

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HECTOR MIGUEL HERRERA-MORENO,

Case No. 1:25-cv-1411

Petitioner,

Hon. Hala Y. Jarbou
Chief U.S. District Court Judge

v.

Hon. Ray Kent
U.S. Magistrate Judge

Warden, North Lake Correctional Facility;
Secretary of the U.S. Dept. of Homeland
Security; U.S. Attorney General; Field Office
Director, U.S. Immigration and Customs
Enforcement, Detroit Field Office,

Respondents.

PETITIONER'S SUR-REPLY TO FEDERAL RESPONDENTS' REPLY

IN SUPPORT OF MOTION TO DISMISS

Petitioner submits this Sur-Reply pursuant to leave of Court. Respondents' Reply (ECF No. 12) raises new factual assertions, new legal arguments, and introduces new evidence for the first time. A brief response is necessary to correct the record and assist the Court.

I. The Habeas Petition Is Not Moot

Respondents contend that the habeas petition became moot because Petitioner received a "bond hearing" on December 3, 2025. This is incorrect.

A. The December 3 hearing did not provide constitutionally adequate process

A bond hearing moots a habeas petition only when it provides the minimum constitutional protections required by due process. Courts consistently hold that hearings that misallocate burdens, rely on untested or undisclosed evidence, or fail to consider alternatives to detention do not satisfy constitutional requirements.

See *Pensamiento v. McDonald*, 315 F. Supp. 3d 684 (D. Mass. 2018); *Doe v. Tompkins*, 299 F. Supp. 3d 242 (D. Mass. 2018).

Here, the December 3 hearing was constitutionally deficient because:

1. The IJ relied on undisclosed or unsupported allegations.
2. The IJ misapplied the dangerousness and flight-risk standards, treating minor and stale arrests as determinative.
3. The IJ stated he was “bound” by *Matter of Hurtado* and did not consider less restrictive alternatives.
4. The IJ failed to conduct a meaningful individualized assessment of rehabilitation, family hardship, or community ties.

A constitutionally inadequate hearing does **not** moot a habeas petition.

B. The underlying injury persists: Petitioner remains detained

Because Petitioner remains in ICE custody under the same conditions challenged in the habeas petition, the injury is ongoing. Ongoing detention defeats mootness. See *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

C. The government’s voluntary-cessation does not moot the case

The December 3 hearing was scheduled only **after** Petitioner filed his habeas petition. Under the voluntary-cessation doctrine, the government bears a “heavy burden” to show the challenged conduct cannot reasonably recur.

Friends of the Earth v. Laidlaw, 528 U.S. 167, 189 (2000).

Respondents make no such showing. The case is not moot.

II. Respondents Raise New Factual Assertions That Require Correction

A. Petitioner did *not* withdraw a bond request on November 19, 2025

Respondents assert that Petitioner “withdrew” a prior bond request at a November 19 hearing. This is incorrect.

At that hearing:

- The IJ questioned whether he had jurisdiction;
- DHS had not produced the I-213;
- The IJ halted the proceeding and directed DHS to file the I-213;
- No argument occurred and no adjudication took place.

Petitioner did not withdraw anything, and this is confirmed by the fact that the official EOIR record contains no withdrawal, no adjudication, and no disposition of any kind for that date. The EOIR electronic Record of Proceedings (eROP) contains no entry reflecting a withdrawal, denial, adjudication, or any disposition of a bond request on November 19, 2025. EOIR records all bond decisions and withdrawals; the absence of such an entry confirms that:

- No withdrawal occurred,
- No disposition occurred, and
- The hearing did not proceed because DHS had not submitted the I-213 and the IJ halted the matter.

Respondents’ contrary assertion is not supported by the administrative record.

B. Respondents rely on new factual claims and declarations outside the record

Respondents’ Reply relies on new factual assertions and a declaration not included with their Motion to Dismiss. These arguments cannot be raised for the first time on reply without affording Petitioner a fair opportunity to respond.

C. Respondents introduced new exhibits in their Reply

Respondents attached two exhibits—Exhibit A (Bond Order) and Exhibit B (Renewed Bond Motion)—for the first time in their Reply. Introducing new evidence in a reply brief is an established basis for permitting a sur-reply.

III. Respondents Misstate the Legal Basis for Jurisdiction

Respondents argue that 8 U.S.C. § 1226(e) bars this Court from reviewing the claims raised. This is incorrect.

Petitioner is not challenging the IJ's discretionary weighing of evidence. He is challenging:

1. the legality of his continued detention,
2. the constitutionality of the procedures used, and
3. the statutory authority governing his custody classification.

These are legal and constitutional questions that § 1226(e) does not bar.

See *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Demore v. Kim*, 538 U.S. 510 (2003).

IV. Meaningful Relief Is Still Available

Petitioner continues to seek:

- A constitutionally adequate custody hearing with the correct burden allocation;
- Consideration of alternatives to detention; or
- Release if DHS cannot justify continued detention.

Because the Court can still grant meaningful relief, the habeas petition is not moot.

See *Chafin v. Chafin*, 568 U.S. 165, 172 (2013).

CONCLUSION

For the foregoing reasons, the Court should deny Respondents' Motion to Dismiss and adjudicate the merits of the habeas petition, or alternatively order a new, constitutionally adequate custody hearing.

Dated: December 3, 2025

Respectfully submitted,
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