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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FIDEL ARIAS TORRES, Petitioner, v. PAM BONDI, Attorney General of the United States, in her official capacity; KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; PATRICK DIVVER, ICE Field Office Director for San Diego County, in his official capacity; WARDEN OF OTAY MESA DETENTION CENTER. Respondents.	Case No. 3:25-cv-02457-BAS-lvlS **REPLY TO OPPOSITION TO PETITIONER'S HABEAS PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER**

I
INTRODUCTION

Petitioner has amended his habeas petition to name the Warden of the Otay Mesa Detention Facility, thereby satisfying the immediate custodian requirement under 28 U.S.C. § 2243 and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). The government's jurisdictional objection is now moot. Moreover, because the petition challenges systemic DHS and EOIR policies—not merely the fact of confinement—jurisdiction properly lies with this Court. See *Padilla*, 542 U.S. at 436 n.8.

This case presents a narrow but consequential question: whether DHS may lawfully designate a long-term resident arrested in the interior of the United States as an "arriving alien" subject to mandatory detention under 8 U.S.C. § 1225(b)(2), and thereby deny bond eligibility—even where an Immigration Judge, after full hearing under 8 U.S.C. § 1226(a), finds the designation improper, determines the individual poses no danger and only a mitigated flight risk, and grants release on a $2,500 bond with ATD conditions.

Petitioner submits that DHS's categorical policy of classifying all individuals present without inspection (EWI) as "applicants for admission" subject to mandatory detention under § 1225(b)(2)—regardless of time of residence or location of apprehension—violates the INA, contradicts longstanding agency practice, was implemented without notice and comment in violation of the APA, and conflicts with controlling Ninth Circuit precedent. See *Torres v. Barr*, 976 F.3d 918, 932 (9th Cir. 2020) (en banc) (holding that "application for admission" is a

term of art triggered at the time of seeking entry, not a perpetual status).

By contrast, 8 U.S.C. § 1226(a) governs the detention of individuals "found in the United States" and placed in § 240 proceedings, vesting Immigration Judges with jurisdiction to conduct custody review and grant bond. DHS's new policy renders this provision superfluous, resulting in prolonged, unlawful detention of individuals like Petitioner.

While the automatic stay provision and bond appeal process may be lawful in the abstract, here they are deployed not to preserve the status quo for expedited appellate review, but to implement a categorical expansion of custody authority already adopted as DHS and BIA policy—rendering the BIA process functionally futile. This transforms a temporary procedural safeguard into a de facto long-term detention mechanism, untethered from individualized custody determinations or statutory authority.

Petitioner is not subject to a final order of removal. The underlying § 1229a removal proceedings remain pending before the Immigration Court. The only matter currently before the BIA is DHS's custody appeal. Because no final order exists, DHS lacks authority to execute removal, and there is no legal basis for mandatory detention under § 1225(b)(2). Those arrested in the interior are, by the express terms of § 1226(a), subject to discretionary custody with the opportunity for bond.

Petitioner has lived in the United States for over two decades. On July 14, 2025, an Immigration Judge conducted a full custody redetermination hearing under § 1226(a), found that Petitioner is not an "arriving alien," and determined

that he poses no danger to the community and only a mitigated flight risk.

The IJ cited Petitioner's extensive family ties—including U.S. citizen children and a naturalized father—his long-term residence, stable employment, tax compliance, active community involvement, and his pursuit of lawful status through an approved I-130 petition for adjustment of status. The IJ noted that Respondent does not have a criminal record. In 25 years of residence in the United States, the Respondent's only adverse history is a traffic violation. The Department agreed that the Respondent is not a danger.

Based on these findings, the IJ concluded that a $2,500 bond with Alternatives to Detention (ATD) conditions would reasonably ensure Petitioner's appearance at future hearings. The only basis for his continued detention is DHS's invocation of the automatic stay to enforce a categorical policy that overrides judicial findings and exceeds statutory authority.

Petitioner's claims are not barred by 8 U.S.C. § 1252. He does not challenge a final removal order, nor does he seek to enjoin removal itself. Rather, he challenges the legality of his ongoing detention under a categorical policy that overrides statutory custody authority and judicial findings. This claim falls outside the scope of § 1252(g) and is not subject to channeling under § 1252(b)(9), which applies only to review of final orders and removal-related actions. See *Torres v. Barr*, 976 F.3d at 932; *Jennings v. Rodriguez*, 583 U.S. 281, 294–95 (2018).

Exhaustion is not required where administrative remedies are foreclosed by binding agency policy and where delay would result in irreparable injury. Here, the BIA has already adopted the challenged policy in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), rendering further administrative review futile.

Continued detention under this policy inflicts immediate and irreparable harm, separating Petitioner from his family, disrupting his business and community ties, and violating his statutory and constitutional rights.

Accordingly, Petitioner respectfully requests immediate release pursuant to this Court's habeas authority. The Immigration Judge has already made an individualized custody determination under 8 U.S.C. § 1226(a), finding that Petitioner is not an "arriving alien," poses no danger to the community, and presents only a mitigated flight risk. DHS's continued detention is not based on any individualized assessment, but rather on a categorical policy that reclassifies long-settled residents as arriving aliens to deny them bond eligibility.

The automatic stay invoked here is merely the mechanism through which DHS enforces that policy when Immigration Judges decline to adopt it—knowing it will result in prolonged detention for months or even years while the case winds its way through the Board of Immigration Appeals and the federal courts. This practice exceeds statutory authority and violates both due process and the Administrative Procedure Act.

II
ARGUMENT

A. Jurisdiction Is Proper Under 28 U.S.C. § 2241

a. The Immediate Custodian Objection Is Moot

Petitioner has amended the caption to name the Warden of the Otay Mesa Detention Facility, satisfying the immediate custodian requirement under 28 U.S.C. § 2243 and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). Respondents' objection on this ground is therefore moot.

b. Habeas Jurisdiction Lies Under 28 U.S.C. § 2241

Respondents' reliance on 8 U.S.C. § 1252(g) is misplaced. The Supreme Court construes § 1252(g) narrowly to three discrete actions the Attorney General may take—commencing proceedings, adjudicating cases, or executing removal orders. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999). Petitioner does not seek to enjoin removal or challenge its timing. He challenges current custody authority and process: DHS's insistence on mandatory detention under § 235(b)(2) despite the IJ's § 236(a) bond order. These claims concern who may detain now and under what statutory authority—not whether or when removal is executed—and thus fall outside § 1252(g).

Section 1252(b)(9) is likewise inapplicable - it is a channeling provision—not a jurisdiction-stripping one. It applies only to claims arising from removal proceedings that can be meaningfully reviewed through a petition for review of a final order. Petitioner's claims arise from DHS's categorical detention policy and its unlawful reclassification of custody, not from the adjudication of removal itself.

The Ninth Circuit has held that habeas jurisdiction remains where detention issues are "sufficiently independent" of removal merits. See *Lopez-Marroquin v. Barr*, 955 F.3d 759, 759 (9th Cir. 2020); *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011).

Nor does § 1252(f)(1) bar relief here: as the Supreme Court explained, it "does not preclude injunctive relief in an individual case." *Garland v. Aleman Gonzalez*, 596 U.S. 543, 558 (2022).

Accordingly, this Court retains jurisdiction to adjudicate Petitioner's habeas and injunctive claims. This jurisdictional foundation also supports review under the

APA, which independently authorizes injunctive relief against unlawful agency action. See 5 U.S.C. §§ 702, 706.

Petitioner challenges Respondents' newly applied categorical § 235(b)(2) policy as unlawful—contrary to statute and historic practice and adopted without notice-and-comment—and seeks to enjoin its application to his custody classification pending review. These claims are distinct from any challenge to the timing of removal and fall squarely within § 2241.

Habeas jurisdiction under 28 U.S.C. § 2241 squarely reaches immigration detention independent of removal adjudication. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 839–42 (2018); *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011).

Nor does the regulatory automatic stay of the IJ's bond order under 8 C.F.R. § 1003.19(i)(2) divest this Court of Article III habeas jurisdiction. An agency regulation cannot strip jurisdiction or insulate unlawful detention from judicial review. See *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) ("The habeas statute clearly applies to aliens… no less than to citizens."); *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001); *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011).

Section 2241 habeas jurisdiction exists precisely to prevent the Executive from unilaterally foreclosing judicial review through procedural or regulatory mechanisms.

The APA likewise does not permit agency regulations to foreclose judicial review of unlawful detention. See 5 U.S.C. § 706(2)(A)–(D)

Because Petitioner's claims concern present custody authority and process—not a discrete execution decision—§ 1252(g) does not apply, and jurisdiction lies under 28 U.S.C. § 2241. Petitioner therefore seeks immediate habeas relief from

unlawful detention and an injunction prohibiting application of the categorical § 235(b)(2) no-bond policy to him.

Immediate relief is necessary to prevent continuing and irreparable harm to Petitioner and his dependent family members, and to avoid rendering habeas relief illusory by requiring exhaustion where administrative review cannot meaningfully or timely remedy the ongoing wrongful deprivation of liberty.

B. Exhaustion Is Excused and the Petition May Proceed

The exhaustion requirement governing habeas petitions under 28 U.S.C. § 2241 is prudential and judicially created, not jurisdictional, and may be excused where administrative remedies are inadequate, unavailable, or would render relief illusory. *McCarthy v. Madigan*, 503 U.S. 140, 144–49 (1992).

Here, exhaustion should be excused because further BIA review would be futile and would cause irreparable delay: DHS adopted a categorical § 235(b)(2) no-bond policy reflected in the July 8, 2025 memorandum and pursued that same position on appeal to the BIA after the IJ rejected it under controlling Ninth Circuit precedent (*Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020)), so additional administrative proceedings cannot meaningfully remedy the detention and merely postpones the only immediately enforceable relief—release and an injunction barring application of the categorical policy.

The claim is primarily legal and constitutional, not a fact bound question for agency factfinding, and excusing exhaustion will not encourage deliberate bypass because relief is sought only on an emergency, case-specific basis and may be narrowly tailored to preserve legitimate agency interests. *Laing v. Ashcroft*, 370

F.3d 994, 998–1001 (9th Cir. 2004); *Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007); *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018)

a. Governing Law and Standard

The Ninth Circuit applies a prudential exhaustion rule to § 2241 petitions but routinely excuses exhaustion where strict application would be futile, would render relief illusory, would cause irreparable harm, or where the claim presents primarily legal or constitutional questions unsuited to agency factfinding. Relevant factors include whether (1) agency expertise is necessary to develop the record, (2) excusing exhaustion would encourage deliberate bypass of the administrative scheme, and (3) administrative review is likely to correct the claimed error. See *Laing v. Ashcroft*, 370 F.3d 994, 998–1001 (9th Cir. 2004); *Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007); *Leonardo v. Crawford*, 646 F.3d 1157, 1159 (9th Cir. 2011).

b. Futility and Irreparable Harm

The Government's categorical § 235(b)(2) no-bond position pre-dated this petition and was rejected by the IJ under controlling Ninth Circuit precedent. See *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020). The July 8, 2025 DHS memorandum formalizing that policy, and the BIA's subsequent adoption of it, reflect a fixed position—not a genuine factual dispute.

Requiring exhaustion would (i) permit the agency to insulate unlawful detention through procedural delay, (ii) postpone relief until it is illusory for a petitioner facing continuing custody, and (iii) deny the only immediately enforceable remedy capable of preventing further harm. See *Laing*, 370 F.3d at 998–1001; *Puga*, 488 F.3d at 815–16.

As the Supreme Court explained, futility exists where the agency has adopted a fixed position and an adverse outcome is preordained. *McCarthy*, 503 U.S. at 148. And the Ninth Circuit has held that deprivation of constitutional rights constitutes irreparable injury. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017).

c. Legal and Constitutional Claims

Petitioner challenges a categorical, policy-based detention regime that applies without individualized consideration and raises legal and constitutional questions unsuited to agency factfinding. See *Carr v. Saul*, 141 S. Ct. 1352, 1362 (2021) ([T]he agency's expertise may be of marginal relevance when the question is purely one of statutory interpretation.); *Sarei v. Rio Tinto*, 550 F.3d 822, 831–32 (9th Cir. 2008) (recognizing futility and legal-question exceptions to prudential exhaustion); *Sims v. Apfel*, 530 U.S. 103, 108–10 (2000) (declining to require issue exhaustion where agency expertise is not central).

These claims do not depend on agency factfinding and are ill-suited to the exhaustion doctrine's purpose of building a factual record for agency correction. *McCarthy*, 503 U.S. at 148; *Arevalo*, 882 F.3d at 766–67.

d. Respondents' Pending BIA Appeal Does Not Defeat Habeas Jurisdiction

Respondents rely on a pending BIA appeal to argue that the petition must be dismissed for failure to exhaust. That argument fails because (1) the BIA has not issued any decision that would resolve the custody question, (2) the policy underlying DHS's appeal was fixed before the petition was filed, and (3) the individualized relief Petitioner seeks—release and an injunction barring application of the categorical policy to him—is precisely the sort of emergency

relief the BIA cannot provide on the expedited timetable required to prevent irreparable harm. Because exhaustion under § 2241 is prudential, not jurisdictional, the Court retains discretion to excuse it. *McCarthy*, 503 U.S. at 148; *Arevalo*, 882 F.3d at 766.

e. Prudential Factors and Tailoring Relief

Courts evaluating prudential exhaustion under § 2241 consider whether (1) agency expertise is necessary to develop the record, (2) excusing exhaustion would encourage deliberate bypass of the administrative scheme, and (3) administrative review is likely to correct the claimed error. See *Laing v. Ashcroft*, 370 F.3d 994, 998–1001 (9th Cir. 2004).

Agency expertise: Limited here because the dominant issues are statutory and procedural; the BIA's adjudicative role does not supply the emergency, individualized remedy necessary to prevent liberty loss.

Encouraging agency resolution: Excusing exhaustion in this narrow, emergency context does not encourage bypass of administrative processes generally; it prevents agencies from using post-filing procedural maneuvers to defeat timely judicial review.

Ability to correct mistakes: Because the requested relief is individualized and urgent, judicial relief is necessary now; the Court may, however, tailor any relief to preserve legitimate agency interests (for example, by limiting relief to Petitioner and to the specific policy application at issue).

These prudential factors confirm that exhaustion should be excused in this case, and that tailored relief may preserve legitimate agency interests without undermining administrative process.

C. DHS's Detention Practices Violate Due Process and Undermine Regulatory Protections

Respondents did not address Petitioner's due process arguments in their Return. Those arguments are therefore uncontested. Petitioner previously raised that DHS's categorical treatment of all EWIs as arriving aliens—and its reliance on the automatic stay mechanism to enforce that policy—was designed to override judicial custody determinations and ensure continued detention while the new framework is litigated through the BIA and appellate courts.

This policy was enacted without congressional authorization or compliance with the Administrative Procedure Act, and it violates the Fifth Amendment's Due Process Clause. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

Federal courts retain habeas jurisdiction to remedy unlawful custody and enforce constitutional protections, even where detention arises under different statutory provisions. Cf. *Constantinovici v. Bondi*, No. 3:25-cv-02405-RBM-AHG (S.D. Cal. Oct. 10, 2025) (granting habeas and ordering immediate release where DHS applied a categorical post-order detention policy without individualized safeguards; though arising under § 241, the court's holding rested on due process principles). The statutory basis differs, but the constitutional injury—and the need for immediate judicial remedy—are the same.

Indeed, unlike in *Constantinovici*, Petitioner is not subject to a final removal order, and proceedings may extend for months or years—precisely the harm Congress sought to prevent by authorizing custody determinations by an Immigration Judge for individuals apprehended in the interior.

The INA's custody framework under § 1226(a) reflects a deliberate legislative choice to ensure timely, individualized review for persons in Petitioner's position. DHS's categorical override nullifies that safeguard and guarantees prolonged detention without statutory or constitutional justification

Here, DHS has implemented a categorical no-bond policy that overrides statutory custody authority and judicial findings. It has refused to honor the Immigration Judge's custody order and has invoked the automatic stay not to preserve public safety, but to enforce a policy that guarantees prolonged detention while litigation unfolds.

This results in a double denial of due process: first, through DHS's reliance on an unauthorized categorical framework; and second, through circumvention of the statutory and regulatory safeguards Congress enacted to protect against prolonged, unjustified custody.

As the court recognized in *Constantinovici*, DHS's failure to follow procedural safeguards violates both its regulations and the Fifth Amendment. The same constitutional defect is present here.

D. DHS's Detention Policy Violates the Administrative Procedure Act

DHS's categorical treatment of all noncitizens who entered without inspection (EWIs) as arriving aliens—and its use of the automatic stay mechanism to enforce that policy—constitutes a substantive rule that was neither authorized by Congress nor promulgated through the notice-and-comment procedures required by 5 U.S.C. § 553. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Agencies may promulgate legislative rules only through notice-and-comment rulemaking.").

This policy binds DHS officers and Immigration Judges to a no-bond classification regardless of individual circumstances, altering rights and obligations and triggering detention without individualized review—hallmarks of a substantive rule. It imposes binding consequences on detained individuals without the procedural safeguards Congress required.

The agency's decision to implement this sweeping detention framework—reclassifying interior arrests under § 235(b)(2) and denying bond eligibility—without statutory authority or public participation exceeds its delegated powers and bypasses the procedural safeguards Congress enacted to ensure transparency and accountability. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("An agency may not bootstrap itself into an area in which it has no jurisdiction.").

DHS's decision to reclassify interior arrests under § 235(b)(2)—contrary to decades of settled practice and judicial precedent—lacks any clear congressional authorization. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), overruled Chevron deference and held that courts must exercise their independent judgment in deciding whether an agency has acted within the scope of its statutory authority, and may not defer to agency interpretations that conflict with the statute's text or structure.

Therefore, this Court should not defer to the interpretation contained in the new policy memorandum or *Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025)* decision -especially when prior interpretations have been implicitly approved by Congress, and conflicts with binding Ninth Circuit precedent.

Section 1226(a) authorizes DHS to arrest and detain noncitizens pending a

decision on removal, but it also permits release on bond or conditional parole. Immigration Judges are empowered to conduct custody redeterminations and order release where appropriate. See 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). DHS's policy nullifies this statutory framework by categorically denying bond eligibility and overriding judicial custody orders.

This categorical detention policy alters the statutory scheme governing custody authority under § 1226(a), overturns decades of settled application, and contravenes Congress's clearly expressed legislative intent. Such a sweeping policy cannot lawfully be adopted informally or through agency adjudication alone.

DHS's invocation of the automatic stay to override an Immigration Judge's bond order—without individualized assessment or public safety justification—further exemplifies arbitrary and capricious agency action. The stay mechanism was designed to preserve public safety in exceptional cases, not to enforce a categorical no-bond policy across all EWIs.

DHS's use of the automatic stay here is not tethered to any individualized public safety concern, but instead operates as a blanket override of judicial custody orders—transforming a case-specific safeguard into a tool of categorical detention. This misuse of the stay mechanism exemplifies arbitrary and capricious agency action. These actions are arbitrary and capricious because they reflect no individualized analysis, no reasoned explanation, and no consideration of the statutory framework Congress enacted to govern custody determinations.

Agency action that conflicts with governing regulations, exceeds statutory authority, or fails to follow required procedures is arbitrary, capricious, and

contrary to law. See 5 U.S.C. § 706(2)(A)–(C). These defects are not merely procedural. They reflect a broader pattern of ultra vires conduct, disregard for congressional limits, and circumvention of the rulemaking requirements Congress imposed to prevent precisely this kind of unchecked executive detention authority.

The APA demands transparency, accountability, and fidelity to congressional limits. DHS's conduct here reflects none of these—and the Court should not permit such unchecked executive detention authority to persist without judicial scrutiny.

IV
CONCLUSION

For the reasons stated above—and as set forth in Petitioner's motion for temporary restraining order and preliminary injunction—this Court should reject Respondents' jurisdictional defenses, find that DHS's detention policy violates the Immigration and Nationality Act, the Administrative Procedure Act, and the Fifth Amendment, and order Petitioner's immediate release on terms the Court deems appropriate.

Should the Court deem further proceedings necessary, the TRO should issue forthwith to prevent continued deprivation of liberty, irreparable injury, and further application of an unlawful detention policy to Petitioner.

Dated: October 20, 2025

Respectfully submitted,

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