UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:25-cv-04325-MJD-LIB

Yeferson Gonzalez Contreras,

Petitioner,

v.

Samuel L. Olson, Kristi Noem, Todd Lyons, Pam Bondi, and Sheriff Joel Brott

Respondents.

**MEMORANDUM IN OPPOSITION TO EMERGENCY MOTION FOR TEMPORARY RESTRAING ORDER AND RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

## INTRODUCTION

On November 13, 2025, Petitioner Yeferson Gonzalez Contreras ("Gonzalez Contreras" or "Petitioner") filed a Petition for Writ of Habeas Corpus (ECF No. 1)("habeas petition") and Petitioner's Emergency Motion for Temporary Restraining Order Under FRCP 65(b) and Preliminary Injunction Under FRCP 65(a) (ECF No. 2)("TRO motion"). Petitioner requested expedited handling of the TRO motion. (ECF No. 2). The Court scheduled a hearing on the TRO Motion for Wednesday, November 19, 2025 at 2:00 p.m. (ECF No. 8).

The federal respondents, Samuel L. Olson, in his official capacity as Field Office Director of Enforcement and Removal Operations, St. Paul Field Office, Immigration and Customs Enforcement; Kristi Noem, in her official capacity as Secretary of the United States Department of Homeland Security; Todd Lyons, in his official capacity as Acting Director and Senior Official Performing the Duties of the Director, United States Immigration and Customs Enforcement; Pam Bondi, in her official capacity as Attorney

General of the United States, hereby submit this memorandum in opposition to the TRO Motion.

As described below, Petitioner's TRO motion and the Habeas petition are premature and rest upon a faulty premise. This case does not come to the court in the same posture as many of the recent cases involving noncitizens who entered the United States without inspection to whom DHS has attempted to apply INA 235(a) or 235(b)(2) under *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Rather, in this case, Petitioner Gonzalez Contreras arrived at the port of entry at Brownsville, Texas, on October 26, 2024. Immigration officials inspected him, determined he did not have the proper documentation to enter the United States, and thus, in a Notice to Appear ("NTA"), charged him under INA section 212(a)(7)(A)(i)(I) as an immigrant not in possession of a valid unexpired immigrant visa, re-entry permit, border crossing card, or other valid entry document as required by the INA. The NTA set an immigration hearing for September 9, 2025 at Fort Snelling, Minnesota. During the inspection, Gonzalez Contreras expressed a desire to seek asylum. Immigration officials could have detained him immediately but exercised their discretion and paroled him into the United States so that he could pursue asylum, withholding of removal, and any other avenues of relief from removal that might be available to him. He was paroled into the United States until October 25, 2025 and issued work authorization. As such, Gonzalez is a true "arriving alien" and subject to removal proceedings under INA 240, 8 U.S.C. § 1229a. As to his custody, that will be determined ICE and the Immigration Court in accordance with 8 U.S.C. 1226(a). While ICE will not oppose a hearing before the Immigration Judge, ICE intends to argue that, since an

Immigration Judge may not redetermine the custody of an arriving alien. 8 C.F.R. § 1003.19(h)(2)(i)(B), the Immigration Judge should deny release altogether or at least condition any release on appropriate bond and other conditions pending the removal and asylum proceedings. Under these circumstances, the Court should deny the TRO motion and the habeas petition.

## BACKGROUND

### A. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Yeferson Gonzalez Contreras ("Gonzalez Contreras" or "Petitioner") is a native and citizen of Venezuela. ECF No. 1 at ¶ 1. Declaration of James L. Van Der Vaart ("Van Der Vaart Decl."), ¶ 5, Exhibit A (Record of Deportable/Inadmissible Alien (Form I-213) dated October 26, 2024 (2 pages).

On Saturday, October 26, 2024, Gonzalez Contreras arrived at the Brownsville, Texas port of entry for a scheduled appointment procured through the "CBP One App" issued through the U.S. Customs and Border Protection. Van Der Vaart Decl., ¶ 5, Ex. A. As such, Gonzalez Contreras was an "arriving alien." *Id.*

Upon inspection, it was determined that Gonzalez Contreras did not have sufficient documentation for a lawful entry into the United States. He was processed, assigned A Number 244-774-761, issued a Notice to Appear ("NTA"). Van Der Vaart Decl."), ¶ 5, Exhibit B (Notice to Appear dated October 26, 2024). The NTA charged Gonzalez Contreras under INA section 212(a)(7)(A)(i)(I) as an immigrant not in possession of a valid unexpired immigrant visa, re-entry permit, border crossing card, or

other valid entry document as required by the INA, and set an immigration hearing for September 9, 2025 at Fort Snelling, Minnesota. Van Der Vaart Decl., ¶¶ 5, 7 and Ex. B.

Immigration officials issued him an authorization to work in the United States and paroled him into the United States pending immigration proceedings under Immigration and Nationality Act ("INA"), Section 240, 8 U.S.C. § 1229a. Van Der Vaart Decl., ¶¶ 5, Exhibits C (I-94, Parole document in Spanish (no English translation available) and D (I-765, Approval Notice dated November 1, 2024 approving Application for Employment Authorization dated October 29, 2024, authorizing employment from October 31, 2024 to October 25, 2025). Being paroled into the United States does not alter the status of an individual; rather, when paroled into the United States, the paroled individual maintains his or her status as it was immediately prior to the parole. Thus, though paroled into the United States, Gonzalez Contreras maintained his status as an "arriving alien." Van Der Vaart Decl., ¶ 5. *See generally* 8 C.F.R. § 212.5.

Gonzalez Contreras made his way to Minnesota. He filed a Form I-589, Application for Asylum or Withholding of Removal dated April 9, 2025 with the Executive Office for Immigration Review ("EOIR"). Van Der Vaart Decl., ¶ 8, Ex. E.

After the change in administrations, Immigration officials revoked the employment authorization by Revocation Notice dated May 29, 2025. Van Der Vaart Decl., ¶ 9, Ex. F.

As scheduled in the NTA, the Immigration Court conducted a Master Calendar Hearing on September 9, 2025. At that time DHS officials filed a motion to dismiss the proceedings which motion Gonzalez Contreras opposed. After hearing arguments by both parties, the Immigration Court granted the motion to dismiss by order dated September 9, 2025. Van Der Vaart Decl., ¶ 10, Ex. G.

Immigration officials then took Gonzalez Contreras into ICE custody. Van Der Vaart Decl., ¶ 11, Ex. H (Record of Deportable/Inadmissible Alien (Form I-213) dated September 9, 2025). Unfortunately, the Form I-213 contained an error. In the box in the upper left corner of the form it incorrectly stated that the manner of Gonzalez Contreras's entry was "WI—Without Inspection." This was inaccurate as Gonzalez Contreras had been paroled into the United States as an "arriving alien." The Form I-213 on page 2 correctly states, "On October 26, 2024, GONZALEZ was released on parole into the United States pending a 240 hearing." Exhibit H, page 2. Van Der Vaart Decl., ¶ 11, Ex. H.

On October 1, 2025, Gonzalez Contreras appealed the granting of the motion to dismiss to the Board of Immigration Appeals (BIA). Van Der Vaart Decl., ¶ 12, Ex. I.

Gonzalez Contreras requested a custody redetermination. By Order dated October 21, 2025, the Immigration Court denied that custody redetermination. Van Der Vaart Decl., ¶ 13, Ex. J. This decision appears to have been based on the inaccurate notation of Gonzalez Contreras entering "WI—Without Inspection."

On November 13, 2025, Gonzalez Contreras filed his Petition for Writ of Habeas Corpus (ECF No. 1) and Petitioner's Emergency Motion for Temporary Restraining Order Under FRCP 65(b) and Preliminary Injunction Under FRCP 65(a). Upon review of these filings, DHS recognized its error in making its motion to dismiss the 240 proceedings in Immigration Court on September 9, 2025. Van Der Vaart Decl., ¶ 14.

To correct this problem and to return the parties to the status quo of the original Immigration Court proceedings under INA 240, as set forth in the NTA, Exhibit B, on November 14, 2025, DHS officials filed in the BIA a motion for remand to the Immigration Court to allow the DHS to withdraw the previously granted motion to dismiss which Gonzalez Contreras had opposed and which is the subject of Gonzalez Contreras's appeal to the BIA (Exhibit I). Van Der Vaart Decl., ¶ 15, Ex. K. As of November 18, 2025, Petitioner has not opposed DHS's motion to remand and the BIA has not yet ruled on the motion to remand. *Id.*

Assuming the BIA remands the matter back to the Immigration Court, the DHS will withdraw its motion to dismiss and proceed with the current removal proceedings under INA 240 initiated by the filing of the NTA dated October 26, 2024 charging Gonzalez Contreras as an arriving alien subject to inadmissibility under INA § 212(a)(7)(A)(i)(I). Van Der Vaart Decl., ¶ 16. Once the Immigration Court reinstates the INA 240 removal proceedings, Gonzalez Contreras will have the opportunity to request another custody redetermination, to pursue his asylum and withholding of removal

application, and to pursue any other avenue of relief from removal that may be available to him. Van Der Vaart Decl., ¶ 17.

Meanwhile, Gonzalez Contreras was and remains in immigration detention as an "arriving alien" under 8 U.S.C. 1226(a) pending any custody redetermination that may occur in Immigration Court. Ordinarily, an Immigration Judge may not redetermine the custody of an arriving alien. 8 C.F.R. § 1003.19(h)(2)(i)(B). Van Der Vaart Decl., ¶ 18.

Petitioner is currently detained in the Sherburne County Jail, Elk River, Minnesota. ECF No. 1, ¶ 8.

On November 13, 2025, Petitioner filed his habeas petition, ECF No. 1, and his TRO motion, ECF No. 2. Petitioner essentially asserts he should be in removal proceedings under 8 U.S.C. § 1229a and 1226 pending the outcome of his appeal to the BIA; that under 8 U.S.C. §§ 1229a and 1226(a) he is entitled to custody redetermination by an immigration judge under 1226(a); that *Matter of Q. Li,* 29 I & N Dec. 66 (BIA 2025) should not control as that case contravenes the statute and is ultra vires to the statute in several ways; and the Court should not defer to *Matter of Q. Li* under the standards of *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); and that the question of whether 8 U.S.C. § 1225(b) applies to Petitioner is a legal question for the Court to decide. Petitioner claims violations of the due process clause of 5th Amendment. For relief, Petitioner seeks an order requiring ICE to release him immediately or, at a minimum, an order that the immigration court conduct a bond hearing in accordance

with *Matter of Guerra*, 24 I & N Dec. 37 (BIA 2006) to determine his eligibility for release on bond.

## B. STATUTORY BACKGROUND

For more than a century, the immigration laws have authorized immigration officials to charge noncitizens as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of noncitizens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. "The rule has been clear for decades: "[d]etention during deportation proceedings [i]s ... constitutionally valid." *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); *see Demore*, 538 U.S. at 523 n.7 ("In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."). Indeed, removal proceedings "'would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.'" *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

### a. Detention under 8 U.S.C. § 1225

Though not directly applicable in this case (assuming the BIA remands the case and the motion to dismiss is withdrawn), Section 1225 applies to "applicants for admission,"

who are defined as "alien[s] present in the United States who [have] not been admitted" or "who arrive[] in the United States." 8 U.S.C. § 1225(a)(1). Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018).

Section 1225(b)(1) applies to arriving aliens and "certain other" noncitizens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Id.*; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These noncitizens are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But if the individual "indicates an intention to apply for asylum . . . or a fear of persecution," immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An individual "with a credible fear of persecution" is "detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii). If the individual does not indicate an intent to apply for asylum, express a fear of persecution, or is "found not to have such a fear," he is detained until removed. *Id.* § 1225(b)(1)(A)(i) (B)(iii)(IV).

Section 1225(b)(2) is "broader" and "serves as a catchall provision." *Jennings*, 583 U.S. at 287. It "applies to all applicants for admission not covered by § 1225(b)(1)." *Id.* Under § 1225(b)(2), an individual "who is an applicant for admission" shall be detained for a removal proceeding "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A); *see Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) ("for aliens arriving in and seeking admission into the United States who are placed directly in full removal

proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.'") (citing *Jennings*, 583 U.S. at 299). Still, the Department of Homeland Security ("DHS") has the sole discretionary authority to release on parole "any alien applying for admission to the United States" on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

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

Section 1226 applies to this case and, assuming the BIA remands the case and the motion to dismiss is withdrawn, Section 1226 will continue to control this case. Section 1226 "generally governs the process of arresting and detaining . . . aliens pending their removal." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). Petitioner in this case makes no claim that his apprehension on September 9, 2025 was not appropriate (so long as he is accorded a bond hearing).

The Attorney General and the Department of Homeland Security ("DHS") thus have broad discretionary authority to detain a noncitizen during removal proceedings.[1] *See* 8

[1] Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General's authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for noncitizens under section 1226(a) is "one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings." *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

U.S.C. § 1226(a)(1) (DHS "may continue to detain the arrested alien" during the pendency of removal proceedings); *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) (highlighting that "subsection (a) creates authority for *anyone's* arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions").

When a noncitizen is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS "may continue to detain the arrested alien." 8 U.S.C. § 1226(a)(1). "To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings." *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280–81 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999)).

If DHS decides to release the noncitizen, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). If DHS determines that a noncitizen should remain detained during the pendency of his removal proceedings, the noncitizen may request a bond hearing before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the noncitizen, based on a variety of factors that account for the noncitizen's ties to the United States and evaluate whether the noncitizen poses a flight risk or danger to the community. *See Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);[2] *see*

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[2] The BIA has identified the following non-exhaustive list of factors the immigration judge may consider: "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such

*also* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].").

Section 1226(a) does not provide a noncitizen with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does Section 1226(a) explicitly address the burden of proof that should apply or any particular factor that must be considered in bond hearings. Rather, it grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release a noncitizen during his removal proceedings. *Id.* If, after the bond hearing, either party disagrees with the decision of the immigration judge, that party may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

Included within the Attorney General and DHS's discretionary authority are limitations on the delegation to the immigration court. Under 8 C.F.R. § 1003.19(h)(2)(i)(B), the immigration judge does not have authority to redetermine the conditions of custody imposed by DHS for any arriving alien. This regulation may come into play depending on what occurs in Immigration Court after the remand, the withdrawal of the motion to dismiss, the reinstitution of the removal/asylum proceedings, and any requested custody redetermination hearing. See Van Der Vaart Decl., ¶ 18. This Court should deny the TRO motion to allow those proceedings to play out.

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activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." *Guerra*, 24 I. & N. Dec. at 40.

While not applicable in this case, the regulations also allow DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2) ("The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary.").

**c. Review of custody determinations at the Board of Immigration Appeals ("BIA")**

The BIA is an appellate body within the Executive Office for Immigration Review ("EOIR"). *See* 8 C.F.R. § 1003.1(d)(1). Members of the BIA possess delegated authority from the Attorney General. 8 C.F.R. § 1003.1(a)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also "through precedent decisions, [it] shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). "The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General." 8 C.F.R. § 1003.1(d)(7). Here, as stated, DHS has moved the BIA to reman the case back to the Immigration Court to allow the removal/asylum proceedings to proceed. Again, this Court should deny the TRO motion to allow the remand to occur, the removal/asylum proceedings to proceed, and to allow the Immigration Court to make a decision on any custody redetermination request.

## ARGUMENT

### A. Applicable Legal Standards

"The district courts of the United States . . . are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute[.]" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (internal quotations omitted). "[T]he scope of habeas has been tightly regulated by statute, from the Judiciary Act of 1789 to the present day[.]" *Thuraissigiam*, 591 U.S. at 125 n.20. To warrant a grant of habeas corpus, a petitioner must demonstrate that his custody violates the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2241(c)(3).

Injunctive relief is "an extraordinary remedy never awarded as a right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). A court may grant interim relief only if a movant shows: (1) he is likely to succeed on the merits, (2) he will suffer imminent, irreparable harm absent interim relief, (3) that harm outweighs the harm an injunction would cause other parties, and (4) the public interest favors interim relief. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981) (en banc). The movant bears the burden of proof for each factor, *Gelco v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987), "a heavy burden" and a "difficult task." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The exacting burden is further heightened when a party seeks a mandatory preliminary injunction—one which "alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *TruStone Fin. Fed. Credit Union v. Fiserv, Inc.*, No. 14-CV-424 (SRN/SER), 2014 WL 12603061, at *1 (D. Minn. Feb. 24, 2014). "Mandatory preliminary

injunctions are to be cautiously viewed and sparingly used." *Id.* Petitioner's TRO motion fails to satisfy the *Dataphase* factors; in particular, the TRO motion should be denied because, until the remand occurs and the Immigration Court finally decides the custody/detention issue, there has been no exhaustion of administrative remedies and in any event Petitioner's ongoing detention under Section 1226 remains appropriate, legal, and constitutional.

**B. Petitioner Is Properly Detained Under Section 1226.**

Petitioner is properly in removal proceedings. As described above, while ICE obtained a dismissal of the original removal proceedings which Petitioner appealed to the BIA, ICE has moved the BIA to remand the case back to the Immigration Court to allow DHS to withdraw the motion to dismiss and to proceed with removal proceedings and Petitioner's asylum claims. Petitioner has not taken any position on this remand request, we anticipate he will agree to this remand, the withdrawal of the motion to dismiss, and the reinstitution of the removal and asylum proceedings. Should he request a hearing on the custody issue, that will proceed under Section 1226. Thus, assuming this all occurs—hopefully with Petitioner's agreement—the habeas petition and the TRO motion are effectively moot and should be dismissed without prejudice.

Meanwhile, Petitioner remains properly obtained under Section 1226. Indeed, the premise of his habeas petition and TRO motion is that his custody should be determined under Section 1226. Thus, the goal of the habeas petition and the TRO motion have already been achieved. All that remains to be done is for the remand to occur, the motion to dismiss withdrawn, and for the proceedings in Immigration Court to play out.

Petitioner's credible fear and asylum claim have not occurred yet because Petitioner appealed the granting of the motion to dismiss to the BIA. Once the remand occurs, the Immigration Court will be able to proceed to adjudicate the removal, asylum, and associated custody issues. This Court should dismiss the TRO motion to allow all these proceeding to occur and play out.

**C. The Court lacks subject matter jurisdiction.**

Petitioner is properly in removal proceedings and is detained properly under Section 1226. The court should dismiss the habeas petition and the TRO motion on the merits. The Court also lacks subject matter jurisdiction to delve any further into this detention issue raised by the habeas petition and TRO motion for the same reasons: Pending the BIA remand and subsequent action in Immigration Court, the Court lacks subject matter jurisdiction over the TRO motion and the habeas petition either because Petitioner has not exhausted her administrative remedies or because the detention issue is not ripe for review. The Coutrt should dismiss the TRO motion for these reasons alone. *See Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007); *see also Reiter v. Cooper*, 507 U.S. 258, 269 (1993) ("Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed."); *Mathena v. United States*, 577 F.3d 943, 946 (8th Cir. 2009); *Arroyo v. Fikes*, No. 21-CV-2489 (KMM/BRT), 2022 WL 2820405, at *2 (D. Minn. May 5, 2022). While "[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention [in federal court]," *Araujo- Cortes v. Shanahan*, 35 F. Supp. 3d

533, 538 (S.D.N.Y. 2014), exhaustion should be required as a prudential matter, *accord Paz Nativi v. Shanahan*, No. 16 Civ. 8496 (JPO), 2017 WL 281751, at *1 (S.D.N.Y. Jan. 23, 2017) ("[B]efore immigration detention may be challenged in federal court. . . exhaustion is generally required as a prudential matter." (collecting cases)).

The Court also lacks subject matter jurisdiction under the INA. Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] *commence proceedings*, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title."[3] Except as provided in § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

Section 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of Homeland Security chooses to commence removal proceedings, including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning

[3] Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended § 1252(g) by adding "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law." REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings").

Petitioner's claim stems from her detention during removal proceedings. That detention arises from the decision to commence such proceedings against her. *See, e.g.*, *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge arose from this decision to commence proceedings[.]"); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g) and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

As other courts have held, "[f]or the purposes of § 1252, the Attorney General commences proceedings against an alien when the alien is issued a Notice to Appear before an immigration court." *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). "The Attorney General may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings." *Id.* at *3. "Thus, an alien's detention throughout this process arises from the Attorney General's decision to commence proceedings" and review of claims arising from such detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g).

**D. The due process claim lacks merit.**

Because Petitioner is properly detained under Section 1226(a) pending his removal proceedings, his due process claim fails. To the extent Petitioner intends to argue that he expects to remain released on his own recognizance during the pendency of his removal proceedings, this argument is unavailing. An "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 250 n. 12 (1983). And the Supreme Court has held that applicants for admission such as Petitioner are only entitled to the protections set forth by statute and that "the Due Process Clause provides nothing more." *Department of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020).

The Supreme Court has long recognized that Congress exercises "plenary power to make rules for the admission of foreign nationals and to exclude those who possess those characteristics which Congress has forbidden." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Pursuant to that longstanding doctrine, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The broad scope of the political branches' authority over immigration is "at its zenith at the international border." *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004). Accordingly, "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

The Supreme Court has explained that applicants for admission lack any constitutional due process rights with respect to admission aside from the rights provided

by statute: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Mezei*, 345 U.S. at 212, and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination". *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court reaffirmed "[its] century-old rule regarding the due process rights of an alien seeking initial entry" in *Thuraissigiam*, explaining that an individual who illegally crosses the border—like Petitioner—is an applicant for admission and "has only those rights regarding admission that Congress has provided by statute." 591 U.S. at 139-40.

As explained by the Supreme Court, "[w]hen an alien arrives at a port of entry—for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered the country …". *Thuraissigiam*, 591 U.S. at 139. Stated further, "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.'" *Id.* (quoting *Mezei*, 345 U.S. at 215). The Court held that this same "threshold" rule applies to individuals, like Petitioner, who are apprehended after trying "to enter the country illegally" since by statute, such individuals are also defined as applicants for admission. *Id.* at 139-40. Treating such an individual in a more favorable manner than an individual arriving at a port of entry would "create a perverse incentive to enter at an unlawful rather than a lawful location" and therefore the Supreme Court rejected the argument that an individual who "succeeded in making it 25 yards into U.S. territory before he was caught" should be entitled to additional constitutional protections. *Id.* at 140.

Instead, applying the "century-old rule regarding the due process rights of an alien seeking initial entry[,]" the Court explained that aliens arrested after crossing the border illegally, such as Petitioner, have "only those rights regarding admission that Congress has provided by statute." *Id.* at 140. The Court was clear: "the Due Process Clause provides nothing more" than the procedural protections set forth in 8 U.S.C. § 1225 that allow an individual to seek protection from removal if he fears return to his home country and also seek parole from the agency. *Id.* The Supreme Court's decision in *Thuraissigiam* is instructive. In relevant part, *Thuraissigiam* concerned a due process challenge raised by an alien apprehended 25 yards from the border, which he crossed illegally. 591 U.S. at 139. DHS detained and processed him for expedited removal because he lacked valid entry documents. *Id.* at 114. An asylum officer then determined that Mr. Thuraissigiam lacked a credible fear of persecution. *Id.* Mr. Thuraissigiam petitioned for a writ of habeas corpus, asserting a fear of persecution and requesting another opportunity to apply for asylum. *Id.*

In its decision, the Supreme Court delineated the boundaries of due process claims that can be made by applicants for admission. Specifically, the Court held that for such aliens stopped at the border, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 131 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Guerrier v. Garland*, 18 F.4th 304, 313 (9th Cir. 2021) ("In concluding that Thuraissigiam's due process rights were not violated, the Supreme Court emphasized that the due process rights of noncitizens

who have not 'effected an entry' into the country are coextensive with the statutory rights Congress provides.").

The U.S. Court of Appeals for the First Circuit also held that detention of an alien seeking admission to the United States does not violate due process in *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987). In that case, the Court explained that "the detention of the appellants is entirely incident to their attempted entry into the United States and their apparent failure to meet the criteria for admission—and so, entirely within the powers expressly conferred by Congress." *Id.* The appellants were detained pursuant to 8 U.S.C. § 1225(b) and the Court found no due process violation in the denial of their parole applications "pending the ultimate (seasonable) resolution of the exclusion/asylum proceedings" as there was "no suggestion of unwarranted governmental footdragging in these cases" and because "prompt attention appears to have been paid to the administrative aspects of exclusion and asylum." *Id.*

This Court should apply the "century-old rule" reaffirmed in *Thuraissigiam* and conclude that Petitioner's due process rights are coextensive with the rights provided under statute. Here, the law provides that "[a]ny alien subject to the [credible fear process] 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). For the reasons set forth above, the Petitioner is subject to mandatory detention under this statute.

### E. THE REMAINING *DATAPHASE* FACTORS DO NOT SUPPORT A TEMPORARY RESTRAINING ORDER.

This Court should deny Petitioner's TRO motion because he has not established sufficient irreparable harm, and the public interest and balance of the equities favor the

United States' position. As a threshold matter, the Court need not even reach these factors, given Petitioner's failure to show a likelihood of success on the merits of her claim. *See Devisme v. City of Duluth*, No. 21-CV-1195 (WMW/LIB), 2022 WL 507391, at *4 (D. Minn. Feb. 8, 2022) ("Because Devisme has not demonstrated a likelihood of success on the merits, the Court need not address the remaining *Dataphase* factors."). But even if the Court were to consider the other factors, Petitioner's claim fails.

Regardless of the merits his or her claims, a plaintiff must show "that irreparable injury is likely in the absence of an injunction." *Singh v. Carter*, 185 F. Supp. 3d 11, 20 (D.D.C. 2016). To be considered "irreparable," a plaintiff must show that absent granting the preliminary relief, the injury will be "'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The significance of the alleged harm is also relevant to a court's determination of whether to grant injunctive relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."); *E.B. v. Dep't of State*, 422 F. Supp. 3d 81, 88 (D.D.C. 2019) ("While 'there is some appeal to the proposition that any damage, however slight, which cannot be made whole at a later time, should justify injunctive relief,' the Court cannot ignore that 'some concept of magnitude of injury is implicit in the [preliminary injunction] standards.'") (quoting *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019,

1026 (D.D.C. 1981)).

Petitioner cites the potential negative consequences of being further from his counsel as a basis for irreparable harm. DHS can agree, subject to a 72-hour reservation of rights, agreed not to move Petitioner out of the District of Minnesota during pendency of the habeas matter. Therefore, the assertion of irreparable harm is moot.

The two remaining *Dataphase* factors—the public interest and the balance of harms—also weigh against injunctive relief. "For practical purposes, these factors 'merge' when a plaintiff seeks injunctive relief against the government." *Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 888 (D. Minn. 2021).

Under the balance of harms factor, "[t]he goal is to assess the harm the movant would suffer absent an injunction, as well as the harm other interested parties and the public would experience if the injunction issued." *Katch, LLC v. Sweetser*, 143 F. Supp. 3d 854, 875 (D. Minn. 2015) (citing *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994)). When balancing the harms, courts will also consider whether a proposed injunction would alter the status quo, finding that such proposals weigh against injunctive relief. *See, e.g., Katch, LLC*, 143 F. Supp. 3d at 875; *Amigo Gift Ass'n v. Exec. Props., Ltd.*, 588 F. Supp. 654, 660 (W.D. Mo. 1984) ("[B]ecause Amigo is not seeking the mere preservation of the status quo but rather is asking the Court to drastically alter the status quo pending a resolution of the merits, the Court finds that the balance of the equities tips decidedly in favor of Executive Properties.").

Importantly, the Court must take into consideration the public consequences of

injunctive relief against the government. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (cautioning that the Court "should pay particular regard for the public consequences" of injunctive relief). The government has a compelling interest in the steady enforcement of

its immigration laws. *See Miranda v. Garland*, 34 F.4th 338, 365–66 (4th Cir. 2022) (vacating an injunction that required a "broad change" in immigration bond procedure); *Ubiquity Press Inc. v. Baran*, No 8:20-cv-01809-JLS-DFM, 2020 WL 8172983, at *4 (C.D. Cal. Dec. 20, 2020) ("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) ("the Government's interest in enforcing immigration laws is enormous.").

Judicial intervention would only disrupt the status quo. *See, e.g.*, *Slaughter v. White*, No. C16-1067-RSM-JPD, 2017 WL 7360411, at * 2 (W.D. Wash. Nov. 2, 2017) ("[T]he

purpose of a preliminary injunction is to preserve the status quo pending a determination on the merits."). The Court should avoid a path that "inject[s] a degree of uncertainty" in the process. *USA Farm Labor, Inc. v. Su*, 694 F. Supp. 3d 693, 714 (W.D.N.C. 2023). The BIA exists to resolve disputes like the one regarding Petitioner's detention. *See* 8 C.F.R. § 1003.1(d)(1). By regulation it must "provide clear and uniform guidance" "through precedent decisions" to "DHS [and] immigration judges." *Id.* Respondents respectfully ask that the Court allow the established process to continue without disruption.

The BIA also has an "institutional interest" to protect its "administrative agency authority." *See McCarthy v. Madigan*, 503 U.S. 140, 145, 146 (1992) *superseded by statute as recognized in Porter v. Nussle*, 534 U.S. 516 (2002). "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Global Rescue Jets, LLC v. Kaiser Foundation Health Plan, Inc.*, 30 F.4th 905, 913 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Indeed, "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." *McCarthy*, 503 U.S. at 145. The Court should deny the TRO motion.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court dismiss or deny Petitioner's TRO motion.

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