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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

SAMUEL SANCHEZ APARICIO

Petitioner,

v.

KRISTI NOEM, Secretary of the U.S. Department of Homeland Security; PAMELA BONDI, Attorney General of the United States; THOMAS E. FEELEY, Field Office Director of Salt Lake City Field Office, U.S. Immigration and Customs Enforcement; MARIA BELLOW, Corrections Captain, Henderson Detention Center; REGGIE RADER, Police Chief, Henderson Police Department,

Respondents.

Case No. 2:25-cv-01919-GMN-DJA

Federal Respondents' Response to Petitioner's Emergency Motion for Temporary Restraining Order (ECF No. 2)

Federal Respondents Kristi Noem, Pamela Bondi, and Thomas Feeley, through undersigned counsel, file their response to Petitioner Samuel Sanchez Aparicio's Emergency Motion for Temporary Restraining Order ("motion"). ECF No. 2. Petitioner's motion should be denied because: 1) numerous provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction to review the Petitioner's claims and preclude this Court from granting the relief he seeks, 2) Petitioner fails to demonstrate he is entitled to temporary injunctive relief, and 3) Petitioner has failed to exhaust his administrative remedies and there is no futility to such exhaustion.

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This response is supported by the following memorandum of points and authorities.

Respectfully submitted this 21st day of October 2025.

SIGAL CHATTAH
Acting United States Attorney

/s/ Virginia T. Tomova
VIRGINIA T. TOMOVA
Assistant United States Attorney

Memorandum of Points and Authorities

I. Introduction

Currently in separate removal proceedings before the Executive Office of Immigration Review's Immigration Court, Petitioner Samuel Sanchez Aparicio, an undocumented alien, challenges his temporary detention while the decision is made regarding his removal. Petitioner is in Immigration and Customs Enforcement (ICE) custody and is subject to mandatory detention pursuant to 8 U.S.C. § 1225(b)(2). In his motion, Petitioner requests that this Court releases him from detention while his removal proceedings are pending without requiring him to exhaust his administrative remedies. Plaintiff's propositions are against Supreme Court precedent.

Petitioner challenges a lawfully enacted regulation (8 C.F.R. § 1003.19(i)(2)) authorizing his detention through an automatic stay, but critically, that automatic stay merely implements detention Congress authorized under 8 U.S.C. § 1225(b)(2). Therefore, to grant the motion, Petitioner asks this Court to set aside a lawfully enacted regulation and statute, finding both unconstitutionally applied, as alleged violations of the Due Process Clause of the United States Constitution. But as discussed below, the Supreme Court has long recognized Congress's broad power and immunity from judicial control to expel aliens from the country and to detain them while doing so. *See e.g., Shaughnessy v. United States*, 345 U.S. 206, 210 (1953); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). The United States' temporary detention of Petitioner in no way exceeds this broad authority and does not deprive Petitioner of Due Process. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

While Petitioner's claims are structured around allegations of unlawful detention authority, his claims attack the decisions rendered (and not yet rendered) by immigration judges (IJs) during immigration bond hearings. Petitioner asks this Court to review IJ decisions, which is explicitly

barred by statute. Through multiple provisions of 8 U.S.C. § 1252, Congress has unambiguously stripped federal courts of jurisdiction over challenges to the commencement of removal proceedings, including detention pending removal proceedings. Further, Petitioner has failed to exhaust his administrative remedies. Even apart from these preliminary issues, Petitioner cannot show a likelihood of success on the merits because he seeks to circumvent the detention statute under which he is rightfully detained to secure bond hearings to which he is not entitled. Petitioner's motion should be denied for the following reasons:

First, numerous provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction to review the Petitioner's claims and preclude this Court from granting the relief he seeks. Congress has unambiguously stripped federal courts of jurisdiction over challenges to the commencement of removal proceedings, including detention pending removal proceedings. Congress further directed that any challenges arising from any removal-related activity—including detention pending removal proceedings—must be brought before the appropriate federal court of appeals, not a district court.

Second, Petitioner fails to demonstrate he is entitled to temporary injunctive relief. Petitioner cannot show a likelihood of success on the merits because he seeks to circumvent the detention statute under which he is rightfully detained to secure bond hearings that he is not entitled to. Petitioner falls precisely within the statutory definition of aliens subject to mandatory detention without bond found in § 1225(b)(2).

Third, the automatic stay pursuant to 8 C.F.R. § 1003.19(i)(2) does not violate due process and the length of the automatic stay does not violate due process.

Fourth, Petitioner is required to exhaust his administrative remedies before petitioning this Court for the impermissible relief he seeks here. The Ninth Circuit has stated that when an alien fails to exhaust appellate review at the BIA, courts should "ordinarily" dismiss the habeas petition without prejudice or stay proceedings until he exhausts his appeals. *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011). There is a pending appeal regarding this Petitioner before the BIA with a current briefing schedule of October 30, 2025. There is no futility argument here, as the BIA may cite with the Immigration Judge and find that Petitioner should not be detained under 8 U.S.C. § 1225(b)(2), but rather § 1226(a). If that occurs, then Petitioner's claims will be moot. Petitioner has

failed to exhaust his administrative remedies, and his attempts to avail himself of the exceptions to the exhaustion requirement are unpersuasive. For these reasons, and those set forth below, the Court should deny Petitioner's motion for temporary restraining order.

II. Statutory Background

A. Detention Under 8 U.S.C. § 1225

Section 1225 applies to "applicants for admission," who are defined as "alien[s] present in the United States who [have] not been admitted" or "who arrive[] in the United States." 8 U.S.C. § 1225(a)(1). Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 218 (BIA 2025).

Section 1225(b)(1) applies to arriving aliens and "certain other" aliens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Jennings*, 583 U.S. at 287; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These aliens are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But if the alien "indicates an intention to apply for asylum . . . or a fear of persecution," immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An alien "with a credible fear of persecution" is "detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii). If the alien does not indicate an intent to apply for asylum, express a fear of persecution, or is "found not to have such a fear," they are detained until removed from the United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

Section 1225(b)(2) is "broader" and "serves as a catchall provision." *Jennings*, 583 U.S. at 287. It "applies to all applicants for admission not covered by § 1225(b)(1)." *Id.* Under § 1225(b)(2), an alien "who is an applicant for admission" shall be detained for a removal proceeding "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A); *see Matter of Yajure Hurtado*, 29 I&N Dec. 216, 220 (BIA 2025) ("[A]liens who are present in the United States without admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings."); *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) ("for aliens arriving in and seeking admission into the United States who are placed directly in full removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C.

§ 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.'") (citing *Jennings*, 583 U.S. at 299). However, the Department of Homeland Security (DHS) has the sole discretionary authority to temporarily release on parole "any alien applying for admission to the United States" on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

B. Detention Under 8 U.S.C. § 1226(a)

Section 1226 provides for arrest and detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Under § 1226(a), the government may detain an alien during his removal proceedings, release him on bond, or release him on conditional parole. By regulation, immigration officers can release aliens upon demonstrating that the alien "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination (i.e., a bond hearing) by an IJ at any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

At a custody redetermination, the IJ may continue detention or release the alien on bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37, 39-40 (BIA 2006) (listing nine factors for IJs to consider). But regardless of the factors IJs consider, an alien "who presents a danger to persons or property should not be released during the pendency of removal proceedings." *Id.* at 38.

C. Review Before the Board of Immigration Appeals

The Board of Immigration Appeals (BIA) is an appellate body within the Executive Office for Immigration Review (EOIR) and possesses delegated authority from the Attorney General. 8 C.F.R. §§ 1003.1(a)(1), (d)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1, 1236.1. The BIA not only resolves disputes before it, but is also directed to, "through precedent decisions, [] provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). Decisions

rendered by the BIA are final, except for those reviewed by the Attorney General. 8 C.F.R. § 1003.1(d)(7).

Federal regulations provide that both the noncitizen and the government have a right to appeal an IJ's decision regarding a custody status or bond redetermination to the BIA. 8 C.F.R. §§ 1003.19(f), 1003.38. Pertinent here, if an IJ issues an order "authorizing release (on bond or otherwise)," § 1003.19(i)(2) ("automatic stay regulation") permits the Department of Homeland Security ("DHS") to automatically stay the IJ's order, resulting in the continued detention of the noncitizen pending DHS's appeal to the BIA. To trigger the stay, DHS need only file a one-page form with the immigration court within one day of its release order. *Id.* § 1003.19(i)(2). Section 1003.6(c)(1) further provides that the stay remains in effect for ten business days to permit DHS to file a notice of appeal with the BIA. Once DHS files the notice of appeal, the stay is automatically extended for ninety days. *Id.* § 1003.6(c)(4). This ninety-day period may be automatically extended by an additional thirty days if DHS seeks a "discretionary stay" from the BIA pursuant to § 1003.19(i)(1) prior to the expiration of the original ninety-day period. *Id.* § 1003.6(c)(5). Moreover, under § 1003.6(d), if the BIA "authorizes an alien's release (on bond or otherwise), denies a motion for discretionary stay, or fails to act on such a motion before the automatic stay period expires, the alien's release shall be automatically stayed for five [additional] business days," or for fifteen business days if DHS refers the case to the Attorney General within those five business days. From there, the Attorney General may order a stay "pending the disposition of any custody case." *Id.* Therefore, Petitioner's detention is temporary while his removal proceedings are pending.

III. Background

Petitioner is a citizen of Mexico, who has not been admitted or paroled in the United States. *See* Notice to Appear, attached as Exhibit A. It is unknown when Petitioner entered the United States. Petitioner was arrested on August 6, 2025, by police for a DUI offense and a traffic violation. ECF No. 2, p. 4. Subsequently, Petitioner was taken by ICE in custody, upon Homeland Security Investigations' reasonable belief of Petitioner's unlawful presence in the United States. Petitioner is in violation of 8 U.S.C. § 1325, which governs improper entry by aliens.

Petitioner requested a bond hearing on August 27, 2025, which was given on September 3, 2025. *See* Bond Request, attached as Exhibit B; *see also* Bond Memorandum of the Immigration

Judge, attached as Exhibit C. The IJ granted the Petitioner a $ 3,500 bond and ordered his release. *See* Order, attached as Exhibit D. On September 4, 2025, DHS filed a notice of intent to appeal the bond, which automatically stayed the IJ's custody redetermination decision pursuant to 8 C.F.R. § 1003.19(i)(2). *See* Notice of ICE Intent to Appeal Custody Redetermination, attached as Exhibit E. DHS also submitted an EOIR -43 Senior Legal Official Certification. *See* EOIR-43 Senior Legal Official Certification, attached as Exhibit F. On September 17, 2025, ICE filed its appeal before the BIA. *See* Bond Appeal, attached as Exhibit G. On September 24, 2025, the IJ reversed his decision on the bond because of the decision in *The Matter of Yasjure Hurtado*, 29 I&N Dec. 216 (BIA 2025). *See Bond Memorandum of the Immigration Judge*, attached as Exhibit H.

On October 9, 2025, the BIA issued a Briefing Schedule with a transcript and granted both parties until October 30, 2025, to submit their briefs to the BIA. *See* Briefing Schedule, attached as Exhibit I.

IV. Standard of Review

Judicial review of immigration matters, including of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from

judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

V. Argument

Petitioner's temporary detention pursuant to the automatic stay of 8 C.F.R. § 1003.19(i)(2) is reinforced by Congress's command to detain Petitioner throughout his removal proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this temporary detention does not violate Due Process. Petitioner also has failed to exhaust his administrative remedies. Because Petitioner cannot show that his temporary detention violates the law, the motion should be dismissed.

A. The Court Lacks Jurisdiction to Entertain Petitioner's Action Under 8 U.S.C. § 1252.

Contrary to Petitioner's arguments, this Court lacks subject matter jurisdiction over Petitioner's claims. ECF No. 2, pp. 8-10. As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of Petitioner's claims. Accordingly, Petitioners are unable to show a likelihood of success on the merits.

First, Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] *commence proceedings*, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter."[1] 8 U.S.C. § 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title."[2] Except as provided

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[1] Much of the Attorney General's authority has been transferred to the Secretary of Homeland Security and many references to the Attorney General are understood to refer to the Secretary. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005)

[2] Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended § 1252(g) by adding "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

Section 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of Homeland Security chooses to commence removal proceedings, including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings").

Petitioner's claims stem from his detention during removal proceedings. ECF No. 2, p. 1. That detention arises from the decision to commence such proceedings against him, which Petitioner acknowledges. *Id.*, p. 4. *See also, e.g.*, *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge arose from this decision to commence proceedings[.]"); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g) and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

As other courts have held, "[f]or the purposes of § 1252, the Attorney General commences proceedings against an alien when the alien is issued a Notice to Appear before an immigration court." *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). "The Attorney General may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings." *Id.* at *3. "Thus, an alien's detention throughout this process arises from the Attorney General's decision to commence proceedings" and review of claims arising from such detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g). As such, judicial review of the Bond Denial Claims is barred by § 1252(g). The Court should dismiss for lack of jurisdiction.

Second, under § 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to

remove an alien from the United States" is only proper before the appropriate federal court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

> Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for

claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]"). Here, Petitioners challenge the government's decision and action to detain them, which arises from DHS's decision to commence removal proceedings, and is thus an "action taken . . . to remove [them] from the United States." *See* 8 U.S.C. § 1252(b)(9); *see also, e.g.*, *Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government's decision to "commence proceedings"). As such, the Court lacks jurisdiction over this action. The reasoning in *Jennings* outlines why Petitioners' claims are unreviewable here.

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that "§1252(b)(9) [did] not present a jurisdictional bar" in situations where "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at 294–95. In this case, Petitioner *does* challenge the government's decision to detain him in the first place. ECF No. 2, p. 8. Though Petitioner may attempt to frame his challenge as one relating to detention authority, rather than a challenge to

DHS's decision to detain him in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

Indeed, the fact that Petitioner is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. 318, 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the Bond Denial Claims for lack of jurisdiction under § 1252(b)(9). If anything, Petitioner must present his claims before the appropriate federal court of appeals because he challenges the government's decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9). The Court should deny the pending motion and dismiss this matter for lack of jurisdiction under 8 U.S.C. § 1252.

B. Petitioner Fails to Establish Entitlement to Interim Injunctive Relief

Petitioner's motion should be denied because he has not established that he is entitled to an interim injunctive relief. Petitioner cannot establish that he is likely to succeed on the underlying merits, there is no showing of irreparable harm, and the equities do not weigh in his favor. In general, the showing required for a temporary restraining order is the same as that required for a preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a temporary restraining order, a plaintiff must "establish that he is likely to succeed on the merits, that he is 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); s*ee Nken v. Holder*, 556 U.S. 418, 426 (2009). Plaintiff must demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

The final two factors required for preliminary injunctive relief—balancing of the harm to the opposing party and the public interest—merge when the Government is the opposing party. *See Nken*, 556 U.S. at 435. The Supreme Court has specifically acknowledged that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S.

598, 611 (1985); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981); *Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (movant seeking injunctive relief "must show either (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor.") (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001)).

1. No Likelihood of Success on the Merits.

Likelihood of success on the merits is a threshold issue. *See Garcia*, 786 F.3d at 740. Petitioner cannot establish that he is likely to succeed on the underlying merits of his claims for alleged statutory and constitutional violations because he is subject to mandatory detention under 8 U.S.C. § 1225. The Court should reject Petitioner's arguments that the automatic stay violates due process and that § 1226(a) governs his detention instead of § 1225. ECF No. 2, p. 14. When there is "an irreconcilable conflict in two legal provisions," then "the specific governs over the general." *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). As Petitioner points out, § 1226(a) applies to those "arrested and detained pending a decision" on removal. 8 U.S.C. § 1226(a); *see* ECF No. 2 at 11. In contrast, § 1225 is narrower. *See* 8 U.S.C. § 1225. It applies only to "applicants for admission"; that is, as relevant here, aliens present in the United States who have not be admitted. *See id.; see also Florida v. United States,* 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023). Because Petitioner falls within that category, the specific detention authority under § 1225 governs over the general authority found at § 1226(a).

a. Petitioner is Lawfully Detained Pursuant to 8 U.S.C. § 1225(b)(2).

The current operative mechanism of Petitioner's detention is an automatic stay of release on bond for a maximum of 90 days under 8 C.F.R. § 1003.19(i)(2), but this confinement is statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention throughout the entire removal proceedings. Pursuant to 8 U.S.C. § 1225(b)(2)(A), "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under

section 1229a [removal proceedings]." 8 U.S.C. § 1225(b)(2)(A). The Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and that aliens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at 287 ("Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.").

Contrary to Petitioner's arguments, he falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement as Petitioner is an "applicant for admission" to the United States. If Petitioner does not think that he is an applicant for admission, then what is his status in the United States. As described above, an "applicant for admission" is an alien present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Petitioner admitted in his motion that he has not been admitted to the United States. ECF No. 2, p. 3. Congress's broad language here is unequivocally intentional—an undocumented alien is to be "deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1). Regardless of Petitioner's characterization that "an applicant for admission" should only include aliens captured at the border or at a port of entry, he is "deemed" an applicant for admission based on Petitioner's failure to seek lawful admission to the United States before an immigration officer, which is undisputed. ECF No. 2, p. 3 And because Petitioner has not demonstrated to an examining immigration officer that Petitioner is "clearly and beyond a doubt entitled to be admitted," Petitioner's detention is mandatory. 8 U.S.C. § 1225(b)(2)(A). Thus, the Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that Petitioner "shall be" detained.

The Supreme Court has confirmed an alien present in the country but never admitted is deemed "an applicant for admission" and that "detention must continue" "until removal proceedings have concluded" based on the "plain meaning" of 8 U.S.C. § 1225. *Jennings v.* 583 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme Court reversed the Ninth Circuit Court of Appeal's imposition of a six-month detention time limit into the statute. *Id.* at 297. The Court clarified there is no such limitation in the statute and reversed on these grounds, remanding the constitutional Due Process claims for initial consideration before the lower court. *Id.* But under the words of the statute, as explained by the Supreme Court, 8 U.S.C. § 1225 includes aliens like the Petitioner who are present but have not been admitted and they shall be detained

pending their removal proceedings. Specifically, the Supreme Court declared, "an alien who 'arrives in the United States,' *or* 'is present' in this country but 'has not been admitted,' is treated as 'an applicant for admission.'" *Id.* at 287 (emphasis on "or" added). In doing so, the Court explained both aliens captured at the border and those illegally residing within the United States would fall under § 1225. This would include Petitioner as an alien who is present in the country without being admitted.

And now, the Board of Immigration Appeals (BIA) has confirmed the application of § 1225 in a published formal decision: "Based on the plain language of section 235(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration Judges lack authority to hear bond requests or to grant bond to aliens who are present in the United States without admission." *Matter of Yahure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Indeed, §1225 applies to aliens who are present in the country *even for years* and who have not been admitted. *See Matter of Yajure Hurtado*, 29 I&N Dec. 216, 226 (BIA 2025) ("the statutory text of the INA . . . is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status." (citing 8 U.S.C. §1225)). The BIA found § 1225 clear and unambiguous as explained above. Thus, because the alien was present in the United States (regardless of how long) and because he was never admitted, he shall be detained during his removal proceedings. *See id.* at 228. In doing so, the BIA rejected the same arguments raised by Petitioner and by other similar petitioners in this District. For example, the BIA rejected the "legal conundrum" postulated by the alien that while he may be an applicant for admission under the statute, he is somehow not actually "seeking admission." *Id.* at 221. The BIA explained that such a leap failed to make sense and violated the plain meaning of the statute. *See id.* Next, the BIA rejected the alien's argument that the mandatory detention scheme under § 1225 rendered the recent amendment to § 1226 under the Laken Riley Act superfluous. *Id.* The BIA explained, "nothing in the statutory text of section 236(c), including the text of the amendments made by the Laken Riley Act, purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute 'shall be detained for [removal proceedings].'" *Id.* at 222. The BIA explained

further that any redundancy between the two statutes does not give license to "rewrite or eviscerate" one of the statutes. *See id.* (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). Also, the BIA reasoned that it matters not that the alien was initially served with a warrant listing 8 U.S.C. § 122**6** and informing him of his ability to seek bond—an Immigration Court cannot bestow jurisdiction upon itself with that initial paperwork when said jurisdiction has been specifically revoked by Congress in § 1225. *See id.* at 226-27 (explaining "the mere issuance of an arrest warrant does not endow an Immigration Judge with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).") The BIA further pointed out, "Our acknowledgement that aliens detained under section 236(a) may be eligible for discretionary release on bond does not mean that *all* aliens detained while in the United States with a warrant of arrest are detained under section 236(a) and entitled to a bond hearing before the Immigration Judge, regardless of whether they are applicants for admission under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A)." *Id.* at 227 (quotations omitted). Thus, the BIA rejected this and every argument raised by the alien to find § 1225 applied to him despite residing in the country for years. *Id.* The BIA mandate is also sweeping. The *Hurtado* decision was unanimous, conducted by a three-appellate judge panel. *See id. generally.* It is binding on all immigration judges in the United States. 8 C.F.R. § 1003.1(g)(1) ("[D]ecisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of the immigration laws of the United States."). And because the decision was published, a majority of the entire Board must have voted to publish it, which establishes the decision "to serve as precedent[] in all proceedings involving the same issue or issues." *See* 8 C.F.R. § 1003.1(g)(2)-(3). Indeed, this is the law of the land in immigration court today. *See* also 8 C.F.R. § 1003.1(d)(1) (explaining "the Board, through precedent decisions, shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations."). And in the Board's own words, *Hurtado* is a "precedential opinion." *Id.* at 216.

But in some prior cases such as the Petitioner's case here, where an immigration judge erred in releasing a qualifying alien on bond, like Petitioner, who is subject to mandatory detention, DHS's invocation of the stay of release pending appeal in 8 C.F.R. § 1003.19(i)(2) not only is

consistent with law but also ensured DHS's opportunity to vindicate Congress's mandatory detention scheme. While the law is now clear in immigration court, the BIA has yet to reach DHS's appeal involving the Petitioner, with its briefing schedule of October 30, 2025. *See* Exhibit H. Pursuant to the statutory and Supreme Court case law, Petitioner's temporary detention is lawful while his removal proceedings are pending. Any argument by Petitioner that his detention exceeds statutory authority is clearly invalid and should be rejected. The United States respectfully maintains §1225 straightforwardly applies to Petitioner, especially in light of *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (explaining "an alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1)). Petitioner is properly detained under § 1225 and cannot show an entitlement to relief and/or likelihood of success on the merits.

b. An automatic stay and the length of the automatic stay does not violate due process.

Petitioner argues that the automatic stay violates due process, without any statutory, Ninth Circuit or Supreme Court law support. As a matter of fact, the two cases that Petitioner seems to primarily rely in his petition - *Diouf v. Napolitano*, 643 F.3d 1081 (9th Cir. 2011) and *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), were abrogated in 2022 by the Ninth Circuit in *Rodriguez Diaz v. Garland*. In addition, Petitioner's reliance on *Diouf* and *Singh* is misplaced at best, as the Petitioners in these cases were detained under different statutory provisions 8 U.S.C. § 1226(a) and § 1226(c), than the one under which Petitioner Aparicio is detained in this case - 8 U.S.C. § 1225(b)(2). The Ninth Circuit has held that the detention of aliens during removal proceedings has long been upheld as a permissible exercise of the political branches' authority over immigration. *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1194 (9th Cir. 2022) (*abrogating Diouf v. Napolitano*, 643 F.3d 1081, 1091-92 (9th Cir. 2011).

Assuming the Court rules on the merits of this argument, then the automatic stay does not violate due process because it permits the Government an opportunity to appeal an IJ bond decision before the detainee is released. The Supreme Court has expressed a "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Demore*, 538 U.S. at 526. "As we said more than a

century ago, deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" *Id.* at 523 (citing *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)). Here, a stay of some length is afforded precisely because it allows the Government an opportunity to appeal before a detainee might flee. *El-Dessouki*, 2006 WL 2727191, at *3 ("a finite period of detention to allow the BIA an opportunity to review the immigration judge's bond redetermination is a narrowly tailored procedure that serves the government's interest in preventing flight of aliens likely to be ordered removable and in protecting the community"). Petitioner's argument that the automatic stay violates his due process rights while the appeal of the IJ's bond determination is proceeding misses the point.

Although Petitioner is detained pending appeal to the BIA, the question is whether permitting an automatic stay violates due process. Petitioner and others have a right to appeal an adverse custody decision to the BIA. *See* 8 CFR §§ 1003.19(a), 1236.1(d). Similarly, the Government may appeal an adverse bond decision to the BIA. An automatic stay of limited duration allows the Government to pursue its appeal before the subject might post bond and flee. *See Demore*, 538 U.S. at 528 ("detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings"). The purpose of the automatic stay is to "avoid the necessity of having to decide whether to order a stay on extremely short notice with only the most summary presentation of the issues." Review of Custody Determinations, 71 FR 57873-01, 2006 WL 2811410

Similarly, the length of the automatic stay does not violate due process. An automatic stay of up to 90 days does not violate due process because it is narrowly tailored to serve a compelling Government interest. An alien's right to procedural due process is violated "only if [1] the proceeding was 'so fundamentally unfair that the alien was prevented from reasonably presenting his case,' " and [2] the alien proves that "the alleged violation prejudiced his or her interests." *Mendez–Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016) (citations omitted). Here, Petitioner is permitted to contest the stay by filing a brief to the BIA by October 30, 2025. Exhibit H. Petitioner does not argue that his current detention has prejudiced his interests regarding his removal or the merits of the IJ bond decision. *See also Vargas–Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) ("Where

an alien is given a full and fair opportunity ... to present testimony and other evidence in support of the application, he or she has been provided with due process.").

There is no substantive due process violation. Laws that infringe a "fundamental" right protected by the Due Process Clause are constitutional only if "the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Substantive due process protections apply to resident aliens. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). An automatic stay of up to 90 days does not violate due process because it remains in effect until the BIA has an opportunity to review the appeal. In the context of post-removal detention, the Court in *Zadvydas* wrote that "we think it practically necessary to recognize some presumptively reasonable period of detention...." *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The Court determined that "an argument can be made for confining any presumption to 90 days" but set a limit of 180 days before a detainee in removal proceedings would be entitled to a bond hearing. *Id.* In the absence of other authority (and Petitioner presents none), Petitioner has not established that an automatic stay of up to 90 days in this appeal provision violates due process. Petitioner's reliance on *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1075 (N.D. Cal. 2004) is misplaced. ECF No. 2, p. 15. The ruling in *Zavala* was predicated upon an indefinite, mandatory stay. But the regulation was amended in 2006 to permit an automatic stay of up to only 90 days. *See Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1032 (E.D. Wis.), aff'd sub nom. *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (noting that *Zavala* relied on "the previous regulation under which the duration of the automatic stay was indefinite" whereas the "current regulation provides that the automatic stay will lapse 90 days after the filing of the notice of appeal."). In sum, Petitioner's temporary detention pending his removal proceedings does not violate Due Process. He has been detained for roughly eleven weeks as his *process* unfolds. Specifically, his expedited narrow appeal on the issue of release on bond is before the BIA with briefing schedule of October 30, 2025. Exhibit H. Resolution one way or another is undoubtedly forthcoming. Petitioner's ample available process in his current removal proceedings demonstrate no lack of Procedural Due Process—nor any deprivation of liberty "sufficiently outrageous" required to establish a Substantive Due Process claim. *See generally Reed v. Goertz*, 598 U.S. 230, 236 (2023); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 628 (8th Cir. 2001), *as corrected* (Mar. 27, 2001), *as*

corrected (May 1, 2001). Congress simply made the decision to detain him pending removal which is a "constitutionally permissible part of that process." *See Demore v. Kim*, 538 U.S. 510, 531 (2003). Petitioner cannot show a likelihood of success on the merits.

2. Irreparable Harm Has Not Been Shown

To prevail on their request for interim injunctive relief, Petitioner must demonstrate "immediate threatened injury." *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citing *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)). Merely showing a "possibility" of irreparable harm is insufficient. *See Winter*, 555 U.S. at 22. And as discussed above, detention alone is not an irreparable injury. *See Reyes*, 2021 WL 662659, at *3, *aff'd sub nom. Diaz Reyes*, 2021 WL 3082403 ("[C]ivil detention after the denial of a bond hearing [does not] constitute[] irreparable harm such that prudential exhaustion should be waived."). Further, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. Here, as explained above, because Petitioners' alleged harm "is essentially inherent in detention, the Court cannot weigh this strongly in favor of" Petitioners. *Lopez Reyes v. Bonnar*, No 18-cv-07429-SK, 2018 WL 747861 at *10 (N.D. Cal. Dec. 24, 2018).

3. Balance of Equities Does Not Tip in Petitioner's Favor

It is well settled that the public interest in enforcement of the United States' immigration laws is significant. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 551-58 (1976); *Blackie's House of Beef*, 659 F.2d at 1221 ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant.") (citing cases); *see also Nken*, 556 U.S. at 435 ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established and permits and prolongs a continuing violation of United States law.") (internal quotation omitted). The BIA also has an "institutional interest" to protect its "administrative agency authority." *See McCarthy v. Madigan*, 503 U.S. 140, 145, 146 (1992) *superseded by statute as recognized in Porter v. Nussle*, 534 U.S. 516 (2002). "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that

it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Global Rescue Jets, LLC v. Kaiser Foundation Health Plan, Inc.*, 30 F.4th 905, 913 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Indeed, "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy*, 503 U.S. at 145. Moreover, "[u]ltimately the balance of the relative equities 'may depend to a large extent upon the determination of the [movant's] prospects of success.'" *Tiznado-Reyna v. Kane*, Case No. CV 12-1159-PHX-SRB (SPL), 2012 WL 12882387, at * 4 (D. Ariz. Dec. 13, 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)). Here, as explained above, Petitioner cannot succeed on the merits of his claims. The balancing of equities and the public interest weigh heavily against granting Petitioner's equitable relief.

C. *Petitioner Has Failed to Exhaust Administrative Remedies*

Similarly, requiring exhaustion here would be consistent with Congressional intent to have claims, such as Petitioner's, subject to the channeling provisions of § 1252(b)(9) that provide for appeal to the BIA and then, if unsuccessful, the Ninth Circuit. "Exhaustion can be either statutorily or judicially required." *Acevedo–Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004). "If exhaustion is statutory, it may be a mandatory requirement that is jurisdictional." *Id.* (citing *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 747 (9th Cir. 1991)). "If, however, exhaustion is a prudential requirement, a court has discretion to waive the requirement." *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325–26 (9th Cir. 1981)). Here, Petitioner is attempting to bypass the administrative scheme by not filing a brief to the BIA in response to the government's appeal regarding his bond.

"District Courts are authorized by 28 U.S.C § 2241 to consider petitions for habeas corpus." *Castro–Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001). "That section does not specifically require petitioners to exhaust direct appeals before filing petitions for habeas corpus." *Id.* That said, the Ninth Circuit "require[s], as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241." *Id.* Specifically, "courts may require prudential exhaustion if (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the

deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (internal quotation marks omitted).

"When a petitioner does not exhaust administrative remedies, a district court ordinarily should either dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies, unless exhaustion is excused." *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011); *see also Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (no jurisdiction to review legal claims not presented in the petitioner's administrative proceedings before the BIA). Moreover, a "petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." *Vargas v. INS*, 831 F.3d 906, 908 (9th Cir. 1987); *see also Sola v. Holder*, 720 F.3d 1134, 1135-36 (9th Cir. 2013) (declining to address a due process argument that was not raised below because it could have been addressed by the agency).

Here, exhaustion is warranted because agency expertise is required. "[T]he BIA is the subject-matter expert in immigration bond decisions." *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019). The BIA is well-positioned to assess how agency practice affects the interplay between 8 U.S.C. §§ 1225 and 1226. *See Delgado v. Sessions*, No. C17-1031-RSL-JPD, 2017 WL 4776340, at *2 (W.D. Wash. Sept. 15, 2017) (noting a denial of bond to an immigration detainee was "a question well suited for agency expertise"); *Matter of M-S-*, 27 I&N Dec. 509, 515-18 (2019) (addressing interplay of §§ 1225(b)(1) and 1226). *But see Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896-97 (9th Cir. 2021); *Vasquez Garcia*, No. 25-cv-02180-DMS-MMP, 2025 WL 2549431, at *4-5.

Waiving exhaustion would also "encourage other detainees to bypass the BIA and directly appeal their no-bond determinations from the IJ to federal district court." *Aden*, 2019 WL 5802013, at *2. Individuals, like Petitioner, would have little incentive to seek relief before the BIA if this Court permits review here. And allowing a skip-the-BIA-and-go-straight-to-federal-court strategy would needlessly increase the burden on district courts. *See Bd. of Tr. of Constr. Laborers' Pension Trust for S. Calif. v. M.M. Sundt Constr. Co.*, 37 F.3d 1419, 1420 (9th Cir. 1994) ("Judicial economy is an

important purpose of exhaustion requirements."); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023) (noting "exhaustion promotes efficiency"). If the IJs erred as Petitioner alleges or may eventually allege, this Court should allow the administrative process to correct itself. *See id.*

Moreover, detention alone is not an irreparable injury. Discretion to waive exhaustion "is not unfettered." *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Petitioners bear the burden to show that an exception to the exhaustion requirement applies. *Leonardo*, 646 F.3d at 1161; *Aden*, 2019 WL 5802013, at *3. "[C]ivil detention after the denial of a bond hearing [does not] constitute[] irreparable harm such that prudential exhaustion should be waived." *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at *3 (W.D. Wash. Feb. 19, 2021), *aff'd sub nom. Diaz Reyes v. Mayorkas*, No. 21-35142, 2021 WL 3082403 (9th Cir. July 21, 2021).

Because Petitioner has not exhausted his administrative remedies, this matter should be dismissed or stayed.

VI. Conclusion

For the foregoing reasons, Federal Respondents respectfully request that the Court deny Petitioner's motion for temporary restraining order.

Respectfully submitted this 21st day of October 2025.

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/s/ Virginia T. Tomova
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