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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

M.K.,

Petitioner,

v.

SIXTO MARRERO, WARDEN OF THE
IMPERIAL REGIONAL DETENTION
FACILITY; PETER E. DIVVER JR.,
FIELD OFFICE DIRECTOR, SAN
DIEGO FIELD OFFICE, U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT; TODD M. LYONS,
ACTING DIRECTOR, U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT; TODD BLANCHE,
ACTING ATTORNEY GENERAL;
MARK WAYNE MULLIN,
SECRETARY, DEPARTMENT OF
HOMELAND SECURITY, IN THEIR
OFFICIAL CAPACITIES,

Respondents.

Case No. 3:26-cv-2499-RBM-MMP

**PETITIONER'S REPLY IN
SUPPORT OF MOTION TO
ENFORCE JUDGMENT**

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1 **I. INTRODUCTION**

2 Respondents' opposition confirms the central defect in the bond proceedings:
3 it identifies no clear and convincing evidence that M.K. is likely to flee. Instead,
4 Respondents recite that the Immigration Judge ("IJ") stated the burden, admitted
5 exhibits, heard testimony, and mentioned the *Guerra* factors. Doc. No. 16 at 5–8.
6 Those procedural steps do not satisfy the substantive burden of proof. At the May
7 13 hearing, DHS called no witness, asked M.K. no questions, and argued only that
8 the prior asylum ruling and M.K.'s supposedly poor prospects on appeal created an
9 "enhanced" flight risk. May 13 Tr. at 3–4, 12, 18–19. At the May 15 hearing, DHS
10 again elicited no testimony showing that M.K. was likely to flee—in fact, between
11 the two days, DHS asked M.K. 17 substantive total questions, while the IJ asked him
12 54. *See generally* May 13 Tr.; May 15 Tr. 1; May 15 Tr. 2. Rather than require the
13 Government to carry its burden, the IJ filled that gap by treating detention-caused
14 facts as evidence against M.K., searching for credibility issues unrelated to flight,
15 and requiring that M.K. prove that his sponsor was reliable. That is precisely the
16 burden shift this Court's Order prohibited.

17 The Government compounds its factual errors by elevating semantics over
18 substance. Neither M.K. nor his sponsor testified that they were cousins. M.K.
19 explained that his sponsor is related to him through his brother's wife. May 15 Tr. 1
20 at 6. His sponsor, in turn, explained that **her cousin**—whom she also calls her sister
21 because the two grew up together—is married to M.K.'s brother. May 15 Tr. 2 at 2–
22 3. In other words, M.K.'s sponsor is his sister-in-law's "sister." She is not a complete
23 family stranger. That testimony reflects a close, longstanding family relationship by
24 marriage, not an inconsistency. M.K.'s sponsor considers M.K. part of her family
25 and agreed to sponsor him at the request of the relative who married his brother.
26 May 15 Tr. 1 at 6; May 15 Tr. 2 at 2–4. The relevant question was whether that
27 relationship made the sponsor a committed and reliable sponsor—not whether each
28 witness described the family tree using terminology precise enough to establish legal

1 family relationships in a probate proceeding. It was error to treat ordinary variations
2 in how members of an extended family describe one another as evidence of
3 dishonesty.

4 Additionally, the supposed Instagram/WhatsApp “inconsistency” is equally
5 meritless—and was affirmatively reconciled by the testimony. M.K. recalled
6 communicating with his sponsor through Instagram. May 15 Tr. 1 at 6. His sponsor
7 explained that WhatsApp was their principal means of communication and confirmed
8 that M.K. had also messaged her on Instagram before entering the United States.
9 May 15 Tr. 2 at 9–11. What matters is the substance and regularity of their
10 communications, not which Meta-owned application they used on a particular
11 occasion. Both witnesses described a close, family-based relationship, and the
12 sponsor testified that she spoke with M.K. several times each week. May 15 Tr. 1 at
13 6; May 15 Tr. 2 at 3–4. She and her husband had already prepared a room for him,
14 established they could support him financially and emotionally, and pledged to help
15 him comply with every immigration obligation. May 15 Tr. 2 at 3–6. In the bond
16 proceeding, M.K. also submitted evidence that the sponsor is employed and lives
17 with her family in a single-family home in Hoffman Estates, an affluent Chicago
18 suburb. Respondents cannot transform informal kinship terminology and an ordinary
19 difference in recollection about a messaging application into clear and convincing
20 evidence of flight risk. Their reliance on such trivialities only confirms the absence
21 of meaningful evidence supporting detention.

22 **II. ARGUMENT**

23 **A. Prudential Exhaustion Should Be Waived.**

24 Exhaustion under 28 U.S.C. § 2241 is prudential, not jurisdictional. *Singh v.*
25 *Holder*, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011). The factors in *Puga v. Chertoff* do
26 not warrant exhaustion here. 488 F.3d 812, 815 (9th Cir. 2007). No agency expertise
27 is needed to decide whether Respondents complied with this Court’s specific
28 command that DHS prove flight risk by clear and convincing evidence. The

1 Government has not identified any additional evidence needed to supplement the
2 record, and Respondents accept Petitioner's transcripts as accurate. Doc. No. 16 at
3 2. Nor would review encourage routine bypass of the BIA: this is the uncommon
4 posture of a motion asking the issuing court to enforce its own habeas order. Courts
5 in this District retain that supervisory authority and may excuse prudential exhaustion
6 where, as here, the narrow question is whether the Government complied with the
7 court's prior order rather than whether the IJ reached the correct discretionary bond
8 determination. *Bayani v. LaRose*, No. 26-CV-0266-JES-VET, 2026 WL 1270059,
9 at *4–5 (S.D. Cal. May 8, 2026) (excusing prudential exhaustion where the petitioner
10 sought only enforcement of the court's prior bond-hearing order and continued
11 detention would perpetuate the constitutional injury). And BIA review cannot
12 substitute for this Court's determination whether its order was obeyed.

13 The *Laing* factors independently support waiver. A bond appeal would be
14 inadequate for a person already detained approximately eighteen months and
15 suffering documented physical and emotional harm while separated from his
16 detained daughter. *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004)
17 (recognizing that prudential exhaustion may be excused where administrative
18 remedies are inadequate or ineffective, pursuit of those remedies would be futile,
19 irreparable injury would result, or the administrative proceedings would be void).

20 The Government's reliance on *Aden* and *Delgado*, two nonbinding Western
21 District of Washington decisions, is misplaced. *Aden* involved a single bond
22 determination, a pending BIA appeal, and a claim that the IJ gave excessive weight
23 to the petitioner's criminal history in assessing dangerousness, an evidentiary
24 judgment the BIA could revisit. *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL
25 5802013, at *1–3 (W.D. Wash. Nov. 7, 2019). The court also emphasized that the
26 petitioner sought the same bond redetermination in both forums and had not shown
27 that administrative review would be inadequate, ineffective, or void. *Id.* at *3.
28 *Delgado* is further afield. It involved an ordinary challenge to a discretionary bond

denial under the usual rule placing the burden on the detainee, the petitioner's BIA appeal remained pending, and the petitioner did not oppose dismissal. *Delgado v. Sessions*, No. C17-1031-RSL-JPD, 2017 WL 4776340, at *1–3 (W.D. Wash. Sept. 15, 2017). Here, M.K. does not ask the Court to reweigh an ordinary bond determination. He asks the Court to enforce its own order after *two* hearings failed to hold DHS to its clear and convincing burden. This case therefore falls squarely within *Laing* because BIA review would be inadequate to secure prompt compliance with this Court's Order, and requiring exhaustion would prolong the very detention caused by the alleged constitutional violation. *See Laing*, 370 F.3d at 1000. *Bayani*, a recent decision from this District, confirms that exhaustion may be excused in this precise posture, where the Court is determining compliance with its own bond-hearing order rather than reviewing the IJ's discretionary judgment. *Bayani*, 2026 WL 1270059, at *4–5.

B. Respondents Did Not Carry Their Clear-and-Convincing Burden.

1. The Government identifies procedures, not evidence of flight risk.

Respondents identify no conduct, plan, or circumstance showing that M.K. is likely to abscond. At the first hearing, DHS rested on the prior asylum decision. May 13 Tr. at 18-19. Again, DHS presented no witness and declined to question M.K. At the second hearing, DHS relied on the same asylum decision, M.K.'s inability to establish residence and employment while detained, and attacks on witness credibility. None establishes flight risk, much less clearly and convincingly.

The actual *Guerra* evidence overwhelmingly pointed the other way. M.K. waited seven months in Mexico for a CBP One appointment and entered lawfully; lacked a criminal record, immigration violations, or attempts to flee; appeared for every proceeding; arrived with a family member – his daughter who is also in immigration custody in the United States; demonstrated a fixed residence and support awaiting him; and obtained dedicated counsel. The IJ acknowledged that lawful

entry weighed “very strongly” in M.K.’s favor. May 13 Tr. at 19–20. Yet the IJ later treated M.K.’s lack of time, employment, and non-detained appearances in the United States—each a consequence of lawful entry and continuous detention—as factors that “weigh heavily against” him. May 15 Tr. 2 at 25–28. That reasoning converts DHS’s burden into M.K.’s obligation to establish equities he was never permitted to acquire precisely because he followed the rules and did not try to flee from border patrol in the first instance. Likewise, criticizing a sponsor’s background without contrary government evidence improperly shifts the burden. *Zarei v. Larose*, No. 26-CV-02335-GPC-MMP, 2026 WL 1415042, at *5 (S.D. Cal. May 19, 2026).

The prior asylum credibility ruling does not cure the evidentiary failure. It concerned the merits of a different proceeding. Respondents never connect it to conduct suggesting that M.K. would disobey a future order, and they ignore his only demonstrated response to U.S. immigration directives: he waited months for lawful entry and has complied ever since. Treating the prior denial of relief as dispositive would replace the individualized inquiry this Court ordered.

2. The asserted credibility issues are misstated, trivial, and unrelated to flight.

The IJ’s credibility findings were not based on any evidence submitted by the Government. First, as discussed above, the Government here misstates the record: neither M.K. nor his sponsor testified that they were cousins; both described a family relationship through M.K.’s sister-in-law. Doc. No. 16 at 6; May 15 Tr. 1 at 6; May 15 Tr. 2 at 2–3. The sponsor’s unrefuted testimony that she spoke with M.K. several times each week, had prepared a room for him, could support him financially and emotionally, and would help him satisfy every immigration obligation confirms both the relationship and her reliability as a sponsor, evidence the Government ignores. May 15 Tr. 2 at 3–6.

Second, the Instagram/WhatsApp testimony was compatible, or at most an ordinary difference in recollection, and does not show a fabricated relationship or

1 any risk that M.K. will flee. May 15 Tr. 1 at 6; May 15 Tr. 2 at 9–11.

2 Third, M.K.’s difficulty with the phrase “explicit adverse credibility
3 determination” had no bearing on flight risk. After saying he had trouble hearing one
4 question, he answered it when repeated. May 15 Tr. 1 at 8–11. The interpretation
5 difficulties were not invented: the interpreter herself later asked the IJ to shorten and
6 repeat a statement because she had “lost it” and did not want to compromise accuracy.
7 *Id.* at 13. Whether M.K. could explain the legal basis of a prior asylum decision
8 through an interpreter does not predict whether he will appear. The IJ’s reliance on
9 M.K. “not answering questions correctly,” purportedly blaming the interpreter, and
10 “weav[ing] in” memory issues was speculation, not clear and convincing evidence.
11 May 15 Tr. 2 at 26–28. And again, the IJ made M.K. disprove adverse inferences
12 rather than requiring DHS to prove flight risk. *See Perez Velasquez v. Bondi*, No.
13 26-CV-01759-GPC-DDL, 2026 WL 1042479, at *7 (S.D. Cal. Apr. 16, 2026).

14 Finally, the Government does not address Petitioner’s showing that the IJ
15 never considered whether bond, electronic monitoring, or other conditions could
16 address any perceived risk. That omission further demonstrates that the IJ did not
17 hold DHS to its burden. *Bayani*, 2026 WL 1270059, at *7. After two hearings
18 infected by the same burden-shifting error, another hearing before the same
19 adjudicator is unlikely to provide the relief this Court’s order.

20 **III. RELIEF REQUESTED**

21 Petitioner respectfully requests that the Court order Respondents to release
22 M.K. within forty-eight hours under appropriate conditions of supervision, promptly
23 return all personal property taken from him, including his identification, funds, and
24 employment authorization documents, and file a declaration confirming his release.
25 Prompt return of those items will allow M.K. to travel directly to his sponsor,
26 establish a stable residence, and pursue lawful employment. After Respondents twice
27 failed to provide the hearing this Court ordered, a third hearing would only prolong
28 the constitutional injury. Courts in this District have recently ordered immediate

1 release where another bond hearing would not adequately protect the petitioner's
2 rights. *See Mubanga v. Mullin*, No. 26-cv-02565-JO-AHG, 2026 WL 1945743, at
3 *2–3 (S.D. Cal. July 6, 2026).

4 **IV. CONCLUSION**

5 For these reasons, M.K. respectfully requests that the Court grant his motion
6 and enter the relief described above.

7
8 Dated: July 23, 2026

MORRISON & FOERSTER LLP

9
10 /s/ Brian M. Kramer
11 BRIAN M. KRAMER

12 *Attorney for Petitioner*
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