UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARSH PATEL (A[redacted])	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 25-cv-11180
KRISTI NOEM, Secretary, U.S Department of Homeland Security; and	)	
SAMUEL OLSON, Field Office Director, Chicago Field Office, Immigration and Customs Enforcement,	)	Hon. Jeffrey I Cummings
	)	
Respondents.	)	

PETITIONER'S MEMORANDUM IN RESPONSE TO THE COURT'S ORDER

The Petitioner, HARSH PATEL, by and through his own and proper person and through his attorneys, KRIEZELMAN BURTON & ASSOCIATES, LLC, files this memorandum in accordance with the Court's September 16, 2025 order, and in support thereof, states as follows:

Petitioner brings the instant action to review his unlawful detention. This Court has jurisdiction over this matter and exhaustion is not required and should be excused as seeking a bond redetermination before the immigration court in the first instance would be futile.

A. This Court has jurisdiction over this matter and 8 U.S.C. § 1252 does not deprive this Court of jurisdiction

This action arises under the Constitution of the United States, the Immigration and Nationality Act of 1952, as amended ("INA"), 8 U.S.C. § 1101 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. This Court has habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241, and Article I, section 9, clause 2 of the United States Constitution (the "Suspension Clause"), as Petitioner is presently subject to immediate detention and custody

under color of authority of the United States government, and said custody is in violation of the Constitution, law or treaties of the United States. This action is brought to compel the Respondents, officers of the United States, to accord Petitioner the due process of law to which he is entitled under the Fifth and Fourteenth Amendments of the United States Constitution.

This Court is not deprived of jurisdiction by 8 U.S.C. § 1252(b)(9) and (g) as Petitioner's claims do not challenge any decision to commence proceedings, adjudicate cases, or execute removal orders.

Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien from the United States* under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphasis added).

The Supreme Court's decision in *Jennings v. Rodriguez* is instructive here and supports Petitioner's position that this Court does have jurisdiction and that Section 1252(b)(9) does not present a jurisdictional bar.

The Supreme Court determined that the "arising from" language of Section 1252(b)(9) should not be interpreted so expansively as to include any action that technically follows the commencement of removal proceedings, because that would bar judicial review of questions of law and fact that are unrelated to the removal proceedings until a final order of removal was issued. *Jennings v. Rodriguez*, 583 U.S. 281, 292-95 (2018). Petitioner, like the class in

Jennings, "are not asking for review of an order of removal, they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at 294-95.

Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien *arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.*
>
> 8 U.S.C. § 1252(g) (emphasis added).

The Supreme Court's decision in *Jennings* is again instructive here related to Section 1252(g). The *Jennings* court writes that "[w]e did not interpret [section 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." *Jennings*, 583 U.S. at 294 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)).

An immigration judge's (IJ) review of a bond determination is a distinct proceeding from an alien's underlying removal proceeding. 8 C.F.R. § 1003.19(d). It is "clear bond hearings are separate and apart from deportation proceedings." *Gornicka v. INS*, 681 F.2d 501, 505 (7th Cir. 1982). Here, Petitioner is seeking review of his unlawful detention. He is not challenging a removal order or anything else listed in Section 1252(b)(9) and (g) which would strip this court of jurisdiction. This Court has jurisdiction over Petitioner's matter.

B. Exhaustion is not required and should be excused as seeking bond redetermination before the immigration court in the first instance would be futile

The Immigration and Nationality Act mandates exhaustion in order to challenge "final order[s] of removal." 8 U.S.C. § 1252(d)(1). However, this provision does not cover challenges to preliminary custody or bond determinations, which are quite distinct from "final order[s] of removal." *See Gornicka,* 681 F.2d at 505 ("[I]t is clear bond hearings are separate and apart from deportations hearings.... A bond determination is not a final order of deportation ... and does not effect [sic] the deportation proceeding.").

Congress does require exhaustion for certain types of habeas petitions, but not for those petitions, such as Petitioner's, brought under 28 U.S.C. § 2241. See *James v. Walsh*, 308 F.3d 162, 167 (2d Cir.2002) ("Section 2254(b)(1) requires state prisoners to exhaust all available state court remedies before filing a Section 2254 petition, whereas Section 2241 contains no such exhaustion requirement.").

"[W]here Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan,* 503 U.S. 140, 144 (1992). In exercising that discretion, we must balance the individual and institutional interests involved, taking into account "the nature of the claim presented and the characteristics of the particular administrative procedure provided." *Id.* at 146. We start with "the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *Id.* at 144-45; *see also Sanchez v. Miller,* 792 F.2d 694, 697 (7th Cir.1986) (accord). This rule, however, is not absolute.

The Seventh Circuit has held that individual interests demand that exhaustion be excused when:

> (1) requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an indefinite timeframe for administrative action;
> (2) the agency lacks the ability or competence to resolve the issue or grant the relief requested;
> (3) appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or
> (4) where substantial constitutional questions are raised.

Iddir v. INS, 301 F.3d 492, 498 (7th Cir.2002) (internal quotations and citations omitted).

Here, requiring exhaustion would be futile due to the Board of Immigration Appeal's September 5th decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), which proclaimed for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is no longer eligible for release on bond. The Board's decision, in contravention of decades of immigration law, precedent by the Supreme Court, and Executive Office of Immigration Review policies and procedures, takes a new reading of INA § 235(b)(2), 8 U.S.C. § 1225(b)(2), which requires mandatory detention of "Applicants for Admission," to include those present in the United States without having been inspected and admitted and who are later apprehended.

Prior to the Board's decision, noncitizens present in the United States without having been inspected and admitted and who are later apprehended are subject to detention under INA § 236(a), 8 U.S.C. § 1226(a). Noncitizens detained under this section are not subject to mandatory detention and may be released on bond or on their own recognizance.

Therefore, requiring Petitioner to request a bond redetermination with the immigration court in the first instance would be futile as the bond would undoubtedly be denied in light of *Matter of Yajure Hurtado*. It would prejudice to Petitioner by prolonging his detention to request a bond that will ultimately be denied.

Further, even if Petitioner had received a bond denial order prior to filing the instant petition, an appeal to the BIA would also be futile because the BIA is without jurisdiction to decide constitutional questions, such as Petitioner's due process question. *See Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (citing *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994)).

Federal district courts in the First Circuit, Second Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit have all recently disagreed with the new interpretation set forth in *Matter of Yajure Hurtado* and have subsequently granted relief to habeas petitioners:

First Circuit
- *Sampiao v. Hyde*, 2025 WL 2607924 (D. Mass. Sept. 9, 2025)
- *Jimenez v. FCI Berlin, Warden*, No. 25-cv-326-LM-AJ (D.N.H. Sept. 8, 2025)
- *Doe v. Moniz*, 2025 WL 2576819 (D. Mass. Sept. 5, 2025)
- *Romero v. Hyde*, 2025 WL 2403827 (D. Mass. Aug. 19, 2025)
- *Martinez v. Hyde*, 2025 WL 2084238 (D. Mass. July 24, 2025)
- *Dos Santos v. Noem*, 2025 WL 2370988 (D. Mass. Aug. 14, 2025)
- *Gomes v. Hyde*, 2025 WL 1869299 (D. Mass. July 7, 2025)

Second Circuit
- *Lopez Benitez v. Francis*, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025)
- *Samb v. Joyce*, 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025)

Fourth Circuit
- *Leal-Hernandez v. Noem*, 2025 WL 2430025 (D. Md. Aug. 24, 2025)

Fifth Circuit
- *Kostak v. Trump*, 2025 WL 2472136 (W.D. La. Aug. 27, 2025)

Sixth Circuit
- *Pizarro Reyes v. Raycraft*, 2025 WL 2609425 (E..D. Mich. Sept. 9, 2025)
- *Lopez-Campos v. Raycraft*, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025)

Eighth Circuit
- *Carmona-Lorenzo v. Trump*, 2025 WL 2531521 (D. Neb. Sept. 3, 2025)
- *Cortes Fernandez v. Lyons*, 2025 WL 2531539 (D. Neb. Sept. 3, 2025)
- *Palma Perez v. Berg*, 2025 WL 2531566 (D. Neb. Sept 3, 2025)
- *O.E. v. Bondi*, 2025 WL 2466670 (D. Minn. Aug. 27, 2025)
- *Jacinto v. Trump*, 2025 WL 2402271 (D. Neb. Aug. 19, 2025)

- *Maldonado v. Olson*, 2025 WL 2374411 (D. Minn. Aug. 15, 2025)
- *Garcia Jimenez v. Kramer*, 2025 WL 2374223 (D. Neb. Aug. 14, 2025)
- *Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025)

Ninth Circuit

- *Cuevas Guzman v. Andrews*, 2025 WL 2617256, at *3 n.4 (E.D. Cal. Sept. 9,
- 2025)
- *Caicedo Hinestroza v. Kaiser*, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025)
- *Zaragoza Mosqueda v. Noem*, 2025 WL 2591530, at *7 (C.D. Cal. Sept. 8, 2025)
- *Hernandez Nieves v. Kaiser*, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025)
- *Vasquez Garcia et al. v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025)
- *Arrazola-Gonzalez v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025)
- *Rosado v. Figueroa*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025)
- *Rodriguez Vazquez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025)

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over this matter and the jurisdiction stripping provisions of 8 U.S.C. § 1252 are inapplicable, and exhaustion is not required and should be excused as seeking a bond redetermination before the immigration court in the first instance would be futile.

Respectfully Submitted,

/s/ Nicole Provax

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