Emergency Supplemental briefing.
Case No. 3:26-cv-02791-RSH-JLB

Administrative Exhaustion.

Exhaustion is not required in the context of a motion to enforce and would be futile here. "Exhaustion can be either statutorily or judicially required." *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004). "If exhaustion is statutory, it may be a mandatory requirement that is jurisdictional." *Id.* (citing *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991)). "If, however, exhaustion is a prudential requirement, a court has discretion to waive the requirement." *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325-26 (9th Cir. 1981)).

In the context of petitions for writ of habeas corpus for immigration detainees under §2241, "exhaustion is a prudential rather than jurisdictional requirement." *Singh v. Holder*, 638 F.3d 1196, fn. 3 (9th Cir. 2011). "[C]ourts may require prudential exhaustion if (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga v. Chertoff*, 488 F. 3d 812,815 (9th Cir. 2007) (internal quotations and citations omitted). Exhaustion may be excused for "a number" of reasons, including "where 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." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (internal quotations and citations omitted).

In cases of motions to enforce bond orders, "any alleged exhaustion requirement [ ] must fully contend with the Court's continuing authority to enforce its own injunction." *C.A.R.V. v. Wofford*, No. 1:25-cv-01395-JLT-SKO, 2026 U.S. Dist. LEXIS 17595, 2026 WL 241823 at *4. In *Leonardo v. Crawford*, the Ninth Circuit contended with the administrative exhaustion requirement in the context of a petitioner's motion to enforce a prior bond order. 646 F.3d at 1160-61. The Court explained that "the district court had authority to review compliance with its earlier order conditionally granting habeas relief," and that the lower court had indeed exercised that authority by determining that the government complied with its prior order. *Id.* at 1161. However, the Court also explained that "[t]he district court was under no obligation to address Leonardo's new arguments under the ambit of ensuring compliance with the earlier order," and that under ordinary circumstances, a petitioner must either exhaust administrative remedies or show an excuse for exhausting remedies before seeking relief in federal court. *Id.* at 1161,1160.

See McCarthy v. Madigan, 503 U.S. 140,146-49, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992): "This Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action. *See Gibson v. Berryhill*, 411 U.S. 564,575, n. 14, 36 L. Ed. 2d 488, 93 S. Ct. 1689 (1973) (administrative remedy deemed inadequate "most often...because of delay by the agency"). *See also Coit Independence Joint Venture v. FSLIC*, 489 U.S. at *587 ("Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures"); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587,591-592, 70 L. Ed. 747, 46 S. Ct. 408 (1926) (claimant "is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"). Even where the administrative decisionmaking schedule is otherwise reasonable and definite, a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim. *Bowen v. City of*

New York, 476 U.S. at 483 (disability-benefit claimants "would be irreparably injured were the exhaustion requirement now enforced against them"); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752,773, 91 L. Ed. 1796, 67 S. Ct. 1493 (1947) ("impending irreparable injury flowing from delay incident to following the prescribed procedure" may contribute to finding that exhaustion is not required).

Second, an administrative remedy may be inadequate "because of some doubt as to whether the agency was empowered to grant effective relief." *Gibson v. Berryhill*, 411 U.S. at 575, n. 14. For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute. *See, e.g., Moore v. East Cleveland*, 431 U.S. at 497, n. 5; *Mathews v. Diaz*, 426 U.S. 67, 76, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976).

Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it. *Gibson v. Berryhill*, 411 U.S. at 575, n. 14.

Several courts in Southern District of California recently have excused "administrative exhaustion for the limited purpose of ensuring compliance with a previous order where petitioner shows that an excuse applies or the applicability of an exception is apparent on the face of the motion", *see Bayani v. Larose*, No. 26-cv-0266-JES-VET, 2026 U.S. Dist. LEXIS 102798, at *11-12 (S.D. Cal. May 8, 2026) (excusing prudential exhaustion because of "the difficulty of appealing to the BIA considering the lengthy timeline of appeal, the importance of his [Petitioner's] liberty interest at stake, and the Court's competence with issues of constitutional law as required for the scope of this [Petitioner's] motion"). *See also Larissa Tiboko-Tfiuh v. Kristi Noem*, No. 26-cv-01215-JO-DEB, (S.D. Cal. April 2, 2026) (declining "to apply prudential administrative exhaustion requirement, first, due to delays inherent in the administrative appeal process the BIA reviewed, to make a petitioner go through that would risk the very harm that the Court's prior order was designed to prevent in the first place, which is prolonged detention without due process... Therefore, requiring the appeal of the IJ's bond determination to the BIA would not provide Petitioner...meaningful and timely relief from the alleged unlawful prolonged detention and would, instead, render any review futile or much of the benefits of that decision or much of the benefits of a review futile by the time it was decided".).

Many other courts also have excused administrative exhaustion for the limited purpose of ensuring compliance with its prior order. *See, e.g., Izaguirre v. Freden*, No. 6:25-cv-6672-EAW, 2025 WL 3551788, at *1 (W.D.N.Y. Dec. 11, 2025) (holding that exhaustion was not required because, "[a]mong other reasons, exhaustion would be futile under these circumstances."); *Loba L.M.*, 2026 U.S. Dist. LEXIS 52636, 2026 WL 710307 at *5 (excusing exhaustion despite the petitioner not making "an explicit showing" of an excuse in the motion to enforce, because the court had previously found ongoing irreparable harm in its previous order); *Morgan v. Oddo*, No. 3:24-cv-221, 2025 U.S. Dist. LEXIS 181706, 2025 WL 2653707, at *3-4 (W.D. Pa. Sept. 16, 2025) (noting the difficulty in applying the exhaustion requirement to motions to enforce and excusing prudential exhaustion); *see also Mau v. Chertoff*, 562 F. Supp. 2d 1107 (S.D. Cal. 2008) (holding that exhaustion was not required for the limited scope of review of a motion to enforce); *Judulang v. Chertoff*, 562 F. Supp. 2d 1119 (S.D. Cal. 2008) (same); *Sales v. Johnson*, 2017 U.S. Dist. LEXIS 215855, 2017 WL 6855827 (N.D. Cal. Sept. 20, 2017) (same).

Following all grounds set forth above and considering the growing importance of my liberty interest at stake, since I am subject of unreasonable prolonged immigration detention for 17 months, I argue that here is not required prudential exhaustion of the administrative remedies. And I am asking respectfully this Court for an excuse for exhausting those remedies because,among other reasons, "pursuit of administrative remedies would be a futile gesture", and "irreparable injury will result", quoting *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004).

Any Government's concern about a need of administrative exhaustion before seeking relief with this Court is remedied:

1) "by the narrow scope of the Court's review: the Court will only determine whether the bond hearing was constitutionally adequate as required by its prior order, and not delve into areas of discretionary decisions made by the IJ";
2) "by the posture of this motion, which depends on the Court's continuing jurisdiction to ensure compliance with its orders. *See Leonardo v. Crawford*, 646 F.3d at 1161", (quoting *Bayani v. Larose*, No. 26-cv-0266-JES-VET, 2026 U.S. Dist. LEXIS 102798, at *11-12 (S.D. Cal. May 8, 2026).

Regarding alleged "irreparable injury", although my immigration detention is civil, I state that this Court's prior order, granting me habeas relief, found that Respondents had violated my due process rights by holding me in conditions "indistinguishable from penal confinement" without any individualized custody determination for over a year. *See Zulfia Kunakbaeva v. Warden Otay Mesa Detention Center*, No. 26-cv-660-RSH-JLB, (S.D. Cal. March 2, 2026). *See also Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 773 (S.D. Cal. 2020) (explaining that OMDC is "a private, for-profit detention center operated by CoreCivic, Inc., which also runs many state penitentiaries" where detention is "indistinguishable from penal confinement.").

Legal standard.

"When questions require a close review of agency-found facts," like an administrative judge's finding of dangerousness or flight risk in a bond hearing, "we review for an abuse of discretion." *Martinez v. Clark*, 124 F.4th 775, 784 (9th Cir. 2024); *see also Loba L.M.*, 2026 U.S. Dist. LEXIS 52636, 2026 WL 710307 at *5 (applying abuse of discretion standard to review compliance with an order for bond hearing on habeas); *Y.S.G. v. Andrews*, No. 2:25-cv-1884-SCR, 2025 U.S. Dist. LEXIS 208276, 2025 WL 2979309, at *8 (E.D. Cal. Oct. 22, 2025) (same); *C.A.R.V. v. Wofford*, No. 1:25-cv-01395-JLT-SKO, 2026 U.S. Dist. LEXIS 17595, 2026 WL 241823 at *6 (same). "Under an abuse of discretion standard, we cannot reweigh evidence but can only determine whether the [agency] applied the correct legal standard". *Id.* (cleaned up). The Court's review for abuses of discretion is limited to those which allege "violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions." *See Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (quoting *Strickland v. Morton*, 519 F.2d 467, 471 (9th Cir. 1975)).

The government's discretion in immigration bond hearings is constrained by the requirements of due process. *Hernandez v.* Sessions, 872 F.3d 976, 981 (9th Cir. 2017) ("[T]he government's discretion to incarcerate non-citizens is always constrained by the requirements of due process."). A noncitizen may show that an IJ abused her discretion in violation of the due process clause in a bond hearing by demonstrating either that the IJ "simply did not apply the right standard to the facts" or that "the IJ erred because the evidence itself could not – as a matter of law – have supported the decision to deny bond." *Garcia v. Hyde*, No.: 25-cv-585-JJM-PAS, 2025 U.S. Dist. LEXIS 253787, 2025 WL 3466312, at *7 (D.R.I. Dec. 3, 2025) (internal quotations omitted).

Due process.

This Court's prior order say: "Petitioner is entitled to a prompt and individualized bond hearing, at which Respondents must justify her continued detention by a showing of clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if released", *see Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011). The clear and convincing evidence standard is an "intermediate burden of proof" applied when "particularly important interests are at stake". *Mondaca-Vega v. Lynch*, 808 F.3d 413, 422 (9th Cir. 2015) (internal quotations omitted, cleaned up). This standard "requires an abiding conviction that the truth of the factual contentions at issue is highly probable." *Id.* "Put

differently, the evidence must instantly tilt the evidentiary scales in the affirmative when weighed against the evidence offered in opposition.", *see Larissa Tiboko-Tfiuh v. Kristi Noem*, No. 26-cv-01215-JO-DEB, (S.D. Cal. April 2, 2026).

In *Matter of Guerra*, the BIA held that IJs may consider any evidence in the record when assessing bond eligibility, so long as the evidence is "probative and specific." 24 I&N Dec. 37 (BIA 2006). The BIA listed a non-exhaustive set of factors which IJs may consider in making such determinations:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States: (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States. *Id.* at 40.

Since *Matter of Guerra*, several federal courts have used the "probative and specific" evidence requirement to determine whether IJ's bond determinations comport with due process constraints. See *Garcia*, 2025 U.S. Dist. LEXIS 253787, 2025 WL 3466312 at *9 (collecting cases).

At my bond hearing IJ relied on the sole evidence for to find I was a extreme flight risk – my removal order issued by the IJ denying my asylum claim, despite this removal order is not final. She did not analyze whether that evidence comply with required clear and convincing standard and even did not specify that standard. Instead, she alleged: "her removal order is evidence, the question is how much weight I should give that." This IJ's allegation support that she did not specify never legal standard, but argued that made fact finding depend only of her discretion. That underscores that IJ abused her discretion at the bond hearing. However, a removal order does not have "probative" value because it is not a factor which indicate a likelihood of failure to appear or a flight under *Matter of Guerra*. And this evidence does not support that finding I was a flight risk with high degree of certainty required by clear and convincing standard. The IJ's reliance on evidence without probative or specific value under *Guerra* to find flight risk weighs strongly in favor of finding that IJ erred since she did not apply correct evidentiary standard, while alleged in her order at the end of my bond hearing on March 4, 2026, that she "believes the Government has carried it's burden that detention is justified by clear and convincing evidence". *See Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016) ("An agency acts contrary to the law when it gives mere lip service or verbal commendation of a standard but then fails to abide the standard in its reasoning and decision.").

The IJ implicitly shifted the burden to me (Petitioner) to prove why I was not a flight risk or danger to the community. She appears to have taken Respondents' cursory arguments regarding my removal order and entrance into the country without meaningful if any explanation at face value, requiring me to refute the statements rather than requiring Respondents to prove their evidentiary value and correspondence with required "clear and convincing" standard of proof. The conclusion in the bond hearing's order that the factors as "limited family ties, limited residence in the United States, those are all factors that contribute to the court's finding", also support the argument that IJ shifted the burden to Petitioner.

IJ's denial of bond on flight risk based on my removal order without particular reasoning shows that IJ appears to have relied on her speculative presumption that my appeal to the BIA would lack merit or in other words I would not succeed on my appeal before the BIA or the Ninth Circuit. This speculation was improper for her to consider under *Guerra*. See 25 I&N Dec. at 40; *Kamara v. Garland*, No. 24-cv-743-LJV, 2025 U.S. Dist. LEXIS 111072, 2025 WL 1651063, at *2 (W.D.N.Y. June 11, 2025) (explaining the importance of IJ neutrality for due process in bond hearings). "[A]n immigration judge has a responsibility to function as a neutral, impartial arbiter and must be careful to refrain from assuming the role of advocate for either party." *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006). An

IJ's role at a bond hearing is to determine whether the government has met its burden to detain Petitioner. Instead, the IJ appears to assume that I'd flee if be released from custody and not attend my future immigration proceedings. However, the right to liberty from unjust executive detention is an underlying principle of U.S. Constitution. See U.S. Const. Amend. V, §1; The Federalist No. 84 (Alexander Hamilton) ("The practice of arbitrary imprisonments has been, in all ages, the favorite and most formidable instruments of tyranny.").

The IJ also failed to consider the terms of bond and the alternative conditions to detention.

In conclusion, "what we have here on the record is that the Petitioner introduced record evidence on one side of the ledger, evidence that went toward the fact that she was not a flight risk", including the documentation of the U.S. citizen sponsor and verification of a stable residential address, the information of my entry in the United States by CBP-1 application, lack of criminal history; "the Government introduced no evidence on the other side of the ledger establishing that I was a flight risk"; and then the IJ's implicit speculative presumption about the likelihood of future outcomes and, on that basis, ruled that I was a flight risk. *See Larissa Tiboko-Tfiuh v. Kristi Noem*, No. 26-cv-01215-JO-DEB, (S.D. Cal. April 2, 2026). "When there is strong evidence on one side of the record, and no evidence plus speculation on the other side of the record...and the IJ goes with the speculation and the conclusion that is not supported by any factual evidence in the record, Court finds that is not a application of a clear and convincing standard, and that is not the placement of a burden on the Government." *Id.*

[redacted]
Kunakbaeva Zulfia

05.19.2026
Date