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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 Petition for Habeas Corpus (ECF No. 1)**

Federal Respondents Kristi Noem, Pamela Bondi, and Thomas Feeley, through undersigned counsel, hereby submit their response to Petitioner Samuel Sanchez Aparicio's Petition for Habeas Corpus. ECF No. 1. This response is supported by the following memorandum of points and authorities.

Respectfully submitted this 3rd day of November 2025.

SIGAL CHATTAH
Acting United States Attorney

*/s/ Virginia T. Tomova*
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**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 that he exhaust his administrative remedies. Petitioner'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 his petition, 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."). Because Petitioner's temporary detention is lawful, the Habeas Petition fails, and the United States, including all Federal Respondents in their official capacities, hereby seeks dismissal of the Petition.

## II. Statutory and Regulatory Background

### a. Applicants for Admission

"The phrase 'applicant for admission' is a term of art denoting a particular legal status." *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc). Section 1225(a)(1) states:

> (1) Aliens treated as applicants for admission. — An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival …) shall be deemed for the purposes of this Act an applicant for admission.

8 U.S.C. § 1225(a)(1).[1] Section 1225(a)(1) was added to the INA as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, § 302, 110 Stat. 3009-546. "The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Before IIRIRA, "immigration law provided for two types of removal proceedings: deportation hearings and exclusion hearings." *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). A deportation hearing was a proceeding against an alien already physically present in the United States, whereas an exclusion hearing was against an alien outside of the United States seeking admission *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 25 (1982)). Whether an applicant was eligible for "admission" was determined only in exclusion proceedings, and exclusion proceedings were limited to "entering" aliens — those aliens "coming ... into the United States, from a foreign port or place or from an outlying possession." *Plasencia*, 459 U.S. at 24 n.3 (quoting 8 U.S.C. § 1101(a)(13) (1982)). "[N]on-citizens who had entered without inspection could take advantage of greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings." *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010); *see also Plasencia*, 459 U.S. at 25-26. Prior to IIRIRA, aliens who attempted to lawfully enter the United States were in a worse position than aliens who crossed the border unlawfully. *See Hing Sum*, 602 F.3d at 1100; *see also* H.R. Rep. No. 104-469, pt. 1, at 225-229 (1996). IIRIRA "replaced deportation and exclusion proceedings with a general removal proceeding." *Hing Sum*, 602 F.3d at 1100.

IIRIRA added Section 1225(a)(1) to "ensure[] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal

[1] Admission is the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13).

footing in removal proceedings under the INA." *Torres*, 976 F.3d at 928; *see also* H.R. Rep. 104-469, pt. 1, at 225 (explaining that § 1225(a)(1) replaced "certain aspects of the current 'entry doctrine,'" under which illegal aliens who entered the United States without inspection gained equities and privileges in immigration proceedings unavailable to aliens who presented themselves for inspection at a port of entry). The provision "places some physically-but not-lawfully present noncitizens into a fictive legal status for purposes of removal proceedings." *Torres*, 976 F.3d at 928.

b. **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. at 220 ("[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).

c. **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.

d. **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.

**e. <u>Staying Immigration Judge's Bond Order</u>**

Bond decisions issued by an Immigration Judge can be appealed by DHS or an alien to BIA by filing a Notice of Appeal from a Decision of an Immigration Judge (EOIR-26) within 30

days. DHS can file a motion with the BIA seeking *a discretionary stay* of the custody decision--whether to release the noncitizen on bond consistent with the IJ's order at any time during the appeal period. 8 C.F.R. § 1003.19(i)(1) (hereafter "discretionary stay").

In contrast, in cases where the bond issued is greater than $10,000 or "DHS has determined" that the noncitizen should not be released, a stay of custody order is issued automatically preventing the release of the noncitizen on bond upon filing of a simple one-page form, the Notice of Service of Intent to Appeal Custody Redetermination (EOIR-43). *See* 8 C.F.R. § 1003.19(i)(2) (hereinafter "automatic stay").

While the automatic stay is not subject to review by either the IJ or the BIA, the discretionary stay requires an individualized analysis by the BIA of the noncitizen's case to determine if staying the IJ's order is appropriate. This analysis considers the individual's criminal history, ties to the community, flight risk, dangerousness, and the likelihood of prevailing in removal proceedings. *See, e.g., Gunaydin v. Trump*, 784 F. Supp. 3d 1175 (D. Minn. 2025); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003).

The rules provide that if the BIA has not acted on the custody appeal, the automatic stay shall lapse 90 days after the filing of the notice of appeal. 8 C.F.R. § 1003.6(c)(4) (2006). However, DHS may seek an additional discretionary stay from the BIA to prevent lapse; to do so, DHS would submit a motion to the BIA asking for a discretionary stay pending the BIA's decision on the custody appeal. In this case, the automatic stay would remain in place for up to thirty additional days to permit the BIA time to rule on the motion. 8 C.F.R. § 1003.6(c)(5). If the BIA denies the discretionary stay, fails to act upon it within the requisite period, or issues a decision upholding the immigration judge's custody ruling, then the automatic stay would remain in place for an additional five business days to permit the Secretary or a designated DHS official to decide whether to refer the decision for the Attorney General's review. 8 C.F.R. § 1003.6(d). If the agency decides to refer, then the automatic stay would remain in place for an additional fifteen business days to permit the Attorney General time to consider the merits of the referred decision and decide whether to act on the referred decision. *Id.*

## III. Factual 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 exactly 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. 1, ¶ 25. Subsequently, Petitioner was taken by ICE in custody, upon Homeland Security Investigations' reasonable belief of Petitioner's unlawful presence in the United States. *Id.* 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 Yajure Hurtado*, 29 I. & N. Dec. 216. *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

In a petition for a writ of habeas corpus, the petitioner is challenging the legality of his restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Specifically, here,

Petitioner challenges his temporary civil immigration detention pending his removal proceeding.

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. Am.-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*, 345 U.S. at 210 ("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*, 342 U.S. at 538 ("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*, 538 U.S. at 531 ("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 petitioner must be dismissed as a matter of law.

**a. Petitioner is Lawfully Detained Under 8 U.S.C. §1225.**

Petitioner's temporary detention pursuant to the stay provisions of 8 C.F.R. § 1003.19(i) 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. Because Petitioner cannot show the temporary detention violates the law, the Petition must be denied. *See* 28 U.S.C. § 2241.

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.").

Petitioner 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. 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). Congress's broad language here is unequivocally intentional—an undocumented alien is to be "deemed for purposes of this chapter an applicant for admission." *Id.* Petitioner 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. 1, ¶ 24. 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*, 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 Yajure Hurtado*, 29 I. & N. Dec. 216. 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. at 226 ("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)).

In *Hurtado*, the BIA affirmed the decision of the immigration judge finding the Immigration Court lacked jurisdiction to conduct a bond hearing because the alien who was present in the United States for almost three years but was never admitted shall be detained under 8 U.S.C. §1225 for the duration of his removal proceedings. *Id.* The case involved an alien who unlawfully entered the United States in 2022 and was granted temporary protected status in 2024. *Id.* at 216–17. However, that status was revoked in 2025, and the alien was subsequently apprehended and placed in removal proceedings. *Id.* at 217. It is clear from the decision, the alien was initially served with a Notice of Custody Determination, informing him of his detention under 8 U.S.C. § 1226 and his ability to request bond, like the Petitioner was in this case. *Id.* at 226. However, when the alien sought a redetermination of his custody status, the immigration judge held the Court did not have jurisdiction under § 1225. *Id.* at 216. The alien appealed to the BIA. *Id.*

In affirming the decision of the immigration judge who determined he lacked jurisdiction, 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. § 1226 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 clear: "under a plain language reading of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests or to grant bond to aliens, like the respondent, who are present in the United States without admission." *Id.* at 225. Indeed, this ruling emphasizes that § 1225 applies to aliens like the Petitioner who is also present in the United States but has not been admitted.

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.

As such, immigrant judges are holding § 1225 applies to aliens who are present but not admitted and therefore immigration judges have denied bond for lack of jurisdiction. But in some prior cases 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) 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. But in the coming days, the Federal Respondents would expect the BIA to reach this appeal, apply the broad holding in *Hurtado*, and reverse the immigration judge's release of the Petitioner on bond. Indeed, this very decision by the immigration judge, upon which Petitioner places so much weight, was wrongly decided and without jurisdiction and will soon be reversed.

Because Petitioner shall be detained during the removal proceedings and these proceedings are uncontrovertibly ongoing, his temporary detention is lawful. Any argument by Petitioner that his detention exceeds statutory authority is clearly invalid and should be rejected. The United States is aware of prior rulings in this District and others rejecting this argument (*see e.g.*, *Herrera-Torralba v. Knight*, 2:25-cv-01366-RFB-DJA (D. Nev. Sep 05, 2025); *Maldonado-Vazquez v. Feeley*, 2:25-cv-01542-RFB-EJY (D. Nev. Sep 17, 2025)), but the United States respectfully maintains §1225 straightforwardly applies to Petitioner, especially in light of *Jennings*. *See Jennings*, 583 U.S. at 287 (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)).

**1. *The Vargas Lopez v. Trump Recent Decision Is Highly Instructive and Supports Petitioner's Detention Under 8 U.S.C. § 1225.***

The United States District Court for the District of Nebraska's decision denying the habeas corpus petition in *Vargas Lopez v. Trump* is particularly relevant here. In *Vargas Lopez*, the petitioner, an undocumented alien who had been residing in the United States since 2013, sought immediate release from detention. *Vargas Lopez*, No. 8:25CV526, 2025 WL 2780351, at *1 (D. Neb. Sept. 30, 2025). Prior to filing his petition, Vargas Lopez had received a bond hearing, and the immigration judge ordered that he be released from custody under bond of $10,000. *Id.* at *3. DHS however appealed the bond determination, which automatically stayed Vargas Lopez's release on bond. *Id.* Vargas Lopez then filed a petition for habeas corpus alleging that the automatic stay was *ultra vires* and violated his due process rights. *Id.* He also alleged that application of 8 U.S.C. § 1225 in his case was unlawful because 8 U.S.C. § 1226 should control his detention. *Id.*

First, the court denied the petition because Vargas Lopez failed to carry his burden of demonstrating by a preponderance of the evidence that his detention was unlawful. *Id.* at *6. Vargas Lopez argued that he fell under § 1226, not 1225, but his petition and filings failed to provide proof of the "warrant for Vargas Lopez's arrest" that § 1226 requires.

Second, the court concluded that Vargas Lopez was subject to detention without possibility of bond under § 1225(b)(2). To do so, the court analyzed the Supreme Court's decision in *Jennings* to reject the notion that § 1225(b)(2) and § 1226(a) apply to two distinct groups of aliens; the two sections are not mutually exclusive. *Id.* at *6–8. The court then concluded that Vargas Lopez is an alien within the "catchall" scope of § 1225(b)(2), subject to detention without possibility of release on bond through a proceeding on removal under § 1229a. *Id.* at *9. The court found that Vargas Lopez was an "applicant for admission" because his counsel admitted that Vargas Lopez "wishe[d] to stay in this country." *Id.* That finding, according to the court, was consistent with the conclusions of the BIA in *Hurtado* and *Jennings*.

Pursuant to the language of the statute and the holding of *Jennings*, the court said that "just because Vargas Lopez illegally remained in this country *for years* does not mean that he is

suddenly not an 'applicant for admission' under § 1225(b)(2)." *Id.* "Even if Vargas Lopez might have fallen within the scope of § 1226(a)," the court found "he also certainly fit within the language of § 1225(b)(2) as well." *Id.* "The Court thus conclude[d] that the *plain language* of § 1225(b)(2) and the "all applicants for admission" language of *Jennings* permitted the DHS to detain Vargas Lopez under § 1225(b)(2)." *Id.*

***2. The Chavez v. Noem Recent Decision Is Also Instructive.***

The United States District Court for the Southern District of California's decision in *Chavez v. Noem*, No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228, at *1 (S.D. Cal. Sept. 24, 2025), is also instructive. In *Chavez,* the court denied a motion for a temporary restraining order ("TRO") filed by the petitioners who were detained under 8 U.S.C. § 1225(b)(2). *Chavez*, 2025 WL 2730228, at *1. The *Chavez* petitioners argued they should not have been mandatorily detained and instead they should have received bond redetermination hearings under § 1226(a). *Id.* The *Chavez* petitioners filed a motion for TRO, seeking to "enjoin[] Respondents from continuing to detain them unless [they received] an individualized bond hearing . . . pursuant to 8 U.S.C. § 1226(a) within fourteen days of the TRO." *Id.*

In denying the TRO, the *Chavez* court went no further than the plain language of § 1225(a)(1). *Id.* at *4. Beginning and ending with the statutory text, the *Chavez* court correctly found that because petitioners did not contest that they are "alien[s] present in the United States who ha[ve] not been admitted," then the *Chavez* petitioners are "applicants for admission" and thus subject to the mandatory detention provisions of "applicants for admission" under § 1225(b)(2). *Id*; *see also Matter of Yajure Hurtado*, 29 I. & N. Dec. at 221–222 (finding that an alien who entered without inspection is an "applicant for admission" and his argument that he cannot be considered as "seeking admission" is unsupported by the plain language of the INA, and further stating, "[if]f he is not admitted to the United States . . . but he is not 'seeking admission' . . . then what is his legal status?").

***3. The BIA's Decision in Hurtado Is Entitled to Significant Weight in Construing the Scope of 8 U.S.C. § 1225(b)(2).***

While *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024), eliminated Chevron

deference, *Hurtado* nonetheless should be afforded substantial weight under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the weight owed to an agency interpretation depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140. *Hurtado* scores highly on these factors.

First, the BIA applied its specialized expertise in immigration detention law, the very subject Congress charged it with administering. Its decision addressed the interplay between §§ 1225 and 1226 in detail, relying on statutory text, legislative history, and decades of experience resolving custody questions. Second, the BIA's reasoning is thorough and well supported. It carefully explained why noncitizens who entered without inspection remain "applicants for admission" under § 1225(a)(1) and why reclassifying them under § 1226(a) would create statutory issues and undermine congressional intent. Third, the BIA's interpretation is consistent with Supreme Court precedent, including *Jennings*, which recognized that detention under § 1225(b) is mandatory. Finally, adopting *Hurtado* promotes uniformity and coherence in federal immigration law by preventing detention outcomes from turning on the happenstance of when and where a noncitizen is apprehended.

**4. *The Legislative History Bolsters Petitioner's Detention.***

When the plain text of a statute is clear, "that meaning is controlling" and courts "need not examine legislative history." *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir. 2011). But to the extent legislative history is relevant here, nothing "refutes the plain language" of § 1225. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011). Congress passed IIRIRA to correct "an anomaly whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully." *Torres*, 976 F.3d at 928; *Chavez*, 2025 WL 2730228, at *4. It "intended to replace certain aspects of the [then] current 'entry doctrine,' under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry." *Torres*, 976 F.3d at 928 (quoting H.R. Rep. 104-469, pt. 1, at 225); *Chavez*, 2025 WL 2730228, at *4

(The addition of § 1225(a)(1) "ensure[d] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission.' ").

As the pertinent House Judiciary Committee Report explains: "[Before the IIRIRA], aliens who [had] entered without inspection [were] deportable under section 241(a)(1)(B)." H.R. Rep. No. 104-469, pt. 1, at 225 (1996). But "[u]nder the new 'admission' doctrine, such aliens *will not be considered to have been admitted*, and thus, must be subject to a ground of inadmissibility, rather than a ground of deportation, *based on their presence without admission*." *Id.* Thus, applicants for admission remain such unless an immigration officer determines that they are "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A); *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 228. Failing to clearly and beyond a doubt demonstrate that they are entitled to admission, such aliens "shall be detained for a proceeding under section 240." 8 U.S.C. § 1225(b)(2)(A); *see also Jennings*, 583 U.S. at 288.

The Court should thus reject Petitioner's proposed statutory interpretation and request to be released because Petitioner's requests would make aliens who presented at a port of entry subject to mandatory detention under § 1225, but those who crossed illegally would be eligible for a bond under § 1226(a).

***5. Under Loper Bright, the Statute Controls, Not Prior Agency Practices.***

Any argument that prior agency practice supports applying § 1226(a) to Petitioner is unavailing because under *Loper Bright*, the plain language of the statute and not prior practice controls. *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 225–26. In overturning *Chevron*, the Supreme Court recognized that courts often change precedents and "correct[] our own mistakes" *Loper Bright Enterprises*, 603 U.S. at 411 (overturning *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). *Loper Bright* overturned a decades old agency interpretation of the Magnuson-Stevens Fishery Conservation and Management Act that itself predated IIRIRA by twenty years. *Loper Bright Enterprises*, 603 U.S. at 380. Thus, longstanding agency practice carries little, if any, weight under *Loper Bright*. The weight given to agency interpretations "must always 'depend upon their thoroughness, the validity of their reasoning,

the consistency with earlier and later pronouncements, and all those factors which give them power to persuade.'" *Loper Bright Enterprises*, 603 U.S. at 432–33 (quoting *Skidmore*, 323 U.S. at 140 (cleaned up)).

The BIA's recent precedent decision in *Hurtado* includes thorough reasoning. *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 221–22. In *Hurtado*, the BIA analyzed the statutory text and legislative history. *Id.* at 223–225. It highlighted congressional intent that aliens present without inspection be considered "seeking admission." *Id.* at 224. The BIA concluded that rewarding aliens who entered unlawfully with bond hearings while subjecting those presenting themselves at the border to mandatory detention would be an "incongruous result" unsupported by the plain language "or any reasonable interpretation of the INA." *Id.* at 228.

To be sure, "when the best reading of the statute is that it delegates discretionary authority to an agency," the Court must "independently interpret the statute and effectuate the will of Congress." *Loper Bright Enterprises*, 603 U.S. at 395. But "read most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings have concluded." *Jennings*, 583 U.S. at 297 (cleaned up). Prior practice does not support Petitioner's position that the plain language mandates detention under § 1226(a).

**b. Petitioner's Temporary Detention Does Not Offend Due Process**

As mentioned above, Congress broadly crafted "applicants for admission" to include undocumented aliens present within the United States like Petitioner. *See* 8 U.S.C. § 1225(a)(1). And Congress directed aliens like the Petitioner to be detained during their removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *Jennings*, 583 U.S. at 297 ("Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded."). In so doing, Congress made a legislative judgment to detain undocumented aliens during removal proceedings, as they—by definition—have crossed borders and traveled in violation of United States law. As explained above, that is the prerogative of the legislative branch serving the interest of the government and the United States.

The Supreme Court has recognized this profound interest. *See Shaughnessy*, 345 U.S. at 210 ("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."). And with this power to remove aliens, the Supreme Court has recognized the United States' longtime Constitutional ability to detain those in removal proceedings. *Carlson*, 342 U.S. at 538 ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S. at 235 ("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*, 538 U.S. at 531 ("Detention during removal proceedings is a constitutionally permissible part of that process."); *Jennings*, 583 U.S. at 286 ("Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.").

In another immigration context (aliens already ordered removed awaiting their removal), the Supreme Court has explained that detaining these aliens less than six months is presumed constitutional. *See Zadvydas*, 533 U.S. at 701. But even this presumptive constitutional limit has been subsequently distinguished as perhaps unnecessarily restrictive in other contexts. For example, in *Demore*, the Supreme Court explained Congress was justified in detaining aliens during the entire course of their removal proceedings who were convicted of certain crimes. *Demore*, 538 U.S. at 513. In that case, similar to undocumented aliens like Petitioner, Congress provided for the detention of certain convicted aliens during their removal in 8 U.S.C. § 1226(c). *See id.* The Court emphasized the constitutionality of the "definite termination point" of the detention, which was the length of the removal proceedings.[2] *Id.* at 512.[3] In light of Congress's interest in dealing with illegal immigration by keeping specified aliens in detention pending the

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[2] "In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings,* the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was 'indefinite' and 'potentially permanent,' *id.,* at 690–691, 121 S.Ct. 2491, the record shows that § 1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas.*"

[3] In 2018, the Court again highlighted the significance of a "definite termination point" for detention of certain aliens pending removal. *See Jennings*, 583 U.S. at 304.

removal period, the Supreme Court dispensed of any Due Process concerns without engaging in the "*Mathews v. Eldridge* test" *See id. generally*.

Likewise, in the case at bar, Petitioner's temporary detention pending his removal proceedings does not violate Due Process. Petitioner has been detained for a few months as his *process* unfolds. Specifically, DHS's narrow appeal on the issue of release on bond is before the BIA, and 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*, 538 U.S. at 531.

The temporary, automatic, and discretionary stays permit the United States an opportunity to appeal an IJ bond decision to correct any errors by the Immigration Judge while providing "an appropriate and less restrictive means whereby the government's interest in seeking a stay of the custody redetermination may be protected without unduly infringing upon Petitioner's liberty interest." *Zavala*, 310 F. Supp. 2d at 1077; *El-Dessouki v. Cangemi*, No. CIV 063536 DSD/JSM, 2006 WL 2727191, at *3 (D. Minn. Sept. 22, 2006); *Altayar v. Lynch*, No. CV-16-02479-PHX-GMS (JZB), 2016 WL 7383340, at *10–11 (D. Ariz. Nov. 23, 2016).

As explained in *Altayar*, 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; *Altayar*, 2016 WL 7383340 at *12-13. An automatic stay of up to 90 days does not violate due process because it is narrowly tailored to serve a compelling United States interest. *Id.* In *Altayar*, the Court found there is no procedural due process violation from § 1003.19(i)(2).

In this case, Petitioner, who is present in the United States without admission or parole, is an applicant for admission in INA § 240 removal proceedings and is therefore detained pursuant to 8 U.S.C. § 1225. As discussed above, his detention is mandatory and the IJ does not

have jurisdiction to issue a bond. Because the IJ in this case conducted a bond hearing and granted a bond *in error*, the automatic stay of 8 C.F.R. § 1003.19(i)(2) has here served the very purpose for which it was created in the first place. As history has revealed, subsequent to the IJ's decision error, the BIA issued its precedential decision in *Hurtado*, essentially superseding the IJ's erroneous decision and showing that IJ lacked jurisdiction to grant Petitioner's bond. Had the automatic stay not been in place, the error would have gone further, and Petitioner would have been mistakenly released from DHS custody.

The United States is aware of prior rulings in this District and others rejecting these arguments, but the United States respectfully maintains Petitioner has not been deprived of Due Process in light of the aforementioned precedent.

**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. I.N.S.*, 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. U.S. Dep't of Immigr. & Naturalization*, 831 F.2d 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); *Garcia v. Noem*, No. 25-CV-02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025), 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 Tr. for S. California 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.

**d. Request for EAJA Fees Should be Denied**

Petitioner seeks attorney's fees and costs pursuant to § 2412 of the Equal Access for Justice Act ("EAJA"), which allows fee-shifting in civil actions by or against the United States. EAJA has two parts, agency adversarial adjudication fee-shifting, 5 U.S.C. § 504, and fee-shifting in civil actions in federal court, 28 U.S.C. § 2412. Petitioner cannot obtain fees in this case under 5 U.S.C. § 504 since that provision excludes administrative immigration proceedings. *Ardestani v. I.N.S.*, 502 U.S. 129 (1991). His only recourse for fees is pursuant to § 2412(d)(1)(A), which provides, subject to exceptions not relevant here, that in an action brought by or against the United States, a court must award fees and expenses to a prevailing non-government party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

Here, Petitioner's request is premature because he is not a prevailing party. Second, even if Petitioner were to prevail in this case, the Federal Respondents' position asserted in this

Response is substantially justified because other courts have found the arguments presented herein to be persuasive and that DHS can lawfully detain, under the mandatory detention provisions of 8 U.S.C. § 1225, other petitioners who are similarly situated to this Petitioner.

As described above, the United States District Court for the District of Nebraska and the United States District Court for the Southern District of California have both issued decisions holding that, under the plain language of § 1225(a)(1), aliens present in the United States who have not been admitted are "applicants for admission" and are thus subject to the mandatory detention provisions of "applicants for admission" under § 1225(b)(2). *See Vargas Lopez*, 2025 WL 2780351; *Chavez*, 2025 WL 2730228. Because other federal judges have found persuasive the positions advanced by the Federal Respondents in this case, the Federal Respondents' position is substantially justified. *See Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1091 (9th Cir. 2022) (finding that the district court did not abuse its discretion, in finding that the United States' position was substantially justified for purposes of EAJA, where different judges disagreed about the proper reading of the statute and the case involved an issue of first impression). Because the United States' position in this case is substantially justified, Petitioner's request for attorney's fees under EAJA cannot prevail.

## VI. Conclusion

For the foregoing reasons, Federal Respondents respectfully request that the Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted this 3rd day of November 2025.

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*/s/ Virginia T. Tomova*
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