UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 25-25773-CIV-WILLIAMS

MICHEL HERNANDEZ-HERNANDEZ,

Plaintiff,

v.

ELISA M. SUKKAR, *et al.*,

Defendants.
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PETITIONER'S TRAVERSE

The petitioner, by and through the undersigned, submits this traverse in support of his petition for a writ of habeas corpus.

Argument

I. Injunctive relief and declaratory relief are different types of relief, and the Court can grant the former here because the class action *Bautista* court only has the power to grant the latter.

In class action immigration cases, depending on the underlying sections of the immigration code involved in the case, "Section 1252(f)(1) limits lower courts' authority to 'enjoin or restrain,' whereas a declaratory judgment (unlike an injunction) ' "is not ultimately coercive." ' " *Garland* v. *Aleman Gonzalez*, 596 U. S. 543, 572 n. 9 (2022) (Sotomayor, J., concurring, and joined by Kagan and Breyer, JJ) (quoting *Steffel* v. *Thompson*, 415 U. S. 452, 471 (1974)). It "is clear . . . that even though a declaratory judgment has 'the force and effect of a final judgment,' 28 U.S.C. s 2201, it is a much milder form of relief than an injunction." *Steffel*, 415 U. S., at 471. "Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." *Id.* The government, that is, the immigration authorities at a government-

wide systemic level, wish to inappropriately not comply with a district court's order.

Although the government now suggests that the class wide declaratory relief order of the district court in *Bautista* v. *Santacruz*, — F. Supp. 3d —, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025) (partial summary judgment on declaratory relief), and *Bautista* v. *Santacruz*, — F.R.D. —, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3288403, at *9 (C.D. Cal. Nov. 25, 2025) ("When considering this determination with the MSJ Order, the Court extends the same declaratory relief granted to Petitioners to the Bond Eligible Class as a whole."), is the same type of relief as the injunction and habeas writ requested here,[1] the fact of the matter is that the government previously recognized that such types of relief were distinct before the Supreme Court in the *Aleman Gonzalez* case. See *Aleman Gonzalez*, 596 U. S., at 572 n. 9 (Sotomayor, J., concurring) ("Moreover, if (as the Court holds today) § 1252(f)(1) bars classwide relief, and (as the Government suggests) the provision affects **both injunctive and declaratory relief**, it is hard to see how any class action could proceed, as no relief would be available in the lower courts.") (emphasis added).

The government say nothing about the *Bautista* court's mention of § 1252(f)'s limitations. See Verified Petition (D.E. 1, at 10 ¶ 49 (citing *Bautista*, 2025 WL 3288403, at *7–*8). There,

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[1] See *Jennings* v. *Rodriguez*, 583 U. S. 281, 323–26 (2018) (Thomas, J., concurring and joined by Gorsuch, J.) (distinguishing habeas relief from injunctive relief and declaratory relief); *id.*, at 324 ("Respondents do not seek habeas relief, as understood by our precedents. Although their complaint references the general habeas statute, see Third Amended Complaint, at 1, it is not a habeas petition. The complaint does not request that the District Court issue any writ. See *id.*, at 31–32. Rather, it seeks a declaration and an injunction that would provide relief [in the form of bond hearings] for both present and future class members, including future class members not yet detained. *Ibid.*").

It is due to these differences that the plaintiff brings two causes of action in his complaint, one seeking an injunction under the Administrative Procedure Act, and another seeking a non-core habeas writ to provide a bond hearing. That is also why the Court has venue under the legal custodian theory for his non-core habeas count.

the court "rejected the Government's argument that classwide declaratory relief was prohibited by § 1252(f)" as an alternative to injunctive relief. *Bautista*, 2025 WL 3288403, at *7 (citation omitted). And multiple courts of appeals have issued precedent holding that § 1252(f) prohibits class wide injunctive relief, but not class wide declaratory relief, implicitly recognizing that they are different types of relief. *Al Otro Lado* v. *Exec. Off. for Immigr. Rev.*, 120 F. 4th 606, 625 (CA9 2024) ("As the Government concedes, however, that argument is foreclosed by circuit precedent holding that § 1252(f)(1) does not 'bar classwide declaratory relief.' ") (citation omitted); *Brito* v. *Garland*, 22 F. 4th 240, 251 (CA1 2021) ("And while declaratory relief can sometimes have much the same practical effect as injunctive relief, it differs legally and materially."); *Make The Rd. New York* v. *Wolf*, 962 F. 3d 612, 635 (CADC 2020) ("It does not proscribe issuance of a declaratory judgment, which the Associations sought here, *see* J.A. 38–39."); *Alli* v. *Decker*, 650 F. 3d 1007, 1012 (CA3 2011) ("A closely adjacent provision, § 1252(e)(1)(A) . . . is compelling evidence that Congress knew how to preclude declaratory relief, but chose not to in § 1252(f)(1).").

Given how § 1252(f) functions, class relief in immigration cases subject to that limitation must be obtained via class wide declaratory relief. And where the government does not comply with that declaratory relief, individualized actions for injunctive, habeas, or other relief must be pursued by the class members in order to make the class wide declaratory relief effective. See *Brito*, 22 F. 4th, at 250 ("Of course, the inability to use a classwide injunction does not deprive the district courts of their other tools for fairly and efficiently managing similar **individual requests** for injunctive relief.") (emphasis added).

On that note, the government says nothing of the Eleventh Circuit cases cited by the petitioner noting that **claim preclusion** in the class action setting looks to the particular types of

relief sought in the class action case. For example, "[i]t is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action." *Fortner* v. *Thomas*, 983 F. 2d 1024, 1031 (CA11 1993) (citations and footnote omitted). Further, when a class member individually "seeks relief different from that requested by the class representatives," that class member's case "should not [be] dismissed." *Spears* v. *Johnson*, 859 F. 2d 853, 855 (CA11 1988), opinion vacated in part on reconsideration, 876 F.2d 1485 (CA11 1989). See also *Herron* v. *Beck*, 693 F. 2d 125, 127 (CA11 1982) ("First, although the class action in *Brown v. Beck v. Evans, supra,* did involve various conditions in the same jail, the class representatives sought only declaratory and injunctive relief, not damages. Thus, the appellant's claim for damages would not be barred by the class action.").

Second, claim preclusion is different from **issue preclusion**.[2] It is under the doctrine of issue preclusion that the government is bound by the *Bautista* orders. *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322, 331–33 (1979) (allowing use of non-mutual offensive collateral estoppel by plaintiffs in subsequent litigation).[3] To begin with, the fact that a federal court's order is not currently appealable does not mean that a party to a proceeding, including the government, can simply ignore the court's order. On top of that, the government invokes the first filed rule as a method to ignore the Eleventh Circuit's precedent about when a non-final order can give rise to issue preclusion in a second proceeding.

In this Circuit, non-final orders in a case, such as partial summary judgment orders, that

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[2] Acknowledging this distinction is not contradictory, as suggested by the government. See Return (D.E. 8, at 7 & n. 2.)

[3] But seeing that the plaintiff is a *Bautista* class member, his argument for offensive collateral estoppel would be a mutual one, not non-mutual.

were fully and fairly litigated, as occurred in the *Bautista* case,[4] are entitled to issue preclusion. *Christo* v. *Padgett*, 223 F. 3d 1324, 1339 (CA11 2000) ("It is widely recognized that the finality requirement is less stringent for issue preclusion **than for** claim preclusion.") (emphasis added); *id.*, at 1338–40 (applying issue preclusion to findings in an order on a motion to dismiss that was not a final judgment); *Dana* v. *E.S. Originals, Inc.*, 342 F. 3d 1320, 1325 (Fed. Cir. 2003) ("The *Christo* case makes clear (as does our decision in *RF Delaware*) that the Eleventh Circuit follows the more flexible approach employed by the Restatement of Judgments, which gives collateral estoppel effect to orders that do not constitute final, appealable judgments if they are 'sufficiently firm to be accorded conclusive effect.' ") (quoting *Christo,* 223 F. 3d, at 1339 n. 47); *id.*, at 1324 ("With regard to whether the party to be estopped had a full and fair opportunity to litigate and whether the partial summary judgment orders were sufficiently final to be accorded preclusive effect, this case is closer to *Christo* than to *RF Delaware*."). Further, individualized lawsuits can be brought by members of a class to obtain relief on claims which are based on issues that were previously decided in the class litigation. E. g., *Brown* v. *R.J. Reynolds Tobacco Co.*, 611 F. 3d 1324, 1326–29 (11th Cir. 2010) (describing *Engle* litigation).

The first filed rule is irrelevant here. The plaintiff here is not a named "class plaintiff" (D.E. 8, at 10) in the *Bautista* case, and he has never "admitt[ed]" (*id.*) to such a thing. And as described above, the plaintiff's case and the *Bautista* case do not "see[k] the identical injunctive and declaratory relief." (D.E. 8, at 9.) In fact, the law prohibits that, 8 U. S. C. § 1252(f), and what the plaintiff is doing is seeking individualized relief to give effect to the class wide declaratory relief from the *Bautista* court as contemplated by § 1252(f)'s purpose, see *Brito*, 22

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[4] The government has not contested that it received a full and fair hearing before the *Bautista* court.

F. 4th, at 250. Under such circumstances, there would be no occasion or possibility for this Court to "improperly infring[e] on the authority of a sister court of equal dignity." *Collegiate Licensing Co.* v. *Am. Cas. Co. of Reading, Pa.*, 713 F. 3d 71, 80 (CA11 2013). Additionally, the first filed rule is about "forum" issues, *Manuel* v. *Convergys Corp.*, 430 F. 3d 1132, 1135 (CA11 2005), not the preclusion of additional claims filed on an individualized basis by persons who happen to be members of a class action.

As a final point, to interpret the rules of civil procedure to preclude a habeas petition would cause an unconstitutional suspension of the writ in violation of Article I, § 9, cl. 2 of the Constitution. " All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States." *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 525 (2004) (citing U.S. Const., Art. I, § 9, cl. 2). "[I]t [is] uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U. S. 723, 779 (2008) (citation omitted); cf. *Lopez* v. *Hardin*, No. 2:25-CV-830-KCD-NPM, 2025 WL 3022245, at *3 (M.D. Fla. Oct. 29, 2025) ("Interpreting § 1252(g) to bar all detention-related claims—the effective result of Respondents' proposed reading—would raise serious constitutional concerns.").

II. As this Court has repeatedly held, *Matter of Yajure Hurtado* is wrong on the law, and exhaustion of remedies is not required to pursue habeas relief against it.

While the government has not argued that the plaintiff needs to exhaust his Count I claim under the Administrative Procedure Act, it has suggested that the plaintiff must exhaust his habeas claim by appealing to the Board of Immigration (BIA) which is the very same BIA that recently published *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025). That is wrong due to the futility of doing so. *Boffill* v. *Field Off. Dir.*, No. 25-CV-25179-BECERRA, 2025 WL 3246868,

at *4–*5 (S.D. Fla. Nov. 20, 2025) (collecting cases).

On the merits, as several Judges in this District have already held, the plaintiff and persons like him are not subject to mandatory detention under 8 U. S. C. § 1225(b)(2), and thus have a right to pursue the custody review processes afforded by § 1226 and its implementing regulations and case law. E. g., Order (D.E. 6) at *7, *Franco* v. *Att'y Gen.*, No. 25-25466-CV-WILLIAMS (S.D. Fla. Dec. 1, 2025) ("The IJ and Respondents' interpretation of the INA 'directly contravenes the statute, disregards decades of settled precedent,' and is erroneous.") (citations omitted); *id.*, at *11 n. 4 (noting "the continued onslaught of litigation being generated by Respondents' widespread illegal detention practices"); *id.*, at *7–*12 (collecting cases across the country); *Fernandez* v. *Ripa*, Order (D.E. 17) at *10–*16, 1:25-cv-24981-LEIBOWITZ (S.D. Fla. Nov. 25, 2025); *Ardon-Quiroz* v. *Assistant Field Off. Dir.*, No. 25-CV-25290-BECERRA, 2025 WL 3451645, at *5–*7 (S.D. Fla. Dec. 1, 2025); *Boffill* v. *Field Off. Dir.*, No. 25-CV-25179-BECERRA, 2025 WL 3246868, at *5–*7 (S.D. Fla. Nov. 20, 2025); *Puga* v. *Assistant Field Off. Dir., Krome N. Serv. Processing Ctr.*, No. 25-24535-CIV-ALTONAGA, 2025 WL 2938369, at *3–*5 (S.D. Fla. Oct. 15, 2025); *Merino* v. *Ripa*, No. 25-23845-CIV-MARTINEZ, 2025 WL 2941609, at *3 (S.D. Fla. Oct. 15, 2025); see also *id.*, at *4 (ruling that automatic stay regulations violate procedural due process). The government has made no argument to distinguish those cases. It simply resists the outcome of those cases, hoping to continue its "widespread illegal detention practices." Order (D.E. 6) at *11 n. 4, *Franco*, No. 25-25466-CV-WILLIAMS.

As for the government's attempt to disparage the petitioner due to his past criminal record (D.E. 8, at 2–3), that is all ultimately irrelevant. Given that the Florida definition of "cannabis" is categorically overbroad, the plaintiff is not removable based upon any sort of controlled substance related ground of removal. *Leger* v. *U. S. Att'y Gen.*, 101 F. 4th 1295, 1299 (CA11

2024); *Said* v. *U. S. Att'y Gen.*, 28 F. 4th 1328, 1333 (CA11 2022). The BIA has held multiple times that fleeing and eluding under Fla. Stat. § 316.1935 is not a crime of moral turpitude. *In re: Marcos Antonio Acosta Quirch*, 2017 WL 8785855 (BIA Dec. 1, 2017); *In re: A-A-*, AXXX XXX 632 (BIA Oct. 25, 2018) (available at: https://www.scribd.com/document/393702854/A-A-AXXX-XXX-632-BIA-Oct-25-2018?secret_password=kSfQ5zbrnovII8bY9x30). Affray under F. S. § 870.01 is essentially the common law offense of disturbing the peace by fighting in public, *C.M.* v. *State*, 234 So.3d 837, 839–40 (Fla. 2d DCA 2018), and such offenses do not involve moral turpitude, *In re: Wenston Emmanuel Fray*, 2019 WL 2464452, at *2–*3 (BIA Feb. 27, 2019). And obstruction by disguise under F. S. § 843.03 does not involve moral turpitude either because it does not have the knowing threat or use of deadly physical force as an element. *Matter of Logan*, 17 I. & N. Dec. 367, 368–69 (BIA 1980).

Regardless, the government has not suggested that the petitioner's criminal history is an impediment to his having a bond hearing under 8 U. S. C. § 1226(a), and has thus forfeited any such claim. See *United States* v. *Sineneng-Smith*, 590 U. S. 371, 375 (2020) ("[I]n both civil and criminal cases, in the first instance and on appeal . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."); *id.*, at 376 ("In short, Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.") (cleaned up).

III. The government has admitted to unlawfully arresting the petitioner.

The government agrees that, "[o]n November 10, 2025, an Immigration Judge granted the Petitioner's motion to reopen the reopen the removal proceedings." (D.E. 8, at 3.) And they admit that, "[o]n November 16, 2025, during a check in, ICE ERO **revoked Petitioner's OSUP**,

and he was taken into custody." (*Id.*) By doing so, the government has admitted that the petitioner's arrest was completely unlawful.

Immigration detention is governed by various provisions. Detention under 8 U. S. C. § 1226(a), known as pre-final order detention, is authorized "pending a decision on whether the alien is to be removed from the United States." In contrast, final order detention is governed by § 1231 for "when an alien is ordered removed." § 1231(a)(1)(A). Detention under this provision is only allowed when there is a removal order that is administratively final. See *Farah* v. *U. S. Att'y Gen.*, 12 F. 4th 1312, 1331 (CA11 2021). It is under these provision were an OSUP or order of supervision is authorized. § 1231(a)(3).

Without the existence of an order of removal, arrest and custody under an order of supervision is unlawful:

> She sought a writ of habeas corpus and declaratory and injunctive relief under 28 U.S.C. § 2241, arguing that the government's ongoing supervision and planned removal subjected her to unlawful "custody." In particular, she contended that the 1995 order was no longer operative because she had validly self-executed it by voluntarily departing the United States before its issuance.

Romero v. *Sec'y, U. S. Dep't of Homeland Sec.*, 20 F. 4th 1374, 1378 (CA11 2021); *id.*, at 1380 n. 4 ("Here, Romero seeks release from her supervision conditions and planned deportation—precisely the type of relief that a writ of habeas corpus is meant to provide.") (citation omitted); *id.*, at 1380 ("Although the order in *Madu* never came into existence, while the order here—on Romero's theory—came into and then passed out of existence, both petitioners make the same basic argument: An operative removal order does not exist."); *id.* ("Accordingly, if Romero validly self-executed that order by voluntarily departing in 1995, the government must now seek its reinstatement as a prerequisite to her deportation."). See also 8 CFR §§ 241.5(a) ("An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision."), 241.4(a)(1)–

(4) ("the provisions of this section apply to . . . alien[s] ordered removed").

The grant of a motion to reopen nullifies the existence of a removal order. *Contreras-Bocanegra* v. *Holder*, 678 F. 3d 811, 818–19 (CA10 2012) (en banc) ("When the Board grants a motion to reopen, this action vacates the underlying removal order and restores the noncitizen to her prior status.") (citing *Nken v. Holder,* 556 U. S. 418, 429 n. 1 (2009)). Thus, when the government arrested the petitioner, there was no order of removal in effect, and thus supervision under 8 U. S. C. § 1231 and its implementing regulation was no longer lawful. The supervision was simply void at the time of the petitioner's arrest. Thus, there was nothing for the government to revoke. The government claims its arrest authority from the revocation of the petitioner's supervision, but there was no supervision to revoke. Therefore, the arrest was unlawful.

Under such circumstances, the Court should order the petitioner's outright release right now, without the need for a bond hearing. 28 U. S. C. § 2243 ("The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."); *Hensley* v. *Mun. Ct., San Jose Milpitas Jud. Dist., Santa Clara Cnty., California*, 411 U. S. 345, 349–50 (1973) ("habeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes") (cleaned up).

Alternatively, the Court should order a bond hearing for the petitioner.

Dated: December 15, 2025

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