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10 **IN THE UNITED STATES DISTRICT COURT**
 11 **FOR THE DISTRICT OF ARIZONA**

13 Fausto Elias Montijo,
 Petitioner,
 14 v.
 15 John E. Cantu, et al.,
 16 Respondents.

No. CV-25-03445-PHX-SMB (CDB)

**RESPONSE TO MOTION FOR
 INJUNCTIVE RELIEF**

18 Petitioner Fausto Elias Montijo was arrested in 2016 for smuggling 16 kilos of meth
 19 into the United States. He is now in custody and seeks this Court’s extraordinary relief of an
 20 injunctive order releasing him. Unlike numerous habeas petitioners in recent months,
 21 Petitioner here supports his argument with virtually zero supporting exhibits containing
 22 statements by Petitioner, family members, or anyone else to support his release.

23 Petitioner is a noncitizen who lacks any legal status, was properly detained, and is
 24 properly deemed by the government to be subject to 8 U.S.C. § 1225(b)(2). The motion should
 25 therefore be denied.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Factual Background.**

3 Petitioner is a 53-year-old citizen of Mexico, born in Cananea, Sonora, Mexico. Exhibit
4 1, Declaration of Jaime R. Viramontes, ¶ 4. In 2009, Petitioner entered the United States with
5 a Border Crossing Card but failed to disclose that he was entering with intent to resume
6 employment. Exhibit 1, ¶ 5. United States Customs and Border Protection (CBP) concluded
7 that Petitioner was out of status and removable, and Petitioner voluntarily returned to Mexico.
8 Exhibit 1, ¶ 5.

9 In 2016, CBP arrested Petitioner and four other persons for attempting to smuggle 15.62
10 kilograms of meth into the United States. Exhibit 1, ¶ 6. The government is currently unable
11 to report additional facts about the outcome of this arrest, because additional time is needed to
12 access and fully review Petitioner's files. The government's information on Petitioner's
13 history next picks up in 2019, when Arizona state troopers encountered Petitioner near Tucson
14 and contacted CBP. Exhibit 1, ¶ 7. CBP determined that Petitioner had entered the country
15 without inspection or admission, and arrested him. Exhibit 1, ¶ 7. Petitioner admitted he had
16 entered the country illegally in 2009. Exhibit 1, ¶ 7. The government processed him for
17 expedited removal. Exhibit 1, ¶ 7. On December 27, 2019, the government served him with a
18 Notice to Appear and placed him into removal proceedings under Immigration and Nationality
19 Act (INA) § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Exhibit 1, ¶ 8. These proceedings
20 were dismissed in 2022, without prejudice. Exhibit 1, ¶ 9.

21 CBP and agents from Enforcement Removal Operations (ERO) next encountered
22 Petitioner on June 19, 2025, arresting him on grounds of being present in the United States
23 without being inspected or admitted. Exhibit 1, ¶ 10. Petitioner was issued a Notice to Appear
24 in Removal Proceedings pursuant to INA § 240, 8 U.S.C. § 1229a. On July 3, 2025, the
25 Petitioner made a Bond Redetermination request. Exhibit 1, ¶ 12. On July 14, 2025, an
26 Immigration Judge (IJ) issued a \$8,000 bond, and the government reserved appeal. Exhibit 1,
27 ¶ 16. The deadline for the government to file an appeal was August 13, 2025. Exhibit 1, ¶ 16.
28 The government filed a Notice of Appeal with the Board of Immigration Appeals (B.I.A.) on

1 July 24, 2025, specifically contesting the IJ’s decision to issue Petitioner a bond. Exhibit 1, ¶
2 17. Petitioner filed an application for relief from removal on August 26, 2025. Exhibit 1, ¶ 19.
3 The government filed a brief with the B.I.A. on August 28, 2025. Exhibit 1, ¶ 20. Before the
4 Immigration Court, a hearing on Petitioner’s pending application for relief from removal is
5 currently set to be heard on October 15, 2025. Exhibit 1, ¶ 25.

6 **LAW AND ARGUMENT**

7 Petitioner makes three broad arguments in support of his view that detaining him under
8 8 U.S.C. § 1225(b) is improper, and that his detention status should instead be subject to 8
9 U.S.C. § 1226(a). First, he argues that the statutory text and legislative history support his
10 interpretation of the two provisions at issue. The government will explain below why its
11 interpretation of § 1225(b) is the correct one that this Court should adopt. Second, Petitioner
12 argues that the B.I.A.’s decision in 2025 to accept the government’s current view on § 1225(b)
13 is owed no deference. The Court need not analyze this point, because the government agrees
14 that no deference is owed.

15 Third, Petitioner argues that “numerous” other district courts nationwide have agreed
16 with Petitioner’s argument here. Doc. 2 at 19. As the Court is well aware, district court
17 decisions only constitute persuasive precedents that are not binding here, and this is even more
18 so the case when Petitioner cannot cite even a single *appellate* decision from any federal circuit
19 that has weighed in on the question. Moreover, the district court rulings on this question are
20 not unanimous. Judge Bencivengo in the Southern District of California has disagreed with
21 the weight of Petitioner’s “numerous” district court opinions, issuing a succinct and well-
22 reasoned analysis of her conclusions. *Chavez v. Noem*, -- F. Supp. 3d --, No. 25-cv-02325-
23 CAB-SBC, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025). The government will address this
24 third argument simultaneously to the first argument, by explaining why § 1225(b) is the proper
25 detaining authority for Petitioner as opposed to § 1226.

26 **I. Statutory Framework**

27 **A. Applicants for Admission**

28 “The phrase ‘applicant for admission’ is a term of art denoting a particular legal status.”

1 *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc). Section 1225(a)(1) states:

2 (1) Aliens treated as applicants for admission.— An alien
3 present in the United States who has not been admitted or who
4 arrives in the United States (whether or not at a designated port
of arrival ...) shall be deemed for the purposes of this Act an
applicant for admission.

5 8 U.S.C. § 1225(a)(1).¹ Section 1225(a)(1) was added to the INA as part of the Illegal
6 Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). Pub. L. No. 104-
7 208, § 302, 110 Stat. 3009-546. “The distinction between an alien who has effected an entry
8 into the United States and one who has never entered runs throughout immigration law.”
9 *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

10 Before IIRIRA, “immigration law provided for two types of removal proceedings:
11 deportation hearings and exclusion hearings.” *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir. 1999)
12 (en banc). A deportation hearing was a proceeding against a noncitizen already physically
13 present in the United States, whereas an exclusion hearing was against a noncitizen outside of
14 the United States seeking admission. *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 25
15 (1982)). Whether an applicant was eligible for “admission” was determined only in exclusion
16 proceedings, and exclusion proceedings were limited to “entering” noncitizens — those
17 noncitizens “coming ... into the United States, from a foreign port or place or from an outlying
18 possession.” *Plasencia*, 459 U.S. at 24 n.3 (quoting 8 U.S.C. § 1101(a)(13) (1982)). “[N]on-
19 citizens who had entered without inspection could take advantage of greater procedural and
20 substantive rights afforded in deportation proceedings, while non-citizens who presented
21 themselves at a port of entry for inspection were subjected to more summary exclusion
22 proceedings.” *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010); *see also Plasencia*,
23 459 U.S. at 25-26. Prior to IIRIRA, noncitizens who attempted to lawfully enter the United
24 States were in a worse position than noncitizens who crossed the border unlawfully. *See Hing*
25 *Sum*, 602 F.3d at 1100; *see also H.R. Rep. No. 104-469*, pt. 1, at 225-229 (1996). IIRIRA
26 “replaced deportation and exclusion proceedings with a general removal proceeding.” *Hing*

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28 ¹ Admission is the “lawful entry of an alien into the United States after inspection
and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13).

1 *Sum*, 602 F.3d at 1100.

2 IIRIRA added Section 1225(a)(1) to “ensure[] that all immigrants who have not been
3 lawfully admitted, regardless of their physical presence in the country, are placed on equal
4 footing in removal proceedings under the INA.” *Torres*, 976 F.3d at 928; *see also* H.R. Rep.
5 104-469, pt. 1, at 225 (explaining that § 1225(a)(1) replaced “certain aspects of the current
6 ‘entry doctrine,’” under which illegal noncitizens who entered the United States without
7 inspection gained equities and privileges in immigration proceedings unavailable to
8 noncitizens who presented themselves for inspection at a port of entry). The provision “places
9 some physically-but not-lawfully present noncitizens into a fictive legal status for purposes of
10 removal proceedings.” *Torres*, 976 F.3d at 928.

11 **B. Expedited Removal Under 8 U.S.C. § 1225**

12 IIRIRA established distinct types of removal proceedings. Pub. L. 104-208, 110 Stat.
13 3009, 3009-546 (1996). Removal proceedings under § 1225 are known as “expedited removal
14 proceedings.” *See Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109-113 (2020)
15 (citing provisions). Only two categories of noncitizens are eligible for expedited removal,
16 rather than full removal proceedings, (1) “arriving aliens” and (2) noncitizens who “ha[ve] not
17 been admitted or paroled into the United States” and have not been “physically present in the
18 United States” for two years. 8 U.S.C. § 1225(b)(1)(A)(i)-(iii). “Arriving aliens” are defined
19 by regulation as “an applicant for admission coming or attempting to come into the United
20 States at a port-of-entry ...” 8 C.F.R. § 1.2.

21 Expedited removal proceedings are conducted by an immigration officer, not an IJ. The
22 immigration officer asks the applicant for admission questions to determine (a) “identity,
23 alienage, and inadmissibility,” and (b) whether the noncitizen intends to apply for asylum. 8
24 C.F.R. § 235.3(b)(2)(i), (b)(4). Noncitizens are not entitled to counsel and no recording or
25 transcript is made. *Id.* § 235.3(b)(2)(i). If the noncitizen is inadmissible and does not intend to
26 apply for asylum, the immigration officer, after supervisory review, issues a Notice and Order
27 of Expedited Removal. *Id.* § 235.3(b)(2)(i).

28 The noncitizen has no right to appeal to an IJ, the B.I.A., or any other court. *Id.* §

1 235.3(b)(2)(ii); 8 U.S.C. § 1252(a)(2)(A)(i). Unlike section 240 proceedings, which often take
2 place over the course of several months, the expedited removal process is “conducted on a
3 very compressed schedule and can result in deportation in hours or days.” *Coal. for Humane*
4 *Immigrant Rts. v. Noem*, No. 25-CV-872 (JMC), 2025 WL 2192986, at *4 (D.D.C. Aug. 1,
5 2025).

6 **C. Removal Proceedings under 8 U.S.C. § 1229a**

7 Removal proceedings under § 1229a are commonly referred to as “full removal
8 proceedings” or “240 removal proceedings” due to the statutory section of the INA in which
9 they appear. 8 U.S.C. § 1229a; INA § 240. The proceedings take place before an IJ, an
10 employee of the Department of Justice. 8 U.S.C. § 1229a(a)(1), (b)(1). Noncitizens in 1229a
11 proceedings have an opportunity to apply for relief from removal. *See, e.g.*, 8 U.S.C. § 1158
12 (asylum); 8 U.S.C. § 1229b(b) (cancellation of removal for nonpermanent residents); 8 U.S.C.
13 § 1255 (adjustment of status). These are adversarial proceedings in which the noncitizen has
14 the right to hire counsel, examine and present evidence, and cross-examine witnesses. 8 U.S.C.
15 § 1229a(b)(4). Either party may appeal the IJ decision to the B.I.A.. 8 U.S.C. § 1229a(b)(4)(C);
16 *see also* 8 C.F.R. § 1240.15. If the B.I.A. issues a final order of removal, the noncitizen may
17 also seek judicial review at a U.S. court of appeals through a petition for review. 8 U.S.C. §
18 1252.

19 **D. Detention under the INA**

20 The INA authorizes civil detention of noncitizens during removal proceedings and
21 “[d]etention is necessarily part of this deportation procedure.” *Carlson v. Landon*, 342 U.S.
22 524, 538 (1952); *see also* 8 U.S.C. § 1225(b), 1226(a), and 1231(a). “Where an alien falls
23 within this statutory scheme can affect whether his detention is mandatory or discretionary, as
24 well as the kind of review process available to him if he wishes to contest the necessity of his
25 detention.” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008).

26 **i. Detention under Section 1225**

27 The INA mandates the detention of applicants for admission. 8 U.S.C. § 1225(b)(1) and
28 (2); *see also Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (Applicants for admission “fall

1 into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).”).
2 As explained above, arriving noncitizens and noncitizens present less than two years are
3 subject to expedited removal. 8 U.S.C. § 1225(b)(1). If a noncitizen “indicates an intention to
4 apply for asylum,” the noncitizen proceeds through the credible fear process and is subject to
5 mandatory detention. 8 U.S.C. § 1225(b)(1)(B)(ii); *see also* 8 U.S.C. § 1225(B)(1)(B)(iii)(IV).

6 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583 U.S.
7 at 287. The Supreme Court recognized that 1225(b)(2) “applies to all applicants for admission
8 not covered by § 1225(b)(1).” *Id.* Under § 1225(b)(2), a noncitizen “who is an applicant for
9 admission” shall be detained for a removal proceeding “if the examining immigration officer
10 determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be
11 admitted.” 8 U.S.C. § 1225(b)(2)(A). While section 1225 does not provide for noncitizens to
12 be released on bond, DHS has the sole discretionary to release any applicant for admission on
13 a “case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C.
14 § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

15 **ii. Detention under Section 1226**

16 Section 1226 provides that “an alien may be arrested and detained pending a decision
17 on whether the noncitizen is to be removed. 8 U.S.C. § 1226(a). Under § 1226(a), the
18 government may detain a noncitizen during his removal proceedings, release him on bond, or
19 release him on conditional parole.² By regulation, immigration officers can release a
20 noncitizen if the noncitizen demonstrates that he “would not pose a danger to property or
21 persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). A
22 noncitizen can also request custody redetermination (i.e., a bond hearing) by an IJ at any time
23 before a final in this country but “has not been admitted,” is treated as “an applicant for
24 admission.” § 1225(a)(1). *Jennings*, 583 U.S. at 286–87.

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27 ² Being “conditionally paroled under the authority of § 1226(a)” is distinct from
28 being “paroled into the United States under the authority of § 1182(d)(5)(A).” *Ortega-
Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007). 5 order of removal is issued.
See 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

1 **II. The Government’s Position on Petitioner**

2 The INA, 8 U.S.C. § 1101 *et seq.*, entrusts the Executive branch to remove inadmissible
3 and deportable noncitizens and to ensure that noncitizens who are removable are in fact
4 removed from the United States. “[D]etention necessarily serves the purpose of preventing
5 deportable [] aliens from fleeing prior to or during their removal proceedings, thus increasing
6 the chance that if ordered removed, the aliens will be successfully removed.” *Demore v. Kim*,
7 538 U.S. 510, 528 (2003). The Supreme Court has long held that deportation proceedings
8 “would be in vain if those accused could not be held in custody pending the inquiry” of their
9 immigration status. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). Congress intended
10 for all applicants for admission to be detained during the course of their removal proceedings.
11 *See Jennings*, 583 U.S. at 299 (interpreting the “plain meaning” of sections 1225(b)(1) and (2)
12 to mean that applicants for admission be mandatorily detained for the duration of their
13 immigration proceedings).

14 The plain language of the statute is clear: Petitioner is subject to detention under §
15 1225(b)(2) because he is an applicant for admission. *Chavez*, 2025 WL 2730228, *4 (“By the
16 plain language of § 1225(a)(1), then, Petitioners are ‘applicants for admission’ and thus
17 subject to the mandatory detention provisions of ‘applicants for admission’ under §
18 1225(b)(2).”); *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 220 (B.I.A. 2025). The INA
19 specifies that “an alien present in the United States who has not been admitted” “shall be
20 deemed . . . an applicant for admission.” 8 U.S.C. § 1225(a). Applicants for admission “fall
21 into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).”
22 *Jennings*, 583 U.S. at 287.

23 As the Supreme Court indicated in *Jennings*, “[r]ead most naturally, §§ 1225(b)(1) and
24 (b)(2) thus mandate detention of applicants of admission until certain proceedings have
25 concluded.” *Jennings*, 583 U.S. at 297. Section 1225(b)(1) covers which applicants for
26 admission, including arriving noncitizens or noncitizens who have not been admitted and have
27 been present for less than two years, and directs that both of those classes of applicants for
28 admission are subject to expedited removal. 8 U.S.C. § 1225(b)(1). Section 1225(b)(2) “serves

1 as a catchall provision that applies to all applicants not covered by 1225(b)(1) (with specific
 2 exceptions not relevant here).³ *Jennings*, 583 U.S. at 287. *Jennings* recognized that
 3 1225(b)(2) mandates detention. *Id.* at 297; *see also Matter of Li*, 29 I. & N. Dec. 66, 69 (B.I.A.
 4 2025) (“[A]n applicant for admission . . . whether or not at a port of entry, and subsequently
 5 placed in removal proceedings is detained under . . . 8 U.S.C. § 1225(b), and is ineligible for
 6 any subsequent release on bond.”). Petitioner, present in the United States without being
 7 admitted, is an applicant for admission. *See Yajure*, 29 I. & N. Dec. at 221. Under the plain
 8 language of the statute, Petitioner is subject to detention under § 1225(b)(2). *Yajure*, 21 I. &
 9 N. Dec. at 220–21.

10 Petitioner points to the recent passage of the Laken Riley Act, Pub. L. No. 119-1, 17
 11 January 29, 2025, 139 Stat 3, 139 Stat. 3 (2025) (“LRA”) to make the improbable argument
 12 that Congress intended in 2025 that persons charged as inadmissible under section 1182(a)(6)
 13 or (a)(7) should be granted bond hearings under section 1226(a). Doc. 2 at 14-15. The plain
 14 language of the LRA fails to support this. The LRA reflects to the contrary a “congressional
 15 effort to be doubly sure” that such unlawful noncitizens are detained. *Barton*, 590 U.S. at 239.
 16 The LRA does not change what Congress intended in IIRIRA. *See Almendarez-Torres v.*
 17 *United States*, 523 U.S. 224, 237 (1998) (“These later-enacted laws, however, are beside the
 18 point. They do not declare the meaning of earlier law. . . or a change in the meaning of an
 19 earlier statute.”). Nothing in the LRA requires that the noncitizen who falls under § 1225(b)(2)
 20 be treated as a noncitizen detained under § 1226(a). *Chavez*, 2025 WL 2730228, *5 (Nor
 21 does § 1225’s explicit definition of “alien[s] present in the United States who ha[ve] not been
 22 admitted” as “applicants for admission” render the addition of § 1226(c) by the Riley Laken
 23 Act superfluous.”); *Yajure-Hurtado*, 29 I. & N. Dec. at 221–22.

24 **III. Analysis of the Winter Factors.**

25 **A. Standard of Review**

26 Petitioner seeks a temporary restraining order (TRO). Doc. 2. The standard for
 27

28 ³ The two exceptions are crewmen and stowaways. See 8 U.S.C. §§ 1225(a)(2), 1281,
 and 1282(b).

1 analyzing a motion for a TRO is the same as for a preliminary injunction. *Babaria v. Blinken*,
2 87 F.4th 963, 976 (9th Cir. 2023) (describing the two standards as “substantially identical”).
3 Nonetheless, a TRO is not appropriate here in light of the remedy Petitioner seeks, which is
4 his release from detention. The purpose of a TRO is “to preserve an existing situation in status
5 quo until the court has an opportunity to pass upon the merits of the demand for a preliminary
6 injunction.” *W. Watersheds Project v. Bernhardt*, 391 F. Supp. 3d 1002, 1008-09 (D. Or.
7 2019). Releasing Petitioner from detention would alter the status quo, and increase the burden
8 on the government to later restore that status quo. Since Petitioner has not made any particular
9 showing of the need for a TRO here, the Court should more properly analyze the arguments
10 through the standards and brief-timing of a preliminary injunction.

11 A “preliminary injunction is an extraordinary and drastic remedy.” *Munaf v. Geren*,
12 553 U.S. 674, 689-90 (2008). A district court should enter a preliminary injunction only “upon
13 a clear showing that the [movant] is entitled to such relief.” *Winter v. Natural Resources*
14 *Defense Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain relief, the moving party must
15 demonstrate (1) that he is likely to succeed on the merits of its claims; (2) that he is likely to
16 suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities
17 tips in his favor; and (4) that the proposed injunction is in the public interest. *Id.* at 20. These
18 factors are mandatory. As the Supreme Court has articulated, “[a] stay is not a matter of right,
19 even if irreparable injury might otherwise result” but is instead an exercise of judicial
20 discretion that depends on the particular circumstances of the case. *Nken v. Holder*, 556 U.S.
21 418, 433 (2009) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)).

22 Further, Petitioner agrees with Respondents here that when the government is a party,
23 the balance of equities and public interest factors merge. Doc. 2 at 20; *Drakes Bay Oyster Co.*
24 *v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Weighing the public interest “primarily
25 addresses impact on non-parties rather than parties.” *Pacito v. Trump*, 768 F. Supp. 3d 1199,
26 1237 (W.D. Wash. 2025) (quoting *CTIA – The Wireless Ass’n v. City of Berkeley, Cal.*, 928
27 F.3d 832, 852 (9th Cir. 2019)).

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