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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

LESBIA JESENIA LEIVA FLORES, Petitioner-Plaintiff, v. SERGIO ALBARRAN, et al., Respondents-Defendants.	Case No. 3:25-cv-09302-AMO **RESPONDENTS-DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUCNTION SHOULD NOT ISSUE** Date: November 19, 2025 Time: 9:00 a.m. Hon. Araceli Martínez-Olguín

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I. INTRODUCTION

Aliens "lawfully residing in this society have many rights which are accorded to noncitizens by few other countries." *Foley v. Connelie*, 435 U.S. 291, 294 (1978). Yet Congress has also identified a "crisis at the land border" that involves "hundreds of thousands" of individuals entering the country illegally each year, H.R. REP. NO. 104-469, at 107 (1996), and the resulting need "to expedite the removal from the United States of aliens who indisputably have no authorization to be admitted," H.R. REP. NO. 104-828, at 209 (1996).

For these reasons, "[t]he decisions of [the Supreme] Court with regard to the rights of aliens living in our society"—including the "restraints imposed" upon them— "have reflected fine, and often difficult, questions of values." *Foley*, 435 U.S. at 294. Mindful of these values, Congress has created—and courts have upheld—procedures unique to individuals subject to expedited removal that are "coextensive" with due process. *Guerrier v. Garland*, 18 F.4th 304, 310 (9th Cir. 2021) (explaining that "in the expedited removal context, a petitioner's due process rights are coextensive with the statutory rights Congress provides") (citing *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138 (2020)). These procedures include the right to a non-adversarial interview before a trained asylum officer, administrative review before an immigration judge, and limited judicial review. 8 U.S.C. § 1252(e)(2); 8 C.F.R. §§ 208.30, 235.3, 1208.30. But they do not permit aliens to challenge their mandatory detention or entitle them to pre-detention hearings. *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), 1225(b)(2)(A).

Petitioner Lesbia Jesenia Leiva Flores ("Petitioner") entered the United States on or about July 28, 2021, and was issued a notice and order for expedited removal pursuant to § 1225(b)(1) approximately one day later. Nothing has changed to alter the fact that she is subject to expedited removal or mandatory detention, her parole and her application for asylum included. Where, as here, the government properly exercises its authority to pursue expedited removal under 8 U.S.C. §1225(b), those procedures fully satisfy due process and preclude Petitioner from clearing the high bar for a preliminary injunction requiring additional process. Under the plain text of 8 U.S.C. § 1225, Petitioner cannot show a likelihood of success on the merits, establish irreparable harm, or countervail the government's compelling interest in enforcing mandatory detention pending expedited removal for the narrow category of aliens to which she belongs.

II. STATUTORY BACKGROUND

A. Detention Under 8 U.S.C. § 1225

Congress established the expedited removal process in 8 U.S.C. § 1225 to ensure that the Executive could "expedite removal of aliens lacking a legal basis to remain in the United States." *Kucana v. Holder*, 558 U.S. 233, 249 (2010); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 106 (2020) ("[Congress] crafted a system for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country."). Section 1225 applies to "applicants for admission" to the United States, who are defined as "alien[s] present in the United States who [have] not been admitted" or aliens "who arrive[] in the United States," whether at a designated port of arrival. 8 U.S.C. § 1225(a)(1). Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)," both of which are subject to mandatory detention. *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) ("[R]ead most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings have concluded."). Here, Petitioner is subject to § 1225(b)(1) and is not subject to § 1226(a), or its procedures. Because Petitioner does not address or claim she is subject to § 1225(b)(2), Respondents focus their arguments on § 1225(b)(1) and § 1226(a).

1. Section 1225(b)(1)

Section 1225(b)(1) applies to "arriving aliens" and "certain other" individuals "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." 8 U.S.C. §§ 1225(b)(1)(A)(i), (iii). Section 1225(b)(1) allows for the expedited removal of any alien "described in" § 1225(b)(1)(A)(iii)(II), as designated by the Attorney General or Secretary of Homeland Security—that is, any individual not "admitted or paroled into the United States" and "physically present" fewer than two years—who is inadmissible under § 1182(a)(7) at the time of "inspection." *See* 8 U.S.C. § 1182(a)(7) (categorizing as inadmissible aliens without valid entry documents). Whether that happens at a port of entry or after illegal entry is not relevant; what matters is whether, when an officer inspects an alien for admission under § 1225(a)(3), that alien lacks entry documents and so is subject to §1182(a)(7). The Attorney General's or Secretary's authority to "designate" classes of aliens as subject to expedited removal is subject to his or her "sole and unreviewable discretion." 8 U.S.C. § 1225(b)(1)(A)(iii); *see*

also American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352 (D.C. Cir. 2000) (upholding the expedited removal statute).

The Secretary (and earlier, the Attorney General) has designated categories of aliens for expedited removal under § 1225(b)(1)(A)(iii) on five occasions; most recently, restoring the expedited removal scope to "the fullest extent authorized by Congress." *Designating Aliens for Expedited Removal*, 90 Fed. Reg. 8139 (Jan. 24, 2025). The notice thus enables the U.S. Department of Homeland Security ("DHS") "to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under [8 U.S.C. § 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility," who were not otherwise covered by prior designations. *Id.* at 8139–40 .

Still, DHS has full discretionary authority to:

> parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Secretary of Homeland Security, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

Expedited removal under § 1225(b)(1) is a distinct statutory procedure from removal under § 1229a. Section 1229(a) governs full removal proceedings initiated by a notice to appear and conducted before an immigration judge, during which the individual may apply for relief or protection. By contrast, expedited removal under § 1225(b)(1) applies in narrower, statutorily defined circumstances—typically to individuals apprehended at or near the border who lack valid entry documents or commit fraud upon entry—and allows for their removal without a hearing before an immigration judge, subject to limited exceptions. For these individuals, DHS has discretion to pursue expedited removal under § 1225(b)(1) or § 1229a. *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

B. Mandatory Detention for Asylum Seekers

Expedited removal proceedings under § 1225(b)(1) include additional procedures if an individual indicates an intention to apply for asylum[1] or expresses a fear of persecution, torture, or return to the individual's country. *See* 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). In that situation, the individual is given a non-adversarial interview with an asylum officer, who determines whether the individual has a "credible fear of persecution" or torture. *Id.* §§ 1225(b)(1)(A)(ii), (b)(1)(B)(iii)(II), (b)(1)(B)(iv), (v); *see also* 8 C.F.R. § 208.30; *Thuraissigiam*, 591 U.S. at 109–11 (describing the credible fear process). The individual may also pursue *de novo* review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. §§ 1003.42(d), 1208.30(g). During the credible fear process, an individual may consult with an attorney or representative and engage an interpreter. 8 C.F.R. § 208.30(d)(4), (5). However, an alien subject to these procedures "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

If the asylum officer or immigration judge does not find a credible fear, the individual is "removed from the United States without further hearing or review." 8 U.S.C. §§ 1225(b)(1)(B)(iii)(I), (b)(1)(C); 1252(a)(2)(A)(iii), (e)(2); 8 C.F.R. §§ 1003.42(f), 1208.30(g)(2)(iv)(A). If the asylum officer or immigration judge finds a credible fear, the individual is generally placed in full removal proceedings under 8 U.S.C. § 1229a but remains subject to mandatory detention. *See* 8 C.F.R. § 208.30(f); 8 U.S.C. § 1225(b)(1)(B)(iii)(IV).

2. Detention Under 8 U.S.C. § 1226(a)

A different statutory detention authority, 8 U.S.C. § 1226, applies to aliens who have been lawfully admitted into the U.S. but are deportable and subject to removal proceedings. Section 1226(a) provides for the arrest and detention of these aliens "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Under § 1226(a), DHS may, in its discretion, detain an alien during his removal proceedings, release him on bond, or release him on conditional parole.[2] By regulation,

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[1] Individuals must apply for asylum within one year of arriving in the United States, 8 U.S.C. § 1558(a)(2)(B), except if the individual can demonstrate "extraordinary circumstances" that justify moving that deadline. *Id.* § 1558(a)(2)(D).

[2] Being "conditionally paroled under the authority of § 1226(a)" is distinct from being "paroled into the

immigration officers can release an alien if he demonstrates that he "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). An alien can also request a custody redetermination (*i.e.*, a bond hearing) by an IJ at any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a) ; 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19. At a custody redetermination, the IJ may continue detention or release the alien on bond or conditional parole. 8 U.S.C. § 1226(a) ; 8 C.F.R. § 1236.1(d)(1). IJs have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. & N. Dec. 37, 39–40 (BIA 2006) (listing nine factors for IJs to consider).

The Attorney General, in *Matter of M-S-*, unequivocally recognized that 8 U.S.C. §§ 1225 and 1226(a) do not overlap but describe "different classes of aliens." *Matter of M-S-*, 27 I&N Dec. 509, 516 (A.G. 2019). The Attorney General also held—in an analogous context—that aliens present without admission and placed into expedited removal proceedings are detained under 8 U.S.C. § 1225 even if later placed in 8 U.S.C. § 1229a removal proceedings. 27 I&N Dec. at 518-19.

III. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Lesbia Jesenia Leiva Flores is a native and citizen of Nicaragua who entered the United States on or about July 28, 2021, and was encountered by immigration officials that same day. DO Decl. ¶ 6. Petitioner admitted she was a foreign national without the necessary legal documents to enter, pass through, or remain in the United States and that she understood that her manner of entry into the United States—crossing outside of a port of entry without inspection—was illegal. DO Decl. Ex. 1. Petitioner was determined inadmissible pursuant to § 1225(b)(1), and she was provided and refused to sign a Notice and Order of Expedited Removal (I-860) on July 29, 2021.[3] *Id.* Ex. 2.

On August 8, 2021, Enforcement and Removal Operations ("ERO") reviewed Petitioner's custody status and determined that pursuant to the class action preliminary injunction in *Fraihat v. ICE*, 445 F.Supp. 3d 709 (C.D. Cal. 2020), Petitioner was "at heightened risk of severe illness and death upon contracting the COVID-19 virus." DO Decl. ¶ 9, Ex. 5. In accordance with *Fraihat*, ERO released

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United States under the authority of § 1182(d)(5)(A)." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007) (holding that because release on "conditional parole" under § 1226(a) is not a parole, the alien was not eligible for adjustment of status under § 1255(a)).

[3] The "Order of Removal Under Section 235(b)(1) of the Act" portion of the Notice and Order of Expedited Removal is blank because the Petitioner claimed fear returning to her country and is pending a credible fear interview. DO Decl. Ex. 2, 6.

Petitioner from custody. *Id.* ICE served Petitioner with an Interim Notice Authorizing Parole pursuant to its authority under INA § 212(d)(5)(A) (*i.e.*, 8 U.S.C. § 1182(d)(5)(A)). DO Decl. ¶ 9, Ex. 5. The parole was valid for one year from the date of issuance. *Id.* Petitioner's parole was automatically terminated on August 8, 2022.

Upon release from ICE custody, ERO instructed Petitioner to report to the ERO San Francisco Field Office. DO Decl. ¶ 10. On September 14, 2021, ERO asked Petitioner to continue reporting to ERO and was served with Order of Recognizance ("OREC") documents. *Id.* Review of Petitioner's file and procedural history reveals OREC documents were erroneously issued in this case. *Id.* OREC documents are properly issued to individuals in § 1229a removal proceedings who are released pursuant to § 1226. Petitioner should not have been issued OREC documents, because (1) she was in § 1225 (b)(1) expedited removal proceedings, not § 1226 proceedings, and (2) she had already been paroled pursuant to § 1182(d)(5)(A) one month earlier and was therefore already out of custody.

On or about January 3, 2022, Petitioner filed a Form I-589, Application for Asylum and for Withholding of Removal, with the U.S. Citizenship and Immigration Services (USCIS). *Id.* ¶ 11. On June 12, 2021, USCIS served Petitioner with a Notice of Dismissal, stating that DHS "records indicate that [Petitioner] w[as] apprehended by DHS officials, placed in expedited removal proceedings. . . The asylum office cannot process [Petitioner's] Form I-589 at this time." Exhibit D to Decl. of Kate Lewis, Dkt. No. 3-2.[4] On October 28, 2025, Petitioner was taken into ICE custody pursuant to 1225(b)(1), because she remains subject to expedited removal and mandatory detention. DO Decl. ¶ 12-13.

Petitioner filed a habeas petition and a motion for a temporary restraining order (the "Motion") on October 29, 2025, to require Respondents to release Petitioner from custody without bond. Notice of Mot. and Ex Parte Mot. For TRO, Dkt. No. 3. The Court granted the Motion on October 29, 2025, and issued an order to show cause why a preliminary injunction should not issue. Order Granting TRO; Order to Show Cause Re: Preliminary Injunction, Dkt. No. 4. Petitioner was released from ICE custody by 7:00 a.m. on October 30, 2025. Respondents-Defendants' Status Report, Dkt. No. 7. The hearing on the OSC is set for November 19, 2025, at 9:00 a.m., and the TRO is extended until that date. S*ee*

[4] Aliens in expedited removal must undergo the credible fear process before applying for asylum. Thus, USCIS dismisses the affirmative asylum application, and a credible fear interview is scheduled.

Stipulation Regarding Briefing Schedule and Hearing Date' Order as Modified, Dkt. No. 9.

IV. ARGUMENT

A. Legal Standard

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). To obtain relief, the moving party must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

B. Petitioner Fails to Meet the High Bar for Injunctive Relief

1. Petitioner Cannot Show a Likelihood of Success on the Merits

a. Under the Plain Text of § 1225(b)(1), Petitioner Must Be Detained Pending the Outcome of Her Removal Proceeding

Petitioner cannot show a likelihood of success on her claim that she is entitled to release or a custody hearing prior to re-detention. This is because Petitioner is subject to expedited removal due to her status as an alien who is not "admitted or paroled into the United States" and was "physically present" fewer than two years when she was found to be inadmissible under § 1182(a)(7) at the time of "inspection." 8 U.S.C. § 1225(b)(1)(A)(iii)(II). Petitioner entered the United States without valid documentation and was encountered by immigration officials that same day. DO Decl. ¶ 6. She was issued a Notice and Order of Expedited Removal the day after her entry into the United States. DO Decl. Ex. 2.[5]

Recent BIA authority confirms that Petitioner is subject to mandatory detention under § 1225(b). In *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (BIA 2025), the BIA held that, based on the plain text of the statute, an alien who entered without inspection remains an "applicant for admission" who is "seeking admission," and is therefore subject to mandatory detention without a bond hearing, even if that alien has

[5] Petitioner claims that neither she nor her counsel have seen an "expedited removal order." Motion at 13 fn. 5. But the Notice and Order of Expedited Removal indicates that Petitioner "refused to sign" the order of expedited removal when it was provided on July 29, 2021. DO Decl. Ex. 2.

been present in the U.S. for years. *Id.*, slip op. at 220. Thus, the BIA also held that IJs lack authority to hold bond hearings for aliens in such circumstances. *Id.* The BIA considered, and rejected, the individual's argument that the government's "'longstanding practice' of treating aliens who are present in the United States without inspection as detained under []8 U.S.C.A. § 1226(a), and therefore eligible for a bond." *Id.* at 225. Citing the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the BIA explained that such a practice could be relevant where the statute is "doubtful and ambiguous," but here, "the statutory text of the INA . . . is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status." *Hurtado*, slip op. at 226. The BIA has therefore now confirmed, in a decision binding on IJs nationwide, what the government is arguing here: individuals such as Petitioner are "applicants for admission" subject to mandatory detention under § 1225(b) and have no right to a bond hearing.

Respondents recognize that recent district court preliminary injunction decisions have concluded that § 1225(b) is not applicable to aliens who were conditionally released in the past under § 1226(a).[6] But Petitioner here was not conditionally released under § 1226(a)—instead, she was granted a temporary, one-year parole pursuant to § 1182(d)(5)(A) and to comply with the class action injunction in *Fraihat*.

Moreover, these non-binding decisions do not grapple with the textual argument that the BIA just held was "clear and explicit." *Hurtado*, slip op. at 226. Taken together, the plain language of §§ 1225(a) and 1225(b) indicate that applicants for admission, including those "present" in the U.S.—like Petitioner—are subject to mandatory detention under Section 1225(b). When there is "an irreconcilable conflict in two legal provisions," then "the specific governs over the general." *Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). While § 1226(a) applies generally to aliens who are "arrested and detained pending a decision on" removal, § 1225 applies more narrowly to "applicants for admission"—*i.e.*, aliens present in the U.S. who have not been admitted. Because Petitioner falls within this latter category, the specific detention authority under § 1225 controls over the general authority found at § 1226(a).

[6] *See, e.g.*, *Ramirez Clavijo v. Kaiser*, No. 25-CV-06248-BLF, 2025 WL 2419263 (N.D. Cal. Aug. 21, 2025); *Jimenez Garcia v. Kaiser*, No. 4:25-cv-06916-YGR (N.D. Cal. Aug. 29, 2025); *Hernandez Nieves v. Kaiser*, No. 25-CV-06921-LB, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025); *Salcedo Aceros v. Kaiser*, No. 25-CV-06924-EMC (EMC), 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025).

As an alien subject to mandatory detention under § 1225(b), Petitioner is not entitled to custody redetermination hearings at any time, whether pre- or post-detention. *Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018) ("[N]either § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings."); *Hurtado*, slip op. at 229 (holding that immigration judge "lacked authority to hear the respondent's request for a bond as the respondent is an applicant for admission and is subject to mandatory detention under § 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A)"). Petitioner remains an alien who is amenable to expedited removal and subject to mandatory detention due to her presence in the United States without having been either "admitted or paroled" or physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility.

To the extent Petitioner claims that the Order of Release on Recognizance ("OREC") she was issued on September 14, 2021, indicates she was released pursuant to § 1226, Petitioner is wrong. *See* Mot. at 10; Lewis Decl. Ex. B. (referencing "section 236 of the Immigration and Nationality Act," *i.e.*, 8 U.S.C. § 1226). The OREC was erroneously issued. DO Decl. ¶ 10. This document is intended for individuals in 1229a removal proceedings, not individuals like Petitioner who are in expedited proceedings. Further, the OREC was meaningless, because Petitioner had already been released from custody on August 8, 2021—when the OREC was issued "releasing" her on her own recognizance in September 2021. *Id.* ¶ 9. Thus, Petitioner could not have reasonably relied on this erroneous document as authority for her detention or release.

(i) Petitioner Is Subject to Mandatory Detention During the Credible Fear Process[7]

For aliens like Petitioner, who express a fear of returning to their country of origin, the individual is given a non-adversarial interview with an asylum officer, who determines whether the individual has a "credible fear of persecution" or torture. *Id.* §§ 1225(b)(1)(A)(ii), (b)(1)(B)(iii)(II) , (b)(1)(B)(iv) , (v) ; *see also* 8 C.F.R. § 208.30; *Thuraissigiam*, 591 U.S. at 109–11 (describing the credible fear process). However, an alien subject to these procedures "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C.

[7] Though Petitioner is not eligible to apply for asylum while in expedited removal, she can still go through the credible fear process.

§ 1225(b)(1)(B)(iii)(IV) . As such, Petitioner is not entitled to a custody redetermination hearing by an immigration judge or a pre-deprivation hearing before re-detention. *Jennings*, 583 U.S. at 297 ("[R]ead most naturally, §§ 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings have concluded."); *see also Matter of Q. Li,* 29 I&N. Dec. 66, 69 (BIA 2025) ("[A]n applicant for admission who is arrested and detained without a warrant while arriving in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings is detained under section 235(b) of the INA, 8 U.S.C. § 1225(b), and is ineligible for any subsequent release on bond under section 236(a) of the INA, 8 U.S.C. § 1226(a)."). If an asylum officer or immigration judge determines that she has a credible fear of persecution or torture, Petitioner may be placed in full removal proceedings under 8 U.S.C. § 1229a, *see* 8 C.F.R. § 208.30(f), although she will remain subject to mandatory detention under § 1225(b)(2)(A).

(ii) Petitioner Is Subject to Expedited Removal Despite Previously Having Been Released on Temporary Parole under § 1182(d)(5)(A)

Section 1225(b)(1) applies to aliens who are neither "admitted" nor "paroled." § 1225(b)(1)(A)(iii)(II). Petitioner was neither admitted nor paroled when she was immediately placed into expedited removal proceedings on July 29, 2021. Petitioner's subsequent temporary, one-year parole—which automatically expired in August 2022—pursuant to § 1182(d)(5)(A) and the class action injunction in *Fraihat* does not exempt her from expedited removal or mandatory detention under § 1225(b)(1) once that parole has expired. Congress has long provided authority to immigration officials to use parole to release aliens into the interior of the United States, emphasizing that parole is not an "admission" within the meaning of the INA. 8 U.S.C. §§ 1101(a)(13)(B), 1182(d)(5)(A). After IIRIRA, the Secretary of Homeland Security "may . . . in [her] discretion parole" an "alien applying for admission," and specifies that such a parole is done "temporarily under such conditions as [the Secretary] may prescribe [and] only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

So too here, Petitioner's parole does not constitute an admission under the statute. *See Jennings*, 583 U.S. at 288 ("Such parole [under § 1225(b)], however, 'shall not be regarded as an admission of the alien.'"); *Matter of Q. Li*, 29 I&N. Dec. at 68 (petitioner released on parole and subject to periodic

reporting still permitted to be taken into mandatory detention pursuant to § 1225(b) two and a half years later because she remained an arriving alien throughout the time she was released). Individuals paroled at the border still retain their status as an "arriving alien" under the INA once they lose their parole, *see* 8 U.S.C. § 1182(d)(5)(A); *see also Morales-Ramirez v. Reno*, 209 F.3d 977, 978 (7th Cir. 2000) ("'Parole' into the United States allows an individual physically to enter the country, but it is not equivalent to legal entry into the United States."). As Congress put it, "when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case *shall continue to be dealt with in the same manner as that of any other applicant for admission* to the United States." 8 U.S.C. § 1182(d)(5)(A) (emphasis added).

Respondents respectfully disagree with, and have appealed, the holding in *Aviles-Mena v. Kaiser, et al.* that "when ICE affirmatively chooses to release an individual on parole, it has made the determination that it no longer intends to fast-track their removal and that it will proceed with the standard removal process under 8 U.S.C. § 1229a." No. 25-cv-06783-RFL 2025 WL 2578215, *10 (Sept. 5, 2025) (notice of appeal filed on Nov. 4, 2025, Dkt. 23). There is nothing in § 1225(b)(1) that precludes immigration officials from exercising their discretion to parole an individual pursuant § 1182(d)(5)(A). Thus, parole is not a determination that ICE no longer intends to fast-track removal—especially when ICE affirmatively fast-tracked removal a few days earlier by initiating expedited proceedings. In addition, the *Aviles-Mena* court relied on *Coal. for Human Immigrant Rts. v. Noem,* No. 25-cv-872, 2025 WL 2192986 (D.D.C. Aug. 1, 2025), which focuses on expedited removal, not detention. 2025 WL 2578215, *10.

But even setting aside Respondents' disagreement with the legal holding in that case, the reasoning in *Aviles-Mena* does not apply here. Rather than an affirmative, voluntary parole determination, ICE released this Petitioner to "comply with requirements of the preliminary injunction in *Fraihat v. ICE*, 445 F.Supp. 3d 709 (C.D. Cal. 2020)", which has since been vacated. DO Decl. ¶ 9; *Fraihat v. ICE*, 16 F.4th 613 (9th Cir. Oct. 20, 2021). This Petitioner's temporary release thus was the result of a court order and reflected the (now expired) exigencies of the Covid-19 public health crisis. As such, the unique—and unambiguously temporary—circumstances of Petitioner's release do not create a liberty interest, nor do they reflect a determination that Respondents no longer intended to place

Petitioner in expedited removal under § 1225(b)(1). *Cf. Giorges v. Kaiser*, No. 5:25-cv-07683-NW, 2025 WL 2898967 (N.D. Cal. Oct. 10, 2025) (finding that petitioners' court-ordered release during the Covid-19 public health crisis does not entitle petitioner "to a liberty interest that they otherwise would not have had").

Further, the years Petitioner was on parole does not count towards the two-year threshold in § 1225(b)(1). Under the statute, applicants for admission are subject to expedited removal unless they can show that they were physically present in the United States for the two-year period *immediately prior* to the date of determination of inadmissibility. 8 U.S.C. § 1225(b)(1)(A)(iii)(II). Here, that determination was made shortly after Petitioner's arrival in the United States, at which time she was issued the order for expedited removal. DO Decl. Ex. 2. Therefore, she could not show that she was present in the United States for two years prior to the determination of her inadmissibility in 2021.

Even if Petitioner has been present in the United States for more than two years or otherwise did not meet the requirements set forth in § 1225(b)(1), Petitioner is still subject to mandatory detention under § 1225(b)(2). The government can use its discretion to detain an applicant for admission under § 1225(b)(2) instead of § 1225(b)(1)—but both require mandatory detention. *See Jennings*, 583 U.S. at 287 (§ 1225(b)(2) "serves as a catchall provision" and "applies to all applicants for admission not covered by § 1225(b)(1).").

Thus, because § 1225(b) mandates the detention of individuals subject to expedited removal, including Petitioner, she cannot succeed on her claim that she is entitled to a pre-detention hearing.

b. The *Mathews* Factors Do Not Apply

Given her status as an applicant for admission subject to mandatory detention, Petitioner's reliance on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) is misplaced. As an initial matter, the Supreme Court has upheld mandatory civil immigration detention without utilizing the multi-factor "balancing test" of *Mathews*. *See Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention under 8 U.S.C. § 1226(c)); *cf. Zadvydas v. Davis*, 533 U.S. 678 (2001) (upholding mandatory detention under 8 U.S.C. § 1231(a)(6) for six months after the 90-day removal period).[8]

[8] As the Ninth Circuit recognized in *Rodriguez Diaz*, "the Supreme Court when confronted with constitutional challenges to immigration detention has not resolved them through express application of *Mathews*." *Rodriguez Diaz v. Garland*, 53 F.4th 1206 (9th Cir. 2022) (citations omitted). Whether the

In any event, applicants for admission like Petitioner, who were not admitted into the country, lack a liberty interest in *additional* procedures including a custody redetermination or pre-detention bond hearing. Their conditional parole status does not provide them with additional rights above and beyond the specific process already provided by Congress in § 1225. *See Thuraissigiam*, 591 U.S. at 139 ("aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border'"); *Ma v. Barber*, 357 U.S. 185, 190 (1958) (concluding that the parole of an alien released into the country while admissibility decision was pending did not alter her legal status); *Alvarenga Pena v. Hyde,* No. 25-cv-11983 2025 WL 2108913, *2 (D. Mass. Jul. 28, 2025) (finding that mandatory detention under § 1225(b)(2)(A) of an alien arrested at a traffic stop in the interior of the United States "comports with due process"). Indeed, for "applicants for admission" who are amenable to § 1225(b)(1)—*i.e.*, because they were not physically present for at least two years on the date of inspection, 8 U.S.C. § 1225(b)(1)(A)(iii)(II)—"[w]hatever the procedure authorized by Congress . . . is due process," whether or not they are apprehended at the border or after entering the country. *Thuraissigiam*, 591 U.S. at 138–139 ("This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."). These aliens have "only those rights regarding admission that Congress has provided by statute." *Id.* at 140; *see Dave v. Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004). Petitioner is entitled only to the protections set forth by statute, and "the Due Process Clause provides nothing more." *Thuraissigiam*, 591 U.S. at 140.[9]

C. Petitioner Cannot Establish Irreparable Harm

In addition to her failure to show a likelihood of success on the merits, Petitioner does not meet her burden of establishing that she will be irreparably harmed absent a preliminary injunction. Under §

Mathews test applies in this context is an open question in the Ninth Circuit. *See Rodriguez Diaz*, 53 F.4th at 1207 (applying *Mathews* factors to uphold constitutionality of Section 1226(a) procedures in a prolonged detention context; "we assume without deciding that *Mathews* applies here").

[9] Courts in this district cite to *Morrissey v. Brewer*, 408 U.S. 471 (1972), in support of their conclusion that aliens in similar circumstances to Petitioner are entitled to a pre-deprivation hearing. While the Supreme Court did find that post-arrest process should be afforded to the parolee in *Morrissey*, the government respectfully submits that the framework for determining process for parolees differs from that for aliens illegally present in the United States. A fundamental purpose of the parole system is "to help individuals reintegrate into society" to lessen the chance of committing antisocial acts in the future. *See id.* at 478-80. That same goal of integration, in order to support the constructive development of parolees and to lessen any recidivistic tendencies, is not present with unlawfully present aliens.

1225(b)(1), Petitioner will be referred to a credible fear determination, at which such concerns will be addressed. Petitioner points to no other irreparable harm other than to argue that detention itself is a paradigmatic harm. However, such harm cannot weigh strongly in favor of Petitioner. *See Lopez Reyes v. Bonnar*, No. 18-cv-07429-SK, 2018 WL 7474861 at *10 (N.D. Cal. Dec. 24, 2018) ("Because this type of irreparable harm is essentially inherent in detention, the Court cannot weigh this strongly in favor of Petitioner"). It is also countervailed by authority mandating—and upholding—her categorical detention as lawful. *See supra* Part V.B.1. Indeed, the alleged infringement of constitutional rights is insufficient where, as here, a petitioner fails to demonstrate "'a sufficient likelihood of success on the merits of [her] constitutional claims to warrant the grant of a preliminary injunction.'" *Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc'd Gen. Contractors of Cal., Inc. v. Coal for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)); *see also Meneses v. Jennings*, No. 21-cv-07193-JD, 2021 WL 4804293, at *5 (N.D. Cal. Oct. 14, 2021) (denying TRO where petitioner "assume[d] a deprivation to assert the resulting harm") (denying TRO where petitioner "assume[d] a deprivation to assert the resulting harm"). Further, any alleged harm from the fact of detention alone is insufficient because "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003); *see also Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). Accordingly, given her status as an alien subject to expedited removal, Petitioner cannot establish that her lawfully authorized mandatory detention would cause her irreparable harm.

D. The Balance of Equities and Public Interest Do Not Favor an Injunction

When the government is a party, the balance of equities and public interest merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Further, where a moving party only raises "serious questions going to the merits," the balance of hardships must "tip sharply" in his favor. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008)).

Here, the government has a compelling interest in the steady enforcement of its immigration laws. *See, e.g.*, *Demore*, 538 U.S. at 523; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (holding that the court "should give due weight to the serious consideration of the public interest" in

enacted laws); *see also Ubiquity Press Inc. v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) (explaining that "the public interest in the United States' enforcement of its immigration laws is high"); *United States v. Arango*, CV 09-178 TUC DCB, 2015 WL 11120855, at 2 (D. Ariz. Jan. 7, 2015) (finding that "the Government's interest in enforcing immigration laws is enormous"). Indeed, the government "suffers a form of irreparable injury" "[a]ny time [it] is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted).

Petitioner's claimed harm cannot outweigh this public interest in the application of the law, particularly since courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). Recognizing the availability of a preliminary injunction under these circumstances would permit any alien subject to expedited removal to obtain additional review, circumventing the comprehensive statutory scheme that Congress enacted. That statutory scheme — and judicial authority upholding it — likewise favors the government. While it is "always in the public interest to protect constitutional rights," if, as here, a petitioner has not shown a likelihood of success on the merits of his claim, that public interest does not outweigh the competing public interest in enforcement of existing laws. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). The public and governmental interest in applying the established procedures for individuals subject to expedited removal, including their lawful, mandatory detention, *see* 8 U.S.C. § 1225(b); *Jennings*, 583 U.S. at 297, is significant.

V. CONCLUSION

For the aforementioned reasons, the government respectfully requests that a preliminary injunction should not issue.

Dated: November 7, 2025

Respectfully submitted,

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