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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 ROGELIO BERTO MENDEZ

11 Petitioner,

12 v.

13 KRISTI NOEM, Secretary of the U.S.
Department of Homeland Security; PAMELA
14 BONDI, Attorney General of the United
States; THOMAS E. FEELEY, Field Office
15 Director of Salt Lake City Field Office, U.S.
Immigration and Customs Enforcement,
16 JOHN MATTOS, Warden at Southern
Nevada Detention Center

17 Respondents.
18

Case No. 2:25-cv-02062-RFB-MDC

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

19 Federal Respondents Kristi Noem, Pamela Bondi, and Thomas Feeley, through
20 undersigned counsel, file their response to Petitioner Samuel Sanchez Aparicio's Emergency
21 Motion for Temporary Restraining Order ("motion"). ECF No. 2. Petitioner's motion should
22 be denied because: 1) numerous provisions of 8 U.S.C. § 1252 deprive this Court of jurisdiction
23 to review the Petitioner's claims and preclude this Court from granting the relief he seeks, as
24 the BIA has already denied him a bond, 2) Petitioner fails to demonstrate he is entitled to
25 temporary injunctive relief, and 3) Petitioner has failed to exhaust his administrative remedies
26 and there is no futility to such exhaustion. The BIA has already denied Petitioner a bond and
27 there is a pending appeal before the BIA regarding his removal proceedings. In his motion,
28 Petitioner tries to present himself as an exemplar of someone who "has lived an honest and

1 productive life” but his criminal record proves otherwise and shows that not only he is a danger
2 to the community, but his mandatory detention is more than justified by law, during the appeal
3 on his removal proceedings before the BIA. *See* Petitioner’s Criminal Record, attached as
4 Exhibit A. If the Petitioner seeks this Court to overrule a BIA decision regarding his detention,
5 this Court is stripped from jurisdiction. This response is supported by the following
6 memorandum of points and authorities.

7 Respectfully submitted this 29th day of October 2025.

8
9 SIGAL CHATTAH
Acting United States Attorney

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

12 **Memorandum of Points and Authorities**

13 **I. Introduction**

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

22 Petitioner challenges a lawfully enacted regulation (8 C.F.R. § 1003.19(i)(2)) authorizing
23 his detention through an automatic stay, but critically, that automatic stay merely implements
24 detention Congress authorized under 8 U.S.C. § 1225(b)(2). Therefore, to grant the motion,
25 Petitioner asks this Court to set aside a lawfully enacted regulation and statute, finding both
26 unconstitutionally applied, as alleged violations of the Due Process Clause of the United States
27 Constitution. But as discussed below, the Supreme Court has long recognized Congress’s broad
28 power and immunity from judicial control to expel aliens from the country and to detain them

1 while doing so. *See e.g., Shaughnessy v. United States*, 345 U.S. 206, 210 (1953); *Carlson v. Landon*,
2 342 U.S. 524, 538 (1952). The United States' temporary detention of Petitioner in no way
3 exceeds this broad authority and does not deprive Petitioner of Due Process. *See Demore v. Kim*,
4 538 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally
5 permissible part of that process.”)

6 While Petitioner’s claims are structured around allegations of unlawful detention
7 authority, his claims attack the decisions rendered (and not yet rendered) by immigration judges
8 (IJs) during immigration bond hearings. Petitioner asks this Court to review IJ decisions, which
9 is explicitly barred by statute. Through multiple provisions of 8 U.S.C. § 1252, Congress has
10 unambiguously stripped federal courts of jurisdiction over challenges to the commencement of
11 removal proceedings, including detention pending removal proceedings. Further, Petitioner has
12 failed to exhaust his administrative remedies regarding his removal proceedings because there is
13 an appeal before the BIA with the parties awaiting a briefing schedule regarding such
14 proceedings. In addition, the BIA has already denied Petitioner a bond. Even apart from these
15 preliminary issues, Petitioner cannot show a likelihood of success on the merits because he seeks
16 to circumvent the detention statute under which he is rightfully detained pending the outcome of
17 his removal proceedings which are currently on appeal before the BIA. For these reasons,
18 Petitioner’s motion should be denied for the following reasons:

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

26 Second, Petitioner fails to demonstrate he is entitled to temporary injunctive relief.
27 Petitioner cannot show a likelihood of success on the merits because he seeks to circumvent the
28 detention statute under which he is rightfully detained to secure bond hearings that he is not

1 entitled to. Petitioner falls precisely within the statutory definition of aliens subject to mandatory
2 detention without bond found in § 1225(b)(2).

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

5 Fourth, Petitioner is required to exhaust his administrative remedies before petitioning
6 this Court for the impermissible relief he seeks here. The Ninth Circuit has stated that when an
7 alien fails to exhaust appellate review at the BIA, courts should “ordinarily” dismiss the habeas
8 petition without prejudice or stay proceedings until he exhausts his appeals. *Leonardo v.*
9 *Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011). There is a pending appeal regarding this
10 Petitioner’s removal proceedings before the BIA and the parties are waiting for a briefing
11 schedule. Petitioner has failed to exhaust his administrative remedies, and his attempts to avail
12 himself of the exceptions to the exhaustion requirement are unpersuasive. For these reasons,
13 and those set forth below, the Court should deny Petitioner’s motion for temporary
14 restraining order.

15 **II. Procedural and Factual Background**

16 Petitioner, an undocumented alien from Mexico, entered the United States without
17 being admitted, inspected or paroled into the United States at an unknown time and date. At the
18 time of his entry into the United States, Petitioner had no encounters with ICE or the Customs
19 and Border Patrol Unit. On June 6, 2004, Petitioner was charged with discharging a firearm
20 from a motor vehicle, a felony. Exhibit A. On June 25, 2004, Petitioner was arrested for
21 discharging a firearm resulting in a disorderly conduct conviction and fine. On June 25, 2004,
22 Petitioner was arrested for driving under the influence resulting in a conviction. On July 6,
23 2004, Petitioner was charged and convicted with driving under the influence, failure to use
24 headlights, driving without a driver’s license and failure to provide proof of insurance. Exhibit
25 A. On August 25, 2004, Petitioner pleaded guilty to a disorderly conduct. *Id.* On July 7, 2021,
26 Petitioner was arrested for assault with a deadly weapon resulting in an assault conviction and
27 sentence of six months in jail. *Id.*

1 On May 29, 2025, ICE arrested the Petitioner on a warrant. From there, ICE
2 commenced removal proceedings against the respondent and placed him in ICE custody at no
3 bond. *See* Notice to Appear, attached as Exhibit B. On July 7, 2025, Petitioner, through counsel,
4 filed a motion to redetermine the respondent's bond before an Immigration Judge. On July 17,
5 2025, at the bond hearing, ICE argued that the Immigration Judge had no jurisdiction under
6 Section 235(b) of the INA. The Immigration Judge granted the respondent a \$5,000 bond. The
7 DHS reserved appeal of the Immigration Judge's decision and a Notice of Appeal was filed on
8 July 29, 2025, with the Board of Immigration Appeals. On July 25, 2025, DHS filed additional
9 charges of inadmissibility and deportability against Petitioner. *See* Additional Charges of
10 Inadmissibility/Deportability, attached as Exhibit C.

11 On September 9, 2025, the respondent's merits hearing on his application for relief from
12 removal took place. The Immigration Judge granted the respondent's application for
13 Cancellation of Removal for Nonpermanent Residents under INA § 240A(b)(1). The DHS
14 reserved appeal of the Immigration Judge's decision and a Notice of Appeal was filed on
15 September 19, 2025, with the Board of Immigration Appeals. *See* Notice of Appeal, attached as
16 Exhibit D. On September 30, 2025, the Board of Immigration Appeals sustained DHS' appeal
17 and vacated the Immigration Judge's July 31, 2025, decision granting the respondent a \$5,000
18 bond. As of today, October 28, 2025, The DHS is awaiting a scheduling order from the Board of
19 Immigration Appeals to file a brief in support of the DHS appeal of the Immigration Judge's
20 decision on September 9, 2025, granting Petitioner Cancellation of Removal for Nonpermanent
21 Residents. This case is factually dissimilar to the other cases decided by the Court, because there
22 is a final order from the BIA denying petitioner's bond. *See* BIA Bond Decision, attached as
23 Exhibit E. It is alarming, how Petitioner is trying to downplay the severity of his criminal
24 behavior and to claim that drawing a gun twice in a threatening manner, somehow does not
25 endanger the safety of the public.

26 / / /

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28 / / /

1 III. Statutory Background

2 A. Detention Under 8 U.S.C. § 1225

3 Section 1225 applies to “applicants for admission,” who are defined as “alien[s] present
4 in the United States who [have] not been admitted” or “who arrive[] in the United States.” 8
5 U.S.C. § 1225(a)(1). Applicants for admission “fall into one of two categories, those covered by
6 § 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018).
7 *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 218 (BIA 2025).

8 Section 1225(b)(1) applies to arriving aliens and “certain other” aliens “initially
9 determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation.”
10 *Jennings*, 583 U.S. at 287; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These aliens are generally subject to
11 expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But if the alien “indicates an
12 intention to apply for asylum . . . or a fear of persecution,” immigration officers will refer the
13 alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An alien “with a credible fear of
14 persecution” is “detained for further consideration of the application for asylum.” *Id.* §
15 1225(b)(1)(B)(ii). If the alien does not indicate an intent to apply for asylum, express a fear of
16 persecution, or is “found not to have such a fear,” they are detained until removed from the
17 United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

18 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583 U.S.
19 at 287. It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.* Under §
20 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a removal
21 proceeding “if the examining immigration officer determines that [the] alien seeking admission
22 is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A); *see Matter of*
23 *Yajure Hurtado*, 29 I. & N. Dec. at 220 (“[A]liens who are present in the United States without
24 admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8
25 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings.”);
26 *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) (“for aliens arriving in and seeking admission
27 into the United States who are placed directly in full removal proceedings, section 235(b)(2)(A)
28 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

1 Security (DHS) has the sole discretionary authority to temporarily release on parole “any alien
2 applying for admission to the United States” on a “case-by-case basis for urgent humanitarian
3 reasons or significant public benefit.” *Id.* § 1182(d)(5)(A); see *Biden v. Texas*, 597 U.S. 785, 806
4 (2022).

5 **B. Detention Under 8 U.S.C. § 1226(a)**

6 Section 1226 provides for arrest and detention “pending a decision on whether the alien
7 is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), the government
8 may detain an alien during his removal proceedings, release him on bond, or release him on
9 conditional parole. By regulation, immigration officers can release aliens upon demonstrating
10 that the alien “would not pose a danger to property or persons” and “is likely to appear for any
11 future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination
12 (i.e., a bond hearing) by an IJ at any time before a final order of removal is issued. See 8 U.S.C.
13 § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19. At a custody redetermination, the IJ
14 may continue detention or release the alien on bond or conditional parole. 8 U.S.C. § 1226(a); 8
15 C.F.R. § 1236.1(d)(1). IJs have broad discretion in deciding whether to release an alien on bond.
16 *In Re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for IJs to consider). But
17 regardless of the factors IJs consider, an alien “who presents a danger to persons or property
18 should not be released during the pendency of removal proceedings.” *Id.* at 38.

19 **C. Review Before the Board of Immigration Appeals**

20 The Board of Immigration Appeals (BIA) is an appellate body within the Executive
21 Office for Immigration Review (EOIR) and possesses delegated authority from the Attorney
22 General. 8 C.F.R. §§ 1003.1(a)(1), (d)(1). The BIA is “charged with the review of those
23 administrative adjudications under the [INA] that the Attorney General may by regulation
24 assign to it,” including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1, 1236.1. The
25 BIA not only resolves disputes before it, but is also directed to, “through precedent decisions, []
26 provide clear and uniform guidance to DHS, the immigration judges, and the general public on
27 the proper interpretation and administration of the [INA] and its implementing regulations.” *Id.*
28 § 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).

1 Federal regulations provide that both the noncitizen and the government have a right to
2 appeal an IJ's decision regarding a custody status or bond redetermination to the BIA. 8 C.F.R.
3 §§ 1003.19(f), 1003.38. Pertinent here, if an IJ issues an order “authorizing release (on bond or
4 otherwise),” § 1003.19(i)(2) (“automatic stay regulation”) permits the Department of Homeland
5 Security (“DHS”) to automatically stay the IJ's order, resulting in the continued detention of the
6 noncitizen pending DHS's appeal to the BIA. To trigger the stay, DHS need only file a one-page
7 form with the immigration court within one day of its release order. *Id.* § 1003.19(i)(2). Section
8 1003.6(c)(1) further provides that the stay remains in effect for ten business days to permit DHS
9 to file a notice of appeal with the BIA. Once DHS files the notice of appeal, the stay is
10 automatically extended for ninety days. *Id.* § 1003.6(c)(4). This ninety-day period may be
11 automatically extended by an additional thirty days if DHS seeks a “discretionary stay” from
12 the BIA pursuant to § 1003.19(i)(1) prior to the expiration of the original ninety-day period. *Id.* §
13 1003.6(c)(5). Moreover, under § 1003.6(d), if the BIA “authorizes an alien's release (on bond or
14 otherwise), denies a motion for discretionary stay, or fails to act on such a motion before the
15 automatic stay period expires, the alien's release shall be automatically stayed for five
16 [additional] business days,” or for fifteen business days if DHS refers the case to the Attorney
17 General within those five business days. From there, the Attorney General may order a stay
18 “pending the disposition of any custody case.” *Id.* Therefore, Petitioner’s detention is temporary
19 while his removal proceedings are pending.

19 IV. Standard of Review

20 Judicial review of immigration matters, including of detention issues, is limited. *I.N.S. v.*
21 *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S.
22 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787,
23 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88,
24 101 n.21 (1976) (“the power over aliens is of a political character and therefore subject only to
25 narrow judicial review”). The Supreme Court has thus “underscore[d] the limited scope of
26 inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable
27 subject is the legislative power of Congress more complete than it is over the admission of
28 aliens.” *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82

1 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954). The plenary power of Congress and the
2 Executive Branch over immigration necessarily encompasses immigration detention, because
3 the authority to detain is elemental to the authority to deport, and because public safety is at
4 stake. *See Shaughnessy*, 345 U.S. at 210 (“Courts have long recognized the power to expel or
5 exclude aliens as a fundamental sovereign attribute exercised by the Government’s political
6 departments largely immune from judicial control.”); *Carlson*, 342 U.S. at 538 (“Detention is
7 necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235
8 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in
9 custody pending the inquiry into their true character, and while arrangements were being made
10 for their deportation.”); *Demore*, 538 U.S. at 531 (“Detention during removal proceedings is a
11 constitutionally permissible part of that process.”)

12 **V. Argument**

13 Petitioner’s temporary detention pursuant to the automatic stay of 8 C.F.R. §
14 1003.19(i)(2) is reinforced by Congress’s command to detain Petitioner throughout his removal
15 proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this temporary detention does not
16 violate Due Process. Petitioner claims that he is no longer in removal proceedings, however that
17 is not entirely accurate as the cancellation of his removal proceeding is currently on appeal
18 before the BIA. Thus, Petitioner has failed to exhaust his administrative remedies regarding his
19 removal. Because Petitioner cannot show that his temporary detention violates the law, the
20 motion should be dismissed.

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

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

26 *First*, Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus
27 jurisdiction, to review “any cause or claim by or on behalf of an alien arising from the decision
28 or action by the Attorney General to [1] *commence proceedings*, [2] *adjudicate cases*, or [3] *execute*

1 removal orders against any alien under this chapter.”¹ 8 U.S.C. § 1252(g) (emphasis added).

2 Section 1252(g) eliminates jurisdiction “[e]xcept as provided in this section and notwithstanding
3 any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United
4 States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title.”²

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

7 Section 1252(g) also bars district courts from hearing challenges to the *method* by which
8 the Secretary of Homeland Security chooses to commence removal proceedings, including the
9 decision to detain an alien pending removal. *See Alvarez v. U.S. Immigr. & Customs Enft*, 818 F.3d
10 1194, 1203 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s
11 discretionary decisions to commence removal” and also to review “ICE’s decision to take
12 [plaintiff] into custody and to detain him during removal proceedings”).

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

22 As other courts have held, “[f]or the purposes of § 1252, the Attorney General
23 commences proceedings against an alien when the alien is issued a Notice to Appear before an
24 immigration court.” *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCX), 2008 WL

25 _____
26 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)

27 ² Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended
28 § 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.

1 11336833, at *3 (C.D. Cal. Sept. 11, 2008). “The Attorney General may arrest the alien against
2 whom proceedings are commenced and detain that individual until the conclusion of those
3 proceedings.” *Id.* at *3. “Thus, an alien’s detention throughout this process arises from the
4 Attorney General’s decision to commence proceedings” and review of claims arising from such
5 detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir.
6 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g). As such, judicial review of the
7 Bond Denial Claims is barred by § 1252(g). The Court should dismiss for lack of jurisdiction.

8 *Second*, under § 1252(b)(9), “judicial review of all questions of law . . . including
9 interpretation and application of statutory provisions . . . arising from any action taken . . . to
10 remove an alien from the United States” is only proper before the appropriate federal court of
11 appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9);
12 *Reno*, 525 U.S. at 483. Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels
13 judicial review of all [claims arising from deportation proceedings]” to a court of appeals in the
14 first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D.
15 Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

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

18 Notwithstanding any other provision of law (statutory or nonstatutory), . . . a
19 petition for review filed with an appropriate court of appeals in accordance with
20 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].

21 8 U.S.C. § 1252(a)(5). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—
22 whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through
23 the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016)
24 (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims,
25 including policies-and-practices challenges . . . whenever they ‘arise from’ removal
26 proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the
27 action is “unrelated to any removal action or proceeding” is it within the district court’s
28 jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a

1 “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple” (internal
2 quotation marks omitted).

3 Critically, “[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one.”
4 *Aguilar v. U.S. Immigr. & Customs Enft Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir.
5 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that “[n]othing . . . in any other provision of
6 this chapter . . . shall be construed as precluding review of constitutional claims or questions of
7 law raised upon a petition for review filed with an appropriate court of appeals in accordance
8 with this section.” *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to
9 review such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review
10 process before the court of appeals ensures that aliens have a proper forum for claims arising
11 from their immigration proceedings and “receive their day in court.” *J.E.F.M.*, 837 F.3d at
12 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010)
13 (“The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns”
14 by permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional
15 claims or questions of law.”).

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

1 from the government's decision to "commence proceedings"). As such, the Court lacks
2 jurisdiction over this action. The reasoning in *Jennings* outlines why Petitioner's claims are
3 unreviewable here.

4 While holding that it was unnecessary to comprehensively address the scope of
5 § 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of challenges
6 that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found
7 that "§1252(b)(9) [did] not present a jurisdictional bar" in situations where
8 "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at
9 294–95. In this case, Petitioner *does* challenge the government's decision to detain him in the
10 first place. ECF No. 2, p. 8. Though Petitioner may attempt to frame his challenge as one
11 relating to detention authority, rather than a challenge to DHS's decision to detain him in the
12 first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

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

21 ***B. Petitioner Fails to Establish Entitlement to Interim Injunctive Relief***

22 Petitioner's motion should be denied because he has not established that he is entitled to
23 an interim injunctive relief. The BIA has denied Petitioner a bond and his release from
24 temporary detention while his removal proceedings are pending. Petitioner cannot establish that
25 he is likely to succeed on the underlying merits, there is no showing of irreparable harm, and the
26 equities do not weigh in his favor. In general, the showing required for a temporary restraining
27 order is the same as that required for a preliminary injunction. *See Stuhlberg Int'l Sales Co. v. John*
28 *D. Brush & Co.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a temporary

1 restraining order, a plaintiff must “establish that he is likely to succeed on the merits, that he is
2 likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities
3 tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council,*
4 *Inc.*, 555 U.S. 7, 20 (2008); see *Nken v. Holder*, 556 U.S. 418, 426 (2009). Plaintiff must
5 demonstrate a “substantial case for relief on the merits.” *Leiva-Perez v. Holder*, 640 F.3d 962,
6 967–68 (9th Cir. 2011). When “a plaintiff has failed to show the likelihood of success on the
7 merits, we need not consider the remaining three [*Winter* factors].” *Garcia v. Google, Inc.*, 786
8 F.3d 733, 740 (9th Cir. 2015).

9 The final two factors required for preliminary injunctive relief—balancing of the harm to
10 the opposing party and the public interest—merge when the Government is the opposing party.
11 See *Nken*, 556 U.S. at 435. The Supreme Court has specifically acknowledged that “[f]ew
12 interests can be more compelling than a nation’s need to ensure its own security.” *Wayte v.*
13 *United States*, 470 U.S. 598, 611 (1985); see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-
14 79 (1975); *New Motor Vehicle Bd. Of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977);
15 *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220–21 (D.C. Cir. 1981); *Maharaj v.*
16 *Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (movant seeking injunctive relief “must show either
17 (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that
18 serious legal questions are raised and the balance of hardships tips sharply in the moving party’s
19 favor.”) (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001)).

20 **1. No Likelihood of Success on the Merits.**

21 Likelihood of success on the merits is a threshold issue. See *Garcia*, 786 F.3d at 740.
22 Petitioner cannot establish that he is likely to succeed on the underlying merits of his claims for
23 alleged statutory and constitutional violations because he is subject to mandatory detention
24 under 8 U.S.C. § 1225. The Court should reject Petitioner’s arguments that the automatic stay
25 violates due process and that § 1226(a) governs his detention instead of § 1225. ECF No. 2, p.
26 14. When there is “an irreconcilable conflict in two legal provisions,” then “the specific governs
27 over the general.” *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). As
28 Petitioner points out, § 1226(a) applies to those “arrested and detained pending a decision” on

1 removal. 8 U.S.C. § 1226(a); *see* ECF No. 2 at 7-8. In contrast, § 1225 is narrower. *See* 8 U.S.C.
2 § 1225. It applies only to “applicants for admission”; that is, as relevant here, aliens present in
3 the United States who have not be admitted. *See id.*; *see also Fla. v. United States*, 660 F. Supp. 3d
4 1239, 1275 (N.D. Fla. 2023). Because Petitioner falls within that category, the specific detention
5 authority under § 1225 governs over the general authority found at § 1226(a).

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

7 The current operative mechanism of Petitioner’s detention is an automatic stay of release
8 on bond for a maximum of 90 days under 8 C.F.R. § 1003.19(i)(2), but this confinement is
9 statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention throughout the entire
10 removal proceedings. Pursuant to 8 U.S.C. § 1225(b)(2)(A), “in the case of an alien who is an
11 applicant for admission, if the examining immigration officer determines that an alien seeking
12 admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained
13 for a proceeding under section 1229a [removal proceedings].” 8 U.S.C. § 1225(b)(2)(A). The
14 Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and that
15 aliens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at 287
16 (“Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.”).

17 Contrary to Petitioner’s arguments, he falls squarely within the ambit of Section
18 1225(b)(2)(A)’s mandatory detention requirement as Petitioner is an “applicant for admission”
19 to the United States. If Petitioner does not think that he is an applicant for admission, then what
20 is his status in the United States. As described above, an “applicant for admission” is an alien
21 present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Petitioner
22 admitted in his motion that he has not been admitted to the United States. ECF No. 2, at 4.
23 Congress’s broad language here is unequivocally intentional—an undocumented alien is to be
24 “deemed for purposes of this chapter an applicant for admission.” 8 U.S.C. § 1225(a)(1).
25 Regardless of Petitioner’s characterization that “an applicant for admission” should only
26 include aliens captured at the border or at a port of entry, he is “deemed” an applicant for
27 admission based on Petitioner’s failure to seek lawful admission to the United States before an
28 immigration officer, which is undisputed. ECF No. 2, at 4. And because Petitioner has not

1 demonstrated to an examining immigration officer that Petitioner is “clearly and beyond a
2 doubt entitled to be admitted,” Petitioner’s detention is mandatory. 8 U.S.C. § 1225(b)(2)(A).
3 Thus, the Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates
4 that Petitioner “shall be” detained.

5 The Supreme Court has confirmed an alien present in the country but never admitted is
6 deemed “an applicant for admission” and that “detention must continue” “until removal
7 proceedings have concluded” based on the “plain meaning” of 8 U.S.C. § 1225. *Jennings*, 583
8 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme Court
9 reversed the Ninth Circuit Court of Appeal’s imposition of a six-month detention time limit into
10 the statute. *Id.* at 297. The Court clarified there is no such limitation in the statute and reversed
11 on these grounds, remanding the constitutional Due Process claims for initial consideration
12 before the lower court. *Id.* But under the words of the statute, as explained by the Supreme
13 Court, 8 U.S.C. § 1225 includes aliens like the Petitioner who are present but have not been
14 admitted and they shall be detained pending their removal proceedings. Specifically, the
15 Supreme Court declared, “an alien who ‘arrives in the United States,’ or ‘is present’ in this
16 country but ‘has not been admitted,’ is treated as ‘an applicant for admission.’” *Id.* at 287
17 (emphasis on “or” added). In doing so, the Court explained both aliens captured at the border
18 and those illegally residing within the United States would fall under § 1225. This would include
19 Petitioner as an alien who is present in the country without being admitted.

20 And now, the Board of Immigration Appeals (BIA) has confirmed the application of §
21 1225 in a published formal decision: “Based on the plain language of section 235(b)(2)(A) of the
22 Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration Judges lack
23 authority to hear bond requests or to grant bond to aliens who are present in the United States
24 without admission.” *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216. Indeed, §1225 applies to
25 aliens who are present in the country *even for years* and who have not been admitted. *See Matter of*
26 *Yajure Hurtado*, 29 I. & N. Dec. at 226 (“the statutory text of the INA . . . is instead clear and
27 explicit in requiring mandatory detention of all aliens who are applicants for admission, without
28 regard to how many years the alien has been residing in the United States without lawful

1 status.” (citing 8 U.S.C. §1225)). The BIA found § 1225 clear and unambiguous as explained
2 above. Thus, because the alien was present in the United States (regardless of how long) and
3 because he was never admitted, he shall be detained during his removal proceedings. *See id.* at
4 228. In doing so, the BIA rejected the same arguments raised by Petitioner and by other similar
5 petitioners in this District. For example, the BIA rejected the “legal conundrum” postulated by
6 the alien that while he may be an applicant for admission under the statute, he is somehow not
7 actually “seeking admission.” *Id.* at 221. The BIA explained that such a leap failed to make
8 sense and violated the plain meaning of the statute. *See id.* Next, the BIA rejected the alien’s
9 argument that the mandatory detention scheme under § 1225 rendered the recent amendment to
10 § 1226 under the Laken Riley Act superfluous. *Id.* The BIA explained, “nothing in the statutory
11 text of section 236(c), including the text of the amendments made by the Laken Riley Act,
12 purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. §
13 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute ‘shall be detained
14 for [removal proceedings].’” *Id.* at 222. The BIA explained further that any redundancy between
15 the two statutes does not give license to “rewrite or eviscerate” one of the statutes. *See id.*
16 (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). Also, the BIA reasoned that it matters not
17 that the alien was initially served with a warrant listing 8 U.S.C. § 1226 and informing him of
18 his ability to seek bond—an Immigration Court cannot bestow jurisdiction upon itself with that
19 initial paperwork when said jurisdiction has been specifically revoked by Congress in § 1225. *See*
20 *id.* at 226-27 (explaining “the mere issuance of an arrest warrant does not endow an
21 Immigration Judge with authority to set bond for an alien who falls under section 235(b)(2)(A)
22 of the INA, 8 U.S.C. § 1225(b)(2)(A).”) The BIA further pointed out, “Our acknowledgement
23 that aliens detained under section 236(a) may be eligible for discretionary release on bond does
24 not mean that *all* aliens detained while in the United States with a warrant of arrest are detained
25 under section 236(a) and entitled to a bond hearing before the Immigration Judge, regardless of
26 whether they are applicants for admission under section 235(b)(2)(A) of the INA, 8 U.S.C. §
27 1225(b)(2)(A).” *Id.* at 227 (quotations omitted). Thus, the BIA rejected this and every argument
28 raised by the alien to find § 1225 applied to him despite residing in the country for years. *Id.* The

1 BIA mandate is also sweeping. The *Hurtado* decision was unanimous, conducted by a three-
2 appellate judge panel. *See id. generally*. It is binding on all immigration judges in the United
3 States. 8 C.F.R. § 1003.1(g)(1) (“[D]ecisions of the Board and decisions of the Attorney General
4 are binding on all officers and employees of DHS or immigration judges in the administration of
5 the immigration laws of the United States.”). And because the decision was published, a
6 majority of the entire Board must have voted to publish it, which establishes the decision “to
7 serve as precedent[] in all proceedings involving the same issue or issues.” *See* 8 C.F.R. §
8 1003.1(g)(2)-(3). Indeed, this is the law of the land in immigration court today. *See also* 8 C.F.R.
9 § 1003.1(d)(1) (explaining “the Board, through precedent decisions, shall provide clear and
10 uniform guidance to DHS, the immigration judges, and the general public on the proper
11 interpretation and administration of the Act and its implementing regulations.”). And in the
12 Board’s own words, *Hurtado* is a “precedential opinion.” *Id.* at 216.

13 But in some prior cases such as the Petitioner’s case here, where an immigration judge
14 erred in releasing a qualifying alien on bond, like Petitioner, who is subject to mandatory
15 detention, DHS’s invocation of the stay of release pending appeal in 8 C.F.R. § 1003.19(i)(2) not
16 only is consistent with law but also ensured DHS’s opportunity to vindicate Congress’s
17 mandatory detention scheme. While the law is now clear in immigration court, the BIA has yet
18 to reach DHS’s appeal involving the Petitioner, and the parties are awaiting a briefing schedule
19 regarding his removal proceedings. Pursuant to the statutory and Supreme Court case law,
20 Petitioner’s temporary detention is lawful while his removal proceedings are pending. Any
21 argument by Petitioner that his detention exceeds statutory authority is clearly invalid and
22 should be rejected. The United States respectfully maintains §1225 straightforwardly applies to
23 Petitioner, especially in light of *Jennings*, 583 U.S. at 287 (explaining “an alien who “arrives in
24 the United States,” or “is present” in this country but “has not been admitted,” is treated as “an
25 applicant for admission.” § 1225(a)(1)). Petitioner is properly detained under § 1225 and cannot
26 show an entitlement to relief and/or likelihood of success on the merits.

27 *b. An automatic stay and the length of the automatic stay does not violate due process.*
28

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

11 Assuming the Court rules on the merits of this argument, then the automatic stay does
12 not violate due process because it permits the Government an opportunity to appeal an IJ bond
13 decision before the detainee is released. The Supreme Court has expressed a "longstanding
14 view that the Government may constitutionally detain deportable aliens during the limited
15 period necessary for their removal proceedings." *Demore*, 538 U.S. at 526. "As we said more
16 than a century ago, deportation proceedings 'would be vain if those accused could not be held
17 in custody pending the inquiry into their true character.'" *Id.* at 523 (citing *Wong Wing*, 163
18 U.S. at 235). Here, a stay of some length is afforded precisely because it allows the
19 Government an opportunity to appeal before a detainee might flee. *El-Dessouki v. Cangemi*, No.
20 CIV 063536 DSD/JSM, 2006 WL 2727191 (D. Minn. Sept. 22, 2006), at *3 ("a finite period of
21 detention to allow the BIA an opportunity to review the immigration judge's bond
22 redetermination is a narrowly tailored procedure that serves the government's interest in
23 preventing flight of aliens likely to be ordered removable and in protecting the community").
24 Petitioner's argument that the automatic stay violates his due process rights while the BIA has
25 denied him a bond and the appeal of the IJ's cancellation of his removal proceedings is pending
26 misses the point.

27 Although Petitioner is detained pending appeal to the BIA regarding his removal
28 proceedings which is supported by case law, the question is whether permitting an automatic

1 stay violates due process. Petitioner and others have a right to appeal an adverse custody
2 decision to the BIA. *See* 8 CFR §§ 1003.19(a), 1236.1(d). Similarly, the Government may
3 appeal an adverse bond decision to the BIA. An automatic stay of limited duration allows the
4 Government to pursue its appeal before the subject might post bond and flee. *See Demore*, 538
5 U.S. at 528 (“detention necessarily serves the purpose of preventing deportable criminal aliens
6 from fleeing prior to or during their removal proceedings”). The purpose of the automatic stay
7 is to “avoid the necessity of having to decide whether to order a stay on extremely short notice
8 with only the most summary presentation of the issues.” *Review of Custody Determinations*,
9 71 FR 57873-01, 2006 WL 2811410.

10 Similarly, the length of the automatic stay does not violate due process. An automatic
11 stay of up to 90 days does not violate due process because it is narrowly tailored to serve a
12 compelling Government interest. An alien’s right to procedural due process is violated “only if
13 [1] the proceeding was ‘so fundamentally unfair that the alien was prevented from reasonably
14 presenting his case,’ ” and [2] the alien proves that “the alleged violation prejudiced his or her
15 interests.” *Mendez-Garcia v. Lynch*, 840 F.3d 655 (9th Cir. 2016) (citations omitted). Petitioner
16 does not argue that his current detention has prejudiced his interests regarding his removal or
17 the merits of the IJ bond decision. *See also Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27
18 (9th Cir. 2007) (“Where an alien is given a full and fair opportunity ... to present testimony and
19 other evidence in support of the application, he or she has been provided with due process.”).

20 There is no substantive due process violation. Laws that infringe a “fundamental” right
21 protected by the Due Process Clause are constitutional only if “the infringement is narrowly
22 tailored to serve a compelling state interest.” *Reno*, 507 U.S. at 302. Substantive due process
23 protections apply to resident aliens. *See, e.g., Mathews*, 426 U.S. at 77. An automatic stay of up to
24 90 days does not violate due process because it remains in effect until the BIA has an
25 opportunity to review the appeal. In the context of post-removal detention, the Court in
26 *Zadvydas* wrote that “we think it practically necessary to recognize some presumptively
27 reasonable period of detention....” *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). The Court
28 determined that “an argument can be made for confining any presumption to 90 days” but set a

1 limit of 180 days before a detainee in removal proceedings would be entitled to a bond hearing.
2 *Id.* In the absence of other authority (and Petitioner presents none), Petitioner has not
3 established that an automatic stay of up to 90 days in this appeal provision violates due process.
4 Petitioner’s reliance on *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1075 (N.D. Cal. 2004) is
5 misplaced. ECF No. 2, p. 15. The ruling in *Zavala* was predicated upon an indefinite,
6 mandatory stay. But the regulation was amended in 2006 to permit an automatic stay of up to
7 only 90 days. *See Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1032 (E.D. Wis.), *aff’d sub nom.*
8 *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (noting that *Zavala* relied on “the previous
9 regulation under which the duration of the automatic stay was indefinite” whereas the “current
10 regulation provides that the automatic stay will lapse 90 days after the filing of the notice of
11 appeal.”).

12 In sum, Petitioner’s temporary detention pending the appeal on his removal proceedings
13 does not violate Due Process. Since his detention on May 29, 2025, Petitioner has been
14 provided with due process all within the 90 days of his detention, including a request for a bond,
15 a bond hearing, an appeal of the IJ’s bond determination before the BIA and a pending appeal
16 on his removal proceedings. The Supreme Court has authorized the detention of illegal aliens
17 pending their removal proceedings which is the case with this Petitioner. Resolution one way or
18 another is undoubtedly forthcoming from the BIA which has already denied Petitioner a bond
19 and has ordered his temporary detention pending the outcome of the BIA appeal on his removal
20 proceedings. Petitioner’s ample available process in his current removal proceedings
21 demonstrate no lack of Procedural Due Process—nor any deprivation of liberty “sufficiently
22 outrageous” required to establish a Substantive Due Process claim. *See generally Reed v. Goertz*,
23 598 U.S. 230, 236 (2023); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 628 (8th Cir. 2001), *as*
24 *corrected* (Mar. 27, 2001), *as corrected* (May 1, 2001). Congress simply made the decision to detain
25 him pending removal which is a “constitutionally permissible part of that process.” *See Demore*,
26 538 U.S. at 531. Petitioner cannot show a likelihood of success on the merits.

27 / / /

28 / / /

2. Irreparable Harm Has Not Been Shown

To prevail on their request for interim injunctive relief, Petitioner must demonstrate “immediate threatened injury.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citing *Los Angeles Mem'l Coliseum Comm'n v. Nat'l 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 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) (“[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 Petitioner’s 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 7474861 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, Inc.*, 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,

1 to afford the parties and the courts the benefit of its experience and expertise, and to compile a
2 record which is adequate for judicial review.” *Glob. Rescue Jets, LLC v. Kaiser Found. Health Plan,*
3 *Inc.*, 30 F.4th 905, 913 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)).
4 Indeed, “agencies, not the courts, ought to have primary responsibility for the programs that
5 Congress has charged them to administer.” *McCarthy*, 503 U.S. at 145. Moreover, “[u]ltimately
6 the balance of the relative equities ‘may depend to a large extent upon the determination of the
7 [movant’s] prospects of success.’” *Tiznado-Reyna v. Kane*, Case No. CV 12-1159-PHX-SRB
8 (SPL), 2012 WL 12882387, at * 4 (D. Ariz. Dec. 13, 2012) (quoting *Hilton v. Braunskill*, 481 U.S.
9 770, 778 (1987)). Here, as explained above, Petitioner cannot succeed on the merits of his
10 claims. Petitioner’s bond has been denied by the BIA and the DHS’s appeal regarding his
11 removal proceedings is currently pending before the BIA. The balancing of equities and the
12 public interest weigh heavily against granting Petitioner’s equitable relief.

13 ***C. Petitioner Has Failed to Exhaust Administrative Remedies***

14 Similarly, requiring exhaustion here would be consistent with Congressional intent to
15 have claims, such as Petitioner’s, subject to the channeling provisions of § 1252(b)(9) that
16 provide for appeal to the BIA and then, if unsuccessful, the Ninth Circuit. “Exhaustion can be
17 either statutorily or judicially required.” *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir.
18 2004). “If exhaustion is statutory, it may be a mandatory requirement that is jurisdictional.” *Id.*
19 (citing *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 747 (9th Cir. 1991)).
20 “If, however, exhaustion is a prudential requirement, a court has discretion to waive the
21 requirement.” *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325–26 (9th Cir. 1981)). Here, the
22 parties are awaiting a briefing schedule from the BIA regarding Petitioner’s removal
23 proceedings. Petitioner is attempting to bypass the administrative scheme by choosing not to file
24 a brief to the BIA in response to the government’s forthcoming appeal regarding his removal
25 proceedings bond. Petitioner has not cited to any case law that support his argument that he
26 should be released on a bond after the BIA has denied him a bond and while his removal
27 proceedings are pending on appeal before the BIA. Petitioner’s arguments are contrary to
28 statutory and Supreme Court case law.

1 “District Courts are authorized by 28 U.S.C § 2241 to consider petitions for habeas
2 corpus.” *Castro–Cortez v. I.N.S.*, 239 F.3d 1037, 1047 (9th Cir. 2001). “That section does not
3 specifically require petitioners to exhaust direct appeals before filing petitions for habeas
4 corpus.” *Id.* That said, the Ninth Circuit “require[s], as a prudential matter, that habeas
5 petitioners exhaust available judicial and administrative remedies before seeking relief under §
6 2241.” *Id.* Specifically, “courts may require prudential exhaustion if (1) agency expertise makes
7 agency consideration necessary to generate a proper record and reach a proper decision; (2)
8 relaxation of the requirement would encourage the deliberate bypass of the administrative
9 scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes
10 and to preclude the need for judicial review.” *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)
11 (internal quotation marks omitted).

12 “When a petitioner does not exhaust administrative remedies, a district court ordinarily
13 should either dismiss the petition without prejudice or stay the proceedings until the petitioner
14 has exhausted remedies, unless exhaustion is excused.” *Leonardo v. Crawford*, 646 F.3d 1157,
15 1160 (9th Cir. 2011); *see also Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) (issue
16 exhaustion is a jurisdictional requirement); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010)
17 (no jurisdiction to review legal claims not presented in the petitioner’s administrative
18 proceedings before the BIA). Moreover, a “petitioner cannot obtain review of procedural errors
19 in the administrative process that were not raised before the agency merely by alleging that
20 every such error violates due process.” *Vargas v. U.S. Dep’t of Immigr. & Naturalization*, 831 F.2d
21 906, 908 (9th Cir. 1987); *see also Sola v. Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (declining
22 to address a due process argument that was not raised below because it could have been
23 addressed by the agency).

24 Here, exhaustion is warranted because agency expertise is required. “[T]he BIA is the
25 subject-matter expert in immigration bond decisions.” *Aden v. Nielsen*, No. C18-1441RSL, 2019
26 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019). The BIA is well-positioned to assess how
27 agency practice affects the interplay between 8 U.S.C. §§ 1225 and 1226. *See Delgado v. Sessions*,
28 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*

1 *M-S*, 27 I. & N. Dec. 509, 515–18 (2019) (addressing interplay of §§ 1225(b)(1) and 1226). *But*
2 *see Vazquez-Rodriguez v. Garland*, 7 F.4th 888, 896–97 (9th Cir. 2021); *Garcia v. Noem*, No. 25-CV-
3 02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025), at *4-5.

4 Waiving exhaustion would also “encourage other detainees to bypass the BIA and
5 directly appeal their no-bond determinations from the IJ to federal district court.” *Aden*, 2019
6 WL 5802013, at *2. Individuals, like Petitioner, would have little incentive to seek relief before
7 the BIA if this Court permits review here. And allowing a skip-the-BIA-and-go-straight-to-
8 federal-court strategy would needlessly increase the burden on district courts. *See Bd. of Tr. of*
9 *Constr. Laborers’ Pension Tr. for S. California v. M.M. Sundt Constr. Co.*, 37 F.3d 1419, 1420 (9th Cir.
10 1994) (“Judicial economy is an important purpose of exhaustion requirements.”); *see also Santos-*
11 *Zacaria v. Garland*, 598 U.S. 411, 418 (2023) (noting “exhaustion promotes efficiency”). If the IJs
12 erred as Petitioner alleges or may eventually allege, this Court should allow the administrative
13 process to correct itself. *See id.*

14 Moreover, detention alone is not an irreparable injury. Discretion to waive exhaustion
15 “is not unfettered.” *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Petitioners bear the
16 burden to show that an exception to the exhaustion requirement applies. *Leonardo*, 646 F.3d at
17 1161; *Aden*, 2019 WL 5802013, at *3. “[C]ivil detention after the denial of a bond hearing [does
18 not] constitute[] irreparable harm such that prudential exhaustion should be waived.” *Reyes*,
2021 WL 662659, at *3. For these reasons, the motion should be dismissed or stayed.

19 VI. Conclusion

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

22 Respectfully submitted this 29th day of October 2025.

23 SIGAL CHATTAH
24 Acting United States Attorney

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