UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:25-cv-04814-MJD-DJF

Yeferson Gonzalez Contreras,

Petitioner,

v.

David Easterwood,[1] et al.,

Respondents.

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

INTRODUCTION

This is the second time in several months that Petitioner Yeferson Gonzalez Contreras ("Gonzalez Contreras" or "Petitioner") has sought habeas relief from this Court. In his first petition, Petitioner sought relief without confronting the facts that his original parole into the United States had lapsed on its own terms by the time he filed his first petition and more importantly that he has always had the status as an "arriving alien" under the Immigration and Nationality Act ("INA") since he was originally paroled into the country in October 2024. Additionally, Petitioner's appeal of the Immigration Court's original ruling remains pending in the BIA. Despite these impediments, Petitioner's first habeas petition was resolved and dismissed when the Immigration Court conducted a second bond hearing regarding Petitioner's detention.

[1] Samuel L. Olson is no longer in the Field Office Director. Accordingly, pursuant to Fed. R. Civ. P. 25(d), we substituted as the lead respondent David Easterwood, Acting Field Office Director of Enforcement and Removal Operations, St. Paul Field Office, U.S. Immigration and Customs Enforcement.

The Immigration Court conducted a bond redetermination hearing on November 25, 2025. By written order dated December 8, 2025, the Immigration Court denied the request for a change in custody status. The Immigration Court found that it lacked jurisdiction to set any bond, because Petitioner was an "arriving alien" and under 8 C.F.R. § 1003.19(h)(2)(i)(B) the Immigration Judge was prohibited from re-determining bond for an "arriving alien." To the knowledge of the undersigned, Petitioner has not appealed this denial of bond and it appears the time within which to appeal has expired. An appeal concerning the bond determination has not yet been filed nor has the deadline elapsed.

Petitioner filed this second habeas petition to challenge the constitutionality and legality of the ruling of the Immigration Judge that prohibited the Immigration Judge from granting release on bond to Petitioner as an "arriving alien." The Court should deny this second habeas petition and the accompanying TRO motion for the reasons that follow.

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 ay release on appropriate bond and other conditions pending the removal and asylum proceedings. Under these circumstances, the Court should deny the second TRO motion and the second habeas petition.

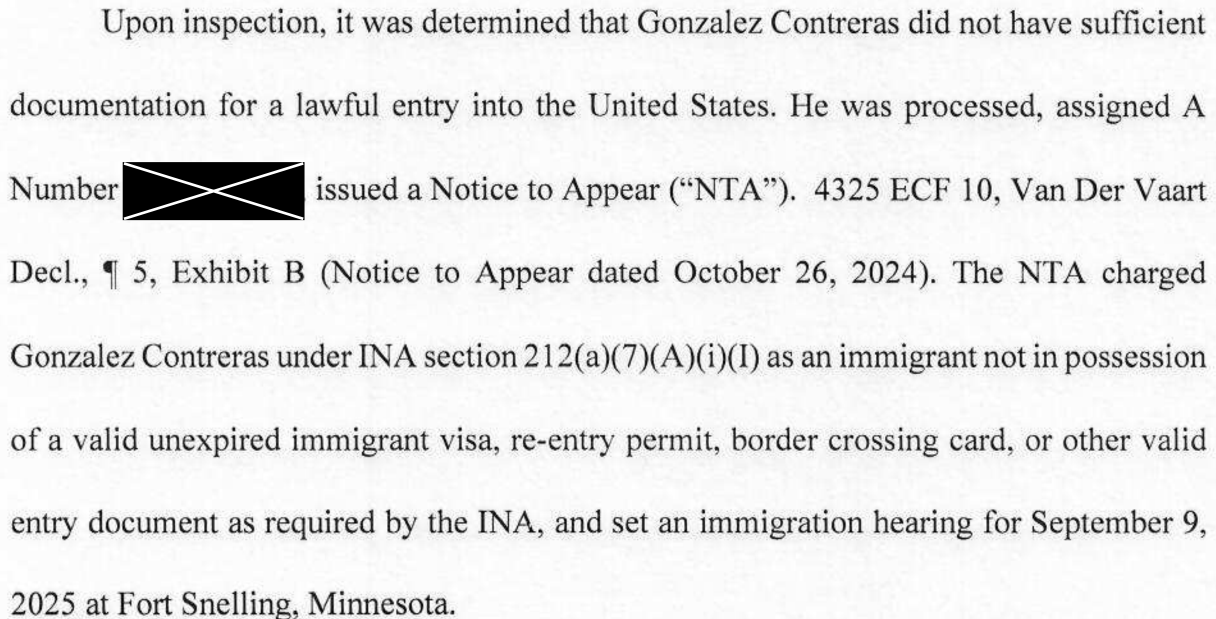
BACKGROUND

A. FACTUAL AND PROCEDURAL BACKGROUND

This is Petitioner's second habeas petition. Petitioner's first petition was filed in a case styled as *Yeferson Gonzalez Contreras v. Olson, et al.,* Civil Action No. 25-cv-04325 MJD-LIB ("*Contreras I*"). References to documents in that action will be to "4325 ECF..."

1. *Gonzalez Contreras v. Olson, et al.,* Civil Action No. 25-cv-04325..

A brief summary of the facts usefully introduces what is at stake in the present second habeas action. Petitioner is a native and citizen of Venezuela. ECF No. 1,¶ 1. On October 26, 2024, Gonzalez Contreras arrived at the Brownsville, Texas port of entry for a scheduled appointment with the U.S. Customs and Border Protection. Contreras I, 4325 ECF 10, 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  issued a Notice to Appear ("NTA"). 4325 ECF 10, 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.

Immigration officials issued him a work authorization and paroled him into the United States pending immigration proceedings under 8 U.S.C. § 1229a. 4325 ECF 10, 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." 4325 EC F No. 10, Van Der Vaart Decl., ¶ 5. *See generally* 8 C.F.R. § 212.5.

Six months later, Gonzalez Contreras filed his asylum application on or about April 9, 2025 with the Executive Office for Immigration Review ("EOIR"). 4325 ECF No. 10, 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. 4325 ECF No. 10, Van Der Vaart Decl., ¶ 9, Ex. F.

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 the Immigration Court granted the motion to dismiss by order dated September 9, 2025. 4325 ECF No. 10, Van Der Vaart Decl., ¶ 10, Ex. G.

Immigration officials then took Gonzalez Contreras into ICE custody. 4325 ECF No. 10, 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." 4325 ECF No. 10, Van Der Vaart Decl., ¶ 11, Ex. H, page 2. Gonzalez Contreras appealed the granting of the motion to dismiss to the BIA. 4325 ECF No. 10, 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. 4325 ECF No. 10, 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 first Petition for Writ of Habeas Corpus. *See Gonzalez Contreras v. Olson, et al.,* Civil Action No. 25-cv-04325 MJD-LIB), ECF No. 1.[2] To correct the procedural problems in the proceedings, DHS filed a motion to remand in Petitioner's BIA appeal. While Petitioner recently filed a document in the BIA, he did not withdraw his BIA appeal, and the case remains pending in the BIA.

2. The second bond hearing.

[2] 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. 4325 ECF No. 10, 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, 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). 4325 ECF No. 10, Van Der Vaart Decl., ¶ 15, Ex. K.

The Immigration Court conducted a bond redetermination hearing on November 25, 2025. By written order dated December 8, 2025, the Immigration Court denied the request for a change in custody status. The Immigration Court found that it lacked jurisdiction to set any bond, because Petitioner was an "arriving alien" and under 8 C.F.R. § 1003.19(h)(2)(i)(B) the Immigration Judge was prohibited from re-determining bond for an "arriving alien."

The Immigration Court initially acknowledged that "an alien who is in DHS custody may request that an Immigration Judge redetermine his custody status at any time before a deportation or removal order becomes administratively final. 8 C.F.R. § 1236.1(d). However, under the regulations, an Immigration Judge is prohibited from exercising jurisdiction to redetermine the custody status of arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section INA § 212(d)(5). 8 C.F.R § 1003.19(h)(2)(i)(B); *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998). The relevant jurisdictional question under 8 C.F.R. § 1003.19(h)(2)(i)(B) is simply whether Respondent's circumstances make him an arriving alien, as defined by 8 C.F.R. § 1001.1(q)." ECF No. 5, Ex. K.

Then, the Immigration Court correctly determined that Petitioner clearly fit within the INA's definition of an "arriving alien." Specifically, here Petitioner is an applicant for admission as he came to a port of entry seeking admission to the United States; that DHS had designated Petitioner as an arriving alien in the NTA; and that the Court was precluded from undertaking a determination as to the propriety of that designation. *See* 8 C.F.R. § 1003. 19(h)(2)(ii). The Immigration Court correctly rejected Petitioner's contention that

his parole took him out of the definition of "arriving alien" because, "An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after any such parole is terminated or revoked. 8 C.R.F. 1001.1(q)."

Apparently, before the Immigration Court Petitioner argued that, since the DHS had conceded that it was relying on Section 1226 for detention authority, the Immigration Court could not rely on the "arriving alien" exception to the general availability of bond under section 1226. The Immigration Court rejected that argument: "Respondent's [Gonzalez Contreras's] arguments are caught up in classification under INA §§ 235 and 236 and any alleged concession by DHS as to the governing statutory scheme. While §§ 235 and 236 also discuss ineligibility for bond, 8 C.F.R. § 1003.19(h)(2)(i)(B), itself provides a separate and distinct category of bond ineligibility which divests the Court of jurisdiction. *Cf. Matter of Li*, 29 I. & N. Dec. 66, fn 3 (BIA 2025)."

Finally, after acknowledging that the immigration court conducted bond hearing at the direction of the district court, the Immigration Court concluded: "This Court did not and does not view the Federal District Court's order as requiring a specific outcome or requiring that the Respondent be ordered released by this Court. This Court understood the Federal District Court order was for the Immigration Judge to hold a bond hearing under the conditions and deadlines set by the Federal District Court. This Court reviewed the case on November 25, 2025. This Court again reviewed this case in formulating a written decision. In good faith, this Court respectfully believes this decision to be the correct decision based on this Court's understanding of the facts and law of this case. In short, because the Respondent is an arriving alien, the Court simply does not believe it has

jurisdiction under the law to issue a bond. Therefore, it would be improper to do so without specific authority. ECF No. 5, Exhibit K.

To the knowledge of the undersigned, Petitioner has not appealed this denial of bond and it appears the time within which to appeal has expired. An appeal concerning the bond determination has not yet been filed nor has the deadline elapsed.

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. Petitioner is currently detained in the Sherburne County Jail, Elk River, Minnesota.

3. The Second Habeas Petiton (Civil No. 25-cv-4814).

On December 30, 2025, Petitioner filed the instant his habeas petition, ECF No. 1, and his TRO motion, ECF No. 2. Petitioner essentially asserts that the Immigration Court's decision after the custody redetermination conducted on November 25, 2025 violated the INA and the due process clause of the of 5th Amendment of the U.S. Constitution. For relief, Petitioner seeks an order requiring ICE to release him immediately or, at a minimum, an order requiring that ICE allow him to post the bond suggested by the Immigration Court as an alternative.

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. 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.[3] *See* 8 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*

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[3] 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).

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);[4] *see 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

[4] 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 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.

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 is the limitation applied by the Immigration Court.

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. At his request, and at the direction of this Court, Petitioner received a custody redetermination hearing and decision. Petitioner did not appeal this decision to the BIA. Petitioner remains properly detained pending the outcome of the BIA remand, and the ensuing asylum and removal proceedings. 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 and 8 C.F.R. § 1003.19(h)(2)(i)(B). This is the limitation applied by the Immigration Court.. 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. Specifically, to the extent that Petitioner claims that the denial of bond to him as an arriving alien violated the INA, the Court lacks subject matter jurisdiction over the TRO motion and the habeas petition because Petitioner has not exhausted her administrative remedies. The Cout should dismiss the TRO motion and the habeas petition for this reason. *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)). Here, the Petitioner was denied bond by the Immigration Court.

Petitioner did not appeal that denial to the BIA. He did not exhaust his administrative remedies with respect to any error under the INA that may have occurred with the denial of bond. Therefore, Petitioner is precluded from making any claim in this Court that the bond denial violated the INA.

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."[5] 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

[5] 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. No violation of the INA occurred.

To the extent Petitioner may claim that the denial of bond to him violated the INA, the Court should deny that claim. Petitioner did not appeal to the BIA; therefore, Petitioner has waiver any error under the INA and the Court lacks subject matter jurisdiction over any violation of the INA. As noted above, the Immigration Court properly denied Petitioner bond based on his status as an arriving alien. In neither the habeas petition nor the TRO memorandum does Petitioner specifically identify any factual or legal error with respect to the application of the arriving alien regulation to Petitioner. See 8 C.F.R. § 1003.19(h)(2)(i)(B). Petitioner does not cite any case (BIA, district court, circuit court, or otherwise) in which the arriving alien regulation was applied improperly or unconstitutionally. Petitioner makes no claim that the regulation is ultra vires or otherwise improper. Respondents are not aware of any such precedent.

The only argument Petitioner makes in this case is the one rejected by the Immigration Court. Specifically, Petitioner argues that, since the DHS had conceded that it was relying on Section 1226 for detention authority, the Immigration Court could not rely on the "arriving alien" exception to the general availability of bond under section 1226 and to do so would be inconsistent with 1226. The Immigration Court rejected that argument: "Respondent's [Gonzalez Contreras's] arguments are caught up in classification under INA §§ 235 and 236 and any alleged concession by DHS as to the governing statutory scheme. While §§ 235 and 236 also discuss ineligibility for bond, 8 C.F.R. § 1003.19(h)(2)(i)(B), itself provides a separate and distinct category of bond ineligibility

which divests the Court of jurisdiction. *Cf. Matter of Li*, 29 I. & N. Dec. 66, fn 3 (BIA 2025)."

In short, no INA violation of the INA occurred when the Immigration Judge denied bond to Petitioner.

E. 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," *Shaunessy v. Mezei*, 345 U.S. 206, 212 (1953), 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.*

In addition to the foregoing, Respondents make the following points in response to several arguments made by Petitioner. First, Petitioner asserts the arriving alien regulation should not apply to him because he was paroled into the country, the purpose of his parole has not been satisfied, and his parole was improperly revoked or cancelled without any individualized assessment of his situation. The Court should reject these arguments. The regulation itself provides that it applies to aliens paroled after arrival. 8 C.F.R §

1003.19(h)(2)(i)(B); *Matter of Oseiwusu*, 22 I&N Dec. 19 (BIA 1998). Further, INA Section 212(d)(5) states that when, "in the opinion of the Attorney General" [Secretary of Homeland Security], "the purposes of such parole have been served," an alien "shall 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 application for admission." See 8 U.S.C. § 1182(d)(5). No "individualized" assessment was required or appropriate as this was not a revocation or cancellation. Petitioner's parole period actually ended as of October 25, 2025—his parole was never cancelled. Finally, Petitioner cannot complain that the purpose of his parole has not been satisfied, because he took 6 months of his one-year parole period before he even applied for asylum. There is no evidence that Petitioner attempted to obtain an extension of his parole. Parole in and of itself did not give Petitioner an "vested" reliance interest under these circumstances. Finally, the fact that his asylum application remains pending undercuts his arguments that rely on his parole.

Second, Petitioner argues that applying the arriving alien regulation is inconsistent with the discretionary regime under section 1226. The regulation, 8 C.F.R § 1003.19(h)(2)(i)(B), was duly promulgated and has been on the books for years if not decades. 0Again, Petitioner cites no case to support this argument. But, there is nothing inconsistent here, generally or applied to Petitioner. Detention under 1226 is discretionary. The cases cited (*Khalid* and *Mayamu*) did not involve the arriving alien regulation.

Third, the *Matthews* factors do not weigh in favor of Petitioner. While detention impinges on a detainee's private interests, detention has been approved for nearly a century. There is no risk in applying 8 C.F.R § 1003.19(h)(2)(i)(B) as that regulation applies to

arriving aliens and Petitioner is indisputably an arriving alien. Petitioner does not cite and Respondents are not aware of any precedent supporting Petitioner's argument in this regard. The Government has a strong interest in applying and enforcing the immigration laws as passed by Congress, and detention of arriving aliens is an important feature of immigration law.

This Court should apply the "century-old rule" reaffirmed in *Thuraissigiam, Mezei.* and the other cases cited above and conclude that Petitioner's due process rights are coextensive with the rights provided under statute. For the reasons set forth above, Petitioner's detention pending completion of his asylum and removal proceedings is appropriate and constitutional.

F. 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. The TRO previously entered remains in effect. DHS can agree, subject to a 72-hour reservation of rights, 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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