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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Bernardio Benitez-Cornejo,

Petitioner,

v.

John E. Cantu, Field Office Director of
Enforcement and Removal Operations, Phoenix
Field Office, Immigration and Customs
Enforcement;

Kristi Noem, Secretary, U.S. Department of
Homeland Security;

Pamela Bondi, U.S. Attorney General;

Fred Figueroa, Warden of Eloy Detention
Center;

Todd Lyons, Acting Director, Immigration and
Customs Enforcement and Removal
Operations.

Respondents.

Case No.

**EMERGENCY
MOTION FOR
PRELIMINARY
INJUNCTION**

**MEMORANDUM OF
POINTS AND
AUTHORITIES IN
SUPPORT OF
MOTION FOR PI**

**Challenge to Unlawful
Incarceration; Request for
Declaratory and Injunctive
Relief**

NOTICE OF MOTION

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure and Rule 65-1 of the Local Rules of this Court, Petitioner moves this Court for an order enjoining Respondents John E. Cantú, in his official capacity as Field Office Director of Enforcement and Removal Operations, Phoenix Field Office, Immigration and Customs Enforcement, Kristi Noem, in her official capacity as the Secretary of the U.S. Department of Homeland Security ("DHS"), Pamela Bondi, in her official capacity as the U.S. Attorney General with authority over the Executive Office for Immigration Review, and Fred Figueroa, in his official capacity as Warden of the Eloy Detention Center, where Petitioner is detained, from continuing to detain Petitioner Bernardino Benitez-Cornejo, or ordering a bond hearing before an immigration judge. Respondents should also not transfer the Petitioner outside the District of Arizona, where he is presently located. Such an order would maintain the status quo while habeas jurisdiction is litigated, and would also ensure that Petitioner remains close to legal counsel and family.

The reasons for this Motion are in the accompanying Memorandum of Points and Authorities. As this Motion shows, Petitioner warrants a temporary restraining order and preliminary injunction as he is eligible for release or a bond hearing before an immigration judge.

Petitioner is submitting a Habeas petition for same, on the same grounds, and is also filing the motions for temporary restraining order and preliminary injunction to prevent irreparable injury before a hearing on his Habeas may be held. Petitioner has provided Respondents with notice of his motions for emergency injunctive relief. Exhs. D, E (Letter to Katherine Branch, Civil Chief, U.S. Attorney's Office, Arizona; Affidavit of Jesse Evans-Schroeder dated October 3, 2025).

WHEREFORE, Petitioner prays that this Court grant his request for a temporary

restraining order and preliminary injunction enjoining Respondents from continuing to detain him, order a bond hearing before an immigration judge in fifteen days, and enjoining Respondents from removing him to any third country without first providing him with constitutionally compliant procedures.

Dated: October 3, 2025

Respectfully Submitted

s/Jesse Evans-Schroeder
Attorney for Petitioner

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INTRODUCTION

Petitioner Bernardino Benitez-Cornejo seeks a Preliminary Injunction (PI) that requires Respondents to either release him from custody within seven days of the issuance of a PI, or order a bond hearing before an immigration judge within fifteen days where DHS bears the burden of demonstrating that his removal is reasonably foreseeable and whether his detention is justified (i.e. whether he poses a danger or a flight risk), and where the immigration judge must further consider whether, in lieu of detention, alternatives to detention exist to mitigate any risk that Respondents may establish. Petitioner additionally seeks a PI enjoining Respondents from transferring Petitioner outside the District of Arizona, where he is presently located.

Petitioner is a 64-year-old who has been placed in removal proceedings. He has been in the United States since around 2000. He has a partner here, three U.S. citizen stepchildren and six U.S. citizen grandchildren. He has many other friends in the community and has resided at the same residence for nearly 25 years. He has no criminal record and had gainful employment doing bar and booth remodeling before he was detained by ICE. Petitioner has remained in DHS custody since his initial detention on June 30, 2025.

Petitioner should prevail on this motion because he is likely to succeed on the merits of his claims. The text of 8 U.S.C. § 1226(a) and § 1225(b)(2) demonstrates that he is not subject to mandatory detention. The legislative history further supports the application of § 1226(a) to Petitioner. The Board's decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, is not entitled to deference because it contravenes the statutory language and legislative history, and it deviates from longstanding agency practice. Further, other federal courts have rejected the respondents' novel argument that 8 U.S.C. § 1225(b) governs the detention of every noncitizen without lawful immigration status.

Petitioner will also suffer irreparable harm in the absence of a PI. The balance of equities tips in his favor, and a PI is in the public interest. Prudential exhaustion is not required here due to futility, irreparable injury, and agency delay. Finally, there is no jurisdictional hurdle barring relief. This Court should thus grant this motion.

I. STATEMENT OF THE FACTS

Petitioner is a 64-year-old who has been placed in removal proceedings. He has been in the United States since around 2000.¹ He has a partner here, three U.S. citizen stepchildren and six U.S. citizen grandchildren. His partner and many of his children and grandchildren wrote letters in support of his bond request. He also has many other friends in the community and has resided at the same residence for nearly 25 years. He has no criminal record and had gainful employment doing bar and booth remodeling before he was detained by DHS.

On June 30, 2025, Petitioner went to a Home Depot to purchase materials for his job. He then went to order food from a Mexican and Guatemalan street food vendor. He was standing approximately 10 feet from the vendor when he was approached and seized by DHS officers (though the officers did not initially identify themselves as immigration officers). DHS officers pushed him against their van, zip-tied his hands, and told him not to flee. Only after he was restrained did DHS officers ask whether Petitioner had legal status, to which he replied he did not. DHS officers then searched Petitioner and confiscated his wallet without his consent.

Petitioner believes his detention was based solely on his Hispanic appearance. Petitioner has remained in DHS custody since his initial detention on June 30, 2025.

¹ Petitioner previously attempted to enter the United States on March 19, 2000; March 23, 2000; July 19, 2000; and July 24, 2000. During these attempted entries he encountered border patrol and was granted voluntary departure on those same dates.

On July 3, 2025, DHS issued a notice of custody determination concluding that Petitioner was subject to detention under 8 U.S.C. § 1226. Exh. B, Form I-863 Custody Determination Form. On that same form, Petitioner requested a review of the custody determination by the immigration judge. Id.

On July 17, 2025, the immigration judge denied the request for a custody redetermination. Exh. C, Immigration Judge Bond Redetermination Decision. The immigration judge concluded that she lacked jurisdiction to consider Petitioner's bond request based on the BIA's decision in *Matter of Q.Li*, 29 I&N Dec. 66 (BIA 2025). Specifically, she found that, based on that decision, Petitioner was considered an applicant for admission who had arrived in the United States under 8 U.S.C. § 1225 and was thus subject to mandatory detention. In the alternative, the immigration judge found that, if she did have jurisdiction, she would have granted Petitioner a \$5000 bond. Though noting Petitioner's multiple entries into the country, she found that the equities weighed in Petitioner's favor as he had three U.S. citizen stepchildren and six U.S. citizen grandchildren. She also observed that Petitioner told the court he intended to apply for asylum and related relief and wanted to seek a "path to future lawful status."

On July 18, 2025, Petitioner filed a notice of appeal of the immigration judge's decision with the BIA.

On July 22, 2025, DHS issued Petitioner a Notice to Appear before an immigration judge. The Notice charged Petitioner with removability under 8 U.S.C. § 1182(a)(6)(A)(i), as being present in the country without being admitted or paroled and under 8 U.S.C. § 1182(a)(6)(A)(i), as not having a valid U.S. status document.

On August 4, 2025, Petitioner moved the immigration court to suppress the evidence against him. Specifically, Petitioner argued that suppression was warranted under 8. C.F.R.

287.8(b)(2) because the detention was not based on reasonable suspicion and because it was an egregious violation of the Fourth Amendment. DHS opposed that motion on August 11, 2025.

Petitioner has been detained by Respondents since June 30, 2025. He is presently detained at the Eloy Detention Center in Eloy, Arizona.

II. LEGAL STANDARD

Petitioner is entitled to preliminary injunctive relief if he establishes that he is “likely to succeed on the merits, . . . likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [his] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Even if Petitioner does not show a likelihood of success on the merits, the Court may still grant relief if he raises “serious questions” as to the merits of his claims, the balance of hardships tips “sharply” in his favor, and the remaining equitable factors are satisfied. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). As shown below, Petitioner overwhelmingly satisfies both standards.

III. ARGUMENT

Petitioner should prevail on this motion because he is likely to succeed on the merits of his claims, likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and an injunction is in the public interest.

Respondents have violated the Immigration and Nationality Act and applicable regulations. Indeed, the text of 8 U.S.C. § 1226(a) and § 1225(b)(2) demonstrate that Petitioner is not subject to mandatory detention. The legislative history further supports the application of § 1226(a) to Petitioner. The Board’s decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, is not entitled to deference because it contravenes the statutory language and legislative history, and it deviates from longstanding agency practice. Further, other federal courts have rejected the Respondents’

novel argument that 8 U.S.C. § 1225(b) governs the detention of every noncitizen without lawful immigration status.

Petitioner will also suffer irreparable harm in the absence of a PI. The balance of equities tips in his favor, and a PI is in the public interest. Prudential exhaustion is not required here due to futility, irreparable injury, and agency delay. Finally, there is no jurisdictional hurdle barring relief. This Court should thus grant this motion.

A. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIM

Petitioner is likely to succeed on his claim that his ongoing detention by Respondents under 8 U.S.C. § 1225(b)(2), and the denial of access to bond, is unlawful.

1. Discretionary Versus Mandatory Detention in Removal Proceedings

Noncitizens detained by DHS while in removal proceedings generally can request a bond—or “custody redetermination”—hearing before an immigration judge. 8 U.S.C. 1226(a); 8 C.F.R. 1236.1(d)(1). If the noncitizen does not present a danger to others, a threat to the national security, or a flight risk, the immigration judge may order that individual released on conditional parole or upon the posting of a monetary bond of no less than \$1,500. 8 U.S.C. 1226(a)(2)(A)-(B); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

Certain categories of noncitizens are subject to mandatory detention while in removal proceedings. Under a provision in IIRIRA, if “an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [8 U.S.C. 1229a].” 8 U.S.C. 1225(b)(2)(A). In the same bill, Congress defined “admission” and “admitted” as the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. 1101(a)(13)(A). In other words, the terms “admission” and “admitted” “refer to inspection and authorization by an immigration officer at the port of entry.”

Hing Sum v. Holder, 602 F.3d 1092, 1101 (9th Cir. 2010). Thus, as the Supreme Court has explained, 8 U.S.C. 1225(b)(2)(A) only applies to noncitizens who are “seeking admission into the country,” *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018), i.e., those who are “arriving in the United States.” *Clark v. Martinez*, 543 U.S. 371 (2005).

Consistent with the text of 8 U.S.C. 1225(b)(2)(A), federal regulations preclude immigration judges from granting bond to “arriving aliens,” 8 C.F.R. 1003.19(h)(1)(B)(ii), a phrase defined in relevant part as “an applicant for admission coming or attempting to come into the United States at a port-of-entry.” 8 C.F.R. 1001.1(q). The decision to preclude immigration judges from granting bond to arriving aliens—as distinct from all noncitizens who entered without admission—was the product of notice and comment rulemaking in early 1997 following the enactment of the IIRIRA. As the regulations were initially proposed, all “[i]nadmissible aliens in removal proceedings” would have been ineligible for bond. *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal*, 62 Fed. Reg. 444, 483 (Jan. 3, 1997). After receiving comments, however, the Attorney General deleted the proposed provision and replaced it with one that would apply only to “[a]rriving aliens.” *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312, 10361 (March 6, 1997).

As the Attorney General explained, “[t]he effect of this change [was] that inadmissible aliens, except for arriving aliens, have available to them bond redetermination hearings before an immigration judge, while arriving aliens do not.” *Id.* at 10323. In other words, “aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.” *Id.*

The IIRIRA also made subject to mandatory detention those noncitizens who have been

convicted of certain crimes or engaged in terrorist activity. For example, the IIRIRA made noncitizens who are inadmissible by reason of having committed certain criminal offenses subject to mandatory detention under 8 U.S.C. 1226(c)(1)(A), and those inadmissible for having engaged in terrorist activity subject to mandatory detention under 8 U.S.C. 1226(c)(1)(D). More recently, under the Laken Riley Act, Pub. L. No. 119-1, Congress mandated detention for noncitizens who entered without admission and were subsequently charged with, arrested for, convicted of, or admitted to certain offenses. 8 U.S.C. 1226(c)(1)(E). These provisions under 8 U.S.C. 1226(c) would be superfluous if all noncitizens who were present without admission were already subject to mandatory detention under 8 U.S.C. 1225(b)(2)(A).

2. The Government's Novel and Widely Rejected Theory That All Noncitizens Who Entered Without Admission Are Subject to Mandatory Detention

On Friday, July 4, 2025, President Trump signed the One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72. Among other things, the bill appropriated \$45 billion to ICE to detain noncitizens through fiscal year 2029. § 90003, 139 Stat. 358.

On Tuesday, July 8, 2025, Acting ICE Director Todd Lyons issued a memorandum stating that DHS and the Department of Justice had "revisited" the government's legal position regarding the statutory basis for detaining noncitizens who were present in the country without being admitted. According to Lyons, the government now believed that noncitizens present without admission are subject to mandatory detention under 8 U.S.C. 1225(b), rather than discretionary detention under 8 U.S.C. 1226(a), because, under 8 U.S.C. 1225(a)(1), they are deemed "applicant[s] for admission." The memo further stated that this change in legal interpretation might "warrant re-detention of a previously released alien in a given case."

On September 5, 2025, the BIA issued a precedential decision adopting ICE's novel argument that all noncitizens who are present without admission are subject to mandatory

detention under 8 U.S.C. 1225(b)(2)(A). *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). The BIA acknowledged that 8 U.S.C. 1225(b)(2)(A) only applies to noncitizens who are “seeking admission,” but, like ICE, concluded that the provision applied to all noncitizens who are present without admission as they are also “applicant[s] for admission” under 8 U.S.C. 1225(a)(1). 29 I&N Dec. at 218. The BIA acknowledged that its interpretation rendered superfluous multiple provisions of 8 U.S.C. 1226(c), including one recently enacted in the Laken Riley Act, but it stated that “redundancies are common in statutory drafting.” 29 I&N Dec. at 221-22 (quoting *Barton v. Barr*, 590 U.S. 222 (2020)).

To date, dozens of federal district judges have either outright rejected the government’s novel interpretation,² or found that noncitizens challenging the government’s interpretation were

² *Belsai D.S. v. Bondi*, No. 25-3682 (D. Mn. Oct. 1, 2025) (Menendez, J.) (granting habeas petition); *Santiago Santiago v. Noem*, No. 25-361 (W.D. Tx. Oct. 1, 2025) (Cardone, J.) (granting habeas petition); *Villanueva Herrera v. Tate*, No. 25-3364 (S.D. Tx. Sept 26, 2025) (Hittner, J.) (granting habeas petition); *Gamez Lira v. Noem*, No. 25-855 (D.N.M. 25-855) (Johnson, J.) (granting habeas petition); *Singh v. Lewis*, No. 25-96, 2025 LX 400065 (W.D. Ky. Sept. 22, 2025) (Jennings, J.) (granting habeas petition); *Chafila v. Scott*, No. 25-437, 2025 LX 422663 (D. Maine Sept. 21, 2025) (Neumann, J.) (granting habeas petition); *Hasan v. Crawford*, No. 25-1408, 2025 LX 499354 (E.D. Va. Sept. 19, 2025) (Brinkema, J.) (granting habeas petition); *Barrera v. Tindall*, No. 25-451, 2025 LX 435572 (W.D. Ky. Sept. 19, 2025) (Jenning, J.) (granting habeas petition); *Salazar v. Dedos*, No. 25-835, 2025 WL 2676729 (D.N.M. Sept. 17, 2025) (Urias, J.) (granting habeas petition); *Garcia Cortes v. Noem*, No. 25-2677, 2025 WL 2652880 (D. Colo. Sept. 16, 2025) (Sweeney, J.) (granting habeas petition); *Pizarro Reyes v. Raycraft*, No. 25-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025) (White, J.) (granting habeas petition); *Sampiao v. Hyde*, No. 25-11981, 2025 WL 2607924 (D. Mass. Sept. 9, 2025) (Kobick, J.) (granting habeas petition); *Jimenez v. FCI Berlin*, No. 25-326, 2025 LX 360066 (D.N.H. Sept. 8, 2025) (McCafferty, J.) (granting habeas petition); *Doe v. Moniz*, No. 25-12094, 2025 WL 2576819 (D. Mass. Sept. 5, 2025) (Talwani, J.) (granting habeas petition); *Lopez Benitez v. Francis*, No. 25-5937, 2025 WL 2267803 (S.D.N.Y. Aug. 8, 2025) (Ho, J.) (granting habeas petition); *Lopez-Campos v. Raycraft*, No. 25-12486, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025) (McMillion, J.) (granting habeas petition); *Diaz v. Mattivelo*, No. 25-12226, 2025 WL 2457610 (D. Mass. Aug. 27, 2025) (Kobick, J.) (granting habeas petition); *Jose J.O.E. v. Bondi*, No. 25-3051, 2025 WL 2466670 (D. Minn. Aug. 27, 2025) (Tostrud, J.) (granting habeas petition); *Leal-Hernandez v. Noem*, No. 25-2428, 2025 WL 2430025 (D. Md. Aug. 24, 2025) (Rubin, J.) (granting habeas petition); *Romero v. Hyde*, No. 25-11631, ___ F.Supp.3d ___, 2025 WL 2403827 (D. Mass. Aug. 19, 2025) (Murphy, J.) (granting habeas petition); *Samb v. Joyce*, No. 25-6373, 2025 WL 2398831 (S.D.N.Y. Aug. 19,

substantially likely to prevail on the merits.³ These judges have not been unsparing in their criticism of the government's newfound position. One called it a "nonstarter." *Doe v. Moniz*, No. 25-12094, 2025 WL 2576819 at *10 (D. Mass. Sept. 5, 2025). Another called it "willfully blind." *Leal-Hernandez v. Noem*, No. 25-2428, 2025 WL 2430025 at *25 (D. Md. Aug. 24, 2025). Another called it "a policy argument, projected onto Congress." *Romero v. Hyde*, No. 25-11631, ___ F. Supp. 3d ___, 2025 WL 2403827 at *28 (D. Mass. Aug. 19, 2025). And another noted that the government "could not identify any federal court that has adopted their novel reading of § 1225(b)(2)(A)." *Pizarro Reyes v. Raycraft*, No. 25-12546, 2025 WL 2609425 at *20 (E.D. Mich. Sept. 9, 2025).

It is not difficult to understand why federal district courts have rejected the government's

2025) (Ho, J.) (granting habeas petition); *dos Santos v. Noem*, No. 25-12052, 2025 WL 2370988 (D. Mass. Aug. 14, 2025) (Kobick, J.) (granting habeas petition); *Diaz Martinez v. Hyde*, No. 25-11613, ___ F. Supp. 3d ___, 2025 WL 2084238 (D. Mass. July 24, 2025) (Murphy, J.) (granting habeas petition); *Gomes v. Hyde*, No. 25-11571, 2025 WL 1869299 (D. Mass. July 7, 2025) (Kobick, J.) (granting habeas petition).

³ *Guerrero Lepe v. Andrews*, No. 1:25-cv-01163 (E.D. Ca Sept. 23, 2025) (Sherriff, J.) (granting preliminary injunction); *Aceros v. Kaiser*, No. 25-06924, 2025 LX 330524 (N.D. Cal. Sept. 12, 2025) (Chen, J.) (granting preliminary injunction); *Guzman v. Andrews*, No. 25-01015, 2025 LX 354551 (E.D. Cal. Sept. 9, 2025) (Sherriff, J.) (granting preliminary injunction); *Mosqueda v. Noem*, No. 25-2304, 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025) (Snyder, J.) (granting temporary restraining order); *Nieves v. Kaiser*, No. 25-6921, 2025 LX 320701 (N.D. Cal. Sept. 3, 2025) (Beeler, J.) (granting preliminary injunction); *Garcia v. Noem*, No. 25-2180, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025) (Sabraw, J.) (granting temporary restraining order); *Garcia v. Kaiser*, No. 25-06916, 2025 LX 322337 (N.D. Cal. Aug. 29, 2025) (Gonzalez Rogers, J.) (granting preliminary injunction); *Kostak v. Trump*, No. 25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025) (Edwards, J.) (granting temporary restraining order and preliminary injunction); *Benitez v. Noem*, No. 25-02190, 2025 LX 322897 (C.D. Cal. Aug. 26, 2025) (Klausner, J.) (granting temporary restraining order); *Ramirez Clavijo v. Kaiser*, No. 25-06248, 2025 WL 2419263 (N.D. Cal. Aug. 21, 2025) (Freeman, J.) (granting preliminary injunction); *Arrazola-Gonzalez v. Noem*, No. 25-01789, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025) (Wright, J.) (granting temporary restraining order); *Maldonado v. Olson*, No. 25-3142, 2025 WL 2374411 (D. Minn. Aug. 15, 2025) (Nelson, J.) (granting temporary restraining order); *Maldonado Bautista v. Santacruz*, No. 25-01873, 2025 LX 341363 (C.D. Cal. July 28, 2025) (granting temporary restraining order); *Vazquez v. Bostock*, No. 25-05240, 779 F. Supp. 3d 1239 (W.D. Wash. April 24, 2025) (Cartwright, J.) (granting preliminary injunction).

novel interpretation. By its terms, 8 U.S.C. 1225(b)(2)(A) only applies to noncitizens who are “seeking admission,” and Congress defined “admission” as the “lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. 1101(a)(13)(A). Accordingly, “[c]onstruing section 1225(b)(2) to apply to noncitizens already residing in the country would read the word ‘entry’ out of the definitions of ‘admitted’ and ‘admission.’” *Chafla v. Scott*, No. 25-437, 2025 LX 422663 (D. Maine Sept. 21, 2025) (citing 8 U.S.C. 1101(a)(13)(A)). As importantly, if “the [BIA was] correct that § 1225(b)’s mandatory detention provisions apply to all persons who have not been admitted into the United States, that would render superfluous those provisions of § 1226 that apply to certain categories of inadmissible aliens, such as § 1226(c)(1)(A), (D), and (E).” *Hasan v. Crawford*, ___ F. Supp. 3d ___, 2025 WL 268225 at *22 (E.D. Va. Sept. 19, 2025) (Brinkema, J.). The BIA’s interpretation would also “render the Laken Riley Act a meaningless amendment, since it would have prescribed mandatory detention for noncitizens already subject to it.” *Aceros v. Kaiser*, 2025 WL 2637503 at *28 (N.D. Cal. Sept. 12, 2025).

Indeed, the plain text of § 1226 demonstrates that subsection (a) applies to Petitioner. Section 1226(a) permits the release of noncitizens who are detained “pending a decision on whether the [noncitizen] is to be removed from the United States.” 8 U.S.C. § 1226(a). While § 1226(a) provides the right to seek release, § 1226(c) carves out specific categories of noncitizens—including certain categories of noncitizens who are inadmissible under 8 U.S.C. § 1182(a)—and subjects them instead to mandatory detention. *See, e.g.*, § 1226(c)(1)(A), (C). If § 1226(a) could never apply to inadmissible noncitizens, there would be no reason to specify that § 1226(c) governs certain persons who are inadmissible; instead, § 1226(c) would only have needed to address people who are deportable for certain offenses under 8 U.S.C. § 1227(a).

Recent amendments to § 1226 dramatically reinforce that this section covers people like Petitioner, whom DHS alleges to be present without admission. Specifically, the Laken Riley Act added language to § 1226 that directly references those who are inadmissible under § 1182(a)(6) because they are present without admission or under § 1182(a)(7) because of the lack valid documentation. *See* Laken Riley Act (LRA), Pub. L. No. 119-1, 139 Stat. 3 (2025); 8 U.S.C. § 1226(c)(1)(E). By including such individuals under § 1226(c) and carving them out of § 1226(a) if they have been arrested, charged with, or convicted of certain crimes, Congress reaffirmed that § 1226(a) covers persons charged under § 1182(a)(6) or (a)(7). *See Rodriguez Vazquez v. Bostock*, No. 3:25-CV-05240-TMC, 2025 WL 1193850, at *14 (W.D. Wash. June 6, 2025) (explaining these amendments explicitly provide that § 1226(a) covers people like Petitioner because the “‘specific exceptions’ [in the LRA] for inadmissible noncitizens who are arrested, charged with, or convicted of the enumerated crimes logically leaves those inadmissible noncitizens not criminally implicated under Section 1226(a)’s default rule for discretionary detention.”); *Diaz Martinez v. Hyde*, 2025 WL 2084238, at *7 (D. Mass. July 24, 2025) (“if, as the Government argue[s], . . . a non-citizen’s inadmissibility were alone already sufficient to mandate detention under section 1225(b)(2)(A), then the 2025 amendment would have no effect.” 2025 WL 2084238, at *7; *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299, at *7 (D. Mass. July 7, 2025) (similar). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (observing that a statutory exception would be unnecessary if the statute at issue did not otherwise cover the excepted conduct).

Unlike 8 U.S.C. § 1226, 8 U.S.C. § 1225(b) requires the detention of certain individuals who are arriving at U.S. ports of entry or who recently entered the United States. As relevant here, 8 U.S.C. § 1225(b)(2)(A) applies only to individuals who are “seeking admission” to the United

States.⁴ See *Vasquez-Garcia et al. v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025) (rejecting DHS' contention that an individual who entered the United States without inspection "is automatically understood to be 'seeking admission' within the meaning of § 1225(b)(2)(A), without need[ing] to affirmatively apply for admission or parole"); *Arazola Gonzalez v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025) (concluding that habeas petitioner showed likelihood of success on the merits of argument that "[t]o ignore the 'seeking admission' language [in 8 U.S.C. § 1225(b)(2)(A) . . . would render the language purposeless and violate a key rule of statutory construction"]; see also 8 C.F.R. § 1.2 (addressing noncitizens who are presently "coming or attempting to come into the United States").

8 U.S.C. § 1225 further defines its scope by reference to "inspections"—a term not defined in the INA, but which typically connotes an examination upon or soon after physical entry. See 8 U.S.C. § 1225 (titled "Inspection by immigration officers; expedited removal of inadmissible arriving [noncitizens]; referral for hearing"); §§ 1225(b)(1)–(2) (referring to "inspections" in their titles); § 1225(b)(2)(A), (b)(4) (referring to "examining immigration officers"); § 1225(d)(1) (authorizing immigration officials to search certain conveyances in order to conduct "inspections" where noncitizens "are being brought into the United States"); see also *Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (emphasis added) (relying on section title to help construe statute). Many statutory provisions, various regulations, and agency precedent also discuss "inspection" in the context of admission processes at ports of entry, further supporting the conclusion that § 1225 has a limited temporal and geographic scope. See, e.g., 8 U.S.C. §§ 1187(h)(2)(B)(i), 1225A; 8

⁴ 8 U.S.C. § 1225(b)(1) concerns "expedited removal of inadmissible arriving [noncitizens]," including those who present themselves for inspection upon "arriving" and other individuals designated by the Attorney General who have been present in the United States for less than two years, and who are "inadmissible under section 1182(a)(6)(C) or § 1182(a)(7)." 8 U.S.C. § 1225(b)(1)(A)(i). Subsection (b)(1) does not require Petitioner's detention because he did not present himself for inspection, and he has been in the United States for around 25 years.

U.S.C. § 1752a; 8 C.F.R. § 235.1; *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010)); *see also King v. Burwell*, 576 U.S. 473, 492 (2015) (looking to an Act’s “broader structure . . . to determine [the statute’s] meaning”).

The statutory and regulatory text’s use of the present and present progressive tenses further excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States. *See* 8 U.S.C. § 1225(b)(2)(C) (addressing the “[t]reatment of [noncitizens] *arriving* from contiguous territory,” i.e. those who are “*arriving* on land”) (emphasis added). As the Supreme Court recognized, this mandatory detention scheme applies “at the Nation’s borders and ports of entry, where the Government must determine whether a [] [noncitizen] seeking to enter the country is admissible,” and § 1225 is concerned “primarily [with those] seeking entry.” *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018).

The Board in *Matter of Yajure Hurtado* ignored the “seeking admission” requirement and instead focused solely on whether an individual who enters the United States without inspection is “applicant for admission,” as § 1225(b)(2)(A) also requires. But as the Ninth Circuit has explained, “when deciding whether language is plain, [courts] must read the words in their context and with a view to their place in the overall statutory scheme.” *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th Cir. 2022) (internal quotation marks omitted). In context, the differential phrasing of “applicant for admission” and “seeking admission” in the same statutory subsection is significant, because “applicant for admission” is a term of art that has been analyzed as such by both the Supreme Court and the Ninth Circuit Court of Appeals. *See DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020); *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018); *see also Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc) (an individual submits an “application for admission” only at “the moment in time when the immigrant actually applies for admission into

the United States.”). By contrast, an individual who has not presented at a port of entry and has not filed any affirmative application for immigration benefits is not “seeking” anything under the plain meaning of the word. *See Merriam Webster’s Dictionary* (2025) (defining “seek” as, inter alia, “to go in search of” or “to try to acquire or gain”).

Thus, Petitioner prevails regardless of the scope of § 1225(a)(1)’s definition of “applicant for admission.” This is because classification as an “applicant for admission” is not sufficient to render someone subject to mandatory detention under § 1225(b)(2). The “applicant for admission” must *also* be “seeking admission,” and that is clearly not the case for Petitioner.

Moreover, the Justice Department’s own regulations only preclude immigration judges from granting bond to “[a]rriving aliens,” 8 C.F.R. 1003.19(h)(1)(B)(ii), as distinct from noncitizens who previously entered the country and are merely present without admission. When the Justice Department created these regulations following notice and comment, it specifically stated that “aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.” *Vazquez v. Bostock*, 779 F. Supp. 3d 1239, 1261 (W.D. Wash. April 24, 2025) (quoting 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997)). And, “an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a de facto amendment to its regulation through adjudication.” *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003) (Silberman, J.) (citing cases). *See also Patel v. INS*, 638 F.2d 1199, 1202 (9th Cir. 1980) (rejecting BIA decision that imposed additional requirement that the INS declined to impose during notice and comment rulemaking).

3. The Legislative History Further Supports the Application Of § 1226(a) To Petitioner

The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104–208, Div. C, §§ 302–03, 110 Stat. 3009–546, 3009–582 to 3009–583, 3009–585, also supports the conclusion that § 1226(a) applies to Petitioner. In passing IIRIRA, Congress was focused on the perceived problem of recent arrivals to the United States who did not have documents to remain. *See* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29; H.R. Rep. No. 104-828, at 209. Notably, Congress did not say anything about subjecting all people present in the United States after an unlawful entry to mandatory detention if arrested. This is important because prior to IIRIRA, people like Petitioner were not subject to mandatory detention. *See* 8 U.S.C. § 1252(a)(1) (1994) (authorizing Attorney General to arrest and release noncitizens physically present in the United States pending a determination of deportability). Had Congress intended to make such a monumental shift in immigration law (potentially subjecting millions of people to mandatory detention), it would have explained so or spoken more clearly. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468–69 (2001). But to the extent it addressed the matter, Congress explained precisely the opposite, noting that the new § 1226(a) merely “restates the current provisions in [INA] section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond a [] [noncitizen] *who is not lawfully in the United States.*” H.R. Rep. No. 104- 469, pt. 1, at 229 (emphasis added); *see also* H.R. Rep. No. 104-828, at 210 (same).

The agency’s interpretation of IIRIRA soon after its enactment is consistent with this history. As noted in a recent decision from this judicial district, “a 1997 interim rule issued ‘to implement the provisions of [IIRIRA],’ which had passed six months earlier . . . explained that ‘[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond

and bond redetermination.” *Rosado v. Figueroa*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025) (quoting 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997)).

The most recent amendment to the INA’s detention provisions – the LRA – further underscores Congress’s understanding – now as in the 1990s – that individuals who enter the United States without inspection are not automatically subject to detention under 8 U.S.C. § 1225. As previously explained, the LRA amendments clearly prohibit bond under 8 U.S.C. § 1226 for individuals who entered the United States without inspection *and* were subsequently charged with, arrested for, or convicted of certain listed offenses. To hold that *all* individuals who entered without inspection are prohibited from obtaining bond under 8 U.S.C. § 1226 would therefore run afoul of the canon against superfluities. Under this “most basic [of] interpretive canons, . . . ‘[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Corley v. United States*, 556 U.S. 303, 314 (2009) (third alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *see also Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir. 2023) (similar).

The BIA acknowledged that reading 8 U.S.C. § 1225(b)(2)(A) to apply to individuals who entered without inspection would create a redundancy in the statute by subjecting such individuals mandatory detention under two separate provisions. *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 222. The BIA dismissed such redundancy as permissible and posited that the LRA did not purport to “overrule” 8 U.S.C. § 1225(b)(2)(A). *Id.* at 219, 222. But once again, in reaching this conclusion, the BIA did not address the requirement of 8 U.S.C. § 1225(b)(2)(A) that an individual must be “seeking admission” to be subject to § 1225(b)(2)(A). To give substance to the phrase “seeking admission” would both ensure fidelity to the plain language of the statute and eliminate concerns about redundancies between § 1226(c) and § 1225(b)(2)(A): individuals who entered without

inspection and have been present in the United States for more than two years would not be subject to detention, *unless* they were subject to one of the mandatory detention provisions of the LRA.⁵

4. The Board's Decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, Is Not Entitled to Deference Because It Contravenes the Statutory Language and Legislative History, and It Deviates from Longstanding Agency Practice

In *Loper Bright Enterprises v. Ramiundo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron v. NRDC*, 467 U.S. 837 (1984), and held that the APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority. Where a statute is ambiguous, courts may now apply the framework set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rather than the deferential *Chevron* framework. *See Loper Bright*, 603 U.S. at 394. Under *Skidmore*, the question is whether the agency's reasoning—although not binding—has the “power to persuade” based on “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.” 323 U.S. at 140. In other words, *Skidmore* deference is discretionary, and courts retain the authority to adopt or reject the agency's view based on its merits.

The BIA's decision in *Matter of Yajure Hurtado* does not satisfy the requirements for deference under *Loper Bright* or *Skidmore*. First, the BIA's decision lacks the “thoroughness” and “validity” required for deference. 323 U.S. at 140. The BIA analyzed the history of the statutory phrase “applicants for admission” in some detail, despite Mr. Yajure's concession on this issue, but it did not meaningfully analyze the plain language, statutory context, or legislative history of the distinct phrase “seeking admission,” which is also required for 8 U.S.C. § 1225(b)(2)(A) to apply. “Applicant for admission” – not “seeking admission” – is the statutory phrase construed by

⁵ It is unclear what the BIA meant when it suggested that a statute must contain clear language to “overrule” another statute. *See* 29 I. & N. Dec. at 219. Unlike Article III courts, which may overrule lower courts' caselaw, Congress changes statutes by the amendment process.

the Supreme Court as expansive in *Jennings v. Rodriguez*, 583 U.S. 281, 287, 297 (2018), and *DHS v. Thuraissigiam*, 591 U.S. 103, 109 (2020).

Nor is the BIA entitled to deference in its superficial treatment of the conflict between its unprecedented reading of 8 U.S.C. § 1225(b)(2)(A) and the recent amendments in the LRA. The Board did not meaningfully contend with the redundancy it identified between its expansive interpretation of 8 U.S.C. § 1225(b)(2)(A) and the clear statutory language applying the LRA amendments to individuals who entered the United States without inspection.

Finally, as the Board itself acknowledged, its decision in *Matter of Yajure Hurtado* was fundamentally inconsistent with its own earlier pronouncements, such as *Matter of Akhmedov*, 29 I. & N. Dec. 166 (BIA 2025), and with decades of agency practice in untold numbers of cases. *See* 29 I. & N. Dec. at 225-26 & n.6. The Board's initial protestation that the issue was not raised in these prior cases, 29 I. & N. Dec. at 225 n.6, stands in sharp contrast to its own contention that the agency may never exceed the "authority that is delegated to the Immigration Judge by the INA and the Attorney General through regulation." *Id.* at 217. Surely, if the putatively jurisdiction-stripping statutory language were so crystal clear as to be unambiguous, then the BIA would have detected and addressed such a fundamental jurisdictional roadblock, rather than simply adjudicating countless cases outside the scope of its authority over the course of nearly 30 years. In sum, the Board's decision in *Matter of Yajure Hurtado* lacks merit, represents a stark deviation from the agency's own prior practice, and is not worthy of deference under *Loper Bright*.

DHS's long practice of considering people like the Petitioner as detained under §1226(a) further counsels against deference. As happened here, DHS issued a Form I-286, Notice of Custody Determination, stating that Petitioner had been detained under § 1226(a). For decades, and across administrations, DHS has thereby acknowledged that § 1226(a) applies to individuals

who are present without admission after entering the United States unlawfully, but who were later apprehended within the United States long after their entry. *See also* 62 Fed. Reg. at 10323.3 (explaining that “[d]espite being applicants for admission, [noncitizens] who are present without having been admitted or paroled (formerly referred to as [noncitizens] who entered without inspection) will be eligible for bond and bond redetermination”). Such a longstanding and consistent interpretation “is powerful evidence that interpreting the Act in [this] way is natural and reasonable.” *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relying in part on “over 60 years” of government interpretation and practice to reject government’s new proposed interpretation of the law at issue).

In sum, § 1226 governs this case. The mandatory detention provision of § 1225 applies only to individuals arriving in the United States as specified in the statute, while § 1226 applies to those who previously entered without admission.

B. PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

In the absence of a PI, Petitioner will continue to be unlawfully detained by Respondents under § 1225(b)(2) and denied the freedom the IJ has already established is appropriate. Petitioner has now been in custody following his detention for approximately three months. “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty” that the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Further, it “is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation modified); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005); *see also Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017) (concluding that Plaintiffs who

showed unconstitutional deprivation of physical liberty “also carried their burden as to irreparable harm.”); *Maldonado Bautista et al. v. Santacruz, et al.*, No. 5:25-cv-01873-SSS-BFM (C.D. Calif. July 28, 2025), Order Granting TRO, Dkt. 14 at 9 (“[T]he Court finds that the potential for Petitioners’ continued detention without an initial bond hearing would cause immediate and irreparable injury, as this violates statutory rights afforded under § 1226(a).”).

Detainees in civil ICE custody are held in “prison-like conditions” which have real consequences for their lives. *Preap v. Johnson*, 831 F.3d 1193, 1195 (9th Cir. 2016). As the Supreme Court has explained, “[t]he time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness.” *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); accord *Nat’l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984). Moreover, the Ninth Circuit has recognized in “concrete terms the irreparable harms imposed on anyone subject to immigration detention” including “subpar medical and psychiatric care in ICE detention facilities, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained.” *Hernandez*, 872 F.3d at 995. Finally, the government itself has documented alarmingly poor conditions in ICE detention centers.⁶

During his time in the U.S., Petitioner has maintained gainful employment and has U.S. citizen stepchildren and 6 U.S. citizen grandchildren. Petitioner’s continued detention rips him

⁶ See, e.g., DHS, Office of Inspector General (“OIG”), Summary of Unannounced Inspections of ICE Facilities Conducted in Fiscal Years 2020-2023 (2024) (violations of health and safety standards; staffing shortages affecting suicide watch, and detainees held in unauthorized restraints, without being allowed time outside their cell,). U.S. Dep’t of Homeland Security Office of Inspector General, *OIG-24-23, Results of an Unannounced Inspection of ICE’s Golden State Annex in McFarland, California* (Sept. 24, 2024), available at <https://www.oig.dhs.gov/sites/default/files/assets/2024-09/OIG-24-59-Sep24.pdf>.

from his family and imperils the family's economic and emotional well-being. Exh. C (Letters from family).

C. THE BALANCE OF EQUITIES TIPS IN PETITIONER'S FAVOR AND A PI IS IN THE PUBLIC INTEREST.

Because the government is a party, these two factors are considered together. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Petitioner has established that the public interest factor weighs in his favor because his claim asserts that the new policy violates federal laws. *See Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). Because the policy preventing Petitioner from realizing the bond the immigration judge intended to grant "is inconsistent with federal law, . . . the balance of hardships and public interest factors weigh in favor of a preliminary injunction." *Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2019); *see also Moreno Galvez*, 52 F.4th 821, 832 (9th Cir. 2022) (quoting approvingly district judge's declaration that "it is clear that neither equity nor the public's interest are furthered by allowing violations of federal law to continue"). This is because "it would not be equitable or in the public's interest to allow the [government] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (citation omitted). Indeed, Respondents "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

Further, any burden imposed by requiring the Respondents to release Petitioner from custody or providing a hearing before an immigration judge is both *de minimis* and clearly outweighed by the substantial harm he will suffer as long as he continues to be detained. *See Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required.").

If preliminary relief is not entered, the government would effectively be granted permission to detain Petitioner or to summarily remove him to any third country, in violation of the requirements of Due Process. “The public interest and the balance of the equities favor ‘prevent[ing] the violation of a party’s constitutional rights.’” *Ariz. Dream Act Coal.*, 757 F.3d at 1069 (quoting *Melendres*, 695 F.3d at 1002); *see also Hernandez*, 872 F.3d at 996 (“The public interest benefits from an injunction that ensures that individuals are not deprived of their liberty and held in immigration detention because of bonds established by a likely unconstitutional process.”); *cf. Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution.”).

D. PRUDENTIAL EXHAUSTION IS NOT REQUIRED.

Prudential exhaustion does not require Petitioner to be forced to endure the very harm he is seeking to avoid by awaiting a BIA decision, where the Board’s recent precedential decision makes the outcome of that appeal a foregone conclusion. “[T]here are a number of exceptions to the general rule requiring exhaustion, covering situations such as where administrative remedies are inadequate or not efficacious, . . . [or] irreparable injury will result.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (citation omitted). Administrative exhaustion is not required where a request for relief before the agency would be futile because the agency has “predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). In addition, a court may waive an exhaustion requirement when “requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action,” such as “from an unreasonable or indefinite time frame for administrative action.” *Id.* at 146-47 (citing cases). Here, the exceptions regarding futility, irreparable injury, and agency delay warrant waiving any prudential exhaustion

requirement.

1. Futility

The BIA's decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, renders prudential exhaustion futile in bond cases involving individuals who entered the United States without inspection. *Zaragoza Mosqueda, et al. v. Noem*, 2025 WL 2591530, at *7 (C.D. Cal. Sept. 8, 2025). The BIA's decision in *Matter of Yajure Hurtado* "predetermine[s]" the outcome of DHS's administrative appeal. *McCarthy*, 503 U.S. at 148. Prudential exhaustion is therefore unnecessary, and the Court should take jurisdiction over Petitioner's case.

Further, Petitioner has already been subjected to the new DHS policy issued "in coordination with the Department of Justice (DOJ)" on July 8, 2025, instructing all ICE employees to consider anyone arrested within the United States and charged with being inadmissible under § 1182(a)(6)(A)(i) to be subject to mandatory detention. Petitioner has been deprived of liberty as an IJ stated that she would have granted him a bond if she had jurisdiction, and the Board's decision in *Matter of Yajure Hurtado* ensures that he will continue to be so deprived throughout the pendency of his case. Under these circumstances, arguments to the BIA in opposition to DHS's appeal would be futile.

2. Irreparable injury

Because Petitioner was denied access to a bond, each day he remains in detention is one in which his statutory and constitutional rights have been violated. Similarly situated district courts have repeatedly recognized this fact. As one court has explained, "because of delays inherent in the administrative process, BIA review would result in the very harm that the bond hearing was designed to prevent: prolonged detention without due process." *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 237 (W.D.N.Y. 2019) (internal quotation marks omitted). Indeed, "if Petitioner is

correct on the merits of his habeas petition, then Petitioner has *already* been unlawfully deprived of a [lawful] bond hearing [,] [and] . . . each additional day that Petitioner is detained without a [lawful] bond hearing would cause him harm that cannot be repaired.” *Villalta v. Sessions*, No. 17-CV-05390-LHK, 2017 WL 4355182, at *3 (N.D. Cal. Oct. 2, 2017) (internal quotation marks and brackets omitted); *see also Cortez v. Sessions*, 318 F. Supp. 3d 1134, 1139 (N.D. Cal. 2018) (similar). Other district courts have echoed these points.⁷ Petitioner asserts both statutory and constitutional claims and has a “fundamental” interest in his ability to pay his bond, as “freedom from imprisonment is at the ‘core of the liberty protected by the Due Process Clause.’” *Hernandez*, 872 F.3d at 993 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Moreover, the irreparable injury Petitioner faces extends beyond a chance at physical liberty. There are several “irreparable harms imposed on anyone subject to immigration detention[.]” *Hernandez*, 872 F.3d at 995. These include “subpar medical and psychiatric care in ICE detention facilities.” *Id.*

3. Agency delay

Third, the BIA’s delays in adjudicating bond appeals warrant excusing any exhaustion requirement. A court’s ability to waive exhaustion based on delay is especially broad here given the “fundamental” interest in physical liberty that is at stake for Petitioner. *Hernandez*, 872 F.3d at 993. Moreover, the Supreme Court has explained that “[r]elief [when seeking review of detention] must be speedy if it is to be effective.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The BIA’s months-long review is unreasonable and results in ongoing injury to Petitioner. *See, e.g., Perez*,

⁷ *See, e.g., Perez*, 445 F. Supp. 3d at 286; *Blandon v. Barr*, 434 F.Supp. 3d 30, 37 (W.D.N.Y. 2020); *Marroquin Ambriz v. Barr*, 420 F. Supp. 3d 953, 961 (N.D. Cal. 2019); *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1003–04 (N.D. Cal. 2018); *Montoya Echeverria v. Barr*, No. 20-CV-02917- JSC, 2020 WL 2759731, at *6 (N.D. Cal. May 27, 2020); *Rodriguez Diaz v. Barr*, No. 4:20-CV-01806-YGR, 2020 WL 1984301, at *5 (N.D. Cal. Apr. 27, 2020); *Birru v. Barr*, No. 20-CV-01285-LHK, 2020 WL 1905581, at *4 (N.D. Cal. Apr. 17, 2020); *Lopez Reyes v. Bonnar*, No. 18-CV-07429-SK, 2018 WL 7474861, *7 (N.D. Cal. Dec. 24, 2018).

445 F. Supp. 3d at 286. Indeed, as one district judge observed, “the vast majority of . . . cases . . . have ‘waived exhaustion . . . where several additional months may pass before the BIA renders a decision on a pending appeal [of a custody order].” *Montoya Echeverria*, 2020 WL 2759731, at *6 (quoting *Rodriguez Diaz*, 2020 WL 1984301, at *5); *see also Hechavarria*, 358 F. Supp. 3d at 237–38 (citing *McCarthy* and BIA delays as reason to waive prudential exhaustion requirement). Additionally, the issues presented in this petition are questions of statutory interpretation which are “unlikely to require agency consideration to generate a proper record to reach a proper decision.” *Maldonado Bautista et al.*, No. 5:25-cv-01873-SSS-BFM, Order Granting TRO.

V. CONCLUSION

For these reasons, the Court should grant Petitioner’s Motion for a Preliminary Injunction.

Dated: October 3, 2025

Respectfully Submitted,

/s/ Jesse Evans-Schroeder
Jesse Evans-Schroeder
Attorney for Petitioner

WORD COUNT CERTIFICATION

The undersigned counsel of record for Petitioner certifies that this Memo contains 9447 words, which complies with the word limit of L.R. 11-6.1.

/s/ Jesse Evans-Schroeder

Jesse Evans-Schroeder
Attorney for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY THAT I SERVED A COPY OF *PETITIONER'S EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION* by mail to the following individual:

Chief, Civil Division, U.S. Attorney's Office
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/s/ Jesse Evans-Schroeder
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