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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HERMON ASMELASH,

Petitioner,

v.

CHRISTOPHER LAROSE, warden of
Otay Mesa Detention Center;
PATRICK DIVVER, San Diego Field
Office Director, Immigration and Customs
Enforcement and Removal Operations
("ICE/ERO");
TODD LYONS, Acting Director of
Immigration Customs Enforcement
("ICE");
MARKWAYNE MULLIN, Secretary of
the Department of Homeland Security
("DHS");
Attorney General of the United States,
U.S. DEPARTMENT OF HOMELAND
SECURITY;
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT;

Respondents.

Case No.: '26CV2135 JLS DEB

**PETITION FOR WRIT OF HABEAS
CORPUS AND ORDER TO SHOW
CAUSE WITHIN THREE DAYS;
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Agency Doc. No.: 

1 Petitioner HERMON ASMELASH petitions this Court for a writ of habeas
2 corpus under 28 U.S.C. § 2241 to remedy Respondents' detaining him unlawfully,
3 and states as follows:
4

5 INTRODUCTION

6 1. Petitioner, HERMON ASMELASH ("Mr. Asmelash" or "Petitioner"), by and
7 through his undersigned counsel, hereby petitions this Court under 28 U.S.C. § 2241,
8 et seq., to issue a Writ of Habeas Corpus ordering Mr. Asmelash's release from
9 immigration detention by the Department of Homeland Security, United States
10 Immigration and Customs Enforcement ("ICE"). Mr. Asmelash seeks immediate
11 release from custody because Respondents have held him since May 8, 2025—a
12 prolonged period. Mr. Asmelash waited almost eight months to have his asylum
13 application adjudicated. On January 21, 2026 he was denied all relief and ordered
14 removed. He timely filed an appeal with the BIA and continues to await their
15 decision. After his entry into the United States, he was given and passed a credible
16 fear interview. He was then transferred to an Arizona detention facility, and then
17 transferred back to Otay Mesa detention Center where he remains today. His Notice
18 to Appear was entered on July 25, 2025. His individual hearing was January 21,
19 2026. His appeal was filed on or about February 19, 2026. He has never had a bond
20 hearing because he entered without inspection and the current position of the
21 immigrations courts is that they lack jurisdiction to conduct a bond hearing. He has
22 been detained for 10 months. There is no possibility of his removal in the
23
24

1 foreseeable future. His continued detention without a hearing as to flight risk and
2 danger to the community violates the U.S. Constitution and federal law.

3 CUSTODY

4 2. Mr. Asmelash is currently in Respondents' legal and physical custody. They
5 are detaining him at the Otay Mesa Detention Center in San Diego, California. He is
6 under Respondents' and their agents' direct control.
7

8 PARTIES

9 3. Mr. Asmelash is a 28-year-old citizen of Eritrea born  He is
10 currently detained at the Otay Mesa Detention Center in San Diego, California.

11 4. Mr. Asmelash is currently in Respondents' legal and physical custody at the
12 Otay Mesa Detention Center in San Diego, California. CoreCivic, Inc., a Maryland
13 corporation, operates that facility.
14

15 5. Respondent Christopher LAROSE is the Warden of the Otay Mesa Detention
16 Center where Petitioner is being held. Respondent Christopher LaRose oversees the
17 day-to-day operations of the Otay Mesa Detention Center and acts at the Direction of
18 Respondents Freden, Lyons and Noem. Respondent Christopher LaRose is a
19 custodian of Petitioner and is named in his official capacity.

20 6. Respondent Patrick Divver is the Acting Field Office Director of ICE in San
21 Diego, California and is named in his official capacity. ICE is the component of the
22 DHS that is responsible for detaining and removing noncitizens according to
23
24

1 immigration law and oversees custody determinations. In his official capacity, he is
2 the legal custodian of Petitioner.

3 7. Respondent Todd M. LYONS is the Acting Director of ICE and is named in his
4 official capacity. Among other things, ICE is a component of the DHS, 6 U.S.C. § 271,
5 and an “agency” within the meaning of the Administrative Procedure Act, 5 U.S.C. §
6 701(b)(1). It is the agency responsible for enforcing immigration laws, and it is
7 detaining Mr. Asmelash. Respondent Lyons has custodial authority over Mr.
8 Asmelash, who names him in his official capacity.

10 8. Respondent MARKWAYNE MULLIN is the Secretary of the DHS and is named
11 in her official capacity. DHS is the federal agency responsible for enforcing
12 immigration laws and granting immigration benefits. See 8 U.S.C. § 1103(a); 8 C.F.R.
13 § 2.1. Respondent Noem has ultimate custodial authority over Mr. Asmelash, who
14 names her in her official capacity.

15 9. Respondent Attorney General of the United States is the most senior official in
16 the U.S. Department of Justice (DOJ) and is named in her/his official capacity.
17 She/He is responsible for the Immigration and Nationality Act’s implementation and
18 enforcement (see 8 U.S.C. §§ 1103(a)(1), (g)), and oversees the Executive Office for
19 Immigration Review, the office that administers Mr. Asmelash’s removal
20 proceedings and is responsible for adjudicating Mr. Asmelash’s asylum application.
21 Mr. Asmelash names her in her official capacity.

10. Respondent U.S. Immigration Customs Enforcement is the federal agency responsible for custody decisions relating to non-citizens charged with being removable from the United States, including the arrest, detention, and custody status of non-citizens.

11. Respondent U.S. Department of Homeland Security is the federal agency that has authority over the actions of ICE and all other DHS Respondents.

JURISDICTION AND VENUE

12. This action arises under the United States Constitution and the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., INA § 101 et seq., to challenge Mr. Asmelash's detention under the INA and any inherent or plenary powers the government may claim to continue holding him.

13. This Court has jurisdiction under 28 U.S.C. § 1331, § 2241; 5 U.S.C. §§ 701–706 (Administrative Procedure Act, “APA”); and the Suspension Clause, U.S. Const. art. I, § 9, cl. 2, and the Fifth and Eighth Amendments of the United States Constitution. Jurisdiction is not limited by a petitioner’s nationality, immigration status, or any other classification. *See Boumediene v. Bush*, 553 U.S. 723, 747 (2008). The Court may grant relief under the Suspension Clause; the Fifth and Eighth Amendments; 5 U.S.C. § 706 (APA); and 28 U.S.C. §§ 1361 (Mandamus Act), 1651 (All Writs Act), 2001 (Declaratory Judgment Act), and 2241 (habeas corpus).

14. Specifically, this Court has jurisdiction under 28 U.S.C. § 2241 to review Mr. Asmelash's detention. Federal district courts possess broad authority to issue writs of habeas corpus when a person is held "in custody in violation of the

1 Constitution or laws or treaties of the United States” (28 U.S.C. § 2241(c)(3)), and
2 this authority extends to immigration detention challenges that survived the REAL
3 ID Act’s jurisdictional restrictions. Because Mr. Asmelash seeks the traditional
4 habeas remedy of release from allegedly unlawful detention, his petition presents
5 precisely the type of threshold legality-of-detention question that § 2241 was
6 designed to address. *See INS v. St. Cyr*, 533 U.S. 289, 301 (2001); *see also Lopez-*
7 *Marroquin v. Barr*, 955 F.3d 759, 759 (9th Cir. 2020) (citing *Singh v. Holder*, 638 F.3d
8 1196, 1211-12 (9th Cir. 2011)). And federal courts are not stripped of jurisdiction
9 under 8 U.S.C. § 1252. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). No court
10 has ruled on the legality of Mr. Asmelash’s detention.
11

12 15. Venue is proper in this District under 28 U.S.C. §§ 1391(b)(2) and (e)(1)
13 because a substantial part of the events or omissions giving rise to this claim have
14 happened here, Mr. Asmelash is detained here, and his custodian resides here.
15 Venue is also proper under 28 U.S.C. § 2243 because Mr. Asmelash’s immediate
16 custodian resides in this District. *See Rumsfeld v. Padilla*, 542 U.S. 426, 451-52
17 (2004) (Kennedy, J., concurring).
18

19 **FACTUAL BACKGROUND**

20 16. Mr. Asmelash was born in Eritrea. Eritrea is a harsh dictatorship and
21 does not tolerate any form of protest or dissent¹. Mr. Asmelash was identified in a
22

23 ¹ “There were no significant changes in the human rights situation in Eritrea during the year. The
24 government abused a wide range of human rights. Significant human rights issues included credible
reports of: disappearances; torture or cruel, inhuman, or degrading treatment or punishment; arbitrary
arrest or detention; transnational repression against individuals in another country; serious abuses in a

1 protest regarding forced conscription and human rights abuses. He was detained,
2 tortured and then placed into forced conscription. He escaped to Ethiopia but was
3 returned by Ethiopian authorities, accused of being a traitor and tortured in
4 detention once again. He was able to escape a second time and fled to the United
5 States to seek asylum here.

6
7 17. He made his way to Mexico and finally crossed into the United States on
8 May 8, 2025. He immediately encountered CBP officers and was taken into custody.
9 He was taken into custody and given a credible fear interview, which he passed. He
10 was briefly sent to detention in Arizona but was returned to Otay Mesa Detention
11 Center on July 25, 2025. He has been in detention since May 8, 2025.

12 18. Mr. Asmelash's Notice to Appear was finally filed on July 25, 2025, two
13 months after he was initially detained. His first Master Calendar was 8/7/2025 with a
14 follow up on 10/01/ 2025 and a final hearing on 01/21/2026, almost eight months after
15 his initial detention. He was denied all forms of relief. He has timely filed an appeal with
16 the BIA. Appeals are currently taking anywhere from 6 months to a year for adjudication.

17 19. There is no end in sight to Mr. Asmelash' detention ... not because he is a
18 flight risk or a threat to the community. That has never been determined. He has
19 never had a bond hearing because the Immigration Courts currently hold that they
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23 conflict; serious restrictions on freedom of expression and media freedom; restrictions of religious
24 freedom; trafficking in persons, including forced labor; prohibiting independent trade unions and
systematic restrictions on workers' freedom of association; and significant presence of any of the worst
forms of child labor. The government did not take credible steps or action to identify and punish
officials who committed human rights abuses." Eritrea 2024 Human Rights Report, U.S. Dept of State.

1 do not have jurisdiction to hold bond hearings for detainees such as Mr. Asmelash.
2 He remains in detention because the administration insists that all people that lack a
3 green card or citizenship must be detained.

4 20. On July 8, 2025, the Department of Homeland Security ("DHS")
5 instituted a notice titled "Interim Guidance Regarding Detention Authority for
6 Applicants for Admission" (the "Notice") requiring, in general, that anyone arrested
7 in the United States and charged with being inadmissible to be considered an
8 "applicant for admission" under 8 U.S.C. § 1225(b)(2)(A), subject to mandatory
9 detention under 8 U.S.C. § 1225(b)(2)(A) and not subject to detention under 8 U.S.C.
10 § 1226(a).
11

12 21. In *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, --- F.
13 Supp. 3d ---, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025), the district court declared
14 the Notice unlawful under the Administrative Procedures Act but did not issue a
15 final judgment. On December 18, 2025, however, the *Bautista* court entered final
16 judgement. *Bautista*, ECF No. 94.
17

18 22. Mr. Asmelash thought to ask for a bond but IJ's have consistently ruled
19 that they do not have jurisdiction to redetermine the conditions of custody over
20 individuals who have been apprehended shortly after entering the United States and
21 who have been processed under Section 235(b)(1) expedited removal statute, and
22 who have been placed in removal proceedings. Even after *Maldonado, supra*, was
23 decided, Immigration Judges have still held that they do not have jurisdiction to
24

1 conduct bond hearings. Recently this case was once again put on hold pending
2 appeal.

3 23. Mr. Asmelash has come to believe that his detention will have no end.
4 The only end seems to be that he finally breaks down and agrees to voluntary
5 departure. There is no other logical explanation for what is currently going on.

6 24. Mr. Asmelash's continued detention without a tenable justification and
7 without a demonstration that removal is significantly likely in the reasonably
8 foreseeable future violates constitutional due process. Zadvydus v. Davis, 533 U.S.
9 678 (2001); Kydyrali v. Wolf, 499 F. Supp. 3d 768 (S.D. Cal. 2020).

10 25. The government has failed to effectuate Mr. Asmelash's removal within
11 a reasonable period of time or present any evidence that his removal is significantly
12 likely to occur in the reasonably foreseeable future.

13 26. Mr. Asmelash's detention without a tenable justification violates his
14 rights under the Due Process Clause of the Fifth Amendment.

15 EXHAUSTION OF REMEDIES

16 27. For habeas claims, exhaustion of administrative remedies is prudential,
17 not jurisdictional. *Hernandez*, 872 F.3d at 988. A court may waive the prudential
18 exhaustion requirement if "administrative remedies are inadequate or not
19 efficacious, pursuit of administrative remedies would be a futile gesture, irreparable
20 injury will result, or the administrative proceedings would be void." *Id.* (quoting
21 *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation and quotation marks
22
23
24

1 omitted)). Petitioner asserts that exhaustion should be waived because
2 administrative remedies are (1) futile and (2) his continued detention results in
3 irreparable harm.

4 28. Exhausting administrative remedies here is futile because Respondents
5 contend Mr. Asmelash is subject to mandatory detention even in the face of
6 *Maldonado, supra*. As such, any request for a hearing is a crap shoot. Moreover,
7 immigration judges in this district claim to have no jurisdiction to conduct a custody
8 redetermination hearing as to individuals procedurally situated like Mr. Asmelash.
9 Indeed, in contravention to the INA and long-standing precedent and practice, the
10 Board of Immigration Appeals and Attorney General have deemed no noncitizen
11 eligible for bond before an immigration judge (with the exception of only
12 noncitizens who entered the U.S. on a visa). As such, any attempts to exhaust
13 administrative remedies would be entirely futile.
14

15 29. Recently, under *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-
16 SSS-BFM, --- F. Supp. 3d ---, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025), the AUSA
17 has asserted that bond hearings are now available. However, after the final decision
18 in *Maldonado* was entered, DHS sent out a directive to Immigration Judges to ignore
19 this case and continue to deny jurisdiction. On or about Feb 18, 2026, *Maldonado*
20 was stayed pending appeal. There currently is no possibility for petitioner to have a
21 bond hearing.
22

23 30. Moreover, no statutory exhaustion requirements apply to Petitioner's
24 claim of unlawful custody in violation of his due process rights, and there are no

1 administrative remedies that he needs to exhaust. *See Am.-Arab Anti-Discrimination*
2 *Comm. v. Reno*, 70 F.3d 1045, 1058 (9th Cir. 1995) (finding exhaustion to be a “futile
3 exercise because the agency does not have jurisdiction to review” constitutional
4 claims); *In re Indefinite Det. Cases*, 82 F. Supp. 2d 1098, 1099 (C.D. Cal. 2000)
5 (same).

6
7 31. More importantly, every day that Petitioner remains detained causes
8 him harm that cannot be repaired. His continued detention puts his mental health at
9 greater risk, further warranting a finding of irreparable harm and the waiver of the
10 prudential exhaustion requirement. He cannot get the medical attention he requires
11 while he is detained.

12 32. The Court must consider this in its irreparable harm analysis of the
13 effects on Petitioner as his detention continues. *See De Paz Sales v. Barr*, No. 19-CV-
14 07221-KAW, 2020 WL 353465, at *4 (N.D. Cal. Jan. 21, 2020) (noting that the
15 petitioner “continues to suffer significant psychological effects from his detention,
16 including anxiety caused by the threats of other inmates and two suicide attempts,”
17 in finding that petitioner would suffer irreparable harm warranting waiver of
18 exhaustion requirement).

19
20 **FIRST CAUSE OF ACTION**
21 **Fifth Amendment Due Process Violation**

22 33. Mr. Asmelash re-alleges and incorporates by reference, as if fully set
23 forth herein, the allegations in paragraphs 1-35 above.
24

1 34. The Supreme Court has long recognized that the Fifth and Fourteenth
2 Amendments refer to all “persons,” not just “citizens.” Aliens, even inadmissible or
3 removable aliens, must be afforded due process protection. *See Yick Wo v. Hopkins*,
4 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not
5 confined to the protection of citizens.”). As stated by the Court, the provisions of the
6 Fourteenth Amendment “are universal in their application, to all persons within the
7 territorial jurisdiction, without regard to any differences of race, of color, or of
8 nationality” *Id.* (emphasis added).

10 35. The Supreme Court has held that “even one whose presence in this
11 country is unlawful, involuntary, or transitory is entitled to that constitutional
12 protection [of the Due Process Clauses of the Fifth and Fourteenth Amendments]”
13 *Mathews v. Diaz*, 426 U.S. 67, 75 n.7 (1976); see also *Plyler v. Doe*, 457 U.S. 202, 210
14 (1982) (“Whatever his status under the immigration laws, an alien is surely a
15 ‘person’ in any ordinary sense of that term.”); *Wong Wing v. United States*, 163 U.S.
16 228, 238 (1896) (“Persons within the territory of the United States... even aliens...
17 [may not]... be deprived of life, liberty or property without due process of law.”).

19 36. As there is no final order of removal, and there doesn’t appear to be
20 one in the reasonably foreseeable future, Mr. Asmelash may not be removed from
21 the United States. His removal is not reasonably foreseeable, and his detention no
22 longer serves any legitimate purpose under the INA.

23 37. In *Kydyrali v. Wolf*, 499 F. Supp. 3d 768 (S.D. Cal. 2020), a judge in this
24 District granted habeas relief in a substantially similar case, applying a six-factor

balancing test first articulated in *Banda v. McAleenan*, 385 F. Supp. 3d 1099 (W.D. Wash. 2019), which considers: (1) total length of detention to date; (2) likely duration of future detention; (3) conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings caused by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal. The court determined that prolonged detention, when considered alongside other due process concerns, can rise to the level of a constitutional violation warranting release. *Kydyrali*, 499 F. Supp. 3d at 773.

38. Applying the Banda six-factor framework here supports granting Mr. Asmelash's petition.

39. The final factor—finality—strongly supports the grant of this habeas petition. Mr. Asmelash has been languishing in detention for over 10 months with no end in sight.

40. There were no delays in his case that can be attributed to Mr. Asmelash.

41. Mr. Asmelash has now been detained by ICE for nearly 10 months since his arrival in the United States on May 8, 2025. This period is well beyond the presumptively reasonable six-month period set forth in *Zadvydas*, 533 U.S. at 701. Courts consistently find detention beyond this threshold triggers due process scrutiny. *See Kydyrali*, 499 F.Supp. 3d at 774–75.

1 42. Conditions of confinement also raise constitutional concerns as the
2 medical treatment available at the Otay Mesa Detention Center is not adequate to
3 address Mr. Asmelash's health conditions.

4 43. Mr. Asmelash poses no risk of flight and no danger to the community.
5 He has no criminal history, has demonstrated compliance with all prior immigration
6 requirements, and has community support in the United States. His wife is here and
7 is waiting for his release.
8

9 44. Mr. Asmelash's continued detention without a tenable justification
10 violates his Fifth Amendment right to due process.

11 **PRAYER FOR RELIEF**

12 Mr. Asmelash asks this Court to grant the following relief:

- 13
- 14 1. Issue a Writ of Habeas Corpus ordering Respondents to release
15 Mr. Asmelash from custody immediately;
 - 16 2. Declare the continued detention of Mr. Asmelash without a
17 tenable justification a violation of the Due Process Clause of the U.S.
18 Constitution;
 - 19 3. Order Respondents to show cause why Mr. Asmelash is being
20 subjected to unlawful and unconstitutional detention; and
 - 21 4. Grant any other relief that may be fit and proper.

22 Dated: April 6, 2026

Respectfully submitted,

23 By: /s/ Brian J. McGoldrick
24 Brian J. McGoldrick, Esq.
Attorney for Petitioner

VERIFICATION PURSUANT TO 28 U.S.C. 2242

I am submitting this verification on behalf of the Petitioner because I am Petitioner's attorney. I have discussed with the Petitioner the events described in the Petition. Based on those discussions, I hereby verify that the factual statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Executed on this 6th day of April, 2026, in San Diego, California.

/s/ Brian J. McGoldrick
Brian J. McGoldrick, Esq.
Attorney for Petitioner