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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Marlon Alcides Palma-Platero,  
10 Petitioner,

11 v.

12 Jeff B. Sessions, III, et al.,  
13 Respondents.  
14

No. CV 17-01484-PHX-DGC (DKD)

**ORDER**

15 On May 16, 2017, Petitioner Marlon Alcides Palma-Platero filed, through counsel,  
16 a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Doc. 1) and a Motion for  
17 Preliminary Injunction and/or Temporary Restraining Order (Doc. 3). On June 5, 2017,  
18 the Court entered an Order to Show Cause requiring Respondents Jeff Sessions, III, John  
19 F. Kelly, and Enrique Lucero<sup>1</sup> to show cause why the petition should not be summarily  
20 granted for the reasons set forth in the order.

21 On June 19, 2017, Respondents filed a combined Answer and Response to the  
22 Order to Show Cause and Response to the Petition (Doc. 9). On June 20, 2017, Petitioner  
23 filed a Reply (Doc. 14), followed subsequently by two Notices of Supplemental  
24 Authority and three Motions to Expedite Ruling (Docs. 6, 11, and 13).<sup>2</sup> The Court will  
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26 <sup>1</sup> The Court dismissed Respondents Juan P. Osuna and Cara O. Knapp after  
27 concluding that these individuals were not proper Respondents in a habeas case  
28 challenging a petitioner's confinement.

<sup>2</sup> Respondents have also filed a Response to the Notice of Supplemental Authority  
(Doc. 12).

1 grant the Petition and deny as moot Petitioner’s Motion for Preliminary Injunction and/or  
2 Temporary Restraining Order, as well as the two Motions to Expedite.

3 **I. Background**

4 Petitioner is a native and citizen of El Salvador. Petitioner first entered the United  
5 States in June 2001 and was subsequently removed in 2011. (Doc. 1 at 5). Sometime  
6 thereafter, Petitioner returned to the United States seeking asylum. (*Id.*). When DHS  
7 sought to reinstate Petitioner’s prior order of removal, Petitioner claimed a fear of  
8 returning to his country of origin and the reinstatement of his removal order was  
9 suspended pursuant to 8 C.F.R. § 1208.31. (*Id.* at 6.) Petitioner was subsequently  
10 detained by ICE and given a reasonable fear interview, as a result of which he received “a  
11 positive reasonable fear determination” and was placed into “withholding only  
12 proceedings” pursuant to 8 C.F.R. § 1208.2(c)(3). (*Id.*).

13 As part of those proceedings, Petitioner applied for Withholding of Removal and  
14 relief under the Convention Against Torture Act. (*Id.*) Petitioner’s hearing on his claim  
15 for protection from return to El Salvador was scheduled for June 28, 2017. (*Id.*).

16 Meanwhile, on April 27, 2017, Petitioner filed a request for a bond  
17 redetermination hearing with the Immigration Judge. (*Id.*). However, no hearing was  
18 held. (*Id.*). Instead, on April 28, 2017, Immigration Judge Knapp denied the motion on  
19 the basis that she lacked jurisdiction to consider the motion because Petitioner “is in  
20 Withholding-Only proceedings.” (*Id.*, Doc. 1-7). Petitioner’s appeal of that ruling  
21 remains pending.

22 **II. Petition**

23 Petitioner states that he has now been “detained longer than six months under the  
24 authority of either 8 U.S.C. § 1236(a) or 8 U.S.C. § 1231(a).” (*Id.* at 2.) Petitioner  
25 contends that pursuant to *Rodriguez v. Robbins (Rodriguez III)*, 804 F.3d 1060 (9th Cir.  
26 2015), and *Diouf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011), mandatory detention  
27 under these statutes terminates after six months, at which time the detained alien must be  
28 granted a hearing to determine whether he or she may be released from custody on bond.

1 (*Id.* at 2-3.). Similarly, in his Motion for Preliminary Injunction and/or Temporary  
2 Restraining Order, Petitioner seeks an order requiring Respondents to provide him with  
3 an individualized bond hearing as soon as possible. (Doc. 3 at 1-2).

4 Petitioner acknowledges that he has failed to exhaust his administrative remedies  
5 because his challenge to the IJ’s decision is still pending. He argues, however, that  
6 exhaustion is a prudential rather than a jurisdictional, requirement and the factors  
7 favoring application of the exhaustion requirement are not present here. Specifically,  
8 Petitioner claims that an administrative appellate record is not material to “the purely  
9 legal issue of whether aliens in withholding-only proceedings are entitled . . . to bond  
10 hearings after six months of ICE detention” (Doc. 1 at 20); that a decision to waive the  
11 exhaustion requirement will not encourage litigants to bypass the administrative review  
12 scheme, but will instead prevent this issue from arising in the future; and that BIA review  
13 would not preclude the need for judicial review because the parties would undoubtedly  
14 seek further review in this Court or in the Court of Appeals.

15 **III. Response to Order to Show Cause**

16 Respondents argue that the Petition should be dismissed for lack of jurisdiction  
17 because Petitioner has not yet exhausted his administrative remedies. According to  
18 Respondents, this action is an improper attempt to circumvent the administrative review  
19 process and would, if successful, encourage other litigants to sidestep the administrative  
20 review scheme.

21 Respondents also argue that the Petition is subject to dismissal on the merits.  
22 They claim that the order of reinstatement is a final order and that Petitioner is therefore  
23 detained pursuant to 8 U.S.C. § 1231, not § 1226. Thus, according to Respondents,  
24 Petitioner is in withholding-only proceedings, not removal proceedings, and the IJ  
25 properly held that the immigration court lacked jurisdiction under 8 C.F.R. §§ 1003.19(a)  
26 and 1236.1(d) to redetermine Petitioner’s custody status. Respondents further allege that  
27 the Ninth Circuit’s decisions in *Diouf II* and *Rodriguez III* do not support Petitioner’s  
28

1 claim because those holdings do not apply to aliens subject to reinstated orders of  
2 removal.

#### 3 **IV. Discussion**

##### 4 **A. Detention Authority**

5 While there was disagreement as to the source of the government’s detention  
6 authority in this case, after the Order to Show Cause was issued, the Ninth Circuit held  
7 that the finality of a reinstated removal order is not affected by the pendency of  
8 withholding-only proceedings. *Padilla-Ramirez v. Bible*, \_\_\_ F.3d \_\_\_, 2017 WL  
9 2871513, at \*4 (9th Cir. Jul. 6, 2017). Thus, aliens in withholding-only proceedings are  
10 detained pursuant to the government’s § 1231(a) post-removal detention authority, rather  
11 than the pre-removal detention authority provided by § 1226(a). *Id.* The Court therefore  
12 concludes that Petitioner is being detained pursuant to § 1231(a).

##### 13 **B. Exhaustion**

14 As Petitioner notes, exhaustion is a prudential rather than a jurisdictional  
15 requirement. *Singh v. Holder*, 638 F.3d 1196, 1203 n. 3 (9th Cir. 2011). Courts may  
16 require prudential exhaustion if (1) agency expertise makes agency consideration  
17 necessary to generate a proper record and reach a proper decision; (2) relaxation of the  
18 requirement would encourage the deliberate bypass of the administrative scheme; or  
19 (3) administrative review is likely to allow the agency to correct its own mistakes and to  
20 preclude the need for judicial review. *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir.  
21 2007). Even if these factors favor application of the exhaustion requirement, however,  
22 waiver of the requirement may nevertheless be appropriate “where administrative  
23 remedies are inadequate or not efficacious, pursuit of administrative remedies would be a  
24 futile gesture, irreparable injury will result, or the administrative proceedings would be  
25 void.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation and quotation  
26 marks omitted).

27 Respondents rely solely on the second factor enumerated in *Puga* to argue that  
28 Petitioner should be precluded from seeking review in this Court until his BIA appeal is

1 complete. But the Court has identified no fewer than six cases in this District where the  
2 exhaustion requirement was waived for similarly-situated petitioners. *See Rivas-Moreira*  
3 *v. Lynch*, CV 16-04518-PHX-DJH (BSB), Doc. 17; *Mendez-Cruz v. Lynch*, CV 16-  
4 04416-PHX-GMS (DMF), Doc. 18; *Velarde-Maldonado v. Sessions*, CV 17-01018-PHX-  
5 JJT (MHB), Doc. 16; *Urias-Alvarenga v. Sessions*, CV 17-01005-PHX-JJT (JFM), Doc.  
6 17; *Fuentes-Barnett v. Sessions*, CV 17-00858-PHX-DGC (JZB), Doc. 24; *Gomez-*  
7 *Vasquez v. Lynch*, CV 17-00269-PHX-JJT (JFM), Doc. 11. The Court finds that the  
8 potential for irreparable harm to Petitioner, in the form of continued unlawful detention,  
9 outweighs any incremental incentive that a waiver of the exhaustion requirement would  
10 provide to potential litigants.

### 11 **C. Application of *Diouf II***

12 Petitioner maintains that he is entitled to a bond hearing pursuant to *Diouf II*. In  
13 that case, the Ninth Circuit addressed the due process requirements for prolonged  
14 detention under 8 U.S.C. §§ 1226(a) and 1231(a)(6). The court concluded that because  
15 prolonged detention of an alien without an individualized determination of flight risk and  
16 danger would “raise serious constitutional concerns,” aliens facing prolonged detention  
17 under § 1231(a)(6) “are entitled to a bond hearing before an immigration judge and [are]  
18 entitled to be released from detention unless the government establishes that the alien  
19 poses a risk of flight or a danger to the community.” *Diouf II*, 634 F.3d at 1092.

20 Respondents’ efforts to distinguish *Diouf II* are unavailing. Although the  
21 petitioner in *Diouf II* was undertaking a collateral challenge to his removal order, the  
22 Ninth Circuit expressly extended the right to a bond hearing to *all* aliens detained under  
23 § 1231(a)(6), stating: “Section 1231(a)(6) encompasses aliens such as *Diouf*, whose  
24 collateral challenge to his removal order (a motion to reopen) is pending in the court of  
25 appeals, *as well as to aliens who have exhausted all direct and collateral review of their*  
26 *removal orders* but who, for one reason or another, have not yet been removed from the  
27 United States.” *Diouf II*, 634 F.3d at 1085 (emphasis added). Respondents do not  
28 identify any basis for concluding that Petitioner falls outside the latter category of aliens.

1 Thus, the clear language of *Diouf II*, which was echoed in *Padilla-Ramirez*, 2017 WL  
2 2871513, at \*2, removes any doubt that the government is required to provide Petitioner  
3 with a bond hearing before an immigration judge.

4 **V. Preliminary Injunction**

5 In his Motion for Preliminary Injunction and/or Temporary Restraining Order,  
6 Petitioner seeks the same relief requested in the Petition, namely, an order requiring  
7 Respondents to provide him with an individualized bond hearing. In light of the Court's  
8 ruling on the Petition, the other motions will be denied as moot. The Court will also deny  
9 Petitioner's two motions for expedited ruling as moot in light of this order.

10 **IT IS ORDERED:**

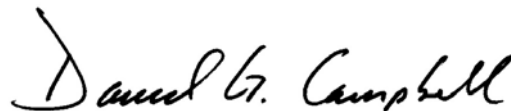
11 (1) Petitioner's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241  
12 (Doc. 1) is **granted**.

13 (2) Petitioner's Motion for Preliminary Injunction and/or Temporary  
14 Restraining Order (Doc. 3), and two Motions to Expedite Ruling (Docs. 6, 11, and 13) are  
15 **denied** as moot.

16 (3) Within **20 days** of the date of this Order, Respondents must provide  
17 Petitioner with a hearing before an Immigration Judge with the power to grant his release  
18 on bond if the Immigration Judge determines that he qualifies for release under  
19 applicable law.

20 (4) The Clerk of Court must terminate this action and enter judgment  
21 accordingly.

22 Dated this 1st day of September, 2017.

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27 David G. Campbell  
28 United States District Judge