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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

JOAQUÍN DAVID RICO-TAPIA
Plaintiff / Petitioner

vs.

**Michael J.D. Smith, Warden, Federal Detention.
Center, Honolulu, Hawai'i; Polly Kaiser,
Acting Field Office Director, San Francisco
Field Office, Immigration and Customs
Enforcement; Pam Bondi, Attorney General
of the United States; Kristi Noem, Secretary
of Homeland Security, in their official capacities,**

Defendants/ Respondents

CASE NO. CV25-00379 SASP-KJM

**PETITIONER'S REPLY
TO RESPONDENT'S
OPPOSITION TO TRO
AND WRIT OF HABEAS
CORPUS**

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I. INTRODUCTION

a. Judicial Review under the INA

1. This case is about wrongful detention; not whether Mr. Rico-Tapia is subject to removal from the United States, the court's jurisdiction over this habeas corpus petition is proper. The Supreme Court has interpreted Section 1252(g)'s jurisdiction-stripping provisions narrowly, limiting it to only "three discrete actions": the "decision or action' to 'commence proceedings, adjudicate cases, or *execute* removal orders." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) ("*AADC*") (quoting 8 U.S.C. § 1252(g)) (emphasis in original). The Court rejected any reading of the statute that would cover "the universe of deportation claims," *id.*, and cautioned against interpreting it to "sweep in any claim that can technically be said to 'arise from'" these three actions, *Jennings v. Rodriguez*, 583 U.S. 281, 294, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018). The statute "does not bar courts from reviewing an alien detention order, because such an order, while intimately related to efforts to deport, is not itself a decision to execute removal orders." *Cardoso v. Reno*, 216 F.3d 512, 516 (5th Cir. 2000). This Court has jurisdiction to review habeas petitions filed by immigration detainees who assert that they are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Supreme Court held in *Jennings v. Rodriguez*, 583 U.S. 281, 294, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018), that §

1252(b)(9) did not present a jurisdictional bar to the review of claims by detainees who were denied bond hearings and subjected to mandatory detention pursuant to 8 U.S.C. § 1226. *Id.* at 295.

II. LEGAL STANDARD

2. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate [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.'" Success is the most important element.
3. The Ninth Circuit takes a "sliding-scale" approach to preliminary relief, under which "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiffs can support issuance of a preliminary injunction, so long as the plaintiffs also show that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Fraihat v. U.S. Immigr. & Customs Enft*, 16 F.4th 613, 635 (9th Cir. 2021) (cleaned up). This approach allows a stronger showing of one *Winter* factor to offset a weaker showing of another. *Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, Kentucky v. Labrador*, 122 F.4th

825, 843-44 (9th Cir. 2024). In all circumstances, the moving party must make "a showing on all four prongs" under *Winter* to obtain a preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). For the reasons discussed further below, satisfaction of the Winters factors is presented here.

III. ARGUMENT

a. Revocation of Mr. Rico-Tapia's Liberty Poses a Serious Constitutional Question

4. The government's own documents indicate that on December 27, 2022 the government issued Mr. Rico-Tapia an Order of Release on Recognizance pursuant to "section 236 of the Immigration and Nationality Act" codified at § 1226 indicating that he was "placed in removal proceedings". *See* Exhibit A, Ramos Dec. Release on recognizance is not "humanitarian" or "public benefit" "parole into the United States" under section 1182(d)(5)(A) but rather a form of "conditional parole" from detention upon a charge of removability, authorized under section 1226. *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115-16 (9th Cir. 2007) (holding that a non-citizen released on an "Order of Release on Recognizance" necessarily must have been detained and released under section 1226, including because he was not an "arriving alien" under the regulations governing section 1225 examinations). The statutory treatment of the Petitioner prior to ICE detention has been used by court's to resolve the mandatory versus discretionary detention issue presented here "The

abstract statutory interpretation issues raised by this case must be considered against the backdrop of [the] uncontestable fact" that, from the time of his release in 2023, Jimenez "has always been treated by [the government] as subject to discretionary detention under section 1226, rather than mandatory detention under section 1225." *Jimenez v. FCI Berlin*, 2025 U.S. Dist. LEXIS 176165, *13, 2025 DNH 107P, 2025 LX 360066 ("Because Jimenez has a clear case on the law and facts, this court exercised its inherent authority to hold a bail hearing")

5. Had the government produced the detention warrant (Form I-200) in this case, it would also indicate Mr. Rico-Tapia's arrest was authorized pursuant to "section 236 of the Immigration and Nationality Act" codified at §1226. *See Ramos Dec. Exhibit B*. Section 1226 warrants have been held as a disqualifying factor the application of the 1225 mandatory detention statute. "Because Gomes was arrested on a warrant and ordered detained under Section 1226, his detention continues to be governed by Section 1226(a)'s discretionary framework." *Gomes v. Hyde*, 2025 U.S. Dist. LEXIS 128085, *3, 2025 LX 250082, 2025 WL 1869299; *see also Benitez v. Francis*, 2025 U.S. Dist. LEXIS 157214, *13-14, 2025 LX 337407, __ F.Supp.3d __, 2025 WL 2371588 ("Thus, it is indisputable that Respondents have consistently treated Mr. Lopez Benitez as subject to §1226, and that they most recently detained him last week pursuant to that statute The Court cannot credit

Respondents' new position as to the basis for Mr. Lopez Benitez's detention, which was adopted post hoc and raised for the first time in this litigation.”).

b. Petitioner’s Constitutional Protections Restrict Arbitrary Government Acts

6. Mr. Rico-Tapia challenges his continued detention as unconstitutional under the 5th Amendment of the United States Constitution procedurally and substantively. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S. Ct. 625, 97 L. Ed. 956 (1953) [“[O]nce passed through our gates, even illegally,” noncitizens “may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”]. The Due Process Clause protects all persons within the United States from being “deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. It is settled law that the Due Process clause applies to noncitizens within the United States “whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *Trump v. J. G. G.*, ---U.S. ----, 604 U.S. 670, 145 S. Ct. 1003, 1006, 221 L.Ed.2d 529 (2025) (“It is well established that the Fifth Amendment entitles aliens to due process of law in the context of removal proceedings.”) Irreparable harm may be established where a petitioner will be incarcerated or detained pending the exhaustion of administrative remedies. “[E]xhaustion might not be required if [the petitioner were challenging her

incarceration . . . or the ongoing deprivation of some other liberty interest." (quoting *Bois v. Marsh*, 801 F.2d 462, 468, 255 U.S. App. D.C. 248 (D.C. Cir. 1986))).

c. ICE Individualized Detention Assessment Is Lacking

7. The government makes no showing whether it even applied its own regulations at 8 C.F.R. Section 241.13(i)(3) (it did not) requiring it to conduct an individualized assessment to determine the appropriateness of revoking Mr. Rico-Tapia's liberty¹. Government agencies are required to follow their own regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S. Ct. 499, 98 L. Ed. 681 (1954); *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003). Courts have repeatedly determined that where ICE fails to follow its own regulations in revoking release, the detention is unlawful and the petitioner's release must be ordered. *See, e.g., Orellana v. Baker*, No. 25-1788-TDC, 2025 U.S. Dist. LEXIS 164986, 2025 WL 2444087, at *25-26 (D. Md. Aug. 25, 2025); *M.S.L. v. Bostock*, No. 6:25-cv-1204-AA, 2025 WL 2430267, at *10 (D. Or. Aug. 21, 2025); *Ceesay v. Kurzdorfer*, 781 F. Supp. 3d 137, 163 (W.D.N.Y. 2025); *Rombot v. Souza*, 296 F.

¹ Revocation procedures. Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.
8 CFR 241.13 (i) (3)

Supp. 3d 383, 387 (D. Mass. 2017); *Rokhfirooz v. Larose*, 2025 U.S. Dist. LEXIS 180605, *12, 2025 LX 377518, 2025 WL 2646165. Nothing in the record indicates that the government adhered to the requirements relating to 8 C.F.R. Section 241.13(i)(3).

8. When DHS released Mr. Rico-Tapia it necessarily determined that he was "not a danger to the community or a flight risk." *Salazar v. Kaiser*, No. 25-CV-01017, 2025 WL 2456232, at *13 (E.D. Cal. Aug. 26, 2025). Once released, Mr. Rico -Tapia established a reliance interest in continued freedom, so long as he abided by the terms of his release. *See e.g., Calderon v. Kaiser*, No. 25-CV-06695-AMO, 2025 U.S. Dist. LEXIS 163975, 2025 WL 2430609, at *3 (N.D. Cal. Aug. 22, 2025) (recognizing a noncitizen's protected interest in continued liberty); *Aceros v. Kaiser*, 2025 U.S. Dist. LEXIS 179594, *20, 2025 LX 330524, 2025 WL 2637503 ("a noncitizen released from custody pending removal proceedings has a protected liberty interest in remaining out of custody. *See e.g., Ramirez Clavijo v. Kaiser*, 25-cv-06248-BLF, at 6, 2025 U.S. Dist. LEXIS 163056"). The government cannot now about-face and summarily extinguish Mr. Rico-Tapia's liberty interest without abiding by its own regulations regarding an individualized evaluation necessary to justify revocation.
9. "[E]ven when an initial decision to detain or release an individual is discretionary, the government's subsequent release of the individual from custody creates "an

implicit promise" that the individual's liberty will be revoked only if they fail to abide by the conditions of their release." *Calderon v. Kaiser*, No. 25-CV-06695-AMO, 2025 U.S. Dist. LEXIS 163975, 2025 WL 2430609, at *2 (N.D. Cal. Aug. 22, 2025).

d. The Statutory Structure of Section 1225 and 1226

10. Section 1225(b) authorizes detention for certain aliens seeking admission into the country, in contrast Section 1226 authorizes the Government to detain certain aliens already in country pending the outcome of removal proceedings. Section 1226(a) establishes a discretionary detention framework for noncitizens arrested and detained "[o]n a warrant issued by the Attorney General." For such individuals, the Attorney General (1) "may continue to detain the arrested alien," (2) "may release the alien on . . . bond of at least \$1,500," or (3) "may release the alien on . . . conditional parole." 8 U.S.C. §§ 1226(a)(1)-(2). The arresting immigration officer makes an initial custody determination, but noncitizens have the right to request a custody redetermination (i.e., bond) hearing before an Immigration Judge. See 8 C.F.R. §§ 1236.1(c)(8), (d)(1). Bond may be denied only if the government "either (1) prove[s] by clear and convincing evidence that [the noncitizen] poses a danger to the community or (2) prove[s] by a preponderance of the evidence that [the noncitizen] poses a flight risk." *Gomes v. Hyde*, 2025 U.S. Dist. LEXIS 128085, *4-5, 2025 LX 250082, 2025 WL 1869299.

11. The *Gomes* Court held that 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. *Gomes v. Hyde*, *19-20; see also *De Oliveira v. Joyce*, 2025 U.S. Dist. LEXIS 125776, *13, 2025 LX 261808, 2025 WL 1826118 (“preoccupation with technical concerns over 1225 processing versus 1226 processing for detention only exalts form over substance insofar as the Due Process Clause, writ large, is concerned, at least in this case involving a prolonged period of parole.”). Interpreting § 1225(b)(2) to cover noncitizens arrested on a warrant would render superfluous much of § 1226(c), including a subsection added by Congress in 2025. See Laken Riley Act, Pub. L. No. 119-1, § 2, 139 Stat. 3, 3 (2025) (adding 8 U.S.C. §1226(c)(1)(E)). *Sequen v. Kaiser*, 2025 U.S. Dist. LEXIS 181837, *19, 2025 LX 483499, __ F.Supp.3d __, 2025 WL 2650637.
12. Unsurprisingly, the government does not cite a single case that any Court has adopted its interpretation that mandatory detention is the default status for persons subject to removal proceedings under section 1225(b)² rather than 1226.³ The

² 8 USCS § 1225 (A) In general. Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 240 [8 USCS § 1229a].

³ 8 USCS § 1226. Apprehension and detention of aliens

(a) **Arrest, detention, and release.** On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

government ignores that “Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of a[] [noncitizen] 'pending a decision on whether the [noncitizen] is to be removed from the United States.'" *Jennings v. Rodriguez*, 583 U.S. 281, 288, 138 S. Ct. 830, 200 L. Ed. 2d 122 (2018) (quoting § 1226(a)). Except as provided in Section 1226(c), "the Attorney General 'may release' a[] [noncitizen] detained under § 1226(a) 'on . . . bond' or 'conditional parole.'" *Id.* (quoting § 1226(a)(1)(2)).” *Vazquez v. Bostock*, 779 F. Supp. 3d 1239, 1246, 2025 U.S. Dist. LEXIS 78395, *8, 2025 LX 61968, 2025 WL 1193850. 8 C.F.R. § 235.3 describes Section 1225(b)(2) as applying to "any *arriving alien* who appears to the inspecting officer to be inadmissible." (Emphasis added.) The regulation thus contemplates that "applicants *seeking admission*" are a subset of applicants "roughly interchangeable" with "arriving aliens." *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 U.S. Dist. LEXIS 141724, 2025 WL 2084238, at *6 (D. Mass. July 24, 2025). "Arriving aliens" are specifically defined by regulation as applicants for admission "coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1.2. *Aceros v. Kaiser*, 2025 U.S. Dist. LEXIS 179594, *26, 2025 LX 330524, 2025 WL 2637503 *6 . Mr. Rico-Tapia

- (A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
- (B) conditional parole;

is long past arrival, he has effectuated entry and presence to his fundamental right to due process and liberty.

13. Because Mr. Rico-Tapia was paroled into the United States and resided in its interior for about two years, the government's assertions that mandatory detention applies to him is contrary to at least two nationwide stays to expedited removal to paroled persons. *See Coal. for Humane Immigrant Rights v. Noem*, 2025 U.S. Dist. LEXIS 148615, 2025 LX 395377, 2025 WL 2192986 at 22 (holding that § 1225(b)(1)(A)(iii) "forbids the expedited removal of noncitizens who have been, at any point in time, paroled into the United States.") *see also Make the Rd. New York v. Noem*, No. 25-CV-190 (JMC), 2025 U.S. Dist. LEXIS 169432, 2025 WL 2494908 (D.D.C. Aug. 29, 2025)(finding that the petitioners in that case were likely to succeed on the merits of their claim that applying the expedited removal process set forth in 8 U.S.C. § 1225(b)(1) to noncitizens detained within the interior of the United States (i.e., in all locations not within 100 air miles of a land border) violates Due Process.) *See Aviles-Mena v. Kaiser*, 2025 U.S. Dist. LEXIS 173976, *10, 2025 LX 303289, 2025 WL 2578215 ("Aviles-Mena no longer qualifies for expedited removal because he was "paroled" into the United States").
14. The Government seems to argue that every noncitizen who has not been lawfully admitted to the United States is constitutionally frozen and continues to be a noncitizen "seeking admission" and thus subject to § 1225(b)(2) mandatory

detention. In other words, it treats the phrases "applicant for admission" and "seeking admission" as synonymous. But this reading would render the phrase "seeking admission" in § 1225(b) superfluous. To qualify for § 1225(b)(2), a noncitizen must (1) be an applicant for admission, (2) be "seeking admission", and (3) be "not clearly and beyond a doubt entitled to be admitted." If, as the Government seems to argue, all applicants for admission are deemed to be "seeking admission" for as long as they remain applicants, then the phrase "seeking admission" would add nothing to the provision. This "violates the rule against surplusage." *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 U.S. Dist. LEXIS 157214, 2025 WL 2371588, at *6 (S.D.N.Y. Aug. 13, 2025); *see also United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432, 143 S.Ct. 1720, 216 L.Ed.2d 370 (2023) ("[E]very clause and word of a statute should have meaning."); *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("[N]o clause, sentence, or word shall be superfluous, void, or insignificant.") Petitioner is likely to succeed on the merits. Mr. Rico-Tapia enjoys a liberty interest under §1226(a) and the procedural protections thereunder that cannot be unilaterally abrogated by the Government simply "switching tracks." *See Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 U.S. Dist. LEXIS 157214, 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025) (refusing to credit the Government's post hoc litigation position that

its detention was under 1225(b) when it had consistently treated the petitioner as subject to 1226).

15. The government's position in this case, as in many recent cases presenting substantially similar circumstances, is that petitioners' claims fail because they are subject to mandatory detention under 8 U.S.C. § 1225(b). Nearly all district courts that have considered the issue have, rejected the Government's interpretation of section 1225(b)(2) as mandating detention pending removal proceedings. *See, e.g., Salcedo Aceros v. Kaiser*, No. 25-cv-06924, 2025 U.S. Dist. LEXIS 179594, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-00326, ECF No. 16, 2025 U.S. Dist. LEXIS 176165 (D.N.H. Sept. 8, 2025); *Martinez v. Hyde*, No. CV 25-11613, 2025 U.S. Dist. LEXIS 141724, 2025 WL 2084238 (D. Mass. July 24, 2025); *Gomes*, 2025 U.S. Dist. LEXIS 128085, 2025 WL 1869299; *Lopez Benitez v. Francis*, No. 25 CIV. 5937, 2025 U.S. Dist. LEXIS 157214, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Rosado v. Figueroa*, No. CV 25-02157, 2025 U.S. Dist. LEXIS 156344, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *R&R adopted [*17] sub nom. Rocha Rosado v. Figueroa*, No. CV-25-02157, 2025 U.S. Dist. LEXIS 156336, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1256 (W.D. Wash. 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981, 2025 U.S. Dist. LEXIS 175513, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Francisco T. v. Bondi*, No. 25-CV-03219,

2025 U.S. Dist. LEXIS 179562, 2025 WL 2629839 (D. Minn. Aug. 29, 2025); *Maldonado v. Olson*, No. 25-CV-3142, 2025 U.S. Dist. LEXIS 158321, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 U.S. Dist. LEXIS 169423, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025).

e. The Court Has Inherent Authority To Remedy Prolonged Detention

16. "The Ninth Circuit has further held, both explicitly and implicitly, that courts have the authority to remedy prolonged detention . . . by ordering the government to provide an individualized bond hearing before an IJ." *Mansoor v. Figueroa*, 2018 U.S. Dist. LEXIS 23695, *8, 2018 WL 840253 "The constitution typically 'requires some kind of a hearing *before* the State deprives a person of liberty or property,'" particularly because the loss of liberty "cannot be fully compensated after the fact." *Zapata v. Kaiser*, 2025 U.S. Dist. LEXIS 190934, *19, 2025 LX 489414. Exhaustion of administrative remedies is futile in light of recent Board of Immigration Appeals precedential decisions effectively foreclosing individual bond detention hearings grants for most detained non-citizens. *Matter of Hurtado*, 29 I. & N. Dec. 216, 220 (B.I.A. 2025).

IV. CONCLUSION

17. Petitioner raises serious constitutional issues relating to his detention as violative of due process and requests immediate release and a return to the status quo to pursue

his asylum claim in California where he lived prior to detention. The Petitioner request that Bond be waived as a discretionary matter under Rule 65.

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Respectfully Submitted,

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