**UNITED STATES DISTRICT COURT**
**DISTRICT OF ARIZONA**

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| Erian Moldogaziev,<br>Petitioner<br>-vs-<br>John Cantu, et al.,<br>Respondents. | CV-25-3265-PHX-MTL (JFM)<br><br>**Report & Recommendation on Petition for Writ of Habeas Corpus** |

## I. MATTER UNDER CONSIDERATION

Petitioner has filed through counsel an Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 4). The Petitioner's Petition is now ripe for consideration. Accordingly, the undersigned makes the following proposed findings of fact, report, and recommendation pursuant to Rule 8(b), Rules Governing Section 2254 Cases, Rule 72(b), Federal Rules of Civil Procedure, 28 U.S.C. § 636(b) and Rule 72.2(a)(2), Local Rules of Civil Procedure.

It seems, to the undersigned, that this case lies in a swelling clash between three threads that have made our American nation not wealthy or powerful, but great.

The first is asylum. This nation finds its roots in pilgrims arriving in this land, seeking asylum from persecution in the religiously homogenous lands from which they came. These same pilgrims were believers in a God who instructed his followers that they should offer asylum to the foreigners amongst them, because they had once been foreigners in Egypt.[1] This thread runs so deep that when gifted a monument to liberty, we chose to install on its foundation an ode to asylum asking the world to send us their

[1] *See e.g.* Leviticus 19:34, English Standard Version ("You shall treat the stranger who sojourns with you as the native among you, and you shall love him as yourself, for you were strangers in the land of Egypt: I am the Lord your God.")

"tired…poor…huddled masses yearning to breathe free."

The second thread arises from the first: our devotion to preserving liberty. Our roots began to sprout up when we declared that our maker endowed us with an inalienable right to liberty, that rulers should not just meanly spirit away. Eventually we enumerated those liberty rights in amendments to our Constitution.

The third thread arises from our recognition that the angels of our lesser natures require boundary markers to keep us from abandoning our principles in the ebb and flow of public opinion. So our nation, although birthed from the first two threads, matured when we entered a mutual compact, the Constitution, committing ourselves to the rule of law. So engrained is this commitment that our officials are compelled to swear allegiance, not to the nation, but to our Constitution. U.S. Const., Art. II, Sect. 1, Cl. 8; 5 U.S.C. § 3331.

From the limited record in this case, it appears Petitioner entered this country in honor of all three, seeking asylum from persecution, voluntarily submitting to our laws on how to do so, and faithfully adhering to the limits we placed on his freedom while we decided whether he deserved such asylum. Now, we appear to have, without cause other than a change of heart, reversed course, unceremoniously snatched him up, imprisoned him, and appear to be rushing to expel him from our shores.

The limited role of this Court is not to decide the rightness of our nation's actions, but only to decide whether our doing so was, in certain particulars, a violation of our established law, including our Constitution, as determined by higher courts.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The substantive facts are largely not in dispute, although the legal significance or source of them is debated by the parties, and the provision of documentation is all but nonexistent.

**Application for Admission** - Petitioner is an adult citizen and national of Kyrgyzstan. On September 21, **2022** he arrived at the San Ysidro Port of Entry in

California, requesting asylum.[2] (Petition at ¶¶ 49; Exh. A, Decl. at ¶ 5; Exh. B, Bond Dec. at 1.)[3]

**Parole** - "Respondents paroled him into the United States, based on Petitioner's individual facts and circumstances, under 8 U.S.C. § 1182(d)(5) and released him from custody pursuant to the same statute."[4] (Petition at ¶¶ 49; Exh. A, Decl. at ¶ 5.)

**Removal/Asylum Proceedings** - On the same date, September 21, 2022, the Government initiated removal proceedings under 8 U.S.C. § 1229a, asserting Petitioner was inadmissible pursuant to 8 U.S.C. § 1182(a)(7)(A)(i)(I) (without documents), and issued an order requiring him to appear in Chicago, Illinois on September 11, 2023. (Petition at ¶¶ 46, 50-51; Exh. P-1, Rec. Deport. 8/26/25 at 1-2; Exh A, Sandoval Decl. at ¶¶ 4-6; and Exh. B, IJ Dec. 9/16/25 at 1.)

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[2] The 8/26/25 Record of Deportable Alien asserts Petitioner "was an alien present in the United States without having been admitted or paroled" and that he "did not present himself to immigration officers at any port of entry." (Exh. P-1 at 3.) Respondents do not adopt those assertions or provide any evidence which would support them, neither do they assert that Petitioner was paroled into the country, only that he was "placed into removal proceedings in Chicago" and was three years later "encountered at a CBP checkpoint in Blythe, Arizona" (presumably, Blythe California). (Answer at 7.) But Respondents do not deny Petitioner's explicit assertions that he was paroled under § 1182(d)(5). Conversely, Petitioner repeatedly argues that he entered the country without inspection. (*See* Reply at 1, 13, 14 (asserting entry without inspection); and Petition at 7-10 (arguing statutes governing aliens entering without inspection).) Petitioner's references to entry without inspection are not entirely unfounded. That is the alleged basis for his pending removal alleged in the Record of Deportable Alien (Exh. P-A). But this Court does not resolve this case on the basis of the allegations in that proceeding, but upon the facts presented and supported in this case. Petitioner plainly alleges he sought admission and was granted parole, and those allegations are supported by the Declaration provided by Respondents and the decision of the Immigration Judge.

[3] Exhibits herein are referenced as follows: to the Petition (Doc. 4) as "Exh. P-__"; to the Answer (Doc. 14), as "Exh. ___"; and to the Reply (Doc. 17) as Exh. R-___."

[4] The 8/26/25 Record of Deportable Alien asserts Petitioner "was an alien present in the United States without having been admitted or paroled" and that he "did not present himself to immigration officers at any port of entry." (Exh. P-1 at 3.) But Respondents do not adopt those assertions or provide any evidence which would support them. Conversely, Petitioner repeatedly argues that he entered the country without inspection, although perhaps in light of the allegations made against him in the recent immigration proceedings. (*Compare* Reply, Doc. 17 at 1, 13, 14 (asserting entry without inspection) *with* Petition, Doc. 4 at 7-10 (arguing statutes governing aliens entering without inspection.)

On June 23, **2023**, Petitioner filed a formal application for asylum in the immigration court in Chicago.[5] He was sent a Notice of Hearing for a master hearing set for December 5, 2023. Petitioner appeared for that hearing, and the Immigration Judge ("IJ") set an individual hearing. In a Notice of Hearing issued July 16, 2025 Petitioner was directed to appear for that in-person hearing on February 3, 2027. (Petition at ¶¶ 52-54; Exh. P-1, Rec. Deport. 8/26/25 at 2; Exh. P-3, 7/16/25 Notice; and Exh A, Sandoval Decl. at ¶ 8.)

Petitioner summarizes:

> Here, Petitioner has resided in the United States since October 2022, when DHS inspected him at the San Ysidro Port of Entry, issued a Notice to Appear, and allowed him to reside in the country pending removal proceedings. For nearly three years, Petitioner lived openly in the interior with the knowledge and acquiescence of DHS.

(Petition at 19, ¶ 87.)

**Apprehension and Detention** - No further immigration proceedings regarding Petitioner occurred until August 26, **2025**,[6] when Petitioner was arrested near Blythe, California by Customs and Border Protection ("CBP"). Petitioner was detained and transported to immigration detention facilities in Yuma, Arizona, and then Eloy, Arizona. He was charged with having entered the United States without inspection. (Petition at ¶¶ 1, 55-56; Exh. P-1, Rec. Deport. 8/26/25 at 2-3; Exh A, Sandoval Decl. at ¶¶ 9-10; Exh. B, IJ Dec. 9/16/25 at 1.)

On September 2, 2025, Petitioner filed through counsel a request for bond redetermination, which was denied by an IJ in Eloy, Arizona on September 8, 2025. The denial was based on a determination that Petitioner was subject to mandatory detention

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[5] The regulations provide for an initial finding on asylum upon inspection, and if a credible fear is found, referral for a full determination. *See* 8 C.F.R. § 208.30.

[6] The August 26, 2025 Record of Deportable Alien reports that Petitioner was "previously apprehended on September 21, 2022 in the Imperial Beach Border Patrol Station area of responsibility" and was served with a Notice to Appear. (Exh. P-31 at 2.) In contrast, the Answer alleges he was on that date "encountered…at the San Ysidro, California, Port of Entry." (Answer, Doc. 14 at 2.) (*See* Exh. 1, Decl. at 2, ¶ 5 ("applied for admission at the international border").)

under 8 U.S.C. § 1225(b)(2)(A).[7] (Petition at ¶¶ 57-58; Exh A, Sandoval Decl. at ¶¶ 12-15; Exh. B, IJ Dec. 9/16/25.)

Petitioner was scheduled for a removal hearing on October 17, 2025. (Exh A, Sandoval Decl. at ¶ 18-19.)

## III. PLEADINGS

**Petition** - Petitioner, who remains detained in Eloy, Arizona, commenced the current case by filing his original Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on September 8, 2025 (Doc. 1). Petitioner filed an Amended Petition (Doc. 4) (hereinafter "Petition") on September 11, 2025. Petitioner's Petition asserts the following five grounds[8] for relief:

**Ground 1** - Petitioner is illegally detained pursuant to **misapplication of the statute** 8 U.S.C. § 1225(b)(2) (which precludes release), and even if properly detained under 8 U.S.C. § 1226(a) he is eligible for release on bond.

**Ground 2** – Petitioner is illegally detained in violation of application provisions of the **Code of Federal Regulations**, including 8 C.F.R. §§ 236.1, 1236.1, and 1003.19.

**Ground 3** – Petitioner is detained pursuant to arbitrary and capricious agency action in violation of the **Administrative Procedures Act** by adopting a policy applying 8 U.S.C. § 1225(b)(2) to aliens like Petitioner.

**Ground 4** - Petitioner is detained by agency action in without compliance with procedure required by law, in violation of the **Administrative Procedures Act**, in adopting changes in rules without notice and opportunity to be heard.

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[7] The record before the Court provides no indication of the parties' treatment of Petitioner's previous grant of parole. Petitioner does not challenge the handling of those matters, so the undersigned finds an explanation unnecessary to resolving the Petition. *But see Y-Z-L-H v. Bostock*, 792 F.Supp.3d 1123, 1138 (D. Or. July 9, 2025) (finding § 1182(d)(5) requires individualized determination to terminate parole, and only on the basis that the original purposes have been served); and *Ramirez Tesara v. Wamsley*, 2025 WL 2637663 (W.D. Wash. Sept. 12, 2025) (same).

[8] Petitioner states his claims in "counts." In keeping with Rule 2(c)(1), Rules Governing § 2254 Proceedings, the undersigned uses the nomenclature of "grounds for relief."

**Ground 5** – Petitioner is detained in violation of his Fifth Amendment Right to **Due Process** because he has been denied the opportunity to petition for release in violation of 8 U.S.C. § 1226(a).

Petitioner seeks relief in the form of orders for his release and declaratory relief regarding the asserted policy of denying release to aliens in his position. He also seeks a prohibition of his transfer from this District.

**Response** - On October 9, 2025, Respondents filed their Answer (Doc. 14). Respondents argue: (a) pursuant to 8 U.S.C. § 1252(g), this Court lacks jurisdiction; (b) pursuant to 8 U.S.C. § 1252(b)(9) and 1252(a)(5), this Court lacks jurisdiction; (c) as an "arriving alien" Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) seeking admission, and there is therefore no denial of Due Process; and (d) Administrative Procedures Act claims are not properly brought in a habeas petition.

**Reply** – On October 15, 2025 Petitioner filed his Reply (Doc. 17), arguing: (1) the Court has jurisdiction under the terms of the statute and/or the Suspension Clause; (2) his detention is governed by § 1226(a), not § 1225(b)(2) and thus he is entitled to consideration for release on bond.

## IV. APPLICATION OF LAW TO FACTS

### A. JURISDICTION OF THE COURT

Respondents challenge the Court's jurisdiction over the Petition. The United States District Court is a court of limited original jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). The courts "are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

The undersigned concludes the Court has jurisdiction.

#### 1. General Habeas Jurisdiction

This is a habeas case. Petitioner has filed this case as one seeking habeas relief. Indeed, the Petition seeks relief from detention by federal authorities under color of federal law, which he contends is contrary to law because he has been denied consideration for

release on bond or other terms. "[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

District courts have jurisdiction over habeas petitions founded on federal law: "Writs of habeas corpus may be granted by...the district courts" if the petitioner is in custody "under or by color of the authority of the United States," "for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States," or "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241.

Thus, absent contrary law, this Court has jurisdiction over this case under 28 U.S.C. § 2241.

**2. Limits to Review re Removal Proceedings**

Respondents assert this Court has been stripped of its jurisdiction under § 2241 over Petitioner's habeas claims by 8 U.S.C. §§ 1252(g), and 1252(b)(9)/1252(a)(5). In evaluating these assertions, this Court is guided by the general rule requiring it to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation, and by the strong presumption in favor of judicial review. *Ibarra-Perez v. United States*, 154 F.4th 989, 995 (9th Cir. Aug. 27, 2025).

**a. 1252(g) – Discretionary Removal Actions**

Section 1252(g) provides (with various exceptions):

> no court shall have jurisdiction to hear 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 against any alien under this chapter.

8 U.S.C. § 1252(g). In seeking to apply this statute, Respondents assert: "Here, Petitioner's claims necessarily arise 'from the decision or action by the Attorney General to commence proceedings [and] adjudicate cases,' over which Congress has explicitly foreclosed district court jurisdiction. 8 U.S.C. § 1252(g)." (Answer, Doc. 14 at 5.)

That argument has long been rejected by the Supreme Court. This statute is not "a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Rather, "[t]he 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.'" *Id.* (emphasis in original). The provision has no application to the "many other decisions or actions that may be part of the deportation process—such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *Id.* "[D]ecisions or actions that occur during the formal adjudicatory process are not rendered unreviewable because of § 1252(g)." *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1121 (9th Cir. 2001).

More recently, the Supreme Court has reiterated: "We did not interpret [the language of § 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (citing *Reno*, *supra* at 482-483). *See also Ibarra-Perez*, 154 F.4th at 996.

Here, Petitioner does not challenge his removal proceedings, whether their commencement, adjudication or execution. For example, he does not seek an order mandating he be granted asylum, or other termination of his removal proceedings. Instead, he challenges only his detention pending such processes. That is outside the scope of § 1252(g). *See Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (habeas challenge to post-removal order detention not barred by § 1252(g)); *I.N.S. v. St. Cyr*, 533 U.S. 289, 311 n. 34 (2001) (noting that challenges to detention pending removal were not within the limited scope of § 1252(g) as described in *Reno*).[9]

[9] Section 1252(g) is directed against "a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno*, 525 U.S. at 485 n.9. The "provision shields discretionary determinations to deny relief, not failures to honor relief already granted." *Spulveda Ayala v. Bondi*, 2025 WL 2084400, at *3 (W.D. Wash. July 24, 2025).

Respondents cite to an unpublished Ninth Circuit decision, *Limpin,* where the court addressed a claim that the alien was "wrongfully arrested and detained." (Answer at 4.) The *Limpin* decision relied on § 1252(g) and summarily opined: "The district court properly dismissed Limpin's action for lack of subject matter jurisdiction because claims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court's jurisdiction." *Limpin v. United States*, 828 F. App'x 429 (9th Cir. 2020). The *Limpin* court cited to *Sissoko v. Rocha*, 509 F.3d 947, 948-49 (9th Cir. 2007). In *Sissoko*, the court had found a *Bivens* claim for false arrest barred by § 1252(g) because the entire claim arose from the "decision to commence expedited removal proceedings," which was followed by the application of the mandatory detention provisions for such cases under 8 U.S.C. § 122(b)(1)(B)(iii)(IV). Here, in contrast, Petitioner's claim Petitioner is not challenging a decision to arrest and detain an alien at the commencement of removal proceedings, but solely the decision to continue to detain him long after his arrest and the commencement of his proceedings. Thus, his claim does not arise from a decision to "commence proceedings."

Other circuits' **courts of appeals** have also found § 1252(g) does not defeat habeas jurisdiction over similar detention challenges. *See e.g. Kong v. United States*, 62 F.4th 608, 617 (1st Cir. 2023) ("§ 1252(g) does not bar judicial review of Kong's challenge to the lawfulness of his detention"); *Ozturk v. Hyde*, 136 F.4th 382, 397 (2d Cir. 2025) (same, citing *Kong*). Other judges in the **District of Arizona** have also reached this conclusion. *See Pineulas-Mendoza v. Sessions*, 2019 WL 13214463, at *3 (D. Ariz. Apr. 5, 2019); *Echevarria v. Bondi,* No. CV-25-03252-PHX-DWL (ESW), 2025 WL 2821282, at *2 (D. Ariz. Oct. 3, 2025); and *Alvarez v. Rivas*, No. CV 25-2943-PHX-GMS (CDB), 2025 WL 2898389, at *9 (D. Ariz. Oct. 7, 2025), report and recommendation rejected in part on other grounds, 2025 WL 2899092 (D. Ariz. Oct. 10, 2025).

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*See also M.S.L. v. Bostock*, 2025 WL 2430267, at *7 (D. Or. Aug. 21, 2025) (quoting *Spulveda*).

**b. 1252(b)(9)/1252(a)(5) – Zipper Clause**

Next, Respondents assert that this Court's habeas jurisdiction has been stripped by 8 U.S.C. § 1252(b)(9), the so called "zipper clause," [10] which restricts claims "arising from any action taken or proceeding brought to remove an alien from the United States" to judicial review from a final order of removal (and explicitly precludes habeas jurisdiction under 28 U.S.C. § 2241 for such claims). In turn, Section 1252(a)(5) limits jurisdiction over such claims to the circuit courts of appeal.

Nonetheless, these sections do not preclude all habeas review related to the removal process. In *Jennings v. Rodriguez* the Supreme Court rejected calls to extend § 1252(b)(9) to any cause of action related to an alien's detention in connect with their removal proceedings.

> Interpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

*Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018). *See also Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) ("§ 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.'")

Since *Jennings,* the Ninth Circuit has held that challenges to detention pending removal proceedings are not swept up in § 1252(b)(9)'s pervasive delay and channeling of judicial review of removal challenges. For example, in *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006), the court found the district court properly exercised

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[10] Section 1252(b)(9) "is a 'zipper clause' in the sense that it consolidates or 'zips' 'judicial review' of immigration proceedings into one action in the court of appeals." *Singh v. Gonzales*, 499 F.3d 969, 976 (9th Cir. 2007) (quoting *Mahadeo v. Reno*, 226 F.3d 3, 12 (1st Cir.2000)).

jurisdiction over a detention challenge, rejecting calls to apply the 1252(b)(9) bar.[11] *See also Flores-Torres v. Mukasey*, 548 F.3d 708, 711 (9th Cir. 2008) (same).

Respondents ignore the plain holding of these cases, and point to broad language in the Ninth Circuit's decision in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) and argue that these sections require challenges like Petitioner's be raised in the removal appeal to the circuit court. Although *J.E.F.M.* recognized the broad sweep of these sections, it also plainly recognized there were "built-in limits".

> By channeling only those questions "arising from any action taken or proceeding brought to remove an alien," the statute excludes from the PFR process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9).

*J.E.F.M.*, 837 F.3d at 1032. More directly, the *J.E.F.M.* court cited to *Nadarajah v. Gonzales*, and its holding that the statute did not preclude detention challenges in habeas proceedings in the district court. 837 F.3d at 1032. Moreover, the Ninth Circuit has since *J.E.F.M.* acknowledged the limits of 1252(b)(9) over detention issues. *See Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 810 (9th Cir. 2020); and *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018).

**3. Suspension Clause**

Petitioner argues that if the Court finds its jurisdiction limited by statute, the Court should rely upon the Suspension Clause, U.S. Const. Art. I § 9, cl. 2, to find any jurisdictional limitations unconstitutional and unenforceable. Respondents do not respond. Because the undersigned concludes that the Court's *habeas* jurisdiction is not constrained under the statutes cited by Respondents as to any claim with potential merit, the undersigned does not reach the Suspension Clause issue.

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[11] This reading is supported by the legislative history of the section. *See Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 10–11 (1st Cir. 2007).

**B. GROUNDS 1 & 2 - RIGHT TO BOND HEARING**

In Ground 1, Petitioner argues that his detention is governed by 8 U.S.C. § 1226(a), and under that statute he is entitled to a bond hearing, and Respondents have improperly deemed him detained under 8 U.S.C. § 1125(b)(2), and declined to consider him for release. In Ground 2 Petitioner asserts he is unlawfully detained because the Government previously held those "who had entered without inspection were eligible for consideration for bond and bond hearings before IJs under 8 U.S.C. § 1226." (Petition, Doc. 1 at 14-15, citing , 62 Fed. Reg. 10312, 10323 (1997), discussed *supra*).)

**1. Parties' Positions**

**Respondents' Position** - Respondents argue that Petitioner's detention is governed (and mandated) by 8 U.S.C. § 1225(b)(2)(A). (Answer, Doc. 14 at 6.) That provision directs:

> in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding.

That provision purportedly does not provide for any type of conditional release. Respondents reason that Petitioner is an applicant for admission, found to be an inadmissible alien. (Answer, Doc, 15 at 6-7.)

**Petitioner's Position** - Petitioner argues that he can only properly be detained under 8 U.S.C. § 1226(a), which authorizes conditional release. (Reply, Doc. 17 at 17.) That provision directs:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

Petitioner argues that reading the statutes together, § 1225 applies where an alien is detained at the border upon entry. Conversely, Petitioner argues, § 1226(a) applies to any aliens who have already entered the country, but are subsequently detained pending removal proceedings.

**2. Detention and Release/Parole**

**a. Forms of Release**

Title 8 contains five primary statutes governing the detention of alien immigrants:

- § 1225 covers aliens seeking admission (either because they qualify, or based on a request for asylum);
- although § 1225 does not provide for release, § 1182(d)(5) gives the Secretary of Homeland Security discretion, "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" to parole into the country aliens seeking admission;
- § 1226 covers admitted aliens during removal proceedings (with provisions for release for some aliens) for whom the Attorney General has issued a warrant of arrest, and provides for consideration of release on bond or other conditions;[12] and
- § 1231 covers aliens ordered removed.

Because Petitioner has apparently not been given a final order of removal (*see* Reply at 7), § 1231 is not applicable. Thus, to be authorized, Petitioner's current detention must be under § 1225 or § 1226.

Which applies is of particular moment because any parole from detention under § 1225 arises only under § 1182(d)(5) under the discretion of the Secretary. Conversely, if an alien is detained under § 1226, that detention is subject to the Attorney General's discretion to release the alien on bond or conditions, and the applicable regulations provide a process for the alien to seek the exercise of that discretion, and administrative appeal thereof. *See* 8 C.F.R. § 236.1(c) and (d).

**b. Comparison of Pre-Removal-Order Detention Statutes**

In *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018), the Court summarized the pre-

[12] 8 U.S.C. § 1226(c) makes detention mandatory and denies release to deportable aliens with certain criminal convictions. Because there is no suggestion that Petitioner has such convictions, the undersigned does not further discuss the application of these provisions to Petitioner.

removal detention statutes:

> In sum, U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c).

583 U.S. at 289.

**Arriving Aliens** - The Court described the circumstances triggering detention under § 1225:

> That process of [deciding who may enter and/or stay in the country] generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible. Under [ ] 8 U.S.C. § 1225, an alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1). Applicants for admission must "be inspected by immigration officers" to ensure that they may be admitted into the country consistent with U.S. immigration law. § 1225(a)(3).
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> As relevant here, applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2).
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> * * *
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> Regardless of which of those two sections authorizes their detention, applicants for admission may be temporarily released on parole "for urgent humanitarian reasons or significant public benefit." § 1182(d)(5)(A); see also 8 C.F.R §§ 212.5(b), 235.3 (2017). Such parole, however, "shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A). Instead, when the purpose of the parole has been served, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." *Ibid.*

*Jennings*, 583 U.S. at 287-288.

**Aliens "Inside" the Country** - *Jennings* described the operation of § 1226(a) on aliens already in the country.

> Even once inside the United States, aliens do not have an absolute right to remain here. For example, an alien present in the country may still be removed if he or she falls "within one or more ... classes of deportable aliens." § 1227(a). That includes aliens who were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission. See §§ 1227(a)(1), (2).
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> Section 1226 generally governs the process of arresting and detaining that group of aliens pending their removal. As relevant here, § 1226 distinguishes between two different categories of aliens. Section 1226(a) sets out the default rule: The Attorney General may issue a warrant for the arrest and detention of an alien "pending a

> decision on whether the alien is to be removed from the United States." § 1226(a). "Except as provided in subsection (c) of this section," the Attorney General "may release" an alien detained under § 1226(a) "on ...bond" or "conditional parole." *Ibid.*
>
> Section 1226(c), however, carves out a statutory category of aliens who may not be released under § 1226(a).

583 U.S. at 288-289.

> As long as the detained alien is not covered by § 1226(c), the Attorney General "may release" the alien on "bond ... or conditional parole." § 1226(a). Federal regulations provide that aliens detained under § 1226(a) receive bond hearings at the outset of detention. *See* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

*Id.* at 306. The Ninth Circuit has summarized the procedures applicable under § 1226(a):

> Section 1226(a) and its implementing regulations provide extensive procedural protections that are unavailable under other detention provisions, including several layers of review of the agency's initial custody determination, an initial bond hearing before a neutral decisionmaker, the opportunity to be represented by counsel and to present evidence, the right to appeal, and the right to seek a new hearing when circumstances materially change. *See generally* 8 U.S.C. § 1226(a)(1)–(2); 8 C.F.R. §§ 236.1, 1003.19.

*Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1202 (9th Cir. 2022).

**Treatment of All Aliens as Seeking Admission** – In 1996, Congress amended § 1225 to include a new subsection (a)(1), which remains in effect. Pub.L. 104-208, Div. C, Title III, §§ 302(a) (Sept. 30, 1996). That subsection provides.

> An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival…) shall be deemed for purposes of this chapter an applicant for admission.

8 U.S.C. § 1225(a)(1) (2025). Petitioner complains that this provision is being applied by Respondents to aliens already "in country" to justify applying mandatory detention under § 1225.

In *Dep't of Homeland Sec. v. Thuraissigiam*, the Supreme Court applied this section to an alien who had evaded inspection, and "succeeded in making it 25 yards into U. S. territory before he was caught." 591 U.S. 103, 139 (2020). But the Court compared this to an alien who "arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country." *Id.* The Court noted the applicability of § 1225(a)(1) and the aliens' treatment as seeking admission, but

noted that "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry,' Like an alien detained after arriving at a port of entry, an alien like respondent is 'on the threshold.'" *Thuraissigiam*, 591 U.S. at 140 (citations omitted). Under the Supreme Court's read, § 1225(a)(1) does not determine whether an alien is "in country," only that they are deemed to be seeking admission.

Conversely, where an alien is not detained "shorty after an unlawful entry," they are "in country," subject to § 1226, and entitled to a greater degree of constitutional protections. "But once an alien enters 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 v. Davis*, 533 U.S. 678, 693 (2001).[13]

Indeed, the 1225(b)-expedited-removal process is generally[14] limited to "an alien... who is arriving in the United States." 8 U.S.C. § 1225(b)(1)(A)(i). The regulations define the term "arriving alien" as "an applicant for admission coming or attempting to come into

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[13] At first blush it may seem illogical to treat aliens who have submitted to inspection (and tried to comply with the law) more stridently than those who simply managed to sneak into the country. *Cf. Zadvydas*, 533 U.S. at 704 (Scalia, J., dissenting) ("We are offered no justification why an alien under a valid and final order of removal—which has totally extinguished whatever right to presence in this country he possessed—has any greater due process right to be released into the country than an alien at the border seeking entry.") At least as to pre-removal order detention, in a world where government officials were omniscient and perfectly adhered to the law, that would hold. But there are for more facts subject to dispute with a person simply "found" living in the country, versus one who appears at the border seeking admission.

[14] Such expedited removal is not authorized for "an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." 8 U.S.C. § 1225(b)(1)(F). In addition to arriving aliens, § 1225(b)-expedited removal also applies to short term aliens who fail to show they have been "physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility," when designated by the Secretary for expedited removal. 8 U.S.C. § 1225(b)(1)(A)(iii)(II). Historically, no designation under subsection (iii)(II) was ever made. Eventually sea and air arrivals were designated for expedited removal. In January, 2025, the Secretary upended that history by designating all aliens "to apply expedited removal to the fullest extent authorized by Statute. *Salcedo Aceros v. Kaiser*, 2025 WL 2637503, at *3 (N.D. Cal. Sept. 12, 2025) (quoting *Designating Aliens for Expedited Removal*, 90 Fed. Reg. 8139 (Jan. 24, 2025)). Because the undesigned concludes herein that Petitioner is, even if not a "short term resident," subject to § 1225 as an "arriving alien." Consequently, this recent change has no application to Petitioner.

the United States at a port-of-entry." 8 C.F.R. § 1.2. *See also* 8 C.F.R. § 1001.1(q) (same). *Cf.* 8 C.F.R. § 235.3 (discussing application of expedited removal to "arriving aliens").

That describes Petitioner. That Petitioner was paroled into the country does not alter that status.

**Summary** - In sum, if you are "inside the United States," your pre-removal detention is governed by § 1226(a), is discretionary, and if detained you must be considered for release on bond or conditional parole. On the other hand, if you are an arriving alien (whether standing at the border, detained, or paroled into the country), you are not "inside the United States," your detention is governed by § 1225, detention is mandatory, release is discretionary and there is no right to consideration for release.[15]

**3. Petitioner is Not "Inside the United States"**

**a. Physical Presence is Not Sufficient**

It would be reasonable for a layman to assume the status of being "inside the United States" extends to anyone not physically standing at the border, or detained in an immigration lockup awaiting admission or removal. But that proposition was rejected long ago. In *Leng May Ma v. Barber*, 357 U.S. 185 (1958) the Court addressed the status of an alien paroled into the country pending determination of her admissibility.

> It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'

*Id.* at 187 (citations omitted). The Court addressed the status of the two different groups.

> For over a half century this Court has held that the detention of an

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[15] This is not an outdated construction. For example, in *Echevarria v. Bondi*, CV-25-03252-PHX-DWL, 2025 WL 2821282 (D. Ariz. Oct. 3, 2025), Judge Lanza reasoned that § 1226 rather than §1225 applied to an alien who had simply entered the country with "no contact with immigration authorities" and had never been inspected, and thus could not be governed by § 1225(b)(2), even if deemed "an applicant for admission" under § 1225(a)(1). *Echevarria*, at *1, *5.

> alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. It seems quite clear that an alien so confined would not be 'within the United States' for purposes of s 243(h)...Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. In s 212(d)(5) of the Act [8 U.S.C. § 1182(d)(5)...the Congress specifically provided that parole 'shall not be regarded as an admission of the alien,' and that after the return to custody the alien's case 'shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.'

*Ma*, 357 U.S. at 188.

Moreover, the Court found not only that a paroled alien was not "admitted," they were not even "within the United States." *Id.* at 189. The Court described a grant of parole as simply having one's "prison bounds...enlarged" beyond the port of entry, and concluded that Ma "was still in theory of law at the boundary line and had gained no foothold in the United State[s]." *Id.* Thus, despite his parole away from the port of entry at San Ysidro, Petitioner has remained "at the boundary line" and not "in" the United States.

Indeed, the regulations provide: "An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) [8 U.S.C. § 1182(d)(5)]of the Act, and even after any such parole is terminated or revoked." 8 C.F.R. § 1001.1(q).

**b. Purported Form of Release Irrelevant**

Petitioner argues (at least some of the time) that his release was under § 1226(a) rather than § 1182(d)(5), and thus he is "in the country," and thus entitled to bond following his recent apprehension. (Petition at 21-23.) The undersigned is not convinced that the effect of authorized release of an arriving alien is dependent upon the statutory authority relied on to grant such release.

In *Leng May Ma v. Barber*, the alien sought admission to the country in May, 1951, was initially detained and then released on parole in August, 1952, before the December 24, 1952 effective date of § 1182(d)(5) as part of the Immigration and Nationality Act of 1952. *Ma,* 357 U.S. 185, 186 (1958). *See Gutierrez-Sosa v. Del Guercio*, 247 F.2d 266, 267 (9th Cir. 1957) (effective date of INA). The alien sought relief under the withholding

of deportation provisions in INA § 283(h), which was available only to those "within the United States. *See Ma*, 357 U.S. at 190-191 (Douglas, J., dissenting) (quoting § 283(h)). The *Ma* Court concluded that (despite her administrative parole) Ma was never "within the United States," citing *Kaplan v. Tod*, 267 U.S. 228 (1925) as determining that a (pre-INA) parole did not result in an "entry." *Ma*, 357 U.S. at 189.

In finding administrative parole did not amount to an entry rendering Ma "within the United States," the Court described § 1182(d)(5) (INA "§ 212(d)(5)") as "generally a codification of the administrative practice pursuant to which petitioner was paroled." As recognized in *Ma*, § 1182(d)(5) may incorporate an explicit annunciation of the principle that "parole is not entry," but it did not restrict the application of that principle to parole under § 1182(d)(5).

The *Ma* Court opined:

> The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court. Physical detention of aliens is now the exception, not the rule, and is generally employed only as to security risks or those likely to abscond. Certainly this policy reflects the humane qualities of an enlightened civilization. The acceptance of petitioner's position in this case, however, with its inherent suggestion of an altered parole status, would be quite likely to prompt some curtailment of current parole policy—an intention we are reluctant to impute to the Congress.

357 U.S. at 190.[16]

Thus, whether paroled under § 1182(d)(5), § 1226(a), or some other administrative practice, Petitioner's status as an alien submitting to inspection and seeking admission precludes him from being "in the country" until he is granted admission. Indeed § 1226 proffers no indication that an arriving alien released under its terms is somehow transformed into being "in country."

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[16] One wonders whether the *Ma* court would describe the current policies as "humane" or "enlightened."

The undersigned is aware that other courts have taken the opposite approach, and once having concluded that an arriving alien was granted release other than under § 1182(d)(5), *e.g.* under § 1226 or "on recognizance," they conclude the alien was "in country," no longer an "arriving alien," and thus subject to detention and entitled to consideration for release under § 1226(a).[17] *See e.g. Rosado v. Figueroa,* CV-25-2157-PHX-DLR (CDB), 2025 WL 2337099, at *7 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted sub nom. Rocha Rosado v. Figueroa*, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025).

The undersigned does not find these cases persuasive to the extent they rely on distinctions (between § 1182(d)(5) parole and § 1226(b) release) drawn solely in the context of applying the adjustment of status provisions under 8 U.S.C. § 1255.[18] *See Ortega-Cervantes v. Gonzales,* 501 F.3d 1111 (9th Cir. 2007); *Delgado-Sobalvarro v. Att'y Gen. of U.S.,* 625 F.3d 782 (3d Cir. 2010); and *Matter of Castillo-Padilla*, 25 I. & N. Dec. 257 (BIA 2010). In both *Ortega-Cervantes* and *Delgado-Soblavarro*, the Courts had no occasion to decide whether the release of an arriving alien under § 1226 would amount to an entry into the country or terminated the alien's status as "arriving," because the only question was whether the non-§1182(d)(5) release amounted to "parole" within the meaning of § 1255(a). The same is true of the BIA's decision in *Castillo-Padilla.*

Moreover, the undersigned finds them unpersuasive to the extent that they rely on

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[17] There are a number of cases in this circuit addressing aliens who did not qualify as "arriving aliens" because they did not submit to inspection at a port of entry. *See e.g. Cardin Alvarez v. Rivas,* CV-25-2943-PHX-GMS (CDB), 2025 WL 2898389, at *1 (D. Ariz. Oct. 7, 2025), *report and recommendation adopted in part, rejected in part* 2025 WL 2899092 (D. Ariz. Oct. 10, 2025) (alien encountered Border Patrol agents eleven miles northeast of port of entry); *Pablo Sequen v. Albarran*, 2025 WL 2935630 (N.D. Cal. Oct. 15, 2025) (aliens arrested after entry); *Espinoza v. Kaiser*, 2025 WL 2581185 (E.D. Cal. Sept. 5, 2025); *Rico-Tapia v. Smith*, 2025 WL 2950089 (D. Haw. Oct. 10, 2025); and *Rodriguez v. Bostock*, 2025 WL 2782499 (W.D. Wash. Sept. 30, 2025). The undersigned finds these cases distinguishable, and thus not persuasive.

[18] Section 1255 provides for an adjustment of status, a discretionary form of relief for certain aliens physically in the country to adjust their status to being a legal permanent resident. 8 U.S.C. § 1255(a). It is expressly limited, however to "an alien who was inspected and admitted or paroled into the United States." *Id.*

challenges to Homeland Security's recent interpretation of § 1225(a) as improperly equating every unauthorized alien's status as an "applicant for admission" with "seeking admission" or being an "arriving alien," without discussing how the petitioning "arriving alien" lost their "arriving" status by being released under § 1226. *See e.g. J.S.H.M v. Wofford,* 2025 WL 2938808 (E.D. Cal. Oct. 16, 2025). Moreover, those recent interpretations do not apply to an arriving alien on parole, such as Petitioner.

**c. Provision for Removal for Inadmissibility Not Controlling**

Petitioner argues that the applicability of § 1226 is shown because that provision extends to aliens being deported pursuant § 1227(a)(1)(A) because they are "inadmissible," and § 1226(c) only denies release to certain inadmissible aliens, *i.e.* those who have committed certain specified crimes. (Reply, Doc. 17 at 13-14.) But the reference to being inadmissible in that section does not imply that the covered aliens sought admission, have their application still pending, and they have in the meantime been paroled. That section declares deportable an "alien who *at the time of entry or adjustment of status* was ...inadmissible." *See e.g. Kyong Ho Shin v. Holder*, 607 F.3d 1213, 1214 (9th Cir. 2010) (alien previously admitted while a child deemed "inadmissible" because green card provided by mother was fraudulent, but remained eligible for withholding of removal because use was unknowing).

Aliens, like Petitioner, who were inspected at the border, are still seeking admission and were merely paroled into the country, have never effected an entry. "For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." *Ma*, 357 U.S. at 188. And the Court has "equat[ed] parole with detention. *Id.* at 189.

**d. Petitioner's Regulatory and Legislative History Arguments**

**Federal Register Argument** - Petitioner acknowledges that past practice had been to apply detention under § 1226 to aliens "who entered the country without inspection." (Petition, Doc. 4 at 7, ¶ 31.) But Petitioner cites a regulation proposal from 1997 that

observed: "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." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (1997). The key portion is the reference to "aliens who entered without inspection." Petitioner does not fit within that class, because he submitted to inspection and sought admission through asylum.

**Legislative History** - Petitioner argues that the practice developed that aliens "who were released into the United States after inspection and issuance of an NTA, were treated as detained under § 1226." (*Id.* at ¶ 32 (citing H.R. Rep. No. 104-469, pt. 1, at 229 (1996).) The referenced record does not support that contention. It asserted that § 1226(a) ("Section 236(a)") "restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States." But this lends no support to Petitioner's contention because the referenced section 242(a)(1), previously codified at 8 U.S.C. § 1252(a) (1994), dealt with the arrest and detention "[p]ending a determination of deportability." The Supreme Court has explained the distinction:[19]

> The immigration laws create two types of proceedings in which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings. The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.

*Landon v. Plasencia*, 459 U.S. 21, 25 (1982). Under this distinction, Petitioner (having sought admission and being "outside" the country because of his parole) would have been under exclusion proceedings, not deportation proceedings. It is true that (given his parole) Petitioner was not unlawfully in the country. But under *Ma*, he is not "in" the country at all, but rather detained (albeit previously on parole) while he tries to be allowed to be "in

[19] This distinction was diminished, but not wholly eliminated with the passage of IIRIRA. *See Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010).

the country."

**e. Lack of Evidence of Application of § 1182(d)(5) Not Controlling**

Petitioner, mistakenly assuming that the form or statutory basis for his original release would alter his "in country" status, points to the lack of evidence to support a release under § 1182(d)(5) for humanitarian or public benefit purposes and argues he thus must have been released pursuant to § 1226(a). (Petition at 22, ¶ 96 (citing *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115-16 (9th Cir. 2007)).)

*Ortega-Cervantes* does not mandate such a result. As discussed hereinabove (in section IV(B)(3)(b)), in that case the Ninth Circuit was tasked with deciding "whether aliens who are 'conditional[ly] parole[d]' pursuant to 8 U.S.C. § 1226(a) are necessarily 'paroled into the United States' and thus eligible for adjustment of status pursuant to 8 U.S.C. § 1255(a)." 501 F.3d at 1112. The court distinguished "parole" under § 1182(d)(5) from conditional release under § 1226(a), and found the petitioner's release to be under § 1226(a) because:[20] (a) he was, after apprehension, ordered detained under § 1226(a); and (b) his release form referenced release under § 1226, and referenced only the "conditional parole" specified in § 1226(a).[21] The court declined to hold that § 1182(d)(5) could never be applied to an alien already in the country (rather than seeking admission), but found nothing in the case to conclude that such an unusual basis for release had been granted to Ortega-Cervantes. 501 F.3d at 1116. But *Ortega-Cervantes* did not assert the opposite, *i.e.* that an arriving alien seeking admission could be released pursuant to § 1226(a). Nor did the court require a record supporting humanitarian/public-benefit reasons for a court to conclude that an arriving alien was paroled pursuant to § 1182(d)(5).

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[20] The court further rejected as unsupported the alien's contention that his release must have been a qualifying "parole" under § 1182(d)(5) because it was given to allow him to serve as a witness against his smuggler, a circumstance authorizing parole under § 1182(d)(5) as provided in 8 C.F.R. § 212.5(b)(4).

[21] Upon his initial release, Ortega-Cervantes married a U.S. Citizen and sought to adjust his status, which was available only to those inspected and admitted or paroled into the United States. When he reported as required by the terms of his release, he was again taken into custody, and again released pending his deportation proceedings. The court found his release was in both instances pursuant to § 1226(a).

The undersigned does not find persuasive the other case cited by Petitioner for his proposition, *Rocha Rosado v. Figueroa*. In that case, the Report & Recommendation being addressed had cited *Ortega-Cervantes* and relied on evidence that "[n]one of the documents issued to Rosado or presented to the Court makes any reference to Rosado having been 'paroled' into the United States." *Rosado v. Figueroa*, 2025 WL 2337099, at *7 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted sub nom. Rocha Rosado v. Figueroa,* No. CV-25-02157-PHX-DLR (CDB), 2025 WL 2349133 (D. Ariz. Aug. 13, 2025). Here, neither party have presented any contemporaneous documents establishing the source of Petitioner's release. But without more, this causes no reason to question the assertions that § 1182(d)(5) was the authority for Petitioner's release.

Further, in *Rocha-Rosado* the court relied on the fact that the alien had not been placed in "expedited removal" proceedings and had not asserted a claim for asylum, but had been given a notice of removal proceedings pursuant to 8 U.S.C. § 1229. Here, in contrast, Petitioner did seek asylum. Moreover, § 1229 applies to all proceedings under § 1229a, 8 U.S.C. § 1229(a)(1), and that section applies to applications for admission. 8 U.S.C. § 1229a(a)(3). The only exceptions are for expedited removal proceedings under 8 U.S.C. § 1228 for aliens convicted of an aggravated felony, 8 U.S.C. § 1229a(a)(3), and aliens in expedited removal without a credible claim of asylum. *See Guerrier v. Garland,* 18 F.4th 304, 306 (9th Cir. 2021) (if the asylum officer finds that the applicant in expedited removal has a credible fear of persecution, the applicant receives full consideration of his asylum claim in a standard removal hearing). Here, Petitioner was found to have a credible fear of persecution, and thus was properly placed in § 1229a removal proceedings.

Petitioner cites to *Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747 (BIA 2023) (which was relied on by the court in *Rocha-Rosado,* 2025 WL 2337099, at *7), which addressed the same limited question on entitlement to an adjustment of status. There the BIA reasoned that when an alien enters the country without inspection ("present in the United States who has not been admitted") then under 8 U.S.C. § 1225(a)(1) they are deemed "an applicant for admission" even though they have not submitted to inspection

and sought admission. In such an instance, the BIA concluded, the government has authority to choose between treating them as actually seeking admission under § 1225, and proceeding under that section with the potential for release under § 1182(d)(5), or as being inadmissible and subject to removal under § 1229a, and subject to the detention and release provisions of § 1226(a). In *Cabrera-Fernandez*, the aliens acknowledged that the government had released them under § 1226(a). Thus there was no basis to treat their release as one under § 1182(d)(5). Consequently, the aliens had not been "paroled" under § 1182(d)(5), only "conditionally paroled" under § 1226(a), and thus they were ineligible for an adjustment of status. Here, in contrast, Petitioner was not simply found in the United States, but submitted to inspection and sought admission.

**4. Concluson**

Based upon the foregoing, the undersigned concludes that Petitioner is subject to detention under § 1225. Petitioner makes no argument that § 1225 by its terms entitles him to consideration for bond, does not assert a right to a hearing under § 1182(b)(5), and points to no other applicable statute or regulation entitling him to a detention hearing. Consequently, Grounds 1 and 2 must be denied.

**C. GROUNDS 3 & 4 - APA CLAIMS**

In Grounds 3 and 4 Petitioner asserts claims under the Administrative Procedures Act, 5 U.S.C. § 706, *et seq*. Respondents argue that such claims are not properly brought in a habeas petition. Respondents rely in part on *Flores-Miramontes v. I.N.S.*, 212 F.3d 1133, 1140 (9th Cir. 2000) for the proposition that APA claims cannot be raised in a habeas petition. (Answer, Doc. 14 at 11.) At most, that case concludes that the APA does not "govern habeas proceedings" and "does not serve to repeal in whole or in part the general habeas statute."

The Ninth Circuit has held that "the writ of habeas corpus is limited to attacks upon the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir.

1979). Thus, if Petitioner's claims were not based on some unique mandate of the APA as a basis to find his confinement illegal, he would simply be seeking judicial review of agency actions, *e.g.* arbitrary and capricious activity, 5 U.S.C. § 706(2)(A), and failure to comply with procedures required by law, *id.* at ¶ (2)(D). Such claims are not properly raised in his habeas Petition. The role of habeas is not as an appeal engaging in plenary "review" of some other proceeding or decision, but to be an entirely separate, collateral proceeding to determine *ab initio* the limited question of whether the petitioner's confinement is a violation of law and if so to remedy it. "The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny." *Peyton v. Rowe*, 391 U.S. 54, 58 (1968).

However, where the relief sought would terminate custody or accelerate release, it is within the "core of habeas corpus" and must be brought in a habeas proceeding. *See Trump v. J. G. G.*, 604 U.S. 670, 672 (2025); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); and *Nettles v. Grounds*, 830 F.3d 922, 930 (9th Cir. 2016). "[A]n action sounds in habeas 'no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration.'" *Pinson v. Carvajal*, 69 F.4th 1059, 1071 (9th Cir. 2023).

Indeed, in *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), the Ninth Circuit granted habeas relief on the bases of claims brought under the APA. However, in that case, the petitioners relied upon provisions of the APA which mandated notice of and opportunity for comment on proposed rules, and publication of the adopted rules. In particular, they challenged rules adopted without prior notice or comment adopted by the Bureau of Prisons denying certain prisoners early release incentives. Thus, the violation of the APA necessarily implied the invalidity of the prisoners' confinement.[22]

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[22] If Petitioner's claims were not based on some unique mandate of the APA as a basis to find his confinement illegal, he would simply be seeking judicial review of agency actions, *e.g.* arbitrary and capricious activity, 5 U.S.C. § 706(2)(A), and failure to comply with procedures required by law, *id.* at ¶ (2)(D). Such claims are not properly raised in his habeas Petition. The role of habeas is not as an appeal engaging in plenary "review" of some other proceeding or decision, but to be an entirely separate, collateral proceeding to

**1. Ground 3 – Arbitrary Application**

In Ground III Petitioner contends that the Government is arbitrarily and capriciously misapplying § 1225(b) to detain him. While that claim might sound in habeas, it is merely duplicative of his direct habeas claims in Grounds 1 and 2 that the applicable statutes do not support his detention without a hearing. And, it would similarly be without merit because (as determined in addressing Grounds 1 and 2) § 1225(b) properly applies to Petitioner.

**2. Ground 4 – Notice and Comment**

In Ground IV Petitioner contends the Government has failed to follow the public notice-and-comment procedures relied on in *Paulsen*.

**Dismissal for Improper Venue** - Ordinarily, systemic claims are governed by § 1252(e)(3). That statute channels such claims to the District Court for the District of Columbia. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 487 (1999) (summarizing § 1252(e)(3) as providing only "limited review of statutes and regulations pertaining to the exclusion of aliens"); and *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1101 n. 3 (9th Cir. 2019), *rev'd on ohther grounds*, 591 U.S. 103 (2020) (describing § 1252(e)(3) as authorizing a person to "challenge the constitutionality and legality of the expedited removal provisions, regulations implementing those provisions, or written policies to implement the provisions").

However, Section 1252(e) only applies "in any action pertaining to an order to exclude an alien." 8 U.S.C. § 1252(e)(1)(A). Here, Petitioner does not challenge his exclusion order or proceedings, only his detention. *See Echevarria v. Bondi*, CV-25-03252-PHX-DWL (ESW), 2025 WL 2821282, at *3 (D. Ariz. Oct. 3, 2025) (finding a detention claim did not pertain to an order of exclusion, and thus was not governed by §

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determine *ab initio* the limited question of whether the petitioner's confinement is a violation of law and if so to remedy it. "The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny." *Peyton v. Rowe*, 391 U.S. 54, 58 (1968).

1252(e)(3)).[23]

If § 1252(e) nonetheless applies, then Section 1252(e)(3) establishes the jurisdiction (the district court) and the proper venue (District of Columbia) for claims within its purview. *See Am. Immigr. Laws. Ass'n v. Reno*, 199 F.3d 1352, 1359 (D.C. Cir. 2000) (describing channeling under 1252(e)(3) to the District of Columbia as venue selection); and *Singh v. Barr*, 982 F.3d 778, 783 (9th Cir. 2020) (circuit court had neither jurisdiction nor venue to review claims governed by 1252(e)(3)). Thus, while this district court may have jurisdiction, it is not the proper venue.

However, defective venue is not necessarily dispositive of a claim. 28 U.S.C. § 1406(a) provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." The undersigned finds the interests of justice do not call for a transfer of venue for three reasons. First, neither Petitioner nor Respondents seek a transfer. Second, it is only Ground 4 which is improperly before this Court, the statute only provides for transfer of cases, and the parties have not sought severance. *See Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18, 32 (D.D.C. 2011). Third, as discussed hereinafter, the claim appears to be without merit. *See Viaggio v. Field*, 177 F. Supp. 643 (D. Md. 1959) (declining transfer as not in interests of justice where transferee forum would dismiss claim under the statute of limitations in the district).

Accordingly, if § 1252(e)(3) applies, Ground 4 should be dismissed without prejudice.

**Denial on Merits** - On the other hand, if § 1252(e)(3) does not apply, Ground 4 is without merit because the referenced procedures only apply to the adoption of "rules." 5 U.S.C. § 553(b), (c). By its own terms, that section does not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,"

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[23] Because there is limited authority for the proposition that detention does not "pertain" to exclusion, the undersigned proceeds to address the merits of Ground 4.

except when notice is explicitly required by other statute. *Id.* at (b)(A). Here, Petitioner fails to identify an applicable modified "rule," only new policies, BIA decisions, and practices (Petition at ¶¶ 60, 63, 67, 72, and 77). Petitioner does not point to a statute requiring notice or hearing for the kinds of interpretation, practice, and policy changes he asserts have occurred. Thus, Petitioner fails to show that the APA was violated. It is true that Petitioner references the "interim" rule in 62 Fed. Reg. at 10323. But as discussed hereinabove, the language in that Rule only applies to persons who entered without inspection, and thus does not apply to Petitioner. Thus any APA violation in the modification of that Rule would not render Petitioner's detention illegal.

Therefore, this Ground should either be dismissed for improper venue or denied as without merit.

**D. GROUND 5- CONSTITUTIONAL CLAIM**

In Ground 5, Petitioner argues he has been denied due process under the Fifth Amendment because his detention is "not reasonably related to the purpose of ensuring a noncitizen's removal from the United States." (Petition at 18, citing *inter alia*, *Zadvydas v. Davis*, 533 U.S. 678, 690-92 (2001). Petitioner offers his previous parole, three years of law abiding presence, and strong ties to the community as evidence.

Respondents argue that detention under § 1225(b) has been determined to comport with due process, even without provision for bond. Respondents reason that as an alien seeking admission, Petitioner has only the rights given him by Congress. Respondents further argue that this Court lacks jurisdiction to review the discretionary decision to grant parole under 8 U.S.C. § 1182(d)(5)(A). (Answer at 7-9.)

**1. Detention Subject to Limited Due Process**

In *Dep't of Homeland Sec. v. Thuraissigiam*, the Supreme Court discussed the due process rights of arriving aliens seeking admission. "[A]s to 'foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even

been admitted into the country pursuant to law,' 'the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.'"591 U.S. 103, 138 (2020) (quoting *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 660 (1892)). These principles apply to Petitioner despite him having been granted parole pending the resolution of his asylum application. "[A]liens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are 'treated' for due process purposes 'as if stopped at the border.'"[24] *Id.* at 139.

The question remains whether the principle underlying *Thuraissigiam* applies only to questions of admission, or whether it extends to detention. The undersigned has not identified any recent, binding authority involving arriving aliens deciding whether *Thuraissigiam* itself applies to not only the admission question, but also detention issues.

The facts of *Thuraissigiam* were limited to a challenge to the admission decision, and were so disconnected from detention that the *Thuraissigiam* court found no basis for habeas jurisdiction, and the decision contains no language extending its holding beyond the admission decision. Moreover, all but one of the cases on which *Thuraissigiam* relied for its holding on the limits on process due to arriving aliens plainly dealt solely with the process due in determining admission. In *Nishimura Ekiu v. United States*, the court was concerned with determining whether "foreigners who have never been naturalized...shall be permitted to enter," and concluded that actions of the executive "within powers expressly conferred by congress, are due process of law." 142 U.S. 651, 660 (1892). In *U.S. ex rel. Knauff v. Shaughnessy*, the Court was concerned with "the decision to admit or to exclude an alien" when it declared "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." 338 U.S. 537, 543-44 (1950). In *Landon v. Plasencia*, the Court recognized: "This Court has long held that an

[24] Moreover, the *Thuraissigiam* court acknowledged that even those aliens who enter without inspection but who are "detained shortly after unlawful entry cannot be said to have effected an entry," remain "on the threshold," and have only the rights prescribed by Congress serving as due process. *Thuraissigiam*, 591 U.S. at 139-140. In that case, Thuraissigiam had proceeded 25 yards into the country. *But see*

alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." 459 U.S. 21, 32 (1982).

However, in *Shaughnessy v. United States ex rel. Mezei*, (relied on in *Thuraissigiam*) the petitioning alien had (after a period of residence) left the United States and spent 19 months "behind the iron curtain" before attempting to return to the U.S. The Court found he was not challenging his exclusion, just his continued detention on Ellis Island because other countries would not take him. 345 U.S. 206, 207 (1953). The *Mezei* Court quoted *Knauff* for the proposition that while aliens who had already "passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in the due process of law...But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry to the country is concerned.'" *Mezei*, 345 U.S. at 212 (quoting *Knauff*, 338 U.S. at 544). The Court went on to determine whether Mezei could be detained indefinitely on Ellis Island, concluding that Mezei was not deprived of "any statutory or constitutional right." 345 U.S. at 215-216.

Thus, while the facts and holding of *Thuraissigiam* may have been limited to a question of admission rather than detention, the principle it relied on was not. Under *Mezei*, detention questions have been governed by the same principle that the procedure authorized by Congress is the only process due.

Indeed, in *Zadvydas,* the Court distinguished *Mezei* in finding a right to a detention hearing for aliens post-removal order. The Court discussed Mezei's status as an "arriving alien" deemed "stopped at the border." *Zadvydas*, 533 U.S. at 693-694 ("this Court's ...rejection of his challenge to continued detention rested upon a basic territorial distinction," *i.e.* his detention on Ellis Island was not a "landing") (citing *Mezei,* 345 U.S. at 215). *See also Xi v. U.S. I.N.S.*, 298 F.3d 832, 837 (9th Cir. 2002) (recognizing *Mezei* describes due process rights of arriving aliens regarding detention, but finding *Zavydas's* constitutional construction of § 1231(a)(6) to apply to all post-removal order aliens,

including arriving aliens).

Moreover, in *Immigr. & Customs Enf't v. Padilla*, 141 S. Ct. 1041 (2021) the Court summarily vacated and remanded "for further consideration in light of" *Thuraissigiam* the Ninth Circuit's decision in *Padilla v. Immigr. & Customs Enf't*, 953 F.3d 1134 (9th Cir. 2020). The Ninth Circuit had found that non-arriving aliens "seeking admission" (but who initially evaded inspection, and had effected an entry) were subject to detention under § 1225(b) (because they had not resided for two years), were entitled to a bond hearing. This reversal at least suggests that *Thuraissigiam* applies to detention issues.

It is true that the district court on remand in *Padilla* concluded that *Thuraissigiam* limits an arriving alien's due process rights only as to their admission. *Padilla v. U.S. Immigr. & Customs Enf't*, 704 F. Supp. 3d 1163 (W.D. Wash. 2023). There, the district judge relied on the facts of *Thuraissigiam* being limited to a challenge to the admission decision, and were so disconnected from detention that the *Thuraissigiam* court found no basis for habeas jurisdiction, and the decision contains no language extending its holding beyond the admission decision. But the district court did not analyze the effect of *Mezei,* or its treatment in *Zadvydas* and *Xi*, in coming to that conclusion.

Other courts in this circuit have reached similar conclusions, albeit by different means, none of which the undersigned finds persuasive. In *Rosado*, 2025 WL 2337099, at *15, Magistrate Judge Bibles relied on the distinctions drawn in *Ortega-Cervantes* in applying the adjustment of status provisions under 8 U.S.C. § 1255, which decision the undersigned has found inapposite. (*See supra* Section IV(B)(3)(b).) In *Y-Z-L-H v. Bostock*, 792 F.Supp.3d 1123 (D. Or. July 9, 2025), Judge Simon summarily concluded *Thuraissigiam* applied only to claims seeking admission, *id.* at 1141-42, and despite acknowledging that the arriving alien had been paroled, described him as "no longer at the threshold of initial entry." *Id.* at 1146. In *Aviles-Mena v. Kaiser*, 2025 WL 2578215, at *4 (N.D. Cal. Sept. 5, 2025), Judge Lin relied on the facts of *Thuraissigiam* as limiting it to admission questions, and treated parole as amounting to an entry. In *Gao v. LaRose*, 2025 WL 2770633, at *3 (S.D. Cal. Sept. 26, 2025) Judge Hui detailed cases applying and

cases distinguishing *Thuraissigiam*, and without explanation proceeded to analyze whether due process required detention hearing.

In contrast, in *Leon Alcazar v. Cantu*, No. CV-24-03342-PHX-JAT (DMF), 2025 WL 2548698, at *14 (D. Ariz. June 5, 2025), *report and recommendation adopted*, 2025 WL 2304357 (D. Ariz. Aug. 11, 2025), Magistrate Judge Fine applied *Thuraissigiam* to a detention claim by an arriving alien without discussing the distinguishing facts. And in *Martinez v. Larose,* 980 F.3d 551 (6th Cir. 2020), Circuit Judge Thapar (in a concurrence to a denial of a petition for rehearing) relied on *Mezei* to apply *Thuraissigiam* to an arriving alien's detention challenge.

The undersigned agrees with Circuit Judge Thapar's reliance on *Mezei*, and thus concludes that insofar as an arriving alien's detention is concerned,[25] the process due is determined by the political branches. And Petitioner points to no applicable statute or regulation entitling him to a detention hearing while detained under § 1225(b).

**2. *Zadvydas* Inapplicable**

Petitioner argues that the reasoning of *Zadvydas* should apply to require opportunities for his release. This argument was rejected by the Supreme Court in *Jennings* because, unlike in *Zadvydas*: (1) detention under § 1225(b) has a definite term (completion of proceedings); (2) the detention is statutorily mandated, rather than permissive, and thus not ambiguous; and (3) unlike § 1231(a)(6) detention, detention under § 1225(b) is subject to exceptions, namely § 1182(b)(5). *Jennings*, 583 U.S. at 299-301. (The *Jennings* Court reached similar conclusions with respect to detention under § 1226. *Id.* at 303-306.) Thus the Court found no opportunity to apply the constitutional avoidance canon employed in *Zadvydas*. *See also Demore v. Kim*, 538 U.S. 510, 527-530 (2003)

[25] The undersigned acknowledges the discomfiture of ascribing no due process rights to arriving aliens when one considers the specter of: orders for hard labor, inhumane conditions of detention, or outright abuse. *See e.g. Cardin Alvarez v. Rivas,* CV-25-2943-PHX-GMS(CDB), 2025 WL 2898389, at *15 (D. Ariz. Oct. 7, 2025), *report and recommendation adopted in part,* 2025 WL 2899092 (D. Ariz. Oct. 10, 2025). But that discomfort does not provide a basis for this court to apply a rule different from that plainly established in *Mezei* with regard to detention issues.

(finding *Zadvydas* distinguishable and thus inapplicable to mandatory detention under § 1226(c) of criminal aliens still in removal proceedings.) *Cf.* Banda v. McAleenan, 385 F. Supp. 3d 1099 (W.D. Wash. 2019) (deciding without reliance on *Zadvydas* that 17 months detention under § 1225(b) without a bond hearing was "prolonged" and thus av violation of due process); *Arechiga v. Archambeault*, 2023 WL 5207589 (D. Nev. Aug. 11, 2023) (arriving alien detained under § 1225 for 43 months had a due process right to a bond hearing).)

Nor does Petitioner contend that his detention has or will become prolonged.

Moreover, there is another significant distinction between Petitioner and *Zadvydas*. In *Zadvydas* the Court rejected the Government's efforts to contend that alien status alone justified mandatory detention pursuant to *Mezei*. The Court distinguished the situation of arriving aliens (like Mezei), who have never effected an entry, from the petitioners in that case.

> in *Mezei* itself, both this Court's rejection of Mezei's challenge to the procedures by which he was deemed excludable and its rejection of his challenge to continued detention rested upon a basic territorial distinction. *See Mezei, supra*, at 215, 73 S.Ct. 625 (holding that Mezei's presence on Ellis Island was not "considered a landing" and did "not affec[t]" his legal or constitutional status (internal quotation marks omitted)).

*Zadvydas*, 533 U.S. at 694.

Thus Petitioner's argument under the holding and reasoning of *Zadvydas* is without merit, and he has failed to show a denial of the limited due process guaranteed him by our Constitution.

Therefore, Ground 5 must be denied as without merit.

## V. RECOMMENDATION

**IT IS THEREFORE RECOMMENDED:**

(A) Ground Four (APA Notice and Comment) of Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 4) should be either: (1) **DISMISSED WITHOUT PREJUDICE** for improper venue; or (2) **DENIED** as without merit.

(B) The remainder of Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 4) be **DENIED**.

## VI. EFFECT OF RECOMMENDATION

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment.

However, pursuant to Rule 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See also* Rule 8(b), Rules Governing Section 2254 Proceedings. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

In addition, the parties are cautioned Local Civil Rule 7.2(e)(3) provides that "[u]nless otherwise permitted by the Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall not exceed ten (10) pages."

Dated: November 18, 2025

James F. Metcalf
United States Magistrate Judge

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