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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BARTOLOME FERNANDO-BARRUETA

Petitioner

v.

Kristi NOEM, Secretary, U.S. Department of Homeland Security; et al.,

Case No.: No.: 25-cv-2670-LL-SBC

Judge: Hon. Linda Lopez

PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN

INTRODUCTION

Petitioner respectfully submits this Traverse in response to Respondents' Return to the Petition for Writ of Habeas Corpus. The Government's opposition rests on a mistaken premise—that Petitioner's custody is governed by INA § 235(b), asserting that he is subject to mandatory detention without bond. That premise is contradicted by the agency's own records, by the governing statutory framework, and by recent decisions within this District.

Petitioner does not dispute DHS's authority to arrest or initiate removal proceedings, nor the factual basis for his current custody; he challenges only the subsequent misclassification of that custody.

On August 9, 2025, the Department of Homeland Security arrested Petitioner in the interior of the United States pursuant to a Form I-200, Warrant for Arrest of Alien, issued three

days earlier, on August 6, 2025. As the form itself makes clear, INA § 236 provides the substantive authority for the arrest and detention of noncitizens already present in the United States, while INA § 287 confers enforcement authority to execute such warrants (ECF No. 5-4).

Having exercised its arrest authority under §§ 236 and 287, the Government cannot now retroactively reclassify that detention as arising under § 235(b) merely to avoid the individualized bond procedures Congress established in § 236(a).

The statutory distinction between §§ 235 and 236 is clear and non-overlapping. As the Attorney General explained in *Matter of M-S-*, 27 I&N Dec. 509, 516 (A.G. 2019), each provision governs a distinct class of noncitizens—§ 235 applies to those encountered at or near the border seeking initial admission, while § 236 applies to persons arrested in the interior under warrant authority.

The issue before this Court is therefore straightforward: whether a noncitizen arrested in the interior pursuant to a Form I-200 issued under INA §§ 236 and 287 may be denied a bond hearing by reclassifying that custody as arising under INA § 235(b).

This is not a challenge to removal itself; it is a challenge to the unlawful deprivation of liberty resulting from DHS's improper application of its detention authorities.

The same question has recently arisen in other habeas petitions before this District. In *Ramiro Chavez Valdovinos v. Kristi Noem et al.*, No. 25-cv-2439-TWR (KSC) (S.D. Cal. Sept. 25, 2025), Judge Todd W. Robinson held that § 1252 does not bar habeas review, found exhaustion futile in light of *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025)and concluded that detention following an interior arrest under a Form I-200 is governed by § 236(a), not § 235(b).,

Here, Petitioner was denied bond on September 15, 2025, solely on the basis of *Matter of Yajure-Hurtado*. Because *Yajure-Hurtado* was issued by the BIA itself, any administrative appeal would be futile, and prudential exhaustion should therefore be excused.

For the reasons set forth below, the Government's arguments lack merit. The statutory text, agency documentation, and nearly three decades of consistent practice all confirm that

Petitioner is detained under § 236(a) and is therefore entitled to an individualized bond hearing before an Immigration Judge.

JURISDICTION

A. 8 U.S.C. § 1252(b)(9): Does Not Bar Habeas Review of Collateral Custody Challenges

Respondents contend that the Court lacks jurisdiction because Petitioner's custody "arises from" removal proceedings and thus falls within § 1252(b)(9). Throughout their Return to the Petition, Respondents rely extensively on *Chavez v. Noem*, No. 3:25-cv-02325 (S.D. Cal. Sept. 24, 2025). Surprisingly, however, the *Chavez* Court rejected an argument concerning § 1252(b)(9) that mirrored the very reasoning advanced by the Government in this case. The *Chavez* Court held that § 1252(b)(9) "poses no jurisdictional bar" where the petitioner "was not asking for review of an order of removal, challenging the decision to detain them in the first place or to seek removal, nor challenging any part of the process by which their removability will be determined." (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 294–95 (2018)). As *Chavez* further explained, "detention pursuant to § 1225(b)(2) may occur during—but remains independent of—the removal proceedings."

Respondents also contend that Petitioner's claim reflects mere "creative framing" to avoid a jurisdictional bar. That assertion is misplaced. There is nothing "creative" about distinguishing the statutory authority governing detention from the discretionary decision to detain. The Supreme Court in *Jennings v. Rodriguez*, squarely held that § 1252(b)(9) "does not present a jurisdictional bar" to challenges addressing the source or scope of detention authority, because such challenges are collateral to the removal process itself. *Id.* at 294–95. Labeling this argument as "creative" does not convert a statutory challenge into a removal claim. As *Jennings* cautioned, § 1252(b)(9) cannot be read so broadly as to encompass every dispute "in any way connected to deportation proceedings." *Id.* at 293. The Ninth Circuit likewise holds that claims "independent of the removal process" fall outside § 1252(b)(9). *Gonzalez v. ICE*, 975 F.3d 788, 810 (9th Cir. 2020).

Accordingly, § 1252(b)(9) does not deprive this Court of jurisdiction to review this habeas petition, which presents a collateral statutory challenge to DHS's custody classification—not to removal itself.

B. 8 U.S.C. § 1252(g): Does Not Apply to DHS's Misclassification of Custody

Respondents also contend that § 1252(g) deprives this Court of jurisdiction because Petitioner's detention "stems from ICE's decision to commence removal proceedings." That argument fails.

The Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), held that § 1252(g) applies only to "three discrete actions" the Attorney General may take—commencing proceedings, adjudicating cases, or executing removal orders—and does not extend to "the many other decisions or actions that may be part of the deportation process." *Id.* The Court explicitly cautioned against interpreting the statute as a blanket bar over all claims tangentially related to removal.

Here, Petitioner does not challenge DHS's decision to commence proceedings, nor any act to adjudicate or execute a removal order. Rather, the petition challenges the legal basis for his current detention—specifically, DHS's post-arrest reclassification of custody as arising under INA § 235(b) despite the arrest and warrant expressly issued under §§ 236 and 287. This misclassification of detention authority constitutes a collateral legal error wholly independent of the decision to initiate removal.

Respondents rely heavily on *Chavez v. Noem* throughout their Return, yet that very decision rejected the same jurisdictional arguments the Government advances here, explaining:

> "As the Supreme Court made clear in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999), "§ 1252(g) applies only to three discrete actions that the Attorney General may take—commence proceedings, adjudicate cases, or execute removal orders…. It does not bar the many other decisions or actions that may be part of the deportation process."

"Here... Petitioners' detention pursuant to § 1225(b)(2) may be during—but is nonetheless independent of—the removal proceedings." Chavez v. Noem, No. 3:25-cv-02325 (S.D. Cal. Sept. 24, 2025), slip op. at 5.

As it did in *Chavez*, the Government's invocation of § 1252(g) fails because this habeas claim does not arise from the decision to commence or prosecute removal—it arises from an unlawful custody classification inconsistent with the statutory basis cited on the arrest warrant itself.

Accordingly, § 1252(g) does not divest this Court of jurisdiction to review Petitioner's habeas claim, which challenges an unlawful detention framework—not the commencement or execution of removal proceeding

EXHAUSTION

Respondents also argue that Petitioner failed to exhaust administrative remedies by not appealing the Immigration Judge's bond denial to the Board of Immigration Appeals ("BIA"). That contention is misplaced. The same *Chavez v. Noem* court that Respondents invoke in their Return rejected a similar argument advanced by the Government on this issue. In *Chavez*, the court held that exhaustion in this context is prudential, not jurisdictional.

The court explained:

"*There is no dispute that exhaustion here is a prudential, not mandatory, requirement.... The Court therefore finds the prudential exhaustion requirements waived for futility.*"

The *Chavez* court further found that "resort to the agency would be futile" because *Yajure-Hurtado* is binding and forecloses relief before the BIA. That same reasoning applies here. The BIA has already ruled in *Yajure-Hurtado* that individuals deemed inadmissible under § 212(a)(6)(A)(i) are subject to mandatory detention under § 235(b)(2) and are therefore ineligible for bond. Requiring Petitioner to appeal to that same body would serve no purpose, as the outcome is predetermined.

Respondents nevertheless assert—in a footnote at page 6 of their return—that dismissal or stay is required under *Castro–Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), *Leonardo v. Crawford,* 646 F.3d 1157 (9th Cir. 2011), *Alvarado v. Holde*r, 759 F.3d 1121 (9th Cir. 2014), and *Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010). That reliance is misplaced. Each of those cases addressed exhaustion in the context of direct petitions for review or challenges to removal orders, where the exhaustion requirement is statutory and jurisdictional—unlike here, where the claim arises under § 2241 and involves only custody classification.

The controlling Ninth Circuit authority for habeas custody claims is *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017), which holds that exhaustion in this context is prudential and may be waived when "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." (quoting *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004)).

Here, pursuit of administrative remedies would unquestionably be futile. The BIA has already decided this very question in *Yajure-Hurtado*, holding that noncitizens deemed inadmissible under § 212(a)(6)(A)(i) must be detained under § 235(b)(2) without bond. That precedential decision binds all Immigration Judges and the BIA itself under 8 C.F.R. § 1003.1(g)(1). As the *Chavez* court recognized, further appeal to the same agency would serve no purpose consistent with the goals of prudential exhaustion—namely, allowing the agency to consider the issue in the first instance or correct its own errors—because the agency has already issued a definitive ruling on this issue.

Accordingly, the prudential exhaustion requirement should be deemed satisfied or excused, as the Chavez court found under materially identical circumstances.

DETENTION AUTHORITY AND STATUTORY FRAMEWORK

A. The Government Misreads INA §§ 235 and 236

Respondents contend that Petitioner is subject to mandatory detention under INA § 235(b) because he is an "applicant for admission." That argument fails on both the facts and the

law. Petitioner was not an arriving alien encountered at a port of entry, during inspection at the border, or among individuals intercepted near the international boundary. Rather, he was arrested in the interior of the United States pursuant to a Form I-200 Warrant for Arrest of Alien dated August 6, 2025, which expressly cites INA §§ 236 and 287 as the governing authorities. See ECF No. 5-4 .

The plain text of § 235(b)(2) applies only when "an immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). That statutory trigger—an inspection and determination by an examining officer —never occurred here. Petitioner arrest followed a domestic enforcement action pursuant to a Form I-200 Warrant for Arrest of Alien issued under INA §§ 236 and 287, executed three days later, on August 9, 2025, not a border inspection.

DHS's records corroborate this. The Record of Deportable/Excludable Alien and accompanying I-213 (ECF No. 5 at 3–4) describe a Fugitive Operations field arrest executed by ICE/ERO San Diego officers pursuant to a Fugitive Operations Field Worksheet and a Form I-200 warrant. The record notes that Petitioner's prior immigration case had been administratively closed, confirming that DHS was aware of Petitioner's existing procedural posture before initiating this interior arrest. These facts demonstrate that this was an interior, warrant-based enforcement action undertaken under §§ 236 and 287—not an encounter during or near border inspection subject to § 235(b).

These contemporaneous DHS records—the Form I-200 Warrant for Arrest of Alien, Form I-213 Record of Deportable/Inadmissible Alien, and accompanying Fugitive Operations Field Worksheet—constitute the administrative record governing Petitioner's custody classification. DHS is bound by that record. Having invoked §§ 236 and 287 as the statutory bases for the arrest, the agency cannot now reinterpret its own paperwork to retroactively characterize the detention as arising under § 235(b). See INS v. *Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (rejecting agency constructions inconsistent with the statute's plain terms and the administrative record).

Furthermore, Section 236(a) provides that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). This statutory text confirms that detention under § 236(a) applies to noncitizens already present in the United States who are taken into custody pursuant to a warrant—precisely the situation reflected in Petitioner's Form I-200.

A Form I-200 warrant issued under §§ 236 and 287 necessarily places custody within the framework of § 236—its discretionary provision under § 236(a) or, in limited criminal cases, its mandatory provision under § 236(c). Because Petitioner's arrest involved no such criminal basis, his detention falls squarely under § 236(a).

This conclusion accords with the statutory framework described in *Jennings v. Rodriguez*, and reaffirmed in *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025). In *Q. Li*, the Board clarified that "Section 236(a) applies to aliens already present in the United States and authorizes detention only '[o]n a warrant issued by the Attorney General leading to the alien's arrest,'" while "Section 235(b) applies primarily to aliens seeking entry into the United States and authorizes DHS to detain an alien without a warrant at the border." *Id.* at 70 (citing *Jennings*, 583 U.S. at 297, 302–03). Thus, under DHS's own precedent, an I-200–based interior arrest—like Petitioner's—falls squarely within § 236(a) authority, not § 235(b).

Moreover, the Board acknowledged that a warrant issued under § 236 is "one leading to the alien's arrest," and that the implementing regulation "authorizes a prospective arrest and contemplates that the subject of the warrant has not yet been arrested and taken into custody at the time the warrant is issued." *Id.* at 69 n.3 (citing 8 C.F.R. § 236.1(b)(1); *Jennings*, 583 U.S. at 302).

The Form I-200 issued for Petitioner thus fits precisely within the framework described in *Q. Li*, confirming that his custody arises under § 236(a).

In short, DHS's records and controlling precedent confirm that it acted under § 236(a) authority. The Government cannot retroactively re-characterize Petitioner's custody as arising

under § 235(b) merely to avoid the individualized bond procedures Congress provided in § 236(a).

B. Respondents Misapply § 235(a)(1) and Ignore the Statutory Trigger in § 235(b)(2)

Respondents' reliance on the definitional clause in § 235(a)(1) disregards the operative condition Congress imposed in § 235(b)(2). The Government quotes the phrase that "[a]n alien present in the United States who has not been admitted … shall be deemed for purposes of this Act an applicant for admission," but omits the essential requirement that detention under § 235(b)(2)(A) attaches only when an immigration officer determines that "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). That statutory trigger—an inspection and admissibility determination under § 235(a)(3)—never occurred here.

DHS's own records (ECF No. 5 at 3–4) confirm that Petitioner was arrested in the interior under a Form I-200 warrant invoking §§ 236 and 287. No inspection was conducted, no admissibility finding was made, and no Notice and Order of Expedited Removal was issued. Without an inspection under § 235(a)(3), the predicate condition for detention under § 235(b)(2) is entirely absent.

Matter of Yajure-Hurtado, does not change this result. That decision concerned individuals initially detained under § 235(b) immediately after unlawful entry near the border. It did not extend § 235(b) detention authority to noncitizens arrested months or years later in the interior under I-200 warrants issued pursuant to §§ 236 and 287. The Board itself acknowledged that its holding was limited to "those initially detained under section 235(b) after entry." *Id.* at 219 n.3.

The Government's expansive interpretation would transform every noncitizen who entered without inspection into an "applicant for admission" for detention purposes—regardless of how long they have lived in the United States or where they were encountered. That reading collapses the distinct detention authorities Congress deliberately preserved, erasing the statutory

boundary between § 235 (governing inspection and expedited removal near the border) and § 236 (governing post-entry arrests and custody). The statutory text, administrative record, and relevant case law all point to one conclusion: Petitioner's custody arises under § 236(a), not § 235(b), and he is therefore entitled to the individualized bond hearing Congress authorized under § 236(a).

In sum, both the statutory text and the undisputed administrative record confirm that Petitioner's custody arises under § 236(a). Having acted under that authority, DHS cannot deny the bond procedures Congress expressly provided under § 236(a).

C. DHS's Sudden Reinterpretation Contradicts Nearly Three Decades of Consistent Policy

For nearly thirty years following the 1996 amendments to the INA under IIRIRA, both the legacy INS and, later, DHS uniformly applied § 235(b) detention authority only to arriving aliens or individuals apprehended shortly after crossing the border—not to those arrested in the interior after unlawful entry. During this period—spanning multiple administrations—the government consistently treated interior arrests of noncitizens already present in the United States as governed by § 236, even when they had entered without inspection.

Only beginning around July 8, 2025, after an internal memorandum began circulating within ICE field offices, did DHS start to reinterpret the definitional clause in § 235(a)(1) as extending "applicant for admission" status to all EWIs, regardless of the time or place of apprehension—a reinterpretation that was later reinforced by the BIA's decision in *Yajure-Hurtado*.

This abrupt shift—made without statutory amendment, rulemaking, or public notice—contradicts nearly three decades of consistent agency practice and constitutes an arbitrary and capricious departure from settled policy. Such a reinterpretation is entitled to considerably less deference and should be rejected. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.").

D-The *Chavez v. Noem* Order Did Not Resolve the Statutory Question Presented Here

Respondents cite *Chavez v. Noem*, No. 3:25-cv-02325 (S.D. Cal. Sept. 24, 2025), apparently to imply that the court's denial of a temporary restraining order supports their position that Petitioner's detention is properly governed by § 235(b). That reliance is misplaced.

The *Chavez* order merely denied temporary relief and did not reach—let alone resolve—the underlying statutory question of whether detention authority properly arose under § 235(b) or § 236(a). Nothing in that decision purports to adopt DHS's position on the merits or to determine the proper statutory basis for custody. The court's brief discussion of the competing interpretations occurred only in the context of assessing preliminary relief, not as a definitive ruling on the statutory issue.

A denial of a temporary restraining order is not a ruling on the merits or a binding determination of law. See *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The findings of fact and conclusions of law made by a court granting or denying a preliminary injunction are not binding at trial on the merits.").

By contrast, the court in *Ramiro Chavez Valdovinos v. Noem*, No. 25-cv-2439-TWR (KSC) (S.D. Cal. Sept. 25, 2025) (Hon. Todd W. Robinson), did reach the statutory question in a materially similar context. There, the court held that § 1252's jurisdiction-stripping provisions do not bar habeas review, that exhaustion would be futile in light of *Yajure-Hurtado*, and that detention following an interior arrest pursuant to a Form I-200 is governed by § 236(a), not § 235(b). The court granted the petition in part and ordered an individualized bond hearing under § 236(a) within fourteen days, expressly directing that Respondents may not deny bond on the ground that § 235(b)(2) requires mandatory detention.

Accordingly, the *Chavez* order provides no controlling or persuasive authority on the question presented here. The statutory issue before this Court—whether a noncitizen arrested in the interior pursuant to a § 236/287 warrant may be denied a bond hearing through post-hoc

reclassification under § 235(b)—was never decided in *Chavez* and therefore offers no support for Respondents' position.

CONCLUSION

For the foregoing reasons, the Department of Homeland Security's own records confirm that Petitioner was arrested in the interior pursuant to a previously issued Form I-200, Warrant for Arrest of Alien, under the authority of INA §§ 236 and 287—not § 235(b).

This Court has habeas jurisdiction under *Jennings v. Rodriguez*, which held that § 1252(b)(9) does not bar collateral challenges to detention authority, and under related district decisions recognizing that such custody-classification claims are properly reviewable under 28 U.S.C. § 2241. Exhaustion is prudential, not jurisdictional, and in this case is futile in light of *Yajure-Hurtado*, which forecloses relief before the BIA and therefore should be excused.

Accordingly, Petitioner respectfully reiterates his request that this Court grant the writ, find that his detention arises under § 236(a), and either order his release or, in the alternative, direct the Department of Homeland Security to provide him with an individualized bond hearing before an Immigration Judge consistent with applicable constitutional safeguards.

Respectfully submitted,

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