ADAM GORDON
United States Attorney
KIM A. C. GREGG
Assistant U.S. Attorney
California Bar No. 318764
Office of the U.S. Attorney
880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 546-68437
Facsimile: (619) 546-7751
Email: Kim.Gregg@usdoj.gov

Attorneys for Respondents

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; WARDEN OF OTAY MESA DETENTION CENTER,

Respondents.

Case No.: 25-cv-02629-BJC-MMP

RESPONDENTS' RETURN TO PETITIONER'S AMENDED HABEAS PETITION

Date: October 24, 2025
Time: 2:30 p.m.
Judge: Hon. Benjamin J. Cheeks

I. INTRODUCTION

Petitioner filed an amended habeas petition under 28 U.S.C. § 2241 challenging his post-removal-order detention by Immigration and Customs Enforcement (ICE) and requesting the Court to declare that he is subject to discretionary detention under 8 U.S.C. § 1226(a) and order his release. But as Petitioner's claims stem from the

Department of Homeland Security's (DHS) decision to detain Petitioner for purposes of executing his final order of removal, 8 U.S.C. § 1252(g) bars judicial review over his claims. Moreover, because Petitioner's same challenge to ICE's detention authority is currently pending on appeal with the Board of Immigration Appeals (BIA), the Court should dismiss this petition for failure to exhaust administrative remedies. Even if the Court is not inclined to dismiss the petition on jurisdiction or prudential grounds, it must deny Petitioner's habeas petition because there is no dispute that he is subject to a final, executable removal order and is thus lawfully detained under 8 U.S.C. § 1231(a).

II. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is a citizen and national of El Salvador. Exh. 1 at 1.[1] He has been removed on several prior occasions and has repeatedly re-entered the United States, including on June 2, 1999. *See id.*; Exh. 2 at 2, 10–11.

On January 16, 2003, DHS served Petitioner with a Notice to Appear, charging him with inadmissibility under section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States who has not been admitted or paroled. Exh. 1. On May 24, 2004, an Immigration Judge (IJ) found Petitioner removable as charged, denied his applications for relief, and ordered him removed to El Salvador. Exh. 2. On October 19, 2005, the BIA affirmed the IJ's decision. Exh. 3.

Petitioner later filed a Petition for Review (PFR) of the BIA's decision with the Ninth Circuit Court of Appeals. The Ninth Circuit dismissed the PFR on June 8, 2012, and issued its mandate on August 1, 2012, thereby rendering Petitioner's order of removal final and executable. *See* Exh. 4.

On May 14, 2025, ICE arrested Petitioner, and he was booked into the San Diego Metropolitan Correction Center (MCC) for potential criminal prosecution for illegal

[1] The attached exhibits are true copies of documents obtained from ICE counsel, with limited redactions to protect against unauthorized disclosures of personally identifiable information that federal agencies maintain under the Privacy Act, 5 U.S.C. § 552a.

re-entry.[2] *See* Exh. 5 at 2–4. On May 28, 2025, Petitioner was released from MCC and transferred to ICE custody at Otay Mesa Detention Center (OMDC) for purposes of executing his final order of removal to El Salvador. *See id.* at 5. Petitioner has remained detained in ICE custody pursuant to 8 U.S.C. § 1231(a).

On August 18, 2025, Petitioner appeared before an IJ for a bond hearing. *See* Exh. 6 at 1. At the hearing, DHS mistakenly argued that Petitioner was subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A). *See id.* at 2. The IJ disagreed with DHS and found Petitioner subject to discretionary detention under 8 U.S.C. § 1226(a) and ordered him release on bond. *See id.* at 2, 4. DHS appealed the IJ's bond order to the BIA, and after further review of the record, filed a motion to remand the bond proceedings to clarify that Petitioner was and continues to be subject to detention under 8 U.S.C. § 1231(a) based on his final order of removal. *See* Exh. 7.

On October 9, 2025, Petitioner filed this amended habeas petition, requesting that the Court declare he is subject to discretionary detention under 8 U.S.C. § 1226(a) and order his release on the bond that the IJ granted. Respondents' return to Petitioner's amended petition follows.[3]

---

[2] Petitioner represents: "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." ECF No. 6 at ¶ 1. As with Petitioner's other habeas matter before this Court (Case No. 25-cv-02551), Respondents have found no record of Petitioner being booked into custody or appearing for a USCIS interview in June 2025. ICE records reflect that Petitioner was arrested on May 14, 2025, booked into MCC, and transferred to OMDC two weeks later. *See* Exh. 5 at 2–5.

[3] Petitioner filed his original habeas petition in this case on October 3, 2025, along with a corresponding motion for temporary restraining order. ECF Nos. 1, 2. At the time, the case was before Chief Judge Cynthia Bashant, and the Chief Judge ordered Respondents to respond to the original petition and motion for temporary restraining order no later than October 14, 2025. ECF No. 3. Petitioner subsequently filed the instant amended habeas petition on October 9, 2025, and the Chief Judge thereafter transferred the case to this Court due to a related case. ECF Nos. 6, 7. Because Petitioner's amended petition is the operative pleading and supersedes his prior petition and motion for temporary restraining order, Respondents hereby responds to the amended petition.

III. ARGUMENT

The Court should dismiss Petitioner's amended habeas petition because 8 U.S.C. § 1252(g) bars review over his claim and he has failed to exhaust his administrative remedies. Even if the Court reviewed his claims, the Court must deny Petitioner's claims because is lawfully detained under 8 U.S.C § 1231(a).

A. Petitioner's claims are barred under 8 U.S.C. § 1252(g).

Petitioner bears the burden of establishing that this Court has subject matter jurisdiction over her claims. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.").

Pertinent here, 8 U.S.C. § 1252(g) bars judicial review over any claim or cause of action arising from any decision to commence or adjudicate removal proceedings or execute removal orders. *See* 8 U.S.C. § 1252(g). These three actions "represent the initiation or prosecution of various stages in the deportation process" and there was "good reason for Congress to focus special attention upon, and make special provision for" them. *Reno v. Am.-Arab Anti Discrimination Comm.*, 525 U.S. 471, 483 (1999). "Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9.

Here, Petitioner's habeas claims stem from the decision to execute his final order of removal. The record shows that ICE arrested and detained Petitioner "due to having a final order of removal" and that he was "pending repatriation to back to El Salvador." Exh. 5 at 5. Had ICE not exercised its discretion to execute his removal order, Petitioner would not have brought this habeas petition. Because Petitioner's claims necessarily arise "from the decision or action by the Attorney General to . . . execute removal orders," review of Petitioner's claims is barred under 8 U.S.C § 1252(g). Thus, the Court must dismiss the habeas petition.

///

B. Petitioner has not exhausted his administrative remedies.

Even if the Court had jurisdiction to review Petitioner's claims, they should be dismissed for failure to exhaust administrative remedies. While 28 U.S.C. § 2241 "does not specifically require petitioners to exhaust direct appeals before filing petitions for habeas corpus," the Ninth Circuit "require[s], as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241." *Castro Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006). Like jurisdictional limits and limits on venue, prudential limits are "ordinarily not optional." *Id.*

Courts have required prudential exhaustion where "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (simplified). "When a petitioner does not exhaust administrative remedies, a district court ordinarily should either dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies, unless exhaustion is excused." *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011).

Here, all three prudential concerns weigh in favor of requiring agency exhaustion. First, Petitioner seeks from this Court an order upholding the IJ's decision that he is subject to discretionary detention under § 1226(a). Because his claims necessarily implicate whether the IJ's findings and conclusions regarding ICE's detention authority were correct, agency expertise on the issue is "necessary to generate a proper record and reach a proper decision." *Puga*, 488 F.3d at 815. And "the BIA is the subject-matter expert in immigration bond decisions." *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019). Thus, the BIA is the appropriate body to

first pass on the IJ's determination that Petitioner is subject to discretionary detention under § 1226(a).

Second, allowing Petitioner to present his detention claim for the first time before the district court would permit him to bypass the administrative scheme in place to deal with such claims. Ninth Circuit precedent has required petitioners in these circumstances "to have exhausted administrative remedies by appealing to the BIA before asking the federal district court to review the IJ's decision." *Leonardo*, 646 F.3d at 1160 (explaining that pursuing habeas review before appealing to the BIA was an "improper" shortcut). Especially here, where there is a pending motion to remand the case to the IJ for further proceedings in light of Petitioner's final order of removal, "[t]he exhaustion requirement avoids premature interference with the agency's processes and helps to compile a full judicial record." *Liu v. Waters*, 55 F.3d 421, 424 (9th Cir. 1995) (simplified).

And third, the BIA can afford Petitioner the same relief he seeks here—that is, to clarify the statutory authority under which he is detained. Because the BIA has the ability and expertise to determine this issue, administrative review would allow the agency "to preclude the need for judicial review." *Puga*, 488 F.3d at 815. As all three prudential factors favor requiring administrative exhaustion, the Court must impose the requirement in this case. *See, e.g.*, *Francisco Cortez v. Nielsen*, No. 19-cv-00754-PJH, 2019 WL 1508458, at *4 (N.D. Cal. Apr. 5, 2019) (requiring exhaustion and dismissing the habeas petition where the petitioner filed it while his BIA appeal challenging his detention was pending).

Here, because there is a pending appeal and motion to remand concerning Petitioner's custody determination, his administrative remedies have not been exhausted. *See id.* And there is no reason to waive the exhaustion requirement. *See e.g.*, *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (reversing a district court's waiver of a petitioner's exhaustion requirement, noting that such waiver "would permit aliens to bypass the deadlines and pathways of judicial review prescribed by the INA").

Petitioner suggests that exhausting administrative remedies would be futile because the government is set on its position that he is subject to mandatory detention under § 1225(b)(2)(A). *See* ECF No. 6 at ¶¶ 23, 31. But as DHS's motion to remand states, further review of the record reveals that Petitioner was not subject to either § 1225(b)(2)(A) or § 1226(a), but rather, to § 1231(a) because of his final order of removal. *See* Exh. 7. Because the BIA can remedy errors that occurred during the bond proceedings, including remanding the case for further consideration and clarification of Respondents' detention authority, requiring exhaustion would not be futile in this case.

Thus, for the above reasons, Respondents request the Court to dismiss the habeas petition for failure to exhaust administrative remedies. *See Mukhamadiev v. U.S. Dep't of Homeland Security*, No. 25-cv-1017-DMS-MSB, 2025 WL 1208913, at *3 (S.D. Cal. Apr. 25, 2025) (dismissing habeas petition after finding petitioner should be required to exhaust administrative review scheme).

C. Petitioner is lawfully detained.

Even if the Court assumed jurisdiction and excused exhaustion of Petitioner's claims, the Court must deny his request for relief because Petitioner is lawfully detained under 8 U.S.C. § 1231(a). "To determine whether Congress has authorized [a petitioner's] detention, we must first identify the statutory provision that purports to confer such authority on the Attorney General." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008).

ICE's authority to detain, release, and re-detain noncitizens who are subject to a final order of removal is governed by 8 U.S.C. § 1231(a), which provides that "the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). "During the removal period, the Attorney General *shall* detain the alien." 8 U.S.C. § 1231(a)(2)(A) (emphasis added). "If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. § 1231(a)(3); *see also* 8 U.S.C. § 1231(a)(6) (providing for detention beyond

the removal period for certain "inadmissible or criminal aliens"). The regulations permit re-detention of a noncitizen where "appropriate to enforce a removal order." 8 C.F.R. § 241.4(l)(2)(iii). But the detention cannot be indefinite; "once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

Here, Petitioner is subject to a final, executable order of removal, which means he has no right to remain in the United States. *See* Exhs. 2–4. As mentioned above, ICE detained Petitioner so it could execute his removal order to El Salvador. *See* Exh. 5 at 5 (stating that Petitioner "was placed under arrest due to having a final order of removal" and that he would be detained "pending repatriation to back to El Salvador."). The regulations permit ICE to re-detain Petitioner for this purpose. 8 C.F.R. § 241.4(l)(2)(iii) (authorizing re-detention "to enforce a removal order").

To the extent Petitioner raises any prolonged detention arguments under *Zadvydas*, such claims would fail. Since re-detaining Petitioner on May 28, 2025, ICE has been diligently pursuing removal efforts, including transferring him to a facility in Louisiana in June to board a flight to El Salvador. ICE's present removal efforts are halted only because of this Court's order enjoining Respondents "from removing Petitioner from the United States or this District pending further order of the Court[.]" *See Nestor Paul Hernandez-Morales v. Bondi et al.*, 25-cv-02551-BJC-MMP at ECF No. 4 (Sept. 30, 2025). There is no dispute that Respondent can effectuate Petitioner's prompt removal to El Salvador once this Court's stay in his earlier habeas matter is lifted. It is Petitioner, not Respondents, who has caused the delay in his removal and has thereby prolonged his detention.

Because Petitioner's removal is reasonably foreseeable, his continued detention is authorized under § 1231(a). *See Zadvydas*, 533 U.S. at 699. As such, Petitioner is lawfully detained, and the Court must deny his habeas petition.[4]

[4] That DHS mistakenly argued § 1225(b)(2)(A) as the statutory authority for Petitioner's detention during the IJ's bond proceedings is of no moment. There can be

IV. CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court dismiss or deny Petitioner's amended habeas petition.

DATED: October 14, 2025

ADAM GORDON
United States Attorney

s/ Kim A. C. Gregg
KIM A. C. GREGG
Assistant United States Attorney

Attorneys for Respondents

---

no dispute that Petitioner is subject to a final order of removal, and that § 1231(a) and corresponding regulations authorize detention for purposes of executing his removal order. Moreover, § 1225(b) and § 1226(a) apply only where removal proceedings are pending. Because Petitioner's removal proceedings are not pending and he is subject to a final, executable order of removal, he is lawfully detained under § 1231(a). Thus, Petitioner's arguments concerning § 1226(a) must be rejected as inapplicable here.