UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Herberth Nahum Flores Berrios
Petitioner,

v.

Kristi Noem, *et al*.,

Respondents.

Case No. 4:25-cv-06043

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO THE ORDER TO SHOW CAUSE, TO THE PETITION OF WRIT OF HABEAS CORPUS, AND OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND SUMMARY JUDGMENT

INTRODUCTION

Petitioner Herberth Nahum Flores Berrios hereby submits this Reply Brief in response to Respondent's Response to the order to show cause, to the Petition for Writ of Habeas Corpus, and opposition to Respondent's motion to dismiss and for summary judgment [Docket No. 9].

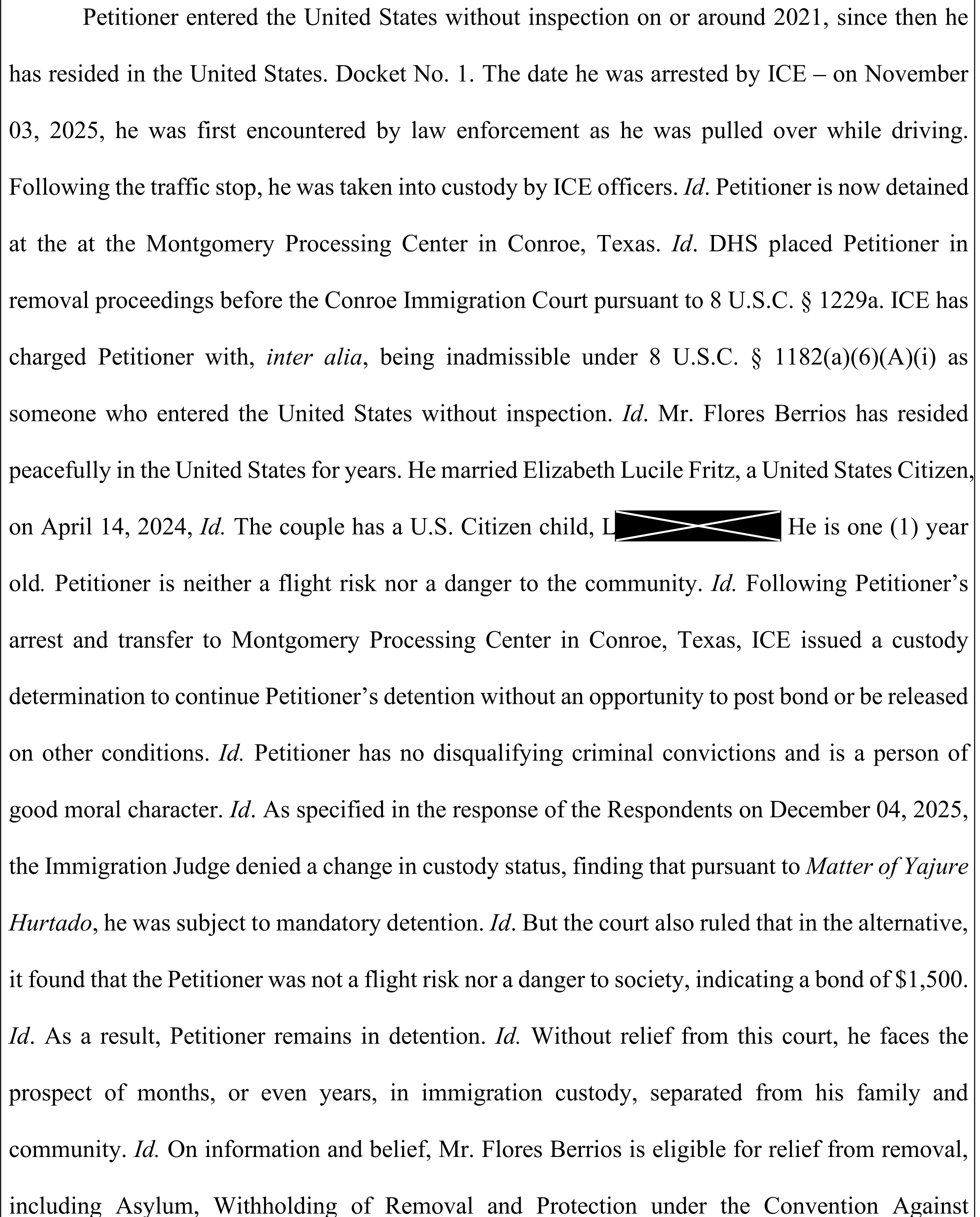
Petitioner replies to the issues and arguments made by the Respondents. The absence of any rebuttal is not, however, a waiver or abandonment of any claim or argument made previously. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus, the motion for issuance order to show cause and on the arguments presented in his emergency motion for temporary restraining order and/or preliminary injunction relief.

Petitioner opposes to Respondent's motion to dismiss and motion for summary judgment because a genuine dispute of material fact exists, and the evidence is such that a reasonable jury could return a verdict in favor to the Petitioner, the nonmoving party. *Rogers v. Bromac Title Servs., L.L.C.*, 755 F.3d 347,350 (5th Cir. 2014) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

First, Respondents move for summary judgment, arguing that 1) Petitioner failed to exhaust his administrative remedies; (2) Petitioner is subject to mandatory detention under 8 U.S.C. 1225(b)(2) and (3) that Bautista class action ruling is not binding. However, Petitioner disagrees. This Court has recently considered and rejected these arguments in several cases presenting the same legal issue. Significantly, in *Lopez-Tipaz v. Noem, et al*., 4:25-cv-4905 (S.D. Tex. Nov. 25, 2025); *Martinez Mendez v. Noem, et al*., 4:25-cv-4981 (S.D. Tex. Nov.25, 2025); *Gonzalez Osorio v. Noem, et al*., 4:25-cv-06127 (S.D. Tex. Dec. 29, 2025). In these cases, among others the Court concluded that the petitioners were unlawfully detained and entitled to habeas relief. *See Lopez-*

Tipaz, 4:25-cv-4905, at 6-7; *Martinez Mendez*, 4:25-cv-4981, at 7; *Gonzalez Osorio v. Noem, et al*., 4:25-cv-06127. Equally important, in *Miranda Silva v. Noem*, et al., 4:25-cv-05784 (S.D. Tex. Dec.15, 2025) this court noted that a district court in the Central District of California certified a class of petitioners similarly situated to *Miranda Silva* – people like Petitioner and found no reason to depart from its prior decisions or the decisions. In *Miranda Silva* this court enforced the class-action ruling that § 1226(a), not § 1226(b)(2) applies to people like Petitioner. The court's reasoning applies with equal force here.

Equally important exhaustion of administrative remedies does not apply whereas here, a Petition challenges only the agency action collateral to removal proceedings, such as release on non-monetary conditions and/or bond. 8 U.S.C. § 1252(d)(1) applies only to challenges to a "final order of removal." Therefore, when a noncitizen files a habeas petition challenging detention, bond, custody, or other collateral issues, the exhaustion requirement does not apply. See *Garza-Garcia v. Moore, 539* F. Supp. 2d 899, 904 (S.D. Tex. 2007); *Roy v. Ashcroft,* 389 F.3d 132, 137 (5th Cir. 2004). Exhaustion is not required where the petitioner challenges the legality of detention itself, a matter the agency lacks authority to remedy. *Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). Even if administrative exhaustion was required it would be futile. Decisions of the Board of Immigration Appeals (BIA) are binding on immigration judges, and *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025) thus precludes an IJ from finding jurisdiction over noncitizens like Petitioner to hold a custody redetermination hearing and/or to grant release on bond. Pursuant to *Yajure Hurtado* a remedy of an appeal taken to the BIA from the determination would also be futile. Finally, exhaustion of administrative remedies would be futile in this case because the BIA has no jurisdiction to adjudicate Constitutional issues raised here. *See Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976). Therefore, this court should grant Petitioner's § 2241 petition.



FACTUAL AND PROCEDURAL BACKGROUND

Petitioner entered the United States without inspection on or around 2021, since then he has resided in the United States. Docket No. 1. The date he was arrested by ICE – on November 03, 2025, he was first encountered by law enforcement as he was pulled over while driving. Following the traffic stop, he was taken into custody by ICE officers. *Id*. Petitioner is now detained at the at the Montgomery Processing Center in Conroe, Texas. *Id*. DHS placed Petitioner in removal proceedings before the Conroe Immigration Court pursuant to 8 U.S.C. § 1229a. ICE has charged Petitioner with, *inter alia*, being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) as someone who entered the United States without inspection. *Id*. Mr. Flores Berrios has resided peacefully in the United States for years. He married Elizabeth Lucile Fritz, a United States Citizen, on April 14, 2024, *Id.* The couple has a U.S. Citizen child, L He is one (1) year old. Petitioner is neither a flight risk nor a danger to the community. *Id.* Following Petitioner's arrest and transfer to Montgomery Processing Center in Conroe, Texas, ICE issued a custody determination to continue Petitioner's detention without an opportunity to post bond or be released on other conditions. *Id.* Petitioner has no disqualifying criminal convictions and is a person of good moral character. *Id*. As specified in the response of the Respondents on December 04, 2025, the Immigration Judge denied a change in custody status, finding that pursuant to *Matter of Yajure Hurtado*, he was subject to mandatory detention. *Id*. But the court also ruled that in the alternative, it found that the Petitioner was not a flight risk nor a danger to society, indicating a bond of $1,500. *Id*. As a result, Petitioner remains in detention. *Id.* Without relief from this court, he faces the prospect of months, or even years, in immigration custody, separated from his family and community. *Id.* On information and belief, Mr. Flores Berrios is eligible for relief from removal, including Asylum, Withholding of Removal and Protection under the Convention Against

Torture under INA § 204 codified at 8 U.S.C. §1158 and INA § 241(b)(3) codified at 8 U.S.C. §1231(b)(3).

APPLICABLE LAW

Petitioner incorporates by reference the legal analysis and authorities contained in the Habeas Petition, the Motion for Issuance Order to Show Cause and the Memorandum of Law in Support of the Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction, and the Reply filed contemporaneously herewith shall govern and control the issues raised in connection with this matter. Petitioner argues that the Government is misinterpreting the law, is not applying the correct law in this case. The cases on which Respondents rely do not control the outcome here.

ARGUMENT

Petitioner argues that the Government acknowledges that this Court has rejected its arguments concerning the applicability of § 1225(b)(2). Petitioner respectfully request to consider prior rulings from its own Courts and other Courts where it has recognized that 8 U.S.C. § 1226(a) is applicable to people like Petitioner and not § 1225(b)(2) and therefore has granted Habeas Petitions.

EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO THE FILING OF THE HABES PETITION IS NOT REQUIRED

Petitioners argue that this Court should not dismiss the Habeas Petition or grant the motion for summary judgment because exhaustion of administrative remedies is not required. Even if it was required it would be futile.

First, exhaustion of remedies may be excused when Constitutional claims are involved-administrative review would be futile as the BIA does not have jurisdiction to adjudicate constitutional issues raised here. *See Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976) (A

constitutional challenge to administrative action does not require exhaustion.); *Ramirez Osorio v. INS*, 745 F.2d 937, 939 (5th Cir. 1984) (holding that "exhaustion is not required when administrative remedies are inadequate").

Second, exhaustion does not apply, whereas here, a petition challenges only the agency action collateral to removal proceedings, such as bond. 8 U.S.C. § 1252(d)(1) applies only to challenges to a "final order of removal." Therefore, when a noncitizen files a habeas petition challenging detention, bond, custody, or other collateral issues, the exhaustion requirement does not apply. A challenge to immigration bond proceedings is not a challenge to a final order of removal, and therefore §1252(d)(1) does not require exhaustion. See *Garza-Garcia v. Moore, 539* F. Supp. 2d 899, 904 (S.D. Tex. 2007); *Roy v. Ashcroft,* 389 F.3d 132, 137 (5th Cir. 2004).

Third, Exhaustion is not required where the petitioner challenges the legality of detention itself, a matter the agency lacks authority to remedy. *Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004).

Fourth, even if administrative exhaustion was required, it would be futile. Decisions of the Board of Immigration Appeals (BIA) are binding on immigration judges, and as previously stipulated by the Petitioner and the Respondents on December 04, 2025, the Immigration Judge denied a change in custody status pursuant to *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025). A remedy of an appeal taken to the BIA from the determination would also be futile - pursuant to *Yajure Hurtado*.

Therefore, judicial intervention enjoining Respondents from preventing Petitioner from having a bond hearing pursuant to the holding in *Yajure Hurtado* is necessary to enable petitioner to avail himself of his administrative remedies. Accordingly, the law does not require exhaustion and even if it did it would be futile.

PETITONER IS NOT SUBJECT TO ANY DETENTION AT ALL – IF ANY NOT MANDATORY DETENTION

Petitioner argues that the Habeas Petition should be granted under the plain language of the provision 8 U.S.C. § 1226(a).

Petitioner is not subject to mandatory detention under 8 U.S.C. § 1225(b)(2); in fact, he is not subject to any detention at all - if any, it would be under 8 U.S.C. § 1226(a). Respondent's novel interpretation of the civil immigration detention statutes, as laid out on July 8, 2025, ICE Memorandum (ICE Memo), and the BIA precedential decision, *Matter of Yajure-Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), contravenes the plain language and statutory framework of the Immigration and Nationality Act (INA). As the Supreme Court explained in *Jennings v. Rodriguez*, § 1226(a)—and its authority to seek release on bond—governs the detention of those, like Plaintiffs, who are "already in the country" and are detained "pending the outcome of removal proceedings." 583 U.S. 281, 289 (2018).

By contrast, § 1225(b)(2)'s mandatory detention scheme applies "at the Nation's borders and ports of entry" primarily to noncitizens "seeking to enter the country." *Id*. at 287. DHS cannot retroactively convert an individual in § 240 proceedings into a § 1225(b) detainee because § 1225(b) applies only at the time of "inspection and admission," not years later when placed in removal proceedings.

Courts across the country, more than two dozen to date, have uniformly rejected Defendants' radical reinterpretation of the statute. Including the recent decisions by this Court; i.e. *See Buenrostro-Mendez v. Bondi,* No. 4:25-cv-3726, 2025 WL 2886346 (S.D. Tex. Nov.06, 2025); *Padron Covarrubias v. Vergara*, No. 5:25-cv-00112, 2025 WL 2950097 (S.D. Tex. Oct. 8, 2025); *Mejia Juarez v. Bondi*, No. 4:25cv-3937 (S.D. Tex. Oct. 27,2025); *Cruz Gutierrez v. Thompson*,

No. 4:25-cv-04965, 2025 WL 3187521 (S.D. Tex. Nov.14, 2025); *Cardenas Perez v. Noem*, No. 1:25-cv-181, 2025 (S.D. Tex. Nov. 20, 2025); *Espinoza Andres v. Noem*, No. H-25-cv-5128, 2025 WL 3458893 (S.D. Tex. Dec. 2, 2025); *Cabrera-Hernandez v. Bondi*, No.25-cv-197 (S.D. Tex. Dec 2, 2025); *Shi v. Lyons*, No. 1:25-cv-274, WL 3637288 (S.D. Tex. Dec. 12, 2025), *Hernandez Hervert v. Bondi,* No. 1:25-cv-01763-RP, 2025 (W.D. Tex Nov. 14, 2025)*; Lopez Baltazar v. Vasquez*, No. 5:25-cv-00160 (W.D. Tex. Oct. 14, 2025.); *Rodriguez Cortina v. De Anda-Ybarra*, No. 25-cv-523, 2025 WL 3218682 (W.D. Tex. Nov. 18, 2025); *Dominguez Vega v. Thompson*, 5:25-cv-01439, (W.D. Tex. Nov. 19, 2025); *Galdamez Martinez v. Noem*, 25-cv-1373, 2025 WL 3471575 (W.D. Tex. Nov. 26, 2025).

THIS COURT SHOULD ENFORCE BAUTISTA

In *Miranda Silva v. Noem*, et al., 4:25-cv-05784 (S.D. Tex. Dec.15, 2025) this court noted that a district court in the Central District of California certified a class of petitioners similarly situated to people like Petitioner and found no reason to depart from its prior decisions or the decisions. In *Miranda Silva,* this court enforced the class-action ruling that § 1226(a), not § 1226(b)(2), applies to people like Petitioner. The court's reasoning in *Miranda Silva* applies with equal force here. As such, by virtue of the final judgment issued on December 18, 2025, in *Maldonado Bautista v. Santacruz* this court should determine that Petitioner is not subject to mandatory detention under 8 U.S.C. § 1225(b)(2) in fact he is not subject to any detention at all - if any it would be under 8 U.S.C. § 1226(a).

PETITIONER ASSERTS EVERY CLAIM

Respondents have deprived Mr. Flores Berrios of his liberty interest, protected by the Fifth Amendment, by detaining him since November 03, 2025. Mr. Flores Berrios' detention is improper because he shouldn't be detained at all, and the government is depriving him of a bond

hearing. A hearing is, if anything, a right to be heard, and here the immigration judge is unable to even consider whether he is even eligible for a bond, despite the law or entertaining counsel's arguments. Like the accused in criminal cases, habeas is proper. *See Moore v. Dempsey*, 261 U.S. 86 (1923); *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Burns v. Wilson*, 346 U.S. 137, 154 (1953). Consistent with this court prior decisions, this court should deny Respondent's motion for summary judgment and motion to dismiss. Petitioners urge this Court to apply its prior ruling favorable to Petitioner, rulings of multiple Circuits and other supporting authorities.

CONCLUSION

For these reasons, and the reasons stated in the Petition, the Court should GRANT the Petition for Writ of Habeas Corpus and order Petitioner's immediate release or, in the alternative, release on the bond previously granted by the Immigration Judge of $1,500.

DATED 14th of January 2026

Respectfully submitted,

/s/ Xavier Vicente Chavez
XAVIER VICENTE CHAVEZ, SDTX #1601193
State Bar # 24069495
xavier@xavierlawfirm.com
Xavier Law Firm
25775 Oak Ridge Dr. Suite 120
The Woodlands, TX 77380
(281) 296-3741
Counsel for Petitioner

/s/ Elva Lorena Gaona Krewson
ELVA GAONA KREWSON, SDTX #3947618
State Bar # 24140092
xavier@xavierlawfirm.com

/s/ Nelly Carolina Sanchez Estrada
Nelly Sanchez Estrada, SDTX #3947576

State Bar # 24135331
xavier@xavierlawfirm.com

Counsel for Petitioner

VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I represent Petitioner, Herberth Nahum Flores Berrios and submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing Reply are true and correct to the best of my knowledge.

Dated this 12th day of January 2026.

/s/ Xavier Vicente Chavez
Counsel for Petitioner
xavier@xavierlawfirm.com
Xavier Law Firm
25775 Oak Ridge Dr. Suite 120
The Woodlands, TX 77380
(281) 296-3741(281) 296-3741

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Instrument was sent via ECF on January 12, 2026, to all counsel of record.

/s/ Xavier Vicente Chavez
Counsel for Petitioner
xavier@xavierlawfirm.com
Xavier Law Firm
25775 Oak Ridge Dr. Suite 120
The Woodlands, TX 77380
(281) 296-3741(281) 296-3741