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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DIANA M. RIVERA ZUMBA, A209-465-372 Petitioner, v. PAM BONDI, Attorney General of the United States of America, et al. Respondents.	HON. KATHARINE S. HAYDEN Civil Action NO.25-14626 (KSH)

PETITIONER'S REPLY TO RESPONDENTS' ANSWER TO VERIFIED HABEAS CORPUS PETITION AND ORDER TO SHOW CAUSE

On the Brief:

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PRELIMINARY STATEMENT

On August 8, 2025, the US Immigration and Customs Enforcement ("ICE") agency arrested the Petitioner, Diana M. Rivera Zumba, near her home in Newark, New Jersey. The Petitioner had entered without inspection into the U.S. back in September of 2002 and had been waiting for her next removal hearing after her case (including her application for cancellation of removal) had been remanded by the Board of Immigration Appeals on November 13, 2023, subsequent to the death of her late-husband. The Petitioner was taken to Delaney Hall Detention Center in Newark, New Jersey, her original place of detention.

On August 12, 2025 she filed a bond motion with the Elizabeth Detention Center Immigration Court. However, on or about August 13, 2025 Petitioner was being told at the Delaney Detention Facility that she would be transferred soon. She would call her son the next morning, August 14, 2025 and indicate she was being shipped out but was not sure where. A few hours later, on August 14, 2025 at 1:24 pm instant counsel for the Petitioner filed a habeas corpus petition with the New Jersey District Court at a time that Respondents claim that Petitioner was in ICE custody in transit (boarding a plane in the District of Maryland) rather than New Jersey. Petitioner would then arrive at a Richwood Correction Center in Monroe, Louisiana on August 14, 2025 at around 4:30p.m. but was not checked in and later on Sunday, August 16, 2025 arrived at her final destination at the Adelanto Detention Center in Adelanto, California where she remains today in ICE custody. During this entire transit period, Petitioner was unable to communicate with her family or counsel and was not sure where she was or what time it was. She would be transferred through at least 8 states before finally reaching her new detention facility location in Adelanto, California.

The two questions to resolve are: 1) whether this Court possesses jurisdiction over this habeas petition and 2) whether the Petitioner's detention is unlawful.

I. This Court Possesses Jurisdiction under the Unknown Custodian/Unknown Location Rule.

The unknown custodian/unknown location rule should apply in the instant case. See Munoz-Saucedo v. Pittman, No. 25-2258 (CPO)---F.Supp.3d----2025 WL 1750346 (D.N.J., June 24, 2025). Similar to the instant case, in the Munoz-Saucedo case, the alien "in transit" to a new detention facility in Texas and the precise custodian or location was not clear at the time that the habeas was filed. The Court noted in Munoz-Saucedo that "counsel did not know or could not find out who [Petitioner's] immediate custodian was when [his] detention was filed" even though counsel may have been told the ultimate destination. Id. at 6. Invoking the unknown custodian exception, the New Jersey District Court determined that there should be no gaps in habeas jurisdiction because otherwise "the practical effect of which is 'that for some unspecified period of time after detention, seemingly however long the government chooses to take in transporting a detainee between states or…facilities-a detainee would be unable to file a habeas petition at all, anywhere' is troubling and has been rejected" Id. citing to Ozturk v. Hyde, 136 F.4th 382, 392 (2d Cir. 2025); Denmanjuk, 784 F.2d at 115-16 (applying exception where the petitioner was in custody "in a confidential location" that was "unknown to his attorneys."). The Munoz-Saucedo court then concluded that "[c]onsidering recent and ongoing events with respect to immigration detainees, the need for the exception clearly remains." Id. at 7 (noting "Noting Petitioner's attorney received conflicting, inaccurate, and delayed information about his whereabouts and because he was not permitted to communicate his location or ultimate destination during transit, his custodian was, for all practical purposes, unknown at the time of filing."

Applying this exception, this Court should have habeas jurisdiction in this case. First, the last known custodian and last known place of detention in this case at the time of filing the habeas corpus petition was Luis Soto, warden of the Delaney Hall Detention Facility, Newark, New Jersey and it was listed as the place of detention on the online ICE Inmate locator system all day on the day that the habeas corpus petition was filed and was not changed until late in the day or night, after the Petitioner reached a detention center in Monroe, Louisiana in the late afternoon of August 14, 2025, the date the habeas petition was filed.

Second, even though the parties deduce that the Petitioner was "probably" in transit near Baltimore, Maryland around the time that the habeas petition was filed, this is not a certainty as even the Respondents are unsure of the time and location of the Petitioner during her transfer to ultimate and current place of detention at the Adelanto Detention Facility in Adelanto, California. Thus, all we really know in this case is that the Petitioner was in transit to Louisiana at the time the habeas petition was filed in this case. The only thing we know for certain is that at the time her habeas petition was filed Petitioner's counsel believed that she was being detained in Newark, New Jersey and would soon be transferred out of the jurisdiction. Given the circumstances in this case, we respectfully submit that the jurisdiction is proper in New Jersey as the only place she was "detained" and "in custody" at the time her habeas was filed.

Habeas jurisdiction is also proper in New Jersey because there is only one proper jurisdiction and also in order to avoid forum shopping. The immediate custodian and only proper respondent at the time that the habeas was filed was the warden of the Delaney Hall Detention Center, where Petitioner was listed as being detained at the time her habeas petition was filed. And even if Petitioner was in transit to another detention facility, Petitioner could not have filed a habeas petition naming another warden because one can only name the immediate custodian not a future

custodian and, in this case, Petitioner and counsel (and probably even Respondents) did not even know where exactly she was going to be detained and, in any case, it would not have made a difference, because the immediate custodian or warden is the proper focus for any attorney filing a habeas. Thus, for all intensive purposes, at the time she filed her habeas petition, Mr. Soto was the proper immediate custodian or warden for the Petitioner and the last person with the ability to produce Petitioner's body before the habeas court. And the whole purpose of this immediate custodian rule is in order to compose a simple rule that allows district courts to assume habeas jurisdiction over habeas cases in the district of confinement in order to prevent forum shopping by habeas petitioners. Thus, in instances where even ICE does not know where the Petitioner is being or has been detained and simply has the Petitioner's location as TBD (to be determined) or "in transit" the logical rule would be to seek the last known immediate custodian or adopt the unknown location/unknown custodian rule until the Petitioner reaches a certain place a detention and detention is transferred from one immediate custodian to another immediate custodian. Otherwise, as in this case where Petitioner was transferred to over eight (8) separate locations within the span of four days, habeas jurisdiction would potentially amount to an elusive exercise of whack-a-mole with jurisdiction potentially vesting in multiple jurisdictions or none at all since there is no known location or known custodian during this 4-day trip. Thus, Petitioner submits that the "person" who in the best position to produce the detainee's body before the habeas court (having immediate custody) would be the sending immediate custodian (Warden Soto), at least until the receiving immediate custodian (Warden in Louisiana or California) receives the detainee. That person would theoretically be in the best position to call off the transfer and say bring the prisoner back, at least until the detainee is received and checked into a new detention facility with a new immediate custodian. See In Matter of Jackson, 15 Mich. 417, 439-440

(1967)("This writ…is directed to…[the] jailer."). Thus, the focus for jurisdiction in these habeas cases should be the actual "jailer" not the transporter or the intended jailer or the theoretical jailer. And only if the actual jailer is unknown then presumably the unknown jailer/unknown location exception applies using the last actual known jailer rather than requiring the district courts to request a detailed travel log every time a habeas is filed where a detainee is "in transit" or location "TBD."

The alternative to this rule is no rule at all where Congress' limiting clause requiring that habeas petitions be brought "within their respective jurisdictions" would be meaningless and "every judge anywhere (could) issue the Great write on behalf of applicants far distantly removed from courts whereon they sat." Carbo v. United States, 364 U.S. 611, 617 (1961). Thus, the great writ is issuable only in the district of confinement not the district of transport or transit. Thus, as Rumsfield v. Padilla, 542 U.S. 426, 499 (2004) states, by definition, the immediate custodian and the prisoner reside in the same district." Thus, in the instant case, absent clairvoyance on the part of habeas counsel, the immediate custodian and prisoner resided or were present in New Jersey not on the tarmac in Baltimore, Maryland or wherever the Petitioner was secretly being held at 1:24pm when the habeas was filed. In fact, Respondents sought an extension from this court to determine exactly what Petitioner's itinerary and timeline was during the 4 days she was in transit to California.

Most importantly, the rule promoted by the Respondents makes no sense. First, because they suggest multiple jurisdictions which is the first issue in preventing forum shopping. Here the Respondent suggest that Petitioner should have filed the habeas petition in Maryland, a jurisdiction where Petitioner's counsel was not even aware she was in, or transfer the habeas to California, a jurisdiction where Petitioner would not arrive at and be detained at until days later.

The Ozturk decision is also of no use for the Respondents. In Ozturk, the government argued for jurisdiction in Louisiana, a jurisdiction that the alien in that case would not arrive until days after filing her habeas. And in Ozturk, the Petitioner was arrested in Massachusetts but was detained for the first time at a government facility in Vermont (before being shipped out to Louisiana). Thus, the habeas case was transferred to Vermont, the place of detention (of her immediate custodian) at the time the habeas was filed. Jurisdiction was not proper in Massachusetts because there had never been an immediate custodian there but rather the immediate custodian was the field office director in Vermont (where the alien was actually being detained at the time the habeas was filed). The alien in that case may have been in transit but ultimately the first place of actual detention with an immediate custodian, at the time of filing the habeas, was Vermont versus Massachusetts. And besides, Ozturk was a transfer case meaning that the Massachusetts court (where the alien was only arrested not in custody) transferred the case to Vermont, the immediate custodian at the time the habeas was filed, rather than let the government forum shop by seeking the transfer of the habeas petition all the way down to Louisiana where the Petitioner in that case would not be in custody until days later. See Anariba v. Director Hudson County Correctional Center, 17 F.3th 434 (3d Cir. 2021)(...the transfer of the detainee outside of the court's territorial jurisdiction does not strip that court of jurisdiction to entertain a Rule 60(b) motion).

In sum, the instant case is more analogous to the facts in Munoz-Saucedo and the immediate custodian should be the warden of Delaney Hall in New Jersey or the unknown custodian/location applies.

II. Petitioner is Being Unlawfully Detained Pursuant in Violation of the INA and the US Constitution.

Incredibly, the Respondents argue that the Petitioner is being properly detained as "an applicant for admission under 8 U.S.C. Section 1225(b)(2)(A) and is subject to a mandatory detention "[a]s of July 8, 2025." See Respondents' Answer at 17 ("As of July 8, 2025, however, ICE takes a different position: that is, all applicants for admission, including those who are present without admission, are subject to mandatory detention under Section 1225(b)(2). This whole approach is not only not in compliance with the INA but most certainly unconstitutional where a woman who is not an "arriving alien seeking admission" or a parolee is not, 20 years after her entry without inspection into the US, suddenly seeking admission and supposedly now at the border seeking admission into the U.S.

The Petitioner is clearly eligible as an entry without inspection alien eligible for bail under 236(a) of the Immigration and Nationality Act ("INA") and should have never been detained in the first place. Respondent is a noncitizen who entered the United States without inspection or parole in September of 2006 and was never detained by the Department of Homeland Security ("DHS") until August 8, 2025 where for some reason the Respondents, without cause or materially changed circumstances decided to take the Petitioner into their custody and ship her to the West Coast of the United States thousands of miles away. For decades, DHS took the position that noncitizens like Petitioner were eligible for release on bond pursuant to INA § 236(a), unless they fell under the mandatory detention provisions of INA § 236(c). However, on July 8, 2025, DHS issued an internal memo that abruptly changed its longstanding position. As we can now see from the attached Answer (legal brief) DHS now takes the legal position that all noncitizens who entered the U.S. without inspection or parole are

actually "applicants for admission" pursuant to INA § 235(b), and therefore are ineligible for release on bond regardless of how long they have resided in the United States. DHS' new position is without legal support, and this Court should find that it possesses jurisdiction over Respondent's custody determination for the following reasons.

First, as the Supreme Court has previously noted, INA § 236 is the default rule for discretionary detention. It applies to anyone who is detained "pending a decision on whether the [noncitizen] is to be removed from the United States." Noncitizens detained under INA § 236 are eligible for custody redetermination hearings unless they fall under the mandatory detention provisions of INA § 236(c). The carve out under § 236(c), including the most recent passage of the Laken Riley Act ("LRA"), illustrates that Congress intended § 236 to serve as the default detention authority for individuals like Petitioner. When Congress creates specific exceptions to a statute's applicability, it proves that, absent those exceptions, the statute generally applies.

Second, canons of statutory interpretation, legislative history, and longstanding agency practice clearly demonstrate that Congress *did not* intend noncitizens like Petitioner to be subject to mandatory detention under INA § 235(b). DHS' position runs contrary to how INA 235(b) has been consistently applied in the past and finds no basis in the context of the statutory schemes governing immigration detention. To find otherwise would render significant parts of INA § 236(a) obsolete, redundant or superfluous, which clearly Congress did not intend to do.

Third, DHS' position is not supported by any precedential Board of Immigration Appeals ("BIA" or "Board")) case law. *Matter of Q. Li* concerned a noncitizen who was detained shortly after crossing the border and who was subsequently released on parole under INA § 212(d)(5)(A) but later re-detained. Under those circumstances, the Board found that the noncitizen was an applicant for admission and subject to mandatory detention under INA § 235(b). Crucially, the

Board's holding reiterated the well-established understanding that INA § 236(a) applies to noncitizens already present in the United States, while INA § 235(b) applies primarily to noncitizens seeking entry into the United States and authorizes DHS to detain them without a warrant at the border. This interpretation is also supported by the Supreme Court's decision in *Jennings v. Rodriguez* and several recent district court decisions that have granted preliminary injunctive relief and enjoined the application of INA § 235(b) to individuals similarly situated to Petitioner.

The facts of this case are distinguishable from *Matter of Q.Li*. In the instant case, the Petitioner entered without inspection around September of 2002, was not detained by DHS either at the border or anywhere near the border and was "at large" for the next 23 years in the U.S. without incident until Respondents sought to change the INA and US Constitution through memo. Even when the Petitioner was issued a Notice to Appear on May 31, 2017 at the Newark Asylum office and referred to Immigration Court there is no indication of her being an "applicant for admission" or having been "paroled." Rather, she was in removal proceedings and as a non-criminal alien in removal proceedings who entered EWI and was not apprehended entering the U.S. should have been subject to INA 236(a), the default custody provision.

STATUTORY BACKGROUND

The INA prescribes three basic forms of detention for noncitizens in removal proceedings. First, INA § 236 authorizes the detention of noncitizens in standard non-expedited removal proceedings before an IJ. *See* INA § 236; 8 U.S.C. § 1229a. Individuals in INA § 236(a) detention are entitled to a bond hearing at the outset of their detention, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), while noncitizens who have been arrested, charged with, or convicted of certain crimes are subject to mandatory detention, *see* INA § 236(c). Second, the INA provides

for mandatory detention of noncitizens subject to expedited removal under INA § 235(b)(1) and for other *recent arrivals* seeking admission referred to under INA § 235(b)(2). Finally, the Act also provides for detention of noncitizens who have been previously ordered removed, including individuals in withholding-only proceedings, *see* 8 U.S.C. § 1231(a)–(b).

The detention provisions at INA § 236(a) and § 235(b)(2) were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104—208, Div. C, §§ 302–03, 110 Stat. 3009-546, 3009–582 to 3009–583, 3009–585. Section 236(c) was most recently amended earlier this year by the LRA, Pub. L. No.119-1, 139 Stat. 3 (2025).

Following enactment of the IIRIRA, the Executive Office of Immigration Review drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under INA § 235 and that they were instead detained under INA § 236(a). *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). In the decades that followed, most noncitizens who entered without inspection—unless they were subject to some other detention authority—received bond hearings. This practice was also consistent with the practice prior the enactment of the IIRIRA, in which noncitizens who were not deemed "arriving" were entitled to a custody hearing before an IJ or other hearing officer. *See* 8 U.S.C. § 1252(a) (1994); *see also* H.R. Rep. No. 104-469, pt. 1, at 229 (1996) (noting that § 1226(a) simply "restates" the detention authority previously found at § 1252(a)).

On July 8, 2025, DHS issued a memo to all employees of Immigration and Customs Enforcement ("ICE") stating that "[t]his message serves as notice that DHS, in coordination with the Department of Justice (DOJ), has revisited its legal position on detention and release

authorities. DHS has determined that section 235 of the Immigration and Nationality Act (INA), rather than section 236, is the applicable immigration detention authority for all applicants for admission. The following interim guidance is intended to ensure immediate and consistent application of the Department's legal interpretation while additional operational guidance is developed." The memo further stated DHS' new position with regard to custody determinations as follows:

> An "applicant for admission" is an alien present in the United States who has not been admitted or who arrives in the United States, whether or not at a designated port of arrival. INA § 235(a)(1). **Effective immediately, it is the position of DHS that such aliens 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 now treated in the same manner that "arriving aliens" have historically been treated. **The only aliens eligible for a custody determination and release on recognizance, bond, or other conditions under INA § 236(a) during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237, with the exception of those subject to mandatory detention under INA § 236(c).**
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> Moving forward, ICE will not issue Form I-286, Notice of Custody Determination, to applicants for admission because Form I-286 applies by its terms only to custody determinations under INA § 236 and part 236 of Title 8 of the Code of Federal Regulations. With a limited exception for certain habeas petitioners, on which the Office of the Principal Legal Advisor (OPLA) will individually advise, if Enforcement and Removal Operations (ERO) previously conducted a custody determination for an applicant for admission still detained in ICE custody, ERO will affirmatively cancel the Form I-286.
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> *See* https://www.aila.org/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission (last accessed August 4, 2025) (emphasis original).

As a result, according to DHS *all* noncitizens who have entered the United States without inspection and are subject to the grounds of inadmissibility, including long-time U.S. residents, are now considered to be subject to mandatory detention under INA § 235(b) and ineligible for release on bond. Conversely, according to DHS "[t]he only aliens eligible for a custody

determination and release on recognizance, bond, or other conditions under INA § 236(a) during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237, with the exception of those subject to mandatory detention under INA § 236(c)." *Id.*

The plain text of INA § 236 demonstrates that it is 236(a), not INA § 235(b), applies to the Petitioner's detention. INA § 236(a) "provides the general process for arresting and detaining [noncitizens] who are present in the United States and eligible for removal." *Diaz v. Garland*, 53 F.4th 1189, 1196 (9th Cir. 2022) (citation omitted). As the Supreme Court has remarked, INA § 236(a) "sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of a[] [noncitizen] 'pending a decision on whether the [noncitizen] is to be removed from the United States.'" *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018) (quoting INA § 236(a)). Section 236(c) carves out a statutory category of noncitizens for whom detention is mandatory, consisting of individuals who have committed certain "enumerated . . . criminal offenses [or] terrorist activities." INA § 236(c). Among the individuals carved out and subject to mandatory detention are certain categories of "inadmissible" noncitizens. *See* INA § 236(c)(1)(A), (D), (E). This is in stark contrast with mandatory detention provision under INA § 235(b)(2), which "supplement[s] § [236's] detention scheme." *Diaz,* 53 F.4th at 1197. Section 235(b) "applies primarily to [noncitizens] seeking entry into the United States ('applicants for admission' in the language of the statute)." *Jennings*, 583 U.S. at 297; *see* INA § 235(b) (entitled "Inspection of applicants for admission").

Thus, the plain text of INA § 236(a) applies to noncitizens like the Petitioner. The fact that INA § 236(a) is the default rule for arrest and detention and that section (c) carves out exceptions further demonstrates that the discretionary bond procedures apply to noncitizens like

Petitioner who are present without being admitted or paroled and have not been implicated in any crimes set forth in subsection (c). The Supreme Court has held that when Congress creates "specific exceptions" to a statute's applicability, it "proves" that absent those exceptions, the statute generally applies. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010).

The recent enactment of LRA further supports this finding. The Act added language to INA § 236(c) that directly references people who have entered without inspection or who are present without authorization. *See* Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025). Pursuant to these amendments, noncitizens charged as inadmissible under INA § 212(a)(6)(A) (the inadmissibility ground for entry without inspection) or INA § (a)(7)(A) (the inadmissibility ground for lacking valid documentation to enter the United States) *and* who have been arrested, charged with, or convicted of new certain crimes (not previously covered by INA § 236(c)) are now subject to § 1226(c)'s mandatory detention provisions. *See* INA § 236(c)(1)(E). By including such individuals under INA § 236(c), Congress reaffirmed that § 236(a) covers noncitizens who are not subject to section (c) but are charged as removable under § 212(a)(6)(A) or 212(a)(7). *Gieg v. Howarth*, 244 F.3d 775, 776 (9th Cir. 2001) ("[w]hen Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect.").

If INA § 236(a) did not apply to Petitioner—like DHS contends—vast portions of the INA § 236 would be rendered meaningless. This is because DHS contends that noncitizens like Petitioner who entered without inspection are really "applicants for admission" and therefore subject to mandatory detention under INA § 235(b)(2). Courts have made it clear that statutes must be interpreted as a whole, "giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent,

meaningless or superfluous." *Shulman v. Kaplan*, 58 F.4th 404, 410–11 (9th Cir. 2023) (quoting *Rodriguez v. Sony Computer Ent. Am., LLC*, 801 F.3d 1045, 1051 (9th Cir. 2015)).

It is noteworthy that "[w]hen Congress adopts a new law against the backdrop of a longstanding administrative construction," courts "generally presume[] the new provision should be understood to work in harmony with what has come before." *Monsalvo Velazquez v. Bondi*, 145 S. Ct. 1232, 1242 (2025) (internal quotation marks omitted). Here, DHS' sudden reversal—particularly after Congress just recently amended INA § 236 to include the LRA provisions—further undermines the Department's argument that the detention authority for noncitizens like Respondent lies under INA § 235(b) instead of INA § 236(a).

I. RESPONDENTS' POSITION THAT PETITIONER IS SUBJECT TO MANDATORY DETENTION IS A VIOLATION OF WELL SETTLED LAW.

a. INA § 235(b)(2) Does Not Apply to Noncitizens Who Entered Without Inspection

As noted above, DHS' new position contends that Petitioner is subject to mandatory detention under INA § 235(b)(A) because she is an "applicant for admission." But INA § 235(b)(A) concerns a completely different category of noncitizens. In *Jennings*, the Supreme Court discussed INA § 235 as part of a process that "generally begins at the Nation's borders and ports of entry, where the Government must determine whether a [noncitizen] seeking to enter the country is admissible." 583 U.S. at 287. As for INA § 236, *Jennings* described 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 288. The Court then summarized the distinction as follows: "In sum, U.S. immigration law authorizes the Government to detain certain [noncitizens] seeking admission into the country under §§ [235](b)(1) and (b)(2). It also authorizes the Government to detain certain [noncitizens]

already in the country pending the outcome of removal proceedings under §§ [236](a) and (c)." *Id.* at 289 (emphasis added); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (a noncitizen "who *tries to enter* the country illegally is treated as an applicant for admission . . . and a [noncitizen] who is detained *shortly after unlawful entry* cannot be said to have effected an entry") (emphasis added) (cleaned up).

DHS' newfound position misconstrues the phrase "applicant for admission" to suggest that every person, other than those who have been admitted, are subject to mandatory detention. INA § 235(a)(1) defines an "applicant for admission" as a person who is "present in the United States who has not been admitted or who arrives in the United States." INA § 235(a)(1). According to DHS, INA 235(b)(1) generally applies to arriving aliens and INA § 235(b)(2) serves as a broader catchall provision for all applicants for admission not covered by INA § 235(b)(1). In other words, DHS argues that every noncitizen who entered without parole or inspection is an "applicant for admission" pursuant to § 235(a)(1) and is therefore subject to mandatory detention. However, INA § 235(b)(2)(A) states in full that:

> Subject to subparagraphs (B) and (C), 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.*
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> *Id.* (emphasis added).

Thus, for section 235(b)(2)(A) to apply, several conditions must be met—in particular, an "examining immigration officer" must determine that the individual is: (1) an "applicant for admission"; (2) "seeking admission"; and (3) "not clearly and beyond a doubt entitled to be admitted." DHS' position conveniently overlooks these conditions and treats "applicants for admission" the same as those "seeking admission." The phrase "seeking admission" is undefined in the statute but necessarily implies some sort of present-tense action. *See Matter of M-D-C-V-*,

28 I. & N. Dec. 18, 23 (BIA 2020) ("The 'use of the present progressive, like use of the present participle, denotes an ongoing process.'" (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1011-12 (9th Cir. 2020))). Indeed, only those who take affirmative acts, like submitting an "application for admission," are those that can be said to be "seeking admission" within § 235(b)(2)(A).

By limiting (b)(2) to those "seeking admission," Congress confirmed that it did not intend to sweep into this section individuals like Petitioner who have already entered and are now residing in the United States. *See Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc) (holding that an individual submits an "application for admission" only at "the moment in time when the immigrant actually applies for admission into the United States.")[1] Accordingly, INA § 235(b)(2)'s reference to "applicants for admission" must be read "in their context and with a view to their place in the overall statutory scheme." *San Carlos Apache Tribe v. Becerra*, 53 F.4th 1236, 1240 (9th Cir. 2022) (citation omitted); *see also King v. Burwell*, 576 U.S. 473, 492 (2015) (looking to an act's "broader structure . . . to determine [the statute's] meaning"). The Board's recent decision in *Matter of Q. Li*, 29 I. & N. Dec. 66 (BIA 2025) reinforces this position. The Board held that a noncitizen who was apprehended "approximately 5.4 miles away from a designated port of entry and 100 yards north of the border" was detained under INA § 235(b) and not INA § 236(a). *Id.* at 67. In other words, the noncitizen was apprehended upon arrival. The Board then explained that such persons are properly treated as "arriv[ing] in the United States," given that they are "detained shortly after unlawful entry," and "'[are] apprehended' just inside 'the southern border, and not at a point of entry, on the same day [they] crossed into the United States.'" *Id.* at 68 (quoting *Matter of M-D-C-V-*, 28 I. &. N. Dec. 18, 23

[1] In *Torres*, the *en banc* Court of Appeals rejected the idea that § 235(a)(1) means that anyone who is presently in the United States without admission or parole is someone "deemed to have made an actual application for admission." *Id.* (emphasis omitted).

(BIA 2020)). Notably, the Board's decision supports the argument that INA § 236(a) "applies to [noncitizens] already present in the United States," while INA § 235(b) "applies primarily to [noncitizens] seeking entry into the United States and authorizes DHS to detain a[] [noncitizen] without a warrant at the border." *Id.* at 70 (internal quotation marks omitted).

The broader statutory structure of immigration detention authority also demonstrates the inapplicability of INA § 235(b) to Petitioner's case. *See King*, 576 U.S. at 492 (explaining that an act's "broader structure" can be a useful tool "to determine [a statute's] meaning."); *see also Biden v. Texas*, 597 U.S. 785, 799–800 (2022) (looking to statutory structure to inform interpretation of INA provision). This is particularly true where "a provision . . . may seem ambiguous in isolation." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). In such situations, the statute's meaning "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*

The broader text of INA § 235 reinforces this understanding of the two sections' structure and application. INA § 235 concerns "expedited removal of inadmissible *arriving* [noncitizens]." INA § 235 (emphasis added). Paragraph (b)(1) encompasses only the "inspection" of certain "arriving" noncitizens and other recent entrants the Attorney General designates, and only those who are "inadmissible" for having misrepresented information to an inspecting officer or for lacking documents to enter the United States. Paragraph (b)(2) is similarly limited to people applying for admission when they arrive in the United States. The title explains that this paragraph addresses the "[i]nspection of other [noncitizens]," i.e., those noncitizens who are "seeking admission," but whom (b)(1) does not address. *Id.* § 235(b)(2), (b)(2)(A).

By limiting (b)(2) to those "seeking admission," Congress confirmed that it did not intend to sweep into this section individuals like Petitioner who have already entered and are now residing in the United States. Otherwise, the language "seeking admission" in INA § 235(b)(2) serve no purpose, as the statute specifies that it is addressing a person who is both an "applicant for admission" and who is determined to be "seeking admission." *Id.*

Furthermore, subparagraph (b)(2)(C) addresses the "[t]reatment of [noncitizens] arriving from contiguous territory," i.e., "the case of [a noncitizen] . . . who is arriving on land." INA § 235(b)(2)(C). This language further underscores Congress's temporal requirements in INA § 235 and focus on those who are arriving into the United States. Similarly, the title of § 235 refers to the "inspection" of "inadmissible arriving" noncitizens. *See, e.g., Dubin v. United States*, 599 U.S. 110, 120–21 (2023) (relying on section title to help construe statute).

Finally, the entire statute is premised on the idea that an inspection occurs near the border and shortly after arrival, as the statute repeatedly refers to "examining immigration officer[s]," INA § 235(b)(2)(A), (b)(4), and sets out procedures for "inspection[s]" of people "arriving in the United States," id. § 235(a)(3), (b)(1), (b)(2), (d).

b. Case Law Does Not Support the Respondent's Novel Position

As briefly mentioned above, the Board's recent decision in *Matter of Q. Li* does not support the Respondents' position, and in fact reiterates the long held understanding that INA § 235(b)(2) applies narrowly to those who were "detained shortly after unlawful entry," and "'[are] apprehended' just inside 'the southern border, and not at a point of entry, on the same day [they] crossed into the United States.'" *Matter of Q. Li*, 28 I&N Dec. at 68. Crucially, nothing in *Matter of Q. Li* supports DHS' new drastically overbroad interpretation of detention authority under INA § 235(b)(2). Instead, the BIA held narrowly that "we hold that an applicant for admission

who is arrested and detained without a warrant *while arriving* in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings is detained under section 235(b) of the INA, 8 U.S.C. § 1225(b), and is ineligible for any subsequent release on bond under section 236(a) of the INA, 8 U.S.C. § 1226(a)." *Id.* at 69 (emphasis added); *see also Matter of M-S-*, 27 I&N Dec. 509, 516 (A.G. 2019) (noting that ". . . section 235 (under which detention is mandatory) and section 236(a) (under which detention is permissive) can be reconciled only if they apply to different classes of aliens.") (quoting *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1081 (9th Cir. 2015) (concluding that "permissive and mandatory [provisions] are in harmony, as they apply to different situations").

DHS cannot reasonably argue that *Matter of Q. Li* applies to Petitioner or any noncitizen who entered the U.S. without inspection and was not arrested or detained without a warrant while arriving in the U.S. Indeed, the Board made a very clear distinction between noncitizens like Q. Li (who were detained and released on parole and then re-detained upon termination of the parole) and noncitizens who entered without permission and were never detained by noting that INA § 236 "'*applies to aliens already present in the United States*' and 'authorizes detention only '[o]n a warrant issued' by the Attorney General leading to the alien's arrest.'" *Id.* at 70 (emphasis added) (quoting *Jennings*, 583 U.S. at 302–303). The Supreme Court's decision in *Jennings* also demonstrates that INA § 235 is a process that "generally begins at the Nation's borders and ports of entry, where the Government must determine whether a [noncitizen] seeking to enter the country is admissible," whereas INA § 236 governs "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." 583 U.S. at 287, 288.[2]

No precedential BIA decisions support DHS' position. Few unpublished Board decisions on this matter currently exist, but at least one of them reversed an IJ's decision finding that INA § 235(b) mandatory detention applied in a case nearly identical to Respondent's. *See* Ex. A, September 1, 2023 BIA Decision (noting that "respondent last entered the United States without being admitted or paroled" and holding that "we are unaware of any precedent stating that an Immigration Judge lacks authority to redetermine the custody conditions of a respondent in removal proceedings under the circumstances here.").

Notably, this issue is subject to ongoing federal litigation and at least two district courts have recently granted injunctive relief in favor of noncitizens similarly situated to Respondent. For example, a district court in the Western District of Washington preliminarily enjoined the Executive Office for Immigration Review ("EOIR") in Tacoma, Washington from denying bond pursuant to INA § 235(b) on similar grounds raised in this memorandum of law.[3] *See* Ex. B.,

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[2] There is no dispute that the Supreme Court was aware of the distinction between INA § 235 and INA § 236 when it rendered its decision. During oral argument, the government's attorney was directly questioned directly about this applicability of each statute and confirmed that INA § 236(a) applies to those who were present without having been admitted or paroled. *See* Transcript of Oral Argument at. 8:2-15, *Jennings v. Rodriguez*, 583 U.S. 281 (2018), available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1204_k536.pdf (last accessed August 4, 2025). The government took the same position before the Supreme Court even more recently in *Biden v. Texas*. *See* Transcript of Oral Argument at 44:24-45:2, *Biden v. Texas*, 597 U.S. 785 (2022), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-954_m6hn.pdf (last accessed August 4, 2025) ("[Solicitor General]: . . . DHS's long-standing interpretation has been that [236](a) applies to those who have crossed the border between ports of entry and are shortly thereafter apprehended.").

[3] Like Respondent, the plaintiffs in this matter are individuals who entered without inspection and were not previously detained. Immigration Judges at the Tacoma, Washington immigration court took the position that their detention was governed by INA § 235(b) rather than INA § 236(a). The matter is still pending a final resolution, but the order granting preliminary injunctive

ECF Doc. 29 April 24, 2025 Order Granting Preliminary Injunction. More recently, on July 28, 2025, a court in the Central District of California issued a preliminary injunction enjoining DHS from continuing to detain similarly situated noncitizens unless they are provided with an individualized bond hearing. *See* Ex. C, ECF Doc. 14, July 2025 Order Granting Preliminary Injunction (noting that INA § 235 does not apply to noncitizens who entered without inspection or parole); *see also Martinez v. Hyde*, Civil Action No. 25-11613-BEM, 2025 U.S. Dist. LEXIS 141724 *13, 2025 WL 2084238 (D. Mass. July 24, 2025) (finding that DHS' "selective reading of the statute [INA § 235]—which ignores its 'seeking admission' language—violates the rule against surplusage and negates the plain meaning of the text."); *Gomes v. Hyde*, 1:25-cv-11571-JEK, 2025 U.S. Dist. LEXIS 128085, 2025 WL 1869299 (D. Mass. July 7, 2025) (finding INA § 1226(a) applies to those who entered without inspection or parole).

CONCLUSION

For the foregoing reasons, the Court should find this Court has jurisdiction over this matter and that the Petitioner's detention is unlawful and grant this habeas petition and order her release.

s/Regis Fernandez
Regis Fernandez, Esq.
Attorney for Petitioner

relief soundly rejected the Defendants' arguments and found that plaintiffs have a likelihood of success on the ultimate merits of this issue.

PROOF OF SERVICE

No service is needed as Respondent's participate in ECAS for the New Jersey District Court.

s/Regis Fernandez
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Dated: August 26, 2025