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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fausto Elias Montijo,

Petitioner,

v.

John E. Cantu, et al.,

Respondents.

No. CV-25-03445-PHX-SMB (CDB)

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

The government responds as follows in answer to Petitioner's Petition for Writ of Habeas Corpus.[1] Doc. 1. The government has previously filed a brief in opposition to Petitioner's Motion for Injunctive Relief. Doc. 11. The arguments below are identical in substance to the government's arguments in its previously-filed response brief. The government also relies on the same foundational exhibit that it previously did, but re-attaches it here as Exhibit 1.

Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2). As such, the petition should be dismissed.

[1] The government does not, in filing this answer, waive Petitioner's obligation to perfect service upon the Respondents.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background.

Petitioner is a 53-year-old citizen of Mexico, born in Cananea, Sonora, Mexico. Exhibit 1, Declaration of Jaime R. Viramontes, ¶ 4. In 2009, Petitioner entered the United States with a Border Crossing Card but failed to disclose that he was entering with intent to resume employment. Exhibit 1, ¶ 5. United States Customs and Border Protection (CBP) concluded that Petitioner was out of status and removable, and Petitioner voluntarily returned to Mexico. Exhibit 1, ¶ 5.

In 2016, CBP arrested Petitioner and four other persons for attempting to smuggle 15.62 kilograms of meth into the United States. Exhibit 1, ¶ 6. The government is currently unable to report additional facts about the outcome of this arrest, because additional time is needed to access and fully review Petitioner's files.[2] The government's information on Petitioner's history next picks up in 2019, when Arizona state troopers encountered Petitioner near Tucson and contacted CBP. Exhibit 1, ¶ 7. CBP determined that Petitioner had entered the country without inspection or admission, and arrested him. Exhibit 1, ¶ 7. Petitioner admitted he had entered the country illegally in 2009. Exhibit 1, ¶ 7. The government processed him for expedited removal. Exhibit 1, ¶ 7. On December 27, 2019, the government served him with a Notice to Appear and placed him into removal proceedings under Immigration and Nationality Act (INA) § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Exhibit 1, ¶ 8. These proceedings were dismissed in 2022, without prejudice. Exhibit 1, ¶ 9.

CBP and agents from Enforcement Removal Operations (ERO) next encountered

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[2] The government stated this in its Response brief as well, Doc. 11, but acknowledges that Petitioner disputes this factual assertion and alleges that "Petitioner has never been arrested for attempting to smuggle methamphetamine," Doc. 12 at 9. The Department of Homeland Security has been unable to provide the U.S. Attorney's Office with any new or updated information for purposes of this action. Thus, in keeping with its obligation of candor to the Court, the government here merely rests on its original statements about this arrest, based on the declaration at Exhibit 1, ¶ 6, while acknowledging Petitioner's disagreement with it. Further, the government does not allege that this disputed fact is even relevant to the analysis here, since Petitioner's present detention is not based on any criminal history.

Petitioner on June 19, 2025, arresting him on grounds of being present in the United States without being inspected or admitted. Exhibit 1, ¶ 10. Petitioner was issued a Notice to Appear in Removal Proceedings pursuant to INA § 240, 8 U.S.C. § 1229a. On July 3, 2025, the Petitioner made a Bond Redetermination request. Exhibit 1, ¶ 12. On July 14, 2025, an Immigration Judge (IJ) issued a $8,000 bond, and the government reserved appeal. Exhibit 1, ¶ 16. The deadline for the government to file an appeal was August 13, 2025. Exhibit 1, ¶ 16. The government filed a Notice of Appeal with the Board of Immigration Appeals (B.I.A.) on July 24, 2025, specifically contesting the IJ's decision to issue Petitioner a bond. Exhibit 1, ¶ 17. Petitioner filed an application for relief from removal on August 26, 2025. Exhibit 1, ¶ 19. The government filed a brief with the B.I.A. on August 28, 2025. Exhibit 1, ¶ 20. Before the Immigration Court, a hearing on Petitioner's pending application for relief from removal is currently set to be heard on October 15, 2025. Exhibit 1, ¶ 25.

STANDARD OF REVIEW

Petitioner bears the burden of demonstrating that his detention is unlawful. *Maldonado v. Olson*, No. 25-CV-3142, 2025 WL 2374411, at *4 (D. Minn. Aug. 15, 2025). In a petition for a writ of habeas corpus, the petitioner is challenging the legality the restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Judicial review of immigration matters, including of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

LAW AND ARGUMENT

Petitioner in the Petition structures his arguments similarly to his Motion for Injunctive Relief. The government thus responds similarly as well, while noting that a second federal district court in Nebraska has now joined Judge Bencivengo from the Southern District of California to conclude that section 1225(b)(2) warrants the mandatory detention of noncitizens such as Petitioner. *Chavez v. Noem*, -- F. Supp. 3d --, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025) (Bencivengo, J.); *Vargas Lopez v. Trump*, -- F. Supp. 3d --, 2025 WL 2780351 (D. Neb. Sept. 30, 2025) (Buescher, J.) (holding that § 1225(b)(2) applied to noncitizen who had been present in the United States for 12 years).

Petitioner makes three broad arguments in support of his view that detaining him under 8 U.S.C. § 1225(b) is improper, and that his detention status should instead be subject to 8 U.S.C. § 1226(a). First, he argues that the statutory text and legislative history support his interpretation of the two provisions at issue. The government will explain below why its interpretation of § 1225(b) is the correct one that this Court should adopt. Second, Petitioner argues that the B.I.A.'s decision in 2025 to accept the government's current view on § 1225(b) is owed no deference. The Court need not analyze this point, because the government agrees

that no deference is owed.

Third, Petitioner cites other district court decisions nationwide who have agreed with Petitioner's argument here. Doc. 1 at 16-18. As the Court is well aware, district court decisions only constitute persuasive precedents that are not binding here, and this is even more so the case when Petitioner cannot cite even a single *appellate* decision from any federal circuit that has weighed in on the question. Moreover, the district court rulings on this question are not unanimous. The Southern District of California district court has disagreed with the weight of Petitioner's citations, issuing a succinct and well-reasoned analysis of her conclusions. *Chavez*, 2025 WL 2730228. So did the Nebraska district court. *Vargas Lopez*, 2025 WL 2780351. The government will address this third argument simultaneously to the first argument, by explaining why § 1225(b) is the proper detaining authority for Petitioner as opposed to § 1226.

I. Statutory Framework

A. Applicants for Admission

"The phrase 'applicant for admission' is a term of art denoting a particular legal status." *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc). Section 1225(a)(1) states:

> (1) Aliens treated as applicants for admission.— 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 the purposes of this Act an applicant for admission.

8 U.S.C. § 1225(a)(1).[3] Section 1225(a)(1) was added to the INA as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, § 302, 110 Stat. 3009-546. "The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Before IIRIRA, "immigration law provided for two types of removal proceedings: deportation hearings and exclusion hearings." *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir. 1999)

[3] Admission is the "lawful entry of an alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13).

(en banc). A deportation hearing was a proceeding against a noncitizen already physically present in the United States, whereas an exclusion hearing was against a noncitizen outside of the United States seeking admission. *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 25 (1982)). Whether an applicant was eligible for "admission" was determined only in exclusion proceedings, and exclusion proceedings were limited to "entering" noncitizens — those noncitizens "coming ... into the United States, from a foreign port or place or from an outlying possession." *Plasencia*, 459 U.S. at 24 n.3 (quoting 8 U.S.C. § 1101(a)(13) (1982)). "[N]on-citizens who had entered without inspection could take advantage of greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings." *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010); *see also Plasencia*, 459 U.S. at 25-26. Prior to IIRIRA, noncitizens who attempted to lawfully enter the United States were in a worse position than noncitizens who crossed the border unlawfully. *See Hing Sum*, 602 F.3d at 1100; *see also* H.R. Rep. No. 104-469, pt. 1, at 225-229 (1996). IIRIRA "replaced deportation and exclusion proceedings with a general removal proceeding." *Hing Sum*, 602 F.3d at 1100.

IIRIRA added Section 1225(a)(1) to "ensure[] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA." *Torres*, 976 F.3d at 928; *see also* H.R. Rep. 104-469, pt. 1, at 225 (explaining that § 1225(a)(1) replaced "certain aspects of the current 'entry doctrine,'" under which illegal noncitizens who entered the United States without inspection gained equities and privileges in immigration proceedings unavailable to noncitizens who presented themselves for inspection at a port of entry). The provision "places some physically-but not-lawfully present noncitizens into a fictive legal status for purposes of removal proceedings." *Torres*, 976 F.3d at 928.

B. Expedited Removal Under 8 U.S.C. § 1225

IIRIRA established distinct types of removal proceedings. Pub. L. 104-208, 110 Stat. 3009, 3009-546 (1996). Removal proceedings under § 1225 are known as "expedited removal

proceedings." *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109-113 (2020) (citing provisions). Only two categories of noncitizens are eligible for expedited removal, rather than full removal proceedings, (1) "arriving aliens" and (2) noncitizens who "ha[ve] not been admitted or paroled into the United States" and have not been "physically present in the United States" for two years. 8 U.S.C. § 1225(b)(1)(A)(i)-(iii). "Arriving aliens" are defined by regulation as "an applicant for admission coming or attempting to come into the United States at a port-of-entry …" 8 C.F.R. § 1.2.

Expedited removal proceedings are conducted by an immigration officer, not an IJ. The immigration officer asks the applicant for admission questions to determine (a) "identity, alienage, and inadmissibility," and (b) whether the noncitizen intends to apply for asylum. 8 C.F.R. § 235.3(b)(2)(i), (b)(4). Noncitizens are not entitled to counsel and no recording or transcript is made. *Id.* § 235.3(b)(2)(i). If the noncitizen is inadmissible and does not intend to apply for asylum, the immigration officer, after supervisory review, issues a Notice and Order of Expedited Removal. *Id.* § 235.3(b)(2)(i).

The noncitizen has no right to appeal to an IJ, the B.I.A., or any other court. *Id.* § 235.3(b)(2)(ii); 8 U.S.C. § 1252(a)(2)(A)(i). Unlike section 240 proceedings, which often take place over the course of several months, the expedited removal process is "conducted on a very compressed schedule and can result in deportation in hours or days." *Coal. for Humane Immigrant Rts. v. Noem*, No. 25-CV-872 (JMC), 2025 WL 2192986, at *4 (D.D.C. Aug. 1, 2025).

C. <u>Removal Proceedings under 8 U.S.C. § 1229a</u>

Removal proceedings under § 1229a are commonly referred to as "full removal proceedings" or "240 removal proceedings" due to the statutory section of the INA in which they appear. 8 U.S.C. § 1229a; INA § 240. The proceedings take place before an IJ, an employee of the Department of Justice. 8 U.S.C. § 1229a(a)(1), (b)(1). Noncitizens in 1229a proceedings have an opportunity to apply for relief from removal. *See, e.g.*, 8 U.S.C. § 1158 (asylum); 8 U.S.C. § 1229b(b) (cancellation of removal for nonpermanent residents); 8 U.S.C. § 1255 (adjustment of status). These are adversarial proceedings in which the noncitizen has

the right to hire counsel, examine and present evidence, and cross-examine witnesses. 8 U.S.C. § 1229a(b)(4). Either party may appeal the IJ decision to the B.I.A.. 8 U.S.C. § 1229a(b)(4)(C); *see also* 8 C.F.R. § 1240.15. If the B.I.A. issues a final order of removal, the noncitizen may also seek judicial review at a U.S. court of appeals through a petition for review. 8 U.S.C. § 1252.

D. Detention under the INA

The INA authorizes civil detention of noncitizens during removal proceedings and "[d]etention is necessarily part of this deportation procedure." *Carlson v. Landon*, 342 U.S. 524, 538 (1952); *see also* 8 U.S.C. § 1225(b), 1226(a), and 1231(a). "Where an alien falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as well as the kind of review process available to him if he wishes to contest the necessity of his detention." *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008).

i. Detention under Section 1225

The INA mandates the detention of applicants for admission. 8 U.S.C. § 1225(b)(1) and (2); *see also Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)."). As explained above, arriving noncitizens and noncitizens present less than two years are subject to expedited removal. 8 U.S.C. § 1225(b)(1). If a noncitizen "indicates an intention to apply for asylum," the noncitizen proceeds through the credible fear process and is subject to mandatory detention. 8 U.S.C. § 1225(b)(1)(B)(ii); *see also* 8 U.S.C. § 1225(B)(1)(B)(iii)(IV).

Section 1225(b)(2) is "broader" and "serves as a catchall provision." *Jennings*, 583 U.S. at 287. The Supreme Court recognized that 1225(b)(2) "applies to all applicants for admission not covered by § 1225(b)(1)." *Id.* Under § 1225(b)(2), a noncitizen "who is an applicant for admission" shall be detained for a removal proceeding "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). While section 1225 does not provide for noncitizens to be released on bond, DHS has the sole discretionary to release any applicant for admission on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C.

§ 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

ii. Detention under Section 1226

Section 1226 provides that "an alien may be arrested and detained pending a decision on whether the noncitizen is to be removed. 8 U.S.C. § 1226(a). Under § 1226(a), the government may detain a noncitizen during his removal proceedings, release him on bond, or release him on conditional parole.[4] By regulation, immigration officers can release a noncitizen if the noncitizen demonstrates that he "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8). A noncitizen can also request custody redetermination (i.e., a bond hearing) by an IJ at any time before a final in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1). *Jennings*, 583 U.S. at 286–87.

II. The Government's Position on Petitioner

The INA, 8 U.S.C. § 1101 *et seq.*, entrusts the Executive branch to remove inadmissible and deportable noncitizens and to ensure that noncitizens who are removable are in fact removed from the United States. "[D]etention necessarily serves the purpose of preventing deportable [] aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that if ordered removed, the aliens will be successfully removed." *Demore v. Kim*, 538 U.S. 510, 528 (2003). The Supreme Court has long held that deportation proceedings "would be in vain if those accused could not be held in custody pending the inquiry" of their immigration status. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). Congress intended for all applicants for admission to be detained during the course of their removal proceedings. *See Jennings*, 583 U.S. at 299 (interpreting the "plain meaning" of sections 1225(b)(1) and (2) to mean that applicants for admission be mandatorily detained for the duration of their immigration proceedings).

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[4] Being "conditionally paroled under the authority of § 1226(a)" is distinct from being "paroled into the United States under the authority of § 1182(d)(5)(A)." *Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1116 (9th Cir. 2007). 5 order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

The plain language of the statute is clear: Petitioner is subject to detention under § 1225(b)(2) because he is an applicant for admission. *Chavez*, 2025 WL 2730228, *4 ("By the plain language of § 1225(a)(1), then, Petitioners are 'applicants for admission' and thus subject to the mandatory detention provisions of 'applicants for admission' under § 1225(b)(2)."); *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 220 (B.I.A. 2025). 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) thus mandate detention of applicants of admission until certain proceedings have concluded." *Jennings*, 583 U.S. at 297. Section 1225(b)(1) covers which applicants for admission, including arriving noncitizens or noncitizens 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)."[5] *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 (B.I.A. 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."). Petitioner, present in the United States without being admitted, is an applicant for admission. *See Yajure*, 29 I. & N. Dec. at 221. Under the plain language of the statute, Petitioner is subject to detention under § 1225(b)(2). *Yajure*, 21 I. & N. Dec. at 220–21.

Petitioner points to the recent passage of the Laken Riley Act, Pub. L. No. 119-1, 17 January 29, 2025, 139 Stat 3, 139 Stat. 3 (2025) ("LRA") to make the improbable argument

[5] The two exceptions are crewmen and stowaways. See 8 U.S.C. §§ 1225(a)(2), 1281, and 1282(b).

that Congress intended in 2025 that persons charged as inadmissible under section 1182(a)(6) or (a)(7) should be granted bond hearings under section 1226(a). Doc. 1 at 18. The plain language of the LRA fails to support this. The LRA reflects to the contrary a "congressional effort to be doubly sure" that such unlawful noncitizens are detained. *Barton*, 590 U.S. at 239. The LRA does not change what Congress intended in IIRIRA. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) ("These later-enacted laws, however, are beside the point. They do not declare the meaning of earlier law. ... or a change in the meaning of an earlier statute."). Nothing in the LRA requires that the noncitizen who falls under § 1225(b)(2) be treated as a noncitizen detained under § 1226(a). *Chavez*, 2025 WL 2730228, *5. Nor does § 1225's explicit definition of "alien[s] present in the United States who ha[ve] not been admitted" as "applicants for admission" render the addition of § 1226(c) by the Riley Laken Act superfluous."); *Yajure-Hurtado*, 29 I. & N. Dec. at 221–22.

CONCLUSION

For the reasons stated, Respondents urge the Court to deny the Petition and dismiss this action.

Respectfully submitted on October 20, 2025.

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