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5 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
6 AT SEATTLE

7 JAIME PADILLA,

8 Petitioner,

Case No. C20-840-RSL-MAT

9 v.

ORDER DENYING MOTION FOR  
TEMPORARY RESTRAINING  
10 ORDER AND SETTING BRIEFING  
SCHEDULE

11 LOWELL CLARK, et al.,

12 Respondents.

13 I. INTRODUCTION

14 Petitioner, who is currently detained in U.S. Immigration and Customs Enforcement  
15 (“ICE”) custody at the Northwest ICE Processing Center in Tacoma, Washington, brings this 28  
16 U.S.C. § 2241 habeas action through counsel to obtain release from detention or a bond hearing.  
17 Currently before the Court is Petitioner’s motion for a temporary restraining order (“TRO”)  
18 seeking the ultimate relief requested in this case: immediate release or a bond hearing at which  
19 the U.S. Department of Homeland Security (“DHS”) bears the burden of justifying his detention  
20 by clear and convincing evidence. (Dkt. 2.) The Government opposes the motion. (Dkt. 5.)  
21 Having considered the parties’ submissions, the balance of the record, and the governing law, the  
22 Court DENIES the motion for a TRO and sets a briefing schedule on the merits of the habeas  
23 petition.

ORDER DENYING MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND SETTING BRIEFING SCHEDULE -

1 II. BACKGROUND

2 Petitioner is a native and citizen of Mexico who initially entered the United States  
3 without inspection in 1993. In 1996, he married a U.S. citizen, and he has one U.S. citizen step-  
4 child and three biological U.S. citizen children.

5 In 1997, Petitioner was granted voluntary return to Mexico but returned to the United  
6 States the same year, again without inspection. In 2008, Petitioner left the United States to  
7 pursue consular processing of a visa application his wife filed on his behalf. In 2009, however,  
8 he returned to the United States using false documents.

9 On November 9, 2019, Petitioner was arrested for Assault in the Fourth degree with  
10 sexual motivation, a gross misdemeanor, based on allegations that when he entered a tenant's  
11 apartment to survey repairs, he touched her without permission. The charge is being contested  
12 and has not yet been resolved. ICE agents encountered him while he was in jail, and he has been  
13 held in ICE custody since November 12, 2019.

14 ICE subsequently commenced removal proceedings against him and an individual  
15 hearing is scheduled for June 30, 2020. Petitioner has filed applications for adjustment of status  
16 based on his marriage to a U.S. citizen or, alternatively, cancellation of removal under 8 U.S.C. §  
17 1229b(a).

18 On December 2, 2019, Petitioner received a bond hearing before an Immigration Judge  
19 ("IJ"). He was represented by counsel. In accordance with 8 C.F.R. § 1236.1(c)(8) and *Matter of*  
20 *Urena*, 25 I&N Dec. 140 (BIA 2009), the IJ placed the burden of proof on Petitioner to show that  
21 he was not a danger to the community or a flight risk. The IJ considered Petitioner's family  
22 status, including the fact that his wife and four children are U.S. citizens; Petitioner's  
23 employment situation, noting that he owned his own business, employed others, and was a



1 a party to demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer  
2 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his  
3 favor, and (4) that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d  
4 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).<sup>1</sup>

5 Because Petitioner seeks a TRO ordering the Government to take action, rather than to  
6 preserve the status quo, he is seeking a mandatory injunction. *See Garcia v. Google*, 786 F.3d  
7 733, 740 (9th Cir. 2015) (en banc); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*,  
8 571 F.3d 873, 878-79 (9th Cir. 2009). Mandatory injunctions are “particularly disfavored,” and  
9 as such, the moving party’s burden is “doubly demanding.” *Garcia*, 786 F.3d at 740 (quoted  
10 source omitted). Rather than simply showing he is likely to succeed, he “must establish that the  
11 law and facts *clearly favor* [his] position.” *Id.* (emphasis in original).

12 With respect to the first *Winter* factor, likelihood of success on the merits, Petitioner  
13 contends that his current detention violates the Due Process Clause and that he is entitled to  
14 immediate release or a bond hearing where the Government bears the burden of proof by clear  
15 and convincing evidence. The Government responds that Petitioner has not exhausted his  
16 administrative remedies and that he has received all the benefits of due process to which he is  
17 entitled. As discussed below, the Court finds exhaustion dispositive for purposes of this motion  
18 and therefore declines to address the due process arguments.

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21 <sup>1</sup> The Ninth Circuit has held that, as an alternative to this test, a preliminary injunction is appropriate if “serious  
22 questions going to the merits were raised and the balance of the hardships tips sharply” in the moving party’s favor,  
23 thereby allowing preservation of the status quo when complex legal questions require further inspection or  
deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). However, the “serious  
questions” approach supports a court’s entry of a TRO only so long as the moving party also shows that there is a  
likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135.

1           The Ninth Circuit has held that the proper procedure to challenge an IJ’s bond  
2 determination is to appeal to the BIA, wait for the BIA to render its decision, and then file a  
3 habeas petition in the district court. *Leonardo v. Crawford*, 646 F.3d 1157, 1159-61 (9th Cir.  
4 2011). The exhaustion requirement, however, is prudential, rather than jurisdictional. *Singh v.*  
5 *Holder*, 638 F.3d 1196, 1203 n.3 (9th Cir. 2011). Therefore, it may be waived. *See Puga v.*  
6 *Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007). When deciding whether to require prudential  
7 exhaustion, courts consider whether “(1) agency expertise makes agency consideration necessary  
8 to generate a proper record and reach a proper decision; (2) relaxation of the requirement would  
9 encourage the deliberate bypass of the administrative scheme; and (3) administrative review is  
10 likely to allow the agency to correct its own mistakes and to preclude the need for judicial  
11 review.” *Id.* (quoting *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 881 (9th Cir. 2003)). Even if  
12 these factors weigh in favor of prudential exhaustion, waiver of exhaustion may be appropriate  
13 “where administrative remedies are inadequate or not efficacious, pursuit of administrative  
14 remedies would be a futile gesture, irreparable injury will result, or the administrative  
15 proceedings would be void.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th Cir. 2004) (quoting  
16 *S.E.C. v. G.C. George Sec., Inc.*, 637 F.2d 685, 688 (9th Cir. 1981)).

17           Petitioner’s motion for a TRO does not address exhaustion, and in his habeas petition he  
18 simply asserts the he “has exhausted all available administrative remedies that can provide the  
19 relief he seeks.” (Dkt. 1 at 5.) Petitioner, however, has an appeal of his initial bond hearing  
20 pending before the BIA, and if it is granted, he may obtain the ultimate relief he seeks here—  
21 release from detention. Furthermore, there is no indication in the record that Petitioner has  
22 appealed the IJ’s recent denial of his request for a second bond hearing. Allowing Petitioner to  
23 proceed with this action could encourage others to bypass the administrative scheme. While

1 Petitioner may be able to present facts and argument that will justify waiver of the prudential  
2 exhaustion requirement, he has not done so at this time. Given the outstanding questions  
3 regarding exhaustion, the Court cannot find that he has met his demanding burden of showing  
4 that the facts and the law clearly favor his position. As this issue is dispositive, the Court need  
5 not consider the remaining *Winter* factors. *See Garcia*, 786 F.3d at 740 (“Because it is a  
6 threshold inquiry, when a plaintiff has failed to show the likelihood of success on the merits, we  
7 need not consider the remaining three [Winter elements].” (internal quotation marks omitted)).

#### 8 IV. CONCLUSION

9 Based on the foregoing, the Court ORDERS:

10 (1) Petitioner’s motion for a TRO (Dkt. 2) is DENIED.

11 (2) If not previously accomplished, electronic posting of this Order and petitioner’s  
12 § 2241 habeas petition shall effect service upon the United States Attorney of the petition and all  
13 supporting documents. Service upon the United States Attorney is deemed to be service upon the  
14 named respondents.

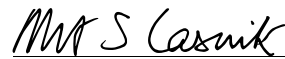
15 (3) **Within 30 days of the date this Order is posted**, respondents shall show cause  
16 why a writ of habeas corpus should not be granted by filing a return as provided in 28 U.S.C. §  
17 2243. As a part of such return, respondents shall submit a memorandum of authorities in support  
18 of their position, and should state whether an evidentiary hearing is necessary. Respondents shall  
19 file the return with the Clerk of the Court and shall serve a copy upon petitioner.

20 (4) The return will be treated in accordance with LCR 7. Accordingly, on the face of  
21 the return, respondents shall note it for consideration on the fourth Friday after it is filed, and the  
22 Clerk shall note the return accordingly. Petitioner may file and serve a response not later than the  
23 Monday immediately preceding the Friday appointed for consideration of the matter, and

1 respondents may file and serve a reply brief not later than the Friday designated for consideration  
2 of the matter.

3 (5) If petitioner's custody status changes at any point during this litigation,  
4 **respondents shall file a status update with the Court as soon as possible and no later than**  
5 **14 days after the change.**

6 Dated this 16th day of June, 2020.

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9 ROBERT S. LASNIK  
10 United States District Judge

11 Recommended for Entry  
12 This 15th day of June, 2020.

13 /s/ Mary Alice Theiler  
14 MARY ALICE THEILER  
15 United States Magistrate Judge