

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JIANGFEI GU (	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 3:26-cv-0036
KRISTI NOEM, Secretary, U.S. Department of	)	
Homeland Security; ROBERT LYNCH, Field	)	
Office Director, Cleveland Field Office,	)	
Immigration and Customs Enforcement,	)	
DENNIS SULLIVAN, Executive Director of	)	
Corrections Center of Northwest Ohio,	)	
	)	
Respondents.	)	

RESPONDENT'S BRIEF IN RESPONSE TO FEBRUARY 12, 2026 COURT ORDER

Petitioner submits this brief, as requested by the Court on February 12, 2026. Petitioner is unable to obtain transcripts from the bond hearing that took place on October 28, 2025, as Petitioner's counsel is not the attorney of record for the bond proceedings and because of this, a request for a transcript takes longer than 8 days' notice to obtain. However, if provided additional time, Petitioner may obtain these records should the Court require them.

As the Court notes in its February 12, 2026 order, the Immigration Judge found it lacked jurisdiction to hear Respondent's bond motion and denied bond as a result. Doc. 3-1. The Immigration Judge specifically held that it "lacks the authority to redetermine the respondent's detention status." *Id.* The Immigration Judge ordered this on the basis that 8 U.S.C. § 1225(b)(2), INA § 235(b)(2), requires mandatory detention of "Applicants for Admission." *Id.* The Board of Immigration Appeals' decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), determined 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.

While the Judge made an alternative finding regarding his determination of Respondent's flight and danger to the community, these statements and findings were not made pursuant to section 1226(a) since the Judge explicitly found that section 1225(b)(2) governed Respondent's detention. Doc. 3-1. The Judge cannot make findings under both sections of the statute.

However, if this Court finds that the Judge's determination was made pursuant to section 1226(a), the remedy available to Petitioner for appeal of the decision is constitutionally insufficient and the hearing itself did not comport with due process. If Petitioner's bond is denied, the procedure available to Petitioner is an appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.19. However, 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 Fall 2026. As such, Petitioner is likely to endure several additional months of detention is likely unlawful. 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).

Requiring Petitioner to wait six months or longer in detention to reach a decision on whether he can be released on bond would be futile. While waiting for a decision, his Immigration Court final hearing will be scheduled. Given that a removal determination would likely come before the BIA's determination of whether a bond is appropriate in this case, an appeal is a constitutionally insufficient remedy. Since there are constitutional claims raised by

Petitioner in this case, this Court should find that exhaustion is not required according to the Sixth 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. *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025).

Additionally, the hearing itself did not comport with due process and the federal regulations. Following the 1996 enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the Immigration and Naturalization Service (INS) adopted new regulations, 8 C.F.R. § 236.1(c)(2)–(8). Under those regulations, “the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” *Id.* § 236.1(c)(8). The new regulations concerned an initial custody decision by an officer *upon arrest*; however, the BIA found it reasonable to apply the standard set forth in 8 C.F.R. § 236.1(c)(8) to § 1226(a) custody redetermination hearings, placing “[t]he burden ... on the alien to show to the satisfaction of the Immigration Judge that he or she merits release on bond.” *In Re Guerra*, 24 I.& N. Dec. 37, 40 (BIA 2006). Under that standard, the government “need not show anything to justify incarceration for the pendency of removal proceedings, no matter the length of those proceedings.” *Velasco Lopez v. Decker*, 978 F.3d 842, 849 (2d Cir. 2020).

While the Supreme Court nor the Sixth Circuit has addressed whether applying this burden of proof at the bond redetermination hearing comports with the requirements of due process, numerous other courts, including those within the Sixth Circuit, have examined this issue and confirmed it is in fact the government’s burden “by a preponderance of the evidence that [the noncitizen] poses a flight risk.” *Hernandez-Lara v. Lyons*, 10 F. 4th 19, 41 (1st Cir.

2021); *Soto-Medina v. Lynch*, 2026 WL 161002 (W.D. Mich. Jan. 21, 2026); *Ochoa Ochoa v. Noem*, 2025 WL 2938779 (N.D. Ill. Oct. 16, 2025); *Lopez-Alvarez v. Ripa*, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025) (ordering a bond hearing within seven day or release); *Kostak v. Trump*, 2025 WL 2472136 (W.D. La. Aug. 27, 2025) (same); *Roman v. Noem*, 2025 WL 2710211 (D. Nev. 23, 2025). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the very liberty that [the Due Process Clause] protects.” *Soto-Medina v. Lynch*, 2026 WL 161002 (W.D. Mich. Jan. 21, 2026) (citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

The Fifth Amendment's Due Process Clause extends to all persons, regardless of status. *See A.A.R.P. v. Trump*, 605 U.S. 91 (2025). Thus, noncitizens, such as Petitioner, are entitled to its protections. *See id.* While detention pending removal is “a constitutionally valid aspect of the deportation,” such detention must comport with due process. *See Demore v. Kim*, 538 U.S. 510, 523, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003). In the context of the Due Process Clause, requiring a particular “standard of proof ‘serves to allocate the risk of error between the litigants’ and reflects the ‘relative importance attached to the ultimate decision.’ ” *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020) (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Thus, the Supreme Court has repeatedly reaffirmed that “due process places a heightened burden of proof *on the State* in civil proceedings in which the ‘individual interests at stake ... are both particularly important and more substantial than mere loss of money.’ ” *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (alterations in original; emphasis added) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)); *see also Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (requiring clear and convincing evidence to justify civil commitment because “[f]reedom from

bodily restraint has always been at the core of the liberty protected by the Due Process Clause”). “The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.” *Addington*, 441 U.S. at 427, 99 S.Ct. 1804.

The Supreme Court, therefore, upheld the application of the “clear and convincing” standard for civil commitment proceedings because “the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires *the state to justify confinement* by proof *more substantial than a mere preponderance of the evidence*.” *Id.* (emphasis added); *see also United States v. Salerno*, 481 U.S. 739, 751 (1987) (holding that pretrial detention will be permitted under the Due Process Clause “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community”). The Supreme Court has made clear that “civil commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington*, 441 U.S. at 427 (emphasis added).

Given the government’s failure to provide a bond hearing that complies with all regulations and requirements under due process, the appropriate remedy at this juncture is the immediate release of Petitioner. Courts have consistently held that the proper remedy is release for unlawful detention. *Beltran Barrera v. Tindall*, 2025 WL 2690565, at *7 (W.D. Ky. Sep. 19, 2025); *Roble v. Bondi*, --- F.Supp.3d ---, 2025 WL 2443453, at *5 (D. Minn. Aug. 25, 2025) (ordering petitioner’s “release from custody as a remedy for ICE’s illegal re-detention”); *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *see also Espinoza*, 2025 WL 2675785, at *11; *Ramirez Clavijo v. Kaiser*, 2025 WL 2419263, at *6 (N.D. Cal. Aug. 21, 2025); *Munoz Materano v. Arteta*, --- F.Supp.3d ---, 2025 WL 2630826, at *20 (S.D.N.Y. Sept. 12, 2025).

Another bond determination hearing by an immigration judge would not remedy the core constitutional violation at issue here. “[Petitioner’s] detention was unlawful from its inception because ICE detained [him] under the wrong statute and without any notice or opportunity to be heard, much less the procedures required under section 1226(a). In this situation a post-deprivation bond hearing before a DHS officer or even an immigration judge would provide no genuine opportunity to relief because the detention without adequate pre-deprivation procedures has already been carried out.” *Rodriguez-Acuero v. Almogodar*, 2025 WL 3314420 (E.D.N.Y. Nov. 28, 2025); *Barco Mercado v. Francis*, --- F.Supp.3d ---, 2025 WL 3295903 (S.D.N.Y. Nov. 26, 2025); *AMM v. Thompson*, 2025 WL 3296316 (S.D. Tex. Nov. 18, 2025); *Lopez Benitez v. Francis*, 795 F.Supp.3d 475, 484 (S.D.N.Y. 2025).

If this court finds immediate release inappropriate, Petitioner requests that this court order bond hearing within five days, where the burden is on the Government to prove by clear and convincing evidence that the detainee poses a danger or flight risk. *Soto-Medina v. Lynch*, 2026 WL 161002 (W.D. Mich. Jan. 21, 2026); *Ochoa Ochoa v. Noem*, 2025 WL 2938779 (N.D. Ill. Oct. 16, 2025); *Lopez-Alvarez v. Ripa*, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025) (ordering a bond hearing within seven day or release); *Kostak v. Trump*, 2025 WL 2472136 (W.D. La. Aug. 27, 2025) (same); *Roman v. Noem*, 2025 WL 2710211 (D. Nev. 23, 2025).

For the foregoing reasons, this Court should order Respondents to immediately release Petitioner as a result of the due process violation. In the alternative, Petitioner requests that the Court 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, where the burden is on the Government to prove by clear and convincing evidence that the detainee poses a danger or flight risk.

Dated: February 23, 2026

Respectfully Submitted,
Jiangfei Gu

/s/ Jennifer Peyton

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