UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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| Armando BECERRA VARGAS,<br><br>Petitioner,<br><br>v.<br><br>Pamela Bondi, United States Attorney General, *et al.*,<br>Respondents | ) | No. 5:25-CV-01023-FB-HJB |

**RESPONSE OF PETITIONER TO THE RESPONDENTS' ANSWER AND THEIR MOTION TO DISMISS IN PART OR SEVER THE PETITION FOR WRIT OF HABEAS CORPUS**

The Petitioner, Mr. Becerra, submits his response to the Respondents' response to his habeas petition urging denial and motion to dismiss dated September 12, 2025. Respondents generally maintain that Petitioner's detention is lawful. They assert that an intervening Board of Immigration Appeals' (BIA) decision, *Matter of Yajure-Hurtado*, published on September 5, 2025, resolves that "aliens present in the United States without having been admitted or paroled, like this Petitioner, are subject to mandatory detention under § 1225(b)(2) as applicants for admission. 29 I&N Dec. 216 (BIA 2025)." Resp. Br. 2. Respondents (1) argue for severance or dismissal of all but the first three of Petitioner's seven causes of action, which they believe are redressable (substantive due process, unlawful application of the INA, and procedural due process). They state that his APA claim, his Suspension Clause claim, and his injunctive/stay claims are unredressable. Resp. Br.1-2. The Respondents (2) assert also a threshold jurisdictional challenge, asserting that no set of facts in support of Petitioner's claim would entitle him to relief, namely

his release, because "[T]his statutory interpretation issue is not properly before the district court and must be funneled through the court of appeals." Resp. Br. 12-17. The Respondents (3) believe also that"[t]here is no colorable claim in this habeas petition that Petitioner's detention without bond is unconstitutional" and "Petitioner is not entitled to any [further due process] beyond what § 1225(b) provides him." Resp. Br. 17-18. The Court should deny their motion, and grant the relief requested. The Court should find that it owes no deference to *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025), because this Petition for release involves statutory interpretation, and it should find the BIA's abrupt turnaround after 30 years based on its new interpretation of the immigration bond scheme is incorrect and contrary to the U.S. Constitution.

Petitioner has not, and is not, challenging the commencement of proceedings, nor ICE's initial detention of him, nor ICE's removal proceedings at all. Here, Petitioner has shown he was placed in proceedings in June 2012. ICE released him on his own recognizance the same day, that is, under INA §1226(a). He remained released, as removal proceedings progressed, over the next thirteen years. He complied with ICE's order of recognizance, and never failed to miss a court hearing or an ICE checkin. In June 2025, ICE suddenly re-arrested him at his annual check-in in San Antonio, without providing rationale or justification. Habeas Petition 1-2, 20. It now argues that he is subject to mandatory detention under INA §1225(b)(2), as an "applicant for admission." Resp. Br. 7-8. He did not, and does not, challenge "the threshold decision to detain or release." The Respondents urge now that their new interpretation of the bond statutes should be shielded from review by this Court. But his removal proceedings—now in detention—are proceeding apace. No individualized determination as to factors such as his flight risk or dangerousness occurred before ICE arrested him in June 2025, despite him seeking to have that done by the immigration judge in August 2025, which IJ Tijerina refused to do, because the IJ found he had not ju-

risdiction to do so because he found § 1225(b)(2) subjected him to mandatory detention. Petitioner raises a substantial constitutional question that cannot properly be adjudicated administratively.

Nothing in the record reflects—and Respondents do not assert—(1) who made the decision to detain him, (2) when that decision occurred, (3) on what basis the decision to detain him was made, or (4) whether there was any material change in circumstances with respect to Petitioner that triggered his detention.

Respondents' novel position would expand § 1225(b) far beyond how it has been enforced historically, potentially subjecting millions more undocumented immigrants to mandatory detention, while simultaneously narrowing § 1226(a) such that it would have extremely limited (if any) application. If, as Respondents contend, anyone who has entered the country unlawfully, regardless of how long they have resided here, is subject to mandatory detention under § 1225(b)(2)(A), "[i]t has been estimated" that the application of § 1225 that Respondents propose "would require the detention of millions of immigrants currently residing in the United States." *Martinez*, 2025 WL 2084238, at *5 (citing Maria Sacchetti & Carol D. Leonning, *ICE declares millions of undocumented immigrants ineligible for bond hearings*, Washington Post (July 14, 2025), https://washingtonpost.com/immigration/2025/07/14/ice-trump-undocumented-immigrants-bond-hearings/ [https://perma.cc./LN4F-FJDG] ("[T]he policy will apply to millions of immigrants who crossed the U.S.-Mexico border over the past few decades.

## I. The Court Should Reject the Respondents' Jurisdictional Challenge

The Court has habeas jurisdiction under 28 U.S.C. § 2254. That jurisdiction is not withdrawn, as Respondents argue, under 8 U.S.C. §§ 1252 (a)(5) and (b)(9), and (g). Resp. Br. 12.

Respondents state "[t]his statutuory interpretation issue . . .must first be funneled through the court of appeals," citing a district court decision, *SQDC v. Bondi*, No. 25–3348 (PAM/DLM),

2025 WL 2617973 (D. Minn. Sept. 9, 2025). Resp. Br. 12. At least one court of appeals, the First Circuit, has explicitly and repeatedly "held that district courts retain jurisdiction over challenges to the legality of detention in the immigration context." *Kong v. United States*, 62 F.4th 608, 614 (1st Cir. 2023) (quoting *Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (citing *Hernández v. Gonzales*, 424 F.3d 42, 42 (1st Cir. 2005))).[1] So, too, has the Supreme Court. In *Jennings v. Rodriguez*, 583 U.S. 281, the Court specifically held that section 1252 did not bar review of non-citizens' claims of entitlement to bond hearings pending resolution of their immigration proceedings. *Id.* at 292–95; *see also Johnson v. Guzman Chavez*, 594 U.S. 523, 533 n.4 (holding same, summarily citing *Jennings).* These cases clearly demonstrate that this Court has jurisdiction to determine what legal authority governed Petitioner's detention and whether, as a result, Petitioner was entitled to a bond hearing. *See generally Jennings*, 583 U.S. 281 (doing precisely that).[2]

Respondents' argument to the contrary relies alternatively on one of two mischaracterizations. First, Respondents claim that Petitioner's claim stems from his detention during removal proceedings." Resp. Br. 13, 17. But challenging denial of a bond hearing is not the same thing as challenging the initial detention decision, as the Supreme Court has made clear. *Nielsen v. Preap*,

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[1] Although section II-A of Justice Alito's *Jennings* opinion, concerning section 1252, was joined only by a plurality of the Court, *see Jennings*, 583 U.S. at 284 (noting that Justices Roberts and Kennedy joined that part of the opinion), three additional justices reached the same conclusion in dissent. *See id.* at 355 (Breyer, J., dissenting) ("Jurisdiction also is unaffected by 8 U.S.C. § 1252(b)(9), which by its terms applies only '[w]ith respect to review of an order of removal under [§ 1252(a)(1)].' § 1252(b). The respondents challenge their detention without bail, not an order of removal.' " (brackets in original)). This Court should therefore properly give *Jennings*'s jurisdictional holding its full precedential value based on "common ground shared by five or more justices." *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (quoting *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992)).

[2] *See also* 8 C.F.R. § 1003.19(d) ("Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding.").

586 U.S. 392, 402 (2019) (citing *Jennings*, 583 U.S. at 294). In his operative complaint, Petitioner clearly bases his claim on "the [Immigration Judge's] assertion that he was not entitled to bond due to the government's assertion that he was detained pursuant to [mandatory detention §1225(b)(2)] rather than 8 U.S.C. §1226." Habeas Pet. 3. Therefore, section 1252 "does not present a jurisdictional bar." *Nielsen*, 586 U.S. at 402.

**Section 1252(g)**

Second, Respondents cite to *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020), where the court of appeals held that no district court has jurisdiction to review "commence proceedings…[or] the execution of a removal order." Respondents claim that Petitioner's detention "arises from the decision to commence removal proceedings" as analogous to the decision to apply the detention statutes to certain classes of citizens in its novel reading of §§ 1225, 1226. Resp. Br. 13. In fact, courts have long held that § 1252(g) does not prohibit challenges to unlawful practices merely because they are in some fashion connected to removal orders. For example, in *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998)— interpreting § 1252(g)—the ninth circuit specifically held § 1252(g) did not bar due process claims. *Id.* at 1052–53; *see also Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir. 2000). There, plaintiffs sought injunctive relief on the ground that certain Immigration and Naturalization Service administrative procedures used to obtain final orders with respect to document fraud violated their due process rights. *Walters*, 145 F.3d at 1036. Those orders "render[ed] the [noncitizen] deportable and permanently excludable." *Id.* The government argued the district court lacked jurisdiction under § 1252(g) to issue an injunction prohibiting the deportation (as it was then called) of noncitizens that received inadequate process. *Id.* at 1052. The ninth circuit held § 1252(g) "does not prevent the district court from exercising jurisdiction over the plaintiffs' due process claims." *Id.* Plaintiffs' due process claims did "not arise from a 'decision

or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien,' but instead constitute 'general collateral challenges to unconstitutional practices and policies used by the agency.' " *Id.* (quoting 8 U.S.C. § 1252(g); then quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991)). The ninth circuit wrote, "Although the constitutional violations ultimately may have led to the plaintiffs' erroneous deportation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims." *Id.*

**Section 1252(b)(9)**

Respondents argue his constitutional claims regarding their detention of him are removed from this Court's jurisdiction, and must wait for a final order of removal. Resp. Br. 14-17. Section 1252(a)(5) provides that a petition for review is "the sole and exclusive means for judicial review of an order of removal." Section 1252(b)(9) is a " 'zipper clause' that consolidates all 'questions of law and fact ... arising from any action taken or proceeding brought to remove an alien' into a petition for review." *Martinez v. Napolitano*, 704 F.3d 620, 622 (9th Cir. 2012) (quoting § 1252(b)(9)). The "arising from" language appears broad, but the Supreme Court has cautioned against an "expansive" interpretation of § 1252(b)(9) that would lead to "absurd" results and make certain claims "effectively unreviewable." *Jennings*, 583 U.S. at 293, 138 S.Ct. 830. Courts have held that § 1252(b)(9) does not does not bar claims that are "independent of or collateral to the removal process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016). *See, e.g., Jose J.O.E. v. Bondi*, No. 25-cv-3051, --- F. Supp. 3d ----, 2025 WL 2466670, at *7 (D. Minn. Aug. 27, 2025) (collecting cases) (rejected government's § 1252(b)(9) arguments alongside their similar § 1252(g) challenge).

The Tenth Circuit has weighed in on this issue as well, reaching the following § 1252(b)(9)

conclusion:

> We cannot accept the district court's expansive interpretation of § 1252(b)(9). Indeed, the language of the statute leaves no room for debate. The statute's 'narrow' scope does not deprive the district court of jurisdiction . . . . Congress did not intend the zipper clause 'to cut off claims that have a tangential relationship with pending removal proceedings.' . . . . A claim only arises from a removal proceeding when the parties in fact are challenging removal proceedings.

*Mukantagara v. U.S. Dep't of Homeland Sec.*, 67 F.4th 1113, 1116 (10th Cir. 2023) (citations omitted). Petitioner's claims here are legal in nature and challenge specific conduct unrelated to removal proceedings, and under the above reasoning, this Court should likewise reject Respondents' § 1252(b)(9) jurisdictional argument.

Moreover, because Petitioner challenges ICE's actions taken *after* their decision to commence proceedings and release him in 2012, §§ 1252(b)(9) and 1252(a)(5) do not apply. Here, Petitioner "does not contend that greater judicial-type procedures must be imposed upon the administrative actions of ICE than those already required by law; [rather, he] argues that the agency must comply with the procedures already in place, and its failure to do so amounts to a complete and arbitrary denial of due process." *Chipantiza-Sisalema*, 2025 WL 1927931, at *3 (citing *Velasco Lopez*, 978 F.3d at 851).

**Section 1252(e) Does Not Deprive This Court of Jurisdiction**

The Respondents do not argue that 8 U.S.C. § 1226(e) deprives this Court of jurisdiction, but this Court may assure itself that section is not an impediment here.

8 U.S.C. § 1226(e) provides:

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

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

## II. The Court Should Reject Respondents' Argument That the Plain Language of Sections 1225 and 1226 Require Mandatory Detention for Noncitizens Who Are Present without Admission, and Owes No Deference to *Matter of Yajure-Hurtado*

Respondents contend that Petitioner "falls squarely within the ambit of section 1225(b)(2)(A)'s mandatory detention requirement," given he is an "applicant for admission." Resp. Br. 10.

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

> **Effective immediately, it is the position of DHS that [applicants for admission under section 235(a)(1) of the Immigration and Nationality Act] are subject to deten-**

> **tion under INA § 235(b) and may not be released from ICE custody except by INA § 212(d)(5) parole.** These aliens are also ineligible for a custody redetermination hearing ("bond hearing") before an immigration judge and may not be released for the duration of their removal proceedings absent a parole by DHS. For custody purposes, these aliens are not treated in the same manner that "arriving aliens" have historically been treated.

As a result, ICE is now ignoring particularities that have historically been highly relevant to determinations whether a noncitizen such remain or custody or be released—such as: when, why, or how they entered the U.S.; whether they have criminal convictions; whether they present a danger to the community or flight risk; whether they have serious medical conditions requiring treatment.

*First*, as several courts have recently explained, § 1225 imposes three conditions that must be satisfied for § 1225(b)(2)(A) to apply and justify mandatory detention. *See, e.g., Benitez*, 2025 WL 2371588, at *5 ("[F]or section 1225(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.'") (quoting *Martinez v. Hyde*, --- F. Supp. 3d ----,. 2025 WL 2084238, at *2 (D. Mass. July 24, 2025)); § 1225(b)(2)(A). Fatal here to Respondents' argument is that Petitioner is not "seeking admission." *Id.* Petitioner's Notice to Appear, which states "You have been admitted to the United States, but are removable for the reasons stated below." See Exh 3, attached, Notice to Appear.. Petitioner's Notice to Appear (NTA) reiterates this point: "You are an alien present in the United States who has not been admitted or paroled." It is axiomatic that a person *present in the United States* "since 2002" (NTA, allegation #3) is not an individual seeking admission to the United States. The BIA in *Matter of Yajure-Hurtado* does away with the geographic absurdity of seeking admission after decades of presence in the interior:

> The respondent's argument is not supported by the plain language of the INA,

> and actually creates a legal conundrum. If he is not admitted to the United States (as he admits) but he is not "seeking admission" (as he contends), then what is his legal status? The respondent provides no legal authority for the proposition that after some undefined period of time residing in the interior of the United States without lawful status, the INA provides that an applicant for admission is no longer "seeking admission," and has somehow converted to a status that renders him or her eligible for a bond hearing under section 236(a) of the INA, 8 U.S.C.A. § 1226(a). See Matter of Lemus, 25 I&N Dec. 734, 743 & n.6 (BIA 2012) (noting that "many people who are not actually requesting permission to enter the United States in the ordinary sense [including aliens present in the United States who have not been admitted] are nevertheless deemed to be 'seeking admission' under the immigration laws").

*Matter of Yajure-Hurtado*, 29 I&N Dec. at 221. The BIA goes on to hold that "[t]he statutory text of the INA is not "doubtful and ambiguous" but is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status. See INA § 235(b)(1), (2), 8 U.S.C. § 1225(b)(1), (2). But Petitioner is not, nor was he at the time he was arrested, "seeking admission," *id.*, § 1225(b)(2)(A)'s mandatory detention provision does not apply. Respondents are wrong to interpret the statute as placing Petitioner "squarely within the definition of individuals deemed to be "applicants for admission," the specific detention authority under § 1225." Resp. Br. 10. *See also Romero v.Hyde*, --- F. Supp. 3d ----, 2025 WL 2403827, at *9 (D. Mass. Aug. 19, 2025) ("[T]he phrase 'seeking admission,' otherwise undefined in the statute, necessarily requires some 'some sort of present-tense action.') (citation omitted).

As the Supreme Court recognized in *Jennings*, § 235(b) is concerned "primarily [with those] seeking entry," and is generally imposed "*at the Nation's borders and ports of entry*, where the Government must determine whether [a noncitizen] seeking to enter the country is admissible." *Jennings*, 583 U.S. at 297, 287. Throughout its text, the statute refers to "inspections"—a term not defined in the INA but which typically connotes an examination upon or soon after physical entry. Many statutory provisions, various regulations and agency precedent discuss "inspection" in the context of ad-

mission processes at ports of entry, further supporting the conclusion that § 235 has a limited temporal and geographic scope.[3] Consistent with this focus on the moment of physical entry, § 235(b)(2) is limited to those in the process of "seeking admission." Similarly, the implementing regulations at 8 C.F.R. § 1.2 address noncitizens who are presently "coming or attempting to come into the United States." The statutory and regulatory text's use of the present and present progressive tenses excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States. A number of the courts cited above have agreed that § 235(b)(2) only reaches individuals who are in the process of entering or who have just entered the United States.

Additionally, the INA's statutory structure makes clear that § 236 also reaches individuals who have not been admitted and have entered without inspection. Section 236(c) exempts specific categories of noncitizens from the default eligibility to seek release on bond in § 236(a), including noncitizens subject to certain grounds of inadmissibility. Moreover, Congress recently added new mandatory detention grounds to § 236(c) that apply only to noncitizens who have not been admitted,[4] expressly including those who are inadmissible under § 212(a)(6)(A), or (7)--that is, persons who entered without being admitted.[7] If § 236(a) did not apply to inadmissible noncitizens, then the carve out in § 236(c) that refers to inadmissibility and Congress' most recent amendments would all be surplusage.

The statutory history also supports a limited reading of § 235(b)'s reach. When Congress amended § 235(b)'s predecessor statute—which authorized detention only of arriving noncitizens—to include individuals who had not been admitted, legislators expressed concerns about recent arri-

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[3] *See* INA § 235 (titled "Inspection by immigration officers; expedited removal of inadmissible arriving [noncitizens]; referral for hearing"); INA §§ 235(b)(1)–(2) (referring to "inspections" in their titles); INA § 235(d)(1) (authorizing immigration officials to search certain conveyances in order to conduct "inspections" where noncitizens "are being brought into the United States").

[4] *See, e.g.*, INA §§ 217(h)(2)(B)(i), 235A; 8 U.S.C. § 1752a; 8 C.F.R. § 235.1; *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).

vals to the United States who lacked the documents to remain in the country. There was no suggestion in the legislative history that Congress intended to subject all people present in the United States after an unlawful entry to mandatory detention and thereby transform immigration detention and sweep millions of noncitizens into § 235(b).[5]

Under the Supreme Court's recent decision in *Loper Bright v. Raimondo*, a federal habeas court should independently interpret the meaning and scope of § 235(b) using the traditional tools of statutory construction.[6] Because the BIA's decision in *Matter of Yajure Hurtado* is a deviation from the agency's long-standing interpretation of §§ 235 and 236; is not guidance issued contemporaneously with enactment of the relevant statutes; and contradicts the statutory interpretations of dozens of federal courts, a habeas court should give it no weight under *Loper Bright* or *Skidmore*. Indeed, a number of courts have instead found that under *Loper Bright*, the prior longstanding practice of the government—under which noncitizens who resided in the United States and previously entered without inspection were deemed subject to INA § 236—is a useful interpretive aid.[7]

**A. The Record Demonstrates Detention Is Pursuant to § 236(a), Not § 235(b)**

Here, the record shows that ICE arrested Petitioner in June 2012 in San Antonio pursuant to 8 U.S.C. § 1226(a). See Exh. 3, NTA, Exh. 4, Form I-200 Warrant for Arrest, dated June 2012; Form I-286 Notice of Custody Determination (supports his claim that detention is pursuant to § 1226(a)); Exh. 5, Form I-213, Record of Inadmissible/Deportable Alien, created by ICE on June 28, 2012, in-

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[5] INA § 236(c)(1)(E), *as amended by* Laken Riley Act, Pub. L. 119-1, 139 Stat. 3 (2025).

[6] *See, e.g., Martinez,* 2025 WL 2084238 at *6 (citing the use of present and present progressive tense to support conclusion that INA § 235(b)(2) does not apply to individuals apprehended in the interior); *accord Lopez Benitez*, 2025 WL 2371588 at *6–7. *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in INA § 235(b)(1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

[7] *See, e.g., Maldonado*, 2025 WL 2374411 at *11.

dicating "BECERRA was provided with copies of I-862 [NTA], I-200 [warrant of arrest], I-286 [Notice of DHS Custody Determination], and I-220A, [Order of Release on Recognizance]." This further militates toward the Court's concluding that Section 1226(a), as opposed to 1225(b)(2)(A), is applicable to this case. Which makes sense because Section 1225(b)(2)(A) would correspond to those "arriving," while Section 1226(a) would correspond to those "present." It was not until Petitioner requested a custody redetermination hearing (bond hearing) that Respondents claimed his detention was under § 1225(b)(2)(A). The Court should not credit this new position that was adopted post-hac, despite clear indication that Petitiner was not detained under this provision. *Cf. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 22, 24 (2020) (holding that, under arbitrary and capricious review in the administrative law context, "[t]he basic rule is clear: [a]n agency must defend its actions based on the reasons it gave when it acted," not on "impermissible post hoc rationalizations"). And several courts addressing this very issue have held the same.[8] The issue seems beyond dispute that Section 1226(a), and not Section 1225(b)(2)(A), applies to a noncitizen who has resided in this country for over twenty-three years (since 2002) and was already within the United States, was apprehended and released in 2012 within the U.S., and was apprehended and arrested most recently at his annual ICE check-in, and not upon arrival at the border. The reading of the statutes supports this finding, as does every other Court that has had to address the distinction between Section 1225(b)(2)(A) and Section 1226(a).[9] In fact, the plain text of Sections 1225 and

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[8] *See Lopez Benitez v. Francis et al.*, —— F.Supp.3d ——, ——, 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025).

[9] *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299 (D. Mass. July 7, 2025); *Martinez v. Hyde*, —— F. Supp. 3d ——, 1:25-cv-11613-BEM, 2025 WL 208438 (D. Mass. July 24, 2025); *Bautista v. Santacruz*, No. 5:25-cv-01873-SSS-BFM (C.D. Cal. July 28, 2025); *Rosado v. Figueroa et al.*, No. 2:25-cv-02157-DLR, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *Lopez Benitez v. Francis et al.*, —— F.Supp.3d ——, No. 1:25-cv-05937-DEH, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Gonzalez et al. v. Noem et al.*, No. 5:25-cv-02054-ODW-BFM (C.D. Cal. Aug. 13, 2025); *dos Santos v. Noem*, No. 1:25-cv-

1226, together with the structure of the larger statutory scheme, indicates that Section 1225(b)(2) does not apply to noncitizens who are arrested on a warrant issued by the Attorney General while residing in the United States.

While Respondents do not argue exhaustion, Petitioner remarks merely that it is not raised because any administrative appeal of bond denial is foreclosed now by *Matter of Yajure-Hurtado*, including his current one at the BIA. It would be futile. It would be inappropriate here to require him to exhaust his appeal to the Board of Immigration Appeals ("BIA"), see *Miranda v. Garland*, 34 F.4th 338, 351 (4th Cir. 2022) (where Petitioner has raised serious constitutional claims, administrative exhaustion should be excused absent a clear expression from Congress – and the INA does not require or mandate exhaustion of administrative remedies (quoting *McCarthy v. Madigan,* 503. U.S. 140, 144 (1992)).

**III. Constitutional Claims: Due Process**

Respondents urge this Court to reject his constitutional claims because "[P]etitioner is not entitled to anything beyond what § 1225(b) provides him. Resp. Br. 18. The continued detention of Petitioner, however, separates him from his family, prohibits his removal defense in many ways, including by inhibiting his access to computers, to any counsel's office to prepare evidence, to communicate with witnesses, gather evidence, and afford legal representation, among other related harms. His detention makes it difficult for them to access counsel and prepare for the ongoing removal proceedings.In the immigration context, the Supreme Court only recognizes two purposes for civil detention: preventing flight and mitigating the risks of danger to the community.

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12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Maldonado v. Olson*, —— F.Supp.3d ——, No. 0:25-cv-03142-SRN-SGE, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Romero v. Hyde, et al.*, —— F.Supp.3d ——, No. 1:25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Benitez et al. v. Noem et al.*, No. 5:25-cv-02190-RGK-AS (C.D. Cal. Aug. 26, 2025); *Kostak v. Trump et al.*, No. 3:25-cv-01093-JE-KDM, 2025 WL 2472136 (W.D. La. Aug. 27, 2025).

*Zadvydas*, 533 U.S. at 690; *Demore*, 538 U.S. at 528. A noncitizen may only be detained based on these two justifications if they are otherwise statutorily eligible for bond. *Zadvydas*, 533 U.S. at 690. Petitioner's detention is improper because he has been deprived of his substantive Due Process rights. The Fifth Amendment guarantees that no person shall be deprived of liberty without due process of law. U.S. Const. Amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). "Government detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural safeguards, or in certain special and non-punitive circumstances 'where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint.' " *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1076 (N.D. Cal. 2004) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Indeed, here, the Petitioner was released for over 13 years, from June 2012 to June 2023, and was not a danger to the community or a flight risk. The discretionary bond framework under Section 1226(a) requires a bond hearing to make an individualized custody determination – a hearing the IJ did not conduct. Therefore, without first evaluating Petitioner's risk of flight or dangerousness, his detention is a violation of his due process rights.

The procedural protections required in a given situation are evaluated using the *Mathews v. Eldridge* factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see Hernandez*, 872 F.3d 976, 993 (9th Cir. 2017) (applying *Mathews* factors in immigration detention context).

Turning to the first *Mathews* factor, petitioner has a substantial private interest in remaining free from detention. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Petitioner has been out of custody for over twenty three years, and during that time, established extensive ties and life in the community. His detention denies him that freedom.

Second, "the risk of an erroneous deprivation [of liberty] is high" where, as here, "[the petitioner] has not received any bond or custody redetermination hearing." *A.E. v. Andrews*, 2025 WL 1424382, at *5 (E.D. Cal. May 16, 2025). Civil immigration detention, which is "nonpunitive in purpose and effect[,]" is justified when a noncitizen presents a risk of flight or danger to the community. *See Zadvydas*, 533 U.S. at 690; *Padilla*, 704 F. Supp. 3d at 1172. Petitioner has one criminal case from an arrest on November 28, 2005, for Battery-Touch or Strike, under Florida Statutes §784.03, that resulted in the State dropping the charge. He has attended every court hearing since initiation of removal proceedings in 2012. The government does not dispute this and did not present evidence that petitioner was a flight risk or danger to community. Nonetheless, ICE detained him,and the government has not given any reason why it did so, other than arguing that he is subject to mandatory detention based on the government's decision pursuant to a nation-wide policy involving a novel interpretation of the INA. Petitioner has not been provided any procedural safeguards to determine whether his detention is justified, and his request for a custody redetermination was denied because the immigration judge found that he lacked jurisdiction. Given the absence of any procedural safeguards, "the probable value of additional procedural safeguards, i.e., a bond hearing, is

high." *A.E.*, 2025 WL 1424382, at *5.

Third, the government's interest in detaining petitioner without a hearing is "low." *Ortega v Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019); *Doe*, 2025 WL 691664, at *6. In immigration court, custody hearings are routine and impose a "minimal" cost. *Doe*, 2025 WL 691664, at *6. The government's interest is further diminished where a person "has consistently appeared for [his] immigration hearings ... and [ ] does not have a criminal record," *Pinchi v Noem*, 2025 WL 1853763 (N.D. Cal. 2025), at *2, as is the case here.

On balance, the *Mathews* factors show that Petitioner is entitled to a bond hearing, which should have been provided before petitioner was detained. "'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest.' " *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971)); *see Zinermon*, 494 U.S. at 127 ("Applying [the *Mathews*] test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty ...."). The Supreme Court has held that Due Process requires a pre-deprivation hearing before those released on parole from a criminal conviction can have their bond finally revoked. *See Morrissey*, 408 U.S. at 480–86. The same is true for those subject to revocation of probation. *Gagnon v. Scarpelli*, 411 U.S. at 782.

Given the absence of "evidence of urgent concerns," this Court should conclude that "a *pre*-deprivation hearing [was] required to satisfy due process." *Guillermo M. R.*, 2025 WL 1983677, at *9. Numerous district courts have reached a similar conclusion. *See, e.g., id.*; *Garcia*, 2025 WL 1927596, at *5; *Pinchi*, 2025 WL 1853763, at *3–4; *Ortega*, 415 F. Supp. 3d at 970; *Singh*, 2025 WL 1918679, at *8–9; *Doe*, 2025 WL 691664, at *6; *Valencia Zapata v. Kaiser*, 2025 WL 2578207, at *1 (N.D.Cal., 2025).

**IV. This Court Should Find His Suspension Clause Claim, His APA Claim, and His Injunctive Claims Are Proper and Redressable**

The Respondents state that his APA claim, his Suspension Clause claim, and his injunctive/stay claims are unredressable. Resp. Br.1-2. They cite no authority. Here, Petitioner has alleged viable causes of action, and he has sought injunctive relief from this Court, under the laws and the Constitution. The Respondents' motion to dismiss should be denied. The writ of habeas corpus should be granted. His detention is illegal. The writ is reduced to a sham if

The Suspension Clause of the United States Constitution dictates that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The writ of habeas corpus has long been viewed as a vital instrument to challenge an unlawful restraint of liberty. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (recognizing that the "writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions."). "[T]he Supreme Court has noted that this Clause requires 'some judicial intervention in deportation cases.' " *Muka v. Baker*, 559 F.3d 480, 483 (6th Cir. 2009) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001)).

Congress may eliminate habeas jurisdiction in certain cases without running afoul of the Suspension Clause as long as adequate and effective alternatives to habeas corpus relief are provided. *See St. Cyr*, 533 U.S. at 314 n.38 ("Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals."); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (holding that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus").

The bond process can be an adequate and effective alternative to habeas relief only if individuals are given a meaningful opportunity to exercise their rights guaranteed by law. 8 U.S.C. § 1226(a). The Court should find it has jurisdiction to remedy via habeas the executive branch's overreach regarding the broad and sweeping detention of noncitizens of the kind in this Petition within the United States.

The Court should not sever his Administrative Procedures Act (APA) claim. He assert he is confined in violation of the Administrative Procedure Act because DHS revoked its order or release on recognizance without a legal basis. Under the Act, an agency action may be set aside if it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). An action is arbitrary and capricious if the agency fails to examine relevant evidence or articulate a satisfactory explanation. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42–43 (1983). Post-hoc rationalizations will not suffice; agency action must be upheld, if at all, on the basis articulated by the agency itself. *See id.* at 50. An agency ought to lead by example and follow its own regulations. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *see also Webster v. Doe*, 486 U.S. 592, 602 n.7, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988).

Petitioner has shown that on July 8, 2025, DHS announced a new policy for detention regarding persons situated like Petitioner, here for over 23 years without admission or inspection. Exh. 1, Lyons memo; Exh. 3, NTA. It arrested him and canceled its Order of Recognizance, Form I-220A, in June 2025, without any procedure or hearing, without any rationale, and with severe prejudice to Petitioner.

He has sought injunctive relief with this Court. Habeas Petition 22-24. This Court should act on his request.

An injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking preliminary injunctive relief must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20, 129 S.Ct. 365. "[I]f a plaintiff can only show that there are serious questions going to the merits—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the balance of hardships tips *sharply* in the plaintiff's favor, and the other two *Winter* factors are satisfied." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks and citations omitted) (emphasis in original). "[W]hen the Government is the opposing party," the final two factors "merge." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009).

The Supreme Court has recognized this protected liberty interest even though the released individual is subject to extensive conditions of release, like reporting regularly to a parole officer, not using alcohol, and not traveling out of the country. *Young*, 520 U.S. at 148, 117 S.Ct. 1148; *see also Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."); *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (same in the context of probation). Courts have recognized that, with the passage of time, a protectable liberty interest can "crystallize[ ]" even where an individual was released from prison in error, where the individual "reasonably thought the release was deliberate and lawful." *See Hurd v. D.C., Gov't*, 864 F.3d

671, 683–84 (D.C. Cir. 2017).

The Petitioner has argued above that the *Mathews v Eldridge* injunctive relief tips sharply in his favor. The fact that Petitioner is subject to discretionary conditions of release likewise does not mean he lacks a protectable liberty interest and can be re-detained without process. *Zadvydas* provided no instruction for what process is necessary to protect non-citizens' liberty interest when the government seeks to return them to custody. Instead, *Morrissey* and *Young* address that issue, explaining that the deprivation is a "grievous loss" that can be taken away only upon review at a hearing before a neutral arbiter, regardless of whether government agents otherwise have statutory authority to re-detain. *Morrissey*, 408 U.S. at 482, 489,; *see also Young*, 520 U.S. at 148.

Respondents provide no principled reason for why Petitioner's liberty interest should be less than that of a U.S. citizen parolee or probationer. Although the Court "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature," *Rodriguez Diaz*, 53 F.4th at 1208 (quotation omitted), this is no less true in the context of a state's interest over parolees. The Supreme Court has instructed that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979), and if released a state has "an 'overwhelming interest' in ensuring that a parolee complies with [the conditions of parole] and is returned to prison if he fails to do so." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365(1998). The courts are "averse to imposing federal requirements upon the parole systems of the States." *Id.* at 369. The *Morrissey* court acknowledged these state interests, but found that the "State has no interest in revoking parole without some informal procedural guarantees." 408 U.S. at 483. If a parolee serving out a sentence for a violent crime, and subject to highly restrictive conditions of release, has a sufficiently

strong liberty interests to be entitled to a hearing prior to re-incarceration, then a non-citizen freed from civil detention on bond likely has a similar entitlement.

Petitioner can think of no other context in which government agents could permissibly take someone who had been released by a judge, lock up that person, and have no hearing either beforehand or promptly thereafter.

## V. Conclusion

"[A] complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.' " *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

Here, Petitioner has alleged viable causes of action, and he has sought injunctive relief from this Court, under the laws and the Constitution. The Respondents' motion to dismiss and sever his claims should be denied. The writ of habeas corpus should be granted. His detention is illegal. The writ is reduced to a sham if the trial courts do not act within a reasonable time. *Rhueark v. Wade*, 540 F. 2d 1282, 1283 (5th Cir. 1976); *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978); *Fay v. Noia*, 372 U.S. 391, 400 (1963) ("The writ must be construed to afford "a swift and imperative remedy in all cases of illegal restraint or confinement.")

Respectfully submitted on this 17th day of September, 2025.

/s/ Stephen O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE OF PETITIONER TO THE RESPONDENTS' ANSWER AND THEIR MOTION TO DISMISS IN PART OR SEVER THE PETITION FOR WRIT OF HABEAS CORPUS
in the case of Armando Becerra Vargas v. Pamela Bondi, et al., Civil Action 5:25-CV-01023, was sent to Lacy L. McAndrew, Assistant United States Attorney, Western District of Texas, 601 N.W. Loop 410, Suite 600, San Antonio, TX 78216 through the District Clerk's electronic case filing system on this day the 17th of September, 2025.

Dated this 17th day of September, 2025

s/ Stephen O'Connor
Stephen O'Connor