UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

[redacted]	CIVIL ACTION NO.
Petitioner/Plaintiff,	
vs.	
JOHN ASHCROFT, as Attorney General of the United States; TOM RIDGE, as Secretary of the United States Department of Homeland Security; MARION DILLIS, Officer in Charge, Krome Service Processing Center (SPC), Immigration and Customs Enforcement (ICE), United States Department of Homeland Security; MICHAEL ROZOS, Field Office Director, Miami ICE Detention and Removal Office, United States Department of Homeland Security,	
Respondents/Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER/PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER (TRO) AND/OR PRELIMINARY INJUNCTIVE RELIEF

The Petitioner/Plaintiff (hereinafter "Petitioner"), [redacted], by and through his undersigned counsel, hereby submits this memorandum of law in support of his emergency motion for temporary restraining order and/or a preliminary injunction seeking an order from this Honorable Court enjoining Respondents from preventing Petitioner's release on bond; releasing Petitioner from physical custody pending the outcome of the instant action on any reasonable conditions on bond that would ensure his appearance at any future immigration hearings; and declaring that the actions and/or decisions of Immigration Judge (IJ) [redacted] were (a) in violation of the Equal Protection guarantees of the Due Process Clause of

the Fifth Amendment by utilizing the impermissible criteria of national origin as a basis to deny bond; (b) in violation of the substantive and procedural guarantees of the Due Process Clause of the Fifth Amendment by determining that no conditions of bond, except financial conditions, could be set and therefore no conditions of bond could satisfy release; and (c) in violation of the Immigration and Nationality Act (INA) and U.S. Department of Justice (DOJ) regulations because an IJ does have the authority to set non-monetary conditions of bond in a removal proceeding. To avoid redundancy, Petitioner hereby incorporates the factual background and the procedural history of his case as set forth in the instant motion and makes reference to the supporting exhibits attached to the Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Declaratory and Injunctive Relief (hereinafter "Habeas Petition").

ARGUMENT

I. JURISDICTION

A. Subject Matter Jurisdiction

This Court has subject-matter jurisdiction over the instant petition and action under 28 U.S.C. § 2241(c)(1) and (3), Art. I, § 9, C1. 2 of the United States Constitution ("Suspension Clause"), and 28 U.S.C. § 1331, as Petitioner is in the custody of the United States Department of Homeland Security ("DHS"), acting under the color of authority, by Respondents, agents of the United States.

Despite the provisions of INA § 236(e), codified at 8 U.S.C. § 1226(e), which bar federal courts from reviewing discretionary decisions regarding parole and bond "under this section," it is well-settled that INA § 236(e) does not serve to bar federal courts from reviewing questions of statutory construction or Constitutional claims such as mandatory detention under the statutory

writ of habeas corpus, 28 U.S.C. §2241. *See Demore v. Kim,* 123 S.Ct. 1708, 1713-14 (2003) (INA §236(e) does not bar habeas jurisdiction in absence of specific provision barring habeas and because petitioner lodged a constitutional challenge to legislation); *Zadvydas v. Davis,* 533 U.S. 678, 686-89, 121 S.Ct. 2491, 2497-98 (2001) (INA 236(e), 242(a)(2)(B)(ii), 242(a)(2)(C), 242(g) did not bar habeas jurisdiction for challenge to post-removal detention); *Haitian Refugee Ctr., Inc. v. Nelson,* 872 F.2d 1555, 1560 n. 9 (11th Cir. 1989) (holding that federal courts also have jurisdiction to review allegations that agency officials have acted outside their statutory authority); *Gonzalez v. O'Connell,* 355 F.3d 1010, 1014-15 (7th Cir. XXXX) (Habeas jurisdiction to challenge mandatory detention even where the predicate issue to the constitutional claim was a statutory claim); *Aguilar v. Lewis,* 50 F. Supp.2d 539, 542-43 (E.D. Va. 1999) (INA §236(e) bars discretionary decisions not statutory interpretation); *Velasquez v. Reno,* 37 F. Supp.2d 663, 667-70 (D.N.J. 1999) (INA §236(e) barring review of detention decisions does not foreclose habeas challenge to application of statute). Moreover, INA §242(g) does not bar review of detention decisions; nor does INA §242(b)(9) or INA §242(a)(2)(B)(ii). *Zhislin v. Reno,* 195 F.3d 810 (6th Cir. 1999) (INA § 242(g) as interpreted by *Reno v. American- Arab Anti-Discrimination Comm.*, 119 S.Ct. 936, 943 (1999) does not bar review of challenge to indefinite detention); *Parra v. Perryman,* 172 F.3d 954 (7th Cir. 1999) (In light of *American Arab* INA §242(g) does not bar habeas to review detention issue); *Sillah v. Davis,* 252 F. Supp.2d 589, 593-97 (W.D. Tenn. 2003) (INA §242(a)(2)(B)(ii) does not preclude habeas jurisdiction to challenge revocation of parole); *Bouayad v. Holmes,* 74 F. Supp.2d 471, 473-74 (E.D. Pa. 1999) (Government conceded that habeas jurisdiction existed to challenge mandatory detention and the court determined that neither INA § 236(e) nor INA § 242(b)(9) preclude jurisdiction over detention); *Kiareldeen v. Reno,* 71 F. Supp.2d 402, 405-07 (D. N.J. 1999)

(Neither INA § 236(e) nor § 242(g) bars habeas jurisdiction to review detention based upon secret evidence); *Alikhani v. Fasano,* 70 F. Supp.2d 1124, 1126-30 (S.D. Cal. 1999) (INA §§242(g), 242(b)(9) and 236(e) do not bar challenge to statutory and constitutional challenge to mandatory detention).

In *INS v. St. Cyr***,** 533 U.S. 289, 302 (2001), the Supreme Court held that habeas is still available to challenge the legality of the Service's deportation and removal orders because the Constitution requires habeas review to extend to claims of erroneous application or interpretation of statutes. *See Calcano-Martinez v. I.N.S.***,** 533 U.S. 338 (2001) (holding that aliens may bring their statutory and constitutional claims in district court by filing a habeas petition although such claims brought in petitions for review with courts of appeals would be dismissed for lack of jurisdiction); *Bejacmar v. Ashcroft*, 291 F.3d 735, 736 (11th Cir. 2002) (abandoning its reasoning in *Richardson v. Reno,* 180 F.3d 1311 (11th Cir. 1998), *cert. denied,* 120 S.Ct. 1529 (2000), and finding that "*St. Cyr* removes the last statutory pillar supporting our circuit's earlier conclusion that IIRIRA repealed district court jurisdiction in habeas cases")

Similarly, in *Zadvydas v. Davis*, 533 U.S. 678, 694-97, 121 S.Ct. 2491 2501-02 (2001), resident aliens who had been ordered removed brought habeas petitions challenging their detention during a period of custody beyond the 90-day removal period. In that case, the Supreme Court stated as follows regarding habeas jurisdiction: "We note at the outset that the primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts to hear these cases." *Id*. at 687 (citing Section 2241(c)(3), authorizing any person to claim in federal court that he or she is being held "in custody in violation of the Constitution or laws. . .of the United States"). With respect to the alien's important Constitutional claims, the Court found that

> [a] statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment--from government custody, detention, or other forms of physical restraint--lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And this Court has said that government detention violates that clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, supra, at 80, 112 S.Ct. 1780, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention--at least as administered under this statute.

Id. at 690 (emphasis added).

Here, Petitioner challenges: (1) the use of Petitioner's Mexican nationality as a basis to deny his liberty in violation of the equal protection guarantees of the Due Process Clause of the Fifth Amendment; and (2) the IJ's erroneous application and misinterpretation of the Immigration and Nationality Act ("INA"), Section 236(a), codified at 8 U.S.C. §1226(a), as well as implementing federal regulations, *viz*., 8 C.F.R. §1003.19, 8 C.F.R. § 1236.1(d), which resulted in the IJ's denial of Petitioner's request for release on bond. The IJ's order denying release on bond subjected the Petitioner to detention pending the actual execution of his removal, based solely on his national origin and despite the fact that Petitioner has absolutely no criminal record in the United States, and in fact has never committed nor ever been accused of any criminal acts in this country. The only charge in his Notice to Appear (NTA) issued November 19, XXXX, the charging document issued by the U.S. Department of Homeland Security, agents of Respondents, concerned Petitioner's inadvertent overstay of his H1-B status. *See* Habeas Petition, ¶ 11; *see also* Exh. 3 attached to Habeas Petition. Moreover, as will be discussed, Mr.

[redacted] is not required to exhaust his administrative remedies in this case. Therefore, this Court has subject matter jurisdiction over Petitioner's habeas claims which are now ripe for review.

B. Exhaustion of Administrative Remedies Is Not Required in This Case

"Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v. Madigan,* 503 U.S. 140, 144, 112 S.Ct. 1081 (1992); *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 (11th Cir. 1989) ("We note at the outset that the application of the judicial exhaustion doctrine is subject to the discretion of the trial court.") (citing *Panola Land Buyers Ass'n v. Shuman,* 762 F.2d 1550, 1556-57 (11th Cir. 1985); *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1034 (5th Cir. 1982) ("the exhaustion requirement is not a jurisdictional prerequisite but a matter committed to the sound discretion of the trial court"). Here, Congress has not specifically mandated exhaustion before judicial review of custody determinations. Because exhaustion is not required by statute, sound judicial discretion must govern this Court's decision of whether to exercise jurisdiction absent exhaustion. *See McCarthy,* 503 U.S. at 144. Exercise of such sound judicial discretion is warranted here because there is an abundant body of law that supports this Court's jurisdiction over this case absent exhaustion.

First, exhaustion does not apply where, as here, a petition challenges only the agency action collateral to removal proceedings, such as bond. *Welch v. Reno,* 101 F.Supp.2d 347, 351 (D. Md. 2000) (Statutory exhaustion only for review of final orders of removal); *Aguilar v. Lewis,* 50 F.Supp.2d 539, 541 (E.D. Va. 1999) (No federal statute imposes an exhaustion

requirement concerning bond); *Rowe v. INS*, 45 F. Supp. 2d 144, 145-46 (D. Mass. 1999) (and cases cited therein); *Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997) (and cases cited therein); *Montero v. Cobb*, 937 F. Supp. 88, 90-91 (D. Mass. 1976). *Alikhani v. Fasano,* 70 F.Supp.2d 1124, 1129- 30 (S.D. Cal. 1999). The instant petition only seeks review of the IJ's bond determination, and not of a final order of removal.

In addition, exhaustion is not required "where [, as here,] an agency's exercise of authority is clearly at odds with the specific language of the statute." *McClendon v. Jackson Television Inc*., 603 F.2d 1174, 1177 (5th Cir. 1979). As discussed *infra*, the IJ's exercise of authority to deny Petitioner release on bond solely on the ground that the IJ has no statutory authority to impose bond conditions other than monetary conditions directly contravenes the specific language of § 236(a), which confers the IJ such authority.

Moreover, exhaustion is also not required where a review procedure exists but it is not mandated by statute or agency regulations. *Darby v. Cisneros*, 113 S.Ct. 2539 (1993) (Where regulation provided that ALJ's determination shall be final unless the Sec. of HUD, in his discretion, decides to review the decision after request of a party, such regulation does not provide for mandatory review and plaintiff could file suit without making request to Sec.); *Noriega-Lopez v. Ashcroft,* 335 F.3d 874, 880-82 (9th Cir. 2003) (Failure to file a motion to reconsider BIA decision is neither statutorily required under INA §242(d)(1) nor prudentially required); *Chang v. U.S.,* 327 F.3d 911, 922- 24 (9th Cir. 2003) (Where investor was not required to seek a removal proceeding to review denied petition and where IJ in removal could not address APA, estoppel and constitutional claims and where statutes now limit the scope of removal proceedings, plaintiffs did not have to exhaust removal proceeding). Here, although Petitioner may appeal the IJ's decision to the BIA, such appeal is not mandated by statute or

agency regulations. *See* 8 C.F.R. § 1003.19(f) ("An appeal from the determination by an Immigration Judge *may be taken* to the Board of Immigration Appeals pursuant to § 1003.38") (emphasis added).

Finally, exhaustion of administrative remedies would be futile in this case because the BIA has no jurisdiction to adjudicate constitutional issues raised here.1 *See Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976) (A constitutional challenge to administrative action does not require exhaustion.); *Jean v. Nelson,* 727 F.2d 957, 981 (11th Cir. 1984) (en banc), *aff'd,* 472 U.S. 846, 105 S.Ct. 2992 (1985) (allowing exception to exhaustion requirement where remaining administrative remedies could not cure alleged defect in agency procedures); *Ramirez-Osorio v. INS,* 745 F.2d 937, 939 (5th Cir. 1984) (holding that "exhaustion is not required when administrative remedies are inadequate"); *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1033-36 (5th Cir. 1982) (same). Some courts have held that, notwithstanding the constitutional claims, exhaustion is still required if the claims involve a procedural error that is correctable by the administrative tribunal. *Vargas v. INS,* 831 F.2d 906, 908 (9th Cir. 1987); *Dhangu v. INS,* 812 F.2d 455, 460 (9th Cir.1987). Nonetheless, exhaustion is not required here since the BIA has no expertise to adjudicate the equal protection claim raised in the instant case. *See Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (Although a party may be required to

1 It should be noted that the instant case is distinguishable from *Boz v. United States*, 248 F.3d 1299 (11th Cir. 2001), wherein the Eleventh Circuit affirmed the district court's dismissal of a habeas petition for lack of jurisdiction on the ground that the petitioner failed to exhausted the administrative remedies available to him. However, *Boz* does not apply here because that case involved the post-removal mandatory detention of criminal aliens under INA § 236(c) and § 241, where administrative remedies were available to the petitioner, 90-days after issuance of his final order of removal. To the contrary, the instant case involves pre-removal non-mandatory detention of a non-criminal alien under INA § 236(a). Here, the Petitioner "need not exhaust his administrative remedies" because the only available administrative remedy, appeal to the BIA, would be futile as it "will not provide relief commensurate with the claim" raised in the instant case. *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1561 (11th Cir. 1989). In addition, the continuing validity of *Boz* is in doubt in light of *Zadvydas v. Davis,* 533 U.S. 678, 701, 121 S.Ct. 2491 (2001). Subsequent to *Boz*, the Supreme Court in *Zadvydas* held that detention of permanent resident aliens beyond six months following issuance of an alien's final order of removal is presumptively unreasonable. *Zadvydas*, 533 U.S at 701-02. In *Boz*, the petitioner had been held in post-removal detention for approximately three (3) years. *Boz*, 248 F.3d at 1300.

exhaust a procedural due process claim that could be remedied by the IJ, an equal protection claim that the IJ/BIA cannot decide does not require exhaustion); *Jankowski v. INS,* 138 F.Supp.2d 269, 273-76 (D. Conn. 2001) *rev'd on other grounds* 291 F.3d 172 (2d Cir. 2002) (Equal protection challenge does not require exhaustion).

C. This Court's Authority to Grant the Instant Motion

This Court has the discretion to enter a temporary restraining order and a preliminary injunction. *See Haitian Refugee Center v. Nelson*, 872 F.2d 1555, 1561-1562 (11th Cir. 1989). In order for preliminary relief to issue, the movant must establish the following: (1) a substantial likelihood that the movants will ultimately prevail on the merits; (2) that he will suffer irreparable injury if the injunction is not issued; (3) that the threatened injury to the movant outweighs the potential harm to the opposing party; and (4) that the injunction, if issued, would not be adverse to the public interest. *Id*. As discussed below, all of these factors heavily weigh in the Petitioner's favor in the instant case.

II. Substantial Likelihood that the Petitioner will Prevail on the Merits Of His Claims

A. Statutory Violation of INA § 236(a)

1. Standard of Statutory Construction

When reviewing an agency's interpretation of a statute, the Court must apply established canons of statutory construction. *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 431, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). The words used are to be given their ordinary meaning, *Chevron v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778 (1984), and the language in question is to be construed in harmony with related provisions and the statute as a whole. *K Mart Corp. v. Cartier Inc.,* 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). Furthermore, the language should not be construed in a way that renders a term surplusage.

United States v. Menasche, 348 U.S. 528, 75 S.Ct. 513, 99 L.Ed. 615 (1955). If the language regarding intent is ambiguous, the Court must defer to the agency's reasonable interpretation of the statute. *Chevron*, 467 U.S. at 843. If the language of the statute is not ambiguous, the intent of Congress must be given effect. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999); *Chevron, U.S.A.*, 467 U.S. 837 at 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694. An agency's interpretation may be overturned only if it is arbitrary, capricious, or manifestly contrary to law. *Chevron, U.S.A.*, 467 U.S. at 842-43, 104 S.Ct. 2778. However, the federal courts should defer to an agency decision only when the statute, "applying the normal 'tools of statutory construction,' [is] ambiguous." *INS v. St. Cyr*, 533 U.S. 289, 320 n. 45, 121 S.Ct. 2271 (internal citations omitted).

2. Section 236(a) clearly authorizes the IJ to "prescribe" and impose bond conditions he deems appropriate

Applying these standards, it is clear that § 236(a) authorizes the IJ to "prescribe" and impose bond conditions he deems appropriate. Under § 236(a)(2), the Attorney General (and his designate the immigration judge) "may release the alien on—(A) bond of at least $1,500, with security approved by, and *containing conditions prescribed by, the Attorney General* . . . (emphasis added). The plain language of the statute, therefore, authorizes the IJ to "prescribe" and impose conditions for bond. Under the statute, the only limit imposed on the IJ's authority is granting work authorization to Mr. [redacted] as a condition of release. INA §236(a)(3). Therefore, giving the words of the statute their ordinary meaning, as required, *Chevron*, 467 U.S. 837, § 236(a) authorizes the IJ to impose bond conditions he deems appropriate. Federal case law interpreting § 236(a) in the context of the IJ's authority to impose bond conditions also supports Petitioner's construction of the statute. Petitioner's research reveals only three federal district court cases that interpreted § 236(a) in that context. All of these cases clearly indicate

that, when determining release on bond under § 236(a), the IJ has statutory authority to impose any conditions he/she deems appropriate. *Quezada-Bucio v. Ridge*, 317 F.Supp.2d 1221 (W.D. Wash. XXXX) ("The IJ would then determine, based on the standard set forth in INA § 236(a), whether, and *under what conditions*, petitioner may be released from custody pending the resolution of his appeal before the BIA") (emphasis added). *Alwaday v. Beebe*, 43 F.Supp.2d 1130 (D. Or. 1999) (same); *Pastor-Camarena v. Smith,* 977 F. Supp. 1415, 1418 (W.D. Wash. 1997) (same).

3. Companion Regulations to § 236(a) also authorize the IJ to impose bond conditions he deems appropriate

Nor do the regulations of the Department of Justice prohibit the IJ from setting other conditions of bond. 8 C.F.R. §1003.19 (XXXX); 8 C.F.R. § 1236.1(d). In fact, 8 C.F.R. § 1236.1(d) provides that the IJ may impose conditions other than monetary condition. This regulatory provision provides that:

> After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 1240 becomes final, request *amelioration of the conditions under which he or she may be released*. (emphasis added). Prior to such final order . . . the immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

This regulatory provision provides that an alien in removal proceedings may seek reconsideration of the Service's initial custody determination <u>before an IJ</u> at any time before a final order of removal is issued against him, <u>including amelioration of conditions of his release</u>. It further provides that such alien may seek amelioration of the terms of release even after he is

released. This by implication means that the IJ has authority to impose various conditions of his release before a final order of removal is issued.

In addition, the regulatory provision provides that the IJ has authority under INA § 236 to release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 1003.19 of this chapter. As indicated previously, § 236 only prohibits the IJ from granting work authorization to Mr. [redacted] as a condition of release, and authorizes the IJ to "prescribe" and impose conditions for bond. INA §236(a)(2)(A). Nor does 8 C.F.R. §1003.19 prohibit the IJ from setting other conditions of bond. Therefore, reading "in harmony" these "related" statutory and regulatory provisions "as a whole," as required, *K Mart,* 486 U.S. at 291, the only logical conclusion that can be drawn is that the IJ has authority under INA §236(a) to "prescribe and impose" any conditions for bond he deems necessary. Reading the statute otherwise would render the terms of the statute surplusage, *see Menasche*, *supra*, contravening the intent of Congress in enacting the statute.

4. The IJ's decision directly contravenes § 236(a) and its companion regulations

The IJ's bond determination in the instant case was arbitrary, capricious, and manifestly contrary to law, because it directly contradicts the plain meaning of § 236(a) and companion regulations, which authorize him to consider conditions other than monetary condition for bond. *Chevron, U.S.A.,* 467 U.S. at 842-43, 104 S.Ct. 2778 (An agency's interpretation may be overturned only if it is arbitrary, capricious, or manifestly contrary to law.). The IJ impermissibly concluded that he had no statutory authority to impose any conditions of bond, other than financial conditions, that would ensure Mr. [redacted] appearance. Ignoring all the other conditions suggested by Mr. X [redacted] the IJ reasoned that financial conditions would not ensure Mr. [redacted]' appearance, because as a Mexican citizen he could obtain a birth certificate

and cross the border. *See* Habeas Petition, ¶ 20; *see also* Declaration Under Penalty of Perjury of [redacted] attached as Exh. 8 to Habeas Petition (hereinafter refferred to as "[redacted] Decl."), ¶¶ 10-11. As discussed, *supra*, the IJ's claim that he could not impose any other conditions, such as electronic monitoring, extensive reporting, or ordering Mr. [redacted] to provide his passports to ICE, and therefore could not guarantee his appearance, is in clear contravention of INA §236(a)(2)(A), 8 U.S.C. §1226(a)(2)(A), and its companion regulations.

B. The IJ Violated Petitioner's Equal Protection Rights Under the Fifth Amendment to the United States Constitution

At the hearing, the IJ denied Petitioner's release on bond, specifically on the basis of his Mexican citizenship. According to the IJ, because Petitioner is a citizen of Mexico he may not be released on bond because he "could use his Mexican birth certificate to cross the border into Mexico" and, therefore, again according to the IJ, this makes Petitioner a "flight risk" and not eligible for release. However on the basis of this faulty and speculative reasoning, any alien of Mexican nationality before any immigration judge in the future could be disabled from being released on bond, merely on the basis of his Mexican national origin. Such a result is discriminatory and plainly unconstitutional, as will be discussed. It is clear that the IJ's decision to deny release on bond on such a basis was in contravention of equal protection and due process clause contained in the Fifth Amendment to the United States Constitution.

It is well-settled that equal protection applies to aliens who are physically present in, and admitted to, the United States to the same scope and extent as United States citizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the protections of the Constitution "are universal in their application to all persons within the territorial jurisdiction, without regard to

any differences of race, of color or of nationality"); *Plyler v. Doe*, 457 U.S. 202, 211-12, 102 S.Ct. 2382, 2391-92, (1982) (the Fifth, Sixth, and Fourteenth Amendments apply to all persons within the United States, including excludable aliens); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (applying strict scrutiny to incarceration of Japanese in United States during World War II); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying strict scrutiny to race discrimination in schools in Washington, D.C.); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that national origin discrimination against Hispanics in grand jury selection impermissible); *Oyama v. California*, 332 U.S. 633, 644-47 (1948) (holding that restriction on transfer of agricultural property of Japanese lawful permanent resident is a violation of equal protection).

The Supreme Court in *Zadvydas v. Davis, discussed supra,* underscored in that decision the importance of constitutional rights attaching to aliens within the borders of the United States. As the Court clearly stated, "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. *Zadvydas,* 533 U.S. at 693 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (same). The Court made clear however that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. *Id*. (citing *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883 (1976);

Kwong Hai Chew v. Colding, 344 U.S. 590, 596-598, and n. 5, 73 S.Ct. 472, 97 L.Ed. 576 (1953); *Yick Wo v. Hopkins*, *supra*).

Petitioner has been admitted to the United States since 1999, and therefore unquestionably enjoys the full protection of the Equal Protection Clause under the case law cited above. *See* Habeas Petition, ¶ 10; Decl. ¶ 1. Mr. X[redacted] only charge of removal appearing in his Notice of Removal, issued November 19, [redacted] is that he failed to maintain or comply with the conditions of his change of status, in violation of INA § 237(a)(1)(C)(i). *See* Habeas Petition, Exh. 3. The reason for his overstay was inadvertent, *see* Habeas Petition, ¶ 12; Decl. ¶ 4, as Mr. [redacted] was laid-off from his professional position and was given faulty advice by prior counsel that he had six months to depart the United States after his lay-off. *Id*. Mr. [redacted] had never previously violated any immigration laws of the United States and has never knowingly violated or even been *accused* of violating any other laws of the United States, immigration or criminal, before his arrest and incarceration without bond. *Id*.

Because the IJ's decision rested on a "suspect classification," namely Petitioner's national origin as a Mexican citizen, it is well-settled that there must be some compelling governmental interest for the imposition of such classification for it to be permissible under the United States Constitution. As the Supreme Court noted in *Demore v. Hyung Joon Kim*, 538 U.S. 510, 123 S.Ct. 1708 (2003), there is an "uncontroversial requirement that detention serve a compelling governmental interest and that detainees be afforded adequate procedures ensuring against erroneous confinement." *Id*. at 566 n. 22 (citing *Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that due process requires "adequate procedures" permitting detained aliens to show that "they no longer present special risks or danger" warranting confinement)). Moreover, any action by the government based on an individual's

national origin must be "narrowly tailored" to effectuate the asserted compelling governmental interest. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995) (holding that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989).

In the case at bar, there is no question Petitioner's continued detention solely based on the mere fact of his Mexican national origin was arbitrary, capricious and not narrowly tailored in any way to the effectuation of any compelling governmental interest. The lack of "narrow tailoring" is especially apparent due to the fact that undersigned counsel for Petitioner had agreed to the imposition of "any conditions" to the release of Petitioner that the government may have been inclined to require or the IJ inclined to impose. For example, the Petitioner could have been released into a program of home detention, which requires the wearing of an ankle bracelet to closely monitor his whereabouts. In the alternative (or additionally) the IJ could have imposed a requirement that Petitioner report to the Service or any appropriate agency on a daily or weekly basis. These options would have allowed the governmental interests in monitoring and assuring

the Petitioner's continued presence to be met while also allowing Petitioner to be released from incarceration.2

C. The IJ Also Violated Petitioner's Due Process Rights Under the Fifth Amendment to the United States Constitution

In addition to violating Petitioner's equal protection rights, the IJ additionally violated Mr. [redacted]'s substantive and procedural due process rights because the IJ determined (erroneously) that he had no power to set any conditions of bond, and that, therefore and *a fortiori*, no conditions of bond could possibly satisfy the government's concerns that Petitioner might constitute a "flight risk." This failure to impose any conditions on Petitioner's release on bond, including, as discussed, electronic monitoring, as well as retention of passports, daily reporting and a monetary bond, was an impermissible basis to deny release on bond. In addition, by refusing to impose *any* conditions, the IJ thereby pretermitted any meaningful opportunity for Mr. [redacted] to be heard on the issue of whether he could be released on bond. Had the IJ exercised his clear statutory authority to set conditions on bond, then Mr. XXXXX would certainly have argued that such conditions adequately ensure his presence at future hearings, and assuage the government's concerns about his risk of flight.

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2 The government will allege that the compelling governmental interest is premised on Mr [redacted]'s alleged status as a "fugitive." However, there is simply no evidence that Petitioner has engaged in any crime, nor has he ever fled any jurisdiction to evade criminal prosecution while any charges were pending. To the contrary, the evidence will show that Mr [redacted] left XXXX in 1999, and charges were not brought against him until one (1) and two (2) years following his departure. *See* Habeas Petition, ¶ 15 and Exh. 5; Decl. ¶ 8. As soon as charges were brought against him, he retained counsel in X[redacted] who is currently vigorously fighting those charges. [redacted] law contains a presumption of innocence and there is no convicton against Mr. [redacted]. Indeed, there is absolutely no evidence that XXXX is particularly concerned about Mr. [redacted] as the [redacted] courts have not initiated any extradition proceedings against him. *See* Habeas Petition, Exh. 4; Decl. ¶ 7. No extradition proceedings are currently pending. *Id*. Moreover, Mr. [redacted] has remained in the United States for over five years without any indication that he would hide his presence or flee the country. *See e.g*. Exhibit 1. Finally, the recent interest in Mr. [redacted] is tied directly to [redacted] who has used [redacted] authorities as a means to snatch custody of their child from him and to thwart the decision of [redacted] custody proceedings. Exh. 2.

As the Supreme Court has stated, "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Hamdi v. Rumsfeld*, -- U.S. --, 124 S.Ct. 2633, 2648 (XXXX) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950)); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617, 113 S.Ct. 2264 (1993) ("due process requires a 'neutral and detached judge in the first instance'") (quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80 (1972)). The Court also reiterated that "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 2648-49 (emphasis added)(citing *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (quoting Baldwin v. Hale, 1 Wall. 223, 233, 17 L.Ed. 531 (1864); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (other citations omitted)). "These essential constitutional promises may not be eroded." *Id* In the instant case, Petitioner's substantive due process rights were violated by the IJ's application of a clearly incorrect legal principle, namely that he is prohibited under legal authority from setting any conditions on bond other than monetary conditions. *See* 8 C.F.R. §§ 1236.1 and 1003.19. Such a blatant and fundamental legal error meets the test for a substantive due process violation. As the stated by the court in *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), "a substantive due process claim implicates the essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling,

was in itself impermissible. . . .It has been said, for instance, that substantive due process protects individuals against state actions which are 'arbitrary and capricious,' . . . or those which run counter to 'the concept of ordered liberty'" *Id*. at 754. The IJ's conduct in holding that he was without authority to impose conditions when he actually had such authority was "stunning, evidencing more than humdrum legal error," as is required to meet the test for a substantive due process violation. *Id*. at 754 n. 5.

Moreover, Petitioner's procedural due process rights were also violated because he was pretermitted from engaging in any discussion of the appropriateness of any conditions on bond due to the IJ's erroneous impression that the judge lacked any authority to impose such conditions. As discussed above, the IJ does possess such authority. *See Quezada-Bucio v. Ridge*, 317 F. Supp.2d 1221 (W.D. Wash. XXXX); *Alwaday v. Beebe*, 43 F. Supp.2d 1130 (D. Or. 1999); *Pastor-Camarena v. Smith,* 977 F. Supp. 1415, 1418 (W.D. Wa.1997). Such an error worked a violation of Petitioner's right to be heard and to meaningfully present his claims in such an important matter such that Mr. [redacted] was prevented from protecting his liberty interest to be free from continued detention.

III. The Petitioner Will Suffer Irreparable Injury If the Injunction Is Not Issued

1. Continued Detention Itself Represents A Continuing Irreparable Injury To Petitioner

The fact that Mr. [redacted] will remain incarcerated unlawfully represents in and of itself a continuing irreparable injury to Petitioner. *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990) ("[I]t is well to remember the magnitude of the injury that pretrial detention inflicts and the departure that it marks from ordinary forms of constitutional governance"); *Grodzki v. Reno*, 950 F. Supp. 339, 342 (N.D. Ga. 1996) ("The court . . .finds that the continued detention of [the

petitioner], a permanent resident alien, without affording him an individualized bond determination hearing, constitutes irreparable injury and that emergency relief is necessary to prevent this injury"); *Dash v. Mitchell*, 356 F. Supp. 1292, 1309 (D. D.C. 1972) ("Pretrial detention inflicts irreparable injury on persons detained by subjecting them to incarceration without any compensation, even if the detention is subsequently held to have been wrongfully imposed").

2. Petitioner's Continued Detention Will Separate Him From His Family

Furthermore, if Petitioner is denied release on bond with reasonable conditions, he will suffer irreparable injury in that he will be separated from his wife and two U.S. citizen children who are extremely close to him. *See United States v. Wharton*, 514 F.2d 406, 408, 412 (9th Cir. 1975) ("Governmental conduct would work a serious injustice if this family were divested of the home in which they have invested so much of themselves"); *Tefel v. Reno*, 972 F. Supp. 608, 619-620 (S.D. Fla. 1997) (failure to issue temporary restraining order would result in irreparable injury including family separation), *rev'd on other grounds* 180 F.3d 1286 (11th Cir. 1999).

Based on the letters submitted by Petitioner and his immediate family members, it is evident that his continued detention will cause them extreme emotional harm and break up their tight-knit and loving family. *See* Habeas Petition, Exh. 1 (indicating that he will suffer extreme emotional harm by being separated from his family). In a physician's letter dated December 20, XXXX, the doctor reports that Mr. XXXXX' two children "suffer severe cases of XXXX." *Id*.

IV. The Petitioner's Injuries Overwhelmingly Outweigh Any Potential Harm To The Respondents

The injury to the Petitioner far outweighs the potential harm to the Respondents by permitting him to be released on conditions of bond while awaiting conclusion of his removal proceedings. As discussed *supra*, Petitioner will suffer various forms of irreparable harm if he

remains in detention. On the other hand, the Respondents will suffer no harm if the Petitioner is permitted to be released on bond and remains in the United States pending his removal proceedings. He poses no risk to United States security or to his community nor is he a flight risk. To the contrary, as indicated in numerous support letters, he is man of great character and who has generously helped and positively influenced numerous individuals. *See* Exh. 1. Although the IJ found that Petitioner is a flight risk, as discussed *supra*, that finding has no support in law or in fact. Petitioner has no history of immigration law violations, prior to the NTA issued in November, nor has he ever failed to appear before the IJ when he was required to do so. The IJ failed to consider these factors that clearly establish that Petitioner does not pose any flight risk. Instead, the IJ found Petitioner to be a flight risk solely based on his speculation that "he could get a Mexican birth certificate and cross the border." Such a finding is based on mere speculation, and if upheld, will render bond hearings meaningless for all Mexican citizens because no Mexican citizen would ever be eligible for a bond because he or she could "get a birth certificate" and "cross the border." Because Petitioner does not pose any danger to the community or flight risk, there would be no harm to the Respondent by releasing the Petitioner.

V. The Issuance of the Injunction Is Not Adverse To The Public Interest

The issuance of the injunction in this case is not adverse to the public interest. In fact, the issuance of an injunction strongly favors the public interest here. It is clearly against public policy and the public's interest to separate members of an immediate family. Indeed, one of the purposes behind our immigration law is to preserve family unity. *See, e.g., INS v. Errico*, 385 U.S. 214 (1966). Furthermore, the invidious racial and national origin classification at the base of the IJ's ruling, if allowed to stand, would represent a judicial imprimatur of impermissible racial and national origin discrimination. Such a ruling is not only unsupported legally, but also

adverse to the public interest in protecting minorities from arbitrary, capricious and unconstitutional governmental actions.

CONCLUSION

WHEREFORE, the Petitioner respectfully requests that this Honorable Court enter an order enjoining Respondents, and their agents, from preventing Petitioner's release on bond; releasing Petitioner from physical custody pending the outcome of the instant action on any reasonable conditions on bond that would ensure his appearance at any future immigration proceedings; and declaring that the actions and/or decisions of [redacted] were (a) in violation of the Equal Protection guarantees of the Due Process Clause of the Fifth Amendment by utilizing the impermissible criteria of national origin as a basis to deny bond; (b) in violation of the Due Process Clause of the Fifth Amendment by determining that no conditions of bond could be set and therefore no conditions of bond could satisfy release; and (c) in violation of the INA and DOJ regulations because an immigration judge does have the authority to set conditions of bond in a removal proceeding.

DATED: [redacted]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Motion for a Temporary Restraining Order and/or Preliminary Injunctive Relief, and Memorandum of Law were served via hand delivery on this _____ day of December, [redacted] Assistant United States Attorney for the Southern District of Florida, 99 N.E. 4th Street, Miami, Florida 33132.