UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

NAFIOU LAMIDI

Petitioner,

v.

E.L. TATUM, JR., Warden of the Federal Correctional Institute, Berlin; **PATRICIA H. HYDE**, Acting Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations, Boston Field Office; **TODD LYONS**, Acting Director, U.S. Immigration and Customs Enforcement; **KRISTI NOEM**, Secretary of U.S. Department of Homeland Security; **PAMELA BONDI**, U.S. Attorney General;

Respondents.

Case Number: 1:25-cv-297-LM-TSM

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND REQUEST FOR HABEAS CORPUS RELIEF; IN THE ALTERNATIVE, PETITIONER'S REQUEST FOR A BAIL HEARING

INTRODUCTION

This case presents the question of whether Petitioner is currently detained under 8 U.S.C. § 1226(a) or 8 U.S.C. § 1225(b). On September 5, 2025, the Board of Immigration Appeals (BIA) issued a precedential decision, *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (B.I.A. 2025), which erroneously concluded that all noncitizens who have not been admitted to the United States (i.e., inadmissible aliens) are categorically held under 8 U.S.C. § 1225(b), not 8 U.S.C. § 1226(a), even though Section 1226(a) also covers the detention of inadmissible aliens. This Court should reject *Matter of Yajure Hurtado* and find that Petitioner is detained under 8 U.S.C. § 1226(a).

After the initial arrest, Respondents released him through the order of release on recognizance under 8 U.S.C. § 1226 after making the initial custody determination under 8 U.S.C. § 1226(a). Respondents re-detained him through the administrative arrest warrant and re-determined his custody status under 8 U.S.C. § 1226. The evidence supporting these facts is Respondents' own official documents, and the Respondents do not dispute their validity. Thus, Petitioner's detention continues to be governed by 8 U.S.C. § 1226(a). *See Romero v. Hyde*, Civil Action No. 25-11631-BEM, 2025 U.S. Dist. LEXIS 160622, at *16 (D. Mass. Aug. 19, 2025) (holding that the petitioner is detained under 8 U.S.C. § 1226 because "[p]ending her initial removal proceedings, Petitioner was arrested and released under section 1226."; and collecting cases); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 U.S. Dist. LEXIS 128085, at *3 (D. Mass. July 7, 2025) ("Because Gomes was arrested on a warrant and ordered detained under Section 1226, his detention continues to be governed by Section 1226(a)'s discretionary framework. Gomes' petition will accordingly be granted, and the government respondents will be ordered to provide him with a bond hearing before an Immigration Judge."); *Martinez v. Hyde*, Civil Action No. 25-11613-BEM, 2025 U.S. Dist. LEXIS 141724, at *22 (D. Mass. July 24, 2025) ("The April

2024 Notice to Appear and Order of Release on Recognizance demonstrate why Petitioner cannot be detained under section 1225(b)(2)(A)."); *dos Santos v. Noem*, No. 1:25-cv-12052-JEK, 2025 U.S. Dist. LEXIS 157488, at *3 (D. Mass. Aug. 14, 2025) ("The government's argument contravenes the plain text of Section 1226(a) and would render superfluous Section 1226(c), which mandates the detention of certain noncitizens and is the sole exception to Section 1226(a)'s discretionary framework. Because dos Santos was arrested on a warrant and ordered detained under Section 1226, his detention continues to be governed by Section 1226(a)'s discretionary framework."); *Benitez v. Francis*, 2025 U.S. Dist. LEXIS 157214, at *7 (S.D.N.Y. Aug. 8, 2025) (holding that 8 U.S.C. § 1226 governs the detention because "(1) DHS has consistently treated Mr. Lopez Benitez as subject to detention on a discretionary basis under § 1226(a), which is fatal to Respondents' claim that he is subject to mandatory detention under § 1225(b); and (2) a proper understanding of the relevant statutes, in light of their plain text, overall structure, and uniform case law interpreting them, compels the conclusion that § 1225's provision for mandatory detention of noncitizens 'seeking admission' does not apply to someone like Mr. Lopez Benitez, who has been residing in the United States for more than two years."); *Duchi-Naula v. Tatum*, Civil No. 1:25-cv-247-LM-AJ (D.N.H. July 7, 2025) (oral ruling) (citing *Rodriguez Vazquez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025)).

The Court should grant Petitioner's habeas corpus petition and order Respondents to provide a bond hearing under 8 U.S.C. § 1226(a). In the alternative, this Court should hold a bail hearing during the pendency of this habeas corpus petition through this Court's inherent power because the law is clear that Petitioner is detained under 8 U.S.C. § 1226(a).

UNDISPUTED MATERIAL FACTS

Petitioner is 36 years old and from Benin. On November 2, 2024, Petitioner entered the

United States near Arizona without a lawful entry. He fled Benin due to fear of persecution. Respondents placed Petitioner in regular removal proceedings under 8 U.S.C. § 1229a after vacating the expedited removal order and without providing a credible fear interview.

On January 3, 2025, Respondents released him under 8 U.S.C. § 1226(a)'s release on recognizance. Since his release from immigration detention, Petitioner has established a stable residence in Lyndon Center, Vermont, and has received support from the Northeast Kingdom Asylum Seekers Assistance Network (NEKASAN).

On February 10, 2025, Petitioner reported to Respondents' routine check-in without any incident. However, on May 12, 2025, Respondents detained Petitioner without any reason or justification pursuant to an administrative arrest warrant under 8 U.S.C. § 1226. On the same day, Respondents re-determined Petitioner's custody status under 8 U.S.C. § 1226 to be detained.

On May 28, 2025, with the assistance of pro bono counsel, Petitioner filed a motion for a bond hearing (custody redetermination) before an Immigration Judge (IJ). On June 5, 2025, the IJ held that the IJ had no jurisdiction over Petitioner's bond hearing because he was detained under 8 U.S.C. § 1225, a mandatory detention, instead of 8 U.S.C. § 1226(a). Petitioner timely appealed the IJ's decision to the Board of Immigration Appeals (BIA). The appeal is currently pending.

On September 5, 2025, the BIA issued *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (B.I.A. 2025), which held that all noncitizens who have not been admitted to the United States (i.e., inadmissible aliens) are categorically held under 8 U.S.C. § 1225(b), not 8 U.S.C. § 1226(a). The BIA is bound by its own precedent under 8 C.F.R. § 1003.1(g)(1) ("decisions of the Board and decisions of the Attorney General are binding on all officers and employees of DHS or immigration judges in the administration of immigration laws of the United States").

ARGUMENT

I. THE COURT CAN AND SHOULD ENTERTAIN PETITIONER'S HABEAS CORPUS PETITION

The Court can and should entertain Petitioner's arguments presented in his habeas corpus petition. Respondents do not appear to assert that there is a statutory mandate requiring exhaustion here. *See* Govt's MTD at 5-6. Nevertheless, Respondents request that this Court should hold this case in abeyance, as a matter of prudent judicial discretion, until Petitioner's bond appeal at the BIA is completed. *See id.* The Court should reject this argument, as it would needlessly prolong the Petitioner's unlawful detention without a bond hearing. Moreover, in light of *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (B.I.A. 2025), Petitioner's bond appeal before the BIA is now futile.

Although this Court has broad discretion to require administrative exhaustion based on prudential reasons, "[e]xhaustion is not required . . . 'with regard to claims which turn only on statutory construction.'" *Williams v. Warden, FCI Berlin*, 2025 DNH 086, 2025 U.S. Dist. LEXIS 148910, at *16 (D.N.H. Aug. 4, 2025). "Nor is exhaustion required when exhaustion would be futile, as when [Respondents] 'ha[ve] indicated predetermination of the issue.'" *Id.* Further, "[a] failure to exhaust may also be excused when exhaustion would cause irreparable harm, such as by requiring him to be incarcerated beyond the date he would otherwise be entitled to release[.]" *Id.*

All of these exceptions to the prudential exhaustion requirements apply in this case. *First*, the dispositive question presented here is whether Petitioner is detained under 8 U.S.C. § 1226(a) or 1225(b) based on the unique circumstance of this case. This is "a pure question" of statutory interpretation. *Williams*, 2025 U.S. Dist. LEXIS 148910, at *17. *Second*, *Matter of Yajure Hurtado* renders Petitioner's bond appeal futile. In this decision, the BIA categorically held that <u>all</u> noncitizens "who are present in the United States without admission" are ineligible for bond hearings before IJs. *Id.* at 216. This is consistent with Respondents' July 8, 2025 policy announcing that Respondents intend to detain all non-admitted noncitizens pursuant to 8 U.S.C. §

1225(b), regardless of how they were released into the community or how long they have resided in the United States. *See Martinez*, 2025 U.S. Dist. LEXIS 141724, at *11 ("mandatory detention for all applicants has only been the official policy of the Department of Homeland Security ('DHS') for a few weeks, since July 8, 2025, when Acting Director of U.S. Immigration and Customs Enforcement, Todd M. Lyons, issued an internal memorandum explaining that the agency had 'revisited its legal position:'").[1] *Third*, Petitioner faces irreparable harm from detention without this Court's intervention. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021) ("There is no question that [the petitioner] suffered a substantial deprivation of liberty."); *Gomes*, 2025 U.S. Dist. LEXIS 128085, at *11-12 ("if the situation is such that 'a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim,' exhaustion may be excused even though 'the administrative decisionmaking schedule is otherwise reasonable and definite.'") (quoting *Portela-Gonzalez v. Sec'y of the Navy*, 109 F.3d 74 (1st Cir. 1997)). *See also Williams*, 2025 U.S. Dist. LEXIS 148910, at *17 ("requiring Williams to exhaust his claims would necessarily entail that he remains incarcerated while pursuing administrative relief, despite clear evidence that he has already passed the date by which he should have been released from incarceration and transferred to prerelease custody.").

Respondents rely on the First Circuit's *Brito* to support their position that this Court should wait until the BIA's decision on appeal. *See* Govt's MTD at 5-6 (citing and quoting *Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021)). However, *Brito* emphasized that "[e]xhaustion might not be required if [the petitioner] were challenging h[is] incarceration[.]" *Brito*, 22 F.4th at 256. And this Court has not required the petitioner to exhaust the administrative remedy at the BIA before the petitioner can challenge his incarceration under the Due Process Clause. *See Hernandez-Lara*

[1] https://www.aila.org/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission.

v. Immigration & Customs Enf't, 560 F. Supp. 3d 531 (D.N.H. 2019), *affirmed in part by Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021).

Based on all of these exceptions to any prudential exhaustion requirement, this Court can and should entertain Petitioner's habeas corpus petition.

II. THE COURT SHOULD FIND THAT PETITIONER IS DETAINED UNDER 8 U.S.C. § 1226(a)

The Court should find that Petitioner is detained under 8 U.S.C. § 1226(a). After the initial arrest, Respondents released him through the order of release on recognizance under 8 U.S.C. § 1226 instead of either providing him a credible fear interview or releasing him under the humanitarian parole under 8 U.S.C. § 1182(d)(5)(A). Respondents re-detained him through the administrative arrest warrant and re-determined his detention status under 8 U.S.C. § 1226. *See* Docket Number (DN) 1-7 (decision to place Petitioner in full removal proceedings without the credible fear interview path), 1-1 (releasing Petitioner through an order of recognizance under 8 U.S.C. § 1226), 1-2 (determining Petitioner's release under 8 U.S.C. § 1226), 1-3 (re-detaining with an administrative arrest warrant and re-determining Petitioenr's custody status under 8 U.S.C. § 1226). Thus, this is fatal to Respondents' argument that Petitioner is detained under 8 U.S.C. § 1225. *See Benitez*, 2025 U.S. Dist. LEXIS 157214, at *7-8 ("DHS has consistently treated [the petitioner] as subject to detention on a discretionary basis under § 1226(a), which is fatal to Respondents' claim that he is subject to mandatory detention under § 1225(b)"); *Romero*, 2025 U.S. Dist. LEXIS 160622, at *16 ("[p]ending her initial removal proceedings, Petitioner was arrested and released under section 1226."; and collecting cases); *Gomes*, 2025 U.S. Dist. LEXIS 128085, at *3 ("Because Gomes was arrested on a warrant and ordered detained under Section 1226, his detention continues to be governed by Section 1226(a)'s discretionary framework."); *Martinez*, 2025 U.S. Dist. LEXIS 141724, at *22 ("The April 2024 Notice to Appear and Order of

Release on Recognizance demonstrate why Petitioner cannot be detained under section 1225(b)(2)(A)."); *dos Santos*, 2025 U.S. Dist. LEXIS 157488, at *3 ("Because dos Santos was arrested on a warrant and ordered detained under Section 1226, his detention continues to be governed by Section 1226(a)'s discretionary framework.").

Respondents argue that the Petitioner was initially detained under 8 U.S.C. § 1225(b)(1) near the border, which is evidenced by Form I-213. *See* Govt's Br. at 8. However, Respondents do not dispute that Respondents subsequently re-determined his custody status after vacating the expedited removal order and placing him in full proceedings without the path of a credible fear interview determination and subsequently released him under 8 U.S.C. § 1226 with an order of release on recognizance. DN 1-7, 1-1. If this is not enough, Respondents also made a separate custody determination that Petitioner was released on his own recognizance through the custody determination under 8 U.S.C. § 1226(a). DN 1-2. Because Petitioner's detention was governed by 8 U.S.C. § 1226(a), Respondents made a re-determination of Petitioner's custody status through 8 U.S.C. § 1226(a) to re-detain Petitioner with an administrative arrest warrant under 8 U.S.C. § 1226(b). DN 1-3. Thus, Respondents' argument that Petitioner's detention is not governed by 8 U.S.C. § 1226(a) is clearly belied by the record, Respondents' own official documents. *See Benitez*, 2025 U.S. Dist. LEXIS 157214, at *13 ("[R]egardless of what Mr. Lopez Benitez's designation could have been when he was initially arrested in 2023, there is no dispute that: (1) he was in fact designated for treatment under § 1226 at that time; (2) his most recent warrant from last month was also issued subject to § 1226; and (3) Respondents detained him on that basis.").

Although Respondents do not meaningfully dispute that Petitioner was released under an order of recognizance under 8 U.S.C. § 1226(a) and re-detained under 8 U.S.C. § 1226(b), Respondents still argue that Petitioner is detained under 8 U.S.C. § 1225(b) solely because

Petitioner is an inadmissible alien, which the BIA has endorsed in *Matter of Yajure Hurtado*. However, this argument is inconsistent with the statutory interpretation of 8 U.S.C. § 1226 and 8 U.S.C. § 1225 and Respondents' previous understanding of the law.

This Court has already rejected Respondents' argument in *Duchi-Naula*. As the Court already explained, which is consistent with the statutory interpretation analysis of *Rodriguez Vazquez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025), Respondents' legal position renders "significant portions of 1226 meaningless for the reasons outlined in" *Bostock*. *Duchi-Naula*, Oral Ruling, at *50-51. This is because 8 U.S.C. § 1226 also applies to inadmissible noncitizens. *See Bostock*, 779 F. Supp. 3d, 2025 U.S. Dist. LEXIS 78395 at *35 ("A plain reading of this exception implies that the default discretionary bond procedures in Section 1226(a) apply to a noncitizen who, like Rodriguez, is present without being admitted or paroled but has not been implicated in any crimes as set forth in Section 1226(c)."); *Martinez*, 2025 U.S. Dist. LEXIS 141724, at *17 ("But if, as the Government argued in Gomes and again now, a non-citizen's inadmissibility were alone already sufficient to mandate detention under section 1225(b)(2)(A), then the 2025 amendment would have no effect."); *Gomes*, 2025 U.S. Dist. LEXIS 128085, at *17 ("The government's interpretation of Section 1225(b)(2) would also render a recent amendment to Section 1226 superfluous."); *Benitez*, 2025 U.S. Dist. LEXIS 157214, at *23 ("But there is no indication that Congress intended § 1226 to be limited only to visa overstays. And there is nothing in the history or application of § 1226 to even remotely suggest that it was intended to have such a narrow reach.").

Respondents' implicit reliance on the Supreme Court's decision in *Jennings* is not persuasive either. Respondents appear to argue that the Supreme Court endorsed Respondents' position in *Jennings v. Rodriguez*, 583 U.S. 281, 289, 299 (2018). Govt's Br. at 4. As *Bostock*

explained, *Jennings* supports Petitioner's, IJ's, and this Court's reasoning. *See Bostock*, 2025 U.S. Dist. LEXIS 78395, at *39-40 ("the Supreme Court's opinion in *Jennings* also lends some support to Rodriguez's proposal for harmonizing Sections 1225 and 1226."). "[W]hen discussing Section 1226, *Jennings* describes it as governing 'the process of arresting and detaining' noncitizens who are living 'inside the United States' but 'may still be removed,' including noncitizens 'who were inadmissible at the time of entry.'" *Id.* at *40 (quoting *Jennings*, 583 U.S. at 287). Thus, *Jennings* does not help Respondents' position. *See dos Santos*, 2025 U.S. Dist. LEXIS 157488, at *20 (rejecting the government's argument that *Jennings* supports its argument that all non-admitted noncitizens can be detained under 8 U.S.C. § 1225(b)).

Nor does Respondents' reliance on *Matter of M-S-*, 27 I. & N. Dec. 509 (B.I.A. 2019) and *Matter of Q. Li*, 29 I. & N. Dec. 66 (B.I.A. 2025) support Respondents' statutory interpretation in this case. To start with *Matter of Q. Li*, Respondents did not release Petitioner into the United States through the parole authority under 8 U.S.C. § 1182(d)(5)(A), which was the issue in *Matter of Q. Li*. Indeed, Respondents do not dispute this fact. Govt's Br. at 3 ("Petitioner was released from immigration custody on an order of recognizance."), 8 (acknowledging "Petitioner's prior release on an order of recognizance" under 8 U.S.C. § 1226). In contrast, Petitioner, "as [his] Order explicitly states, was released upon h[is] own recognizance as a form of conditional parole under section 1226." *Martinez*, 2025 U.S. Dist. LEXIS 141724, at *11. The BIA's own precedent clearly distinguishes the conditional parole under 8 U.S.C. § 1226 from the humanitarian parole under 8 U.S.C. § 1225. *See Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747, 748 (B.I.A. 2023). Thus, *Matter of Q. Li* is factually different from the instant case. *See Martinez*, 2025 U.S. Dist. LEXIS 141724, at *9 (concluding the same).

Matter of M-S- does not help Respondents' position either. In advancing Respondents'

argument, Respondents quote *Matter of M-S-*, which states that "all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond." Govt's Br. at 8 (quoting *Matter of M-S-*, 27 I. & N. Dec. at 519). However, Petitioner's case was *not* transferred to full removal proceedings *after* establishing a credible fear interview. Instead, Respondents chose to place Petitioner in full proceedings based on their discretion without providing a credible fear interview, vacated the expedited removal, and decided to release him under 8 U.S.C. § 1226(a). DN 1-7 at 1 ("USCIS has exercised discretion to issue a Notice to Appear so that the individual may appear in immigration court so his case was not delayed."). Further, Respondents rely on 8 U.S.C. § 1225(b)(2) to argue that Petitioner is detained under 8 U.S.C. § 1225. Govt's Br. at 4. However, *Matter of M-S* did not address the meaning of 8 U.S.C. § 1225(b)(2) in the context of the government releasing an individual under 8 U.S.C. § 1226(a). Instead, *Matter of M-S-* involved 8 U.S.C. § 1225(b)(1), which governs the transfer of proceedings from expedited to full *after* credible fear determinations. *See Matter of M-S-*, 27 I. & N. Dec. at 509 ("The question here is whether, under the Act, aliens transferred *after establishing* a credible fear are eligible for released on bond.") (emphasis added), 515-519 (analyzing 8 U.S.C. § 1225(b)(1)). Thus, *Matter of M-S-* does not help Respondents' argument factually and legally.

In sum, the Court should reject Respondents' argument that Petitioner is detained under 8 U.S.C. § 1225(b)(2). Petitioner is detained under 8 U.S.C. § 1226(a).

III. THE COURT CAN AND SHOULD HOLD A BAIL HEARING PURSUANT TO THE COURT'S INHERENT AUTHORITY

The Court can and should hold a bail hearing pursuant to the Court's inherent authority. This Court "has inherent power to release the petitioner pending determination of the merits." *Gomes v. US Dep't of Homeland Sec.*, 460 F. Supp. 3d 132, 144 (D.N.H. 2020). The Court "may grant bail to a habeas petitioner if: (1) the petitioner has a clear case on the law and facts, *or* (2)

exceptional circumstances are present and the petitioner demonstrates a substantial claim of constitutional error." *Id.* (citing *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972)) (emphasis added).

The first prong is applicable in this case, as Petitioner has a clear case on the law and facts. As explained above, the facts and law are clear that Petitioner is detained under 8 U.S.C. § 1226(a). *See supra* II. Respondents released Petitioner under 8 U.S.C. § 1226(a) after making a custody determination under 8 U.S.C. § 1226(a). Respondents re-detained Petitioner under 8 U.S.C. § 1226(a) with an administrative arrest warrant pursuant to 8 U.S.C. § 1226(a). Respondents also made the re-determination of Petitioner's custody status pursuant to 8 U.S.C. § 1226(a).

Thus, the Court should hold a bail hearing through the Court's inherent authority.

CONCLUSION

For the reasons stated above, this Court should deny Respondents' motion to dismiss and grant Petitioner's habeas corpus petition. In the alternative, the Court should hold a bail hearing and require Respondents to justify Petitioner's detention by clear and convincing evidence for the dangerousness prong and preponderance of evidence for the flight risk prong.

Date: September 6, 2025

Nafiou Lamidi,

By and through her attorneys,

/s/ SangYeob Kim
Gilles R. Bissonnette (NH Bar: 265393)
SangYeob Kim (NH Bar: 266657)
Chelsea Eddy (NH Bar: 276248)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
Phone: 603.333.2081
gilles@aclu-nh.org
sangyeob@aclu-nh.org
chelsea@aclu-nh.org

Kristen J. E. Connors (*Pro Hac Vice*)
Montroll, Oettinger & Barquist, P.C.
126 College Street, Suite 400
Burlington, Vermont 05401
(802) 540-0250
kconnors@mblawoffice.com