

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MICHAEL ANDRES ALVAREZ PUERTA,

Petitioner,

v.

MICHAEL NESSINGER, Warden,
Donald W. Wyatt Detention Facility,
PATRICIA HYDE, Director, Boston Field
Office, U.S. Immigration and Customs
Enforcement, and KRISTI NOEM, U.S.
Secretary of Homeland Security, *in their
official capacities.*

Respondents.

Civil Action No. 1:25-CV-00108

**REPLY IN SUPPORT OF OPPOSITION TO
PETITION FOR WRIT OF HABEAS CORPUS**

The United States, on behalf of Respondents, moved to dismiss Petitioner Michael Andres Alvarez Puerta's Amended Petition for Writ of Habeas Corpus (ECF No. 7) under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) for the various reasons set forth in its Opposition (ECF No. 10). The United States submits this reply to Petitioner's Response to the Opposition (ECF No. 11) to reiterate why dismissal of the Writ is appropriate.

Petitioner's Writ is based exclusively on allegations regarding the custody redetermination hearing ("bond hearing") that took place on December 26, 2024—these claims are mooted by Petitioner having received a second bond hearing on April 10, 2025. Petitioner made no allegations in his pleadings as to the second

bond hearing, and his attempt to do so now via a responsive brief contravenes general rules of pleading under Federal Rule of Civil Procedure 8(a). Furthermore, notwithstanding Petitioner's new, unpled allegations, statutory and prudential concerns weigh in favor of requiring administrative exhaustion of Petitioner's claims as to the second bond hearing, particularly since the issues Petitioner has raised with the Board of Immigration Appeals ("BIA") are duplicative of those he is now raising before this Court.

I. Petitioner improperly introduces unpled allegations in a responsive brief in violation of Federal Rule of Civil Procedure 8(a).

Under general rules of pleading, a complaint must have "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Complaint must "contain sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint should be dismissed when its allegations, taken in the light most favorable to the claimant, fail to state a claim. Fed. R. Civ. P. 12(b)(6); *Twombly*, 550 U.S. at 555.

The Amended Petition alleges denial of due process at Petitioner's first bond hearing, held on December 26, 2024, when the Immigration Judge ("IJ") allegedly improperly placed the burden of proof on Petitioner, as opposed to the Government, to show that he was not a danger to the community. *See generally* ECF No. 7. The Amended Petition has been rendered moot in light of Petitioner's second bond hearing. Leaving nothing further for the Court to rule on, the Amended Petition must be dismissed.

Petitioner now attempts to constructively amend his Writ through his brief opposing the Government's motion to dismiss. ECF No. 11 at 3. Specifically, Petitioner introduces a host of new factual allegations about the second bond hearing that took place on April 10, 2025, alleging that the IJ, although correctly placing the burden on the Government this time, did not apply the correct legal standard. *Id.* at 6-7. Petitioner relies on these new allegations to argue that his Writ is "judicially reviewable and is ripe for review." *Id.* at 2. These new arguments are premised on factual allegations entirely absent from the pleadings and must be disregarded by the Court for purposes of ruling on the pending motion to dismiss.

Complaints must provide adequate notice to defendants of the underlying facts and claims; this requirement is not met when a complaint is silent as to factual allegations and legal theories raised by a plaintiff in later-filled memoranda. *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 123 (1st Cir. 2004); *see also Dep't of Recreation & Sports of Puerto Rico v. World Boxing Ass'n*, 942 F.2d 84, 89 (1st Cir. 1991) (court has "no duty" to "create a claim" that is "not spelled out in [the] pleading"). The only issue pled in the Amended Petition is the constitutionality of the first bond hearing. While the Amended Petition was still pending before this Court, Petitioner moved for and received a second bond hearing before the Immigration Court (and then filed an appeal of that hearing to the BIA). Only in response to the Government's Opposition did Petitioner acknowledge he had received a second bond hearing and raise allegations that the second hearing, too,

was constitutionally inadequate. Thus, not only did Petitioner expect the Court to award relief based on outdated allegations, but these shifting goalposts have failed to provide the adequate notice Respondents must be afforded under Rule 8(a). See *Frederico v. Home Depot*, 507 F.3d 188, 201-02 (3d Cir. 2007) (“we do not consider after-the-fact allegations in determining the sufficiency of [plaintiff’s] complaint under Rules 9(b) and 12(b)(6)”); *Luthy v. Proulx*, 464 F. Supp. 2d 69, 74 n.25 (D. Mass. 2006) (“complaint may not be amended by the briefs in opposition to a motion to dismiss.”); *Winne v. Nat’l Coll. Student Loan Trust 2005-1*, 16-cv-00229, 2017 WL 3573813, at *6 (D. Me. Aug. 17, 2017) (“Factual allegations made for the first time in a responsive memorandum are not properly considered in evaluating the sufficiency of a complaint under Rule 12(b)(6).”).

The Amended Petition here is premised on an alleged due process violation by the IJ at the first bond hearing on December 26, 2024. Any such violation was rendered moot by the second bond hearing. Nothing further is required for this Court to dismiss the Petition. To the extent Petitioner’s reply brief to the Government’s motion to dismiss presents issues and claims not contained in his Amended Petition, these claims are not properly before the court.

II. Petitioner must exhaust his administrative appeal before filing a petition for habeas corpus.

Even if this Court were to permit Petitioner to raise entirely new allegations in a response brief to a motion to dismiss, the additional allegations do not save his Writ from dismissal because Petitioner has not exhausted his administrative remedies. Petitioner filed an appeal on the issue of the second bond denial to the

BIA on April 10, 2025. ECF No. 11 at 4. That appeal is currently pending, with the briefing period having closed just a few days prior to the date of this filing. *Id.* Thus, the issue of Petitioner's eligibility for a new bond hearing or release has not yet been resolved by the agency. Petitioner has not exhausted his administrative remedies, and the agency should be allowed to correct any potential errors before the Court evaluates a petition for habeas corpus.

Yet even as Petitioner pursues an appeal of his denial of bond to the BIA, he maintains that exhaustion is not required. Legal authority, including from this Circuit, holds to the contrary. The First Circuit has reiterated that 8 U.S.C. § 1252(d) requires administrative exhaustion of claims in a habeas petition, and courts in this Circuit have extended that requirement to challenges to detention. *See Sayyah v. Farquharson*, 382 F.3d 20, 26 (1st Cir. 2004); *see also Martinez v. Gonzales*, No. 05-cv-00112-WES, 2005 WL 2219078, at *2 (D.R.I. Sept. 13, 2005) (8 U.S.C. § 1252(d)'s exhaustion requirement applies even where the underlying challenge is to detention). This Court recently denied a habeas petition requesting immediate release or, alternatively, a new bond hearing because the issue was still pending before the BIA. *See Order at 2, Perevoznikov v. Nessinger*, No. 25-cv-00085-JJM-LDA, ECF No. 10 (D.R.I. May 2, 2025) ("There is no question that before filing a habeas petition a petitioner must exhaust all administrative remedies.").

Petitioner further contends that prudential concerns counsel against requiring administrative exhaustion because he has suffered irreparable harm by virtue of his detention. ECF No. 11 at 10. But continued detention, standing alone,

is insufficient to constitute irreparable harm as a matter of law.¹ *See, e.g., Hernandez-Hernandez v. Feeley*, 535 F. Supp. 3d 142, 151 (W.D.N.Y. 2021); *Roman v. Decker*, No. 20-CV-3752, 2020 WL 4273823, at *7 (S.D.N.Y. July 24, 2020) (“The risk of prolonged detention does not constitute an irreparable injury that excuses the prudential exhaustion requirement.”). Nor does the possibility of delay in completing the administrative relief process automatically give rise to irreparable harm. *See Portela-Gonzalez v. Sec’y of Navy*, 109 F.3d 74, 78 (1st Cir. 1997) (“A pessimistic prediction or a hunch that further administrative proceedings will prove unproductive is not enough to sidetrack the exhaustion rule.”); *Dos Reis v. Vitello*, No. 25-cv-10497-RGS, 2025 WL 1043434, at *2 (D. Mass. Apr. 8, 2025) (“Given the extraordinary case load of the BIA, the result may not be as expeditious as one might wish, but neither is it so ‘prolonged’ as to rise to a violation of due process.”).

Furthermore, Petitioner has not been subjected to prolonged detention so as to constitute irreparable harm. Petitioner is detained pursuant to 8 U.S.C. § 1226(a) and is not currently subject to a final order of removal under 8 U.S.C. § 1231. *See* 8 U.S.C. § 1231(a)(2) (providing authority for detention of an individual who has a final order of removal); *see* ECF No. 10-1, Chan Decl. ¶¶ 12-13. Petitioner had a hearing before the IJ on his application for relief from removal on May 15, 2025. ECF No. 10-1, Chan Decl. ¶ 12. The hearing was adjourned and continued until September 9, 2025. *Id.* As of the date of this filing,

¹ Contrary to Petitioner’s assertion (ECF No. 11 at 10), Exhibit 4 does not address any potential irreparable harm Petitioner would suffer in the event of continued detention at Wyatt. *See* ECF No. 12, Exh. 4 at 3, 9.

Petitioner will have been detained for just over six months. Petitioner maintains that “continued detention due to the four month or longer timeline of the B.I.A. appeal and his ongoing removal case justifies the Court in relaxing the exhaustion requirements.” ECF No. 11 at 12.

The Supreme Court has declined to read procedural protections into § 1226(a) and left open the question of whether periodic bond hearings are constitutionally necessary for § 1226(a) detainees. *See Jennings v. Rodriguez*, 583 U.S. 281, 305-06, 311-12 (2018). Nonetheless, the Supreme Court’s decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and First Circuit law regarding limitations on the length of detention under 8 U.S.C. § 1226(c) are instructive, and would suggest that Petitioner’s detention is not presumptively unreasonable. *See Reid v. Donelan*, 17 F.4th 1, 8-9 (1st Cir. 2021). As noted in the Government’s Opposition, courts in this Circuit have frequently found that detention for periods of much longer than six months did not on its own violate due process. *See* ECF No. 10 at 17 n.4 (citing cases).² Even in the few instances where courts have considered whether detention under § 1226(a) was unreasonably prolonged and contrary to due process, the individuals had been detained for much longer than Petitioner. *See, e.g. Velasco Lopez v. Decker*, 978 F.3d 842, 855 (2d Cir. 2020) (fifteen month detention under § 1226(a) “without an end in sight or a determination that [petitioner] was a danger

² Although the cases cited therein involved individuals who were detained under 8 U.S.C. § 1226(c), the Government provides this context because Petitioner challenges ongoing detention based on his allegation that there is no significant likelihood of release in the reasonably foreseeable future.

or flight risk” violated due process); *see also Figueroa v. McDonald*, 680 F. Supp. 3d 18, 26 n.3 (D. Mass. 2018) (relying on *Jennings* in declining to decide whether petitioner’s one-year detention under 1226(a) had become unreasonably prolonged under the Due Process Clause).

Petitioner’s argument that there “is no end in sight for the length of his detention,” ECF No. 11 at 11, is also unavailing. Sufficient evidence that rebuts a petitioner’s belief “that there is no significant likelihood of removal in the reasonably foreseeable future” justifies detentions exceeding six months and supports the denial of petitions like the Petitioner’s. *See, e.g., Zadvydas*, 533 U.S. at 701. If removal proceedings have moved along promptly without hindrance from immigration authorities or intervening rulings by the Immigration Court, there is generally no reason to doubt that the individual’s continued detention fully aligns with the statutory purpose of categorical detention. *See id.* at 690, 699. Petitioner is not currently subject to a final order of removal and his application for relief from removal has been well underway, with no suggestion that his continued detention is attributable to any unreasonable delays or inattention. ECF No. 11 at 4; ECF No. 10-1, Chan Decl. ¶¶ 12-13.

The facts of *Zadvydas* highlight why Petitioner’s continued detention, should he become subject to a final order of removal, would not come close to raising the constitutional concerns the petitioners in *Zadvydas* were facing. In *Zadvydas*, removal was not reasonably foreseeable because no country would accept the petitioners due to questions of citizenship and the United States lacked a

repatriation treaty with the petitioners' receiving countries. 533 U.S. at 685-86, 691, 699 ("The civil confinement here at issue is not limited, but potentially permanent."). Given those facts, the Supreme Court read a limit into § 1231 detention authority when petitioners meet the burden of establishing that there is good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.* at 701.

There is no suggestion that Petitioner is stuck in a "removable-but-unremovable limbo," as the petitioners in *Zadvydas* were. *See Jama v. I.C.E.*, 542 U.S. 335, 347 (2005). If Petitioner's application for relief from removal is denied and he becomes removable³, there is no evidence to suggest that removal to Colombia would not occur in a reasonably foreseeable timeframe; to the contrary, there is every reason to believe he can be removed promptly to Colombia. *Cf. Zadvydas*, 533 U.S. at 697. Enforcement and Removal Operations ("ERO") has successfully removed noncitizens to Colombia.⁴ ECF No. 10-1, Chan Decl. ¶ 13. If Petitioner's application for relief from removal is denied and he is ordered removed by the Immigration Court, ERO anticipates being able to remove him to Colombia in a timely manner, given its recent removals to Colombia. *Id.* In

³ Under 8 U.S.C. § 1231(a)(1)(A), once an individual is ordered removed, removal is to take place within 90 days.

⁴ *See also* Office of Homeland Security Statistics, Table 41, Noncitizen Enforcement Returns by Region and Country of Nationality: Fiscal Years 2013 to 2022, U.S. DEP'T OF HOMELAND SEC., <https://ohss.dhs.gov/topics/immigration/yearbook/2022/table41> (936 noncitizen enforcement returns of Colombian nationals); ICE ERO Statistics, U.S. IMMIGRATION & CUSTOMS ENF'T, <https://www.ice.gov/statistics> (939 removals of Colombian citizens in FY 2024 and 225 removals in FY 2025 as of January 2025).

the meantime, nothing prevents Petitioner from seeking further bond redeterminations based on materially changed circumstances that might arise in the future over the course of his detention. *See* 8 C.F.R. § 1003.19(e). In short, there is no indication that Petitioner’s detention is or is likely to become “unreasonably prolonged” to give rise to a potential Due Process violation or otherwise amount to irreparable harm. “[U]ncertainty alone [about the end date of a detention] does not render [a] detention *indefinite* in the sense the Supreme Court found constitutionally problematic in *Zadvydas*.” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1063 (9th Cir. 2008).

Finally, Petitioner’s argument that the BIA cannot provide meaningful redress is undercut by his own stated grounds for the appeal. As in *Perevoznikov*, the “very issue” Petitioner raises in his reply brief with respect to the second bond hearing—namely, whether the IJ applied the correct legal standard—“is *the* issue pending before the BIA” and therefore “all statutory and common-law reasons for requiring exhaustion of administrative remedies are present. *See* Order at 2, *Perevoznikov*, No. 25-cv-00085-JJM-LDA, ECF No. 10 (emphasis added); *see also* ECF No. 10-4, Exh. C, Notice of Appeal at 2 (“The IJ did not apply the correct legal standard in considering the DHS evidence of dangerousness.”); ECF No. 11 at 12 (“The petition raises legal questions relating to the application of legal standards and the agency’s adherence to controlling precedent.”).

Furthermore, in attempting two bites at the apple, Petitioner backs himself into a corner with respect to his BIA appeal when casting—improperly, in the

Government's view—the issue before this Court as a constitutional one, which, he argues, “extend[s] beyond the B.I.A.’s zone of appellate jurisdiction.” ECF No. 11 at 13. Insofar as Petitioner contends he is raising a question of law in challenging the legal standard that was applied at the second bond hearing, the matter is still properly before the BIA. The BIA “may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.” 8 C.F.R. § 1003.1(d)(3)(ii). Absent a colorable constitutional claim, the presentment of the same question to the Court and the BIA with respect to the second bond hearing provides all the more reason to require administrative exhaustion first and dismiss the Petition.

III. Petitioner is seeking review of the IJ’s discretionary decision over which this Court has no jurisdiction.

Even if Petitioner did not concurrently present the same issue to both the BIA and this Court with respect to the second bond hearing, this Court is still without jurisdiction because the issues Petitioner raises entail a review of the IJ’s discretionary decision. Petitioner relies on *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021) to argue that his Petition is not barred from judicial review because “the reviewable question here concerns the legal standards that apply to a determination of dangerousness during a bond hearing.” ECF No. 11 at 8. But Petitioner is not in fact disputing the legal standard that *should* be applied at a bond hearing, as was the case in *Hernandez-Lara*. Rather, he is asking this Court—and the BIA—to review whether the IJ in fact applied the “clear and convincing” standard at his bond hearing. *See* ECF No. 11 at 4 (“The second bond hearing

resulted in a second finding that the uncorroborated police and incident reports without any other evidence substantiating their allegations constituted clear and convincing evidence of dangerousness”). This is essentially a challenge to the correctness of the IJ’s fact-finding by another name. *See Carcamo v. U.S. Dep’t of Justice*, 498 F.3d 94, 98 (2d Cir. 2007) (“regardless of the rhetoric employed in the petition, whether it merely quarrels over the correctness of the factual findings or justification for the discretionary choices . . . [,] we would lack jurisdiction”); *id.* (“Due process does not require that the IJ credit [petitioner’s] testimony over the evidence contained in the criminal complaint. In any event, police reports and complaints, even if containing hearsay and not a part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief.”). At least one other court in this Circuit recently held that this is “precisely the type of alleged error committed to review by the BIA (and in most circumstances ultimately by the Federal Circuit Court of Appeals).” *See Dos Reis*, 2025 WL 1043434, at *2. This Court is without jurisdiction to review whether the IJ applied the correct legal standard at the second bond hearing and must not step into the shoes of the BIA to review the IJ’s weighing of evidence.

For these reasons, Petitioner’s Writ should be dismissed in its entirety.

Respectfully submitted,

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By: /s/ Rachna Vyas

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CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2025, I filed the foregoing document through this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Federal Rule of Civil Procedure 5(b)(2)(E) and Local Rule Gen 304.

/s/ Rachna Vyas

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