**UNITED STATES DISTRICT COURT**
**DISTRICT OF RHODE ISLAND**

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| I.G.S.,<br><br>Petitioner,<br><br>v.<br><br>MICHAEL NESSINGER, Warden, Donald W. Wyatt Detention Facility, PATRICIA HYDE, Director, Boston Field Office, U.S. Immigration and Customs Enforcement, and KRISTI NOEM, U.S. Secretary of Homeland Security, *in their official capacities.*<br><br>Respondents. | Civil Action No. 1:25-CV-339 |

**RESPONDENTS' OPPOSITION TO PETITIONER'S PETITION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2241**

The United States of America, on behalf of Respondents Patricia Hyde and Kristi Noem,[1] in their official capacities, by and through their attorney, Acting United States Attorney Sara Miron Bloom, respectfully submits this opposition to Petitioner I.G.S.'s Petition for Habeas Corpus.

Petitioner, a native and citizen of El Salvador, was detained by federal immigration agents on April 30, 2025. In his habeas petition, he claims that on July 10, 2025, an immigration judge erred in finding that Petitioner presents a risk of flight because the judge improperly relied on issues that had previously been decided in a 2023 detention hearing. In fact, Petitioner's detention

[1] The United States Attorney's Office does not represent the Warden of the Wyatt Detention Facility, Michael Nessinger. Also, the caption on the petition only lists Nessinger, Hyde and Noem as respondents but paragraph 7 refers to respondent Todd Lyons, Acting Director of Immigration and Customs Enforcement. If Petitioner means to include Lyons as a Respondent, as a federal official, the United States Attorney's Office also files this response on behalf of Lyons in his official capacity.

is lawful under 8 U.S.C. § 1225(b) because he is an applicant for admission who is not "clearly and beyond a doubt entitled to be admitted" to the United States. Moreover, Petitioner has been provided with all process that is due to him as an applicant for admission, and his period of detention is presumptively reasonable under the Constitution. Because Petitioner's detention is fully supported by statute, regulation, and the Constitution, the Petition should be denied.

## I. BACKGROUND

### A. Petitioner's Immigration History

Petitioner is an El Salvadoran national who entered the United States without inspection at an unknown place and on an unknown date and time. Pet. Ex. 1, I-213 at 2. See also Resp. Ex. 7, ¶ 6, Declaration of Keith Chan, Assistant Field Office Director, United States Department of Homeland Security (DHS), United States Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) (Chan Decl.).

On February 16, 2023, ICE/ERO officers detained Petitioner. Ex. 7, Chan Decl. ¶ 7. [redacted] and being a member of a Transnational Criminal Organization, specifically MS-13. Pet. Ex. 1 at 6, I-213; Ex. 7, Chan Decl. ¶ 8. That same day ICE served Petitioner with a Form I-862, Notice to Appear, charging him as being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(ii) (presence in the United States without being admitted or paroled). Ex. 7, Chan Decl. ¶ 9. ICE filed the Notice to Appear with the Boston Immigration Court on February 22, 2023, initiating removal proceedings. *Id.*

On March 7, 2023, Petitioner filed a motion for custody redetermination hearing with the Boston Immigration Court. *Id.* ¶ 10. An immigration judge granted the request and on March

13, 2023, Petitioner appeared before an immigration judge for a bond hearing and was released pursuant to a $5,000 bond. Pet. Ex. 2 at 8, March 13, 2023, Order; Resp. Ex. 7, Chan Decl. ¶ 11. In issuing his decision, the 2023 immigration judge stated that he did not find that the Government had met its burden of demonstrating that petitioner presented a danger to the community or a risk of flight that could not be ameliorated with conditions upon release. Exs. 1 and 2.[2] The Order releasing Petitioner on bond states "[i]t is Further Ordered that respondent shall have no violation of Criminal or Immigration laws to include working without authorization." Pet. Ex. 2 at 7, March 13, 2023, Order; Ex. 7, Chan Decl. ¶ 11. On March 13, 2023, ICE released Petitioner from custody. Ex. 7, Chan Decl. ¶ 12.

On March 3, 2025, Petitioner filed a motion with the Chelmsford Immigration Court to administratively close the removal proceedings based on a pending Form I-130, Petition for Alien Relative. Ex. 7, Chan Decl. ¶ 13. On March 14, 2025, an immigration judge administratively closed the removal proceedings. Ex. 3, March 14, 2025, Order of the IJ; Ex. 7, Chan Decl. ¶ 14.

On April 30, 2025, [redacted] Ex. 7, ¶ 16. [redacted] *Id.* ¶ 16. Also on April 30, 2025, ICE officers

[2] The audio recording of the March 13, 2023, bond hearing is difficult to understand, but the latter portion of the recording in which the immigration judge issues his decision can be heard. Counsel for Respondents was able to hear several portions of the recording by slowing down the audio. Respondents have also provided the Court with an unofficial transcription to aid the Court in listening to the audio. The audio recording itself is submitted under seal as Respondents' Exhibit 1 and the unofficial transcript is submitted as Exhibit 2.

interviewed Petitioner and asked him if he was an MS-13 gang member. Petitioner responded that he would be a MS-13 gang member upon return to El Salvador. Ex. 7, Chan Decl. ¶ 18.

On May 5, 2025, the Chelmsford Immigration Court re-calendared Petitioner's removal proceedings, granting a motion filed by ICE to re-calendar removal proceedings after Petitioner was detained. *Id.*, Chan Decl. ¶ 19.

On June 16, 2025, Petitioner filed a motion for a custody redetermination hearing. Resp. Ex. 4 at 2, Petitioner's Request for New Bond Hearing Date; Ex: 7, Chan Decl. ¶ 20. On June 26, 2025, an immigration judge issued an order acknowledging that Petitioner's bond redetermination was withdrawn. Resp. Ex. 5, June 26, 2025, Bond Order; Ex. 7, Chan Decl. ¶ 21.

On July 1, 2025, Petitioner filed a second request for a custody determination. Ex. 7, Chan Decl. ¶ 22. In advance of the bond hearing, the DHS filed a notice of Petitioner's ineligibility for a bond hearing, citing Jennings v. Rodriguez, 583 U.S. 281, 287 (2018). Ex. 6. DHS also filed several exhibits in support of its position that Petitioner should be detained.[3] Pet. Ex. 2.

On July 10, 2025, a different immigration judge than the one who made the 2023 bond decision denied release on bond. Ex. 7, Chan Decl. ¶ 23. The immigration judge did not find that Petitioner was held under 8 U.S.C. § 1225. Instead, the immigration judge found that Petitioner was held under 8 U.S.C. § 1226(a) but found that ICE had demonstrated that he poses a risk of flight and ordered him detained. Ex. 7, Chan Decl. ¶ 23. Both parties reserved the right to appeal this decision to the Board of Immigration Appeals (BIA). The deadline for filing an

[3] The DHS's exhibits are contained in Petitioner's Exhibit 2.

appeal is August 11, 2025. As of August 7, 2025, no appeals have been filed. Ex. 7, Chan Decl. ¶ 24.

**B. Legal Background for Aliens Seeking Admission to the United States.**

In exercising its plenary power over immigration, Congress delegated to the Secretary of Homeland Security the responsibility for "[s]ecuring the borders," enforcing the immigration laws, and "control[ling] and guard[ing] the boundaries and borders of the United States against the illegal entry of aliens." 6 U.S.C. §§ 202(2) & (3); 8 U.S.C. § 1103(a)(5).

Pursuant to 8 U.S.C. § 1225(a)(1), an alien present in the United States who has not been admitted is known as an applicant for admission. Pursuant to Section 1225(a)(3), all applicants for admission are subject to inspection by immigration officers to determine if they are admissible to the United States. The term "admission" is defined by the Immigration and Nationality Act (INA) to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

Section 1225(b)(1) provides for the inspection of aliens arriving in the United States for admission. And, relevant here, Section 1225(b)(2)(A) provides for the inspection of all "other" applicants for admission and states that "in 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 240."[4] 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

## II. ARGUMENT

### A. Petitioner Has Failed to Exhaust his Administrative Remedies

[4] Section 240 of the INA, codified at 8 U.S.C. § 1229a, refers to the full removal proceedings that the Petitioner is currently subject to before the Immigration Court.

First and foremost, the petition should be denied because Petitioner failed to exhaust his administrative remedies before filing it. Petitioner filed his habeas petition only 16 days after requesting a bond hearing before the immigration judge and just one week after being denied bond. The time for filing an appeal to the BIA has not lapsed and Petitioner should be required to exhaust all available remedies at the administrative level before seeking relief before this Court.

Generally, a plaintiff's failure to exhaust his administrative remedies "precludes [him] from obtaining federal review of claims that would have properly been raised before the agency in the first instance." *Brito v. Garland*, 22 F.4th 240, 255 (1st Cir. 2021). Exhaustion must be "proper," which requires "compliance with an agency's deadlines and other critical procedural rules," as well using "all steps that the agency holds out." *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotations omitted); *see also Rodriguez-Rosa v. Spaulding*, No. 19-CV-11984, 2020 WL 2543239, at *7-11 (D. Mass. May 19, 2020). As the First Circuit has noted, "[e]xhaustion allows 'an agency the first opportunity to apply [its] expertise' and 'obviat[es] the need for [judicial] review in cases in which the agency provides appropriate redress." *Brito*, 22 F.4th at 256 (quoting *Anversa v. Partners Healthcare Sys., Inc.*, 835 F.3d 167, 174-76 (1st Cir. 2016)). It "gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures." *Woodford*, 548 U.S. at 89 (cleaned up). Moreover, administrative exhaustion often results in the creation of a developed administrative record that is useful to the court in the event of subsequent judicial review. *See id.* at 94-95.

Petitioner contends that there is no statutory exhaustion requirement under 28 U.S.C. § 2241 because habeas protections are "fundamental to individual liberty." Pet. ¶ 9. Petitioner's

end-run around the administrative exhaustion requirement – one week after being denied bond -- is unavailing. *See Portela-Gonzalez v. Sec'y of Navy*, 109 F.3d 74, 80 (1st Cir. 1997) ("The short of it is that [Plaintiff] lacked a legally sufficient reason for leaping prematurely to a judicial venue."); *see also Randall v. Wall*, C.A. No. 10-52ML, 2010 WL 1141410, at *2 (D.R.I. Feb. 18, 2010) (Almond, M.J.) (recommending dismissal of habeas petition as "unexhausted" and thus failing to survive Rule 4 scrutiny where appeal to the Rhode Island Supreme Court was still pending). As this Court recently held, "[t]here is no question that before filing a habeas petition a petitioner must exhaust all administrative remedies." *See* Order at 2, *Perevoznikov v. Wyatt et al.*, C.A. No. 25-cv-085-JJM-LDA (D.R.I. May 2, 2025) (McConnell, C.J. )(denying a petitioner's habeas petition requesting immediate release, or in the alternative, a new bond hearing before an IJ because the issue was still pending before the BIA).

Petitioner's assertion that he is exempt from any administrative exhaustion requirement also fails to consider that the First Circuit has recognized "two species of exhaustion: statutory and common-law. The former deprives a federal court of jurisdiction, while the latter "cedes discretion to a [federal] court to decline the exercise of jurisdiction." *Brito*, 22 F.4th at 255 (cleaned up). "Although exhaustion of administrative remedies is absolutely required if explicitly mandated by Congress, courts have more latitude in dealing with exhaustion questions when Congress has remained silent." *Portela-Gonzalez*, 109 F.3d at 77 (internal citations omitted). Both species apply here, calling for exhaustion of administrative relief before this Court can review Petitioner's claims.

1. Statutory exhaustion applies to habeas corpus petitions.

The First Circuit has held that exhaustion generally applies to habeas corpus petitions. *See Sayyah v. Farquharson*, 382 F.3d 20, 26 (1st Cir. 2004) (finding statutory exhaustion barred review where petitioner failed to appeal removal order to BIA). This Court has repeatedly

reiterated that holding, finding that "the First Circuit has clearly held that [8 U.S.C.] § 1252(d)'s exhaustion requirement is jurisdictional and 'applies broadly to all forms of court review of final orders of removal, including habeas corpus.'" *Martinez v. Gonzales*, No. 05–112S, 2005 WL 2219078, at *2 (D.R.I. Sept. 13, 2005) (Smith, J.) (citing *Sayyah*, 382 F.3d at 26); *see also Ferrell v. Wall*, 862 F. Supp. 2d 88, 99 (D.R.I. 2012) (McConnell, C.J.) (requirement of exhaustion under 28 U.S.C. § 2254(b)(1)(A)); *see also Boyce v. Roden*, C.A. No. 12–10499–DPW, 2012 WL 1073386, at *2 (D. Mass. Mar. 27, 2012) (summarily dismissing a habeas petition and holding that "[e]very claim in a petition must be exhausted").

In *Martinez*, this Court dismissed a habeas corpus petition where the petitioner had not yet received a final decision from the immigration judge or BIA, and there were no circumstances indicating that the petitioner would be "deprived of the opportunity to appeal any adverse decision by the IJ to the BIA, and then bring his [] claim to the United States Courts." 2005 WL 2219078, at *2. This Court further held that "§ 1252(d)'s exhaustion requirement applies even when there is no final order of removal and the underlying challenge is to detention," and that the petitioner was "required to exhaust his administrative remedies pursuant to 8 U.S.C. § 1252(d)(1) prior to seeking federal court relief." *Id.* at *3.

Here, at the time of filing, Petitioner has not even begun the administrative process by filing an appeal with the BIA. Unless and until Petitioner has received a final administrative decision from the BIA, his habeas corpus action before this Court is premature and barred.

2. <u>The Court should exercise its discretion to mandate exhaustion of administrative remedies.</u>

Application of the common law doctrine of exhaustion mandates the same result. Review of unexhausted claims is appropriate in "circumstances in which the interests of the individual *weigh heavily* against requiring administrative exhaustion." *Anversa*, 835 F.3d at 176 (emphasis

added). Consideration of individual concerns may require courts to not strictly enforce exhaustion if: "(1) the requirement subjects an individual to an unreasonable or indefinite time frame for administrative action; (2) the administrative agency lacks the competence to resolve the particular issues presented; or (3) the requirement would be futile because the administrative body is shown to be biased or has predetermined the issue before it." *Martinez*, 2005 WL 2219078, at *3 (citing *McCarthy v. Madigan*, 503 U.S. 140, 146-48 (1992)). Countervailing institutional interests include protecting administrative agency authority and promoting judicial efficiency. *Woodford*, 548 U.S. at 89.

This Court, in determining whether to exercise its discretion to address Petitioner's challenge to the immigration judge's detention order, must decide whether the "twin purposes of protecting administrative agency authority and promoting judicial efficiency" are outweighed by the Petitioner's interest in immediate adjudication of his claim by this Court. *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 455, 464 (D. Mass. 2010) (citing *Portela-Gonzalez*, 109 F.3d at 77). Petitioner does not allege any circumstances that heavily outweigh the exhaustion requirement.

*a. Petitioner's detention has not been "unreasonably prolonged" to give rise to irreparable harm or a due process violation.*

In the First Circuit, courts "adhere to the notion that the Due Process Clause imposes some form of reasonableness limitation upon the duration of detention under section 1226(c)." *Reid v. Donelan*, 17 F.4th 1, 7 (1st Cir. 2021) (cleaned up); *see also Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); *Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-63 (9th Cir. 2008) (extending the reasonableness limitation to detentions under § 1226(a)). But, under those limits, six months of detention are presumptively reasonable, and even detention beyond six months does not trigger an automatic constitutional right to a reasonableness hearing or

bond hearing for a person detained pursuant to § 1226(c). *Reid*, 17 F.4th at 9; *Hernandez-Lara v. Lyons*, 10 F.4th 19, 30 n.4 (1st Cir. 2021) (finding "the potential length of detention under section 1226(a) relevant to the weight of the liberty interest at stake").[5] Petitioner has not yet been detained for six months, and thus his detention remains presumptively reasonable.

*b. The circumstances and procedural background of this case favor mandating exhaustion of administrative remedies.*

Petitioner claims that the 2025 immigration judge improperly relied on finding that he was a member of MS-13 in determining that he presented a risk of flight, thus warranting his detention. Petitioner claims that the 2023 immigration judge had already determined that he is not a member of MS-13 and that to find so now was in error. Because this concerns questions of fact, "the agency has a strong interest in making its own factual record, a factor that in some cases may outweigh the litigant's need for judicial resolution." *Martinez*, 2005 WL 2219078, at *4 (cleaned up). Furthermore, the DHS maintains that Petitioner is subject to mandatory detention, another issue that the BIA has the power to address. Here, Petitioner has not alleged that the BIA is not empowered to grant meaningful redress—on the contrary, the BIA, which is the body with the expertise and authority in this area, has the power to reverse (or affirm) the

[5] Courts within the First Circuit have repeatedly rejected claims of unreasonably prolonged detention brought by noncitizens who have been detained for much longer than Petitioner. *See, e.g.*, *Melo v. Ashcroft*, 364 F. Supp. 2d 183, 197-98 (D.R.I. 2005) (Smith, J.)(denying habeas petition and holding that detention exceeding **6 months** did not violate substantive due process, absent evidence demonstrating there was no significant likelihood of removal in reasonably foreseeable future); *Podoprigora v. Charbourne*, No. C.A. 03–420 T, 2004 WL 725057, at *3-4 (D.R.I. Mar. 2, 2004) (Hagopian, M.J.) (recommending that post-removal order detention of **14 months** was not violative of due process); *Alphonse v. Moniz*, No. CV 21-11844-FDS, 2022 WL 279638 at *9 (D. Mass. Jan. 31, 2022) (habeas relief denied despite detention lasting nearly **14 months**); *Dos Santos v. Moniz*, No. CV 21-10611-PBS, 2021 WL 3361882, at *4 (D. Mass. May 18, 2021) ("mandatory detention [exceeding **16 months**] . . . has not been unreasonably prolonged"); *Martinez Lopez v. Moniz*, No. CV 21-11540-FDS, 2021 WL 6066440, at *5 (D. Mass. Dec. 22, 2021) (detention **over 13 months** did not independently warrant a bond hearing); *Silva v. Moniz*, No. 20-cv-12255-DJC, Dkt. 26 (D. Mass. Oct. 28, 2021) (denying *Reid* claim brought by petitioner detained for **27 months**); *Lafortune v. Mayorkas*, No. 1:22-cv-11624-DJC, Dkt. 16 (D. Mass. Apr. 20, 2023) (habeas relief denied despite detention for over 19 months at time of decision).

detention decision of the Immigration Court. *See Portela-Gonzalez*, 109 F.3d at 80 ("[L]ong-recognized concerns regarding agency autonomy and judicial efficiency weigh heavily in favor of requiring complete exhaustion of administrative remedies."). Finally, Petitioner does not suggest that the BIA is biased or has predetermined this issue.

While the administrative appeal process may take some time to conclude, individual concerns here do not significantly outweigh the policy of allowing the BIA the initial opportunity to review Petitioner's claims. *See Ex. 8, Oliveira dos Reis v. Vitello et al.*, No. 1:25-cv-10497, Dkt. 15 at 5 (D. Mass. Apr. 8, 2025) ("Given the extraordinary case load of the BIA, the result may not be as expeditious as one might wish, but neither is it so 'prolonged' as to rise to a violation of due process.") (citing *Reid*, 17 F.4th at 9). Requiring exhaustion in this case will also promote judicial efficiency and avoid piecemeal litigation by giving the BIA an opportunity to develop and review the factual record and, if necessary, correct any mistakes. *See D.C.Y.F. v. Vilbon*, 2021 WL 4169817, at *1 (D.R.I. Aug. 8, 2021) (McElroy, J.) (mere presentment to the agency of "the same factual allegations" as those made to the federal court not sufficient to satisfy exhaustion requirement; rather, the agency "must be given the first opportunity to consider 'the substance of (the) federal habeas corpus claim.'") (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)). If Petitioner successfully persuades the Board to reverse the immigration judge's denial of bond, the petition will be moot. If the Board denies the relief Petitioner is seeking, then Petitioner's writ will become ripe for judicial review.

There is no reason why dismissing this case and letting Petitioner first fully exhaust administrative remedies would cause undue prejudice, irreparable harm, or unusual hardship of any sort. Accordingly, this Court should deny the Petition for failure to fully exhaust administrative remedies.

**B. Petitioner Is Properly Detained Under 8 U.S.C. § 1225(b)(2)(A)**

Petitioner is properly detained under 8 U.S.C. § 1225(b)(2)(A) which mandates that he remain in detention during the pendency of his removal proceedings. Pursuant to 8 U.S.C. § 1225(b)(2)(A), "in 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 of this title." 8 U.S.C. § 1225(b)(2)(A).

In the present case, Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement. To start, Petitioner is an "applicant for admission" to the United States. As described above, an "applicant for admission" is an alien present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Next, because Petitioner has not demonstrated to an examining immigration officer that he is "clearly and beyond a doubt entitled to be admitted," his detention is mandatory. 8 U.S.C. § 1225(b)(2)(A); *see also Alvarenga Pena v. Hyde*, Civil Action No. 25-cv-11983-NMG, 2025 WL 2108913, at *1 (D. Mass. Jul. 28, 2025) ("Because petitioner remains an applicant for admission, his detention is authorized so long as he is not clearly and beyond doubt entitled to be admitted to the United States.").

Indeed, Petitioner *cannot* demonstrate that he is "clearly and beyond a doubt entitled to be admitted" because, as he is present in the United States without being admitted or paroled, he is inadmissible per 8 U.S.C. § 1182(a)(6) and 8 U.S.C. § 1182(a)(7)(A)(i)(I). Thus, the Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he "shall be" detained.

This reasoning is supported by the Supreme Court. As explained in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), applicants for admission fall into one of two categories: those covered by

Section 1225(b)(1) and those covered by Section 1225(b)(2). 583 U.S. at 287. Section 1225(b)(1) applies to aliens arriving in the United States who are initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. Section 1225(b)(1)(A)(i). Section 1225(b)(2), on the other hand, is "broader" and "serves as a catchall provision that applies to *all* applicants for admission not covered by 1225(b)(1) (with specific exceptions not relevant here)." *Jennings*, 583 U.S. at 837 (emphasis added). Put another way, while Section 1225(b)(1) applies to aliens "arriving" in the United States, Section 1225(b)(2) applies to all "other" aliens who are applicants for admission—like Petitioner. Simply put, an alien does not lose his "applicant for admission" status simply because he was inspected at a time other than his immediate arrival in the United States. Moreover, the Supreme Court has confirmed that this statutory mandate for detention extends for the entirety of removal proceedings. *See Jennings*, 583 U.S. at 302 ("[Section] 1225(b)(2) ... mandates[s] detention of aliens *throughout the completion of applicable proceedings* and not just until the moment those proceedings begin." (emphasis added)).[6]

This reasoning was also recently adopted by another court. *See Alvarenga Pena*, 2025 WL 2108913, at *1. In that case, Alvarenga Pena illegally entered the United States in 2005 and was subsequently placed in immigration proceedings that were terminated. *Id.* Approximately 20 years later, ICE encountered Alvarenga Pena following a traffic stop in 2025 and detained him under Section 1225(b)(2). *Id.* The Court stated that "[b]ecause petitioner remains an applicant for

[6] The only means to obtain release for an applicant for admission is through parole. CBP and ICE have discretion to parole applicants for admission into the United States. *See* 8 U.S.C. § 1182(d)(5). For those detained under § 1225(b), regulations provide that ICE or CBP may grant parole if the alien is "neither a security risk nor a risk of absconding," and (1) has a serious medical condition; (2) is pregnant; (3) falls within certain categories of juveniles; (4) will be a witness; or (5) if continued detention is otherwise "not in the public interest." 8 C.F.R. § 212.5(b); *see also* 8 C.F.R. § 235.3(c).

admission, his detention is authorized [under Section 1225(b)(2)(A)] so long as he is not clearly and beyond doubt entitled to be admitted to the United States." *Id.* at *2. Alvarenga Pena suggested that he was lawfully in the United States because he was the recipient of an approved I-130 petition, but the Court rejected that argument as "the approval of a visa petition does not, by itself, entitle an alien to permanent resident status." *Id.* (citing *Firstland Int'l, Inc. v. INS*, 377 F.3d 127, 132 n.6 (2d Cir. 2004)). The Court went on to point out that not only was petitioner's detention authorized by Section 1225(b)(2)(A)—it was mandated by Section 1225(b)(2)(A). *Id.*

Respondents recognize that another court recently reached a different conclusion. *See Gomes v. Hyde*, No. 25-cv-11571-JEK, 2025 WL 1869299, at *1 (D. Mass. Jul. 7, 2025). Respectfully, however, this Court should decline to following the reasoning in *Gomes*. The Court in *Gomes* concluded that Section 1225(b) authorizes the government to detain aliens *seeking admission* to the country, *i.e.*, in the court's view, upon immediate arrival in the country, whereas Section 1226(a) authorizes the government to detain certain aliens *already in* the country. *Id.* The Court focused on the fact that Gomes had "resided in the country for over a year" at the time he was arrested on a warrant issued pursuant to Section 1226. *Id.* at 5. But, by its plain language, Section 1225(b) does not apply just to aliens arriving in the United States. Again, while Section 1225(b)(1) concerns aliens "arriving" in the United States, Section 1225(b)(2) is a "catch-all" that applies to all "other" aliens who are applicants for admission. Simply put, the Court in *Gomes* read a temporal limitation into Section 1225(b) that is not supported by the text of the statute.

Moreover, to the extent Petitioner claims his detention falls under 8 U.S.C. § 1226(a) and is discretionary simply because he has been placed in full removal proceedings, his argument is belied by the language of Section 1225(b) itself, which states that the alien "shall be detained for a proceeding under ***section 1229a*** of this title." (emphasis added). Moreover, in *Matter of Q. Li*,

29 I&N Dec. 66, 2025 WL 1442892 (BIA 2025), the Board of Immigration Appeals held that mandatory detention under 8 U.S.C. § 1225(b) applies to ***all*** "applicant[s] for admission," whether they are placed in expedited removal proceedings or in full removal proceedings under 8 U.S.C. § 1229a. *Id.* at 67-68; *see also Matter of M-S-*, 27 I&N Dec. 509, 2019 WL 1724249 (Atty.Gen. 2019) (holding that aliens who are present in the United States without admission or parole and placed into expedited removal proceedings are detained under Section 1225 even if later placed into full removal proceedings).

Accordingly, because Petitioner is an applicant for admission who had not demonstrated "clearly" and "beyond doubt" that he is "entitled to be admitted," his detention is authorized—and mandated—by 18 U.S.C. § 1225(b)(2)(A).

**C. Petitioner's Due Process Claim Is Meritless.**

Petitioner claims that his current detention is unlawful. It is not - the cause of his detention is that the Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A), as set forth above.

Petitioner maintains that his current detention is in violation of his constitutional rights to due process of law because "he may not be found to be a flight risk based on the same evidence for which he was previously found not to be a flight risk in a prior bond proceeding." Pet. at 11, ¶ 29. This argument fails. Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A), as set forth above. In addition, Petitioner is mistaken in his contention that in ordering him detained on July 13, 2025, the immigration judge improperly relied on issues previously decided by the immigration judge who released him in 2023.

Petitioner contends that the issue of whether he is a gang member was "fully litigated" during the 2023 bond hearing and that the 2025 immigration judge improperly relied on his gang

membership in finding that he currently presents a risk of flight. This is not the case. The recording from the 2023 bond hearing reveals that the immigration judge based his release order on DHS's failure to meet its burden that Petitioner presented a danger to the community or a risk of flight. The immigration judge did not make findings regarding whether Petitioner was a gang member. Resp. Exs. 1 and 2.

The immigration judge conducting the 2025 bond hearings was different from the one who made the bond determination in 2023. The applicable regulations indicate that bond proceedings are separate and apart from removal proceedings, so each bond request is a separate proceeding. 8 C.F.R. § 1003.19(d). The 2025 immigration judge determined that the Petitioner was eligible for a bond hearing under 8 U.S.C. § 1226(a). The DHS argued that the Petitioner was a danger and a flight risk; however, DHS primarily argued [redacted] The immigration judge then determined that the Petitioner posed a flight risk, and no amount of bond would ameliorate that risk. The immigration judge appears to have weighed the evidence in the record before her which in part includes evidence not present in 2025, namely the [redacted], as well as prior statements that he used to be a MS-13 gang member, and that petitioner [redacted]

It does not appear that the Petitioner's counsel filed any of the previous bond determinations or evidence in the 2025 bond proceeding, so any findings, including credibility and testimony of the Petitioner, from the previous bond decision were not a part of this new 2025 bond proceeding. The immigration judge is not bound by the determination of a previous immigration judge in bond proceedings and must weigh all evidence, including the new statements of the Petitioner. Indeed, "[t]he determination of the Immigration Judge as to custody status or bond may

[7] The exhibits the DHS submitted to the immigration judge are contained in Petitioner's Exhibit 2.

be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service." 8 C.F.R. § 1003.19(d). Thus, Petitioner is mistaken in his contention that collateral estoppel bars any subsequent consideration of his gang status. "Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Jackson v. Coalter*, 337 F.3d 74, 85 (1st Cir. 2003) (internal quotations omitted). Here, the only issue determined during the 2023 bond hearing was whether the DHS had met its burden in demonstrating that the Petitioner presented a danger to the community or a flight risk. The immigration judge did not make a finding of whether Petitioner was or was not a member of MS-13. Thus, neither collateral estoppel or issue preclusion prevent the 2025 immigration judge from relying in part on Petitioner's admitted gang membership in addition to other more recent events in determining that he presented a flight risk. *See Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994) (citation omitted) ("The principle of collateral estoppel, or issue preclusion, bars relitigation of any factual or legal issue that was *actually* decided in previous litigation between the parties, whether on the same or a different claim.") (emphasis in original)).

To the extent Petitioner intends to argue that he expects to remain released on his own recognizance during the pendency of his removal proceedings, this argument is unavailing. An "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 250 n. 12 (1983). And the Supreme Court has held that applicants for admission such as Petitioner are only entitled to the protections set forth by statute and that "the Due Process Clause provides nothing more." *Department of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020).

The Supreme Court has long recognized that Congress exercises "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). Pursuant to that longstanding doctrine, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). The broad scope of the political branches' authority over immigration is "at its zenith at the international border." *United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004). Accordingly, "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

The Supreme Court has explained that applicants for admission lack any constitutional due process rights with respect to admission aside from the rights provided by statute: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), and "it is not within the province of any court, unless expressly authorized by law, to review [that] determination . . . ." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). The Supreme Court reaffirmed "[its] century-old rule regarding the due process rights of an alien seeking initial entry" in *Thuraissigiam*, explaining that an individual who illegally crosses the border—like Petitioner—is an applicant for admission and "has only those rights regarding admission that Congress has provided by statute." 591 U.S. at 139-40.

As explained by the Supreme Court, "[w]hen an alien arrives at a port of entry—for example, an international airport—the alien is on U.S. soil, but the alien is not considered to have entered the country . . . ." *Thuraissigiam*, 591 U.S. at 139. Stated further, "aliens who arrive at

ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border.'" *Id.* (quoting *Mezei*, 345 U.S. at 215). The Court held that this same "threshold" rule applies to individuals, like Petitioner, who are apprehended after trying "to enter the country illegally" since by statute, such individuals are also defined as applicants for admission. *Id.* at 139-40. Treating such an individual in a more favorable manner than an individual arriving at a port of entry would "create a perverse incentive to enter at an unlawful rather than a lawful location" and therefore the Supreme Court rejected the argument that an individual who "succeeded in making it 25 yards into U.S. territory before he was caught" should be entitled to additional constitutional protections. *Id.* at 140.

Instead, applying the "century-old rule regarding the due process rights of an alien seeking initial entry[,]" *id. at 139,* the Court explained that aliens arrested after crossing the border illegally, such as Petitioner, have "only those rights regarding admission that Congress has provided by statute," *id.* at 140. The Court was clear: "the Due Process Clause provides nothing more" than the procedural protections set forth in 8 U.S.C. § 1225 that allow an individual to seek protection from removal if he fears return to his home country and seek parole from the agency. *Id.* at 140.

The Supreme Court's decision in *Thuraissigiam* is instructive. In relevant part, *Thuraissigiam* concerned a due process challenge raised by an alien apprehended 25 yards from the border, which he crossed illegally. 591 U.S. at 139. DHS detained and processed him for expedited removal because he lacked valid entry documents. *Id.* at 114. An asylum officer then determined that Mr. Thuraissigiam lacked a credible fear of persecution. *Id.* Mr. Thuraissigiam petitioned for a writ of habeas corpus, asserting a fear of persecution and requesting another opportunity to apply for asylum. *Id.*

In its decision, the Supreme Court delineated the boundaries of due process claims that can be made by applicants for admission. Specifically, the Court stated that for such aliens stopped at the border, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Id.* at 131 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also Guerrier v. Garland*, 18 F.4th 304, 313 (9th Cir. 2021) ("In concluding that Thuraissigiam's due process rights were not violated, the Supreme Court emphasized that the due process rights of noncitizens who have not 'effected an entry' into the country are coextensive with the statutory rights Congress provides.").

The First Circuit has also held that detention of an alien seeking admission to the United States does not violate due process in *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987). In that case, the court explained that "the detention of the appellants is entirely incident to their attempted entry into the United States and their apparent failure to meet the criteria for admission—and so, entirely within the powers expressly conferred by Congress." *Id.* The appellants were detained pursuant to 8 U.S.C. § 1225(b) and the Court found no due process violation in the denial of their parole applications "pending the final resolution of the exclusion proceedings and their parallel asylum applications" as there was "no suggestion of unwarranted governmental footdragging in these cases" and because "prompt attention appears to have been paid to the administrative aspects of exclusion and asylum." *Id.*

This Court should apply the "century-old rule" reaffirmed in *Thuraissigiam* and conclude that Petitioner's due process rights are coextensive with the rights provided him under statute. Here, the law provides that "in 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

240." 8 U.S.C. § 1225(b)(2)(A). For the reasons set forth above, the Petitioner is subject to mandatory detention under this statute.

Moreover, mandatory detention is warranted under 8 U.S.C. § 1229a whether the Petitioner remains in ongoing removal proceedings or is later processed for expedited removal. *See Matter of Q. Li*, 29 I&N Dec. 66, 67 ("'in 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 240.'" (emphasis added) (quoting 8 U.S.C. § 1225(b)(2)(A)). ICE's decision to place an alien arriving in the United States in either expedited removal proceedings under 8 U.S.C. § 1225(b)(1), or full removal proceedings 8 U.S.C. § 1229a, is discretionary. However, ICE's decision to detain or release aliens deemed applicants for admission is not. "For those placed in expedited removal proceedings who are referred to an Immigration Judge for consideration of their asylum application. . . 8 U.S.C. § 1225(b)(1)(B)(ii), requires detention until the final adjudication of the asylum application." *Q. Li*, 29 I&N Dec. at 68 (citing *Matter of M-S-*, 27 I&N Dec. 509, 516 (A.G. 2019)). "Likewise, for aliens arriving in and seeking admission into the United States who are placed directly in full removal proceedings, section . . . 8 U.S.C. § 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.' " *Q. Li*, 29 I&N Dec. at 68 (quoting *Jennings*, 583 U.S. at 299). Thus, Petitioner claim that his current detention is in violation of his constitutional rights to due process of law is without merit and should be dismissed.

## III. CONCLUSION

For the reason described above, the Petitioner's Petition should be dismissed.

Respectfully submitted,

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By: */s/ Dulce Donovan*

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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 8, 2025, I caused the foregoing Opposition to be filed by means of this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Fed. R. Civ. P. 5(b)(2)(E) and Local Rules Gen 304.

*/s/ Dulce Donovan*
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