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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MILTON FRANCISCO SOZA VELASQUEZ AND ALBIN ADOLFO ASTURIAS ESTURBAN Plaintiffs and Petitioners, vs. CHRISTOPHER LAROSE, Warden of the Otay Mesa Detention Center et al. Defendants-Respondents	Case No.: 25-CV-3137 JLS (MSB) Hon. Judge Janis L Sammartino **RETURN IN SUPPORT OF HABEAS CORPUS**

Petitioners file their traverse as follows:

1. Petitioners admit the Factual Allegations contained in ECF #6-1.

The facts in this case are not in dispute. ECF # 1& 6-1. For purposes of their Petitions for Habeas Corpus Petitioners do not dispute the factual allegations contained in the exhibits submitted by Respondents in Docket 6-1. Petitioners dispute the legal conclusions and inference as stated below.

2. Joinder is proper in this case.

Under Federal Rule of Civil Procedure 20(a), permissive joinder of plaintiffs "is proper if (1) the plaintiffs assert[] a right to relief arising out of the same transaction and occurrence and (2) some question of law or fact common to all the plaintiffs will arise in the action." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000) (citing Fed. R. Civ. P. 20(a)) (emphasis omitted). Further, "[e]ven once these requirements are met, a district court must examine whether permissive joinder would 'comport with the principles of fundamental fairness' or would result in prejudice to either side." *Id.* (quoting Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980)). Here the claims of both Petitioners arise out of an uniform policy, Exhibit R-1, and raise the same purely legal questions. Moreover there is a striking factual similarity in the allegations supporting Plaintiffs' claims: Both Petitioners entered without inspection near El Paso Texas in 2022. *See* ECF # 8-1 PAGE ID 83 & 95. Both have resided in the United States since then. *Id.* Both have no criminal record or prior immigration history. *See* ECF # 8-1 PAGE ID 88-89 & 100-03. Both were placed in section 240 removal proceedings and charged as non-citizens who "have not been admitted or paroled." *See* ECF # 8-1 PAGE ID 83 & 95. Both were charged with the same charges of inadmissibility. *Id.* Both have pending removal proceedings. *Id.* And both are detained at the Otay Mesa Detention Center. For purposes of the claims pleaded there is no factual disparity. And as Respondents' opposition show there is zero disparity in the "question of law or fact common to all plaintiffs . . . ." Fed R. Civ. P. 20(a)(1)(B). The resolution of the claims in habeas depend entirely of the interpretation of two related but mutually exclusive statutory provisions. The claim

stand or fall based on whether both Petitioners are subject to the mandatory detention provision in section 1225(b)(2) or to the 'default rule' in section 1226(a). No particularized factual analysis affects the claims.

3. **Respondents' jurisdictional arguments are without merit because Petitioners are not challenging anything that Sections 1252 cover.**

First, Respondents' argument that section 1252(g) bars Petitioner's claims, Response at 7-8, is foreclosed by binding precedent and the unambiguous statutory text. Section 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). The Supreme Court has mandated that courts read § 1252(g) narrowly. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999) (reasoning that § 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders' "). Because § 1252(g) names "three discrete events along the road to deportation," *AADC*, 525 U.S. at 482, it does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018). Here, Petitioners are not challenging any exercise of discretion to execute any final removal orders because no such orders exist. Nor are they challenging Respondents' discretion and/or decision to initiate removal proceedings or adjudicate their cases: the removal proceedings before the EOIR are ongoing and unaffected by their detention or release. Instead, like the petitioner in *Zadvydas v. Davis*, 533 U.S. 678 (2001), Petitioners "challenge the extent of the Attorney General's authority under the [Immigration and Nationality Act] statute" and the Constitution. *Id*, 533 U.S. at 688. "[T]he extent of that authority is not a matter of discretion," and

therefore falls outside the scope of § 1252(g). *Id.* (holding that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to detention); *Ibarra-Perez v. United States*, _ F.4th _, Bi, 24-631, 2025 WL 2461663 at *6 (9th Cir. Aug. 27, 2025). Because Petitioners here challenge the lawfulness of their respective detention during *the pendency* of their removal proceedings, this is not a challenge to one of the "three discrete events along the road to deportation" that § 1252(g) applies to. *See Reno, 525 U.S. at 482.* Courts have, thus, rejected Respondents' exact arguments. *See Mosqueda v. Noem,* No. 5:25-CV-02304 CAS (BFM), 2025 WL 2591530, at *3 (C.D. Cal. Sept. 8, 2025); *Grigorian v. Bondi,* No. 25-CV-22914-RAR, 2025 WL 2604573, at *3 (S.D. Fla. Sept. 9, 2025).

Moreover, Petitioners' claims concern "issues which ripened before removal proceedings began," such as stop, arrest, and detention. This is in contrast from the cases cited by Respondents where the claims did arise from removal proceedings. Insofar as the instant action and the TRO seek only an order prohibiting their detention that may violate the INA and/or the Constitution, 8 U.S.C. §1252(g) is not a bar to this Court's jurisdiction.

In fact, the Ninth Circuit has indicated that where a non-citizen challenges the Attorney General's arguably discretionary decision on a purely legal basis as a "violation [of] the Constitution" or "INA," courts have jurisdiction to review such decisions as "premised on a lack of legal authority." *Id.* at *8*; accord Bowrin v. U.S. I.N.S.*, 194 F.3d 483, 488 (4th Cir. 1999) (explaining that § 1252(g) does not bar jurisdiction over habeas petitions challenging "agency interpretation of statutes as these decisions do not fall into any of the three categories enumerated in § 1252(g)."); *Phetsadakone v. Scott*, 2025 WL 2579569, at *2 (W.D. Wash. Sept. 5, 2025); *Ortega v. Kaiser*, 2025 WL 2243616, at *4 (N.D. Cal. Aug. 6, 2025). Here, the historical facts are uncontroverted and Petitioners raise only pure questions of law. The 9th Circuit has

already held that § 1252(g) does not deprive the federal courts of jurisdiction to review a non-citizen's purely legal arguments challenging the removal process. *Ibarra-Perez*, _ F.4th _, Bi, 24-631, 2025 WL 2461663 at *8 (holding § 1252(g) did not bar "review [of] Ibarra-Perezs' purely legal arguments challenging ICE's removal to Mexico without providing any process that would have allowed him to present evidence supporting his fear of removal to that country"). Nor does the statute bar challenges to the legality of detention. *See, e.g., Öztürk v. Hyde*, 136 F.4th 382, 394–401 (2d Cir. 2025); *Hernandez v. Gonzales*, 424 F.3d 42, 42–43 (1st Cir. 2005).

Second, in *Nielsen v. Preap*, 586 U.S. 392 (2019), the Supreme Court held that § 1252(b)(9) did not bar a lawsuit that, like this one, sought to challenge the government's contention that it was statutorily entitled to detain aliens without a bond hearing during the pendency of their removal proceedings. *Id.* at 402 ("Nor are we stripped of jurisdiction by § 1252(b)(9)...[because] respondents here are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal [as opposed to the decision to deny them bond hearings]; and they are not even challenging any part of the process by which their removability will be determined.") (cleaned up). As in *Jennings,* Petitioners' claims are not encompassed within § 1252(b)(9) because Petitioners here are "not asking for review of an order of removal; they are not challenging *the decision* to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Jennings,* 583 U.S. at 294–95. Therefore,"[u]nder these circumstances, § 1252(b)(9) does not present a jurisdictional bar." *Id.* at 294–95. Courts to have addressed these exact arguments have rejected Respondents' 8 U.S.C. § 1252(a)(5) and (b)(9) arguments because the petitioner's claims "are legal in nature and challenge specific conduct unrelated to removal proceedings." *Garcia Cortes v. Noem,* No. 1:25-CV-02677-CNS, 2025 WL

2652880, at *2 (D. Colo. Sept. 16, 2025) (citing *Mukantagara v. U.S. Dep't of Homeland Sec.*, 67 F.4th 1113, 1116 (10th Cir. 2023) ("Congress did not intend the zipper clause 'to cut off claims that have a tangential relationship with pending removal proceedings.' . . . A claim only arises from a removal proceeding when the parties in fact are challenging removal proceedings.")); *Jose J.O.E. v. Bondi,* No. 25-CV-3051 (ECT/DJF), 2025 WL 2466670, at *7 (D. Minn. Aug. 27, 2025)

Petitioners readily admit that district courts lack jurisdiction to review orders of removal. *See* 8 U.S.C. § 1252(a)(5) ("[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and and *exclusive means for judicial review of an order of removal . . .* "). And that review on a petition for review includes "all questions of law and fact, including interpretation and application of constitutional and statutory provisions" related to that order of removal. 8 U.S.C. § 1252(b)(9). But these settled legal principles are irrelevant for the issues at bar. In this case Petitioners challenge the legality of their respective detention, not a removal order. In fact, no order of removal has issued yet against either Petitioner.

To date numerous district courts have rejected the same jurisdictional arguments the government makes here. *See, e.g., Zaragoza Mosqueda v. Noem*, No. 5:25-cv-02304-CAS-BFM, 2025 WL 2591530, at *2–3 (C.D. Cal. Sept. 8, 2025); *Benitez v. Noem*, No. 5:25-cv-02190-RGK-AS (C.D. Cal. Aug. 26, 2025) [Dkt. 11] at 3–4; *Ceja Gonzalez v. Noem*, No. 5:25-cv-02054-ODW-ADS (C.D. Cal. Aug. 13, 2025) [Dkt. 12] at 3–6; *Maldonado Bautista v. Santacruz Jr.*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 28, 2025) [Dkt. 14] at 4–5; *J.S.H.M. v. Minga Wofford*, No. 1:25-CV-01309-JLT-SKO (E.D. Cal. Oct. 16, 2025) [Dkt. 15] at 12; *Helal v Janecka*, No. 5:25-cv-02650-HDV-JC (C.D. Cal Oct. 24, 2025 [Dkt 8 at 5]); *Chavez v. Noem*, No. 3:25-cv-02325-CAB-SBC (S.D. Cal. Sept. 24, 2025) [Dkt. 8] at 4–6; *Barrajas v. Noem*, No. 4:25-cv-00322-SHL-HCA, 2025 WL 2717650, at *2–3 (S.D. Iowa Sept. 23, 2025); *Garcia*

Cortes v. Noem, No. 1:25-cv- 02677-CNS, 2025 WL 2652880, at *1–2 (D. Colo. Sept. 16, 2025); *Jose J.O.E. v. Bondi*, No. 25-cv-3051-ECT-DJF, 2025 WL 2466670, at *6–7 (D. Minn. Aug. 27, 2025).

4. Petitioners are not "Applicants For Admission" and thus not subject to mandatory detention under § 1225(b)(2)(A)

As the Response emphasizes the merits of Respondents' statutory arguments implicate the construction of two statutory provisions. The first -- 8 U.S.C. § 1225(b)(2)(A) – provides that, absent exceptions that are inapplicable here, "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding." Petitioners who are long-time residents of the United States cannot be and are not processed under section 1225(b). They are both placed in section 240 removal proceedings which are ongoing. Of note: in the Notices to Appear Respondents did not classify Petitioners as "arriving aliens" but as present in the US without inspection. *See* ECF # 8-1 PAGE ID 83 & 95. And none of the boxes implicating section 1225(b) were checked. *See id.*

The second relevant provision is 8 U.S.C. § 1226(a), which provides in pertinent part that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General . . . may continue to detain the arrested alien; and . . . may release the alien on . . . bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or . . . conditional parole." *Id.* In other words, § 1226(a) contemplates that a noncitizen who is arrested and detained pending a removal decision is "generally" entitled to a bond hearing. *See Nielsen v. Preap,* 586 U.S. at 95-98 *("*Aliens who are arrested because they are believed to be deportable may generally apply for release on bond or parole while the question of their removal is being decided. These aliens may secure their

release by proving to the satisfaction of a Department of Homeland Security officer or an immigration judge that they would not endanger others and would not flee if released from custody. . . . 8 U.S.C. § 1226(a) generally permits an alien to seek release in this way . . . ."). This is the "default rule." *Jennings,* 583 U.S. at 288 ("Section 1226 generally governs the process of arresting and detaining that group of aliens pending their removal. . . . Section 1226(a) sets out the default rule . . . ."); *Rodriguez Diaz v. Garland,* 53 F.4th 1189, 1196-97 (9th Cir. 2022) ("The provision at issue in this case, 8 U.S.C. § 1226, provides the general process for arresting and detaining aliens who are present in the United States and eligible for removal. . . . Under § 1226(a) and its implementing regulations, a detainee may request a bond hearing before an IJ at any time before a removal order becomes final. . . . Additional provisions supplement § 1226's detention scheme. Section 1225(b) applies to an 'applicant for admission' . . . .") (citations omitted). Thus, while Section 1225(b) "authorizes the Government to detain certain aliens seeking admission into the country," section 1226 "authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings." *Jennings* at 289.

Respondents cited no cases agreeing with their position that § 1225(b)(2)(A) applies to noncitizens in Petitioners' situation who were arrested under section 1226. *See* ECF # 8-1 PAGE ID 93; Cf. *Rodriguez Diaz v. Garland,* 53 F.4th 1189, 1202 (9th Cir. 2022) (observing that § 1226(a) and its implementing regulations "provide extensive procedural protections that are unavailable under other detention provisions").

Moreover, for decades, DHS applied § 1226(a) to such individuals, acknowledging they are not "arriving aliens" at ports of entry. *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007). This is "powerful evidence" of a "natural and reasonable" reading of the statute. *Abramski v. United States*, 573 U.S.

169, 203 (2014) (Scalia, J., dissenting); see also *Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relied on over sixty years of government and interpretation to reject the government's new interpretation of the law).

Here, Respondents attempt to ignore the inclusion of the phrase "seeking admission" in § 1225(a)(1) which implies affirmative action toward admission, such as presenting at a port, not passive presence after unlawful entry. *See Thuraissigiam*, 591 U.S. at 138 (distinguishing "applicants" as those inspected or paroled). Congress used "arriving alien" narrowly elsewhere in § 1225, supporting the conclusion that § 1225(b)(2)(A) does not apply broadly to those apprehended inland. *See* 8 C.F.R. § 1001.1(q) (defining "arriving alien" as one at a port or recently entered).

The recent shift, prompted by a July 2025 DHS guidance, exhibit R-1, lacks compelling justification and appears driven by policy rather than textually compelled. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395–96 (2024) (courts owe no deference to agency interpretations). This abrupt change also implicates due process, as Petitioners had a protected liberty interest in the bond hearing under the prior regime. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (prolonged detention raises due process concerns); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (long-term residents have due process rights); *see also Bautista v. Santacruz*, No. 5:25-cv-01873-SSS-BFM, 2025 U.S. Dist. LEXIS 171364, at *15–16 (C.D. Cal. July 28, 2025) ("respondents fail to articulate any valid justification, legal or otherwise, for the application of § 1225 to Petitioners as applicants for admission." (cleaned up)); *Barrera v. Tindall*, No. 3:25-cv-541-RGJ, 2025 WL 2690565, at *1, *4–7 (W.D. Ky. Sept. 19, 2025) ("If Congress had intended for Section 1225 to govern all noncitizens present in the country, who had not been admitted, then it would not have recently adopted an amendment to Section 1226 that prescribes a subset of noncitizens be

exempt from the discretionary bond framework." (cleaned up and collecting cases)); *Hasan v. Crawford*, __ F. Supp. 3d __, 2025 WL 2682255, at *6–10, *13 (E.D. Va. Sept. 19, 2025) (ordering immediate release under § 1226, and rejecting argument that § 1225(b)(2) applied to someone like the petitioner who had been in the United States for several months, had not committed any crimes, and attended all required meetings with ICE officials). These cases, while not binding, persuasively rejected the government's argument, based on statutory history and due-process concerns.

5. Petitioners have no available remedies to exhaust.

On habeas review under § 2241, exhaustion is a prudential rather than jurisdictional requirement." *Singh v. Holder*, 638 F.3d 1196, 1203 n. 3 (9th Cir. 2011). To determine whether prudential exhaustion is appropriate, courts consider the following factors, often referred to as the *Puga* factors: (1) whether "agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision," (2) whether "relaxation of the requirement would encourage the deliberate bypass of the administrative scheme," and (3) whether "administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

Even if the *Puga* factors weigh in favor of prudential exhaustion, a petitioner may avoid the requirement by demonstrating one of the following *Laing* factors applies in their case: (1) "administrative remedies are inadequate or not efficacious," (2) "pursuit of administrative remedies would be a futile gesture," (3) "irreparable injury will result," or (4) "the administrative proceedings would be void." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting *S.E.C. v.*

G.C. George Sec., Inc., 637 F.2d 685, 688 (9th Cir. 1981); *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1000 (N.D. Cal. 2018)). Here, Petitioners raise a purely legal question on which the Court exercises independent judgment. And even more importantly requiring Petitioners to seek custody redermination would be a "futile gesture" since the position taken by Respondents is not fact driven but an uniform policy change regarding interpretation of the applicable law. See Exhibit R-1. Immigration Judges on the other hand, are bound to follow *Yajure Hurtado*, 29 I&N Dec. 216, 2025 WL 2674169 (BIA 2025) in the absence of a TRO or habeas writ. Thus, an IJ will be bound to find that the IJ lacks jurisdiction to hear bond requests from these Petitioners because they are "alien present in the United States without admission". *See Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1251 (W.D. Wash. 2025) (citing *Hernandez v. Sessions*, 872 F.3d 976, 989 (9th Cir. 2017)); *Vang v. Eischen*, No. 23-cv-721 (JRT/DLM), 2023 WL 5417764, at * 3 (D. Minn. Aug. 1, 2023) ("There is no useful purpose to proceeding through the administrative remedy process where the petitioner presents a pure question of law."); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at *5 (D. Mass. July 7, 2025); *Salad v. Alaska Dep't of Corr.*, 769 F. Supp. 3d 913, 921 (D. Alaska 2025). In other words, this is not the type of case "[w]here the parties are expected to develop the issues in an adversarial administrative proceeding," and thus where "the rationale for requiring [court-imposed] exhaustion is at its greatest." *Agha v. Holder*, 743 F.3d 609, 616 (8th Cir. 2014) (quoting *Sims v. Apfel*, 530 U.S. 103, 110, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000)).

6. Petitioners withdraw their challenge to 8 C.F.R. § 241.4.

Petitioners respectfully request leave to withdraw the claims and arguments challenging to 8 C.F.R. § 241.4.

Date: 11/19/2025

Respectfully Submitted by

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