Leonor Perretta (#7596)
PERRETTA LAW OFFICE
8831 South Redwood Road, Suite A
West Jordan, Utah 84088
Telephone: (801) 263-1213
Facsimile: (801) 263-1332
Leonor@perrettalaw.com

Attorney for Petitioners

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Heriberto Herrera Torralba, Gaudencio Dominguez Castillo Jose Vazquez 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.	**PETITIONERS' REPLY IN SUPPORT OF THE PETITION** Case No. 2:25-CV-01366-RFB-DJA

Petitioners, through undersigned counsel hereby reply to the Federal Respondents Response to the Amended Habeas Petition.

First, the government brief argues the issues as if it were not a complete reversal of decades of its own interpretation and caselaw. The government does not explain its reversal or even acknowledge it, yet it is based wholly on an unpublished ICE memo issued on July 8, 2025. This memo was later leaked to the American Immigration Lawyers Association ("AILA") which is the only reason that immigration attorneys knew about the change in the government's position other than the refusal to release clients who receive bonds from an immigration judge. That memo was referred to in the original and amended petition and is attached here as Exhibit A. Since it was leaked, presumably through a photo of a computer screen, the quality is low but it is legible.

The government response does not acknowledge this change in position or seek to justify it in any way, it just argues the issues to the Court as if they had always been this way, when in fact non-citizens with the same fact scenarios presented here were regularly released on bond either by ICE itself or the immigration courts up until July 8th.

Contrary to the new DHS argument, Petitioners are not applicants for admission in removal proceedings and are therefore not subject to mandatory detention and the cases cited by the government are not on point and do not stand for this proposition. If the government argument is the correct one, why has it only started making this argument since July 8, 2025 when the law has not changed in almost 30 years.

Most of the government response argues that the petitioners are not entitled to temporary injunctive relief, but the petitioners have not requested temporary injunctive relief. Instead, Petitioners have asked the court to issue a Writ of Habeas Corpus to order the petitioners be allowed to pay the bond set by the IJs and be released forthwith. This reply will still address the arguments on the merits in the Government Response.

Second, Petitioners have alleged that the government has violated their procedural and substantive due process rights by invoking the automatic stay in part because it did not make any individualized determination as to whether to invoke the automatic stay provision in their cases as articulated by § 1003.6(c)(1). (ECF No. 17, Due Process Section). The Government's Response fails to address this issue at all so it should be deemed conceded.

Finally, exhaustion is not required for two reasons. First because the Petitioners prevailed before the immigration court, they do not have anything to appeal to the BIA. Second, even if they did have to appeal, EOIR has already agreed to the DHS memo of July 8, 2025 and the BIA cannot rule on Due Process issues so any appeal would be futile.

I. ARGUMENT

A. The Current Position of DHS is a Complete Reversal of Prior Interpretations & Caselaw

The DHS memo issued on July 8, 2025 was issued precisely to change decades of accepted interpretations and contravene current caselaw. It was done without notice to the public, opportunity to comment or publication. It is one of many examples of the current administration seeking to detain and deport immigrants without due process of law and contrary to long established law.

The government response does not acknowledge this change in position or seek to justify it in any way, it just argues the issues to the Court as if they had always been this way, when in fact non-citizens with the same fact scenarios presented here were regularly released on bond either by ICE itself or the immigration courts up until July 8th.

Contrary to the new DHS argument, petitioners are not applicants for admission in expedited removal proceedings and are therefore not subject to mandatory detention and the cases cited by the government are not on point and do not stand for this proposition.

There are two distinct statutes that deal with removal of noncitizens. 8 U.S.C § 1225 (Expedited Removal) & § 1229(a) (Removal Proceedings). All of the petitioners are in removal proceedings under section 1229(a) rather than under section 1225. Removal proceedings under section 1229(a) (§240 of the INA) are initiated by the DHS issuance of a Notice to Appear ("NTA"). The NTA for each petitioner is attached at Exhibit B and establishes that each petitioner is in removal proceedings under section 240 of the INA; 8 U.S.C § 1229(a).

Yet the government argues that they are subject to mandatory detention under §1225 even though they have submitted no documentation that they are in removal proceedings under that section of law. That is because section 1225 which is referred to as Expedited Removal only applies at the border, within a certain time and distance from the border or when someone has been in the U.S. for less than two years. The government ignores these time and distance limitations of section 1225.

Created in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, ("IIRIRA") the expedited removal statute applies to noncitizens who arrive at a port of entry

and to some noncitizens who enter without having been admitted or paroled and who have not been continuously present in the United States for at least two years. *See* 8 C.F.R. § 1.2; 8 U.S.C. § 1225(b)(1)(A)(i), (iii).

Initially, the application of expedited removal was limited to noncitizens who arrived at a port of entry.1 In 2002, the government expanded the reach of expedited removal to apply to noncitizens who entered by sea without inspection. *Id.* Two years later, the use of expedited removal was expanded to also apply to those who crossed a land border without inspection, and were encountered by immigration authorities both within two weeks of their arrival and within 100 miles of the border. *Id.* For more than a decade, the government did not broaden its use of expedited removal to other noncitizens.

However, on two occasions since, the government has expanded the application of the expedited removal process to the full scope permitted by law.2 From June 2020 through March 2022, and again in January 2025 to the present, immigration officers have been authorized to apply it to:

> a. Any noncitizen who arrived at a port of entry, at any time, and is determined to be inadmissible for fraud or misrepresentation or lacking proper entry documents and
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> b. Any noncitizen who entered without inspection (by land or sea), was never admitted or paroled, is encountered anywhere in the United States, and cannot prove that they have

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1 *See* Hillel R. Smith, "The Department of Homeland Security's Authority to Expand Expedited Removal," *Congressional Research Service*, last updated April 6, 2022, 1, https://crsreports.congress.gov/product/pdf/LSB/LSB10336.

2 *See* "Designating Aliens for Expedited Removal," 84 Fed. Reg. 35409 (July 23, 2019), rescinded by "Rescission of the Notice of July 23, 2019, Designation Aliens for Expedited Removal," 87 Fed. Reg. 16022 (March 21, 2022); *and* "Designating Aliens for Expedited Removal," 90 Fed. Reg. 8139 (January 24, 2025).

> been physically present in the United States for the two years preceding the immigration officer's determination that they are inadmissible for fraud or misrepresentation or lack of proper entry documents. *Id.*(emphasis added).

Even under the expanded application, expedited removal does not apply to someone who was not caught at the border and has been physically present in the U.S. for more than two years, which is precisely why the petitioners are not in expedited removal proceedings. Yet the government argues that even though they are not subject to expedited removal, they are subject to mandatory detention under section 1225, the expedited removal statute.

The NTAs in these cases, establish that the petitioners are not in expedited removal but are instead in INA 240 removal proceedings (8 U.S.C. §1229(a)) and thus they are not subject to mandatory detention. Instead, they are eligible for bond under INA 236. (8 U.S.C. §1226). The government is conflating these two statutes and attempting to justify the mandatory detention of noncitizens in 240 removal proceedings (section 1229(a)) by implicating section 1225, a statute to which they are not and have never been subject to.

The Immigration Judges ("IJ") that decided the petitioners' bond issue in court all agreed with this assertion and determined that the petitioners are not subject to 1225 and therefore not subject to mandatory detention.

The IJ in Mr. Herrera's bond memorandum notes that he has not been placed in expedited removal, has been in the U.S. for 30 years, was arrested well over 100 miles from the border, deep in the U.S. *See* ECF 17-1, Pages 5-6. The IJ goes on to find that because he was apprehended over 100 miles from the nearest land border and not within a two-year period of his entry that the plain language of section 1225 does not apply to Mr. Herrera.

The IJ in Mr. Dominguez's bond memorandum reaches the same conclusion. *Id.* at 15-16. That IJ found that the DHS position is not supported by the law and that Mr. Dominguez is detained under section 236 of the INA (8 U.S.C. § 1226), not section 1225. The IJ concluded that 1225 places limits on who is subject to the law. *Id.* at 16. He found that one must read §§ 1225(a) and (b) together to define who is an "applicant for admission" as one who is 1) arriving into the U.S. or 2) physically present in the U.S. without admission to parole for a period of less than two years. *Id.*(emphasis added). She found that section 1226 applies to the detention of noncitizens "already present in the United States." *Citing Jennings v. Rodriguez*, 583 U.S. 281, 285 (2018). *Id.* at 17.

The IJ goes on to correctly note that DHS's recent expansion of section 1225 would render 1226 meaningless and contravenes the Supreme Court's interpretation of the functions of these separate sections. *Id.* The BIA has affirmed that an applicant for admission who is arrested while arriving in the U.S. is detained under 1225 and by contrast section 1226 authorizes DHS to arrest a noncitizen in the U.S. pending a decision on removal proceedings. *Citing Matter of Q.Li*, 29 I&N Dec. 66, 69 (BIA 2025). The IJ cites the same BIA case for support of this proposition which is cited by the government out of context in support of its position. This case will be discussed further below.

Finally, the IJ notes that DHS is ignoring the temporal limits set forth in 1225 and concludes that because Mr. Dominguez was arrested inside the U.S. and has been living in the U.S. longer than two years, he was not arriving into the U.S. and thus does not meet the definitions of section 1225, is not an applicant for admission and is instead detained under

section 1226 which allows the IJ to set a bond. *Id.* at 18. She then analyzed danger to society and risk of flight and granted the lowest bond of $1500.

The IJ in Mr. Vazquez's case did not issue a separate memorandum but went through the same analysis that resulted in the same conclusions. ECF 17-1 at 25.

In its endeavor to justify its position, the government cites caselaw out of context that does not support its current position. For example, the government cites the Supreme Court case of *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). In that case a lawful permanent resident of the U.S. was being detained under section 1226 (c) which mandates the detention of noncitizens with certain criminal convictions. *Id.* Mr. Rodriguez was inside the U.S. not at a port of entry or within 100 miles and DHS was arguing that he was subject to mandatory detention, NOT under 1225 as DHS argues here, but under 1226(c) due to a conviction that subjected him to mandatory detention. *Jennings* at 838. The court specifically stated that section 1225 applies to those at the border and 1226 apply to noncitizens already present in the U.S. *Jennings* at 838, 842, 846. Therefore, the court distinguishes between the two sections of the law and when each applies. *Id.* (U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c)). *Id.* at 838.

The BIA in *Matter of Q.Li*, 29 I&N Dec. 66 (BIA 2025) analyzed mandatory detention for someone who was caught at the border, later released on parole and then re-detained by ICE after an Interpol notice seeking the noncitizen for document forgery and human smuggling. The

BIA found in that case, that the noncitizen was subject to mandatory detention because she was subject to section 1225(b) since she was encountered 100 yards from the border and later released on parole. *Id.*

The BIA noted that the Supreme Court of the United States has clarified that "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry,'" and is in the same position as an alien seeking admission at a port of entry. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)(emphasis added). The BIA also noted that it has held in other contexts, that the term "arriving" applies to aliens, like the respondent, "who [are] apprehended" just inside "the southern border, and not at a point of entry, on the same day [they] crossed into the United States." *Id. citing Matter of M-D-C-V-*, 28 I&N Dec. 18, 23 (BIA 2020) (emphasis added).

The BIA in that case concluded an 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). *Id.*

The IJs, the BIA and the Supreme Court in the cases cited above have distinguished the application of 1225 to cases of individuals who were caught in close proximity to the border while arriving into the U.S. The other case where 1225 may apply is to those who entered the U.S. without inspection and have only been physically present in the U.S. for less than two years. Neither of these limiting factors applies to the current petitioners. None of them was caught by ICE while arriving in the U.S., within 100 miles of the border or within the first two years of

physical presence in the U.S. Therefore, according to the IJ analysis, and the published cases they are not subject to mandatory detention under section 1225 but are instead eligible for bond under section 1226.

B. The Government Fails to Respond to the Due Process Arguments in the Amended Habeas Petition

Petitioners argued that the automatic stay provision in 8 C.F.R. 1003.6(c)(1) violates their right to both procedural and substantive due process. (ECF No. 17-Due Process Section, at 14-23). The government did not respond to this argument and therefore it should be deemed to have conceded it.

C. Petitioners do Not Need to Exhaust Administrative Remedies

The government argues that Petitioners have failed to exhaust administrative remedies by not appealing to the BIA or not allowing the DHS appeal to the BIA to progress. However, the Petitioners are not required to exhaust with the BIA because they were the prevailing party before the immigration court. The petitioners, had they been placed in removal proceedings and received a bond hearing one day prior to July 8th, would have been granted bond and released immediately. Because they were detained after July 8th, they were held by ICE without bond. They pursued administrative remedies by requesting a bond redetermination hearing with the IJ. They showed that they qualified for bond by providing evidence that they were not a danger to the community and not a flight risk. Each petitioner had an individualized hearing where the IJ considered the new DHS arguments and decided that they were not supported by the law. The

IJs also analyzed danger to the community and flight risk and determined that a low bond should be set in each case. (*See* ECF 17.1).

Had the petitioners not requested a bond redetermination from the immigration court after being denied bond by ICE, they would have failed to exhaust administrative remedies. However, they have done exactly what is required by law. They are not required to appeal a decision in which they were all prevailing parties. Yet DHS insists on detaining them contrary to law and now suggests that they need to remain unlawfully detained until the BIA decides each case even though the DHS has no support in law for its current position. In addition to already having exhausted administrative remedies and prevailed, the BIA has already agreed to the new DHS position according to the July 8th memo that states that DHS, in coordination with DOJ (EOIR/BIA are part of DOJ) has revised its legal position so any appeal would be futile.

According to the 9th Circuit "Futility is a traditional exception to judicially created exhaustion requirements because '[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.'" *Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 895 (9th Cir. 2021) (*quoting Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021)); *see also Perez-Guzman v. Lynch*, 835 F.3d 1066, 1073 (9th Cir. 2016) (exhaustion is not required where it would be futile to raise a particular issue before the agency); *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004)("It is axiomatic that one need not exhaust administrative remedies that would be futile or impossible to exhaust."). The futility exception "to the exhaustion requirement has been carved for constitutional challenges to [DHS] procedures." *Iraheta-Martinez v. Garland*, 12 F.4th 942, 949 (9th Cir. 2021).

As to due process claims in particular, "[t]he key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Id. See also Coyt v. Holder*, 593 F.3d 902, 905 (9th Cir.2010) (considering challenge to validity of 8 C.F.R. § 1003.2(d) (2010) because exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation); *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004) ("[T]he principle of exhaustion may exclude certain constitutional challenges that are not within the competence of administrative agencies to decide.").

For example, substantive due process claims that the agency has no power to adjudicate need not be raised before the BIA. *See Morgan v. Gonzales*, 495 F.3d 1084, 1089-90 (9th Cir. 2007); *see also Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 938 (9th Cir. 2005) (per curiam) ("Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims.").

In this case, we know that the appeal would be futile because DOJ was involved in the issuance of the unpublished memo on July 8th. The BIA is part of EOIR and under DOJ, so it is unlikely to issue a decision different from the already agreed upon position in the memo.

Second, as noted by the 9th Circuit in the cases cited above, the BIA cannot rule on the due process issues raised here. Only a federal court can rule on whether the automatic stay provision staying the bond until the BIA can rule on it violates due process.

CONCLUSION

The government fails to acknowledge or explain its July 8th reversal of longstanding policy and procedure contrary to established caselaw. Instead based on this unpublished memo it seeks to justify the detention of the petitioners who are not subject to section 1225 because they were not apprehended at or near the border or within 2 years of their arrival. This section of the law has not changed since its effective date in 1996 and the government cannot randomly decide how to interpret the laws in order to justify the detention of immigrants who were never subject to mandatory detention prior to July 8th.

The government has not responded to the petitioner's Due Process arguments and therefore the court should deem this argument unopposed.

Finally, the petitioners need not exhaust any more administrative remedies then they already have because they are the prevailing parties below, because DOJ has already announced that it will go along with the DHS position on the issue and finally because the BIA cannot rule on matters of Due Process.

Based on the Amended Habeas Petition and this response, the petitioners request the court issue a Writ of Habeas Corpus and order DHS to accept payment of the bonds in the amounts determined by the IJ in each case and release them immediately upon payment of those bonds.

RESPECTFULLY SUBMITTED this 29th day of August, 2025.

PERRETTA LAW OFFICE

/s/ Leonor Perretta
Attorney for Petitioners