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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-2629-BJC-MMP REPLY TO RETURN TO PETITION FOR WRITE OF HABEAS CORPUS AND MOTION FOR TRO AND PRELIMINARY INJUNCTION

I
INTRODUCTION

This habeas proceeding under 28 U.S.C. § 2241 challenges the legality of Petitioner's continued civil immigration detention. It does not seek to enjoin removal or contest the validity of Petitioner's long-final removal order. The sole issue is present custody authority and procedural compliance.

On August 18, 2025, the Immigration Judge exercised jurisdiction under INA § 236(a), found no danger and only a mitigable flight risk, and ordered release on a $1,500 bond with Alternatives to Detention. DHS appealed, invoking the automatic stay under 8 C.F.R. § 1003.19(i)(2), and framed the dispute as whether § 235(b)(2) or § 236(a) governs custody.

The automatic stay is being used not to preserve the status quo, but to implement a new detention policy—contrary to congressional intent, historic practice, the APA, and controlling Ninth Circuit precedent. That policy shift is likely to require months or years of continued custody to resolve through the BIA and Ninth Circuit, inflicting irreparable harm and rendering relief illusory.

After this Petition was filed, DHS moved the BIA to remand and reclassify custody under INA § 241—five months into detention—without providing the procedural safeguards its own regulations require upon re-detention, including written notice stating reasons and a prompt informal interview. See 8 C.F.R. §§ 241.4(l)(1), 241.13(i)(3). BIA precedent also prohibits retroactive changes to initial custody status. Petitioner opposed reclassification; the BIA has not ruled.

This reply addresses both the Government's Return to Petition and its Opposition to Injunctive Relief. Respondents' threshold defenses fail: 8 U.S.C. § 1252(g) does not bar review of present custody authority; exhaustion is prudential

and excused; and the regulatory stay does not strip this Court's habeas jurisdiction.

The Immigration Judge's unrebutted factual findings are compelling and demonstrate why immediate release is the proper remedy. Even if § 241 applied, DHS's failure to follow its own mandatory re-detention procedures renders continued custody unlawful. See *Constantinovici v. Bondi*, No. 3:25-cv-02405-RBM-AHG (S.D. Cal. 2025), for a discussion of § 241 requirements.

Petitioner respectfully requests an order directing immediate release, with terms consistent with the Immigration Judge's § 236(a) bond determination. Alternatively, should the Court entertain DHS's attempted § 241 reclassification, Petitioner requests immediate release under the same supervisory conditions already authorized by the I.J.

Petitioner's continued detention is inflicting irreparable harm on both Petitioner and his U.S. citizen family and violates congressional mandates and binding regulatory safeguards.

II
FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Néstor Paul Hernandez-Morales is a long-settled resident of the United States who has lived openly in the interior for decades. He holds a contractor's license, operates a construction business, pays taxes, and is active in his community (Exs. C, D, H). DHS arrested Petitioner in the interior on May 14, 2025, but classified him as an "arriving alien" and initiated custody under INA § 235(b)(2), triggering mandatory detention and bypassing the procedural safeguards applicable to long-term residents (Ex. A).

On August 18, 2025, the Immigration Judge exercised jurisdiction under INA § 236(a), expressly rejected DHS's arriving-alien classification, and ordered

Petitioner released on a $1,500 bond with Alternatives to Detention after finding no danger and only a mitigable flight risk (Ex. A).

DHS appealed the IJ's decision and invoked the regulatory automatic stay under 8 C.F.R. § 1003.19(i)(2), framing its appeal as a categorical dispute over whether § 235(b)(2) or § 236(a) governs custody for individuals who entered without inspection (EWI) but have long residence in the interior. The appeal advances a categorical policy position that DHS now applies § 235(b)(2) to all EWIs regardless of residence or arrest location (Ex. B).

Following the filing of Petitioner's habeas Petition in this consolidated matter and the Court's scheduling order of October 6, 2025 (and subsequent transfer to District Judge Benjamin J. Cheeks) (Ex. J), the district court in a collateral habeas action (Case No. 25-cv-2551-BJC-MMP) denied the collateral habeas relief on October 15, 2025, concluding that 8 U.S.C. § 1252(g) precluded jurisdiction.

Petitioner timely filed a notice of appeal in that collateral matter on October 16, 2025, and perfected a Motion for Stay and an Emergency Motion for Stay Pending Hearing on October 18, 2025. Those appellate filings assert that DHS's refusal to conduct a credible-fear determination and its classification decisions are ultra vires acts that fall outside § 1252(g)'s shield for discretionary execution of removal.

After this Petition was filed, DHS moved the Board of Immigration Appeals to remand and reclassify Petitioner's custody under INA § 241—over five months into his detention—without providing the § 241 procedural safeguards the agency's own regulations require when re-detaining an alien, including written notice stating the reasons for re-detention and a prompt informal interview (see 8

C.F.R. §§ 241.4(l)(1), 241.13(i)(3)) (Return Ex.7). Petitioner opposed DHS's motion; the BIA has not yet ruled on the appeal or motion.

BIA precedent—including *Matter of M-S-*, 27 I&N Dec. 509 (BIA 2019), and *Matter of Q. Li*, 27 I&N Dec. 598 (BIA 2019)—holds that initial custody classification applies, and changes to procedural posture are not applied retroactively.

In their Return, Respondents allege that Petitioner absconded in 2012. This allegation is unsupported by the record. The record contains no evidence of a bag-and-baggage letter, executed removal reporting notice, or notice of failure to appear, and the 2012 removal order was never executed.

To the contrary, DHS issued employment authorization and allowed Petitioner to live and work openly in the community for over a decade. Petitioner was never detained under § 241; rather, it appears DHS exercised humanitarian discretion to permit him to remain. (Exs. A, C, G–I)

The record reflects that no procedural safeguards required for re-detention under § 241 were provided, and no post-detention custody review was conducted. Instead, DHS reclassified custody under a new policy of categorical no-bond classification (Ex. A; Return Ex. 7)

Petitioner remains detained at Otay Mesa ICE Processing Center (Return at 2; see also Ex. A). No credible-fear determination has been conducted. No removal order has been lawfully executed. No pre-detention notice or individual interview has occurred; no post-detention custody review under § 241 has occurred – as Respondent has maintained the no bond posture under 235(b((2) throughout his detention.

The Immigration Judge's unrebutted bond findings and § 236(a) determination remain on the record; DHS's appeal and BIA reclassification motion are pending; and the collateral-habeas appeal and final hearing on the stay motions remain in the Ninth Circuit

Meanwhile, Petitioner, his U.S. citizen disabled spouse, and his autistic grandchild continue to suffer daily injury from unlawful custody that defies the Immigration Judge's findings, bypasses required procedural safeguards, and disregards Petitioner's long-standing residence, employment, and community ties—including disruption of necessary care for his autistic grandchild (Exs. A, C, D, F–I).

III
ARGUMENT

A. Jurisdiction Is Proper Under 28 U.S.C. § 2241

Respondents' reliance on 8 U.S.C. § 1252(g) is misplaced. The Supreme Court construes § 1252(g) narrowly to three discrete actions the Attorney General may take —to commence proceedings, adjudicate cases, or execute removal orders. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

Petitioner does not ask this Court to control a discrete decision to "execute" removal on any date. He challenges current custody authority and process: DHS's insistence on mandatory no-release detention under § 235(b)(2) notwithstanding the IJ's § 236(a) bond order, and DHS's attempted pivot to § 241 without the regulatory notice-and-interview required by 8 C.F.R. §§ 241.4(l)(1), 241.13(i)(3). Those claims concern who may detain now and under what procedures, not whether or when removal is executed, and thus fall outside § 1252(g).

Section 1252(b)(9) is inapplicable because Petitioner does not seek review

of the removal order or its merits but challenges detention procedures independent of removal adjudication; and § 1252(f)(1) does not bar the individualized injunctive relief requested here, as *Garland v. Aleman Gonzalez*, 596 U.S. 543, 556–58 (2022), limits certain nationwide prospective relief but does not preclude relief tailored to remedy unlawful custody.

Petitioner filed this habeas petition before Respondents sought to reclassify his custody under § 241, and the BIA has not remanded or issued any final reclassification; the Court should therefore evaluate the lawfulness of the custody status that currently governs him.

Petitioner challenges Respondents' newly applied categorical § 235(b)(2) policy as unlawful—contrary to statute and historic practice and adopted without notice-and-comment—and seeks to enjoin its application to his custody classification pending review. Those claims are distinct from any challenge to the timing of removal and fall squarely within § 2241.

Habeas jurisdiction under 28 U.S.C. § 2241 squarely reaches immigration detention independent of removal adjudication. See *Jennings v. Rodriguez*, 138 S. Ct. 830, 839–42 (2018); *Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Singh v. Holder*, 638 F.3d 1196, 1202–03 (9th Cir. 2011).

It also extends to post-order custody while removal is pending. *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001). The Ninth Circuit permits district-court habeas review where detention issues are "sufficiently independent" of removal merits. *Lopez-Marroquin v. Barr*, 955 F.3d 759, 759 (9th Cir. 2020); *Singh*, 638 F.3d at 1202–03.

While § 1252(g) protects the Executive's discretion over when/whether to

execute removal, Petitioner does not seek to restrain that discretion—only to prevent unlawful detention and to require the procedures the regulations mandate if DHS proceeds under § 241. See *Rauda v. Jennings*, 55 F.4th 773, 777 (9th Cir. 2022).

Nor does the regulatory automatic stay of the IJ's bond, 8 C.F.R. § 1003.19(i)(2), divest this Court of Article III habeas authority; an agency regulation cannot strip jurisdiction or immunize unlawful custody from judicial review.

To the extent Respondents invoke other channeling provisions, none bars individualized relief here: § 1252(b)(9) does not apply because Petitioner's claims target detention procedures, not the "review of an order of removal," and § 1252(f)(1) does not foreclose individual injunctive relief. *Garland v. Aleman Gonzalez*, 596 U.S. 543, 556–58 (2022).

Because Petitioner's claims concern present custody authority and process, not a discrete execution decision, § 1252(g) does not apply, and jurisdiction lies under 28 U.S.C. § 2241.

Petitioner therefore seeks immediate habeas relief from unlawful detention and an injunction prohibiting application of the categorical § 235(b)(2) no-bond policy to him; immediate relief is necessary to prevent continuing and irreparable harm to Petitioner and his dependent family members, and to avoid rendering habeas relief illusory by requiring exhaustion where administrative review cannot meaningfully or timely remedy the ongoing wrongful deprivation of liberty.

B. Exhaustion Is Excused and the Petition May Proceed

The exhaustion requirement under § 2241 is judicially created and subject to equitable exceptions. It is not jurisdictional, and courts may excuse it where

administrative remedies are inadequate, unavailable, or would cause irreparable harm. See *McCarthy v. Madigan*, 503 U.S. 140, 144–49 (1992); *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018); *Brown v. Davenport*, 596 U.S. 118, 129 (2022).

Petitioner filed this habeas petition after the Immigration Judge rejected DHS's § 235(b)(2) theory, finding that classification inconsistent with controlling Ninth Circuit precedent, and after DHS appealed to the BIA on that same ground. Following the filing of this petition, DHS sought to remand for the purpose of reclassifying Petitioner's custody under INA § 241, and now advances that new custody theory before this Court.

The BIA has not remanded, and no formal custody reclassification has occurred. Requiring exhaustion at this stage—after five months of detention—would allow Respondents to delay judicial review while pursuing a new statutory basis for detention. DHS has not complied with the notice, interview, and individualized custody review procedures required to effectuate detention under § 241.

In addition, Respondents have not addressed the existing legal and procedural deficiencies under the original § 235(b)(2) detention theory previously rejected by the IJ. Under these circumstances, further administrative proceedings would serve no meaningful purpose, would not provide the immediate and individualized relief sought, and would render habeas relief illusory.

Prudential exhaustion may be excused where agency review cannot meaningfully remedy the alleged injury, would cause irreparable delay, or where the claim raises legal or constitutional questions unsuited to agency resolution.

Here, Petitioner challenges Respondents' categorical § 235(b)(2) no-bond

policy as applied to long-term residents arrested in the interior, as well as DHS's attempted § 241 reclassification.

Petitioner also raises legal and APA claims that the BIA cannot meaningfully resolve on the expedited timetable necessary to prevent ongoing, irreparable harm. Requiring exhaustion under these circumstances would only prolong unlawful detention and defeat the very habeas remedy § 2241 protects.

a. Governing law and standard

The Ninth Circuit applies a prudential exhaustion rule to § 2241 habeas petitions but routinely excuses exhaustion where strict application would be futile, would render relief illusory, would cause irreparable harm, or where the claim presents primarily legal or constitutional questions unsuited to agency factfinding and correction.

Relevant factors are whether (1) agency expertise is necessary to develop the record, (2) allowing the petitioner to proceed would encourage deliberate bypass of the administrative scheme, and (3) administrative review is likely to correct the claimed error. See *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004); *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007); *Leonardo v. Crawford*, 646 F.3d 1157, 1159 (9th Cir. 2011).

b. Exhaustion here would be futile and would render habeas relief futile

The Government's categorical § 235(b)(2) no-bond position pre-dated this petition and was rejected by the Immigration Judge under controlling Ninth Circuit precedent and longstanding practice for interior arrestees. See Torres v. Barr, 976 F.3d 918, 927 (9th Cir. 2020).

After the Department circulated a July 8, 2025 memorandum formalizing the categorical no-bond policy, the BIA began adopting that approach in August 2025.

DHS then appealed the IJ's § 236(a) bond determination based solely on that policy—not on any individualized factual dispute.

After this habeas petition was filed, DHS sought to reclassify Petitioner's custody under § 241. In doing so, the agency bypassed the regulatory notice-and-interview requirements in 8 C.F.R. §§ 241.4(l)(1) and 241.13(i)(3) and disregarded the individualized custody factors the IJ had already applied.

Those factors remain unaddressed and are unlikely to receive meaningful consideration under the categorical no-bond policy Respondents now seek to impose without congressional authorization.

Requiring exhaustion under these circumstances would (i) permit the agency to insulate unlawful detention by shifting statutory bases post-filing, (ii) delay judicial relief until it is illusory for a petitioner facing continuing custody, and (iii) deny the only immediately enforceable remedy capable of preventing continuing harm—release or supervision. See *Laing v. Ashcroft*, 370 F.3d 994, 998–1001 (9th Cir. 2004); *Puga v. Chertoff*, 488 F.3d 812, 815–16 (9th Cir. 2007).

As the Supreme Court recognized, Futility exists where the agency has adopted a fixed position and an adverse outcome is preordained. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). And the Ninth Circuit has held that Deprivation of constitutional rights unquestionably constitutes irreparable injury. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017).

The relief requested is immediate release from unlawful detention and an individualized injunction barring application of the categorical policy to Petitioner. Administrative review cannot deliver those forms of relief in time to prevent continuing, irreparable injury; exhaustion is therefore futile and should be excused.

c. Legal and constitutional claims weigh strongly against exhaustion

Petitioner challenges a categorical, policy-based detention regime that applies without individualized consideration and raises legal and constitutional questions unsuited to agency factfinding. See *Carr v. Saul*, 141 S. Ct. 1352, 1362 (2021) ("[T]he agency's expertise may be of marginal relevance when the question is purely one of statutory interpretation."); *Sarei v. Rio Tinto*, 550 F.3d 822, 831–32 (9th Cir. 2008); *Sims v. Apfel*, 530 U.S. 103, 108–10 (2000).

The core claims are legal and procedural: (1) the categorical § 235(b)(2) policy exceeds statutory authority and was adopted without notice-and-comment; and (2) DHS's attempted pivot to § 241 failed to follow applicable regulatory notice-and-interview requirements.

These claims do not depend on agency factfinding and are ill suited to the exhaustion doctrine's goal of developing a factual record for agency correction. Futility exists where the agency has adopted a fixed position and an adverse outcome is preordained. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

Ninth Circuit precedent permits waiver of prudential exhaustion where administrative review cannot alter the outcome or would be futile; here the BIA cannot prevent the imminent harms at issue even if it were to address the legal questions later. See *Arevalo v. Hennessy*, 882 F.3d 763, 766–67 (9th Cir. 2018).

d. Response to Respondents' exhaustion theory and pending BIA action

Respondents rely on a pending BIA appeal and motion to remand to argue the petition must be dismissed for failure to exhaust. That argument fails because (1) the BIA has not issued any final reclassification or remand that would resolve the custody question, (2) the attempted reclassification occurred after the petition

was filed and thus cannot undo the immediate harms already presented, and (3) the individualized relief Petitioner seeks—release and an injunction barring application of the categorical policy to him—is precisely the sort of emergency relief the BIA cannot provide on the expedited timetable required to prevent irreparable harm.

The BIA's eventual decision—if any—cannot retroactively cure the unlawful detention already suffered or provide the immediate judicial remedy required to prevent further irreparable harm. As the Supreme Court recognized, Futility exists where the agency has adopted a fixed position and an adverse outcome is preordained. *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

Respondents' categorical policy and post-filing reclassification effort reflect precisely that posture. Because exhaustion under § 2241 is a prudential, not jurisdictional, requirement, the Court retains discretion to excuse it where delay would defeat the purpose of habeas relief. See *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018).

Allowing Respondents to wait out judicial review by seeking post-filing reclassification would reward delay and undermine habeas's core purpose as a prompt remedy for unlawful detention.

e. Prudential factors and tailoring relief

Courts evaluating prudential exhaustion under § 2241 consider whether (1) agency expertise is necessary to develop the record, (2) excusing exhaustion would encourage deliberate bypass of the administrative scheme, and (3) administrative review is likely to correct the claimed error. See *Laing v. Ashcroft*, 370 F.3d 994, 998–1001 (9th Cir. 2004).

Agency expertise: limited here because the dominant issues are statutory and procedural; the BIA's adjudicative role does not supply the emergency, individualized remedy necessary to prevent liberty loss.

Encouraging agency resolution: excusing exhaustion in this narrow, emergency context does not encourage bypass of administrative processes generally; it prevents agencies from using post-filing procedural maneuvers to defeat timely judicial review.

Ability to correct mistakes: because the requested relief is individualized and urgent, judicial relief is necessary now; the Court may, however, tailor any relief to preserve legitimate agency interests (for example, by limiting relief to Petitioner and to the specific policy application at issue).

C. Petitioner Is Not Lawfully Detained Under § 1231, and DHS's Post-Filing Reclassification Violates Statutory and Constitutional Requirements

Respondents now contend that even if their original § 235(b)(2) classification was improper, detention is independently authorized under 8 U.S.C. § 1231(a) because Petitioner is subject to a final order of removal. This post-filing pivot cannot cure the unlawfulness of the detention. DHS cannot retroactively supply a new statutory basis for custody five months after arrest without complying with the procedural requirements Congress and the agency's own regulations impose.

a. DHS Has Not Complied With Either the Pre-Detention or Post-Detention Requirements Under § 1231

Throughout these proceedings, removal has been subject to judicial or administrative stays, and at no point during the past five months has DHS

conducted any individualized assessment of the likelihood of imminent removal. Instead, DHS has relied entirely on a categorical no-bond detention policy to justify continued custody. That reliance is improper under the governing statutes and regulations, which require case-specific review before prolonged detention can be sustained. See *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

DHS's procedural failures began at the outset of detention. The agency did not provide the required written notice or conduct the required individual interview at the time it now claims § 1231 detention authority attaches. See 8 C.F.R. § 241.4(l)(1) (requiring notice and initial interview prior to detention or re-detention under § 241); 8 C.F.R. § 241.13(i)(3). Absent these threshold procedural steps, DHS had no lawful basis to detain Petitioner under § 1231 in the first place.

Further, DHS now seeks to redo its custody classification—an action that would have significant implications for past detention, which would have mandated release absent compliance with these pre-detention procedural requirements, and for any future detention, which must include individualized custody review applying the same factors already addressed by the IJ.

DHS's failure to comply with 8 C.F.R. § 241.4(l)(1) and 8 C.F.R. § 241.13(i)(3) is not a technicality; it is dispositive. In *Constantinovici v. Bondi*, No. 3:25-cv-02405-RBM-AHG (S.D. Cal. Oct. 10, 2025) (unpublished), the Southern District of California granted habeas relief and ordered immediate release after finding that DHS violated these exact regulatory provisions by failing to provide timely notice of revocation and a prompt informal interview. The court emphasized that failure to follow these procedures violates both the governing regulations and the Fifth Amendment's Due Process Clause.

These procedural defects are not merely technical; they go to the heart of lawful custody authority and due process. Without compliance, DHS cannot lawfully invoke § 1231 detention.

Should the Court accept DHS's proposed reclassification at this late stage, the same procedural defect exists here. Alternatively, if DHS continues to rely on the original § 235(b)(2) theory, that position rests on an unlawful, categorical no-bond policy adopted without congressional authorization or compliance with the notice-and-comment requirements of the Administrative Procedure Act. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) (agency policies with binding effect require notice-and-comment rulemaking). In either scenario, DHS has not lawfully established custody authority

b. DHS May Not Retroactively Cure an Unlawful Detention by Shifting Statutory Bases Post-Filing

DHS may not retroactively cure an unlawful detention by shifting statutory bases post-filing. Custody classification is determined at the time of initial arrest and detention—not through post-hoc adjustments. See *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) (holding that individuals transferred from expedited to full removal proceedings remain detained under § 235(b) based on initial classification); *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025) (In short: the moment of arrest determines classification.).

Respondents arrested Petitioner in the interior and misclassified him under § 235(b)(2), triggering mandatory detention without bond. The Immigration Judge correctly rejected that theory, exercised § 236(a) jurisdiction, and granted bond after finding Petitioner neither a flight risk nor a danger. Respondents now seek to

pivot to § 1231 only after the filing of this habeas petition—an attempt to insulate the unlawful detention from review.

Courts have recognized that detention authority must reflect the statutory provision applicable during the relevant procedural posture. See *Prieto-Romero v. Clark*, 534 F.3d 1053, 1059 (9th Cir. 2008). Such post-hoc rationalization undermines meaningful judicial review, deprives the court of a stable basis for evaluating custody legality, and cannot satisfy the requirements of § 1231 or the Constitution.

c. Respondents Have Not Shown a Likelihood of Removal in the Reasonably Foreseeable Future

Even if § 1231 were applicable, DHS has not met its burden under *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). Continued detention under § 1231 is permissible only where removal is "significantly likely to occur in the reasonably foreseeable future." Petitioner has now been detained for five months and has made a sufficient showing that removal is not imminent. Once that showing is made, the burden shifts to DHS to rebut it with evidence of imminent removal and procedural compliance.

DHS cannot invoke *Zadvydas* as a blank check for indefinite detention; it must demonstrate both. It has done neither. DHS has provided no travel arrangements, no repatriation documentation, no interview records, and no custody determinations. DHS merely voices a desire to remove Petitioner without satisfying the required legal prerequisites.

DHS has also failed to comply with the custody review procedures required under 8 C.F.R. § 241.4, including written notice, a post-order interview, and an individualized determination. These safeguards are mandatory—not

discretionary—and their absence renders continued detention unlawful. The existence of a stay in a separate matter does not excuse

DHS's failure to maintain a lawful basis for detention in compliance with statute and regulation, nor its failure to conduct required custody reviews. The burden remains with DHS, and it has failed to meet it.

d. DHS's Categorical Refusal to Provide Bond or Individualized Custody Review Violates Both § 236(a) and § 1231

The Immigration Judge found that Petitioner is not dangerous and poses only a mitigable flight risk, and ordered release under § 236(a). DHS's categorical refusal to provide bond or individualized review conflicts with both statutory schemes. Under § 236(a), release was ordered; under § 1231, DHS is required to conduct post-order custody reviews under 8 C.F.R. § 241.4.

DHS's failure to comply with the mandatory procedures under 8 C.F.R. § 241.4 is particularly significant here. The government did not effectuate detention under § 241 at the time of the 2012 removal order. Instead, for more than a decade, DHS allowed Petitioner to live openly in the community, issued employment authorization, and took no steps to execute the order.

This prolonged inaction further underscores that DHS cannot invoke § 1231 as if detention had followed the removal order in 2012; the regulatory prerequisites to lawful re-detention must be satisfied anew, and they were not

No pre-detention notice, no post-order interview, and no individualized custody determination were ever conducted when re-detention began in 2025, despite the existence of judicial and administrative stays preventing removal for an indefinite period. Under § 241.4, those procedural protections are mandatory prerequisites to lawful detention—not optional formalities. DHS's failure to follow

them renders its asserted § 1231 custody authority legally defective.

DHS's no-bond policy ignores both the IJ's unrebutted findings and its own regulatory obligations, effectively nullifying the statutory framework Congress enacted. Respondents' Return offers no individualized justification for continued detention and fails to address this categorical no-bond policy, as fully briefed in Petitioner's Memorandum of Points and Authorities in Support of the Motion for Temporary Restraining Order and Request for an Order to Show Cause for Preliminary Injunction.

D. DHS's Detention Practices Violate Due Process and Undermine Regulatory Protections

Respondents did not address Petitioner's due process arguments in their Return. Those arguments are therefore uncontested. Petitioner previously raised that DHS's categorical treatment of all EWIs as arriving aliens—and its reliance on the automatic stay mechanism to implement this policy—was designed solely to hold Petitioner in custody while the new policy was litigated through the BIA and the appellate courts, effectively guaranteeing no release for months or years.

This policy was enacted without congressional authorization or compliance with the Administrative Procedure Act, and it violates the Fifth Amendment's Due Process Clause. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

DHS now compounds these due process violations by seeking to change custody classification midstream—after five months of unlawful detention under one theory—to a new theory under § 1231, without providing pre-detention notice, post-detention individualized review, or any of the procedural safeguards required

by regulation.

Here, DHS has provided no notice of re-detention, no prompt interview, and no individualized assessment of flight risk or danger. It has categorically refused bond notwithstanding an Immigration Judge's order to the contrary. These procedural deficiencies are not minor—they strike at the core of lawful detention authority and violate the constitutional minimums required for continued deprivation of liberty.

This sequence of (1) prolonged detention under an unlawful no-bond policy, and (2) attempted reclassification without notice or individualized review, results in a double denial of due process: first, through reliance on an ultra vires categorical policy; and second, through circumvention of the mandatory procedures for post-order detention.

As the court recognized in *Constantinovici v. Bondi*, No. 3:25-cv-02405-RBM-AHG (S.D. Cal. Oct. 10, 2025) (unpublished), DHS's failure to follow these procedures violates both its regulations and the Fifth Amendment. The same due process defect is present here.

E. DHS's Detention Policy Violates the Administrative Procedure Act

DHS's categorical treatment of all EWIs as arriving aliens—and its use of the automatic stay mechanism to enforce that policy—constitutes a substantive rule that was neither authorized by Congress nor promulgated through the notice-and-comment procedures required by 5 U.S.C. § 553. See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 96 (2015) ("Agencies may promulgate legislative rules only through notice-and-comment rulemaking.").

The agency's decision to implement this sweeping detention framework

without statutory authority or public participation exceeds its delegated powers and bypasses the procedural safeguards Congress enacted to ensure transparency and accountability. See F*DA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("An agency may not bootstrap itself into an area in which it has no jurisdiction.").

This categorical detention policy alters the statutory scheme governing custody authority, overturns decades of settled application, and contravenes Congress's clearly expressed legislative intent. Such a sweeping policy cannot lawfully be adopted informally or through agency adjudication alone.

DHS's subsequent attempt to reclassify Petitioner under § 1231—after five months of detention—without providing pre-detention notice, a prompt interview, or individualized custody review further violates its own governing regulations. See 8 C.F.R. §§ 241.4(l)(1), 241.13(i)(3).

These procedural protections are front-loaded by design and cannot be satisfied retroactively months after detention begins. DHS's failure to provide notice and conduct a prompt interview at the outset renders its asserted § 1231 custody authority defective as a matter of law and exemplifies the kind of arbitrary and capricious agency action the APA forbids.

Agency action that conflicts with governing regulations, exceeds statutory authority, or fails to follow required procedures is arbitrary, capricious, and contrary to law. See 5 U.S.C. § 706(2)(A)–(C).

These defects are not merely procedural. They reflect a broader pattern of ultra vires conduct, disregard for congressional limits, and circumvention of the rulemaking requirements Congress imposed to prevent precisely this kind of

unchecked executive detention authority. The APA requires more—and DHS has failed to meet those basic obligations here.

IV
CONCLUSION

For the foregoing reasons, DHS's continued detention of Petitioner is unlawful under both 8 U.S.C. §§ 236(a) and 1231. Respondents have relied on an unauthorized categorical no-bond policy, failed to comply with mandatory regulatory procedures, and violated both constitutional due process and the Administrative Procedure Act.

To the extent Respondents now invoke § 1231 as a post-filing basis for detention, the Court may and should address the legality of that asserted authority to ensure meaningful habeas relief, as it was raised by Respondents and briefed by both parties. Alternatively, if the Court determines that the petition's scope must be amended, Petitioner respectfully requests leave to amend to conform to the issues presented and to grant interim relief pending that amendment.

Petitioner respectfully requests immediate release from unlawful custody. The Court need not specify the precise statutory mechanism—whether under the existing § 236(a) bond order or through supervised release under § 1231—because continued detention is unlawful under either framework. Should the Court deem it necessary to specify, Petitioner consents to release under either mechanism as determined appropriate by the Court.

Because Petitioner has demonstrated a strong likelihood of success on the merits, irreparable harm, and that the equities and public interest favor release, this Court should grant the writ or, in the alternative, issue a temporary restraining

order directing Petitioner's immediate release while these proceedings are resolved.

Respectfully submitted,

Dated October 20, 2025

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