

1 TODD BLANCHE  
 Deputy Attorney General of the United States  
 2 SIGAL CHATTAH  
 First Assistant United States Attorney  
 3 District of Nevada  
 Nevada Bar Number 8264  
 4 VIRGINIA T. TOMOVA  
 Assistant United States Attorney  
 5 Nevada Bar No. 12504  
 501 Las Vegas Blvd. So., Suite 1100  
 6 Las Vegas, Nevada 89101  
 Phone: (702) 388-6336  
 7 Fax: (702) 388-6787  
Virginia.Tomova@usdoj.gov

8 *Attorneys for the Federal Respondents*

9  
 10 **UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA**

11 Oscar GANDARA SIMENTAL,

12 Petitioner,

13 v.

14 Jason KNIGHT, Field Office Director, Salt  
 Lake City Field Office, U.S. Immigration and  
 Custom Enforcement, Enforcement and  
 15 Removal Operations Division; John  
 16 MATTOS, Warden, Nevada Southern  
 Detention Center; Kristi NOEM, Secretary,  
 United States Department of Homeland  
 17 Security; Pamela BONDI, Attorney General  
 of the United States,

18 Respondents.  
19

Case No. 2:26-cv-00205-RFB-NJK

**Federal Respondents' Response to the  
 Court's Order to Show Cause (ECF No.  
 4) Why the Court Should Not Grant  
 Petitioner's Motion for Temporary  
 Restraining Order (ECF No. 2)**

20 Federal Respondents Jason Knight, Kristi Noem, and Pamela Bondi, through  
 21 undersigned counsel, file their response to the Court's order to show cause (ECF No. 4) as  
 22 to why the Court should not grant the unsigned Motion for a Temporary Restraining Order  
 23 (ECF No. 2).

24 Petitioner's motion should be denied because he has failed to demonstrate that he is  
 25 entitled to an injunctive relief as his detention is lawful and he has failed to exhaust  
 26 administrative remedies.

27 This response is supported by the following memorandum of points and authorities.  
28

1 Respectfully submitted this 2nd day of February 2026.

2 TODD BLANCHE  
3 Deputy Attorney General of the United States  
4 SIGAL CHATTAH  
5 First Assistant United States Attorney

6 /s/ Virginia T. Tomova  
7 VIRGINIA T. TOMOVA  
8 Assistant United States Attorney

9 **Memorandum of Points and Authorities**

10 **I. INTRODUCTION**

11 As a general matter, an alien who arrives in the United States and cannot  
12 demonstrate his admissibility generally is either promptly removed or detained pending  
13 removal proceedings. See 8 U.S.C. §§ 1225(b)(1)(A), (B), and (2)(A). Here, petitioner,  
14 Oscar Gandara Simental, an illegal alien, is a citizen of Mexico, who has a long-standing  
15 history of violating the immigration laws of the United States. Petitioner was voluntarily  
16 returned to Mexico by the United States Border Patrol on May 28, 2006, until he was re-  
17 arrested again by ICE based on an administrative warrant of arrest. See I-213, attached as  
18 Exhibit A; *see also* Administrative Warrant, attached as Exhibit B.<sup>1</sup> Petitioner was  
19 transferred to ICE custody on January 13, 2026, and he is currently detained pursuant to  
20 INA § 235, because he is an applicant for admission. Petitioner falls within the definition of  
21 an applicant for admission subject to mandatory detention under 8 U.S.C. 1225(b)(2). He  
22 also has violated two times 8 U.S.C. § 1325, by illegally entering the United States twice.  
23 The penalties under § 1325 for repeated violations include a fine or imprisonment for 2  
24 years. *See* 8 U.S.C §1325. Petitioner has not requested bond hearing before an Immigration  
25 Judge for a determination on whether he is at flight risk or a danger to the community.  
26 Petitioner is currently in removal proceedings before the Executive Office of Immigration  
27 Review's Immigration Court. In the meantime, he is challenging temporary detention while  
28 the decision is made regarding his removal. In his motion, Petitioner requests that this  
Court releases him from detention while his removal proceedings are pending without

<sup>1</sup> An administrative warrant has been requested from the agency and will be provided upon receipt.

1 requiring him to exhaust his administrative remedies. Plaintiff's propositions are against  
2 Supreme Court precedent.

3 Petitioner cannot show a likelihood of success on the merits, because to grant the  
4 motion, Petitioner asks this Court to set aside a lawfully enacted regulation and statute,  
5 finding both unconstitutionally applied, as alleged violations of the Due Process Clause of  
6 the United States Constitution. But as discussed below, the Supreme Court has long  
7 recognized Congress's broad power and immunity from judicial control to expel aliens from  
8 the country and to detain them while doing so. *See e.g., Shaughnessy v. United States*, 345 U.S.  
9 206, 210 (1953); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). The United States' temporary  
10 detention of Petitioner in no way exceeds this broad authority and does not deprive  
11 Petitioner of Due Process. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during  
12 removal proceedings is a constitutionally permissible part of that process.") Petitioner falls  
13 precisely within the statutory definition of aliens subject to mandatory detention without  
14 bond found in § 1225(b)(2).

15 While Petitioner's claims are structured around allegations of unlawful detention  
16 authority, his claims attack the decisions rendered (and not yet rendered) by Immigration  
17 Judges (IJs) during immigration bond hearings. Petitioner asks this Court to review IJ  
18 decisions, which is explicitly barred by statute. Through multiple provisions of 8 U.S.C. §  
19 1252, Congress has unambiguously stripped federal courts of jurisdiction over challenges to  
20 the commencement of removal proceedings, including detention pending removal  
21 proceedings. Further, Petitioner has failed to exhaust his administrative remedies. Petitioner  
22 has not requested a bond hearing before an IJ, instead he wants this Court to release him from  
23 detention even though he is subject to mandatory detention under § 1225(b)(2) pending his  
24 removal proceedings and is violating the immigration laws of the United States. Petitioner  
25 cannot show a likelihood of success on the merits because he seeks to circumvent the  
26 detention statute under which he is rightfully detained to secure bond hearings to which he is  
27 not entitled. Petitioner cannot establish a likelihood of success on the merits and his  
28 motion should be denied.

## 1 II. STATUTORY FRAMEWORK

2 Before 1996, the federal immigration laws required the detention of aliens who  
3 presented at a port of entry but allowed aliens who were already unlawfully present in the  
4 United States to obtain release pending removal proceedings. Congress passed the Illegal  
5 Immigration Reform and Immigration Responsibility Act (“IIRIRA”) specifically to stop  
6 conferring greater privileges and benefits on aliens who enter the United States unlawfully  
7 as compared to those who present themselves for inspection at a port of entry. As relevant  
8 here, Congress enacted what is now 8 U.S.C. § 1225, which requires the detention of any  
9 alien “who is an applicant for admission” and defines that term to encompass any “alien  
10 present in the United States who has not been admitted” following inspection by  
11 immigration authorities. 8 U.S.C. § 1225(a), (b)(2)(A). The statute makes no exception for  
12 how far into the country the alien traveled or how long the alien managed to evade  
13 detection. Unless the Secretary exercises the narrow and discretionary parole authority,  
14 detention is the rule for aliens who have never been lawfully admitted.

15 There is no dispute that Petitioner is an “applicant for admission” under Section  
16 1225(a), who entered the United States without inspection, three times in violation of 8  
17 U.S.C. § 1325. Although, this Court continues to hold that illegals such as Petitioner, are  
18 not applicants for admission under § 1225, but rather should be treated under § 1226(a), and  
19 given bond hearings, because the Government has previously operated under a different  
20 understanding of the law, this Court must still apply the language of Section 1225(b)(2)(A)  
21 as written. Ultimately, based on the prior rulings from this court, the district court’s  
22 interpretation is not only contrary to text, but it would reimpose the same perverse regime  
23 that IIRIRA was meant to eliminate—requiring the detention of aliens who present at a port  
24 of entry as the law requires, but authorizing the release of those aliens who enter the United  
25 States in violation of law. The Court should not endorse such a backwards outcome—  
26 particularly one that is so plainly subversive of congressional intent. For these same reasons,  
27 Petitioner’s due process claims also fail because such is entirely derivative of the Petitioner’s  
28 mistaken interpretation of §1225. Petitioner cannot show a likelihood of success on the

1 merits and his motion should be denied.

2 **A. Detention Under 8 U.S.C. § 1225**

3 Section 1225 applies to “applicants for admission,” who are defined as “alien[s]  
4 present in the United States who [have] not been admitted” or “who arrive[] in the United  
5 States.” 8 U.S.C. § 1225(a)(1). Applicants for admission “fall into one of two categories,  
6 those covered by § 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings v. Rodriguez*, 583  
7 U.S. 281, 287 (2018). *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 218 (BIA 2025).

8 Section 1225(b)(1) applies to arriving aliens and “certain other” aliens “initially  
9 determined to be inadmissible due to fraud, misrepresentation, or lack of valid  
10 documentation.” *Jennings*, 583 U.S. at 287; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These aliens  
11 are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But  
12 if the alien “indicates an intention to apply for asylum . . . or a fear of persecution,”  
13 immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii).  
14 An alien “with a credible fear of persecution” is “detained for further consideration of the  
15 application for asylum.” *Id.* § 1225(b)(1)(B)(ii). If the alien does not indicate an intent to  
16 apply for asylum, express a fear of persecution, or is “found not to have such a fear,” they  
17 are detained until removed from the United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

18 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583  
19 U.S. at 287. It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.*  
20 Under § 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a  
21 removal proceeding “if the examining immigration officer determines that [the] alien  
22 seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §  
23 1225(b)(2)(A); *see Matter of Yajure Hurtado*, 29 I. & N. Dec. at 220 (“[A]liens who are present  
24 in the United States without admission are applicants for admission as defined under section  
25 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of  
26 their removal proceedings.”); *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) (“for aliens  
27 arriving in and seeking admission into the United States who are placed directly in full  
28 removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates

1 detention ‘until removal proceedings have concluded.’”) (citing *Jennings*, 583 U.S. at 299).  
2 However, the Department of Homeland Security (DHS) has the sole discretionary authority  
3 to temporarily release on parole “any alien applying for admission to the United States” on  
4 a “case-by-case basis for urgent humanitarian reasons or significant public benefit.” *Id.* §  
5 1182(d)(5)(A); see *Biden v. Texas*, 597 U.S. 785, 806 (2022).

#### 6 **B. Detention Under 8 U.S.C. § 1226(a)**

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

15 At a custody redetermination, the IJ may continue detention or release the alien on  
16 bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). IJs have broad  
17 discretion in deciding whether to release an alien on bond. *In Re Guerra*, 24 I. & N. Dec. 37,  
18 39–40 (BIA 2006) (listing nine factors for IJs to consider). But regardless of the factors IJs  
19 consider, an alien “who presents a danger to persons or property should not be released  
20 during the pendency of removal proceedings.” *Id.* at 38.

#### 21 **C. Review Before the Board of Immigration Appeals**

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

1 general public on the proper interpretation and administration of the [INA] and its  
2 implementing regulations.” *Id.* § 1003.1(d)(1). Decisions rendered by the BIA are final,  
3 except for those reviewed by the Attorney General. 8 C.F.R. § 1003.1(d)(7).

4 Federal regulations provide that both the noncitizen and the government have a right  
5 to appeal an IJ's decision regarding a custody status or bond redetermination to the BIA. 8  
6 C.F.R. §§ 1003.19(f), 1003.38. Petitioner has not requested a bond hearing.

### 7 **III. FACTUAL BACKGROUND**

8 Petitioner, an illegal alien, is a citizen of Mexico, who has a long-standing history of  
9 violating the immigration laws of the United States. Petitioner was voluntarily returned to  
10 Mexico by the United States Border Patrol on May 28, 2006, until he was re-arrested again  
11 for a second time by ICE based on an administrative warrant on January 13, 2026. *See*  
12 Exhibits A and B. Petitioner was issued a Notice to Appear on January 13, 2026, which  
13 commenced his removal proceedings *See* Notice to Appear, attached as Exhibit C. He also  
14 has a hearing before an IJ on February 9, 2026. *Id.* Petitioner falls within the definition of  
15 an applicant for admission subject to mandatory detention under 8 U.S.C. 1225(b)(2). He  
16 also has violated twice times 8 U.S.C. § 1325, by illegally entering the United States twice.  
17 Exhibit A. Petitioner has not requested a bond hearing.

### 18 **IV. STANDARD OF REVIEW**

19 Judicial review of immigration matters, including of detention issues, is limited.  
20 *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination*  
21 *Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo*  
22 *v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow*  
23 *Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“the power over aliens is of a political character  
24 and therefore subject only to narrow judicial review”). The Supreme Court has thus  
25 “underscore[d] the limited scope of inquiry into immigration legislation,” and “has  
26 repeatedly emphasized that over no conceivable subject is the legislative power of Congress  
27 more complete than it is over the admission of aliens.” *Fiallo*, 430 U.S. at 792 (internal  
28

1 quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S.  
2 522, 531 (1954).

3 The plenary power of Congress and the Executive Branch over immigration  
4 necessarily encompasses immigration detention, because the authority to detain is elemental  
5 to the authority to deport, and because public safety is at stake. *See Shaughnessy*, 345 U.S. at  
6 210 (“Courts have long recognized the power to expel or exclude aliens as a fundamental  
7 sovereign attribute exercised by the Government's political departments largely immune  
8 from judicial control.”); *Carlson*, 342 U.S. at 538 (“Detention is necessarily a part of this  
9 deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)  
10 (“Proceedings to exclude or expel would be vain if those accused could not be held in  
11 custody pending the inquiry into their true character, and while arrangements were being  
12 made for their deportation.”); *Demore*, 538 U.S. at 531 (“Detention during removal  
13 proceedings is a constitutionally permissible part of that process.”)

## 14 **V. ARGUMENT**

### 15 **A. Petitioner Fails to Establish Entitlement to Interim Injunctive Relief**

16 Petitioner’s motion should be denied because he has not established that he is  
17 entitled to an interim injunctive relief. Petitioner cannot establish that he is likely to  
18 succeed on the underlying merits, there is no showing of irreparable harm, and the equities  
19 do not weigh in his favor. In general, the showing required for a temporary restraining  
20 order is the same as that required for a preliminary injunction. *See Stuhlberg Int’l Sales Co. v.*  
21 *John D. Brush & Co.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a  
22 temporary restraining order, a plaintiff must “establish that he is likely to succeed on the  
23 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that  
24 the balance of equities tips in his favor, and that an injunction is in the public interest.”  
25 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Nken v. Holder*, 556 U.S. 418,  
26 426 (2009). Plaintiff must demonstrate a “substantial case for relief on the merits.” *Leiva-*  
27 *Perez v. Holder*, 640 F.3d 962, 967–68 (9th Cir. 2011). When “a plaintiff has failed to show  
28

1 the likelihood of success on the merits, we need not consider the remaining three [*Winter*  
2 factors].” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

3 The final two factors required for preliminary injunctive relief—balancing of the  
4 harm to the opposing party and the public interest—merge when the Government is the  
5 opposing party. *See Nken*, 556 U.S. at 435. The Supreme Court has specifically  
6 acknowledged that “[f]ew interests can be more compelling than a nation’s need to ensure  
7 its own security.” *Wayte v. United States*, 470 U.S. 598, 611 (1985); *see also United States v.*  
8 *Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434  
9 U.S. 1345, 1351 (1977); *Blackie’s House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220–21 (D.C.  
10 Cir. 1981); *Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (movant seeking  
11 injunctive relief “must show either (1) a probability of success on the merits and the  
12 possibility of irreparable harm, or (2) that serious legal questions are raised and the balance  
13 of hardships tips sharply in the moving party’s favor.”) (quoting *Andrieu v. Ashcroft*, 253  
14 F.3d 477, 483 (9th Cir. 2001) (9th Cir. 2001

15 ***1. No Likelihood of Success on the Merits.***

16 Likelihood of success on the merits is a threshold issue. *See Garcia*, 786 F.3d at 740.  
17 Petitioner cannot establish that he is likely to succeed on the underlying merits of his claims  
18 for alleged statutory and constitutional violations because he is subject to mandatory  
19 detention under 8 U.S.C. § 1225. When there is “an irreconcilable conflict in two legal  
20 provisions,” then “the specific governs over the general.” *Karczewski v. DCH Mission Valley*  
21 *LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). As Petitioner points out § 1226(a) applies to those  
22 arrested and detained pending a decision on removal. 8 U.S.C. § 1226(a); *see* ECF No. 2, pp.  
23 2, 6. In contrast, § 1225 is narrower. *See* 8 U.S.C. § 1225. It applies only to “applicants for  
24 admission”; that is, as relevant here, aliens present in the United States who have not be  
25 admitted. *See id.*; *see also Fla. v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023).  
26 Because Petitioner falls within that category, the specific detention authority under § 1225  
27 governs over the general authority found at § 1226(a).

28 / / /

1           *a. Petitioner is Lawfully Detained Pursuant to 8 U.S.C. § 1225(b)(2).*

2           Petitioner’s detention is lawful and statutorily authorized pursuant to 8 U.S.C. §  
3 1225(b)(2), which requires mandatory detention throughout the entire removal proceedings.  
4 Pursuant to 8 U.S.C. § 1225(b)(2)(A), “in the case of an alien who is an applicant for  
5 admission, if the examining immigration officer determines that an alien seeking admission  
6 is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a  
7 proceeding under section 1229a [removal proceedings].” 8 U.S.C. § 1225(b)(2)(A). The  
8 Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and  
9 that aliens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at  
10 287 (“Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.”).

11           Contrary to Petitioner’s arguments, he falls squarely within the ambit of Section  
12 1225(b)(2)(A)’s mandatory detention requirement as Petitioner is an “applicant for  
13 admission” to the United States. If Petitioner does not think that he is an applicant for  
14 admission, then what is his status in the United States. As described above, an “applicant  
15 for admission” is an alien present in the United States who has not been admitted. 8 U.S.C.  
16 § 1225(a)(1). Petitioner’s alien record clearly shows that he has not been admitted to the  
17 United States. Exhibit C. Furthermore, the record shows that he has entered and re-entered  
18 the United States illegally and without an inspection on two separate occasions. Petitioner  
19 has complete disregard for the immigration laws of the United States. Congress’s broad  
20 language here is unequivocally intentional—an undocumented alien is to be “deemed for  
21 purposes of this chapter an applicant for admission.” 8 U.S.C. § 1225(a)(1). Regardless of  
22 Petitioner’s characterization that “an applicant for admission” should only include aliens  
23 captured at the border or at a port of entry, he is “deemed” an applicant for admission based  
24 on Petitioner’s failure to seek lawful admission to the United States before an immigration  
25 officer, which is undisputed. And because Petitioner has not demonstrated to an examining  
26 immigration officer that Petitioner is “clearly and beyond a doubt entitled to be admitted,”  
27 Petitioner’s detention is mandatory. 8 U.S.C. § 1225(b)(2)(A). Thus, the Petitioner is  
28

1 properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that Petitioner  
2 “shall be” detained.

3 The Supreme Court has confirmed an alien present in the country but never admitted  
4 is deemed “an applicant for admission” and that “detention must continue” “until removal  
5 proceedings have concluded” based on the “plain meaning” of 8 U.S.C. § 1225. *Jennings*,  
6 583 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme  
7 Court reversed the Ninth Circuit Court of Appeal’s imposition of a six-month detention  
8 time limit into the statute. *Id.* at 297. The Court clarified there is no such limitation in the  
9 statute and reversed on these grounds, remanding the constitutional Due Process claims for  
10 initial consideration before the lower court. *Id.* But under the words of the statute, as  
11 explained by the Supreme Court, 8 U.S.C. § 1225 includes aliens like the Petitioner who are  
12 present but have not been admitted and they shall be detained pending their removal  
13 proceedings. Specifically, the Supreme Court declared, “an alien who ‘arrives in the United  
14 States,’ or ‘is present’ in this country but ‘has not been admitted,’ is treated as ‘an applicant  
15 for admission.’” *Id.* at 287 (emphasis on “or” added). In doing so, the Court explained both  
16 aliens captured at the border and those illegally residing within the United States would fall  
17 under § 1225. This would include Petitioner as an alien who is present in the country  
18 without being admitted.

19 And now, the Board of Immigration Appeals (BIA) has confirmed the application of  
20 § 1225 in a published formal decision: “Based on the plain language of section 235(b)(2)(A)  
21 of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration  
22 Judges lack authority to hear bond requests or to grant bond to aliens who are present in the  
23 United States without admission.” *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216. Indeed,  
24 §1225 applies to aliens who are present in the country *even for years* and who have not been  
25 admitted. *See Matter of Yajure Hurtado*, 29 I. & N. Dec. at 226 (“the statutory text of the INA  
26 . . . is instead clear and explicit in requiring mandatory detention of all aliens who are  
27 applicants for admission, without regard to how many years the alien has been residing in  
28 the United States without lawful status.” (citing 8 U.S.C. §1225)). The BIA found § 1225

1 clear and unambiguous as explained above. Thus, because the alien was present in the  
2 United States (regardless of how long) and because he was never admitted, he shall be  
3 detained during his removal proceedings. *See id.* at 228. In doing so, the BIA rejected the  
4 same arguments raised by Petitioner and by other similar petitioners in this District. For  
5 example, the BIA rejected the “legal conundrum” postulated by the alien that while he may  
6 be an applicant for admission under the statute, he is somehow not actually “seeking  
7 admission.” *Id.* at 221. The BIA explained that such a leap failed to make sense and violated  
8 the plain meaning of the statute. *See id.* Next, the BIA rejected the alien’s argument that the  
9 mandatory detention scheme under § 1225 rendered the recent amendment to § 1226 under  
10 the Laken Riley Act superfluous. *Id.* The BIA explained, “nothing in the statutory text of  
11 section 236(c), including the text of the amendments made by the Laken Riley Act, purports  
12 to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. §  
13 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute ‘shall be  
14 detained for [removal proceedings].’” *Id.* at 222. The BIA explained further that any  
15 redundancy between the two statutes does not give license to “rewrite or eviscerate” one of  
16 the statutes. *See id.* (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). Also, the BIA  
17 reasoned that it matters not that the alien was initially served with a warrant listing 8 U.S.C.  
18 § 1226 and informing him of his ability to seek bond—an Immigration Court cannot bestow  
19 jurisdiction upon itself with that initial paperwork when said jurisdiction has been  
20 specifically revoked by Congress in § 1225. *See id.* at 226-27 (explaining “the mere issuance  
21 of an arrest warrant does not endow an Immigration Judge with authority to set bond for an  
22 alien who falls under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).”) The BIA  
23 further pointed out, “Our acknowledgement that aliens detained under section 236(a) may  
24 be eligible for discretionary release on bond does not mean that *all* aliens detained while in  
25 the United States with a warrant of arrest are detained under section 236(a) and entitled to a  
26 bond hearing before the Immigration Judge, regardless of whether they are applicants for  
27 admission under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).” *Id.* at 227  
28 (quotations omitted). Thus, the BIA rejected this and every argument raised by the alien to

1 find § 1225 applied to him despite residing in the country for years. *Id.* The BIA mandate is  
2 also sweeping. The *Hurtado* decision was unanimous, conducted by a three-appellate judge  
3 panel. *See id. generally.* It is binding on all immigration judges in the United States. 8 C.F.R.  
4 § 1003.1(g)(1) (“[D]ecisions of the Board and decisions of the Attorney General are binding  
5 on all officers and employees of DHS or immigration judges in the administration of the  
6 immigration laws of the United States.”). And because the decision was published, a  
7 majority of the entire Board must have voted to publish it, which establishes the decision “to  
8 serve as precedent[] in all proceedings involving the same issue or issues.” *See* 8 C.F.R. §  
9 1003.1(g)(2)-(3). Indeed, this is the law of the land in immigration court today. *See also* 8  
10 C.F.R. § 1003.1(d)(1) (explaining “the Board, through precedent decisions, shall provide  
11 clear and uniform guidance to DHS, the immigration judges, and the general public on the  
12 proper interpretation and administration of the Act and its implementing regulations.”).  
13 And in the Board’s own words, *Hurtado* is a “precedential opinion.” *Id.* at 216.

14 Here, the Petitioner has not requested a bond hearing before an IJ, thus he has not  
15 exhausted his administrative remedies. Pursuant to the statutory and Supreme Court case  
16 law, Petitioner’s temporary detention is lawful while his removal proceedings are pending.  
17 Any argument by Petitioner that his detention exceeds statutory authority is clearly invalid  
18 and should be rejected. The United States respectfully maintains §1225 straightforwardly  
19 applies to Petitioner, especially in light of *Jennings*, 583 U.S. at 287 (explaining “an alien  
20 who “arrives in the United States,” or “is present” in this country but “has not been  
21 admitted,” is treated as “an applicant for admission.” § 1225(a)(1)). Petitioner is properly  
22 detained under § 1225 and cannot show an entitlement to relief and/or likelihood of success  
23 on the merits.

## 24 **2. Irreparable Harm Has Not Been Shown.**

25 To prevail on their request for interim injunctive relief, Petitioner must demonstrate  
26 “immediate threatened injury.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th  
27 Cir. 1988) (citing *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197,  
28 1201 (9th Cir. 1980)). Merely showing a “possibility” of irreparable harm is insufficient. *See*

1 *Winter*, 555 U.S. at 22. And as discussed above, detention alone is not an irreparable injury.  
2 See *Reyes v. Wolf*, No. C20-0377JLR, 2021 WL 662659, at \*3 (W.D. Wash. Feb. 19, 2021),  
3 *aff'd sub nom. Diaz Reyes v. Mayorkas*, No. 21-35142, 2021 WL 3082403 (9th Cir. July 21,  
4 2021) (“[C]ivil detention after the denial of a bond hearing [does not] constitute[] irreparable  
5 harm such that prudential exhaustion should be waived.”). Further, “[i]ssuing a preliminary  
6 injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme  
7 Court’s] characterization of injunctive relief as an extraordinary remedy that may only be  
8 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at  
9 22. Here, as explained above, because Petitioners’ alleged harm “is essentially inherent in  
10 detention, the Court cannot weigh this strongly in favor of” Petitioners. *Lopez Reyes v.*  
11 *Bonnar*, No 18-cv-07429-SK, 2018 WL 7474861 at \*10 (N.D. Cal. Dec. 24, 2018).

### 12 3. Balance of Equities Does Not Tip in Petitioner’s Favor.

13 It is well settled that the public interest in enforcement of the United States’  
14 immigration laws is significant. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 551-58  
15 (1976); *Blackie’s House of Beef, Inc.*, 659 F.2d at 1221 (“The Supreme Court has recognized  
16 that the public interest in enforcement of the immigration laws is significant.”) (citing cases);  
17 see also *Nken*, 556 U.S. at 435 (“There is always a public interest in prompt execution of  
18 removal orders: The continued presence of an alien lawfully deemed removable undermines  
19 the streamlined removal proceedings IIRIRA established and permits and prolongs a  
20 continuing violation of United States law.”) (internal quotation omitted). The BIA also has  
21 an “institutional interest” to protect its “administrative agency authority.” See *McCarthy v.*  
22 *Madigan*, 503 U.S. 140, 145, 146 (1992) *superseded by statute as recognized in Porter v. Nussle*,  
23 534 U.S. 516 (2002). “Exhaustion is generally required as a matter of preventing premature  
24 interference with agency processes, so that the agency may function efficiently and so that it  
25 may have an opportunity to correct its own errors, to afford the parties and the courts the  
26 benefit of its experience and expertise, and to compile a record which is adequate for  
27 judicial review.” *Glob. Rescue Jets, LLC v. Kaiser Found. Health Plan, Inc.*, 30 F.4th 905, 913  
28 (9th Cir. 2022) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Indeed, “agencies, not

1 the courts, ought to have primary responsibility for the programs that Congress has charged  
2 them to administer.” *McCarthy*, 503 U.S. at 145. Moreover, “[u]ltimately the balance of the  
3 relative equities ‘may depend to a large extent upon the determination of the [movant’s]  
4 prospects of success.’” *Tiznado-Reyna v. Kane*, Case No. CV 12-1159-PHX-SRB (SPL), 2012  
5 WL 12882387, at \* 4 (D. Ariz. Dec. 13, 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770,  
6 778 (1987)). Here, as explained above, Petitioner cannot succeed on the merits of his claims.  
7 The balancing of equities and the public interest weigh heavily against granting Petitioner’s  
8 equitable relief.

9 ***a. Petitioner Has Failed to Exhaust Administrative Remedies***

10 Similarly, requiring exhaustion here would be consistent with Congressional intent  
11 to have claims, such as Petitioner’s, subject to the channeling provisions of § 1252(b)(9) that  
12 provide for appeal to the BIA and then, if unsuccessful, the Ninth Circuit. “Exhaustion can  
13 be either statutorily or judicially required.” *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541  
14 (9th Cir. 2004). “If exhaustion is statutory, it may be a mandatory requirement that is  
15 jurisdictional.” *Id.* (citing *El Rescate Legal Servs., Inc. v. Exec. Off. of Immigr. Rev.*, 959 F.2d  
16 742, 747 (9th Cir. 1991)). “If, however, exhaustion is a prudential requirement, a court has  
17 discretion to waive the requirement.” *Id.* (citing *Stratman v. Watt*, 656 F.2d 1321, 1325–26  
18 (9th Cir. 1981)). Here, Petitioner has not requested a bond hearing, but filed his motion for  
19 TRO before the Court, attempting to bypass the administrative scheme which is contrary to  
20 Congressional intent.

21 “District Courts are authorized by 28 U.S.C § 2241 to consider petitions for habeas  
22 corpus.” *Castro–Cortez v. I.N.S.*, 239 F.3d 1037, 1047 (9th Cir. 2001). “That section does not  
23 specifically require petitioners to exhaust direct appeals before filing petitions for habeas  
24 corpus.” *Id.* That said, the Ninth Circuit “require[s], as a prudential matter, that habeas  
25 petitioners exhaust available judicial and administrative remedies before seeking relief under  
26 § 2241.” *Id.* Specifically, “courts may require prudential exhaustion if (1) agency expertise  
27 makes agency consideration necessary to generate a proper record and reach a proper  
28 decision; (2) relaxation of the requirement would encourage the deliberate bypass of the

1 administrative scheme; and (3) administrative review is likely to allow the agency to correct  
2 its own mistakes and to preclude the need for judicial review.” *Puga v. Chertoff*, 488 F.3d  
3 812, 815 (9th Cir. 2007) (internal quotation marks omitted).

4 “When a petitioner does not exhaust administrative remedies, a district court  
5 ordinarily should either dismiss the petition without prejudice or stay the proceedings until  
6 the petitioner has exhausted remedies, unless exhaustion is excused.” *Leonardo v. Crawford*,  
7 646 F.3d 1157, 1160 (9th Cir. 2011); *see also Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th  
8 Cir. 2014) (issue exhaustion is a jurisdictional requirement); *Tijani v. Holder*, 628 F.3d 1071,  
9 1080 (9th Cir. 2010) (no jurisdiction to review legal claims not presented in the petitioner’s  
10 administrative proceedings before the BIA). Moreover, a “petitioner cannot obtain review of  
11 procedural errors in the administrative process that were not raised before the agency merely  
12 by alleging that every such error violates due process.” *Vargas v. INS*, 831 F.2d 906, 908 (9th  
13 Cir. 1987); *see also Sola v. Holder*, 720 F.3d 1134, 1135–36 (9th Cir. 2013) (declining to  
14 address a due process argument that was not raised below because it could have been  
15 addressed by the agency).

16 Here, exhaustion is warranted because agency expertise is required. First, an IJ has  
17 to determine if this Petitioner can be released on a bond after he or she has conducted  
18 analysis as to whether this Petitioner is at flight risk and/or a danger to the community, that  
19 has not happened. Instead, Petitioner wants to be released while completely circumventing  
20 the administrative process and immigration laws. “[T]he BIA is the subject-matter expert in  
21 immigration bond decisions.” *Aden v. Nielsen*, No. C18-1441RSL, 2019 WL 5802013, at \*2  
22 (W.D. Wash. Nov. 7, 2019). The BIA is well-positioned to assess how agency practice  
23 affects the interplay between 8 U.S.C. §§ 1225 and 1226. *See Delgado v. Sessions*, No. C17-  
24 1031-RSL-JPD, 2017 WL 4776340, at \*2 (W.D. Wash. Sept. 15, 2017) (noting a denial of  
25 bond to an immigration detainee was “a question well suited for agency expertise”); *Matter*  
26 *of M-S-*, 27 I. & N. Dec. 509, 515–18 (2019) (addressing interplay of §§ 1225(b)(1) and 1226).  
27 *But see Vasquez-Rodriguez v. Garland*, 7 F.4th 888, 896–97 (9th Cir. 2021); *Garcia v. Noem*, 803  
28 F. Supp. 3d 1064, 1073–1074 (S.D. Cal. 2025).

1 Waiving exhaustion would also “encourage other detainees to bypass the BIA and  
2 directly appeal their no-bond determinations from the IJ to federal district court.” *Aden*,  
3 2019 WL 5802013, at \*2. Individuals, like Petitioner, would have little incentive to seek  
4 relief before the BIA if this Court permits review here. And allowing a skip-the-BIA-and-go-  
5 straight-to-federal-court strategy would needlessly increase the burden on district courts. *See*  
6 *Bd. of Tr. of Constr. Laborers’ Pension Trust for S. Calif. v. M.M. Sundt Constr. Co.*, 37 F.3d 1419,  
7 1420 (9th Cir. 1994) (“Judicial economy is an important purpose of exhaustion  
8 requirements.”); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023) (noting  
9 “exhaustion promotes efficiency”). If the IJs erred as Petitioner alleges or may eventually  
10 allege, this Court should allow the administrative process to correct itself. *See id.*

11 Moreover, detention alone is not an irreparable injury. Discretion to waive  
12 exhaustion “is not unfettered.” *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004).  
13 Petitioners bear the burden to show that an exception to the exhaustion requirement applies.  
14 *Leonardo*, 646 F.3d at 1161; *Aden*, 2019 WL 5802013, at \*3. “[C]ivil detention after the  
15 denial of a bond hearing [does not] constitute[] irreparable harm such that prudential  
16 exhaustion should be waived.” *Reyes*, 2021 WL 662659, at \*3.

17 Because Petitioner has not exhausted his administrative remedies, this matter should  
18 be dismissed or stayed.

19 ***b. Request for EAJA Fees Should be Denied.***

20 Petitioner seeks attorney’s fees and costs pursuant to § 2412 of the Equal Access for  
21 Justice Act (“EAJA”), which allows fee-shifting in civil actions by or against the United  
22 States. EAJA has two parts, agency adversarial adjudication fee-shifting, 5 U.S.C. § 504,  
23 and fee-shifting in civil actions in federal court, 28 U.S.C. § 2412. Petitioner cannot obtain  
24 fees in this case under 5 U.S.C. § 504 since that provision excludes administrative  
25 immigration proceedings. *Ardestani v. I.N.S.*, 502 U.S. 129 (1991). His only recourse for fees  
26 is pursuant to § 2412(d)(1)(A), which provides, subject to exceptions not relevant here, that  
27 in an action brought by or against the United States, a court must award fees and expenses  
28 to a prevailing non-government party “unless the court finds that the position of the United

1 States was substantially justified or that special circumstances make an award unjust.” 28  
2 U.S.C. § 2412(d)(1)(A).

3 Here, Petitioner’s request is premature because he is not a prevailing party. Second,  
4 even if Petitioner were to prevail in this case, the Federal Respondents’ position asserted in  
5 this Response is substantially justified because other courts have found the arguments  
6 presented herein to be persuasive and that DHS can lawfully detain, under the mandatory  
7 detention provisions of 8 U.S.C. § 1225, other petitioners who are similarly situated to this  
8 Petitioner.

9 As described above, the United States District Court for the District of Nebraska  
10 and the United States District Court for the Southern District of California have both  
11 issued decisions holding that, under the plain language of § 1225(a)(1), aliens present in the  
12 United States who have not been admitted are “applicants for admission” and are thus  
13 subject to the mandatory detention provisions of “applicants for admission” under §  
14 1225(b)(2). *See Vargas Lopez v. Trump*, 802 F. Supp. 3d 1132 (D. Neb. 2025); *Chavez v. Noem*,  
15 801 F. Supp. 3d 1133 (S.D. Cal. 2025). Because other federal judges have found persuasive  
16 the positions advanced by the Federal Respondents in this case, the Federal Respondents’  
17 position is substantially justified. *See Medina Tovar v. Zuchowski*, 41 F.4th 1085, 1091 (9th  
18 Cir. 2022) (finding that the district court did not abuse its discretion, in finding that the  
19 United States’ position was substantially justified for purposes of EAJA, where different  
20 judges disagreed about the proper reading of the statute and the case involved an issue of  
21 first impression). Because the United States’ position in this case is substantially justified,  
22 Petitioner’s request for attorney’s fees under EAJA cannot prevail.

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1 **VI. CONCLUSION**

2 For the foregoing reasons, Federal Respondents respectfully request that the Court  
3 deny the Petitioner's Motion for Preliminary Injunction.

4 Respectfully submitted this 2nd day of February 2026.

5 TODD BLANCHE  
6 Deputy Attorney General of the United States  
7 SIGAL CHATTAH  
8 First Assistant United States Attorney

9 /s/ Virginia T. Tomova  
10 VIRGINIA T. TOMOVA  
11 Assistant United States Attorney  
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