U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

May 21, 2026

By ECF
Honorable LaShann DeArcy Hall
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *M.A.V.R. v. Maldonado, et al.*, No. 2:26-cv-2907 (LDH)

Dear Judge DeArcy Hall:

This Office represents Respondents in this habeas action, in which Petitioner M[redacted] A[redacted] V[redacted] R[redacted] ("Petitioner") challenges his detention by U.S. Immigration and Customs Enforcement ("ICE"). *See* ECF No. 9. Respondents respectfully write in accordance with the Court's Order to Show Cause dated May 15, 2026 (the "OTSC"), which directed Respondents to show cause why a writ of habeas corpus should not be issued.

In sum, the Petition for Writ of Habeas Corpus ("Petition") should be denied because ICE afforded him the process that 8 U.S.C. § 1226(a) requires after *da Cunha v. Freden*, -- F.4th -, 2026 WL 1146044 (2d Cir. Apr. 28, 2026), held that detainees like Petitioner are covered by the detention authority in that statute.[1] Specifically, after *da Cunha*, ICE conducted a custody determination and found Petitioner to be a danger in light of his criminal conviction in September 2025. Petitioner refused the opportunity to pursue administrative appeal to an immigration judge of the custody determination – a choice that the Court in *Quille v. Blanche*, No. 2:26-cv-2818 (Gonzalez, J.) "caution[ed]" . . . may severely prejudice" the habeas petition – and ICE's custody determination is not subject to district court review.

Respondents, however, are cognizant of *Garcia v. Maldonado*, where this Court concluded that *da Cunha* rendered unlawful a detention under 8 U.S.C. § 1225(b)(2)(A) that began before *da Cunha* and that the remedy was to release the petitioner, even though ICE (like here) provided that petitioner with a post-*da Cunha* § 1226(a) custody determination that resulted in his continued detention. *See* No. 2:26-cv-2560, Minute Entry and Order dated May 8, 2026 (E.D.N.Y.) (DeArcy Hall, J.). But there was no dispute that the *Garcia* habeas petitioner remained within the ambit of § 1226(a) after his release, as would Petitioner here, regardless of the Court's decision. And as an alien covered by § 1226(a), Petitioner here could be immediately detained again after his release, which would trigger another custody determination based on the

[1] The Government is still evaluating next steps in *da Cuhna*. For purposes of a potential future appeal, in the event *Cunha* is vacated, stayed, or overruled, Respondents respectfully preserve their arguments that 8 U.S.C. § 1225(b)(2)(A) applies.

same facts that already resulted in ICE sustaining his detention. Such a do-over does not remedy any prior unlawful detention; it would only waste resources. Respondents respectfully submit that affording a post-*da Cunha* custody determination to aliens whose detention began before and was rendered unlawful by *da Cunha* is the appropriate remedy.

While reserving all rights, including the right to appeal, Respondents submit this letter in lieu of a formal responsive memorandum of law, to conserve judicial and party resources, and to expedite the Court's consideration of this case.

I. Background

Under § 1226(a), the Government may arrest and detain an alien pending a decision in his removal proceedings or release him on bond or conditional parole. Section 1226(a) provides, in relevant part, that:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole;

8 U.S.C. § 1226(a).

In *da Cunha*, the Second Circuit held that the detention authority in 8 U.S.C. § 1225(b)(2)(A) does not apply to aliens who are present in the United States after entering the country without inspection and admission, and who were not apprehended at or near the border at the time of entry. 2026 WL 1146044, at *2. Rather, § 1226(a) would apply in those circumstances. *Id.*

Petitioner entered the United States at an unknown time and place. *See* Declaration of Patrick J. Heerey ("ICE Decl.") ¶ 3. He was first encountered by immigration authorities on February 20, 2026, which is the encounter that resulted in the detention he challenges here. *Id.* ¶ 8. Petitioner's detention is, therefore, governed by *da Cunha*, so he is detained under § 1226(a).

Because Petitioner is detained under § 1226(a), on May 18, 2026, ICE provided Petitioner with an individualized custody determination, in which it concluded that he did not establish that he did not pose a danger to persons or property because he was convicted of driving while ability impaired in September 2025. *Id.* ¶¶ 4-7, 23. Petitioner also has pending charges for false impersonation, unlicensed operation of a motor vehicle, and other vehicular

infractions. *Id.* ¶ 6.

ICE provided Petitioner the documented results of his custody determination on the same day. *Id.* ¶ 23. Petitioner refused to acknowledge receipt of the notification and refused to request or waive a custody redetermination (commonly known as a bond hearing) before an immigration judge, as is his right to request under § 1226(a). *Id.*

II. The Habeas Petition Should Be Denied Because Petitioner Is Lawfully Detained And Refuses To Seek Administrative Appeal Of His Custody Determination

Petitioner is properly detained under § 1226(a), and his remedy, if any, is administrative.

As noted above, on April 28, 2026, the Second Circuit held in *da Cunha* that § 1226(a) applies to aliens who, like Petitioner, entered the United States without inspection and admission and were not apprehended at or near the border at the time of entry. 2026 WL 1146044, at *2. By regulation, immigration officers conduct custodial determinations and may release aliens detained under § 1226(a) if the alien meets his burden of showing that he "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). *See Fontanelli, as Next Friend of Bernal Garcia v. Francis*, 2025 WL 2773234, at *4 (S.D.N.Y. Sept. 29, 2025) ("§ 1226(a) and its implementing regulations require ICE officials to make an individualized custody determination, specifically whether the noncitizen is a danger to person or property or persons and is likely to appear for any future proceeding.") (citations and internal quotation marks omitted); *Hamilton v. Shanahan*, 2009 WL 5173927, at *2 (recognizing that the alien bears the burden of proof); *see also Velasco Lopez v. Decker*, 978 F.3d 842, 849 (2d Cir. 2020) (referring to "post-arrest custody determination" under § 1226(a).)

Under 8 U.S.C. § 1226(e), ICE's custody determination is outside this Court's jurisdiction to review. Section 1226(e) provides that "[ICE]'s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by [ICE] under this section regarding the detention of any [noncitizen] or the revocation or denial of bond or parole." 8 U.S.C. § 1226(e). Thus, "[a] district court has no authority to review ICE's discretionary determinations made under [Section 1226] or otherwise question their propriety." *Fontanelli*, 2025 WL 2773234, at *4.

Though Petitioner may not seek review in this Court, he has recourse administratively. After ICE makes the initial custody determination, an alien can request a custody redetermination (*i.e.*, a bond hearing) by an immigration judge ("IJ") at any time before a final order of removal is issued. *See* 8 C.F.R. § 236.1(d)(1). Under 8 C.F.R. § 1003.19(h)(3), an alien seeking bond must "first demonstrate, by clear and convincing evidence, that release would not pose a danger to other persons or to property. If an alien meets this burden, the alien must further demonstrate, by clear and convincing evidence, that the alien is likely to appear for any scheduled proceeding or interview." *See Hylton v. Shanahan*, 2015 WL 3604328 (S.D.N.Y. June 9, 2015) (declining to shift burden of proof onto government in a bond hearing in immigration court where respondent was detained under § 1226(a)).

If dissatisfied with the IJ decision, the alien can seek review by the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(F), 1003.38, 1236.1(d)(3); *Monterosa v.*

Decker, 2020 WL 1847771, at *3 (S.D.N.Y. Apr. 11, 2020) ("After ICE makes and initial detention decision, any person who is detained has the right to request a bond hearing before an Immigration Judge."). No review is available in this Court. *See Arevalo-Guasco v. Dubois*, 788 Fed Appx. 25, 27 (2d Cir. 2019) (concluding that § 1226(e) precludes judicial review of the IJ's weighing of evidence and factual findings regarding whether [Petitioner-Appellant] is a danger to the community"); *Hamilton*, 2009 WL 5173927, at *3 ("Section 1226(e) specifically divests [district courts] of jurisdiction to review the decisions of the IJ and the BIA (acting on behalf of the Attorney General) regarding the detention of aliens under Section 1226.")

Numerous courts in this Circuit have held that to the extent that habeas petitioners want to challenge the initial custody determination, ordinarily they must exhaust administrative remedies before seeking federal court intervention. *See, e.g.*, *Almonte Rojas v. Genalo*, 2026 WL 275991, at *1 (E.D.N.Y. Feb. 3, 2026) (Komitee, J.) (citing *Castillo Lachapel v. Joyce*, 786 F. Supp. 3d 860, 864 (S.D.N.Y. 2025)); *accord Fontanelli*, 2025 WL 2773234, at *5-*8; *Capunay Guzman v. Joyce,* 786 F.Supp.3d 865, 869-871 (S.D.N.Y. 2025); *Roman v. Decker*, 2020 WL 4273823, at * 7 (S.D.N.Y. July 24, 2020); *Paz Nativi v. Shanahan*, 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). The exhaustion requirement "aims to provide the agency with a chance to correct its own errors, 'protect[ ] the authority of administrative agencies,' and otherwise conserve judicial resources by 'limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary.'" *Guzman,* 786 F.Supp.3d at 869-871 (quoting *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.)). As the court in *Castillo Lachapel* explained, "[i]f the immigration judge releases [petitioner] on bond, his [habeas petition would be moot . . . . And even if the immigration judge denies bond, [the] petition could be mooted if the [BIA] reverses that determination." 786 F. Supp. 3d at 864 (internal quotation marks and citation omitted).

But Petitioner affirmatively refuses to exhaust his administrative remedies. *See* ICE Decl. ¶ 23. Petitioner's gamesmanship should not be rewarded with this Court's jurisdiction or grant of his habeas petition. *See Quille*, No. 2:26-cv-2818, Order dated May 15, 2026 ("The Court cautions Petitioner that . . . failure to engage in the administrative process" by seeking a bond hearing "may severely prejudice his [habeas] petition") (Gonzalez, J.). As Petitioner has received an initial custody determination pursuant to § 1226(a) and 8 C.F.R. § 236.1(c)(8), the Petition should be denied and this action dismissed.

None of the recognized exceptions to exhaustion apply. A district court may in its discretion excuse exhaustion when "(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile and (4) in certain instances a plaintiff has raised a substantial constitutional question." *See Beharry*, 329 F.2d at 62. Numerous courts in this Circuit have also found that none of these exceptions apply where, as here, an immigration judge or the BIA could release a habeas petitioner detained under 8 U.S.C. § 1226(a) on bond. *See, e.g.*, *Castillo Lachapel*, 2025 WL 1685576 at *3; *Capunay Guzman*, 786 F. Supp. 3d at 870; *Monterosa*, 2020 WL 1847771 at *6-*7; *Roman*, 2020 WL 4273823, at *7.

With respect to the first exception, as explained above, Petitioner has available

administrative remedies—a bond hearing with an immigration judge *and* appeal of the immigration judge's decision, if adverse, to the BIA. *See Castilla Lachapel*, 2025 WL 1685576, at *3 (describing the two levels of administrative review available to petitioner). "Because [Petitioner]'s [potential] bond hearing may provide him with the relief that he seeks—*i.e.*, his release—this Court concludes in the exercise of its discretion that [Petitioner] must exhaust these avenues before seeking judicial relief." *Id.* (internal quotations and citations omitted). *See Paz Nativi*, 2017 WL 281751, at *2 ("The pendency of a BIA appeal that could potentially moot [petitioner's] habeas petition counsels for the Court to stay its hand until the exhaustion of administrative review in the name of preserving scarce judicial resources and avoiding the possibility of duplicative or conflicting rulings.").

The second exception is also inapplicable. Petitioner cannot show irreparable harm at this time. He has been detained less than two weeks, and he has received an individualized custody determination, and will receive a bond hearing. *See Capunay Guzman*, 786 F. Supp. 3d at 871 (where petitioner had been detained for nineteen days "'[t]he risk of prolonged detention'—as opposed to actual prolonged detention—'does not constitute an irreparable injury that excuses the prudential exhaustion requirement'") (quoting *Roman*, 2020 WL 4273823, at *8).

Similarly, on the third exception, Petitioner has not shown that a bond hearing would be futile. *See Capunay Guzman*, 786 F. Supp. 3d at 870 ("arguments concerning the futility of any bond motion are similarly premature, as he has not yet made a motion for bond"). *See also Cabral v. Decker*, 331 F. Supp. 3d 255, 263 n. 6 (S.D.N.Y. 2018) ("[T]he question of whether the petitioner's yet-to-happen bond hearing complies with due process is not before this Court.").

With respect to the fourth exception, "[m]ere existence of a constitutional issue . . . does not create an automatic exception to an exhaustion requirement." *Monterosa,* 2020 WL 1847771, at *5. "Thus, when applying this exception, 'courts will endeavor to avoid deciding a constitutional issue if the case might be resolved on a narrower factual basis.'" *Capunay Guzman*, 786 F. Supp. 3d at 871 (quoting *Monterosa*, 2020 WL 1847771, at *5). As the court in *Capunary Guzman* noted, only a few courts in this Circuit have excused exhaustion under the fourth exception in cases where the petitioner had been detained and denied bond at the bond hearing or was not yet detained and sought to prevent re-detention. *See id.* (collecting cases).

Accordingly, Respondents respectfully request that the Petition be denied. Respondents thank the Court for consideration of this submission.

Respectfully submitted,

JOSEPH NOCELLA, JR.
United States Attorney

By: */s/ Justin S. Kirschner*
Justin S. Kirschner
Assistant United States Attorney
(718) 254-6884
Justin.Kirschner@usdoj.gov

cc: All Counsel of Record (by ECF)