

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

Mr. Jorge Humberto ALVAREZ ORTIZ,
Petitioner,

v.

JOSEPH FREDEN,
in his official capacity as Field
Office Director, Buffalo Field
Office, U.S. Immigration &
Customs Enforcement;

STEVEN KURZDORFER,
In his official capacity as Acting
Field Office Director, Buffalo Field
Office, U.S. Immigration & Customs
Enforcement;

TODD LYONS,
In his official capacity as Acting
Director, U.S. Immigration and
Customs Enforcement,

KRISTI NOEM,
In her official capacity as Secretary
of Homeland Security,

Respondent.

Civil Action No. 25-cv-960

Immigration No. A1 

**RESPONSE IN OPPOSITION
TO RESPONDENTS' MOTION
TO DISMISS**

Oral Argument Requested

RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Respondents have filed a motion to dismiss. The Motion argues that the Petition for a Writ of Habeas Corpus should be dismissed due to 1) failure to exhaust administrative remedies, 2) because Petitioner is detained under 8 U.S.C. § 1225(b) and his detention is mandated until he is removed, and 3) because ICE purports to have the authority to freely transfer noncitizens at will. The Motion to Dismiss should be denied as it is without merit. Petitioner responds as follows:

Failure to Exhaust Administrative Remedies

Petitioner did, indeed, request a bond hearing, and he was denied one by an Immigration Judge. Irrespective of such, exhaustion of administrative remedies here would be futile as the Board of Immigration Appeals precedent decision in *Matter of Yajure Hurtado* is being followed by all Immigration Courts nationwide, as part of a wide-reaching bond denial policy in violation of the law. Appeal of an Immigration Judge decision to the Board of Immigration Appeals would be futile as a bond appeal takes an average of six months or more, a single member of that Board cannot overrule Board precedent, and the likelihood of a three-member panel convening and overturning *Matter of Yajure Hurtado* is so remote that exhaustion would be futile and would also cause irreparable harm; the likelihood of the bond matter being moot by the time the BIA reviews it is also very high.

Petitioner's Detention is Under 8 U.S.C. § 1226(a), Not 8 U.S.C. § 1225(b)

For the reasons as stated in the Petition, the government's contention that 8 U.S.C. § 1225(b) controls Petitioner's detention is legally incorrect. As of today, Petitioner's counsel is aware of 176 favorable district court decisions¹ rejecting the government's contention that 8 U.S.C. § 1225(b) provides the authority for mandatory detention.

We are only aware of 10 unfavorable decisions nationwide, but that counts denials of TRO motions and denials on the basis of jurisdiction or lack of exhaustion. In actuality, only two of those decisions were actually on the merits. Of the unfavorable decisions, one decision was

¹ A spreadsheet tracking district court decisions on this issue is available at <https://ailassoc.sharepoint.com/:x/s/legalteam/ETbJeNF7whFKjedlZi4f-L0BLqBvPhDAf5Fan6xh3q9ItA> and is also being attached as an exhibit to this filing.

subsequently overruled by the same judge (*Pena v. Hyde*, 2025 WL 2108913 (D. Mass. July 28, 2025)); overruled by *Lema Zamora v. Noem*, 2025 WL 2958879 (D. Mass. Oct. 17, 2025)); and one was dismissed for failure to exhaust administrative remedies but actually reached a favorable result on the statutory question (*Quinonez Mercado ex rel. Abarca-Jovel v. DHS*, 2025 WL 2430423 (D. Mass. Aug. 22, 2025)). In one case, *Pipa-Aquise v. Bondi*, 2025 WL 2490657 (E.D. Va. Aug. 5, 2025), the Court was dealing with a distinct issue and although the government has cited this as a case that breaks from the weight of authority on the issue of 1225(b)(2) versus 1226(a) detention, the same judge, Judge Nachmanoff issued *Teyim v. Perry*, which addresses this issue directly and concluded that 1226(a), not 1225(b), controls.

Judge Philip Calabrese in the Northern District of Ohio has denied three petitions for failure to exhaust administrative remedies, but one of the cases, *Monroy Villalta v. Greene*, 2025 WL 2472886 (N.D. Ohio Aug. 5, 2025), predates *Yajure Hurtado*. The second petition was denied based on a purported lack of exhaustion (*Laguna Espinoza v. Director of Detroit Field Office*, 2025 WL 2878173 (N.D. Ohio Oct. 9, 2025)) where the Petitioner did not make a robust argument about the futility of such, and the third petition was likewise denied due to a lack of exhaustion without addressing futility at all (*Abdoulaye Ba v. Director of Detroit Field Office*, 2025 WL 2977712 (N.D. Ohio Oct. 22, 2025)).

In *S.Q.D.C. v. Bondi*, 2025 WL 2617973 (D. Minn. Sept. 9, 2025), Judge Paul Magnuson denied a petition based on lacking jurisdiction to review detention under 1252(b)(9) and 1252(g), but this issue was acknowledged and rejected by Judge Katherine Menendez in *Belsai D.S. v. Bondi*, 2025 WL 2802947 (D. Minn. Oct. 1, 2025). In *Vargas Lopez v. Trump*, 2025 WL 2780351 (D. Neb. Sept. 30, 2025), Judge Brian Buescher in the District of Nebraska denied habeas relief but did not grapple with the reasoning in the weight of authority going the other

way, did not address the meaning or import of “seeking admission” under 1225(b)(2)(A), and accepted the government’s argument that 1225(b)(2) and 1226(a) overlap, ignoring superfluity issues. The remaining two cases that we are aware of were denials of TRO only. *Huaman Villanueva v. Chestnut*, 2025 WL 2996559 (E.D. Cal. Oct. 24, 2025); *Chavez v. Noem*, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025).

As such, it appears that out of these ten “denials,” only one, *Vargas Lopez v. Trump*, purported to actually reach the merits of the issue and was not subsequently overturned by the same judge. The rest of these cases were either TRO denials, denials based on a supposed lack of jurisdiction, denials based on a purported lack of exhaustion of administrative remedies, or, in one case, subsequently overruled by the same judge after considering the arguments and the weight of authority.

Movement of Petitioner

The issues surrounding ICE moving petitioner and this Court’s authority to enjoin such actions have been addressed with respect to the TRO motion and, for brevity’s sake, will not be repeated here.

Dated: November 4, 2025

/s/ Matthew K. Borowski

Matthew K. Borowski
Attorney for Petitioner
4343 Union Road,
Buffalo NY 14225
E-mail: matthew@borowskilaw.com
Tel: 716-330-1503