UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-CV-2720-RMR

NESTOR ESAI MENDOZA GUTIERREZ, for himself and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

JUAN BALTASAR, Warden, Aurora ICE Processing Center, in his official capacity,

ROBERT GUADIAN, Director of the Denver Field Office for U.S. Immigration and Customs Enforcement, in his official capacity;

KRISTI NOEM, Secretary of the U.S. Department of Homeland Security, in her official capacity;

TODD LYONS, Acting Director of U.S. Immigration and Customs Enforcement, in his official capacity;

PAMELA BONDI, Attorney General of the United States, in her official capacity;

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW;

SIRCE OWEN, Acting Director for Executive Office of Immigration Review, in her official capacity;

U.S. DEPARTMENT OF HOMELAND SECURITY;

AURORA IMMIGRATION COURT; and,

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents-Defendants.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Petitioner-Plaintiff Mendoza Gutierrez ("Plaintiff") asks for a temporary restraining order against Respondents-Defendants ("Defendants") pursuant to Rule 65 and the All Writs Act. Plaintiff is a civil immigration detainee at the Immigration and Customs Enforcement (ICE) Denver Contract Detention Facility in Aurora ("Aurora Facility"). Defendants deny Plaintiff release on bond under their erroneous new interpretation of the Immigration and Nationality Act ("INA"). The Court should order Plaintiff's release (or that Defendants provide a bond hearing within 7 days). The Court should further enjoin Defendants from transferring Plaintiff outside of the Court's jurisdiction.

I. Introduction

In an epic change to Defendants' policies and practices, Defendants are denying bond to people like Plaintiff. Previously – and for decades – noncitizens detained after residing in the U.S. were bond-eligible. 8 U.S.C. § 1226 provides noncitizens "arrested and detained" during removal proceedings "may [be] release[d] on a bond …" absent certain criminal charges. 8 U.S.C. § 1226(a)(2), (c). The Supreme Court explained § 1226 is the "default" detention provision, authorizing detaining people "already in the country," explicitly distinguishing them from "[noncitizens] seeking admission into the country" who "shall" be detained under § 1225. *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018).

Defendants now insist that, actually, 8 U.S.C. § 1225 governs Plaintiff's detention. Under Defendants' novel theory, Plaintiff is "seeking admission" to the U.S. and thus subject to mandatory detention under § 1225(b)(2) – despite having lived here for decades. This is a sharp contrast to Defendants' decades-long prior practice where § 1225 applied only "at the Nation's borders and ports of entry." *Jennings*, 583 U.S. at 287.

Plaintiff is entitled to preliminary relief – as numerous federal courts now hold.[1] "The language of … § 1226 is … clear[]. … [it] applies to [noncitizens] already present in the [U.S.] … [And] permits … release on bond." *Jennings*, 583 U.S. at 303.

I. Factual Background

A. Immigration Detention's Legal Framework

This case concerns two provisions of the INA governing immigrant detention: 8 U.S.C. § 1226(a) and § 1225(b). The distinction between the two determines whether a detained noncitizen can be released on bond or is subject to mandatory detention.

Noncitizens subject to § 1226(a) face *discretionary* detention. *See* 8 U.S.C. § 1226(a)(1); 8 C.F.R. § 1236.1(c)(8). These noncitizens can seek a "custody

[1] *Rodriguez-Vazquez v. Bostock*, 779 F.Supp.3d 1239 (W.D. Wash. Apr. 24, 2025) (granting preliminary class relief); *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299, *8 (D. Mass. July 7, 2025) (granting individual *habeas* relief); *Diaz Martinez v. Hyde*, No. CV 25-11613-BEM, --- F. Supp.3d ---, 2025 WL 2084238, *9 (D. Mass. July 24, 2025) (denying reconsideration of individual *habeas* relief); Ex. 1, *Maldonado Bautista v. Santacruz*, No. 5:25-cv-01874-SSS-BFM, *13 (C.D. Cal. July 28, 2025) (granting preliminary class relief); *Escalante v. Bondi*, No. 25-cv-3051, 2025 WL 2212104 (D. Minn. July 31, 2025) (report and recommendation to grant preliminary relief, adopted *sub nom O.E. v. Bondi*, 2025 WL 2235056 (D. Minn. Aug. 4, 2025); *Lopez Benitez v. Francis*, No. 25-Civ-5937, 2025 WL 2267803 (S.D. N.Y. Aug. 8, 2025) (granting individual *habeas* relief); *de Rocha Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025) (recommendation to grant *habeas* relief, adopted at 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Dos Santos v. Noem*, No. 1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025) (granting *habeas* relief); *Aguilar Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411 (D. Minn. Aug. 15, 2025) (same); *Arrazola-Gonzalez v. Noem*, No. 5:25-cv-01789-ODW, 2025 WL 2379285 (C.D. Cal. Aug 15, 2025) (same); *Romero v. Hyde*, --- F.Supp.3d ----, 2025 WL 2403827 (D. Mass. Aug. 19, 2025) (same); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025) (same); Ex. 2, *Benitez v. Noem*, No. 5:25-cv-02190, Doc. 11 (C.D. Cal. Aug. 26, 2025) (granting preliminary relief); Ex. 3, *Kostak v. Trump*, No. 3:25-dcv-01093-JE, Doc. 20 (W.D. La. Aug. 27, 2025) (same); Ex. 4, *Lopez-Campos v. Raycraft*, No. 2:25-cv-12486, Doc. 14 (E.D. Mich. Aug. 29, 2025) (granting *habeas* relief).

redetermination" – or bond hearing – before an immigration judge (IJ) to present evidence that they are not a flight risk or danger to the community. *See* 8 C.F.R. § 1236.1(d).

By contrast, people detained under § 1225(b) are subject to *mandatory* detention. *See Jennings*, 583 U.S. at 288; 8 U.S.C. § 1182(d)(5).

These two provisions reflect immigration law's distinction between noncitizens arrested *after entering* the country (§ 1226) and those arrested *while arriving in* the country (§ 1225). Before the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), the statutory authority for custody determinations was found at 8 U.S.C. § 1252(a) (1994), and authorized detention during "deportation" proceedings *and* release on bond. Those "deportation" proceedings governed the detention of anyone in the United States, regardless of manner of entry. IIRIRA maintained the same authority for detention and release on bond at 8 U.S.C. § 1226(a). *See* H.R. Rep. No. 104-469, pt. 1, at 229 (1996) (explaining the new § 1226(a) "restate[d] the current provisions in [then 8 U.S.C. § 1252(a)] regarding the authority … to … detain, and release on bond…").

The IIRIRA also enacted new mandatory detention (without bond) provisions for people apprehended on arrival at 8 U.S.C. § 1225. *See Jennings*, 583 U.S. at 303.

In implementing the IIRIRA's detention authority, the then-INS clarified that people entering the U.S. without inspection and who were *not* apprehended while "arriving" would continue to be detained under § 1226(a) (formerly § 1252(a)) with access to bond. 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Inadmissible [noncitizens], except for arriving [noncitizens], have available to them bond … This procedure maintains the status quo.").

B. Defendants' New Illegal Mandatory Detention Policy

During the almost thirty years since the IIRIRA's passage, Defendants DHS and the Executive Office for Immigration Review (EOIR) – the immigration court system – applied § 1226(a) to detain people caught in the interior after entry without inspection. Thus, for decades, Defendants permitted noncitizens the chance to seek release on bond.

Now, Defendants have dramatically switched course and insist that § 1225(b)(2)(A) requires detention of *all* persons who *ever* entered the U.S. without inspection, regardless of where they were arrested or how long they have resided here.

The change began at the Tacoma Immigration Court where IJs began denying bond to everyone who entered without inspection. *See Rodriguez Vazquez*, 779 F. Supp. at 1244. Then, on May 22, 2025, the Board of Immigration Appeals (BIA) issued an unpublished decision affirming one Tacoma IJ's decision that a noncitizen who lived in the U.S. for over 10 years was subject to mandatory detention under § 1225(b)(2)(A).

After the unpublished BIA decision, in July 2025, DHS "in coordination with the [DOJ]" issued a memo stating "effective immediately, it is the position of DHS" that anyone who entered without inspection is "subject to detention under [8 U.S.C. § 1225(b)] and may not be released from ICE custody … ." According to DHS, noncitizens are now "ineligible for a [bond] hearing … and may not be released" during removal proceedings.[2]

Since DHS's change in position, IJs hearing claims at the Aurora Facility have now adopted this illegal interpretation of the INA's detention scheme.[3]

[2] Ex. 5, "Interim Guidance Regarding Detention Authority for Applicants for Admission."
[3] Ex. 6, IJ Kane Decision Denying Bond to N. Mendoza Gutierrez.

C. Mr. Mendoza Gutierrez is Ideally Qualified for Bond

Mr. Mendoza Gutierrez – and hundreds of others like him – is detained solely because of Defendants' new policy. He has lived in the Denver Metro Area for 26 years. He rents an apartment with his wife, where they live with their two U.S.-citizen children. He owns his own drywall firm and has steady employment. He has no criminal convictions, other than traffic tickets and a 23-year-old misdemeanor DUI conviction (which is not disqualifying).[4] *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1194 (B.I.A. 1999) & 8 U.S.C. § 1226(c)(1)(E)(ii). In short, he is an ideal candidate for bond.

ICE initiated removal proceedings against Mr. Mendoza Gutierrez, charging him with being present "without admission," [5] i.e. entering the country "without inspection" and "seeking admission" in violation of 8 U.S.C. § 1182. After Plaintiff was detained on May 25, 2025, he sought bond. IJ Alison R. Kane ruled on June 23, 2025 that she lacked jurisdiction to consider bond – relying on Defendants' new interpretation of § 1225.[6]

II. Legal Standard for Granting Preliminary Relief

Plaintiff can easily show he is entitled to preliminary relief as (1) he is likely to succeed on the merits; (2) he will suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003).

[4] Ex. 7, Decl. of N. Mendoza Gutierrez, ¶¶ 1-11.
[5] *Id.* at ¶ 14 & Ex. 8, N. Mendoza Gutierrez Notice to Appear.
[6] Ex. 6, IJ Kane Decision Denying Bond to N. Mendoza Gutierrez.

III. Legal Argument – The Court Should Order Preliminary Relief

A. Mr. Mendoza Gutierrez is Likely to Succeed on the Merits

Simply, Defendants' policy violates the INA. As the Supreme Court explained, § 1225 is concerned "primarily [with those] seeking entry," *i.e.*, cases "at the Nation's borders and ports of entry, where the Government must determine whether a[] [noncitizen] seeking to enter the country is admissible." *Jennings*, 583 U.S. at 297 *&* 287. In contrast, § 1226 applies to people who, like Plaintiff, are "already in the country" and are detained "pending the outcome of removal proceedings." *Id*. at 289. The INA's plain text, canons of statutory construction, the statutes' legislative history, the implementing regulations, and decades of agency practice all support this conclusion.

Thus, every court considering the issue sided with Plaintiff. *Supra* fn. 1.

1. The text of § 1226(a) and canons of statutory construction demonstrate Plaintiff is entitled to bond hearings.

Contrary to Defendants' new policy, application of § 1226(a) does not turn on whether a person was previously admitted to the country. The plain text of 8 U.S.C. § 1226(a) includes people who are inadmissible, like Plaintiff. Here, in the removal proceedings, DHS alleges Plaintiff entered the country without inspection and thus is present without inspection.[7] *See* 8 U.S.C. § 1182(a)(6)(A)(i). Section 1226(a) – the INA's "default" detention authority, *Jennings*, 583 U.S. at 281 – applies to people detained "pending a decision on whether the [noncitizen] is to be removed." 8 U.S.C. § 1226(a). As the statute expressly provides, this language includes both (1) people like Mr.

[7] *See* Ex. 8, N. Mendoza Gutierrez Notice to Appear.

Mendoza Gutierrez who entered without inspection, were never formally admitted to the country, and thus are charged as "inadmissible" under § 1182(a)(6)(A)(i), and (2) people who were admitted and are charged as "deportable" under the INA. *See id*. § 1229a(a)(3) (removal proceedings "determine[e] whether a [noncitizen] *may be admitted* to the [U.S.] or, if the [noncitizen] has been so admitted, removed from the [U.S.]") (emphasis added).

The statute's structure makes this clear. Subsection 1226(a) provides the general right to seek release on bond. Subsection 1226(c) then carves out discrete categories of noncitizens who are subject to mandatory detention due to certain criminal history. *See*, *e.g.*, *id*. § 1226(c)(1)(A), (D). These carve-outs include noncitizens who are inadmissible for entering without inspection *and* who meet certain other crime-related criteria. *See id*. § 1226(c)(1)(E). Because § 1226(c)'s exception expressly applies to people who entered without inspection (like Plaintiff) and who meet certain other criteria, it reinforces the default rule: § 1226(a)'s general detention authority otherwise applies to Plaintiff. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010).

Recent amendments to § 1226 reinforce this point by explicitly including people who are inadmissible for being present without admission/having entered without inspection. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025) (LRA). These amendments make people charged as inadmissible under § 1182(a)(6)(A)(i) (the inadmissibility ground for entry without inspection) or (a)(7) (the inadmissibility ground for lacking valid documentation) *and* who have had certain criminal encounters subject to mandatory detention under § 1226(c). *See* 8 U.S.C. § 1226(c)(1)(E). By including such individuals under § 1226(c), Congress expressly reaffirmed that § 1226(a) covers persons

charged under § 1182(a)(6)(A) or (a)(7). "[W]hen Congress creates 'specific exceptions' to a statute's applicability, it 'proves' that absent those exceptions, the statute generally applies." *Rodriguez Vazquez*, 779 F.Supp.3d at 1256-57 (quoting *Shady Grove*, 559 U.S. at 400). *See also Gomes*, 2025 WL 1869299, *6; *Diaz Martinez*, 2025 WL 2084238, *7.

Several canons of interpretation reinforce this understanding. First, the canon against rendering text superfluous applies. *See*, *e.g.*, *Clark v. Rameker*, 573 U.S. 122, 131 (2014) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous," internal citations omitted). Despite the plain text of § 1226, Defendants now assert that anyone present in the U.S. without being admitted is subject to § 1225(b)(2)(A) mandatory detention. This interpretation renders significant portions of Section 1226(c) meaningless. *Rodriguez Vazquez*, 779 F.Supp.3d at 1258. As the *Rodriguez Vazquez* court explained, this is so because if "Section 1225 … and its mandatory detention provisions apply to all noncitizens who have not been admitted, then it would render superfluous provisions of Section 1226 that apply to certain categories of inadmissible noncitizens." *Id*. at 1258 (citation modified).

Second, "when Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Estrada v. Smart*, 107 F.4th 1254, 1268 (10th Cir. 2024) (cleaned up). That presumption applies here, given the LRA's amendments to § 1226. *See Rodriguez Vazquez*, 779 F.Supp.3d at 1259 (quoting *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995)). Indeed, as noted above, and as the *Rodriguez Vazquez* court explained, these amendments explicitly provide that § 1226(a) covers people like Plaintiff. This is 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." *Id*. 1259 (emphasis in original, citation modified). *See also*, *e.g.*, *Diaz Martinez*, 2025 WL 2084238, at *7 ("if, 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 [LRA] amendment would have no effect").

Finally, "[w]hen Congress adopts a new law against the backdrop of a longstanding administrative construction," courts "generally presume[] the new provision should have been understood to work in harmony with what has come before." *Monsalvo Velazquez v. Bondi*, 145 S. Ct. 1232, 1242 (2025) (citation modified). This canon also supports Plaintiff's understanding of the statute, because "Congress adopted the new amendments to Section 1226(c) against the backdrop of decades of post-IIRIRA agency practice applying discretionary detention under Section 1226(a) to inadmissible noncitizens such as [Plaintiffs]." *Rodriguez Vazquez*, 779 F.Supp.3d, at 1259.

2. The statutory structure and the textual limitations of § 1225(b)(2) further demonstrate that § 1226(a), not § 1225(b)(2), applies to Plaintiff.

The statutory structure also strongly supports the long-accepted interpretation that § 1226(a) applies to Plaintiff. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted); *see also Biden v. Tex.*, 597 U.S. 785, 799-800 (2022) (interpreting INA).

The Supreme Court has described the structure of § 1226 and § 1225 as distinguishing between the two basic groups of noncitizens. Section 1226(a) (with access

to bond) applies to those who are "already in the country" and are detained "pending the outcome of removal proceedings." *Jennings*, 583 U.S. at 289. By contrast, § 1225(b)(2) mandatory detention applies "at the Nation's borders and ports of entry, where the Government must determine whether a[] [noncitizen] seeking to enter the country is admissible." *Id*. at 287. Indeed, the whole purpose of § 1225 is to define *how* DHS inspects, processes, and detains people at the border. *See id*. at 297 ("[Section] 1225(b) applies primarily to [noncitizens] seeking entry into the [U.S.] …"). *See also* H.R. Rep. No. 104-469, pt. 1, at 157-58, 228-29 (explaining the purpose of § 1225).

Section 1225's text reinforces the two sections' structure and reflects its limited temporal scope. To begin, § 1225 concerns the "inspection" and "expedited removal of inadmissible arriving [noncitizens]." 8 U.S.C. § 1225. For example, § 1225(b)(1) encompasses only "inspection" of certain "arriving" noncitizens, and only those who are "inadmissible" for having misrepresented information or lacking entry documents.

Section 1225(b)(2) is similarly limited to people applying for admission on arrival, but whom (b)(1) does not cover. The title explains that it addresses "[i]nspection of other [noncitizens]." The subsection further specifies it applies only to "applicants for admission" (defined at § 1225(a)(1)) who "*seek[] admission*." By stating § 1225(b)(2) applies only to those "seeking admission," Congress confirmed it did not intend to sweep up those who previously entered and began residing in the U.S.

> [S]omeone who enters a movie theater without purchasing a ticket and then proceeds to sit through the first few minutes of a film would not ordinarily then be described as 'seeking admission' to the theater. Rather, that person would be described as already present there. Even if that person, after being detected, offered to pay for a ticket, one would not describe them as 'seeking admission' (or 'seeking' 'lawful entry') at that point – one would say

> they had entered unlawfully but now seek a lawful means of remaining there.

Lopez Benitez, 2025 WL 2267803, *7. *See also* H.R. Rep. No. 104-469, pt. 1, at 157-58, 228-29; H.R. Rep. No. 104-828, at 209. Until recently, even Defendants took this position, explaining "'seek[ing] admission' … entails affirmative actions to gain authorized entry."[8]

"This active construction of the phrase 'seeking admission'" accords with the plain language in § 1225(b)(2)(A) by requiring both that a person be an "applicant for admission" and "also [be] *doing* something" following arrival to obtain authorized entry. *Diaz Martinez*, 2025 WL 2084238, at **6-7 (emphasis in original); *see also Lopez Benitez*, 2025 WL 2267803, at *7 (this is the "plain, ordinary meaning" of "seeking admission").

By contrast, under Defendants' new policy, inadmissibility alone triggers § 1225(b)(2) mandatory detention. But as the Government itself previously said:

> Nothing in [§ 1225's] structure suggests that Congress regarded [noncitizens] 'seeking admission' and 'applicants for admission' as equivalent, interchangeable terms. If that were the case, the statutory reference to [noncitizens] 'seeking admission' would be redundant; Congress could simply have stated that all 'applicants for admission' 'shall be detained for' removal proceedings, without any reference to [noncitizens] 'seeking admission.'[9]

The statute's temporal focus on people "arriving" is evident in other respects too. Section 1225(b)(2)(C) addresses "[t]reatment of [noncitizens] *arriving* from contiguous

[8] Ex. 9, Reply Br. for Fed. Appellees at 14-15 (pdf pp. 21-22), *Crane v. Johnson*, No. 14-10049 (5th Cir. Sept. 29, 2014); *accord* Ex. 10, Tr. of Oral Argument at 44:23-45:2, *Biden v. Texas*, 597 U.S. 785 (2022) (No. 21-954) ("[Solicitor General]: … DHS's long standing interpretation has been that 1226(a) applies to those who have crossed the border between ports of entry and are shortly thereafter apprehended.").

[9] Ex. 9, *Crane* Br. at p. 16 (pdf p. 23).

territory" (emphases added). This language underscores Congress' focus on people who just entered the U.S., and not on people residing in the interior.[10]

3. The legislative history further supports Plaintiff's argument.

IIRIRA's legislative history also supports the conclusion that § 1226(a) applies to Plaintiff. In the IIRIRA, Congress focused on recent arrivals who lacked documents to remain. *See* H.R. Rep. No. 104-469, pt. 1, at 157-58, 228-29. Notably, Congress said nothing about subjecting *all* people present in the U.S. to mandatory detention.

This is important: before the IIRIRA, people like Plaintiff were not subject to mandatory detention under *any* theory. *See* 8 U.S.C. § 1252(a) (1994). Had Congress intended a monumental shift in immigration law (potentially subjecting millions of people to mandatory detention), it would have clearly said so. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (finding "implausible that Congress would give to the [agency] through these modest words [such] power"). In fact, Congress said the *opposite*: the new § 1226(a) just "restates the current provisions … regarding the authority … to arrest, detain, and release on bond a[] [noncitizen]." H.R. Rep. No. 104-469, pt. 1, at 229. "Because noncitizens like [Plaintiff] were entitled to discretionary detention under [§] 1226(a)'s predecessor statute and Congress declared its scope unchanged … this background supports [Plaintiff's] position that he too is subject to discretionary detention." *Rodriguez Vazquez*, 779 F.Supp.3d at 1260.

[10] A recent published BIA decision supports that § 1225(b) applies only to arriving individuals. In *Matter of Q. Li*, the BIA held a person apprehended "approximately 5.4 miles away from a designated port of entry and 100 yards north of the border" was detained under § 1225(b), *not* § 1226(a). 29 I. & N. Dec. 66, 66-67 (BIA 2025). *See also Matter of Akmedov*, 29 I&N Dec. 166 (BIA 2025) (considering § 1226 detainee for bond).

4. Defendants' policies violate longstanding EOIR regulations.

Finally, Defendants' policies violate EOIR's regulations stating people like Plaintiff are detained under § 1226(a) and bond-eligible. Following the IIRIRA's passage, in the decades since, and *still today*, EOIR's regulations recognize Plaintiff is detained under § 1226(a). EOIR explained "[d]espite being applicants for admission, [noncitizens] who are present without having been admitted ... will be eligible for bond." 62 Fed. Reg. at 10323; *see also id*. ("Inadmissible [noncitizens], except for arriving [noncitizens], have available to them bond."). In the following decades, the relevant regulations are unchanged. *Compare* 63 Fed. Reg. 27441, 27448 (May 19, 1998), *with* 8 C.F.R. § 1003.19(h)(2). Even today, the regulation governing IJs' bond jurisdiction – 8 C.F.R. § 1003.19(h)(2) – only limits an IJ's bond jurisdiction to noncitizens subject to § 1226(c).

Regulatory "guidance and the agency's subsequent years of unchanged practice is persuasive." *Rodriguez Vazquez*, 779 F.Supp.3d at 1261. "When an agency claims to discover in a long-extant statute an unheralded power … [courts] greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. v. EPA*, 574 U.S. 302, 324 (2014).

B. Plaintiff Faces Imminent, Irreparable Harm

Because Plaintiff was denied bond, he is imprisoned in jail-like conditions.[11] "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972) . "It is hard to adequately state the significance of the potential injury" to a person who is illegally incarcerated, as one cannot "be given back" any day "he has

[11] *See*, *e.g.*, Ex. 7, Decl. of N. Mendoza Gutierrez, ¶¶ 18.

spent in prison." *Case v. Hatch*, No. 08-CV-00542 MV/WDS, 2011 WL 13285731, *5 (D. N.M. May 2, 2011). Detention causes "potentially irreparable harm every day [one] remains in custody." *Rodriguez Vazquez*, 779 F.Supp.3d at 1262. This injury is "certain, great, actual, and not theoretical." *See Heideman v. S. Salt Lake City, Utah*, 348 F.3d 1182, 1189 (10th Cir. 2003) (citations omitted).

Courts routinely find far less weighty interests justify preliminary relief. *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929) (tax payment); *RoDa Drilling v. Siegal*, 552 F.3d 1203, 1210-11 (10th Cir. 2009) (control of real property); *Bray v. QFA Royalties, LLC*, 486 F.Supp.2d 1237 (D. Colo. 2007) (terminating sandwich shop franchise agreements).

C. Balancing the Equities and Public Interest Weigh Heavily in Favor of Relief

The balance of equities and the public interest factors merge in cases against the government. *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 436 (2009). Simply, the government cannot claim injury from an order enjoining unlawful action. *See*, *e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *Wages & White Lion, Inv., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021) ("There is generally no public interest in … unlawful agency action").

Here, requiring the government to return to its prior practice – granting bond hearings – does not injure Defendants in any way. People granted bond – especially when represented by immigration counsel – regularly attend all subsequent proceedings.[12] A noncitizen can only be released on bond after a finding "by clear and convincing evidence" that "the [noncitizen] is likely to appear for any scheduled proceeding." 8 C.F.R. §

[12] Ex. 11, Decl. of A. Reed, ¶ 25.

1003.19(h)(3). For Plaintiff to be released, the bond hearing still must determine "release would not pose a danger to other persons or property." *See id*. Thus, "[t]he harm to the government is minimal." *Rodriguez Vazquez*, 779 F.Supp.3d at 1262.

IV. The Court Should Not Require Plaintiffs to Provide Security

The Court should not require a Rule 65 bond. Courts have "wide discretion in the matter of requiring security and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964). There is no likelihood of harm to the government in this case, given that the requested relief would only preserve the status quo and require the Defendants to provide Plaintiff a bond hearing. Indeed, here the purpose of any security is satisfied by the bond required in immigration court.[13]

V. Conclusion

Accordingly, the Court should grant a temporary restraining order (or preliminary injunction) to Plaintiff to require either his release from custody, or that Defendants provide him a bond hearing within 7 days. The court should further enjoin the Defendants from transferring Mr. Mendoza Gutierrez outside the District of Colorado.

[13] In the alternative, the Court should require a nominal bond. *See Andujo v. Longshore*, 14-CV-1532-REB, 2014 WL 2781163 (D. Colo. June 19, 2014).

Dated: September 3, 2025.

Respectfully submitted,

s/ Timothy R. Macdonald

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ATTORNEYS FOR PLAINTIFF-PETITIONER AND THE PUTATIVE CLASS

CERTIFICATE OF CONFERRAL

I hereby certify that consistent with D. Colo. Local Rule 7.1, before filing this motion, on September 3, 2025, I conferred with counsel for Defendants-Respondents, Kevin Traskos, Chief, Civil Division, US Attorney's Office for the District of Colorado, regarding the relief requested herein. Defendants-Respondents are still formulating their position on this motion.

s/ Timothy R. Macdonald
Attorney for Plaintiff-Petitioner and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2025, I electronically filed the foregoing **PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER** with the Clerk of the Court using the CM/ECF system, and that in accordance with Fed. R. Civ. P. 5, all counsel of record shall be served electronically through such filing.

s/ Anna I. Kurtz

Counsel for Plaintiff-Petition and the Putative Class