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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

ANTONIO MOREIRA NETO	)	
	)	
Petitioner,	)	
v.	)	No. 25-cv-00311-JL-TSM
	)	
E.L. TATUM, JR <sup>1</sup> , et. al.	)	
	)	
Respondents.	)	
	)	

**I. PETITIONER’S REPLY TO OBJECTION TO HABEAS PETITION**

1. Petitioner, Antonio Moreira Neto (hereinafter referred to as “Antonio,” “Mr. Moreira Neto,” or “Petitioner”) respectfully replies to the Objection to Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (“Objection to Petition”) filed by Respondents on September 3, 2025. Doc. 10.

**II. SUMMARY OF OBJECTION TO PETITION**

2. Respondents first ask that the injunctive relief requested by Petitioner be denied because subsequent proceedings in immigration court have arguably rendered this request moot, and that Petitioner has not shown how this request falls within the Court’s habeas authority.

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<sup>1</sup> So named in the original caption. However, per Respondents’ objection, the current acting Warden of FCI Berlin is Andrew Ackley; *see* Fed. R. Civ. P. 25(d) (“[W]hen a public officer who is a party in an official capacity . . . resigns, or otherwise ceases to hold office while the action is pending[, t]he officer’s successor is automatically substituted as a party.”)

3. Secondly, Respondents argue that Petitioner has “failed to exhaust his administrative remedies,” based on the fact that Petitioner has a pending appeal before the Board of Immigration Appeals (“BIA”) regarding his bond eligibility, and that the Court should allow the “appeal to run its course.” Doc. 10 at \*5.
4. Third, Respondents argue that Petitioner is lawfully detained as an “applicant for admission under 8 U.S.C. § 1225(b)(2)(A).”
5. Finally, Respondents argue that Petitioner’s detention is constitutional. In support of their claim, Respondents cite various cases, most of which have one thing in common: they specify the limited rights of noncitizens in their *initial entry*. Respondents’ claims have no support in the relevant statutory language, in the relevant jurisprudence, nor in the facts of this case.
6. For the reasons presented in the Habeas Petition and the arguments hereinafter, Respondents’ claims should not prevail.

### **III. FACTUAL CORRECTION**

7. Before addressing the legal claims made by Respondents, Petitioner seeks to correct a factual inaccuracy produced by Respondents in the “Background” section of the Objection to Habeas Petition. On Page 3 of the Objection to Petition, Respondents claimed that Petitioner “through his immigration counsel, admitted that he is inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(7)(A)(i)(I).” Doc. 10 at \*3. The claim was made based on the declaration submitted by Respondents. Chan Decl., ¶ 20.
8. However, that information is not accurate. The Department of Homeland Security (“DHS”) has charged Petitioner with two charges of removability: 212 (a)(6)(A)(i) and

212 (a)(7)(A)(i)(I). The first, 212 (a)(6)(A)(i) charges Petitioner as “an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.” The second, 212 (a)(7)(A)(i)(I), charges Petitioner as “an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act . . .”

9. These charges are conflicting, which is why Petitioner objected to the second charge under 212 (a)(7)(A)(i)(I) (here referred to as 1182(a)(7)(A)(i)(I)), and only conceded to the first charge under 212 (a)(6)(A)(i), (here referred to as 8 U.S.C. § 1182(a)(6)(A)(i)). At the hearing, the Immigration Judge accepted Petitioner’s objection and made a finding of removability only under the first charge, 8 U.S.C. § 1182(a)(6)(A)(i).
10. Considering that the present case analyzes, among other things, which statutory provision is being used to detain Petitioner, such correction is relevant here.

#### IV. LEGAL ANALYSIS

##### i. Petitioner should not have to exhaust his administrative remedies in order to receive protection from this Court

11. The first merit claim made by Respondents is that Petitioner has “failed to exhaust his administrative remedies,” and that he should wait for his administrative appeal to be decided by the BIA. Respondents’ claim should not prevail here.
12. “There are two species of exhaustion: statutory and common-law.” *Brito v. Garland*, 22 F.4th 240, 255 (1st Cir. 2021). “The former deprives a federal court of jurisdiction, while the latter ‘cedes discretion to a [federal] court to decline the exercise of

jurisdiction.” *Id.* (quoting *Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 174. (1st Cir. 2016).

13. Here, there is no statute requiring exhaustion, as expressly stated by Respondents (Doc. 10 at \*5). The argument made by Respondents is that the common-law exhaustion principle would be applicable here.
14. When there is no statutory requirement for exhaustion, the judicial discretion governs. *Morgan v. Garland*, 120 F.4th 913, 927 (1st Cir. 2024) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). While making this decision, the Court “must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.” *Anversa*, 835 F.3d at 176 (quoting *McCarthy*, 503 U.S. at 146).
15. Both the Supreme Court and the First Circuit have identified circumstances in which the interests of an individual weigh heavily against requiring exhaustion. *Portela-Gonzalez v. Sec’y of the Navy*, 109 F.3d 74, 77 (1st Cir. 1997) (quoting *McCarthy*, 503 U.S. at 145, 146). Among other things, the First Circuit has stated that it would be inappropriate to require exhaustion when “further agency proceedings would be futile.” *Id.* The Circuit has also recognized that the applicability of the exhaustion rule would not be necessary when “unreasonable or indefinite delay threatens unduly to prejudice the subsequent bringing of a judicial action.”
16. The First Circuit has also decided that exhaustion may not be required if the petitioner is challenging his “incarceration . . . or the ongoing deprivation of some other form of liberty interest.” *Brito v. Garland*, 22 F.4th 240, 256 (1st Cir. 2021) (quoting *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986)).

17. Here, Petitioner’s administrative appeal is with the BIA, a part of the Executive Office for Immigration Review (“EOIR”), which operates under DOJ authority. The DOJ is part of this process and is claiming here that Petitioner is not entitled to a bond hearing. DHS recently issued an internal memorandum, “in coordination with the DOJ,” affirming that section 1225 “is the applicable immigration detention authority for all applicants for admission.”<sup>2</sup> It should also be noted that former immigration judges have reported that they were “told to rule in a certain way” by superiors, and there was “pressure from above.”<sup>3</sup>

18. In sum, Respondents are arguing that:

- a) They are entitled to detain someone who has been in the United States for over 20 years without providing him an opportunity for a bond hearing;
- b) They can expedite his removal proceedings because he is detained, and no Court has the power to halt such proceedings;
- c) Petitioner cannot seek relief through a habeas petition and must wait several months until a decision is reached at the BIA (which is part of the DOJ) on whether he is entitled to a bond hearing;
- d) While waiting for his appeal, because his removal proceedings have been expedited due to his detention, he will have limited access to legal counsel, limited opportunities for relief, the risk of being transferred anywhere in the country, and

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<sup>2</sup> See *Diaz Martínez*, 2025 WL 2084238, at \*4 & nn.10–11 (citing Acting ICE Director Todd M. Lyons’s July 8, 2025 memorandum, “Interim Guidance Regarding Detention Authority for Applicants for Admission”).

<sup>3</sup> Oscar Margain, *Fired immigration judges describe threat to judicial independence from Justice Dept.*, NBC BOSTON, <https://www.nbcboston.com/news/local/fired-us-immigration-judge-interviews/3776340/> (July 25, 2025) [<https://perma.cc/G6FL-8D73>].

the possibility of being ordered removed from the country, altering any eligibility that he would have for relief.

19. Respectfully, the position here supported by Respondents is unreasonable and should be quite worrisome for anyone who defends the rule of law and basic rights for every person, as established in the U.S. Constitution. Requesting Petitioner to exhaust the administrative remedies and wait (indefinitely) for his appeal to be decided by the BIA would cause extreme prejudice to him, and potentially alter the *status quo* of Petitioner significantly, as the appeal can last several months, and Petitioner can be ordered removed in the meantime. Petitioner is at risk of irreparable harm if exhaustion of the administrative remedies is required.

ii. **Petitioner is not lawfully detained as an applicant for admission and Respondents' interpretation of the statute does not have any legal basis**

20. Respondents are arguing that Petitioner, who has been in the United States for over twenty years, is an “applicant for admission” and is subject to mandatory detention without access to a bond hearing. To support this claim, Respondents present two legal cases: *Jennings v. Rodriguez*, 583 U.S. 281, 299 (2018), and *Matter of Q. Li*, 29 I. & N. 66-69 (2025).

21. The second case, which is from the BIA, is directed at noncitizens who “entered with being inspected and admitted or paroled,” arguing that those noncitizens would be applicants for admission, and subject to mandatory detention. *See* Doc. 10 at \*6. Although there are significant issues with *Matter of Q. Li*, those issues do not need to be analyzed here, as Petitioner was not admitted nor paroled.

22. Here, Petitioner’s only charge of removability that was accepted by the Immigration Court was under 212 (a)(6)(A)(i), which charged him as being “an alien present in the

United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.” See Notice to Appear.

23. Thus, the use of *Matter of Q. Li* here is improper, as that case does not reflect the same factual circumstances as this one.
24. The other legal case used by Respondents is *Jennings v. Rodriguez*, 583 U.S. 281, 299 (2018), which was reinterpreted by DHS approximately two months ago. See *Diaz Martinez*, 2025 WL 2084238, at \*4–5 & nn.9–11 (D. Mass. July 24, 2025). This novel interpretation is contrary to “the agency’s own implementing regulations, *id.* at 6 & nn.14, 16; its published guidance, *id.* at 8; the decisions of its immigration judges (until very recently), *id.*; decades of practice, *id.* at 4 & nn.9–11; the Supreme Court’s gloss on the statutory scheme, *id.* at 8; and the overall logic of our immigration system, *id.*” *Aguiriano Romero v. Hyde*, No. 25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025) (citing *Diaz Martinez*, 2025 WL 2084238, at \*4–5 & nn.9–11 (D. Mass. July 24, 2025)).
25. First, it is important to understand that such an interpretation of *Jennings* ignores important parts of the decision where the Supreme Court makes a clear distinction between noncitizens who are detained while entering the country and noncitizens who are already present in the United States. *Jennings v. Rodriguez*, 804 F. 3d 106. The opinion of the Supreme Court states that “§ 1226 applies to aliens already present in the United States.” and that “§ 1226(a) authorizes the Attorney General to arrest and detain an alien ‘pending a decision on whether the alien is to be removed from the United States.’” § 1226(a). As long as the detained alien is not covered by § 1226(c),

the Attorney General ‘may release’ the alien on ‘bond ... or conditional parole.’ § 1226(a). Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention. *See* 8 CFR §§ 236.1(d)(1), 1236.1(d)(1).”

26. Therefore, the only two legal bases presented by Respondents to support the claim that Petitioner is an “applicant” for admission should not be applicable here. The interpretation here presented is also contrary “to the plain text of the statute and the overall statutory scheme.” *Aguiriano Romero v. Hyde*, No. 25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *also Diaz Martinez v. Hyde*, — F. Supp. 3d —, 2025 WL 2084238 (D. Mass. July 24, 2025); *see also, e.g., Rodriguez Vazquez v. Bostock*, — F. Supp. 3d —, 2025 WL 1193850 (W.D. Wash. Apr. 24, 2025) (holding same); *Gomes v. Hyde*, 2025 WL 1869299 (D. Mass. July 7, 2025) (same); *Garcia v. Hyde*, Civ. No. 25-11513 (D. Mass. July 14, 2025) (same); *Rosado v. Bondi*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025) (same), *report and recommendation adopted without objection*, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Lopez Benitez v. Francis*, — F. Supp. 3d —, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025) (same); *dos Santos v. Lyons*, 2025 WL 2370988 (D. Mass Aug. 14, 2025) (same); *Aguilar Maldonado v. Olson*, 2025 WL 2374411 (D. Minn. Aug. 15, 2025) (same); *Escalante v. Bondi*, 2025 WL 2212104 (D. Minn. July 31, 2025) (granting preliminary relief after positively weighing likelihood of success), *report and recommendation adopted sub nom. O. E. v. Bondi*, 2025 WL 2235056 (D. Minn. Aug. 4, 2025); *Arrazola-Gonzalez v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025) (granting individualized bond hearings on *ex parte* motion for temporary restraining order after finding likelihood of success); *Garcia Jimenez v. Kramer*, 2025 WL 2374223 (D. Neb.

Aug. 14, 2025) (granting relief from stay of bond order pending BIA appeal); *Mayo Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025) (same); *Rodrigues De Oliveira v. Joyce*, 2025 WL 1826118 (D. Me. July 2, 2025) (recognizing disagreement as to the detention statutes and granting habeas petition on due process grounds). *But see Pena v. Hyde*, 2025 WL 2108913 (D. Mass. July 28, 2025).

iii. **Petitioner's detention is unconstitutional**

27. Finally, Respondents argue that Petitioner's detention is constitutional and does not violate the Fifth Amendment due process clause. To support that assertion, Respondents state that Petitioner is "only entitled to the protections set forth by statute and that 'due process clause provides nothing more.'" *See* Doc. 10 at \*6-7.
28. Respondents cite several Supreme Court cases that actually support Petitioner's claim, as they all conclude that noncitizens only have limited rights at their *initial entry*. Below, Petitioner will show how the cases cited by Respondents support a conclusion that the Supreme Court has *always* differentiated noncitizens who are attempting to enter the country, from those who are already in the country:
  - a. In *Thuraissigiam*, the Court reinforces the limited protections for individuals seeking **initial entry to the United States**. *See Department of Homeland Security v. Thuraissigiam*, 591 U.S. 199, 220 (2020) (emphasis added).
  - b. In *Landon*, the Court held that an alien seeking **initial admission** to the United States requests a privilege and is therefore afforded fewer

constitutional rights. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (emphasis added).

- c. In *Zadvydas*, the Court states that “certain constitutional protections available to persons inside the United States are unavailable to aliens *outside* of our geographical borders.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (emphasis added). “A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment’s Due Process Clause forbids the Government to ‘depriv[e]’ any ‘person . . . of . . . liberty . . . without due process of law.’” *Id* at 690.
- d. In *Shaugnessy v. United States ex rel. Mezei*, the Court again ratifies that the different protections are for those “on the threshold of initial entry”. *See Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Supreme Court also stated that “an alien on the threshold of initial entry stands on a different footing” than a noncitizen who has effected an entry into the United States, and that “once passed through our gates, ‘even illegally,’ noncitizens may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Id* at 212.

29. The Supreme Court has made similar distinctions in other cases, such as *Nishimura Ekiu*, where the Court clarified that arriving aliens are only individuals who have never been to the U.S., holding that “**foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law.**” *See Nishimura Ekiu v. United States*,

142 U.S. 651 (1892) (emphasis added). In *United States v. Flores-Montano*, the Supreme Court reiterated that the power over immigration is “at its zenith at the **international border**.” See *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004) (emphasis added).

30. The additional cases cited by Respondents in their Objection to Petition (between pages 10 and 12, starting with *Demore v. Kim*, 538 U.S. 510, 522 (2003) and finishing with *Dambrosio v. McDonald, Jr.*, No. 25-CV-10782-FDS, 2025 WL 1070058, at \*2 (D. Mass. Apr. 9, 2025)) are not applicable in this case, as Petitioner is not subject to a final order of removal. , and he is not being detained in order to execute such an order.

31. Here, Petitioner has been living in the United States for over twenty years, and he was not apprehended at the border. The Notice to Appear and the Notice of Custody Determination, both documents issued by DHS, clearly do not identify him as an “alien for admission.” Petitioner remains detained without even an opportunity for a bond hearing before an impartial adjudicator. To deny Petitioner’s constitutional rights as defended here by Respondents would mean undermining the constitutional protections that are applicable to every person inside the country.

**PRAYER FOR RELIEF**

Wherefore, Petitioner respectfully requests this Court to consider this reply to the response filed by Respondents, and reaffirms the requests made by Petitioner's Reply to Objection to Habeas Petition.

Respectfully submitted,

*/s/ Vinicius Damasceno*

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Dated: September 5, 2025

**CERTIFICATE OF SERVICE**

I, Vinicius Damasceno, hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF (NEF), and paper copies will be sent to those indicated as non-registered participants.

Dated: September 5, 2025

/s/ Vinicius Damasceno  
Vinicius Damasceno, Esq.

