UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Victor BUENROSTRO-MENDEZ, *Petitioner-Plaintiff*, v. PAMELA JO BONDI, Attorney General of the United States, et al., *Respondents-Defendants*.	Civ. No. 25-3726

RESPONSE OF PETITIONER TO THE RESPONDENTS' ANSWER AND HIS OPPOSITION TO THEIR MOTION TO DISMISS AND TO SUMMARY JUDGEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Petitioner, Mr. Buenrostro, timely submits his traverse to the Respondents' return to his habeas petition. This Court issued Respondents an Order for Expedited Answer on August 11, 2025. The Respondents have filed their return on September 12, 2025, urging denial and a motion to dismiss.[1] Federal respondents generally maintain that Petitioner's detention is lawful. First, they assert this Court lacks jurisdiction over his habeas petition because they allege he has failed to exhaust his administrative remedies. They claim that the Board of Immigration Appeals' (BIA) decision, *Matter of Yajure-Hurtado*, published on September 5, 2025, means "[e]xhausting administrative remedies would not be futile." Dkt. 12 at 9. They argue there is no futility since the appeal will "address the issue presented by the Petitioner, no exception applies, and the Court should require the Petitioner here to exhaust administrative remedies prior to seeking habeas relief." Dkt. 12 at 8–9. Second, they maintain that even if the Court does have jurisdiction, the claims in the petition fail on the merits. Dkt. 12 at 9–11. They supply a sworn Declaration of ICE Deportation Officer Matthew Alexander, Dkt. 12, Respondents' Exh. 1. They do not reference it or cite to it in their return. Presumably, they attach it as support that administrative removal proceedings are ongoing while detention continues, and Petitioner is "[a]fforded time at the administrative level to file an application for relief from removal." Dkt. 12 at 11. For this reason, they assert that neither his constitutional nor his due process rights have been violated. *Id.* They deny a violation of the Administrative Procedures Act "[b]ecause the Respondents have followed applicable statutes, and regulations, including mandatorily detaining the petitioner under 8 U.S.C. § 1225(b)(2)." *Id.* Other than this general denial, the Respondents do otherwise contest his allegations regarding APA violations, see Dkt. 1 at 22.

---

[1] On September 17, 2025, counsel for Respondent Warden Martin Frink, served his joinder in the federal respondents' Answer to the Habeas petition.

The Respondents allude in passing to an alternative request for "summary judgement," Dkt. 1, 13, but have not filed a separate Motion for Summary Judgment. The Respondents in their return did not address the Petitioner's allegations concerning deprivation of procedural due process, Dkt. 1 at 17, 20, and they make no reference whatsoever to Officer Alexander's sworn declaration, Dkt. 12, Respondent's Exh. 1. To the extent Respondents imply that there is no dispute as to any material fact, Petitioner submits that such a disposition as summary judgement is inappropriate absent a showing by Respondents that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Avila-Alvarado v. Reno*, 2000 WL 33348728, at *1 (W.D.Tex., 2000). They have made no such showing. Nor have Respondents addressed Petitioner's arguments that this Court owes no deference, in light of the Supreme Court's ruling in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), to Respondents' interpretation of the INA and regulations. Dkt 1 at 16-18.

BRIEF SUMMARY OF FACTS

Petitioner is 25 years old. He came to this country, unlawfully, at age 9, by crossing from Mexico into the U.S. in 2009. ICE agents arrested him after a traffic stop in Giddings, Texas in July 2025. He filed a motion for a bond hearing with the Conroe Immigration Court that same month. On July 29, 2025, IJ Andrea Cole denied his request, finding she had no jurisdiction pursuant to ICE's argument at the hearing that he is subject to mandatory detention under 8 U.S.C. § 1225(b). He filed an appeal of that decision to the Board of Immigration Appeals (BIA) on August 6, 2025, arguing that the IJ erred and that in fact his detention fell under 8 U.S.C. § 1226(a), which permits an IJ to grant a bond. That appeal is currently pending. On September 5, 2025, the BIA published *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025), holding that "Aliens … who surreptitiously cross into the United States remain applicants for admission until

and unless they are lawfully inspected and admitted by an immigration officer…Therefore, just as Immigration Judges have no authority to redetermine the custody of arriving aliens who present themselves at a port of entry, they likewise have no authority to redetermine the custody conditions of an alien who crossed the border unlawfully without inspection, even if that alien has avoided apprehension for more than 2 years." Their decision renders his bond appeal arguments futile. He filed his Petition for Habeas Corpus on August 8, 2025. Respondents filed their return on September 12, 2025.

ARGUMENT

I. The Court Should Reject Respondents' Argument That the Plain Language of Sections 1225 and 1226 Require Mandatory Detention for Noncitizens Who Are Present without Admission after Many Years within the United States, and Hold It Owes No Deference to *Matter of Yajure-Hurtado*

Respondents contend that Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2) until full removal proceedings have concluded. Dkt. 12 at 4, 8-11. Their contention—as many district courts to have considered such contention have found—is novel. *Romero v. Hyde*, 2025 WL 2403827, at *9 (D.Mass., 2025) (This argument reflects a novel interpretation of the immigration detention statutes, adopted by DHS about a month ago. *See Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, *4–5 (D. Mass. July 24, 2025)). The courts have uniformly been rejecting this novel reading of the detention statutes in the INA.[2] Nor have

[2] *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255 (E.D. Va. Sept. 19, 2025); *Arce v. Trump*, No. 8:25CV520, 2025 WL 2675934 (D. Neb. Sept. 18, 2025); *Vazquez v. Feeley*, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Palma v. Trump*, No. 4:25CV3176, 2025 WL 2624385 (D. Neb. Sept. 11, 2025); *Carlon v. Kramer,* No. 4:25CV3178, 2025 WL 2624386 (D. Neb. Sept. 11, 2025); *Perez v. Kramer*, No. 4:25CV3179, 2025 WL 2624387 (D. Neb. Sept. 11, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Martinez v. Secretary of Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379 (W.D. Tex. Sept. 8, 2025); *Herrera Torralba v. Knight*, No. 2:25-CV-01366-RFB-DJA, 2025 WL 2581792 (D. Nev. Sept. 5, 2025); *Carmona-Lorenzo v. Trump,* No. 4:25CV3172, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Fernandez v. Lyons*, No. 8:25CV506, 2025 WL 2531539 (D. Neb. Sept. 3, 2025); *Perez v. Berg*, No. 8:25CV494, 2025 WL 2531566 (D. Neb. Sept. 3, 2025); *Leal-Hernandez v. Noem*, No. 1:25-CV-02428- JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Jacinto v. Trump*, No. 4:25CV3161, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Garcia Jimenez v. Kramer*, No. 4:25CV3162, 2025 WL 2374223 (D. Neb. Aug. 14, 2025); *Anicasio v. Kramer*, No. 4:25CV3158, 2025 WL 2374224 (D. Neb. Aug. 14, 2025); *Mohammed H. v. Trump*, No. CV 25-1576 (JWB/DTS), 2025 WL 1692739, at *5–

Respondents cited any contrary court authority. Dkt. 12, 1–13.

As the numerous district court decisions note, and as Petitioner himself noted in his petition, recently, ICE has reversed—without warning and without any publicly stated rationale—course and adopted a policy of attempting to treat all individual noncitizens that were not previously admitted to the U.S. that are contacted in the interior of the U.S. at any time after their entry as "arriving" and ineligible for bond regardless of the particularities of their case. See Exh. 1, *ICE Interim Guidance Regarding Detention Authority for Applicants for Admission*. (ICE Memorandum"), July 8, 2025. The Lyons two-page memorandum states on p. 1:

> **Effective immediately, it is the position of DHS that [applicants for admission under section 235(a)(1) of the Immigration and Nationality Act] are subject to detention under INA § 235(b) and may not be released from ICE custody except by INA § 212(d)(5) parole.** These aliens are also ineligible for a custody redetermination hearing ("bond hearing") before an immigration judge and may not be released for the duration of their removal proceedings absent a parole by DHS. For custody purposes, these aliens are not treated in the same manner that "arriving aliens" have historically been treated.

Petitioner Exh. 1. As a result, ICE is now ignoring particularities that have historically been highly relevant to determinations whether a noncitizen such remain or custody or be released—such as: when, why, or how they entered the U.S.; whether they have criminal convictions; whether they present a danger to the community or flight risk; whether they have serious medical conditions requiring treatment.

First, as several courts have recently explained, § 1225 imposes three conditions that must be satisfied for § 1225(b)(2)(A) to apply and justify mandatory detention. *See, e.g., Lopez Benitez v. Francis et al.*, —— F.Supp.3d ——, ——, 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025). ("[F]or section 1225(b)(2)(A) to apply, several conditions must be met—in particular, an 'examining immigration officer' must determine that the individual is: (1) an 'applicant for

---

6 (D. Minn. June 17, 2025); *Günaydin v. Trump*, 784 F. Supp. 3d 1175 (D. Minn. 2025).

admission'; (2) 'seeking admission'; and (3) 'not clearly and beyond a doubt entitled to be admitted.'") (quoting *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238at *2 (D. Mass. July 24, 2025)); § 1225(b)(2)(A). Fatal here to Respondents' argument is that Petitioner is not "seeking admission." *Id.* It is undisputed that Petitioner's Notice to Appear (NTA) charges him as an alien present United States who has not been admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General." See Dkt. 12 at 2; Dkt. 12, Respondents' Exh 1 at 2. The Respondents here have not disputed that he entered the U.S. unlawfully without apprehension at age 9. Dkt. 1 at 11. The Court should find that it is axiomatic that a person *present in the United States,* here for over 15 years, is *not* an individual seeking admission to the United States. The Board of Immigration Appeals (BIA) in *Matter of Yajure-Hurtado* meanwhile has ruled in favor of Respondent's arguments, on September 5, 2025, in a published decision, however Petitioner argues here that this Court need not defer to the BIA's interpretation, and should reject its reasoning. The appellate panel in *Yajure-Hurtado* leaves aside unmentioned the geographic absurdity of seeking admission after decades of presence in the interior, and instead finds "plain statutory language" controls:

> The respondent's argument is not supported by the plain language of the INA, and actually creates a legal conundrum. If he is not admitted to the United States (as he admits) but he is not "seeking admission" (as he contends), then what is his legal status? The respondent provides no legal authority for the proposition that after some undefined period of time residing in the interior of the United States without lawful status, the INA provides that an applicant for admission is no longer "seeking admission," and has somehow converted to a status that renders him or her eligible for a bond hearing under section 236(a) of the INA, 8 U.S.C.A. § 1226(a). See Matter of Lemus, 25 I&N Dec. 734, 743 & n.6 (BIA 2012) (noting that "many people who are not actually requesting permission to enter the United States in the ordinary sense [including aliens present in the United States who have not been admitted] are nevertheless deemed to be 'seeking admission' under the immigration laws").

Matter of Yajure-Hurtado, 29 I&N Dec. at 221. The BIA goes on to hold that "[t]he statutory text of the INA is not "doubtful and ambiguous" but is instead clear and explicit in requiring mandatory

detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status. *See* INA § 235(b)(1), (2), 8 U.S.C. § 1225(b)(1), (2)." But because Petitioner is not, nor was he at the time he was arrested, "seeking admission," *id.*, § 1225(b)(2)(A)'s mandatory detention provision does not apply. Respondents are wrong to interpret the statute as placing Petitioner within the definition of individuals deemed to be "applicants for admission," the specific detention authority under § 1225." Dkt 12 at 10. *See also Romero v.Hyde*, ___ F. Supp. 3d ___, 2025 WL 2403827, at *9 (D. Mass. Aug. 19, 2025) ("[T]he phrase 'seeking admission,' otherwise undefined in the statute, necessarily requires some 'some sort of present-tense action.') (citation omitted); *Campos-Leon v Forestal*, 1:25-cv-01774-SEB-MJD, (S. D. Ind. September 22, 2025*); Doe v. Moniz*, 2025 WL 2576819, at *1 (D.Mass., 2025).

As the Supreme Court recognized in *Jennings*, § 235(b) is concerned "primarily [with those] seeking entry," and is generally imposed "*at the Nation's borders and ports of entry*, where the Government must determine whether [a noncitizen] seeking to enter the country is admissible." *Jennings v. Rodriguez*, 583 U.S. 281, 297, 287 (2018). Throughout its text, the statute refers to "inspections"—a term not defined in the INA but which typically connotes an examination upon or soon after physical entry. Many statutory provisions, various regulations and agency precedent discuss "inspection" in the context of admission processes at ports of entry, further supporting the conclusion that § 235 has a limited temporal and geographic scope.[3] Consistent with this focus on the moment of physical entry, § 235(b)(2) is limited to those in the process of "seeking admission."

---

[3] *See* INA § 235 (titled "Inspection by immigration officers; expedited removal of inadmissible arriving [noncitizens]; referral for hearing"); INA §§ 235(b)(1)–(2) (referring to "inspections" in their titles); INA § 235(d)(1) (authorizing immigration officials to search certain conveyances in order to conduct "inspections" where noncitizens "are being brought into the United States").

4 *See, e.g.,* INA §§ 217(h)(2)(B)(i), 235A; 8 U.S.C. § 1752a; 8 C.F.R. § 235.1; *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

Similarly, the implementing regulations at 8 C.F.R. § 1.2 address noncitizens who are presently "coming or attempting to come into the United States." The statutory and regulatory text's use of the present and present progressive tenses excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States. A number of the courts cited above have agreed that § 235(b)(2) only reaches individuals who are in the process of entering or who have just entered the United States.

Additionally, the INA's statutory structure makes clear that § 236 also reaches individuals who have not been admitted and have entered without inspection. Section 236(c) exempts specific categories of noncitizens from the default eligibility to seek release on bond in § 236(a), including noncitizens subject to certain grounds of inadmissibility. Moreover, Congress recently added new mandatory detention grounds to § 236(c) that apply only to noncitizens who have not been admitted,[4] expressly including those who are inadmissible under § 212(a)(6)(A), or (7)—that is, persons who entered without being admitted. If § 236(a) did not apply to inadmissible noncitizens, then the carve out in § 236(c) that refers to inadmissibility and Congress' most recent amendments would all be surplusage.

The statutory history also supports a limited reading of § 235(b)'s reach. When Congress amended § 235(b)'s predecessor statute—which authorized detention only of arriving noncitizens—to include individuals who had not been admitted, legislators expressed concerns about recent arrivals to the United States who lacked the documents to remain in the country. There was no suggestion in the legislative history that Congress intended to subject all people present in the United States after an unlawful entry to mandatory detention and thereby transform immigration detention and sweep millions of noncitizens into § 235(b).[5]

---

[5] INA § 236(c)(1)(E), *as amended by* Laken Riley Act, Pub. L. 119-1, 139 Stat. 3 (2025).
6 *See, e.g., Martinez,* 2025 WL 2084238 at *6 (citing the use of present and present progressive tense to support

Under the Supreme Court's recent decision in *Loper Bright Enters. v. Raimondo*, a federal habeas court should independently interpret the meaning and scope of § 235(b) using the traditional tools of statutory construction.[6] Because the BIA's decision in *Matter of Yajure-Hurtado* is a deviation from the agency's long-standing interpretation of §§ 235 and 236; is not guidance issued contemporaneously with enactment of the relevant statutes; and contradicts the statutory interpretations of dozens of federal courts, a habeas court should give it no weight under *Loper Bright* or *Skidmore.* Indeed, a number of courts have instead found that under *Loper Bright*, the prior longstanding practice of the government—under which noncitizens who resided in the United States and previously entered without inspection were deemed subject to INA § 236—is a useful interpretive aid.[7]

A. The Record Demonstrates Detention Is Pursuant to § 236(a), Not § 235(b)

Here, the record shows that ICE arrested Petitioner in July 2025 in Giddings, Texas as an alien already present in the interior of the United States, thus pursuant to 8 U.S.C. § 1226(a). Dkt. 12, at 2; Dkt. 12, Respondents' Exh.1 at 2. This further militates toward the Court's concluding that Section 1226(a), as opposed to 1225(b)(2)(A), is applicable to this case. Which makes sense because Section 1225(b)(2)(A) would correspond to those "arriving," while Section 1226(a) would correspond to those "present." It was not until Petitioner requested a custody redetermination hearing (bond hearing) that Respondents claimed his detention was under § 1225(b)(2)(A). The Court should not credit this new position that was adopted post-hoc, despite clear indication that Petitioner was not detained under this provision. *Cf. Dep't of Homeland Sec. v. Regents of the*

---

conclusion that INA § 235(b)(2) does not apply to individuals apprehended in the interior); *accord Lopez Benitez v. Francis*, No. ___, 2025 WL 2371588, at *6–7 (S.D.N.Y. 2025). *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in INA § 235(b)(1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

[7] *See, e.g., Maldonado*, 2025 WL 2374411 at *11.

Univ. of Cal., 591 U.S. 1, 22, 24 (2020) (holding that, under arbitrary and capricious review in the administrative law context, "[t]he basic rule is clear: [a]n agency must defend its actions based on the reasons it gave when it acted," not on "impermissible post hoc rationalizations"). And several courts addressing this very issue have held the same.[8] The issue seems beyond dispute that Section 1226(a), and not Section 1225(b)(2)(A), applies to a noncitizen who has resided in this country for over fifteen years (since 2009) and was already within the United States, was apprehended in July 2025 in Giddings, and not upon arrival at the border. The reading of the statutes supports this finding, as does every other Court that has had to address the distinction between Section 1225(b)(2)(A) and Section 1226(a).[9] In fact, the plain text of Sections 1225 and 1226, together with the structure of the larger statutory scheme, indicates that Section 1225(b)(2) does not apply to noncitizens who are arrested on a warrant issued by the Attorney General while residing in the United States.

II. The Court Should Reject the Respondents' Jurisdictional Challenge

While Respondents argue exhaustion, Petitioner remarks merely that even though he has exercised his right, and has filed a bond appeal, Dkt. 1, Respondents' Exh. 2, it unnecessary because any administrative appeal of bond is foreclosed now by the BIA in *Matter of Yajure-Hurtado*. Respondents, confoundingly, do not recognized the futility of an appeal. Dkt. 12 at 8.

---

[8] *See Lopez Benitez v. Francis et al.*, — F.Supp.3d ——, ——, 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025).
[9] *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299 (D. Mass. July 7, 2025); No. CV 25-11613-BEM, 2025 WL 2084238 (D. Mass. July 24, 2025); *Bautista v. Santacruz*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 28, 2025); *Rosado v. Figueroa et al.*, No. 2:25-cv-02157-DLR, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *Lopez Benitez v. Francis et al.*, — F.Supp.3d ——, No. 1:25-cv-05937-DEH, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Gonzalez et al. v. Noem et al.*, No. 5:25-cv-02054-ODW-BFM (C.D. Cal. Aug. 13, 2025); *dos Santos v. Noem*, No. 1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Maldonado v. Olson*, — F.Supp.3d ——, No. 0:25-cv-03142-SRN-SGE, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Romero v. Hyde, et al.*, — F.Supp.3d ——, No. 1:25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Benitez et al. v. Noem et al.*, No. 5:25-cv-02190-RGK-AS (C.D. Cal. Aug. 26, 2025); *Kostak v. Trump et al.*, No. 3:25-cv-01093-JE-KDM, 2025 WL 2472136 (W.D. La. Aug. 27, 2025).

They woodenly insist that "[t]he appeal is not futile in this case." They seem to point to the very case, Yajure-Hurtado, that forecloses success on any appeal, as proof that the BIA will address "[t]he same issue presented by Petitioner in this case." Dkt. 12 at 9. It would clearly be futile. Nor even, in the absence of the BIA's controlling precedent in *Yajure-Hurtado*, would exhaustion be appropriate, *see Miranda v. Garland*, 34 F.4th 338, 351 (4th Cir. 2022) (where Petitioner has raised serious constitutional claims, administrative exhaustion should be excused absent a clear expression from Congress – and the INA does not require or mandate exhaustion of administrative remedies (quoting *McCarthy v. Madigan,* 503. U.S. 140, 144 (1992)).

Where no statute or rule mandates exhaustion, it is then within the Court's "sound judicial discretion" whether to require exhaustion. *Shearson v. Holder*, 725 F.3d 588, 593 (6th Cir. 2013). This is also known as "prudential exhaustion." *Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 747 (6th Cir. 2019). The Fifth Circuit has held that claims of due process violations, except for procedural errors that are correctable by the BIA, are generally not subject to the exhaustion requirement. *Anwar v. INS,* 116 F.3d 140, 144 n. 4 (5th Cir.1997). Here, the BIA has already indicated its view that forecloses any success he might have at the BIA on his currently pending bond appeal. *Matter of Yajure-Hurtado*, 29 I&N Dec. at 221.

In the alternative, a court can also choose to waive exhaustion, when the "legal question is fit for resolution and delay means hardship." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). Courts may require prudential exhaustion when: (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review. *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL

2496379 at *4 (E.D. Mich. Aug. 29, 2025). Here, all factors favor weigh against requiring exhaustion.

The central question at issue here is whether Section 1225 or Section 1226 applies to Petitioner. This is a purely legal question of statutory interpretation and does not require a record. Alternatively, this Court is not bound, or deferential to any agency interpretation of a statute. *Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024)* ("courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."). Second, because of the Constitutional violation Petitioner asserts, an appeal to an administrative review board, here the BIA, is not necessary. Courts have held due process challenges generally do not require exhaustion because the BIA cannot review constitutional challenges. *See, e.g., Sterkaj v. Gonzalez*, 439 F.3d 273, 279 (6th Cir. 2006). Lastly, the government here has made clear their position on Section 1225, and it is being applied at all levels within the DHS. Therefore, it is unlikely that any administrative review would lead it to changing its position and thus precluding judicial review. *Id.* As a result, this Court should find that prudential exhaustion is not required.

In the alternative, the Courts should also find that exhaustion should also be waived. Bond appeals before the BIA take on average six months to complete. *Lopez-Campos*, 2025 WL 2496379, at *5 (citing *to Rodriguez v. Bostock*, 779 F.Supp.3d 1239, 1245 (W.D. Wash. 2025)). But as stated, this is the "legal question" that is "fit for resolution." *Shalala*, 529 U.S. at 13. Prolonging Petitioner's detainment here would mean unnecessary hardship when tis Court is able to resolve the question now. Courts have waived exhaustion under similar circumstances. *Lopez-Campos,* 2025 WL 2496379, at *5 ("Because exhaustion would be futile and unable to provide Lopez-Campos with the relief he requests in a timely manner, the Court waives administrative exhaustion and will address the merits of the habeas petition."); *Pizarro Reyes v. Raycraft*, 2025

WL 2609425 (E.D. Mich. Sep. 9, 2025) ("the Court requires administrative exhaustion, Pizarro Reyes faces not only more, potentially unnecessary, months in prison, but also harm to his ability to mount a successful case against his removal. As a result, the Court will waive administrative exhaustion."); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924, at *6-7 (D. Mass. Sept. 9, 2025) (holding that because "the policy concerns animating the common-law exhaustion" are absent, "waiver of exhaustion is warranted"). Therefore, this Court should similarly in line with its fellow trial courts waive the exhaustion requirement for Petitioner and reach the merits of his Petition.

III. Constitutional Claims: Due Process

Respondents urge this Court to reject his constitutional claims. Dkt. 12 at 11. The continued detention of Petitioner, however, separates him from his family, prohibits his removal defense in many ways, including by inhibiting his access to computers, to any counsel's office to prepare evidence, to communicate with witnesses, gather evidence, and afford legal representation, among other related harms. His detention makes it difficult for them to access counsel and prepare for the ongoing removal proceedings. In the immigration context, the Supreme Court only recognizes two purposes for civil detention: preventing flight and mitigating the risks of danger to the community. *Zadvydas*, 533 U.S. at 690; *Demore v. Kim*, 538 U.S. 510, 528 (U.S., 2003). A noncitizen may only be detained based on these two justifications if they are otherwise statutorily eligible for bond. *Zadvydas*, 533 U.S. at 690. Petitioner's detention is improper because he has been deprived of his substantive Due Process rights. The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. U.S. Const. Amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "Government detention

violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural safeguards, or in certain special and non-punitive circumstances 'where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1076 (N.D. Cal. 2004) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). The discretionary bond framework under Section 1226(a) requires a bond hearing to make an individualized custody determination – a hearing the IJ did not conduct. Therefore, without first evaluating Petitioner's risk of flight or dangerousness, his detention is a violation of his due process rights.

The procedural protections required in a given situation are evaluated using the *Mathews v. Eldridge* factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); *see Hernandez*, 872 F.3d 976, 993 (9th Cir. 2017) (applying *Mathews* factors in immigration detention context).

Turning to the first *Mathews* factor, petitioner has a substantial private interest in remaining free from detention. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Petitioner has been out of custody for over fifteen years, and during that time, established extensive ties and life in the community. His detention denies him that freedom.

Second, "the risk of an erroneous deprivation [of liberty] is high" where, as here, "[the petitioner] has not received any bond or custody redetermination hearing." *A.E. v. Andrews*, 2025

WL 1424382, at *5 (E.D. Cal. May 16, 2025). Civil immigration detention, which is "nonpunitive in purpose and effect[,]" is justified when a noncitizen presents a risk of flight or danger to the community. *See Zadvydas*, 533 U.S. at 690; *Padilla v. U.S. Immigr. & Customs Enf't*, 704 F. Supp. 3d 1163, 1172 (W.D. Wash. 2023). Petitioner has no criminal record. The government does not dispute this and did not present evidence that petitioner was a flight risk or danger to community. Nonetheless, ICE detained him, and the government has not given any reason why it did so, other than arguing that he is subject to mandatory detention based on the government's decision pursuant to a nation-wide policy involving a novel interpretation of the INA. Petitioner has not been provided any procedural safeguards to determine whether his detention is justified, and his request for a custody redetermination was denied because the immigration judge found that he lacked jurisdiction. Given the absence of any procedural safeguards, "the probable value of additional procedural safeguards, i.e., a bond hearing, is high." *A.E.*, 2025 WL 1424382, at *5.

Third, the government's interest in detaining petitioner without a hearing is "low." *Ortega v.Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019); *Doe*, 2025 WL 691664, at *6. In immigration court, custody hearings are routine and impose a "minimal" cost. *Doe*, 2025 WL 691664, at *6. The government's interest is further diminished where a person "has consistently appeared for [his] immigration hearings ... and [ ] does not have a criminal record," *Pinchi v. Noem*, No. 25-CV-05632-RMI (RFL), 2025 WL 1853763 at *2 (N.D. Cal. July 4, 2025), as is the case here.

On balance, the *Mathews* factors show that Petitioner is entitled to a bond hearing, which should have been provided before petitioner was detained. "'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.'" *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)); *see Zinermon*, 494 U.S. at 127

("Applying [the *Mathews*] test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty ...."). The Supreme Court has held that Due Process requires a pre-deprivation hearing before those released on parole from a criminal conviction can have their bond finally revoked. *See Morrissey v. Brewer*, 408 U.S. 471, 480–86 (1972). The same is true for those subject to revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Given the absence of "evidence of urgent concerns," this Court should conclude that "a *pre*-deprivation hearing [was] required to satisfy due process." *Guillermo M. R. v. Kaiser*, No. 25-CV-05436-RFL, 2025 WL 1983677 at *9 (N.D. Cal. July 17, 2025). Numerous district courts have reached a similar conclusion. *See, e.g., id.*; *Garcia v. Andrews*, No. 2:25-CV-01884-TLN-SCR, 2025 WL 1927596 at *5 (E.D. Cal. July 14, 2025); *Pinchi*, 2025 WL 1853763, at *3–4; *Ortega*, 415 F. Supp. 3d at 970; *Singh v. Andrews*, No. 1:25-CV-00801-KES-SKO (HC), 2025 WL 1918679 at *6 (E.D. Cal. July 11, 2025); *Valencia Zapata v. Kaiser*, No. 25-CV-07492-RFL, 2025 WL 2578207 at *1 (N.D. Cal. Sept. 5, 2025).

He has sought injunctive relief with this Court. Dkt. 1 at 22–24. This Court should act on his request.

An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking preliminary injunctive relief must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365. "[I]f a plaintiff can only show that there are serious questions going to the merits—a lesser showing than

likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips *sharply* in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks and citations omitted) (emphasis in original). "[W]hen the Government is the opposing party," the final two factors "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

The Supreme Court has recognized this protected liberty interest even though the released individual is subject to extensive conditions of release, like reporting regularly to a parole officer, not using alcohol, and not traveling out of the country. *Young v. Harper*, 520 U.S. 143, 148, (1997); *see also Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same in the context of probation). Courts have recognized that, with the passage of time, a protectable liberty interest can "crystallize[ ]" even where an individual was released from prison in error, where the individual "reasonably thought the release was deliberate and lawful." *See Hurd v. D.C., Gov't*, 864 F.3d 671, 683–84 (D.C. Cir. 2017).

The Petitioner has argued above that the *Mathews v Eldridge* injunctive relief tips sharply in his favor. The fact that Petitioner is subject to discretionary conditions of release likewise does not mean he lacks a protectable liberty interest and can be re-detained without process. *Zadvydas* provided no instruction for what process is necessary to protect non-citizens' liberty interest when the government seeks to return them to custody. Instead, *Morrissey* and *Young* address that issue, explaining that the deprivation is a "grievous loss" that can be taken away only upon review at a

hearing before a neutral arbiter, regardless of whether government agents otherwise have statutory authority to re-detain. *Morrissey*, 408 U.S. at 482, 489,; *see also Young*, 520 U.S. at 148.

Respondents provide no principled reason for why Petitioner's liberty interest should be less than that of a U.S. citizen parolee or probationer. Although the Court "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature," *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1208 (2022) (quotation omitted), this is no less true in the context of a state's interest over parolees. The Supreme Court has instructed that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979), and if released a state has "an 'overwhelming interest' in ensuring that a parolee complies with [the conditions of parole] and is returned to prison if he fails to do so." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365(1998). The courts are "averse to imposing federal requirements upon the parole systems of the States." *Id.* at 369. The *Morrissey* court acknowledged these state interests, but found that the "State has no interest in revoking parole without some informal procedural guarantees." 408 U.S. at 483. If a parolee serving out a sentence for a violent crime, and subject to highly restrictive conditions of release, has a sufficiently strong liberty interests to be entitled to a hearing prior to re-incarceration, then a non-citizen freed from civil detention on bond likely has a similar entitlement.

Petitioner can think of no other context in which government agents could permissibly take someone, lock up that person, and have no hearing either beforehand or promptly thereafter.

CONCLUSION

"[A] complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise

a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

Here, Petitioner has alleged viable causes of action, and he has sought injunctive relief from this Court, under the laws and the Constitution. The Respondents' motion to dismiss should be denied. The writ of habeas corpus should be granted. His detention is illegal. The writ is reduced to a sham if the trial courts do not act within a reasonable time. *Rhueark v. Wade*, 540 F. 2d 1282, 1283 (5th Cir. 1976); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978); *Fay v. Noia*, 372 U.S. 391, 400 (1963) ("The writ must be construed to afford "a swift and imperative remedy in all cases of illegal restraint or confinement.")

Respectfully submitted on this 22nd day of September, 2025.

/s/ Stephen O'Connor
Counsel for Petitioner
Attorney for Respondent
O'Connor & Associates
7703 N. Lamar Blvd, Ste 300
Austin, Tx 78752
Tel: (512) 617-9600
Steve@oconnorimmigration.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE OF PETITIONER TO THE RESPONDENTS' ANSWER AND HIS OPPOSITION TO THEIR MOTION TO DISMISS AND SUMMARY JUDGEMENT in the case of *Victor Buenrostro Mendez v. Pamela Bondi, et al.*, Civil Action 25-3726, was sent to Catina Perry, Assistant United States Attorney, via first-class mail to: Southern District of Texas, 1000 Lousiana, Suite 2300, Houston TX 77002, and through the District Clerk's electronic case filing system on this day the 22nd of September, 2025.

Dated this 22nd day of September, 2025

s/ Stephen O'Connor
Stephen O'Connor