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

10 ROGELIO BERTO MENDEZ

11 Petitioner,

12 v.

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

17 Respondents.
18

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

**Federal Respondents' Response to
Petition for Writ of Habeas Corpus
(ECF No. 1)**

19 Federal Respondents Kristi Noem, Pamela Bondi, and Thomas Feeley, through
20 undersigned counsel, hereby submit their response to Petitioner Rogelio Berto Mendez'
21 Petition for Habeas Corpus. ECF No. 1. This response is supported by the following
22 memorandum of points and authorities.

23 Respectfully submitted this 31st day of October 2025.

24 SIGAL CHATTAH
Acting United States Attorney

25 /s/ Virginia T. Tomova
26 VIRGINIA T. TOMOVA
27 Assistant United States Attorney
28

1 **Memorandum of Points and Authorities**

2 **I. Introduction**

3 Currently in separate removal proceedings before the Executive Office of
4 Immigration Review’s Immigration Court, Petitioner, an undocumented alien, challenges
5 his temporary detention while the decision is made regarding his removal. Petitioner
6 thereby petitions this Court for a Writ of Habeas Corpus under 28 U.S.C. § 2241. In doing
7 so, Petitioner challenges lawfully enacted regulations (8 C.F.R. § 1003.19(i)(1)–(2))
8 authorizing Petitioner’s detention through an automatic and discretionary stay, but
9 critically, the stay merely implements detention Congress authorized under 8 U.S.C. §
10 1225(b)(2). Therefore, to grant the Petition, Petitioner asks this Court to set aside a lawfully
11 enacted regulation and statute, finding both unconstitutionally applied, as alleged
12 violations of the Due Process Clause of the United States Constitution. But as discussed
13 below, the Supreme Court has long recognized Congress’s broad power and immunity
14 from judicial control to expel aliens from the country and to detain them while doing so.
15 *See e.g., Shaughnessy v. United States*, 345 U.S. 206, 210 (1953); *Carlson v. Landon*, 342 U.S.
16 524, 538 (1952). The United States’ temporary detention of Petitioner in no way exceeds
17 this broad authority and does not deprive Petitioner of Due Process. *See Demore v. Kim*, 538
18 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally
19 permissible part of that process.”). Because Petitioner’s temporary detention is lawful, the
20 Habeas Petition fails, and the United States, including all federal Respondents in their
21 official capacities, hereby seeks dismissal of the Petition.

22 **II. Background**

23 **A. Statutory and Regulatory Background**

24 **1. Applicants for Admission**

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

27
28 (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

1 States (whether or not at a designated port of arrival ...) shall be deemed
2 for the purposes of this Act an applicant for admission.

3 8 U.S.C. § 1225(a)(1).¹ Section 1225(a)(1) was added to the INA as part of the Illegal
4 Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). Pub. L. No.
5 104-208, § 302, 110 Stat. 3009-546. “The distinction between an alien who has effected an
6 entry into the United States and one who has never entered runs throughout immigration
7 law.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

8 Before IIRIRA, “immigration law provided for two types of removal proceedings:
9 deportation hearings and exclusion hearings.” *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir.
10 1999) (en banc). A deportation hearing was a proceeding against an alien already physically
11 present in the United States, whereas an exclusion hearing was against an alien outside of
12 the United States seeking admission *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 25 (1982)).
13 Whether an applicant was eligible for “admission” was determined only in exclusion
14 proceedings, and exclusion proceedings were limited to “entering” aliens—those aliens
15 “coming ... into the United States, from a foreign port or place or from an outlying
16 possession.” *Plasencia*, 459 U.S. at 24 n.3 (quoting 8 U.S.C. § 1101(a)(13) (1982)). “[N]on-
17 citizens who had entered without inspection could take advantage of greater procedural and
18 substantive rights afforded in deportation proceedings, while non-citizens who presented
19 themselves at a port of entry for inspection were subjected to more summary exclusion
20 proceedings.” *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010); *see also Plasencia*, 459
21 U.S. at 25-26. Prior to IIRIRA, aliens who attempted to lawfully enter the United States
22 were in a worse position than aliens who crossed the border unlawfully. *See Hing Sum*, 602
23 F.3d at 1100; *see also* H.R. Rep. No. 104-469, pt. 1, at 225-229 (1996). IIRIRA “replaced
24 deportation and exclusion proceedings with a general removal proceeding.” *Hing Sum*, 602
25 F.3d at 1100.

26
27
28 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).

1 IIRIRA added Section 1225(a)(1) to “ensure[] that all immigrants who have not been
2 lawfully admitted, regardless of their physical presence in the country, are placed on equal
3 footing in removal proceedings under the INA.” *Torres*, 976 F.3d at 928; *see also* H.R. Rep.
4 104-469, pt. 1, at 225 (explaining that § 1225(a)(1) replaced “certain aspects of the current
5 ‘entry doctrine,’” under which illegal aliens who entered the United States without
6 inspection gained equities and privileges in immigration proceedings unavailable to aliens
7 who presented themselves for inspection at a port of entry). The provision “places some
8 physically-but not-lawfully present noncitizens into a fictive legal status for purposes of
9 removal proceedings.” *Torres*, 976 F.3d at 928.

10 **2. Detention under the INA**

11 **i. Detention under 8 U.S.C. § 1225**

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

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

27 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583
28 U.S. at 287. It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.*

1 Under § 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a
2 removal proceeding “if the examining immigration officer determines that [the] alien
3 seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §
4 1225(b)(2)(A); *see Hurtado*, 29 I. & N. Dec. at 220 (“[A]liens who are present in the United
5 States without admission are applicants for admission as defined under section 235(b)(2)(A)
6 of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their
7 removal proceedings.”); *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) (“for aliens
8 arriving in and seeking admission into the United States who are placed directly in full
9 removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates
10 detention ‘until removal proceedings have concluded.’”) (citing *Jennings*, 583 U.S. at 299).
11 However, the DHS has the sole discretionary authority to temporarily release on parole
12 “any alien applying for admission to the United States” on a “case-by-case basis for urgent
13 humanitarian reasons or significant public benefit.” *Id.* § 1182(d)(5)(A); *see Biden v. Texas*,
14 597 U.S. 785, 806 (2022).

15 **ii. Detention under 8 U.S.C. § 1226(a)**

16 Section 1226 provides the general detention authority for aliens in removal
17 proceedings. An alien “may be arrested and detained pending a decision on whether the
18 alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), the
19 United States may detain an alien during his removal proceedings, release him on bond, or
20 release him on conditional parole. By regulation, immigration officers can release aliens if
21 the alien demonstrates that he “would not pose a danger to property or persons” and “is
22 likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien can also request
23 a custody redetermination (often called a bond hearing) by an IJ at any time before a final
24 order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1),
25 1003.19.

26 At a custody redetermination, the IJ may continue detention or release the alien on
27 bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). Immigration judges
28 have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. &

1 N. Dec. 37, 39–40 (BIA 2006). The IJ should consider the following factors during a
2 custody redetermination: (1) whether the alien has a fixed address in the United States; (2)
3 the alien’s length of residence in the United States; (3) the alien’s family ties in the United
4 States; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6)
5 the alien’s criminal record, including the extensiveness of criminal activity, time since such
6 activity, and the seriousness of the offense; (7) the alien’s history of immigration violations;
7 (8) any attempts by the alien to flee prosecution or otherwise escape authorities; and (9) the
8 alien’s manner of entry to the United States. *Id.* at 40. But regardless of these factors, an
9 alien “who presents a danger to persons or property should not be released during the
10 pendency of removal proceedings.” *Id.* at 38.

11 **iii. Review Before the Board of Immigration Appeals**

12 The Board of Immigration Appeals (BIA) is an appellate body within the Executive
13 Office for Immigration Review (EOIR) “charged with the review of those administrative
14 adjudications under the [INA] that the Attorney General may by regulation assign to it.” 8
15 C.F.R. § 1003.1(d)(1). By regulation, it has authority to review IJ custody determinations. 8
16 C.F.R. §§ 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also
17 “through precedent decisions, shall provide clear and uniform guidance to DHS, the
18 immigration judges, and the general public on the proper interpretation and administration
19 of the [INA] and its implementing regulations.” *Id.* § 1003.1(d)(1). Decisions rendered by
20 the BIA are final, except for those reviewed by the Attorney General. 8 C.F.R. §
21 1003.1(d)(7).

22 **iv. Staying Immigration Judge's Bond Order**

23 Bond decisions issued by an Immigration Judge can be appealed by DHS or an alien
24 to BIA by filing a Notice of Appeal from a Decision of an Immigration Judge (EOIR-26)
25 within 30 days. DHS can file a motion with the BIA seeking a *discretionary stay* of the
26 custody decision--whether to release the noncitizen on bond consistent with the IJ's order at
27 any time during the appeal period. 8 C.F.R. § 1003.19(i)(1) (hereafter “discretionary stay”).
28

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

6 While the automatic stay is not subject to review by either the IJ or the BIA,
7 the discretionary stay requires an individualized analysis by the BIA of the noncitizen's case
8 to determine if staying the IJ's order is appropriate. This analysis considers the individual's
9 criminal history, ties to the community, flight risk, dangerousness, and the likelihood of
10 prevailing in removal proceedings. *See, e.g., Gunaydin v. Trump*, - F.Supp.3d -, No. 25-CV-
11 01151 (JMB/DLM), 2025 WL 1459154 (D. Minn. May 21, 2025); *Zavala v. Ridge*, 310
12 F.Supp.2d 1071 (D. N.D. Cal. 2004); *Bezman v. Ashcroft*, 245 F.Supp.2d 446 (D. Conn.
13 2003).

14 The rules provide that if the BIA has not acted on the custody appeal, the automatic
15 stay shall lapse 90 days after the filing of the notice of appeal. 8 C.F.R. § 1003.6(c)(4) (2006).
16 However, DHS may seek an additional discretionary stay from the BIA to prevent lapse; to
17 do so, DHS would submit a motion to the BIA asking for a discretionary stay pending the
18 BIA's decision on the custody appeal. In this case, the automatic stay would remain in place
19 for up to thirty additional days to permit the BIA time to rule on the motion. 8 C.F.R. §
20 1003.6(c)(5). If the BIA denies the discretionary stay, fails to act upon it within the requisite
21 period, or issues a decision upholding the immigration judge's custody ruling, then the
22 automatic stay would remain in place for an additional five business days to permit the
23 Secretary or a designated DHS official to decide whether to refer the decision for the
24 Attorney General's review. 8 C.F.R. § 1003.6(d). If the agency decides to refer, then the
25 automatic stay would remain in place for an additional fifteen business days to permit the
26 Attorney General time to consider the merits of the referred decision and decide whether to
27 act on the referred decision. *Id.*

28 ///

III. Procedural and Factual Background

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

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

On September 9, 2025, the respondent's merits hearing on his application for relief from removal took place. The Immigration Judge granted the respondent's application for Cancellation of Removal for Nonpermanent Residents under INA § 240A(b)(1). The DHS reserved appeal of the Immigration Judge's decision and a Notice of Appeal was filed on September 19, 2025, with the Board of Immigration Appeals. *See* Notice of Appeal, attached

1 as Exhibit D. On September 30, 2025, the Board of Immigration Appeals sustained DHS'
2 appeal and vacated the Immigration Judge's July 31, 2025, decision granting the respondent
3 a \$5,000 bond. As of today, October 28, 2025, The DHS is awaiting a scheduling order from
4 the Board of Immigration Appeals to file a brief in support of the DHS appeal of the
5 Immigration Judge's decision on September 9, 2025, granting Petitioner Cancellation of
6 Removal for Nonpermanent Residents. This case is factually dissimilar to the other cases
7 decided by the Court, because there is a final order from the BIA denying petitioner's bond.
8 *See* BIA Bond Decision, attached as Exhibit E. It is alarming how Petitioner is trying to
9 downplay the severity of his criminal behavior and to claim that drawing a gun twice in a
10 threatening manner somehow does not endanger the safety of the public.

11 **IV. Standard of Review**

12 In a petition for a writ of habeas corpus, the petitioner is challenging the legality of
13 his restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show
14 the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Specifically,
15 here, Petitioner challenges his temporary civil immigration detention pending his removal
16 proceeding.

17 Judicial review of immigration matters, including of detention issues, is limited.
18 *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination*
19 *Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo*
20 *v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow*
21 *Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“the power over aliens is of a political character
22 and therefore subject only to narrow judicial review”). The Supreme Court has thus
23 “underscore[d] the limited scope of inquiry into immigration legislation,” and “has
24 repeatedly emphasized that over no conceivable subject is the legislative power of Congress
25 more complete than it is over the admission of aliens.” *Fiallo*, 430 U.S. at 792 (internal
26 quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S.
27 522, 531 (1954).

28 ///

1 **V. Argument**

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

3 Petitioner’s temporary detention pursuant to the stay provisions of 8 C.F.R. §
4 1003.19(i) is reinforced by Congress’s command to detain Petitioner throughout his removal
5 proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this temporary detention does not
6 violate Due Process. Because Petitioner cannot show the temporary detention violates the
7 law, the Petition must be denied. *See* 28 U.S.C. § 2241.

8 The current operative mechanism of Petitioner’s detention is an automatic stay of
9 release on bond for a maximum of 90 days under 8 C.F.R. § 1003.19(i)(2), but this
10 confinement is statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention
11 throughout the entire removal proceedings.

12 Pursuant to 8 U.S.C. § 1225(b)(2)(A), “in the case of an alien who is an applicant for
13 admission, if the examining immigration officer determines that an alien seeking admission
14 is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a
15 proceeding under section 1229a [removal proceedings].” 8 U.S.C. § 1225(b)(2)(A). The
16 Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and
17 that aliens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at
18 287 (“Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.”).

19 Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)’s mandatory
20 detention requirement as Petitioner is an “applicant for admission” to the United States. As
21 described above, an “applicant for admission” is an alien present in the United States who
22 has not been admitted. 8 U.S.C. § 1225(a)(1). Congress’s broad language here is
23 unequivocally intentional—an undocumented alien is to be “deemed for purposes of this
24 chapter an applicant for admission.” *Id.* Petitioner is “deemed” an applicant for admission
25 based on Petitioner’s failure to seek lawful admission to the United States before an
26 immigration officer, which is undisputed. *See generally* ECF Nos. 41, 41-1. And because
27 Petitioner has not demonstrated to an examining immigration officer that Petitioner is
28 “clearly and beyond a doubt entitled to be admitted,” Petitioner’s detention is mandatory. 8

1 U.S.C. § 1225(b)(2)(A). Thus, the Petitioner is properly detained pursuant to 8 U.S.C. §
2 1225(b)(2)(A), which mandates that Petitioner “shall be” detained.

3 The Supreme Court has confirmed an alien present in the country but never admitted
4 is deemed “an applicant for admission” and that “detention must continue” “until removal
5 proceedings have concluded” based on the “plain meaning” of 8 U.S.C. § 1225. *Jennings*,
6 583 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme
7 Court reversed the Ninth Circuit Court of Appeal’s imposition of a six-month detention
8 time limit into the statute. *Id.* at 297. The Court clarified there is no such limitation in the
9 statute and reversed on these grounds, remanding the constitutional Due Process claims for
10 initial consideration before the lower court. *Id.* But under the words of the statute, as
11 explained by the Supreme Court, 8 U.S.C. § 1225 includes aliens like the Petitioner who are
12 present but have not been admitted and they shall be detained pending their removal
13 proceedings.

14 Specifically, the Supreme Court declared, “an alien who ‘arrives in the United
15 States,’ *or* ‘is present’ in this country but ‘has not been admitted,’ is treated as ‘an applicant
16 for admission.’” *Id.* at 287 (emphasis on “or” added). In doing so, the Court explained both
17 aliens captured at the border and those illegally residing within the United States would fall
18 under § 1225. This would include Petitioner as an alien who is present in the country
19 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)
22 of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration
23 Judges lack authority to hear bond requests or to grant bond to aliens who are present in the
24 United States without admission.” *Hurtado*, 29 I&N Dec. at 216. Indeed, §1225 applies to
25 aliens who are present in the country *even for years* and who have not been admitted. *See*
26 *Hurtado*, 29 I&N Dec. at 226 (“the statutory text of the INA . . . is instead clear and explicit
27 in requiring mandatory detention of all aliens who are applicants for admission, without
28

1 regard to how many years the alien has been residing in the United States without lawful
2 status.” (citing 8 U.S.C. §1225)).

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

15 In affirming the decision of the immigration judge who determined he lacked
16 jurisdiction, the BIA found § 1225 clear and unambiguous as explained above. Thus,
17 because the alien was present in the United States (regardless of how long) and because he
18 was never admitted, he shall be detained during his removal proceedings. *See id.* at 228. In
19 doing so, the BIA rejected the same arguments raised by Petitioner and by other similar
20 petitioners in this District. For example, the BIA rejected the “legal conundrum” postulated
21 by the alien that while he may be an applicant for admission under the statute, he is
22 somehow not actually “seeking admission.” *Id.* at 221. The BIA explained that such a leap
23 failed to make sense and violated the plain meaning of the statute. *See id.*

24 Next, the BIA rejected the alien’s argument that the mandatory detention scheme
25 under § 1225 rendered the recent amendment to § 1226 under the Laken Riley Act
26 superfluous. *Id.* The BIA explained, “nothing in the statutory text of section 236(c),
27 including the text of the amendments made by the Laken Riley Act, purports to alter or
28 undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A),

1 requiring that aliens who fall within the definition of the statute ‘shall be detained for
2 [removal proceedings].’” *Id.* at 222. The BIA explained further that any redundancy
3 between the two statutes does not give license to “rewrite or eviscerate” one of the statutes.
4 *See id.* (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)).

5 Also, the BIA reasoned that it matters not that the alien was initially served with a
6 warrant listing 8 U.S.C. § 1226 and informing him of his ability to seek bond—an
7 Immigration Court cannot bestow jurisdiction upon itself with that initial paperwork when
8 said jurisdiction has been specifically revoked by Congress in § 1225. *See id.* at 226-27
9 (explaining “the mere issuance of an arrest warrant does not endow an Immigration Judge
10 with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA, 8
11 U.S.C. § 1225(b)(2)(A).”) The BIA further pointed out, “Our acknowledgement that aliens
12 detained under section 236(a) may be eligible for discretionary release on bond does not
13 mean that *all* aliens detained while in the United States with a warrant of arrest are detained
14 under section 236(a) and entitled to a bond hearing before the Immigration Judge,
15 regardless of whether they are applicants for admission under section 235(b)(2)(A) of the
16 INA, 8 U.S.C. § 1225(b)(2)(A).” *Id.* at 227 (quotations omitted). Thus, the BIA rejected this
17 and every argument raised by the alien to find § 1225 applied to him despite residing in the
18 country for years. *Id.*

19 The BIA mandate is clear: “under a plain language reading of section 235(b)(2)(A) of
20 the INA, 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests
21 or to grant bond to aliens, like the respondent, who are present in the United States without
22 admission.” *Id.* at 225. Indeed, this ruling emphasizes that § 1225 applies to aliens like the
23 Petitioner who is also present in the United States but has not been admitted.

24 The BIA mandate is also sweeping. The *Hurtado* decision was unanimous, conducted
25 by a three-appellate judge panel. *See id. generally.* It is binding on all immigration judges in
26 the United States. 8 C.F.R. § 1003.1(g)(1) (“[D]ecisions of the Board and decisions of the
27 Attorney General are binding on all officers and employees of DHS or immigration judges
28 in the administration of the immigration laws of the United States.”). And because the

1 decision was published, a majority of the entire Board must have voted to publish it, which
2 establishes the decision “to serve as precedent[] in all proceedings involving the same issue
3 or issues.” *See* 8 C.F.R. § 1003.1(g)(2)-(3). Indeed, this is the law of the land in immigration
4 court today. *See* also 8 C.F.R. § 1003.1(d)(1) (explaining “the Board, through precedent
5 decisions, shall provide clear and uniform guidance to DHS, the immigration judges, and
6 the general public on the proper interpretation and administration of the Act and its
7 implementing regulations.”). And in the Board’s own words, *Hurtado* is a “precedential
8 opinion.” *Id.* at 216.

9 As such, immigrant judges are holding § 1225 applies to aliens who are present but
10 not admitted and therefore immigration judges have denied bond for lack of jurisdiction.
11 But in some prior cases where an immigration judge erred in releasing a qualifying alien on
12 bond, like Petitioner, who is subject to mandatory detention, DHS’s invocation of the stay
13 of release pending appeal in 8 C.F.R. § 1003.19(i)(2) ensured DHS’s opportunity to
14 vindicate Congress’s mandatory detention scheme.

15 While the law is now clear in immigration court, the BIA has yet to reach DHS’s
16 appeal involving the Petitioner. But in the coming days, the Federal Respondents would
17 expect the BIA to reach this appeal, apply the broad holding in *Hurtado*, and reverse the
18 immigration judge’s release of the Petitioner on bond. Indeed, this very decision by the
19 immigration judge, upon which Petitioner places so much weight, was wrongly decided and
20 without jurisdiction and will soon be reversed.

21 Because Petitioner shall be detained during the removal proceedings and these
22 proceedings are uncontrovertibly ongoing, his temporary detention is lawful. Any argument
23 by Petitioner that his detention exceeds statutory authority is clearly invalid and should be
24 rejected. The United States is aware of prior rulings in this District and others rejecting this
25 argument (*see e.g., Herrera-Torralba v. Knight*, 2:25-cv-01366-RFB-DJA (D. Nev. Sep 05,
26 2025); *Maldonado-Vazquez v. Feeley*, 2:25-cv-01542-RFB-EJY (D. Nev. Sep 17, 2025)), but the
27 United States respectfully maintains §1225 straightforwardly applies to Petitioner, especially
28 in light of *Jennings*. *See Jennings*, 583 U.S. at 287 (explaining “an alien who “arrives in the

1 United States,” or “is present” in this country but “has not been admitted,” is treated as “an
2 applicant for admission.” § 1225(a)(1)).

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

5 The United States District Court for the District of Nebraska’s decision denying the
6 habeas corpus petition in *Vargas Lopez v. Trump* is particularly relevant here. In *Vargas Lopez*,
7 the petitioner, an undocumented alien who had been residing in the United States since
8 2013, sought immediate release from detention. *Vargas Lopez*, No. 8:25CV526, 2025 WL
9 2780351, at *1 (D. Neb. Sept. 30, 2025). Prior to filing his petition, Vargas Lopez had
10 received a bond hearing, and the immigration judge ordered that he be released from
11 custody under bond of \$10,000. *Id.* at *3. DHS however appealed the bond determination,
12 which automatically stayed Vargas Lopez’s release on bond. *Id.* Vargas Lopez then filed a
13 petition for habeas corpus alleging that the automatic stay was *ultra vires* and violated his
14 due process rights. *Id.* He also alleged that application of 8 U.S.C. § 1225 in his case was
15 unlawful because 8 U.S.C. § 1226 should control his detention. *Id.*

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

20 Second, the court concluded that Vargas Lopez was subject to detention without
21 possibility of bond under § 1225(b)(2). To do so, the court analyzed the Supreme Court’s
22 decision in *Jennings* to reject the notion that § 1225(b)(2) and § 1226(a) apply to two distinct
23 groups of aliens; the two sections are not mutually exclusive. *Id.* at *6–8. The court then
24 concluded that Vargas Lopez is an alien within the “catchall” scope of § 1225(b)(2), subject
25 to detention without possibility of release on bond through a proceeding on removal under §
26 1229a. *Id.* at *9. The court found that Vargas Lopez was an “applicant for admission”
27 because his counsel admitted that Vargas Lopez “wishe[d] to stay in this country.” *Id.* That
28

1 finding, according to the court, was consistent with the conclusions of the BIA
2 in *Hurtado* and *Jennings*.

3 Pursuant to the language of the statute and the holding of *Jennings*, the court said that
4 “just because Vargas Lopez illegally remained in this country *for years* does not mean that he
5 is suddenly not an ‘applicant for admission’ under § 1225(b)(2).” *Id.* “Even if Vargas Lopez
6 might have fallen within the scope of § 1226(a),” the court found “he also certainly fit
7 within the language of § 1225(b)(2) as well.” *Id.* “The Court thus conclude[d] that the *plain*
8 *language* of § 1225(b)(2) and the “all applicants for admission” language
9 of *Jennings* permitted the DHS to detain Vargas Lopez under § 1225(b)(2).” *Id.*

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

11 The United States District Court for the Southern District of California’s decision in
12 *Chavez v. Noem*, No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228, at *1 (S.D. Cal. Sept. 24,
13 2025), is also instructive. In *Chavez*, the court denied a motion for a temporary restraining
14 order (“TRO”) filed by the petitioners who were detained under 8 U.S.C. § 1225(b)(2).
15 *Chavez*, 2025 WL 2730228, at *1. The *Chavez* petitioners argued they should not have been
16 mandatorily detained and instead they should have received bond redetermination hearings
17 under § 1226(a). *Id.* The *Chavez* petitioners filed a motion for TRO, seeking to “enjoin[]
18 Respondents from continuing to detain them unless [they received] an individualized bond
19 hearing . . . pursuant to 8 U.S.C. § 1226(a) within fourteen days of the TRO.” *Id.*

20 In denying the TRO, the *Chavez* court went no further than the plain language of §
21 1225(a)(1). *Id.* at *4. Beginning and ending with the statutory text, the *Chavez* court correctly
22 found that because petitioners did not contest that they are “alien[s] present in the United
23 States who ha[ve] not been admitted,” then the *Chavez* petitioners are “applicants for
24 admission” and thus subject to the mandatory detention provisions of “applicants for
25 admission” under § 1225(b)(2). *Id.*; *see also* *Hurtado*, 29 I. & N. Dec. at 221–222 (finding that
26 an alien who entered without inspection is an “applicant for admission” and his argument
27 that he cannot be considered as “seeking admission” is unsupported by the plain language
28

1 of the INA, and further stating, “[if] he is not admitted to the United States . . . but he is not
2 ‘seeking admission’ . . . then what is his legal status?”).

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

5 While *Loper Bright Enterprises v. Raimondo*, 603 U.S. 726 (2024), eliminated Chevron
6 deference, *Hurtado* nonetheless should be afforded substantial weight under *Skidmore v. Swift*
7 *& Co.*, 323 U.S. 134 (1944). Under *Skidmore*, the weight owed to an agency interpretation
8 depends on “the thoroughness evident in its consideration, the validity of its reasoning, its
9 consistency with earlier and later pronouncements, and all those factors which give it power
10 to persuade, if lacking power to control.” *Id.* at 140. *Hurtado* scores highly on these factors.

11 First, the BIA applied its specialized expertise in immigration detention law, the very
12 subject Congress charged it with administering. Its decision addressed the interplay between
13 §§ 1225 and 1226 in detail, relying on statutory text, legislative history, and decades of
14 experience resolving custody questions. Second, the BIA’s reasoning is thorough and well
15 supported. It carefully explained why noncitizens who entered without inspection remain
16 “applicants for admission” under § 1225(a)(1) and why reclassifying them under § 1226(a)
17 would create statutory issues and undermine congressional intent. Third, the BIA’s
18 interpretation is consistent with Supreme Court precedent, including *Jennings*, which
19 recognized that detention under § 1225(b) is mandatory. Finally, adopting *Hurtado* promotes
20 uniformity and coherence in federal immigration law by preventing detention outcomes
21 from turning on the happenstance of when and where a noncitizen is apprehended.

22 **4. The Legislative History Bolsters Petitioner’s Detention**

23 Petitioner’s reliance on the Laken Riley Act and the legislative history is misplaced.
24 When the plain text of a statute is clear, “that meaning is controlling” and courts “need not
25 examine legislative history.” *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th Cir.
26 2011). But to the extent legislative history is relevant here, nothing “refutes the plain
27 language” of § 1225. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011).
28 Congress passed IIRIRA to correct “an anomaly whereby immigrants who were attempting

1 to lawfully enter the United States were in a worse position than persons who had crossed
2 the border unlawfully.” *Torres v. Barr*, 976 F.3d at 928; *Chavez*, 2025 WL 2730228, at *4. It
3 “intended to replace certain aspects of the [then] current ‘entry doctrine,’ under which illegal
4 aliens who have entered the United States without inspection gain equities and privileges in
5 immigration proceedings that are not available to aliens who present themselves for
6 inspection at a port of entry.” *Torres*, 976 F.3d at 928 (quoting H.R. Rep. 104-469, pt. 1, at
7 225); *Chavez*, 2025 WL 2730228, at *4 (The addition of § 1225(a)(1) “ensure[d] that all
8 immigrants who have not been lawfully admitted, regardless of their physical presence in
9 the country, are placed on equal footing in removal proceedings under the INA—in the
10 position of an ‘applicant for admission.’ ”).

11 As the pertinent House Judiciary Committee Report explains: “[Before the IIRIRA],
12 aliens who [had] entered without inspection [were] deportable under section 241(a)(1)(B).”
13 H.R. Rep. No. 104-469, pt. 1, at 225 (1996). But “[u]nder the new ‘admission’ doctrine,
14 such aliens *will not be considered to have been admitted*, and thus, must be subject to a ground of
15 inadmissibility, rather than a ground of deportation, *based on their presence without admission*.”
16 *Id.* Thus, applicants for admission remain such unless an immigration officer determines
17 that they are “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A);
18 *Hurtado*, 29 I. & N. Dec. at 228. Failing to clearly and beyond a doubt demonstrate that they
19 are entitled to admission, such aliens “shall be detained for a proceeding under section 240.”
20 8 U.S.C. § 1225(b)(2)(A); *see also Jennings*, 583 U.S. at 288.

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

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

26 Any argument that prior agency practice supports applying § 1226(a) to Petitioner is
27 unavailing because under *Loper Bright*, the plain language of the statute and not prior
28 practice controls. *Hurtado*, 29 I. & N. Dec. at 225–26. In overturning *Chevron*, the Supreme

1 Court recognized that courts often change precedents and “correct[] our own mistakes”
2 *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411 (2024) (overturning *Chevron, U.S.A., Inc.*
3 *v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). *Loper Bright* overturned a decades old
4 agency interpretation of the Magnuson-Stevens Fishery Conservation and Management
5 Act that itself predated IIRIRA by twenty years. *Loper Bright Enterprises*, 603 U.S. at 380.
6 Thus, longstanding agency practice carries little, if any, weight under *Loper Bright*. The
7 weight given to agency interpretations “must always ‘depend upon their thoroughness, the
8 validity of their reasoning, the consistency with earlier and later pronouncements, and all
9 those factors which give them power to persuade.’” *Loper Bright Enterprises*, 603 U.S. at
10 432–33 (quoting *Skidmore.*, 323 U.S. at 140 (cleaned up)).

11 For example, here Petitioner points to 62 Fed. Reg. at 10323, where the agency
12 provided no analysis of its reasoning. In contrast, the BIA’s recent precedent decision in
13 *Hurtado* includes thorough reasoning. *Hurtado*, 29 I. & N. Dec. at 221–22. In *Hurtado*, the
14 BIA analyzed the statutory text and legislative history. *Id.* at 223-225. It highlighted
15 congressional intent that aliens present without inspection be considered “seeking
16 admission.” *Id.* at 224. The BIA concluded that rewarding aliens who entered unlawfully
17 with bond hearings while subjecting those presenting themselves at the border to
18 mandatory detention would be an “incongruous result” unsupported by the plain language
19 “or any reasonable interpretation of the INA.” *Id.* at 228.

20 To be sure, “when the best reading of the statute is that it delegates discretionary
21 authority to an agency,” the Court must “independently interpret the statute and effectuate
22 the will of Congress.” *Loper Bright Enterprises*, 603 U.S. at 395. But “read most naturally, §§
23 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain
24 proceedings have concluded.” *Jennings*, 583 U.S. at 297 (cleaned up). Prior practice does
25 not support Petitioner’s position that the plain language mandates detention under
26 § 1226(a).

27 ///

28 ///

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 v. United States*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.”). 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 v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.”); *Demore v. Kim*, 538 U.S. 510, at 531 (2003) (“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.”).

1 In another immigration context (aliens already ordered removed awaiting their
2 removal), the Supreme Court has explained that detaining these aliens less than six months
3 is presumed constitutional. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). But even this
4 presumptive constitutional limit has been subsequently distinguished as perhaps
5 unnecessarily restrictive in other contexts. For example, in *Demore*, the Supreme Court
6 explained Congress was justified in detaining aliens during the entire course of their removal
7 proceedings who were convicted of certain crimes. *Demore*, 538 U.S. at 513. In that case,
8 similar to undocumented aliens like Petitioner, Congress provided for the detention of
9 certain convicted aliens during their removal in 8 U.S.C. § 1226(c). *See id.* The Court
10 emphasized the constitutionality of the “definite termination point” of the detention, which
11 was the length of the removal proceedings. *Id.* at 512 (“In contrast, because the statutory
12 provision at issue in this case governs detention of deportable criminal aliens *pending their*
13 *removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from
14 fleeing prior to or during such proceedings. Second, while the period of detention at issue in
15 *Zadvydas* was “indefinite” and “potentially permanent,” *id.*, at 690–691, 121 S.Ct. 2491, the
16 record shows that § 1226(c) detention not only has a definite termination point, but lasts, in
17 the majority of cases, for less than the 90 days the Court considered presumptively valid in
18 *Zadvydas*.”)² In light of Congress’s interest in dealing with illegal immigration by keeping
19 specified aliens in detention pending the removal period, the Supreme Court dispensed of
20 any Due Process concerns without engaging in the “*Mathews v. Eldridge* test” *See id. generally.*

21 Likewise, in the case at bar Petitioner’s temporary detention pending his removal
22 proceedings does not violate Due Process. Petitioner has been detained for a few months as
23 his *process* unfolds. Specifically, DHS’s narrow appeal on the issue of release on bond is
24 before the BIA, and resolution one way or another is undoubtedly forthcoming. Petitioner’s
25 ample available process in his current removal proceedings demonstrate no lack of
26 Procedural Due Process—nor any deprivation of liberty “sufficiently outrageous” required

27 _____
28 ² 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.

1 to establish a Substantive Due Process claim. *See generally Reed v. Goertz*, 598 U.S. 230, 236
2 (2023); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 628 (8th Cir. 2001), *as corrected* (Mar.
3 27, 2001), *as corrected* (May 1, 2001). Congress simply made the decision to detain him
4 pending removal which is a “constitutionally permissible part of that process.” *See Demore*,
5 538 U.S. at 531.

6 The temporary, automatic and discretionary stays permits the United States an
7 opportunity to appeal an IJ bond decision to correct any errors by the Immigration Judge
8 while providing “an appropriate and less restrictive means whereby the government's
9 interest in seeking a stay of the custody redetermination may be protected without unduly
10 infringing upon Petitioner's liberty interest. *Zavala*, 310 F. Supp. 2d at 1077; *El-Dessouki v.*
11 *Cangemi*, No. CIV 063536 DSD/JSM, 2006 WL 2727191, at *3 (D. Minn. Sept. 22, 2006);
12 *Altayar v. Lynch*, No. CV-16-02479-PHX-GMS (JZB), 2016 U.S. Dist. LEXIS 175819, at
13 *10–11 (D. Ariz. Nov. 23, 2016).

14 As explained in *Altayar*, purpose of the automatic stay is to “avoid the necessity of
15 having to decide whether to order a stay on extremely short notice with only the most
16 summary presentation of the issues.” Review of Custody Determinations, 71 FR 57873-01,
17 2006 WL 2811410; *Altayar*, 2016 U.S. Dist. LEXIS 175819 at *12-13. An automatic stay of
18 up to 90 days does not violate due process because it is narrowly tailored to serve a
19 compelling United States’ interest. *Id.* In *Altayar*, the Court found there is no procedural due
20 process violation from § 1003.19(i)(2).

21 In this case, Petitioner who is present in the United States without admission or
22 parole, is an applicant for admission in INA § 240 removal proceedings and is therefore
23 detained pursuant to 8 U.S.C. § 1225. As discussed above, his detention is mandatory and
24 the IJ does not have jurisdiction to issue a bond. Because the IJ in this case conducted a
25 bond hearing and granted a bond *in error*, the automatic stay of 8 C.F.R. § 1003.19(i)(2) has
26 here served the very purpose for which it was created in the first place. As history has
27 revealed, subsequent to the IJ’s decision error, the BIA issued its precedential decision in
28 *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

1 would have gone farther and Petitioner would have been mistakenly released from DHS
2 custody.

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

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

7 Similarly, requiring exhaustion here would be consistent with Congressional intent
8 to have claims, such as Petitioner's, subject to the channeling provisions of § 1252(b)(9) that
9 provide for appeal to the BIA and then, if unsuccessful, the Ninth Circuit. "Exhaustion can
10 be either statutorily or judicially required." *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541
11 (9th Cir. 2004). "If exhaustion is statutory, it may be a mandatory requirement that is
12 jurisdictional." *Id.* (citing *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d
13 742, 747 (9th Cir. 1991)). "If, however, exhaustion is a prudential requirement, a court has
14 discretion to waive the requirement." *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325–26
15 (9th Cir. 1981)). Here, the parties are awaiting a briefing schedule from the BIA regarding
16 Petitioner's removal proceedings. Petitioner is attempting to bypass the administrative
17 scheme by choosing not to file a brief to the BIA in response to the government's
18 forthcoming appeal regarding his removal proceedings bond. Petitioner has not cited to any
19 case law that support his argument that he should be released on a bond after the BIA has
20 denied him a bond and while his removal proceedings are pending on appeal before the
21 BIA. Petitioner's arguments are contrary to statutory and Supreme Court case law.

22 "District Courts are authorized by 28 U.S.C § 2241 to consider petitions for habeas
23 corpus." *Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1047 (9th Cir. 2001). "That section does not
24 specifically require petitioners to exhaust direct appeals before filing petitions for habeas
25 corpus." *Id.* That said, the Ninth Circuit "require[s], as a prudential matter, that habeas
26 petitioners exhaust available judicial and administrative remedies before seeking relief under
27 § 2241." *Id.* Specifically, "courts may require prudential exhaustion if (1) agency expertise
28 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

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

4 “When a petitioner does not exhaust administrative remedies, a district court
5 ordinarily should either dismiss the petition without prejudice or stay the proceedings until
6 the petitioner has exhausted remedies, unless exhaustion is excused.” *Leonardo v. Crawford*,
7 646 F.3d 1157, 1160 (9th Cir. 2011); *see also Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th
8 Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Tijani v. Holder*, 628 F.3d 1071,
9 1080 (9th Cir. 2010) (no jurisdiction to review legal claims not presented in the petitioner’s
10 administrative proceedings before the BIA). Moreover, a “petitioner cannot obtain review of
11 procedural errors in the administrative process that were not raised before the agency merely
12 by alleging that every such error violates due process.” *Vargas v. U.S. Dep’t of Immigr. &*
13 *Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987); *see also Sola v. Holder*, 720 F.3d 1134, 1135–
14 36 (9th Cir. 2013) (declining to address a due process argument that was not raised below
15 because it could have been addressed by the agency).

16 Here, exhaustion is warranted because agency expertise is required. “[T]he BIA is
17 the subject-matter expert in immigration bond decisions.” *Aden v. Nielsen*, No. C18-
18 1441RSL, 2019 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019). The BIA is well-positioned
19 to assess how agency practice affects the interplay between 8 U.S.C. §§ 1225 and 1226. *See*
20 *Delgado v. Sessions*, No. C17-1031-RSL-JPD, 2017 WL 4776340, at *2 (W.D. Wash. Sept.
21 15, 2017) (noting a denial of bond to an immigration detainee was “a question well suited
22 for agency expertise”); *Matter of M-S-*, 27 I. & N. Dec. 509, 515–18 (2019) (addressing
23 interplay of §§ 1225(b)(1) and 1226). *But see Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896–
24 97 (9th Cir. 2021); *Garcia v. Noem*, No. 25-CV-02180-DMS-MMP, 2025 WL 2549431 (S.D.
25 Cal. Sept. 3, 2025), at *4-5.

26 Waiving exhaustion would also “encourage other detainees to bypass the BIA and
27 directly appeal their no-bond determinations from the IJ to federal district court.” *Aden*,
28 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-

1 straight-to-federal-court strategy would needlessly increase the burden on district courts. *See*
2 *Bd. of Tr. of Constr. Laborers' Pension Tr. for S. California v. M.M. Sundt Constr. Co.*, 37 F.3d
3 1419, 1420 (9th Cir. 1994) (“Judicial economy is an important purpose of exhaustion
4 requirements.”); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023) (noting
5 “exhaustion promotes efficiency”). If the IJs erred as Petitioner alleges or may eventually
6 allege, this Court should allow the administrative process to correct itself. *See id.*

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

14 **D. Request for EAJA Fees Should be Denied**

15 Petitioner seeks attorney’s fees and costs pursuant to § 2412 of the Equal Access for
16 Justice Act (“EAJA”), which allows fee-shifting in civil actions by or against the United
17 States. EAJA has two parts, agency adversarial adjudication fee-shifting, 5 U.S.C. § 504,
18 and fee-shifting in civil actions in federal court, 28 U.S.C. § 2412. Petitioner cannot obtain
19 fees in this case under 5 U.S.C. § 504 since that provision excludes administrative
20 immigration proceedings. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129
21 (1991). His only recourse for fees is pursuant to § 2412(d)(1)(A), which provides, subject to
22 exceptions not relevant here, that in an action brought by or against the United States, a
23 court must award fees and expenses to a prevailing non-government party “unless the court
24 finds that the position of the United States was substantially justified or that special
25 circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A).

26 Here, Petitioner’s request is premature because he is not a prevailing party. Second,
27 even if Petitioner were to prevail in this case, the Federal Respondents’ position asserted in
28 this Response is substantially justified because other courts have found the arguments

1 presented herein to be persuasive and that DHS can lawfully detain, under the mandatory
2 detention provisions of 8 U.S.C. § 1225, other petitioners who are similarly situated as
3 Perez Sales.

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

16 Because the United States’ position in this case is substantially justified, Petitioner’s
17 request for attorney’s fees under EAJA cannot prevail.

18 **VI. Conclusion**

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

21 Respectfully submitted this 31st day of October 2025.

22 SIGAL CHATTAH
23 Acting United States Attorney

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