

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

MALUNDA DAVID GILBERTO)
DESTINO)
)
 Petitioner,)
)
 v.)
)
Esker L. TATUM, JR.)
 Warden of FCI Berlin;)
PATRICIA H. HYDE, Acting Field)
 Office Director, Immigration and Customs)
 Enforcement, Enforcement and Removal)
 Operations, Boston Field Office;)
TODD LYONS, Acting Director,)
 U.S. Immigration and Customs)
 Enforcement;)
KRISTI NOEM, Secretary of U.S.)
 Department of Homeland Security;)
PAMELA BONDI, U.S. Attorney)
 General)
)
 Respondent.)
)

Case No. 25-cv-374

**PETITION FOR WRIT OF
HABEAS CORPUS – 28 U.S.C. § 2241**

**ORAL ARGUMENT
REQUESTED**

INTRODUCTION

1. Mulanda David Gilberto Destino (“Mr. Destino” or “Petitioner”) is an Angolan citizen who entered the United States on or about September 20, 2022, via the border near El Paso, Texas. After a positive credible fear determination shortly after his arrival in the United States, Mr. Destino was released from immigration custody. Petitioner was living at [REDACTED] in Scarborough, Maine prior to being taken into immigration custody last month. In the absence of materially changed circumstances, Mr. Destino’s recent arrest and re-detention violate his due process rights.

2. Petitioner Destino was released from immigration custody on or about September 23, 2022. He has appeared for all scheduled interviews, hearings, and related appointments. He has no criminal record. Nonetheless, on August 20, 2025, agents from the Department of Homeland Security [DHS], Immigration & Customs Enforcement [ICE], Enforcement and Removal Operations [ERO] conducted surveillance at Mr. Destino's home, followed him when he left in his car, and eventually pulled him out of his vehicle at a Citgo station, forcibly taking him into custody. Mr. Destino is currently detained at FCI Berlin, located at 1 Success Loop Road, Berlin, New Hampshire 03570.

3. Despite the initial positive credible fear determination in September 2022, on August 11, 2023 the Executive Office for Immigration Review denied Mr. Destino's applications for asylum, withholding of removal, and deferral of removal pursuant to Article 3 of the United Nations Convention Against Torture. Mr. Destino filed a timely appeal with the Board of Immigration Appeals on or about August 16, 2023. That appeal remains pending, with the parties' brief due on October 10, 2025.

JURISDICTION

4. This action arises under the Constitution of the United States and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*

5. This Court has subject matter jurisdiction under 28 U.S.C. § 2241 (*habeas corpus*), and 28 U.S.C. § 1331 (federal question).

6. This Court may grant relief under the *habeas corpus* statutes, 28 U.S.C. § 2241 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

VENUE

7. Venue is proper in this District because the Respondents are officers, employees, and/or agencies of the United States. Additionally, Petitioner is currently detained at FCI-Berlin, which lies within this judicial district. 28 U.S.C. § 2241.

8. “[A] district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits.” *Gomes v. U.S. Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 144 (D.N.H. 2020) (quoting *Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972)).

REQUIREMENTS OF 28 U.S.C. § 2243

9. Under 28 U.S.C. § 2243, a District Court must grant the petition for writ of *habeas corpus* or issue an order to show cause (OSC) to the respondents “forthwith,” unless the petitioner is not entitled to relief. If an order to show cause is issued, the Court must then require respondents to file a return “within *three days* unless for good cause additional time, not exceeding twenty days, is allowed.” *Id.* (emphasis added).

10. The federal *habeas* statute has a longstanding role in protecting individuals from unlawful detention at the hands of an overreaching government. The Great Writ has been referred to as “perhaps the most important writ known to the constitutional law of England, affording as it does a *swift* and imperative remedy in all cases of illegal restraint or confinement.” *Fay v. Noia*, 372 U.S. 391, 400 (1963) (emphasis added).

PARTIES

11. Petitioner is an Angolan citizen who is presently detained at FCI Berlin, in Berlin, NH. He is in custody of lead Respondent and under the direct control of additional agency Respondents and their agents.

12. Respondent Esker L. Tatum, Jr., Warden of FCI Berlin, is named in his official capacity as the direct custodian of Mr. Destino. In this capacity, the Warden has physical custody over Petitioner because ICE contracts FCI Berlin to house immigration detainees, including Petitioner.

13. A habeas petitioner must file their petition in the district in which they are confined and must name as a respondent the petitioner's immediate custodian. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 442-47, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004). At the time of filing this petition, the ICE Detainee Locator - <https://locator.ice.gov> – reflects that Petitioner remains detained at FCI-Berlin in Berlin, New Hampshire. Respondent Tatum would thus be his immediate custodian.

14. Respondent Patricia Hyde is sued in her official capacity as the Director of the Boston Field Office of U.S. Immigration and Customs Enforcement. Respondent Hyde is a legal custodian of Petitioner and has authority to release him.

15. Respondent Todd Lyons is sued in his official capacity as Acting Director of the United States Immigration and Customs Enforcement. In this capacity, Respondent Lyons oversees all detention of noncitizens held in ICE custody and is another of petitioner's legal custodians imbued the authority to release him.

16. Respondent Kristi Noem is sued in her official capacity as Secretary of the U.S. Department of Homeland Security. In this capacity, Respondent Noem is responsible for the implementation and enforcement of the Immigration and Nationality Act, and oversees ICE, the DHS sub-agency responsible for Petitioner's detention and custody. Respondent Noem is another of Petitioner's legal custodians.

17. Respondent Pamela Bondi is sued in her official capacity as the Attorney General of the United States and the senior official of the U.S. Department of Justice (“DOJ”). In that capacity, she has the authority to adjudicate removal cases and to oversee the Executive Office for Immigration Review (“EOIR”), which administers the immigration courts and the Board of Immigration Appeals. Respondent Bondi is therefore also a legal custodian of Petitioner.

STATEMENT OF FACTS*

18. Petitioner Malunda David Gilberto Destino turned twenty-five years on [REDACTED] That was six days after he became a father. He marked both of these watershed life moments while in immigration custody at FCI-Berlin. Petitioner has lived in the United States since 2022. He is engaged to Mibenga Cristiana Antonio-Iyembe, an asylee awaiting her lawful permanent residence. The couple’s child [REDACTED]

[REDACTED] was born on [REDACTED]

19. Petitioner first entered the United States near El Paso, Texas on September 20, 2022. He was “processed as an Expedited Removal/Credible Fear” case. Upon information and belief Petitioner received a positive credible fear determination and was released from immigration custody in September 2022.

20. Upon information and belief, Mr. Destino appeared before an Immigration Judge on August 11, 2023. That judge denied his applications for asylum, withholding of removal, and relief under Article 3 of the United Nations Convention against torture. Mr. Destino filed a timely appeal with the Board of Immigration Appeals [BIA] on August 16, 2023. That appeal remains pending, with the parties’ briefs due on October 10, 2025.

** Undersigned counsel has just become involved in Mr. Destino’s case and has only had access to limited case background materials. Petitioner thus may amend and/or supplement the procedural/factual statements contained herein.*

21. Since arriving in the United States, Mr. Destino has lived in southern Maine, where – among other endeavors – he has played semi-professional soccer with the Lewiston, Maine-based club Maine Legends FC. He is regarded as a vibrant member of the community, volunteering his skills to help coach youth soccer players. Upon information and belief, Petitioner has no criminal record.

22. On August 20, 2025, ERO agents set up surveillance outside Mr. Destino’s home and ultimately arrested him at a gas station in Scarborough, Maine. He was initially detained at the Plymouth County Department of Corrections in Plymouth, Massachusetts. He has since been transferred to FCI-Berlin in Berlin, New Hampshire, where he remains as of this filing.

LEGAL AUTHORITY

23. A positive credible fear determination effectively negates an expedited removal order, allowing the applicant to have their asylum and related applications adjudicated by an asylum officer and immigration judge. *See, e.g.*, 8 U.S.C. § § 1225(b)(1)(A)(i)–(ii) and 1225(b)(1)(B)(ii); *see also*, 8 C.F.R. § 208.30(f). After a positive credible fear determination, detention is no longer mandatory. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, **if found not to have such a fear**, until removed.”)(Emphasis added).

24. Notwithstanding the provisions of 8 U.S.C. § 1225(b) as they relate to the interplay between expedited removal and credible fear, Petitioner’s custody status may be considered under 8 U.S.C. § 1226(a)

25. Petitioner Destino received a positive credible fear determination and has since availed himself of the statutorily prescribed asylum process. His case remains on appeal with the BIA, with briefing scheduled for October 10, 2025. Cases on appeal to the BIA are not final

orders of removal. 8 CFR § 1003.6(a) calls for an automatic stay of execution of an Immigration Judge's decision in removal proceedings, providing in pertinent part that "the decision in any [removal] proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification." The Executive Office for Immigration Review's Board of Immigration Appeals Practice Manual 6.2(b) reaffirms the automatic stay, stating that, "If a party appeals an Immigration Judge's decision on the merits of the case (not including bond and custody determinations) to the Board during the appeal period, the order of removal is automatically stayed during the Board's adjudication of the appeal. 8 C.F.R. § 1003.6(a). The stay remains in effect until the Board renders a final decision in the case."

COUNT ONE: Violation of 8 U.S.C. § 1226(a)

26. The allegations in the above paragraphs are realleged and incorporated herein.

27. Petitioner submits that facts and procedural history of his case resemble those in *Jimenez v. FCI Berlin, Warden*, No. 25-CV-326-LM-AJ, 2025 WL 2639390 (D.N.H. Sept. 8, 2025), where – over the Government's objection – the Court analyzed the petitioner's re-detention after two-plus years under 8 U.S.C. § 1226(a), as opposed to 8 U.S.C. § 1225(b).

28. The *Jimenez* Court aptly noted that, "The abstract statutory interpretation issues raised by this case must be considered against the backdrop of [the] uncontestable fact" that, from the time of his release in 2023, Jimenez 'has always been treated by [the government] as subject to discretionary detention under section 1226, rather than mandatory detention under section 1225.'" *Id.* at *5 (citing *Romero v. Hyde*, — F. Supp. 3d —, 2025 WL 2403827, at *8 (D. Mass. Aug. 19, 2025) and *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at

*5, *8 (D. Mass. July 7, 2025). The Jimenez Court thus adopted the logical conclusion of the Gomes v. Hyde Court, noting that a “noncitizen originally detained under § 1225(b) but released on conditional parole under § 1226 and later rearrested on a § 1226 warrant was entitled to bond hearing under § 1226 and its implementing regulations. *Id.*

29. Consequently, Respondents’ indiscriminate decision to detain Petitioner absent notice or any opportunity to seek bond violates 8 U.S.C. § 1226(a).

COUNT TWO: Violation of Fourth Amendment Reasonable Search and Seizure

30. The allegations in the above paragraphs are realleged and incorporated herein.

31. The Department arrested and detained Petitioner in violation of his right to be free from unreasonable search and seizure. A party claiming a Fourth Amendment violation must establish both that a seizure occurred and that the seizure was unreasonable. *Sodal v. Cook County* 506 U.S. 56, 71 S. Ct. 538, 121 L. Ed. 2d 450 (1992). A seizure is unreasonable if a balance of public and private interests implicated by the seizure favors the asserted private interest. *Id.* Petitioner asserts a private interest to apply for lawful status in the United States. Respondents have not asserted an articulable reason for detaining Petitioner. The balance of Petitioner’s asserted private liberty interest outweighs the government interest.

32. For these reasons, Petitioner’s arrest and detention violates the Fourth Amendment.

COUNT THREE: Violation of Fifth Amendment Right to Due Process

33. The allegations in the above paragraphs are realleged and incorporated herein.

34. The Constitution establishes due process rights for “all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The *Zadvydas* Court

found that civil incarceration is only acceptable “in certain special and narrow non-punitive circumstances, where a special justification . . . outweighs the individual’s constitutionally protected interest.” 533 U.S. 678, 690 (2001). The Court further held that noncitizens in deportation/removal proceedings are entitled to due process protection. *Id.*, 533 U.S. at 690 (“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.’”).

35. Similarly, in *Hernandez-Lara v. Lyons*, the First Circuit Court of Appeals on the United States Supreme Court’s civil detention jurisprudence in its due process analysis to conclude similarly that due process rights apply to noncitizens. 10 F.4th 19, 36-38 (1st Cir. 2021).

36. Here, Petitioner’s whereabouts were well known to immigration officials. Petitioner has been in the United States for over three (3) years now, working and recently starting a family. He has no criminal record. After receiving a positive credible fear determination, Petitioner appeared before an immigration judge. Five days after receiving an adverse ruling, Petitioner appealed to the proper administrative tribunal. That appeal had been pending for over two (2) years when ERO inexplicably chose to stake out Mr. Destino’s known residence and then forcibly detain him in a public place, leaving his pregnant fiancée to fend for herself just week before their child was due.

37. Since his apprehension on September 20, 2022, Petitioner has followed proper legal procedures, and his case remains pending before the BIA. Respondent agencies’ actions undermine the premise that noncitizens may apply for protection under United States and international law without fear of arbitrary detention years after their initial release into the

community absent any materially aggravating changes of circumstances. Nothing about Petitioner's personal or legal history suggests that he poses any danger to the community or that he presents a risk of flight.

38. Consequently, Petitioner's arbitrary detention violates the Due Process Clause of the Fifth Amendment.

PRAYERS FOR RELIEF

Wherefore, Petitioner respectfully requests this Court to grant the following:

- (1) Assume jurisdiction over this matter;
- (2) Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days
- (3) Declare that Petitioner's detention and arrest violate 8 U.S.C. § 1226(a), the Fourth Amendment, and/or the Fifth Amendment's Due Process Clause
- (4) Issue a Writ of *Habeas Corpus* ordering Respondents to release petitioner immediately, while in the interim preventing his transfer outside of this District
- (5) In the alternative, exercise its inherent authority by scheduling a bail hearing before this Court forthwith
- (5) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act, and on any other basis justified under law; and
- (6) Grant any further relief as this Court deems just and proper.

Respectfully submitted by Petitioner,

MULANDA DAVID GILBERTO
DESTINO

Through his attorney,

Dated: September 28, 2025

/s/Ronald L. Abramson

Ronald L. Abramson (NH Bar No. 9936)

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VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I represent Petitioner Mulanda David Gilberto Destino, and I submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing Petition for Writ of *Habeas Corpus* are true and correct to the best of my knowledge.

Dated this 28th day of September 2025.

/s/ Ronald L. Abramson

Ronald L. Abramson

CERTIFICATE OF SERVICE

I, Ronald L. Abramson, 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, with an immediate courtesy copy being sent via email to Assistant United States Attorney Raphael Katz.

Dated: September 28, 2025

/s/ Ronald L. Abramson
Ronald L. Abramson