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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ASKHAT KOSHKINBAY,
Petitioner,

v.

CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center; 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,
Respondents.

Case No.: 26-cv-3039-RSH-DDL

Amended petition for writ of habeas corpus (partially unopposed)

I. Introduction

This Court should order that Mr. Koshkinbay be released subject to reasonable conditions, receive a new bond hearing, or both. It should do so because the immigration judge's "finding that [he] poses a flight risk" constituted an "abuse of discretion." *Perez Velasquez v. Bondi*, No. 26-cv-1759-GPC-DDL, 2026 WL 1042479, *5 (S.D. Cal. April 16, 2026). An immigration judge abuses her discretion in denying an immigration bond when she does not "apply[] the correct legal standard." *Martinez v. Clark*, 124 F.4th 775, 785 (9th Cir. 2024) (establishing jurisdiction and the standard of review for immigration court bond decisions challenged through § 2241 litigation). The IJ applied the incorrect legal

standard here: She flipped the burden of proof. Respondents do not oppose this Court ordering a new bond hearing under the proper standard of proof.

This Court granted Mr. Koshkinbay's *pro se* petition and ordered Respondents to hold a bond hearing for Mr. Koshkinbay in early February 2026. *Koshkinbay v. Warden*, 26-cv-284-RSH-DEB, ECF No. 5 (S.D. Cal.) (attached here at Exhibit A). Mr. Koshkinbay's then-13-month "detention without a bond hearing ha[d] become unreasonable and violate[d] due process." *Id.* at 5. This Court ordered therefore that he was "entitled to a prompt and individualized bond hearing, at which Respondents must justify his continued detention by a showing of clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if released." *Id.* It ordered that he receive that hearing "within fourteen (14) days of [its] order." *Id.* at 6.

In early March 2026, Respondents realized that the hearing had not yet been held and scheduled a same-day hearing. At it, the immigration judge and the parties misunderstood this Court's order because, in immigration court, *noncitizens* are referred to as the respondents. So, quickly reading this Court's order, the immigration judge put the burden of proof on Mr. Koshkinbay: "I read that to mean the burden still is on the Respondent, counsel, that he is not a flight risk or a danger to the community." Exhibit B, 2:44 PM hearing, 04:36–46. The IJ again followed up, "So counsel, it's up to the respondent to show that he is not a flight risk or a danger to the community." *Id.* at 05:03–10.[1]

Because the IJ's failure to apply the correct legal standard was error—violating this Court's order as well as due process—this Court should order Mr. Koshkinbay's release subject to a reasonable bond or reasonable conditions of supervision. At a minimum, it should order another bond hearing.

[1] Mr. Koshkinbay has lodged an audio recording of the hearing as Exhibit B. There was a recess during the hearing, so there are two audio files within Exhibit B. The first is cited as the 2:44 PM hearing; the second is cited as the 3:42 PM hearing. There is no official transcript created during immigration court bond hearings.

II. Statement of Facts and Case History

Mr. Koshkinbay fled political persecution in Kazakhstan and arrived at the Otay Mesa Port of Entry on January 12, 2025. Exhibit A at 1. He received a positive credible fear interview result and was placed before an immigration judge for full removal proceedings. He was detained at the Otay Mesa Detention Center, where he remains under 8 U.S.C. § 1225(b). Exhibit A at 2.

Mr. Koshkinbay obtained a *pro bono* immigration attorney and filed his asylum application with the court on June 17, 2025. *Id.* at 2. His asylum merits hearing was initially scheduled for November 26, 2025. Exhibit C at 1 (collected hearing scheduling notices). It was moved several times and held on May 29, 2026. Exhibit C at 3, 5. There was not enough time to complete the hearing, so another one will be held on July 10, 2026. Exhibit C at 6.

In January 2026, Mr. Koshkinbay filed a *pro se* petition for a writ of habeas corpus. Exhibit A at 1; *see Koshkinbay v. Warden*, No. 26-cv-284-RSH-DEB, ECF No. 1 (S.D. Cal.).

This Court granted the petition on February 3, 2026. "On balance, the Court determine[d] that the applicable factors indicate[d] that Petitioner's detention without a bond hearing ha[d] become unreasonable and violate[d] due process. Exhibit A at 5. It ordered, "Petitioner is entitled to a prompt and individualized bond hearing, at which Respondents must justify his continued detention by a showing of clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if released." *Id.* The Respondents were "directed to arrange an individualized bond hearing for petitioner . . . before an immigration court within fourteen (14) days of this order." *Id.* at 6 (original emphasis omitted).

On March 2, 2026, the immigration court held a bond hearing. *See* Exhibit B. DHS had filed a request for that hearing that same morning. Exhibit B, 2:44 PM hearing, 01:13–03:05.

The immigration judge noted at the outset, "Let me just take a look at the

district court's order to see if the burden of proof shifted to the Department. One moment please." *Id.* 03:51–04:10.

The immigration judge followed up with confusion, echoed by the parties, about who the Respondents in the *habeas* litigation were—the warden and government officials—versus who the noncitizen respondent was in the underlying *immigration* administrative proceeding:

> The Court: Okay, so it says petitioner is entitled to a prompt and individualized bond hearing, at which *respondent* must justify his continued detention by showing a clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if release. So I read that to mean that the burden still is on the respondent, counsel, to show that he is not a flight risk or a danger to the community. Is that how you read that, counsel?
>
> Mr. Koshkinbay's counsel: Yes, Your Honor.
>
> The Court: And government counsel?
>
> DHS counsel: Yes, Your Honor. . . .
>
> The Court: Okay so counsel it is up to respondent to show that he is not a flight risk or a danger to the community.

Id. 04:21–05:11 (emphasis added).

An attorney appearing for Mr. Koshkinbay's primary *pro bono* counsel requested more time to prepare for the hearing, noting they had learned of the bond hearing that day as well; they did not represent Mr. Koshkinbay in the habeas litigation. *Id.* 05:15–39. The immigration judge denied that request because the hearing was already being held outside of the time imposed by this Court's order. *Id.* 05:40–56. She provided an hourlong recess for counsel to prepare for a hearing. *Id.*

Following the recess, the immigration judge reiterated, "According to the district court's order, the burden remains on the respondent to show that he is not

a flight risk or a danger to the community." Exhibit B, 3:42 PM hearing, 00:26–32. Mr. Koshkinbay's counsel submitted information indicating Mr. Koshkinbay had no criminal history, either in the United States or Kazakhstan, and provided an affidavit indicating he would be sponsored by a nonprofit shelter based in Austin, Texas, named Casa Marinella. She noted that the nonprofit's affidavit explained how it had strict house rules, including a curfew, and that it provided support resources such as English classes, clothing, and food. *Id.* 00:42–1:40. It also provides transportation to all immigration hearings. *Id.*

The government argued Mr. Koshkinbay was a flight risk because the nonprofit's letter was ten months old, and from a nonprofit rather than an individual; he had been detained upon arrival in the United States; and he had arrived at the port of entry with a group of asylum seekers without making a CBP One appointment. *Id.* 04:46–05:59.

The immigration judge followed up, "And I will state for the record that it's not clear to this court how the district court judge reached the conclusion that the respondent is eligible for bond. Under the Immigration and Nationality Act, he's an arriving alien and arriving aliens are not eligible for bond. But the court is respecting the district court's order." *Id.* 06:59–07:19.

After additional argument, the immigration judge denied bond because Mr. Koshkinbay had not provided sufficient evidence he was not a flight risk as a new arrival in the United States without family here. She explained,

> He has a letter from a shelter in Texas, Austin, Texas, from ten months ago. So it's an outdated letter, it's not current, there's no indication that the facility, that the shelter would still accommodate the respondent. And moreover the Court does have concerns in general when the sponsor is essentially a shelter and not a designated individual because the shelter takes in many individuals, and as the government pointed out, there's no certainty that the shelter will ensure that he attends all his immigration hearings and that he won't be a flight risk. . . . And while this outdated letter, dated ten months ago, states that Casa Marinella has strict house rules, there's nothing that really indicates that the respondent

> wouldn't be free to leave if he chose to do so. So the Court, based on the fact that it's a shelter, and not an individual who would be his sponsor, based on the fact that it's an outdated letter from months ago, the Court is not convinced that the Respondent is not a flight risk. In fact, the Court is going to find that he's a flight risk and that there's no amount of bond that would mitigate that risk. So I am going to deny bond on that basis.

Id. at 12:14–14:12.

III. This Court has jurisdiction.

This Court has jurisdiction under 28 U.S.C. § 2241. There is no immigration statute that "strip[s] federal courts of 'traditional habeas jurisdiction.'" *Martinez*, 124 F.4th at 781. While this Court does not have jurisdiction over the "'executive's exercise of discretion[,]' . . . that discretionary judgment does not include constitutional claims or questions of law." *Id.* at 782. And as the Ninth Circuit held in *Martinez*, the question of whether a noncitizen is ultimately "a danger to the community or a risk of flight"—as well as the question whether something procedurally was "amiss" during that determination—is "a reviewable mixed question" of law. *Id.* at 783, 785; *see, e.g.*, *Perez-Velasquez*, 2026 WL 1042479 at *2 (collecting cases explaining this point).

IV. This Court 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 bond. *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 or not as to an immigration judge's abuse of discretion in a bond hearing. *Id.*

Here—when the question is whether this Court's order was followed; when Mr. Koshkinbay was detained in violation of due process without any individualized bond hearing before this Court ordered the bond hearing at issue; and when it is irreparable harm to continue to be detained in immigration custody when a constitutionally adequate bond hearing could and should result in his

release—this Court should not require exhaustion.

Indeed, in another recent case in which a habeas order was not followed by the immigration court, Judge Moskowitz granted immediate release on reasonable conditions set by ICE and explained, "Because th[e] question—whether the Respondents complied with the prior court order and judgment—is a legal question for the Court, rather than the BIA, exhaustion was not required." *Asadimofarah v. LaRose*, No. 26-cv-2442-BTM-SBC, ECF No. 9 at 3 (S.D. Cal. May 22, 2026) (attached as Exhibit D).

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*, 2026 WL 622302 at *10 (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) (quoting *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004)).

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. "And, in any event, the underlying factual record is straightforward and undisputed." *Gomes v. Hyde*, 804 F. Supp. 3d 265, 273 (D. Mass. 2025). Neither

does the second factor favor exhaustion: whether the immigration court followed this Court's order is "a mixed question of fact and law" that "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 in the next six months and would thus significantly prolong his illegal detention. *Miri*, 2026 WL 622302 at *11.

Regardless, even if *all* of 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. Koshkinbay's case. Indeed, the Ninth Circuit has recognized "the irreparable harms imposed on anyone subject to immigration detention." *Hernandez*, 872 F.3d at 995." Courts have also "found that continued detention after a potentially legally inadequate hearing may constitute such irreparable harm." *Perez Velasquez*, 2026 WL 1042479 at *4 (collecting cases). For both of these reasons, "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).

At the end of the day, Mr. Koshkinbay's petition—a petition arising from standards identified in this Court's prior order identifying a legal violation stemming from his due-process violating detention—is not an appropriate one in which to require exhaustion to the BIA as a prudential matter.

V. The immigration judge violated due process, abused her discretion, and violated this Court's order by placing the burden of proof on Mr. Koshkinbay.

This Court ordered as a matter of due process that, within 14 days of February 13, 2026, Mr. Koshkinbay was "entitled to a prompt and individualized bond hearing, at which *Respondents* must justify his continued detention by a showing of clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if released." Exhibit A at 5–6 (emphasis added).

In immigration court, the *noncitizen* is the respondent. So the immigration judge and the parties misunderstood this Court's order. The immigration judge stated, "I read that to mean that the burden still is on the respondent, counsel, to show that he is not a flight risk or a danger to the community." Exhibit B, 2:44 PM hearing, 04:30–45. She denied Mr. Koshkinbay bond under this legal standard. Exhibit B, 3:42 PM hearing, 00:26–32, 12:14–14:12.

This was a violation of due process, this Court's order, and an abuse of discretion. Whether an immigration court applies "the wrong burden of proof" is "a 'question[] of law.'" *Martinez*, 124 F.4th at 785 (quoting *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011), *abrogated on other grounds recognized in Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)). Here, in line with due process precedent from the Ninth Circuit, this Court ordered that the burden of proof be on the government to prove Mr. Koshkinbay was a flight risk. Exhibit A. The immigration judge applied the wrong burden of proof, keeping it on Mr. Koshkinbay. Exhibit B. This was a constitutional violation and an abuse of discretion that requires a remedy.

VI. As in *Zheng*, *Perez Velasquez*, and *Asadimofarah*, this Court should order Mr. Koshkinbay's immediate release.

This Court should order Mr. Koshkinbay's release on reasonable conditions determined by ICE. Respondents have now twice violated his due process rights. First, they detained him for over a year without holding an

individualized bond hearing. Second, they placed the incorrect burden of proof on him to prove he was not a flight risk. And Respondents have violated not just one but multiple components of this Court's order. Respondents held a bond hearing multiple weeks after this Court's deadline, under the wrong legal standard this Court identified.

After finding that an IJ's failure to apply the correct legal standard violated due process, district courts in cases like *Zheng*, *Perez Velasquez*, and *Asadimofarah* each ordered immediate release.

In *Zheng v. Rokosky*, __ F. Supp. 3d __, 2026 WL 800203, *8 (D.N.J. Mar. 23, 2026), the district court held that the petitioner's five-month detention had "become so unreasonable" after a faulty bond hearing that "the only just remedy in these circumstances is immediate release." The court explained that "Respondents have now violated Petitioner's due process rights twice: first when they initially detained him unlawfully under § 1225(b), and then again when they deprived him of a constitutionally adequate bond hearing." *Id.* It noted that "[c]ourts across the country confronting due process violations akin to that here have recognized that a new hearing would either be unnecessary, futile, or an inadequate remedy." *Id.* at *10 (collecting cases).

Given that Respondents were "given an opportunity to cure their earlier constitutional violation by providing Petitioner a fundamentally fair bond hearing" but "woefully failed to do so," the court declined to give them a "third bite at the apple" and ordered immediate release. *Id.* at *11.

Similarly, the court in *Perez Velasquez* surveyed recent cases to this point and concluded that it would order "immediate release with reasonable conditions of supervision [a]s the appropriate remedy." 2026 WL 1042479 at *7 (internal quotation marks omitted).

In *Asadimofarah*, Judge Moskowitz ordered the petitioner's immediate release because an immigration judge had failed to "engage in an individualized

analysis as to whether, with conditions, Petitioner would fail to appear," as they had been ordered to do in a prior habeas case. Exhibit D at 4. In light of the immigration judge's failure to abide by the order, among other case-specific reasons, "[r]elease subject to a reasonable bond or reasonable conditions of supervision is the appropriate remedy." *Id.* at 5.

As in *Zheng*, Mr. Koshkinbay's detention has "become so unreasonable" that "the only just remedy in these circumstances is immediate release." 2026 WL 800203, *8. Respondents were "given an opportunity to cure their earlier constitutional violation by providing [Mr. Koshkinbay]" a fundamentally fair bond hearing" but "woefully failed to do so," and this Court should decline to give them a "third bite at the apple." *Id.* at *11.

VII. Claim and Prayer for Relief

For these reasons, this Court should grant Mr. Koshkinbay's habeas petition and order his release subject to a reasonable bond or reasonable conditions of supervision. Should this Court decline to order immediate release, it should at a minimum order a new bond hearing.

Respectfully submitted,

Dated: June 8, 2026

s/ Jessie Agatstein

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