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

20 D.E.M.,

21
22 Petitioner,

23 vs.

24 CHRISTOPHER J. LAROSE, Warden,
25 Otay Mesa Detention Center;
26 GREGORY J. ARCHAMBEAULT, San
27 Diego Field Office Director; TODD M.
28 LYONS, Acting Director of U.S.
Immigration and Customs Enforcement;
KRISTI NOEM, Secretary of the U.S.
Department of Homeland Security,

Respondents.

Case No. '25CV2521 CAB AHG

**COMPLAINT AND VERIFIED
PETITION FOR WRIT OF
HABEAS CORPUS PURSUANT TO
28 U.S.C. § 2241**

INTRODUCTION

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2 1. Petitioner D.E.M. ("Mr. M") is a 44-year-old father of two Special Immigrant
3 Juveniles young adults and one United States citizen infant son who is being unlawfully
4 detained by Immigration and Customs Enforcement ("ICE") at the Otay Mesa Detention
5 Center ("OMDC"), despite being granted bond by an Immigration Judge on August 8,
6 2025.

7 2. Respondents have refused to release Mr. M because they contend that (1) his
8 detention is lawful under 8 C.F.R. § 1003.19(i)(2), which stays release on bond where
9 Respondents have appealed the bond grant, and (2) his detention is pursuant to 1225, not
10 1226. 9/24/2025 Declaration of Nicholas C. Borkowski ("Borkowski Decl.") Exs. 7 &
11 10. However, neither of these reasons warrant Mr. M's continued detention. As for the
12 first reason, courts have found that automatic-stay provision of 8 C.F.R. § 1003.19(i)(2)
13 violates the Fifth Amendment because it flips the presumption of liberty and deprives
14 noncitizens of an individualized review of their custody determination. *See, e.g., Anicasio*
15 *v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025). As for the second reason, DHS's
16 policy of claiming noncitizens apprehended in the interior are subject to § 1225 mandatory
17 detention, *see* Borkowski Decl. Ex. 1, contradicts the clear statutory language of the
18 Immigration and Nationality Act. Respondents' continued detention violates Mr. M's
19 constitutional and statutory rights. For the reasons argued below, this Court should grant
20 Mr. M's writ and release him on the same conditions granted by the IJ.

21 3. Petitioner seeks his immediate release under appropriate conditions from his
22 unlawful incarceration in ICE custody.

23 4. Mr. M is a 44-year-old father of three children who reside in the United States. He
24 has a two-year-old United States citizen son and possesses sole legal and physical custody
25 over two teenage children who have both been granted Special Immigrant Juvenile Status
26 and Deferred Action. Mr. M has no criminal history. He has lived in the United States for
27 ten years and has extensive family ties in this country. He also has a consistent employment
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1 history in the United States and has worked for the last five years for Laguna Farms as a
2 raspberry harvester.

3 5. ICE did not have a warrant for Mr. M's arrest on July 9, 2025. Rather, the agents
4 targeted him as he walked to his car to commute to work. ICE lacked reasonable suspicion
5 for his arrest. Mr. M was startled by the heavily armed masked men wearing street clothes
6 under bulletproof vests driving unmarked SUVs who arrested him. ICE officers pushed
7 Mr. M to the ground, bloodying his knees. Although Mr. M's arms were pinned down in
8 front of his chest, the ICE officers threatened to break his arms if he did not put his hands
9 behind his back; an officer then yanked Mr. M up by his ear lobes, leaving bruises and
10 scratches where his ear connects to his head, to force his arms behind his back.

11 6. Mr. M requested a bond hearing, which was held on August 8, 2025. At the hearing,
12 the IJ held that he had jurisdiction under 8 U.S.C. § 1226, found that Mr. M posed no
13 danger to the community and was not a flight risk, and granted bond at \$6,500.

14 7. Yet, Mr. M remains detained by ICE at OMD.

15 8. Therefore, Mr. M respectfully requests that this Court end his indefinite
16 incarceration and issue a writ of habeas corpus ordering his release.

17 JURISDICTION

18 9. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §
19 2241 (habeas corpus), 28 U.S.C. § 1651 (All Writs Act), and 28 U.S.C. § 1331 (federal
20 questions). This Court also has jurisdiction pursuant to Art. 1 § 9, cl. 2 of the United States
21 Constitution (the Suspension Clause); *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

22 10. Administrative exhaustion is a prudential rather than a jurisdictional
23 requirement for habeas review under § 2241. *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539,
24 541 (9th Cir. 2004).

25 11. This Court may grant relief under 28 U.S.C. §§ 2241 and 2243 (habeas
26 corpus), 28 U.S.C. §§ 2201–02 (declaratory relief), 28 U.S.C. § 1651 (All Writs Act), Fed.
27 R. Civ. P. 65 (injunctive relief), the Fifth Amendment, and 5 U.S.C. §§ 500 et seq., the
28 Administrative Procedure Act (“APA”).

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12. Venue is proper in the Southern District of California pursuant to 28 U.S.C. §§ 1391(b) and (e) because a substantial part of the events giving rise to the claims in this action took place in this district. Furthermore, Petitioner is detained at the Otay Mesa Detention Center, which is located in this judicial district. All material decisions have been made at the San Diego Field Office of ICE, which is located in this judicial district.

PARTIES

13. Petitioner Mr. M has been detained by Respondents at the OMDC in San Diego, California since shortly after his arrest on July 9, 2025. Borkowski Decl. Ex. 4. He is 44 years old and the father of a U.S. citizen and two teenagers with deferred action and special immigrant juvenile status. *Id.* Ex. 3 at 15, 26.

14. Respondent Christopher J. LaRose is the Warden of the OMDC, where Petitioner is currently detained. Respondent LaRose has physical custody over Petitioner. Respondent LaRose is sued in his official capacity.

15. Respondent Gregory J. Archambeault is the Field Office Director for the San Diego Field office of ICE. OMDC is located within the jurisdiction of the ICE San Diego Field Office, which has legal authority over all individuals in ICE custody there. As Acting Field Office Director, Mr. Archambeault is a custodian of Petitioner with legal authority to produce and release Mr. M. Respondent Archambeault is sued in his official capacity.

16. Respondent Todd M. Lyons is the Acting Director for ICE, a component agency of the United States DHS. ICE is responsible for enforcing United States immigration laws, including the detention of alleged noncitizens in removal proceedings, which the agency chooses to accomplish through imprisonment and the removal of noncitizens with final removal orders. As ICE's Acting Director, Respondent Lyons is a custodian of Petitioner, with authority to produce and release him. Respondent Lyons is sued in his official capacity.

1 17. Respondent Kristi Noem is the Secretary of the United States DHS. She is
2 responsible for overseeing DHS and its sub-agency, ICE, and has ultimate responsibility
3 for the detention of noncitizens in civil immigration custody. Respondent Noem is a legal
4 custodian of Petitioner. Respondent Noem is sued in her official capacity.

5 EXHAUSTION

6 18. Because the habeas statute (28 U.S.C. § 2241) “does not specifically require
7 petitioners to exhaust direct appeals before filing petitions for habeas corpus,” exhaustion
8 in this case “is a prudential requirement” that “a court has discretion to waive.” *Acevedo-*
9 *Carranza*, 371 F.3d at 541. “Exhaustion of remedies is not required when resort to such
10 remedies would be futile.” *Id.* at 541–42. Nor is it required where “irreparable injury will
11 result.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004). Exhaustion is also not
12 required when “requiring resort to the administrative remedy may occasion undue
13 prejudice to subsequent assertion of a court action.” *McCarthy v. Madigan*, 503 U.S. 140,
14 146–47 (1992), *superseded by statute on other grounds as stated in Booth v. Churner*, 532
15 U.S. 731, 739–41 (2001). “Such prejudice may result . . . from an unreasonable or
16 indefinite time frame for administrative action.” *Id.* at 147 (citing cases). These exceptions
17 warrant waiving any prudential-exhaustion requirement here.

18 19. Futility. Exhaustion would be futile for Mr. M because the Board of
19 Immigration Appeals (“BIA”) recently held in *In re Yajure Hurtado*, 29 I&N Dec. 216
20 (BIA 2025), that IJs lack jurisdiction to hear bond cases even for individuals who have
21 been in the United States for many years, like Mr. M, because it interpreted 8 U.S.C. §
22 1225 as applying broadly to individuals “present in the United States who have not been
23 admitted.” *Id.* at 221. This holding is in line with a DHS and EOIR policy, issued “in
24 coordination with the Department of Justice” on July 8, 2025, instructing all ICE
25 employees to consider anyone arrested within the United States and charged with being
26 inadmissible under § 1182(a)(6)(A)(i) as an “applicant for admission” subject to §
27 1225(b)(2)(A). Borkowitz Decl. Ex. 1. Given this precedent, there is little doubt that the
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1 BIA would reverse the IJ's decision, at which point Mr. M would again need to turn to this
2 Court for relief.

3 20. Irreparable Injury. Because Mr. M has been granted bond yet remains
4 detained, every day that he remains at OMDC is one in which his statutory and
5 constitutional rights are being violated. "Freedom from imprisonment," which Mr. M is
6 being denied despite the IJ's order, "is at the 'core of the liberty protected by the Due
7 Process Clause.'" *Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017) (quoting
8 *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Mr. M need not exhaust administrative
9 remedies because "if Petitioner is correct on the merits of his habeas petition, then
10 Petitioner has already been unlawfully deprived" of his rights and "each additional day that
11 Petitioner is detained . . . would cause him harm that cannot be repaired." *Villalta v.*
12 *Sessions*, 2017 WL 4355182, at *3 (N.D. Cal. Oct. 2, 2017) (cleaned up); *Cortez v.*
13 *Sessions*, 318 F. Supp. 3d 1134, 1139 (N.D. Cal. 2018). Beyond just his physical liberty,
14 there are "irreparable harms imposed on anyone subject to immigration detention," such as
15 "subpar medical and psychiatric care in ICE detention facilities." *Hernandez*, 872 F.3d at
16 995. Mr. M has already suffered these harms, having contracted COVID-19 while in
17 OMDC about a month after the IJ granted him bond. Borkowski Decl. ¶ 4. In addition,
18 Mr. M. did not receive appropriate medical treatment for the injuries that he suffered when
19 he was arrested on July 9, 2025. *See id.* Ex. 3 at 15.

20 21. Undue Prejudice. The BIA's delay in adjudicating bond appeals further
21 warrants excusing any exhaustion requirement. As the Ninth Circuit has explained,
22 Supreme Court precedent "permits a court under certain prescribed circumstances to
23 excuse exhaustion" such as where "'a claimant's interest in having a particular issue
24 resolved promptly is so great that deference to the agency's judgment [of a lack of finality]
25 is inappropriate.'" *Klein v. Sullivan*, 978 F.2d 520, 523 (9th Cir. 1992) (alteration in
26 original) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976)). Courts have frequently
27 held that, "because of delays inherent in the administrative process, BIA review would
28 result in the very harm that the bond hearing was designed to prevent: prolonged detention

1 without due process.” *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 237 (W.D.N.Y.
2 2019) (cleaned up).

3 22. Additionally, because the issues presented are questions of statutory
4 interpretation, they are “unlikely to require agency consideration to generate a proper
5 record to reach a proper decision.” *Maldonado Bautista et al. v. Santacruz, et al.*, No. 5:25-
6 cv-01873 (C.D. Cal. July 28, 2025), Order Granting Temporary Restraining Order, Dkt. 14
7 at 11.

8 **FACTUAL AND PROCEDURAL BACKGROUND**

9 **I. Mr. M Has Resided in Southern California for a Decade.**

10 23. Mr. M has resided in Southern California, specifically Oxnard, California for
11 over a decade. For the past five years he has worked in agriculture for Laguna Farms, LLC.
12 Borkowski Decl. Ex. 3 at 15, 24. His employer has lauded Mr. M as someone who
13 “consistently demonstrated professionalism, reliability, and a strong commitment to his
14 role. He made positive contributions to Laguna’s team, maintained excellent working
15 relationships with coworkers, and demonstrated a strong work ethic.” *Id.* at 24.

16 24. Mr. M goes out of his way to be an excellent father for his kids and father
17 figure for his partner’s children. His young adult son indicates:

18 My dad, [D.E.M.], has been the most important person in my life. He has raised and
19 cared for me since I arrived in the United States. He is not only my father, but also my
20 main support system, my protector, and my role model. My dad has always motivated
21 me to work hard, do well in school, stay out of trouble, and be respectful. He supports
22 me emotionally and guides me in every aspect of my life. Since my dad was detained,
23 . . . I feel like a huge part of my life is missing, and now I’m expected to take on
24 responsibilities that I’m not yet ready for, especially while I’m still trying to find my
25 path as a young adult.

26 Borkowski Decl. Ex. 3 at 43.

27 25. His 13-year old daughter noted:
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1 He is the person who takes care of me, makes decisions for me, and supports me in
2 everything I do. He helps me get to school, makes sure I am safe, takes me to
3 appointments, helps with homework, and is always there when I need him. We are
4 very close, and he has been the only consistent parent figure in my life.” *Id.* at 51.
5 Similarly, his stepdaughter noted that he listened to her patiently and helped her avoid
6 failing a class in high school and states: “[He] has always been the light in our home,
7 he makes everyone laugh and always puts others before himself. His absence has left
8 a huge emotional gap for all of us, especially for my little brother, [], a U.S. citizen,
9 who calls for his dad constantly and no longer has anyone to play with. I try to step in
10 and play with him, but it’s not the same.”

11 Borkowski Decl. Ex. 3 at 66.

12 26. Mr. M has never been convicted of or arrested for any crimes. *See* Borkowski
13 Decl. Ex. 3 at 15; Ex. 8 at 138. Mr. M’s partner has been actively working with an
14 immigration attorney at Immigrant Defenders Law Center (“ImmDef”) for his bond case
15 and on finding an attorney to represent Mr. M in his removal proceedings, but many private
16 attorneys have said they will not take the case if he is detained in OMDC. *See id.* Ex. 9 at
17 141.

18 **II. ICE Aggressively Arrested Mr. M Using Physical Violence and Without**
19 **Reason or a Warrant in his Neighborhood While He Was Going to Work.**

20 27. In the early morning of July 9, 2025, Mr. M was walking to his car, parked a
21 few blocks away from his house, when he was suddenly approached by five masked men
22 who got out of several unmarked vehicles. Borkowski Decl. Ex. 4 at 101–02.
23 Understandably, he was “startled when [he] was arrested by people in street clothes driving
24 in unmarked SUVs. They were wearing green bullet proof vests, and face coverings.” *Id.*
25 Ex. 3 at 15. These masked individuals “grabbed [him], took [him] to the ground, and they
26 kept instructing [him] to put [his] hands behind [his] back,” which he could not do because
27 he “used [his] hands to stop the blow[s] and to cover [him]self.” *Id.* An individual
28 “forcefully put his knees on [his] back as they arrested [him] and pulled [his] ears so that
[he] would look up.” *Id.* They then “threatened [him] that they were going to break [his]
arms” if he didn’t put his hands—which were still pinned to the ground—behind his back.
Id.

1 28. Weeks after the arrest, Mr. M still had “scratches [o]n the back of [his] ears
2 due to the force they used to pull [his] head back.” Borkowski Decl. Ex. 3 at 15. His knees
3 were also injured during the arrest. *Id.*

4 29. Mr. M should not be subjected to GPS ankle monitoring, which causes
5 physical harm and discomfort, especially given ICE’s prior mistreatment and Mr. M’s
6 consistent compliance with legal obligations. Borkowski Decl. Ex. 3 at 15.

7 30. ICE did not have a warrant for Mr. M’s arrest. In the Notice to Appear, DHS
8 marked that Mr. M “[is] an alien present in the United States who has not been admitted or
9 paroled.” Borkowski Decl. Ex. 4 at 93. It did not mark the box “You are an arriving alien.”
10 *Id.*

11 31. Mr. M was brought approximately 200 miles from his home in Oxnard to
12 OMDC, where he remains detained.

13 **III. The IJ Orders Mr. M’s Release from Custody Under Bond**

14 32. On August 1, 2025, Mr. M requested a bond hearing. His motion explained
15 that he is subject to INA § 236 (8 U.S.C. § 1226(a)) and therefore entitled to a bond hearing.
16 Borkowski Decl. Ex. 2 at 6. The Immigration Court conducted a custody redetermination
17 hearing on August 8, 2025. *Id.* Ex. 5. At the hearing, DHS argued that the IJ lacked
18 jurisdiction to redetermine Mr. M’s custody, arguing that he was detained under INA § 235
19 (8 U.S.C. §1225). *Id.* Ex. 10 at 144–45. Relying on Supreme Court, Ninth Circuit, and
20 BIA precedent, the IJ held that it would not consider “someone like [Mr. M], who has been
21 physically present in the United States for 10 years, as an applicant for admission,” despite
22 DHS’s arguments. *Id.* Ex. 8 at 136–37 (citing *Jennings v. Rodriguez*, 583 U.S. 281, 289
23 (2018); *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (*en banc*); *United States v.*
24 *Gambino-Ruiz*, 91 F.4th 981, 989 (9th Cir. 2024); *In re M-S-*, 27 I&N Dec. 509 (A.G.
25 2019)). The IJ explained that “sections 235 and 236 of the INA each cover distinct, non-
26 overlapping classes of” noncitizens. *Id.* at 136.

27 33. It noted that Mr. M “was not detained near the border and has been present in
28 the United States since his last entry 10 years ago.” Borkowski Decl. Ex. 8 at 137. At the

1 hearing, the IJ considered the evidence presented by Mr. M. *Id.* at 137–38. The IJ noted
2 that DHS “did not argue that [Mr. M] was a danger.” *Id.* at 138. Although the IJ recognized
3 that he “presents some risk of flight because of his limited relief and manner of entry,” it
4 determined that Mr. M “possess various positive factors which mitigate his risk of flight.”
5 *Id.* DHS argued at the hearing, but not in its briefing, that Mr. M presents a greater risk of
6 flight because of his alleged (per ICE’s narrative in its I-213 form) attempt to flee from
7 officers during his arrest. *Id.* The IJ rejected this argument, noting that it is not
8 “unreasonable to assume that such an abrupt encounter with several armed and masked
9 strangers would trigger a flight reaction to avoid harm.” *Id.*

10 34. Having “considered all the information, evidence, and arguments presented
11 by the parties,” the IJ found that [Mr. M] does not pose a danger to the community” (a
12 conclusion that DHS did not object to) and that any possible risk of flight “could be
13 mitigated with bond and Alternatives to Detention.” Borkowski Decl. Ex. 8 at 136, 138.
14 As a result, the Immigration Court imposed a \$6,500 bond, which Mr. M paid. *Id.* at 138.

15 35. Immediately after the hearing on August 8, DHS filed form EOIR-43,
16 indicating its intent to appeal. Borkowski Decl. Ex. 6. On August 25, eleven business days
17 after the IJ issued its order granting Mr. M bond, DHS filed its Notice of Appeal and a
18 Motion to Equitably Toll 8 C.F.R. § 1003.6(c)(1) Filing Deadline by One Business Day.
19 *Id.* Ex. 7. Under that section, a “stay shall lapse if DHS fails to file a notice of appeal with
20 the Board within ten business days of the issuance of the order of the immigration judge.”
21 8 C.F.R. § 1003.6(c)(1). DHS Attorney Michael P. McQuinn filed a declaration in support
22 of the motion. It explains how the ECAS filing platform “was temporarily unavailable
23 during the IT service outage . . . from 8:00pm EST - 9:00am [sic] EST” on August 22.
24 Borkowski Decl. Ex. 7 at 129. The ECAS Help Desk informed Mr. McQuinn that the
25 portal was available and to call if he continued to have issues. *Id.* The declaration is silent
26 about whether Mr. McQuinn availed himself of this resource of support. Instead, he
27 responded on Monday, August 25, noting that his “colleagues are not having any issues
28 logging on to ECAS,” but that he still was receiving an error. *Id.* at 127. He later reset his

1 browser cache and was able to login. *Id.* at 119. The BIA accepted this late filing, despite
2 no evidence that Mr. McQuinn was diligent in attempting to file and despite the express
3 deadline in 8 C.F.R. § 1003.6(c)(1).

4 36. On September 3, the IJ provided the Bond Memorandum of the Immigration
5 Judge to facilitate the BIA's review of DHS's appeal. Borkowski Decl. Ex. 8.

6 37. Mr. M hopes to be reunited with his partner and children so he can continue
7 to care for and support them. He hopes to secure his release through the instant petition
8 and believes he should not be subjected to GPS ankle monitoring, which causes physical
9 harm and discomfort, especially given ICE's prior mistreatment and Mr. M's consistent
10 compliance with legal obligations. Borkowski Decl. Ex. 3 at 15.

11 Legal framework

12 **IV. Law and Procedure Governing This Habeas Petition.**

13 38. The Constitution guarantees that the writ of habeas corpus is "available to
14 every individual detained within the United States." *Hamdi v. Rumsfeld*, 542 U.S. 507,
15 525 (2004) (citing U.S. Const., Art. I, § 9, cl. 2). This includes immigration-related
16 detention. *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

17 39. The "historic purpose of the writ" of habeas corpus is "to relieve detention by
18 executive authorities without judicial trial." *Zadvydas*, 533 U.S. at 699 (cleaned up).

19 40. A writ under 28 U.S.C. § 2241 may issue if, among other things, a person "is
20 in custody under or by color of the authority of the United States" or is "in custody in
21 violation of the Constitution or laws or treaties of the United States." 8 U.S.C. § 2241(c).
22 A habeas court's role is at its "most extensive in cases of pretrial and noncriminal
23 detention," especially "where there ha[s] been little or no previous judicial review of the
24 cause for detention." *Boumediene v. Bush*, 553 U.S. 723, 780 (2008).

25 41. A court "entertaining an application for a writ of habeas corpus shall forthwith
26 award the writ or issue an order directing the respondent to show cause why the writ should
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1 not be granted, unless it appears from the application that the applicant or person detained
2 is not entitled thereto.” 28 U.S.C. § 2243.

3 42. “The writ, or order to show cause shall be directed to the person having
4 custody of the person detained. It shall be returned within three days unless for good cause
5 additional time, not exceeding twenty days, is allowed.” 28 U.S.C. § 2243.

6 43. Once the government files its return, the Court shall set a “hearing, not more
7 than five days after the return unless for good cause additional time is allowed.” 28 U.S.C.
8 § 2243. “The court shall summarily hear and determine the facts, and dispose of the matter
9 as law and justice require.” *Id.*

10 **V. Relevant Statutes and Rules**

11 44. In its briefing related to the bond hearing, DHS argued only that Mr. M was
12 detained under § 1225 rather than § 1226. *See generally* Borkowski Decl. Ex. 10.
13 Crucially, bond is unavailable to those detained under § 1225 while the Attorney General
14 may grant bond to a § 1226 detainee. *Compare* 8 U.S.C. § 1225(b)(2) (“shall be detained”)
15 *with*, 8 U.S.C. § 1226(a)(2).

16 45. Section 1226(a) applies to anyone who is detained “pending a decision on
17 whether the [noncitizen] is to be removed from the United States.” 8 U.S.C. § 1226(a).
18 Section 1226 confirms that this authority includes not just noncitizens who are deportable
19 pursuant to 8 U.S.C. § 1227(a), but also noncitizens, who are inadmissible pursuant to 8
20 U.S.C. § 1182(a). 8 U.S.C. § 1226(c). In contrast, § 1225 is concerned “primarily [with
21 those] seeking entry,” *i.e.*, cases “at the Nation’s borders and ports of entry, where the
22 Government must determine whether a[] [noncitizen] seeking to enter the country is
23 admissible.” *Jennings*, 583 U.S. at 297, 287. “Courts have repeatedly held that § 1225
24 applies to arriving aliens, while § 1226 governs detention of ‘aliens already in the
25 country.’” *Anicasio v. Kramer*, 2025 WL 2374224, at *2 (D. Neb. Aug. 14, 2025) (quoting
26 *Jennings*, 583 U.S. at 281).

27 46. Despite the clear statutory language, DHS issued a new policy on July 8, 2025,
28 instructing all ICE employees to consider anyone inadmissible under § 1182(a)(6)(A)(i)—

1 i.e., those who are present without admission—to be an “applicant for admission” and
2 therefore subject to mandatory detention pursuant to 8 U.S.C. § 1225(b)(2)(A). *See*
3 Borkowski Decl. Ex. 1.

4 47. In certain cases, 8 C.F.R. § 1003.19(i)(2) provides for an automatic stay “upon
5 DHS’s filing of a notice of intent to appeal the custody redetermination (Form EOIR-43)
6 with the immigration court within one business day of the order, and, except as otherwise
7 provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by
8 the Board.” In turn, 8 CFR 1003.6(c)(1) provides that “[t]he stay shall lapse if DHS fails
9 to file a notice of appeal with the Board within ten business days of the issuance of the
10 order of the immigration judge.”

11 48. The automatic stay will also lapse if the BIA has not rendered a decision after
12 90 days. 8 C.F.R. § 1003.6(c)(4). However, DHS can extend the detention by seeking a
13 discretionary stay from the BIA after the 90 days, which automatically extends the stay for
14 an additional 30 days while the BIA decides the discretionary-stay request. 8 C.F.R. §
15 1003.6(c)(5). If the BIA authorizes a “[noncitizen]’s release (on bond or otherwise), denies
16 a motion for discretionary stay, or fails to act on such a motion before the automatic stay
17 period expires, the [noncitizen]’s release shall be automatically stayed for five business
18 days.” 8 C.F.R. § 1003.6(d). During that period, DHS can choose to refer the bond
19 decision to the Attorney General, which extends the automatic stay for another 15 business
20 days. *Id.* The Attorney General can then extend the stay for the pendency of the custody
21 proceedings. *Id.*

22 49. Detention under all sections of the INA must comport with the Fifth
23 Amendment’s Due Process Clause, which “applies to all ‘persons’ within the United States,
24 including [noncitizens], whether their presence here is lawful, unlawful, temporary, or
25 permanent.” *Zadvydas*, 533 U.S. at 693; *see also Demore v. Kim*, 538 U.S. 510, 523 (2003).
26 To comport with substantive due process, immigration detention must “bear [a] reasonable
27 relation to the purpose for which the individual [was] committed.” *Zadvydas*, 533 U.S. at
28 690. When considering due process challenges, courts should first consider whether the

1 government's deprivation of liberty violates substantive due process. Only if the
2 deprivation passes muster in that inquiry does the court turn to the procedural due process
3 claim. *See Zinermon v. Burch*, 494 U.S. 113, 125–26 (1990) (substantive due process
4 challenges the deprivation itself, whereas procedural due process challenges only the
5 process that accompanied it); *Huynh v. Reno*, 56 F. Supp. 2d 1160, 1162 n.3 (W.D. Wash.
6 1999) (“[O]nly when a restriction on liberty survives substantive due process scrutiny does
7 the further question of whether the restriction is implemented in a procedurally fair manner
8 become ripe for consideration.”) (citing *United States v. Salerno*, 481 U.S. 739, 746
9 (1987)).

10 50. This Court has the authority to invalidate agency actions beyond delegated
11 authority as ultra vires. *See Romero v. INS*, 39 F.3d 977, 980 (9th Cir. 1994).

12 51. Under the APA, “final agency action for which there is no other adequate
13 remedy in a court [is] subject to judicial review.” 5 U.S.C. § 704. The reviewing Court
14 “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be
15 . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”
16 or “unsupported by substantial evidence.” 5 U.S.C. § 706(2)(A), (E).

17 52. One burden of the government's is to prove “by clear and convincing evidence
18 that [Mr. M's] continued detention is justified.” *Ixchop Perez v. McAleenan*, 435 F. Supp.
19 3d 1055, 1063 (N.D. Cal. 2020). Evidence obtained as a result of an illegal arrest is
20 inadmissible to support the government's burden of proof. *United States v. Holliway*, 2024
21 WL 5169836, at *6 (E.D. Cal. Dec. 19, 2024) (citing *United States v. Morales*, 252 F.3d
22 1070, 1073 (9th Cir. 2001)).

23 ARGUMENT

24 53. Mr. M's ongoing detention despite the IJ grant of bond is unlawful and
25 warrants the grant of a writ of habeas corpus. His detention allegedly under 8 U.S.C.
26 § 1226 violates the INA because that statute provides that noncitizens like Mr. M, who are
27 residing in the country rather than arriving into it, are subject to § 1226, which allows for
28

1 bond, and not § 1225, which does not allow for bond. The automatic-stay provision in 8
2 C.F.R. § 1003.19(i)(2) violates Mr. M's substantive and procedural due process rights. The
3 Due Process Clause ensures that no individual is “deprived of life, liberty, or property,
4 without due process of law.” U.S. CONST. AMEND. V. There is no special justification
5 for Mr. M’s ongoing detention after the IJ’s determination that bond was proper; and
6 DHS’s ability to stay—and effectively overturn—the neutral factfinder’s decision without
7 justification is unreasonable and fundamentally unfair. This automatic stay is also ultra
8 vires—the Attorney General and its agents are delegated bond-determination authority, 6
9 U.S.C. § 111, and DHS lacks the statutory authority to unilaterally extend a noncitizen’s
10 detention. DHS’s detention of Mr. M under § 1225 violates the Administrative Procedure
11 Act, 5 U.S.C. § 706(2), because it is arbitrary, capricious, and not in accordance with the
12 INA. Additionally, because his arrest was based only on Mr. M’s apparent race and
13 ethnicity, it was unlawful, *see United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975),
14 and any evidence obtained from the arrest—including alleged admissions regarding Mr.
15 M’s alienage—must be excluded. Without that evidence, the Government lacks sufficient
16 grounds to detain Mr. M, further warranting his release.

17 **I. DHS’s Misclassification of Mr. M as an Applicant for Admission Under**
18 **Section 1225 Undermines the Statutory Limits of the INA**

19 54. The text, legislative history, and statutory history of the INA as well as the
20 context surrounding Mr. M’s detainment all demonstrate that Mr. M is detained under 8
21 U.S.C. § 1226, not § 1225.

22 **A. Mr. M. Is Detained “Pending a Decision” on Removal Under the Clear**
23 **Text of 1226(b).**

24 55. First, the plain text of § 1226 demonstrates that subsection (a) applies to Mr.
25 M. By its own terms, § 1226(a) applies to anyone who is detained “pending a decision on
26 whether the [noncitizen] is to be removed from the United States.” 8 U.S.C. § 1226(a).
27 Section 1226 explicitly confirms that this authority includes not just noncitizens who are
28 deportable pursuant to 8 U.S.C. § 1227(a) but also noncitizens, such as Mr. M, who are

1 inadmissible pursuant to 8 U.S.C. § 1182(a). *See* 8 U.S.C. § 1226(c). While § 1226(a)
2 provides the right to seek release, § 1226(c) carves out specific categories of noncitizens
3 from being released—including certain categories of inadmissible noncitizens—and
4 subjects them instead to mandatory detention. *See, e.g.*, § 1226(c)(1)(A), (C).

5 56. If DHS’s position that § 1226(a) did not apply to inadmissible noncitizens
6 such as Mr. M who are present without admission in the United States were correct, there
7 would be no reason to specify that § 1226(c) governs certain persons who are inadmissible;
8 instead, the statute would only have needed to address people who are deportable for
9 certain offenses.

10 57. DHS’s reading is inconsistent with the canon against superfluities. Under this
11 “most basic [of] interpretive canons, . . . ‘[a] statute should be construed so that effect is
12 given to all its provisions, so that no part will be inoperative or superfluous, void or
13 insignificant.’” *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*,
14 542 U.S. 88, 101 (2004)); *see also Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir.
15 2023) (“[C]ourt[s] ‘must interpret the statute as a whole, giving effect to each word and
16 making every effort not to interpret a provision in a manner that renders other provisions
17 of the same statute inconsistent, meaningless or superfluous.’”). But by concluding that
18 the mandatory detention provision of § 1225(b)(2) applies to Mr. M, DHS violates this
19 rule.

20 58. In sum § 1226’s plain text demonstrates that it applies to those who are present
21 within and residing within the United States and who are not at the border seeking
22 admission. Therefore, § 1225(b)(2) should not be read to apply to everyone who is in the
23 United States “who has not been admitted.”

24 59. The text of § 1225 reinforces this interpretation. As the Supreme Court
25 recognized, § 1225 is concerned “primarily [with those] seeking entry.” *Jennings*, 583
26 U.S. at 297. Paragraphs (b)(1) and (b)(2) in § 1225 reflect this understanding.

27 60. To begin, paragraph (b)(1)—which concerns “expedited removal of
28 inadmissible arriving [noncitizens]”—encompasses only the “inspection” of certain

1 “arriving” noncitizens and other recent entrants designated by the Attorney General, and
2 only those who are “inadmissible under section 1182(a)(6)(C) or § 1182(a)(7).” 8 U.S.C.
3 § 1225(b)(1)(A)(i). These grounds of inadmissibility are for those who misrepresent
4 information to an examining immigration officer or do not have adequate documents to
5 enter the United States. Thus, subsection (b)(1)’s text demonstrates that it is focused only
6 on people arriving at a port of entry or having recently entered the United States; it is not
7 focused on those already residing here.

8 61. Paragraph (b)(2) is similarly limited to people applying for admission when
9 they arrive in the United States. The title explains that this paragraph addresses the
10 “[i]nspection of other [noncitizens],” i.e., those noncitizens who are “seeking admission,”
11 but who (b)(1) does not address. *Id.* § 1225(b)(2), (b)(2)(A). By limiting (b)(2) to those
12 “seeking admission,” Congress confirmed that it did not intend to sweep into this section
13 individuals like Mr. M, who already entered the country and have been residing in the
14 United States for over a decade. An individual submits an “application for admission” only
15 at “the moment in time when the immigrant actually applies for admission into the United
16 States.” *Torres*, 976 F.3d at 927. Indeed, in *Torres*, the en banc Ninth Circuit rejected the
17 idea that § 1225(a)(1) means that anyone who is presently in the United States without
18 admission or parole is someone “deemed to have made an actual application for
19 admission.” *Id.* (emphasis omitted). That holding is instructive here too, as only those
20 who take affirmative acts, like submitting an “application for admission,” are those who
21 can be said to be “seeking admission” within § 1225(b)(2)(A). Otherwise, that language
22 would serve no purpose, violating a key rule of statutory construction. *See Shulman*, 58
23 F.4th at 410–11.

24 62. Furthermore, subparagraph (b)(2)(C) addresses the “[t]reatment of
25 [noncitizens] arriving from contiguous territory,” i.e. those who are “arriving on land.” 8
26 U.S.C. § 1225(b)(2)(C) (emphasis added). This language further underscores Congress’s
27 focus in § 1225 on those who are arriving *into* the United States—not those already residing
28 here. Similarly, the title of § 1225 refers to the “inspection” of “inadmissible arriving”

1 noncitizens. *See Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (emphasis added)
2 (relying on section title to help construe statute).

3 63. Finally, the entire statute is premised on the idea that an inspection occurs near
4 the border and shortly after arrival, as the statute repeatedly refers to “examining
5 immigration officer[s],” 8 U.S.C. § 1225(b)(2)(A), (b)(4), or officers conducting
6 “inspection[s]” of people “arriving in the United States,” *id.* § 1225(a)(3), (b)(1), (b)(2),
7 (d); *see also King v. Burwell*, 576 U.S. 473, 492 (2015) (looking to an act’s “broader
8 structure . . . to determine [the statute’s] meaning”).

9 64. The new DHS and EOIR policy, *see Borkowski Decl. Ex. 1*, and the BIA
10 decision denying bond to petitioners on this basis, *In re Yajure Hurtado*, 29 I&N Dec. 216
11 (BIA 2025), ignore all this and instead focus on the definition of “applicant for admission”
12 at § 1225(a)(1), which defines an “applicant for admission” as a person who is “present in
13 the United States who has not been admitted or who arrives in the United States,” 8 U.S.C.
14 § 1225(a)(1). But as the Ninth Circuit has explained, “when deciding whether language is
15 plain, [courts] must read the words in their context and with a view to their place in the
16 overall statutory scheme.” *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th
17 Cir. 2022) (internal quotation marks omitted). Here, that context underscores that the
18 definition in (a)(1) is limited by other aspects of the statute to those who undergo an initial
19 inspection at or near a port of entry shortly after arrival—and that it does not apply to those
20 who are arrested in the interior of the United States months or, like Mr. M, years later.

21 65. Significantly, in deeming that all noncitizens who entered without inspection
22 are necessarily encompassed by the mandatory detention provision at § 1225(b)(2), the
23 DHS and EOIR policy ignores that the provision does not simply address applicants for
24 admission. Instead, the language “applicant for admission” in (b)(2)(A) is further qualified
25 by clarifying that the subparagraph applies only to those “seeking admission”—in other
26 words, those who have applied to be admitted or paroled. The new policy and the BIA’s
27 implementation of the policy ignores this text, just as it ignores the statutory language in §
28 1226 that expressly encompasses persons who have entered the United States and are

1 present without admission. Thus, Mr. M prevails regardless of the scope of § 1225(a)(1)'s
2 definition of "applicant for admission." This is because classification as an "applicant for
3 admission" is not sufficient to render someone subject to mandatory detention under §
4 1225(b)(2). The "applicant for admission" must also be "seeking admission," and that is
5 clearly not the case for Mr. M.

6 **B. The Legislative and Statutory History of U.S. Immigration Law**
7 **Distinguishes Between 1226 Detainees, Like Mr. M, and 1225 Detainees.**

8 66. The legislative history of the Illegal Immigration Reform and Immigrant
9 Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 302–03, 110 Stat.
10 3009–546, 3009–582 to 3009–583, 3009–585, also supports a limited construction of §
11 1225 and the conclusion that § 1226(a) applies to Mr. M. In passing IIRIRA, Congress
12 was focused on the perceived problem of recent arrivals to the United States who did not
13 have documents to remain. *See* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29; H.R.
14 Rep. No. 104-828, at 209. Notably, Congress did not say anything about subjecting all
15 people present in the United States after an unlawful entry to mandatory detention if
16 arrested. This is important, as prior to IIRIRA, people like Mr. M were not subject to
17 mandatory detention. *See* 8 U.S.C. § 1252(a)(1) (1994) (authorizing Attorney General to
18 arrest noncitizens for deportation proceedings, which applied to all persons physically
19 present within the United States). Had Congress intended to make such a monumental shift
20 in immigration law (potentially subjecting millions of people to mandatory detention), it
21 would have explained so or spoken more clearly. *See Whitman v. Am. Trucking Ass'ns*,
22 531 U.S. 457, 468–69 (2001). But to the extent it addressed the matter, Congress explained
23 precisely the opposite, noting that the new § 1226(a) merely "restates the current provisions
24 in [INA] section 242(a)(1) regarding the authority of the Attorney General to arrest, detain,
25 and release on bond a[] [noncitizen] who is not lawfully in the United States." H.R. Rep.
26 No. 104-469, pt. 1, at 229 (emphasis added); *see also* H.R. Rep. No. 104-828, at 210
27 (same).

67. More recent amendments to § 1226 reinforce that this section covers people like Mr. M who DHS alleges to be present without admission. The Laken Riley Act added language to § 1226 that directly references people who are inadmissible because they are present without admission. *See* Laken Riley Act (LRA), Pub. L. No. 119-1, 139 Stat. 3 (2025). Specifically, pursuant to the LRA amendments, people charged as inadmissible pursuant to § 1182(a)(6) (the inadmissibility ground for presence without admission) or § 1182(a)(7) (the inadmissibility ground for lacking valid documentation to enter the United States) *and* who have been arrested, charged with, or convicted of certain crimes are subject to § 1226(c)'s mandatory detention provisions. *See* 8 U.S.C. § 1226(c)(1)(E). By including such individuals under § 1226(c), Congress further clarified that § 1226(a) covers persons charged under § 1182(a)(6) or (a)(7). In other words, if someone is only charged as inadmissible under § 1182(a)(6) or (a)(7) and the additional crime-related provisions of § 1226(c)(1)(E) do not apply, then § 1226(a) governs that person's detention. *See Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1259 (W.D. Wash. 2025) (explaining that these amendments explicitly provide that § 1226(a) covers people like Mr. M because the "specific exceptions" [in the LRA] for inadmissible noncitizens who are arrested, charged with, or convicted of the enumerated crimes logically leaves those inadmissible noncitizens not criminally implicated under Section 1226(a)'s default rule for discretionary detention."); *Diaz Martinez v. Hyde*, 2025 WL 2084238, at *7 (D. Mass. July 24, 2025) ("[I]f, as the Government argue[s], . . . a non-citizen's inadmissibility were alone already sufficient to mandate detention under section 1225(b)(2)(A), then the 2025 amendment would have no effect."); *Gomes v. Hyde*, 2025 WL 1869299, at *7 (D. Mass. July 7, 2025) (similar); *Gonzalez et al. v. Noem et al.*, No. 5:25-cv-02054 (C.D. Cal. August 13, 2025) Order Granting Ex Parte Application for TRO and OSC, Dkt. 12 at 7 ("If Respondents are correct that Congress meant for § 1225 to govern all aliens present in the United States who had not been admitted, it would render the exception made under § 1226(c)(1)(E) unnecessary. This does not stand to reason for, as Respondents aptly note, 'a statute should be construed so that effect is given to all its provisions.'" (citations omitted.)); *see also*

1 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010)
2 (observing that a statutory exception would be unnecessary if the statute at issue did not
3 otherwise cover the excepted conduct).

4 **C. In Line with DHS Practice, Mr. M Was Not Charged as an “Arriving**
5 **Alien.”**

6 68. DHS’s long practice of considering people like Mr. M as detained under
7 §1226(a) further supports this reading of the statute. Typically, in cases like that of Mr.
8 M, DHS issues a Form I-286, Notice of Custody Determination, or Form I-200 stating that
9 the person is detained under § 1226(a) or has been arrested under that statute. This decision
10 to invoke § 1226(a) is consistent with longstanding practice. For decades, and across
11 administrations, DHS has acknowledged that § 1226(a) applies to individuals who are
12 present without admission after entering the United States unlawfully but who were later
13 apprehended within the United States long after their entry. Such a longstanding and
14 consistent interpretation “is powerful evidence that interpreting the Act in [this] way is
15 natural and reasonable.” *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J.,
16 dissenting); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983)
17 (relying in part on “over 60 years” of government interpretation and practice to reject
18 government’s new proposed interpretation of the law at issue).

19 69. Agency regulations have long recognized that people like Mr. M are subject
20 to detention under § 1226(a). Nothing in 8 C.F.R. § 1003.19(h)—the regulatory basis for
21 the immigration court’s jurisdiction—provides otherwise. In fact, EOIR confirmed that §
22 1226(a) applies to Mr. M when it promulgated the regulations governing immigration
23 courts and implementing § 1226 decades ago. Specifically, EOIR explained that “[d]espite
24 being applicants for admission, [noncitizens] who are present without having been
25 admitted or paroled (formerly referred to as [noncitizens] who entered without inspection)
26 will be eligible for bond and bond redetermination.” 62 Fed. Reg. at 10312, 10323 (Mar.
27 6, 1997).
28

70. Indeed, and in line with this long-standing practice, the government itself charged Mr. M as an “alien present in the United States who has not been admitted or paroled” rather than an “arriving alien.” Borkowski Decl. Ex. 4 at 93. The same notice to appear informed petitioner that he could request that an immigration judge review DHS’s custody determination, further supporting that he was not detained under a provision which would require mandatory detention such as § 1225(b)(2). *See Anicasio*, 2025 WL 2374224, at *2 (considering the NTA in granting a writ of habeas corpus to a petitioner who, like Mr. M, was detained under the automatic-stay provision despite being granted bond.).

* * *

71. In sum, § 1226 governs this case. Section 1225 and its mandatory detention provision applies only to individuals arriving in the United States as specified in the statute, while § 1226 applies to those who have previously entered without admission and are now present and residing in the United States. Mr. M is subject to § 1226, and the IJ had discretion to grant Mr. M bond. Mr. M's ongoing detention despite being granted bond is unlawful and warrants relief.

II. ICE's Continued Detention of Mr. M Violates His Substantive Due Process Rights Under the Fifth Amendment

72. Continued detention despite a bond order and findings of no danger or flight risk violates the Fifth Amendment's substantive due process protections. *Zadvydas*, 533 U.S. at 690. Because DHS invoked the automatic-stay provision in 8 C.F.R. § 1003.19(i)(2), Mr. M is being subjected to such a violation.

73. The Fifth Amendment’s Due Process Clause states that, “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. AMEND. V. Accordingly, in the United States, “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Salerno*, 481 U.S. at 755.

74. Due Process “protections apply to all ‘persons’ within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent, and to immigration detention as well as criminal detention.” *Hernandez v.*

1 Sessions, 872 F.3d 976, 990 (9th Cir. 2017) (cleaned up). For noncitizens in immigration
2 detention, “[f]reedom from imprisonment—from government custody, detention, or other
3 forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Zadvydas*,
4 533 U.S. at 690.

5 75. The Supreme Court “repeatedly has recognized that civil commitment *for any*
6 *purpose* constitutes a significant deprivation of liberty that requires due process
7 protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added); *see also*
8 *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (“civil detainees retain greater liberty
9 protections than individuals detained under criminal process,” and therefore they enjoy
10 constitutional protections “at least as great as those afforded to” criminal detainees).

11 76. Because “[a]rbitrary civil detention is not a feature of our American
12 government,” *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018), civil confinement is
13 only permissible “in certain special and narrow non-punitive circumstances,” where a
14 “special justification” asserted by the government “outweighs the individual’s
15 constitutionally protected interest in avoiding physical restraint.” *Zadvydas*, 533 U.S. at
16 690 (cleaned up). To find a due process violation for someone in civil confinement, a court
17 need only balance the individual’s “liberty interests in freedom from incarceration” against
18 “the legitimate interests of the state.” *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th
19 Cir. 2003).

20 77. Respondents have not attempted to show any “special justification” or
21 compelling governmental interest which would outweigh Mr. M’s constitutional liberty.
22 DHS presented neither evidence nor argument to support a finding that Mr. M presents a
23 danger to the community. Its briefing before the IJ also did not include any argument or
24 reference to ensuring Mr. M’s appearance at future proceedings. *See* Borkowski Decl. Ex.
25 10. The government had the opportunity to challenge the merits of Mr. M’s request for
26 bond below, but it instead chose to focus its argument on the IJ’s jurisdiction. *Id.* As such,
27 and based on the evidence in the record, the IJ determined Mr. M was not a danger or flight
28

1 risk, and imposed a bond and other conditions, including his continued appearance at court
2 dates, as conditions of his bond. Borkowski Decl. Ex. 8 at 138.

3 78. Additionally, the Supreme Court has noted, “[t]he choice . . . is not between
4 imprisonment and the [noncitizen] ‘living at large.’ It is between imprisonment and
5 supervision under release conditions that may not be violated.” *Zadvydas*, 533 U.S. at 696
6 (internal citations omitted). In other words, even if ICE has an interest in “assuring [Mr.
7 M’s] presence at [a possible speculative] moment of removal,” *id.* at 699, this interest
8 cannot justify continued imprisonment if there are ample alternatives to meet this objective.
9 Such alternatives plainly exist here where Mr. M has in the past attended state court
10 proceedings for his teenage children and ensured their compliance with any requirements
11 in their removal proceedings before they were dismissed. *See* Borkowski Decl. Ex. 3 at
12 51, 59–63.

13 79. The automatic-stay provision invoked by DHS to prevent Mr. M’s release
14 despite the IJ’s grant of bond provides further evidence that Mr. M’s substantive due
15 process rights have been violated. The automatic-stay provision applies only in situations
16 like here where an IJ has already determined an individual should be released on bond.
17 The governmental interest in the continued detention of these least-dangerous individuals,
18 in contravention of the order of a neutral factfinder, does not outweigh the liberty interest
19 at stake. The BIA’s recent decision in *In re Yajure Hurtado* confirms that the BIA will
20 most certainly rule in the government’s favor. 29 I&N Dec. 216 (BIA 2025). Furthermore,
21 the BIA may take another five to six months to issue their decision. Therefore, only this
22 Court can provide relief to Mr. M to protect his liberty interest. Accordingly, the Court
23 should find that the government’s invocation of the automatic-stay provision to detain Mr.
24 M has violated his substantive due process rights.

25 80. This Court has the authority to order Mr. M’s release to remedy the violation
26 of his substantive due process rights. The federal habeas statute directs district courts to
27 “hear and determine the facts” of a habeas petition and to “dispose of the matter as law and
28 justice require.” 28 U.S.C. § 2243; *see also* *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)

(explaining that as far back as the nineteenth century, “the Court interpreted the predecessor of § 2243 as vesting a federal court ‘with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus’”) (quoting *In re Bonner*, 151 U. S. 242, 261 (1894)). In immigration habeas cases, including in this Circuit, courts regularly order release upon determining that detention violates substantive due process. *See, e.g., Ekeh v. Gonzales*, 197 F. App’x 637, 638 (9th Cir. 2006) (ordering supervised release pursuant to *Zadvydas*); *Nguyen v. Fasano*, 84 F. Supp. 2d 1099, 1113 (S.D. Cal. 2000) (issuing order to show cause why the petitioner should not be released).

III. Mr. M’s Detention Under 8 C.F.R. § 1003.19(i)(2) Despite the IJ Granting Him Bond Violates His Procedural Due Process Rights Under the Fifth Amendment

81. The Court need only address Mr. M’s procedural due process claim if it finds for the government on his substantive due process claim. *See Huynh*, 56 F. Supp. 2d at 1162 n.3 (W.D. Wash. 1999) (“[O]nly when a restriction on liberty survives substantive due process scrutiny does the further question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration.”) (citing *Salerno*, 481 U.S. at 746).

82. The automatic-stay provision under 8 C.F.R. § 1003.19(i)(2) allows DHS to override an IJ’s bond decision without judicial review or individualized findings, which is exactly what has happened to Mr. M. Mr. M’s liberty interest, protected by the Fifth Amendment, should have prevented DHS from staying his release in a manner that is unreasonable or fundamentally unfair. *See, e.g., Zadvydas*, 533 U.S. at 700; *Jorge M.F. v. Jennings*, 534 F. Supp. 3d 1050, 1054 (N.D. Cal. 2021) (finding a “noncitizen’s liberty interest in remaining out of custody on bond was similar to the liberty interests of people on pre-parole, parole, and probation”); *Rombot v. Souza*, 296 F. Supp. 3d 383, 389 (D. Mass. 2017) (Saris, C.J.) (recognizing that “[noncitizen] may no doubt be returned to custody upon a violation of [supervision] conditions,’ . . . but it has never given ICE carte blanche to re-incarcerate someone without basic due process protection.”) (quoting

1 *Zadvydas*, 533 U.S. at 700). Under *Mathews v. Eldridge*, 424 U.S. 319 (1976), Mr. M’s
2 civil detention violates his due process rights. He must therefore be released on the bond
3 order the IJ granted.

4 83. The *Mathews* test balances (1) the private interest threatened by governmental
5 action; (2) the risk of erroneous deprivation of such interest and the probable value of
6 additional procedural safeguards; and (3) the government interest. 424 U.S. at 335; *see*
7 *Perera v. Jennings*, 598 F. Supp. 3d 736, 745–46 (N.D. Cal. Apr. 15, 2022) (applying the
8 *Mathews* test where the petitioner was at risk of being re-detained under § 1226(c) and
9 holding that the petitioner was “entitled to a post-deprivation bond hearing should ICE re-
10 detain him”).

11 84. First, the interest at stake is paramount to Mr. M. *See Young v. Harper*, 520
12 U.S. 143, 146–47 (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82 (1973); *Morrissey v.*
13 *Brewer*, 408 U.S. 471, 482–83 (1972); *see also Ortega v. Bonnar*, 415 F. Supp. 3d 963,
14 969–70 (N.D. Cal. 2019) (holding that a noncitizen has a protected liberty interest in
15 remaining out of custody following an IJ’s bond determination). Being free from physical
16 detention by one’s own government “is the most elemental of liberty interests.” *Hamdi v.*
17 *Rumsfeld*, 542 U.S. 507, 529 (2004). Mr. M’s private interest in his liberty, especially
18 where he has multiple children—including a toddler U.S. citizen—who misses his care and
19 affection, the main private interest here, is “unquestionably substantial.” *Martinez Leiva*
20 *v. Becerra*, 2023 WL 3688097, at *7 (N.D. Cal. May 26, 2023) (quoting *Singh v. Holder*,
21 638 F.3d 1196, 1208 (9th Cir. 2011)). Mr. M is being held at a detention center in the same
22 conditions as criminal inmates and is far from his family who have been unable to visit
23 him. *See Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020) (finding, in assessing
24 the first *Mathews* factor, that “[t]he deprivation he experienced while incarcerated was, on
25 any calculus, substantial. He was locked up in jail. He could not maintain employment or
26 see his family or friends or others outside normal visiting hours.”). Mr. M “has an
27 overwhelming interest here—regardless of the length of his immigration detention—
28

1 because ‘any length of detention implicates the same’ fundamental rights.” *Perera v.*
2 *Jennings*, 2021 WL 2400981, at *4 (N.D. Cal. June 11, 2021) (citation omitted).

3 85. Second, there is a large risk of erroneous deprivation of Mr. M’s liberty
4 interest through the procedures used in this case, and there are available alternative
5 procedures which would ameliorate those risks. The risk of deprivation is high because
6 the only individuals subject to the automatic stay are those who, by definition, prevailed at
7 their bond hearing. In this case, the IJ concluded that Mr. M was not a threat to public
8 safety and determined the \$6,500 bond would mitigate any small risk of flight. In fact, at
9 the hearing before the IJ, the government did not contest the IJ’s findings that Petitioner
10 posed no danger to the community. Nevertheless, despite a neutral decision-maker finding
11 a bond was warranted, the automatic-stay provision allowed DHS—the party who lost its
12 bond argument—to unilaterally deprive Mr. M of his liberty. “A unilateral determination
13 made by the Service attorney that effectively overrules the reasoned decision of the
14 Immigration Judge poses a serious risk of error.” *Zavala v. Ridge*, 310 F. Supp. 2d 1071,
15 1078 (N.D. Cal. 2004). While a stay usually “requires the demonstration of likelihood of
16 success on the merits and irreparable harm, the automatic stay provision does not demand
17 any showing and, in fact, was promulgated explicitly for the purpose of avoiding a case-
18 by-case determination.” *Id.* (citing 66 Fed. Reg. 54909 (Oct. 31, 2001)). Essentially, the
19 automatic-stay provision “conflates the functions of adjudicator and prosecutor.” *Id.* Other
20 courts considering the automatic-stay provision have found this problematic as well. *See,*
21 *e.g., Sampiao v. Hyde*, 2025 WL 2607924, at *10 (D. Mass. Sept. 9, 2025) (granting
22 petition for habeas corpus and the immediate release of petitioner who, like Mr. M, was
23 granted bond by the IJ but remained detained under the automatic-stay provision); *Leal-*
24 *Hernandez v. Noem*, 2025 WL 2430025, at *15 (D. Md. Aug. 24, 2025) (same); *Palma v.*
25 *Trump*, 2025 WL 2624385, at *3 (D. Neb. Sept. 11, 2025) (same); *Ashley v. Ridge*, 288 F.
26 Supp. 2d 662, 669 (D.N.J. 2003) (finding petitioner’s continued detention under the
27 automatic-stay provision unconstitutional); *Günaydin v. Trump*, 784 F. Supp. 3d 1175,
28 1188 (D. Minn. 2025) (same).

1 86. Additionally, the stay provision does not require DHS to consider or
2 demonstrate any individualized facts or show a likelihood of success on the merits. *See* 8
3 C.F.R. § 1003.19(i)(2) (stating the stay is automatic and the bond “shall be stayed” upon
4 filing of the form EOIR-43). “[A] stay of an order directing the release of a detained
5 individual is an ‘especially’ extraordinary step, because ‘[i]n our society liberty is the norm,
6 and detention prior to trial or without trial is the carefully limited exception.’” *Günaydin*,
7 784 F. Supp. 3d at 1188 (alteration in original) (quoting *Salerno*, 481 U.S. at 755). By
8 contrast, the automatic-stay regulation “turns these well-established procedural principles
9 on their heads and carries a significant risk of erroneous deprivation.” *Id.* at 1189.

10 87. As to available alternatives, the regulations already provide one: DHS may
11 request a discretionary emergency stay from the BIA. *See* 8 C.F.R. § 1003.10(i)(1)
12 (granting BIA discretionary stay authority). This procedure mitigates the concern about
13 DHS usurping the neutral adjudicatory role and provides additional safeguards that the
14 automatic-stay provision lacks.

15 88. The risk of the erroneous deprivation of rights is particularly high here where
16 DHS has continued to unilaterally detain Mr. M despite having not even fulfilled the
17 procedural requirements to invoke the automatic-stay provision. To invoke the automatic
18 stay, DHS was required to file its notice of appeal within ten business days of the IJ’s bond
19 order. 8 C.F.R. § 1003.6(c)(1). Here, that deadline was on Friday, August 22. When DHS
20 did not file its appeal that day, any stay applicable to Mr. M lapsed, 8 C.F.R. § 1003.6(c)(1),
21 and he should have been immediately released. Instead, Mr. M remained and remains
22 detained. On Monday, August 25, DHS filed a motion to equitably toll the filing deadline.
23 Borkowski Decl. Ex. 7.

24 89. Mr. M’s ongoing detention despite the DHS’s untimely notice of appeal
25 suggests that the DHS’s theory is not only that it can continue to detain individuals granted
26 bond by timely invoking the automatic-stay provision in 8 C.F.R. § 1003.19(i)(2) but also
27 that it can do so without following the procedural requirements proscribed in 8 C.F.R. §
28 1003.19(i)(2) and § 1003.6(c)(1). DHS has unilaterally decided that by filing a motion to

1 equitably toll the deadline in § 1003.6(c)(1), it is able to continue detaining Mr. M until
2 that motion is decided. This decision stretches far beyond DHS's authority and is a clearly
3 erroneous violation of Mr. M's rights.

4 90. Third, the government's interest in detaining Mr. M under the automatic-stay
5 provision after a neutral adjudicator awarded him bond is both vague and minimal,
6 especially in contrast to the significant liberty interest at stake for Mr. M. Any government
7 interest, for example, in ensuring Mr. M's attendance for his immigration case has already
8 been secured by the IJ's finding that he is neither a danger nor a flight risk.

9 91. It is "always in the public interest to prevent the violation of a party's
10 constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see*
11 *Rodriguez v. Robbins*, 715 F.3d 1127, 1145–46 (9th Cir. 2013) ("[T]he government suffers
12 no harm from an injunction that merely ends unconstitutional practices and/or ensures that
13 constitutional standards are implemented."). Conversely, the cost of providing an
14 individualized review is low, and the longer Mr. M remains detained, the weaker the
15 government's interest in detaining him without this review becomes. *See Zadvydas*, 533
16 U.S. at 701. Thus, the government's substantially weak interest in detaining Mr. M does
17 not outweigh Mr. M's substantial liberty interest and the risk of erroneous deprivation of
18 that liberty.

19 **IV. The Automatic-Stay Regulation Is Ultra Vires Because It Exceeds the**
20 **Statutory Authority Granted to the Attorney General.**

21 92. By permitting DHS to unilaterally extend the detention of an individual, in
22 contravention of the findings of an agent (the IJ) properly delegated the authority to make
23 such a determination, 8 C.F.R. § 1003.19(i)(2) exceeds the statutory authority Congress
24 gave to the Attorney General.

25 93. "Agency actions beyond delegated authority are 'ultra vires,' and courts must
26 invalidate them." *U.S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257
27 (8th Cir. 1998); *see also Romero v. INS*, 39 F.3d 977, 980 (9th Cir. 1994) (holding that an
28 immigration regulation that is inconsistent with the statutory scheme is invalid).

1 94. The statutory section under which Petitioner is charged permits the Attorney
2 General to detain or release aliens on bond. 8 U.S.C. § 1226(a). Congress has permitted
3 the Attorney General to delegate detention determinations to “any other officer, employee,
4 or agency of the Department of Justice.” 28 U.S.C. § 510. IJs are administrative law judges
5 within the DOJ and are thus properly delegated bond-determination authority. *See* 8 U.S.C.
6 § 1101(b)(4). By contrast, DHS, the party that invoked the automatic-stay provision, is not
7 within the Department of Justice but is a separate executive department. *See* 6 U.S.C. §
8 111. “Because this back-ended approach effectively transforms a discretionary decision
9 by the immigration judge to a mandatory detention imposed by [DHS], it flouts the express
10 intent of Congress and is ultra vires to the statute.” *Zavala*, 310 F. Supp. 2d at 1079.

11 95. Accordingly, the challenged regulation is invalid, and Mr. M’s detention on
12 that basis is unlawful.

13 **V. The DHS July 8, 2025 Memorandum Violates the APA.**

14 96. Under the APA, “final agency action for which there is no other adequate
15 remedy in a court [is] subject to judicial review.” 5 U.S.C. § 704. The reviewing Court
16 “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be
17 . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”
18 or “unsupported by substantial evidence.” 5 U.S.C. §§ 706(2)(A), (E).

19 97. The DHS July 8, 2025 Policy, which reinterprets 8 U.S.C. § 1225 to apply to
20 all noncitizens encountered within the United States regardless of entry circumstances, *see*
21 Borkowski Decl. Ex. 1, violates the APA because it constitutes a substantive policy change
22 issued without notice-and-comment rulemaking, as required under 5 U.S.C. § 553. By
23 categorically denying bond eligibility and reclassifying broad swaths of individuals as
24 “applicants for admission,” the memorandum departs from longstanding statutory
25 interpretation and agency practice without a reasoned explanation, rendering it arbitrary
26 and capricious under 5 U.S.C. § 706(2)(A). Furthermore, the policy undermines procedural
27 protections guaranteed by U.S.C. § 1226 and due process principles, making it not in
28 accordance with law and in excess of statutory authority.

1 98. In addition, the Supreme Court’s decision in *Loper Bright Enters. v.*
2 *Raimondo*, 603 U.S. 369, 412–413, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024), which
3 eliminated judicial deference to agency guidance (the Chevron doctrine, (*Chevron U.S.A.,*
4 *Inc. v. NRDC*, 467 U.S. 837 (1984)), fundamentally altered the legal landscape governing
5 agency interpretations of statutes. As such, because the DHS July 8, 2025 memorandum
6 lacks any textual support and undermines statutory safeguards for immigrants who are
7 already living productive lives in the United States, a court might reasonably exercise its
8 independent judgment in interpreting the Immigration and Nationality Act rather than
9 deferring to DHS’s unreasonable reading of U.S.C. § 1225. *Loper Bright* empowers courts
10 to find the DHS July 8, 2025 memorandum legally invalid and refuse to follow it.

11 99. As discussed above, Respondent is clearly detained under § 1226. As such,
12 DHS’s claim that Mr. M is detained pursuant to § 1225(b)(2) is arbitrary and capricious.
13 Respondents’ detention of Mr. M violates the INA and the Fifth Amendment. Respondents
14 lack statutory authority under § 1225(b)(2) to detain Mr. M.

15 100. Petitioners’ detention is arbitrary, capricious, an abuse of discretion, violative
16 of the Constitution, and without statutory authority in violation of 5 U.S.C. § 706(2).

17 **VI. Any Evidence Obtained as a Result of Mr. M’s Unlawful Arrest Is**
18 **Inadmissible to Support the Government’s Burden of Proof.**

19 101. Mr. M was arrested by ICE without reasonable suspicion or probable cause,
20 apparently based solely on his appearance. The Fourth Amendment, which applies to “all
21 seizures of the person, including seizures that involve only a brief detention,” *Brignoni-*
22 *Ponce*, 422 U.S. at 878 (citation omitted), “forbids stopping or detaining persons for
23 questioning about their citizenship on less than a reasonable suspicion that they may be
24 aliens.” *Id.* at 884. Although “reasonable suspicion” constitutes a less stringent standard
25 than probable cause, it nevertheless requires at least a minimal degree of objective
26 justification to support the stop. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). This means
27 officers are required to have “specific articulable facts,” and “rational inferences” drawn
28 from those facts that “reasonably warrant suspicion” that the individual “may be illegally

1 in the country.” *Noem v. Vasquez Perdomo*, 2025 WL 2585637, at *9 (U.S. Sept. 8, 2025)
2 (Sotomayor, dissenting) (citing *Brignoni-Ponce*, 422 U.S. at 884). Officers must clearly
3 state reasons beyond an “inchoate and unparticularized suspicion or ‘hunch’” of illegal
4 activity. *Wardlow*, 528 U.S. at 123–24.

5 102. Even under *Noem v. Vasquez Perdomo*, this stop is unlawful. *See generally*
6 *Vasquez Perdomo*, 2025 WL 2585637 (U.S. Sept. 8, 2025) (Kavanaugh, concurring). In
7 his concurring opinion, Justice Kavanaugh stated that although considerations such as an
8 individual’s appearance, place of employment, or English language proficiency may allow
9 the Government to reasonably detain someone for inquiry into their immigration status,
10 “*apparent ethnicity alone cannot furnish reasonable suspicion* under this Court’s case law
11 regarding immigration stops.” *Id.* at *3 (emphasis added) (citation omitted). Rather, it can
12 used as a “‘relevant factor’ when considered along with other salient factors.” *Id.*

13 103. However, given the facts here, Mr. M was likely stopped based solely on his
14 racial and ethnic appearance. When he was detained by ICE, he was not at a “location[]
15 where people are hired for day jobs.” *Vasquez Perdomo*, 2025 WL 2585637 at *1. Instead,
16 he was walking from his home in Oxnard, California to his car at six in the morning, a
17 reasonable time when many individuals are commuting to work. Borkowski Decl. Ex. 4
18 at 101–02. There were no factors outlined in DHS’s I-213 form that indicated that Mr. M
19 had a specific job in “construction, landscaping, agriculture, or car washes.” *Vasquez*
20 *Perdomo*, 2025 WL 2585637, at *1. Mr. M was by himself and not speaking any
21 language—English or otherwise—which further suggests that ICE identified him based
22 only on the observable characteristics of his ethnicity. This flies in the face of the holding
23 in *Brignoni-Ponce*, where the Court held border patrol agents may not use “Mexican
24 ancestry” alone as reasonable suspicion for stops, even near the border, since many U.S.
25 and naturalized citizens “have the physical characteristics identified with Mexican
26 ancestry.” *Brignoni-Ponce*, 422 U.S. at 885–86. While Justice Kavanaugh explained in
27 *Vasquez Perdomo* that the government may consider appearance as part of the reason to
28 stop an individual, a stop cannot solely rely on this factor. *Vasquez Perdomo*, 2025 WL

1 2585637, at *3. Yet, that is exactly what happened here. ICE agents stopped Mr. M solely
2 based on his physical characteristics, in violation of the Fourth Amendment.

3 104. The government bears the burden “of proving by clear and convincing
4 evidence that [Mr. M’s] continued detention is justified.” *Ixchop Perez v. McAleenan*, 435
5 F. Supp. 3d 1055, 1063 (N.D. Cal. 2020); *see also Reynoso-Rodriguez v. Napolitano*, 2009
6 WL 3157477, at *4 (E.D. Cal. Sept. 28, 2009) (holding that “bail is appropriate ‘unless the
7 government establishes that he is a flight risk or will be a danger to the community’”
8 (citation omitted)). Additionally, because Mr. M was designated as an “alien present in
9 the United States who has not been admitted or paroled,” Borkwoski Decl. Ex. 4 at 93, the
10 government bears the burden of proving his alienage. *See* 8 CFR § 1240.8(c). However,
11 “[i]f law enforcement violates a defendant’s Fourth Amendment right . . . then, under the
12 exclusionary rule, ‘all evidence seized as a result . . . must be suppressed as the fruit of the
13 poisonous tree.’” *United States v. Hollaway*, 2024 WL 5169836, at *6 (E.D. Cal. Dec. 19,
14 2024) (citing *United States v. Morales*, 252 F.3d 1070, 1073 (9th Cir. 2001)).

15 105. The government’s documentation related to Mr. M’s citizenship status is
16 based on an alleged admission made by Mr. M during his detention and arrest by ICE
17 officers, which was conducted in violation of his constitutional rights. Borkwoski Decl.
18 Ex. 4 at 102. Therefore, any evidence or admission from this process is inadmissible,
19 leaving the government without sufficient grounds to detain Mr. M or prove his alienage.

20 CLAIMS FOR RELIEF

21 FIRST CLAIM

22 Violation of the Immigration and Nationality Act

23 (Jurisdictional Misclassification – § 1225 vs. § 1226)

24 106. Petitioner repeats and realleges all the allegations above and incorporates
25 them by reference here.

26 107. DHS asserts that the Petitioner is subject to mandatory detention under 8
27 U.S.C. § 1225 as an “arriving alien,” despite having arrested him inside the U.S. and
28

1 charging him under § 1226. Courts have consistently held that § 1226 governs detention
2 of aliens already present in the country. *See generally Jennings v. Rodriguez*, 583 U.S. 281
3 (2018); *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013).

4 **SECOND CLAIM**

5 **Violation of the Fifth Amendment to the United States Constitution**

6 **(Substantive Due Process)**

7 108. Petitioner re-alleges and incorporates by reference the paragraphs above.

8 109. The Due Process Clause of the Fifth Amendment forbids the government from
9 depriving any “person” of liberty “without due process of law.” U.S. Const. Amend. V.

10 110. The government has two legitimate interests that may be served by civil
11 immigration detention: preventing flight from removal proceedings and protecting the
12 community from danger.

13 111. Petitioner’s detention is untethered to any legitimate government interest,
14 which would be amply satisfied by his release with appropriate conditions. For these
15 reasons, Petitioner’s ongoing detention violates due process.

16 **THIRD CLAIM**

17 **Violation of the Fifth Amendment to the United States Constitution**

18 **(Procedural Due Process)**

19 112. Petitioner repeats and realleges all the allegations above and incorporate them
20 by reference here.

21 113. Mr. M’s private interest in his liberty and the risk of erroneous deprivation of
22 his liberty far outweighs the government’s interest in detaining him after an IJ has found
23 he is neither a flight risk, a danger, nor is he able to obtain private counsel for his
24 immigration court proceedings from detention. *See Mathews v. Eldridge*, 424 U.S. 319,
25 330, 335 (1976).

26 **FOURTH CLAIM**

27 **Ultra Vires Action by DHS**

1 114. Petitioner repeats and realleges the allegations above and incorporates them
2 by reference here.

3 115. The regulation permitting DHS to impose an automatic stay exceeds its
4 statutory authority under the INA, which delegates bond decisions to Department of
5 Justice-appointed Immigration Judges. *See, e.g., Romero v. INS*, 39 F.3d 977 (9th Cir.
6 1994); *Al Otro Lado v. Mayorkas*, 619 F. Supp. 3d 1029 (S.D. Cal. 2022).

7 **FIFTH CLAIM**

8 **Violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)**

9 116. Petitioner repeats and realleges the allegations above and incorporates them
10 by reference here.

11 117. Under the Administrative Procedure Act, a court must “hold unlawful and set
12 aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not
13 in accordance with the law,” that is “contrary to constitutional right [or] power,” or that is
14 “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5
15 U.S.C. § 706(2)(A)-(C).

16 118. Respondents’ detention of Mr. M pursuant to § 1225(b)(2) is arbitrary and
17 capricious. Respondents’ detention of Mr. M violates the INA and the Fifth Amendments.
18 Respondents do not have statutory authority under § 1225(b)(2) to detain Mr. M.

19 119. Mr. M’s detention is arbitrary, capricious, an abuse of discretion, violative of
20 the Constitution, and without statutory authority in violation of 5 U.S.C. § 706(2).

21 **SIXTH CLAIM**

22 **Violation of the Fourth Amendment to the United States Constitution**

23 120. Petitioner repeats and realleges the allegations above and incorporates them
24 by reference here.

25 121. Mr. M was arrested by ICE without reasonable suspicion or probable cause,
26 in violation of his Fourth Amendment Rights. As such, any evidence related to Mr. M’s
27 citizenship status based on alleged admissions made by Mr. M during his arrest and
28

1 detention by ICE officers is inadmissible. The government thus lacks sufficient grounds
2 to detain Mr. M or prove his alienage.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Petitioner respectfully requests that the Court:

- 5 a. Assume jurisdiction over this matter;
- 6 b. Grant the petition and issue a writ of habeas corpus commanding Petitioner's
- 7 immediate release from Respondents' custody under reasonable conditions of
- 8 supervision, and ordering that Respondents may not re-detain him absent a
- 9 violation of those conditions proven by ICE at a pre-deprivation hearing;
- 10 c. Enjoin Respondents from causing Petitioner any greater harm during the pendency
- 11 of this litigation and his immigration court case, such as by transferring him away
- 12 from his family ties in California and his pro bono counsel;
- 13 d. Declare Petitioner's detention in Respondents' custody unlawful under the INA
- 14 and the Due Process Clause of the Fifth Amendment of the United States
- 15 Constitution;
- 16 e. Declare Petitioner's arrest violated his rights under the Fourth Amendment of the
- 17 United State Constitution and that any evidence obtained through his arrest is
- 18 inadmissible;
- 19 f. Award Petitioner reasonable attorneys' fees, costs, and other disbursements in this
- 20 action permitted under the Equal Access to Justice Act, 28 U.S.C. § 2412, and on
- 21 any other basis justified under law;
- 22 g. Grant such further relief as the Court deems just and proper.
- 23

24 Respectfully submitted on September 25, 2025

25 /s/ Kelly Gregg

26 Kelly Gregg

27 GIBSON, DUNN & CRUTCHER LLP

28 *Pro Bono Attorney for Petitioner*

Verification Pursuant to 28 U.S.C. § 2242

I am submitting this verification on behalf of Petitioner because I am one of Petitioner's attorneys. As his attorney, I hereby verify that the factual statements made in the attached Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: September 25, 2025

/s/ Kelly Gregg

Kelly Gregg

GIBSON, DUNN & CRUTCHER LLP

Pro Bono Attorney for Petitioner

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9 *Pro Bono Attorneys for Petitioner*

10 UNITED STATES DISTRICT COURT
11 SOUTHERN DISTRICT OF CALIFORNIA
12

13 D.E.M.,

14 Petitioner,

15 v.

16 CHRISTOPHER J. LAROSE, Warden, Otay
17 Mesa Detention Center; PATRICK DIVVER,
18 San Diego Field Office Director; TODD M.
19 LYONS, Acting Director of U.S. Immigration
20 and Customs Enforcement; KRISTI NOEM,
Secretary of the U.S. Department of Homeland
Security,

21 Respondents
22

Case No. '25CV2521 CAB AHG

**DECLARATION OF NICHOLAS C.
BORKOWSKI IN SUPPORT OF
PETITION FOR WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C.
§ 2241**

Date:
Judge: Hon.

23
24
25
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DECLARATION OF NICHOLAS C. BORKOWSKI IN SUPPORT OF PETITION FOR WRIT OF
HABEAS CORPUS
Case No.

1 I, Nicholas C. Borkowski, declare and state as follows:

2 1. I am an attorney duly licensed by the State Bar of California and admitted
3 to practice before this Court. I am a Managing Attorney at Immigrant Defenders Law
4 Center, and counsel of record for D.E.M. in this matter. I submit this declaration in
5 support of D.E.M.'s Petition for Writ of Habeas Corpus. I have personal knowledge of
6 the facts stated in this declaration and, if called as a witness, I could and would testify
7 competently to the matters set forth herein.

8 2. On September 5, 2025, I emailed OMDClgalvisit@corecivic.com to
9 schedule a video appointment with Mr. M on September 12 or 15.

10 3. On September 8, OMDC Legal Visit informed me that a video appointment
11 could be scheduled for Monday, September 15 at 11:00 a.m. I confirmed this meeting
12 and shared a link for the video conference, and OMDC Legal Visit confirmed receipt.

13 4. On September 8, I spoke with Mr. M's partner, who informed me that he
14 had tested positive for COVID-19 and was placed in quarantine.

15 5. On September 15 at 11:00 a.m., I began the video call, but Mr. M was not
16 present. At 11:12 a.m., I emailed OMDC Legal Visit to confirm that Mr. M would be
17 joining.

18 6. At 11:50 a.m., OMDC Legal Visit responded, "Reschedule detainee was
19 not clear by medical, until 9/11/25 [sic]," and rescheduling the video call for September
20 18.

21 7. Attached as **Exhibit 1** is a true and correct copy of ICE's July 8, 2025
22 Interim Guidance Regarding Detention Authority for Applicants for Admission.

23 8. Attached as **Exhibit 2** is a true and correct copy of Respondents' Motion to
24 Calendar Custody Redetermination Hearing, dated August 1, 2025.

25 9. Attached as **Exhibit 3** is a true and correct copy of Respondents' Exhibits
26 in Support of Custody Redetermination Hearing, dated August 1, 2025.

27

28

10. Attached as **Exhibit 4** is a true and correct copy of DHS Submission of Evidence , dated Augst 4, 2025.

11. Attached as **Exhibit 5** is a true and correct copy of Order of the Immigration Judge, issued on August 8, 2025.

12. Attached as **Exhibit 6** is a true and correct copy of Notice of ICE Intent to Appeal Custody Redetermination, dated August 8, 2025.

13. Attached as **Exhibit 7** U.S. Department of Homeland Security’s Motion to Equitably Toll 8 C.F.R. § 1003.6(c)(1) Filing Deadline by One Business Day, filed August 25, 2025.

14. Attached as **Exhibit 8** is a true and correct copy of Bond Memorandum of the Immigration Judge, dated September 3, 2025.

15. Attached as **Exhibit 9** is a true and correct copy of Declaration of D.E.M.'s Partner in Support of Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, dated September 24, 2025.

16. Attached as **Exhibit 10** is a true and correct copy of DHS Brief on Jurisdiction to Redetermine Custody, dated August 4, 2025.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 24, 2025, in Los Angeles, California.

By: Nicholas C. Borkowski
Nicholas C. Borkowski

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