UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSE ANTONIO RIVERO, (A [redacted] Petitioner, v. KRISTI NOEM, Secretary, U.S Department of Homeland Security; and ROBERT LYNCH, Field Office Director, Detroit Field Office, Immigration and Customs Enforcement, Respondents.	)	Case No. 1:25-cv-1294

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF

The Petitioner, JOSE ANTONIO RIVERO, 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 October 31, 2025, order, and in support thereof, states as follows:

A. Exhaustion is not required and should be excused as seeking an appeal from a bond redetermination before the Board of Immigration Appeals in the first instance would be futile.

Exhaustion is not required, as suggested by Respondents, and requesting the Board of Immigration Appeals to review the order from the Immigration Judge denying bond on the sole basis of no jurisdiction would be futile at this juncture. 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 v. INS*, 681 F.2d 501, 505 (7th Cir. 1982). ("[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.").

The Sixth Circuit has previously held that a due process challenge generally does not require exhaustion since the BIA lacks authority to review constitutional challenges. *See Sterkaj v. Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *accord Bangura v. Hansen*, 434 F.3d 487, 494 (6th Cir. 2006) ("exhaustion of administrative remedies may not be required in cases of non-frivolous constitutional challenges to an agency's procedures.") (citation omitted); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025).

Even so, the three-factor test applied by courts in this Circuit also weighs against requiring exhaustion. Courts may require prudential exhaustion when:

> (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
> (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and
> (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

See Shweika v. Dep't of Homeland Sec., No. 1:06-cv-11781, 2015 WL 6541689, at *12 (E.D. Mich. Oct. 29, 2015). These factors all work in Petitioner's favor. First, the issues raised in Petitioner's case are purely legal in nature and do not require the agency to develop the record. Second, because Petitioner's petition includes a due process claim, the administrative scheme (appeal to the BIA) is futile since, the BIA lacks authority to review constitutional claims. Lastly, while Respondents argue in their reply that "[i]n an appeal to the BIA, Petitioner may seek a new bond hearing and request release," administrative review is not likely to change Respondents' position that Section 1225(b)(2)(A) applies in this case, adding to the futility argument. DHS's policy makes clear that mandatory detention is the position to be taken, and this is being done in conjunction with the Department of Justice.

Additionally, 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 appeal a bond redetermination with the Board of Immigration Appeals in the first instance would be futile as the bond appeal would undoubtedly be denied in light of *Matter of Yajure Hurtado*. It would prejudice to Petitioner by prolonging his detention to request an appeal to a bond that has already been denied solely based on no jurisdiction. Dkt. 1-6.

Yet even if this Court were to agree that prudential exhaustion should apply, waiver of the exhaustion requirement is warranted here because Petitioner is likely to experience irreparable harm if he is unable to seek habeas relief until the BIA decides an appeal on the denied bond, which the Immigration Judge denied solely based on lack of jurisdiction. *See* Dkt. 1-6; *see also Sampiao v. Hyde, et al.* 1:25-cv-11981-JEK, at *11-12 (D. Mass. Sept. 9, 2025); *Romero v. Hyde*, No. 25-cv-11631-BEM, 2025 WL 2403827, at *7 (D. Mass. Aug. 19, 2025) (finding that loss of liberty is a form of irreparable harm and citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). Waiver is appropriate when the interests of the individual weigh heavily against requiring administrative exhaustion, or exhaustion would be futile and unable to afford the petitioner the relief he seeks. *See McCarthy*, 503 U.S. at 145; *see also Fazzani v. NE Ohio Corr. Ctr.*, 473 F.3d 229 (6th Cir. 2006) (citing *Aron v. LaManna*, 4 F. App'x 232, 233 (6th Cir. 2001) and *Goar v. Civiletti*, 688 F.2d 27, 28-29 (6th Cir. 1982)); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025) ("because exhaustion would be futile and unable to provide Lopez-Campos with the relief he requests in a timely manner, the Court waivers administrative exhaustion and will address the merits of the habeas petition.").

The average processing time for bond appeals exceeded 200 days (more than 6 months) in 2024. *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1248 (W.D. Wash. 2025). There is no requirement for the BIA to act promptly or decide the appeal quicker than any other case. If the

BIA were to act promptly, it would be unlikely to decide Petitioner's appeal anytime soon, and if it processes the appeal at the same rate as last year's appeals, the appeal may not be resolved until spring 2026. As such, Petitioner is likely to endure several additional months of detention. Such a prolonged loss of liberty would, in these circumstances, constitute irreparable harm. *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986).

Additionally, requiring Petitioner to wait six months in detention to reach a decision on whether he can be released on bond would be futile. He is scheduled for a Master Calendar Hearing on November 25, 2025 – less than six months from now. As such, exhaustion would not effectively afford him the relief he seeks, given that a removal determination would likely come before the BIA's determination of whether a bond is appropriate in this case.

Therefore, given the constitutional claims raised by Petitioner, this Court should find that exhaustion is not required according to the Sixth Circuit standards. If it does find the exhaustion applies, then the Court should waive exhaustion since it would be futile and would not provide Petitioner with the relief he requests in a timely manner. *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025).

B. Petitioner is detained under 8 U.S.C. § 1226 and not under 8 U.S.C. § 1225.

By way of review, 8 U.S.C. § 1225(b)(2), INA § 235(b)(2), requires mandatory detention of "Applicants for Admission." Conversely, noncitizens detained under 8 U.S.C. § 1226(a), INA § 236(a), are not subject to mandatory detention and may be released on bond or on their own recognizance. The Board of Immigration Appeals' decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), determined for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is subject to detention under 8 U.S.C. § 1225(b)(2) and therefore subject to mandatory detention and no longer eligible for release on

bond. The decision strips the immigration judge's authority to hear a bond request for any noncitizen present in the United States without having been inspected and admitted and who are later apprehended by DHS.

Respondents argue in their response that Petitioner is properly detained under 8 U.S.C. § 1225(b)(2) and not under 8 U.S.C. § 1226. This argument fails for several reasons.

First, district courts across the country have unanimously rejected *Matter of Yajure Hurtado's* new interpretation that those who entered unlawfully and are later apprehended are now subject to mandatory detention under 8 U.S.C. § 1225(b)(2). The following cases are an overall sample of recent circuits that have all disagreed with Respondents' interpretation and have subsequently granted relief to habeas petitions:

First Circuit

- *Chafla v. Scott*, Case No. 2:25-cv-00437 (D. Me. September 21, 2025)
- *Tamay v. Scott*, Case No. 2:25-cv-00438 (D. Me. September 21, 2025)
- *Lema v. Scott*, Case No. 2:25-cv-00439 (D. Me. September 21, 2025)
- *Hilario Rodriguez v. Moniz*, No 25-12358 (D. Mass. September 18, 2025)
- *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

- *Hasan v. Crawford*, 2025 WL 2682255 (E.D. Va. Sept. 19, 2025)
- *Leal-Hernandez v. Noem*, 2025 WL 2430025 (D. Md. Aug. 24, 2025)

Fifth Circuit

- *Lopez-Areveloa v. Ripa*, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025)
- *Lopez Santos v. Noem*, 2025 WL 2642278, (W.D. La. Sept. 11, 2025)
- *Martinez v. Noem*, No. 5:25-CV-01007, 2025 WL 2598379 (W.D. Tex. Sept. 8, 2025)
- *Kostak v. Trump*, 2025 WL 2472136 (W.D. La. Aug. 27, 2025)

Sixth Circuit

- *Singh v. Lewis*, 2025 WL 2699219 (W.D. Ky. Sept. 22, 2025)
- *Beltran Barrera v. Tindall*, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025)
- *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)
- *Sanchez Ballestros v. Noem*, 2025 WL 2880831 (W.D. Ky. Oct. 9, 2025)
- *Contreras-Cervantes v. Raycraft*, 2025 WL 2952796 (E.D. Mich. Oct. 17, 2025)
- *Pacheco Mayen v. Raycraft,* 2025 WL 2978529 (E.D. Mich. Oct. 17, 2025)
- *Diaz Sandoval, v. Raycraft*, 2025 WL 2977517 (E.D. Mich. Oct. 17, 2025)
- *Jimenez Garcia v. Raybon*, 2025 WL 2976950 (E.D. Mich. Oct. 21, 2025)
- *Casio-Mejia v. Raycraft*, 2025 WL 2976737 (E.D. Mich. Oct. 21, 2025)
- *Santos Franco, v. Raycraft*, 2025 WL 2977118 (E.D. Mich. Oct. 21, 2025)
- *Contreras-Lomeli, v. Raycraft*, 2025 WL 2976739 (E.D. Mich. Oct. 21, 2025)
- *Rodriguez Carmona, v. Noem*, 2025 WL 2992222 (W.D. Mich. Oct. 24, 2025)
- *Puerto-Hernandez, v. Lynch*, 2025 WL 3012033 (W.D. Mich. Oct. 28, 2025)
- *Marin Garcia, v. Noem*, 2025 WL 3017200 (W.D. Mich. Oct. 29, 2025)
- *Ramirez v. Noem*, 1:25-cv-1261 (W.D. Mich. Oct. 31, 2025)
- *Godinez-Lopez v. Ladwig, et al.*, 2025 WL 3047889 (W.D. Tenn. Oct. 31, 2025)
- *Ruiz Mejia v. Noem*, 1:25-cv-1227 (W.D. Mich. Oct. 31, 2025)
- *Perez Guerra v. Woosley,* (W.D. Ky. Oct. 31, 2025)
- *Magallanes Sanchez v. Olson*, Case No. 25-cv-13226 (N.D. Ill. Nov. 3, 2025)
- *Hernandez Alonso* v. Tindall, 2025 WL 3083920 (W.D. Ky. Nov. 4, 2025)
- *Salgado Mendoza v. Noem*, 1:25-cv-1252 (W.D. Mich. Nov. 4, 2025)
- *Hernandez Capote v. Secretary of U.S. Department of Homeland Security*, 2025 WL 3089756 (E.D. Mich. Nov. 5, 2025)
- *Sanchez Guzman v. Noem*, 1:25-cv-13415 (N.D. Ill. Nov. 6, 2025)

Seventh Circuit

- *Campos Leon v. Forestal*, 2025 WL 2694763 (S.D. In. Sept. 22, 2025)
- *Alejandro v. Olson*, 1:25-cv-02027 (S.D. In. Oct. 11, 2025)
- *B.D.V.S. v. Forestal*, 2025 WL 2855743 (S.D. Ind. Oct. 8, 2025)
- *Ochoa Ochoa v. Noem*, 1:25-cv-10865 (N.D. Ill. Oct. 16, 2025)
- *Padilla v. Noem,* No. 25 CV 12462, 2025 WL 2977742 (N.D. Ill. Oct. 22, 2025)
- *Miguel v. Noem*, No. 25 C 11137, 2025 WL 2976480 (N.D. Ill. Oct. 21, 2025)

Eighth Circuit

- *Aditya W.H. v. Trump,* 782 F. Supp. 3d 691 (D. Minn. 2025).
- *Helbrum v. Williams,* 2025 WL 2840273 (S.D. Iowa, Sept. 30, 2025)
- *Giron Reyes v. Lyons*, Case No. C25-4048 (N.D. Iowa September 23, 2025)
- *Duenas Arce v. Trump*, 2025 WL 2675934 (D. Neb. Sept. 18, 2025)
- *Brito Barrajas v. Noem*, No. 4:25-cv-00322 (S.D. Iowa September 23, 2025)
- *Lorenzo Perez v. Kramer*, 2025 WL 2624387 (D. Neb. Sept. 11, 2025)
- *Ozuna Carlon v. Kramer*, 2025 WL 2624386 (D. Neb. Sept. 11, 2025)
- *Genchi Palma v. Trump*, 2025 WL 2624385 (D. Neb. Sept. 11, 2025)

- *Hernandez Marcelo v. Trump*, 3:25-cv-0000934 (S.D. Iowa Sept. 10, 2025)
- *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

- *N.A. v. LaRose,* 2025 WL 2841989 (S.D. Cal. Oct. 7, 2025)
- *E.C. v. Noem,* 2025 WL 2916364 (D. Nev. Oct 14, 2025)
- *Guerrero Lepe v. Andrews et al*, No. 1:2025cv01163 (E.D. Cal. 2025)
- *Vazquez v. Feeley*, No. 2:25-CV-01542, 2025 WL 2676082 (D. Nev. Sept. 17, 2025)
- *Herrera Torralba v. Knight*, No. 2:25-CV-01366, 2025 WL 2581792 (D. Nev. Sept. 5, 2025)
- *Benitez et al. v. Noem,* No. 5:25-cv-02190 (C.D. Cal. Aug. 26, 2025)
- *Sanchez Roman v. Noem* 2025 WL 2710211 (D. Nev. Sep. 23, 2025)
- *Maldonado Vazquez v. Feeley*, 2025 WL 2676082 (D. Nev. Sept. 17, 2025)
- *Salcedo Aceros v. Kaiser*, 2025 WL 2637503 (N.D. Cal Sept. 12, 2025)
- *Cuevas Guzman v. Andrews*, 2025 WL 2617256, (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)

Tenth Circuit

- *Salazar v. Dedos* 2025 WL 2676729 (D. NM. Sept. 17, 2025)
- *Garcia Cortes v. Noem*, 2025 WL 2652880 (D. Colo. Sept. 16, 2025)

However, even if this Court considers the argument that Petitioner is in fact subject to mandatory detention, as Respondents argue, courts across the country continue to hold that section 1225 does not apply to individuals who entered without inspection and were detained, years later, within the United States. *See supra.*

Further, this Court is not required, and should not, give deference to the recent Board decision cited in Respondent's brief. In *Loper Bright*, the Supreme Court was clear that "[c]ourts

must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and indeed "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Rather, this Court can simply look to the Supreme Court's own words in *Jennings* that held that for decades, § 1225 has applied only to noncitizens "seeking admission into the country"—i.e., new arrivals, and that this contrasts with § 1226, which applies to noncitizens "already in the country." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). The Court in *Jennings* was abundantly clear about these interpretations. Petitioner in this case is not a new arrival and had been in the United States for several years at the time of his detention.

The text of sections 1225 and 1226, together with binding Supreme Court precedent interpreting those provisions and the numerous district court decisions confirm that he is subject to section 1226(a)'s discretionary detention scheme.

CONCLUSION

For the foregoing reasons, this Court should order Petitioner's release or in the alternative, order Respondents to schedule a neutral bond hearing under section 1226 for Petitioner's removal proceedings within 5 days of the order and accept jurisdiction to issue a bond order.

Respectfully Submitted,

/s/ Andrea Ochoa
Andrea Ochoa, Esq.
KRIEZELMAN BURTON & ASSOCIATES, LLC
200 West Adams Street, Suite 2211
Chicago, Illinois 60606
(312) 332-2550, aochoa@krilaw.com
Attorney No. IL 6330234
Attorney for Petitioner