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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DIANA M. RIVERA ZUMBA, A[redacted] 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' BRIEF IN FURTHER SUPPORT OF ANSWER TO HABEAS PETITION

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PRELIMINARY STATEMENT

On August 28, 2025, the Court issued an opinion and order finding it possessed jurisdiction over the Petitioner's habeas petition and directing Respondents to submit a brief concerning the lawfulness of Petitioner's detention. On September 5, 2025, the Respondents submitted a brief arguing, in essence, that because Petitioner was an "applicant for admission" she was properly subject to mandatory detention under 8 U.S.C. §1225(b)(2) a statute that has historically been used to detain noncitizens with little or no ties to the U.S. Incredibly, the Respondents claim that the Petitioner is now subject this statute, INA §235(b)(2) which has rather than INA §236(a) which applies to all other aliens who have been present in the U.S. Petitioner now submits her brief in reply to the Respondents' legal arguments regarding custody.

The legally precarious position that the Respondents propose is disturbing on many levels and Petitioner addresses each point below. Also, as Respondents' point out in yesterday's submission, on September 5, 2025 the Board of Immigration Appeals issued an agency decision in Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025) adopting the Respondents legal position in this case, that persons who have lived decades in the U.S. can be summarily detained without bail and summarily removed even while acknowledging that this is a break from longstanding past practice.

I. No Chevron Deference Is Due to the BIA And Petitioner's Detention Should Be Covered by 8 USC § 1226 (INA §236(a))(bond possible) and Not 8 USC §1225((INA §235(b)(2)(mandatory detention).

As a preliminary matter, this Court reviews the instant statute *de novo* since the federal courts no longer owe deference to federal agencies. Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024)(overruling Chevron deference to agency interpretations of ambiguous statutes).

Under a pure *de novo* standard of review this Court should find that the Respondents' position is not supported at all by the statutory provisions of the INA regarding detention. However, rather than reiterate the lengthy statutory examination already presented by Petitioner in her opening brief, Petitioner's counsel hereby highlights the main points as to why this Court should find that that statute at issue does not apply and that Petitioner's detention is unlawful.

A. The Plain Language of the Detention Statutes Only Authorize Petitioner's Detention Under INA 236(a) and Not 236(d).

There are three main detention statutes in the INA. A mandatory one for "arriving aliens seeking admission" in expedited removal proceedings, who have little or no ties to the U.S. INA §235. Another one for criminal aliens who are also subject to mandatory detention under INA 236(c). And the final catchall one for aliens, all other aliens who are in the US, and are presumably eligible for bond. INA §236(a). The Petitioner in this case has always been subject to the last discretionary detention statute allowing for release, INA §236(a), that is, until recently.

On July 6, 2025, Respondent, DHS, through memo instructed all of its employees at the Immigration and Customs Enforcement ("ICE") agency to "revisit" its legal position and apply section 235(mandatory detention for arriving aliens) of the INA, rather than section 236(a)(non-mandatory detention for non-criminals present in the U.S.) to "all applicants for admission," thereby subjecting a whole group of aliens who had entered and were already residing in the U.S., and were historically not subject to mandatory detention, to mandatory and unreviewable detention. The Respondents' position is simple: that because Petitioner has never been "admitted" to the U.S., she is an "applicant for admission" and therefore subjected to expedited removal under INS §235(b)(2). Thus, through memo, DHS now purports to subject an entire group of individuals, with lengthy periods of residence and equities in the U.S., including the

Petitioner, to mandatory detention. With the stroke of the proverbial pen, DHS has now stripped millions of "persons" residing in the U.S. of the most basic right to meaningfully challenge their detention and removal. Petitioner submits that the Respondents position is clearly unlawful at the statutory and constitutional level.

First, the Respondents' position is that the plain language of the 235(b)(2) statute clearly applies to the Petitioner. Yet, the issue here is not whether INA §235(b)(2) mandates detention. That much is clear as the Petitioner is detained with no possibility of release no matter what equities she has. The issue is whether this section, INA §235(b)(2), applies to individuals such as Ms. Rivera Zumba, who entered the U.S. over 23 years ago and have extensive ties to the United States. Jennings v. Rodriguez, 583 U.S. 281, 288, 297 (2018)(contemplating bail for persons in the U.S.). Petitioner submits that, from the inspection of the actual INA §235 statute, it is clear that it was not intended to be used against persons who had entered decades ago and have ties to the U.S., but rather to individuals with recent entries and have some form of proximity to the border. The only proximity that Ms. Rivera Zumba has to the border is that this is where is now being currently detained, in Adelanto (which means "progress" in Spanish), California, after having lived for over 23 years in New Jersey. Thus, instead of progress on the immigration statutory front, we are faced with a significant setback and deterioration of civil liberties and rights of millions of persons in the U.S. including the Petitioner. But back to the statutory analysis.

As a preliminary matter, the INS §235(b) statute is entitled "Inspection of applicants for admission" and discusses several conditions that must be met including that an "examining immigration officer" must determine that the individual is an "applicant for admission", "seeking admission" and "not clearly and beyond a doubt entitled to be admitted." Id. Thus, from the

wording of the statute at issue, it is clear that DHS is erroneously treating "applicants for admission" the same as those "seeking admission" where seeking admission necessarily implies present-tense action and does not envision persons who have entered the U.S. decades ago and are now residing in the U.S. Torres v. Barr, 976 F.3d 918, 927 (9th Cir. 2020)(en banc)(rejecting the idea that anyone who is present in the United States without admission or parole is someone "deemed to have made an actual application for admission."). By limiting INA §235(b)(2) to those "seeking admission" Congress confirmed that it did not intend to be apply this statute to those aliens residing in the U.S. Thus, the plain language of the statute does not compel this Court to subject Ms. Rivera Zumba to the 235(b)(s) mandatory detention/expedited removal scheme for applicants for admission who are seeking admission at our nation's borders.

Second, Respondents' contention that the congressional intent is clear in relegating individuals like Ms. Rivera Zumba, who have not been admitted to the U.S., to INA Section 235(b)(2), is unconvincing. As recent courts have pointed out, Respondents new policy contradicts ICE's own implementing regulations, decades of practice, and the U.S. Supreme Court's own understanding of the statutory layout. See Romero v. Hyde, No. CV 25-11631-BEM, 2025 WL 2403827, at *19 (D. Mass. Aug. 19, 2025)(concluding that "the interpretation being advanced by the Government, which would require the mandatory detention of hundreds of thousands, if not millions, of individuals currently residing within the United States, is contrary to the plain m text of the statute and the overall statutory scheme). Not at all convinced, the court in Romero v. Hyde points out: "if Congress's intention was so clear, why did it take thirty years to notice?"). Id. at 29. That is because the statutory language was clear from that beginning that the mandatory detention statute was intended to be applied to those individuals seeking admission at our nation's borders and not to persons who have already entered and have

been living here for decades. See Matter of Yajure Hurtado at 225 (BIA conceding that EWI aliens within the US have, for decades, been afforded bail).

B. Other Rules of Statutory Construction Compel This Court to Find that INA §236(a) is the Controlling Detention Statute in This Case.

As the Court in Romero v. Hyde points out, this "novel position" is "really a policy argument, projected onto Congress" and it violates basic rules of statutory construction. Id. at 28. None of it makes sense except by seeing it for what it is: as a unlawful power grab meant to relegate millions of individuals to detention camps while terrorizing everyone else into abandoning their rights (and departing the U.S.) by subjecting them to a statutory scheme that Congress never intended to be applied to them.

i. Violation of the Rule Against Surplusage.

First, this new interpretation violates the rule against surplusage. For example, if Congress had intended to permit only persons who has been "admitted" to be eligible for release they could have just stated so. Congress could have simply said "only persons who are admitted *may* be released. All others *shall* be detained." Instead, we have three separate statutes that presumably worked in harmony with one another, until a few weeks ago, and, twenty-eight years later, are now somehow irreparably superfluous. Shulman v. Kaplan 58 F.4th 404, 410-11 (9th Cir. 2023)(finding that statutes must be interpreted as a whole in a manner that does not render the same statute inconsistent, meaningless or superfluous). Thus, this court should not accept that these other detention statutes were legislated into existence only to serve as decoration.

The same goes for the passage by Congress of the Laken Riley Act ("LRA"). With so many challenges facing our country surely Congress does not sit around writing statutes that serve no purpose except to be "doubly" or "triply" sure that the law was being followed.

Respondents submit to this Court that even though the LRA added mandatory detention requirements for "inadmissible" aliens simply to "shore up what Congress believed was an enforcement gap" and reflects "a congressional effort to be doubly sure." Respondents' Brief at 10. citing Barton v. Barr, 590 U.S. 222, 239 (2020). This Court should not be persuaded that this redundancy was intended. As the District Court in Massachusetts observed in Romero v. Hyde, the language at issue in Barton v. Barr involved the commission of a crime of moral turpitude that made the alien both inadmissible and removable and did not make the statute redundant at all. Id. at 27 ("By contrast, Respondents' reading of sections 1225 and 1226 is better conceived as a contradiction…[t]hus, by creating a specific exception, disallowing bond for certain applicants for admission, Congress clearly evinced its intention that bond remain available for the remainder."). They were two separate statutes. Thus, this court should reject Respondents' argument that the LRA was passed simply as a way of being super-duper-sure that inadmissible aliens who were arrested for crimes were mandatorily detained even though they were supposedly already subject to mandatory detention in the first place.

Given that agency actions now face more scrutiny (with the elimination of Chevron deference) and given the Respondents abrupt departure from past interpretations of the statute at hand, this Court should employ the rule of lenity and give the benefit of any ambiguity to the petitioner, and not the government in this case. See Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L.Ed. 433 (1948). But as shown above, the statute at issue is not ambiguous and was intended to work in harmony with the other statutes. There was nothing ambiguous about it until recently. The only thing that has become ambiguous is the Department of Justices' respect for the rule of law and the slippery slope this creates for the civil liberties and rights of the rest of the population. We have entered the acceleration phase of the erosion of our rights.

ii. Prohibition Against Retroactive Application of New Standards.

Another rule of statutory application which the court should consider in this case is the prohibition against the retroactive application of new standards by the BIA. See Francisco-Lopez v. AG United States, 970 F.3d 431 (3d Cir. 2020). In Franciso-Lopez v. AG United States, the Third Circuit Court was asked to examine the retroactive application of an expansive definition of larceny offenses that retroactively constituted crimes involving moral turpitude, upending decades of practice of considering larceny offenses CMT's only if there was an intent to *permanently* deprive. Id. at 433 citing Matter of Diaz-Lizarraga, 26 I&N Dec. 847 (BIA 2016) and Matter of Obeya, 26 I. & N. Dec. 856, 858-61 (BIA 2016). Rejecting the expansive, retroactive definition of a CMT (as applied to larceny offenses), the Third Circuit vacated the BIA's decision noting its aversion to retroactive application of immigration laws. Id. at 436 citing INS v. St. Cyr., 533 U.S. 289, 320, 12 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)(quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 449, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)("In the immigration context, our aversion to retroactivity is particularly significant and is generally informed by 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."). That is why aliens that were eligible for a 212(c) waiver may not be retroactively stripped of this right to seek this waiver. Thus, the rule against retroactivity and the rule of lenity come into play and make the application of this new standard to Ms. Rivera Zumba, legally unwarranted.

The five factors for this retroactivity test are 1) whether the particular case is one of first impression; 2) whether the new rule represents an abrupt departure from well established practice or merely occupied a void in an unsettled area of law 3) the extent to which the party

against whom the new holding is applied in fact relief on the former rule, 3) the degree of the burden imposed and 5) the statutory interest in application of this new rule. Id.

Applying the facts of this case and the recent interpretation and application of this mandatory detention statute to new arrivals, all factors favor the Petitioner. First, even though the BIA unequivocally states in their Matter of Yajure Hurtado decision that this is an issue that is being raised for the first time before the BIA, they do not indicate that this is a novel issue. In fact, the BIA in Yajure Hurtado states: "[w]e acknowledge that for years Immigration Judges have conducted bail hearing for aliens who entered the United States without inspection…In fact, the supplemental information for the 1997 interim rule…reflects that the Immigration and Naturalization Service took the position at that time that '[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond determinations.). Id. at 225. Thus, the BIA admits that this is not the way this statute has been applied or interpreted until now. And that the only thing novel about this now is that nobody thought about interpreting this statute this way until a couple of weeks ago when the Trump administration set out to implement the largest deportation campaign in the history of the U.S. regardless of whether the detention statutes actually authorized mandatory blankets detentions or not.

This leads us to the second factor: whether this new rule represents a radical and abrupt departure from well established practice as conceded by the BIA. As shown above, it does.

The third factor also tilts in favor of Ms. Rivera Zumba (whether the party against whom the new holding is applied relied on the former rule). And the standard here is not whether the noncitizen actually relied on the old law but whether such reliance was reasonable. Petitioner submits that, absent a criminal conviction or departing the U.S., it would not have been

unreasonable for her to rely on her right to be free from detention based on a continued and consistent application of the detention statutes as applied to her, especially since she was already in removal proceedings and had attended all her hearings. It was reasonable for her to walk free and about her business as she had done for the last 23 years assuming she would not be detained, chained and scurried away to the other side of the country after an eight-state ordeal where she and her fellow detainees were forced to sleep on the floor like dogs.

Fourth, the burden imposed on Ms. Rivera Zumba through the retroactive application of this new rule is heavy. She has been stripped away from her son, whose father died a couple of years ago and who is starting college at the New Jersey Institute of Technology (NJIT) this month. She was shipped out thousands of miles from her home state, deprived of food and water and subject to overcrowded conditions in detention, all solely due to the Respondents' stated goal of maximizing fear and chaos among this large segment of the national population all for the sole purpose of them giving up their statutory and constitutional rights (and abandon the U.S.). The problem is: what happens to the rights of those of us who have no choice but to stay.

Lastly, the statutory interest in applying this new law retroactively is nonexistent. Ms. Rivera Zumba is not part of a group of criminal aliens that have recently infiltrated the U.S. and present an imminent danger to society. She had been living in the U.S. peacefully for years prior to her detention. Thus, there is no discernible BIA uniformity interest, in retroactively applying this novel interpretation when the BIA had already uniformly applied the prior standard for more than two decades before abruptly deciding to change course a few months ago. See Francisco-Lopez v. AG United States, at 440 citing Garcia-Martinez v. Sessions, 86 F.3d 1291, 1295-96 (9th Cir 2018) (holding that the BIA's uniformity interests do not "have a great deal of weight in a case like this one where the BIA lived with the preexisting rule for seven decades and, in fact,

until just a couple of years ago would have treated [the petitioner] as a person who had not committed CIMTs"). The only discernable statutory interests in implementing this statute this way was to circumvent and violate the U.S. Constitution. That is the only conclusion this court, as many others have, can reach.

II. Applying INA §235(b)(2) Statute to the Petitioner's Case Is Unconstitutional as It Would Violate the Due Process Clause of the U.S Constitution.

Notably, even though Petitioner's two-count habeas petition complaint clearly argues that the Petitioner's detention under INA §235(b)(2) is unconstitutional, Respondents make absolutely no attempt to defend its constitutionality and the great dangers it presents to all of us living in the continental U.S. Petitioner submits that this court has jurisdiction to review the constitutionality of her detention as the Fifth Amendment guarantees that "[n]o personal shall be…deprived of life, liberty, or property, without due process of law." U.S. Const. amend. Moreover, under the two-part inquiry, Patchak. V. Jewell, 828 F.3d 995, 1004 (D.C. Cir. 2016), the court must, first "determine whether the constitutional safeguards apply at all and whether the procedure followed is constitutionally sufficient. Make the Road New York v. Noem, Case NO. 25-cv-190 (JMC)(Opinion, August 29, 2025)(finding that the government's expanded application of expedited removal to noncitizens apprehended anywhere in the U.S. violated the due process clause and issuing stay).

The Respondents claim that, because the Petitioner has not been *admitted* to the United States, she is only entitled to almost non-existent protections made available by Congress under INA §235(b)(2). However, the law is clear that, even though certain constitutional protections do not extend to noncitizens outside of the US, once a noncitizen *enters* the country, legal circumstances change because the Due Process clause applies to all "persons" within the United

States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Zadvydas v. Davis, 533 U.S. 678, 693 (2001); Landon v. Plasencia, 459 U.S. 21, 34 (1982)(finding that once present in the U.S., noncitizens have a "weighty" liberty interest in remaining, as they "stand[]to lose the right to stay and live and work in this land of freedom."); Shaughnessy v. United States, ex rel. Mezei, 345 U.S. 206, 212 (1953)("[O]nce passed through our gates, *even illegally*, noncitizens "may be expelled only after proceedings confirming to traditional standards of fairness encompassed in due process of law."); Mathew v. Diaz, 426 U.S. 67, 77 (1976)("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to constitutional protection). The same applies to a person's liberty interests since the Respondents' position contradicts more than a century of precedent which holds that those who have entered the U.S. have a liberty interest in remaining-no matter how they entered and who they are. See Yamataya v. Fisher, 189 U.S. 86, 100-01 (1903)(even noncitizen who entered illegally cannot be "deprived of [her] liberty" without receiving "due process of law"); Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025)(Venezuelan nationals alleged to be members of a foreign terrorist organization and subject to removal under the Alien Enemies Act are subject to due process of law under the Fifth Amendment under "well established" rule); A.A.R.P. v Trump, 145 S. Ct. 1364, 1367 (2025)(Venezuelan nationals entitled to due process).

Accordingly, while the government's power to summarily exclude aliens is "at its zenith at the international border," See United States. v. Flores Montano, 541 U.S. 149, 152 (2004), the Constitution requires the Government to "turn square corners" with regards to providing due process for noncitizens "arrested at courthouses or off the street" in the interior of the country." See Make the Road v. Noem, at 25. This is why the government must provide sufficient due process to individuals who have lived in the U.S. for many years, such as the Petitioner or

"[who] may even be U.S. citizens." Id. Because once we go down this legal rabbit hole and deprive a non-citizen woman who has lived over 23 years in the U.S. of her liberty rights without sufficient due process, there is nothing legally to stop the government from applying the same expedited scheme to U.S. citizens. A.A.R.P. v. Trump at 1367 ("[p]rocedural due process rules are meant to protect against the mistaken or unjustified deprivation of life, liberty or property"). Seen through this prism, the Respondents' position is alarming as such application of this expedited detention and removal scheme can easily be applied to lawful permanent residents or U.S. citizens as well living in the U.S. or coming back from a trip.

Given the serious constitutional implications in allowing Respondents to stretch the reach of the 235(b)(2) detention statute to persons, such as the Petitioner, who have already entered and have lived in the U.S. for many years, it is best to interpret such statute as not applicable to these cases, in order to avoid serious constitutional questions.

CONCLUSION

For the foregoing reasons, the Court should find that the Petitioner's detention is unlawful and grant this habeas petition and order her release. Multiple other district courts across the U.S. have already flatly rejected the Respondent's proposition on statutory grounds as well as constitutional concerns and, respectfully, this court should too. See Lopez-Campos v. Raycraft, 2025 WL 2496379 (August 29, 2025, Michigan Easter District Court)(ordering alien released or given bond given the due process grounds); Lopez Benitez v. Francis et al., --- F.Supp.3d ----, ----, No. 1:25-cv-05937-DEH, 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025)(ordering the release of a noncriminal who has lived in the US for over 2 years but arrested under this new national mandatory detention campaign). Gomes v. Hyde, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at *8 n.9 (D. Mass. July 7, 2025) ("DHS cannot convert the statutory authority

governing ... detention from [Section 1225(b)] to [Section 1226(a)] through the post-hoc issuance of a warrant.") (citing Matter of Q. Li, 29 I. & N. Dec. 66, 69 n.4 (BIA 2025)); Martinez v. Hyde, --- F. Supp. 3d ----, 1:25-cv-11613-BEM, 2025 WL 2084238 (D. Mass. July 24, 2025) ("[S]ection 1125(b)(2) cannot be read to mandate detention of non-citizens already present within the United States, based on certain inadmissibility grounds, as that would nullify a recent amendment to the immigration statues."); Rodriguez v. Bostock, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); Bautista v. Santacruz, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 28, 2025)(enjoining DHS from detaining without a bond hearing); Rosado v. Figueroa et al., No. 2:25-cv-02157-DLR, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025)(granting habeas and ordering new removal hearing); Gonzalez et al. v. Noem et al., No. 5:25-cv-02054-ODW-BFM (C.D. Cal. Aug. 13, 2025)(granting TRO and ordering release); dos Santos v. Noem, No. 1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025)(granting habeas saying gov't had not met burden); Maldonado v. Olson, --- F.Supp.3d ----, No. 0:25-cv-03142-SRN-SGE, 2025 WL 2374411 (D. Minn. Aug. 15, 2025)(granting preliminary injunction from applying automatic stay and ordering release); Romero v. Hyde, et al., --- F.Supp.3d ----, No. 1:25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025)(granting habeas and warning against application against citizens); Benitez et al. v. Noem et al., No. 5:25-cv-02190-RGK-AS (C.D. Cal. Aug. 26, 2025)(issuing TRO granting bond hearing); Kostak v. Trump et al., No. 3:25-cv-01093-JE-KDM, 2025 WL 2472136 (W.D. La. Aug. 27, 2025)(granting a TRO and ordering a bond hearing). It is our duty as attorneys, jurists and citizens and as anyone who has sworn to uphold the U.S. Constitution, to do so. For the above reasons, this Court should grant Petitioner's habeas petition.

Dated: 9/9/25

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