

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

KELVIN NECTALY GARCIA ORTEGA,)
)
 Petitioner,)
)
 v.)
)
 Esker L. TATUM, Jr., Warden of FCI Berlin;)
 PATRICIA H. HYDE, Acting Field Office)
 Director, Immigration & Customs Enforcement,)
 Enforcement and Removal Operations, Boston)
 Field Office)
 TODD LYONS, Acting Director, US Immigration)
 And Customs Enforcement)
 KRISTI NOEM, Secretary of US Department)
 Of Homeland Security)
 PAMELA BONDI, US Attorney General)
 in their official capacities,)
)
 Respondents.)
)
 _____)

Case No. _____

**PETITION FOR WRIT OF
HABEAS CORPUS**

**ORAL ARGUMENT
REQUESTED**

INTRODUCTION

1. Kelvin Nectaly Garcia Ortega (“Mr. Garcia Ortega” or “Petitioner”) is a Salvadoran citizen who entered the United States on or about June 15, 2024, via the border near Laredo, Texas. Petitioner was not apprehended upon entering the United States, and immediately relocated to the Boston area, whereupon he began residing with his sister Wendy Beatriz Garcia Ortega at [REDACTED]. In the absence of materially changed circumstances, Mr. Garcia Ortega’s recent arrest and detention violate his due process rights.

2. Taken from Immigration and Customs Enforcement’s narrative, Petitioner Garcia Ortega was apprehended due to his presence in an “area known for immigration violators/absconders” and for no other reason. He has never been accused of any illicit activity while present in the

United States or in his native El Salvador. He has no criminal record. He was subjected to this arrest and detainment for no apparent reason other than his appearance and the location in which he was apprehended by ICE. Mr. Garcia Ortega was briefly routed to Burlington, MA, for processing, and then to Plymouth County House of Corrections, and subsequently to FCI Berlin, located at 1 Success Loop Road, Berlin, New Hampshire 03570.

3. Mr. Garcia Ortega requested that the Immigration Judge presiding over his removal proceedings conduct a bond hearing, which Immigration Judge Natalie Smith, presiding at the Chelmsford Immigration Court, initially did. Judge Smith, on September 29, 2025, originally ordered the Petitioner released on the payment of \$10,000.00 bond. Judge Smith indicated she would exercise jurisdiction over the Petitioner and his bond request.

4. The next day, September 30, 2025, the Immigration Judge notified the Petitioner's counsel that she would be rescinding that bond from the previous day, and conducting a new bond hearing to "further address jurisdiction". At this second bond hearing, the Immigration Judge stated she had reconsidered her analysis from the previous day, and instead would be claiming that the Court had no jurisdiction to hear the Petitioner's bond request. His proceedings remain pending at the Chelmsford Immigration Court.

JURISDICTION

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

6. This Court has subject matter jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause).

7. 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

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

9. “(A) district court entertaining a petition for habeas corpus has inherent power to release the petitioner pending determination of the merits.” *Gomes v. US 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

10. The 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. 28 U.S.C. § 2243. If an order to show cause is issued, the Court must require respondents to file a return “within *three days* unless for good cause additional time, not exceeding twenty days, is allowed.” *Id.* (emphasis added).

11. Courts have long recognized the significance of the habeas statute in protecting individuals from unlawful detention. 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

12. Petitioner is a Salvadoran citizen who is currently detained at FCI Berlin, in Berlin, NH.

He is in the custody of the lead Respondent and under the direct control of additional agency Respondents and their agents.

13. Respondent Esker L. Tatum, Jr., Warden of FCI Berlin, is named in his official capacity as the direct custodian of Mr. Garcia Ortega. In this capacity, he has immediate physical custody of Petitioner pursuant to the facility's contract with U.S. Immigration and Customs Enforcement to detain noncitizens and is a legal custodian of Petitioner. 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. Thus, Respondent Tatum, Jr. is a legal custodian of Petitioner.

14. Respondent Patricia Hyde is sued in her official capacity as the Director of the Boston Field Office of United States 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 with the authority to release him.


16. Respondent Kristi Noem is sued in her official capacity as the Secretary of the U.S. Department of Homeland Security (DHS). In this capacity, Respondent Noem is responsible for the implementation and enforcement of the Immigration and Nationality Act, and oversees U.S. Immigration and Customs Enforcement, the component agency responsible for Petitioner's detention and custody. Respondent Noem is a legal custodian of Petitioner.


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 BIA.

Respondent Bondi is therefore also a legal custodian of Petitioner.

STATEMENT OF FACTS

18. Petitioner is a 32 year-old citizen of El Salvador. While growing up in El Salvador, the Petitioner was involved in numerous youth groups, associations, and community activities. He was chosen at a young age to participate in a “Forum for Talented Young Salvadorans” in Los Angeles, California, and was granted a visa for entry into the United States to attend this conference. After attending this forum, he returned to El Salvador seeking to implement the skills and training he received, although he ultimately fled El Salvador due to 


19. Petitioner initially entered the United States on August 17, 2018, on a valid B-2 Visitor Visa, and remained in the United States for 3 days, at which time he returned to El Salvador.

20. After life became extremely difficult and dangerous for the Petitioner in El Salvador, he made the decision to flee his dangerous native country and seek refuge in the United States. He entered the United States to seek refuge on or about June 15, 2024. He was not apprehended at the time while entering the United States, nor was he apprehended shortly after entering the country.

21. It was not until September 10, 2025, that ICE apprehended the Petitioner. In its narrative, ICE indicates that the Petitioner was apprehended because he was located in an “area known for immigration violators/absconders”, and because he was a Hispanic male. There is no other indication in ICE’s Form I-213, filed with the Immigration Court in support of the decision to detain the Petitioner and mandate his permanent detention, for why the Petitioner was approached, apprehended, and detained.

22. Petitioner has since been transferred to FCI Berlin in Berlin, New Hampshire, where he remains as of today.

23. Petitioner filed a request before the Immigration Court to be granted bond and released from ICE's custody. Immigration Judge Natalie Smith, presiding at the Chelmsford Immigration Court, heard the Petitioner's request for bond on September 29, 2025, and originally ordered the Petitioner released on the payment of \$10,000.00 bond. Judge Smith indicated she would exercise jurisdiction over the Petitioner and his bond request.

24. The next day, September 30, 2025, the Immigration Judge notified the Petitioner's counsel that she would be rescinding that bond from the previous day, and conducting a new bond hearing to "further address jurisdiction". At this second bond hearing, the Immigration Judge stated she had reconsidered her analysis from the previous day, and instead would be claiming that the Court had no jurisdiction to hear the Petitioner's bond request. His proceedings remain pending at the Chelmsford Immigration Court.

25. During this second hearing, on September 30, 2025, the Immigration Judge stated that the Court ultimately decided it would not exercise jurisdiction over the Petitioner's bond request, for reasons that remain unclear. The Immigration Judge stated on the record that "**would I have found jurisdiction in this case, I would re-implement the initial bond amount of \$10,000.00**"

26. Petitioner was residing with several close family members in Somerville, Massachusetts, and had nearly a dozen affiants author written declarations in support of his request for bond. He has a community of family members and friends who will support him.

LEGAL AUTHORITY

27. The Department of Homeland Security claimed, pursuant to a recently-decided Board of

Immigration Appeals decision, that the Petitioner is an “applicant for admission” and thus the Immigration Court cannot exercise jurisdiction over Mr. Garcia Ortega’s bond request. See *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025). While the Immigration Judge initially balked at that argument, she subsequently and *sua sponte* reconsidered and reversed her decision, ultimately ruling that she had no jurisdiction over this bond request.

28. Nothing in the charging documents issued to the Petitioner by ICE indicates that the Petitioner is being charged as an arriving alien, or that he is being processed pursuant to 8 U.S.C. Sec. 1225(b). The Respondent was charged with being subject to removal pursuant to INA Sec. 212(a)(7)(A)(i)(I), and under INA Sec. 212(a)(6)(A)(i), although the initial charge of removability has been disputed by the Petitioner. Petitioner also previously entered the country as a visitor, pursuant to the tourist visa lawfully granted to him in 2018, and thus has previously been admitted into the country as a valid non-immigrant.

29. Due to the facts of the Petitioner’s case, including his apprehension and continued detention, the Petitioner’s custody status may be considered under 8 U.S.C. Sec. 1226(a).

CLAIMS FOR RELIEF

COUNT ONE

Violation of Fifth Amendment Right to Due Process

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

31. 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 protections. *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 ‘deprive’ any ‘person of... liberty... without the due process of law.’”)

32. Similarly, in *Hernandez-Lara v. Lyons*, the First Circuit Court of Appeals echoed 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).

33. Here, the Petitioner was taken into custody and detained to this day due to his appearance and due to where he was located when ICE encountered him. There are no criminal allegations, nor was there probable cause to effect an arrest or detention of the Petitioner. The Immigration Judge stated on the record that there appeared to be no reasons that the Respondent would pose a danger to the community.

34. For these reasons, Petitioner’s detention violates the Due Process Clause of the Fifth Amendment.

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

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

36. 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 detention under 8 U.S.C. Sec. 1226(a), authorizing a discretionary determination of the validity of the Petitioner’s continued custody, as opposed to 8 U.S.C. Sec. 1225(b).

37. In *Jimenez*, the Court noted that “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 (B. Mass. Aug. 19, 2025), and *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 18691299, at 5, 8 (D. Mass. July 7, 2025)

38. For these reasons, Petitioner’s detention violates 8 U.S.C. §1226(a).

COUNT THREE
Violation of Fourth Amendment Reasonable Search and Seizure

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

40. 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, in fact conceding on the record at the Petitioner’s prior bond hearing that he did not pose a danger to the public. The balance of Petitioner’s asserted private liberty interest outweighs the government interest here.

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 violates the Due Process Clause of the Fifth Amendment, 8 U.S.C. §1226(a), and the Fourth Amendment;
- (4) Issue a Writ of Habeas Corpus ordering Respondents to release the Petitioner immediately on the posting of \$10,000.00 bond, which was the original order of the Immigration Judge from the initial bond hearing;
- (5) In the alternative, exercise its inherent authority by scheduling a bail hearing before this Court forthwith;
- (6) Award Petitioner attorney's fees and costs under the Equal Access to Justice Act, and on any other basis justified under law; and
- (7) Grant any further relief this Court deems just and proper.

Respectfully submitted,

/s/ Amy B. McGarry

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

I represent Petitioner, Kelvin Nectaly Garcia Ortega, and 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 1st day of October, 2025.

s/Amy B. McGarry
Amy B. McGarry