

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

MARLON GIMENEZ D SILVA RODRIGUES
Petitioner,

v.

Civ. No. 25-600

MICHAEL NESSINGER, Warden, Wyatt
Detention Facility
DAVID WESTLING, Acting Field Office Director,
MICHAEL KROL, HSI New England Special
Agent in Charge
TODD LYONS, Acting Director U.S.
Immigrations and Customs Enforcement,
KRISTI L NOEM, U.S. Secretary
of Homeland Security,
and PAMELA BONDI, U.S. Attorney General

Respondents.

**VERIFIED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO
28 U.S.C. § 2241**

INTRODUCTION

1. Petitioner, Marlon Gimenez D Silva Rodrigues, prior to his arrest and detention, resided in the Commonwealth of Massachusetts. Petitioner's country of citizenship is Brazil. Upon information and belief, Petitioner entered the United States without authorization in 2024 and has been present in the United States since that time. He has significant fears of returning to Brazil and is actively working on submitting applications for asylum and related relief. He has substantial community ties and no criminal history in this country or any other country. Petitioner was arrested in Massachusetts by U.S. Immigration and

Customs Enforcement (“ICE”) or by federal agents acting on ICE’s behalf on or about the month of November, 2025. He was involved in a motor vehicle collision and was taken into ICE custody without cause.

2. Upon information and belief, and in reliance on the ICE Detainee Locator System, Petitioner is currently in ICE custody and detained at Wyatt Detention Center in Central Falls, Rhode Island.
3. Petitioner is present in the United States and, on information and belief, the Department of Homeland Security (“DHS”) has alleged or will allege that Petitioner was not previously admitted or paroled into the United States.
4. Petitioner cannot be subject to mandatory detention under 8 U.S.C. § 1225(b)(1) because Petitioner does not meet the criteria for Expedited Removal. *See Make the Road New York v. Noem*, No. 25-190, 2025 WL 2494908, at *23 (D.D.C. Aug. 29, 2025).
5. Petitioner cannot be subject to mandatory detention under 8 U.S.C. § 1225(b)(2) because, as a person already present in the United States, Petitioner is not presently “seeking admission” to the United States. *See Aguiriano v. Romero v. Hyde*, No. 25-11631, 2025 WL 2403827, at *1, 8-13 (D. Mass. Aug. 19, 2025).
6. On information and belief, Petitioner was not, at the time of arrest, paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5)(A), and therefore Petitioner could not “be returned” under that provision to mandatory custody under 8 U.S.C. § 1225(b) or any other form of custody. Petitioner is not subject to mandatory detention under § 1225 for this reason as well.
7. Petitioner is not lawfully subject to mandatory detention under 8 U.S.C. § 1226(c), including because he has not been convicted of any crime that triggers such detention. *See*

Demore v. Kim, 538 U.S. 510, 513-14, 531 (2003) (allowing mandatory detention under § 1226(c) for brief detention of persons convicted of certain crimes and who concede removability).

8. Instead, as a person arrested inside the United States and held in civil immigration detention, Petitioner is subject to detention, if at all, pursuant to 8 U.S.C. § 1226. *See Aguiriano*, 2025 WL 2403827, at *1, 8-13 (collecting cases).
9. Accordingly, Petitioner is subject to detention, if at all, under 8 U.S.C. § 1226(a).
10. As a person detained under 8 U.S.C. § 1226(a), Petitioner must, upon his request, receive a custody redetermination hearing (colloquially called a “bond hearing”) with strong procedural protections. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (1st Cir. 2021); *Doe v. Tompkins*, 11 F.4th 1, 2 (1st Cir. 2021); *Brito v. Garland*, 22 F.4th 240, 256-57 (1st Cir. 2021) (affirming class-wide declaratory judgment); 8 C.F.R. 236.1(d) & 1003.19(a)-(f).
11. Petitioner requests such a bond hearing.
12. This Court need not require exhaustion because available remedies provide no genuine opportunity for adequate relief; irreparable injury may occur without immediate judicial relief; administrative appeal would be futile; and in the instant case, Petitioner has raised a substantial constitutional question. All four of these factors tilt against requiring exhaustion here.
13. On September 5, 2025, in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), the Board of Immigration Appeals issued a decision which purports to require the Immigration Court to unlawfully deny a bond hearing to all persons such as Petitioner.¹ The responsible

¹ The BIA’s reversal and newly revised interpretation of the statute are not entitled to any deference. *See Loper Bright Ent. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

administrative agency has therefore predetermined that Petitioner will be denied a bond hearing.

14. Petitioner is being irreparably harmed by his ongoing unlawful detention without a bond hearing. *See Aguiriano*, 2025 WL 2403827, at *6-8 (no exhaustion required because “[o]bviously, the loss of liberty is a . . . severe form of irreparable injury” (internal quotation marks omitted)); *Flores Powell v. Chadbourne*, 677 F. Supp. 2d 455, 463 (D. Mass. 2010) (declining to require administrative exhaustion, including because “[a] loss of liberty may be an irreparable harm”); *cf. Brito v. Garland*, 22 F.4th 240, 256 (1st Cir. 2021) (citing *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986), for proposition that “[e]xhaustion might not be required if [the petitioner] were challenging her incarceration . . . or the ongoing deprivation of some other liberty interest”).
15. The Immigration Court lacks jurisdiction to adjudicate the constitutional claims raised by Petitioner, and any attempt to raise such claims would be futile. *See Flores-Powell*, 677 F. Supp. 2d at 463 (holding “exhaustion is excused by the BIA’s lack of authority to adjudicate constitutional questions and its prior interpretation” of the relevant statute).
16. There is no statutory requirement for Petitioner to exhaust administrative remedies. *See Gomes v. Hyde*, No. 25-11571, 2025 WL 1869299, at *4 (D. Mass. July 7, 2025) (“[E]xhaustion is not required by statute in this context.”).²

² The EOIR recently issued a policy memorandum which purports to assert immigration judges and the BIA have authority to consider certain Constitutional arguments in immigration proceedings. However, the memo concedes that the EOIR cannot consider facial challenges to statutes. CONSIDERATION OF CONSTITUTIONAL ARGUMENTS IN AGENCY ADJUDICATIONS, PM-25-45, <https://www.justice.gov/eoir/media/1413276/dl?inline>. In addition, immigration judges are bound by precedent decisions of the Board of Immigration Appeals and must apply the BIA’s interpretation of relevant statutes and regulation and have no evident authority to depart from binding agency precedent based on constitutional or statutory arguments. See, 8 C.F.R. § 1003.1(g)(1) (“[D]ecisions of the Board and decisions of the Attorney General are binding on ... immigration judges....”)

17. Accordingly, there is no requirement for Petitioner to further exhaust administrative remedies before pursuing this Petition. *See Portela-Gonzalez v. Sec'y of the Navy*, 109 F.3d 74 (1st Cir. 1997) (explaining that, where statutory exhaustion is not required, administrative exhaustion not required in situations of irreparable harm, futility, or predetermined outcome).

PARTIES

18. The Petitioner, Marlon Gimenez D Silva Rodrigues, is a native and citizen of Brazil who entered the United States without inspection in 2024. He is a resident of the Commonwealth of Massachusetts.
19. Respondent Michael Nessinger is the Superintendent/Warden of Wyatt Detention Facility and Petitioner's immediate custodian.
20. Respondent David Westling is the Acting Field Office Director for ICE ERO Boston, responsible for the custody and detention decisions for individuals detained within the District.
21. Respondent Michael Krol is the New England Special Agent in Charge for Homeland Security Investigations for the U.S. Immigration and Customs Enforcement.
22. Respondent Todd Lyons is the Acting Director of the U.S. Immigration and Customs Enforcement.
23. Respondent Kristi Noem is the Secretary of the Department of Homeland Security and Respondent Pamela Bondi is the U.S. Attorney General.
24. All respondents are sued in their official capacities.

JURISDICTION

25. This action arises under the U.S. Constitution and the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*
26. 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 U.S. Constitution (Suspension Clause).
27. 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.
28. This action also arises under the Due Process Clause and Equal Protection clauses of the Fifth Amendment and the INA. 8 U.S.C. § 1227 *et seq.*

VENUE

29. Venue is proper under 28 U.S.C. §§ 1391(b)(2), (e) and 28 U.S.C. §§ 2241 *et seq.* Petitioner is detained within this District, and a substantial part of the events giving rise to the claims and relevant facts occurred within the District, including Petitioner's unlawful continued detention in this District and his grant of bond by an IJ.

CLAIMS FOR RELIEF

COUNT ONE

Violation of 8 U.S.C. 1226(a) and Associated Regulations

30. Petitioner may be detained, if at all, pursuant to 8 U.S.C. § 1226(a). 426. Under § 1226(a) and its associated regulations, Petitioner is entitled to a bond hearing. *See* 8 C.F.R. 236.1(d) & 1003.19(a)-(f).
31. Petitioner has not been, and will not be, provided with a bond hearing as required by law.
32. Petitioner’s continuing detention is therefore unlawful.

COUNT TWO

Violation of Fifth Amendment Right to Due Process (Failure to Provide Bond Hearing Under 8 U.S.C. § 1226(a))

33. Because Petitioner is a person arrested inside the United States and is subject to detention, if at all, under 8 U.S.C. § 1226(a), the Due Process Clause of the Fifth Amendment to the United States Constitution requires that Petitioner receive a bond hearing with strong procedural protections. *See Hernandez-Lara*, 10 F.4th at 41; *Doe*, 11 F.4th at 2; *Brito*, 22 F.4th at 256-57.
34. Petitioner has not been, and will not be, provided with a bond hearing as required by law.
35. Petitioner's continuing detention is therefore unlawful.

COUNT THREE

Violation of Fifth Amendment Right to Due Process (Failure to Provide an Individualized Hearing for Domestic Civil Detention)

36. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).
37. The Fifth Amendment's Due Process Clause specifically forbids the Government to "deprive[]" any "person . . . of . . . liberty . . . without due process of law." U.S. CONST. amend. V. "[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"); *cf. Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 139-40 (2020) (holding noncitizens due process rights were limited where the person was not residing in the United States, but rather had been arrested

25 yards into U.S. territory, apparently moments after he crossed the border while he was still “on the threshold”). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” protected by the Due Process Clause. *Zadvydas*, 533 U.S. 678 at (2001).

38. The Supreme Court has thus “repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,” including an individualized detention hearing. *Addington v. Texas*, 441 U.S. 418, 425 (1979) (collecting cases); *see also Salerno*, 481 U.S. at 755 (requiring individualized hearing and strong procedural protections for detention of people charged with federal crimes); *Foucha v. Louisiana*, 504 U.S. 71, 81-83 (1992) (same for civil commitment for mental illness); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (same for commitment of sex offenders).
39. Petitioner was arrested inside the United States and is being held without being provided any individualized detention hearing.
40. Petitioner’s continuing detention is therefore unlawful, regardless of what statute might apply to purportedly authorize such detention.

COUNT FOUR

Violation of Fifth Amendment Right to Due Process (Substantive Due Process)

41. Because Petitioner is not being provided a bond hearing, the government is not taking any steps to effectuate its substantive obligation to ensure that immigration detention bears a “reasonable relation” to the purposes of immigration detention (*i.e.*, the prevention of flight and danger to the community during the pendency of removal proceedings) and is not

impermissibly punitive. *See Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 532-33 (Kennedy, J., concurring).

42. Petitioner's detention is therefore unlawful, regardless of what statute might apply to purportedly authorize such detention.

PRAYER FOR RELIEF

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

- (1) Assume jurisdiction over this matter;
- (2) Order that Petitioner shall not be transferred outside the District of Rhode Island;
- (3) Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days;
- (4) Declare that Petitioner's detention is unlawful;
- (5) Issue a Writ of Habeas Corpus ordering Respondents to release Petitioner immediately, or, in the alternative, provide Petitioner with a bond hearing and order Petitioner's release on conditions the Court deems just and proper; and
- (6) Grant any further relief this Court deems just and proper.

CONCLUSION

As Petitioner is in ICE custody in Central Falls, Rhode Island, he hereby respectfully requests that this Honorable Court find that he has demonstrated his detention is unlawful, and therefore this court should grant the writ.

Respectfully submitted,
Counsel for Petitioner
/s/ Carl Hurvich /s/
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VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I am submitting this verification on behalf of the Petitioner because I am the Petitioner's primary attorney and because Petitioner is detained. I have reviewed the record in this matter and reviewed the claims herein with Petitioner as well prior counsel and family members. Based on personal knowledge and, on information and belief, I hereby verify that the factual statements made in the attached First Amended Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Respectfully submitted,
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/s/Carl Hurvich/s/
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