UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

REFUGIO IBARRA DEL VILLAR ([redacted])	)	
Petitioner,	)	
v.	)	
	)	Case No. 4:25-cv-00137-GNS
KRISTI NOEM, Secretary, U.S Department of Homeland Security; SAMUEL OLSON, Field Office Director, Chicago Field Office, Immigration and Customs Enforcement; and MIKE LEWIS, Jailer, Hopkins County Jail.	)	
Respondents.	)	

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

The Petitioner, REFUGIO IBARRA DEL VILLAR, 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 November 6, 2025, order, and in support thereof, states as follows:

A. Petitioner's removal proceedings have not begun, as Respondents allege.

As a threshold and factual matter, Respondents incorrectly characterize the procedural posture of Petitioner's immigration case. The government states that Petitioner was scheduled for a hearing on November 12, 2025, according to Exhibit 1, Notice to Appear. *See* Dkt. 15 at 5. This is incorrect. First, the hearing could not have taken place. While Petitioner was served with

a Notice to Appear in person after he was detained, the only way for the government to commence removal proceedings, is for the Department of Homeland Security to file a Notice to Appear against Petitioner with an Immigration Court (under the control of the Department of Justice's Executive Office for Immigration Review ("EOIR")). *See* 8 U.S.C. § 1239.1(a). This simply has not happened. Second, the Notice to Appear incorrectly lists the Detroit Immigration Court which does not have jurisdiction over Hopkins County Jail, the facility where Petitioner is detained in Kentucky. In practice, even if the Notice to Appear is filed in Detroit, an Immigration Judge in Detroit will not have jurisdiction over Petitioner's case because it is outside of their area of jurisdiction; the Court will simply not call Petitioner for his hearing. To make matters even more complicated, the only way for his case to transfer to the correct Immigration Court with administrative control over Hopkins County Jail is if the Department of Homeland Security files a Form I-830, Notice to EOIR: Alien Address, considering DHS is Petitioner's custodian. Without it, Petitioner is stuck in limbo without an opportunity to see a judge due to the Department of Homeland Security's failure to file the Notice to Appear to commence removal proceedings let alone file it in the correct jurisdiction. As a result, Petitioner has been detained since the end of October after being arrested without a valid warrant while working in a Chicago suburb as a landscaper, and sits in detention without any open case in any immigration court.[1]

[1] Considering there appears to be factual issues in dispute, and according to this Court's order, Petitioner gives notice to Respondents about these and respectfully requests them to facilitate Petitioner to appear via Zoom on the scheduled November 18, 2025, hearing. Moreover, Petitioner renews his argument that his arrest was in violation of the *Castanon Nava* settlement, as briefed in the underlying petition. *See* Dkt. 1.

B. 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.").

To start, so far the Sixth Circuit has not issued any binding precedent or helpful guidance regarding the legal arguments set out herein. However, 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. His removal proceedings have not began due to the government's failure to file an initiation document with the Immigration Court, let alone the correct one in this case. 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).

C. 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 since Petitioner filed his Habeas on November 5, 2025:

First Circuit

- *Anselmo v. Moniz*, No. 1:25-CV-13309-IT, 2025 WL 3171137 (D. Mass. Nov. 13, 2025)
- *Caguana-Caguana v. Moniz*, No. 1:25-CV-13142-IT, 2025 WL 3171043 (D. Mass. Nov. 13, 2025)
- *Portillo Martinez v. Hyde*, No. CV 25-11909-BEM, 2025 WL 3152847 (D. Mass. Nov. 12, 2025)

Second Circuit

- *Rueda Torres v. Francis*, No. 25 CIV. 8408 (DEH), 2025 WL 3168759 (S.D.N.Y. Nov. 13, 2025)
- *Diallo v. Maldonado, Jr.*, No. 25-CV-05740 (DG), 2025 WL 3158295 (E.D.N.Y. Nov. 12, 2025)
- *G.F.F. v. Francis*, No. 25-CV-7368 (JGK), 2025 WL 3141735 (S.D.N.Y. Nov. 10, 2025)
- *Perez v. Francis*, No. 25-CV-8112 (JGK), 2025 WL 3110459 (S.D.N.Y. Nov. 6, 2025)

Third Circuit

- *Cantu-Cortes v. O'Neill*, No. 25-CV-6338, 2025 WL 3171639 (E.D. Pa. Nov. 13, 2025)
- *Moreira Da Silva v. LaForge*, No. 25CV17095 (EP), 2025 WL 3173859 (D.N.J. Nov. 13, 2025)
- *Guaman Naula v. Noem*, No. CV 25-16792 (SDW), 2025 WL 3158490 (D.N.J. Nov. 12, 2025)

Fourth Circuit

- *Perez-Gomez v. Warden, Camp East Montana Detention Facility*, No. CV 3:25CV773, 2025 WL 3141103 (E.D. Va. Nov. 10, 2025)
- *Diaz Garcia v. Noem*, No. 1:25-CV-1712 (PTG/LRV), 2025 WL 3111223 (E.D. Va. Nov. 6, 2025)

Sixth Circuit

- *Ginez Hernandez v. Noem*, No. 1:25-CV-1307, 2025 WL 3170872 (W.D. Mich. Nov. 13, 2025)
- *Lara v. Noem*, No. 1:25-CV-1332, 2025 WL 3170876 (W.D. Mich. Nov. 13, 2025)
- *Madrid Gonzalez v. Noem*, No. 1:25-CV-1315, 2025 WL 3170879 (W.D. Mich. Nov. 13, 2025)
- *Singh v. Noem*, No. 1:25-CV-1251, 2025 WL 3170855 (W.D. Mich. Nov. 13, 2025)
- *Contreras Alvarez v. Noem*, No. 1:25-CV-1313, 2025 WL 3151948 (W.D. Mich. Nov. 12, 2025)
- *Diego v. Raycraft*, No. 25-13288, 2025 WL 3159106 (E.D. Mich. Nov. 12, 2025)
- *Lucero Lucero v. Noem*, No. 1:25-CV-1295, 2025 WL 3165235 (W.D. Mich. Nov. 12, 2025)
- *E.V. v. Raycraft*, No. 4:25-CV-2069, 2025 WL 3122837 (N.D. Ohio Nov. 7, 2025)
- *Hernandez Garcia v. Raycraft*, No. 1:25-CV-1281, 2025 WL 3122800 (W.D. Mich. Nov. 7, 2025)

- *Morales-Martinez v. Raycraft*, No. 25-CV-13303, 2025 WL 3124695 (E.D. Mich. Nov. 7, 2025)
- *Rodriguez Serrano v. Noem*, No. 1:25-CV-1320, 2025 WL 3122825 (W.D. Mich. Nov. 7, 2025)

Seventh Circuit

- *Cabrera v. Noem*, No. 25 C 12160, 2025 WL 3171288 (N.D. Ill. Nov. 13, 2025)
- *Delgado Avila v. Crowley*, No. 2:25-CV-00533-MPB-MJD, 2025 WL 3171175 (S.D. Ind. Nov. 13, 2025)
- *Mariscal Serrano v. Salazar*, No. 25 C 13170, 2025 WL 3171354 (N.D. Ill. Nov. 13, 2025)
- *Garcia Guevara v. Swearingen*, No. 25 C 12549, 2025 WL 3158151 (N.D. Ill. Nov. 12, 2025)
- *Guaita Quinapanta v. Bondi*, No. 25-CV-795-WMC, 2025 WL 3157867 (W.D. Wis. Nov. 12, 2025)
- *Vasquez Gonzalez v. Olson*, No. 25 C 13162, 2025 WL 3158191 (N.D. Ill. Nov. 12, 2025)
- *Lopez Briseno v. Noem*, No. 25 C 12092, 2025 WL 3145985 (N.D. Ill. Nov. 11, 2025)
- *Ramirez Martinez v. Noem*, No. 25-CV-1ja2029, 2025 WL 3145103 (N.D. Ill. Nov. 11, 2025)
- *Lira Perez v. Noem*, No. 25 C 13442, 2025 WL 3140692 (N.D. Ill. Nov. 10, 2025)
- *Sumba v. Crowley*, No. 1:25-CV-13034, 2025 WL 3126512 (N.D. Ill. Nov. 9, 2025)
- *Garcia Rios v. Noem*, No. 25-CV-13180, 2025 WL 3124173 (N.D. Ill. Nov. 7, 2025)
- *Munoz Arredondo v. Olson*, No. 25-CV-12882, 2025 WL 3124149 (N.D. Ill. Nov. 7, 2025)
- *Mirzoev v. Olson*, No. 25-CV-12969, 2025 WL 3101969 (N.D. Ill. Nov. 6, 2025)
- *Pacheco Carrillo v. Noem*, No. 25 C 12963, 2025 WL 3101993 (N.D. Ill. Nov. 6, 2025)
- *Sanchez Guzman v. Noem*, 1:25-cv-13415 (N.D. Ill. Nov. 6, 2025)

Eighth Circuit

- *Chilel Chilel v. Sheehan*, No. 25-CV-3975 (SRN/DTS), 2025 WL 3157839 (D. Minn. Nov. 12, 2025)

Ninth Circuit

- *Alonso Sanchez v. Hermosillo*, No. 2:25-CV-02152-TMC, 2025 WL 3171362 (W.D. Wash. Nov. 13, 2025)
- *Calel v. Larose*, No. 3:25-CV-02883-GPC-JLB, 2025 WL 3171898 (S.D. Cal. Nov. 13, 2025)
- *Bernardo Aquino v. Larose*, No. 25-CV-2904-RSH-MMP, 2025 WL 3158676 (S.D. Cal. Nov. 12, 2025)
- *Sadeqi v. Larose*, No. 25-CV-2587-RSH-BJW, 2025 WL 3154520 (S.D. Cal. Nov. 12, 2025)

- *Marcial Navarette v. Wamsley*, No. 2:25-CV-02150-TMC, 2025 WL 3134712 (W.D. Wash. Nov. 10, 2025)
- *Tran v. Bondi*, No. C25-01897-JLR, 2025 WL 3140462 (W.D. Wash. Nov. 10, 2025)

Tenth Circuit

- *Molina Ochoa v. Noem*, No. 1:25-CV-00881-JB-LF, 2025 WL 3125846 (D.N.M. Nov. 7, 2025)

Eleventh Circuit

- *Vasquez Carcamo v. Noem*, No. 2:25-CV-00922-SPC-NPM, 2025 WL 3119263 (M.D. Fla. Nov. 7, 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 nearly two 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,

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