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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| | Case No. '25CV2629 BAS DDL |
| NESTER PAUL HERNANDEZ-MORALES,<br>Petitioner,<br>v.<br>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.<br>Respondents. | PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |

## INTRODUCTION

1. Petitioner Néstor Paul Hernandez-Morales has resided in the United States for more than twenty years, with deep family, business, and community ties. He is the beneficiary of an approved I-130 petition filed by his U.S.-citizen spouse. On June 25, 2025, after voluntarily appearing for a scheduled USCIS adjustment-of-status interview, ICE arrested him and transferred him to the Otay Mesa ICE Processing Center.

2. On August 18, 2025, the Immigration Judge ("IJ") held a custody redetermination hearing under INA § 236(a). DHS argued that Petitioner was detained under § 235(b)(2) and therefore ineligible for bond.

3. By contrast, the INA and its implementing regulations provide that individuals like Petitioner — long-term residents apprehended in the interior and placed in § 240 proceedings — are detained, if at all, under § 236(a), which expressly authorizes Immigration Judges to conduct custody redeterminations. See 8 C.F.R. §§ 1003.19(a), 1236.1(d). The Ninth Circuit has confirmed that an 'application for admission' is a discrete event that occurs when a noncitizen presents themselves for entry, not a permanent status that attaches to everyone who entered without inspection. *Torres v. Barr*, 976 F.3d 918, 932 (9th Cir. 2020) (en banc).

4. The IJ rejected DHS's argument, finding that Petitioner is not an "arriving alien," that § 236(a) governs custody, and that Petitioner posed no danger and only a mitigated flight risk. The IJ set a $1,500 bond with Alternative to Detention (ATD) as appropriate.

5. DHS filed a Notice of Intent to Appeal (Form EOIR-43), which under

8 C.F.R. § 1003.19(i)(2) automatically stayed the IJ's bond order and barred Petitioner's release while the appeal is pending. In practice, such appeals extend detention for months or years, making habeas the only timely remedy.

6. Petitioner's ability to obtain relief from the pending BIA appeal is futile. In July 2025, ICE issued a memorandum instructing its attorneys to coordinate with EOIR to reject bond redetermination hearings for all individuals who entered without inspection, regardless of length of residence or location of arrest.

7. That outcome effectively deprives Petitioner of liberty for years and directly conflicts with Ninth Circuit precedent, the statutory framework, and due process of law, leaving habeas as the only timely and effective remedy.

8. Despite recent federal court rulings rejecting Respondents' position, DHS and EOIR continue to maintain that all noncitizens who entered the United States without inspection are categorically ineligible for bond redetermination hearings, treating them as perpetual "applicants for admission" under 8 U.S.C. § 1225(b)(2)(A), regardless of how long they have lived in this country or where they were apprehended. This interpretation directly contravenes the statute, binding Ninth Circuit precedent, and the Fifth Amendment's Due Process Clause. See *Rodriguez Vazquez v. Bostock*, No. 3:25-cv-05240-TMC (W.D. Wash. Apr. 24, 2025), Dkt. 29, 38; *Bautista v. Noem*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 2025), Dkt. 14; *Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020).

9. In September 2025, the BIA formally adopted the new position in a precedential decision, *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025),

holding that such individuals fall under § 235(b)(2) and are categorically ineligible for bond. Given that ruling, DHS is effectively guaranteed to prevail before the BIA, forcing Petitioner to seek relief in the Ninth Circuit Court of Appeals regardless of the facts of his case.

10. Following Matter of Yajure Hurtado, DHS and most immigration judges have treated noncitizens who entered without inspection as categorically ineligible for bond under § 235(b)(2). In the rare instance where an IJ grants bond under § 236(a), DHS automatically appeals, triggering an indefinite stay of release while the new policy is litigated before the BIA and federal appellate courts. In practice, this regime ensures that all such individuals remain detained—regardless of their length of residence, family ties, or humanitarian equities. The resulting blanket denial of effective bond relief demonstrates that administrative remedies are foreclosed, leaving judicial intervention as the only avenue to secure timely release consistent with § 236(a), Ninth Circuit precedent, and due process.

Petitioner seeks habeas corpus, declaratory, and injunctive relief prohibiting Respondents from categorically applying § 235(b)(2) to him as a long-term resident in § 240 proceedings, and to prevent irreparable harm to himself and his family.

## JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. §§ 2241 and 1331. The Suspension Clause protects habeas review of civil immigration detention. See U.S. Const. art. I, § 9, cl. 2.

6. Venue properly lies in the Southern District of California under 28 U.S.C. § 1391(e)(1)–(2). Petitioner was arrested in this District, the Immigration

Judge conducted bond proceedings here, and the ICE Field Office Director responsible for Petitioner's custody resides in this District.

7. The Court may grant declaratory and injunctive relief under 28 U.S.C. §§ 2201–2202 and the APA, 5 U.S.C. § 702, to the extent necessary.

PARTIES

8. Petitioner Néstor Paul Hernandez-Morales is a native and citizen of El Salvador who has resided continuously in the United States for more than twenty years. He was arrested in this District on May 14, 2025, following his voluntary appearance for a USCIS adjustment interview, and remains detained in ICE custody

9. Respondent Pam Bondi is the Attorney General of the United States and is sued in her official capacity as the head of the Department of Justice. The Attorney General is responsible for the fair administration of the laws of the United States.

10. Kristi Noem, Secretary of the U.S. Department of Homeland Security (DHS), is sued in his official capacity as the Cabinet official charged with administration and enforcement of the immigration laws, including custody and release authority. See 8 U.S.C. § 1103(a).

11. Respondent Executive Office for Immigration Review is a component agency of the Department of Justice responsible for conducting removal and bond hearings of noncitizens. EOIR is comprised of a lower adjudicatory body administered by immigration judges and an appellate body known as the Board of Immigration Appeal (BIA). Immigration judges issue bond redetermination hearing decisions, which are then subject to appeal to the BIA.

EOIR is sued as an agency respondent because its policies and decisions are at issue in this action.

12. Respondent Todd Lyons is the Acting Director of U.S. Immigration and Customs Enforcement (ICE) and is sued in his official capacity. ICE is responsible for the detention of Petitioners.

13. Patrick Divver is the Immigration and Customs Enforcement Field Office Director for San Diego County, including the Otay Mesa detention facility and is sued in his official capacity.

## LEGAL BACKGROUND

14. The Immigration and Nationality Act (INA) establishes four distinct detention regimes for noncitizens in removal proceedings. Section 236(a) (8 U.S.C. § 1226(a)) is the default, discretionary authority for individuals "*found in the United States*" and placed in § 240 proceedings; it expressly authorizes an immigration judge to conduct custody redeterminations at the outset of detention (see 8 C.F.R. §§ 1003.19(a), 1236.1(d)).

15. Section 236(c) (8 U.S.C. § 1226(c)) mandates detention for noncitizens charged with or convicted of certain criminal and terrorism-related offenses. Section 235(b)(1) & (b)(2) (8 U.S.C. § 1225) governs custody at the inspection stage, with expedited removal under subsection (b)(1) and other applicants for admission under subsection (b)(2). Finally, section 241 (8 U.S.C. § 1231) provides for post–final-order detention (not at issue here).

16. Section 236(a) governs the detention of long-term residents arrested in the interior and placed in § 240 removal proceedings. By its plain terms, it applies "*pending a decision on whether the [noncitizen] is to be removed from the United*

*States*," and the implementing regulations vest an immigration judge with bond-hearing jurisdiction (8 C.F.R. §§ 1003.19(a), 1236.1(d)).

17. By contrast, section 235(b) applies exclusively at ports of entry. Its text and structure confirm that an "*application for admission*" is a single event occurring at entry, triggering inspection or fear-screening procedures. The Supreme Court in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and this Court en banc in *Torres v. Barr*, 976 F.3d 918, 932 (9th Cir. 2020), held that "*applicant for admission*" is not a perpetual status but a discrete event at the border.

18. Regulatory history under IIRIRA reinforces this textual split. In its 1997 rulemaking, EOIR explained that persons who entered without inspection but are placed in § 240 proceedings remain detained under § 236(a), not § 235. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997).

19. Despite that clear framework, ICE's July 8, 2025 internal guidance directed field offices to reject § 236(a) bond hearings for all individuals who entered without inspection, irrespective of their length of residence or place of arrest.

20. In September 2025, the BIA adopted this position in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), holding that those individuals are categorically ineligible for bond under § 235(b)(2).

21. Several district courts in this Circuit have enjoined that categorical policy and ordered bond hearings under § 236(a) for long-term residents arrested in the interior. See *Rodriguez Vazquez v. Bostock*, No. 3:25-cv-05240-TMC (W.D.

Wash. Apr. 24, 2025); *Bautista v. Sec'y of DHS*, No. 5:25-cv-01873 (C.D. Cal. July 2025).

22. Petitioner is a long-term California resident arrested in the interior and placed in § 240 proceedings. Under the INA's text, its implementing regulations, and controlling Ninth Circuit authority, § 236(a) governs his detention and bond-hearing rights. The government's contrary, categorical reliance on § 235(b)(2) directly conflicts with this statutory and regulatory scheme and forecloses any administrative remedy—necessitating this Court's intervention.

## FACTUAL AND PROCEDURAL BACKGROUND

23, Petitioner Néstor Paul Hernandez-Morales is a native and citizen of El Salvador who has resided in the United States for over two decades. He lives in California with his U.S.-citizen family, provides daily care for his grandson with Level-3 autism, and assists his spouse following major spinal surgery. He holds a valid California contractor's license and owns a construction company that employs U.S. citizens—who have been left without work since his detention.

24. On May 14, 2025, after voluntarily appearing for a scheduled USCIS adjustment-of-status interview based on an approved I-130 petition filed by his U.S.-citizen spouse, DHS arrested and detained Mr. Hernandez-Morales. At the time of arrest, DHS charged him with inadmissibility under INA § 212(a)(9)(A)(i). He was transferred to the Otay Mesa ICE Processing Center, where he remains detained within the jurisdiction of the Otay Mesa Immigration Court.

25. Through counsel, Petitioner filed a motion to reopen on or about June 20, 2025, and a supplemental motion on July 7, 2025, including claims based on changed country conditions and requests for asylum, withholding of removal, and

protection under the Convention Against Torture. Both motions remain pending before the Board of Immigration Appeals.

26. Petitioner is the beneficiary of an approved I-130 petition filed by his U.S.-citizen spouse. Once placed in removal proceedings, jurisdiction over any adjustment application based on that petition transferred exclusively to the Immigration Judge. See 8 C.F.R. § 1245.2(a)(1)(i) ("in the case of any alien who has been placed in deportation proceedings or in removal proceedings … the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file"); see also 8 C.F.R. § 1240.11(a)(1) (requiring the IJ to advise respondents of apparent eligibility for relief and afford them an opportunity to apply).

27. On August 18, 2025, the Immigration Court held a custody redetermination hearing. The Immigration Judge rejected Respondents' classification, finding that INA § 236(a) governs because Petitioner is not an arriving alien, had resided in the United States for decades, and was arrested in the interior. On the merits, the IJ found that Petitioner posed no danger and only a mitigated flight risk, and set bond at $1,500 with ATD conditions.

28. DHS appealed, invoking the automatic stay under 8 C.F.R. § 1003.19(i)(2). In its appeal, DHS advanced the categorical theory that all individuals who entered without inspection are subject to mandatory detention under INA § 235(b)(2) and therefore ineligible for bond. The Immigration Judge—consistent with every federal court to consider the issue—rejected that theory, explaining that Petitioner's interior arrest decades after entry placed him squarely within § 236(a), not § 235(b)(2).

29. Nevertheless, in September 2025, the Board of Immigration Appeals issued *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), adopting DHS's categorical position. That precedential ruling forecloses any possibility of relief on Petitioner's pending appeal. Even if the Ninth Circuit ultimately overturns *Yajure Hurtado*, the appellate process will take years—during which Petitioner will remain in detention without bond.

30. This renders administrative remedies illusory and leaves habeas corpus, injunctive, and declaratory relief from this Court as the only meaningful mechanism to prevent further irreparable injury resulting from unlawful government conduct.

## CAUSES OF ACTION

### COUNT I
### Violation of 8 U.S.C. § 1226(a): Unlawful Continued Detention Despite Bond Grant

31. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

32. Under 8 U.S.C. § 1226(a), noncitizens apprehended in the interior and placed in INA § 240 removal proceedings are detained, if at all, subject to discretionary bond redetermination by an immigration judge.

33. On August 18, 2025, the IJ found that Petitioner is not an "arriving alien," determined that he posed no danger and only a mitigated flight risk, and ordered release on a $1,500 bond with ATD.

34. Although 8 C.F.R. § 1003.19(i)(2) provides for an automatic stay of release pending appeal, Congress did not intend that mechanism to function as a

categorical override of immigration judges' bond authority or to perpetuate detention for years where an IJ has already determined release is appropriate.

35. The congressional intent is reflected in § 236(a), which expressly authorizes custody redeterminations and release on bond "pending a decision on whether the alien is to be removed from the United States," and is confirmed by § 240A(b)(1), which authorizes cancellation of removal for long-term residents to prevent exceptional hardship to U.S. citizen spouses and children — not to inflict that hardship through prolonged and unnecessary detention while removal proceedings drag on.

36. Respondents' continued reliance on § 235(b)(2) to nullify the IJ's order, combined with their invocation of the automatic stay to prolong detention for years, constitutes a tactical abuse of the limited procedural mechanism Congress created. This practice exceeds the statutory authority conferred by § 236(a), unlawfully denies Petitioner the release Congress authorized, and frustrates the very family-unity protections Congress embedded in both bond and cancellation-of-removal provisions.

37. Accordingly, Respondents' actions violate the Immigration and Nationality Act, and Petitioner is entitled to habeas, declaratory, and injunctive relief.

38. Petitioner's pending claims for asylum, withholding of removal, and CAT protection further underscore the need for meaningful access to release while those claims are adjudicated. Continued detention inflicts precisely the type of harm Congress sought to alleviate through discretionary bond authority and humanitarian safeguards embedded in the INA.

COUNT II
Violation of the Administrative Procedure Act (5 U.S.C. § 706)
Unlawful Denial of Bond Jurisdiction

39. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

40. The INA and its implementing regulations authorize Immigration Judges to redetermine custody for noncitizens apprehended in the interior and placed in § 240 proceedings. See 8 U.S.C. § 1226(a); 8 C.F.R. §§ 1003.19(a), 1236.1(d). For decades, EOIR and DHS consistently applied § 236(a) to such individuals, affording bond hearings before an IJ, consistent with the statute's text and EOIR's 1997 rulemaking.

41. In July 2025, however, ICE abruptly abandoned this settled practice. Through an internal memorandum, ICE instructed its trial attorneys to resist § 236(a) bond hearings across the board for all who had entered without inspection, regardless of how long they had resided in the United States or where they were arrested. That directive, though aimed at DHS attorneys, has had the practical effect of shifting the adjudicatory framework in practice, including in Petitioner's case, where EOIR adopted the same categorical position.

42. Two months later, in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), the Board of Immigration Appeals formally ratified that position, holding that all noncitizens who entered without inspection are detained under § 235(b)(2) and categorically ineligible for bond. That decision stripped Immigration Judges of jurisdiction to conduct bond hearings, even where an IJ had already found release appropriate.

43. This abrupt reversal of decades of practice was adopted without notice and comment, lacks reasoned explanation, and is contrary to the governing statute and regulations. The BIA's post hoc rationale in *Yajure Hurtado* cannot cure those defects.

44. Under *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), this Court owes no Chevron deference to the agency's construction of § 235(b)(2), but must apply its own judgment to the statutory text. Properly construed, § 235(b)(2) does not apply to long-term residents arrested in the interior and placed in § 240 proceedings.

45. Accordingly, Respondents' categorical reclassification is unlawful, arbitrary, capricious, and not in accordance with law within the meaning of 5 U.S.C. § 706(2).

COUNT III
Violation of Procedural Due Process (Fifth Amendment)

46. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

47. The Fifth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Noncitizens in removal proceedings possess a fundamental interest in liberty and in being free from unnecessary official restraint.

48. Here, Petitioner was afforded an individualized custody redetermination under § 236(a). The Immigration Judge found that he is not an

"arriving alien," determined that he posed no danger and only a mitigated flight risk, and ordered his release on bond with conditions. Due process required that this individualized determination be honored, absent a lawful statutory basis for continued detention.

49. Respondents' invocation of § 235(b)(2) and reliance on the automatic stay provision of 8 C.F.R. § 1003.19(i)(2) to nullify the IJ's bond order, combined with their categorical refusal to recognize § 236(a) jurisdiction for noncitizens who entered without inspection, deprives Petitioner of a meaningful opportunity for release.

50. This tactic amounts to an abuse of process: a procedural device intended only for temporary review has been converted into an instrument for indefinite detention, ensuring that even individuals found releasable by an IJ remain imprisoned for months or years despite a judicial finding that release is appropriate.

51. Further, Congress expressly recognized that long-term residents develop deep family and community ties and that removal proceedings must account for the "exceptional and extremely unusual hardship" that detention and removal inflict on U.S. citizen spouses and children. 8 U.S.C. § 1229b(b)(1).

52. Respondents' categorical detention policy and their refusal to honor IJ bond determinations defeat that congressional intent, prolonging separation and inflicting the very harms Congress sought to prevent.

53. Such continued detention without effectual access to bond violates procedural due process. At a minimum, due process requires that individuals in civil immigration custody receive a bond hearing before a neutral adjudicator, with

consideration of ability to pay, alternatives to detention, and with the government bearing the burden of proof by clear and convincing evidence.

54. By overriding the IJ's bond order and foreclosing further individualized review, Respondents' policy and practice violate the Fifth Amendment.

## PRAYER FOR RELIEF

Petitioner respectfully requests that this Court:

A. Declare that INA § 236(a), not § 235(b)(2), governs Petitioner's custody as a long-term resident arrested in the interior and placed in § 240 proceedings, and that Respondents' contrary application of § 235(b)(2) is unlawful as applied;

B. Enjoin Respondents from enforcing any categorical policy or practice that denies Immigration Judges jurisdiction to conduct bond hearings under § 236(a) for noncitizens who entered without inspection but are placed in § 240 proceedings;

C. Set aside Respondents' unlawful detention policy, including the July 2025 ICE memorandum, and enjoin enforcement of the new policy articulated in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), as applied to Petitioner.

D. Issue a writ of habeas corpus directing Respondents to release Petitioner forthwith under the terms provided for in the IJ hearing order 14, 2025 or, in the alternative, should additional proceedings be necessary, to provide an immediate § 236(a) bond hearing before a neutral adjudicator consistent with *due process*;

E. Award reasonable attorneys' fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412, or any other applicable authority;

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F. Grant such other and further relief as this Court deems just and proper.

Dated: October 3, 2025

Respectfully submitted,

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

# EXHIBIT LIST

Exhibit A – I.J. Bond Memorandum & Order

Exhibit B – BIA Receipt of Appeal by DHS

Exhibit C – Declaration of Nestor Paul Hernandez-Morales

Exhibit D – Declaration of Petitioner's Spouse

Exhibit E – Letter from Petitioner's Daughter

Exhibit F – Medical Records

Exhibit G - I-`30 Approval Notice

Exhibit H - Contractors License

Exhibit I - Employment Authorization Card)

Exhibit J- Receipt -Motion to Reopen

Exhibit K- Receipt - Supplemental Motion to Reopen

Exhibit L– July 8, 2025 Internal Custody Policy Memo

Exhibit M- Matter of Yajure Hurtado, 29 I&N Dec. 216 (2015)