IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FERNANDO MANUEL HERCULANO CABALLERO, PETITIONER, v. KRISTI NOEM, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Todd Lyons, Acting Director of ICE; Pamela BONDI, U.S. Attorney General; Mary De Anda-Ybarra, Field Office Director of Enforcement and Removal Operations, El Paso Field Office, Immigration and Customs Enforcement; Warden of ERO El Paso Camp East Montana, RESPONDENTS.	Case No. 3:25-cv-428 PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241, BY A PERSON SUBJECT TO UNLAWFUL DETENTION

PETITION FOR WRIT OF HABEAS CORPUS

1. Almost thirty years ago Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, colloquially referred to as IIRIRA. In the nearly three decades since its passage, non-citizens who were found within the United States who had not been admitted or inspected by an immigration officer (colloquially referred to as "EWI") who were placed into removal proceedings were entitled to a bond hearing before a neutral immigration judge (IJ). And, provided they were not subject to "mandatory detention" because they were described in either 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h), such non-citizens were granted bond by IJs across the United States once it was determined they were neither a flight nor safety risk. Simply put, the fact that non-

citizens were not subject to mandatory detention during removal proceedings on the basis of being EWI alone, was and still is, just that—a fact.

2. In January 2025, Congress—fully cognizant of this fact—passed the Laken Riley Act ("LRA") to expand the class of non-citizens present in the country without having been admitted who were subject to mandatory detention under § 1226(c). Specifically, the LRA made non-citizens who were present in the country without admission *and* had been charged with, arrested for, or convicted of burglary, theft, larceny, shoplifting, or assaulting a police officer, among those subject to mandatory detention under § 1226(c). To be clear, the only noncitizens who the LRA is applicable to are those who fall within the definition of an "applicant for admission" as by 8 U.S.C. § 1225(a)(1) and have been arrested, charged with, or convicted of, one the listed offenses. The LRA epitomized Congressional legislation which was unequivocally aimed at making a class of noncitizens subject to mandatory detention (i.e. not entitled to a bond hearing before an IJ) who were not subject to mandatory detention under the INA as it stood for nearly three decades.

3. After decades of non-citizens who were AFA being granted bonds and the passage of the LRA, on July 8, 2025, ICE, "in coordination with" DOJ, announced a new policy that rejected the well-established understanding of the statutory framework, reversed decades of practice, and rendered the LRA completely meaningless.[1] The new

[1] *Available at* https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission.

policy, entitled "Interim Guidance Regarding Detention Authority for Applicants for Admission,"[2] claims that all non-citizen AFAs are subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A). The Board of Immigration Appeals (BIA) issued a decision in *Matter of Hurtado*, 29 I & N Dec. 216 (BIA Sept. 5, 2025) rubberstamping this new policy on September 5, 2025. The BIA's decision in *Matter of Hurtado*, however, ignores countless long-standing cannons of statutory construction, agency practice for nearly three decades, and the due process clauses of the U.S. Constitution.

4. Recent weeks have seen numerous district courts granting habeas petitions filed by noncitizens being unlawfully detained by ICE without being provided the bond hearing proscribed by 8 U.S.C. § 1226(a) based on the seemingly unanimous rejection of the government's novel interpretation of 8 U.S.C. § 1225(b)(2)(A).[3] Whether it be based on statutory interpretation of the relevant statutes or the U.S. Constitution, district court decisions have flooded in over the past few weeks soundly rejecting the government's

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[2] *Id.*

[3] *See e.g., Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828, at *7 (W.D. Tex. Sept. 22, 2025); *Lopez Santos v. Noem*, No. 3:25-cv-01193, 2025 WL 2642278, at *5 (W.D. La. Sept. 11, 2025) *Kostak v. Trump*, No. 25-cv-1093, 2025 WL 2472136, at *3 (W.D. La. Aug. 27, 2025); *Chafla v. Scott*, et. al., No. 2:25-CV-00437-SDN, 2025 WL 2688541, at *5–6 (D. Me. Sept. 21, 2025) (citing *Salcedo Aceros v. Kaiser*, No. 25-cv-06924, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Jimenez v. FCI Berlin, Warden*, No. 25-cv-00326, ECF No. 16 (D.N.H. Sept. 8, 2025); *Martinez v. Hyde*, No. CV 25-11613, 2025 WL 2084238 (D. Mass. July 24, 2025); *Gomes*, 2025 WL 1869299; *Lopez Benitez v. Francis*, No. 25 CIV. 5937, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *R&R adopted sub nom. Rocha Rosado v. Figueroa*, No. CV-25-02157, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1256 (W.D. Wash. 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Francisco T. v. Bondi*, No. 25-CV-03219, 2025 WL 2629839 (D. Minn. Aug. 29, 2025); *Maldonado v. Olson*, No. 25-CV-3142, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); and *Diaz Diaz v. Mattivelo*, No. 1:25-CV-12226, 2025 WL 2457610 (D. Mass. Aug. 27, 2025).

position and ordering the government to immediately release or provide bond hearings to the noncitizen habeas petitioners.[4]

5. Fernando Manuel Herculano Caballero files this position seeking the Court's immediate intervention to ensure Petitioner does not continue to be unlawfully detained by the government based on a new novel theory that belies decades of contradictory agency action and interpretation, ignores all of the most basic cannons of statutory construction, and is nothing more than a thinly veiled attempt to increase the pace of removal orders through a concerted effort to deprive noncitizens of the due process guaranteed by the Constitution and INA.

JURISDICTION

6. This case arises under the Constitution of the United States, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-596, 701-706.

7. This Court has subject matter jurisdiction under 28 U.S.C. § 2241, *et seq.* (habeas corpus), U.S. Const. art. I, § 9, cl. 2 (Suspension Clause), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as Respondent), and 28 U.S.C. § 1651 (All

[4] *Compare Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828, at *7 (W.D. Tex. Sept. 22, 2025) (holding the government's new position violated the due process clause of the U.S. constitution and ordering the government to either release the petitioner or provide a prompt bond hearing without finding it necessary to reach the statutory interpretation arguments); *see also Lepe v. Andrews*, No. 1:25-CV-01163-KES-SKO (HC), 2025 WL 2716910, at *4 (E.D. Cal. Sept. 23, 2025) (gathering recent cases to support its conclusions that "[t]he government's proposed interpretation of the statute (1) disregards the plain meaning of section 1225(b)(2)(A); (2) disregards the relationship between sections 1225 and 1226; (3) would render a recent amendment to section 1226(c) superfluous; and (4) is inconsistent with decades of prior statutory interpretation and practice").

Writs Act). Respondents have waived sovereign immunity for purposes of this suit. 5 U.S.C. §§ 702, 706.

8. The Court may grant relief under the habeas corpus statutes, 28 U.S.C. § 2241, *et. seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*; the All Writs Act, 28 U.S.C. § 1651; and the Court's inherent equitable powers.

9. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Respondents are agencies or officers of agencies of the United States, Respondents and Petitioner reside in this District, Petitioner is detained in this District at ERO El Paso Camp East Montana, and a substantial part of the events or omissions giving rise to Petitioner's claims occurred in this District.[5]

HABEAS CORPUS PURPOSE AND REQUIREMENTS

10. The writ of habeas corpus is "available to every individual detained within the United States."[6] "The essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and ... the traditional function of the writ is to secure release from illegal custody."[7] "Historically, 'the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections

[5] (Ex. 1 ICE Detainee Locator.)

[6] *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (citing U.S. Const., Art I, § 9, cl. 2).

[7] *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

have been strongest.'"[8] "A district court's habeas jurisdiction," therefore, "includes challenges to immigration-related detention."[9]

11. Pursuant to 28 U.S.C. § 2243, a court may grant the petition for writ of habeas corpus or issue an order to show cause ("OSC") to the respondents "forthwith."[10] If an order to show cause is issued, respondents should generally be required to file a return "within *three* days unless for good cause additional time . . . is allowed."[11]

PARTIES

12. Petitioner Fernando Manuel Herculano Caballero is a citizen of Honduras who entered the U.S. without inspection 6 years ago. He was detained by ICE on September 9th, 2025. After detaining Petitioner, ICE did not set a bond. Petitioner requested review of his custody by an immigration judge. On September 25th, 2025, Petitioner was denied a bond hearing by the Batavia Immigration Court which found there was no action required, since Petitioner was transferred out of the jurisdiction. Later the same day, Petitioner requested a review of his custody in the El Paso Immigration Court. That being said, based on DHS' novel new interpretation and the BIA's decision in in *Matter of Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), this bond hearing will not take place; rather, the IJ will issue an order stating some form of the phrase "the BIA's decision in *Hurtado* is what I am required

[8] *Vazquez v. Feeley,* No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3–6 (D. Nev. Sept. 17, 2025) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001)).

[9] *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) and *Demore v. Kim*, 538 U.S. 510, 517 (2003)).

[10] 28 U.S.C. § 2243.

[11] *Id.* (emphasis added).

to follow, so I do not have jurisdiction to give you a bond." This, to be clear, will be the result based on the government's new position—not because he is a flight risk, danger, or described in § 1226(c)--but because he entered the United States without inspection. Nothing more.

13. Respondent Kristi Noem is the Secretary of the Department of Homeland Security. She is responsible for the implementation and enforcement of the Immigration and Nationality Act (INA), and oversees ICE, which is responsible for Petitioner's detention. Ms. Noem has ultimate custodial authority over Petitioner and is sued in her official capacity.

14. Respondent Department of Homeland Security (DHS) is the federal agency responsible for implementing and enforcing the INA, including the detention and removal of noncitizens.

15. Respondent Pamela Bondi is the Attorney General of the United States. She is responsible for the Department of Justice, of which the Executive Office for Immigration Review and the immigration court system it operates is a component agency. She is sued in her official capacity.

16. Respondent Todd Lyons is Acting Director and Senior Official Performing the Duties of the Director of ICE. Respondent Lyons is responsible for ICE's policies, practices, and procedures, including those relating to removal procedures and the detention of immigrants during their removal procedures. Respondent Lyons is a legal custodian of Petitioner. Respondent Lyons is sued in his official capacity.

17. Respondent Mary de Anda-Ybarra is the Director of the El Paso Field Office of ICE's Enforcement and Removal Operations division. As such, Mrs. de Anda-Ybarra is Petitioner's immediate custodian and is responsible for Petitioner's detention and removal. He is named in his official capacity.

18. Respondent Warden of the ERO El Paso Camp East Montana, is who has immediate physical custody of Petitioner. Warden is sued in their official capacity.

STATEMENT OF FACTS

19. The Petitioner, Fernando Manuel Herculano Caballero, is a citizen of Honduras born in Tegucigalpa on [redacted] Mr. Herculano Caballero Caballero Caballero is currently 29 years old.

20. He was orphaned at a young age after the untimely death of his mother and the murder of his father. He suffered being raised and abused at the hands of extended family with his siblings.

21. Mr. Herculano Caballero Caballero Caballero entered the United States in 2019, fearing for his life to apply for asylum and has since married his legal permanent resident wife, Alexia Flores, with whom they are raising her legal permanent resident son, David Flores.

22. Mr. Herculano Caballero Caballero Caballero filed an I-589 Application for Asylum and was in the process of being petitioned for by his legal permanent resident wife prior to his sudden detention by immigration officials.

23. Mr. Herculano Caballero Caballero Caballero has no criminal or civil convictions in the United States or his native Honduras.

LEGAL FRAMEWORK

I. Overview of the INA's Detention Provisions, IIRIRA's Amendments, Decades of Consistency, and the Recent Passage of the Laken Riley Act.

24. This case concerns the INA's detention provisions of the INA found at 8 U.S.C. § 1225(b)(2)(A) and 8 U.S.C. § 1226(a).

25. The detention provisions of the INA prescribe three basic forms of detention for noncitizens.[12]

26. First, 8 U.S.C. § 1226(a) applies to noncitizens already in the Country and authorizes the detention of noncitizens, pursuant to a warrant, who are placed in removal proceedings under 8 U.S.C. § 1229a before an IJ.[13] Individuals who are detained pursuant to § 1226(a) are entitled to a bond hearing before a neutral IJ at the outset of their detention provided they are not subject to "mandatory detention" because they are described in either 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h).[14]

27. Second, the INA provides for mandatory detention of noncitizens subject to expedited removal under 8 U.S.C. § 1225(b)(1) as a result of being found within in a few

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[12] *See Vazquez v. Feeley*, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3–6 (D. Nev. Sept. 17, 2025) ("The INA generally provides for three forms of civil detention for noncitizens in removal proceedings.").

[13] *See id.* at *3; *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255, at *8 (E.D. Va. Sept. 19, 2025) ("In *Jennings*, the Court explained that § 1225(b) governs 'aliens seeking admission into the country' whereas § 1226(a) governs 'aliens already in the country' who are subject to removal proceedings.")(quoting *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018)).

[14] 8 U.S.C. § 1226(a) and (c); 8 C.F.R. §§ 1003.19(a), 1236.1(d; *see also Salazar v. Dedos*, No. 1:25-CV-00835-DHU-JMR, 2025 WL 2676729, at *4 (D.N.M. Sept. 17, 2025) ("Once a noncitizen is within the United States, '[§] 1226 generally governs the process of arresting and detaining [these noncitizens] pending their removal.'")(quoting *Jennings*, 583 U.S. at 288).

weeks of entry and near the land border and other recent arrivals seeking admission under § 1225(b)(2).[15]

28. Lastly, the INA also provides for detention of noncitizens who have been ordered removed, including individuals in withholding-only proceedings.[16]

29. The detention provisions at 8 U.S.C. § 1225 and § 1226 were amended ed as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,[17] and were most recently amended earlier this year by the Laken Riley Act.[18]

30. Prior to the enactment of the IIRIRA, noncitizens arrested in the interior and charged with entering the U.S. without inspection were entitled to a custody hearing before" a neutral adjudicator, "while those stopped at the border were only entitled to release on parole.[19] When the detention provisions were amendedby IIRIRA Congress clarified "the amendment of § 1226(a) simply "restate[d]" the detention authority previously found at § 1252(a) "to arrest, detain, and release on bond a[ ] [noncitizen] who

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[15] *See Salazar v. Dedos,* No. 1:25-CV-00835-DHU-JMR, 2025 WL 2676729, at *4 (D.N.M. Sept. 17, 2025) ("As stated by the Supreme Court, "U.S. immigration law authorizes the Government to detain certain [noncitizens] *seeking admission* into the country under §§ 1225(b)(1) and (b)(2)" and to "detain certain [noncitizens] *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c).""")(quoting *Jennings*, 583 U.S. at 289).

[16] 8 U.S.C. § 1231(a)–(b).

[17] Pub. L. No. 104—208, Div. C, §§ 302–03, 110 Stat. 3009-546, 3009–582 to 3009–583, 3009–585. Section 1226(a).

[18] Pub. L. No.119-1, 139 Stat. 3 (2025).

[19] *Vazquez v. Feeley,* No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3–6 (D. Nev. Sept. 17, 2025) (citing 8 U.S.C. § 1252(a) (1994) (authorizing detention of noncitizens "arriving at ports of the United States")).

is not lawfully in the United States."[20] Meanwhile, the amendments did not disturb "the existing mandatory detention scheme for noncitizens arriving in the U.S. without a clear right to admission and expanded the scope of that detention scheme to include certain recently arrived noncitizens."[21] These amendments and the statutory scheme simply "reflected [Congress'] understanding of longstanding due process precedent that recognizes the more substantial due process rights of noncitizens already residing in the U.S. with those of noncitizens recently arriving."[22]

31. Following the enactment of the IIRIRA, EOIR drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under § 1225 and that they were instead detained under § 1226(a).[23]

32. Thus, in the decades that followed, most people who entered without inspection and were placed in standard removal proceedings received bond hearings, unless their criminal history rendered them ineligible.[24]

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[20] *Id.* (citing H.R. Rep. No. 104-469, pt. 1, at 229 (1996) and H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.).

[21] *Id.*

[22] *Id.* (citing H.R. Rep. No. 104-469, p. 1, at 163-66 (recognizing the "constitutional liberty interest[s]" of noncitizens present in the U.S., versus the assumed minimal due process rights of arriving noncitizens) (citing *Knauff v. Shaughnessy*, 338 U.S 537 (1950)).

[23] *See id.* ("The EOIR's regulations drafted following the enactment of the IIRIRA explained this distinction.") (citing Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection).

[24] *Id.* ("[I]n the decades since IIRIRA was enacted, DHS and the EOIR have applied § 1226(a) to the detention of individuals apprehended within the continental U.S. who entered without inspection and provided them access to release on bond.").

33. For decades, (i.e. since IIRIRA was passed in 1996) two indisputable facts coexisted in immigration proceedings throughout the country: (1) Immigration Judges have been granting bond to noncitizens who were "EWI" (i.e. inadmissible under 8 U.S.C. § 1182(a)(6)(A)), and 2) All individuals who are EWI are considered an "applicant for admission" under 8 U.S.C. § 1225(a)(1). Indeed, one of the most trusted law treatises, *Kurzban*'s, has long explained:

> Although a person who enters EWI is considered an applicant for admission under [8 U.S.C. § 1225(a)(1)] and inadmissible under [8 U.S.C. § 1182(a)(6)(A)(i)], because they are not apprehended at the border, they do not fall within the definition of "arriving aliens" under 8 C.F.R. §§ 1.2, 1001.1(q). Therefore, an IJ is not precluded from conducting a bond hearing.[25]

34. Simply put, being an applicant for admission has never been understood to subject someone to mandatory detention.[26] The regulations go on to make clear that Immigration Judges do not have jurisdiction to grant bond to a discrete subset of "applicants for admission" known as "arriving aliens."[27] In other words, the promulgating regulations were careful to except "arriving aliens," (ALL of whom are "applicants for admission"), from the bond jurisdiction given to Immigration Judges.[28]

35. In January 2025, Congress passed the Laken Riley Act in which added a new subparagraph to the mandatory detention provisions of § 1226(c). The amended statute added subparagraph (E), which states:

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[25] Kurzban, Chapter 3, Admission and Removal, M-3, p. 235 (2018-19) 16th Ed.

[26] *See* n. 25, *supra.*

[27] 8 C.F.R. § 1003.19(h)(2)(i)(B).

[28] (*Id.*)

> **(c) Detention of criminal aliens (1) Custody** The Attorney General shall take into custody any alien who-- ... (E)(i) *is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; **and*** (ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense...[29]

36. As an initial matter, it is important to point out that the LRA's amendment does not apply to anyone who entered the United States legally after inspection by an immigration officer. Put another way, 8 U.S.C. § 1226(c)(1)(E) is only applicable to noncitizens who fall within the definition of "applicants for admission" found in 8 U.S.C. § 1225(a)(1).[30] The LRA, therefore, requires mandatory detention of noncitizens who meet both the status requirement of subclause (i) (inadmissibility for EWI, fraud, or lack of documents; aka "applicants for admission") *and* the conduct requirement of subclause (ii) (a criminal charge, arrest, or conviction for a specified offense).[31]

37. After signing the LRA into law, the president touted its importance, stating: "It's a landmark law that we are doing today, it will save countless innocent American lives."[32]

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[29] 8 U.S.C. § 1226(c)(1)(E).

[30] *Id.*

[31] *Id.*; *see also Vazquez v. Feeley, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *5* ("1226(c)(1)(E) (enacted by the Laken Riley Act) requires mandatory detention for people who were charged as being (1) inadmissible under § 1182(a)(6)(A)(i) (the inadmissibility ground for entry without inspection) or (a)(7) (the inadmissibility ground for lacking valid documentation to enter the U.S.) *and* who (2) have been arrested, charged with, or convicted of certain crimes not relevant here.").

[32] https://www.npr.org/2025/01/29/g-s1-45275/trump-laken-riley-act.

II. DHS in Conjunction with the Immigration Court Take New Position Interpreting 8 U.S.C. § 1225(b)(2)(A) to Subject Every EWI NonCitizen to Mandatory Detention (i.e. Bond Hearings No Longer Provided for EWIs).

38. On July 8, 2025, ICE, "in coordination with" DOJ, announced a new policy that rejected well-established understanding of the statutory framework and reversed decades of practice.[33]

39. The new policy, entitled "Interim Guidance Regarding Detention Authority for Applicants for Admission,"[34] claims that all persons who entered the United States without inspection shall now be deemed "applicants for admission" under 8 U.S.C. § 1225, and therefore are subject to mandatory detention provision under § 1225(b)(2)(A). The policy ICE announced applies regardless of when a person is apprehended, and affects those who have resided in the United States for months, years, and even decades.[35]

40. On September 5, 2025, the BIA issued a decision in *Matter of Hurtado*, which acted as a rubberstamp to the new DHS interpretation taken in "conjunction with" the immigration courts.[36] The decision claimed to simply be interpreting the "plain language" of 8 U.S.C. § 1225(b)(2)(A) which states,

> [I]n the case of a[ ] [noncitizen] who is an applicant for admission, if the examining immigration officer determines that a[ ] [noncitizen] *seeking admission* is not clearly and beyond a doubt entitled to be admitted, the

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[33] *Available at* https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission.

[34] *Id.*

[35] *Id.*

[36] *Matter of Hurtado*, 29 I&N Dec. 216.

> [noncitizen] shall be detained for a proceeding under section 1229a of this title.[37]

41. The BIA's reasoning per *Hurtado* is that the plain language above means every "applicant for admission . . . shall be detained for" removal proceedings.[38] But as several district courts have already pointed out:

> the government's "interpretation of the statute (1) disregards the plain meaning of section 1225(b)(2)(A); (2) disregards the relationship between sections 1225 and 1226; (3) would render a recent amendment to section 1226(c) superfluous; and (4) is inconsistent with decades of prior statutory interpretation and practice.[39]

III. The Statutory and Regulatory Framework of the Entire Act Demonstrates the Government's New Position is Simply Untenable Under Any One of Many Cannons of Statutory Construction

42. The government's new position hinges on a simplistic and overbroad reading of INA § 235(a)(1), which deems any unadmitted alien an "applicant for admission."[40]

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[37] § 1225(b)(2)(A) (emphasis added).

[38] *Hurtado*, 29 I&N Dec. at 219.

[39] *Lepe v. Andrews*, No. 1:25-CV-01163-KES-SKO (HC), 2025 WL 2716910, at *4 (E.D. Cal. Sept. 23, 2025) ; *see also*, *Lopez Benitez v. Francis*, No. 25-Civ-5937, 2025 WL 2267803 (S.D.N.Y. Aug. 8, 2025); *Martinez v. Hyde*, No. CV 25-11613-BEM, —— F.Supp.3d ——, ——, 2025 WL 2084238, at *9 (D. Mass. July 24, 2025); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at *8 (D. Mass. July 7, 2025); *Vasquez Garcia v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Lopez-Campos v. Raycraft*, No. 2:25-cv-12486, —— F.Supp.3d ——, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Kostak v. Trump*, No. 3:25-cv-01093-JE, Doc. 20 (W.D. La. Aug. 27, 2025); Doc. 11, *Benitez v. Noem*, No. 5:25-cv-02190 (C.D. Cal. Aug. 26, 2025); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Romero v. Hyde*, No. 25-11631-BEM, —— F.Supp.3d ——, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Arrazola-Gonzalez v. Noem*, No. 5:25-cv-01789-ODW, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025); *Aguilar Maldonado v. Olson*, No. 25-cv-3142, —— F.Supp.3d ——, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Dos Santos v. Noem*, No. 1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Rocha Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted* 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); Doc. 11, *Maldonado Bautista v. Santacruz*, No. 5:25-cv-01874-SSS-BFM, *13 (C.D. Cal. July 28, 2025).

[40] *See Hurtado*, 29 I&N Dec. at 216-220.

From this, the government leaps to the conclusion that all such aliens are subject to mandatory detention under § 235(b).[41] This interpretation ignores the careful distinctions drawn throughout the INA and its implementing regulations.

43. As an initial matter, the *Hurtado* ironically claims to read the plain language of § 1225(b)(2)(A), but as many courts have pointed out the BIA only reaches its conclusion by omitting "plain language" contradicting its interpretation. Specifically, to be subject to mandatory detention under § 1225(b)(2)(A), the plain text requires an individual to be 1) an "applicant for admission"; 2) "seeking admission"; and 3) determined by an examining immigration officer to be "not clearly and beyond a doubt entitled to be admitted."[42] The second element of Sec. 1225(b)(2)(A)—which requires that he be ***seeking admission***—is not met in the case of EWI noncitizens who are found miles away from the land border and years after their entry. Rather, noncitizens like Petitioner cannot be said to be *seeking admission* when he arrested and detained under these circumstances. Rather, consistent with pre-IIRIRA detention provisions and decades of agency action, § 1225(b)(2) only implicates noncitizens who are "*seeking admission*" into the United States.[43]

44. To ignore the plain language, which limits the application of 8 U.S.C. § 1225(b)(2) to noncitizens in the process of seeking admission into the United States, is to

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[41] *Id.*

[42] 8 U.S.C. § 1225(b)(2)(A); *see also Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *2 (D. Mass. July 24, 2025) (affirming these "several conditions must be met" for a noncitizen to be subject to mandatory detention under § 1225(b)(2)(A)).

[43] *Id.*

not give effect to the meaning of words and to make the words included in the statute superfluous.[44] It would violate the most basic of interpretive canons, which is that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....'"[45]

45. The statutory use of the present and present progressive tenses—"is an applicant for admission" "seeking admission"—excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States.[46] Throughout the country district courts have agreed with this plain reading, which gives effect to the meaning of each word, holding that 8 § 1225(b)(2)(A) must be read to apply only to noncitizens who are apprehended while seeking to enter the country, and that noncitizens already residing in the United States, including those who are charged with inadmissibility, continue to fall under the discretionary detention scheme in § 1226.[47]

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[44] *Corley v. United States*, 556 U.S. 303, 314 (U.S. 2009).

[45] . *Id.* (citing *Hibbs v. Winn,* 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed.2000)).

[46] *See Martinez v. Hyde,* 2025 WL 2084238, at *6 (D. Mass. July 24, 2025) (citing the use of present and present progressive tense to support conclusion that INA § 1225(b)(2) does not apply to individuals apprehended in the interior); *accord Lopez Benitez v. Francis*, 2025 WL 2371588, at *6–7 (S.D.N.Y. Aug. 13, 2025). *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in 8 U.S.C. Sec. 1225 (1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

[47] *See Lopez Santos v. Noem*, No. 3:25-CV-01193, 2025 WL 2642278 (W.D. La. Sept. 11, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Rodriguez v. Bostock*, No. 3:25-CV-05240-TMC, 779 F. Supp. 3d 1239, 1256–59 (W.D. Wash. 2025) (granting

46. Further support for the overwhelming conclusion reached by courts can be found in the various statute proscribing various arrest and detention authorities depending on the circumstances.[48]

A. 8 U.S.C § 1225: Inspection, Arrest, and Detention of Aliens at the Ports of Entry and Near the Border

47. As its title, ("Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearings"), suggests, 8 U.S.C § 1225, proscribes the statutory authority by which immigration officers may inspect, arrest, and detain aliens seeking admission to the United States. While not explicitly limited to the arrest of aliens made at a designated port of entry or in close proximity to the border, 8 U.S.C § 1225, is most often used in this setting and does not require a warrant.

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preliminary injunction prohibiting I.J.s from denying bond to individuals apprehended in the interior based on INA § 1225(b)(2)); *see also Gomes v. Hyde*, 2025 WL 1869299 at *6-7 (D. Mass. July 7, 2025) (relying on statutory structure and Laken Riley Act amendments to § 1226 to find that recent entrant re-detained on a warrant was not subject to § 1225(b)(2)); *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *6–8 (D. Mass. July 24, 2025); *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025); *Rocha Rosado v. Figueroa*, 2025 WL 2337099, at *8–10 (D. Ariz. Aug. 11, 2025); *Aguilar Maldonado v. Olson*, 2025 WL 2374411, at *11–13 (D. Minn. Aug. 15, 2025); *accord Castillo Lachapel v. Joyce*, 2025 WL 1685576, at *2 (S.D.N.Y. June 16, 2025) (parties agreed that a person who had entered without inspection and was arrested in the interior was detained under § 1226(a)).

[48] The authority given by these statutes has been properly delegated by the Secretary of Homeland Security pursuant to the power granted to her by 8 C.F.R. § 2.1.

48. The absence of a warrant requirement in § 1225 is in line with the longstanding principle that the search and seizure of persons at our country's borders is not subject to the Fourth Amendment's warrant requirement.[49]

49. Conversely, in cases where a federal warrant has not been issued and the border exception to the warrant requirement is inapplicable, 8 U.S.C. § 1357, grants CBP and ICE-ERO authority to arrest and briefly detain aliens in limited circumstances.[50] For example, "[t]hey may arrest an alien for being 'in the United States in violation of any [immigration] law or regulation ' . . . where the alien 'is likely to escape before a warrant can be obtained.'" [51] From this statute, one can see that the arrest without a warrant authority set forth in 8 U.S.C. § 1225 was intended to be limited geographically to near the border and intended only to apply to noncitizens potentially subject to expedited removal under 8 U.S.C. § 1225. Indeed, this is illustrated by the first two paragraphs of 8 U.S.C. §1357(a), titled "Powers without warrant" which expressly provide:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

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[49] *See United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("Congress, since the beginning of our Government, has granted the Executive Plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant . . .") (internal citations omitted); *United States v. Cotterman*, 637 F.3d 1068, 1076 (9th Cir. 2011) ("[T]here is [no] room for disagreement over the compelling underpinnings of the doctrine" exempting border searches and seizures from the Fourth Amendment's warrant requirement. "It is well established that the sovereign need not make any special showing to justify its search of persons and property at the international border.").

[50] *See Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) (discussing the authority granted to CBP and ICE-ERO by INA § 287, 8 U.S.C. § 1357, to arrest aliens in some circumstances where a federal warrant has not been issued).

[51] *Id.* (second alteration in original) (quoting INA § 287, 8 U.S.C. § 1357).

> **(1)** to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
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> **(2)** to arrest *any alien who in his presence or view is entering or attempting to enter the United States* in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.[52]

50. By explicitly proscribing as an exception to the warrant requirement noncitizens who the officer sees entering or attempting to enter the United States, the statute implicitly proscribes that arrests made elsewhere that do not fall under one of the proscribed warrant exceptions require a warrant. Due to the fact that it is most often relied on at a designated port of entry or near the border, 8 U.S.C § 1225 is the statute primarily relied on by CBP for the authority to arrest and detain an alien; meanwhile, ICE (the interior enforcement arm of DHS) most often relies on the authority granted by 8 U.S.C § 1226(a). As a result, an arrest warrant issued pursuant to the authority granted by INA § 236(a), 8 U.S.C § 1226(a) is issued in the context of ICE arresting aliens for removal proceedings.[53] In addition to providing the authority under which a warrant for the arrest of an alien may be issued, 8 U.S.C § 1226(a), provides ICE-ERO with the authority to arrest an alien for

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[52] 8 U.S.C. § 1357(a)(1)-(2)(emphasis added).

[53] Pursuant to 8 C.F.R. § 236.1(b), the authority to issue an arrest warrant has been properly delegated by the Attorney General to the list of persons found in 8 C.F.R. § 287.5(e)(2).

which an arrest warrant has been issued "pending a decision on whether the alien is to be removed from the United States."[54]

51. For decades, noncitizens in removal proceedings found in the U.S. who are not described in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) were able to request a bond hearing and obtain a bond from an IJ.[55]

52. One need not look any further than 8 C.F.R. § 1003.19(h)(2) (iii)(B) to see that the statutory and regulatory scheme was always intended to give Immigration Judges jurisdiction to grant bond to most noncitizens falling under the definition of "applicant for admission." This is demonstrated by the fact that the regulations governing an Immigration Judge's bond jurisdiction explicitly strip the Judge of authority over "arriving aliens" which are a subset of noncitizens who fall under the definition of "applicants for admission."[56] Specifically, 8 C.F.R. § 1.2 defines an arriving alien as:

> Arriving alien *means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry*, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section [§ 1182(d)(5)] of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and

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[54] Pursuant to 8 C.F.R. § 236.1(b), the authority to serve an arrest warrant and arrest an alien has been properly delegated by the Attorney General to the list of persons found in 8 C.F.R. § 287.5(e)(3).

[55] *Vazquez v. Feeley*, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3-4 ("Until DHS and DOJ adopted the policy described below, the longstanding practice of the agencies charged with interpreting and enforcing the INA applied § 1226(a) to noncitizens like Petitioner, who entered the U.S. without inspection and were apprehended while residing in the U.S.").

[56] 8 C.F.R. § 1003.19(h)(2)(iii)(B).

> obtained in the United States prior to the alien's departure from and return to the United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section [1225(b)(1)(A)(i)] of the Act.[57]

53. If, as the government now contends, every noncitizen who is an "applicants for admission" is subject to mandatory detention for bond purposes, there would have been no need for a regulation stating immigration judges do not have jurisdiction to grant "arriving aliens" a bond. The regulations specific prohibition against bond for "arriving aliens" implicitly confirms that Immigration Judges *do* have jurisdiction over other categories of "applicants for admission," such as those like Petitioner, who were apprehended years after entry and deep in the nation's interior.[58] Petitioner is not an "arriving alien"; nor is he subject mandatory detention under § 1225. Rather, he is an alien arrested within the United States and detained under § 1226.

B. The Recent Enactment of the Laken Riley Act Forecloses the Immigration Judge's Interpretation and Would Be Rendered Superfluous.

54. The most compelling evidence against the government's position is the recent amendment to the INA's primary mandatory detention statute, § 1226(c). As stated above, in January 2025, Congress passed the Laken Riley Act, which added a new subparagraph to 1226(c) which is only applicable to non-citizens who fall within § 1225(a)(1)'s definition

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[57] 8 C.F.R. § 1.2 (emphasis added).

[58] *See Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (recognizing that "U.S. immigration law authorizes the Government to detain certain aliens *seeking admission into the country* under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c)") (emphasis added); *see also Lopez-Campos v. Raycraft*, 2025 WL 2496379, at *8 (E.D. Mich. Aug. 29, 2025) ("There can be no genuine dispute that Section 1226(a), and not Section 1225(b)(2)(A), applies to a noncitizen who has resided in this country for . . .years.")

of "applicant for admission" and have been arrested, charged with, or convicted of one of several offenses.

55. The structure of this amendment leaves no doubt that mandatory detention under this new provision applies *only* to a noncitizen who meets both the status requirement of subclause (i) (all of which are applicants for admission) *and* the conduct requirement of subclause (ii) (a criminal charge, arrest, or conviction for a specified offense).

56. When it was signed into law the president touted the LRA as a necessary and important amendment that would "save lives."[59] In other words, the amendment mattered and made an important change to the existing laws.

57. But, as countless courts have repeatedly pointed out, under the government's new theory, the LRA is completely devoid of any meaning as every person described in § 1226(c)(1)(E)(i) was already subject to mandatory detention under the government's new interpretation of § 1225(b)(2)(A).[60] Congress, therefore, would have enacted a statute that accomplished nothing. It is a foundational principle of statutory construction that courts must "give effect, if possible, to every clause and word of a statute,"[61] and must avoid interpretations that render statutory language superfluous.[62] The government's position

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[59] *See* n. 34, *supra.*

[60] *See e.g., Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425, at *6–7 (E.D. Mich. Sept. 9, 2025) ("The BIA also argued that § 1225(b)(2)(A) does not render superfluous the Laken Riley Act. . . But. . . considering both §§ 1225(b)(2)(A) and 1226(c)(1)(E) mandate detention for inadmissible citizens, whether one includes additional conditions for such detention does not alter the redundant impact.").

[61] *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

[62] *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

violates this canon in the most profound way, effectively nullifying an entire act of Congress. The only logical conclusion is that Congress enacted § 1226(c)(1)(E) precisely because being EWI or an "applicant for admission" alone *does not* trigger mandatory detention.[63]

IV. Reliance on *Jennings* is Misplaced at Best and Misleading at Worst.

58. In *Matter of Hurtado,* the BIA claims that the Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018) dictates this result. This claim, as one court put it, however, "is, to say the least, not without some doubt."[64] Contrary to the BIA's claims about *Jennings*, Article III courts have seemingly uniformly pointed out that *Jenning* actually said: ""U.S. immigration law authorizes the Government to detain certain aliens *seeking admission into the country* under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c)."[65]

V. Even if *Hurtado* were decided correctly (which it was not), it still would be unlawful to detain Petitioner under the new interpretation as it constitutes an expansion amounting to a new rule which cannot be applied retroactively under longstanding Supreme Court precedent.

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[63] Another (of many) applicable cannons of statutory construction is the principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—further clarifies congressional intent. Within INA § 235 itself, Congress knew precisely how to mandate detention when it intended to. For example, INA § 235(b)(1)(B)(iii)(IV), titled "Mandatory detention," explicitly states that noncitizens found *not* to have a credible fear of persecution "shall be detained" pending removal. Congress's choice to use specific mandatory language in that subsection, while omitting it for all other "applicants for admission" under § 235(a), demonstrates a clear intent not to subject all such individuals to mandatory detention.

[64] *Arce v. Trump*, No. 8:25CV520, 2025 WL 2675934, at *4–6 (D. Neb. Sept. 18, 2025).

[65] *Jennings*, 583 U.S. at 289 (emphasis added).

59. The United States Constitution's Ex Post Facto Clause and the judicial presumption against statutory retroactivity form a bedrock principle of American jurisprudence. This principle is animated by what the Supreme Court has termed the "familiar considerations of fair notice, reasonable reliance, and settled expectations."[66] In the immigration context, where the stakes of deportation are immense, the Supreme Court has been particularly vigilant in guarding against the retroactive application of laws that alter the legal consequences of past actions.

60. In *INS v. St. Cyr*, the Supreme Court held that the repeal of a form of discretionary relief from deportation could not be applied retroactively to individuals who had pleaded guilty to criminal offenses at a time when that relief was available.[67] The Court emphasized that "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[68]

61. Similarly, in *Vartelas v. Holder*, the Court found that an amendment to the INA that broadened the definition of who is "seeking admission"—thereby subjecting certain returning lawful permanent residents to new grounds of inadmissibility—could not be applied to an individual whose conviction predated the statutory change.[69] The Court

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[66] *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

[67] *St. Cyr*; 533 U.S. at 325.

[68] *Id.* at 321.

[69] 566 U.S. at 272.

reasoned that to do so would "attach a new disability, in respect to transactions or considerations already past."[70]

62. This principle against retroactivity extends not only to statutory amendments but also to new judicial interpretations of existing law that dramatically shift the legal landscape. The United States Court of Appeals for the Fifth Circuit, in *Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019), addressed the retroactive application of the BIA's decision in *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) which significantly expanded the scope of what constitutes a "crime involving moral turpitude" (CIMT). The Fifth Circuit held that applying this new, broader definition to conduct that occurred before the decision was issued would be impermissibly retroactive because it would upend the "settled expectations" of individuals concerning the immigration consequences of their actions.[71] The court conducted a balancing test, weighing the "ills of retroactivity against the disadvantages of prospectivity" and found that the frustration of the parties' expectations outweighed any benefit of retroactive application.[72]

63. This consistent and robust body of case law establishes a clear rule: new statutory provisions or judicial interpretations that impose new, adverse immigration consequences for past conduct cannot be applied retroactively. Accordingly, even if the

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[70] *Id.* at 266 (internal quotation marks omitted).

[71] *Id.* at 430-31.

[72] *Id.* (quoting *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998)).

government's new interpretation were correct, its detention of Petitioner based on an Ex Post Facto rule change is nonetheless unlawful under the Constitution.

VI. Irreparable Harm

64. Continued unlawful detention is, by its very nature, an irreparable injury.[73] The Supreme Court has affirmed that "[f]reedom from imprisonment...lies at the heart of the liberty" protected by the Due Process Clause.[74] "Where, as here, the 'alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary'."[75]

65. Everyday Petitioner is detained in ICE custody in direct contravention of the statute and U.S. constitution he suffers irreparable harm. The complete sudden loss of one's freedom and liberty takes a significant toll on anyone in Petitioner's circumstances.

66. Irreparable harm (alarmingly) is also found in the alarming number of deaths in ICE custody recently. A few weekends months ago, a 55-year old man from Vietnam, died in ICE custody.[76]

67. On May 14, 2025, in an oversight hearing before the House Appropriations Committee, Todd Lyons, acting director of Immigration and Customs Enforcement,

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[73] *Phan*, 2025 WL 1993735, at *5 ("Further, '[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

[74] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[75] *Phan*, 2025 WL 1993735, at *5 (citing *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) (quoting Wright, Miller, & Kane, Federal Practice and Procedure, § 2948.1 (2d ed. 2004)).

[76] See Ex. 8

testified that 9 people have died in ICE custody since January 20, 2025.[77] A month after this testimony, on June 23, 2025, a 49-year old Canadian citizen died in ICE custody.[78] Reports of overcrowding, individuals being detained at facilities that are meant for processing and not set up for detention beyond a few hours are increasing, and other inhumane detention practices continue to rise. Moreover, if ever there was an agency who had demonstrated it could not be trusted to abide by the law and treat individuals humanely, it has been ICE over the past few months. The risk of death, emotional trauma, and/or other irreparable harm coming to Petitioner is, tragically, all too real a possibility.

68. Meanwhile, there will be ZERO harm to Respondents if Petitioner is immediately released from ICE custody, or at a minimum, granted the bond hearing she is entitled to by statute.

69. There are no administrative remedies to exhaust that would not be futile. DHS and the immigration courts have repeatedly indicated that DHS' novel position is now the formal position taken in a precedential decision by the BIA. Accordingly, IJs believe they are bound by the BIA's decision and will not grant bond to EWI noncitizens—no matter how long they've lived here and no matter how squeaky clean they have lived their lives in this Country.

VII. Procedural Due Process Violation Under Mathews

[77] This testimony can be found at the following link: https://www.youtube.com/watch?v=QvoURiaxBmA.

[78] The ICE press release on this death can be found at the following link: https://www.ice.gov/news/releases/canadian-national-ice-custody-passes-away

70. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.[79] Petitioner received no such opportunity and/or no such opportunity is available through the immigration courts at this time as a result of DHS' position and *Hurtado*.

71. To determine whether government conduct violates procedural due process, the Court weighs three factors in *Mathews* for courts to weigh: (1) the private interest affected by the government action; (2) the risk that current procedures will cause an erroneous deprivation of the private interest, and the extent to which that risk could be reduced by additional safeguards; and (3) the government's interest in maintaining the current procedures.[80]

A. Private Interest

72. Petitioner's private interest is the right to be free from government detention. Being free from physical detention by the government is at the core of due process protection, and "is the most elemental of liberty interests."[81] In our country, "liberty is the norm, and detention without trial "is the carefully limited exception."[82] Petitioner's interest in being free from government detention is magnified by the fact that he has a family of who loves and depends on him.

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[79] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[80] *Id.* at 335.

[81] *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

[82] *Id.*

73. Further, detention at a remote detention center miles away from major cities in Texas and with limited visiting hours makes it unnecessarily difficult for his family to see him. And, even when they do, they are separated by a glass barrier that prevents them from touching and hugging one another. While detained, Petitioner is unable to financially provide for his family members, who are now suffering financial difficulties.

74. Though Petitioner should have been able to reunite with his wife and children after a bond hearing before an IJ, such hearing is not available to him without federal court intervention.

75. The private interest here is fundamental: freedom from detention. It weighs heavily in the consideration of the *Mathews* factors.

B. Risk of Erroneous Deprivation

76. The second factor—the risk of erroneous deprivation of Mr. Hurculano Cabarello's liberty—is likewise substantial. The government's sudden about face in the way it interpreted § 1225(b)(2)(A) prevents Petitioner from having a bond hearing at all—much less a fair one. This is particularly true when there is significant evidence that this new position was reached by DHS, the "prosecuting agency" in conjunction with "EOIR" the agency that is supposed to be providing neutral adjudication of the noncitizens proceedings. "Such a rule [and process] is anomalous in our legal system," and it represents a basic conflict that has been disapproved of in this context and others.[83] When procedural

[83] *Günaydın*, 2025 WL 1459154, at *8; *see also Marcello v. Bonds*, 349 U.S. 302, 305–06, 75 S. Ct. 757 (1955) (holding that officer adjudicating immigration case cannot undertake prosecutorial role in the same matter).

protections are almost non-existent, it markedly increases the risk of erroneous deprivation of Petitioner's liberty interests.[84]

C. Government Interest

77. The government has no valid interest in depriving Petitioner of a bond hearing. The government's interest is supposed to be in upholding the Constitution and laws, both of which are plainly violated by its recent actions and continued unlawful detention of Petitioner. Depriving anyone of their liberty is a serious thing that should only be done as punishment or when necessary to prevent flight or danger to the community.

78. To balance liberty interests against interests in assuring appearance and safety, the INA explicitly provides bond hearings for noncitizens who are not described in § 1226(c) or 8 C.F.R. § 1003.19(h). The government, however, wants to detain everyone without any regard to whether they are a danger or a flight risk.[85] On balance, the private interests affected and the risk of erroneous deprivation under the current procedures greatly outweigh the government's interest in detaining anyone they want regardless of whether it is necessary or lawful. Petitioner's arbitrary detention without a bond hearing by a neutral adjudicator violates Petitioner's substantive due process rights as guaranteed by the Fifth Amendment.

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[84] *See Black v. Dir. Thomas Decker*, 103 F.4th 133, 152 (2d Cir. 2024).

[85] *Jacinto v. Trump*, 2025 WL 2402271, at *4 ("The governmental interest in the continued detention of these least-dangerous individuals, in contravention of the order of a neutral fact-finder, does not outweigh the liberty interest at stake.").

CLAIMS FOR RELIEF

COUNT I: VIOLATION OF THE INA

79. Petitioner incorporates by reference the allegations of fact set forth in the preceding paragraphs.

80. The mandatory detention provision at 8 U.S.C. § 1225(b)(2) does not apply to all noncitizens residing in the United States who are subject to the grounds of inadmissibility. As relevant here, it does not apply to those who previously entered the country and have been residing in the United States prior to being apprehended and placed in removal proceedings by Respondents. Such noncitizens are detained under § 1226(a), unless they are subject to § 1225(b)(1), § 1226(c), § 1231, or 8 C.F.R. § 1003.19(h).

81. The application of § 1225(b)(2) to Petitioner unlawfully mandates her continued detention and violates the INA as well as the U.S. Constitution.

COUNT II: VIOLATION OF DUE PROCESS

82. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

83. The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects."[86]

[86] *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

84. Petitioner has a fundamental interest in liberty and being free from official restraint.

85. The government's detention of Petitioner without a bond redetermination hearing to determine whether she is a flight risk or danger to others violates her right to due process.

COUNT III: ICE'S VIOLATION OF ITS OWN REGULATIONS & STATUTORY VIOLATION

86. Petitioner re-alleges and incorporates by reference all the foregoing paragraphs above.

87. Petitioner's continued detention by Respondents without a bond hearing pursuant to the process set forth by 8 U.S.C. § 1226 or 8 C.F.R. § 1003.19 is unlawful as ICE and EOIR failed to adhere to the law and mandatory process. As here, "'where an immigration regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute ... and [ICE] fails to adhere to it, the challenged [action] is invalid.'"[87] Petitioner's detention is unlawful and his immediate release is appropriate.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

a. Assume jurisdiction over this matter and issue a writ of habeas corpus requiring that Respondents release Petitioner Immediately, or provide Petitioner with a bond hearing before a neutral IJ pursuant to 8 U.S.C. § 1226(a) within three days;

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[87] *Nguyen v. Hyde*, 2025 WL 1725791, at *5 (quoting *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017)); *see also Zadvydas*, 533 U.S. at 690 ("The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]" any "person ... of ... liberty ... without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").

b. Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days;

c. Declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that EWI noncitizens encountered in the interior long after their entry who are placed in removal proceedings and are not described in § 1226(c) or 8 C.F.R. § 1003.19(h)(2), are entitled to a bond hearing before a neutral adjudicator;

d. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"); and

e. Grant any other and further relief that this Court deems just and proper.

RESPECTFULLY SUBMITTED,

/s/ Dan Gividen
Dan Gividen
Texas State Bar No. 24075434
18208 Preston Rd., Ste. D9-284
Dallas, TX 75252
972-256-8641
Dan@GividenLaw.com

And

/s/Molly McGee
Molly McGee
Massachusetts State Bar No. 696820
385 Broadway Suite 303
Revere, MA 02151
617-208-4141
Email: molly@mollymcgeelaw.com