

1 ADAM GORDON
United States Attorney
2 MARY CILE GLOVER-ROGERS
Assistant U.S. Attorney
3 California State Bar No. 321254
Office of the U.S. Attorney
4 880 Front Street, Room 6293
San Diego, CA 92101-8893
5 Telephone: (619) 546-7609
Facsimile: (619) 546-7751
6 Email: mary.glover-rogers@usdoj.gov

7 Attorneys for Respondent

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 W.F.,

11 Petitioner,

12 v.

13 WARDEN OF OTAY MESA DETENTION
CENTER,,

14 Respondent.
15

Case No.: 25-cv-03635-BTM-MMP

RETURN TO PETITION

16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. Introduction**

2 Petitioner has filed a habeas petition under 28 U.S.C. § 2241. Petitioner is
3 currently in removal proceedings under 8 U.S.C. § 1229a and is charged with
4 deportability/removability under 8 U.S.C. § 1227(a)(1)(B), as an individual who was
5 admitted to the United States but remained for a time longer than permitted by law (i.e.,
6 a visa overstay). As such, Petitioner is detained pursuant to 8 U.S.C. § 1226(a).
7 Petitioner had multiple bond hearings before an immigration judge pursuant to 8 U.S.C.
8 § 1226(a), and he has not appealed the immigration judge’s order denying bond. Based
9 on the arguments set forth below, the Court should deny any requests for relief and
10 dismiss the petition.

11 **II. Factual Background¹**

12 Petitioner is a native and citizen of Haiti. In 2016, he was admitted into the United
13 States on a nonimmigrant visa. On February 6, 2025, he was encountered by Miami
14 ICE/ERO at the Broward County Jail after being arrested for offenses of driving while
15 licenses suspended (first offense), and *capias*—traffic—expired driver’s license more
16 than six months. An immigration detainer, Form I-247, was issued on February 7, 2025,
17 whereby Petitioner was transferred into DHS custody. DHS determined that Petitioner
18 is deportable/removable under 8 U.S.C. § 1227(a)(1)(B), as an individual who was
19 admitted to the United States and has remained for a time longer than permitted by law
20 (i.e., a visa overstay). Based on his charges of removability, he was issued a Notice to
21 Appear (NTA) and placed in removal proceedings under 8 U.S.C. § 1229a. During the
22 pendency of his removal proceedings, Petitioner applied for asylum under 8 U.S.C.
23 § 1158 and his case is set for an individual hearing on March 16, 2026.

24 Petitioner is currently detained at the Otay Mesa Detention Center under 8 U.S.C.
25 § 1226(a). On March 18, 2025, Petitioner, through immigration counsel, had a bond
26 hearing before an immigration judge pursuant to 8 U.S.C. § 1226(a). The immigration
27

28 ¹ The attached exhibits are true copies, with redactions of private information, of documents obtained from ICE counsel.

1 judge denied Petitioner bond on the merits of his request. Subsequently, Petitioner,
2 again through immigration counsel, requested and was provided custody
3 redetermination hearings on May 13, 2025, June 27, 2025, and December 3, 2025. At
4 each hearing, the immigration judge denied a change in custody because Petitioner
5 presented no material change in circumstances that would warrant the immigration
6 court to redetermine his custody status. Further, to date, Petitioner has not appealed the
7 immigration judge’s bond orders to the Board of Immigration Appeals.

8 **III. Argument**

9 **A. Petitioner is Lawfully Detained Under 8 U.S.C. § 1226(a)**

10 Section 1226 provides for arrest and detention “pending a decision on whether
11 the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a),
12 the government may detain an alien during his removal proceedings, release him on
13 bond, or release him on conditional parole. By regulation, immigration officers can
14 release aliens upon demonstrating that the alien “would not pose a danger to property
15 or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8).
16 An alien can also request a custody redetermination (i.e., a bond hearing) by an IJ at
17 any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§
18 236.1(d)(1), 1236.1(d)(1), 1003.19.

19 As set forth above, on February 7, 2025, a Form I-247, was issued after ERO
20 encountered Petitioner at the Broward County Jail for traffic offenses. DHS determined
21 that Petitioner is deportable/removable under 8 U.S.C. § 1227(a)(1)(B), as an individual
22 who was admitted to the United States but remained for a time longer than permitted by
23 law (i.e., a visa overstay). Based on that charge, he was issued a Notice to Appear (NTA)
24 and placed in removal proceedings under 8 U.S.C. § 1229a. As such, Petitioner is
25 detained pursuant to 8 U.S.C. § 1226(a). The immigration judge has convened four
26 bond hearings, and Petitioner has not appealed the immigration judge’s bond order.

27 ///

28 ///

1 **B. Claims and Requested Relief Jurisdictionally Barred**

2 Petitioner bears the burden of establishing that this Court has subject matter
3 jurisdiction over asserted claims. *See Ass'n of Am. Med. Coll. v. United States*, 217 F.3d
4 770, 778-79 (9th Cir. 2000); *Finley v. United States*, 490 U.S. 545, 547-48 (1989).

5 In general, courts lack jurisdiction to review a decision to commence or
6 adjudicate removal proceedings or execute removal orders. *See* 8 U.S.C. § 1252(g)
7 (“[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any
8 alien arising from the decision or action by the Attorney General to commence
9 proceedings, adjudicate cases, or execute removal orders.”); *Reno v. Am.-Arab Anti-*
10 *Discrimination Comm.*, 525 U.S. 471, 483 (1999) (“There was good reason for
11 Congress to focus special attention upon, and make special provision for, judicial
12 review of the Attorney General’s discrete acts of “commenc[ing] proceedings,
13 adjudicat[ing] cases, [and] execut[ing] removal orders”—which represent the initiation
14 or prosecution of various stages in the deportation process.”); *Limpin v. United States*,
15 828 Fed. App’x 429 (9th Cir. 2020) (holding district court properly dismissed under 8
16 U.S.C. § 1252(g) “because claims stemming from the decision to arrest and detain an
17 alien at the commencement of removal proceedings are not within any court’s
18 jurisdiction”). In other words, § 1252(g) removes district court jurisdiction over “three
19 discrete actions that the Attorney may take: [his] ‘decision or action’ to ‘commence
20 proceedings, adjudicate cases, or execute removal orders.’” *Reno*, 525 U.S. at 482
21 (emphasis removed). Congress has explicitly foreclosed district court jurisdiction over
22 claims that necessarily arise “from the decision or action by the Attorney General to
23 commence proceedings [and] adjudicate cases,” over which. 8 U.S.C. § 1252(g).

24 Section 1252(g) also bars district courts from hearing challenges to the method
25 by which the government chooses to commence removal proceedings, including the
26 decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203
27 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s
28

1 discretionary decisions to commence removal” and bars review of “ICE’s decision to
2 take [plaintiff] into custody and to detain him during his removal proceedings”).

3 Other courts have held, “[f]or the purposes of § 1252, the Attorney General
4 commences proceedings against an alien when the alien is issued a Notice to Appear
5 before an immigration court.” *Herrera-Correra v. United States*, No. 08-2941 DSF
6 (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). “The Attorney General
7 may arrest the alien against whom proceedings are commenced and detain that
8 individual until the conclusion of those proceedings.” *Id.* at *3. “Thus, an alien’s
9 detention throughout this process arises from the Attorney General’s decision to
10 commence proceedings” and review of claims arising from such detention is barred
11 under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*,
12 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g).

13 Moreover, under 8 U.S.C. § 1252(b)(9), “[j]udicial review of all questions of law
14 and fact . . . arising from any action taken or proceeding brought to remove an alien
15 from the United States under this subchapter shall be available only in judicial review
16 of a final order under this section.” Further, judicial review of a final order is available
17 only through “a petition for review filed with an appropriate court of appeals.” 8 U.S.C.
18 § 1252(a)(5). The Supreme Court has made clear that § 1252(b)(9) is “the unmistakable
19 ‘zipper’ clause,” channeling “judicial review of all” “decisions and actions leading up
20 to or consequent upon final orders of deportation,” including “non-final order[s],” into
21 proceedings before a court of appeals. *Reno*, 525 U.S. at 483, 485; see *J.E.F.M. v.*
22 *Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (noting § 1252(b)(9) is “breathtaking in
23 scope and vise-like in grip and therefore swallows up virtually all claims that are tied to
24 removal proceedings”). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any
25 issue—whether legal or factual—arising from any removal-related activity can be
26 reviewed *only* through the [petition for review] PFR process.” *J.E.F.M.*, 837 F.3d at
27 1031 (“[W]hile these sections limit *how* immigrants can challenge their removal
28 proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose

1 *all* judicial review of agency actions. Instead, the provisions channel judicial review
2 over final orders of removal to the courts of appeal.” (emphasis in original); *see id.* at
3 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-
4 practices challenges . . . whenever they ‘arise from’ removal proceedings”).

5 Critically, “1252(b)(9) is a judicial channeling provision, not a claim-barring
6 one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D)
7 provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed
8 as precluding review of constitutional claims or questions of law raised upon a petition
9 for review filed with an appropriate court of appeals in accordance with this section.”
10 *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review
11 such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review
12 process before the court of appeals ensures that noncitizens have a proper forum for
13 claims arising from their immigration proceedings and “receive their day in court.”
14 *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*,
15 627 F.3d 58, 61 (2d Cir. 2010) (“The REAL ID Act of 2005 amended the [INA] to
16 obviate . . . Suspension Clause concerns” by permitting judicial review of
17 “nondiscretionary” BIA determinations and “all constitutional claims or questions of
18 law.”). These provisions divest district courts of jurisdiction to review both direct and
19 indirect challenges to removal orders, including decisions to detain for purposes of
20 removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9)
21 includes challenges to the “decision to detain [an alien] in the first place or to seek
22 removal”).

23 In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit has
24 explained that jurisdiction turns on the substance of the relief sought. *Delgado v.*
25 *Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of
26 jurisdiction to review both direct and indirect challenges to removal orders, including
27 decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S.
28

1 at 294–95 (section 1252(b)(9) includes challenges to the “decision to detain [an alien]
2 in the first place or to seek removal[.]”).

3 Here, Petitioner challenges the government’s decision and action to detain, which
4 arises from DHS’s decision to commence removal proceedings, and is thus an “action
5 taken . . . to remove [him/her] from the United States.” *See* 8 U.S.C. § 1252(b)(9); *see*
6 *also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850
7 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because
8 the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No.
9 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that
10 there is no judicial review of the threshold detention decision, which flows from the
11 government’s decision to “commence proceedings”).

12 Accordingly, this Court lacks jurisdiction over this petition under 8 U.S.C.
13 § 1252.

14 **C. Administrative Remedies Should Be Exhausted**

15 “Exhaustion can be either statutorily or judicially required.” *Acevedo–Carranza*
16 *v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004). “If exhaustion is statutory, it may be a
17 mandatory requirement that is jurisdictional.” *Id.* (citing *El Rescate Legal Servs., Inc.*
18 *v. Exec. Off. of Immigr. Rev.*, 959 F.2d 742, 747 (9th Cir. 1991)). “If, however,
19 exhaustion is a prudential requirement, a court has discretion to waive the requirement.”
20 *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325–26 (9th Cir. 1981)). Here, Petitioner
21 is attempting to bypass the administrative scheme by not appealing his underlying bond
22 denials to the Board of Immigration Appeals (BIA).

23 The BIA is an appellate body within the Executive Office for Immigration
24 Review (EOIR) and possesses delegated authority from the Attorney General. 8 C.F.R.
25 §§ 1003.1(a)(1), (d)(1). The BIA is “charged with the review of those administrative
26 adjudications under the [INA] that the Attorney General may by regulation assign to
27 it,” including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1, 1236.1. The
28 BIA not only resolves particular disputes before it, but is also directed to, “through

1 precedent decisions, [] provide clear and uniform guidance to DHS, the immigration
2 judges, and the general public on the proper interpretation and administration of the
3 [INA] and its implementing regulations.” *Id.* § 1003.1(d)(1). Decisions rendered by the
4 BIA are final, except for those reviewed by the Attorney General. 8 C.F.R. §
5 1003.1(d)(7).

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

18 “When a petitioner does not exhaust administrative remedies, a district court
19 ordinarily should either dismiss the petition without prejudice or stay the proceedings
20 until the petitioner has exhausted remedies, unless exhaustion is excused.” *Leonardo v.*
21 *Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011); *see also Alvarado v. Holder*, 759 F.3d
22 1121, 1127 n.5 (9th Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Tijani*
23 *v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (no jurisdiction to review legal claims
24 not presented in the petitioner’s administrative proceedings before the BIA). Moreover,
25 a “petitioner cannot obtain review of procedural errors in the administrative process that
26 were not raised before the agency merely by alleging that every such error violates due
27 process.” *Vargas v. INS*, 831 F.3d 906, 908 (9th Cir. 1987); *see also Sola v. Holder*,

1 720 F.3d 1134, 1135-36 (9th Cir. 2013) (declining to address a due process argument
2 that was not raised below because it could have been addressed by the agency).

3 Here, exhaustion is warranted because agency expertise is required. “[T]he BIA
4 is the subject-matter expert in immigration bond decisions.” *Aden v. Nielsen*, No. C18-
5 1441RSL, 2019 WL 5802013, at *2 (W.D. Wash. Nov. 7, 2019); *Delgado v. Sessions*,
6 No. C17-1031-RSL-JPD, 2017 WL 4776340, at *2 (W.D. Wash. Sept. 15, 2017) (noting
7 a denial of bond to an immigration detainee was “a question well suited for agency
8 expertise”).

9 Waiving exhaustion would also encourage other detainees to bypass the BIA and
10 directly appeal from the IJ to federal district court. *See Aden*, 2019 WL 5802013, at *2.
11 Individuals, like Petitioner, would have little incentive to seek relief before the BIA if
12 this Court permits review here. And allowing a skip-the-BIA-and-go-straight-to-
13 federal-court strategy would needlessly increase the burden on district courts. *See Bd.*
14 *of Tr. of Constr. Laborers’ Pension Trust for S. Calif. v. M.M. Sundt Constr. Co.*, 37
15 F.3d 1419, 1420 (9th Cir. 1994) (“Judicial economy is an important purpose of
16 exhaustion requirements.”); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418
17 (2023) (noting “exhaustion promotes efficiency”). If the IJ erred, this Court should
18 allow the administrative process to correct itself. *See id.*

19 Moreover, detention alone is not an irreparable injury. Discretion to waive
20 exhaustion “is not unfettered.” *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004).
21 Petitioners bear the burden to show that an exception to the exhaustion requirement
22 applies. *Leonardo*, 646 F.3d at 1161; *Aden*, 2019 WL 5802013, at *3. “[C]ivil detention
23 after the denial of a bond hearing [does not] constitute[] irreparable harm such that
24 prudential exhaustion should be waived.” *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL
25 662659, at *3 (W.D. Wash. Feb. 19, 2021), *aff’d sub nom. Diaz Reyes v. Mayorkas*, No.
26 21-35142, 2021 WL 3082403 (9th Cir. July 21, 2021).

27 Because Petitioner has not exhausted his administrative remedies, this matter
28 should be dismissed.

1 **D. Administrative Procedure Claims Are Without Merit**

2 The Administrative Procedure Act (APA) does not provide an avenue for relief
3 in this case. The APA places limits on when agency action is subject to judicial review.
4 “Agency action made reviewable by statute and final agency action for which there is
5 no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704;
6 *Navajo Nation v. Dep’t of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017)
7 (“[Section] 704’s requirement that to proceed under the APA, agency action must be
8 final or otherwise reviewable by statute is an independent element without which courts
9 may not determine APA claims.”). Reviewable “agency action” is defined to include
10 “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent
11 or denial thereof, or failure to act.” 5 U.S.C. § 551(13). “While this definition is
12 ‘expansive,’ federal courts ‘have long recognized that the term [agency action] is not so
13 all-encompassing as to authorize . . . judicial review over everything done by an
14 administrative agency.’” *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800–01 (9th
15 Cir. 2013) (quoting *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460
16 F.3d 13, 19 (D.C. Cir. 2006)). Here, it is not altogether clear what final agency action
17 Petitioner seeks review over. Importantly, habeas relief is available to challenge only
18 the legality or duration of confinement. *Pinson*, 69 F.4th at 1067; *see also Flores-*
19 *Miramontes*, 212 F.3d at 1140 (“For purposes of immigration law, at least, ‘judicial
20 review’ refers to petitions for review of agency actions, which are governed by the
21 Administrative Procedure Act, while habeas corpus refers to habeas petitions brought
22 directly in district court to challenge illegal confinement.”). The Court should therefore
23 reject Petitioner’s APA claims.

24 ///

25 ///

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, Respondents respectfully request that the Court
3 dismiss this action.

4 DATED: January 2, 2026

Respectfully submitted,

5 ADAM GORDON
6 United States Attorney

7 s/ Mary Cile Glover-Rogers
8 MARY CILE GLOVER-ROGERS
9 Assistant United States Attorney
10 Attorneys for Respondents