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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Heriberto Herrera Torralba, Gaudencio
Dominguez Castillo, Jose Vasquez Jacobo

Petitioners,

v.

Jason Knight, Acting Las Vegas/Salt Lake
City Field Office Director, Enforcement
and Removal Operations, United States
Immigration and Customs Enforcement
(ICE); John Mattos, Warden, Nevada
Southern Detention Center; Kristi Noem,
Secretary, United States Department of
Homeland Security; Pamela Bondi,
Attorney General of the United States;
Executive Office for Immigration Review,

Respondents.

Case No. 2:25-cv-01366-RFB-DJA

**Federal Respondents' Response to the
Amended Petition for Writ of Habeas
Corpus (ECF No. 17)**

Federal Respondents Jason Knight, John Mattos, Kristi Noem, Pamela Bondi, and
Executive Office for Immigration Review, though undersigned counsel, file their response
to Petitioners Heriberto Herrera Torralba, Gaudencio Dominguez Castillo and Jose
Vasquez Jacobo's Amended Petition for Writ of Habeas Corpus (ECF No. 17) (the
Amended Petition). In their Amended Petition, the Petitioners, who do not have a legal
status in the United States, are asking the Court to grant a temporary injunctive relief, by
ordering their release from Department of Homeland Security (DHS) Immigration and
Customs Enforcement (ICE) custody while DHS's appeals on their bonds are pending
before the Board of Immigration Appeals (BIA). ECF No. 17, ¶¶ 5, 25. Petitioners are

1 claiming that they are unlawfully detained by DHS, and that their due process rights are
2 violated “based on novel arguments.” ECF No. 17, ¶¶ 5, 13. The “novel arguments”
3 Petitioners are referring to are supported by well-established law and Congress’ intent. The
4 Amended Petition should be denied because: (1) Petitioners fail to demonstrate they are
5 entitled to temporary injunctive relief, because they cannot show a likelihood of success on
6 the merits as they seek to circumvent the detention statute under which they are rightfully
7 detained and the automatic stay imposed upon an Immigration Judge issued bond, once
8 DHS filed a form EOIR-43 pursuant to 8 C.F.R. § 1003.19(i)(2) and a Notice of Appeal
9 pursuant to 8 C.F.R. § 1003.6(c)(1); and (2) Petitioners have failed to exhaust their
10 administrative remedies which further strips this Court from subject matter jurisdiction.
11 The Amended Petition should be denied as a matter of law.

12 I. INTRODUCTION

13 Petitioners’ Amended Petition should be denied for the following reasons.

14 First, Petitioners fail to demonstrate they are entitled to temporary injunctive relief.
15 Petitioners cannot show a likelihood of success on the merits because they seek to
16 circumvent the detention statute under which they are rightfully detained. Petitioners fall
17 precisely within the statutory definition of aliens subject to mandatory detention without
18 bond found in § 1225(b)(2).

19 Second, Petitioners are required to exhaust their administrative remedies before
20 petitioning this Court for the impermissible relief they seek here, which is a release from
21 detention pending the outcome of DHS’ appeals on their bond redeterminations. Petitioners
22 have not exhausted their administrative remedies, and their attempts to avail themselves of
23 the exceptions to the exhaustion requirement are unpersuasive. In addition, there is no
24 violation of the Petitioners’ due process rights, as they were given a bond hearing.
25 Furthermore, the case law supports the Petitioners’ detention while the appeals on their
26 bond redeterminations are pending.

27 For these reasons, and those set forth below, the Court should deny Petitioners’
28 request for relief and dismiss this action in its entirety.

II. STATUTORY BACKGROUND

a. Detention under 8 U.S.C. § 1225.

Section 1225 applies to “applicants for admission,” who are defined as “alien[s] present in the United States who [have] not been admitted” or “who arrive[] in the United States.” 8 U.S.C. § 1225(a)(1). Applicants for admission “fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018).

Section 1225(b)(1) applies to arriving aliens and “certain other” aliens “initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation.” *Id.*; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These aliens are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But if the alien “indicates an intention to apply for asylum . . . or a fear of persecution,” immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An alien “with a credible fear of persecution” is “detained for further consideration of the application for asylum.” *Id.* § 1225(b)(1)(B)(ii). If the alien does not indicate an intent to apply for asylum, express a fear of persecution, or is “found not to have such a fear,” he is detained until removed. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583 U.S. at 287. It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.* Under § 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a removal proceeding “if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A). Still, the DHS has the sole discretionary authority to temporarily release on parole “any alien applying for admission to the United States” on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.” *Id.* § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

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1 **b. Detention under 8 U.S.C. § 1226(a).**

2 Section 1226 provides for arrest and detention “pending a decision on whether the
3 alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), the
4 government may detain an alien during his removal proceedings, release him on bond, or
5 release him on conditional parole.¹ By regulation, immigration officers can release aliens if
6 the alien demonstrates that he “would not pose a danger to property or persons” and “is
7 likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien can also request
8 a custody redetermination (i.e., a bond hearing) by an immigration judge (IJ) at any time
9 before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1),
10 1236.1(d)(1), 1003.19.

11 At a custody redetermination, the IJ may continue detention or release the alien on
12 bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad
13 discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37,
14 39–40 (BIA 2006) (listing nine factors for IJs to consider). But regardless of the factors IJs
15 consider, an alien “who presents a danger to persons or property should not be released
16 during the pendency of removal proceedings.” *Id.* at 38.

17 **c. Review at the Board of Immigration Appeals (BIA)**

18 The BIA is an appellate body within the Executive Office for Immigration Review
19 (EOIR). *See* 8 C.F.R. § 1003.1(d)(1). Members of the BIA possess delegated authority from
20 the Attorney General. 8 C.F.R. § 1003.1(a)(1). The BIA is “charged with the review of those
21 administrative adjudications under the [INA] that the Attorney General may by regulation
22 assign to it,” including IJ custody determinations. 8 C.F.R. § 1003.1(d)(1), 236.1; 1236.1.
23 The BIA not only resolves particular disputes before it, but also “through precedent
24 decisions, [it] shall provide clear and uniform guidance to DHS, the immigration judges,
25 and the general public on the proper interpretation and administration of the [INA] and its
26

27 ¹ Being “conditionally paroled under the authority of § 1226(a)” is distinct from being “paroled into the United
28 States under the authority of § 1182(d)(5)(A).” *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007)
(holding that because release on “conditional parole” under § 1226(a) is not a parole, the alien was not eligible for
adjustment of status under § 1255(a)).

1 implementing regulations.” *Id.* § 1003.1(d)(1). “The decision of the [BIA] shall be final
2 except in those cases reviewed by the Attorney General.” 8 C.F.R. § 1003.1(d)(7).

3 **III. PROCEDURAL BACKGROUND**

4 On July 18, 2025, the Immigration Judge redetermined the ICE bond of \$1,500.00
5 for Petitioner Torralba. On July 21, 2025, ICE filed a Notice of Intent to Appeal. *See*
6 Notice of ICE Intent to Appeal Custody Redetermination regarding Heriberto Herrera
7 Torralba, attached as Exhibit A. On August 1, 2025, DHS filed its Notice of Appeal. *See*
8 Filing Receipt for Appeal Filed by DHS regarding Heriberto Herrera Torralba, attached as
9 Exhibit B. On July 22, 2025, the Immigration Judge redetermined the ICE bond of
10 \$1,500.00 for Petitioner Gaudencio Dominguez-Castillo. On July 22, 2025, ICE filed a
11 Notice of Intent to Appeal. *See* Notice of ICE Intent to Appeal Custody Redetermination
12 regarding Gaudencio Dominquez-Castillo, attached as Exhibit C. On August 1, 2025, DHS
13 filed its Notice of Appeal. *See* Filing Receipt for Appeal Filed by DHS regarding
14 Gaudencio Dominquez-Castillo, attached as Exhibit D. The information regarding the
15 determination of the ICE bond for Petitioner Jose Vasquez-Jacobo, the notice of intent to
16 appeal and the notice of appeal has not been received yet from ICE and such information
17 will be supplemented accordingly, upon receipt. However, based on the amended petition,
18 the bond for Petitioner Vasquez-Jacobo was granted on August 12, 2025, in the amount of
19 \$2,000.00. ECF No. 17, ¶ 18. By filing the above Notices of Intent to Appeal, and
20 thereafter timely filing the above Notices of Appeals, the Immigration Judge’s custody
21 redetermination decisions regarding the above Petitioners are automatically stayed. *See* 8
22 C.F.R. §§ 1003.6(c)(1), 1003.19(i)(2). Petitioners are applicants for admission in removal
23 proceedings pursuant to § 1229a and are subject to detention under 8 U.S.C. §
24 1225(b)(2)(A).

25 On July 28, 2025, Petitioners filed their Petition for Writ of Habeas Corpus, alleging
26 that they are unlawfully detained. ECF No. 5. On July 30, 2025, Petitioners served their
27 Petition to the Civil Process Clerk at the United States Attorney Office in Reno, Nevada,
28 even though they filed the Petition in Las Vegas. ECF No. 6. After evaluating, their initial

Petition, the Court allowed the Petitioners to file an Amended Petition to include their allegations of due process violations. ECF No. 15. The Amended Petition concerns the detention provisions at §§ 1226(a) and 1225(b)(2). *Id.*, ¶ 46. The Court ordered Federal Respondents to file their response to the Amended Petition by August 25, 2025. ECF No. 20.

IV. ARGUMENT

a. Petitioners Fail to Meet the High Bar for Temporary Injunctive Relief.

i. Petitioners are unable to show a likelihood of success on the merits.

1. *Under the Plain Text of § 1225, Petitioners Must Be Detained Pending the Outcome of Their Removal Proceedings.*

The Court should reject Petitioners' argument that § 1226(a) governs their detention instead of § 1225(b)(2)(A). *See* ECF No. 17, ¶¶ 21-22. When there is "an irreconcilable conflict in two legal provisions," then "the specific governs over the general." *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). As Petitioners point out, § 1226(a) applies to aliens arrested and detained pending a decision on removal. 8 U.S.C. § 1226(a); *see* ECF No. 17, ¶¶ 22, 48. More specifically, § 1226(a) is the applicable detention authority for aliens who have been admitted and are deportable who are subject to removal proceedings under § 1229a. 8 U.S.C. §§ 1226, 1227, 1229a. As the Supreme Court explained, § 1226(a) "applies to alien already present in the United States" and "creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings." *Jennings*, 583 U.S. at 289, 303. In contrast, § 1225(b)(2)(A) is narrower. *See* 8 U.S.C. § 1225(b)(2)(A). It applies only to "applicants for admission"; that is, as relevant here, aliens present in the United States who have not be admitted. *See id.*; *see also Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023). The specific mandatory language of § 1225(b)(2)(A) governs over the general permissive language of § 1226(a). *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . ."); *see RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S.

639, 645 (2012) (explaining that the general/specific canon is “most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission” and in order to “eliminate the contradiction, the specific provision is construed as an exception to the general one”); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016) (discussing, in the context of asylum eligibility for aliens subject to reinstated removal orders, this canon and explaining that “[w]hen two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones”). Here, § 1225(b)(2)(A) “does not negate [§ 1226(a)] entirely,” which still applies to admitted aliens who are deportable, “but only in its application to the situation that [§ 1225(b)(2)(A)] covers.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 185 (2012). Because Petitioners are applicants for admission, the specific detention authority under § 1225(b)(2)(A) governs over the general authority found at § 1226(a).

Under 8 U.S.C. § 1225(a), an “applicant for admission” is defined as an “alien present in the United States who has not been admitted or who arrives in the United States.” Applicants for admission “fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings*, 583 U.S. at 287. Section 1225(b)(2)—the provision relevant here—is the “broader” of the two. *Id.* It “serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here).” *Id.* And § 1225(b)(2) requires detention. *Id.* at 297; *see also* 8 U.S.C. § 1225(b)(2); *Matter of Q. Li*, 29 I & N. Dec. at 69 (“[A]n applicant for admission who is arrested and detained without a warrant while arriving in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings is detained under section 235(b) of the INA, 8 U.S.C. § 1225(b), and is ineligible for any subsequent release on bond under section 236(a) of the INA, 8 U.S.C. § 1226(a).”). Section 1225(b) therefore applies because Petitioners are all present in the United States without being admitted.

Petitioners’ argument to limit the phrases “applicants for admission” and “seeking admission” is unpersuasive. *See* ECF No. 17, ¶¶ 51, 58-59. The BIA has long recognized

1 that “many people who are not *actually* requesting permission to enter the United States in
2 the ordinary sense are nevertheless deemed to be ‘seeking admission’ under the immigration
3 laws.” *Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 (BIA 2012). Statutory language “is
4 known by the company it keeps.” *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1202 (9th Cir.
5 2022) (quoting *McDonnell v. United States*, 579 U.S. 550, 569 (2016)). The phrase “seeking
6 admission” in § 1225(b)(2)(A) must be read in the context of the definition of “applicant for
7 admission” in § 1225(a)(1). Applicants for admission are both those individuals present
8 without admission and those who arrive in the United States. *See* 8 U.S.C. § 1225(a)(1).
9 Both are understood to be “seeking admission” under §1225(a)(1). *See Lemus-Losa*, 25 I. &
10 N. Dec. at 743. Congress made that clear in § 1225(a)(3), which requires all aliens “who are
11 applicants for admission or otherwise seeking admission” to be inspected by immigration
12 officers. 8 U.S.C. § 1225(a)(3). The word “or” here “introduce[s] an appositive—a word or
13 phrase that is synonymous with what precedes it (‘Vienna or Wien,’ ‘Batman or the Caped
14 Crusader’).” *United States v. Woods*, 571 U.S. 31, 45 (2013).

15 Petitioners’ interpretation also reads “applicant for admission” out of
16 § 1225(b)(2)(A). One of the most basic interpretative canons instructs that a “statute should
17 be construed so that effect is given to all its provisions.” *See Corley v. United States*, 556 U.S.
18 303, 314 (2009) (cleaned up). Petitioners’ interpretation fails that test. It renders the phrase
19 “applicant for admission” in § 1225(b)(2)(A) “inoperative or superfluous, void or
20 insignificant.” *See id.* If Congress did not want § 1225(b)(2)(A) to apply to “applicants for
21 admission,” then it would not have included that phrase in the subsection. *See* 8 U.S.C. §
22 1225(b)(2)(A); *see also Corley*, 556 U.S. at 314.

23 The U.S. District Court for the Northern District of Florida’s decision in *Florida v.*
24 *United States* is instructive here. 660 F. Supp. 1239. The district court held that 8 U.S.C. §
25 1225(b) mandates detention of applicants for admission throughout removal proceedings,
26 rejecting the assertion that DHS has discretion to choose to detain an applicant for
27 admission under either section 1225(b) or 1226(a). 660 F. Supp. 3d at 1275. The court held
28 that such discretion “would render mandatory detention under § 1225(b) meaningless.

1 Indeed, the 1996 expansion of § 1225(b) to include illegal border crossers would make little
 2 sense if DHS retained discretion to apply § 1225(a) and release illegal border crossers
 3 whenever the agency saw fit.” *Id.* The court pointed to *Matter of M-S-*, 27 I&N Dec. 509, 516
 4 (A.G. 2019), in which the Attorney General explained “section [1225] (under which
 5 detention is mandatory) and section [1226(a)] (under which detention is permissive) can be
 6 reconciled only if they apply to different classes of aliens.” *Florida*, 660 F. Supp. 3d at 1275.
 7 Petitioners’ detention is justified and supported by well-established case law and statutory
 8 provisions.

9 *2. Congress did not intend to treat individuals who unlawfully enter the*
 10 *United States better than those who appear at a port of entry.*

11 When the plain text of a statute is clear, “that meaning is controlling” and courts
 12 “need not examine legislative history.” *Washington v. Chimei Innolux Corp.*, 659 F.3d 842,
 13 848 (9th Cir. 2011). But to the extent legislative history is relevant here, nothing “refutes the
 14 plain language” of § 1225. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir.
 15 2011). Congress passed IIRIRA to correct “an anomaly whereby immigrants who were
 16 attempting to lawfully enter the United States were in a worse position than persons who
 17 had crossed the border unlawfully.” *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en
 18 banc), *declined to extend by*, *United States v. Gambino-Ruiz*, 91 F.4th 981 (9th Cir. 2024). It
 19 “intended to replace certain aspects of the [then] current ‘entry doctrine,’ under which illegal
 20 aliens who have entered the United States without inspection gain equities and privileges in
 21 immigration proceedings that are not available to aliens who present themselves for
 22 inspection at a port of entry.” *Id.* (quoting H.R. Rep. 104-469, pt. 1, at 225). The Court
 23 should reject the Petitioners’ interpretation because it would put aliens who “crossed the
 24 border unlawfully” in a better position than those “who present themselves for inspection at
 25 a port of entry.” *Id.* Aliens who presented at port of entry would be subject to mandatory
 26 detention under § 1225, but those who crossed illegally would be eligible for a bond under §
 27 1226(a). Petitioners’ arguments that they should be treated better because they crossed
 28 illegally, and not at the port of entry, is nonsensical and not supported by the law.

Nothing in the Laken Riley Act (“LRA”) changes the analysis. Redundancies in statutory drafting are “common . . . sometimes in a congressional effort to be doubly sure.” *Barton v. Barr*, 590 U.S. 222, 239 (2020). The LRA arose after an inadmissible alien “was paroled into this country through a shocking abuse of that power.” 171 Cong. Rec. H278 (daily ed. Jan 22, 2025) (statement of Rep. McClintock). Congress passed it out of concern that the executive branch “ignore[d] its fundamental duty under the Constitution to defend its citizens.” *Id.* at H269 (statement of Rep. Roy). One member even expressed frustration that “every illegal alien is currently required to be detained by current law throughout the pendency of their asylum claims.” *Id.* at H278 (statement of Rep. McClintock). The LRA reflects a “congressional effort to be doubly sure” that such unlawful aliens are detained. *Barton*, 590 U.S. at 239.

Petitioners thus cannot show a likelihood of success on the merits and their Amended Petition should be denied.

ii. The Court should deny the Amended Petition because Petitioners have failed to exhaust their administrative remedies before the BIA.

DHS is appealing the IJ’s custody redetermination decision regarding these Petitioners before the BIA. The Petitioners can respond to the DHS’ appeal on the IJ’s bond decision. Instead of allowing the administrative process to be completed, Petitioners complained that the appeal process may take “up to 10 months” and that they should be released from detention in the meantime. ECF No. 17, ¶ 19. Bypassing review at the BIA is “improper.” *Id.* The Ninth Circuit identifies three reasons to require exhaustion before entertaining a habeas petition. *See Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007). First, the agency’s “expertise” makes its “consideration necessary to generate a proper record and reach a proper decision.” *Id.* (quoting *Noriega–Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)). Second, excusing exhaustion encourages “the deliberate bypass of the administrative scheme.” *Id.* (quoting *Noriega–Lopez*, 335 F.3d at 881). And third, “administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.” *Id.* (quoting *Noriega–Lopez*, 335 F.3d at 881). Each reason applies here. *See Puga*, 488 F.3d at 815. The Court should dismiss the Amended Petition.

1. *Exhaustion is warranted because agency's expertise is needed, excusal will only encourage other detainees to bypass administrative remedies, and appellate review at the BIA may preclude the need for judicial intervention.*

Petitioners rely on an administrative agency's "record and longstanding practice" to support a claim that detention under § 1226(a) applies. ECF No. 17, ¶¶ 23, 49. Yet at the same time, they seek to bypass administrative review. *See id.* Before addressing how an agency's "longstanding practice" affects the statutory analysis, the Court would surely benefit from the BIA's expertise. *See Puga*, 488 F.3d at 815. After all, "the BIA is the subject-matter expert in immigration bond decisions." *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019). The BIA is well-positioned to assess how agency practice affects the interplay between 8 U.S.C. §§ 1225 and 1226. *See Delgado v. Sessions*, No. C17-1031-RSL-JPD, 2017 WL 4776340, at *2 (W.D. Wash. Sept. 15, 2017) (noting a denial of bond to an immigration detainee was "a question well suited for agency expertise"); *Matter of M-S-*, 27 I&N Dec. 509, 515-18 (2019) (addressing interplay of §§ 1225(b)(1) and 1226).

Green-lighting Petitioners' skip-the-BIA-and-go-straight-to-federal-court strategy also needlessly increases the burden on district courts. *See Bd. of Tr. of Constr. Laborers' Pension Trust for S. Calif. v. M.M. Sundt Constr. Co.*, 37 F.3d 1419, 1420 (9th Cir. 1994) ("Judicial economy is an important purpose of exhaustion requirements."); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023) (noting "exhaustion promotes efficiency"). This Court should allow the administrative process to correct itself. *See id.*

2. *Petitioners' reasons to waive exhaustion would swallow the rule.*

First, detention alone is not an irreparable injury. Discretion to waive exhaustion "is not unfettered." *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Petitioners bear the burden to show that an exception to the exhaustion requirement applies. *Leonardo*, 646 F.3d at 1161; *Aden*, 2019 WL 5802013, at *3. And detention alone is insufficient to excuse exhaustion. *See, e.g., Delgado*, 2017 WL 4776340, at *2. Adopting such a rationale "would essentially mandate the release of all detainees while their appeals were pending, and

thereby stand the exhaustion requirement on its head.” *Meneses v. Jennings*, No. 21-CV-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021), *abrogated on other grounds by Doe v. Garland*, 109 F.4th 1188 (9th Cir. 2024); *see also Bogle v. DuBois*, 236 F. Supp. 3d 820, 823 n. 6 (S.D.N.Y. 2017) (noting that “continued detention . . . is insufficient to qualify as irreparable injury justifying non-exhaustion”) (quotation marks omitted). “[C]ivil detention after the denial of a bond hearing [does not] constitute[] irreparable harm such that prudential exhaustion should be waived.” *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *3 (W.D. Wash. Feb. 19, 2021), *aff’d sub nom. Diaz Reyes v. Mayorkas*, No. 21-35142, 2021 WL 3082403 (9th Cir. July 21, 2021); *see also Aden*, 2019 WL 5802013, at *3 (Plaintiff “cites no authority for the position that detention following a bond hearing constitutes irreparable harm sufficient to waive the exhaustion requirement.”).

Further, Petitioners “ha[ve] not carried [their] burden” in showing “that prudential exhaustion should be waived.” *Aden*, 2019 WL 5802013, at *3. They simply allege that their detention alone constitutes irreparable harm. *See* ECF No. 17, ¶¶ 81-82. But if Petitioners’ proffered standard for irreparable harm is correct, then every single individual who alleges unlawful detention would similarly meet the irreparable-harm-standard. *See, e.g., Delgado*, 2017 WL 4776340, at *2. The exception would swallow the rule. *See id.* (“[b]ecause all immigration habeas petitions could raise the same argument [that detention is irreparable injury], if it were decisive, the prudential exhaustion requirement would always be waived—but it is not.”).

Petitioners’ argument also “begs the question of whether they have suffered a constitutional deprivation.” *Meneses*, 2021 WL 4804293, at *5. They “simply assumes a deprivation to assert the resulting harm. That will not do.” *Id.* at *5. Federal courts are “not free to address the underlying merits without first determining the exhaustion requirement has been satisfied or properly waived.” *Laing*, 370 F.3d at 998.

Second, Petitioners have not established that appellate review at the BIA would be inadequate or futile. Indeed, the petition itself cites a recent published decision in which “the BIA noted in that case that the respondent’s custody determination is governed by the

provisions of section 1226(a), even though he entered unlawfully.” ECF No. 17, ¶ 53 (citing *Matter of Akhmedov*, 29 I&N Dec. 166 (BIA 2025)). Aside from irreparable harm, exhaustion can be excused only on a showing that review at the BIA is “inadequate or not efficacious” or “would be a futile gesture.” *Laing*, 370 F.3d at 1000.

Critically, there has not been a delay in Petitioners’ cases at the BIA, because DHS’s appeals were just submitted less than a month ago to the BIA. Even accepting Petitioners’ argument that the “BIA’s delays in adjudicating bond appeals warrant excusing any exhaustion requirement, in *Reyes*, the court rejected the claim that “the indefinite timeframe of the BIA’s review” constituted irreparable harm. *Reyes*, 2021 WL 662659, at *3. Although the petitioner’s BIA appeal in *Reyes* had been pending for around 45 days, she had been detained for over two years. *Id.* at *1. Similarly, in *Chavez*, the petitioner had been detained for a year when the court dismissed for failing to exhaust his claim. *Chavez*, 2034 WL 1661159, at *1, *3. And in *Delgado*, the petitioner had been detained for around four months and appealed the IJ’s to the BIA. *Delgado*, 2017 WL 4776340, at *1. The court believed the situation called “for agency expertise” and was “not persuaded” by “petitioner’s claim of irreparable injury due to continued detention.” *Id.* at *2. The Court should take a similar approach here.

iii. Petitioners have not established irreparable harm because appeals to the BIA remain pending in their cases.

Because Petitioners’ alleged harm “is essentially inherent in detention, the Court cannot weigh this strongly in favor of” Petitioners. *Lopez Reyes v. Bonnar*, No. 18-cv-07429-SK, 2018 WL 747861 at *10 (N.D. Cal. Dec. 24, 2018); *see infra* § II. A. ii. The Court should deny the Amended Petition.

iv. The Government has a compelling interest in allowing the BIA to speak on the issue.

Where, as here, the moving party only raises “serious questions going to the merits,” the balance of hardships must “tip sharply” in his favor. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)). Petitioners fail to do so here. *See id.* The government has a compelling

1 interest in the steady enforcement of its immigration laws. *See Miranda v. Garland*, 34 F.4th
2 338, 365–66 (4th Cir. 2022) (vacating an injunction that required a “broad change” in
3 immigration bond procedure); *Ubiquity Press Inc. v. Baran*, No 8:20-cv-01809-JLS-DFM,
4 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) (“the public interest in the United States
5 enforcement of its immigration laws is high”); *United States v. Arango*, CV 09-178 TUC DCB
6 2015 WL 11120855, at 2 (D. Ariz. Jan. 7, 2015) (“the Government’s interest in enforcing
7 immigration laws is enormous.”). Judicial intervention would only disrupt the status quo.
8 *See, e.g., Slaughter v. White*, No. C16-1067-RSM-JPD, 2017 WL 7360411, at * 2 (W.D.
9 Wash. Nov. 2, 2017) (“[T]he purpose of a preliminary injunction is to preserve the status
10 quo pending a determination on the merits.”). The Court should avoid a path that “inject[s]
11 a degree of uncertainty” in the process. *USA Farm Labor, Inc. v. Su*, 694 F. Supp. 3d 693, 714
12 (W.D.N.C. 2023). The BIA exists to resolve disputes like this. *See* 8 C.F.R. § 1003.1(d)(1).
13 By regulation it must “provide clear and uniform guidance” “through precedent decisions”
14 to “DHS [and] immigration judges.” *Id.* Federal Respondents ask that the Court allow the
15 established process to continue without disruption.

16 The BIA also has an “institutional interest” to protect its “administrative agency
17 authority.” *See McCarthy v. Madigan*, 503 U.S. 140, 145, 146 (1992) *superseded by statute as*
18 *recognized in Porter v. Nussle*, 534 U.S. 516 (2002). “Exhaustion is generally required as a
19 matter of preventing premature interference with agency processes, so that the agency may
20 function efficiently and so that it may have an opportunity to correct its own errors, to
21 afford the parties and the courts the benefit of its experience and expertise, and to compile a
22 record which is adequate for judicial review.” *Global Rescue Jets, LLC v. Kaiser Foundation*
23 *Health Plan, Inc.*, 30 F.4th 905, 913 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749,
24 765 (1975)). Indeed, “agencies, not the courts, ought to have primary responsibility for the
25 programs that Congress has charged them to administer.” *McCarthy*, 503 U.S. at 145. The
26 Court should allow the BIA the opportunity to weigh in on these issues he raises on
27 appeal—which are the same issues raised in this action. *See id.* The Court should deny the
28 Amended Petition.

