The Hon. James P. Donohue
Chief Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL RAMIREZ MEDINA,

Petitioner,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN KELLY, Secretary of Homeland Security; NATHALIE ASHER, Director of the Seattle Field Office of U.S. Immigration and Customs Enforcement,

Respondents.

Case No. 2:17-cv-00218-RSM-JPD

RESPONDENTS' MOTION TO DISMISS

Oral Argument Requested

INTRODUCTION

Petitioner Daniel Ramirez Medina ("Petitioner") is challenging the Department of Homeland Security's ("DHS") decisions to terminate Petitioner's deferred action and commence removal proceedings and to detain Petitioner in connection with those proceedings. *See* Dkt. 41 (claiming that DHS's actions violated the Fourth and Fifth Amendments and seeking injunctive and nationwide declaratory relief). As a threshold matter, this action has been filed in the wrong court, and Petitioner must proceed with his claims in immigration court – the court that Congress created to adjudicate these types of claims.

Petitioner's claims can be divided into two components. First, Petitioner is challenging DHS's February 10, 2017, "no bond" determination to hold him in custody. *See* Dkt. 41, "Prayer for Relief" paragraph 1 (seeking Petitioner's "immediate[] release"). In addition, Petitioner

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raises various factual and legal claims (including constitutional claims) regarding DHS's decision to terminate deferred action and commence removal proceedings. *See* Dkt. 41 generally.

As to the initial matter of custody, Petitioner should have requested a bond redetermination, or bond hearing, before an immigration judge ("IJ"). *See* Transcript of Status Hearing at 26:19-20 (Feb. 17, 2017) ("Trans.") (Court holding "in the first instance, that it is my obligation to refer this matter to an immigration judge" and that this referral is without prejudice to Petitioner's other claims); Dkt. 39 at 1 (holding the "Court lacks jurisdiction to . . . rule in the first instance"). Not only did Petitioner fail to request a bond hearing, but when the immigration court scheduled a bond hearing, his attorneys contacted the immigration court and requested that it be cancelled. Had his attorneys not taken this step, it is possible the IJ would have ordered Petitioner released, mooting out this part of the case.

Petitioner has offered no reason why this Court should make an exception to applicable exhaustion requirements in his case and allow him to challenge his custody in the first instance in district court. *See* 8 U.S.C. § 1226. It is true that his release from custody would not moot out the entire case, but this does not excuse him from availing himself of the proper avenue of redress that would potentially resolve the most pressing issue in this case. Nor does Petitioner demonstrate why the Court should grant him even more extraordinary relief in the form of his emergency motion for release.

Second, Petitioner also challenges his pending removal proceedings, arguing that DHS should not have terminated his deferred action and commenced removal proceedings. But 8 U.S.C. § 1252(g) precludes judicial review in district court of "any cause or claim . . . arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders . . . ." Thus, to the extent that Petitioner has any viable legal claims arising from the "decision[s] or action[s]" of DHS in this case, they must be raised initially in immigration court and then, following administrative appeal, through a petition for review filed in the Ninth Circuit Court of Appeals. *See* U.S.C. § 1252(b)(9) (requiring that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provision,

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arising from any action taken or proceeding brought to remove an alien" must be made through a petition for review); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (applying this statutory channeling provision in the context of a Fifth Amendment claim).

To the extent that Petitioner's Amended Petition sufficiently alleges egregious violations of the Fourth and Fifth Amendment, *see* dkt. 41 (Count Nos. 1-4), the Ninth Circuit has found that these types of claims must be raised through a petition for review. *See, e.g., id.*; *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017, 1019 (9th Cir. 2008) (reversing BIA and remanding with instruction to dismiss removal proceedings on the grounds that the Government's entry into a residence violated the Fourth Amendment). Because there is no legal basis to shortcut this congressionally mandated process, Petitioner's claims should be dismissed for lack of jurisdiction. *Cf. Singh v. Holder*, 638 F.3d 1196, 1211 (9th Cir. 2011) (holding that portion of habeas petition arguing that petitioner was "not removable" under statute was not independent of proceedings and had to be channeled through the petition for review process).

BACKGROUND

I. Overview of Deferred Action

The Immigration and Nationality Act ("INA") charges the Secretary of Homeland Security "with the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Individuals are removable if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); *see* 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled . . . is inadmissible."); § 1227(a)(1)(B) ("Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable"). Removal is a civil, not criminal, matter. *Arizona*, 132 S. Ct. at 2499.

The federal government cannot practicably remove every removable alien. Rather, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. DHS, "as an initial matter, must decide whether it makes sense to pursue removal at all." *Id.* "At each stage the Executive has discretion to

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abandon the endeavor." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("*AADC*"). Like other agencies exercising enforcement discretion, DHS must balance a number of factors that are within its expertise. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Deferred action is one of the ways in which DHS exercises enforcement discretion. Deferred action is "a regular practice" in which the Secretary exercises his discretion "for humanitarian reasons or simply for [his] own convenience," to notify an alien of a non-binding decision to forbear from seeking his removal for a designated period. *See AADC*, 525 U.S. at 483-84; 8 C.F.R. § 274a.12(c)(14) ("an act of administrative convenience to the government which gives some cases lower priority"). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *AADC*, 525 U.S. at 484 (citations omitted), a removable individual may remain present in the United States so long as DHS continues to forebear.

Deferred action does not confer lawful immigration status or provide any defense to removal. *Cf. Chaundry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) (discussing the difference between "unlawful presence" and "unlawful status"). An individual with deferred action remains removable at any time, and DHS has the discretion to revoke deferred action unilaterally. *See AADC*, 525 U.S. at 484-85; *Texas v. United States*, 809 F.3d 134, 199 (5th Cir. 2015) (King, J., dissenting) (explaining that the terms "lawful presence" and "deferred action" mean "nothing more than DHS's tentative decision, revocable at any time, not to remove an individual for the time being – i.e., the decision to exercise prosecutorial discretion").[1]

On June 15, 2012, DHS issued a memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." Attached as Exhibit A. That memorandum outlines a program known as Deferred Action for Childhood

[1] The majority opinion in *Texas* also acknowledged that "'[l]awful presence' is not an enforceable right to remain in the United States and can be revoked at any time," although it added that this classification nevertheless has significant legal consequences that can give rise to a state's standing to challenge deferred action policy. *See Texas*, 809 F.3d at 148. Petitioner argues that he is lawfully present in the United States. *See* Dkt. 41-3 at 3. Respondents note that he never had lawful status and his deferred action has been revoked.

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Arrivals ("DACA") that is available to a certain subset of individuals who are unlawfully in this country. The memorandum expressly states, "[t]his memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." Exhibit A at 3. That memorandum does not address the topics of arrest by DHS or the grounds that DHS will consider in terminating deferred action.

The June 15, 2012, Memorandum remains in effect today. *See* Memorandum, dated February 20, 2017, entitled "Enforcement of the Immigration Laws to Serve the National Interest") at 2 attached as Exhibit B; "Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement" dated February 21, 2017, attached as Exhibit C ("Q:30 Do these memoranda affect recipients of Deferred Action for Childhood Arrivals (DACA)? A30: No.").

On October 27, 2015, DHS issued a document entitled, "Frequently Asked Questions." Attached as Exhibit D. Question No. 27 asks, "Can my deferred action under the DACA process be terminated before it expires?" The answer states, "Yes. DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without Notice of Intent to Terminate, at DHS's discretion."[2] This document explains that deferred action "is a discretionary determination to defer removal of an individual" and does not confer lawful status on the individual. *See id.* at Q:1 ("DHS can terminate or renew deferred action at any time, at

[2] In an April 17, 2015, letter to Congress responding to questions about DACA recipients with gang memberships or affiliations, DHS explained that it reviewed records for all DACA recipients and found law-enforcement-related records regarding 49 DACA recipients out of 886,638. *See* Exhibit E (Letter to Chairman Charles E. Grassley with attachment at 4 (Apr. 17, 2015)). Those records were part of TECS, an information-sharing platform with data or access to different databases that include records relevant to the anti-terrorism and law enforcement mission of U.S. Customs and Border Protection and numerous other federal agencies that it supports. Of those records, USCIS reported that 13 individuals had TECS records entered after DACA adjudication, which USCIS was reviewing for possible termination. *See id*. USCIS also reported, based on ad hoc manual reports, that as of March 20, 2015, DHS terminated DACA for at least 282 requestors based on gang affiliation and/or criminal issues. *See id*. at 5. USCIS described the circumstances where DACA termination could arise, stating that "[w]hen a suspicion of gang affiliation comes to the attention of USCIS after the DACA request has been approved, the case is reviewed for possible termination. This information is typically communicated by ICE as result of their engagement with local law enforcement or other encounters." *Id.* at 6.

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the agency's discretion"); *cf. id.* at Q:5 (elaborating on the distinction between "lawful presence" and "lawful status"). This document also explains that if an applicant makes a misrepresentation or knowingly fails to disclose facts in an effort to obtain DACA, the applicant will be considered an enforcement priority. *Id*. at Q:24. Lastly, the document explains that the phrase "national security or public safety threat" includes but is not limited to "gang membership, participation in criminal activities, or participation in activities that threaten the United States." *See id.* at Q:65.

The Form I-821 D, entitled, "Instructions for Consideration of Deferred Action for Childhood Arrivals" states, "[i]ndividuals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time, unless the Department of Homeland Security (DHS) chooses to terminate the deferral." A copy of January 9, 2017, version of the Form I-821 D is attached as Exhibit F.

II. Factual Background

Respondents recognize that this is a motion to dismiss for lack of jurisdiction and not an evidentiary hearing. Nonetheless, for the Court to understand Respondents' arguments regarding jurisdiction, Respondents briefly set forth the most significant facts and most significant factual disputes between the parties. Because Petitioner's counsel cancelled the February 23, 2017, hearing before an IJ, there has been no judicial resolution of any of these disputed facts. To the extent that this Court decides to later hold a bond hearing itself (which Respondents believe would be improper), Respondents request an opportunity to provide additional evidence.

Petitioner lacks lawful status. Petitioner initially applied for DACA in 2013. Dkt. 41 at ¶ 20. After having been granted DACA, Petitioner successfully reapplied for DACA in 2016. *See id*. at 21. By notice dated May 5, 2016, DHS advised Petitioner of its decision to "defer action in your case." Attached as Exhibit G. This notice explained, "Deferred action does not confer or alter any immigration status" and that "[u]nless terminated, this decision to defer removal action will remain in effect for 2 years from the date of this notice."[3]

[3] The notice also advises that "[s]ubsequent criminal activity after your case has been deferred is likely to result in termination of your deferred action." Exhibit G. Contrary to Petitioner's assertion, Dkt. No. 41 at 3, it does not promise that DACA would not be revoked unless he engaged in "[s]ubsequent criminal activity." *Id.*

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Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
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On February 10, 2017, Immigration and Customs Enforcement ("ICE") officers arrested Petitioner's father. Dkt. 41 at ¶ 25. Subsequent to this arrest, Petitioner was questioned and taken into custody under circumstances that remain in dispute.

According to the Form I-213, the document prepared by ICE detailing Petitioner's identity, criminal history, immigration history, and basis for removal and immigration detention (attached as Exhibit H), Petitioner's father told the ICE officers that Petitioner was here "illegally" and that the ICE's officer's subsequent entry in the apartment was consensual. Exhibit H at 3. In his Amended Petition, Petitioner states that neither he nor his brother "are aware of any consent to permit the ICE agents to enter . . . ." Dkt. 41 at ¶ 25.

The Form I-213 also indicates that, Petitioner admitted, in response to ICE's officer's questions: (i) he was born Mexico, (ii) he was in the United States illegally, and (iii) he had been previously arrested on criminal charges. Exhibit H at 3. ICE then took Petitioner into custody. Petitioner claims that he only admitted that he was born in Mexico, that he stated he had DACA, and that the ICE officers lacked probable cause to take him into custody. Dkt. 41 at ¶ 26.[4]

After being taken into custody, Petitioner was transported and questioned. According to the Form I-213, when he was asked if he is or has been involved with any gang activity, he stated, "[n]o, not no more." Exhibit H at 3. When he was questioned further about a tattoo on his forearm, he stated:

> [T]hat he used to hang out with the Sureno's in California. Subject stated that he fled California to escape from the gangs. Subject stated that he still hangs out with the Paizas in Washington State.

Id.

[4] Based on the facts in the Form I-213, Respondents object to Petitioner's counsel's representations at the February 17, 2017, status conference that it "is uncontroverted" that ICE officers asked Petitioner only: where he was from, his name, if was ever arrested, and that Petitioner stated that he was a DACA beneficiary. Trans. at 12-13. Omitted from this discussion are the additional statements recorded on the Form I-213 that Petitioner's father indicated his sons were here illegally, that Petitioner stated he was here illegally, and that the Form I-213 is silent with regard to whether Petitioner indicated he was a DACA beneficiary. Exhibit H at 3.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

ICE then terminated Petitioner's deferred action and commenced removal proceedings. *See* Notice to Appear (attached as Exhibit I); Exhibit J. At or about 1:27 p.m. on February 10, 2017, ICE made a "no bond" custody determination. Exhibit K. Petitioner refused to sign this form and declined to check the box requesting that an IJ review the custody determination. *Id*.

Petitioner disputes that he made the statements contained in the Form I-213 and denies that he has any gang affiliation. *See* Dkt. 41 ¶¶ 27-28, 31-34. Relatedly, in a Classification Appeal Petitioner submitted to an ICE contractor on February 10, 2017, Petitioner wrote in blue ink, "I came in and the officer said I have gang affiliation with gangs so I wear a orange uniform. I do not have a criminal history and I [a]m **not affiliated with any gangs**." Exhibit L at 5. (emphasis added).[5] After submitting the appeal form, however, Petitioner subsequently declined to further appeal his classification. *See id*. at 6.

On February 13, 2017, Petitioner commenced this action. At that time, he had still not requested a bond redetermination before an IJ.

On February 17, 2017, the Court, after requesting that the parties address several questions in writing, held an initial status conference. At this initial conference, he denied Petitioner's motion for immediate release and set the briefing schedule for this motion to dismiss for lack of jurisdiction.

[5] The Classification Appeal was not the basis of ICE's decision to terminate deferred action and commence removal proceedings, and it has no bearing on any issue in this case. However, Petitioner has alleged that the document was altered and that the first seven words of Petitioner's statement were erased. Dkt. 41 at ¶ 49; Nina Shapiro, *Lawyers for detained 'Dreamer' claim feds altered note to boost gang accusation*, Seattle Times, Feb. 16, 2017, *available at* http://www.seattletimes.com/seattle-news/lawyers-for-detained-dreamer-claim-government-misconduct/ (last visited Feb. 27, 2017) ("Mark Rosenbaum, a Los Angeles attorney helping to represent Dreamer Daniel Ramirez Medina, said Thursday evening that the alleged note tampering was 'one of the most serious examples of government misconduct' he has seen in 40 years of practice."). In fact: Petitioner wrote his entire statement in ink, the initial pen that Petitioner used did not write well, and there are no indications that anyone sought to tamper with the document. *See* Exhibits L, M. Moreover, the claim that an ICE contractor erased the first seven words does not make any sense both because these seven words are legible and because even without the seven words, it is clear that Petitioner is denying, rather than admitting, to gang affiliation. *See* Exhibit L (stating that "I do not have a criminal history" and that I am "not affiliated with any gangs.").

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Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

Based on the statements of Petitioner's counsel at the February 17, 2017, hearing, Respondents understood that Petitioner had requested or would be requesting a bond hearing before an IJ and that the Court was ordering that this hearing take place within a week.[6] As a result, ICE requested that the immigration court schedule a bond hearing for Petitioner, which resulted in the immigration court scheduling a bond redetermination hearing for Thursday, February 23, 2017 at 10:00 a.m. (three business days later). Exhibit N. On information and belief, Petitioner's counsel contacted the immigration court and cancelled that bond hearing. As a result, to date, the immigration court has not held a bond hearing, although a master calendar hearing is scheduled for March 22, 2017.

On February 21, 2017, Petitioner filed an Amended Petition seeking immediate release, nationwide declaratory relief for DACA recipients, and injunctive relief. Dkt. 41 (Prayer for Relief). On February 22, 2017, Petitioner filed an emergency motion for conditional release, Dkt. 45, repeating many of the argument raised in previous filings.[7] At the same time, Petitioner filed a brief regarding jurisdiction over the habeas petition. Dkt. 46.

ARGUMENT

I. The Court Should Dismiss Petitioner's Claims For Release Because He Failed To Seek A Bond Hearing Before An Immigration Judge.

This Court has already denied Petitioner's request for immediate release and ruled Petitioner must first seek relief before an IJ. Dkt. 39 at 1. Because Petitioner failed to seek a

[6] When asked by the Court whether Petitioner would be requesting a bond hearing, opposing counsel said, "we would want to do everything we could to get him release on bond," and that "we want to do whatever we can to get him out of detention as soon as possible." *See* Trans. at 8-9.

[7] In the emergency motion, Petitioner cites *United States v. McCandless*, a case that stands for the proposition that in the criminal context, a bail denial is not a final decision and, thus, not subject to an interlocutory appeal. 841 F.3d 819, 822 (9th Cir. 2016). The Ninth Circuit explained that review of such a decision is available only through a writ of mandamus filed in circuit court. *Id.* But *McCandless*, and its related cases, are inapplicable here because this case does not involve the denial of bond to a criminal defendant, and Petitioner is not seeking a writ of mandamus at the appellate level. And, Respondents do not understand Petitioner to be arguing that any individual in removal proceedings can cancel his own bond hearing and then claim extraordinary circumstances that would entitle him to a writ of mandamus. Such a position would not be well-founded.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
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bond hearing before an IJ (and cancelled the bond hearing that was scheduled), the Court continues to lack jurisdiction over Petitioner's claims for release. *See Castro-Cortez v. I.N.S.*, 239 F.3d 1037, 1047 (9th Cir. 2001) (holding that petitioners must exhaust available judicial and administrative remedies before seeking habeas relief under § 2241), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *cf. Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) (explaining "as a prudential matter, that habeas petitioners exhaust available judicial and administrative remedies before seeking relief under § 2241").

A. Overview of the INA's Bond Provisions and Prudential Exhaustion Requirement.

The INA and coordinate regulations establish a well-defined procedure for bond determinations by ICE and for administrative review of those bond determinations by IJs and the Board of Immigration Appeals ("BIA").[8] The INA does not contemplate federal district court judges conducting bond hearings in the first instance. *See* 8 U.S.C. § 1226(a). Petitioner must exhaust his administrative remedies before seeking habeas relief in district court. *See Castro-Cortez*, 239 F.3d at 1047. It is true that the exhaustion requirement is prudential, *see Arango Marquez v. I.N.S.*, 346 F.3d 892, 897 (9th Cir. 2003), but "prudential limits, like jurisdictional

[8] First, ICE considers each alien detained under 8 U.S.C. § 1226(a) individually for release on bond. 8 C.F.R. § 236.1(c)(8) (requiring that the "alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."). If the ICE officer denies bond (or sets a bond the alien thinks is too high), the alien may ask an IJ for a redetermination of the custody decision. 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d)(1); *see Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011) (explaining review process). If the alien is dissatisfied with the IJ's bond determination, he may file an administrative appeal for the BIA to review the necessity and amount. 8 C.F.R. §§ 236.1(d)(3)(i), 1236(d)(3)(i); *see Leonardo*, 646 F.3d at 116. An alien who remains dissatisfied with a discretionary bond decision cannot, by statute, appeal that decision beyond the BIA. 8 U.S.C. § 1226(e). Federal courts have jurisdiction to review administrative immigration bond decisions only if the bond decision violates due process or exceeds statutory authority. *See Leonardo*, 646 F.3d at 116; *Gutierrez–Chavez v. INS*, 298 F.3d 824, 828 (9th Cir. 2002). By regulation, an alien who remains detained under 8 U.S.C. § 1226(a) may later obtain another custody determination only if circumstances have changed materially since the prior bond determination. 8 C.F.R. § 1003.19(e); *but see Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015) (allowing for automatic bond redeterminations for every six-months of detention) *cert. granted sub nom., Jennings v. Rodriguez*, No. 15-1204, 136 S. Ct. 2489, 2016 WL 1182403 (June 20, 2016).

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Office of Immigration Litigation
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limits . . . are ordinarily not optional." *Puga*, 488 F.3d at 815 (internal quotation and citation omitted). Accordingly, the Ninth Circuit requires that immigration habeas petitioners exhaust administrative remedies before seeking relief under § 2241. *Castro-Cortez*, 239 F.3d at 1047.

When determining whether to require prudential exhaustion, courts consider whether: "(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review." *Puga*, 488 F.3d at 815 (*quoting Noriega–Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)). Courts also have discretion to waive the prudential exhaustion requirement where "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (*quoting S.E.C. v. G.C. George Secs., Inc.*, 637 F.2d 685, 688 (9th Cir. 1981) (internal quotations omitted)); *see also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). When a petitioner fails to exhaust prudentially required administrative remedies and exhaustion is not waived, "a district court should either dismiss the petition without prejudice or stay the proceedings until the petitioner has exhausted remedies . . . . " *Leonardo*, 646 F.3d at 1160. For the following reasons, the Court should find that Petitioner is required to exhaust administrative remedies and cannot establish any valid exception to this requirement. The Court should then dismiss Petitioner's claims for release.

B. The Court should dismiss Petitioner's claims for release for failure to exhaust because the IJ is better positioned to generate a proper record, grant potential release without reaching constitutional questions; and reach that decision more expeditiously.

First, an IJ is better positioned to generate a proper record and reach a proper decision, especially because there are significant factual disputes between the parties. IJs are better suited to make the flight risk and dangerousness assessments mandated by the INA and implementing regulations, as IJs take evidence regarding bond redetermination hearings on a regular basis. *See* 8 C.F.R. § 236.1(c)(8). This case is distinguishable from *Singh v. Holder*, where the Ninth

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P.O. Box 868, Ben Franklin Station
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Circuit waived the prudential exhaustion requirement, in part, because a record of administrative appeal was not germane to the purely legal question raised there. 638 F.3d at 1203.

Second, requiring Petitioner to exhaust his release claim before an IJ would avoid constitutional issues because an IJ order that resulted in his release would render his claim for release moot.[9] *See*, *e.g.*, *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991) ("By his petition for habeas corpus, Picrin-Peron has requested only release from custody. Because he has been released, there is no further relief we can provide."). It would violate principles of constitutional avoidance to force consideration of constitutional questions when other avenues for review remain open. *See*, *e.g.*, *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (citations omitted) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision."); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J. concurring); Laurence H. Tribe, *American Constitutional Law* 327 (3d ed. 2000) ("[the *Ashwander*] rules are part of a broader general prescription that courts 'do not review issues, especially constitutional issues, until they have to'"); Erwin Chemerinsky, *Constitutional Law* 52-53 (2d ed. 2002) (same).

Third, requiring Petitioner to exhaust his detention claim before an IJ would be more expedient here. This Court's necessary bifurcation of the jurisdictional issues and merits of this matter means that the soonest Petitioner could obtain the relief sought in his petition through the district court is sometime after the March 8, 2017, hearing on jurisdictional briefing, and following objections to Magistrate Judge Donahue's Report and Recommendation and ruling by Judge Martinez. *See* Fed. R. Civ. P. 59.

Accordingly, the Court should require Petitioner to seek a bond hearing with the immigration court before the Court can consider his habeas claims seeking release from detention based on alleged constitutional violations.

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[9] Additionally, in the event of Petitioner's release on bond, any exceptions to the mootness doctrine are hypothetical and speculative, such as circumstances where Petitioner's confinement would be capable of repetition. *See*, *e.g.*, *Lucero v. Hensley*, 920 F. Supp. 1067, 1077 (C.D. Cal. 1996.

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C. The Court should dismiss Petitioner's claims for release for failure to exhaust because failing to do so ignores the administrative scheme envisioned and encourages others to ignore the administrative scheme.

The Court should also require that Petitioner first seek a bond hearing before an immigration court because failure to do so would encourage future habeas petitioners to attempt to bypass the administrative scheme. As discussed throughout this motion, that administrative review scheme is specific and exacting in that it requires that even certain habeas challenges arising from decision or actions to commence removal proceedings be raised through a petitioner's removal proceedings. *See* 8 U.S.C. §§ 1252(a)(5); (b)(9); (g); *J.E.F.M.*, 837 F.3d at 1031. As that scheme is applied to Petitioner's case, there is no legal or administrative obstacle that prevents an IJ from considering Petitioner's claims of why he is neither a danger nor a flight risk and exercising discretion to potentially release petitioner in furtherance of that administrative scheme. *See* 8 C.F.R. § 236.1(c)(8).

In *Resendiz v. Holder*, in a manner similar to that of Petitioner here, Resendiz argued that "any delay in receiving a bond hearing results in a loss of liberty that requires an emergency motion and an immediate bond hearing to redress." No. C 12-04850 WHA, 2012 WL 5451162, at *5 (N.D. Cal. Nov. 7, 2012). The court required Resendiz to exhaust her bond claim before an IJ because "the fact that pursuing appeals through administratively-established procedures may result in delay is common to all aliens seeking review of their custody or bond determinations," and "[a]llowing those who argue procedural errors in their custody or bond determinations to bypass the administrative process would disrupt the agency's autonomy and result in unnecessary judicial review of unexhausted claims." *Id*. For those same reasons, this Court should require Petitioner to seek a bond hearing in immigration court before the Court can consider his habeas claims seeking release from detention based on alleged constitutional violations.

D. The Court should dismiss Petitioner's claims for release for failure to exhaust.

The Court should require Petitioner to first seek a bond hearing before an immigration court because such review may preclude the need for judicial review regarding Petitioner's detention, and the development of a record at the bond hearing would allow the agency to correct

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any mistakes that Petitioner alleges. As discussed *supra* Section I.B., an immigration court order releasing petitioner on bond would moot Petitioner's claims for release. Moreover, the development of a record before the immigration court consisting of Petitioner's testimony and other supporting evidence regarding why he is allegedly neither a flight risk nor danger would allow petitioner the opportunity to respond to ICE's no-bond determination. To the extent that ICE's no-bond determination is based on the same or similar facts to ICE's decision to terminate Petitioner's DACA and place him into removal proceedings, such development of the record at a bond hearing would also allow ICE to consider evidence from Petitioner.

E. Petitioner cannot establish any exceptions to the bond hearing requirement.

Lastly, Petitioner cannot establish any exceptions to this prudential exhaustion requirement. *Laing*, 370 F.3d at 1000 ("administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void."). The inadequate remedy exception applies when the challenged procedure is demonstrably inadequate or tainted by personal bias. *Amato v. Bernard*, 618 F.2d 559, 569 (9th Cir. 1980). Bare assertions are insufficient. *Diaz v. United Agric. Emp. Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1485 (9th Cir. 1995).

Here, there is no evidence to support an accusation that the IJ has predetermined the question of Petitioner's bond such that exhaustion should be excused. Nor is there a legal barrier that would prevent Petitioner's release on bond, like the BIA's decision in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), that worked to prohibit release on bond of illegal aliens with criminal convictions for certain criminal offenses. *See*, *e.g.*, *Gomez-Ramirez v. Asher*, No. C13-196-RAJ, 2013 WL 2458756, at *2 (W.D. Wash. June 5, 2013).

Additionally, the immigration-related habeas cases Petitioner cites in support of his request for an emergency bond hearing are inapposite. *See* Dkt. 45. First, Petitioner's reliance on *Tam v. I.N.S.*, 14 F. Supp. 2d 1184 (E.D. Cal. 1998), is misplaced because its reasoning has been superseded by the REAL ID Act of 2005 ("REAL ID Act"), codified at 8 U.S.C. § 1252, and it addressed a factual scenario – allegedly prolonged post-order detention – where even today an immigration judge would lack authority to release petitioner. 8 U.S.C. § 1231(a)(6);

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

but see Diouf v. Napolitano, 634 F.3d 1081, 1084 (9th Cir. 2011) ("We hold that individuals detained under § 1231(a)(6) are entitled to the same procedural safeguards against prolonged detention as individuals detained under § 1226(a).").[10] And, while *Elkimya v. Department of Homeland Security*, 484 F.3d 151, 153 (2d Cir. 2007), was decided following the REAL ID Act, that decision is of no help to Petitioner here. There, the Second Circuit specifically addressed the availability of bail while a petition for review was pending with the circuit court. *Id*. However, unlike in *Elkimya*, Petitioner's case does not present a scenario where an immigration judge lacks the authority to have a bond hearing or grant bond, and Petitioner's case is unlike *Elkimya* or analogous to § 2255 habeas petitions where the ultimate relief sought is not itself release. *Id*. Finally, while Petitioner cites to *Xiaoyuan Ma v. Holder*, 860 F. Supp. 2d 1048 (N.D. Cal. 2012), for its analysis of the "in custody" requirement for habeas jurisdiction, the most applicable parts of that holding are that: (1) prudential exhaustion was not required because Xiaoyuan had done all she could to exhaust her administrative claim before the BIA, and (2) the court granted the Government's motion to dismiss because of the jurisdictional channeling provisions of the REAL ID Act. *Xiaoyuan Ma*, 860 F. Supp. 2d at 1060-62. Like *Xiaoyuan*, as discussed below, Petitioner's claims should be brought in his immigration proceedings, but unlike *Xiaoyuan*, Petitioner cannot argue that he has been unable to exhaust his administrative remedies – here, in the form a bond hearing.

* * *

[10] The REAL ID Act took effect on May 11, 2005, and specifically precludes the filing of challenges to administrative removal orders in habeas. The REAL ID Act now requires the filing of such challenges in petitions for review with the circuit courts. *See* 8 U.S.C. §§ 1252(a)(5), (b)(9), (g); *Iasu v. Smith*, 511 F.3d 881, 885 (9th Cir. 2007); *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 947 (9th Cir. 2008). This change in law means that pre-REAL ID Act cases are not persuasive on the issue of habeas jurisdiction to the extent they recognize habeas jurisdiction over challenges to removal proceedings or the action arising from decisions to commence removal proceedings, for which district courts no longer have jurisdiction. 8 U.S.C. §§ 1252(b)(9),(g); *see, e.g., Mapp v. Reno*, 241 F.3d 221, 223 (2d Cir. 2001) (finding that Congress had not yet "expressly narrowed or abolished the judicial power to grant bail to habeas petitioners in Mapp's circumstances.").

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

Accordingly, the Court should find that Petitioner's habeas claim is subject to administrative exhaustion before an immigration judge and that there are no applicable exceptions to that requirement. The Court should, therefore, dismiss Petitioner's claims for release and deny his motion for emergency release where he has failed to exhaust his administrative remedies

II. This Court lacks jurisdiction over Respondents' decisions and actions to commence removal proceedings; and any constitutional claims must be brought through the petition for review process.

In response to the Court's questions raised in Dkt. 39 at ¶ 10, Petitioner is barred by the REAL ID Act and Ninth Circuit precedents from raising in district court each of his constitutional claims. As set forth below, those claims must be raised in immigration court and through the petition for review process. Section 1252(g) precludes judicial review of any challenge arising from any decision or action to commence removal proceedings. That statute states, in relevant part:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g); *see AAAD*, 525 U.S. at 484-85 (explaining that the determination to withhold or terminate deportation is confined to administrative discretion).

The Supreme Court explained that 8 U.S.C. § 1252(g) was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AAAD*, 525 U.S. at 485 n.9.[11] It is consistent with earlier case law mandating that deferred actions determinations were not subject to judicial review in district court. *See Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (concluding that the district court lacked jurisdiction to review the

[11] The Ninth Circuit has applied 8 U.S.C. § 1252(g) to preclude a claim for money damages for an alleged Fourth Amendment violation arising from the commencement of removal proceedings even though the plaintiff was left without any avenue for recovering money damages. *See Sissoko v. Roch*, 509 F.3d 947, 948-951 (9th Cir. 2007).

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

Government's decision not to recommend deferred action under the 1981 Amended Operating Instructions).

In light of the broad prohibition on judicial review contained in 8 U.S.C. § 1252(g), any claim that Petitioner may have (such as his claims for alleged violations of the Fourth and Fifth Amendment) must be raised in immigration court and, following appeal to the BIA, through a petition for review in the Ninth Circuit Court of Appeals. *See* 8 U.S.C. §§ 1252(a)(5); 1252(b)(9). Section 1252(a)(5), entitled "Exclusive means of review," requires that "a petition for review . . . shall be the sole and exclusive means for judicial review of an order of removal . . . ." *See J.E.F.M.*, 837 F.3d at 1031. The Ninth Circuit further explained that "[l]est there be any question about the scope of judicial review," Section 1252(b)(9) mandates that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order . . . ." *See id.* at 1029-31. In sum, those statutory channeling provisions are not limited to challenges to final order of removal but also preclude review in district court of "any" constitutional challenge "arising from any action" taken to remove an alien. *See id.*

Specifically, the *J.E.F.M.* panel held that a district court lacks jurisdiction to adjudicate a due process claim that children in removal proceedings are entitled to appointed counsel. *See id.* (reversing as to jurisdiction). The Ninth Circuit reached this result even though (i) many of the children did not yet have a final order of removal, *id*. at 1029, (ii) potentially there would be no review because the children might not be able to navigate the immigration system without counsel, *id*. at 1035-36, (iii) a class remedy might be more efficient than having every individual file a petition for review, *id*. at 1038, and, most significantly, (iv) neither the BIA nor IJs have the authority to order the constitutional relief sought – court-appointed counsel. *Id*.

The Ninth Circuit nevertheless held that taken together, 8 U.S.C. §§ 1252(a)(5) and (b)(9) "mean that *any* issue – whether legal or factual – arising from *any* removal-related activity can be reviewed *only* through the PFR [Petition for Review] process." *See id*. (emphases in original). As a result, "[w]hen a claim by an alien, however it is framed, challenges the procedure and

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)." *Id*. at 1032 (*citing Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (applying this principle in the context of a claim brought under the Administrative Procedure Act)); *cf. Singh*, 638 F.3d at 1212 (expressing sympathy for individual's "desire for judicial review at the earliest possible moment," but holding that Congress has required that review "must take place in the proceedings related to his petition for review . . .").[12]

The BIA has long held that it can grant relief with respect to claim that an individual's statement was coerced. *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980) (terminating deportation proceedings on the grounds that admissions reflected on the Form I-213 were involuntarily given); *cf. Samyoa-Martinez v. Holder*, 558 F.3d 897, 899, 902 (9th Cir. 2009) (reviewing and rejecting claim that IJ erred in denying a motion to suppress a Form I-213 that allegedly contained involuntary admissions).

The Ninth Circuit has also made clear that, in the context of a petition for review, it may review alleged constitutional violations including claims that were not raised in removal proceedings. *See, e.g., J.E.F.M*., 837 F.3d at 1038 (explaining that, even if never raised in

[12] The only claims that are excluded from the petition for review process are claims that are collateral to the removal process. *See J.E.F.M*., 837 F.3d at 1032 (discussing this concept). The Ninth Circuit has recognized essentially three categories of such claims: (i) a claim to ineffective assistance of counsel that "occurred *after* the issuance of the final order of removal," *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007) (explaining that such a claim necessarily could not have been brought before the IJ) (emphasis original); (ii) a claim for unconstitutionally prolonged detention, *see Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006) (holding that challenge to five-year detention "without any established timeline for . . . when he may be released" following the grant of immigration relief could be brought in district court); and (iii) subject to the exhaustion provisions discussed *supra* Section I, certain claims challenging bond determinations. *See Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011) ("Although § 1226(e) restricts jurisdiction in the federal courts in some respects, it does not limit habeas jurisdiction over constitutional claims or questions of law"). In addition, to these three types of collateral challenges, the Ninth Circuit also recognized a narrow exception for non-frivolous claims of U.S. citizenship because the INA only authorizes the detention of aliens, not of U.S. citizens. *See Flores-Torres v. Mukasey*, 548 F.3d 708, 709-10, 712-13 (9th Cir. 2008). None of these circumstances are applicable to the present action.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

removal proceedings, a court of appeals has the authority to resolve questions of constitutional rights); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017, 1019 (9th Cir. 2008) (reversing the BIA and remanding with instruction to dismiss removal proceedings on the grounds that the Government's entry into a residence did not satisfy the Fourth Amendment). In *Orhorhaghe v. I.N.S.*, 38 F.3d 488, 492, 505 (9th Cir. 1994), the case cited by Petitioner in support of his Fourth Amendment claim, the Ninth Circuit held that that the BIA erred in reversing the IJ's grant of a motion to suppress for alleged Fourth Amendment violation and that when this evidence is excluded the Government failed to carry its burden.[13]

Here, Petitioner is not merely seeking release while removal proceedings are pending; rather he is arguing that he is not subject to removal. Petitioner must bring his claims in immigration court and, following administrative appeal, through a petition for review to the Ninth Circuit. This is because each of his claims involve "questions of law . . . including interpretation and application of constitutional . . . provisions, arising from . . . action taken or proceeding brought to remove an alien from the United States." *See J.E.F.M.,* 837 F.3d at 1029-31.

In Count I (Fifth Amendment – Procedural Due Process), Petitioner contends he has a protected property interest in deferred action. Dkt. 41 at ¶ 54. In challenging DHS's exercise of prosecutorial discretion to revoke deferred action and seek to remove him, his challenge necessarily arises from "action taken or proceedings brought to remove an alien." *See* 8 U.S.C. §§ 1252(a)(5); 1252(b)(9). In fact, he is challenging the very validity of the "proceedings." *See AADC*, 525 U.S. at 484-85 (explaining what deferred action is); *Texas*, 809 F.3d at 199 (King, J.,

[13] Other examples of the Ninth Circuit reviewing claims of Fourth Amendment and Fifth Amendment violations include: *Gonzales-Rivera v. I.N.S.*, 22 F.3d 1441, 1449, 1451 (9th Cir. 1994) (reversing the BIA on the grounds that the officer stopped petitioner solely on the basis of his Hispanic appearance and explaining that bad faith constitutional violations are necessarily egregious); *Yao v. I.N.S.*, 2 F.3d 317, 319, 322 (9th Cir. 1993) (holding that a claim that the Government violated a petitioner's equal protection rights by initiating deportation proceedings while her application for legalization was pending was "cognizable, but without merit"); *see generally*, *Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030 (9th Cir. 2008) ("Questions of law, and in particular due process challenges to removal orders, are reviewed de novo").

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

dissenting) (same).[14] The revocation of deferred action and the commencement of proceedings are two ways of saying the same thing – DHS has decided to take action to remove the alien. By arguing that Petitioner is constitutionally entitled to deferred action (i.e. that DHS must defer acting to remove him) he is, by definition, arguing that DHS is barred from acting to remove him. *See Singh*, 638 F.3d at 1211 (holding that portion of habeas petition contending that petitioner "is not removable" is wholly intertwined with the merits of removal even though "as a technical matter" the petition did not ask the court to exercise jurisdiction over the order of removal). In sum, this constitutional claim must channeled through the petition for review process.

In Count II (Fifth Amendment – Substantive Due Process), Petitioner contends that there is "no reason" he should be detained and that he is neither a flight risk nor a risk to public safety. Dkt. 41 at ¶ 66. This is precisely the issue that would have been decided by the IJ at the bond hearing had Petitioner's counsel not cancelled the hearing. Petitioner's challenge, at present, is not properly before the Court for the reasons stated in the previous section. If the Petitioner decides to request a bond hearing in the future, he may, notwithstanding the limitations of 8 U.S.C. § 1226(e), might be able to bring a Fifth Amendment regarding the IJ's decision at a future date. *See Singh*, 638 F.3d at 1200 (discussing this exception). Moreover, to the extent Petitioner's Substantive Due Process simply repeats his Procedural Due Process argument, this Court lacks jurisdiction for the reasons stated above.

In Count III (Fourth Amendment – Unlawful Seizure), Petitioner is challenging his initial arrest. This claim also arises from action taken to remove Petitioner and should be raised in immigration court through a motion to suppress or motion to terminate and, if unsuccessful, on appeal to the Ninth Circuit. *See Orhorhaghe*, 38 F.3d at 492, 505 (addressing on a petition for

[14] Respondents also contend that Petitioner's Due Process claim is barred by 8 U.S.C. § 1252(g) because it is nothing more than a challenge to the discretionary decision to commence removal proceedings. *See AAAD*, 525 U.S. at 484-85, 491 ('The contention that a[n] [immigration law] violation must be allowed to continue because it has been improperly selected is not powerfully appealing"). But this Court need not address this question today because the proper forum for these claims is through the petition for review process. *See J.E.F.M.*, 837 F.3d at 1031.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

review a motion to suppress for alleged Fourth Amendment violation).[15] In fact, the Ninth Circuit, on a petition for review, has essentially terminated removal proceedings for a Fourth Amendment violation that is similar to the allegation raised by Petitioner. *Compare* Dkt. 41 at ¶ 25 (alleging entry into apartment without consent) *with Lopez-Rodriguez,* 536 F.3d at 1017, 1019 (addressing violation of Fourth Amendment for alleged entry into apartment without consent). Respondents obviously dispute that the facts will support such a claim here, but assuming *arguendo* that Petitioner could make out such a claim, it would have to be brought through the system established by Congress. *See J.E.F.M.*, 837 F.3d at 1031.[16]

In Count IV (Fifth Amendment - Equal Protection), Petitioner alleges that DHS acted with discriminatory intent or purpose in arresting him and then in making a "decision at the processing center to continue to detain him." Dkt. 41 at ¶¶ 77, 78, 80. Petitioner's challenge to the initial arrest cannot be brought in district court for the reasons stated in the paragraph above. Rather, this claim must be brought through the petition for review process. *See, e.g., Gonzales*, 22 F.3d at 1449, 1451 (reversing the BIA on a petition for review and ruling that that officer initially stopped individual solely on the basis of Hispanic appearance); *Yao*, 2 F.3d at 319-20, 322 (reviewing on a petition for review an Equal Protection claim). With respect to Petitioner's challenge to DHS's decision at the processing center to commence removal proceedings, this is a claim arising from action taken or proceedings brought to remove Petitioner and to continue to

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[15] To be clear, it does not appear that Petitioner is alleging that he was arrested based on information he provided to DHS through the DACA program. Dkt. 41 at ¶¶ 25-26. He does allege that after being arrested, certain unidentified information that he provided through DACA was used "against him," *id.* at 68, but fails to state any facts in support of this conclusion, and it is difficult to understand what facts could possibly support it.

[16] To the extent Petitioner is arguing that his Fourth Amendment rights were violated because he was not brought before a magistrate judge within 48 hours of his arrest, this requirement has been found to be inapplicable to removal proceedings because they are civil rather than criminal in nature. *United States v. Tejada*, 255 F.3d 1, 3 (1st Cir. 2001) (considering the issue prior to the enactment of the REAL ID Act); *cf. United States v. Cepeda-Luna*, 989 F.2d 353, 355-56 (9th Cir. 1993) (holding that because deportation proceedings are civil rather than criminal proceedings the thirty-day indictment requirement of the Speedy Trial Act does not apply). But in any event, this type of claim necessarily arises from action taken to remove Petitioner and must be raised in a petition for review. *See J.E.F.M.,* 837 F.3d at 1029-31.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

detain in connection with those proceedings. As a result, the district court does not have jurisdiction over this claim. 8 U.S.C. §§ 1252(a)(5); 1252(b)(9).[17]

There are several points applicable to all four claims. Given the scope of 8 U.S.C. §§ 1252(a)(5), 1252(b)(9), it is irrelevant that there is no final order of removal with respect to Petitioner at this time. *See J.E.F.M.*, 837 F.3d at 1029.[18] To the extent Petitioner argues that IJs cannot provide the relief he seeks for the alleged Fourth and Fifth Amendment violations, this argument is likewise precluded by Ninth Circuit case law. *See id*. at 1038; *cf. Sissoko*, 509 F.3d at 948-51 (holdings that plaintiff's claim statutorily precluded even though it left plaintiff without any forum to assert a claim for monetary damages). Lastly, Petitioner may prefer that his constitutional claims be resolved now rather than at a later date, but that does not provide a basis for this Court to exercise jurisdiction over claims that are subject to a statutory channeling provision. *See J.E.F.M.*, 837 F.3d at 1035-36, 1038; *Singh v. Holder*, 638 F.3d at 1212.[19]

In sum, Congress imposed significant limitations on the ability of habeas petitioners to challenge decisions and actions related to removal proceedings. *See AAAD*, 525 U.S. at 485 n.9. To the extent that Petitioner has any viable claim (which the Government does not concede), it must be brought to a circuit court through the petition for review process. *See J.E.F.M.*, 1029-

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[17] As noted *supra* note 14 the Supreme Court has strongly suggested that this type of claim cannot be brought in district court under 8 U.S.C. § 1252(g) and outlined a number of compelling policy considerations that apply in the context of immigration proceedings. *See AAAD*, 525 U.S. at 489-91 (reversing the circuit court's ruling on selective enforcement). Again, this Court need not rule on this issue today because to the extent Petitioner has any viable claim, it must be channeled through the petition for review process.

[18] Petitioner's assertion to the contrary, Dkt. 46 at 13, is unsupported by any legal authority. Moreover, it would lead to the absurd result that an alien in removal proceedings would be able to challenge his removal in district court, but only if he did so before the IJ ruled on his arguments.

[19] Notably, while requiring Petitioner to raise his claims through removal proceedings seems like a harsh result, it could result in Petitioner obtaining some other form of relief that would not be available but for his placement into removal proceedings. *See*, *e.g.*, *Cabaccang v. U.S. Citizenship & Immigr. Servs.,* 627 F.3d 1313, 1316 (9th Cir. 2010) ("[T]he pendency of removal proceedings means the [petitioners] have not exhausted their administrative remedies.").

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

1031 (holding that Fifth Amendment claim must be channeled through petition for review process).

III. The Court should deny Petitioner's claim for immediate release on bail while his Petition remains pending.

The Court should deny Petitioner's Emergency Motion for Conditional Release, Dkt. 45. First, Petitioner has failed to establish any emergency to justify this motion, which is wholly dissonant with the Court's scheduling order. Dkt. 39. Second, Petitioner's demand for immediate release on bail seeks nothing more than the premature award of the ultimate relief in this case, and he seeks it without satisfying the very high demands for such unusual relief.

First, Petitioner's emergency motion is not warranted. Petitioner did not object to the scheduling order set by the Court at its status hearing on February 17, 2017. Petitioner then cancelled the bond hearing that was scheduled following that status hearing. And Petitioner now, without any support, alleges facts regarding Respondents' conduct that are either misinformed or simply not true.[20] Accordingly, the only change in the status quo that could justify Petitioner's emergency motion at this point in the proceedings is Petitioner's decision not to proceed with a bond hearing before an immigration judge.

In this Circuit, if a petitioner is detained pursuant to facially lawful authority, courts will grant bail pending disposition of a habeas petition only if the petitioner has raised (1) a substantial claim for relief in the petition or (2) extraordinary circumstances that require bail for

[20] Petitioner alleges in his emergency motion that his "counsel was told" that Petitioner "was to be transferred to the 'Level 3' section of that facility, placing him in a category that is usually limited to violent offenders, drug traffickers, or individuals suspected to be a significant threat to national security." Dkt. 45 at 1. Petitioner acknowledges undersigned counsel's communications that Petitioner allegations are not correct; however, Petitioner nonetheless proceeded with this emergency motion despite confirmation that there were no developments warranting this emergency motion. To be clear, Petitioner was transferred within the Northwest Detention Center in the normal course of operations that reflect shifting bed-space needs. *See* Exhibit O at ¶ 6. Petitioner's security classification has not been changed. *Id*. at ¶ 7. Accordingly, there is no change in the security classification of other detainees that Petitioner may be housed with. *Id*. at ¶¶ 5, 7. Although it is not clear how such claims are cognizable through the present action, it is notable that prior to this transfer, Petitioner withdrew his appeal of his security classification at NWDC. *See* Exhibit L at ¶ 6.

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 305-4193

the habeas remedy to be effective. *See Land v. Deeds*, 878 F.2d 318, 319 (9th Cir. 1989). That high burden comes from the courts' acknowledgement that by granting immediate release from custody pending a decision on a habeas petition that seeks release from custody, bail grants the petitioner his "sought-after remedy" prior to a determination on the merits of the petition. *See Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986); 28 *Moore's Federal Practice* § 671.03[9] (Matthew Bender 3d ed.).

While Petitioner argues that he has a substantial claim for relief, the Court should reject that argument, for the reasons set forth above. As noted above, the REAL ID Act precludes Petitioner from prevailing on his Fourth Amendment, due process, and equal protection claims in this Court because that statute makes his removal proceedings and eventual petition for review with the circuit court the only fora for such claims. *See* 8 U.S.C. § 1252(b)(9); *J.E.F.M.*, 837 F.3d at 1029-31. *Tam*, cited by Petitioner, is therefore distinguishable not only because it is a pre-REAL Act case but also because the district court there found a very strong likelihood of prevailing on the merits. *Tam*, 14 Supp. 2d at 1190. Here, a showing of success is not merely lacking; the court's lack of jurisdiction makes the prospect of success on the merits illusory.

Nor has Petitioner sufficiently alleged extraordinary circumstances that would make habeas relief ineffective if later granted. Such circumstances include "a serious deterioration of health while incarcerated, and unusual delay in the appeal process." *See United States v. Mett*, 41 F.3d 1281, 1282 n.4 (9th Cir. 1994). Petitioner has not alleged any medical emergencies. Nor has his appeal process been unusually delayed. Indeed, he has benefitted from expedited briefing before this Court. *See* Minute Order, Dkt. 39. While Petitioner claims extraordinary circumstances based on his allegation that he is neither a flight risk nor a threat to public safety but rather a dedicated family man, Dkt. 45 at 14-17, those are claims he could have made to the IJ. *See* 8 C.F.R. § 236.1(c)(8).[21] His continued detention following his refusal to exhaust that

[21] Respondents recognize that Petitioner wants to be released immediately, but that is true of every other habeas petitioner under section 2241 – every one of whom is necessarily alleging unlawful detention. If this Court disagrees and intends to conduct a bond hearing itself, Respondents will be prepared at that time with evidence supporting Petitioner's continued detention; however, Respondents assert that it would be inappropriate for the Court to address the constitutional issues that may be litigated further in proceedings and potentially in a

U.S. Department of Justice, Civil Division
Office of Immigration Litigation
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administrative remedy is not, therefore, an extraordinary circumstance but rather one of his own making. Furthermore, his claims that he is not a flight risk or danger to society are nothing more than arguments that ICE's custody determination is in error and therefore unlawful. But the mere assertion of unlawful detention, even if evidently meritorious, cannot satisfy the standard for immediate release on bail: "that the petitioner's continued confinement would be unlawful if habeas relief is later granted is true of every successful petition, so it is not an extraordinary circumstance." 28 *Moore's Federal Practice* § 671.03[9]; *see also Martin*, 801 F.2d at 330 ("there is nothing unusual about a claim of unlawful confinement in a habeas proceeding.").

Similarly, the fact that Petitioner formerly possessed DACA does not constitute an extraordinary circumstance. Respondents' action, while disputed, does not constitute "an unprecedented attack on DACA," as Petitioner claims. ICE's arrest, questioning, decision to terminate DACA and commence removal proceedings, and Petitioner's subsequent detention are not a result of any new policy or priorities – Petitioner is not the first DACA recipient to have DACA terminated based on alleged unlawful conduct. *See* Exhibits A, B, C, & D; *supra* note 2. If "panic and confusion" have resulted from this case, it has resulted from the statements made by Petitioner, *see e.g.*, *supra* note 6, rather than any actions by Respondents.

Petitioner has failed to satisfy the high burden required for the Court to grant him the ultimate relief he seeks on a preliminary basis, before it has resolved the highly contested issues of fact and law in this case. The Court should, therefore, deny Petitioner's Emergency Motion for Conditional Release.

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subsequent petition for review. Such review is especially problematic given the factual disputes in this action.

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Office of Immigration Litigation
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record *via* transmission of Notices of Electronic Filing generated by CM/ECF.

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