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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Eliseo Mendez-Cruz,  
10 Petitioner,

11 v.

12 Loretta E Lynch, et al.,  
13 Respondents.  
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No. CV-16-04416-PHX-GMS (DMF)

**ORDER**

15 Before the Court is Petitioner's Motion for Temporary Restraining Order and/or  
16 Preliminary Injunction (Doc. 10) seeking an order enjoining his further detention without  
17 being provided with a fair bond hearing. The Court heard oral argument on the motion  
18 on Friday, February 17, 2017. After consideration of the parties' briefs and argument, the  
19 Court grants the Motion. The underlying Petition for Writ of Habeas Corpus will remain  
20 pending before the Magistrate Judge for further proceedings and the parties will be  
21 required to file a joint status report following Petitioner's bond hearing.

22 **I. Background**

23 Petitioner is a native and citizen of Guatemala. He entered the United States on  
24 July 24, 2015, and was removed in August 2015. Petitioner re-entered the United States  
25 again on December 26, 2015, was removed for the second time in January 2016, and  
26 most recently re-entered the United States in March 2016. He was prosecuted for illegal  
27 re-entry after deportation and his prior removal order was reinstated. After Petitioner  
28 served his 30-day sentence stemming from his illegal re-entry conviction, he expressed a

1 fear of returning to Guatemala, which resulted in his referral for a reasonable fear  
2 interview and a suspension of the execution of his removal order.

3 Petitioner made a showing of reasonable fear if returned to Guatemala and was  
4 referred to immigration proceedings for Withholding of Removal and relief under the  
5 Convention Against Torture. Petitioner’s hearing on the merits of these claims is  
6 scheduled for May 2017. While Petitioner’s immigration proceedings were ongoing, he  
7 sought a custody redetermination hearing, which was denied by the Immigration Judge  
8 for lack of jurisdiction, and is currently on appeal before the BIA. Petitioner has been  
9 detained without a bond hearing since March 27, 2016—or nearly 11 months.

10 In his underlying Petition for Writ of Habeas Corpus, Petitioner argues that his  
11 lengthy detention without bond is unlawful in this Circuit. He seeks a declaration that his  
12 current detention without an appropriate bond hearing is unlawful and an order directing  
13 Respondents to grant him a bond hearing before an IJ, with the burden on the government  
14 to show that he is either a flight risk or a danger to society.

15 **II. Motion for Preliminary Injunction**

16 **A. Standard**

17 “[A] preliminary injunction is an extraordinary and drastic remedy, one that  
18 should not be granted unless the movant, *by a clear showing*, carries the burden of  
19 persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting  
20 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948, pp. 129–  
21 130 (2d ed. 1995)). To obtain a preliminary injunction, the moving party must show  
22 “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in  
23 the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
24 injunction is in the public interest.” *Winter v. Natural Resources Def. Council, Inc.*, 555  
25 U.S. 7, 20 (2008); *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052  
26 (9th Cir. 2009).

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1           The Ninth Circuit’s “serious questions” version of the sliding scale test for  
2 preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.  
3 *Alliance for the Wild Rockies v. Cottrell* 632 F. 3d 1127, 1134 (9th Cir. 2011). Under that  
4 test, a preliminary injunction is appropriate when a plaintiff demonstrates that “‘serious  
5 questions going to the merits were raised and the balance of hardships tips sharply in the  
6 plaintiff’s favor.’” *Id.* at 1134-35 (quoting *Lands Council v. McNair*, 537 F.3d 981, 987  
7 (9th Cir. 2008) (en banc)). The movant must also satisfy the other two *Winter* factors—  
8 likelihood of irreparable harm and that an injunction is in the public interest. *Id.* With  
9 respect to the irreparable harm prong, *Winter* specifically rejected the Ninth Circuit’s  
10 “possibility of irreparable injury” standard. *Stormans, Inc. v. Selecky* 586 F.3d 1109,  
11 1127 (9th Cir. 2009). Under *Winter*, a party seeking preliminary relief must  
12 “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Winter*,  
13 555 U.S. at 22. The Court explained that “[i]ssuing a preliminary injunction based only  
14 on a possibility of irreparable harm is inconsistent with our characterization of injunctive  
15 relief as an extraordinary remedy that may only be awarded upon a clear showing that the  
16 plaintiff is entitled to such relief.” *Id.*

17           Additionally, because Petitioner seeks a mandatory injunction—an injunction  
18 altering the status quo—a “heightened standard” applies. *Katie A. ex rel. Ludin v. Los*  
19 *Angeles County*, 481 F.3d 1150, 1156 (9th Cir. 2007). A mandatory injunction is  
20 “‘particularly disfavored’” and a “district court should deny such relief ‘unless the facts  
21 and law clearly favor the moving party.’” *Stanley v. University of Southern California*,  
22 13 F.3d 1313, 1320 (9th Cir. 1994) (quoting *Anderson v. United States*, 612 F.2d 1112,  
23 1114 (9th Cir. 1979)).

## 24           **B. Likelihood of Success on the Merits**

### 25           **1. Exhaustion**

26           Respondents’ initial argument against relief is that Petitioner has not fully  
27 exhausted his administrative remedies, and the Court should decline to entertain his  
28 petition at this time. But exhaustion is a prudential rather than jurisdictional requirement.

1 *Singh v. Holder*, 638 F.3d 1196, 1203 n. 3 (9th Cir. 2011). Courts may require prudential  
2 exhaustion if (1) agency expertise makes agency consideration necessary to generate a  
3 proper record and reach a proper decision; (2) relaxation of the requirement would  
4 encourage the deliberate bypass of the administrative scheme; or (3) administrative  
5 review is likely to allow the agency to correct its own mistakes and to preclude the need  
6 for judicial review. *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir.2007). Even if these  
7 factors weigh in favor of prudential exhaustion, waiver of exhaustion may be appropriate  
8 “where administrative remedies are inadequate or not efficacious, pursuit of  
9 administrative remedies would be a futile gesture, irreparable injury will result, or the  
10 administrative proceedings would be void.” *Laing v. Ashcroft*, 370 F.3d 994, 1000 (9th  
11 Cir.2004) (citation and quotation marks omitted). Because there is no definitive  
12 timeframe within which the BIA must rule, and the Court finds that Petitioner is entitled  
13 to a bond hearing, it will decline to require prudential exhaustion.

14 **2. Detention Under 8 U.S.C. § § 1226(a) or 1231(a)**

15 Petitioner asserts an entitlement to a bond hearing whether his detention arises  
16 under 8 U.S.C. § 1226(a) or 8 U.S.C. § 1231(a). While § 1226(c) controls the detention  
17 of certain criminal aliens during the pendency of their removal hearings, § 1231(a)  
18 controls the detention of removable aliens “during” and “beyond” “the [statutory]  
19 removal period.”

20 During withholding proceedings, the IJ may determine only if Petitioner should be  
21 granted withholding or deferral of removal. 8 C.F.R. § 1208.2(c)(3)(i). “During such  
22 proceedings, all parties are prohibited from raising or considering any other issues,  
23 including but not limited to issues of admissibility, deportability, eligibility for waivers,  
24 and eligibility for any other form of relief.” *Id.*

25 Nothing about a withholding-only proceeding allows the Petitioner to attack or  
26 relitigate the finality of his underlying removal order. His detention, thus, does not arise  
27 pursuant to § 1226(a). “If Petitioner had a final order of removal (and was subject to  
28 detention under Section 1231) prior to expressing a fear of torture, and he will have a

1 final order of removal (and will be subject to detention under Section 1231) after his  
2 withholding proceedings are completed (no matter what the outcome is), I cannot see  
3 how his detention status should change as a matter of law during his withholding  
4 proceedings. Such a transitory appearance of new rights vis-a-vis an alien's ability to  
5 obtain bond makes no legal sense.” *Reyes v. Lynch*, No. 15-CV-00442-MEH, 2015 WL  
6 5081597, at \*4 (D. Colo. Aug. 28, 2015). The Court therefore finds that Petitioner's  
7 detention arises under 8 U.S.C. § 1231(a).

8 *Diouf v. Napolitano*, 634 F.3d 1081, 1085 (9th Cir. 2011) (*Diouf II*), expressly  
9 applies “to aliens who have exhausted all direct and collateral review of their removal  
10 orders but who, for one reason or another, have not yet been removed from the United  
11 States.” As Respondents argue, nothing about Petitioner's withholding proceedings  
12 affects the finality of his removal order. Thus, Petitioner's detention is governed by  
13 *Diouf II*. Nor does *Diouf II* conflict with the Supreme Court's decision in *Zadvydas v.*  
14 *Davis*, 533 U.S. 671 (2001), because each decision provides a different remedy and the  
15 decisions work in harmony. See *Olivera-Julio v. Asher*, No. C14-1312-RSM, 2014 WL  
16 6387351, at \*2 (W.D. Wash. Nov. 14, 2014) (“After this six-month period, an alien is  
17 entitled to a bond hearing if removal is not imminent, *Diouf v. Napolitano*, 634 F.3d  
18 1081, 1091–92, 1092 n. 13 (9th Cir. 2011), or conditional release if the alien can  
19 demonstrate that there is ‘no significant likelihood of removal in the reasonably  
20 foreseeable future,’ *Zadvydas*, 533 U.S. at 701.”).

21 Because entitlement to a bond hearing after 6 months is mandated by Ninth Circuit  
22 precedent, the Court agrees with Petitioner that granting the request for injunctive relief is  
23 maintaining the status quo as directed by the court of appeals.

#### 24 **C. Likelihood of Irreparable Injury**

25 When civil detention of an alien “crosses the six-month threshold and release or  
26 removal is not imminent, the private interests at stake are profound. Furthermore, the  
27 risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral  
28 decisionmaker is substantial.” *Diouf*, 634 F.3d at 1091–92. Because Petitioner has now

1 been detained for nearly one year without a determination by an IJ that he is a flight risk  
2 or a danger to the community, he has established a likelihood of irreparable injury.

3 **D. Balance of Hardships and the Public Interest**

4 Petitioner argues that the balance of hardship tips in his favor because his  
5 continued detention without being provided a fair bond hearing is unlawful. Because  
6 granting a preliminary injunction will not automatically result in Petitioner's release, and  
7 there is no burden to Respondents in providing a fair bond hearing, the Court finds that  
8 the balance of hardships and the public interest favor the granting of a preliminary  
9 injunction. Because the Court directs only that an appropriate bond hearing be held,  
10 Plaintiff is not required to post bond related to this injunction.

11 **III. Conclusion**

12 The Court finds that Petitioner is likely to succeed on the merits concerning his  
13 right to a bond hearing, that he is likely to suffer irreparable harm in the absence of a  
14 preliminary injunction, that the balance of hardships tips in his favor, and that granting  
15 him a bond hearing is in the public interest. Accordingly, Petitioner's Motion for  
16 Temporary Restraining Order and/or Preliminary Injunction (Doc. 10) is granted.

17 **IT IS ORDERED** withdrawing the reference to the Magistrate Judge and  
18 **granting** Petitioner's Motion for Temporary Restraining Order and/or Preliminary  
19 Injunction (Doc. 10). Within 20 days, Respondents must provide Petitioner with a  
20 hearing before an Immigration Judge with the power to grant him release on bond if the  
21 Immigration Judge determines that he qualifies for release under applicable law.

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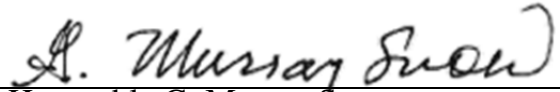
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1           **IT IS FURTHER ORDERED** that within 5 days of Petitioner's forthcoming  
2 bond hearing, the parties must provide a joint status report to the Court indicating what  
3 remaining proceedings are necessary.

4           Dated this 17th day of February, 2017.

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7           Honorable G. Murray Snow  
8           United States District Judge

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