the writ should issue.

I. THE GOVERNMENT FAILS TO DISTINGUISH GOPIE AND RODRIGUEZ-ACURIO; BOTH CONTROL.

The Government cites *Rodriguez-Acurio v. Almodovar*, 2025 WL 3314420 (E.D.N.Y. Nov. 28, 2025), and *Gopie v. Lyons*, 2025 WL 3167130 (E.D.N.Y. Nov. 13, 2025), and acknowledges that both petitioners were released. Dkt. 8 at 2. The Government does not identify any material difference between those cases and this one.

Gopie controls. This Court held in *Gopie* that where ICE issues an I-200 warrant, executes the arrest, and serves the NTA only afterward, the resulting custody determination is invalid because '[a] bond hearing before an immigration judge is a re-determination of custody — it assumes that a valid custody determination was made in the first instance.' 2025 WL 3167130, at *3. The Court further held that the petitioner 'is not required to exhaust a process that was deficient from the outset.' *Id.* The Vrahnas Declaration concedes the same chronology here: the I-200 issued first, ICE 'arrested' Petitioner '*pursuant to the I-200*,' and only 'On the same day, *during processing*, DHS served Petitioner with the NTA.' Vrahnas Decl. ¶¶ 7, 9–10.

Rodriguez-Acurio is on all fours on the constitutional question. The court there held that detention without 'any pre-deprivation notice or an opportunity to be heard before a DHS officer or an immigration judge' violates procedural due process under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and that 'a post-deprivation bond hearing before a DHS officer or even an immigration judge would provide no genuine opportunity to relief because the detention without adequate pre-deprivation procedures has already been carried out.' 2025 WL 3314420, at *31. EDNY courts have applied that holding repeatedly. See *Mejia-Pina v. Bondi*, No. 26-cv-986 (NJC) (E.D.N.Y. Feb. 20, 2026); *Ye v. Maldonado*, No. 25-cv-6417 (E.D.N.Y. Dec. 8, 2025).

II. EXHAUSTION DOES NOT APPLY: THIS PETITION CHALLENGES THE LEGALITY OF THE ARREST, AND AN IMMIGRATION JUDGE CANNOT CURE THE CLAIMS PLEADED.

The Second Circuit has held that 8 U.S.C. § 1226(e) 'does not preclude challenges to the extent of the Government's detention authority under the statutory framework as a whole,' and 'does not limit habeas jurisdiction over constitutional claims or questions of law.' *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020). 'Claims that the discretionary process itself was constitutionally flawed are cognizable in federal court on habeas because they fit comfortably within the scope of § 2241.' *Id.*

This Petition pleads exactly such claims: (i) ICE's lack of statutory authority to arrest under § 1357(a)(2) when § 1182(a)(9)(B)(iii)(II) tolls 'unlawful presence' for the duration of a bona fide pending I-589; (ii) the regulatory infirmity of an arrest at the asylum interview under 8 C.F.R. § 208.9(b) and the *Accardi* doctrine; and (iii) the Fifth Amendment Due Process Clause. None of those is committed to ICE or IJ discretion. All are core habeas claims.

The exhaustion cases on which the Government relies are inapposite. *Castillo Lachapel v. Joyce*, 786 F. Supp. 3d 860 (S.D.N.Y. 2025), required exhaustion because the petitioner there sought relief — release on bond — that an IJ could provide. *Capunay Guzman v. Joyce*, 786 F. Supp. 3d 865 (S.D.N.Y. 2025), held only that 'risk of prolonged detention' is not irreparable injury. *Michalski v. Decker*, 279 F. Supp. 3d 487 (S.D.N.Y. 2018), held that a 'scheduled bond hearing scuttles' a habeas petition that an IJ could moot by granting bond. *Id.* at 495–96. None of these cases addresses an ultra vires arrest claim, an *Accardi* violation, or the absence of valid initial process. An IJ can reconsider whether continued custody is appropriate, but cannot adjudicate whether the initial arrest was authorized by § 1357(a)(2) when § 1182(a)(9)(B)(iii)(II) had already tolled the asserted predicate, and cannot enforce 8 C.F.R. § 208.9(b) — a USCIS regulation governing asylum-office conduct that the IJ does not administer.

To the extent prudential exhaustion is even reached, *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003), recognizes four exceptions, three of which apply here directly: (1) no genuine opportunity for adequate relief (an IJ cannot redress a § 208.9(b) violation); (2) irreparable injury (Petitioner is in actual ICE custody, not merely at risk); and (3) substantial constitutional question (each of the three Counts independently raises one). The Government identifies no administrative mechanism by which an immigration judge could adjudicate Petitioner's statutory arrest-authority claim or his *Accardi* claim, and the proposed bond-hearing exhaustion would therefore not provide meaningful relief.

III. J.G.G. ADDRESSES VEHICLE, NOT MERITS; HABEAS REMAINS THE PROPER CAUSE OF ACTION HERE.

The Government argues that any APA component of the Petition is barred by *Trump v. J.G.G.*, 604 U.S. 670 (2025). J.G.G. holds that claims that 'necessarily imply the invalidity' of confinement 'must be brought in habeas.' *Id.* at 672. That holding goes to vehicle, not merits — and it confirms, rather than impedes, the Petition. Petitioner brings this action under 28 U.S.C. § 2241 for the writ. Even if the Court disregards the APA component, the habeas claims remain fully reviewable. See also *Rodriguez Orellana v. Francis*, No. 25-cv-4212, slip op. (E.D.N.Y. Oct. 3, 2025) (rejecting *J.G.G.*-based bar where 'Petitioner … directly challenged his detention and sought relief in habeas').

IV. THE COORDINATED ARREST AT THE ASYLUM INTERVIEW VIOLATES 8 C.F.R. § 208.9(b) AND THE ACCARDI DOCTRINE.

The Vrahnas Declaration concedes that ICE knew Petitioner 'would be at the U[SCIS] office, located at 1065 Stewart Avenue, Bethpage, NY' (¶ 8); that ICE officers were already 'in high visibility markings reading "POLICE," "ERO," and "ICE"' before Petitioner arrived (¶ 9);

and that ICE arrested him there. Petitioner was at the asylum office because USCIS scheduled him to be there for a non-adversarial asylum interview at 10:00 a.m. on May 4, 2026. Pet. Ex. H.

Section 208.9(b) of Title 8 of the Code of Federal Regulations directs that 'the asylum interview ... shall be conducted in a non-adversarial manner.' Coordinating ICE arrest at the asylum interview converts the very thing the regulation describes as 'non-adversarial' into a means of administrative seizure. The Second Circuit has expressly applied the *Accardi* doctrine to immigration-agency conduct in *Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991), holding that 'where the violated agency regulation governs individual interests, the *Accardi* doctrine requires reversal irrespective of whether a new hearing would produce the same result,' and that 'an alien claiming the [agency] has failed to adhere to its own regulations ... is not required to make a showing of prejudice before he is entitled to relief.' *Id.* Section 208.9(b) is plainly 'for the alien's benefit' — it codifies the non-adversarial character of asylum interviews precisely because the asylum applicant must speak freely about persecution to make out a claim. The Second Circuit has reaffirmed Montilla in *Singh v. Gonzales*, 461 F.3d 290, 295 (2d Cir. 2006).

This Court (per the panel in *Black v. Almodovar*, 156 F.4th 171 (2d Cir. 2025)) has further confirmed that asylum applicants 'have a due process interest in the procedures by which their asylum claims are adjudicated.' The procedure at issue here — the non-adversarial asylum interview required by § 208.9(b) — is precisely such a procedure. Coordinated ICE arrest at that interview interferes with the procedural fairness the Fifth Amendment protects.

V. THE ARREST WAS ULTRA VIRES UNDER 8 U.S.C. § 1357(a)(2): § 1182(a)(9)(B)(iii)(II) TOLLS UNLAWFUL PRESENCE, AND BOTH STATUTORY PREDICATES FAIL.

Section 1357(a)(2) authorizes warrantless administrative arrest only where the officer has 'reason to believe' the alien is 'in the United States in violation of any [law or regulation]' AND the

alien 'is likely to escape before a warrant can be obtained.' The Second Circuit has held that BOTH predicates are required, not one. *Contreras v. United States*, 672 F.2d 307, 309 (2d Cir. 1982). Both predicates fail here.

First, 'reason to believe' fails. Petitioner filed Form I-589 on January 5, 2026 — eighty-nine days BEFORE his B-2 I-94 expired. Pet. Ex. C; I-797C Receipt MGL2641840025. Section 1182(a)(9)(B)(iii)(II) provides that '[n]o period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence.' Petitioner has accrued zero days of unlawful presence within the meaning of § 1182(a)(9)(B). See *United States v. Horma*, 2018 WL 4205529 (E.D. Va. 2018) ('the period of authorized stay begins on the date the alien files a bona fide application for asylum'); *Matter of Rotimi*, 24 I. & N. Dec. 567 (BIA 2008) (asylum applicant 'is exempt from the consequences of accruing unlawful presence'). The 'overstay' premise the Government identifies as the only § 1226(a) charge therefore did not exist as a matter of statute on May 4, 2026.

Second, 'likely to escape' fails. *Contreras* notes that 'when the alien's deportability is clear and undisputed, that circumstance alone may provide a sufficient basis for an INS officer to believe that escape is likely.' 672 F.2d at 311. The corollary is that when deportability is NOT clear and undisputed, mere likelihood is not automatic. Here, deportability for 'overstay' was statutorily defeated by § 1182(a)(9)(B)(iii)(II). Petitioner had appeared at every USCIS appointment, including the very interview at which he was arrested. Pet. ¶¶ 22–27. The objective record shows compliance, not flight risk.

Wong Sun v. United States, 371 U.S. 471, 484 (1963), forecloses the Government's reliance on after-the-fact paperwork: 'a search unlawful at its inception may [not] be validated by what it

turns up.' ICE arrested Petitioner before serving the NTA. Post-arrest service of the NTA, the I-200, and the I-286 cannot retroactively manufacture the predicate that did not exist at the moment of seizure.

VI. THE PARADA CRUZ / BENITEZ FRAMEWORK DISPOSES OF THE PETITION.

The May 7, 2026 Scheduling Order directs Respondents to clarify whether the NTA was issued after Petitioner's arrest in contravention of *Gopie v. Lyons* and *Benitez v. Genalo*. On the face of the Vrahnas Declaration, the answer is yes. Two weeks before this Petition was filed, this Court issued companion decisions in *Parada Cruz v. Noem*, No. 26-cv-01110, 2026 WL 1027441 (E.D.N.Y. Apr. 16, 2026), and *Benitez v. Genalo*, No. 26-cv-01122 (E.D.N.Y. Apr. 16, 2026). Three holdings of this Court directly govern:

> If ICE is going to use an arrest warrant, then there must be removal proceedings initiated before or at the time of the arrest. Such proceedings are begun through the issuance of a Notice to Appear ("NTA"). There is no "leeway." If ICE wants to use a warrant, it must have a valid NTA in place. Parada Cruz, 2026 WL 1027441, at *3 (citing Niz-Chavez v. Garland, 593 U.S. 155, 157–58 (2021)).
>
> Using an after-the-fact warrant to justify a prior arrest is constitutionally problematic. It also is statutorily prohibited under the INA. Id. at *4.
>
> [R]egardless of what statutory authority is used to arrest someone, issuance of NTAs and warrants post-arrest to create post hoc justifications violates due process. Benitez, slip op. at 8.

On the Vrahnas Declaration's own chronology, that sequence is what occurred here. The '*during processing*' service the Declaration describes is, on this District's record, post-arrest service at the Nassau County Correctional Center after ICE had already transported Petitioner from the asylum office in Bethpage. See *Mohd v. Noem*, No. 26-cv-0680, 2026 WL 363525, at *4 (E.D.N.Y. Feb. 9, 2026); *Aguinaga Castellon v. Doe*, No. 26-cv-0647, 2026 WL 326947, at *4 (E.D.N.Y. Feb. 7, 2026). The face of the I-200 should reflect a service location of East Meadow, not

Bethpage; Petitioner respectfully requests that the Court direct Respondents to produce the I-200, NTA, and I-286 with their service-location and timestamp fields visible.

VII. THE COURT'S MAY 6, 2026 ANTI-TRANSFER ORDER REMAINS NECESSARY.

Pending the writ, the Court should keep its May 6, 2026 Order in place under the All Writs Act, 28 U.S.C. § 1651, and *Rumsfeld v. Padilla*, 542 U.S. 426, 442–43 (2004). The Government's letter acknowledges the Order. Dkt. 8 at 2.

CONCLUSION

Petitioner respectfully requests that the Court issue the writ at the conclusion of the May 11, 2026 hearing; declare that the May 4, 2026 arrest was *ultra vires* and violated 8 C.F.R. § 208.9(b) and the Fifth Amendment; maintain the May 6, 2026 anti-transfer Order; and award costs under 28 U.S.C. § 2412.

Dated: May 8, 2026

Philadelphia, Pennsylvania

Respectfully submitted,

/s/ Robert Bond
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Pennsylvania Bar No. 308371
Admitted Pro Hac Vice
(Order, Bulsara, J., May 6, 2026, ECF)
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CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.1(c)

Pursuant to Local Civil Rule 7.1(c) of the Joint Local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York, the undersigned counsel certifies that this Reply Memorandum, exclusive of the caption, signature block, and this certificate, contains 2202 words, as counted by the word-processing program used to prepare the document. This Reply Memorandum is therefore within the 3,500-word limit prescribed by Local Civil Rule 7.1(c) and Section VI.E of Judge Bulsara's Individual Practices.

Dated: May 8, 2026

/s/ Robert Bond

Robert Bond, Esq.

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May _8__, 2026, I caused the foregoing Reply Memorandum to be electronically filed via the Court's CM/ECF system, which will serve all counsel of record, including Marika M. Lyons and Diane C. Leonardo, Assistant United States Attorneys, Office of the United States Attorney for the Eastern District of New York. A courtesy copy is being delivered to the Clerk's Office at the Central Islip courthouse pursuant to Judge Bulsara's Individual Practice III.F. A copy is being mailed by First Class U.S. Mail to Sheriff Anthony J. La Rocco, Nassau County Sheriff's Department, 100 Carman Avenue, East Meadow, NY 11554.

/s/ Robert Bond

Robert Bond, Esq.

Counsel for Petitioner