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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION
11

12 SAUL HERNANDO ACOSTA ROA, *et al.*,

13 Petitioners,

14 v.

15 SERGIO ALBARRAN,¹ San Francisco Field
Office Director, U.S. Immigration and Customs
16 Enforcement, *et al.*,

17 Respondents.

) Case No. 3:25-cv-07802-RS

) **RESPONDENTS' RESPONSE TO ORDER TO**
) **SHOW CAUSE WHY A PRELIMINARY**
) **INJUNCTION SHOULD NOT ENTER**

) Date: September 24, 2025

) Time: 9:30 a.m.

) Location: Courtroom 3, 17th Floor

) Judge: Hon. Richard Seeborg

28 ¹ Sergio Albarran is automatically substituted as a defendant in this matter pursuant to Rule 25(d)
of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

Table of Contents	1
I. INTRODUCTION	1
II. STATUTORY BACKGROUND	2
A. “Applicants for Admission” Under 8 U.S.C. § 1225	2
B. Detention Under 8 U.S.C. § 1225	2
1. Section 1225(b)(1)	2
2. Section 1225(b)(2)	5
C. Detention Under 8 U.S.C. § 1226(a).....	5
III. BACKGROUND	6
IV. ARGUMENT	7
A. Legal Standard	7
B. Petitioners Cannot Show a Likelihood of Success on the Merits	7
1. Under the Plain Text of 8 U.S.C. § 1225, Petitioners Must Be Detained Pending the Outcome of Their Removal Proceedings.....	7
2. The <i>Mathews</i> Factors Do Not Apply	10
3. Congress Did Not Intend to Treat Individuals Who Unlawfully Enter the Country Better than Those Who Appear at a Port of Entry	11
4. Petitioners’ Detention Authority Cannot be Converted to § 1226(a)	11
5. Petitioners Are Not Entitled to a Pre-Detention Hearing Under § 1226(a)	12
6. Petitioners Cannot Obtain an Injunction Prohibiting Transfer	13
C. Petitioners Cannot Establish Irreparable Harm.....	13
D. The Balance of Equities and Public Interest Do Not Favor an Injunction.....	14
E. Any Injunction Should Not Reverse the Burden of Proof	15
V. CONCLUSION	16

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Abel v. United States</i> , 362 U.S. 217 (1960)	13
<i>All. for Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	14
<i>American Immigration Lawyers Ass’n v. Reno</i> , 199 F.3d 1352 (D.C. Cir. 2000)	3
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952).....	13, 14
<i>Dave v. Ashcroft</i> , 363 F.3d 649 (7th Cir. 2004).....	10
<i>Demore v. Kim</i> , 538 U.S. 510 (2003)	10, 14
<i>Dep’t of Homeland Sec. v. Thuraissigiam</i> , 591 U.S. 103 (2020)	passim
<i>Drakes Bay Oyster Co. v. Jewell</i> , 747 F.3d 1073 (9th Cir. 2014)	14
<i>Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity</i> , 950 F.2d 1401 (9th Cir. 1991).....	13
<i>Hernandez Nieves v. Kaiser</i> , No. 25-CV-06921-LB, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025).....	9
<i>In re Guerra</i> , 24 I. & N. Dec. 37 (BIA 2006).....	6
<i>Jennings v. Rodriguez</i> , 583 U.S. 281 (2018)	passim
<i>Jimenez Garcia v. Kaiser</i> , No. 4:25-cv-06916-YGR (N.D. Cal. Aug. 29, 2025).....	9
<i>Karczewski v. DCH Mission Valley LLC</i> , 862 F.3d 1006 (9th Cir. 2017).....	9
<i>United States ex rel. Knauff v. Shaughnessy</i> , 338 U.S. 537 (1950).....	10
<i>Kucana v. Holder</i> , 558 U.S. 233 (2010)	2
<i>Landon v. Plasencia</i> , 459 U.S. 21 (1982).....	10, 12
<i>Lands Council v. McNair</i> , 537 F.3d 981 (9th Cir. 2008).....	14
<i>Lopez Reyes v. Bonnar</i> , No 18-cv-07429-SK, 2018 WL 7474861 (N.D. Cal. Dec. 24, 2018)	13-14
<i>Lopez v. Brewer</i> , 680 F.3d 1068 (9th Cir. 2012)	7
<i>Marin All. For Med. Marijuana v. Holder</i> , 866 F. Supp. 2d 1142 (N.D. Cal. 2011)	14
<i>Maryland v. King</i> , 567 U.S. 1301 (2012)	15
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976).....	10
<i>Matter of E-R-M- & L-R-M-</i> , 25 I & N Dec. 520 (BIA 2011).....	4-5
<i>Matter of Lemus</i> , 25 I & N Dec. 734 (BIA 2012).....	2

1	<i>Matter of Q. Li</i> , 29 I. & N. Dec. 66 (BIA 2025)	5, 8
2	<i>Meneses v. Jennings</i> , No. 21-cv-07193-JD, 2021 WL 4804293 (N.D. Cal. Oct. 14, 2021)	14
3	<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	14
4	<i>Ortega-Cervantes v. Gonzales</i> , 501 F.3d 1111 (9th Cir. 2007)	5, 6
5	<i>Preminger v. Principi</i> , 422 F.3d 815 (9th Cir. 2005)	15
6	<i>Ramirez Clavijo v. Kaiser</i> , No. 25-CV-06248-BLF, 2025 WL 2419263 (N.D. Cal. Aug. 21, 2025)	9
7	<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	13
8	<i>Rodriguez Diaz v. Garland</i> , 53 F.4th 1189 (9th Cir. 2022)	passim
9	<i>Salcedo Aceros v. Kaiser</i> , No. 3:25-cv-06924-EMC, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025)	9
10	<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009)	14
11	<i>Ubiquity Press Inc. v. Baran</i> ,	
12	No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983 (C.D. Cal. Dec. 20, 2020)	14
13	<i>United States v. Arango</i> ,	
14	No. 09-178 TUC DCB, 2015 WL 11120855 (D. Ariz. Jan. 7, 2015)	14
15	<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982)	15
16	<i>Winter v. NRDC</i> , 555 U.S. 7 (2008)	7
17	<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896)	13
18	<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	10
19	Statutes	
20	8 U.S.C. § 1182	1, 2, 3, 5
21	8 U.S.C. § 1225	passim
22	8 U.S.C. § 1229a	passim
23	8 U.S.C. § 1252	4
24	8 U.S.C. § 1226	passim
25	Regulations	
26	8 C.F.R. § 208.30	4
27	8 C.F.R. § 235.3	4, 5
28	8 C.F.R. § 236.1	5

1	8 C.F.R. § 1003.42	4
2	8 C.F.R. § 1208.30	4
3	8 C.F.R. § 1236.1	6
4	90 Fed. Reg. 8139 (Jan. 24, 2025)	3

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1 **I. INTRODUCTION**

2 This Court has ordered Respondents to show cause why a preliminary injunction (“PI”) should
 3 not be entered enjoining the government from re-detaining Petitioners during these habeas proceedings
 4 without a pre-detention hearing before a neutral decision maker. Under the applicable immigration
 5 statutes, Petitioners are “applicants for admission” subject to mandatory detention under 8 U.S.C. §
 6 1225(b). *See* 8 U.S.C. § 1225(a)(1); 8 U.S.C. § 1182(a)(6)(A)(i) (categorizing certain classes of aliens as
 7 inadmissible, and therefore ineligible to be admitted to the United States, including those “present in the
 8 United States without being admitted or paroled”); *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S.
 9 103, 138–140 (2020) (an alien who is neither admitted nor paroled, nor otherwise lawfully present in this
 10 country, remains an “applicant for admission” who is “on the threshold” of initial entry, even if released
 11 into the country “for years pending removal,” and continues to be “‘treated’ for due process purposes ‘as
 12 if stopped at the border’”); *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (such aliens are “treated as
 13 ‘an applicant for admission’”).

14 “Applicants for admission,” which includes aliens present without being admitted or paroled
 15 (“PWAP”)—as is the case with Petitioners, “fall into one of two categories, those covered by §
 16 1225(b)(1) and those covered by § 1225(b)(2),” both of which are subject to mandatory detention.
 17 *Jennings*, 583 U.S. at 287 (“[R]ead most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for
 18 applicants for admission until certain proceedings have concluded.”). They are not entitled to custody
 19 redetermination hearings, whether pre- or post-detention. *Jennings*, 583 U.S. at 297 (“[N]either §
 20 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”). Petitioners thus cannot
 21 show a likelihood of success on his claim that he is entitled to a custody redetermination hearing prior to
 22 re-detention.

23 Nor could Petitioners show a likelihood of success on his claim even if he were subject to 8
 24 U.S.C. § 1226(a) instead of the mandatory detention framework of § 1225(b). Section 1226(a) does not
 25 provide for *pre*-detention immigration judge (“IJ”) review but instead sets out a procedure for review of
 26 detention by a U.S. Immigration and Customs Enforcement (“ICE”) officer once an alien is in custody—
 27 a process that the Ninth Circuit has found ensures “that the risk of erroneous deprivation would be
 28 ‘relatively small.’” *See Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1196–97 (9th Cir. 2022).

II. STATUTORY BACKGROUND

A. “Applicants for Admission” Under 8 U.S.C. § 1225

The Immigration and Nationality Act (“INA”) defines an “applicant for admission” as an “alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .).” 8 U.S.C. § 1225(a)(1); *Thuraissigiam*, 591 U.S. at 140 (“an alien who tries to enter the country illegally is treated as an ‘applicant for admission’”) (citing 8 U.S.C. § 1225(a)(1)); *Matter of Lemus*, 25 I & N Dec. 734, 743 (BIA 2012) (“Congress has defined the concept of an ‘applicant for admission’ in an unconventional sense, to include not just those who are expressly seeking permission to enter, but also those who are present in this country without having formally requested or received such permission[.]”). However long they have been in this country, an alien who is present in the United States but has not been admitted “is treated as ‘an applicant for admission.’” *Jennings*, 583 U.S. at 287.

Under Section 212(a) of the INA, 8 U.S.C. § 1182(a), certain classes of aliens are inadmissible — and therefore ineligible to be admitted to the United States — including those “present in the United States without being admitted or paroled[.]” *Id.* § 1182(a)(6)(A)(i).

B. Detention Under 8 U.S.C. § 1225

Applicants for admission, including those like Petitioners who are PWAP, may be removed from the United States by expedited removal under § 1225(b)(1), or full removal proceedings before an IJ under 8 U.S.C. § 1229a, pursuant to § 1225(b)(2). All applicants for admission “fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2),” both of which are subject to mandatory detention. *Jennings*, 583 U.S. at 287 (“[R]ead most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings have concluded.”).

1. Section 1225(b)(1)

Congress established the expedited removal process in § 1225(b)(1) to ensure that the Executive could “expedite removal of aliens lacking a legal basis to remain in the United States.” *Kucana v. Holder*, 558 U.S. 233, 249 (2010); *see also Thuraissigiam*, 591 U.S. at 106 (“[Congress] crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country.”). This provision authorizes immigration officers to order certain inadmissible

aliens “removed from the United States without further hearing or review.” 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). Section 1225(b)(1) also allows for the expedited removal of any alien “described in” § 1225(b)(1)(A)(iii)(II), as designated by the Attorney General (“AG”) or Secretary of Homeland Security — that is, any alien not “admitted or paroled into the United States” and “physically present” fewer than two years — who is inadmissible under § 1182(a)(7) at the time of “inspection.” *See* 8 U.S.C. § 1182(a)(7) (categorizing as inadmissible aliens without valid entry documents). Whether that happens at a port of entry or after illegal entry is not relevant; what matters is whether, when an officer inspects an alien for admission under § 1225(a)(3), that alien lacks entry documents and so is subject to § 1182(a)(7). The AG’s or Secretary’s authority to “designate” classes of aliens as subject to expedited removal is subject to his or her “sole and unreviewable discretion.” 8 U.S.C. § 1225(b)(1)(A)(iii); *see also American Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) (upholding the expedited removal statute).

On five occasions, the Secretary (and earlier, the AG) has designated categories of aliens for expedited removal under § 1225(b)(1)(A)(iii). In 2004, citing “the interests of focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border,” the Secretary designated for expedited removal those “aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border.” *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004). More recently, the Secretary restored the expedited removal scope to “the fullest extent authorized by Congress.” *Designating Aliens for Expedited Removal*, 90 Fed. Reg. 8139 (Jan. 24, 2025). The current notice enables DHS “to exercise the full scope of its statutory authority to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under [8 U.S.C. § 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility,” who were not otherwise covered by prior designations. *Id.* at 8139–40.²

² On August 29, 2025, a district court in the District of Columbia stayed the Government’s RESPS.’ OPP’N TO PETRS.’ MOT. FOR TRO
3:25-cv-07559

Expedited removal proceedings under § 1225(b)(1) include additional procedures if an alien indicates an intention to apply for asylum or expresses a fear of persecution, torture, or return to the alien's country. *See* 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). In that situation, the alien is given a non-adversarial interview with an asylum officer, who determines whether the alien has a "credible fear of persecution" or torture. *Id.* §§ 1225(b)(1)(A)(ii), (b)(1)(B)(iii)(II), (b)(1)(B)(iv), (v); *see also* 8 C.F.R. § 208.30; *Thuraissigiam*, 591 U.S. at 109–11 (describing the credible fear process). The alien may also pursue *de novo* review of that determination by an IJ. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 1003.42(d), 1208.30(g). During the credible fear process, an alien may consult with an attorney or representative and engage an interpreter. 8 C.F.R. § 208.30(d)(4), (5). However, an alien subject to these procedures "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

If the asylum officer or IJ does not find a credible fear, the alien is "removed from the United States without further hearing or review." 8 U.S.C. §§ 1225(b)(1)(B)(iii)(I), (b)(1)(C); 1252(a)(2)(A)(iii), (e)(2); 8 C.F.R. §§ 1003.42(f), 1208.30(g)(2)(iv)(A). If the asylum officer or IJ finds a credible fear, the alien is generally placed in full removal proceedings under 8 U.S.C. § 1229a, but remains subject to mandatory detention. *See* 8 C.F.R. § 208.30(f); 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

Expedited removal under § 1225(b)(1) is a statutory procedure that is distinct from removal under § 1229a. Section 1229a governs full removal proceedings initiated by a notice to appear and conducted before an IJ, during which the alien may apply for relief or protection. By contrast, expedited removal under § 1225(b)(1) applies in narrower, statutorily defined circumstances — typically to individuals apprehended at or near the border who lack valid entry documents or commit fraud upon entry — and allows for their removal without a hearing, subject to limited exceptions. For these aliens, DHS has discretion to pursue expedited removal under § 1225(b)(1) or § 1229a. *Matter of E-R-M- & L-*

implementation and enforcement of the expansion of expedited removal to the fullest extent authorized by Congress. *Make the Road New York, et al., v. Noem, et al.*, 25-cv-190 (JMC) (D.D.C. Aug. 29, 2025), ECF Nos. 64, 65, *appeal docketed*, No. 25-5320 (D.C. Cir. Sept. 5, 2025). The government's position is that *Make the Road* was wrongly decided, and has appealed that decision. *Id.* at ECF No. 66. The Government has moved for an emergency stay pending appeal in the Court of Appeals for the D.C. Circuit.

1 *R-M-*, 25 I & N Dec. 520, 524 (BIA 2011).

2 **2. Section 1225(b)(2)**

3 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583 U.S. at 287.
 4 It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.* Under Section 1225(b)(2),
 5 an alien “who is an applicant for admission” is subject to mandatory detention pending full removal
 6 proceedings “if the examining immigration officer determines that [the] alien seeking admission is not
 7 clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A) (requiring that such
 8 aliens “be detained for a proceeding under section 1229a of this title”); *Matter of Q. Li*, 29 I. & N. Dec.
 9 66, 68 (BIA 2025) (proceedings under section 1229a are “full removal proceedings under section 240 of
 10 the INA”); *see also id.* (“[F]or aliens arriving in and seeking admission into the United States who are
 11 placed directly in full removal proceedings, [] 8 U.S.C. § 1225(b)(2)(A)[] mandates detention ‘until
 12 removal proceedings have concluded.’”) (citing *Jennings*, 583 U.S. at 299); 8 C.F.R. § 235.3(b)(3) (an
 13 alien placed into § 1229a removal proceedings in lieu of expedited removal proceedings under §
 14 1225(b)(1) “shall be detained” pursuant to § 1225(b)(2)). DHS has the sole discretionary authority to
 15 temporarily release on parole “any alien applying for admission to the United States” on a “case-by-case
 16 basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A); *see also*
 17 *Biden v. Texas*, 597 U.S. 785, 806 (2022).

18 **C. Detention Under 8 U.S.C. § 1226(a)**

19 A different statutory detention authority, 8 U.S.C. § 1226, applies to aliens who have been
 20 lawfully admitted into the United States but are deportable and subject to removal proceedings. Section
 21 1226(a) provides for the arrest and detention of these aliens “pending a decision on whether the alien is
 22 to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), DHS may, in its
 23 discretion, detain an alien during his removal proceedings, release him on bond, or release him on
 24 conditional parole.³ By regulation, immigration officers can release an alien if he demonstrates that he
 25 “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8

26
 27 ³ Being “conditionally paroled under the authority of § 1226(a)” is distinct from being “paroled
 28 into the United States under the authority of § 1182(d)(5)(A).” *Ortega-Cervantes v. Gonzales*, 501 F.3d
 1111, 1116 (9th Cir. 2007) (holding that because release on “conditional parole” under § 1226(a) is not a
 parole, the alien was not eligible for adjustment of status under § 1255(a)).

1 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination (i.e., a bond hearing) by an IJ
 2 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),
 3 1236.1(d)(1), 1003.19. At a custody redetermination, the IJ may continue detention or release the alien
 4 on bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad discretion in
 5 deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006)
 6 (listing nine factors for IJs to consider).

7 Until recently, the government interpreted § 1226(a) to be an available detention authority for
 8 aliens PWAP placed directly in full removal proceedings under § 1229a. *See, e.g., Ortega-Cervantes*,
 9 501 F.3d at 1116. In view of legal developments, the government has determined that this interpretation
 10 was incorrect, and that § 1225 is the sole applicable immigration detention authority for *all* applicants
 11 for admission. *See Jennings*, 583 U.S. at 297 (“Read most naturally, §§ 1225(b)(1) and (b)(2) thus
 12 mandate detention of applicants for admission until certain proceedings have concluded.”).

13 **III. BACKGROUND**

14 Petitioners are eight natives and citizens of Colombia who entered the United States without
 15 inspection, admission or parole between March 2023 and December 2023. BP apprehended them on the
 16 date of their entry, outside of designated ports of entry, within 100 miles of the border. They admitted to
 17 being citizens of Columbia with no right to be in or remain in the United States. The locations and dates
 18 of their entry are as follows:

- 19 • Saul Hernando Acosta Roa unlawfully entered and was apprehended on October 16, 2023 near
 20 Tecate, California. Declaration of Thomas Auer (“Auer Decl.”), Exhs. 1, 2.
- 21 • Cristian Alberto Cedeno Correa unlawfully entered and was apprehended on March 21, 2023
 22 near Lukeville, Arizona. Declaration of Glorimar Alvarez (“Alvarez Decl.”), Exhs. 1, 2.
- 23 • Diana Sofia Cuadros Carreno unlawfully entered and was apprehended on December 12, 2023
 24 near San Ysidro, California. Alvarez Decl., Exhs. 3, 4.
- 25 • Geni Viviana Henao Zambrano unlawfully entered and was apprehended on April 29, 2023 near
 26 El Paso, Texas. Declaration of Julio G. Razalan (“Razalan Decl.”), Exhs 1, 2.
- 27 • Yeison Fabiany Garcia Hurtatis unlawfully entered and was apprehended on October 31, 2023
 28 near Tecate, California. Declaration of Jennifer Ramirez (“Ramirez Decl.”), Exhs. 1, 2.

- 1
- 2 • Yina Paola Hoyos Carvajal unlawfully entered and was apprehended on October 31, 2023 near
- 3 Tecate, California. Razalan Decl., Exhs. 3, 4.
- 4 • Jenyffer Karina Pabon Jimenez unlawfully entered and was apprehended on September 23, 2023
- 5 near Tecate, California. Declaration of Kenny T. Louie (“Louie Decl.”), Exhs. 1, 2.
- 6 • Andres Felipe Restrepo Motta unlawfully entered and was apprehended on November 22, 2023
- 7 near Tecate, California. Alvarez Decl., Exhs. 5, 6.

8 DHS took Petitioners into custody, processed them, and released them on orders of recognizance
 9 pending their removal proceedings. On September 12, 2025, Petitioners appeared for hearings in San
 10 Francisco immigration court. At the hearings, DHS counsel moved to dismiss the removal proceedings.
 11 The IJ deferred resolution of the motions. After Petitioners’ hearings concluded, ICE Enforcement and
 12 Removal Operations (“ERO”) officers located outside of the courtroom took them into custody and
 13 placed them in mandatory detention under 8 U.S.C. § 1225(b). Petitioners filed a joint habeas petition,
 14 ECF No. 1, and an *ex parte* motion for a TRO, ECF Nos. 3, 4. This Court issued a TRO requiring
 15 immediate release and enjoining re-detention without a pre-deprivation hearing. ECF No. 5 at 6.
 16 Petitioners were released from custody pursuant to the Court’s order. The TRO is to remain in effect
 17 until September 26, 2025. *Id.* at 6-7.

18 **IV. ARGUMENT**

19 **A. Legal Standard**

20 A PI is “an extraordinary and drastic remedy, one that should not be granted unless the movant,
 21 by a clear showing, carries the burden of persuasion.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir.
 22 2012). To obtain relief, the moving party must show that “he is likely to succeed on the merits, that he
 23 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in
 24 his favor, and that an injunction is in the public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

25 **B. Petitioners Cannot Show a Likelihood of Success on the Merits**

26 **1. Under the Plain Text of 8 U.S.C. § 1225, Petitioners Must Be Detained Pending the Outcome of Their Removal Proceedings**

27 Petitioners cannot show a likelihood of success on their claims that they are entitled to a custody
 28

1 hearing prior to re-detention. This is because Petitioners are “applicants for admission” due to their
2 presence in the United States without having been either “admitted or paroled.” Such aliens are subject
3 to the mandatory detention framework of 8 U.S.C. § 1225(b) that specifically applies to them, not the
4 general provisions of § 1226(a).

5 Indeed, Petitioners fell within the scope of the 2004 expedited removal designation that was in
6 place at the time of their arrival (in addition to the more recent 2025 designation that expands
7 enforcement to the full scope of the statute). *See* 69 Fed. Reg. at 48879. Because they were
8 apprehended by CBP officers within 14 days of their entry and within 100 miles of the border,
9 Petitioners indisputably fall squarely within both the statutory and regulatory definition of an applicant
10 for admission.

11 Recent BIA authority confirms that Petitioners are subject to expedited removal and mandatory
12 detention under § 1225(b). In *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (BIA 2025), the BIA held
13 that, based on the plain text of the statute, an alien who entered without inspection remains an “applicant
14 for admission” who is “seeking admission,” and is therefore subject to mandatory detention without a
15 bond hearing, even if that alien has been present in the U.S. for years. *Id.*, slip op. at 220. Thus, the
16 BIA also held that IJs lack authority to hold bond hearings for aliens in such circumstances. *Id.* The
17 BIA considered, and rejected, the individual’s argument that the government’s “‘longstanding practice’
18 of treating aliens who are present in the United States without inspection as detained under [] 8 U.S.C.A.
19 § 1226(a), and therefore eligible for a bond.” *Id.* at 225. Citing the Supreme Court’s decision in *Loper*
20 *Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA explained that such a practice could be
21 relevant where the statute is “doubtful and ambiguous,” but here, “the statutory text of the INA . . . is
22 instead clear and explicit in requiring mandatory detention of all aliens who are applicants for
23 admission, without regard to how many years the alien has been residing in the United States without
24 lawful status.” *Hurtado*, slip op. at 226. Nor did it matter that “DHS [had] issued an arrest warrant in
25 conjunction with the Notice to Appear and a Notice of Custody Determination”: “the mere issuance of
26 an arrest warrant does not endow an [IJ] with authority to set bond for an alien who falls under section
27 235(b)(2)(A) of the INA . . . If it did, it would render meaningless the many prohibitions cited above on
28 the authority of an [IJ] to set bond.” *Id.* at 227 (citing, *e.g.*, *Matter of Q. Li*, 29 I&N Dec. 66, 69 (BIA

2025)). The BIA has therefore now confirmed, in a decision binding on IJs nationwide, what the government is arguing here: individuals such as Petitioners are “applicants for admission” subject to mandatory detention under § 1225(b), and have no right to a bond hearing.

Although recent district court PI decisions have concluded that § 1225(b) is not applicable to aliens who were conditionally released in the past under § 1226(a),⁴ the better reading of §§ 1225(a) and 1225(b) is that applicants for admission, including those “present” in the U.S., are subject to mandatory detention under Section 1225(b). 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). While § 1226(a) applies generally to aliens who are “arrested and detained pending a decision on” removal, § 1225 applies more narrowly to “applicants for admission” — *i.e.*, aliens present in the U.S. who have not been admitted. Because Petitioners fall within this latter category, the specific detention authority under § 1225 controls over the general authority found at § 1226(a).

As aliens PWAP subject to mandatory detention under § 1225(b), Petitioners are not entitled to custody redetermination hearings at any time, whether pre- or post-detention. *Jennings*, 583 U.S. at 297 (“[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”). In addition, although DHS initially elected to place Petitioners in full removal proceedings under § 1229a, Petitioners remain individual PWAP who are amenable to mandatory detention, six of whom are also presumptively amenable to expedited removal under 8 U.S.C. § 1225(b)(1) due to not having been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility.⁵

Because § 1225(b) mandates detention of applicants for admission placed in removal proceedings, Petitioners cannot succeed on their claim that they are entitled to a hearing to contest their re-detention.

⁴ *Salcedo Aceros v. Kaiser*, No. 3:25-cv-06924-EMC, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Ramirez Clavijo v. Kaiser*, No. 25-CV-06248-BLF, 2025 WL 2419263 (N.D. Cal. Aug. 21, 2025); *Jimenez Garcia v. Kaiser*, No. 4:25-cv-06916-YGR (N.D. Cal. Aug. 29, 2025); *Hernandez Nieves v. Kaiser*, No. 25-CV-06921-LB, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025).

⁵ They are Saul Hernando Acosta Roa, Diana Sofia Cuadros Carreno, Yeison Fabiany Garcia Hurtatis, Yina Paola Hoyos Carvajal, Jenyffer Karina Pabon Jimenez, and Andres Felipe Restrepo Motta.

2. The *Mathews* Factors Do Not Apply

Given their status as applicants for admission subject to mandatory detention, Petitioners' reliance on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), is misplaced. As an initial matter, the Supreme Court has upheld mandatory civil immigration detention without utilizing *Mathews*'s multi-factor "balancing test." See *Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention under 8 U.S.C. § 1226(c)); cf. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (upholding mandatory detention under 8 U.S.C. § 1231(a)(6) for six months after the 90-day removal period).⁶

In any event, applicants for admission like Petitioners, who were not admitted or paroled into the country, lack a liberty interest in additional procedures, including a custody redetermination hearing. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right."). Indeed, for "applicants for admission" who are amenable to § 1225(b)(1) — *i.e.*, because they were not physically present for at least two years on the date of inspection, 8 U.S.C. § 1225(b)(1)(A)(iii)(II) — "[w]hatever the procedure authorized by Congress . . . is due process," whether or not they are apprehended at the border or after entering the country. *Knauff*, 338 U.S. at 544; accord *Thuraissigiam*, 591 U.S. at 138–139 ("This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."). These aliens have "only those rights regarding admission that Congress has provided by statute." *Thuraissigiam*, 591 U.S. at 140; see *Dave v. Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004). Petitioners are entitled only to the protections set forth by statute, and "the Due Process Clause provides nothing more." *Thuraissigiam*, 591 U.S. at 140.

⁶ As the Ninth Circuit recognized in *Rodriguez Diaz*, "the Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*." *Rodriguez Diaz v. Garland*, 53 F.4th 1206 (9th Cir. 2022) (citations omitted). Whether the *Mathews* test applies in this context is an open question in the Ninth Circuit. See *Rodriguez Diaz*, 53 F.4th at 1207 (applying *Mathews* factors to uphold constitutionality of Section 1226(a) procedures in a prolonged detention context; "we assume without deciding that *Mathews* applies here").

3. 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 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 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). 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). For that reason, Petitioners — who entered the United States without inspection outside of a port of entry — should be treated no differently from noncitizens who present at a port of entry and are subject to mandatory detention under § 1225, including pending further consideration of their applications for asylum. *See* 8 U.S.C. § 1225(b)(1)(B)(ii).

4. Petitioners’ Detention Authority is Governed by § 1225(b)

As applicants for admission, Petitioners’ detention is governed by the § 1225(b) framework even though the government previously released them under 8 U.S.C. § 1226(a). By citing § 1226(a), DHS does not permanently alter an alien’s status as an “applicant for admission” under § 1225; to the contrary, the alien’s release is expressly subject to an order to appear for removal proceedings based on *unlawful* entry. Nor is DHS prevented from clarifying the detention authority to conform to the requirements of the statutory framework as DHS now interprets it. *See, e.g., United Gas Improvement v. Callery*, 382 U.S. 223, 229 (1965) (explaining that an agency can correct its own error). Pursuant to the statutory framework, an alien’s conditional release is not the type of “lawful entry into this country” that is necessary to “establish[] connections” that could form a liberty interest requiring additional process, and he or she remains an “applicant for admission” who is “at the threshold of initial entry” and subject to mandatory detention under § 1225. *Thuraissigiam*, 591 U.S. at 106–07 (“While aliens who have

1 established connections in this country have due process rights in deportation proceedings, the Court
 2 long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country
 3 and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the
 4 Due Process Clause.”)

5 This Supreme Court authority is therefore in conflict with recent district court decisions finding
 6 that the government's election to place a petitioner in full removal proceedings under § 1229a and
 7 release the petitioner under § 1226(a) afforded the petitioner a liberty interest that is protected by the
 8 Due Process Clause. *See, e.g., Ramirez Clavijo*, 2025 WL 2419263, *3. The government's decision to
 9 place aliens like Petitioners in full removal proceedings under § 1229a is consistent with § 1225(b)(2),
 10 and its decision to cite § 1226(a) in releasing them does not render their entry lawful; it remains
 11 unlawful (as the aliens' release was conditioned on appearing for removal proceedings based on
 12 *unlawful* entry), and as the Supreme Court confirmed in *Thuraissigiam*, the aliens remain “on the
 13 threshold of initial entry,” are “treated for due process purposes as if stopped at the border,” and “cannot
 14 claim any greater rights under the Due Process Clause” than what Congress provided in § 1225.
 15 *Thuraissigiam*, 591 U.S. at 139–40.

16 *Thuraissigiam* is consistent with the earlier *Landon* decision, where the Court observed that only
 17 “once an alien gains admission to our country and begins to develop the ties that go with permanent
 18 residence [does] his constitutional status change[.]” 459 U.S. at 32. In *Thuraissigiam*, the Court
 19 reiterated that “established connections” contemplate “an alien's lawful entry into this country.” 591
 20 U.S. at 106–07. In this case, Petitioners were neither admitted nor paroled, nor lawfully present in this
 21 country as required by *Landon* and *Thuraissigiam* to claim due process rights beyond what § 1225(b)
 22 provides. They instead remain applicants for admission who — even if released into the country “for
 23 years pending removal” — continue to be “‘treated’ for due process purposes ‘as if stopped at the
 24 border.’” *Thuraissigiam*, 591 U.S. at 139–140.

25 **5. Petitioners Are Not Entitled to a Pre-Detention Hearing Under § 1226(a)**

26 Even if this Court finds that § 1226(a) applies here, Petitioners would still not be entitled to pre-
 27 detention hearings. For aliens detained under § 1226(a), “an ICE officer makes the initial custody
 28 determination” *post*-detention, which the alien can later request to have reviewed by an IJ. *Rodriguez*

Diaz, 53 F.4th at 1196. The Supreme Court has long upheld the constitutionality of the basic process of immigration detention. *See, e.g., Reno v. Flores*, 507 U.S. 292, 309 (1993) (rejecting procedural due process claim that “the INS procedures are faulty because they do not provide for automatic review by an IJ of the initial deportability and custody determinations”); *Abel v. United States*, 362 U.S. 217, 233–34 (1960) (noting the “impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.”). Thus, under § 1226(a), aliens are not guaranteed *pre*-detention review and may only seek review of their detention by an ICE official once they are in custody — a process that the Ninth Circuit has found constitutionally sufficient in the prolonged-detention context. *See Rodriguez Diaz*, 53 F.4th at 1196–97.⁷

6. Petitioners Cannot Obtain an Injunction Prohibiting Transfer

To the extent Petitioners seeks an injunction that prohibits transferring them out of this District, they cannot succeed. The AG has discretion to determine the appropriate place of detention. *Milan-Rodriguez v. Sessions*, No. 16-cv-01578-AWI, 2018 WL 400317, *10 (E.D. Cal. Jan. 12, 2018) (citing *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985)). And while the Court may review whether such discretion resulted in a deprivation of rights, Petitioners have not shown how their mandatory detention or any transfer would interfere with their ability to present their cases or access counsel any more than any other similarly situated detainee. *See Milan-Rodriguez*, 2018 WL 400317, *10.

C. Petitioners Cannot Establish Irreparable Harm

Petitioners cannot meet their burden of establishing that they will be irreparably harmed absent a PI. The “unlawful deprivation of physical liberty” is a risk of harm “inherent in detention,” and therefore “the Court cannot weigh this strongly in favor of” Petitioners. *See Lopez Reyes v. Bonnar*, No.

⁷ Although *Rodriguez Diaz* did not arise in the pre-detention context, the Ninth Circuit noted that the petition argued that the Section 1226(a) framework was unlawful “for any length of detention” and concluded that the challenge to Section 1226(a) failed “whether construed as facial or as-applied challenges to § 1226(a).” 53 F.4th at 1203.

18-cv-07429-SK, 2018 WL 7474861 at *10 (N.D. Cal. Dec. 24, 2018). It is also countervailed by the authority discussed above providing for mandatory detention. Indeed, the alleged infringement of constitutional rights is insufficient where, as here, Petitioners cannot demonstrate “a sufficient likelihood of success on the merits of [their] constitutional claims to warrant the grant of a preliminary injunction.” *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc’d Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); see also *Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021) (denying TRO where petitioners “assume[d] a deprivation to assert the resulting harm”). Further, any alleged harm from the fact of detention alone is insufficient because “detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.” *Demore*, 538 U.S. at 523; see also *Flores*, 507 U.S. at 306; *Carlson*, 342 U.S. at 538. And as noted by the Ninth Circuit in *Rodriguez Diaz*, if treated as detention under Section 1226(a), the risk of erroneous deprivation and value of additional process is small because of the procedural safeguards in Section 1226(a). Thus, Petitioners cannot show that their lawfully authorized detention would cause irreparable harm.

15 D. The Balance of Equities and Public Interest Do Not Favor an Injunction

16 When the government is a party, the balance of equities and public interest merge. *Drakes Bay*
 17 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435
 18 (2009)). Further, where a moving party only raises “serious questions going to the merits,” the balance
 19 of hardships must “tip sharply” in their favor. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35
 20 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

21 Here, the government has a compelling interest in the steady enforcement of its immigration
 22 laws. See *Demore*, 538 U.S. at 523; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009)
 23 (holding that the court “should give due weight to the serious consideration of the public interest” in
 24 enacted laws); see also *Ubiquity Press Inc. v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983,
 25 at *4 (C.D. Cal. Dec. 20, 2020) (“[T]he public interest in the United States’ enforcement of its
 26 immigration laws is high”); *United States v. Arango*, CV 09-178 TUC DCB, 2015 WL 11120855, at 2
 27 (D. Ariz. Jan. 7, 2015) (“[T]he Government’s interest in enforcing immigration laws is enormous”).
 28 Indeed, the government “suffers a form of irreparable injury” “[a]ny time [it] is enjoined by a court from

1 effectuating statutes enacted by representatives of its people.” *Maryland v. King*, 567 U.S. 1301, 1303
2 (2012) (citation omitted).

3 Petitioners’ claimed harms cannot outweigh this public interest in the application of the law,
4 particularly since courts “should pay particular regard for the public consequences in employing the
5 extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)
6 (citation omitted). Recognizing the availability of a PI under these circumstances would permit any
7 “applicant for admission” subject to § 1225(b) to obtain additional review simply because he or she was
8 conditionally released — even if that release is expressly conditioned on appearing at removal
9 proceedings for *unlawful* entry — circumventing the comprehensive statutory scheme that Congress
10 enacted. That statutory scheme — and judicial authority upholding it — likewise favors the
11 government. While it is “always in the public interest to protect constitutional rights,” if, as here, a
12 petitioner has not shown a likelihood of success on the merits of their claim, that public interest does not
13 outweigh the competing public interest in enforcement of existing laws. *See Preminger v. Principi*, 422
14 F.3d 815, 826 (9th Cir. 2005). The public and governmental interest in applying the established
15 procedures for “applicants for admission,” including their lawful, mandatory detention, *see* 8 U.S.C.
16 § 1225(b); *Jennings*, 583 U.S. at 297, is significant.

17 **E. Any Injunction Should Not Reverse the Burden of Proof**

18 At any bond hearing, Petitioners should have the burden of demonstrating that they are not a
19 flight risk or danger to the community. This is the ordinary standard applied in bond hearings. *Matter of*
20 *Guerra*, 24 I&N Dec. 37, 40 (B.I.A. 2006) (“The burden is on the alien to show to the satisfaction of the
21 [IJ] that he or she merits release on bond.”). It would be improper to reverse the burden of proof and
22 place it on the government in these circumstances. *See Rodriguez Diaz*, 53 F.4th at 1210-12 (“Nothing in
23 this record suggests that placing the burden of proof on the government was constitutionally necessary to
24 minimize the risk of error, much less that such burden-shifting would be constitutionally necessary in all,
25 most, or many cases.”).

26 The Ninth Circuit previously held that the government bears the burden by clear and convincing
27 evidence that an alien is not a flight risk or danger to the community for bond hearings in certain
28 circumstances. *Singh v. Holder*, 638 F.3d 1196, 1203-05 (9th Cir. 2011) (bond hearing after allegedly

prolonged detention). But following intervening Supreme Court decisions, the Ninth Circuit has explained that “*Singh*’s holding about the appropriate procedures for those bond hearings . . . was expressly premised on the (now incorrect) assumption that these hearings were statutorily authorized.” *Rodriguez Diaz*, 53 F.4th at 1196, 1200–01 (citing *Jennings*, 583 U.S. 281, and *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022)). Thus, the prior Ninth Circuit decisions imposing such a requirement are “no longer good law” on this issue, *Rodriguez Diaz*, 53 F.4th at 1196, and the Court should follow *Rodriguez Diaz* and the Supreme Court cases.

V. CONCLUSION

The government respectfully requests that the habeas petition and request for a PI be denied.

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Respectfully submitted,

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