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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Gildardo Rogelio ESCOBAR Salgado, Juan José MENA Vargas, and Alejandro REYES López Petitioners, v. John MATTOS, Warden, Nevada Southern Center; Jason KNIGHT, Acting Las Vegas/Salt Lake City Field Office Director, Enforcement and Removal Operations, United States Immigration and Customs Enforcement (ICE); Kristi NOEM, Secretary, United States Department of Homeland Security, Pamela BONDI Attorney General of the United States, Roman CHABAN, Acting Deputy Director, Executive Office for Immigration Review Respondents.	PETITIONERS' REPLY TO GOVERNMENT DEFENDANTS' RESPONSE Case No. 2:25-cv-01872-RFB-EJY Agency Case Numbers: A[redacted]; A[redacted] A[redacted]

I. INTRODUCTION

In response to Petitioners Petition for Writs of Habeas Corpus, the Government Defendants argue that the Court should agree with and accept a novel interpretation of 8 U.S.C. § 1225(b)(2)(A), claiming that nearly 30 years ago, in 1996, Congress in this statute acted to bar Petitioners permanently from any right to release from detention, to a bond hearing, to any review of the Government Defendants' exercise of allegedly mandatory detention authority. Petitioners assert, in response, that the evidence in support of Congressional intent for this specific outcome is not only non-existent, but that the evidence of Congressional intent weighs squarely against Defendants' interpretation: the Congressional Record, the enabling regulations, and continuing Congressional legislation as recently as January 2025, all challenge Defendants' proposed reading of the statute. This Court owes no deference to Defendants' proposed interpretation; this is the case primarily due to the length of time that occurred between the enactment of the statute and this new interpretation. Nevertheless, the length of time is not the sole flaw in the decision. Among other issues, the government's precedent decision in support of this interpretation fails to grapple with the purposely awkward syntax of the statutory language, the agency's own contradictory precedent, the governing regulations implemented contemporaneously, and the constitutional context of the statutory language. Finally, the government issued this decision in a case that

presented no case or controversy and was in fact moot when the decision was issued. *See, Appendix C: Motion to Reconsider Yajure Hurtado, p. 1.* The individual respondent involved in that precedent case has asked the agency to reconsider that precedent. *Id.*

II. ARGUMENT

The crux of the issue presented by these Petitioners is the question of whether they are detained by the government pursuant to 8 U.S.C. § 1226(a), and therefore statutorily and regulatorily eligible for a bond hearing before an IJ, or whether their detention is pursuant to 8 U.S.C. § 1225, specifically, § 1225(b)(2)(A), and therefore mandatory, with no statutory or regulatory right to a bond hearing. The government asserts that because these Petitioners, as individuals present in the U.S. without lawful admission, are deemed by 8 U.S.C. § 1225(a) to be "applicants for admission," they are inescapably and permanently subject to mandatory detention pursuant to the terms of 8 U.S.C. § 1225, including 8 U.S.C. § 1225(b)(2)(A). The government's analysis fails to recognize the explicit distinctions between Immigration and Nationality Act's (INA) precise classifications and sub classifications.

The largest of the INA's classifications is found in 8 U.S.C. § 1101 (a)(15), which creates two classes of non-citizens or aliens: immigrants and non-immigrants. In that section, the sub-classes of non-immigrants are precisely and

exhaustively defined, while the immigrant class is defined as "every alien ***except*** an alien who is within one of the following classes of nonimmigrant aliens. . ." 8 U.S.C. § 1101 (a)(15). Similarly, in 8 U.S.C. § 1225(a), revised and enacted as section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA), Congress defines another large class, that of "applicants for admission". Congress deliberately created this class in contrast and opposition to aliens who have been lawfully admitted, specifically to collapse the prior legal distinctions between exclusion and deportation proceedings. Report of the Committee on the Judiciary on H.R. 2202, Report No. 104-469, 225, Part I (March 1996). (This subsection is intended to replace certain aspects of the current ''entry doctrine,'' under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry. Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted.") *Id.*

Nevertheless, as the statutory language makes clear, despite its intent to collapse prior the legal distinctions between those who have entered, and those who have not, and combine both exclusion and deportation into one single procedure, Congress also recognized the constitutional constraints of due process. Consistent with that awareness, the definition of "applicants for admission"

includes two separate and clearly identifiable subclasses: aliens "present without admission" and aliens "who arrive in the United States." 8 U.S.C. § 1225(a). Note that these two groups are parallel to the two groups that previously fell within each of the two separate procedures—deportation and exclusion. As part of the enabling regulations, the government precisely defined the second group, also referred to as "arriving aliens." 8 C.F.R. § 1.2. Throughout the remainder of 8 U.S.C. § 1225, Congress carefully distinguishes and focusses on ***actual*** "arriving alien" applicants for admission. The text of 8 U.S.C. § 1225(b)(2)(A) is deliberately syntactically convoluted precisely to maintain this distinction. There is no other explanation for the addition of the "seeking admission" qualifier. The BIA's reading of the text, supported by the Defendants, renders that 'seeking admission' superfluous. The BIA and Defendants' interpret the text to expand the most restricted form of constitutional due process—that provided to those non-citizen aliens seeking admission at the U.S. borders—throughout the entire territory of the United States. As the Supreme Court wrote in *Landon v. Plascencia,* 459 U.S. 21, 33 (1982) "an alien seeking initial admission to the United States requests a privilege, and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Plascencia* at 33. The BIA and the Defendants would read 8 U.S.C. § 1225(b)(2)(A) to say: "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." In essence, this reading would convert every immigration agent throughout the United States into an examining officer. But Congress included that "seeking admission" phrase to reemphasize that the examination procedures laid out in 8 U.S.C. § 1225 are applicable *at the nation's borders*. Threaded through the Report of the House Judiciary Committee's explication of the text of INA § 235/8 U.S.C. § 1225, are the qualifiers: "arriving alien" "aliens seeking admission" "an alien applying for admission" "aliens arriving". Regarding the (b)(2) provisions at issue here, Congress explicitly applies them to "inspection of other *arriving aliens*". *House Judiciary Report, supra*. at 229.

In the analysis of the section 303 of IRRIRA, the House Judiciary Committee wrote "Section 236(a) restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States." *Id.* at 229. If, as Defendants argue, both subclasses of the class of "applicants for admission" are completely, fully, and permanently subject exclusively to the processing and detention procedures laid out in § 1225, then these statements in the House Judiciary Committee's Report cannot be true. The same would be true of the

Conference Committee Report, as the same fundamental distinctions are echoed in that report, in particularly at pages 208-210. ["New section 235(b) establishes new procedures for the inspection and in some cases removal of aliens arriving in the United States." "New section 236(a) restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States."]. Report of the Conference Committee, Report No. I 04-828, 208-210 (September 24, 1996).

Congress had solid constitutional reasons for distinguishing between the subclass of "arriving alien" applicants for admission at the nation's borders, and those merely deemed 'applicants for admission' as a legal fiction for purposes of removal proceedings.[1] Principal among those reasons is the recognition that aliens are persons included within the protections of the U.S. Constitution.

> But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution.
>
> One of these principles is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends -- not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action

[1] The Board of Immigration Appeals explicitly recognized, in *Matter of Y-N-P-*, that the class label of "applicant for admission" does not, by itself, convert an individual into an actual, true, applicant for admission. *Matter of Y-N-P-*, 26 I&N Dec. 10, 13 (BIA 2012) ["being an 'applicant for admission' under section 235(a)(1) is distinguishable from "applying . . . , for admission to the United States" within the meaning of section 212(h)."].

> contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

Yamataya v. Fisher (Japanese Immigrant Case), 189 U.S. 86, 100-101 (1903). [As referenced in *Reno v. Flores*, 507 U.S. 292, 306 (1993).[2] When Congress drafted and passed IRRIRA, it recognized precise constitutional lines. In IIRIRA Congress deliberately chose to define the class of all aliens who have not been lawfully admitted to the U.S. as "applicants for admission." Congress also deliberately recognized and enshrined in the statute the two subclasses composing "applicants for admission:" actual arriving aliens--actual aliens seeking admission—and individuals present in the United States who have not been admitted. In other words, individuals who are present without having ever sought admission, who Congress nevertheless deems "applicants for admission" as a legal fiction. The distinction between these two subclasses is squarely based in the long history of

[2] For a more detailed discussion of the constitutional context of IRRIRA, see David A. Martin, *Due Process and Membership in the National Community: Political Asylum and beyond*, 44 U. PITT. L. REV. 165 (Winter 1983) and David M. Grable, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 Cornell L. Rev. 820 (1998).

judicial precedent recognizing that the requirements of constitutional due process are lowest for those arriving at the nations' borders, and that by contrast, aliens arrested and detained within the United States, especially those present for extended periods, cannot be taken into custody and held arbitrarily. *e.g., Reno v. Flores.*

The regulations published in 1997 by the defendant departments, agencies and their predecessors also squarely support the intentioned distinction between the two sub-classes of "applicants for admission." That is the case because the Supplemental Information that accompanied those implementing regulations explicitly stated that "aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination." Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

The cases cited by the government in support of its request that this court reconsider its prior decisions on these issues are in the minority, both within the Ninth Circuit and across the U.S. As evidence of this assertion, and for the convenience of the Court, Petitioners attach a non-exhaustive, but representative list of recent Federal District Court decisions on both sides of this issue. Finally, the government argues that the recent decision of the Board of Immigration

Appeals, *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), deserves deference, due to the special competence of the agency regarding statutory interpretation of the Immigration and Nationality Act. That argument should fail. As noted by Judge Chen in *Cordero Pelico v. Kaiser*, 25-cv-07286-EMC 2025 WL 2822876 (N.D. Cal. Oct. 3, 2025), "Under *Skidmore*, the 'weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In this regard, the BIA's current position is inconsistent with its earlier pronouncements." *Cordero Pelico v. Kaiser* at 15. In addition to Judge Chen's further reasoning, the BIA's decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) was moot when it was issued,[3] and while the BIA's decision making is not restricted to cases or controversies, the fact that the issue was moot when the decision was issued, rendering *Yajure Hurtado* an advisory opinion, is another factor reducing both the persuasive weight of the agency's reasoning and the agency's expansive and retroactive application of this novel statutory interpretation. Finally, and relevant to Petitioners' cases, while a member of the Tenth Circuit Court of

[3] Petitioners have attached at Exhibit B a redacted copy of the Motion for Reconsideration that has been filed with the BIA, for the factual details, larger context, and legal arguments presented to the BIA in that Motion.

Appeals, Justice Gorsuch reviewed another BIA decision, and recognized that while (due to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) a BIA decision could function to overrule a Federal Court decision, the BIA's rulemaking via precedent decisions should not have retroactive effect. *De Niz Robles v. Lynch,* 803 F.3d 1165 (10th Cir. 2015). Even if *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) were well reasoned, grounded in the record of Congressional intent and the nearly thirty years of intervening practice and precedent, as an exercise in rulemaking via agency decision making, it should not be applied retroactively.

III. CONCLUSION

For the reasons laid out in their Petition for Writs of Habeas Corpus, as well as the reasons included here, the reasons laid out by District Court judges across the United States, and reasons laid out in the attached Motion to Reconsider the BIA's decision in *Matter of Yajure Hurtado*, Petitioners respectfully request that this court grant their Petitions as prayed.

RESPECTFULLY SUBMITTED this 21st day of October 2025.

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/s/ Marti L. Jones
Attorney for Petitioner

APPENDICES

A. List of recent Federal District Court decisions granting habeas and finding that "applicants for admission" detained within the United States are detained pursuant to 8 U.S.C. 1226(a) and Defendants are statutorily and constitutionally required to provide them with Bond Hearings, and to allow them to post the bonds without unconstitutional and ultra vires intervention.

B. List of recent Federal District Court decisions denying habeas on similar facts.

C. Motion to Reconsider, filed with the BIA in *Yajure Hurtado.*