

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

GILBERT ALONSO-PORTILLO,

Petitioner,

v.

RICHARD JONES, Sheriff of Butler
County, *et al.*,

Respondents.

Case No. 1:25-cv-00306

Judge Michael R. Barrett

Magistrate Judge Kimberly A. Jolson

**RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR LEAVE TO
AMEND HABEAS CORPUS PETITION**

Petitioner Gilbert Alonso-Portillo filed Petitioner's Motion for Leave to Amend Habeas Corpus Petition (Motion for Leave, Doc. 22.) On expedited briefing, Respondent was ordered to respond to this motion by July 14, 2025. (July 8, 2025 Notation Order.)

Plaintiff's Motion for Leave should be denied because he failed to exhaust his administrative remedies. Moreover, Petitioner's claim that his First Amendment rights were violated, is without merit, and fails to state a claim upon which relief can be granted pursuant to FRCP Rule 12(b)(6).

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Homeland Security Task Force Agents (“HSTF”) obtained an administrative Warrant of Arrest prior to arriving at Petitioner’s residence. (Record of Deportable/Inadmissible Alien, ICE Decl., Doc. 19-1, PageID 99.)

At Petitioner’s residence, he openly displayed a sign warning the public, “ATTENTION” “THE OWNER OF THE PROPERTY IS ARMED [IMAGE OF HANDGUN] AND PREPARED TO PROTECT LIFE AND PROPERTY FROM CRIMINAL OFFENSE. THERE IS NOTHING INSIDE WORTH RISKING YOUR LIFE FOR!” (FBI Decl., Doc. 19-2, PageID , ¶7; Photograph of Armed Owner Warning Sign, Doc. 19-2, PageID 175-76.)

In response to questioning from a Homeland Security Task Force (“HSTF”) member, Petitioner admitted that he illegally in the United States. (FBI Decl., Doc. 19-2, PageID 172, ¶6.) Petitioner also admitted to owning a handgun and admitted that it was located inside his residence.¹ (*Id.* at PageID 172, ¶8.) He verbally consented to a search of his residence by HSTF. (*Id.*)

During a search of Petitioner’s residence, HSTF personnel located and seized the following:

1. a Beretta PX4 handgun, .40 caliber;
2. a Pioneer Arms AK-style rifle, 7.62 x 39 caliber; and

¹ Pursuant to 18 U.S.C. § 922(g)(5), an alien, unlawfully residing in the United States, like Petitioner, is prohibited from possessing firearms. 18 U.S.C. § 922(g)(5)(A).

3. Over 1,100 of .40 caliber rounds of ammunition.

(FBI Decl., Doc. 19-2, at PageID 173, ¶¶9-10.)

On April 7, 2025, a Notice to Appear was issued for Petitioner initiating removal proceedings. (NTA, ICE Decl., Doc. 19-1, PageID 102-04.)

On April 22, 2025, a bond hearing was held for Petitioner where the immigration judge denied Petitioner bond because he failed to demonstrate “that he is not a danger to the community.” (ICE Decl., Doc. 19-1, PageID 96, ¶8, Bond Memorandum, Doc. 19-1, PageID 136-37; IJ Order, ICE Decl., Doc. 19-1, PageID 138.) The U.S. Immigration Judge specifically observed that 18 U.S.C. § 922(g)(5) is a felony and an aggravated felony under the INA. (Bond Memorandum, ICE Decl., Doc. 19-1, PageID 137.) At the bond hearing, Petitioner pleaded to the charges in his NTA, admitting he was removable. (ICE Decl., Doc. 19-1, PageID 96, ¶9; Bond Memorandum, ICE Decl., Doc. 19-1, PageID 137.)

Petitioner has appealed the April 22, 2025 bond decision denying Petitioner’s release on bond to the Board of Immigration Appeals (“BIA”), and a briefing schedule was filed on May 21, 2025. (Bond Appeal Briefing Schedule, ICE Decl., Doc. 19-1, PageID 140.) Briefs were due and filed on June 11, 2025. (*Id.*)

On May 12, 2025, Petitioner filed the Petition for a writ of habeas corpus and other relief. (Petition, Doc. 6, PAGEID 36-52.)

On May 27, 2025, Petitioner filed an application for cancellation of his removal. (ICE Decl., Doc. 19-1, PageID 96, ¶10; Form EOIR-42B, Application, ICE Decl., Doc.

19-1, 147-70.) He is scheduled for hearing on the application on July 21, 2025 in Immigration Court. (ICE Decl., Doc. 19-1, PageID 96, ¶10.)

On July 7, 2025, Petitioner filed a Motion for Leave to Amend Habeas Corpus Petition (“Motion for Leave”). (Motion for Leave, Doc. 22, PageID 382-405.)

Petitioner’s proposed Amended Petition claims that Petitioner’s First Amendment rights were violated because the HSTF members questioned, arrested, and detained him because he displayed a sign in his yard. (Motion for Leave, Doc. 22, 391-93; FBI Decl., Doc. 19-2, at PageID 172, ¶7; Photograph of Armed Owner Warning Sign, Doc. 19-2, PageID 175-76.) The sign in his yard claimed that Petitioner was armed, displayed a photo of a handgun, and asserted that Petitioner will protect his home by the use of deadly force against criminals. (*Id.*)

Petitioner now denies all admissions made to HSTF. (Motion for Leave, Doc. 22, PageID 392-93.)

Petitioner’s Motion for Leave to Amend should be denied for failure to exhaust administrative remedies and for failure to state a claim upon which relief can be granted.

ARGUMENT

Petitioner’s proposed Amended Petition, adding a First Amendment violation with respect to Petitioner’s arrest and detention would be futile.

As an initial matter, Petitioner’s detention is authorized by statute. 8 U.S.C. § 1226(a); (Return of Writ, Doc. 19, PageID 85-86.)

However, pursuant to 28 U.S.C. § 2242, a habeas corpus petition may be amended under the same rules for amending a complaint in a civil action. The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. *See also Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997) (citing *Foman* standard).

In considering whether to grant motions to amend under Rule 15, a court should consider whether the amendment would be futile, i.e., if it could withstand a motion to dismiss under Rule 12(b)(6). *Hoover v. Langston Equip. Assocs.*, 958 F.2d 742, 745 (6th Cir. 1992).

A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests whether that plaintiff has pleaded a cognizable claim in his or her complaint. "To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 319 (6th Cir. 1999) (internal quotation omitted).

A court should dismiss a claim under Rule 12(b)(6) when the plaintiff has failed to plead sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “A claim has facial plausibility when the plaintiff [has pleaded] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A complaint need not contain detailed factual allegations but must raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555.

Petitioner Failed to Exhaust Administrative Remedies

Aliens seeking habeas corpus jurisdiction must first exhaust all administrative remedies. *See e.g., Leonardo v. Crawford*, 646 F.3d 1157, 1160-61 (9th Cir. 2011); (Return of Writ, Doc. 19, PageID 83.) “Although there is no statutory requirement of administrative exhaustion before immigration detention may be challenged in federal court by a writ of habeas corpus, courts generally do require such exhaustion as a prudential matter.” *Guzman v. Joyce*, No. 25-CV-4777, 2025 WL 1696891, at *2 (S.D.N.Y. June 17, 2025) (cleaned up) (citing *Paz Nativi v. Shanahan*, No. 16-CV-8496, 2017 WL 281751, at *1 (S.D.N.Y. Jan. 23, 2017)); *see also Roman v. Decker*, No. 20-CV-3752, 2020 WL 4273823, at *7 (S.D.N.Y. July 24, 2020) (“The purpose of the exhaustion requirement is to facilitate administrative resolution of issues that might render judicial review unnecessary.”)

First, as with the Petitioner's Habeas Petition, Petitioner failed to exhaust the First Amendment claim in his Amended Petition as required. (*See* Return of Writ, Doc. 19, PageID 82-85.) Petitioner is really seeking expedited review of the Immigration Judge's bond determination prior to the BIA being given the opportunity to review it. (Bond Memorandum, IJ Order, and BIA Briefing Schedule, Doc. 19-1, PageID 136-42.) Petitioner cannot justify a waiver of the judge-made exhaustion requirement. (Return of Writ, Doc. 19, PageID 83.) As such, this Court should not interrupt the administrative process and permit the BIA to review Petitioner's bond determination.

Moreover, Petitioner's detention is authorized by statute and did not violate due process. (*See* Return of Writ, Doc. 19, PageID 85-898; U.S.C. § 1226(a).) Petitioner has received a bond hearing, received due process, and is receiving further due process with his ongoing appeal of the bond determination to the BIA. Petitioner is also receiving due process as part of his current removal proceedings.

Petitioner's First Amendment Claim Fails.

Petitioner's alleged First Amendment claim is without merit. The First Amendment generally, "prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech." *Nieves v. Bartlett*, 587 U.S. 391, 398 (2019) (cleaned up) (citing *Hartman v. Moore*, 547 U.S. 250, 256 (2006)). In fact, "[t]he presence of probable cause should generally defeat a First Amendment retaliatory arrest claim." *Nieves v. Bartlett*, 587 U.S. at 405.

Petitioner claims his warning sign is constitutionally protected speech, and he was penalized because HSTF used it as a basis for his arrest and search of his home. (Motion for Leave, Doc. 22, PageID 393.) Petitioner is essentially claiming a retaliatory arrest upon protected speech.

On April 7, 2025, HSTF arrived at Petitioner's residence with valid administrative arrest warrant based upon their belief Petitioner was in the United States unlawfully. (ICE Decl., Doc. 19-1, PageID 95, ¶¶4-5; ICE Decl., Doc. 19-1, PageID 99, 98-101.) Prior to Petitioner's arrest, ICE's last contact with Petitioner was in 2007 when he was arrested for being in the United States illegally. (ICE Decl., Doc. 19-1, PageID 95, ¶4; ICE 2007 Record, Doc. 19-1, PageID 105-06.)

Although HSTF likely used the sign as the basis to question Petitioner as to whether he did or did not possess firearms inside his residence, HSTF did not use Petitioner's warning sign as the basis to search his home. Petitioner's home was searched because of his admissions that he was present in the United States illegally and that he possessed firearms home. (FBI Decl., Doc. 19-2, PageID 172, ¶¶6, 8.)

These admissions, of being an alien, unlawfully residing in the United States, and in possession of firearms within his home, support a felony charge of being a prohibited person in possession of firearms, in violation of 18 U.S.C. § 922(g)(5). Therefore, HSTF had probable cause to arrest Petitioner. As such, Petitioner's claim that Plaintiff's violated his First Amendment rights fails.

Petitioner asserts that no probable cause existed because no statement had been made to the immigration officers prior to the issuance of the arrest warrant. The

administrative arrest warrant signed by Supervisory Special Agent Joseph R. Stewart, states the following:

I have determined that there is probable cause to believe that Gilbert Alonso Portillo is removable from the United States. This determination is based upon:



X statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

(ICE Decl., Arrest Warrant, Doc. 19-1, PageID 107.)

Because the arrest warrant states that the determination of probable cause were based “upon statements made to an immigration officer **and/or** other reliable evidence . . .”, (*Id.*), Petitioner’s assertion that probable cause for the administrative arrest warrant was made on “statements made to an immigration officer,” fails. (Proposed Amended Petition, Doc. 22, PageID 391-92.)

The second arrest warrant issued to Petitioner was after he was detained in Blue Ash, Ohio, based upon additional information obtained, including Petitioner’s admissions that he was in the United States illegally and in possession of firearms in his residence. (ICE Decl., Arrest Warrant 2, Doc. 19-1, PageID 108-09.)

Petitioner now denies all of his admissions to HSTF in his Motion for Leave. (Motion for Leave, Doc. 22, PageID 392-93). However, this is directly contrary to what happened at his bond hearing on April 22, 2025, where he pleaded to the charges in his Notice to Appear, and conceded to the charge of removability. (ICE Decl, Doc. 19-1, PageID 96, ¶9.) Indeed, this charge was sustained by the Immigration Judge.

(*Id.*; Bond Memorandum, ICE Decl., Doc. 19-1, PageID 136-37.) Petitioner is attempting to create an issue where there is none.

In the end, Petitioner (1) has yet to fully exhaust his administrative remedies, and (2) his First Amendment claim is without merit and fails to state a claim. Therefore, Petitioner's Motion for Leave to Amend should be denied as futile.

CONCLUSION

Based upon the above, the Federal Respondents respectfully request that this Court deny Petitioner's Motion for Leave to Amend Habeas Corpus Petition. (Doc. 22.)

Respectfully submitted,

KELLY A. NORRIS
Acting United States Attorney

s/William B. King II
WILLIAM B. KING II (0094046)
Assistant United States Attorney
Attorney for Defendant
221 East Fourth Street, Suite 400
Cincinnati, Ohio 45202
Office: (513) 684-3711
Fax: (513) 684-6972
E-mail: Bill.King@usdoj.gov