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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
TUCSON DIVISION

Fausto Elias Montijo,

Petitioner,

v.

John E. Cantu, Field Office Director of Enforcement and Removal Operations, Phoenix Field Office, Immigration and Customs Enforcement; Kristi Noem, Secretary, U.S. Department of Homeland Security; Pamela Bondi, U.S. Attorney General; Fred Figueroa, Warden of Eloy Detention Center; Todd Lyons, Acting Director, Immigration and Customs Enforcement and Removal Operations.

Respondents.

Case No.

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE MOTION FOR TRO/PI

Request for Declaratory and Injunctive Relief

NOTICE OF MOTION

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Rule 65-1 of the Local Rules of this Court, Petitioner hereby moves this Court for an order enjoining Respondents John E. Cantú, in his official capacity as Field Office Director of Enforcement and Removal Operations, Phoenix Field Office, Immigration and Customs Enforcement, Kristi Noem, in her official capacity as the Secretary of the U.S. Department of Homeland Security ("DHS"), Pamela Bondi, in her official capacity as the U.S. Attorney General with authority over the Executive Office for Immigration Review, and Fred Figueroa, in his official capacity as Warden of the Eloy Detention Center, where Petitioner is detained, from the continued unlawful detention of Petitioner in the Eloy Detention Center. Petitioner, who has resided in the United States for more than ten (10) years, was arrested after immigration officials targeted the driver of a vehicle in which Petitioner was a passenger for enforcement action. *See* Concurrently filed Habeas Petition, Dkt. 1.

Petitioner was charged in removal proceedings under 8 U.S.C. § 1229a for having entered the United States without inspection. He appeared for a bond redetermination hearing at the Eloy Detention Center, where the Immigration Judge ("IJ") found that that the Immigration Court had jurisdiction and awarded bond – despite a new directive issued by the DHS severely restricting bond eligibility for those who entered the United States without inspection. ICE subsequently issued a Notice of Stay and submitted an appeal of the IJ's decision to the Board of Immigration Appeals ("BIA" or "Board"), arguing that the IJ lacked jurisdiction to grant bond under the new DHS directive. During the pendency of DHS's appeal, on September 5, 2025, the BIA issued a precedent decision formally adopting DHS's restrictive view of bond eligibility and holding that individuals like Petitioner, who entered the United States without inspection and have resided in this country for many years thereafter, are ineligible for bond under 8 U.S.C. § 1226. *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 219 (BIA 2025).

Petitioner, through this temporary restraining order, is seeking injunctive relief declaring that his continued detention, despite his clear eligibility for bond and his family's attempts to pay this bond, is unlawful and violates his statutory and constitutional rights.

Petitioner is submitting a Habeas petition for same, but here seeks a temporary restraining order for expedited relief to prevent irreparable injury before a hearing on a Petitioner's petition for Habeas may be held. The reasons in support of this Motion are set forth in the accompanying Petition for Writ of Habeas Corpus, Memorandum of Points and Authorities, and the declaration and exhibits in support thereof. Petitioner maintains that the only way to prevent further unlawful detention in violation of his rights is an ex-parte temporary restraining order from this Court. Respondents were advised on September 17, 2025 that Petitioner would be filing this ex parte application and of the contents of this application. Exhibit.

Counsel for Respondents is as follows:

Timothy Courchaine, United States Attorney for the District of Arizona
District of Arizona
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Dated: September 17, 2025

Mika Galilee-Belfer
Attorney for Petitioner

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I. INTRODUCTION

Petitioner Fausto Elias-Montijo seeks a Temporary Restraining Order ("TRO") that requires Respondents to release him from custody within seven days of the issuance of a TRO. On July 14, 2025, an Immigration Judge granted Petitioner a bond of $8,000 for release from custody in the Eloy Detention Center, but the Department of Homeland Security ("DHS") stayed that grant of bond and appealed the decision to the Board of Immigration Appeals ("BIA" or "Board").

Although Petitioner was present and residing in the United States for over 10 years at the time of his immigration arrest, he was subjected to a new DHS policy issued on July 8, 2025 which instructs all Immigration and Customs Enforcement ("ICE") employees to consider anyone arrested within the United States and charged with being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) to be subject to mandatory detention under § 1225(b)(2)(A). The new DHS policy was issued "in coordination with the Department of Justice (DOJ)." *See* Habeas Petition, Ex. 2. EOIR formalized its coordination with ICE on September 5, 2025, by publishing *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025). In *Matter of Yajure Hurtado*, the BIA held that 8 U.S.C. § 1225(b)(2)(A) requires the detention throughout removal proceedings of any "inadmissible alien," including those who, like Petitioner, entered the United States without inspection and have resided in this country for more than two years. 29 I. & N. Dec. at 219-20.

The Petitioner remains detained at the Eloy Detention Center because of this new policy. The Board's decision in *Matter of Yajure Hurtado* renders futile any defense he may raise in opposition to DHS' appeal. For the reasons explained below, the stay and appeal of the bond redetermination, the Board's intervening precedent decision, and Petitioner's ongoing detention violate the plain language of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*.

Petitioner therefore seeks a TRO enjoining Respondents from continuing to detain him pending payment of the bond amount as determined by the Immigration Judge. Petitioner also seeks an Order prohibiting Respondents from relocating him outside of Arizona pending final resolution of this litigation.

II. ARGUMENT

The requirements for granting a TRO are "substantially identical" to those for granting a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Petitioner must demonstrate that (1) he is likely to succeed on the merits of his claims; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). A sliding scale test may be applied, and an injunction should be issued when there is a stronger showing on the balance of hardships, even if there are "serious questions on the merits … so long as the plaintiff also shows a likelihood of irreparable harm and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011)*; see also Flathead-Lolo-Bitterroot Citizen Task Force v. Montana,* 98 F.4th 1180, 1190 (9th Cir. 2024). Petitioner satisfies the criteria, and a TRO should be granted.

A. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIM.

Petitioner is likely to succeed on his claim that his ongoing detention by Respondents under 8 U.S.C. § 1225(b)(2), and the denial of access to bond, is unlawful.

1. <u>The Text Of § 1226(a) and § 1225(b)(2) Demonstrate That Petitioner Is Not Subject to Mandatory Detention.</u>

First, the plain text of § 1226 demonstrates that subsection (a) applies to Petitioner. Section 1226(a) permits the release of noncitizens who are detained "pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a). While § 1226(a)

provides the right to seek release, § 1226(c) carves out specific categories of noncitizens—including certain categories of noncitizens who are inadmissible under 8 U.S.C. § 1182(a)—and subjects them instead to mandatory detention. See, e.g., § 1226(c)(1)(A), (C). If § 1226(a) could never apply to inadmissible noncitizens, there would be no reason to specify that § 1226(c) governs certain persons who are inadmissible; instead, § 1226(c) would only have needed to address people who are deportable for certain offenses under 8 U.S.C. § 1227(a).

Recent amendments to § 1226 dramatically reinforce that this section covers people like Petitioner, whom DHS alleges to be present without admission. Specifically, the Laken Riley Act added language to § 1226 that directly references those who are inadmissible under § 1182(a)(6) because they are present without admission or under § 1182(a)(7) because the lack valid documentation. *See* Laken Riley Act ("LRA"), Pub. L. No. 119-1, 139 Stat. 3 (2025); 8 U.S.C. § 1226(c)(1)(E). By including such individuals under § 1226(c) and carving them out of § 1226(a) if they have been arrested, charged with, or convicted of certain crimes, Congress reaffirmed that § 1226(a) covers persons charged under § 1182(a)(6) or (a)(7). *See Rodriguez Vazquez v. Bostock*, No. 3:25-CV-05240-TMC, 2025 WL 1193850, at *14 (W.D. Wash. June 6, 2025) (explaining these amendments explicitly provide that § 1226(a) covers people like Petitioner because the "'specific exceptions' [in the LRA] for inadmissible noncitizens who are arrested, charged with, or convicted of the enumerated crimes logically leaves those inadmissible noncitizens not criminally implicated under Section 1226(a)'s default rule for discretionary detention."); *Diaz Martinez v. Hyde*, 2025 WL 2084238, at *7 (D. Mass. July 24, 2025) ("if, as the Government argue[s], . . . a non-citizen's inadmissibility were alone already sufficient to mandate detention under section 1225(b)(2)(A), then the 2025 amendment would have no effect." 2025 WL 2084238, at *7; *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299, at *7 (D. Mass. July 7, 2025)

(similar). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (observing that a statutory exception would be unnecessary if the statute at issue did not otherwise cover the excepted conduct).

Unlike 8 U.S.C. § 1226, 8 U.S.C. § 1225(b) requires the detention of certain individuals who are arriving at U.S. ports of entry or who recently entered the United States. As relevant here, 8 U.S.C. § 1225(b)(2)(A) applies only to individuals who are "seeking admission" to the United States.[1] *See Vasquez-Garcia et al. v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025) (rejecting DHS' contention that an individual who entered the United States without inspection "is automatically understood to be 'seeking admission' within the meaning of § 1225(b)(2)(A), without need[ing] to affirmatively apply for admission or parole"); *Arrazola Gonzalez v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025) (concluding that habeas petitioner showed likelihood of success on the merits of argument that "[t]o ignore the 'seeking admission' language [in 8 U.S.C. § 1225(b)(2)(A) . . . would render the language purposeless and violate a key rule of statutory construction"); *see also* 8 C.F.R. § 1.2 (addressing noncitizens who are presently "coming or attempting to come into the United States").

8 U.S.C. § 1225 further defines its scope by reference to "inspections"—a term not defined in the INA, but which typically connotes an examination upon or soon after physical entry. *See* 8 U.S.C. § 1225 (titled "Inspection by immigration officers; expedited removal of inadmissible arriving [noncitizens]; referral for hearing"); §§ 1225(b)(1)–(2) (referring to "inspections" in their titles); § 1225(b)(2)(A), (b)(4) (referring to "examining immigration officers'); § 1225(d)(1)

[1] 8 U.S.C. § 1225(b)(1) concerns "expedited removal of inadmissible arriving [noncitizens]," including those who present themselves for inspection upon "arriving" and other individuals designated by the Attorney General who have been present in the United States for less than two years, and who are "inadmissible under section 1182(a)(6)(C) or § 1182(a)(7)." 8 U.S.C. § 1225(b)(1)(A)(i). Subsection (b)(1) does not require Petitioner's detention because he did not present himself for inspection, and he has been in the United States for well over two years.

(authorizing immigration officials to search certain conveyances in order to conduct "inspections" where noncitizens "are being brought into the United States"); *see also Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (emphasis added) (relying on section title to help construe statute). Many statutory provisions, various regulations, and agency precedent also discuss "inspection" in the context of admission processes at ports of entry, further supporting the conclusion that § 1225 has a limited temporal and geographic scope. *See, e.g.*, 8 U.S.C. §§ 1187(h)(2)(B)(i), 1225A; 8 U.S.C. § 1752a; 8 C.F.R. § 235.1; *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)); *see also King v. Burwell*, 576 U.S. 473, 492 (2015) (looking to an Act's "broader structure . . . to determine [the statute's] meaning").

The statutory and regulatory text's use of the present and present progressive tenses further excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States. *See* 8 U.S.C. § 1225(b)(2)(C) (addressing the "[t]reatment of [noncitizens] *arriving* from contiguous territory," i.e. those who are "*arriving* on land") (emphasis added). As the Supreme Court recognized, this mandatory detention scheme applies "at the Nation's borders and ports of entry, where the Government must determine whether a [] [noncitizen] seeking to enter the country is admissible," and § 1225 is concerned "primarily [with those] seeking entry." *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018).

The Board in *Matter of Yajure Hurtado* ignored the "seeking admission" requirement and instead focused solely on whether an individual who enters the United States without inspection is "applicant for admission," as § 1225(b)(2)(A) also requires. But as the Ninth Circuit has explained, "when deciding whether language is plain, [courts] must read the words in their context and with a view to their place in the overall statutory scheme." *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th Cir. 2022) (internal quotation marks omitted). In context, the differential

phrasing of "applicant for admission" and "seeking admission" in the same statutory subsection is significant, because "applicant for admission" is a term of art that has been analyzed as such by both the Supreme Court and the Ninth Circuit Court of Appeals. *See DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020); *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018); *see also Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc) (holding that an individual submits an "application for admission" only at "the moment in time when the immigrant actually applies for admission into the United States."). By contrast, an individual who has not presented at a port of entry and has not filed any affirmative application for immigration benefits is not "seeking" anything under the plain meaning of the word. *See* Merriam Webster's Dictionary (2025) (defining "seek" as, inter alia, "to go in search of" or "to try to acquire or gain").

Thus, Petitioner prevails regardless of the scope of § 1225(a)(1)'s definition of "applicant for admission." This is because classification as an "applicant for admission" is not sufficient to render someone subject to mandatory detention under § 1225(b)(2). The "applicant for admission" must *also* be "seeking admission," and that is clearly not the case for Petitioner.

2. The Legislative History Further Supports the Application Of § 1226(a) To Petitioner.

The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-–208, Div. C, §§ 302–03, 110 Stat. 3009-546, 3009–582 to 3009–583, 3009–585, also supports the conclusion that § 1226(a) applies to Petitioner. In passing IIRIRA, Congress was focused on the perceived problem of recent arrivals to the United States who did not have documents to remain. *See* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29; H.R. Rep. No. 104-828, at 209. Notably, Congress did not say anything about subjecting all people present in the United States after an unlawful entry to mandatory detention if arrested. This is important because prior to IIRIRA, people like Petitioner were not subject to mandatory detention. *See* 8 U.S.C. § 1252(a)(1) (1994) (authorizing Attorney General to arrest and release noncitizens

physically present in the United States pending a determination of deportability). Had Congress intended to make such a monumental shift in immigration law (potentially subjecting millions of people to mandatory detention), it would have explained so or spoken more clearly. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468–69 (2001). But to the extent it addressed the matter, Congress explained precisely the opposite, noting that the new § 1226(a) merely "restates the current provisions in [INA] section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond a [] [noncitizen] *who is not lawfully in the United States*." H.R. Rep. No. 104- 469, pt. 1, at 229 (emphasis added); *see also* H.R. Rep. No. 104-828, at 210 (same).

The agency's interpretation of IIRIRA soon after its enactment is consistent with this history. As noted in a recent decision from this judicial district, "a 1997 interim rule issued 'to implement the provisions of [IIRIRA],' which had passed six months earlier . . . explained that '[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.'" *Rosado v. Figueroa*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025) (quoting 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997)).

The most recent amendment to the INA's detention provisions – the LRA – further underscores Congress's understanding – now as in the 1990s – that individuals who enter the United States without inspection are not automatically subject to detention under 8 U.S.C. § 1225. As previously explained, the LRA amendments clearly prohibit bond under 8 U.S.C. § 1226 for individuals who entered the United States without inspection *and* were subsequently charged with, arrested for, or convicted of certain listed offenses. To hold that *all* individuals who entered without inspection are prohibited from obtaining bond under 8 U.S.C. § 1226 would therefore run afoul of the canon against superfluities. Under this "most basic [of] interpretive canons, . . . '[a]

statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (third alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir. 2023) (similar).

The BIA acknowledged that reading 8 U.S.C. § 1225(b)(2)(A) to apply to individuals who entered without inspection would create a redundancy in the statute by subjecting such individuals mandatory detention under two separate provisions. *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 222. The BIA dismissed such redundancy as permissible and posited that the LRA did not purport to "overrule" 8 U.S.C. § 1225(b)(2)(A). *Id.* at 219, 222. But once again, in reaching this conclusion, the BIA did not address the requirement of 8 U.S.C. § 1225(b)(2)(A) that an individual must be "seeking admission" to be subject to § 1225(b)(2)(A). To give substance to the phrase "seeking admission" would both ensure fidelity to the plain language of the statute and eliminate concerns about redundancies between § 1226(c) and § 1225(b)(2)(A): individuals who entered without inspection and have been present in the United States for more than two years would not be subject to detention, *unless* they were subject to one of the mandatory detention provisions of the LRA.[2]

3. The Board's Decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, Is Not Entitled to Deference Because It Contravenes the Statutory Language and Legislative History, and It Deviates from Longstanding Agency Practice.

In *Loper Bright Enterprises v. Ramiundo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron v. NRDC*, 467 U.S. 837 (1984), and held that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. Where a statute is ambiguous, courts may now apply the framework set forth in

[2] It is unclear what the BIA meant when it suggested that a statute must contain clear language to "overrule" another statute. *See* 29 I. & N. Dec. at 219. Unlike Article III courts, which may overrule lower courts' caselaw, Congress changes statutes by the amendment process.

Skidmore v. Swift & Co., 323 U.S. 134 (1944), rather than the deferential *Chevron* framework. *See Loper Bright*, 603 U.S. at 394. Under *Skidmore*, the question is whether the agency's reasoning–although not binding–has the "power to persuade" based on "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. at 140. In other words, *Skidmore* deference is discretionary, and courts retain the authority to adopt or reject the agency's view based on its merits.

The BIA's decision in *Matter of Yajure Hurtado* does not satisfy the requirements for deference under *Loper Bright* or *Skidmore*. First, the BIA's decision lacks the "thoroughness" and "validity" required for deference. 323 U.S. at 140. The BIA analyzed the history of the statutory phrase "applicants for admission" in some detail, despite Mr. Yajure's concession on this issue, but it did not meaningfully analyze the plain language, statutory context, or legislative history of the distinct phrase "seeking admission," which is also required for 8 U.S.C. § 1225(b)(2)(A) to apply. "Applicant for admission" – not "seeking admission" – is the statutory phrase construed by the Supreme Court as expansive in *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018), and *DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020).

Nor is the BIA entitled to deference in its superficial treatment of the conflict between its unprecedented reading of 8 U.S.C. § 1225(b)(2)(A) and the recent amendments in the LRA. The Board did not meaningfully contend with the redundancy it identified between its expansive interpretation of 8 U.S.C. § 1225(b)(2)(A) and the clear statutory language applying the LRA amendments to individuals who entered the United States without inspection.

Finally, as the Board itself acknowledged, its decision in *Matter of Yajure Hurtado* was fundamentally inconsistent with its own earlier pronouncements, such as *Matter of Akhmedov*, 29 I. & N. Dec. 166 (BIA 2025), and with decades of agency practice in untold numbers of cases. *See*

29 I. & N. Dec. at 225-26 & n.6. The Board's initial protestation that the issue was not raised in these prior cases, 29 I. & N. Dec. at 225 n.6, stands in sharp contrast to its own contention that the agency may never exceed the "authority that is delegated to the Immigration Judge by the INA and the Attorney General through regulation." *Id.* at 217. Surely, if the putatively jurisdiction-stripping statutory language were so crystal clear as to be unambiguous, then the BIA would have detected and addressed such a fundamental jurisdictional roadblock, rather than simply adjudicating countless cases outside the scope of its authority over the course of nearly 30 years. In sum, the Board's decision in *Matter of Yajure Hurtado* lacks merit, represents a stark deviation from the agency's own prior practice, and is not worthy of deference under *Loper Bright.*

DHS's long practice of considering people like the Petitioner as detained under §1226(a) further counsels against deference. Typically, in cases like that of the Petitioner, DHS issues a Form I-286, Notice of Custody Determination, or Form I-200 stating that the person is detained under § 1226(a) or has been arrested under that statute. For decades, and across administrations, DHS has thereby acknowledged that § 1226(a) applies to individuals who are present without admission after entering the United States unlawfully, but who were later apprehended within the United States long after their entry. *See also* 62 Fed. Reg. at 10323.3 (explaining that "[d]espite being applicants for admission, [noncitizens] who are present without having been admitted or paroled (formerly referred to as [noncitizens] who entered without inspection) will be eligible for bond and bond redetermination"). Such a longstanding and consistent interpretation "is powerful evidence that interpreting the Act in [this] way is natural and reasonable." *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relying in part on "over 60 years" of government interpretation and practice to reject government's new proposed interpretation of the law at issue).

4. Other Federal Courts Have Rejected the Respondents' Novel Argument That 8 U.S.C. § 1225(b) Governs the Detention of Every Noncitizen Without Lawful Immigration Status.

Numerous federal courts have rejected the exact conclusion advanced by the BIA in *Matter of Yajure Hurtado* and by ICE in Petitioner's case. For example, after IJs in the Tacoma, Washington, Immigration Court stopped providing bond hearings for persons who entered the United States without inspection and who have since resided here, the U.S. District Court in the Western District of Washington found that such a reading of the INA is likely unlawful and that § 1226(a), not § 1225(b), applies to noncitizens who are not apprehended upon arrival to the United States. *Rodriguez Vazquez v. Bostock*, --- F. Supp. 3d --- 2025 WL 1193850 (W.D. Wash. Apr. 24, 2025); *see also Gomes v. Hyde*, No. 2025 WL 1869299, at *8 (same). The *Rodriguez Vazquez* court reasoned that section 1226(a) applies by default to persons in removal proceedings under § 1229a, including people charged as inadmissible (such as those who entered without inspection), and subparagraph (c)(1)(E) creates an exception for a subset of such people who may not be released. *Id.* (quoting *Jennings*, 583 U.S. at 288); 8 U.S.C. § 1226(c)(1)(E). As the *Rodriguez Vazquez* court explained, "[w]hen Congress creates "specific exceptions" to a statute's applicability, it "proves" that absent those exceptions, the statute generally applies. 2025 WL 1193850, at *12 (citing *Shady Grove Orthopedic Assocs.*, 559 U.S. at 400).

Other Courts within this judicial circuit have reached similar conclusions with respect to individuals who entered the United States without inspection. *See, e.g., Vasquez-Garcia et al.*, 2025 WL 2549431; *see also Arrazola*, 2025 WL 2379285. District Courts elsewhere have agreed. *See, e.g., Pizarro Reyes v. Raycraft*, 2025 WL 2609425 (E..D. Mich. Sept. 9, 2025) (specifically rejecting the Board's analysis of the statute in *Matter of Yajure Hurtado* and concluding that it is "difficult to square a noncitizen's continued presence with "seeking admission" when that noncitizen never attempted to obtain lawful status"); *Kostak v. Trump*, 2025 WL 2472136 (W.D.

La. Aug. 27, 2025) (concluding petitioner who entered the United States without inspection was not subject to detention under § 1225(b), because that statute governs individuals arriving in the United States, while § 1226 governs those, like petitioner, who are already present in the United States); *Leal-Hernandez v. Noem*, 2025 WL 2430025 (D. Md. Aug. 24, 2025) (concluding petitioner who entered without inspection and was arrested after 20 years in the United States was not subject to detention under 8 U.S.C. § 1225(b)(2)(A)).

Furthermore, in cases involving other inadmissible individuals, District Courts have rejected the BIA's conclusion that all individuals without lawful immigration status are subject to detention under 8 U.S.C. § 1225(b). *See, e.g.*, *Sampaio v. Hyde*, 2025 WL 2607924, n.11 (D. Mass. Sept. 9, 2025) (noting court's disagreement with BIA's analysis in *Yajure Hurtado*); *Rosado*, 2025 WL 2337099 (granting petition where inadmissible Petitioner presented himself for inspection upon arrival, was released, and was later re-detained); *Caicedo Hinestroza v. Kaiser*, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025) (same); *Hernandez-Nieves v. Kaiser*, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025) (same); *Lopez Benitez v. Francis*, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025) (same). These cases also implicitly reject the Board's conclusion in *Matter of Yajure Hurtado*, that the legal authority invoked in the ICE arrest warrant is of no consequence in determining the statutory basis for that detention. *See id* (citing use of Form I-286 and 8 U.S.C. § 1226).

In sum, § 1226 governs this case. The mandatory detention provision of § 1225 applies only to individuals arriving in the United States as specified in the statute, while § 1226 applies to those who previously entered without admission.

B. PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A TRO.

In the absence of a TRO, Petitioner will continue to be unlawfully detained by Respondents pursuant to § 1225(b)(2) and denied the freedom the IJ has already established is appropriate.

Petitioner has now been in custody following his bond hearing for approximately nine weeks. "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). Furthermore, it "is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation modified); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005); *see also Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017) (concluding that Plaintiffs who showed unconstitutional deprivation of physical liberty "also carried their burden as to irreparable harm."); *Maldonado Bautista et al. v. Santacruz, et al.,* No. 5:25-cv- 01873-SSS-BFM (C.D. Calif. July 28, 2025), Order Granting TRO, Dkt. 14 at 9 ("[T]he Court finds that the potential for Petitioners' continued detention without an initial bond hearing would cause immediate and irreparable injury, as this violates statutory rights afforded under § 1226(a).")

C. THE BALANCE OF EQUITIES TIPS IN PETITIONER'S FAVOR AND A TRO IS IN THE PUBLIC INTEREST.

Because the government is a party, these two factors are considered together. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Petitioner has established that the public interest factor weighs in his favor because his claim asserts that the new policy violates federal laws. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). Because the policy preventing Petitioner from realizing the bond already granted "is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction." *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019); *see also Moreno Galvez*, 52 F.4th 821, 832 (9th Cir. 2022) (quoting approvingly district judge's declaration that "it is clear that neither equity nor the public's interest are furthered by allowing violations of federal law to continue"). This is because "it would not be equitable or in the public's interest to allow the

[government] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (citation omitted). Indeed, Respondents "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

D. PRUDENTIAL EXHAUSTION IS NOT REQUIRED.

Prudential exhaustion does not require Petitioner to be forced to endure the very harm he is seeking to avoid by awaiting a BIA decision on DHS's appeal, where the Board's recent precedential decision makes the outcome of that appeal a foregone conclusion. "[T]here are a number of exceptions to the general rule requiring exhaustion, covering situations such as where administrative remedies are inadequate or not efficacious, . . . [or] irreparable injury will result." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation omitted). Administrative exhaustion is not required where a request for relief before the agency would be futile because the agency has "predetermined the issue before it." *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). In addition, a court may waive an exhaustion requirement when "requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action," such as "from an unreasonable or indefinite time frame for administrative action." *Id.* at 146-47 (citing cases). Here, the exceptions regarding futility, irreparable injury, and agency delay warrant waiving any prudential exhaustion requirement.

1. Futility

The BIA's decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, renders prudential exhaustion futile in bond cases involving individuals who entered the United States without inspection. *Zaragoza Mosqueda, et al. v. Noem*, 2025 WL 2591530, at *7 (C.D. Cal. Sept. 8, 2025). Although the IJ granted bond to Petitioner and correctly concluded that 8 U.S.C. § 1226 governs

his custody status, the BIA's intervening decision in *Matter of Yajure Hurtado* "predetermine[s]" the outcome of DHS's administrative appeal. *McCarthy*, 503 U.S. at 148. Prudential exhaustion is therefore unnecessary, and the Court should take jurisdiction over Petitioner's case.

Furthermore, Petitioner has already been subjected to the new DHS policy issued "in coordination with the Department of Justice (DOJ)" on July 8, 2025, instructing all ICE employees to consider anyone arrested within the United States and charged with being inadmissible under § 1182(a)(6)(A)(i) to be subject to mandatory detention. *See* Habeas Petition, Ex 2. Petitioner has been deprived of liberty as granted through a bond hearing by an IJ, and the Board's decision in *Matter of Yajure Hurtado* ensures that he will continue to be so deprived throughout the pendency of his case. *See* Habeas Petition, Ex. 5-7. Under these circumstances, arguments to the BIA in opposition to DHS's appeal would be futile.

2. Irreparable injury

Because Petitioner was denied access to bond he was granted, each day he remains in detention is one in which his statutory and constitutional rights have been violated. Similarly situated district courts have repeatedly recognized this fact. As one court has explained, "because of delays inherent in the administrative process, BIA review would result in the very harm that the bond hearing was designed to prevent: prolonged detention without due process." *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 237 (W.D.N.Y. 2019) (internal quotation marks omitted). Indeed, "if Petitioner is correct on the merits of his habeas petition, then Petitioner has *already* been unlawfully deprived of a [lawful] bond hearing [,] [and] . . . each additional day that Petitioner is detained without a [lawful] bond hearing would cause him harm that cannot be repaired." *Villalta v. Sessions*, No. 17-CV-05390-LHK, 2017 WL 4355182, at *3 (N.D. Cal. Oct. 2, 2017) (internal quotation marks and brackets omitted); *see also Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1139

(N.D. Cal. 2018) (similar). Other district courts have echoed these points.[3] Petitioner asserts both statutory and constitutional claims and has a "fundamental" interest in his ability to pay his bond, as "freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'" *Hernandez*, 872 F.3d at 993 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Moreover, the irreparable injury Petitioner faces extends beyond a chance at physical liberty. There are several "irreparable harms imposed on anyone subject to immigration detention[.]" *Hernandez*, 872 F.3d at 995. These include "subpar medical and psychiatric care in ICE detention facilities." *Id.*

3. Agency delay

Third, the BIA's delays in adjudicating bond appeals warrant excusing any exhaustion requirement. A court's ability to waive exhaustion based on delay is especially broad here given the "fundamental" interest in physical liberty that is at stake for Petitioner. *Hernandez*, 872 F.3d at 993. Moreover, the Supreme Court has explained that "[r]elief [when seeking review of detention] must be speedy if it is to be effective." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The BIA's months-long review is unreasonable and results in ongoing injury to Petitioner. *See, e.g.*, *Perez*, 445 F. Supp. 3d at 286. Indeed, as one district judge observed, "the vast majority of . . . cases . . . have 'waived exhaustion . . . where several additional months may pass before the BIA renders a decision on a pending appeal [of a custody order]." *Montoya Echeverria*, 2020 WL 2759731, at *6 (quoting *Rodriguez Diaz*, 2020 WL 1984301, at *5); *see also Hechavarria*, 358 F. Supp. 3d at 237–38 (citing *McCarthy* and BIA delays as reason to waive prudential exhaustion requirement).

[3] *See, e.g., Perez*, 445 F. Supp. 3d at 286; *Blandon v. Barr,* 434 F.Supp. 3d 30, 37 (W.D.N.Y. 2020); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 961 (N.D. Cal. 2019); *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1003–04 (N.D. Cal. 2018); *Montoya Echeverria v. Barr,* No. 20-CV-02917- JSC, 2020 WL 2759731, at *6 (N.D. Cal. May 27, 2020); *Rodriguez Diaz v. Barr*, No. 4:20-CV-01806-YGR, 2020 WL 1984301, at *5 (N.D. Cal. Apr. 27, 2020); *Birru v. Barr*, No. 20-CV-01285-LHK, 2020 WL 1905581, at *4 (N.D. Cal. Apr. 17, 2020); *Lopez Reyes v. Bonnar,* No. 18-CV-07429-SK, 2018 WL 7474861, *7 (N.D. Cal. Dec. 24, 2018).

Additionally, the issues presented in this petition are questions of statutory interpretation which are "unlikely to require agency consideration to generate a proper record to reach a proper decision." *Maldonado Bautista et al.,* No. 5:25-cv-01873-SSS-BFM, Order Granting TRO.

E. THERE IS NO JURISDICTIONAL HURDLE BARRING RELIEF

Finally, there is no jurisdictional bar under the INA because Petitioner does not seek review of an order of removal, but of custody, and his challenge does not fall within the discrete actions specified in the bar to review at 8 U.S.C. § 1252(g). *Maldonado Bautista et al.,* No. 5:25-cv-01873-SSS-BFM, Order Granting TRO (addressing "zipper clause" at 8 U.S.C. § 1252(b)(9)); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (holding that § 1252(g) applies "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'") (emphasis in original). Finally, subsection 2 of 8 U.S.C. § 1252(a), does not cite § 1225(b)(2)(A) or § 1226(a), which are the two provisions whose interpretation by Respondents Petitioner challenges. *See Maldonado Bautista et al.,* No. 5:25-cv-01873-SSS-BFM, Order Granting TRO.

III. CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's Application for a Temporary Restraining Order and Order to Show Cause.

Dated: September 18, 2025

Respectfully Submitted,

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WORD COUNT CERTIFICATION

The undersigned counsel of record for Petitioner certifies that this Memo contains 5646 words, which complies with the word limit of L.R. 11-6.1.

Mika Galilee-Belfer
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I SEVED A COPY OF PETITIONER'S *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION by mail to the following individual:

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