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

12 MIRLEY ADRIANA BAUTISTA PICO, *et al.*,) CASE NO. 4:25-CV-08002-JST

13 Petitioner-Plaintiff,)

14 v.)

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

17 Respondents-Defendants.)

**RESPONDENTS' RESPONSE TO ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION**

Date: October 2, 2025
Time: 2:00 pm
Location: Courtroom 6, 2nd Floor

Judge: Hon. Jon S. Tigar

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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.

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1 **I. INTRODUCTION**

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

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

22 Nor could Petitioners show a likelihood of success on their claims even if they were subject to 8
23 U.S.C. § 1226(a) instead of the mandatory detention framework of § 1225(b). Section 1226(a) does not
24 provide for *pre*-detention immigration judge review but instead sets out a procedure for review of
25 detention by a U.S. Immigration and Customs Enforcement (“ICE”) officer once an alien is in custody – a
26 process that the Ninth Circuit has found ensures “that the risk of erroneous deprivation would be
27 ‘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”) deems an “applicant for admission” to be 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. Thus, for example, an “applicant for admission” includes certain classes of aliens that are inadmissible and therefore ineligible to be admitted to the United States under Section 212(a) of the INA, since those aliens are “present in the United States without being admitted or paroled[.]” 8 U.S.C. § 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 immigration judge 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

1 from the United States without further hearing or review.” Section 1225(b)(1) applies to “arriving aliens”
 2 and “certain other” aliens “initially determined to be inadmissible due to fraud, misrepresentation, or lack of
 3 valid documentation.” *Id.*; 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii). Section 1225(b)(1) also allows for the
 4 expedited removal of any alien “described in” § 1225(b)(1)(A)(iii)(II), as designated by the Attorney General
 5 (“AG”) or Secretary of Homeland Security – that is, any alien not “admitted or paroled into the United
 6 States” and “physically present” fewer than two years – who is inadmissible under § 1182(a)(7) at the time
 7 of “inspection.” *See* 8 U.S.C. § 1182(a)(7) (categorizing as inadmissible aliens without valid entry
 8 documents). Whether that happens at a port of entry or after illegal entry is not relevant; what matters is
 9 whether, when an officer inspects an alien for admission under § 1225(a)(3), that alien lacks entry documents
 10 and so is subject to § 1182(a)(7). The AG’s or Secretary’s authority to “designate” classes of aliens as subject
 11 to expedited removal is subject to his or her “sole and unreviewable discretion.” 8 U.S.C.
 12 § 1225(b)(1)(A)(iii); *American Immigration Lawyers Ass’n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000)
 13 (upholding expedited removal statute).

14 On five occasions, the Secretary (and earlier, the AG) has designated categories of aliens for
 15 expedited removal under § 1225(b)(1)(A)(iii). In 2004, citing “the interests of focusing enforcement
 16 resources upon unlawful entries that have a close spatial and temporal nexus to the border,” the Secretary
 17 designated for expedited removal those “aliens encountered within 14 days of entry without inspection and
 18 within 100 air miles of any U.S. international land border.” *Designating Aliens for Expedited Removal*, 69
 19 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004). More recently, the Secretary restored the expedited removal
 20 scope to “the fullest extent authorized by Congress.” *Designating Aliens for Expedited Removal*, 90 Fed.
 21 Reg. 8139 (Jan. 24, 2025). The current notice enables DHS “to exercise the full scope of its statutory
 22 authority to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under
 23 [8 U.S.C. § 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who
 24 have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically
 25 present in the United States continuously for the two-year period immediately preceding the date of the
 26 determination of inadmissibility,” who were not otherwise covered by prior designations. *Id.* at 8139–40.²

27
 28 ² On August 29, 2025, a district court in the District of Columbia stayed the government’s
 implementation and enforcement of this 2025 notice. *Make the Road New York, et al., v. Noem, et al.*, No.
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Expedited removal proceedings under § 1225(b)(1) include additional procedures if an alien indicates an intention to apply for asylum³ 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 immigration judge ("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 distinct from § 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

25-cv-190 (JMC), 2025 WL 2494908 (D.D.C. Aug. 29, 2025), *appeal docketed*, No. 25-5320 (D.C. Cir. Sept. 5, 2025). The government's position is that *Make the Road* was wrongly decided, and appealed that decision. *Id.* at ECF No. 66. The government's emergency motion is now pending with the D.C. Circuit.

³ Aliens must apply for asylum within one year of arriving in the United States, 8 U.S.C. § 1558(a)(2)(B), except if the alien can demonstrate "extraordinary circumstances" that justify moving that deadline. *Id.* § 1558(a)(2)(D).

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

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

18 A different statutory detention authority, 8 U.S.C. § 1226, applies to aliens who have been lawfully
 19 admitted into the U.S. but are deportable and subject to removal proceedings. Section 1226(a) provides
 20 for the arrest and detention of these aliens “pending a decision on whether the alien is to be removed from
 21 the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), DHS may, in its discretion, detain an alien
 22 during their removal proceedings, release them on bond, or release them on conditional parole.⁴ By
 23 regulation, immigration officers can release an alien if he demonstrates that he “would not pose a danger to
 24 property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien
 25

26 ⁴ Being “conditionally paroled under the authority of § 1226(a)” is distinct from being “paroled into
 27 the United States under the authority of § 1182(d)(5)(A).” *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111,
 28 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 can also request a custody redetermination (*i.e.*, a bond hearing) by an IJ at any time before a final order of
 2 removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19. At a custody
 3 redetermination, the IJ may continue detention or release the alien on bond or conditional parole. 8 U.S.C.
 4 § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad discretion in deciding whether to release an alien on
 5 bond. *In re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for IJs to consider).

6 Until recently, the government interpreted § 1226(a) to be an available detention authority for
 7 aliens PWAP placed directly in full removal proceedings under § 1229a. *See, e.g., Ortega-Cervantes*, 501
 8 F.3d at 1116. In view of legal developments, the government has determined that this interpretation was
 9 incorrect. But prior agency practice applying § 1226(a) to Petitioners does not control because the plain
 10 language of the statute, and not prior practice, controls. *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 225-
 11 26 (BIA 2025); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 408, 431-32 (2024)
 12 (explaining that “the basic nature and meaning of a statute does not change . . . just because the agency
 13 has happened to offer its interpretation through the sort of procedures necessary to obtain deference” and
 14 finding that the weight given to agency interpretations “must always “depend upon the[ir] thoroughness
 15 ..., the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all
 16 those factors which give [them] power to persuade”). Section 1225 is the sole applicable immigration
 17 detention authority for *all* applicants for admission. *See Jennings*, 583 U.S. at 297 (“[r]ead most naturally,
 18 §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have
 19 concluded.”). In *Jennings*, the Supreme Court explained that 8 U.S.C. § 1225(b) applies to all applicants
 20 for admission, noting that the language of 8 U.S.C. § 1225(b)(2) is “quite clear” and “unequivocally
 21 mandate[s]” detention. 583 U.S. at 300, 303 (explaining that “the word ‘shall’ usually connotes a
 22 requirement” (quoting *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 171 (2016))).
 23 Similarly, the Attorney General, in *Matter of M-S-*, unequivocally recognized that 8 U.S.C. §§ 1225 and
 24 1226(a) do not overlap but describe “different classes of aliens.” 27 I&N Dec. at 516. The Attorney
 25 General also held – in an analogous context – that aliens present without admission and placed into
 26 expedited removal proceedings are detained under 8 U.S.C. § 1225 even if later placed in 8 U.S.C. §
 27 1229a removal proceedings. 27 I&N Dec. at 518-19. In *Matter of Q. Li*, the Board of Immigration
 28

1 Appeals (BIA) held that an alien who illegally crossed into the United States between ports of entry and
 2 was apprehended without a warrant while arriving is detained under 8 U.S.C. § 1225(b). 29 I&N Dec. at
 3 71. The BIA recently resolved the question of whether an alien PWAP released from DHS custody
 4 pursuant to INA § 236(a) is an applicant for admission detained under INA § 235(b)(2)(A) in the
 5 affirmative. *Matter of Yajure Hurtado*, 29 I&N Dec. 216.

6 This ongoing evolution of the law makes clear that all applicants for admission are subject to
 7 detention under 8 U.S.C. § 1225(b). *Cf. Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021) (providing
 8 that “no amount of policy-talk can overcome a plain statutory command”); *see generally Florida v.*
 9 *United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023) (explaining that “the 1996 expansion of §
 10 1225(b) to include illegal border crossers would make little sense if DHS retained discretion to apply §
 11 1226(a) and release illegal border crossers whenever the agency saw fit”).⁵ *Florida’s* conclusion “that §
 12 1225(b)’s ‘shall be detained’ means what it says and . . . is a mandatory requirement . . . flows directly
 13 from *Jennings*.” *Florida*, 660 F. Supp. 3d at 1273.

14 **III. BACKGROUND**

15 **A. Factual Background**

16 All of the Petitioners entered the United States without inspection and were apprehended by Customs
 17 and Border Protection (CBP) Officers within 14 days of their entry and within 100 miles of the border; they
 18 are all thus presumptively subject to expedited removal under 8 U.S.C. § 1225(b)(1).

19 Petitioner Bautista Pico

20 Petitioner Bautista Pico is a native and citizen of Colombia who entered the United States without
 21 inspection at or near Otay Mesa, California, on or about March 17, 2024. Declaration of Mirley Razalan
 22 (“Razalan Decl.”), ¶ 4. On the same day, Petitioner was apprehended by CBP Officers and released due to
 23 detention capacity issues. *Id.*

24 On March 18, 2024, the day after she entered the United States without inspection and was
 25

26 ⁵ Though not binding, the U.S. District Court for the Northern District of Florida’s decision is
 27 instructive here. *Florida* held that 8 U.S.C. § 1225(b) mandates detention of applicants for admission
 28 throughout removal proceedings, rejecting the assertion that DHS has discretion to choose to detain an
 applicant for admission under either 8 U.S.C. §§ 1225(b) or 1226(a). 660 F. Supp. 3d at 1275. The court
 held that such discretion “would render mandatory detention under 8 U.S.C. § 1225(b) meaningless.” *Id.*
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1 apprehended by CBP Officers, Petitioner Bautista Pico was placed into removal proceedings, as an alien
2 present without admission or parole, and charged with removability under section 212(a)(6)(A)(i) of the
3 INA. *Id.*, ¶ 5.

4 On September 19, 2025, Petitioner appeared for her first master calendar hearing in immigration
5 court in San Francisco, whereupon the government moved to dismiss proceedings. The immigration judge
6 continued the hearing to permit Petitioner to respond to the motion. On the same date, Petitioner was taken
7 into custody and held under INA section 235(b). *Id.*, ¶¶ 6-7.

8 Petitioner Mei

9 Petitioner Mei is a native and citizen of China who entered the United States without inspection at or
10 near Tecate, California on or about January 9, 2024. Declaration of Gwendolyn Ng (“Ng Decl.”), ¶ 4. On
11 the same day, Petitioner was apprehended by CBP Officers and released due to detention capacity issues. *Id.*

12 The next day, on January 10, 2024, Petitioner was placed into removal proceedings, as an alien
13 present without admission or parole, and charged with removability under section 212(a)(6)(A)(i) of the
14 INA. *Id.*, ¶ 5.

15 On July 16, 2024, the immigration court sua sponte rescheduled Petitioner’s initial master calendar
16 hearing for December 6, 2024. On October 29, 2024, the immigration court sua sponte rescheduled
17 Petitioner’s initial master calendar hearing for September 19, 2025. On September 19, 2025, Petitioner
18 appeared for her first master calendar hearing in immigration court in San Francisco, whereupon the
19 government moved to dismiss proceedings. The immigration judge continued the hearing to permit
20 Petitioner to respond to the motion. On the same date, Petitioner was taken into custody and held under INA
21 section 235(b). *Id.*, ¶¶ 6-9.

22 Petitioner Mosquera Sanchez

23 Petitioner Mosquera Sanchez is a native and citizen of Colombia who entered the United States
24 without inspection at or near Tecate, California, on or about March 20, 2024. Declaration of Jesse Cruz
25 (“Cruz Decl.”), ¶ 4. On the same day, Petitioner was apprehended by CBP Officers and released due to
26 detention capacity issues. *Id.*

27 On March 21, 2024, Petitioner was placed into removal proceedings, as an alien present without
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1 admission or parole, and charged with removability under section 212(a)(6)(A)(i) of the INA. On September
2 19, 2025, Petitioner appeared for his first master calendar hearing in immigration court in San Francisco,
3 whereupon the government moved to dismiss proceedings. The immigration judge continued the hearing to
4 permit Petitioner to respond to the motion. On the same date, Petitioner was taken into custody and held
5 under INA section 235(b). *Id.*, ¶¶ 5-7.

6 Petitioner Sieza Mendoza

7 Petitioner Sieza Mendoza is a native and citizen of Nicaragua who entered the United States without
8 inspection at or near El Paso, Texas on or about December 13, 2023. Declaration of Kenny Louie (“Louie
9 Decl.”), ¶ 4. On the same day, Petitioner was apprehended by CBP Officers and released due to detention
10 capacity issues. *Id.*

11 On December 14, 2023, Petitioner was placed into removal proceedings, as an alien present without
12 admission or parole, and charged with removability under section 212(a)(6)(A)(i) of the INA. On September
13 19, 2025, Petitioner appeared for his first master calendar hearing in immigration court in San Francisco,
14 whereupon the government moved to dismiss proceedings. The immigration judge continued the hearing to
15 permit Petitioner to respond to the motion. On the same date, Petitioner was taken into custody and held
16 under INA section 235(b). *Id.*, ¶¶ 5-7.

17 Petitioner Singh

18 Petitioner Singh is a native and citizen of India who entered the United States without inspection at
19 or near Otay Mesa, California, on or about April 16, 2024. Declaration of Vincent Miers (“Miers Decl.”),
20 ¶ 4. On the same day, Petitioner was apprehended by CBP Officers and released due to detention capacity
21 issues. *Id.*

22 On April 20, 2024, Petitioner was placed into removal proceedings, as an alien present without
23 admission or parole, and charged with removability under section 212(a)(6)(A)(i) of the INA. On July 15,
24 2024, the immigration court sua sponte rescheduled Petitioner’s initial master calendar hearing for December
25 6, 2024. On October 29, 2024, the immigration court sua sponte rescheduled Petitioner’s initial master
26 calendar hearing for September 19, 2025. On September 19, 2025, Petitioner appeared for his first master
27 calendar hearing in immigration court in San Francisco, whereupon the government moved to dismiss
28

proceedings. The immigration judge continued the hearing to permit Petitioner to respond to the motion. On that same date, Petitioner was taken into custody and held under INA section 235(b). *Id.*, ¶¶ 5-9.

B. Procedural Background

On September 19, 2025, Petitioners filed their joint habeas petition. ECF No. 1.⁶ On the same date, they moved *ex parte* for a TRO. ECF Nos. 2, 3. The same day, the duty judge issued a TRO requiring immediate release of the Petitioners and enjoining their re-detention without a pre-deprivation hearing. ECF No. 4 at 5. The TRO was to remain in effect until 5:00 p.m. on October 3, 2025. The government filed a status report on September 22, 2025, confirming that Petitioners had all been released from ICE custody. ECF No. 6.

IV. ARGUMENT

A. Legal Standard

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

The purpose of a preliminary injunction is to preserve the status quo pending final judgment rather than to obtain a preliminary adjudication on the merits. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*,

⁶ The Petition joins five separate petitioners with separate sets of underlying factual circumstances in a single habeas petition. *See* Pet. ¶¶ __. Petitioners do not cite any authority for bringing a group petition with multiple petitioners, and Respondents are unaware of any authority that would permit joinder of separate petitioners. *Cf. Acord v. California*, No. 17-cv-01089, 2017 WL 4699835, at *1 (E.D. Cal. Oct. 19, 2017) (“There is no authority for permitting multiple petitioners to file a single habeas petition under 28 U.S.C. § 2254, and doing so generally is not permitted.”). Indeed, this request for relief for multiple individual aliens would appear to contravene the prohibition contained in 8 U.S.C. § 1252(f)(1), which states that “no court (other than the Supreme Court) shall have the jurisdiction or authority to enjoin or restrain . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.” Respondents reserve their right to move to sever the petition. *See Acord*, 2017 WL 4699835, at *1; *see also Buriev v. Warden, Geo. Broward Transitional Ctr.*, No. 25-cv-60459, 2025 WL 1906626, *1 (S.D. Fla. Mar. 18, 2025) (denying motion for joinder of two habeas petitions); *Rubinstein v. United States*, No. 23-cv-12685, 2024 WL 37931, *3 (E.D. Mich. Jan. 3, 2024) (finding misjoinder of multiple parties in a single habeas petition).

1 739 F.2d 1415, 1422 (9th Cir. 1984). “A preliminary injunction can take two forms.” *Marlyn*
 2 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). “A prohibitory
 3 injunction prohibits a party from taking action and ‘preserves the status quo pending a determination of the
 4 action on the merits.’” *Id.* (internal quotation omitted). “A mandatory injunction orders a responsible party
 5 to take action,” as Petitioners seek here. *Id.* at 879 (internal quotation omitted). “A mandatory injunction
 6 goes well beyond simply maintaining the status quo pendente lite and is particularly disfavored.” *Id.* “In
 7 general, mandatory injunctions are not granted unless extreme or very serious damage will result and are
 8 not issued in doubtful cases.” *Id.* Where plaintiffs seek a mandatory injunction, “courts should be
 9 extremely cautious.” *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994) (internal quotation
 10 omitted). The moving party “must establish that the law and facts *clearly favor* [their] position, not simply
 11 that [they are] likely to succeed.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis
 12 original). Courts have also denied preliminary relief where the relief the plaintiffs seek is the same relief
 13 sought on the merits, because “[j]udgment on the merits in the guise of preliminary relief is a highly
 14 inappropriate result.” *Mendez v. ICE*, No. 23-cv-00829-TLT, 2023 WL 2604585, at *3 (N.D. Cal. Mar.
 15 15, 2023) (quoting *Senate of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992)).

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

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

19 Petitioners cannot show a likelihood of success on their claims that they are entitled to a custody
 20 hearing prior to re-detention. This is because Petitioners are “applicants for admission” due to their presence
 21 in the U.S. without having been either “admitted or paroled.” *See* Razalan Decl., ¶¶ 4-5; Ng Decl., ¶¶ 4-5;
 22 Cruz Decl., ¶¶ 4-5; Louie Decl., ¶¶ 4-5; Miers Decl., ¶¶ 4-5. Such aliens are subject to the mandatory
 23 detention framework of 8 U.S.C. § 1225(b) that specifically applies to them, not the general provisions of §
 24 1226(a).

25 Indeed, Petitioners fall within the scope of the 2004 expedited removal designation that was in place
 26 at the time of their arrival (in addition to the more recent 2025 designation that expands enforcement to the
 27 full scope of the statute). *See* 69 Fed. Reg. at 48879. Because they were apprehended by CBP officers
 28 within 14 days of their entry and within 100 miles of the border, Petitioners indisputably fall squarely within

1 both the statutory and regulatory definition of an applicant for admission subject to expedited removal
2 proceedings.

3 Recent BIA authority confirms that Petitioners are subject to expedited removal and mandatory
4 detention under § 1225(b). In *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (BIA 2025), the BIA held that,
5 based on the plain text of the statute, an alien who entered without inspection remains an “applicant for
6 admission” who is “seeking admission,” and is therefore subject to mandatory detention without a bond
7 hearing, even if that alien has been present in the U.S. for years. *Id.*, slip op. at 220. Thus, the BIA also held
8 that IJs lack authority to hold bond hearings for aliens in such circumstances. *Id.* The BIA considered, and
9 rejected, the individual’s argument that the government’s “‘longstanding practice’ of treating aliens who are
10 present in the United States without inspection as detained under [] 8 U.S.C.A. § 1226(a), and therefore
11 eligible for a bond” required a different result. *Id.* at 225. Citing the Supreme Court’s decision in *Loper*
12 *Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA explained that such a practice could be
13 relevant where the statute is “doubtful and ambiguous,” but here, “the statutory text of the INA . . . is instead
14 clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without
15 regard to how many years the alien has been residing in the United States without lawful status.” *Hurtado*,
16 slip op. at 226. Nor did it matter that “DHS [had] issued an arrest warrant in conjunction with the Notice to
17 Appear and a Notice of Custody Determination”: “the mere issuance of an arrest warrant does not endow an
18 [IJ] with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA . . . If it did, it
19 would render meaningless the many prohibitions cited above on the authority of an [IJ] to set bond.” *Id.* at
20 227 (citing, *e.g.*, *Matter of Q. Li*, 29 I&N Dec. 66, 69 (BIA 2025)). The BIA has therefore now confirmed,
21 in a decision binding on IJs nationwide, what the government is arguing here: individuals such as Petitioners
22 are “applicants for admission” subject to mandatory detention under § 1225(b), and have no right to a bond
23 hearing.

24 Respondents recognize that recent district court preliminary injunction decisions have concluded that
25 § 1225(b) is not applicable to aliens who were conditionally released in the past under § 1226(a).⁷ In their

26
27 ⁷ *Ramirez Clavijo v. Kaiser*, No. 25-CV-06248-BLF, 2025 WL 2419263 (N.D. Cal. Aug. 21, 2025);
28 *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); *Salcedo Aceros v. Kaiser*, No. 25-CV-
06924-EMC (EMC), 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025).

1 TRO motion Petitioners appear to argue that their release under § 1226(a) in the past renders § 1225(b)
2 inapplicable to them, but these non-binding decisions do not grapple with the textual argument that the BIA
3 just held was “clear and explicit.” *Hurtado*, slip op. at 226.

4 Taken together, the plain language of §§ 1225(a) and 1225(b) indicate that applicants for admission,
5 including those “present” in the U.S. – like Petitioners – are subject to mandatory detention under Section
6 1225(b). When there is “an irreconcilable conflict in two legal provisions,” then “the specific governs over
7 the general.” *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). While §
8 1226(a) applies generally to aliens who are “arrested and detained pending a decision on” removal, § 1225
9 applies more narrowly to “applicants for admission” – *i.e.*, aliens present in the U.S. who have not been
10 admitted. Because Petitioners fall within this latter category, the specific detention authority under § 1225
11 controls over the general authority found at § 1226(a).

12 As aliens PWAP subject to mandatory detention under § 1225(b), Petitioners are not entitled to
13 custody redetermination hearings at any time, whether pre- or post-detention. *Jennings*, 583 U.S. at 297
14 (“[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”); *Matter of*
15 *Yajure Hurtado*, I&N Dec. at 229 (holding that immigration judge “lacked authority to hear the
16 respondent’s request for a bond as the respondent is an applicant for admission and is subject to
17 mandatory detention under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A)”). In addition,
18 although DHS initially elected to place Petitioners in full removal proceedings under § 1229a, Petitioners
19 remain PWAP aliens who are amenable to expedited removal and subject to mandatory detention due to their
20 presence in the U.S. without having been either “admitted or paroled” or physically present in the U.S.
21 continuously for the two-year period immediately preceding the date of the determination of inadmissibility.

22 As noted above, the IJ did not rule on DHS’s motions to dismiss Petitioners’ full removal
23 proceedings. If the immigration court grants DHS’s motions, their re-detention will remain mandatory, but
24 the detention authority will shift to § 1225(b)(1). Petitioners will receive the expedited removal procedures
25 under 8 U.S.C. § 1252(e)(2) and, as is the case under § 1225(b)(2), cannot challenge their mandatory
26 detention. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (“Any alien subject to the procedures under this clause shall be
27 detained pending a final determination of credible fear of persecution and, if found not to have such a fear,
28

until removed.”). However, as noted above, if an asylum officer or immigration judge finds a credible fear of persecution or torture for any petitioner, that petitioner may be placed in full removal proceedings under 8 U.S.C. § 1229a, *see* 8 C.F.R. § 208.30(f), although they will still remain subject to mandatory detention under § 1225(b)(2)(A).

2. A Narrow Interpretation of “Seeking Admission” Runs Counter to Congress’s Use of the Phrase “Or Otherwise” in § 1225(a)(3)

Numerous courts in this district have dismissed the government’s construction of § 1225(b), but none of these courts has considered the significance of Congress’s use of “or otherwise” language in § 1225(a)(3) when interpreting § 1225(b)(2). While these courts have narrowly construed the “seeking admission” language in § 1225(b)(2), *see, e.g., Salcedo Aceros*, 2025 WL 2637503 at *10, their textual analysis has not squared their conclusion with the one provision elsewhere in § 1225 where Congress expressly explained the relationship between “seeking admission” and “applicants for admission” – that is, § 1225(a)(3). The government posits that the starting point for understanding what “seeking admission” in § 1225(b) means is the language of § 1225(a)(3).

In § 1225(a)(3), Congress provided:

All aliens (including alien crewmen) who are applicants for admission *or otherwise seeking admission or readmission to or transit through the United States* shall be inspected by immigration officers.

8 U.S.C. § 1225(a)(3) (emphasis added). This use of “or otherwise” to connect terms is a familiar legal construction where the specific items that precede that phrase are meant to be subsumed by what comes after it. *See, e.g., Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963-64 (11th Cir. 2016) (*en banc*) (noting four Congressional statutes and three 11th Circuit procedural rules as exemplary of how the phrase “or otherwise” is to be construed such that “the first action is a subset of the second action”); *cf. Patrick’s Payroll Servs., Inc. v. Comm’r of Internal Revenue*, 848 F. App’x 181, 183-84 (6th Cir. 2021) (interpreting the “plain meaning and ordinary usage of the phrase ‘or did not otherwise’” to mean that what immediately preceded the phrase was “one of the most common examples” of what followed it). As such, “or otherwise” operates as a catch-all category that serves to make clear that what precedes that phrase falls within the larger category that follows. *See Kleber v. CareFusion Corp.*, 914 F.3d 480, 482-83 (7th Cir. 2019) (analyzing the “or otherwise” phrase in a Congressional statute and determining that Congress’s “word choice is significant” in that it

“employ[s] a catchall formulation”); *see also* *Al Otro Lado v. Executive Office for Immigration Review*, 138 F.4th 1102, 1119 (2025) (finding that in 8 U.S.C. §§ 1225(a)(2) and (a)(3) “Congress took care to provide for the inspection of both the *catch-all category of noncitizens ‘otherwise seeking admission’* and stowaways”) (emphasis added).⁸ The catch-all formulation does not render the phrase preceding “or otherwise” superfluous since “the specific items that precede it *are meant* to be subsumed by what comes after the ‘or otherwise.’” *Villarreal*, 839 F.3d at 964 (emphasis in original) (citing *Begay v. United States*, 553 U.S. 137, 153 (2008) (Scalia, J., concurring) (“[T]he canon against surplusage has substantially less force when it comes to interpreting a broad residual clause . . .”). To treat what follows “or otherwise” and what precedes it “as separate categories, does not give effect to every word because it reads ‘otherwise’ out of the statute.” *Villarreal*, 839 F.3d at 964. To that end, Congress’s use of “otherwise” immediately after “or” is textually significant since using the disjunctive word “or” by itself would have suggested a different interpretation “indicat[ing] alternatives and requir[ing] that those alternatives be treated separately.” *Id.*

The import of these statutory construction rules is meaningful as applied to § 1225. First, given Congress’s use of “or otherwise” instead of “or,” “applicant for admission” and “seeking admission” are not separate requirements, as previously held by the Court. Order at 16. Second, based on the plain language of § 1225(a)(3), an “applicant for admission” is a subset of the larger category of aliens that are “seeking admission or readmission to or transit through the United States.” This interpretation necessarily flows from two word choices made by Congress: (1) its use of the word “or” to disjunctively join “admission,” “readmission” and “transit” as modifiers of the word “seeking” to create a broad catch-all category and (2) its use of “or otherwise” to define the relationship between the phrase “applicant for admission” that precedes it and the phrase “seeking admission or readmission to or transit through the United States” that follows it. Third, by so choosing its words, Congress did not describe “seeking admission” as a narrow subset of “applicants for admission.” On the contrary, since “applicant for admission” is a subset of the larger category of “seeking admission or readmission to or transit through the United States,” 8 U.S.C. § 1225(a)(3), the plain

⁸ *Fischer v. United States*, 603 U.S. 480 (2024), which addressed the import of “otherwise” on the preceding subsection’s list of criminal violations, does not change the calculus. The Court did not consider—as here—the use of “or otherwise” connecting two surrounding phrases and, in any event, found—in a situation unlike here—that a list of “many specific examples of prohibited actions” in a prior subsection merely defined the scope of the following “residual clause” to “give it more definite meaning.” *Id.* at 489–91.

1 language of § 1225(b)(2) indicates only that, “in the case of an applicant for admission,” Congress did not
 2 extend that subsection’s detention authority to individuals “seeking readmission” and “seeking transit
 3 through.” It does not follow, however, that the remaining phrase “seeking admission” was meant to be
 4 narrower than “applicant for admission” – a point confirmed by the Ninth Circuit in its recent *en banc*
 5 decision in *Al Otro Lado*.

6 In *Al Otro Lado*, the Ninth Circuit compared the “applicant for admission” provision in § 1225(a)(1),
 7 which deems an “applicant for admission” to be “[a]n alien present in the United States who has not been
 8 admitted or who arrives in the United States,” with the INA’s asylum provision in 8 U.S.C. § 1158(a)(1),
 9 which utilizes similar language providing that an “[a]ny alien who is physically present in the United States or
 10 who arrives in the United States . . . may apply for asylum.” 138 F.4th at 1118-19. The Ninth Circuit did not
 11 find that “seeking admission” is a subset of “applicants for admission.” Instead, the Ninth Circuit found that
 12 “seeking admission” is at least as broad as “applicant for admission.” *Id.* at 1119 (concluding that “§
 13 1225(a)(1) is *solely* about people *seeking admission* to the country”) (emphasis added). This finding is
 14 consistent with the fact that the INA provides other instances of individuals who are seeking admission but
 15 who do not fulfill the criteria for an “applicant for admission” since they are either not present in the United
 16 States or admitted. *See, e.g., Ogbolumani v. U.S. Citizenship & Immigr. Servs.*, 523 F. Supp. 2d 864, 869
 17 (N.D. Ill. 2007) (describing visa applicant *at an American Embassy or Consulate abroad* as seeking
 18 admission); *Matter of Lemus-Losa*, 25 I&N Dec. 734, 741 (BIA 2012) (an alien “can ‘seek admission’ from
 19 anywhere in the world, for ‘example by applying for a visa at a consulate abroad’); *see also* 8 U.S.C.
 20 § 1101(a)(13)(ii), (iv) (noting two circumstances where an alien *lawfully admitted* for permanent residence
 21 can be regarded as “seeking an admission”).

22 3. “Seeking Admission” Is Not Limited to Aliens Who Take Action Toward 23 Admission

24 At least one court in this district has found that “applicant for admission” is broader than “seeking
 25 admission” because it covers “someone who is not ‘admitted’ but is not *necessarily* ‘seeking admission.’” *See*
 26 *Salcedo Aceros*, 2025 WL 2637503 at *11 (emphasis in original). As the argument goes, § 1225(b)(2) covers
 27 only a smaller set of aliens “actively seeking admission.” But “seeking admission” is not a subcategory of
 28 “applicants for admission” referring only to aliens necessarily taking steps toward actual admission.

1 “Seeking admission” is a term of art. *Matter of Lemus-Losa*, 25 I&N at 743 n.6 (BIA 2012). The
 2 INA provides that “many people who are not actually requesting permission to enter the United States in the
 3 ordinary sense [including aliens present who have not been admitted] are nevertheless deemed to be ‘seeking
 4 admission’ under immigration laws.” *Id.* at 743; *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 221 (BIA
 5 2025); *see also Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015). The INA provides numerous examples of
 6 Congress using “seeks admission” to mean something more expansive than seeking an actual admission. *See*,
 7 *e.g.*, 8 U.S.C. § 1182(a)(9)(A) (an alien previously ordered removed and “who again seeks admission within 5
 8 years” is inadmissible); 8 U.S.C. § 1182(a)(9)(B) (an alien unlawfully present for more than 180 days but less
 9 than a year who voluntarily departed and “again seeks admission within 3 years” is inadmissible). These
 10 latter two groups of aliens accrued past periods of “unlawful presence” in the United States and thus were
 11 deemed “applicants for admission” under § 1225(a)(1), but they were also “in a very meaningful (if
 12 sometimes artificial) sense, ‘again seek[ing] admission.’” *Matter of Lemus-Losa*, 25 I&N at 743 n.6.
 13 Accordingly, Congress’s use of “seeking admission” in § 1225(b)(2) did not mean to include only aliens who
 14 are “actually” or “necessarily” seeking admission.

15 4. To Apply § 1225(b)(2) Narrowly to “Arriving Aliens” Runs Counter to 16 Congress’s Specific Use of “Arriving Aliens” Elsewhere in § 1225

17 At least one court in this district has also concluded that “seeking admission” in § 1225(b)(2) applies
 18 narrowly to “arriving aliens.” *See Salcedo Aceros*, 2025 WL 2637503 at *10, 11. And similarly, the
 19 petitioners bar in this district have referred to § 1225(b)(2) as an “arriving alien statute.” *See Salcedo Acero*,
 20 3:25-cv-06924-EMC, ECF No. 24 (September 4, 2025 Hearing Tr.) at 14:10, 23:4-5, 25:1-2. But “where
 21 Congress knows how to say something but chooses not to, its silence is controlling.” *In re Griffith*, 206 F.3d
 22 1389, 1394 (11th Cir. 2000) (holding that “Congress must have consciously chosen not to include the
 23 language ‘or the payment thereof’” in one statutory section when it specifically chose to use that language in a
 24 different section); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (“[I]t is generally
 25 presumed that Congress acts intentionally and purposely when it includes particular language in one section of
 26 a statute but omits it in another . . .”). Congress knew how to use the word “arriving” and, to that end, twice
 27 included that word elsewhere in the *same* statutory section, both in the text and title of § 1225’s expedited
 28 removal provision. *See* 8 U.S.C. § 1225(b)(1) (“Inspection of aliens *arriving* in the United States and certain

other aliens who have not been admitted or paroled”) (emphasis added); 8 U.S.C. § 1225(b)(1)(A)(i) (“If an immigration officer determines that an alien . . . who is *arriving* in the United States. . .”) (emphasis added). Congress’s decision not to use “arriving”—or any variant thereof—in § 1225(b)(2) was purposeful, and that word cannot now be read into that provision to unnecessarily limit Congress’ express language. Accordingly, § 1225(b)(2) is not limited to aliens arriving at the border; it also covers aliens in the country’s interior who are present and not admitted. *See, e.g., Pena v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913, *1-3 (D. Mass. July 28, 2025) (holding that an alien living in the country and later detained after a traffic stop “remains an applicant for admission” and “his continued detention is therefore authorized by § 1225(b)(2)(A)” consistent with constitutional due process); *Sixtos Chavez, et al. v. Kristi Noem, et al.*, No. 3:25-cv-02325-CAB-SBC (S.D. Cal. Sep. 24, 2025), ECF No. 8 (denying application for temporary restraining order and rejecting petitioners’ argument that their detention was governed by § 1226, finding instead that they were subject to mandatory detention under the plain text of § 1225(b)(2)).

5. The INA’s Implementing Regulations Are Contrary to the Narrow View That § 1225(b)(2) Applies Only to Arriving Aliens

At least one court in this district has relied upon “the implementing regulation for § 1225(b)(2)” to bolster its conclusion that this statutory section “has limited application” and applies only to an “arriving aliens” subset of applicants for admission. *Salcedo Aceros*, 2025 WL 2637503 at *10 (“8 C.F.R. § 235.3 describes Section 1225(b)(2) as applying to ‘any *arriving alien* who appears to the inspecting officer to be inadmissible.’”) (emphasis in original). However, the regulation does not support that narrow construction. It provides that the expedited removal provision of § 1225(b)(1) applies to “arriving aliens,” 8 C.F.R. § 235.3(b)(1)(i), and that an arriving alien can be put into regular removal proceedings, 8 C.F.R. § 235.3(c)(1). But most significantly, the regulations expressly provide that § 1225(b)(2) is *not* limited to arriving aliens:

An alien who was not inspected and *admitted or paroled into the United States but who establishes that he or she has been continuously physically present in the United States for the 2-year period immediately prior to the date of determination of inadmissibility* shall be detained in accordance with section 235(b)(2) of the Act for a proceeding under section 240 of the Act.

8 C.F.R. § 235.3(b)(1)(ii) (emphasis added). This implementing regulation – applying § 1225(b)(2) to aliens able to establish their presence in the United States for two consecutive years – undermines the narrow interpretation that § 1225(b)(2) is limited to aliens arriving at the border.

6. 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 the multi-factor "balancing test" of *Mathews*. 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).⁹

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 or pre-detention bond hearing. Their conditional parole status does not provide them with additional rights above and beyond the specific process already provided by Congress in § 1225. See *Thuraissigiam*, 591 U.S. at 139 ("aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border'"); *Ma v. Barber*, 357 U.S. 185, 190 (1958) (concluding that the parole of an alien released into the country while admissibility decision was pending did not alter her legal status); *Pena*, 2025 WL 2108913 at *2 (finding that mandatory detention under § 1225(b)(2)(A) of an alien arrested at a traffic stop in the interior of the United States "comports with due process"). 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. *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." *Id.* at 140; see *Dave v. Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004). Petitioner is entitled only to the protections set forth by statute,

⁹ 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").

and “the Due Process Clause provides nothing more.” *Thuraissigiam*, 591 U.S. at 140.¹⁰

7. 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, miles from the nearest port of entry, and were processed and released outside of a port of entry—should be treated no differently than 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). To hold that these individuals are entitled to additional process would create the perverse incentive for aliens to enter the country unlawfully – or surreptitiously get access to the country’s interior – rather than enter at a lawful location. *See Thuraissigiam*, 591 U.S. at 140

¹⁰ Respondents recognize that this Court recently applied *Morrissey v. Brewer*, 408 U.S. 471 (1972), under a different immigration statutory framework and concluded that certain aliens are entitled to a pre-deprivation hearing. *See Duong v. Kaiser*, No. 25-cv-07598-JST (N.D. Cal.) at ECF No. 18. While the Supreme Court did find that post-arrest process should be afforded to the parolee in *Morrissey*, the government respectfully submits that the framework for determining process for parolees is different from that for aliens illegally present in the United States. A fundamental purpose of the parole system is “to help individuals reintegrate into society” in order to lessen the chance of committing antisocial acts in the future. *See Morrissey*, 408 U.S. at 478-80. That same goal of integration, in order to support the constructive development of individuals who have committed crimes and to lessen any recidivistic tendencies, is not present with unlawfully present aliens, who were not released for the same purpose. Indeed, these Petitioners were each released for lack of bed space and with orders that they must surrender for removal from the United States if so ordered.

1 **8. Petitioners’ Detention Authority Cannot Be Converted to § 1226(a)**

2 As “applicants for admission,” Petitioners’ detention is governed by the § 1225(b) framework. This
 3 remains true even where the government previously released them under 8 U.S.C. § 1226(a). By citing §
 4 1226(a), DHS does not permanently alter an alien’s status as an “applicant for admission” under § 1225; to
 5 the contrary, the alien’s release is expressly subject to an order to appear for removal proceedings based on
 6 *unlawful* entry. Nor is DHS prevented from clarifying the detention authority to conform to the requirements
 7 of the statutory framework as DHS now interprets it. *See, e.g., United Gas Improvement v. Callery*, 382 U.S.
 8 223, 229 (1965) (explaining that an agency can correct its own error). Pursuant to the statutory framework,
 9 an alien’s conditional release is not the type of “lawful entry into this country” that is necessary to “establish[
 10] connections” that could form a liberty interest requiring additional process, and he or she remains an
 11 “applicant for admission” who is “at the threshold of initial entry” and subject to mandatory detention under
 12 § 1225. *Thuraissigiam*, 591 U.S. at 106–07 (“While aliens who have established connections in this country
 13 have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set
 14 the conditions for an alien’s lawful entry into this country and that, as a result, an alien at the threshold of
 15 initial entry cannot claim any greater rights under the Due Process Clause.”)

16 This binding Supreme Court authority is therefore in conflict with recent district court decisions
 17 finding that the government’s “election to place Petitioner in full removal proceedings under § 1229a and
 18 releasing Petitioner under § 1226(a) provided Petitioner a liberty interest that is protected by the Due Process
 19 Clause.” *Ramirez Clavijo*, 2025 WL 2419263, *3. The government’s decision to place aliens like
 20 Petitioners in full removal proceedings under § 1229a is consistent with § 1225(b)(2), and its decision to cite
 21 § 1226(a) in releasing them does not render their entry lawful; it remains unlawful (as the alien’s release is
 22 conditioned on appearing for removal proceedings based on *unlawful* entry), and as the Supreme Court
 23 confirmed in *Thuraissigiam*, the alien remains “on the threshold of initial entry,” is “treated for due process
 24 purposes as if stopped at the border,” and “cannot claim any greater rights under the Due Process Clause”
 25 than what Congress provided in § 1225. *Thuraissigiam*, 591 U.S. at 139–40; *see also Pena*, 2025 WL
 26 2108913 at *2 (“Based upon the inherent authority of the United States to expel aliens, however, applicants
 27 for admission are entitled only to those rights and protections Congress set forth by statute.”).

The Supreme Court's holding in *Thuraissigiam* is consistent with its earlier holding in *Landon*, where the Court observed that only "once an alien gains admission to our country and begins to develop the ties that go with permanent residence [does] his constitutional status change[.]" 459 U.S. at 32. In *Thuraissigiam*, the Court reiterated that "established connections" contemplate "an alien's lawful entry into this country." 591 U.S. at 106–07. In this case, Petitioners were neither admitted nor paroled, nor lawfully present in this country as required by *Landon* and *Thuraissigiam* to claim due process rights beyond what § 1225(b) provides. They instead remain applicants for admission who—even if released into the country "for years pending removal"—continue to be "'treated' for due process purposes 'as if stopped at the border.'" *Thuraissigiam*, 591 U.S. at 139–140 (explaining that such aliens remain "on the threshold" of initial entry).

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

Even if this Court finds that § 1226(a) applies here, Petitioners would still not be entitled to a pre-detention hearing. For aliens detained under § 1226(a), "an ICE officer makes the initial custody 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. *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 immigration judge 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 Section 1226(a), aliens are not guaranteed *pre*-detention review and may instead 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. *Rodriguez Diaz*, 53 F.4th at 1196–97.¹¹

¹¹ 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

RESPONDENTS' RESPONSE TO ORDER TO SHOW CAUSE

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22

10. **Petitioners Cannot Obtain an Injunction Prohibiting Transfer**

To the extent that Petitioners seek 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 do not establish that they will be irreparably harmed absent a PI. The “unlawful deprivation of physical liberty” is a harm that “is essentially inherent in detention,” and thus “the Court cannot weigh this strongly in favor of” Petitioners. *Lopez Reyes v. Bonnar*, No 18-cv-07429-SK, 2018 WL 7474861 at *10 (N.D. Cal. Dec. 24, 2018). It is also countervailed by authority mandating – and upholding – their categorical detention as lawful. Indeed, the alleged infringement of constitutional rights is insufficient where, as here, they fail to 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)); *Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021) (denying TRO where petitioner “assume[d] a deprivation to assert the resulting harm”). Further, any alleged harm from the 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 § 1226(a), the risk of erroneous deprivation and value of additional process is small due to the procedural safeguards that Section 1226(a) provides. Thus, Petitioners cannot establish that their lawfully authorized mandatory detention would cause irreparable

concluded that the challenge to Section 1226(a) failed “whether construed as facial or as-applied challenges to § 1226(a).” *Rodriguez Diaz*, 53 F.4th at 1203.

1 harm.

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

3 When the government is a party, the balance of equities and public interest merge. *Drakes Bay*
 4 *Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435
 5 (2009)). Further, where a moving party only raises “serious questions going to the merits,” the balance
 6 of hardships must “tip sharply” in their favor. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35
 7 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

8 Here, the government has a compelling interest in the steady enforcement of its immigration laws.
 9 *See Noem v. Vasquez Perdomo*, 606 U.S. —, 2025 WL 2585637, at *4-5 (2025) (Kavanaugh, J., concurring)
 10 (finding that balance of harms and equities tips in favor of the government in immigration enforcement given
 11 the “myriad ‘significant economic and social problems’ caused by illegal immigration”); *Demore*, 538 U.S.
 12 at 523; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court “should give
 13 due weight to the serious consideration of the public interest” in enacted laws); *see also Ubiquity Press v.*
 14 *Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) (“the public
 15 interest in the United States’ enforcement of its immigration laws is high”); *United States v. Arango*, 09-CV-
 16 178 TUC DCB, 2015 WL 11120855, at 2 (D. Ariz. Jan. 7, 2015) (“the Government’s interest in enforcing
 17 immigration laws is enormous”). Indeed, the government “suffers a form of irreparable injury” “[a]ny time
 18 [it] is enjoined by a court from effectuating statutes enacted by representatives of its people.” *Maryland*
 19 *v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.) (citation omitted).

20 Petitioner’s claimed harms cannot outweigh this public interest in the application of the law,
 21 particularly since courts “should pay particular regard for the public consequences in employing the
 22 extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation
 23 omitted). Recognizing the availability of an injunction under these circumstances would permit any
 24 “applicant for admission” subject to § 1225(b) to obtain additional review simply because he or she was
 25 released – even if that release is expressly conditioned on appearing at removal proceedings for *unlawful*
 26 entry – circumventing the comprehensive statutory scheme that Congress enacted. That statutory scheme
 27 – and judicial authority upholding it – likewise favors the government. While it is “always in the public
 28

1 interest to protect constitutional rights,” if, as here, a petitioner has not shown a likelihood of success on
 2 the merits of her claim, that public interest does not outweigh the competing public interest in enforcement
 3 of existing laws. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). The public and
 4 governmental interest in applying the established procedures for “applicants for admission,” including
 5 their lawful, mandatory detention, *see* 8 U.S.C. § 1225(b); *Jennings*, 583 U.S. at 297, is significant.

6 **E. Any Court Order Should Not Provide for Immediate Release and Should Not**
 7 **Reverse the Burden of Proof**

8 Immediate release is improper in these circumstances, where Petitioners are subject to mandatory
 9 detention. If the Court is inclined to grant any relief whatsoever, such relief should be limited to providing
 10 Petitioners with a bond hearing while they remain detained. *See, e.g., Javier Ceja Gonzalez v. Noem*, No.
 11 5:25-cv-02054-ODW (C.D. Cal. Aug. 13, 2025), ECF No. 12 (ordering the government to “release
 12 Petitioners or, in the alternative, provide each Petitioner with an individualized bond hearing before an
 13 immigration judge pursuant to 8 U.S.C. § 1226(a) within seven (7) days of this Order”).

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

22 The Ninth Circuit previously held that the government bears the burden by clear and convincing
 23 evidence that an alien is not a flight risk or danger to the community for bond hearings in certain
 24 circumstances. *Singh v. Holder*, 638 F.3d 1196, 1203-05 (9th Cir. 2011) (bond hearing after allegedly
 25 prolonged detention). But following intervening Supreme Court decisions, the Ninth Circuit has explained
 26 that “*Singh*’s holding about the appropriate procedures for those bond hearings . . . was expressly premised
 27 on the (now incorrect) assumption that these hearings were statutorily authorized.” *Rodriguez Diaz*, 53 F.4th
 28 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

For the foregoing reasons, the government respectfully requests that the Court decline to enter a preliminary injunction.

Dated: September 26, 2025

Respectfully submitted,

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