Donovan J Dunnion
Law Office of Donovan J Dunnion
600 West Broadway, Suite 700
San Diego, CA 92101
(619)231-8688

Attorney for Petitioner
Nester Paul Hernandez-Morales

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NESTER PAUL HERNANDEZ-MORALES, Petitioner, v. PAM BONDI, Attorney General of the United States, in her official capacity; KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity; TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity; PATRICK DIVVER, ICE Field Office Director for San Diego County, in his official capacity. Respondents.	Case No. 25-cv-02551-BJC-MMP PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO EMERGENCY EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

I
INTRODUCTION

Respondents concede in their opposition that Petitioner is currently detained at the Otay Mesa Detention Center in San Diego, California. This admission satisfies the Court's initial jurisdictional concern and confirms that Petitioner is within the Court's territorial reach for habeas and injunctive relief.

Petitioner respectfully submits this Reply to clarify the jurisdictional posture, rebut Respondents' opposition, and reinforce the statutory and equitable grounds for temporary injunctive relief. The pending request for a Temporary Restraining Order is not the final disposition of Petitioner's claims—it is a narrowly tailored measure to preserve the Court's jurisdiction and prevent irreparable harm pending full adjudication of the preliminary injunction.

Respondents mischaracterize the nature of the Petition, attempts to relitigate custody classification already adjudicated by the Immigration Judge, and invoke jurisdictional bars that do not apply to the limited relief sought here.

Petitioner does not challenge DHS's general authority to execute removal orders. He seeks only narrow, status-quo relief to preserve Congress's statutory framework and this Court's jurisdiction—not to restrain DHS's enforcement discretion—and to prevent removal that would nullify pending statutory proceedings, violate due process, and inflict irreparable injury.

Petitioner raises substantial claims under the INA, the APA, and the Constitution, and this Court possesses clear authority under the All Writs Act and 5 U.S.C. § 705 to issue a Temporary Restraining Order preserving its jurisdiction

and preventing irreparable harm pending resolution of the preliminary-injunction motion.

II
JURISDICTION IS PROPER AND RESPONDENT IS CORRECTLY NAMED

In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court held that a habeas petitioner seeking release from present physical custody must name the immediate custodian and file in the district of confinement. That rule governs "core" habeas actions—those challenging the fact or duration of custody and seeking release.

Doe v. Garland, 109 F.4th 1188 (9th Cir. 2024), applied Padilla in the immigration detention context, where the petitioner sought immediate release from ICE custody. The Ninth Circuit held that the district court lacked jurisdiction because the petitioner was seeking release from custody—a core habeas claim—and had named supervisory officials rather than the immediate custodian, while filing outside the district of confinement. Applying the rule from *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the court reaffirmed that such petitions must name the immediate physical custodian and be filed in the district of confinement.

Petitioner does not seek release from custody or challenge conditions of confinement. Rather, he seeks to enjoin agency actions that would nullify adjudicatory safeguards, violate statutory and constitutional rights, and foreclose protections enacted by Congress to prevent unlawful removal and irreparable harm. The relief sought is forward-looking and protective: it preserves access to congressionally mandated procedures and prevents circumvention of lawful

process, including removal to a country where Petitioner faces persecution and torture without adherence to those safeguards.

This is not a challenge to the removal order itself, nor a collateral attack on its validity. Rather, it is a request to preserve adjudicatory rights and statutory remedies that would otherwise be extinguished—and to prevent removal before those claims can be meaningfully adjudicated. Federal courts retain jurisdiction to issue process-preserving injunctions where removal would moot pending statutory claims.

This principle is affirmed in *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011), and *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999), which recognize the Court's equitable authority to intervene when agency action threatens to extinguish adjudicatory rights. In such cases, the proper respondent is the official with legal authority over the removal process—not the facility warden or contractor. Petitioner has properly named the ICE Field Office Director, who exercises legal custody and retains exclusive control over removal logistics and execution.

Petitioner has properly named the ICE Field Office Director, who exercises legal custody and removal authority. Otay Mesa Detention Center is operated by CoreCivic under contract with U.S. Immigration and Customs Enforcement (ICE).

The facility warden is a private contractor and does not possess legal custody or removal authority over detainees. ICE retains exclusive control over detention decisions, transfer logistics, and execution of removal orders.

Accordingly, the ICE Field Office Director is the proper respondent for purposes of habeas and injunctive relief. See *Singh,* 638 F.3d at 1202–03;

Barahona-Gomez, 167 F.3d at 1235.

Alternatively, should the Court deem a facility custodian necessary under Doe, Petitioner respectfully requests leave to amend the caption to add the Otay Mesa Detention Center Facility Administrator/Warden as a nominal respondent, without prejudice to the pending request for emergency injunctive relief or the preservation of the status quo pending amendment.

III
8 U.S.C. § 1252(g) DOES NOT BAR RELIEF

Respondents invoke 8 U.S.C. § 1252(g) to argue that this Court lacks jurisdiction to enjoin execution of Petitioner's removal order. That argument misreads both the statute and the nature of the relief sought.

Petitioner does not challenge DHS's discretionary authority to execute removal orders in the abstract. He seeks narrowly tailored relief to preserve adjudication of a pending statutory motion to reopen—a right Congress expressly protected under INA § 1229a(c)(7).

Removal before the Board of Immigration Appeals rules on that motion would nullify Petitioner's statutory claims and foreclose judicial review. Federal courts retain jurisdiction to issue process-preserving injunctions in such circumstances. See *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999).

Respondents' reliance on *Rauda v. Jennings*, 2023 WL 3029253 (S.D. Cal. Apr. 20, 2023), is misplaced. In Rauda, the petitioner had no pending statutory motion before the BIA and sought to enjoin removal based on generalized hardship. Here, Petitioner has a live motion to reopen supported by new evidence of changed country conditions.

DHS's conduct exemplifies the systemic problem the requested injunction is meant to prevent. The agency has refused to provide an individualized assessment of Petitioner's statutory claims and is instead implementing a blanket policy of immediate removal without adjudicating congressionally protected rights.

It is that policy—as applied to Petitioner—not the underlying removal order, that this action seeks to enjoin. The policy's application would nullify statutory procedures, deny due process, and expose Petitioner to torture and persecution abroad, causing precisely the kind of irreparable harm Congress sought to prevent through reopening procedures under INA § 1229a(c)(7) and protection screening under 8 C.F.R. §§ 208.16–208.18.

The APA likewise authorizes courts to postpone agency action to prevent irreparable harm. See 5 U.S.C. § 705. Section 705 applies even in removal contexts where statutory rights are at stake; courts have recognized its authority to postpone agency action to prevent irreparable harm, including when removal would moot pending claims. See, e.g., *Grace v. Barr*, 965 F.3d 883, 891–92 (D.C. Cir. 2020); *Make the Road New York v. Wolf*, 962 F.3d 612, 627 (D.C. Cir. 2020).

The Ninth Circuit has recognized that courts retain jurisdiction to issue injunctions under the All Writs Act when agency action threatens to moot statutory claims before they can be adjudicated. See *Garcia-Izquierdo v. Garland*, No. 21-70649, 2022 WL 168577, at *1 (9th Cir. Jan. 19, 2022) (mem.). Other courts have affirmed this principle in analogous contexts. See, e.g., *Garcia-Izquierdo v. Gartner*, No. 04-CV-7377 (RCC), 2004 WL 2093515, at *2 (S.D.N.Y. Sept. 17, 2004) (holding that a district court "may order that a petitioner's deportation be

stayed . . . when a stay is necessary to preserve the Court's jurisdiction of the case").

Section 1252(g) does not shield DHS from judicial oversight when its conduct threatens to extinguish statutory rights before they can be heard. The Court retains jurisdiction to preserve the *status quo*, prevent irreparable injury, and ensure that Petitioner's claims are adjudicated on the merits.

Petitioner has raised substantial statutory claims, and this Court retains jurisdiction to enter a temporary restraining order pending adjudication of the preliminary injunction.

IV
SECTION 1252(g) DOES NOT STRIP JURISDICTION OVER PROCESS-BASED CHALLENGES.

Respondents invoke 8 U.S.C. § 1252(g) to argue that this Court lacks jurisdiction to enjoin the execution of Petitioner's removal order. That argument misreads both the statute and the nature of the relief sought.

Petitioner does not challenge DHS's discretionary authority to execute removal orders in the abstract. He seeks narrowly tailored relief to preserve adjudication of a pending statutory motion to reopen—a right Congress expressly protected under INA § 1229a(c)(7) and § 241(b)(3).

Removal before the Board of Immigration Appeals rules on that motion would nullify Petitioner's statutory claims and foreclose judicial review. Courts have consistently held that § 1252(g) does not bar jurisdiction-preserving injunctions that protect access to adjudication. See *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999).

Respondents' reliance on *Rauda v. Jennings*, 2023 WL 3029253 (S.D. Cal. Apr. 20, 2023), is misplaced. In *Rauda*, the petitioner had no pending statutory motion before the BIA and sought to enjoin removal based on generalized hardship.

Here, Petitioner has a live motion to reopen supported by new evidence of changed country conditions, and DHS has already litigated his custody classification under § 235(b)(2) before the Immigration Judge, and has an ongoing appeal pending before the BIA. The relief sought is not discretionary interference. it is process protection.

Moreover, courts—including the Ninth Circuit—have recognized that they retain jurisdiction to issue injunctions under the All Writs Act when agency action threatens to moot statutory claims before they can be adjudicated. See United States v. United Mine Workers, 330 U.S. 258, 290 (1947); Garcia-Izquierdo v. Garland, 2022 WL 168577 (9th Cir. Jan. 19, 2022) (Mem). The APA likewise authorizes courts to postpone agency action to prevent irreparable harm. See 5 U.S.C. § 705.

Section 1252(g) does not shield DHS from judicial oversight when its conduct threatens to extinguish statutory rights or inflict irreparable injury before they can be heard. The Court retains jurisdiction to preserve the status quo and ensure that Petitioner's claims are adjudicated on the merits.

V
DHS's ATTEMPT TO TRIGGER A JURISDICTIONAL BAR FAILS BOTH FACTUALLY AND LEGALLY

DHS seeks a jurisdictional "do-over," attempting to reclassify Petitioner under INA § 241(a) not to correct factual error or introduce new evidence, but to

invoke 8 U.S.C. § 1252(g) and divest both the Immigration Judge and this Court of jurisdiction. This maneuver fails for two reasons.

First, the record reflects consistent litigation under a single theory—INA § 235(b)(2)—for over five months. DHS classified Petitioner as an arriving alien, detained him under § 235(b)(2), and litigated his custody status accordingly. The Immigration Judge rejected that classification, finding Petitioner was arrested in the interior after years of residence and governed by § 236(a). The IJ held that DHS's custody posture was procedurally improper and ordered individualized bond adjudication. See Exh. T (IJ Custody Memorandum and Order).

DHS never once raised a claim that the Petitioner is subject to INA § 241(a). In fact, the DHS appealed those IJ findings that 236(a) not 235(b)(2) applies and that appeal is still pending. See, Exhibit U.

Agency precedent confirms that custody classification is not a fluid or discretionary label, but a legal status that remains controlling absent a change in procedural posture recognized by statute or regulation. See *Matter of M-S-*, 27 I&N Dec. 509, 510–11 (A.G. 2019) (holding that detention authority is determined by the initial custody classification and cannot be re-designated midstream absent new proceedings); *Matter of L-Q-i-*, 27 I&N Dec. 664, 665–66 (BIA 2019) (holding that the initial custody classification follows the alien even into subsequent removal proceedings unless a new basis for custody arises).

DHS cannot now retroactively reclassify Petitioner under § 241(a) to avoid judicial review of its failed policy posture. Courts reject such jurisdictional gamesmanship, particularly where the agency's own filings and conduct contradict

its newly asserted position. See *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999).

Second, even if § 241(a) were to apply, it would not eliminate Petitioner's statutory protections. INA § 241(b)(3) prohibits removal to a country where the noncitizen's life or freedom would be threatened on account of protected grounds. Implementing regulations require a credibility determination before removal. See 8 C.F.R. § 208.16(b); § 208.18(b)(1) (CAT claims); § 241(b)(3).

These provisions confirm that a noncitizen subject to a final removal order retains the right to seek protection and must receive an individualized hearing before an Immigration Judge if credible fear is asserted.

The Ninth Circuit has recognized that the right to protection under asylum and CAT is not extinguished by the existence of a removal order. See *Toor v. Lynch*, 789 F.3d 1055, 1057 (9th Cir. 2015). But the survival of those rights post-removal does not justify bypassing pre-removal adjudication. See also 8 C.F.R. § 1240.11(a)(2); *United States v. Accardi*, 347 U.S. 260, 266–68 (1954). Indeed, premature removal may inflict the very harms Congress intended to prevent—and result in irreparable injury, and violate express statutory and regulatory safeguards.

Thus, DHS's reclassification effort fails both factually—given its prior litigation posture—and legally, because even under § 241(a), Petitioner retains the right to adjudication of his protection claims before removal. The Court should reject this maneuver as procedurally improper and incompatible with the statutory safeguards Congress enacted.

DHS's insistence that Petitioner's 2012 removal order constitutes all the due process to which he is entitled—despite new evidence and changed country

conditions—directly contradicts Congress's design in INA § 1229a(c)(7) and § 241(b)(3), and mirrors the agency's recent position opposing stay relief in the Ninth Circuit, where it argued that no further process was required.

These provisions preserve the right to reopen proceedings and seek protection when circumstances materially change. DHS's attempt to reclassify detention to evade those statutes underscores the need for judicial intervention to prevent removal that would nullify statutory rights and inflict irreparable injury without due process of law.

Immediate protection by this Court is therefore necessary to preserve those rights and maintain the *status quo* pending full adjudication.

V
PETITIONER WILL SUFFER IRREPARABLE HARM ABSENT EMERGENCY RELIEF

Removal before the Board adjudicates Petitioner's motion to reopen will inflict irreparable harm that no later court can remedy

First, removal would immediately sever Petitioner from his disabled U.S.-citizen spouse and his U.S.-citizen grandchild with Level-3 autism, both of whom depend on him for daily care and stability.

These family members face exceptional hardship if deprived of Petitioner's support, and Congress expressly designed cancellation of removal under INA § 240A(b) to protect such families from precisely this kind of harm. Courts recognize that family separation and disruption of critical medical and educational support constitute irreparable injury. See Leiva-Perez v. Holder, 640 F.3d 962, 969 (9th Cir. 2011).

Second, removal would expose Petitioner to grave danger in El Salvador,

where individuals with visible tattoos are targeted for arbitrary detention, torture, and extrajudicial abuse under the ongoing State of Exception. Petitioner's tattoos are benign in meaning but have been misidentified by Salvadoran authorities as gang-related. The risk of persecution or torture is the quintessential irreparable harm, implicating life, liberty, and physical safety in ways no later ruling could remedy.

Third, removal now would nullify Petitioner's pending motion to reopen—the sole statutory safeguard Congress provided to allow long-term residents to present new evidence and seek cancellation, asylum, and protection. Petitioner's motion invokes three distinct forms of relief: cancellation of removal under INA § 240A(b), adjustment of status under § 245(a), and asylum under § 208(a), each grounded in statutory protections Congress enacted to prevent precisely this kind of harm.

These claims are supported by extensive documentation, including medical records, country-condition reports, and sworn declarations. Once executed, removal would extinguish the only procedural vehicle available to vindicate Congress's design and deprive Petitioner of any meaningful opportunity for adjudication.

The government's opposition suggests that post-removal adjudication remains viable, but that assertion ignores the practical and legal barriers to pursuing reopening or protection from abroad. As detailed in Petitioner's TRO application, all harms—procedural, humanitarian, and statutory—would be inflicted by the act of removal itself.

The injury arises not from DHS's general authority to execute removal orders, but from its decision to do so before Congress's prescribed safeguards can be applied. Courts retain jurisdiction to enjoin such premature execution when it threatens to moot statutory claims and foreclose judicial review. See *Singh v. Holder,* 638 F.3d 1196, 1202–03 (9th Cir. 2011); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999).

Finally, no adequate alternative remedy exists. Because motions to reopen carry no automatic stay and the Board has denied a stay, Petitioner remains subject to imminent removal absent judicial intervention to preserve ongoing adjudication.

Without a temporary restraining order, removal will occur before this Court can hear the preliminary-injunction motion, rendering that proceeding moot and foreclosing review of the statutory and constitutional claims presented. The equities and public interest strongly favor maintaining the status quo to prevent irreparable harm to Petitioner and his family.

VI
THE BALANCE OF EQUITIES AND PUBLIC INTEREST STRONGLY FAVOR TEMPORARY RELIEF

DHS has ignored the severe and well-documented harms that removal would inflict on Petitioner's disabled U.S.–citizen spouse and his young grandchild with Level-3 autism, both of whom depend on him for daily care and stability. Removal would also expose Petitioner himself to a well-documented risk of torture and persecution in El Salvador, where individuals with visible tattoos face arbitrary detention and abuse under the ongoing State of Exception.

Without a temporary restraining order, removal will occur before this Court can hear the preliminary-injunction motion, rendering that proceeding moot and

foreclosing review of the statutory and constitutional claims presented. A temporary restraining order is therefore necessary to preserve jurisdiction, maintain the status quo, and prevent irreparable injury. These facts underscore why temporary relief is essential to preserve adjudication and prevent irreparable harm.

Because the government is a party, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Both weigh decisively in favor of preserving the status quo until Petitioner's statutory claims can be adjudicated.

Petitioner faces imminent removal that would sever him from his disabled U.S.-citizen spouse and his profoundly autistic U.S.-citizen grandson, both of whom depend on him for daily care and stability. Removal would also expose Petitioner to arbitrary detention and torture in El Salvador, where individuals with visible tattoos are routinely targeted under the ongoing State of Exception. These harms are not speculative—they are well-documented, imminent, and irreversible. See *Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999).

The government, by contrast, faces no cognizable hardship from a brief delay in removal while the Board of Immigration Appeals adjudicates a pending statutory motion to reopen. DHS's decision to execute removal now reflects a broader policy shift toward expedited enforcement without individualized adjudication— while ignoring statutory obligations.

A short injunction simply preserves the status quo and ensures that Congress's procedural safeguards are not nullified by premature enforcement. The government retains full authority to remove Petitioner if the Board ultimately

denies relief.

The public interest likewise favors temporary relief. Courts have long recognized that preserving access to lawful procedures and preventing wrongful removal serve the public interest. See *Leiva-Perez*, 640 F.3d at 970; *Nken*, 556 U.S. at 436. Congress enacted reopening procedures, cancellation of removal, and protection screening to ensure that vulnerable individuals are not deported without a fair opportunity to present their claims. Upholding those safeguards reflects the public's interest in orderly adjudication, family unity, and compliance with humanitarian obligations.

The requested relief does not interfere with DHS's enforcement authority—it ensures that enforcement proceeds only after statutory claims are adjudicated. That balance favors temporary protection now, followed by full adjudication on the merits.

VII
CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court continue the existing restraining orders and issue an Order to Show Cause why a preliminary injunction should not be granted. DHS's attempt to reclassify custody midstream—after months of litigation under a contrary theory—violates agency precedent, undermines statutory safeguards, and threatens removal without individualized adjudication. Even if INA § 241(a) applied, Petitioner retains the right to protection under INA §§ 241(b)(3) and 1229a(c)(7), and the implementing regulations require an individualized hearing before removal.

Absent immediate judicial intervention, DHS's reclassification maneuver

risks nullifying statutory rights and inflicting irreparable harm without meaningful review. The Court should preserve jurisdiction, maintain the status quo, and continue temporary protection pending full adjudication of Petitioner's claims.

Dated: October 8, 2025

Respectfully submitted,

s/Donovan J Dunnion .
Attorney for Petitioner,
Nester Paul Hernandez