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[redacted]

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

DONALDO ANTONIO GUTIERREZ-PANIAGUA,

Petitioner,

v.

MARKWAYNE MULLIN, Secretary of the Department of Homeland Security, TODD BLANCHE, Acting Attorney General, TODD M. LYONS, Acting Director, Immigration and Customs Enforcement, JESUS ROCHA, Acting Field Office Director, San Diego Field Office, CHRISTOPHER LAROSE, Warden at Otay Mesa Detention Center,

Respondents.

CIVIL CASE NO.: 26-cv-2512-GPC-JLB

**Traverse in Support of Second Amended Petition for a Writ of Habeas Corpus**

## INTRODUCTION

In his second amended habeas petition, Mr. Gutierrez-Paniagua argued that his re-detention violated the Due Process Clause and the Administrative Procedures Act because he was not provided proper notice of the reasons for re-detaining him or given an opportunity to respond. Respondents make two arguments in response.

First, Respondents claim Mr. Gutierrez-Paniagua is subject to mandatory detention under 8 U.S.C. § 1226(c). This is not correct. Mr. Gutierrez-Paniagua has no criminal convictions, and all charges he was previously arrested for have been dismissed.

Second, Respondents argue that Mr. Gutierrez-Paniagua should have administratively exhausted the question of whether he is subject to mandatory detention. But none of the *Puga* factors weigh in favor of requiring prudential exhaustion here, and the irreparable harm Mr. Gutierrez-Paniagua has suffered and will continue to suffer strongly *supports* waiver of exhaustion. And because Respondents have waived any argument on the merits, this Court should grant the petition and order his immediate release.

## ARGUMENT

### I. Mr. Gutierrez-Paniagua is not subject to mandatory detention under either 8 U.S.C. § 1226(c) or § 1226(c)(1)(E).

To understand this case, a brief review of the procedural history is warranted. On November 21, 2025, Mr. Gutierrez-Paniagua, represented by former counsel, submitted a habeas petition arguing that because his detention was governed by 8 U.S.C. § 1226(a), rather than 8 U.S.C. § 1225(b)(2)(A), the BIA's decision in *Matter of Yahure Hurtado*, 29 I&N Dec. 216 (BIA 2025), did not apply. ECF 1, No. 25-cv-3250-GPC-AHG. The government responded by arguing that Mr. Gutierrez-Paniagua *was* detained under § 1225(b), and therefore the petition should be dismissed. ECF 5, No. 25-cv-3250-GPC-AHG. But Mr. Gutierrez-Paniagua was apprehended upon arrival, ECF 21-1 at ¶ 4, and therefore not subject to detention under § 1226(a). He was detained for less than a week and then released. *Id.* Only after nearly three years of release, after obtaining a work permit and other documents, was he arrested in Miami; he has been detained since with no process. *See id.* at ¶¶ 7, 11.

Based on incorrect arguments by both his former counsel and the

government, this Court granted the prior habeas petition and ordered a bond hearing. ECF 7, 25-cv-3250-GPC-AHG. Bond was then denied because of an erroneous determination by an immigration judge that Mr. Gutierrez-Paniagua is subject to mandatory detention under § 1226(c). ECF 9, 25-cv-3250-GPC-AHG.

Mr. Gutierrez-Paniagua then filed a new petition, and this Court appointed Federal Defenders. Federal Defenders amended the petition, raising APA and Due Process Claims based on parole revocation. ECF 21. The government now raises the argument about § 1226(c) for the first time for this Court in its return. *See* ECF 23. The government's response does not at all address the merits of the amended petition's claims. Instead, the government (1) alleges Mr. Gutierrez-Paniagua is now mandatorily detained under § 1226(c) and (2) asserts that Mr. Gutierrez-Paniagua has failed to exhaust his administrative remedies. Neither of these points support denying the amended petition.

**A. Because the State of Florida declined to prosecute Mr. Gutierrez-Paniagua, he cannot be held under § 1226(c)(1)(E).**

Respondents argue that Mr. Gutierrez-Paniagua should be subject to mandatory detention under 8 U.S.C. § 1226(c). There are several subsections of § 1226(c), the majority of which require a criminal conviction for mandatory detention. *See* 8 U.S.C. § 1226(c)(1)(A)–(D). Mr. Gutierrez-Paniagua cannot be subject to mandatory detention under any of these subsections because he does not have any criminal convictions.

The final subsection, § 1226(c)(1)(E), also known as the Laken Riley Act, is the only remaining subsection under which Respondents could be arguing mandatory detention. But, again, Mr. Gutierrez-Paniagua cannot be subject to mandatory detention pursuant to § 1226(c)(1)(E), either.

This section requires detention of a noncitizen who "is charged with [or] is arrested for . . . burglary [or] theft . . . ." 8 U.S.C. § 1226(c)(1)(E). "[C]ourts have construed the Laken Riley Act to apply only where an individual is *currently*

charged with or arrested for the enumerated crimes, and concluding mandatory detention is not required when charges are never filed . . . ." *Id.*; *see also Helbrum v. Williams Olson*, No. 25-cv-349-SHL-SBJ, 2025 WL 2840273, at *7 (S.D. Iowa Sep. 30, 2025) ("What Congress did not do is make detention mandatory for anyone who '*was* charged with' one of those offenses (past tense) but had the charges dismissed without a conviction or some other admission of guilt."). "[R]equiring mandatory detention because of a mere arrest for which prosecutors concluded they did not have sufficient evidence to charge Petitioner with a crime[] raises serious due process concerns." *Singh v. Chestnut*, 26-cv-546-DJC-AC, 2026 WL 266021, at *2 (E.D. Cal. Feb. 2, 2026).

The charges leading to Mr. Gutierrez-Paniagua's arrest in May 2025 under case number [redacted] are no longer pending because the Miami-Dade State Attorney's Office dismissed the case. *See* Case Information, Exhibit A. The disposition of all three charges is listed as "no action," which means the State Attorney's Office declined to prosecute the case. *See* Domestic Assistance Response Team Brochure, MIAMI-DADE STATE ATTORNEY'S OFFICE at https://miamisao.com/wp-content/uploads/2020/10/dart-brochure.pdf (defining the term no-action). Instead of providing this information to this Court, Respondents attached to their return an outdated DHS report. *See* ECF 23-1, Exhibit B. "Where, as here, criminal charges were never brought, the Laken Riley Act no longer applies." *Flores Martines v. Mattos*, 26-cv-606-ART-MDC, 2026 WL 1362529, at *6 (D. N.V. May 15, 2026). Mr. Gutierrez-Paniagua therefore cannot be subject to detention under 8 U.S.C. § 1226(c)(1)(E).

And because mandatory detention under any subsection of § 1226(c) is improper in this case, the government has violated the APA and due process by keeping Mr. Gutierrez-Paniagua detained contrary to his previous determination of release. In the prior habeas petition, Mr. Gutierrez-Paniagua's attorney did not raise this appropriate argument. By November 2025, when the prior petition was filed,

these parole arguments were routinely and successfully made in habeas petitions across district courts—including this District. *See, e.g., Ortiz Reyes v. La Rose*, No.: 25-cv-2938 JLS-VET, 2025 WL 3171743 (S.D. Cal. Nov. 13, 2025); *Espinoza v. Kaiser*, No. 25-cv-1101 JLT-SKO, 2025 WL 2675785, at *10–12 (E.D. Cal. Sept. 18, 2025) (same); *Alegria Palma*, No. 25-cv-1942 BJC (MMP), ECF No. 14, at *6 (S.D. Cal. Aug. 11, 2025) (same); *Valdez v. Joyce*, No. 25 Civ. 4627 (GBD), 2025 WL 1707737, at *4–5 (S.D.N.Y. June 18, 2025) (granting habeas petition on due process grounds when petitioner was released on his own recognizance and re-detained without notice, a hearing, or evidence of changed circumstances); *Gonzalez v. Bostock*, No. 25-cv-1404-JNW-GJL, 2025 WL 2841574, at *7–9 (W.D. Wash. Oct. 7, 2025) (same); *Y.M.M. v. Wamsley*, No. 25-cv-2075, 2025 WL 3101782, at *2–3 (W.D. Wash. Nov. 6, 2025) (same). A simple search on Westlaw would have laid out the obvious argument to make on Mr. Gutierrez-Paniagua's behalf.

Respondents claim that Mr. Gutierrez-Paniagua "seeks a second bite of the habeas apple." ECF 23 at 2. This statement overlooks the government's own part in mischaracterizing his first habeas petition and failing to provide any information regarding the non-prosecution of his case in Florida. Had the government done any research into his prior arrest or identified Mr. Gutierrez-Paniagua's first petition for what it was, Mr. Gutierrez-Paniagua would not have had to file a second petition, and he could have been granted the appropriate remedy of release months ago.

**B. This Court should not require prudential exhaustion.**

Second, Mr. Gutierrez-Paniagua should not be required to prudentially exhaust his claims here. The government spends the bulk of its reply addressing why this Court should dismiss because Mr. Gutierrez-Paniagua has not exhausted administrative remedies, but "[a]n exception to the exhaustion requirement has been carved for constitutional challenges to . . . [DHS] procedures." *Sola v. Holder*, 720 F.3d 1134, 1135 (9th Cir. 2013) (per curiam) (quoting *Rashtabadi v. INS*, 23

F.3d 1562, 1567 (9th Cir. 1994)). The government's argument completely ignores the actual issue in Mr. Gutierrez-Paniagua's amended petition: that he should be released because of his parole-based claims. To this day, the government has not identified any justification for his continued re-detention or demonstration of the processes it was required to follow.

Courts generally begin their prudential exhaustion analysis as to any agency determination by looking to the *Puga* factors: "1) whether agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; 2) whether relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and 3) whether administrative review is likely to allow the agency to correct its own mistakes and preclude the need for judicial review." *Miri*, 2026 WL 622302 at *10 (citing *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)). "Nonetheless, even if the three *Puga* factors weigh in favor of prudential exhaustion, a court may waive the prudential exhaustion requirement if 'administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017) (quoting *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004)).

None of the three *Puga* factors favor exhaustion in Mr. Gutierrez-Paniagua's case. First, agency expertise is not necessary to come to the proper decision. "[A]n administrative appellate record is not necessary to resolve [] purely legal questions . . . ." *Hernandez*, 872 F.3d at 989. Here, the two questions are (1) whether Mr. Gutierrez-Paniagua is subject to detention under § 1226(c) and (2) whether Mr. Gutierrez-Paniagua's detention violated the APA and due process. No agency expertise is necessary for the first question because Mr. Gutierrez-Paniagua is not legally subject to mandatory detention under § 1226(c). And no agency expertise is necessary for the second question because the BIA has no authority to decide APA and due process questions. Accordingly, the first factor weighs in Mr. Gutierrez-

Paniagua's favor.

The second factor is neutral. Waiver of exhaustion will neither encourage nor discourage deliberate bypass. Mr. Gutierrez-Paniagua's position is unique, but it is also, in part, caused by the failure of the government to provide correct information related to his prior arrest.

The third factor does not favor exhaustion. "[W]here the agency's position on the question at issue appears already set, and it is 'very likely' what the result of the recourse to administrative remedies would be, such recourse would be futile and is not required." *Hernandez v. Sessions*, 872 F. 3d at 989 (internal citations omitted). Here, the government has re-urged the incorrect determination made by the immigration judge. As courts in this district have observed, "the BIA appears to have largely ceased functioning as a meaningful check on lower-level agency errors, instead upholding 97% of all immigration appeals in 2025, including bond determinations, a rate exceeding the 16-year historical average by at least 30 percentage points." *Tiboko-Tifuh v. Noem*, No. , 2026 WL 1603795, at *3 (S.D. Cal. June 4, 2026) (citing *Perez Velasquez v. Bondi*, No. 26-CV-01759-GPC-DDL, 2026 WL 1042479, *3 n. 2 (S.D. Cal. Apr. 16, 2026). Even if "administrative review is likely to allow the agency to correct its own mistakes," such review would *also* have to "preclude the need for judicial review." *Hernandez*, 872 F. 3d at 988. A correction of this mistake regarding Mr. Gutierrez-Paniagua's mandatory detention still would not correct the underlying issue that he has been re-detained in violation of his previous parole.

Even if all of the *Puga* factors did favor exhaustion, the futility of an appeal to the BIA and Mr. Gutierrez-Paniagua's irreparable injury support waiver of exhaustion. The Ninth Circuit has recognized "the irreparable harms imposed on anyone subject to immigration detention." *Hernandez*, 872 F.3d at 995." Courts have also "found that continued detention after a potentially legally inadequate hearing may constitute such irreparable harm." *Perez Velasquez*, 2026 WL

1042479 at *4 (collecting cases). For these reasons, "district courts in this circuit have routinely waived prudential exhaustion requirements for noncitizens . . . facing prolonged detention while awaiting administrative appeals." *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1253–54 (W.D. Wash. 2025) (collecting cases).

Finally, an appeal to the BIA can take a long time, and "[e]xhaustion is [] excused when delay means hardship." *Lopez-Campos v. Raycraft*, 797 F. Supp 3d 771, 779 (E.D. Mich. 2025). "According to data released by the Executive Office for Immigration Review, the average processing time for bond appeals exceeded 200 days in 2024." *Gomes*, 804 F. Supp. 3d at 273 (citing *Rodriguez*, 779 F. Supp. 3d at 1248–49). And that is the case even when the BIA is fully staffed. At present, the BIA has been reduced from 28 members to 15. Current reporting provides "evidence that BIA has been drastically reshaped within the past year, such that the BIA now functions to rubberstamp IJ bond denials." *Perez Velasquez*, 2026 WL 1042479 at *3. As NPR reported in late March 2026, BIA decisions "backed Department of Homeland Security lawyers in 97% of publicly posted cases; that's at least 30 percentage points higher than the average from the last 16 years." Ximena Vustillo & Rahul Mukherjee, *An immigration court few have heard of is quietly shaping policy behind the scenes*, NPR (Mar. 20, 2026).[1]

The arguments in Mr. Gutierrez-Paniagua's petition are best suited to be decided by this Court. Prudential exhaustion should not be required, especially when Mr. Gutierrez-Paniagua was initially detained based on charges that were dropped and where APA and due process violations have kept him detained for over a year.

[1] Available at https://www.npr.org/2026/03/20/nx-s1-5707535/trump-immigration-detention-appeals-board-deportation.

## II. Because Respondents have waived any argument on the merits, this Court should grant Mr. Gutierrez-Paniagua's immediate release on the regulatory and Due Process violations.

In his amended petition, Mr. Gutierrez-Paniagua argued his re-detention violated the Due Process Clause and the APA. He was not provided "proper notice, reasoning, and a pre-deprivation hearing" in violation of his established due process rights. *Salazar v. Casey*, No. 25-CV-2784 JLS-VET, 2025 WL 3063629 at *5 (S.D. Cal. Nov. 3, 2025). Respondents did not formally revoke Mr. Gutierrez-Paniagua's release, but even if they had, they ran afoul of the APA by violating their own previously-made parole decision. A person shall only be "returned to the custody from which he was paroled" when "the purposes of such parole . . . have been served." 8 U.S.C. § 1182(d)(5)(A). "Under the statute and the regulations, the agency may only revoke parole and re-detain a noncitizen when the parole's purpose is served, or no humanitarian reasons warrant it *and* the noncitizen receives written notice." ECF 21 at 5.

Respondents have failed to address or rebut any of these arguments on the merits. Accordingly, Respondents have waived, or at least forfeited, their opportunity to contest the regulatory and Due Process violations or argue against immediate release. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012) (determining that the government concedes an argument that "was available at the time it filed its answering brief") (citing *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011)).

## CONCLUSION

Because Mr. Gutierrez-Paniagua is *not* subject to mandatory detention under 8 U.S.C. § 1226(c), because he is not required to administratively exhaust this argument, and because Respondents violated the APA and due process when they continued to keep him detained without notice or a hearing, this Court should grant the petition and order Mr. Gutierrez-Paniagua's immediate release.

Respectfully submitted,

Dated: June 12, 2026

*s/ Hannah Basalone*

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