

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Jose PADRON COVARRUBIAS,

Petitioner,

v.

Miguel VERGARA, ICE FIELD OFFICE
DIRECTOR, et al.,
Respondents

CIVIL ACTION No. 5:25-CV-112

**RESPONSE OF PETITIONER TO RESPONDENTS' MOTION TO DISMISS THE
PETITION FOR WRIT OF HABEAS CORPUS**

The Petitioner, Mr. Padron, submits his response to the Respondents' motion to dismiss dated August 25, 2025. Respondents assert a jurisdictional challenge, they argue "beyond doubt" that Petitioner has made a claim that no set of facts in support of his claim would entitle him to relief, namely his release. Gov't Brief 4, 7. They argue he is not "plausibly" entitled to habeas relief. The Court should deny their motion.

The INA authorizes detention for noncitizens under four distinct provisions:

1) **Discretionary Detention. 8 U.S.C. § 1226(a)** generally allows for the detention of noncitizens who are in regular, non-expedited removal proceedings; however, permits those noncitizens who are not subject to mandatory detention to be released on bond or on their own recognizance.

2) **Mandatory Detention of "Criminal" Noncitizens. 8 U.S.C. § 1226(c)** generally requires the mandatory detention of noncitizens who are removable because of certain

criminal or terrorist-related activity after they have been released from criminal incarceration.

3) Mandatory Detention of “Applicants for Admission.” 8 U.S.C. § 1225(b) generally requires detention for certain noncitizen applicants for admission, such as those noncitizens arriving in the U.S. at a port of entry or other noncitizens who have not been admitted or paroled into the U.S. and are apprehended soon after crossing the border.

4) Detention Following Completion of Removal Proceedings. 8 U.S.C. § 1231(a) generally requires the detention of certain noncitizens who are subject to a final removal order during the 90-day period after the completion of removal proceedings and permits the detention of certain noncitizens beyond that period. *Id.* at § 1231(a)(2), (6).

No order of removal has ever issued, so it is undisputed we are in the “pre-order” detention scheme. The instant case concerns the detention provisions at §§ 1226(a) and 1225(b). Both detention provisions, §§ 1226(a) and 1225(b), were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, Pub. L. No. 104—208. Section 1226(a) was most recently amended earlier this year by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).

Following enactment of the IIRIRA, the Executive Office for Immigration Review drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under § 1225(b) and that they were instead detained under § 1226(a) after an arrest warrant was issued by the Attorney General. *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (“Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who en-

tered without inspection) *will be eligible for bond and bond redetermination*)” (emphasis added).

For nearly thirty years, the practice of the government—specifically ICE and Executive Office for Immigration Review, which operate under DHS—was that most individual noncitizens that were apprehended in the interior of the United States after they had been living in the U.S. for more than two years (as opposed to “arriving” at a point of entry, border crossing, or being apprehended near the border and soon after entering without inspection) received a bond hearing. If determined to not be a danger to the community or a flight risk and, as a result, granted a change in custody status, the individuals were released from detention either on their own recognizance or after paying the bond amount set by the IJ in full. 8 U.S.C. § 1226(a)(2)(A).

Rather than explain why, if at all, the IJ was correct to determine that § 1225(b)’s mandatory detention applies to Petitioner, the Respondents in their Answering Brief merely recite the content of § 1226(a) and (b) – offering quite literally no persuasive argument whatsoever. The Petitioner has provided evidence of a dramatic departure in the agencies’ reading recently of the bond statute, and argument as to its error, but their Response is devoid of legal interpretation.

As he noted in his petition, recently, ICE has—without warning and without any publicly stated rationale—reversed course and adopted a policy of attempting to treat all individual noncitizens that were not previously admitted to the U.S. that are contacted in the interior of the U.S. at any time after their entry as “arriving” and ineligible for bond regardless of the particularities of their case. See Ex. 1, ICE Interim Guidance Regarding Detention Authority for Applicants for Admission.” (ICE Memorandum”), July 8, 2025 (attached here). It states:

Effective immediately, it is the position of DHS that [applicants for admission under section 235(a)(1) of the Immigration and Nationality Act] are subject to detention under INA § 235(b) and may not be released from ICE custody except by INA § 212(d)(5) parole. These aliens are also ineligible for a custody redetermination hearing (“bond hearing”) before an immigration judge and may not be released for the duration of their removal proceedings absent a parole by DHS. For custody purposes, these

aliens are not treated in the same manner that “arriving aliens” have historically been treated.

As a result, ICE is now ignoring particularities that have historically been highly relevant to determinations whether a noncitizen such remain or custody or be released—such as: when, why, or how they entered the U.S.; whether they have criminal convictions; whether they present a danger to the community or flight risk; whether they have serious medical conditions requiring ongoing care; whether U.S. citizen family members dependent upon them to provide necessary care; or, whether the noncitizen’s detention is in the community’s best interest. Though no public announcement of this sweeping new interpretation of these statutes was announced, ICE now reasons, and argued in front of the IJ at Petitioner’s foreclosed bond redetermination hearing, on June 25, 2025, before the Laredo immigration judge, that the mandatory detention provision of § 1225(b)(2)(A) applies to all people who enter without inspection who are alleged to be subject to grounds of inadmissibility at § 1182. This is true even in this case, where it is undisputed he was arrested by ICE on May 29, 2025 in a workplace sweep in Tallahassee, Florida. The DHS argues he is subject to mandatory even though it arrested him before the July 8, 2025 memorandum, where in May 2025 it apparently may have issued him Form I-286, Notice of Custody Determination, i.e., arrest warrant, indicating it considered him arrested under §1226(a), and possibly later affirmatively canceled it. See Ex. 1, ICE Memorandum, p. 2, (“if [ICE] previously conducted a custody determination for an applicant for admission still in ICE custody, [ICE] will affirmatively cancel the Form I-286.”] Inasmuch as Petitioner was arrested on his way to work after more than 20 years in the country, § 1226(a) clearly entitled the government to seize him as it did, and as expressly asserted by the NTA charge that Petitioner is “an alien present in the United States who has not been admitted or paroled.” See Gov’t Brief, Ex. 1, NTA.

Matter of Q. Li was published by the BIA on May 13, 2025. Petitioner has argued that the

IJ as well as the ICE trial attorney assigned to the case on June 25, 2025 have misread the holding of the case, which is limited to those who truly were apprehended while “arriving” (present tense) at the border of the United States, Pet. for Habeas 13. Unlike Petitioner, who was not apprehended while arriving, and indeed has lived in the U.S. for 23 years. The ICE trial attorney stated during the June 25, 2025 bond case without elaboration that the arrest on May 29 was “without a warrant” and argued therefore mandatory under 8 U.S.C. § 1225(b), and the IJ, in step, found that *Q. Li* categorically bars bond eligibility for any individual who could potentially be characterized as an “applicant for admission,” regardless of whether 8 U.S.C. § 1225(b) was properly invoked.

The Respondents in their Answering brief here have supplemented the record with the redacted arrest report, known as Form I-213, *Record of Inadmissible/Deportable Alien*, see Gov’t Brief 2. The form, which was submitted during the June 25, 2025 bond hearing, contains numerous errors, including p. 3 referring to “his native Venezuela” (he is Mexican), and p. 2 noting a fictitious “6/24/15 Voluntary Return” evidently an artifact of a previous version of the form the agent who prepared it was using; it also claims the arrest was “At/Near El Paso, Texas,” p.2, when it is undisputed he was arrested in Tallahassee, Florida, which is in the interior of the United States. The Respondents rely on it as apparent proof, in their view, that Petitioner is an applicant for admission as was the noncitizen in *Q. Li*.

As a result of ICE’s interpretation and practice change, individual noncitizens, including long-time U.S. community members like Petitioner (and even those who have had their particular circumstances reviewed and were ordered to be released upon posting bond by an IJ), continue to be detained by ICE. Here, Petitioner’s circumstances were not reviewed because of ICE’s and IJ Emmanuel Garcia’s erroneous interpretation of the statutory scheme. To be clear, other noncitizens are being held in continued ICE detention, even when IJs do not agree with ICE’s interpreta-

tion of the statutes and regulations at hand. “The idea that a different detention scheme would apply to non-citizens ‘already in the country,’ as compared to those ‘seeking admission into the country,’ is consonant with the core logic of our immigration system.” *Martinez v. Hyde*, CV 25-11613-BEM, 2025 WL 2084238 (D. Mass. July 24, 2025) (citing *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018)); *see also Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2267803 (S.D.N.Y. Aug. 8, 2025) (“the Court need not reach the outer limits of the scope of the phrase ‘seeking admission’ in § 1225(b)—it is sufficient here to conclude that it does not reach someone who has been residing in this country for more than two years, and that as someone ‘already in the country,’ *Jennings*, 583 U.S. at 289, [Petitioner] may be subject to detention *only* as a matter of discretion under § 1226(a)”) (emphasis added).

First, the Court should note that the parties here dispute, as a fundamental matter, which statutory section of the Immigration and Nationality Act governs Petitioner’s detention. Respondents would have him subject to *mandatory* detention, arguing that he is subject to mandatory detention under 8 U.S.C. §1225(b). Gov’t Brief 7. To be exact, they appear to concede that while the DHS (the prosecutorial agency in these civil proceedings) has *not* charged him as removable under §1225(b)—which applies to expedited removal proceedings—nor ever begun any such expedited proceedings for arriving aliens, they nonetheless argue that Petitioner is correctly detained pursuant to being in the position of a person akin to being subject to expedited removal proceedings. Gov’t Brief 5, 7-8 (“Contrary to Padron’s contentions, appealing to the BIA is not futile in this case, because the issue on appeal is whether, as a factual matter, Padron falls within the scope of *Matter of Q. Li*, such that he is subject to mandatory detention., or whether the record shows he should be detained under §1226(a) such that he is eligible for a discretionary bond.”) Petitioner has argued, and maintains, he is subject to discretionary detention under 8

U.S.C. §1236(a), which permits an immigration judge (IJ) to review the Department of Homeland Security's (DHS) decision to detain a noncitizen. Pet. for Habeas Corpus 2-7, 14-17. Respondents do not dispute that DHS has placed him into "regular" removal proceedings under 8 U.S.C. § 1229(a). See Exh. 3 of Gov't Brief, the "Notice to Appear." Absent the application of Q. Li, the IJ could redetermine his bond under §1226(a) balancing flight risk and danger.

The government's erroneous interpretation of the INA defies the plain text of 8 U.S.C. § 1226. The government's assertion that Petitioner is detained under § 1225—even though he was arrested in the interior of the country with no allegation as required in §1225(b)(1)(A)(iii)(ii) that he had not shown he had "been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility under this subparagraph"—is meritless. Petitioner came to be in immigration proceedings based on a DHS arrest that was pursuant to the authority contained in section 236 (section 236 of the INA is codified at 8 U.S.C. § 1226.). For decades, § 1225 has applied only to noncitizens "seeking admission into the country"—i.e., new arrivals. *Jennings*, 583 U.S. at 289. This contrasts with § 1226, which applies to noncitizens "already in the country." *Id.* at 289. Petitioner has been in the United States for over 23 years.

This new interpretation is now advanced by the government after decades of consistent use to the contrary. The government's position contravenes the plain language of the INA and its regulations and has been consistently rejected by courts. See, e.g., *Martinez*, 2025 WL 2084238; *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299 (D. Mass. July 7, 2025); *Rodriguez v. Bostock*, No. 3:25-cv-05240-TMC, 2025 WL 1193850 (W.D. Wash. Apr. 24, 2025). See also *Inspection and Expedited Removal of Aliens*, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (explaining that "[d]espite being applicants for admission, aliens who are present without having been admit-

ted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination”).

This new interpretation is inconsistent with the plain language of the INA. First, the government disregards a key phrase in § 1225. “[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien *seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a[.]” 8 U.S.C. § 1225(b)(2)(A) (emphasis added). In other words, mandatory detention applies when “the individual is: (1) an ‘applicant for admission’; (2) ‘seeking admission’; and (3) ‘not clearly and beyond a doubt entitled to be admitted.’” *Martinez*, 2025 WL 2084238, at *2.

The “seeking admission” language, “necessarily implies some sort of present tense action.” *Martinez*, 2025 WL 2084238, at *6; *see also Matter of MD-C-V-*, 28 I. & N. Dec. 18, 23 (B.I.A. 2020) (“The use of the present progressive tense ‘arriving,’ rather than the past tense ‘arrived,’ implies some temporal or geographic limit”); *U.S. v. Wilson*, 503 U.S. 329, 333 (1992) (“Congress’ use of verb tense is significant in construing statutes.”).

In other words, the plain language of § 1225 applies to immigrants currently seeking admission into the United States at the nation’s border or another point of entry. It does not apply to noncitizens “already present in the United States”—only § 1226 applies in those cases. *See Jennings*, 583 U.S. at 303.

When interpreting a statute, “every clause and word . . . should have meaning.” *United States ex rel. Polansky, M.D. v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (internal quotation marks and citation omitted). And “the words of the statute must be read in their context and with a view to their place in the overall statutory scheme.” *Gundy v. United States*, 588 U.S. 128,

141 (2019) (quotation omitted). The government’s position requires the Court to ignore critical provisions of the INA.

Second, the government’s interpretation would render newly enacted portions of the INA superfluous. “When Congress amends legislation, courts must presume it intends its amendment to have real and substantial effect.” *Van Buren v. United States*, 593 U.S. 374, 393 (2021). Congress passed the Laken Riley Act (the “Act”) in January 2025. The Act amended several provisions of the INA, including §§ 1225 and 1226. Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). Relevant here, the Act added a new category of noncitizens subject to mandatory detention under § 1226(c)—those already present in the United States who have also been arrested, charged with, or convicted of certain crimes. 8 U.S.C. § 1226(c)(1)(E); 8 U.S.C. § 1182(a)(6)(A). Of course, under the government’s position, these individuals are already subject to mandatory detention under § 1225—rendering the amendment redundant. Likewise, mandatory-detention exceptions under § 1226(c) are meaningful only if there is a default of discretionary detention—and there is, under § 1226(a). *See Rodriguez*, 2025 WL 1193850, at *12.

Additionally, “[w]hen Congress adopts a new law against the backdrop of a longstanding administrative construction, the court generally presumes that the new provision works in harmony with what came before.” *Monsalvo v. Bondi*, 604 U.S. ___, 145 S. Ct. 1232, 1242 (2025). Congress adopted the Act against the backdrop of decades of agency practice applying § 1226(a) to immigrants like Petitioner, who are present in the United States but have not been admitted or paroled. *Rodriguez*, 2025 WL 1193850, at *15; *Martinez*, 2025 WL 2084238, at *4; 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (“Despite being applicants for admission, aliens who are present without having been admitted or paroled . . . will be eligible for bond and bond redetermination.”).

Section 1226(a) applies by default to all persons “pending a decision on whether the

[noncitizen] is to be removed from the United States.” Removal hearings for noncitizens under 1226(a) are held under § 1229a, which “decid[e] the inadmissibility or deportability of a[] [noncitizen].”

By contrast, § 1225(b) applies to people arriving at U.S. ports of entry or who recently entered the United States. Accordingly, the mandatory detention provision of § 1225(b)(2) does not apply to Petitioner. Crucially, under 8 CFR 235.3(b), the expedited removal provisions shall apply to the following classes of aliens who are determined to be inadmissible under section 212(a)(6)(C) or (7) of the Act: (i) Arriving aliens; and (ii) aliens who arrive in, attempt to enter, or have entered the United States without having been admitted or paroled following inspection by an immigration officer at a designated port-of-entry, and who have not established to the satisfaction of the immigration officer that they have been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility. Pursuant to 8 CFR 235.3(b)(3), “in the expedited removal process, the Service may not charge an alien with any additional grounds of inadmissibility other than section 212(a)(6)(C) or 212(a)(7) of the Act.

INA § 236: Discretionary Detention for Aliens in the Interior

In stark contrast to § 235 of the Immigration and Nationality Act, INA § 236 provides the framework for apprehending and detaining aliens found within the United States. This is the statute of general applicability for interior enforcement actions. Its text presupposes an arrest that occurs away from the border context, stating that “[o]n a warrant issued by the Attorney General, an alien may be arrested and detained.” Pursuant to 8 CFR 236.1(a), “the issuance of a detainer under this section shall be governed by the provisions of § 287.7 of this chapter.” Under 8 CFR 236.1(b), in general, at the time of issuance of the notice to appear, or at any time thereafter and up to the

time removal proceedings are completed, the respondent may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in § 287.5(e)(2) of this chapter and may be served only by those immigration officers listed in § 287.5(e)(3) of this chapter. 8 CFR § 287.8 (b)(1), (b)(2), and (b)(3) refer to the process of interrogations, detentions, and arrests: (1) Interrogation is questioning designed to elicit specific information. An immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away. (2) If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning. (3) Information obtained from this questioning may provide the basis for a subsequent arrest, which must be effected only by a designated immigration officer, as listed in 8 CFR 287.5(c). Under 287.8(b)(2)(i), an arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States. In accordance with 287.8(b)(2)(ii), a warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained. Federal regulations thereby authorize immigration warrants (Forms I-200) to be generated at any time following the issuance of a Notice to Appear for removal proceedings. With respect to an alien arrested and administratively charged with being in the United States in violation of law, the arresting officer shall adhere to the procedures set forth in 8 CFR 287.3 if the arrest is made without a warrant. 8 CFR 287.8(b)(2)(i). Under 8 CFR 287.3(b), if the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering,

attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry in accordance with 8 CFR parts 235, 239, or 240, order the alien removed as provided for in section 235(b)(1) of the Act and § 235.3(b). Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. 8 CFR 287.3(c). Unless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued. 8 CFR 287.3(d). Unlike the mandatory language of § 235, the detention provisions of § 236(a) are explicitly discretionary. The statute provides that the Attorney General "may continue to detain the arrested alien" or "may release the alien on ... bond of at least \$1,500" (emphasis added). The use of the permissive term "may" is a clear grant of discretionary authority that vests immigration judges with jurisdiction to conduct custody redetermination hearings.

The holding of *Q Li* is inextricably tethered to the temporal and geographic immediacy of the apprehension at or near the border. The respondent in *Q Li* was arrested "less than 100 yards north of the southern border as she tried to illegally enter the United States" on the same day she crossed. To extrapolate this holding to an individual apprehended twenty-three years after their initial entry, hundreds of miles from the border, would render the "arriving alien" definition meaningless and transform § 235(b) into an indiscriminate tool for mandatory detention applicable to

virtually any noncitizen in removal proceedings who did not present themselves at a port of entry decades prior. This is an overreach that defies both the specific facts of *Q Li* and the logical interpretation of the INA. The footnote in *Q Li* clarifies that the authority cannot be converted from § 235(b) to § 236(a) via a post-hoc warrant, underscoring that the initial determination of § 235(b) detention must be factually sound. In Mr. Padron's case, the initial facts, including his continuous presence of over two years and the specific charge against him, simply do not support such a determination. In *Matter of Q Li*, 28 I&N Dec. 66, the case and its holding are factually distinguishable, as there it is tethered to a recent entrant apprehended at the border. It cannot be expanded to a different factual scenario of a person residing twenty-three years. To comport with the IJ and DHS, the logic of *Q Li* here would require this Court to find that an apprehension in Florida in 2025 is "shortly after" an entry in Texas in 2001. Such a conclusion would defy common sense. Indeed, the Attorney General has designated as Board precedent *Matter of Akhmedov*, 29 I. & N. Dec. 166, 166 (BIA June 30, 2025). There, the BIA determined that a noncitizen arrested in the interior of the United States and placed into removal proceedings under 8 U.S.C. § 1229a is detained under 8 U.S.C. § 1226(a) and eligible for release on bond. *Matter of Akhmedov*, 29 I. & N. Dec. at 168. Petitioner here has argued that since at least 1996, the INA has mandated the detention of arriving aliens and certain criminal non-citizens detained in the United States. The Board of Immigration Appeals has long held to this interpretation. For everyone else, 8 U.S.C. § 1226(a) provides DHS the discretion to detain noncitizens, subject to review during a custody hearing before an immigration judge. Respondents in their brief completely fail to acknowledge this recent immigration precedent.

Petitioner's only option now, a futile one, is to wait for the BIA to take up the underlying matter. It is futile because the BIA's appellate process does not offer a meaningful or timely op-

portunity to correct Respondent's errors. According to the agency's own data, during fiscal year 2024, the BIA's average processing time for a bond appeal was 204 days, approximately seven months. Meaning for an average case where bond was granted in July 2025 it would not be heard until February 2026. *See Vazquez v. Bostock*, 3:25-CV-05240-TMC (D. W.D. Wash. May 2, 2025). Petitioner here filed his bond appeal on July 3, 2025, meaning it would be heard possibly January 23, 2026 at the 204 day mark. Indeed, the 204 days is only for the average case. Cases can take longer or shorter, meaning that there is no definite timeline for resolution and release. Also, the Board often simply remands an IJ's bond order, as in this case, where the sole content of the IJ's reasoning is the following: "[Petitioner] is ineligible for bond pursuant to *Matter of Q Li* as he is an applicant for admission arrested and detained without a warrant and therefore his detention is pursuant to Section 235(b)." In similar cryptically worded reasoning as here—where the noncitizen has appealed the IJ's cursory order—after months the BIA has simply not issued a decision but instead remanded the bond decision back to the IJ for further reasoning, see unpublished *Matter of X-*, Appeal ID 5465822 (BIA April 25, 2024), Ex. 2, attached here.¹ For an appeal in the legal sense to have any meaningful amount of due process, it must make a difference. In the BIA's current workload, where more than half a year passes before hearing the appeal, it will not make a difference because Petitioner's detained removal proceedings will already have been decided, without his ability to gather evidence for his cancellation application outside of detention, care for his family members who are suffering, and testify in a non-detained court where his witnesses may appear to testify regardless of lawful status, where he can work with counsel to compile the requisite hardship evidence for the immigration judge as to his U.S. citizen children, Stephanie

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¹ The BIA there wrote: "We will remand the record to the Immigration Judge because her bond decision does not contain sufficient factfinding to enable meaningful appellate review. The Immigration Judge stated, without more, that the respondent "had not adequately distinguished his case from

Padron (born October 23, 2005), and Jason Padron Martinez (born June 18, 2013). Indeed, the months a person waits for appellate review deprives them of time with their children, spouses, family and community members, and liberty.

First, the Court should note that the parties here dispute, as a fundamental matter, which statutory section of the Immigration and Nationality Act governs Petitioner's detention. No order of removal has ever issued, so it is undisputed we are in the "pre-order" detention scheme. The government argues that he is subject to mandatory detention under 8 U.S.C. §1225(b). Gov't Brief 7. To be exact, they appear to concede that while the DHS (the prosecutorial agency in these civil proceedings) has *not* charged him as removable under §1225(b)—which applies to expedited removal proceedings—they nonetheless argue that he is correctly detained pursuant to "being in the position of" a person subject to expedited removal proceedings. Gov't Brief 5, 7-8 ("Contrary to Padron's contentions, appealing to the BIA is not futile in this case, because the issue on appeal is whether, as a factual matter, Padron falls within the scope of *Matter of Q. Li*,² such that he is subject to mandatory detention., or whether the record shows he should be detained under §1226(a) such that he is eligible for a discretionary bond.") Petitioner has argued he is subject to discretionary detention under 8 U.S.C. §1236(a), which permits an immigration judge (IJ) to review the Department of Homeland Security's (DHS) decision to detain a noncitizen. Pet. for Habeas Corpus 2-7, 14-17. The government does not dispute that it has placed him into "regular" removal proceedings under 8 U.S.C. § 1229(a). See Exh. 3 of Gov't Brief, the "Notice to Appear."

It is undisputed that Congress's bifurcated bond scheme permits only an administrative appeal to the BIA of the § 1226(a) kind of an IJ's bond, while any further review of ICE's deten-

Matter of M-S- supra. *Matter of X-*, Appeal ID 5465822 (BIA April 25, 2024), p. 2.

tion under §1225(b) is barred. 8 U.S.C. § 1252(e) (“Judicial review of order under section 235(b)(1)”); 8 C.F.R. §§ 1003.19(f), 1003.38; Gov’t Brief 7; Pet. for Habeas Corpus 9-10, 13.

The Government moves to dismiss on a jurisdictional challenge under 8 U.S.C. § 1252(g). Gov’t Brief 8-9.

8 U.S.C. § 1252(g) provides:

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).

According to the Supreme Court, § 1252(g)’s jurisdictional bar “applies only to three discrete actions” identified in the section: commencement of removal proceedings, adjudication of removal cases, and execution of removal orders. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). *Reno* further makes clear that it is “implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings.” *Id.* As set forth above, Petitioner challenges none of these events. The Petition mounts a challenge solely to his continued custody. None of the cases the Government relies on pertain to cases in which a petitioner, here, pursued judicial review of his allegedly unconstitutional custody.³ In accordance with Supreme Court precedent and the plain language of the text, § 1252(g) does not bar this Court’s authority consider this action.

² *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025).

³ The Respondents inappositely cite a recent Western District of Texas case as support, *El Gamal v. Noem*, 2025 WL 1857593, at *4 (W.D.Tex., 2025), but that case involved a challenge to the IJ’s bond denial under 8 U.S.C. §1226(a), not as here under §1225(b). The court there wrote: “As the Court previously suggested in its June 23, 2025, order for advisories, it lacks authority to review an exercise of the Attorney General’s discretion under § 1226(a) to detain pending a decision on wheth-

Respondents in their Answering Brief also cite to 8 U.S.C. § 1252(b)(9) to deny jurisdiction. 8 U.S.C. § 1252(b)(9) provides:

Judicial 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 under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9). Here, again, Respondents advocate for misapplication of the statute. Section 1252(b)(9) requires review of removal orders to be undertaken by the Court of Appeals. See also *id.* § 1252(a)(5) (providing that review by the Court of Appeals is the “exclusive means for judicial review of an order of removal . . .”). The Government erroneously expands the wingspan of § 1252(a)(5), arguing ICE’s decision to arrest Mr. Padron is intertwined with its decision to commence removal proceedings against him. But it misapprehends the statute. Here, custody determinations and removal orders are distinct processes, each with separate mechanisms for judicial review. “Immigration proceedings” is not an apt substitute for “removal orders.” There is no removal order in place (as the Respondents concede in their brief p. 2, noting a final hearing is scheduled for October 24, 2025 at the Laredo detention facility). Further, the plain language of the section has nothing to do with the Petition or the requested relief. Section 1252(b)(9) does not bar this Court’s authority consider this Petition

The Respondents also argue, broadly, that its decisions to detain “are not subject to review.” Gov’t Brief 8-9. It alleges that “[N]o court, even in habeas review, may set aside any decision regarding the detention or release of an alien or the grant, revocation, or denial of a bond or parole, 8 U.S.C. §1252(a).” Gov’t Br. 8. But as above, the Respondents misapprehend the statute.

er an alien is to be removed from the United States.”

8 U.S.C. § 1226(e) provides:

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

8 U.S.C. § 1226(e). But this Court has jurisdiction as provided for by *Demore v. Kim*, 538 U.S. 510 (2003), where the Supreme Court “affirmed that § 1226(e) does not apply to suits challenging the framework for decisions rather than a discretionary decision itself made under 8 U.S.C. § 1226.” Petitioner here does not challenge any discretionary decision made under § 1226. He challenges the executive agencies’ misapplication of the statutory scheme, where their interpretation deviates from decades of prior practice, established case law, and the plain text of the INA. Additionally, *Demore* affirmed that “where Congress intends to preclude judicial review of constitution claims” or “to bar habeas review,” the “Court has required a particularly clear statement that such is Congress’ intent.” *Id.* at 517. Neither the INA nor the Code of Federal Regulations contains such a statement. Thus, § 1226(e) does not bar this Court’s authority to consider this Petition.

Exhaustion of Remedies

The Respondents argue to dismiss the petition because he has “failed to exhaust his administrative remedies.” They cite *Hinojosa v. Horn*, 896 F.3d 305, 314 (5th cir. 2018) as support that prior to raising his detention in this Court, he must exhaust remedies. It should be noted that Petitioner has *pursued* his administrative remedy. He showed in his petition that he has filed his appeal to the BIA of the June 25, 2025 bond decision, the appeal is still pending. As one federal district court put it recently, “it is common (judicial) knowledge these days that the BIA is presently drinking from a veritable firehose of hundreds of thousands of cases on appeal.” *Leal-Hernandez v. Noem*, District of Maryland, 1:25-cv-02428-JRR, Opinion and Order, Aug. 24, 2025. As above,

he has shown that 204 days is the average for a BIA appeal. The Respondents have not argued in any manner here why this case would be different, nor have they brought any compelling government interest to the fore. If the BIA took its average length to hear his appeal, it would not be until January 16, 2026, which would be well past the final hearing scheduled for October 24, 2025. It would be essentially futile. He would have a removal order, or he have been granted relief, but either way his right to seek bond and review of the agencies' mischief will *not* have been vindicated.

Here, where Petitioner has raised serious constitutional claims, administrative exhaustion should be excused absent a clear expression from Congress – and the INA does not require or mandate exhaustion of administrative remedies. *Miranda v. Garland*, 34 F.4th 338, 351 (4th Cir. 2022) (explaining that “where Congress had not clearly required exhaustion, sound judicial discretion governs”) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)); see *Guitard v. U.S. Sec’y of the Navy*, 967 F.2d 737, 741 (2d Cir. 1992) (providing that “[e]xhaustion of administrative remedies may not be required when . . . a plaintiff has raised a ‘substantial constitutional question’”); *Aguilar v. Lewis*, 50 F. Supp. 2d 539, 541 (E.D. Va. 1999) (clarifying that “there is no federal statute that imposes an exhaustion requirement on aliens taken into custody pending their removal”); *Jones v. Zenk*, 495 F. Supp. 2d 1289, 1299–300 (N.D. Ga. 2007) (holding that the § 2241 exhaustion requirement may be waived). As the Supreme Court in *McCarthy* explained: [T]his Court has declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion. “[A]dministrative remedies need not be pursued if the litigant’s interests in immediate judicial review outweigh the

government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.' Application of this balancing principle is 'intensely practical,' because attention is directed to both the nature of the claim presented and the characteristics of the particular administrative procedure. *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). Particularly relevant here, *McCarthy* further explains that where administrative processes may result in undue delay, a court may properly consider that as a factor militating against requiring exhaustion. *Id.* at 146–47. Further, where a court has “some doubt” that the agency can resolve the dispute (including for example the “constitutionality of a statute”), whether because the agency lacks “institutional competence” or “authority,” this too may suggest inadequacy of an administrative remedy. *Id.* at 147–48. Finally, *McCarthy* explains, “an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it.” *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). As applied to the facts and posture of this action (both here and before the immigration court and the BIA), waiver of the requirement to exhaust administrative remedies should be allowed, where this Court as shown is empowered to address the constitutional and statutory issues raised.

Moreover, the habeas petition at issue in *Hinojosa v Horn* raised a different statute, where the petitioners there were denied citizenship by the government and they had access to procedures to raise their claims under 8 U.S.C. § 1503. Unlike the petitioners there, who did not follow the available remedy, here Petitioner *has* complied with filing an appeal; it simply would be futile given the posture of the case to await its outcome. The Respondents in their Answering Brief do not raise any particular harm to the government if this Court waived exhaustion. Inexplicably, they would simply have Petitioner wait, disregarding futility, without reference to the lack of effect of any appeal on the Petitioner's articulated situation, and without regard to the unexplained sudden

departure from thirty years of understanding of the bond statutory scheme. Nor do they address his argument in his petition that the matter is one of pure statutory construction, nor do they defend their own enforcement of their interpretation of the bond scheme as a legal matter. Gov't Brief 1-13. The issue of which detention framework applies is an issue appropriate for this Court to review as review of federal statutes are not entrusted to the expertise of the agency, *INS v. St. Cyr*, 533 U.S. 289, 314-15 (2001). There is no role for agency expertise to play in interpreting a statute because courts—not agencies—are experts in statutory interpretation. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024).

Conclusion

To withstand a Rule 12(b)(6) motion, a “complaint must allege ‘more than labels and conclusions,’ ” and “a formulaic recitation of the elements of a cause of action will not do.” *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (alteration in original) (quoting *Twombly*, 550 U.S. at 557). “[A] complaint ‘does not need detailed factual allegations,’ but must provide the plaintiff’s grounds for entitlement to relief—including factual allegations that when assumed to be true ‘raise a right to relief above the speculative level.’ ” *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). “Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.” *Id.* (alteration omitted) (quoting *Twombly*, 550 U.S. at 558).

Here, Petitioner has alleged viable causes of action, and he has sought injunctive relief from this Court, under the laws and the Constitution. The Respondents’ motion to dismiss should

be denied. The writ of habeas corpus should be granted. His detention is illegal. The writ is reduced to a sham if the trial courts do not act within a reasonable time. *Rhueark v. Wade*, 540 F.2d 1282, 1283 (5th Cir. 1976); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978); *Fay v. Noia*, 372 U.S. 391, 400 (1963) (“The writ must be construed to afford “a swift and imperative remedy in all cases of illegal restraint or confinement.”)

Respectfully submitted on this 27th day of August, 2025.

/s/ Stephen O'Connor
Counsel for Petitioner
Attorney for Respondent
O'Connor & Associates
7703 N. Lamar Blvd, Ste 300
Austin, Tx 78752
Tel: (512) 617-9600
Steve@oconnorimmigration.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE OF PETITIONER TO RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS in the case of Jose Padron Covarrubias v Miguel Vergara, et al., Civil Action 5:25-CV-112, was sent to Hector C. Ramirez, Assistant United States Attorney, Southern District of Texas, 11204 McPherson Road, Suite 100A, Laredo, TX 78045 through the District Clerk's electronic case filing system on this day the 27th of August, 2025.

Dated this 27th day of August, 2025

s/ Stephen O'Connor
Stephen O'Connor