UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

LARYSA KOSTAK	)	**CIVIL ACTION NO: 3:25-cv-01093**
	)	
VERSUS	)	**JUDGE EDWARDS**
	)	
DONALD J. TRUMP, *ET AL.*	)	**MAGISTRATE JUDGE MCCLUSKY**

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

TABLE OF AUTHORITIES

Federal Cases

Page(s)

TABLE OF AUTHORITIES

Federal Cases

Page(s)

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

TABLE OF AUTHORITIES

Federal Statutes

BIA Cases

TABLE OF AUTHORITIES

Federal Regulations

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NOW INTO COURT, through undersigned counsel, come Respondents, who respectfully move this Court to deny Petitioner's Motion for Temporary Restraining Order and Temporary Injunction (Doc. 3), on the grounds articulated below:

I. INTRODUCTION

Petitioner is a Ukrainian national who entered the United States at an unknown location on an unknown date. She entered without inspection from an immigration officer but claims to have been residing in the United States since the year 2005. Although Petitioner entered the United States in 2005, she did not apply for asylum until 2018. Petitioner submitted her application for asylum to the U.S. Citizen and Immigration Services (USCIS) in January 2018. However, since she had been in the country for more than one year at the time her application for asylum was submitted, USCIS could not adjudicate the application. USCIS referred Petitioner's application for asylum to an immigration judge for review. Petitioner had unlawfully remained in the United States since 2005. Yet, Petitioner's initial encounter with Immigrations and Customs Enforcement (ICE) agents occurred in June 2025 when she was detained and taken into custody after appearing for an immigration court hearing. No custody determination had been made prior to June 2025 with respect to Petitioner because ICE was unaware of her presence in the United States. Petitioner

has never had § 1226 detention status. After being denied bond, Petitioner filed a Petition for Writ of Habeas Corpus, (Doc. 1), a Motion for Temporary Restraining Order (TRO) and Temporary Injunction (Doc. 3), and most recently a Motion for Release Pending Adjudication of the Habeas Petition and TRO ("Motion for Release") (Doc. 9).

Numerous provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction to review the Petitioner's claims and preclude this Court from granting the relief she seeks. Congress has unambiguously stripped federal courts of jurisdiction over challenges to the commencement of removal proceedings, including detention pending removal proceedings. Congress further directed that any challenges arising from any removal-related activity—including detention pending removal proceedings—must be brought before the appropriate federal court of appeals, not a district court.

However, even assuming that jurisdiction is established, which is at all times denied, Petitioner nonetheless fails to demonstrate that she is entitled to temporary injunctive relief. Petitioner is being lawfully detained as an applicant for admission pursuant to 8 U.S.C. §1225. Therefore, Petitioner cannot show that her detention violates either her substantive or procedural due process rights. Petitioner seeks to circumvent the detention statute under which she is rightfully detained because she was denied a bond to which she was never entitled. Accordingly, she cannot establish a likelihood of success on the merits of her Petition for Writ of Habeas Corpus. Petitioner falls precisely within the statutory definition of aliens subject to mandatory detention without bond found in 8 U.S.C. § 1225(b)(2). Additionally, Petitioner failed to exhaust administrative remedies before petitioning this Court for the relief sought in these proceedings. Petitioner's allegation that she was detained pursuant to a "ruse" by ICE agents also misses the mark since the record confirms that Petitioner was detained at immigration proceedings that were

scheduled by an immigration judge. As a result, the habeas petition and Motion for TRO are procedurally defective and improper. Petitioner cannot meet her burden of proof with respect to the legal elements for injunctive relief. Therefore, this action should be dismissed in its entirety.

II. STATEMENT OF FACTS

1. Petitioner is a native of the Former Soviet Union and a citizen of Ukraine who entered the United States without being inspected by an immigration officer at an unknown location on an unknown date. (*See* Declaration of Department of Homeland Security Assistant Field Director Charles Ward, attached hereto as Government Exhibit A.)
2. On January 18, 2018, Petitioner filed an application for asylum with U.S. Citizenship and Immigration Services (USCIS). *See* Ex. A, ¶4. USCIS referred the application to an immigration judge for adjudication, thereby initiating removal proceedings.
3. On May 15, 2019, USCIS served Petitioner with Form I-862, Notice to Appear, charging her with removability under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. (*See* Ex. A, ¶5; *See* also Notice to Appear, attached hereto as Government Exhibit A-1).
4. On September 12, 2019, Petitioner appeared before an Immigration Judge for an initial master calendar hearing. After pleadings were resolved and removability established, her case was continued to November 1, 2022, for a hearing on the merits of her asylum application. *See* Ex. A, ¶6.
5. On March 6, 2023, the immigration court issued a Notice of Intent to Take Case Off the Court's Calendar. *See* Ex. A, ¶7. This Notice was issued two years prior to Petitioner's

most recent immigration court hearing and was intended to remove the matter for the court's active docket. The Notice did not constitute a resolution of the Petitioner's case, or an adjudication of any claims raised. The case remained pending and could be placed back on the docket at any time by the court, the Department of Homeland Security, or by the Petitioner.

6. On March 18, 2025, the immigration court issued a Notice of In-Person Hearing to take place on June 26, 2025. *See* Ex. A, ¶8.

7. On June 26, 2025, Petitioner appeared before the immigration court for a master calendar hearing. The case was continued until December 11, 2026, for a hearing on the merits of her asylum application. *See* Ex. A, ¶9.

8. Following her appearance at the June 26, 2025 immigration court proceedings, Petitioner was taken into ICE custody. *See* Ex. A, ¶10.

9. On July 8, 2025, Petitioner filed a request for a bond and custody redetermination in the immigration court. At the custody redetermination hearing on July 22, 2025, the Immigration Judge determined that Petitioner was subject to mandatory detention and denied the request for a change in custody status. Petitioner reserved appeal of the decision, and the appeal is due by August 21, 2025. *See* Ex. A, ¶11.

10. As of August 5, 2025, Petitioner had not filed an appeal with the Board of Immigration Appeals. *See* Ex. A, ¶12.

11. Petitioner is not subject to a final order of removal. An upcoming October 2025 hearing date is currently scheduled in Petitioner's immigration proceedings.

III. PERTINENT STATUTES

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); *see Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) ("for aliens arriving in and seeking admission into the United States who are placed directly in full removal proceedings, section 235(b)(2)(A) of the

INA, 8 U.S.C. § 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.'") (citing *Jennings*, 583 U.S. at 299). Still, the Department of Homeland Security ("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.*; 8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

B. Detention under 8 U.S.C. § 1226(a)

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

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

[1] Being "conditionally paroled under the authority of § 1226(a)" is distinct from being "paroled into the United States under the authority of 8 U.S.C. § 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 8 U.S.C. § 1255(a)).

C. Review at the Board of Immigration Appeals ("BIA")

The BIA is an appellate body within the Executive Office for Immigration Review ("EOIR"). *See* 8 C.F.R. § 1003.1(d)(1). Members of the BIA possess delegated authority from the Attorney General. 8 C.F.R. § 1003.1(a)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also "through precedent decisions, [it] shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). "The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General." 8 C.F.R. § 1003.1(d)(7).

IV. ARGUMENT

A. The Court Lacks Jurisdiction to Entertain Petitioner's Action.

As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of Petitioners' claims. Accordingly, Petitioners are unable to show a likelihood of success on the merits.

First, Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] *commence proceedings*, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter."[2] 8 U.S.C. § 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding

[2] Much of the Attorney General's authority has been transferred to the Secretary of Homeland Security and many references to the Attorney General are understood to refer to the Secretary. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005)

any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title."[3] Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

Section 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of Homeland Security chooses to commence removal proceedings, including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings").

Petitioner's claims stem from her detention during removal proceedings. That detention arises from the decision to commence such proceedings against her. *See, e.g.*, *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge arose from this decision to commence proceedings[.]"); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g) and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

As other courts have held, "[f]or the purposes of § 1252, the Attorney General commences proceedings against an alien when the alien is issued a Notice to Appear before an immigration court." *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3

[3] Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended § 1252(g) by adding "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

(C.D. Cal. Sept. 11, 2008). "The Attorney General may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings." *Id.* at *3. "Thus, an alien's detention throughout this process arises from the Attorney General's decision to commence proceedings" and review of claims arising from such detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g). As such, judicial review of bond denial is barred by § 1252(g). Thus, the applicable law requires dismissal of this habeas action for lack of jurisdiction.

Second, under § 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States" is only proper before the appropriate federal court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55

(2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]"). Here, Petitioner challenges the government's decision and action to detain her, which arises from the decision to commence removal proceedings, and is thus an "action taken . . . to remove [them] from the United States." *See* 8 U.S.C. § 1252(b)(9); *see also, e.g.*, *Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government's decision to "commence proceedings"). As such, the Court lacks jurisdiction over this action.

The fact that Petitioner is challenging the basis upon which she is detained is sufficient to trigger § 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. 281 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the Petitioner's claims pursuant to § 1252(b)(9) since the appropriate federal court of appeals would be the correct forum for Petitioner to seek review of the government's decision to detain her. *See* 8 U.S.C. § 1252(b)(9).

B. Even Assuming Jurisdiction Exists, Petitioner Still Fails to Meet the High Bar for Obtaining Temporary Injunctive Relief.

1. Petitioner is unable to show a likelihood of success on the merits.

    a. Under the Plain Text of § 1225, Petitioner Must Be Detained Pending the Outcome of Her Removal Proceedings.

The Court should reject Petitioner's argument that § 1226(a) governs her detention instead

of § 1225. 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). § 1226(a) applies to aliens "arrested and detained pending a decision" on removal. 8 U.S.C. § 1226(a). In contrast, § 1225 is narrower. *See* 8 U.S.C. § 1225. It applies only to "applicants for admission," i.e., 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). Because Petitioner in the instant case falls within the category of applicant for admission, the specific detention authority set forth in § 1225 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) mandates 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 Petitioner is present in the United States without being admitted.

Moreover, the BIA has long recognized that "many people who are not *actually* requesting permission to enter the United States in the ordinary sense are nevertheless deemed to be 'seeking admission' under the immigration laws." *Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 (BIA

2012). Statutory language "is known by the company it keeps." *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1202 (9th Cir. 2022) (quoting *McDonnell v. United States*, 579 U.S. 550, 569 (2016)). The phrase "seeking admission" in § 1225(b)(2)(A) must be read in the context of the definition of "applicant for admission" in § 1225(a)(1). Applicants for admission are both those individuals present without admission and those who arrive in the United States. *See* 8 U.S.C. § 1225(a)(1). Both are understood to be "seeking admission" under §1225(a)(1). *See Lemus-Losa*, 25 I. & N. Dec. at 743. Congress made that clear in § 1225(a)(3), which requires all aliens "who are applicants for admission or otherwise seeking admission" to be inspected by immigration officers. 8 U.S.C. § 1225(a)(3).

b. Congress did not intend to treat individuals who unlawfully enter the country better than those who appear at a port of entry.

When the plain text of a statute is clear, "that meaning is controlling" and courts "need not examine legislative history." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011). But to the extent legislative history is relevant here, nothing "refutes the plain language" of § 1225. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011). Congress passed Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to correct "an anomaly whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully." *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc), *declined to extend by, United States v. Gambino-Ruiz*, 91 F.4th 981 (9th Cir. 2024). It "intended to replace certain aspects of the [then] current 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry." *Id.* (quoting H.R. Rep. 104-469, pt. 1, at 225). Pursuant to Petitioner's erroneous interpretation of the applicable statutes, aliens who "crossed the border unlawfully" would be in a better position than those "who present themselves for inspection at a port of entry." *Id.* Aliens

who presented at port of entry would be subject to mandatory detention under § 1225, but those who crossed illegally would be eligible for a bond under § 1226(a). This immigration laws are not intended to result in this outcome. As the United States Supreme Court has explained, nothing in INA § 235(b)(2)(A) "says anything whatsoever about bond hearings." *Jennings*, 583 U.S. at 297. Such aliens may only be released from detention if the Department of Homeland Security (DHS) invokes its discretionary parole authority under INA § 212(d)(5). *See Jennings*, 583 U.S. at 288; *see generally* INA § 212(d)(5).

c. Prior agency practices are not entitled to deference under *Loper Bright*.

Petitioner asserts that her detention contradicts decades of precedent interpreting the scope of Section 1225(b)(2). However, to the extent the precedent referenced by Petitioner was predicated on prior agency practices, her reliance on *Loper Bright* is misplaced. Longstanding agency practice carries little, if any, weight under *Loper Bright*. The weight given to agency interpretations "must always 'depend upon their thoroughness, the validity of their reasoning, the consistency with earlier and later pronouncements, and all those factors which give them power to persuade.'" *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 432–33 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And here, the agency provided no analysis to support its reasoning. *See* 62 Fed. Reg. 10312 at 10323; *see also Maldonado v. Bostock*, No. 2:23-cv-00760-LK-BAT, 2023 WL 5804021, at *3, 4 (W.D. Wash. Aug. 8, 2023) (noting the agency provided "no authority" to support its reading of the statute).

To be sure, "when the best reading of the statute is that it delegates discretionary authority to an agency," the Court must "independently interpret the statute and effectuate the will of Congress." *Loper Bright*, 603 U.S. at 395. But "read most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings have concluded." *Jennings*, 583 U.S. at 297. Thus, Petitioner cannot show a likelihood of success on the merits.

d. Petitioner's arrest subsequent to a hearing scheduled by an immigration judge was lawful and did not violate Petitioner's Fourth Amendment rights.

Petitioner asserts that her arrest and detention resulted from an illegal ruse. However, requiring Petitioner appear for the June 2025 hearing in-person rather than by video conferencing does not qualify as a ruse because Petitioner was summoned to court by the immigration judge. The decision to have Petitioner appear in-person was carried out by the court, and not by ICE officials. However, even if the Court were to construe Petitioner's allegations regarding a ruse to be true even though this characterization of events is entirely denied, Respondents aver that use of a ruse still would not illegitimize Petitioner's arrest. In *U.S. v. Allibhai*, 933 F.2d 244 (5th Cir. 1991), the Fifth Circuit examines the permissible use of ruse by law enforcement. The court held that the Government did not engage in outrageous conduct in violation of the defendant's due process rights when agents carried out undercover sting operations.

2. The Court should deny the Motion for TRO because Petitioner has failed to exhaust her administrative remedies before the BIA.

As of the date her Petition for Writ of Habeas Corpus and Motion for TRO were filed, Petitioner had not appealed the IJ's decision to the BIA. When an alien fails to exhaust appellate review at the BIA, courts should "ordinarily" dismiss the habeas petition without prejudice or stay proceedings until he exhausts his appeals. *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011). 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.

a. Exhaustion is warranted because agency expertise is needed, excusing exhaustion will only encourage other detainees to bypass administrative remedies, and appellate review at the BIA may preclude the need for judicial intervention.

Before addressing how an agency's "longstanding practice" affects the statutory analysis, the Court would likely 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).

Waiving exhaustion would also "encourage other detainees to bypass the BIA and directly appeal their no-bond determinations from the IJ to federal district court." *Aden*, 2019 WL 5802013, at *2. Individuals like Petitioner would have little incentive to seek relief before the BIA if this Court permits review here. Green-lighting Petitioner's strategy of skipping BIA review to seek direct review from a federal judge 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").

If the IJ erred as alleged, then this Court should allow the administrative process to correct itself. *See id.*

Also, detention alone does not constitute an irreparable injury. Discretion to waive exhaustion "is not unfettered." *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Petitioner bears 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, Petitioner "had not carried her burden" in showing "that prudential exhaustion should be waived." *Aden*, 2019 WL 5802013, at *3. She simply alleges that her detention alone constitutes irreparable harm. [Doc. 16, p. 7]. But if Petitioner's argument that her post-bond hearing detention represents irreparable harm is accepted, 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.").

Petitioner has not established that appellate review at the BIA would be inadequate or futile. Other than upon proof of irreparable harm, exhaustion can be excused only upon 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, and could not, be a delay of Petitioner's case at the BIA level, because she has not filed an appeal to the BIA. 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 v. ICE*, the petitioner had been detained for a year when the court dismissed for failing to exhaust his claim. *Chavez*, 2024 WL 1661159, at *1, *3. And in *Delgado*, the petitioner had been detained for around four months when he 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 in the instant case.

3. The Government has a compelling interest in allowing the BIA to decide the issue.

The government has a compelling interest in the steady enforcement of its immigration laws. *See Miranda v. Garland*, 34 F.4th 338, 365–66 (4th Cir. 2022) (vacating an injunction that required a "broad change" in immigration bond procedure); *Ubiquity Press Inc. v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) ("the public interest in the United States' enforcement of its immigration laws is high"); *United States v. Arango*, CV 09-

178 TUC DCB, 2015 WL 11120855, at 2 (D. Ariz. Jan. 7, 2015) ("the Government's interest in enforcing immigration laws is enormous."). Judicial intervention would only disrupt the status quo. *See, e.g., Slaughter v. White*, No. C16-1067-RSM-JPD, 2017 WL 7360411, at * 2 (W.D. Wash. Nov. 2, 2017) ("[T]he purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits."). The Court should avoid a path that "inject[s] a degree of uncertainty" in the process. *USA Farm Labor, Inc. v. Su*, 694 F. Supp. 3d 693, 714 (W.D.N.C. 2023). The BIA exists to resolve disputes like this. *See* 8 C.F.R. § 1003.1(d)(1). By regulation it must "provide clear and uniform guidance" "through precedent decisions" to "DHS [and] immigration judges." *Id.*

The BIA also has an "institutional interest" to protect its "administrative agency authority." *See McCarthy v. Madigan*, 503 U.S. 140, 145, 146 (1992) *superseded by statute as recognized in Porter v. Nussle*, 534 U.S. 516 (2002). "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Global Rescue Jets, LLC v. Kaiser Foundation Health Plan, Inc.*, 30 F.4th 905, 913 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Indeed, "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy*, 503 U.S. at 145. The Court should allow the BIA the opportunity to weigh in on these issues he raises on appeal—which are the same issues raised in this action. *See id.* In Considering the above referenced case law, Respondents aver that the jurisprudence supporting denial of Petitioner's request for injunctive relief in the absence of an administrative appeal is plentiful and clear. Petitioner cannot establish irreparable harm when she has ignored an adequate

remedy available to her – appeal to the BIA.

V. CONCLUSION

Based upon the facts and analysis presented above, Respondents respectfully request that the Court deny Petitioner's Motion for a Temporary Restraining Order and Temporary Injunction.

Respectfully submitted,

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