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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

HENRY EDUARDO BASTIDAS MENDOZA, GUSTAVO GIRALDO MUNOZ, and FAYE WAGANE, Petitioners-Plaintiffs, v. SERGIO ALBARRAN, Field Office Director of the San Francisco Immigration and Customs Enforcement Office; TODD LYONS, Acting Director of United States Immigration and Customs Enforcement; KRISTI NOEM, Secretary of the United States Department of Homeland Security, PAMELA BONDI, Attorney General of the United States, acting in their official capacities, Respondents-Defendants.	CASE NO. 3:25-cv-08205-VC **RESPONDENTS' OPPOSITION TO TEMPORARY RESTRAINING ORDER MOTION** Judge: Hon. Vince Chhabria

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I. INTRODUCTION

Petitioners have moved for a temporary restraining order ("TRO") enjoining the government from re-detaining them absent a pre-detention hearing before a neutral decision maker. But under the applicable immigration statutes, Petitioners are "applicants for admission" subject to mandatory detention under 8 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 aliens as inadmissible, and therefore ineligible to be admitted to the United States, including those "present in the United States without being admitted or paroled"); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138–140 (2020) (an alien who is neither admitted nor paroled, nor otherwise lawfully present in this country, remains an "applicant for admission" who is "on the threshold" of initial entry, even if released into the country "for years pending removal," and continues to be "'treated' for due process purposes 'as if stopped at the border'"); *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (such aliens are "treated as 'an applicant for admission'").

These "applicants for admission," which include aliens present without being admitted or paroled ("PWAP")—as is the circumstance with each of the Petitioners in this case, "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."). They are not entitled to custody redetermination hearings, whether pre- or post-detention. *Jennings*, 583 U.S. at 297 ("[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings."). Petitioners thus cannot show a likelihood of success on his claim that they are entitled to a custody redetermination hearing prior to re-detention.

Nor could Petitioners show a likelihood of success on their claims even if they were subject to 8 U.S.C. § 1226(a) instead of the mandatory detention framework of § 1225(b). *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)). Section 1226(a) does not provide for *pre*-detention immigration judge review but instead sets out a procedure for review of detention by a U.S. Immigration and Customs Enforcement ("ICE") officer once an alien is in custody—a process that the Ninth Circuit has found ensures "that the risk of erroneous deprivation would be '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 from the United States without further hearing or review." Section 1225(b)(1) applies to "arriving aliens" and "certain other" aliens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Id.*; 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii). Section 1225(b)(1) also allows for the expedited removal of any alien "described in" § 1225(b)(1)(A)(iii)(II), as designated by the Attorney General ("AG") or Secretary of Homeland Security—that is, any alien not "admitted or paroled into the United States" and "physically present" fewer than two years—who is inadmissible under § 1182(a)(7) at the time of "inspection." *See* 8 U.S.C. § 1182(a)(7) (categorizing as inadmissible aliens without valid entry documents). Whether that happens at a port of entry or after illegal entry is not relevant; what matters is whether, when an officer inspects an alien for admission under § 1225(a)(3), that alien lacks entry documents and so is subject to §1182(a)(7). The AG's or Secretary's authority to "designate" classes of aliens as subject to expedited removal is subject to his or her "sole and unreviewable discretion." 8 U.S.C. § 1225(b)(1)(A)(iii); *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) (upholding expedited removal statute).

On five occasions, the Secretary (and earlier, the AG) has designated categories of aliens for expedited removal under § 1225(b)(1)(A)(iii). In 2004, citing "the interests of focusing enforcement resources upon unlawful entries that have a close spatial and temporal nexus to the border," the Secretary designated for expedited removal those "aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border." *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877-01, 48879 (Aug. 11, 2004). More recently, the Secretary restored the expedited removal scope to "the fullest extent authorized by Congress." *Designating Aliens for Expedited Removal*, 90 Fed. Reg. 8139 (Jan. 24, 2025). The current notice enables DHS "to exercise the full scope of its statutory

authority to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under [8 U.S.C. § 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility," who were not otherwise covered by prior designations. *Id.* at 8139–40.[1]

Expedited removal proceedings under § 1225(b)(1) include additional procedures if an alien indicates an intention to apply for asylum[2] 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

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[1] 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. 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.

[2] 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).

1229a governs full removal proceedings initiated by a notice to appear and conducted before an IJ, during which the alien may apply for relief or protection. By contrast, expedited removal under § 1225(b)(1) applies in narrower, statutorily defined circumstances—typically to individuals apprehended at or near the border who lack valid entry documents or commit fraud upon entry—and allows for their removal without a hearing, subject to limited exceptions. For these aliens, DHS has discretion to pursue expedited removal under § 1225(b)(1) or § 1229a. *Matter of E-R-M- & L-R-M-*, 25 I & N Dec. 520, 524 (BIA 2011).

2. Section 1225(b)(2)

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

C. Detention Under 8 U.S.C. § 1226(a)

A different statutory detention authority, 8 U.S.C. § 1226, applies to aliens who have been lawfully admitted into the U.S. but are deportable and subject to removal proceedings. Section 1226(a) provides for the arrest and detention of these aliens "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Under § 1226(a), DHS may, in its discretion, detain an alien during his

removal proceedings, release him on bond, or release him on conditional parole.[3] By regulation, immigration officers can release an alien if he demonstrates that he "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination (*i.e.*, a bond hearing) by an IJ at any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19. At a custody redetermination, the IJ may continue detention or release the alien on bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for IJs to consider).

Until recently, the government interpreted § 1226(a) to be an available detention authority for aliens PWAP placed directly in full removal proceedings under § 1229a. *See, e.g.*, *Ortega-Cervantes*, 501 F.3d at 1116. In view of legal developments, the government has determined that this interpretation was incorrect. But prior agency practice applying § 1226(a) to Petitioners does not control because the plain language of the statue, and not prior practice, controls. *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 225-26 (BIA 2025); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 408, 431-32 (2024) (explaining that "the basic nature and meaning of a statute does not change . . . just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference" and finding that the weight given to agency interpretations "must always "depend upon the[ir] thoroughness ..., the validity of [their] reasoning, [their] consistency with earlier and later pronouncements, and all those factors which give [them] power to persuade '"). Section 1225 is the sole applicable immigration detention authority for *all* applicants for admission. *See Jennings*, 583 U.S. at 297 ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded."). In *Jennings*, the Supreme Court explained that 8 U.S.C. § 1225(b) applies to all applicants for admission, noting that the language of 8 U.S.C. § 1225(b)(2) is "quite clear" and "unequivocally mandate[s]" detention. 583 U.S. at 300, 303 (explaining that "the word 'shall' usually connotes a

[3] Being "conditionally paroled under the authority of § 1226(a)" is distinct from being "paroled into the United States under the authority of § 1182(d)(5)(A)." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007) (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)).

requirement" (quoting *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 171 (2016))). Similarly, the Attorney General, in *Matter of M-S-*, unequivocally recognized that 8 U.S.C. §§ 1225 and 1226(a) do not overlap but describe "different classes of aliens." 27 I&N Dec. at 516. The Attorney General also held—in an analogous context—that aliens present without admission and placed into expedited removal proceedings are detained under 8 U.S.C. § 1225 even if later placed in 8 U.S.C. § 1229a removal proceedings. 27 I&N Dec. at 518-19. In *Matter of Q. Li*, the Board of Immigration Appeals (BIA) held that an alien who illegally crossed into the United States between ports of entry and was apprehended without a warrant while arriving is detained under 8 U.S.C. § 1225(b). 29 I&N Dec. at 71. The BIA recently resolved the question of whether an alien PWAP released from DHS custody pursuant to INA § 236(a) is an applicant for admission detained under INA § 235(b)(2)(A) in the affirmative. *Matter of Yajure Hurtado*, 29 I&N Dec. 216.

This ongoing evolution of the law makes clear that all applicants for admission are subject to detention under 8 U.S.C. § 1225(b). *Cf. Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021) (providing that "no amount of policy-talk can overcome a plain statutory command"); *see generally Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023) (explaining that "the 1996 expansion of § 1225(b) to include illegal border crossers would make little sense if DHS retained discretion to apply § 1226(a) and release illegal border crossers whenever the agency saw fit").[4] *Florida's* conclusion "that § 1225(b)'s 'shall be detained' means what it says and . . . is a mandatory requirement . . . flows directly from *Jennings*." *Florida*, 660 F. Supp. 3d at 1273.

III. BACKGROUND

A. Factual Background

On March 20, 2024, Petitioner Henry Eduardo Bastidas Mendoza—a native and citizen of Venezuela—entered the U.S. without inspection, admission or parole; Border Patrol ("BP") encountered him

[4] Though not binding, the U.S. District Court for the Northern District of Florida's decision is instructive here. *Florida* held that 8 U.S.C. § 1225(b) mandates detention of applicants for admission 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.*

outside of designated ports of entry within 100 miles of the border in the El Paso, Texas Border Patrol Sector. BP agents determined that he had unlawfully entered the U.S., then apprehended and transported him to a nearby BP facility for processing. He lacked any valid immigration documents that would allow him to legally enter, pass through, or remain in the U.S.; he admitted to entering without presenting himself to an immigration officer for inspection at a designated port of entry.

On July 17, 2023, Petitioner Giraldo Munoz—a native and citizen of Colombia—entered the U.S. without inspection, admission or parole; Border Patrol ("BP") encountered him outside of designated ports of entry within 100 miles of the border near Lukeville, Arizona. BP agents determined that he had unlawfully entered the U.S., then apprehended and transported him to a nearby BP facility for processing. He lacked any valid immigration documents that would allow him to legally enter, pass through, or remain in the U.S.; he admitted to entering without presenting himself to an immigration officer for inspection at a designated port of entry.

On August 5, 2023, Petitioner Faye Wagane—a native and citizen of Senegal—entered the U.S. without inspection, admission or parole; Border Patrol ("BP") encountered him outside of designated ports of entry within 100 miles of the border approximately one mile west of the San Ysidro Port of Entry and one mile north of the border with Mexico. BP agents determined that he had unlawfully entered the U.S., then apprehended and transported him to a nearby BP facility for processing. He lacked any valid immigration documents that would allow him to legally enter, pass through, or remain in the U.S.; he admitted to entering without presenting himself to an immigration officer for inspection at a designated port of entry.

B. Procedural Background

On September 26, 2025, Petitioners filed their habeas petition and an ex parte motion for a temporary restraining order. ECF Nos. 1& 2.[5]

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[5] The Petition joins three separate petitioners with separate sets of underlying factual circumstances in a single habeas petition. *See* Pet. ¶¶ 47, 49 & 51. 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

IV. ARGUMENT

A. Legal Standard

A TRO 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)).

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

1. Under the Plain Text of 8 U.S.C. § 1225, Petitioners Must Be Detained Pending the Outcome of His Removal Proceeding

Petitioners cannot show a likelihood of success on their claims that they are entitled to a custody hearing prior to re-detention. This is because Petitioners are "applicants for admission" due to their presence in the U.S. without having been either "admitted or paroled." *See* Ng Decl. Ex. 1 at 1. Such aliens are subject to the mandatory detention framework of 8 U.S.C. § 1225(b) that specifically applies to them, not the general provisions of § 1226(a).

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

Recent BIA authority confirms that Petitioners are subject to expedited removal and mandatory detention under § 1225(b). In *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (BIA 2025), the BIA held that, based on the plain text of the statute, an alien who entered without inspection remains an "applicant for admission" who is "seeking admission," and is therefore subject to mandatory detention without a bond hearing, even if that alien has been present in the U.S. for years. *Id.*, slip op. at 220. Thus, the BIA also held

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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).

that IJs lack authority to hold bond hearings for aliens in such circumstances. *Id.* The BIA considered, and rejected, the individual's argument that the government's "'longstanding practice' of treating aliens who are present in the United States without inspection as detained under [] 8 U.S.C.A. § 1226(a), and therefore eligible for a bond." *Id.* at 225. Citing the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA explained that such a practice could be relevant where the statute is "doubtful and ambiguous," but here, "the statutory text of the INA . . . is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status." *Hurtado*, slip op. at 226. Nor did it matter that "DHS [had] issued an arrest warrant in conjunction with the Notice to Appear and a Notice of Custody Determination": "the mere issuance of an arrest warrant does not endow an [IJ] with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA . . . If it did, it would render meaningless the many prohibitions cited above on the authority of an [IJ] to set bond." *Id.* at 227 (citing, *e.g.*, *Matter of Q. Li*, 29 I&N Dec. 66, 69 (BIA 2025)). The BIA has therefore now confirmed, in a decision binding on IJs nationwide, what the government is arguing here: individuals such as Petitioners are "applicants for admission" subject to mandatory detention under § 1225(b), and have no right to a bond hearing.

Respondents recognize that recent district court preliminary injunction decisions have concluded that § 1225(b) is not applicable to aliens who were conditionally released in the past under § 1226(a).[6] These non-binding decisions do not grapple with the textual argument that the BIA just held was "clear and explicit." *Hurtado*, slip op. at 226.

Taken together, the plain language of §§ 1225(a) and 1225(b) indicate that applicants for admission, including those "present" in the U.S.—like Petitioners—are subject to mandatory detention under Section 1225(b). When there is "an irreconcilable conflict in two legal provisions," then "the specific governs over the general." *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). While § 1226(a) applies generally to aliens who are "arrested and detained pending a decision on" removal, § 1225 applies

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

more narrowly to "applicants for admission"—*i.e.*, aliens present in the U.S. who have not been admitted. Because Petitioner falls within this latter category, the specific detention authority under § 1225 controls over the general authority found at § 1226(a).

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

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

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, and "the Due Process Clause provides nothing more." *Thuraissigiam*, 591 U.S. at 140.

3. Petitioner's Detention Authority Cannot Be Converted to § 1226(a)

As "applicants for admission," Petitioners' detention is governed by the § 1225(b) framework. This remains true even where the government previously released him under 8 U.S.C. § 1226(a). By citing § 1226(a), DHS does not permanently alter an alien's status as an "applicant for admission" under § 1225; to the contrary, the alien's release is expressly subject to an order to appear for removal proceedings based on *unlawful* entry. Nor is DHS prevented from clarifying the detention authority to conform to the requirements of the statutory framework as DHS now interprets it. *See, e.g.*, *United Gas Improvement v. Callery*, 382 U.S. 223, 229 (1965) (explaining that an agency can correct its own error). Pursuant to the statutory framework,

an alien's conditional release is not the type of "lawful entry into this country" that is necessary to "establish[ ] connections" that could form a liberty interest requiring additional process, and he or she remains an "applicant for admission" who is "at the threshold of initial entry" and subject to mandatory detention under § 1225. *Thuraissigiam*, 591 U.S. at 106–07 ("While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause.")

This binding Supreme Court authority is therefore in conflict with recent district court decisions finding that the government's "election to place Petitioner in full removal proceedings under § 1229a and releasing Petitioner under § 1226(a) provided Petitioner a liberty interest that is protected by the Due Process Clause." *Ramirez Clavijo*, 2025 WL 2419263, *3. The government's decision to place an alien like Petitioner in full removal proceedings under § 1229a is consistent with § 1225(b)(2), and its decision to cite § 1226(a) in releasing him does not render his entry lawful; it remains unlawful (as the alien's release is conditioned on appearing for removal proceedings based on *unlawful* entry), and as the Supreme Court confirmed in *Thuraissigiam*, the alien remains "on the threshold of initial entry," is "treated for due process purposes as if stopped at the border," and "cannot claim any greater rights under the Due Process Clause" than what Congress provided in § 1225. *Thuraissigiam*, 591 U.S. at 139–40; *see also Pena*, 2025 WL 2108913 at *2 ("Based upon the inherent authority of the United States to expel aliens, however, applicants 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).

4. Petitioner Is Not Entitled to a Pre-Detention Hearing Under § 1226(a)

Even if this Court finds that § 1226(a) applies here, Petitioner 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); *Abel v. United States*, 362 U.S. 217, 233–34 (1960); *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). 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.[7]

5. Petitioner Cannot Obtain an Injunction Prohibiting Transfer

To the extent that Petitioner seeks an injunction that prohibits transferring him out of this District, he 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, Petitioner has not shown how his mandatory detention or any transfer would interfere with his ability to present his cases or access counsel any more than any other similarly situated detainee. *See Milan-Rodriguez*, 2018 WL 400317, *10.

C. Petitioner Cannot Establish Irreparable Harm

Petitioners do not establish that he 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

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

strongly in favor of" Petitioner. *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—his categorical detention as lawful. Indeed, the alleged infringement of constitutional rights is insufficient where, as here, he fails to demonstrate "'a sufficient likelihood of success on the merits of [his] 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 his lawfully authorized mandatory detention would cause irreparable harm.

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

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

Here, the government has a compelling interest in the steady enforcement of its immigration laws. *See Noem v. Vasquez Perdomo*, 606 U.S. —, 2025 WL 2585637, at *4-5 (2025) (Kavanaugh, J., concurring) (finding that balance of harms and equities tips in favor of the government in immigration enforcement given the "myriad 'significant economic and social problems' caused by illegal immigration"); *Demore*, 538 U.S. at 523; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court "should give due weight to the serious consideration of the public interest" in enacted laws); *see also Ubiquity Press v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) ("the public

interest in the United States' enforcement of its immigration laws is high"); *United States v. Arango*, CV 09-178 TUC DCB, 2015 WL 11120855, at 2 (D. Ariz. Jan. 7, 2015) ("the Government's interest in enforcing immigration laws is enormous"). Indeed, the government "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J.) (citation omitted).

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

E. Any Court Order Should Not Reverse the Burden of Proof

At any bond hearing, Petitioners should have the burden of demonstrating that they are *not* a flight risk or danger to the community. That is the ordinary standard applied in bond hearings. *Matter of 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] that he or she merits release on bond."). It would be improper to reverse the burden of proof and place it on the government in these circumstances. *See Rodriguez Diaz*, 53 F.4th at 1210-12.

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

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

V. CONCLUSION

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

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Respectfully submitted,

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