UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BRAYAN JOSUE LOPEZ SARMIENTO; JHONATAN ALEX RODRIGUEZ ARGUETA; JOSUE ANTONIO RODRIGUEZ ARGUETA; AXEL EDUARDO MARTINEZ UCLES, on behalf of themselves and all others similarly situated,

Petitioners-Plaintiffs,

v.

PAUL PERRY, *et al.*

Respondents-Defendants.

Case No. 1:25-cv-01644

PETITIONER-PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER

Respondents' opposition lost track of what is being litigated. Rather than respond to the motion that Plaintiff-Petitioners actually filed, their opposition tilted against one of their own invention. *See* Resp'ts. Opp. ("Opp."), Dkt. 33. Because the opposition does not engage with the Motion's legal basis or the applicable injunction factors, nothing in it rebuts Petitioner-Plaintiffs' showing of entitlement to relief.

On December 8, 2025, Plaintiff-Petitioners filed a combined Motion for Temporary Restraining Order and Preliminary Injunction. *See* Pet'r-Pls.' Mot for a TRO & Prelim. Inj. ("Mot."), Dkts. 27, 27-1. Consistent with the *Winter* factors, Plaintiff-Petitioners argued that they are likely to succeed on the merits of their multiple statutory and constitutional claims—including that Respondents failed to provide them with the required pre-deprivation process before re-detaining them, in violation of the Due Process Clause, the Administrative Procedure Act, and the *Accardi* doctrine. *See* Mot. 17–20, 25–27. The Motion requested relief tailored to the distinct

irreparable harms facing each Plaintiff-Petitioner or putative class. *See* Dkt. 27-7 (Proposed Order). For Plaintiff-Petitioner Axel Eduardo Martinez Ucles ("Axel"), the requested relief was a TRO ordering his immediate release from detention, because his detention is unlawful in light of Respondents' failure to provide a pre-deprivation hearing, and because he is suffering irreparable harm in light of the ongoing constitutional violation and Respondents' refusal to provide him with necessary medical care. *See* Mot. 7–8; 27-3 (counsel's repeated emails requesting care); Dkt. 30-1 (June 2025 hospital record indicating potentially serious condition); Dkt. 27-2 (Axel declaration).

Rather than respond to these arguments, Respondents invent new ones. Their opposition fails to mention pre-deprivation process, the APA, the *Accardi* doctrine, or the *Winter* factors at all. *See* Opp. Instead, they argue that Axel cannot appeal his bond petition to this Court (he has not done so), and that Axel cannot make out a deliberate indifference claim (he has not done that either).[1] Respondents concede that "the appropriate remedy [is] to enjoin any unconstitutional practices," Opp. 2—yet they never address the unconstitutional practice actually at issue here: the failure to provide a pre-deprivation hearing prior to any re-detention. Where "a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded." *Williams v. Newport News Sch. Bd.*, No. 4:20-cv-41, 2021 WL 3674983, at *17

[1] Interestingly, although Axel is not arguing in support of a claim for deliberate indifference, Respondents' Opposition seems to invite the conclusion that Axel's injury might actually meet that high bar. They argue that, to show deliberate indifference, Axel must show "a substantial risk of serious harm," and that Respondents "kn[ew] of and disregard[ed] that substantial risk to the inmate's health or safety." Opp. 3–4. Here, Axel's medical records demonstrate a substantial risk that he has a serious undiagnosed medical condition, *see* Dkt. No. 30-1 at 4 [redacted], and Defendants have repeatedly ignored his and his counsel's entreaties for the specialist care that Farmville's own physicians have said he needs. *See* Dkt. 27-2 ¶ 13; Dkt. 27-3. The Court need not address the deliberate indifference standard, but it is telling that, under Respondents' own formulation, the facts here may well satisfy it.

(E.D. Va. Aug. 19, 2021) (citing *Intercarrier Commc'ns, LLC v. Kik Interactive, Inc.*, No. 3:12-cv-771, 2013 WL 4061259, at *3 (E.D. Va. Aug. 9, 2013)). That alone is sufficient reason for this Court to grant the requested relief.

To the extent Respondents' opposition—generously construed—could be read to argue that this Court lacks authority to order Axel's release because an Immigration Judge has since denied bond, that argument is wrong. As noted above, Axel does not seek review of the Immigration Judge's bond determination.[2] He does not challenge the IJ's assessment of flight risk, nor does he ask this Court to revisit or set aside the bond denial. Instead, Axel challenges an antecedent constitutional violation: Respondents' failure to provide any pre-deprivation process before they re-detained him back in July, after years of lawful residence in the community. That claim falls squarely within this Court's habeas and equitable jurisdiction and is not barred by § 1226(e) or § 1252(a)(2)(B). *Lopez v. Sessions*, No. 18-cv-4189 (RWS), 2018 WL 2932726, at *6 (S.D.N.Y. June 12, 2018) ("Federal courts have jurisdiction to hear habeas corpus claims by non-citizens challenging the constitutionality of their detention"); *see also Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (plurality opinion) (§ 1226(e) does not preclude "challenges to the statutory framework that permits the alien's detention without bail"); *see also Muhammad v. Close*, 540 U.S. 749, 750

[2] Respondents' Opposition incorrectly states that "Petitioner's flight risk determination was made based on the individualized facts that Petitioner failed to appear in removal proceedings multiple times." Opp. at 6 (emphasis omitted). This is false—Axel has never failed to appear in removal proceedings. Rather, the IJ's flight risk determination was related to failures to appear in unrelated state court proceedings—only one of which was unexcused (for which Axel paid a small fine). As Axel argued in his renewed bond petition, see Dkt. No. 30-3, these failure-to-appear charges are irrelevant to any present flight risk. Axel has no reason to flee prosecution: he has already appeared at his individual merits hearing; he has pending visa and asylum petitions through which he seeks lawful permanent resident status; he has agreed to represent putative class members in this lawsuit; and he maintains a stable address and close family ties, including financial support of his family.

(2004) (per curiam) (citations omitted) ("Challenges to the validity of any confinement … are the province of habeas corpus.").

Axel's subsequent bond hearing cannot cure this constitutional defect. Where pre-deprivation process is feasible and constitutionally required, *post hoc* proceedings do not retroactively remedy the unlawful deprivation of liberty. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Zinermon v. Burch*, 494 U.S. 113, 127–28 (1990); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 59–61 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (quotations and citation omitted)). And indeed, Axel's recent bond hearing placed the burden on *him* to demonstrate entitlement to release, whereas due process requires *the Government* to bear the burden of justifying any re-detention by clear and convincing evidence. *See Hernandez-Fernandez v. Lyons,* No. 5:25-cv-00773-JKP, 2025 WL 2976923, at *10 (W.D. Tex. Oct. 21, 2025) (noting that "the 'vast majority'—an 'overwhelming consensus'" of courts have placed the burden on the Government to prove danger or flight risk by clear and convincing evidence (citing *Lopez v. Decker*, 978 F.3d 842, 855 n.14 (2d Cir. 2020)); *see also* Mot. 16 n.3. Indeed, numerous courts across the country have reached this conclusion in similar procedural postures, including several over the past few days alone. *See, e.g.*, *Cuya-Priale v. Castro*, No. 2:25-cv-1166, 2025 WL 3564145 (D.N.M. Dec. 12, 2025); *Hortua v. Chestnut*, No. 1:25-cv-01670-TLN-JDP, 2025 WL 3525916 (E.D. Cal. Dec. 9, 2025); *Ye v. Maldonado*, No. 1:25-cv-06417-AMD, 2025 WL 3521298 (E.D.N.Y. Dec. 8, 2025); *Obregon v. Francis*, No. 1:25-cv-09465-KPF, Dkt. 12 (S.D.N.Y. Nov. 20, 2025); *Ortiz-Lopez v. Francis*, No. 1:25-cv-07985, Dkt. 14 (S.D.N.Y. Nov. 6, 2025); *Guachiac-Chox v. Robbins*, No. 1:25-cv-01648-KES-HBK, Dkt. 10 (E.D. Cal. Dec. 8, 2025);

Aguilera v. Albarran, No. 1:25-cv-01619-JLT-SAB, Dkt. 16 (E.D. Cal. Dec. 4, 2025); *L.A.E. v. Wamsley*, No. 3:25-cv-01975-AN, Dkt. 18 (D. Or. Dec. 4, 2025); *Salazar v. Dedos*, No. 1:25-cv-00835-DHU-JMR, 2025 WL 2676729, at *9 (D.N.M. Sept. 17, 2025); *Morgan v. Oddo*, No. 3:24-cv-00221-MPK, 2025 WL 2653707, at *1 (W.D. Pa. Sept. 16, 2025).

This court should do the same. For all of the reasons set forth in Plaintiff-Petitioners' Motion—and left unanswered in Respondents' Opposition—Axel is entitled to immediate release, and may not be re-detained absent a showing of changed circumstances indicating that he is a flight risk or a danger to the community, by clear and convincing evidence.

Date: December 16, 2025

Respectfully submitted,

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**pro hac vice* application forthcoming