UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HARSH PATEL, Petitioner, v. KRISTI NOEM, in her official capacity as Secretary of Homeland Security, *et al.*,[1] Respondents.	)	No. 25 C 11180 Judge Cummings

SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to this court's order, Dkt. 11, respondents submit this supplemental memorandum to respond to petitioner's memorandum in support of his habeas petition, Dkt. 6 ("Pet'r Mem."). By way of review, this case involves petitioner Harsh Patel, a foreign national who has never been lawfully admitted.[2] *See* Dkt. 1 ("Pet.") at ¶ 18. He is currently detained by U.S. Immigration and Customs Enforcement ("ICE") and seeks habeas relief from his mandatory detention while his removal proceedings play out before an immigration judge. *Id.* at ¶¶ 5–8, 14. But his petition should fail for the many reasons discussed in respondents' memorandum in support of their return, *see* Dkt. 8 at 3–15, along with the additional reasons discussed below.

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[1] Pursuant to this court's order, Dkt. 11, respondents report that Brandon Crowley is the Jail Commander for the Clay County Detention Center and should thus be substituted as the "immediate custodian" respondent under Federal Rule of Civil Procedure 25(d).

[2] This memorandum uses the term "foreign national" as equivalent to the statutory term of "alien" within the Immigration and Nationality Act ("INA").

Argument

I. This Court Lacks Jurisdiction to Intervene in Petitioner's Removal Proceedings.

As a threshold matter, Patel's argument that this court has jurisdiction to intervene and manage the bond hearings for his removal proceedings should fail under the multiple jurisdiction-stripping provisions within 8 U.S.C. § 1252. Pet'r Mem. at 1–4. This is because Patel is attempting to use habeas to collaterally attack his ongoing removal proceedings, even though Congress has provided that "*no court shall have jurisdiction*, by habeas corpus . . . or by any other provision of law," to review any questions of law or fact "arising from any action taken or proceeding brought to remove an alien from the United States" except on a petition for review of a final order of removal. 8 U.S.C. § 1252(b)(9) (emphasis added). Moreover, "*no court shall have jurisdiction* to hear any cause or claim" that arises from "the decision or action" to "commence" removal proceedings or "adjudicate [those] cases." *Id.* § 1252(g) (emphasis added). While these jurisdictional bars may still allow foreign nationals to challenge the conditions of their confinement during those removal proceedings, the statutes do not permit the use of habeas to "challeng[e] the decision to detain them in the first place or to seek removal." *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (plurality opinion). Yet that is *precisely* what Patel is requesting here, as adjudicating whether bond should be given to a foreign national in removal proceedings is part and parcel of "adjudicate[ing a] case" before each immigration judge. *See* Pet'r Mem. at 3 ("Petitioner is seeking review of his . . . detention" while he is in removal proceedings.).

First, look at § 1252(g) and the issue of whether the decision to detain Patel is incident to both commencing removal proceedings against him, as well as the determination that he should not be given a bond hearing during his removal proceedings—which is part of "adjudicate[ing a] case." "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." 8 U.S.C.

§ 1226(a). That is the authority respondents are exercising here. Exhibit 3. They are not detaining the petitioner for any reason independent of the decision to commence removal proceedings against him. *See id.* In other words, they are detaining Patel because of those proceedings. *See* Exhibit 1. And Patel has not alleged a reason for this that is not also the reason for the government's decision to commence removal proceedings against him.

True, Patel's habeas claims do not *directly* challenge the decision to initiate removal proceedings against him. Rather, Patel challenges the decision to detain him during the pendency of those proceedings. Thus, the question of whether the court has jurisdiction revolves around whether Patel's detention "arises from" a decision to "commence proceedings, adjudicate cases, or execute removal proceedings." 8 U.S.C. § 1252(g); *see also Valencia-Mejia v. United States*, No. 08-cv-2943, 2008 WL 4286979, at *3 (C.D. Cal. Sept. 15, 2008). The decision to commence removal proceedings against a foreign national includes the detention of that foreign national pending the removal determination. *See* 8 U.S.C. § 1226(a). Consequently, the decision to detain is a "specification of the decision to 'commence proceedings' which . . . § 1252(g) covers." *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 474, 485 n.9 (1999).

As to this issue, *Sissoko v. Mukasey*, 509 F.3d 947 (9th Cir. 2007) ("*Sissoko III*") is directly on point. In that case, the plaintiff had overstayed his visa and then traveled out of the United States for his father's funeral. *See Sissoko v. Mukasey*, 440 F.3d 1145, 1149 (9th Cir. 2006) ("*Sissoko II*"). Upon his return to the United States after the funeral, an immigration inspection officer took him into custody as an "arriving alien" without proper documentation. *Id.* The officer decided to initiate expedited removal proceedings against the plaintiff but later issued a Notice to Appear and placed him in regular removal proceedings. *Sissoko III*, 509 F.3d at 949. He was thereafter subject to mandatory detention for nearly three months during the pendency of his

removal proceedings, and then he and his wife brought a false arrest claim against the arresting immigration officer, alleging that the detention was in violation of the Fourth Amendment. *See Sissoko II*, 440 F.3d at 1149. The court of appeals held that the plaintiff's claim was barred by § 1252(g) because his detention *arose from* the decision to commence expedited removal proceedings. *Id.*; *see also Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms," § 1252(g) "bars us from questioning [the government's] discretionary decisions to commence removal" of a foreign national, which include the "decision to take him into custody *and to detain him during his removal proceedings*." (emphasis added)); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1067–68 (N.D. Ill. 2007) (claim challenging arrest and detention during removal proceedings was barred under § 1252(g) because "'when removal proceedings are initiated against an inadmissible alien by issuing a removal order, the alien is automatically arrested and detained.' The arrest/detention arose from the decision to commence proceedings, and Plaintiff's Fourth Amendment claim arose from the arrest/detention. Thus, . . . the Fourth Amendment claim arose from the decision to commence proceedings.").

Attempting to get around this problem, Patel argues that "[a]n immigration judge's . . . review of a bond determination is a distinct proceeding from an alien's underlying removal proceeding." Pet'r Mem. at 3 (citing 8 C.F.R. § 1003.19(d)). But the regulation Patel cites for support never suggests that an immigration judge is not "adjudicate[ing a] case" for the purposes of § 1252(g) when they are making bond determinations—or applying the Board of Immigration Appeals ("BIA") precedent in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA Sept. 5, 2025), in which it concluded ICE could treat undocumented immigrants already present in the United States as arriving aliens subject to mandatory detention under 8 U.S.C. § 1225(b)(2). Instead of dealing with the laws as enacted *today* (that is, § 1252(g)'s current language of "adjudicate cases"),

Patel relies on *dicta* in *Gornicka v. INS*, 681 F.2d 501 (7th Cir. 1982), arguing that "bond hearings are separate and apart from deportation proceedings." Pet'r Mem. at 3 (quoting *Gornicka*, 681 F.2d at 505). The problem with such reliance is that "deportation proceedings" no longer exist after the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") changed the INA to only provide for "removal proceedings" and, consequently, *Gornicka* was not interpreting the INA as it currently stands. *See* 8 U.S.C. § 1229a; *Vartelas v. Holder*, 566 U.S. 257, 262 (2012) ("In IIRIRA, Congress . . .created a uniform proceeding known as 'removal.'").

Second, 8 U.S.C. § 1252(b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order." Congress specified that "no court shall have jurisdiction, by habeas corpus under [28 U.S.C. § 2241] or any other habeas corpus provision . . . or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact." *Id.*; *see also id.* § 1252(a)(5) (applying the same jurisdictional bar to "judicial review of an order of removal"). While § 1252(b)(9) may not bar claims challenging the conditions or scope of detention of foreign nationals in removal proceedings, it *does* bar claims "challenging the decision to detain them in the first place." *Jennings*, 583 U.S. at 294 (plurality opinion).[3] By making such a challenge, the habeas claims here require a court to

[3] *See also Jennings*, 583 U.S. at 317 (Thomas, J., concurring in part and concurring in the judgment) ("Section 1252(b)(9) is a 'general jurisdictional limitation' that applies to 'all claims arising from deportation proceedings' and the 'many decisions or actions that may be part of the deportation process.' Detaining an alien falls within this definition—indeed, this Court has described detention during removal proceedings as an 'aspect of the deportation process.' . . . The phrase 'any action taken to remove an alien from the United States' must at least cover congressionally authorized portions of the deportation process that necessarily serve the purpose of ensuring an alien's removal." (alterations and citation omitted) (quoting *AADC*, 525 U.S. at 482–83; *Demore v. Kim*, 538 U.S. 510, 523 (2003); and 8 U.S.C. § 1252(b)(9))).

answer "legal questions" that arise from "an action taken to remove an alien," so Patel's claims "fall within the scope of § 1252(b)(9)." *Jennings*, 583 U.S. at 295 n.3 (plurality opinion).

Third, § 1252(a)(2)(B)(ii) provides that "no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B). Even if there were any remaining ambiguity as to whether a foreign national could challenge the decision to detain him during removal proceedings—on the dubious theory that the detention was somehow neither part of the decision to commence removal proceedings nor an action taken to adjudicate that case—Congress added this third jurisdictional bar to clarify that courts may not entertain a challenge to a discretionary decision under the INA.

That jurisdictional bar is relevant here because the statute that Patel insists his detention should be analyzed under (8 U.S.C. § 1226(a)) authorizes detention pending removal proceedings and clearly confers discretion: "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." 8 U.S.C. § 1226(a) (emphasis added). Additionally, except when detention is mandatory based on the alien's criminal history, "pending such decision, the Attorney General . . . *may* continue to detain the arrested alien." *Id.* (emphasis added). This discretionary language within § 1226(a) means Patel's detention is specified as a discretionary decision under the INA that is insulated from judicial review by the plain text of 8 U.S.C. § 1252(a)(2)(B)(ii). *See, e.g.*, *Bouarfa v. Mayorkas*, 604 U.S. 6, 13–14 (2024) ("As '[t]his Court has repeatedly observed,' 'the word may *clearly* connotes discretion.'" (emphasis in original) (quoting *Biden v. Texas*, 597 U.S. 785, 802 (2022) (cleaned up)).

II. Petitioner Is Properly Detained Under 8 U.S.C. § 1225(b)(2).

Finally, petitioner's memorandum argues that exhaustion should not be required in this matter because of the BIA's recent decision in *Yajure Hurtado*—arguing that requesting any bond determination hearing would be futile and providing a list of decisions that have "disagreed with the new interpretation set forth in *Matter of Yajure Hurtado*." Pet'r Mem. at 6. Regarding the former issue, respondents refer the court to their prior memorandum discussing exhaustion. *See* Dkt. 8 at 14–15. As to the correctness of *Yajure Hurtado*, it is important to note that not all decisions have been resolved against the government on the issue of properly interpreting 8 U.S.C. § 1225(b)(2). *See Pena v. Hyde*, No. 25-cv-11983, 2025 WL 2108913, at *2 (D. Mass. July 28, 2025) ("Because petitioner remains an applicant for admission, his detention is authorized so long as he is 'not clearly and beyond doubt entitled to be admitted' to the United States." (quoting 8 U.S.C. § 1225(b)(2)(A))); *see also Florida v. United States*, 660 F. Supp. 3d 1239, 1274–75 (N.D. Fla. 2023). Again, the relevant statute here, 8 U.S.C. § 1225(b)(2)(A), is simple and unambiguous:

> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(A).

Aside from the textual argument over § 1225(b)(2)(A) that respondents included in their previous memorandum, *see* Dkt. 8 at 10–14, the INA specifies that "an alien present in the United States who has not been admitted" "shall be deemed . . . an applicant for admission." 8 U.S.C. § 1225(a). Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings*, 583 U.S. at 287. As the Supreme Court indicated in *Jennings*, "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) . . . mandate detention of applicants

of admission until certain proceedings have concluded." 583 U.S. at 297. Despite the clear direction from the Supreme Court, Patel (along with the cases he cites) argue that there is some third category of applicants for admission who are not subject to mandatory detention. *Jennings*, 583 U.S. at 287. Section 1225(b)(1) covers which applicants for admission, including arriving aliens or foreign nationals who have not been admitted and have been present for less than two years, and directs that both of those classes of applicants for admission are subject to expedited removal. 8 U.S.C. § 1225(b)(1). Section 1225(b)(2) "serves as a catchall provision that applies to all applicants not covered by 1225(b)(1) (with specific exceptions not relevant here)."[4] *Jennings*, 583 U.S. at 287. *Jennings* recognized that 1225(b)(2) mandates detention. *Id.* at 297; *see also Matter of Li*, 29 I. & N. Dec. 66, 69 (BIA 2025) ("[A]n applicant for admission . . . whether or not at a port of entry, and subsequently placed in removal proceedings is detained under . . . 8 U.S.C. § 1225(b), and is ineligible for any subsequent release on bond."). Thus, § 1225(b) should apply to Patel because he is present in the United States without being admitted and is thus still an applicant for admission. *See Yajure Hurtado*, 29 I. & N. Dec. at 221.

Any argument that "seeking admission" limits the scope of § 1225(b)(2)(A) is unpersuasive. Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history and purpose.'" *Abramski v. United States*, 573 U.S. 169, 179 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)). The BIA has long recognized that "many people who are not actually requesting permission to enter the United States in the ordinary sense are nevertheless deemed to be 'seeking admission' under immigration laws." *Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 (BIA 2012). Statutory language "is known by the company

[4] The two exceptions are crewmen and stowaways. *See* 8 U.S.C. §§ 1225(a)(2), 1281, and 1282(b). Neither is relevant to this case.

it keeps." *McDonnell v. United States*, 579 U.S. 550, 569 (2016). The phrase "seeking admission" in § 1225(b)(2)(A) must be read in the context of "applicant for admission" in § 1225(a)(1). Applicants for admission includes arriving aliens and foreign nationals present without admission. *See* 8 U.S.C. § 1225(a)(1). Both are understood to be "seeking admission" under §1225(a)(1). *See Lemus-Losa*, 25 I. & N. at 743. Congress made clear that all foreign nationals "who are applicants for admission or otherwise seeking admission" to be inspected by immigration officers. 8 U.S.C. § 1225(a)(3). The word "or" here "introduce[s] an appositive–a word or phrase that is synonymous with what precedes it ('Vienna or Wien,' 'Batman or the Caped Crusader')." *See United States v. Woods*, 571 U.S. 31, 45 (2013).

Patel's preferred interpretation reads "applicant for admission" out of 1225(b)(2)(A). "[O]ne of the most basic interpretive canons" instructs that a "statute should be construed so that effect is given to all its provisions." *Corley v. United States*, 556 U.S. 303, 314 (2009). "Applicant" is defined as "[s]omeone who requests something; a petitioner, such as a person who applies for letters of administration." *Black's Law Dictionary* (12th ed. 2024). Applying the definition of "applicant" to "applicant for admission," an applicant for admission is a foreign national "requesting" admission, defined by statute as "the lawful entry of the alien into the United States after inspection." 8 U.S.C. § 1101(a)(13)(A). With this definition in mind, "seeking admission" does not have a different meaning from applicant for admission ("requesting admission"); the terms within § 1225(b)(2)(A) are thus synonymous.

This reading also comports with one of the central purposes behind IIRIRA—which was to stop treating foreign nationals who had evaded immigration authorities better than foreign nationals who correctly applied for admission at ports of entry. *See, e.g., Hing Sum v. Holder, 602 F.3d 1092*, 1100 (9th Cir. 2010). The "IIRIRA amendments sought to ensure sensibly enough,

that those who enter the country illegally, without proper inspection, are not treated more favorably under the INA than those who seek admission through proper channels, but are denied access." *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 631 (E.D. Va. 2003). Patel's reading of the statute ignores the context and purpose of IIRIRA in the treatment of foreign nationals present without inspection. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) (noting that interpretive canons must yield "when the whole context dictates a different conclusion); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

The Supreme Court has long held that "the due process rights of an alien seeking initial entry" are no greater than "[w]hatever the procedures authorized by Congress." *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (citation omitted). For unadmitted foreign nationals, like Patel, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *accord Thuraissigiam*, 591 U.S. at 138–140. Here, Congress has chosen to provide foreign nationals present without inspection, despite being applicants for admission, with the due process of full removal proceedings. *See* 8 U.S.C. § 1229a(a)(4). But with those full removal proceedings, Congress indicated that foreign nationals present without inspection "*shall* be detained." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

To this end, the Supreme Court has also long applied the so-called "entry fiction" that all "aliens who arrive at ports of entry . . . are treated for due process purposes as if stopped at the border." *Thuraissigiam*, 591 U.S. at 139. Indeed, that is so "even [for] those paroled elsewhere in the country for years pending removal." *Id.* The Supreme Court has applied the entry fiction

to foreign nationals with highly sympathetic claims to having "entered" and developed significant ties to this country. *See, e.g.*, *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (holding that a mentally disabled girl paroled into the care of U.S. citizen relatives for nine years should be "regarded as stopped at the boundary line" and "had gained no foothold in the United States"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214–215 (1953) (holding that a foreign national with 25 years' of lawful residence who sought to reenter enjoyed "no additional rights" beyond those granted by "legislative grace"). With these cases in mind, it follows that Congress intended for an unlawful entrant who violates immigration laws and evades detection must, once found, be "treated as if stopped at the border." *See Mezei*, 345 U.S. at 215.

Supreme Court precedents indicate that foreign nationals who entered illegally by evading detection while crossing the border should be treated the same as those who were stopped at the border in the first place. *See Thuraissigiam*, 591 U.S. at 138–40. While foreign nationals who have been admitted may claim due-process protections beyond what Congress has provided even when their legal status changes (such as a foreign national who overstays a visa, or is later determined to have been admitted in error), *see Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950), the Supreme Court has never held that foreign nationals who have "entered the country clandestinely" are entitled to such additional rights. *Yamataya v. Fisher*, 189 U.S. 86, 1000 (1903). Congress has instead codified this distinction by treating all foreign nationals who have not been admitted—including unlawful entrants who evade detection for years—as "applicants for admission." 8 U.S.C. § 1225(a)(1). In line with these cases and the statute, Congress created a detention system where applicants for admission, including those who entered the country unlawfully, are detained for removal proceedings under § 1225 and foreign nationals who have been admitted to the country are detained under § 1226.

Conclusion

For the foregoing reasons, the court should deny the petition.

Respectfully submitted,

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