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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MOHAMMAD HORMOZ ZADEH,

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of the Department of Homeland Security, TODD BLANCHE, Acting Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

Case No.: 26-cv-2756-LL-GC

Traverse in Support of Amended Petition for Writ Of Habeas Corpus

[Civil Immigration Habeas, 28 U.S.C. § 2241]

I. Introduction

As Mr. Hormoz Zadeh explained in his amended petition, the Ninth Circuit has held that an immigrant like him, who "has been awarded asylum twice," but is detained while the government appeals for a second time, has "a powerful indication of the improbability of his foreseeable removal, by any objective measure." *Nadarajah v. Gonzales*, 446 F.3d 1069, 1081 (9th Cir. 2006). In that unusual circumstance, detention under 8 U.S.C. § 1226(a) is "indefinite." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1063–64 (9th Cir. 2008). The particular statute § 1226(a), like the post-removal-order-detention statute § 1231(a)(6), "does not authorize indefinite detention." *Id.* at 1063. And courts in the Ninth Circuit are "not free to disregard *Prieto-Romero*'s quite explicit holding" as to how to interpret the length of detention authorized by § 1226(a). *Avilez v. Garland*, 69 F.4th 525, 537 (9th Cir. 2023).

Through a series of complex maneuvers, the government asks this Court to disregard *Prieto-Romero*'s holding. It also asks this Court to require Mr. Hormoz Zadeh to make this purely legal argument first to the Board of Immigration Appeals—even though, as the government agrees, no statute requires he exhaust. Just as petitioners under *Zadvydas v. Davis*, 533 U.S. 678 (2001), need not exhaust their claim to the BIA, the same is true here. Regardless, "requiring Petitioner to remain in detention pending the BIA's decision would cause irreparable harm, which is a separate basis to waive exhaustion." *Dorotheo-Chavez v. Noem*, No., 2026 WL 1031190, *6 (D. Nev. Apr. 16, 2026). For this reason, "district courts in this circuit have routinely waived prudential exhaustion requirements for noncitizens." *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1253–54 (W.D. Wash. 2025).

Because Mr. Hormoz Zadeh's removal is no longer reasonably foreseeable, controlling Ninth Circuit precedent dictates that his detention is no longer

authorized under 8 U.S.C. § 1226(a). This Court should order his release on conditions set by ICE.

II. This Court cannot and should not require prudential exhaustion to the BIA.

There is no exhaustion provision in 8 U.S.C. § 1226(a) or any other immigration statute regarding release pending proceedings. *See Picado v. Hyde*, No. 26-cv-65-JJM-PAS, 2026 WL 352691, *5 (D.R.I. Feb. 9, 2026) (explaining this statutory point). As a result, courts have prudential discretion to decide whether to require exhaustion as to a challenge of detention under § 1226(a). *Id.*

Here—when Mr. Hormoz Zadeh's detention is no longer statutorily authorized as a legal matter, regardless of what bond procedures an immigration judge has provided him; when the BIA is both overwhelmed with appeals and staffed at half-capacity, such that bond appeals will likely take even longer than the average 200-day period from years past; and when it is irreparable harm to continue to be detained in immigration custody—this Court should not require exhaustion.

Courts generally begin their prudential exhaustion analysis as to any agency determination by looking to the *Puga* factors: "1) whether agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; 2) whether relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and 3) whether administrative review is likely to allow the agency to correct its own mistakes and preclude the need for judicial review." *Miri v. Bondi*, No. 26-cv-698-MEMF-MAR, 2026 WL 622302, *10 (C.D. Cal. Mar. 5, 2026) (citing *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)). "Nonetheless, even if the three *Puga* factors weigh in favor of prudential exhaustion, a court may waive the prudential exhaustion requirement if 'administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or

the administrative proceedings would be void.'" *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017).

None of the three *Puga* factors favor exhaustion. The first *Puga* factor does not favor exhaustion: "the Board of Immigration Appeals is not a 'fact-finding authority' and would only be reviewing 'legal error,' [so] there is no 'further development of the record needed' to resolve the issues." *Miri*, 2026 WL 622302 at *10. Further, "an administrative appellate record is not necessary to resolve the purely legal question[] presented," *Hernandez*, 872 F.3d at 989: whether § 1226(a) authorizes the continued detention of a noncitizen who has been twice-granted asylum. Neither does the second factor favor exhaustion: "resolution by this Court can provide guidance for future detainees." *Miri*, 2026 WL 622302 at *11. Neither does the third factor favor exhaustion: While the BIA is theoretically capable of correcting its own mistakes, it does not appear likely to do so before it fully resolves the merits of the government's second asylum appeal, and would thus significantly prolong his illegal detention by many, many months. *Miri*, 2026 WL 622302 at *11.

Regardless, even if *all* the *Puga* factors favored exhaustion, the prolonged irreparable injury that has already resulted and will continue to result counsel in favor of not requiring exhaustion in Mr. Hormoz Zadeh's case. The Ninth Circuit has recognized "the irreparable harms imposed on anyone subject to immigration detention." *Hernandez*, 872 F.3d at 995." As a result, "district courts in this circuit have routinely waived prudential exhaustion requirements for noncitizens . . . facing prolonged detention while awaiting administrative appeals." *Rodriguez*, 779 F. Supp. 3d at 1253–54 (collecting cases).

Finally, it is worth noting how long a BIA appeal takes. "According to data released by the Executive Office for Immigration Review, the average processing time for bond appeals exceeded 200 days in 2024." *Gomes*, 804 F. Supp. 3d at 273 (citing *Rodriguez*, 779 F. Supp. 3d at 1248–49).

And that is the case even when the BIA is fully staffed. At present, the BIA has been reduced from 28 members to 15. Current reporting provides "evidence that BIA has been drastically reshaped within the past year, such that the BIA now functions to rubberstamp IJ bond denials." *Perez Velasquez*, 2026 WL 1042479 at *3. As NPR reported in late March 2026, BIA decisions "backed Department of Homeland Security lawyers in 97% of publicly posted cases; that's at least 30 percentage points higher than the average from the last 16 years." Ximena Vustillo & Rahul Mukherjee, *An immigration court few have heard of is quietly shaping policy behind the scenes*, NPR (Mar. 20, 2026).[1]

At the end of the day, Mr. Hormoz Zadeh's petition—a petition arising from whether his detention is authorized *at all*, regardless of the procedures and results of any bond hearing—is not an appropriate one in which to require exhaustion to the BIA as a prudential matter.

III. *Prieto-Romero* remains good law and controls this case.

The government's two core merits arguments, while convoluted, fare no better.

First, the government argues that *Prieto-Romero* does not hold "that an asylum grantee whose removal proceedings are not final can no longer be subjected to detention under Section 1226(a)." ECF No. 19. It is wrong.

Prieto-Romero explains exactly when an asylum grantee can no longer be subjected to detention under § 1226(a). It's when his detention becomes "*indefinite* in the sense the Supreme Court found constitutionally problematic in *Zadvydas*." 534 F.3d at 1063. That follows from the statutory construction holding in *Zadvydas*, which read the language authorizing immigration detention after being ordered removed under 8 U.S.C. § 1231(a) to prohibit indefinite detention as a matter of constitutional avoidance. *Id.* Indeed, the language in

[1] Available at https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation.

§ 1226(a) is nearly identical to the language in § 1231(a). Both statutes refer "alien[s]" who "may be detained." 8 U.S.C. § 1231(a)(6); *accord* 8 U.S.C. § 1226(a) ("an alien may be arrested and detained pending a decision").

Prieto-Romero then outlined when detention can become indefinite during removal proceedings. Detention is indefinite when "removal [i]s not 'reasonably foreseeable.'" *Id.* That does not happen often during removal proceedings. The whole point is that removal is foreseeable enough to hold proceedings about it. But detention can occasionally become indefinite anyways. That can happen, for example, when there is "a finding that [the asylum grantee] merits mandatory relief from removal." *Id.* at 1065. Specifically, detention is indefinite when there is a "likely impossibility of removal" due to a noncitizen being "awarded . . . asylum twice," and yet still being detained "while the government appeal[s]." *Id.* at 1064 (discussing *Nadarajah*, 443 F.3d at 1081–82).

In this exact circumstance, *Prieto-Romero* explained, "detention of an alien whom the government could not lawfully remove" would not be "authorized by § 1226(a)." *Id.* at 1064–65. It is not "consistent with the implicit limitation that *Zadvydas* requires us to read into the Attorney General's statutory detention authority" under § 1226(a). *Id.* at 1065.

In arguing otherwise, the government simply ignores this statutory interpretation holding in *Prieto-Romero*.

Second, the government argues that *Prieto-Romero*'s holding that indefinite detention is not authorized under § 1226(a) is no longer good law after *Jennings v. Rodriguez*, 583 U.S. 281 (2018). It is, again, wrong.

Jennings is admittedly complex. It addresses many of the core detention immigration statutes: 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). But all it ultimately holds as to § 1226(a) is that the statute does not require "periodic bond hearings every six months." 583 U.S. at 306. That is not an argument Mr. Hormoz Zadeh makes.

It is true that *Jennings* held that two *other* immigration-detention statutes—§ 1226(c) and § 1225(b)—do not incorporate *Zadvydas*'s prohibition against indefinite detention. Those two other statutes both require mandatory detention. So *Jennings* held that the statute that was at issue in *Zadvydas*, § 1231(a)(6), "differs materially" from § 1226(c) and § 1225(b). *Jennings*, 583 U.S. at 299. For example, § 1231(a)(6) uses the more ambiguous words "may detain," while § 1226(c) and § 1225(b) use "shall." *Jennings*, 583 U.S. at 300, 303.[2]

But *Jennings* did *not* address whether § 1226(a) incorporates *Zadvydas*'s prohibition against indefinite detention. *See id.* There are many reasons to think it does, even apart from *Prieto-Romero*'s holding. For one, Section 1226(a) uses the same language *Zadvydas* interpreted in § 1231(a)(6): "may detain."

Further, there is "ambiguity in *Jennings* as to the length of § 1226's detention authority" at all. *Avilez*, 69 F.4th at 537. As a result, courts within the Ninth Circuit "are not free to disregard *Prieto-Romero*'s quite explicit holding" as to the length of that authority under § 1226(a). *Id.* "[N]either [prior Supreme Court case] *Demore* nor *Jennings* squarely addressed the meaning of the statutory phrase 'pending a decision on whether the alien is to be removed from the United States.'" *Id.* (quoting 8 U.S.C. § 1226(a)). "Accordingly . . . *Prieto-Romero* remains good law." *Id.*

When the Ninth Circuit explained that this holding of *Prieto-Romero* remains good law recently in *Avilez*, it is true that the Court addressed a related statutory interpretation issue and not the exact issue in this case. It addressed whether detention authority under § 1226 extends through review to the Ninth Circuit, or only until review by the BIA has concluded. *Avilez*, 69 F.4th at 529–

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[2] *Nadarajah*'s incorporation of *Zadvydas*'s prohibition against indefinite detention into § 1225(b) was thus overruled by *Jennings*, as the government notes. However, *Nadarajah*'s analysis of *when* detention becomes indefinite due to repeated grants of asylum and government appeals was then later incorporated in *Prieto-Romero*'s prohibition against indefinite detention under § 1226(a). As explained, *this* prohibition was not overruled by *Jennings*.

37. It did not address indefinite detention.

Regardless, *Avilez* emphasized the same point that applies here to indefinite detention: that the Supreme Court in *Jennings* did not construe the maximum amount of detention authorized under the discretionary detention provision § 1226(a). *Id.* at 537. Again, there is "ambiguity in *Jennings* as to the length of § 1226's detention authority." *Id.*

As a result, courts are not free to disregard *Prieto-Romero*'s interpretation of that detention authority under § 1226(a)—that it ends when detention becomes "indefinite." *Prieto-Romero*, 534 F.3d at 1063. And one way detention becomes indefinite is when "his removal is barred by our own laws." *Id.* A petitioner can demonstrate that when he has been "awarded . . . asylum twice." *Id.* at 1064.

Because Mr. Hormoz Zadeh has been awarded asylum twice, yet remains detained while the government again appeals his grant of asylum, his detention has become indefinite. Yet section 1226(a) "does not authorize indefinite detention." *Id.* at 1063. This Court must thus order Mr. Hormoz Zadeh be released on conditions set by ICE.

IV. Conclusion

Mr. Hormoz Zadeh has now twice received asylum. An immigration judge has reviewed all the facts of his life and his case—ranging from severe persecution to his academic success to his lack of any criminal record to his health—and twice determined that he should receive a favorable exercise of discretion through a grant of asylum. His removal is not significantly likely in the reasonably foreseeable future, even while the government appeals his asylum grant for the second time. He is thus improperly detained under § 1226(a), which does not authorize indefinite detention. He respectfully requests that this Court order Respondents to immediately release Petitioner from custody subject to conditions set by Respondents.

Respectfully submitted,

Dated: June 2, 2026

s/ Jessie Agatstein

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