


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

DAVID ABGARIAN ()
Petitioner,)
v.)
KRISTI NOEM, Secretary, U.S. Department of)
Homeland Security; MIGUEL VERGARA,)
Harlingen Field Office Director, Immigration)
and Customs Enforcement,)
Respondents.)

Case No. 25-cv-334

Hon. Fernando Rodriguez Jr.

**REPLY TO RESPONDENTS’ OPPOSITION TO PETITIONER’S PETITION OF
HABEAS CORPUS AND MOTION FOR PRELIMINARY INJUNCTION**

The Petitioner, DAVID ABGARIAN, by and through his own and proper person and through his attorneys, KRIEZELMAN BURTON & ASSOCIATES, LLC, files this memorandum in accordance with the Court’s December 18, 2025 order, and in support thereof, states as follows:

I. Exhaustion is not required and should be excused as seeking bond redetermination before the immigration court in the first instance would be futile.

Exhaustion is not required, as suggested by Respondents, and requesting a bond hearing before an Immigration Judge would be futile at this juncture. The Immigration and Nationality Act mandates exhaustion in order to challenge “final order[s] of removal.” 8 U.S.C. § 1252(d)(1). However, this provision does not cover challenges to preliminary custody or bond determinations, which are quite distinct from “final order[s] of removal.” *See Gornicka v. INS*, 681 F.2d 501, 505 (7th Cir. 1982). (“[I]t is clear bond hearings are separate and apart from deportations hearings.... A bond determination is not a final order of deportation ... and does not effect [sic] the deportation proceeding.”).

Congress does require exhaustion for certain types of habeas petitions, but not for those petitions, such as Petitioner's, brought under 28 U.S.C. § 2241. *See James v. Walsh*, 308 F.3d 162, 167 (2d Cir.2002) ("Section 2254(b)(1) requires state prisoners to exhaust all available state court remedies before filing a Section 2254 petition, whereas Section 2241 contains no such exhaustion requirement.").

Further, the Fifth Circuit has previously held that a due process challenge generally does not require exhaustion since the Board of Immigration Appeals (BIA) lacks authority to review constitutional challenges. *See Roy v. Ashcroft*, 389 F.3d 132, 137 (5th Cir. 2004). Only due process claims that concern a "procedural error correctable by the BIA" are still subject to the exhaustion requirement. *Id.* First, the issues raised in Petitioner's case are purely legal in nature and do not involve any procedural error. Second, because Petitioner's petition includes a due process claim, the administrative scheme (appeal to the BIA) is futile since the BIA lacks authority to review constitutional claims. Lastly, administrative review is not likely to change Respondents' position that Section 1225(b)(2)(A) applies in this case. DHS's policy makes clear that mandatory detention is the position to be taken, and this is being done in conjunction with the Department of Justice.

Here, requiring exhaustion would be futile due to the Board of Immigration Appeal's September 5th decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), which proclaimed for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is no longer eligible for release on bond. The Board's decision, in contravention of decades of immigration law, precedent by the Supreme Court, and Executive Office of Immigration Review policies and procedures, takes a new reading of INA § 235(b)(2), 8 U.S.C. § 1225(b)(2), which requires mandatory detention of "Applicants for Admission," to

include those present in the United States without having been inspected and admitted and who are later apprehended.

Prior to the Board's decision, noncitizens present in the United States without having been inspected and admitted and who are later apprehended are subject to detention under INA § 236(a), 8 U.S.C. § 1226(a). Noncitizens detained under this section are not subject to mandatory detention and may be released on bond or on their own recognizance. Therefore, requiring Petitioner to request a bond redetermination with the immigration court in the first instance would be futile as the bond would undoubtedly be denied in light of *Matter of Yajure Hurtado*. It would prejudice Petitioner by prolonging his detention to request a bond that will ultimately be denied.

Yet even if this Court were to agree that prudential exhaustion should apply, waiver of the exhaustion requirement is warranted here because Petitioner is likely to experience irreparable harm if he is unable to seek habeas relief until an Immigration Judge denies bond, and then the BIA decides an appeal on the denied bond. *Sampiao v. Hyde, et al.* Case No. 1:25-cv-11981-JEK, at *11-12 (D. Mass. Sept. 9, 2025); *Romero v. Hyde*, Case No. No. 25-cv-11631-BEM, 2025 WL 2403827, at *7 (D. Mass. Aug. 19, 2025) (finding that loss of liberty is a form of irreparable harm and citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). Waiver is appropriate when the interests of the individual weigh heavily against requiring administrative exhaustion, or exhaustion would be futile and unable to afford the petitioner the relief he seeks. *See Roy*, 389 F.3d at 137; *Buenrostro-Mendez v. Bondi*, No. H-25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025) (exhaustion was not statutorily required under the circumstances and the issue of statutory interpretation belongs in the province of the courts); *Lopez Benitez v. Francis*, 795 F. Supp. 3d 475, 496 (S.D.N.Y. 2025)

(exhaustion is not statutorily required and was excused given that available remedies provided no genuine opportunity for adequate relief and the petitioner raised a substantial constitutional question); *Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828, at *6 (W.D. Tex. Sept. 22, 2025).

The average processing time for bond appeals exceeded 200 days (more than 6 months) in 2024. *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1248 (W.D. Wash. 2025). There is no requirement for the BIA to act promptly or decide the appeal quicker than any other case. If the BIA were to act promptly, it would be unlikely to decide Petitioner's appeal anytime soon, and if it processes the appeal at the same rate as last year's appeals, the appeal may not be resolved until summer 2026. As such, Petitioner is likely to endure several additional months of detention. Such a prolonged loss of liberty would, in these circumstances, constitute irreparable harm. *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986).

Additionally, requiring Petitioner to wait six months in detention to reach a decision on whether he can be released on bond would be futile. He is scheduled for an Individual Hearing on January 30, 2026 – less than six months from now. As such, exhaustion would not effectively afford him the relief he seeks, given that a removal determination would likely come before the BIA's determination of whether a bond is appropriate in this case.

Therefore, given the constitutional claims raised by Petitioner, this Court should find that exhaustion is not required according to the Fifth Circuit standards. If it does find the exhaustion applies, then the Court should waive exhaustion since it would be futile and would not provide Petitioner with the relief he requests in a timely manner. *Buenrostro-Mendez v. Bondi*, No. H-25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025).

II. Petitioner is detained under 8 U.S.C. § 1226 and not under 8 U.S.C. § 1225.

By way of review, 8 U.S.C. § 1225(b)(2), INA § 235(b)(2), requires mandatory detention of “Applicants for Admission.” Conversely, noncitizens detained under 8 U.S.C. § 1226(a), INA § 236(a), are not subject to mandatory detention and may be released on bond or on their own recognizance. The Board of Immigration Appeals’ decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), determined for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is subject to detention under 8 U.S.C. § 1225(b)(2) and therefore subject to mandatory detention and no longer eligible for release on bond. The decision strips the immigration judge’s authority to hear a bond request for any noncitizen present in the United States without having been inspected and admitted and who are later apprehended by DHS.

Respondents argue in their response that Petitioner is properly detained under 8 U.S.C. § 1225(b)(2) and not under 8 U.S.C. § 1226(a). This argument fails for several reasons.

First, prior to and since the decision in *Matter of Yajure Hurtado*, other judges within the district courts of the Fifth Circuit, have similarly rejected Respondents’ interpretation and have subsequently granted relief to habeas petitioners. *See, e.g., Buenrostro-Mendez v. Bondi*, No. 25-3726, 2025 WL 2886346 (S.D. Tex. Oct. 7, 2025); *Covarrubias v. Vergara*, No. 25-112, 2025 WL 2950097 (S.D. Tex. Oct. 8, 2025); *Gutierrez v. Thompson*, No. 25-4695, 2025 WL 3187521 (S.D. Tex. Nov. 14, 2025); *Espinoza Andres v. Noem*, No. 25-5128, 2025 WL 3458893 (S.D. Tex. Dec. 2, 2025); *Perez v. Frink*, No. 25-5357, 2025 WL 3626347 (S.D. Tex. Dec. 12, 2025); *Arenas Santoyo v. Dickey*, No. 25-5555, 2025 WL 3724557 (S.D. Tex. Dec. 23, 2025); *Fernandez v. Dickey*, No. 25-6088, 2026 WL 74184 (S.D. Tex. Jan. 9, 2026); *Garcia Pescador v. Dickey*, No. 25-6070, 2026 WL 74188 (S.D. Tex. Jan. 9, 2026); *Rodriguez Moreno v. Warden, Houston Cont. Det. Facility*, No. 25-6018, 2026 WL 74127 (S.D. Tex. Jan. 9, 2026).

District courts in the First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit, and Eleventh Circuit have similarly rejected Respondents' interpretation and granted habeas relief. Petitioner provided a sampling of those cases in his Petition. ECF No. 1-1.

Further, this Court is not required, and should not, give deference to *Matter of Yajure Hurtado*. In *Loper Bright*, the Supreme Court was clear that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” and indeed “may not defer to an agency interpretation of the law simply because a statute is ambiguous.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Rather, this Court can simply look to the Supreme Court’s own words in *Jennings* that held that for decades, § 1225 has applied only to noncitizens “seeking admission into the country”—i.e., new arrivals, and that this contrasts with § 1226, which applies to noncitizens “already in the country.” *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). The Court in *Jennings* was abundantly clear about these interpretations. Petitioner in this case is not a new arrival and had been in the United States for over four years at the time of his detention.

The text of sections 1225 and 1226, together with binding Supreme Court precedent interpreting those provisions and the numerous district court decisions confirm that he is subject to section 1226(a)’s discretionary detention scheme.

III. Petitioner’s continued detention without a bond hearing is a Fifth Amendment violation.

Petitioner’s deprivation of his liberty by being deprived of the opportunity to request a bond hearing is a violation of the Due Process Clause of the Fifth Amendment. Petitioner has not been found to be a danger to the community and Respondents do not allege that detention is to ensure Petitioner’s appearance during removal proceedings. *See Zadvydas v. Davis*, 533 U.S.

678, 690 (2001). Respondents have not put forth a credible argument that Petitioner could not be safely released to his community and family.

The Fifth Circuit utilizes the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), regarding the adequacy of process, applies in the context of immigration detention. Thus, under *Mathews*, this Court must consider the following three factors: “(1) the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, (3) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Gutierrez v. Thompson*, No. 25-4695, 2025 WL 3187521 (S.D. Tex. Nov. 14, 2025) (citing *Mathews* at 335).

In regard to the first *Mathews* factor, Petitioner has a significant private interest in avoiding detention, one of the “most elemental of liberty interests.” *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Petitioner is married to a U.S. veteran. *See* Doc. 1, ¶ 3. Petitioner is now detained and “experiencing [many of] the deprivations of incarceration, including loss of contacts with friends and family, loss of income earning...lack of privacy, and, most fundamentally, the lack of freedom of movement.” *See Günaydin v. Trump*, No. 25-cv-01151, 2025 WL 1459154, at *7 (D. Minn. May 21, 2025).

As to the second *Mathews* factor, a risk of erroneous deprivation is minimized through a bond hearing, where an Immigration Judge can determine whether Petitioner is a flight risk or a danger to the community. Petitioner has been in the United States since 2021 and is married to a U.S. veteran, factors that would minimize his flight risk. *See* Doc. 1, ¶ 3.

Finally, as to the third factor, while Respondents do have “a legitimate interest in ensuring noncitizens’ appearance at removal proceedings and preventing harms to the

community,” here, Respondents have not established an interest in regards to detaining Petitioner who may well convince “a neutral adjudicator, following a hearing and assessment of the evidence, that his ongoing detention is not warranted.” *Sampiao v. Hyde*, No. 1:25-cv-11981-JEK, 2025 WL 2607924, at *12 (D. Mass. Sept. 9, 2025).

As such, Petitioner’s current detention under the framework of Section 1225(b)(2)(A) violates Petitioner’s Fifth Amendment Due Process rights.

IV. The *Maldonado Bautista* decision is binding on Respondents.

Respondents are obligated to apply the law to all class members, as determined in the binding, final judgment issued in *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, --- F. Supp. 3d ----, 2025 WL 3288403, at *9 (C.D. Cal. Nov. 25, 2025). The Executive Office for Immigration Review, Kristi Noem, Secretary of the U.S. Department of Homeland Security, and the Acting Director of Immigration and Customs Enforcement are Defendants in *Maldonado Bautista*, and are thus bound by the ruling there, which has the full "force and effect of a final judgment." 28 U.S.C. § 2201(a).

It is a “basic proposition that all orders and judgments of courts must be complied with promptly,” *Maness v. Meyers*, 419 U.S. 449, 458 (1975), and thus, in "suits against government officials and departments, [courts] assume that they will comply with declaratory judgments.” *United Aeronautical Corp. v. United States Air Force*, 80 F.4th 1017, 1031 (9th Cir. 2023). This is because declaratory judgments like the one in *Maldonado Bautista* have "the same effect as an injunction in fixing the parties’ legal entitlements." *Florida ex rel. Bondi v. U.S. Dep't of Health & Hum. Servs.*, 780 F. Supp. 2d 1307, 1316 (N.D. Fla. 2011). This understanding of declaratory judgments—and thus this court's obligation to comply with the declaratory judgment in *Maldonado Bautista*—is consistent with the decisions of many courts. *See, e.g., Sanchez-*

Espinoza v. Reagan, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) (Scalia, J.) (“[T]he discretionary relief of declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as injunction or mandamus, since it must be presumed that federal officers will adhere to the law as declared by the court.”), abrogated on other grounds by, *Schieber v. United States*, 77 F.4th 806 (D.C. Cir. 2023), cert. denied, 144 S. Ct. 688 (2024); *Smith v. Reagan*, 844 F.2d 195, 200 (4th Cir. 1988) (describing declaratory relief as “the functional equivalent of a writ of mandamus”).

While a notice of appeal has been filed, no stay on the declaratory judgment has been issued. *Pub. Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998) (“The government’s decision to appeal this Court’s ruling does not affect the validity of the declaratory judgment unless and until the judgment is reversed on appeal or the government seeks and is granted a stay pending appeal.”), rev’d on other grounds, 184 F.3d 900 (D.C. Cir. 1999). Thus, Respondents are bound by *Maldonado Bautista*.

V. Injunctive relief is appropriate in this matter.

Petitioner’s detention without a bond hearing is unlawful and constitutes irreparable harm. To reiterate, the U.S. Supreme Court has recognized that avoiding detention is one of the “most elemental of liberty interests.” *Hamdi*, 542 U.S. at 529. Petitioner has been detained for approximately 3 ½ months. His detention alone qualifies irreparable harm. Further, his sudden detention keeps Petitioner separated over 37 hours away from his U.S. veteran and citizen spouse. Petitioner is suffering emotional and financial irreparable harm due to his separation from his spouse and due to not being able to work. Thus, injunctive relief should be granted due to the irreparable harm Petitioner is facing due to his unlawful detention.

VI. The balance of equities and public interest weigh in favor of Petitioner.

Respondents fail to articulate the exact equities and public interest that requires Petitioner's detention. While certainly the U.S. Government has an interest in enforcing its laws, the U.S. Supreme Court has found that subjecting noncitizens to indefinite detention is not in the best interests of the Government and violates the noncitizen's liberty interests. *Zadvydas v. Davis*, 533 U.S. 678, 692-696 (2001). Petitioner was duly employed as a truck driver and now sits in detention due to a sudden change in internal policy. On the U.S. Immigration and Customs Enforcement website, the Government states that the cost of a detaining a single person costs approximately \$152 per day of taxpayer money.¹ Instead of contributing to the U.S. economy, he remains in detention despite having no criminal record and complying with immigration laws to the best of his ability. Therefore, the balance of equities and public interest favor Petitioner.

CONCLUSION

For the foregoing reasons, this Court should order Petitioner's release or in the alternative, order Respondents to schedule a bond hearing for Petitioner's removal proceedings within 5 days of the order and accept jurisdiction to issue a bond order.

Dated: January 16, 2026

Respectfully Submitted,

/s/ Maya A. Flores

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¹ <https://www.ice.gov/features/atd>

CERTIFICATE OF SERVICE

I, Maya A. Flores, do hereby certify that on January 16, 2026, a copy of the foregoing was served on counsel for Respondents via CM/ECF email notification.

By: /s/Maya A. Flores
MAYA A. FLORES, ESQ.