Kevin C. Milne
(Bar No.183222)
Milne Legal
856 Moultrie Street
San Francisco, CA 94110
(510) 990-3045
Kevin.Milne@MilneLegal.org
CJA Attorney, *pro hac vice*

Attorney for Petitioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Bertin Monge Gomez, Petitioner, v. Warden, Golden State Annex Detention Facility, et al., Respondents	Case No.: 1:25-CV-01-1724-DJC-SCR PETITONER'S AMENDED REPLY TO RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner Bertin Monge Gomez is a citizen of Mexico and is married to Vannesa Guerrero. Declaration of Vannesa Guerrero (Guerrero Decl.), ¶¶ 1, 2. He entered the United States in 2008 when he was 18 years old. *Id.* at ¶ 2. After his arrival in the United States, he lived briefly in Sacramento, California, where he worked in a restaurant performing duties as a cook and dishwasher. *Id.* at ¶ 3. After leaving Sacramento, he moved to Visalia, California, and has lived in Visalia for about 18 years, working in the agricultural and farming sectors, including as a fruit picker and field laborer. *Id.* at ¶ 5. At time he was detained in June 2025, he was employed at Harris Ranch Beef Company. *Id.*

Mr. Gomez and his wife bought a home together in May 2025. *Id.* at ¶ 6. They have four children between the ages of 2 and 16. *Id.* at ¶ 7. One of their children has a serious medical condition involving his left tibia. *Id.* He underwent a core needle biopsy, and the findings showed features suggestive of osteoblastoma, which requires continued medical monitoring and follow-up care, and he will also be having surgery soon. *Id.* Another son, Damien, has a speech delay and requires ongoing evaluation, therapy, and consistent parental support. *Id.* Their children's health issues have caused a great deal of emotional stress and require significant support and involvement from each of the parents. *Id.*

Mr. Gomez was taken into custody by Immigration and Customs Enforcement (ICE) on June 23, 2025, at the U.S. Citizenship and Immigration Services (USCIS) office in Folsom, CA. *Id.* at ¶ 8. He and his wife had gone there together for interviews in connection with a Form I-485 application. *Id.* Mr. Gomez has been in detention since June 23, 2025, and is now being held at the Golden State Annex Detention Facility in

McFarland, California. *See* Petition for Writ of Habeas Corpus (Petition), ECM No. 1, at p. 5.

On or around July 7, 2025, DHS initiated removal proceedings by filing a Notice to Appear, charging Petitioner with "inadmissibility under section 212(a)(6)(A)(i) of the [INA], in that he is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General." *See* Respondents' Answer in Opposition to Petition for Writ of Habeas Corpus (Answer), ECM Nos. 15, at p. 3; 15-1, at, p. 4.

Petitioner filed his Petition on Dec. 3, 2025. The Respondents submitted their Answer on January 8, 2026. ECM No. 15. Petitioner submitted a Reply to the Respondents' Answer on January 19, 2026. ECM No. 16. Petitioner now submits this Amended Reply.

II. DISCUSSION

A. Petitioner's Claim Is Not Moot.

Respondents assert that the Petition should be dismissed on the ground that Petitioner's case is moot. ECM No. 15, at p. 4. Respondents contend the Petitioner "has received the relief he requested in his habeas petition, and has been given a bond hearing before an immigration judge, at which he was ordered detained." *Id.* Respondents also submitted with their Answer a copy of an order issued by an Immigration Judge denying the Petitioner release on bond to support their contention that the case is moot. ECM No. 15-1, pp 9-11.

Petitioner's claim is not moot. Petitioner alleges that he was not afforded a legally sufficient bond hearing. ECM No. 1, ¶ ¶ 2, 4. According to the Petitioner, despite having been detained for over 5 months at the time, "no neutral decisionmaker… has

conducted a hearing to determine whether this lengthy incarceration is warranted based on danger or flight risk." ECM No. 1, ¶ 2. He sought a determination that "Petitioner's detention is not justified because the government has not established by clear and convincing evidence that Petitioner presents a risk of flight or danger." *Id.* at ¶ 4. He also alleged that he had not been afforded a bond hearing while in custody because "the judge said she did not have jurisdiction to give [him] bond." *See id.* The fact that Petitioner may have received a bond hearing, therefore, does not resolve the claim that bond hearing was constitutionally defective because he has been detained without the Government having established by clear and convincing evidence that he presents a risk of danger or of flight; in fact, the Respondents' Answer and exhibits have only served to amplify that claim. *See infra,* pp. 10-13. The Court, therefore, should reject Respondents' claim that the matter is moot.

B. Petitioner Has Fifth Amendment Due Process Rights.

According to Respondents, only aliens who have been lawfully admitted to the U.S. are entitled to due process rights; those who have not been lawfully admitted are entitled only to whatever rights Congress affords, and nothing more. *See* ECM 15, pp. 10-11. Respondents, therefore, assert that Petitioner has no constitutional right to a bond hearing because he does not enjoy any due process rights. Instead, he has only those rights to a hearing that Congress affords by statute. Respondents' position, however, ignores long-standing Supreme Court precedent and should be rejected.

The Due Process Clause of the Fifth Amendment applies to "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). To adopt Respondents' "startling rule" – that a non-citizen is not entitled to any due process

protections under the Constitution unless and until they been admitted lawfully – "would be to undermine more than a century of precedent holding that persons who enter the United States have a liberty interest in remaining – no matter how they entered." *Make The Road New York v. Noem,* --- F.Supp.3d ---, 2025 WL 2494908, at *2, *11-12 (D.D.C. 2025)(*citing Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903)(noncitizen who entered country in violation of law cannot be deprived of liberty interest without due process).

Respondents' contention that only those who are lawfully admitted to the U.S. have due process rights stems from their misreading of several cases upon which they rely for that proposition: *Knauff v. Shaughnessy,* 338 U.S. 537 (1950) and *Dept of Homeland Sec. v. Thuraissigiam,* 591 U.S. 103 (2001). *See* ECM No 15, at p. 10. Those cases concerned the process due persons who had been *denied admission* into the United States, not the process due persons who, like Petitioner, have been living in the United States for over 20 years at the time of his arrest. *See Salcedo Aceros v. Kaiser,* 1:25-cv-06924, 2025 WL 2637503, at *6 (N.D. Cal. August 16, 2025). In rejecting a similar attempt to apply the rationale of the *Knauff and Thuraissigiam* cases to a noncitizen who had been arrested after a scheduled hearing in Immigration Court, the Court in *Salcedos Aceros* explained thus:

> The Government's contention that [Petitioner] has no due process protections is not supported by the cases on which it relies. The Government cites *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) for the proposition that for noncitizens, "[w]hatever the procedure authorized by Congress . . . is due process." But this selective quotation omits the end of the sentence: "as far as an alien *denied entry* is concerned." *Id.* (emphasis added). [Petitioner] is not requesting additional due process to adjudicate denial of entry, and thus *Shaughnessy* does not apply. *See also Landon v. Plasencia*, 459 U.S.21, 32 (1982) (no constitutional rights regarding finding of *exclusion*).

> The Government also cites *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 105 (2020), which likewise concerned the due process afforded to "aliens seeking initial entry" challenging their *exclusion*. In *Thuraissigiam*, the petitioner had "succeeded in making it 25 yards into U. S. territory" when he was detained under the expedited removal statute. *Id.* at 114. After an asylum officer and immigration judge determined that he lacked a "credible fear" and was thus eligible for immediate removal, the petitioner sought "a new opportunity to apply for asylum and other applicable forms of relief." *Id.* at 115. Notably, "[h]is petition made no mention of release from custody." *Id.* In denying his petition, the Supreme Court relied on the "sovereign prerogative" to "admit or exclude" aliens, which it held applied even to noncitizens "paroled elsewhere in the country for years pending removal." *Id.* at 139. Such petitioners had "only those rights *regarding admission* that Congress has provided by statute."

See id. (Emphasis in original). Petitioner is not someone who has been denied *admission* or *entry* into the U.S. In fact, he has "effected an entry," and has lived in the U.S. for more than 20 years.

C. *Petitioner Is Detained Under 8 U.S.C. § 1226 and Not Under 8 U.S.C. § 1225.*

Respondents contend that Petitioner is detained under a detention statute, 8 U.S.C. §1225(b), which mandates his detention and therefore makes him ineligible for release on bond. *See, e.g.,* ECM No 15, at p. 9. ("Petitioner is detained pursuant to § 1225(b)(2)(A), which provides that petitioner 'shall' be detained. Because Petitioner is currently detained under 8 U.S.C. § 1225(b)(2)(A), he is therefore ineligible for release under 8 U.S.C. § 1226(a)."). Respondents' position that persons who have been arrested far from the border and long after entry are subject to mandatory detention rests on a novel reading of section 1225 that has been rejected by the vast majority of courts that have considered it, including a growing number of courts in this District. *See, e.g., Lepe v. Andrews*, 801 F.Supp.3d 1104, 1112 (E.D. Cal. 2025)(collecting cases); *Otilio B.F. v. Andrews*, No. 1:25-cv-01398-KES-EPG, 2025 WL 3152480, at *4 (E.D. Cal. Nov. 11, 2025); *Ortiz Donis v. Chestnut*, No. 25-CV-01228, 2025 WL 2879514, at

*11 (E.D. Cal. Oct. 9, 2025); *Guzman v. Andrews*, No. 25-cv-01015, 2025 WL 2617256, at *3-5 (E.D. Cal. Sept. 9, 2025). This court should reject that position as well.

Immigration screening and enforcement can be separated into two broad categories: border-related enforcement and interior enforcement. *See Jennings v. Rodriguez*, 583 U.S. 281, 287-89 (2018). Immigration enforcement "generally begins at the Nation's borders and points of entry." *Id.* at 287. Section 1225 governs enforcement actions at the border, where the government determines whether to admit noncitizens who are arriving into the United States or who are present but have not been admitted. *See id.* Noncitizens subject to § 1225 must be detained without the opportunity for a bond hearing for the duration of their removal proceedings. 8 U.S.C. § 1225(b).

There are two broad classes of noncitizens subject to § 1225 mandatory detention. *Jennings*, 583 at 287. First, § 1225(b)(1), which pertains to "arriving" noncitizens and noncitizens who have not been admitted and cannot demonstrate that they have been present in the United States for at least two years. *See Make The Road New York*, 2025 WL 2494908, at *5-7. In general, unless they raise a fear of return to their home country, these noncitizens can be administratively and summarily removed by an immigration enforcement officer without being placed in removal proceedings and thus, without ever appearing before an immigration judge. *See* 8 U.S.C. § 1225(b)(1). The other class consists of those detained under section 1225(b)(2), which applies to "applicant[s] for admission" who are "not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2).

Conversely, § 1226 "applies to [noncitizens] already present in the United States." *Jennings*, 583 U.S. at 303. Noncitizens detained under § 1226(a) are entitled to

receive bond hearings at the outset of detention. 8 C.F.R. §§ 236.1(d)(1); *see also Jennings*, 583 U.S. at 306; *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1197 (9th Cir. 2022) (observing that § 1226(a) and its implementing regulations confer "an initial bond hearing before a neutral decisionmaker, the opportunity to be represented by counsel and to present evidence, the right to appeal, and the right to seek a new hearing when circumstances materially change.").

Notably, § 1226(c), which operates as an exception to the provisions of 1226(a), mandates detention for noncitizens based on crime-based inadmissibility grounds (which apply to noncitizens who have not been formally *admitted* into the United States), as well as *deportability* grounds, which apply to noncitizens who have been previously admitted but are removable. *See* 8 U.S.C. § 1226(c)(1). Congress recently added new grounds for mandatory detention under § 1226(c) for noncitizens who are *inter alia* present in the United States without being admitted or paroled, 8 U.S.C. § 1182(a)(6)(A), and who have been charged with, arrested for, or convicted of, or who admit to having committed certain enumerated crimes. 8 U.S.C. § 1226(c)(1)(E). *See Ortiz Donis v. Chestnut*, 2025 WL 2879514 at *9. The statutory scheme and interplay between §§ 1226(a) and 1226(c), therefore, demonstrate that 1226 applies to persons, like Petitioner, who have not been admitted or paroled.

Respondents, however, holds that § 1226 applies only to *deportable* noncitizens—i.e. those who have been admitted—and that § 1225(b)(2)(A) applies to all noncitizens who have not been properly admitted, regardless of how long they have lived in the United States. ECM No. 15, at p. 8. The plain language of the statute, though, makes it clear that the Respondents' interpretation of § 1225(b)(2) is erroneous.

First, the references to *inadmissibility* in § 1226(c), which could refer only to noncitizens who have not been admitted and have committed certain offenses, necessarily mean that noncitizens who are present in the United States without admission and have *no* disqualifying criminal history are subject to discretionary detention under § 1226(a). Furthermore, Respondents fail to contend with the narrowing clause in § 1225(b)(2), which clarifies that it pertains to applicants for admission who are "not clearly and beyond a doubt *entitled to be admitted*." 8 U.S.C. § 1225(b)(2)(A). (Emphasis added). Justice Breyer provides a reasonable interpretation that resolves this purported tension, explaining that § 1225(b)(2):

> [C]onsists of persons who are neither (1) clearly eligible for admission, nor (2) clearly ineligible. A clearly eligible person is, of course, immediately admitted. A clearly ineligible person—someone who lacks the required documents, or provides fraudulent ones—is "removed ... without further hearing or review." But where the matter is not clear, i.e., where the immigration officer determines that an alien "is not clearly and beyond a doubt entitled to be admitted," he is detained for a removal proceeding.

Jennings, 583 U.S. 281 at 353 (Breyer, J. dissenting) (internal citations omitted). In contrast to the Respondents' view, which views the term "applicant for admission" in isolation, this interpretation contends with the full text of § 1225(b)(2).

Accordingly, accepting the Respondents' sweeping interpretation of § 1225(b)(2) as pertaining to all noncitizens who have not been admitted into the United States would violate "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotations omitted).

D. <u>Petitioner's Aug. 7, 2025 Bond Hearing Did Not Meet Due Process Requirements and His Detention Therefore Is Unlawful</u>.

Petitioner had a bond hearing before an IJ on August 7, 2025. That hearing, however was defective for two reasons: 1. The IJ impermissibly shifted the burden of proof from the Government to Petitioner to demonstrate he did not pose a danger to the community, and 2. The IJ's conclusion that he posed a danger to community is not supported by substantial evidence. The Petitioner's detention, therefore, is unlawful.

Under Ninth Circuit precedent, Due Process requires that the government, not the noncitizen, bear the burden of proof at an immigration bond hearing. *Y.S.G. v. Andrews*, 2025 WL 2979309, at *9 (E.D. Cal. October 22, 2025); *Ixchop Perez V. McAleenan*, 435 F.Supp.3d 1055, 1060 (N.D. Cal. 2020). The Court in *Martinez v. Clark*, 124 F.4th 775, 783-85 (9th Cir. 2024) further noted that where the agency decision raises "red flags," it need not take the agency "at its word" that it applied the correct standard. *Id.* at 785. A "red flag" indicates that something is "amiss," such as where the agency misstates the record, fails to mention probative and potentially dispositive evidence, or fails to mention or apply relevant case law in its decision. *Id.* (*citing Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011)).

The bond order issued by the Immigration Judge after the August 7, 2025 hearing clearly raises a "red flag:" the IJ impermissibly shifted the burden of proof to the Petitioner. The IJ's bond order reads:

> After full consideration of the evidence presented, the respondent's request for a change in custody status is hereby ordered:
>
> [X] Denied, because
>
> Jurisdiction addressed in "other," below. Respondent has multiple arrests and convictions for driving under the influence of alcohol, including an occasion when he was also convicted of hit and run. He also has a conviction for driving on a suspended license. Mr. Monge's most recent conviction was 2023. The court finds in light of this prolonged and serious history of engaging in dangerous conduct *that respondent has not met his burden of proving that he does not pose a danger to the community*. Accordingly, the court denies bond.

ECM No. 15-1, at 9. (Emphasis added).

The phrase "respondent has not met his burden of proving that he does not pose a danger to the community" is not susceptible of any meaning except that the IJ impermissibly shifted the burden to proof to the Petitioner to show that he was not a danger to the community.

Respondents do not dispute that the IJ placed the burden on Petitioner to prove that he was not a danger to the community. In their Answer, Respondents quite plainly acknowledged the IJ's shifting of the burden of proof:

> Petitioner has already had a bond hearing, at which an Immigration Judge ordered him detained, *finding he had not shown that he does not pose a danger to the community following his arrests and convictions for driving under the influence of alcohol and other traffic-related crimes.*
>
> ***
>
> Because there is no regulatory, statutory, or constitutional requirement that Petitioner be afforded *another* bond hearing before an Immigration Judge, Petitioner's claim that he should be, *at which the government bears the burden of proof*, should be denied.

ECM No. 15, at pp. 1-2. (Emphasis added). In the first excerpt, the Respondents defend the lawfulness of the IJ's bond decision by asserting that the Petitioner "had not shown that he does not pose a danger to the community." *Id.* In the second excerpt above, by contrast, the Respondents reject the Petitioner's request for a second bond hearing at which the government would bears the burden of proof, based on, according to the Respondents, there being no legal reason for it. The Government impermissibly shifted the burden of proof at the August 7 hearing to Petitioner. Based on Ninth Circuit precedent, *supra*, the August 7, 2025 bond hearing did not comport with due process requirements and Petitioner's detention is unlawful.

The IJ's determination that Petitioner posed a present danger to the community also is not adequately supported. Federal courts have jurisdiction to review whether the

agency properly assessed dangerousness. *Martinez v. Clark*, 124 F.4th 775, 783-85 (9th Cir. 2024). More specifically, regarding a dangerousness determination, even where an individual has been convicted of a criminal offense, criminal history "alone will not always be sufficient to justify denial of bond on the basis of dangerousness." *Singh v. Holder*, 638 F.3d 1196, 1206 (9th Cir. 2011) (*abrogated on other grounds by Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022). Rather, courts must consider the "extensiveness of criminal activity, the *recency* of such activity, and the seriousness of the offenses" are also contemplated. *Matter of Guerra*, 24 1. & N. Dec. at 40. (Emphasis added). Courts must also consider the "remoteness" of the criminal activity as well as "intervening events that might undermine a finding of dangerousness." *Obregon v. Sessions*, No. 17-cv-01463, 2017 WL 1407889, at *7 (N.D. Cal. April 20, 2017).

The August 7, 2025 bond order standing alone shows that the IJ failed to adequately assess the risk of danger Petitioner would have posed to the community if released. Due process requires that present dangerousness be established by "clear and convincing evidence." *See Ixchop Perez*, 435 F.Supp.3d at 1062 (citations omitted); *Y.S.G.*, 2025 WL 2979309, at *9-11 (Finding the IJ "failed to make a meaningful determination as to present dangerousness" and therefore concluding the IJ committed legal error in finding the petitioner was a danger to the community). In order to meet that standard, the IJ must assess the dangerousness of the detainee at the time of the bond hearing. *Y.S.G.*, 2025 WL 2979309, at *9 (citations omitted). "When it comes to non-violent crimes, especially those caused by addictions, the passage of time does make a difference." *Ixchop Perez*, 435 F.Supp.3d at 1062. "Courts must consider the remoteness of [a] DUI and the intervening events that would undermine a finding of dangerousness." *Id.*

The IJ notes in the bond order that Petitioner's most "recent" conviction was in 2023. Petitioner was charged on February 4, 2023 with misdemeanor DUI and with driving on a suspended licensed. *See* Exhibit A. On September 7, 2023, Petitioner was sentenced to 30 days in jail, ordered to participate in a DUI education program of 18 months, and placed on probation for 36 months for that offense. *Id.* The period of time between the date of conviction for that "most recent" offense (Sept. 7, 2023) and the date of the bond hearing (August 7, 2025) was approximately *24 months*.

Here, the IJ did not consider the remoteness of his last conviction and the intervening events. Despite the passage of about two years – the time between the date Petitioner was convicted for the Feb. 4, 2023 offense and the date of the Aug. 7, 2025 bond hearing -- including a lengthy period of probation and court-ordered DUI education, with no apparent intervening arrests, the IJ nevertheless concluded that Petitioner was still a present danger to the community. The IJ violated Petitioner's due process rights by not engaging in a meaningful review to determine current risk of dangerousness. The IJ's failure to give a meaningful review of the Petitioner's record is therefore erroneous.

E. Exhaustion of Judicial Administrative Remedies Is Not Required or, in the Alternative, Should Be Waived.

Respondents assert that Petitioner's application for habeas relief should be dismissed because Petitioner has not exhausted administrative appeals. ECM No. 15, at pp. 5-7. In support of this position, Respondents contend that Petitioner has an appeal of the denial of bond pending before the BIA. *Id.* Because the BIA has not yet issued a decision on that appeal, Respondents contend that that the Court should allow the BIA to consider the appeal before entertaining Petitioner's habeas claim.

The habeas statute under which Petitioner has filed does not require exhaustion of judicial or administrative remedies. *See Perez v. Wolf*, 445 F.Supp.3d 275, 284 (N.D.

Cal. 2021); *compare* 28 U.S.C. § 2241 *with* 28 U.S.C. § 2254(b)(1)(A). Courts may require exhaustion as a prudential matter 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." *Noriega-Lopez v. Ashcroft*, 335 F.3d 874,881 (9th Cir. 2003) (citation omitted); *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007). *C.A.R.V. v. Wofford*, 2026 WL 241823, Case No. 1:25-cv-01395-JLT-SKO (N.D. Cal. Jan. 29, 2026). If a petitioner fails to exhaust prudentially required administrative remedies, then "a district court ordinarily should either dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies." *Leonardo v. Crawford*, 646 F.3d 1157,1160 (9th Cir. 2011).

The exhaustion requirement may be waived, however, if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury would result, or the administrative proceedings would be void." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quotation marks and citation omitted). Delay in a bond appeal is irreparable harm that justifies waiver of the exhaustion requirement. *See Y.S.G*, 2025 WL 2979309, at *7. "The BIA appeals process is long and generally moots pending bond appeals before they are adjudicated." *Rodriguez v. Bostock*, 779 F.Supp.3d 1239, 1248 (W.D. Wash. 2025). 2024 data from the Executive Office of Immigration Review shows the average processing time for appeals was 204 days. *See id.*

In addition, "[f]utility is a traditional exception to judicially created exhaustion requirements because '[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.'" *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 895 (9th Cir. 2021) (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1361

(2021)); *see also Perez-Guzman v. Lynch, 835 F.3d 1066, 1073 (9th Cir. 2016)* (exhaustion is not required where it would be futile to raise a particular issue before the agency); *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("It is axiomatic that one need not exhaust administrative remedies that would be futile or impossible to exhaust."). The futility exception "to the exhaustion requirement has been carved for constitutional challenges to [DHS] procedures." *Iraheta-Martinez v. Garland,* 12 F.4th 942, 949 (9th Cir. 2021). As to due process claims in particular, "[t]he key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Id.; see also Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("[T]he principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.").

Exhaustion is not called for in this case, because Petitioner has suffered and is likely to continue to suffer irreparable harm from wrongful detention, given the lengthy time it takes to have an appeal before the BIA decided. The Notice of Appeal that Respondents submitted as an exhibit indicates the appeal was filed at the BIA on August 20, 2025, almost 6 months ago. *See* ECM 15-1, pp. 12-14. BIA's regulations prescribe time frames for issuing decisions after a case has been assigned,[1] and yet

---

[1] See 8 CFR 1003.1(e)(8)(i). The BIA's regulations provide as follows:

> Timeliness. As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases consistent with paragraph (e)(1) of this section. In all other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained noncitizens. Except in exigent circumstances as determined by the Chief Appellate Immigration Judge, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all

Respondents have provided no information at all about the status of the appeal, including, for example, whether the case has been assigned to an IJ or to a panel, whether a briefing schedule has been established, and how much longer Petitioner will likely have to wait for a decision. Given the length of time that has already passed since the appeal, and the length of time most appeals to the BIA take to be resolved, the exhaustion requirement should be waived.

Waiving the exhaustion requirement in this case is also appropriate because the BIA is not capable of addressing the precise challenge Petitioner makes to his detention. Petitioner in this case is challenging the constitutionality of the bond decision and whether it complied with due process. The BIA, however, is not able to evaluate the constitutionality of immigration proceedings. *See Y.S.G.*, 2025 WL 2979309, at *7 (citing to BIA decisions). "In light of the BIA's scope of review, administrative remedies in this case would not be adequate to resolve petitioner's due process challenge." *Id.*

Finally, exhaustion should also be waived because any appeal to the BIA at this point would be futile. The BIA in its decision *Matter of Yujare Hurtado*, 29 I&N Dec. 216 (BIA), issued on September 5, 2025, established a novel precedent that individuals, like the Petitioner, who entered the country without admission or inspection and who have been residing in the United States for years without lawful status are considered applicants for admission within the meaning of 8 U.S.C. § 1225(a) and, therefore, subject to mandatory detention under 8 U.S.C. § 1225(b)(2) for the duration of their

---

cases assigned to a single Board member within 90 days of completion of the record, or within 180 days after a case is assigned to a three-member panel (including any additional opinion by a member of the panel). *Id.*

removal proceedings.[2] The BIA's decision in *Hurtado* serves as precedent in all proceedings involving the same issue or issues. *See* 8 C.F.R. sections 1003.1(g)(1), (d)(i). Because the BIA is likely to hold that persons such as Petitioner who were detained in the interior of the country are subject to mandatory detention without bond, Petitioner's appeal to the BIA would be futile. *See Pacham v. Archambeault*, No. 3:25-cv-03163-GPC-DEB, 2025 WL 3653984, at *3 and nn. 2 (S.D. Cal. December 17, 2025); *Martinez-Martinez v. Noem*, No. 25cv2975-GPC(VET), 2025 WL 3552746, at *3, and nn. 2 (S.D. Cal. December 11, 2025); *Barco Mercado v. Francis*, No. 25-cv-6582 (LAK), 2025 WL 3295903, at *12 (S.D.N.Y. November 26, 2025)("To force [petitioner] to request a bond hearing from an immigration judge – which would be denied under the BIA's recent [*Hurtado*] decision, and, even if it were held, would result in release being denied under that decision – and then appeal that denial to the same BIA that prevented immigration judges from hearing bond requests in the first place, all before allowing [petitioner] to seek judicial review... would be 'Kafkaesque.'")

Given that Petitioner has satisfied least one of the *Laing* factors to excuse exhaustion, the Court need not require exhaustion.

F. Other Matters.

Respondents have attributed the length of Petitioner's detention to 5 continuances that he or his counsel requested in the underlying removal proceeding. *See, e.g.*, ECM No.15, at p. 2. ("In addition, Petitioner is scheduled for a hearing on the merits of his application for relief from removal, which has been continued

---

[2] The IJ issued the custody redetermination ruling roughly a month before the BIA's decision in *Hurtado*.

approximately five times since he was detained in June 2025, at the request either of Petitioner or his attorneys. Any claim that his detention has been unduly prolonged should likewise fail."); *Id.* at p. 4 ("Since then, that hearing has been continued approximately five times, including for Petitioner to find counsel and then for counsel preparation.") *Id.* at p. 10. ("[T]he length of [petitioner's] detention has been largely a function of the continuances he has sought in his removal proceedings"). Respondents have provided proof of only one request for a continuance, requested by Petitioner's counsel in the removal proceeding, on Nov. 13, 2025. ECM No. 15-1, at p. 15. Neither Petitioner nor the undersigned is aware of any other continuances prior to the date on which the Government filed its Answer, and, to the extent that Respondents contend that the length of Petitioner's detention is attributable to such continuances, Petitioner denies that contention.

CONCLUSION

Petitioner respectfully submits that Petitioner's detention is unlawful because the Respondents have failed to provide him with a bond hearing that comports with due process. Petitioner respectfully requests that the Court order that Petitioner receive a new bond hearing before a neutral decisionmaker at which the Government must prove by clear and convincing evidence that Petitioner is a present danger to the community or presents a risk of flight.

Respectfully Submitted,

/s/ Kevin Milne
Kevin Milne

Dated: Feb. 11, 2026