

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALVARO BLADIMIR ORTIZ)
VENTURA; RENE BALMORE CASTRO)
CARTAGENA; OLGER ZOTO,)

Petitioners,)

v.)

KRISTI NOEM; PAMELA BONDI,)
TODD M. LYONS; JEFFREY)
CRAWFORD; WARDEN, CAROLINE)
DETENTION CENTER, and LIANA)
CASTANO,)

Respondents

Case No. 1:25-cv-1429-MSN-WBP

**REPLY TO RESPONDENTS'
OPPOSITION TO AMENDED PETITION
FOR WRIT OF HABEAS CORPUS**

On September 2, 2025, Petitioners Alvaro Bladimir Ortiz Ventura (“Mr. Ortiz”), Rene Balmore Castro Cartagena (“Mr. Castro”), and Older Zoto (“Mr. Zoto”) filed an amended petition for a writ of habeas corpus. ECF Doc. 4. In response to the Court’s Order to Show Cause, Respondents oppose the Amended Petition. ECF Doc. 7. Petitioners file this reply and request the Court grant the petition for a writ of habeas corpus. First, the Court does not lack jurisdiction over the claims raised in the Amended Petition. Second, Petitioners detention is governed by 8 U.S.C. § 1226(a), not 8 U.S.C. § 1225, and thus they are, contrary to Respondents’ arguments, eligible for bond. Third, Respondents’ continued and unilateral actions precluding Petitions from posting the bond ordered by the immigration judges in each of their cases violates the Immigration and Nationality Act (“INA”) and their Constitutional rights.

I. This Court has jurisdiction over the claims presented in the Amended Petition.

Contrary to Respondents’ assertions, this Court does not lack jurisdiction over the claims raised in the petition. First, the Court does not lack jurisdiction under 8 U.S.C. § 1252(b)(9) as the Supreme Court has already rejected the expansive reading of the statute Respondents advance

here. *See Jennings v. Rodriguez*, 583 U.S. 281, 292-95 (2018). Section 1252(b)(9) works in conjunction with 8 U.S.C. § 1252(a)(5) to channel review of “questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States” through a petition for review of a final order of removal filed with an appropriate court of appeals. 8 U.S.C. §§ 1252(a)(5), (b)(9); *see Aguilar v. U.S. Immigr. & Customs Enforcement*, 510 F.3d 1, 11 (1st Cir. 2007) (describing § 1252(b)(9) as “a judicial channeling provision, not a claim-barring one”). Accordingly, courts have held that § 1252(b)(9) does not bar review of “now-or-never” claims seeking relief that courts cannot meaningfully provide alongside review of a final order of review.” *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020). Petitioners raise now-or-never claims here. Critically, bond proceedings are not reviewable in a petition for review. *See Guidel Polanco v. Garland*, 839 F. App’x 804, 805 (4th Cir. 2021) (dismissing a petition for review challenging a request for release on bond because “challenges to a[noncitizen’s] detention must be brought pursuant to a habeas corpus petition.”) (citing, *inter alia*, *Hosh v. Lucero*, 680 F.3d 375, 378 (4th Cir. 2012)). Because there is no way for Petitioners to bring their claims through a petition for review, § 1252(b)(9) does not bar their claims. *See Jennings*, 583 U.S. at 293 (2018) (observing that interpreting § 1252(b)(9) to bar detention claims would make them “effectively unreviewable” because “[b]y the time a final order of removal was eventually entered, the allegedly [unlawful] detention would have already taken place”).

Critically, Respondents do not explain how the claims raised in the Amended Petition relate to this jurisdiction-stripping provision. *See Opp.* at 9 (simply stating that “Petitioner’s claims cannot withstand this jurisdiction-stripping provision” and that any claims must be raised in immigration court). But Petitioners are not seeking review of any removability determination, and they do not argue that DHS improperly brought removal proceedings against them. *See generally*

ECF Doc. 4. Instead, Petitioners challenge their detention, which is only persisting due to DHS's unilateral choice to invoke a stay of the immigration judge's bond order. Simply put, they are not challenging removability, just their detention while that process plays out. *Texas v. United States*, 126 F.4th 392, 417 (5th Cir. 2025) (recognizing that § 1252(b)(9) "does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined, § 1252(b)(9) is certainly not a bar where, as here, the parties are not challenging any removal proceedings."); *Maldonado v. Olson*, -- F. Supp. 3d --, 2025 WL 2374411, *6-7 (D. Minn. Aug. 15, 2025).

Respondents' argument that 8 U.S.C. § 1252(g) bars the Court's review fares no better. Section 1252(g) bars courts from hearing "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). Consistent with the plain statutory language, the Supreme Court has adopted a "narrow reading" of 1252(g), holding that "the provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno v. Am.-Arab Anti-Discrimination ("AADC")*, 525 U.S. 471, 482, 487 (1999) (emphasis in original). Again, Respondents fail to explain how the claims raised in this proceeding relate to one of these three discrete actions. *See* Opp. at 9-10. They instead simply state that raising a constitutional claim is insufficient and *AADC* "barred claims similar to those brought here." Opp. at 10. But the claims in *AADC* related to the institution of removal proceedings and did not relate to unlawful detention or DHS's across-the-board invocation of a stay of orders granting bond simply because it disagrees with the immigration judge's orders. *See AADC*, 525 U.S. at 491. Respondents' overgeneralization in fact conflicts with the narrow holding in *AADC*, which "did not interpret

th[e statutory] language to sweep in any claim that can technically be said to ‘arise from’ the three listed actions of the Attorney General. Instead, [it] read the language to refer to *just those three specific actions themselves*.” *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (citing *AADC*, 525 U.S. at 482-483).

Indeed, Petitioners do not challenge any of the discrete decisions or actions enumerated in § 1252(g). They do not challenge or claim that the Government should not have put them in removal proceedings. They do not challenge the Government’s adjudication of their removability or any applications for relief filed in those proceedings. And none of Petitioners have a removal order to execute. Petitioners merely challenge the Government’s authority to detain them without the ability to seek release on bond pending those removal proceedings. *See Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) (holding that § 1252(g) does not bar claims that challenge “detention while the administrative process lasts.”); *Medina v. Noem*, -- F. Supp. 3d --, 2025 WL 2306274, *3 n.3 (D. Md. Aug. 11, 2025) (“Mr. Cruz Medina only seeks habeas relief with respect to his detention, not with respect to removal . . . Accordingly this claim does not implicate § 1252(g.”); *Mahdejian v. Bradford*, 2025 WL 2269796, *3 (E.D. Tex. July 2, 2025); *accord Cardoso v. Reno*, 216 F.3d 512, 516-17 (5th Cir. 2000) (recognizing that “section 1252(g) does not bar courts from reviewing an alien detention order, because such an order, while intimately related to efforts to deport, is not itself a decision to ‘execute removal orders’ and thus does not implicate section 1252(g.”); *Maldonado*, -- F. Supp. 3d --, 2025 WL 2374411, *5-6.

Respondents also seek dismissal on the theory that Petitioners’ arguments should have been brought in a separate action under the Administrative Procedures Act (“APA”) and are not proper under habeas. Opp. at 11-12. In support of this argument, Respondents rely on an unpublished decision from the Tenth Circuit, which held that a pro se inmate’s challenge to mail monitoring

as “not in accordance with” the APA was not a “recognizable habeas corpus claim.” *Mesina v. Wiley*, 352 F. App’x 240, 242 (10th Cir. 2009). In that case, the Tenth Circuit distinguished challenges to prison decisions, including “administrative segregation, exclusion from prison programs, or suspension of privileges” from claims involving challenges to convictions or actions that require the petitioner to remain in custody because in the former category of cases “a favorable resolution of the action would not automatically entitle the prisoner to release.” *Id.* But the challenges to the conditions of confinement raised in *Mesina* are clearly distinguishable from Petitioners’ claims challenging the lawfulness of their continued detention after an immigration judge has determined that they may be released on bond. Petitioners’ challenge to the lawfulness of their continued detention is a core habeas challenge that need not be brought under the APA. *See Munaf v. Geren*, 553 U.S. 674, 693 (2008) (“Habeas is at its core a remedy for unlawful executive detention.”).

Respondents also rely on the Fourth Circuit’s decision in *Obando-Segura v. Garland*, 999 F.3d 190 (4th Cir. 2021), holding that a habeas proceeding is not “a civil action” for purposes of the Equal Access to Justice Act. Yet, that decision analyzed the specific language from the EAJA statute, not whether habeas petitions are limited solely to Constitutional claims relating to detention. *See id.* at 195 (recognizing that there can be “a civil aspect” to habeas proceedings). Thus, *Obando-Segura* does not stand for the proposition that a noncitizen cannot bring a habeas petition to challenge their detention because it violates an existing statute.

Indeed, Respondents admit that habeas proceedings are appropriate when, like here, a petitioner seeks release from DHS custody. *Opp.* at 11. This position is grounded in the habeas statute itself, which extends the writ of habeas corpus to individuals “in custody in violation of the Constitution *or laws* or treaties of the United States.” 28 U.S.C. § 2241(c)(3) (emphasis

added). Furthermore, “where detention is constitutionally permissible, it is so only because ‘adequate procedural protections ensure that the government’s asserted justification for physical confinement outweighs the individual’s constitutionally protected interest in avoiding physical restraint.’” *Jarpa v. Mumford*, 211 F.Supp.3d 706, 721 (D. Md. 2016) (quote omitted); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Moreover, numerous courts across the country have recently addressed the claims raised by Petitioners in habeas petitions. *See Leal Hernandez v. Noem*, No. 1:25-cv-2428, 2025 WL 2430025, *14 (D. Md. Aug. 24, 2025); *Jacinto v. Trump*, No. 25-cv-3161, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Hoque v. Trump*, 0:25-cv-1576, 2025 U.S. Dist. LEXIS 117197, at *14-16 (D. Minn. June 17, 2025); *Gunaydin v. Trump*, No. 25-cv-01151, 2025 U.S. Dist. LEXIS 99237, at *14-22 (D. Minn. May 21, 2025); *Zabadi v. Chertoff*, No. 05-cv-01796, 2005 U.S. Dist. LEXIS 50670, at *1-2 (N.D. Cal. June 17, 2005) (listing cases). Because Petitioners bring this case to challenge their unlawful detention, it is a proper habeas claim. Accordingly, the Court should determine that it has jurisdiction over the claims raised in the Amended Petition.

II. Petitioners are subject to detention under 8 U.S.C. § 1226(a), not 8 U.S.C. § 1225(b).

At the heart of Respondents’ argument is a new statutory construction that is contrary to the plain language of the INA, decades of statutory construction and policy, and numerous recent decisions from across the United States. Specifically, Respondents submit that Petitioners are not, as the immigration judge found in each case, subject to detention under 8 U.S.C. § 1226(a), but instead are subject to detention under 8 U.S.C. § 1225(b)(2). *Opp.* at 12. However, Respondents fail to acknowledge that DHS *unsuccessfully* argued in immigration court that § 1225(b) applied and Respondents now ask this Court to ignore the immigration court’s legal finding and pretend that their determination of the applicable statute is correct. In fact, Petitioner Olger Zoto did not

enter the United States unlawfully; as an immigration judge recently determined, he was inspected and admitted when he last entered the United States.¹ *See* Exh. A, Affid. of Sarah Vuong. Thus, Mr. Zoto is clearly subject to § 1226(a) and is entitled to be released on the bond set by the immigration judge.

While Respondents have appealed the immigration judges' bond determinations to the Board of Immigration Appeals, what they seek to do here is what they have already done before the immigration court—neuter the finding of an immigration judge by requiring their legal argument be adopted as definitive to keep Petitioners detained in spite of orders that they should be released. Such attempt must be denied particularly with respect to Mr. Zoto, but also with respect to Mr. Ortiz and Mr. Castro.

Specifically, this Court should rule that Mr. Ortiz and Mr. Castro are subject to detention under § 1226(a), not § 1225(b). The Supreme Court has long recognized a clear distinction between noncitizens who are stopped at our borders and those who have entered the United States, even illegally. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo Urquidez*, 494 U. S. 259, 269 (1990) (Fifth Amendment's protections do not extend to noncitizens outside the territorial boundaries); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Supreme Court has stressed that once noncitizens “enter the country, the legal circumstance changes, for 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*, 533 U.S. at 693. Consistent with that distinction, the INA establishes separates

¹ Respondents repeatedly assert that all petitioners conceded that they entered without inspection. *See, e.g.*, Opp. at 23 (citing ECF Doc. 4 at ¶¶ 25, 31, 36). Not true. The Amended Petition alleged that Mr. Zoto “entered the United States *with inspection* in 2002.” ECF Doc. 4 at ¶ 36 (emphasis added).

procedures for the removal and detention of arriving or recently arrived noncitizens and those who have entered and established a presence in the United States, even those who have done so in violation of the immigration laws. For the latter, the INA mandates that “an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of a [noncitizen].” 8 U.S.C. § 1229a(a)(1). Removal proceedings under 8 U.S.C. § 1229a(a)(1) “shall be the sole and exclusive procedure from the United States” unless otherwise specified in the INA. 8 U.S.C. § 1229a(a)(3).

For noncitizens in standard removal proceedings under § 1229a (§ 240 of the INA), the INA mandates detention pending proceedings for certain classes of criminal noncitizens. *See* 8 U.S.C. § 1226(c). For all others, the noncitizen “may be arrested and detained” pending removal “[o]n a warrant issued by the Attorney General.” 8 U.S.C. § 1226(a). For noncitizens held under § 1226(a), DHS makes an initial custody determination. 8 C.F.R. §§ 1003.19(a), 1236.1(d). The noncitizen may continue to be detained, released on conditional parole, or released on a bond of at least \$1,500. *See* 8 U.S.C. § 1226(a). The noncitizen may, upon request, have the initial custody determination reviewed by an immigration judge, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), and ultimately by the Board of Immigration Appeals (“BIA”), *see* 8 C.F.R. § 1236.1(d)(3).

In 1996, Congress created separate, expedited procedures for “arriving aliens”² and certain “applicants for admission.” 8 U.S.C. § 1225(b). The INA defines an applicant for admission as a noncitizen “present in the United States who has not been admitted or who arrives in the United

² “Arriving alien” is a term of art defined by regulation as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port of entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to designated port of entry and regardless of the means of transport.” 8 C.F.R. § 1.2.

States (whether or not at a designated port of arrival and including a [noncitizen] who is brought to the United States after having been interdicted in international or United States waters).” 8 U.S.C. § 1225(a)(1). The INA further clarifies that the term “application for admission” has “reference to the application for admission *into* the United States,” making clear that the term applies to those applying to enter into the United States. 8 U.S.C. § 1101(a)(4) (emphasis added).

Critically, expedited removal proceedings do not apply to all “applicants for admission.” Instead, they may be applied only to: (1) individuals who are arriving in the United States at a port of entry without valid documents; and (2) those without valid documents who have been in the United States for less than two years and have not been admitted or paroled. 8 U.S.C. § 1225(b)(1)(A)(iii)(II); *see Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109 (2020). Further, this second subset of individuals—noncitizens who have been in the United States for less than two years and have not been admitted or paroled—only become subject to expedited removal if so designated by DHS.³ *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (granting discretionary authority to apply expedited removal to any or all noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II)); *Thuraissigiam*, 591 U.S. at 109; *United States v. Texas*, 144 F.4th 632 (5th Cir. 2025). Noncitizens placed in expedited removal proceedings are referred to standard removal proceedings under § 1229a if they establish a credible fear of persecution if removed. *See* 8 U.S.C. § 1225(b). Otherwise, the noncitizen is ordered removed “without further hearing

³ On January 24, 2025, DHS issued a notice designating the entire subset of noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II) subject to expedited removal: noncitizens “determined to be inadmissible under [8 U.S.C. §§ 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who have not affirmatively shown . . . that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility.” Notice, Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139, 8139 (Jan. 24, 2025). Yet, the District Court for the District of Columbia recently stayed this designation in *Make the Road New York v. Noem*, No. 25-cv-190, 2025 WL 2494908 (D.D.C. Aug. 29, 2025).

or review.” 8 U.S.C. § 1225(b)(1)(B)(iii). Further, any noncitizen “subject to the procedures under [8 U.S.C. § 1225(b)] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.” 8 U.S.C. § 1225(b)(1)(B)(iv).

Finally, § 1225(b)(2) includes a provision mandating the detention of certain “applicants for admission” not covered by § 1225(b)(1). Yet in keeping with the statute’s focus on arriving aliens, the statute does not mandate detention for all applicants for admission but only those who are “seeking admission” to the United States. 8 U.S.C. § 1225(b)(2). Courts and the U.S. Government have consistently taken the position that noncitizens who have entered without inspection and are encountered in the United States years after their initial entry are entitled to removal proceedings under § 1229a and subject to detention under § 1226. *See, e.g., Jennings v. Rodriguez*, 538 U.S. 281, 303 (2018) (“While the language of §§1225(b)(1) and (b)(2) is quite clear, §1226(c) is even clearer. As noted, §1226 applies to *aliens already present in the United States.*”) (emphasis added); IIRIRA Implementing Regulation, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (“Despite 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 redetermination.”); *Benitez v. Francis*, 2025 WL 2371588 (S.D.N.Y. Aug. 8, 2025) (holding that a noncitizens who has been residing in the United States for more than two years cannot be classified as an “alien seeking admission”); *Martinez v. Hyde*, 2025 WL 2084238 (D. Mass. July 24, 2025).

Yet on July 8, 2025, the Government abruptly rejected the reading of 8 U.S.C. § 1226(a) it had employed for decades. In a complete reversal, “DHS, in coordination with the Department of Justice (DOJ) . . . revisited its legal position on detention and release authorities,” and issued guidance instructing all ICE employees that 8 U.S.C. § 1225 rather than § 1226 “is the applicable

immigration detention authority for all applicants for admission.” Exh. B, Interim Guidance Regarding Detention Authority for Applicants for Admission. This reading of the statute has been overwhelmingly rejected by district courts that have considered the issue. *See, e.g., Rodriguez Vasquez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Leal-Hernandez v. Noem*, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Sampiao v. Hyde*, -- F. Supp. 3d --, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Lopez Santos v. Noem*, No. 3:25-cv-1193-TAD-KDM (W.D. La. Sept. 11, 2025) (attached as Exh. C); *Pizarro Reyes v. Raycraft*, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Cuevas Guzman v. Andrews*, 2025 WL 2617256, at *3 n.4 (E.D. Cal. Sept. 9, 2025); *Caicedo Hinestroza v. Kaiser*, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Jimenez v. FCI Berlin, Warden*, No. 25-cv-326-LM-AJ (D.N.H. Sept. 8, 2025); *Zaragoza Mosqueda v. Noem*, 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025); *Doe v. Moniz*, 2025 WL 2576819 (D. Mass. Sept. 5, 2025); *Hernandez Marcelo v. Trump*, No. 3:25-cv-94-RGE-WPK (S.D. Iowa Sept. 10, 2025) (attached as Exh. D); *Carmona-Lorenzo v. Trump*, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Cortes Fernandez v. Lyons*, 2025 WL 2531539 (D. Neb. Sept. 3, 2025); *Hernandez Nieves v. Kaiser*, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025); *Palma Perez v. Berg*, 2025 WL 2531566 (D. Neb. Sept. 3, 2025); *Vasquez Garcia v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Lopez Campos v. Raycraft*, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Kostak v. Trump*, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *O.E. v. Bondi*, 2025 WL 2466670 (D. Minn. Aug. 27, 2025); *Calderon v. Kaiser*, 2025 U.S. Dist. LEXIS 163975 (N.D. Cal. Aug. 22, 2025); *Romero v. Hyde*, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Samb v. Joyce*, 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *Jacinto v. Trump*, -- F. Supp. 3d --, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Arrazola-Gonzales v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025); *Maldonado v. Olson*, -- F. Supp. 3d --, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Jimenez v. Kramer*, 2025 WL 2374223 (D.

Neb. Aug. 14, 2025); *Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025); *Arostegui Castellon v. Kaiser*, 2025 WL 2373425 (E.D. Cal. Aug. 14, 2025); *dos Santos v. Noem*, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Benitez*, 2025 WL 2371588; *Rosado v. Figueroa*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *Martinez*, 2025 WL 2084238; *Gomes v. Hyde*, 2025 WL 1869299 (D. Mass. July 7, 2025).

This court should join its sister districts and conclude that individuals who have been in the United States for years are not subject to detention under 8 U.S.C. § 1225(b)(2). The plain language of the INA is clear: § 1225(b)(2) “authorizes the Government to detain aliens *seeking admission into the country*,” and § 1226(a) “authorizes the Government to detain certain aliens *already in the country* pending the outcome of removal proceedings.” *Jennings*, 583 U.S. at 289; *accord Sampiao*, --F. Supp. 3d--, 2025 WL 2607924, at *8; *Gomes*, 2025 WL 1869299, at *5; *Carmona-Lorenzo*, 2025 WL 2531521, at *2.

As the Supreme Court recognized in *Jennings*, § 1225(b) focuses on individuals arriving at the border and ports of entry, and thus are in the process of “seeking admission.” *Jennings*, 583 U.S. at 297, 303; *see also* 8 C.F.R. § 1.2 (addressing noncitizens who are “coming or attempting to come into the United States.”). Conversely, § 1226(a) focuses on individuals who are in the United States and the Government is seeking to remove through removal proceedings. *Jennings*, 583 U.S. at 303. The INA further clarifies that the term “application for admission” has “reference to the application for admission into the United States,” making clear that the term applies to those applying to enter into the United States. 8 U.S.C. § 1101(a)(4). Petitioners, who have each been present, worked, and established connections in the United States for many years cannot reasonably be described as “seeking admission.”⁴

⁴ Indeed, Mr. Zoto has already been admitted and is not “seeking admission” at this time.

Further, to apply the statute to “all applicants for admission” regardless of whether they are “seeking admission,” as Respondents urge, *see* Resp. 9, would render the phrase “seeking admission” redundant. *Martinez*, 2025 WL 2084238, at *2. And to “treat[] the terms ‘applicant for admission’ and ‘alien seeking admission’ as synonymous [would] violate[] the principle that Congress is presumed to have acted intentionally in choosing different words in a statute, such that different words and phrases should be accorded different meanings.” *Benitez*, 2025 WL 2371588, at *6.

Additionally, applying § 1225(b)(2) to all noncitizens except those who have been admitted would render § 1226(c)(1)(E) unnecessary. *Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924, at *8; *Rodriguez*, 779 F. Supp. 3d at 1259; *Gomes*, 2025 WL 1869299, at *7. In particular, that provision requires mandatory detention for individuals who are present in the United States without being admitted or paroled and who are subject to specific criminal conduct criteria. *Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924, at *8. If all noncitizens who are inadmissible are subject to mandatory detention, there would be no reason for Congress to have enumerated which inadmissible noncitizens are subject to mandatory detention under § 1226(c). *Id.* In fact, in the Laken Riley Act, Congress recently added new mandatory detention grounds to § 1226(c) that apply only to noncitizens who have not been admitted. *Id.*; *Rodriguez*, 779 F. Supp. 3d at 1259. Yet, if Congress intended § 1225(b) detention to extend to all noncitizens who have not been admitted, the recent amendments would be surplusage. *Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924, at *8 (citing the *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (“The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.”)).

While district courts have overwhelmingly agreed with these arguments, the Government has resisted. On September 5, 2025, the Board of Immigration Appeals adopted DHS’s novel statutory reading in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216. The Board found no distinction between the statutory terms “applicant for admission” and “seeking admission, and concluded that § 1225(b)(2) must be read to include all noncitizens who have not been inspected and admitted at any point. *Id.* at 221-22. Further, the Board asserted that legislative history supported its construction, although it did not cite any legislative history addressing the detention statutes. *Id.* at 223-25. Critically, this Court owes the Board no deference in this decision. *Loper Bright v. Raimondo*, 603 U.S. 369, 395, 401 (2024); *Rodriguez*, 2025 WL 1193850, at *12; *Kostak*, 2025 WL 2472136, at *2 n.29; *Gomes*, 2025 WL 1869299, at *8, n.9; *Maldonado*, 2025 WL 2374411, at *11. Rather than following the Board’s contrary conclusions—which are incorrect for the reasons discussed above—this Court should conclude that noncitizens who have entered the United States and are later placed in removal proceedings are subject to the detention provisions of 8 U.S.C. § 1226, not § 1225(b)(2). *See Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924, at * 8 n.11 (disagreeing with *Yajure Hurtado* in exercising its independent judgment); *Pizarro Reyes*, 2025 WL 2609425, at *6 (same).⁵

In the opposition filed with this Court, Respondents fail to acknowledge the overwhelming flood of recent cases rejecting their statutory argument and instead cite cases involving a different

⁵ In fact, just weeks prior to *Yajure Hurtado*, the Attorney General designated for publication a decision recognizing that a noncitizen arrested in the interior of the United States and placed into removal proceedings under 8 U.S.C. § 1229a is detained under 8 U.S.C. § 1226(a) and eligible for release on bond. *Matter of Akhmedov*, 29 I. & N. Dec. 166 (BIA 2025). In *Yajure Hurtado* the Board tried to distance its decision from the statements in *Akhmedov*, stating the immigration judge’s authority to grant bond was not an issue in that case. 29 I. & N. Dec. 226. But, at a minimum, *Akhmedov* demonstrates that the agency had, as recently as June 2025, considered individuals who had entered the United States and were later placed in removal proceedings eligible for bond under § 1226(a).

section of § 1225 that does not apply here. Opp. at 12-14 (citing *Abreu v. Crawford*, 2025 WL 51475 (E.D. Va. Jan. 8, 2025); *Olaya Rodriguez*, 2025 WL 2490670 (E.D. Va. June 24, 2025), *Romero v. Bondi*, 2025 WL 2490659 (E.D. Va. July 2, 2025), and *Pipa-Aquise v. Bondi*, 2025 WL 2490657 (E.D. Va. Aug. 5, 2025)). However, each of those cases involved individuals who were considered detained under § 1225(b)(1) because they had been placed in removal proceedings after a credible fear interview pursuant to *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019). *Olaya Rodriguez*, 2025 WL 2490670, at *2; *Romero*, 2025 WL 2490659, at *3; *Pipa-Aquise*, 2025 WL 2490657, at *2. But none of the Petitioners here were apprehended at the border and placed in credible fear proceedings pursuant to § 1225(b)(1), thus *Matter of M-S-*, 27 I. & N. Dec. 509, and the decisions relied upon by Respondents are inapplicable. See *Abreu*, 2025 WL 51475, at *3 (recognizing a “statutory distinction between noncitizens who are detained *upon arrival* into the United States and those who are detained after they have *already entered* the country, legally or otherwise.”). To be sure, none of these cited cases considered whether the petitioner was “seeking admission” and thus subject to mandatory detention under § 1225(b)(2) and thus provide no support for Respondents’ arguments in this case. Indeed, district courts have overwhelmingly rejected Respondents’ argument that § 1225(b)(2) applies to all “applicants for admission,” not merely those “seeking admission.” See, e.g., *Sampiao*, --F. Supp. 3d--, 2025 WL 2607924, at *8; *Gomes*, 2025 WL 1869299, at *5; *Carmona-Lorenzo*, 2025 WL 2531521, at *2; see Opp. at 13-15. While Mr. Ortiz and Mr. Castro are considered applicants for admission, they are not subject to mandatory detention under § 1225(b)(2) because they are not “seeking admission.” 8 U.S.C. § 1225(b)(2). Mr. Ortiz have each been in the United States for nearing ten years, and neither have a criminal history that would render them a danger to the community or ineligible for

immigration relief. Simply put, Mr. Castro’s entry in 2015 and Mr. Ortiz’s entry in 2016 do not render them individuals who are currently “seeking admission” to the United States.

Similarly, Respondents contend that Petitioners are only entitled to the due process provided by the INA. Opp. at 15-19. Yet the Supreme Court has been clear that for noncitizens “on the threshold of initial entry . . . [w]hatever the procedure authorized by Congress is, it is due process.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (emphasis added). Petitioners are not on the threshold of initial entry as they have been living in the United States for years. Indeed, it is well established that noncitizens like Petitioners who have “once passed through our gates, even illegally” are entitled to greater constitutional protections. *Id.*; see also *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of our geographic borders.”). Thus, even if Respondents are correct that Petitioners’ are properly detained under § 1225(b)(2)—which they are not, particularly with respect to Mr. Zoto—that does not resolve whether their detention complies with due process. As individuals who have “once passed through our gates” they are entitled to greater constitutional protections than those at the threshold of initial entry for whom due process is defined by the procedures set by Congress.

Further, even if the INA does define the process due to Petitioners, as explained *supra*, Petitioners are entitled to a bond hearing under the plain text of the INA and its implementing regulations. Because Mr. Zoto has been admitted and Mr. Ortiz and Mr. Castro are not “seeking admission,” they are all subject to detention under § 1226(a). See 8 U.S.C. § 1226(a); *Miranda v. Garland*, 34 F.4th 338, 346-47 (4th Cir. 2022) (recognizing due process rights for those who have entered without inspection).

III. DHS's invocation of the automatic stay of the bond orders violates the Constitution and the INA.

This Court should also join a growing number of sister districts in concluding that DHS's invocation of the automatic stay of the bond determinations violates Petitioners' due process rights and also the INA. As discussed in the Amended Petition, in 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), that, among other things, mandated detention of certain classes of criminal noncitizens pending removal proceedings, making them generally ineligible for bond or release under 8 U.S.C. § 1226(c). *See* Pub. L. 104-208, Div. C, § 303(a) (codified at 8 U.S.C. § 1226(c)). Recognizing that existing resources might be insufficient to support immediate compliance, IIRIRA allowed for a one-year transition period with less stringent custody rules if the Attorney General notified Congress within ten days of IIRIRA's enactment "that there [wa]s insufficient detention space and . . . personnel available" to comply with the mandatory detention provisions of 1226(c). *See* Pub. L. 104-208, Div. C, § 303(b)(2).

Recognizing that the Transition Period Custody Rules allowed for the release of noncitizens Congress deemed subject to mandatory detention, the implementing regulation allowed the legacy Immigration and Naturalization Service to invoke an automatic stay and appeal an immigration judge's decision overturning an initial custody determination denying bond or setting it at \$10,000 or more. 63 Fed. Reg. at 27448-49. In implementing the automatic stay provision, the Department of Justice ("DOJ") dismissed commenters' concerns that the automatic stay encroaches on the authority of immigration judges, noting that "custody appeals are themselves unusual, undertaken *only in compelling cases*, and subject to review by responsible senior officials within [INS]." 63 Fed. Reg. at 27447 (emphasis added). DOJ added that "[i]t is expected that such appeals will remain exceptional" and that now-former-INS "district directors

will continue to set custody conditions according to their best assessment of the bail risk presented in each case.” *Id.*

On October 31, 2001, DOJ issued an interim rule extending the automatic stay provisions beyond noncitizens subject to mandatory detention under § 1226(c) to allow INS to invoke the automatic stay in other cases in which INS’s decision to deny bond or set it at \$10,000 or higher was reversed or amended by an immigration judge. 66 Fed. Reg. 54909 (Oct. 31, 2001). DOJ subsequently finalized the rule with several modifications, detailed in the Amended Petition (ECF Doc. 7, ¶¶ 51-54). *See* 71 Fed. Reg. 57873 (Oct. 2, 2006); 8 C.F.R. §§ 1003.6(c)(1), (d), 1003.19(i)(1). In the end, under the current regulations, a noncitizen could be subjected to potentially indefinite detention even if an immigration judge and the Board of Immigration Appeals determine that he should be released.

Since July 8, 2025, DHS has been invoking the automatic-stay provisions for nearly every noncitizen they deem should be subject to § 1225 detention, even if an immigration judge disagrees. As a threshold matter, this strays far from the intended case-by-case, selective situation anticipated by the regulation. 71 Fed. Reg. 57873, 57878 (Oct. 2, 2006). But more specifically, nothing in the record for any of the three individual Plaintiffs in this case demonstrates that any individualized review was undertaken, as there is no written certification or affidavit. *See* ECF Docs. 4-4, 4-5, 4-6, 7; *Leal-Hernandez*, 2025 WL 2430025, at *3-4.

Respondents contest the assertion that DHS is invoking the automatic stay provisions pursuant to a policy. Opp. at 12 n.4. While Petitioners admit that they have not seen a written directive, it is clear that there is a directive or policy involving ICE’s use of the automatic stay provisions. At no point has DHS explained the individualized considerations it has allegedly undertaken in considering whether to seek an automatic stay of the bond motions in Petitioners

cases and there is a national trend of the use of the automatic stay petitions. *See Leal-Hernandez*, 2025 WL 2430025, n.12 (comparing the regulations with the July 8, 2025 ICE interim guidance (attached as Exh. B), which “strongly suggest[s] that, at least since last month, the Government dispensed with its 2006 position that the automatic stay is to be used rarely and only with the senior legal officer review certifying the existence of factual bases following individualized case review.”). Indeed, for a regulation that was intended to be rarely used and that was invoked only 43 times in all of fiscal year 2005, *see* 71 Fed. Reg. 57873, 57878 (Oct. 2, 2006), there have been at least a dozen cases across the country since Spring 2025 that have successfully challenged the automatic stay as unlawful. *See, e.g., Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924; *Carmona-Lorenzo v. Trump*, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Perez v. Berg*, 2025 WL 2531566 (D. Neb. Sept. 3, 2025); *Fernandez v. Lyons*, 2025 WL 2531539 (D. Neb. Sept. 3, 2025); *Leal Hernandez*, 2025 WL 2430025, *14 (D. Md. Aug. 24, 2025); *Jacinto v. Trump*, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Maldonado v. Olson*, -- F. Supp. 3d --, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025); *Garcia Jimenez v. Kramer*, 2025 WL 2374223 (D. Neb. Aug. 14, 2025); *Hoque v. Trump*, 0:25-cv-1576, 2025 U.S. Dist. LEXIS 117197 (D. Minn. June 17, 2025); *Mohammad H. v. Trump*, 2025 WL 1692739 (D. Minn. Jun. 17, 2025); *Gunaydin v. Trump*, -- F. Supp. 3d --, 2025 WL 1459154 (D. Minn. May 21, 2025); *see also Singh v. Lewis*, 4:25-cv-96 (W.D. Ky.) (still pending); *Bunay Bermeo v. ODDO*, 3:25-cv-273 (W.D. Pa.) (still pending); *J.G.O. v. Francis*, 1:25-cv-7233 (S.D.N.Y.) (still pending); *Hassan v. Crawford*, 1:25-cv-1408 (E.D. Va.) (still pending); *Aguilar Merino v. Ripa*, 1:25-cv-23845 (S.D. Fla.) (still pending); *Quispe-Ardiles, et al. v. Noem, et al*,

1:25-cv-1382 (E.D. Va.) (still pending); *Singh v. Bondi*, 1:25-cv-1525 (E.D. Va.) (still pending).⁶ However, should Respondents continue to contest the existence of a policy, and should the Court deem the existence of a policy dispositive to resolution of this case, Petitioners seek discovery in order to ascertain whether there is, in fact, a new policy for invoking the automatic stay of bond determinations or whether an individualized assessment was made in these cases in compliance with the regulations.

Irrespective of the scope of such policy, however, DHS's invocation of the automatic stay in each of Petitioners' cases has violated their Constitutional rights and violates the INA. First, Respondents contend that there is no substantive Constitutional violation here because Petitioners essentially have no applicable Constitutional rights and are afforded no due process. Opp. at 20-21. But Respondents ignore, or at best misapprehend, the substantive due process claim raised in the Amended Petition. ECF Doc. 4, ¶¶ 56-61. "The interest in being free from physical detention' is 'the most elemental of liberty interests.'" *Maldonado*, -- F. Supp. 3d --, 2025 WL 2374411, at *9 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 531 (2004)). Because the automatic stay fails to account for any individuals facts, the risk of erroneous deprivation is increased. *Id.* at *13. Yet, Respondents assert that such an interest is of no consequence because the Government has an interest in its immigration enforcement and ensuring appearance at immigration hearings. Opp. at 21. True, but such a response does not acknowledge either Petitioners' right to be free from unnecessary detention or that the Governments' interests were considered by the immigration judge in granting Petitioners' bond. Respondents' recourse for disagreeing with a bond determination is to appeal that determination to the Board of Immigration Appeals, during which

⁶ Respondents' attempt to factually distinguish the other cases addressing the automatic stay is unavailing. None of the factual distinctions is relevant to the legal issues presented in this case.

it can also request a stay of the bond order, but Respondents should not be able to unilaterally overrule the immigration judge's bond determination under § 1226(a). *Leal-Hernandez*, 2025 WL 2430025, at *13; *Mohammad H.*, 2025 WL 1692739, at *5.

Second, this Court should conclude that Petitioners' procedural due process rights have also been violated. Focusing only on individuals who have not been admitted to the United States, Opp. at 22, Respondents have failed to account for Mr. Zoto's due process rights because he *has* been admitted. Ex. A. In any event, Respondents again misapprehend the claims raised in this case. By arguing that there is no interest in release from detention and that Petitioners' detention is not unlawfully prolonged, Respondents are imposing their (incorrect) assertion that Petitioners are subject to mandatory detention. Opp. at 22-23. But an immigration judge specifically disagreed and ruled that each Petitioner was entitled to release. *See* ECF Docs. 4-1, 4-2, 4-3. Moreover, Petitioners are not raising a prolonged detention claim, rather Petitioners assert that DHS's unilateral decision to subject them to mandatory detention notwithstanding their eligibility for and order granting bond is the due process violation. *Leal-Hernandez*, 2025 WL 2430025, at *13-14; *cf.* Opp. at 26-29 (discussing prolonged detention standards). Respondents' failure to discuss the actual counts raised in this petition is telling that there is no actual defense, and the Court should conclude, as other courts have, that Petitioners' procedural due process rights have been violated by the invocation of the automatic stays. *Leal-Hernandez*, 2025 WL 2430025, at *13-14.

Finally, the Court should also find the regulation *ultra vires*. As the District of Maryland succinctly determined:

Where Petitioner's detention is discretionary and subject to bond redetermination pursuant to 8 U.S.C. § 1226(a) and 8 C.F.R. § 1236, respectively, and the IJ has exercised his discretion to issue bond pursuant to his authority as an appointee of the Attorney General, the automatic stay of 8

C.F.R. § 1003.19(i)(2) renders both the discretionary nature of Petitioner’s detention and the IJ’s authority a nullity.

Leal-Hernandez, 2025 WL 2430025, at *15. In their opposition, Respondents simply state that the automatic stay is lawful because it was created pursuant to regulation, which was promulgated by the Attorney General. Opp. at 30. But it is unclear how this point addresses the substantive aspects of the automatic stay and its effect in allowing DHS to unilaterally overrule an immigration judge’s determination. “Because this back-ended approach effectively transforms a discretionary decision by the immigration judge to a mandatory detention imposed by DHS, it flouts the express intent of Congress and is ultra vires to the statute.” *Anicasio*, 2025 WL 2374224, at *5 (marks and citation omitted). Accordingly, this Court should conclude that the regulation is ultra vires, invalid, and that Petitioners’ detention on that basis is unlawful.

Because the Court has jurisdiction over the claims raised in the petition, because Petitioners’ are all subject to detention under 8 U.S.C. § 1226(a) and not § 1225(b)(2), and because DHS’s invocation of the automatic stay of the bond determinations violates Petitioners’ Constitutional rights and the INA, the Court should grant the petition for a writ of habeas corpus and order DHS to accept payment of the bonds ordered by the immigration judges.

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Respectfully submitted,

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