UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JUAN MARIA CHIMBORAZO CUNIN, Petitioner, v. BRIAN MCSHANE, in his official capacity as acting Philadelphia Field Office Director for U.S. Immigration and Customs Enforcement, KRISTI NOEM, in her capacity as Secretary for the United States Department of Homeland Security; PAMELA BONDI, in her official capacity as the Attorney General of the United States, Respondents.	Case No. 3:25-cv-01887 (LAL)

PETITIONER'S REPLY BRIEF
IN SUPPORT OF THE
PETITION FOR WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes

Regulations

Other Authorities

CONTROLLING OR MOST APPROPRIATE AUTHORITY

8 U.S.C. § 1225
8 U.S.C. § 1226

Other Cases Raising Same Merits and Exhaustion Issues

Lopez-Campos v. Raycraft, No. 2:25-cv-12486, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025)
Pizarro Reyes v. Raycraft, 2:25-cv-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025)
Rodriguez v. Bostock, 3:25-cv-05240-TMC (W.D. Wash. Sept. 30, 2025)
Echevarrria v. Bondi, CV-25-032520PHX-DWL (D. Ariz. Oct. 3, 2025)

Caselaw Pertaining to Statutory Claim

Jennings v. Rodriguez, 583 U.S. 281 (2018)

PRELIMINARY STATEMENT

Juan Maria Chimborazo Cunin is a 37 year old native and citizen of Ecuador ("Petitioner" or "Mr. Chimborazo Cunin"). Mr. Chimborazo Cunin crossed the United States/Mexico border without inspection in 2005. On or about March 31, 2017, Mr. Chimborazo Cunin previously applied for asylum. On October 2, 2025, Petitioner was detained while at work and was sent to Clinton County Correctional Facility. Petitioner had an individual calendar hearing scheduled for December 12, 2029. That individual hearing was cancelled and a new one was scheduled for November 18, 2025.

For nearly thirty years, Respondents and the federal courts recognized that noncitizens who entered the United States without inspection and were apprehended years later were eligible for a bond hearing before an immigration judge under 8 U.S.C. § 1226(a). Petitioner has been denied a bond determination in Immigration Court because the Respondents advance a new statutory interpretation that defies the text, structure, and purpose of the Immigration and Nationality Act (INA), and reverses decades of consistent agency practice. The government's novel position mandates the detention, without a bond hearing, of millions of longtime residents of the United States. It is contrary to the plain language of the statute; Congress's intent and understanding of the detention statutes, expressed most recently in January 2025; long-standing agency practice; and the agency's conduct

in this case. It is no surprise that, to the best of counsel's knowledge, this new interpretation has been squarely rejected by a majority of the federal courts to address this issue.[1] Many District Courts have rejected the holding of *Matter of Yajure Hurtado*. Some of the more than fifty district courts that have rejected the government's new interpretation are cited infra at II.[2] Multiple District Courts have ordered bond hearings or release and have held that 1226(a), not 1225(b)(2) authorizes detention. As court after court has held, § 1225 is a border inspection scheme that does not apply to noncitizens who were already residing in the United States when they were apprehended. Instead, § 1226(a) plainly applies. And those courts all rejected the government's argument that exhaustion is a barrier to habeas relief. This Court should grant Mr. Chimborazo Cunin's petition and order Respondents to either immediately release him or hold a new bond hearing.

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[1] The one apparent exception, *Chavez v. Noem*, 2025 WL 2730228 (S.D. Cal. 2025), denied an ex parte temporary restraining order but has not issued a final judgment on the merits.

[2] *See, e.g., Echevarria v. Bondi*, No. CV-25-03252-PHX-DWL (D. Ariz. Oct. 3, 2025); *Vasquez v. Bostock*, 3:25-cv-05240-TMC (W.D. Wash. Sept. 30, 2025).

ARGUMENT

I. This Court Has Jurisdiction Over The Instant Matter.

Respondents' opposition adopts a much broader reading of 8 U.S.C. section 1252(g) than the law supports. Respondents' reading ignores controlling precedent limiting § 1252(g) to three narrow actions, none of which are at issue here.

The Supreme Court cautioned that the jurisdiction bar under § 1252(g) is "narrow" and only "limits review of cases 'arising from' decisions 'to commence proceedings, adjudicate cases, or execute removal orders.'" *Dept. of Homeland Security v. Regents of the University of California*, 591 U.S. 1, 12 (2020) (emphasis added). "We have previously rejected as 'implausible' the Government's suggestion that § 1252(g) covers 'all claims arising from deportation proceedings' or imposes 'a general jurisdictional limitation.'" *Id.* (emphasis added) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)). "Section 1252(g)'s bar on judicial review of claims arising from the government's decision to execute removal orders does not preclude jurisdiction over the challenges to the legality of the detention at issue here." *Kong v. United States*, 62 F.4th 608 (1st Cir. 2023) (emphasis added).

Petitioner's unconstitutional detention is not tied to a decision to "commence" removal proceedings because removal proceedings commenced when the Notice to Appear was served. *See* 8 U.S.C. § 1229(a)(1). Custody proceedings

are independent of "commencing" removal proceedings and fall under 8 U.S.C. § 1226, which has its own jurisdictional provision in 8 U.S.C. § 1226(e) addressing review of discretionary custody decisions. The government's own position here—that detention is mandatory for all respondents who enter without inspection ("EWI") eliminates discretion, making § 1226(e) inapplicable and rendering § 1252(g) irrelevant. Congress would not have enacted § 1226(e) if § 1252(g) already barred review of custody determinations; the government's reading collapses this statutory structure and should be rejected. And, as explained in the habeas corpus petition and further herein, Petitioner's due process rights are violated by his continued detention, and this Court has jurisdiction to rule on due process violations.

Adjudication of the ongoing violation of Respondent's Fifth Amendment rights are "independent of, and collateral to, the removal process. Her detention does not arise from the government's commence[ment of] proceedings." *Ozturk v. Hyde*, 136 F.4th 382, 397-98 (2d Cir. 2025). Therefore, 8 U.S.C. § 1252(g) does not apply and this Court has jurisdiction over the instant matter.

Respondents urge that the Board of Immigration Appeals or federal circuit court through a petition for review should have jurisdiction over Petitioner's claims. This ignores the plain fact that the regulations provide no legal mechanism to challenge or appeal the automatic stay before EOIR, the BIA, or the circuit

court. There is also no mechanism to challenge or appeal his constitutional claims per the regulatory scheme. Respondents offer no alternative court or tribunal for Petitioner to challenge the fact that DHS is keeping him detained.

8 U.S.C. § 1252(b)(9) is not applicable here.

Respondents' argument concerning the 8 U.S.C. § 1252(b)(9) jurisdictional bar muddies the distinction between challenges to removal and constitutional challenges. This case does not challenge any removal order, and section 1252(b)(9) cannot be used to shield unconstitutional detention from judicial review.

The distinction between these categories is important because EOIR lacks jurisdiction to consider constitutional challenges. *Ozturk v. Hyde*, 136 F.4th 382, 400 (2025); *see also Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992) ("Moreover, it is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations."). The Second Circuit noted,

> [W]hile the court of appeals considering the petition for review may consider constitutional claims, that court is obliged to decide the petition ***only*** on the administrative record on which the order of removal is based. 8 U.S.C. § 1252(b)(4)(A). However, **we are not persuaded that an IJ or the BIA would have developed a sufficient factual record, or any record at all,** with respect to the challenged ***detention***, especially seeing as **bond hearings are decided separately, appealed separately, and contain separate records than the removal proceedings**.

The First Circuit noted that the legislative history of section 1259(b)(9) indicates that federal courts retain jurisdiction of habeas petitions:

> [T]he legislative history indicates that Congress intended to create an exception for claims "independent" of removal. H.R.Rep. No. 109–72, at 175, *as reprinted in* 2005 U.S.C.C.A.N. at 300. **Thus, when it passed the REAL ID Act, Congress stated unequivocally that the channeling provisions of section 1252(b)(9) should not be read to preclude "habeas review over challenges to detention."** ***Id.*** (indicating that **detention claims are "independent of challenges to removal orders").** In line with this prescription, **we have held that district courts retain jurisdiction over challenges to the legality of detention in the immigration context.** *See Hernández v. Gonzales*, 424 F.3d 42, 42 (1st Cir.2005) (**holding that detention claims are independent of removal proceedings and, thus, not barred by section 1252(b)(9)).**

Aguilar v. ICE, 510 F.3d 1, 11 (1st Cir. 2007) (emphases added). The Ninth Circuit concurs that 1259(b)(9)'s jurisdictional limitations only apply with respect to final orders of removal, and that Article III courts maintain jurisdiction over constitutional challenges to detention. *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006). Therefore, section 1259(b)(9) does not prevent this Court from exercising jurisdiction.

Additionally, Respondents' reliance on *Jennings v. Rodriguez* is misplaced. The Supreme Court rejected an "expansive interpretation of § 1252(b)(9)[.]" *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018). The excerpt from a concurrence that Respondents cited was already rejected in the same case: "The question is not whether ***detention*** is an action taken to remove an alien but whether the legal questions in this case arise from such an action" and "those legal questions are too

remote from the actions taken to fall within the scope of § 1252(b)(9)." *Id.* at 295 n.3 (emphasis in original). Thus, section 1252(b)(9) does not preclude review of Petitioner's case.

II. Because § 1225 Only Applies to the Inspection of Recent Arrivals, § 1226 Governs the Detention of Residents Like Mr. Chimborazo Cunin.

The text, structure, and purpose of the INA all support Mr. Chimborazo Cunin's argument that § 1226(a) governs his detention, and not § 1225(b)(2)(A). *See Lopez-Campos*, *supra*. The Court does not owe any deference to the agency's new interpretation of §§ 1225 and 1226. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024). Here, the agency believes that the language of the statute is plain such that there are no gaps for the agency to fill. *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 220 (BIA 2025).

Many District Courts have rejected the holding of *Matter of Yajure Hurtado*. They have not only ruled in favor of the Petitioner but have also held that the Court has jurisdiction. *See Ventura Martinez v. Trump*, 3:25-cv-01445 (W.D.La., Oct. 22, 2025). *See, e.g.*, *Oliveira Gomes v. Hyde*, 2025 WL 1868299(D.Mass. July 7, 2025); *Martinez v. Hyde*, 2025 WL 2084238 (D.Mass. July 24, 2025); *dos Santos v. Noem*, 2025 WL 2370988 (D.Mass. Aug. 14, 2025); *Romero v. Hyde*, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Doe v. Moniz*, 2025 WL 2576819 (D.Mass.,

Sept. 5, 2025); *Encarnacion v. Moniz*, No. 25-12237 (D.Mass., Sept. 5, 2025); *Sampiao v. Hyde*, 2025 WL 2607924 (D.Mass., Sept. 9, 2025); *Hilario Rodriguez v. Moniz*, No. 25-12358 (D.Mass., Sept. 18, 2025); *Chogllo Chafla v. Scott*, 2025 WL 2531027 (D.Me., Sept. 2, 2025); *Jimenez v. FCI Berlin, Warden*, 2025 WL 2639390 (D.N.H., Sept. 8, 2025); *Lopez Benitez v. Francis*, 2025 WL 2371588 (S.D.N.Y., Aug. 13, 2025); *Samb v. Joyce*, 2025 WL 2398831 (S.D.N.Y., Aug. 19, 2025); *Savane v. Francis*, 2025 WL 2774452 (S.D.N.Y., Sept. 28, 2025); *Luna Quispe v. Crawford*, 2025 WL 2783799 (E.D.Va., Sept. 29, 2025); *Rivera Zumba v. Bondi*, 2025 WL 2753496 (D.N.J., Sept. 26, 2025); *Leal-Hernandez v. Noem*, 2025 WL 2430025 (D.Md., August 24, 2025); *Hasan v. Crawford*, 2025 WL 2682255 (E.D.Va., Sept. 19, 2025); *Kostak v. Trump*, 2025 WL 2472136 (W.D.La., Augt. 27, 2025); *Lopez Santos v. Noem*, 2025 WL 2642278 (W.D.La., Sept.11, 2025); *Lopez-Arevelo v. Ripa*, 2025 WL 2691828 (W.D.Tex., Sept. 22, 2025); *Barrera v. Tindall*, 2025 WL 2690565 (W.D.Ky., Sept.19, 2025); *Singh v. Lewis*, 2025 WL 2699219 (W.D.Ky., Sept. 22, 2025); *Lopez-Campos v. Raycroft*, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Pizarro Reyes v. Raycraft*, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Campos Leon v. Forestal*, 2025 WL 2694763 (S.D.Ind., Sept. 22, 2025); *Giron Reyes v. Lyons*, 2025 WL 2712427 (N.D.Iowa, Sept. 23, 2025); *Santiago Helbrum v. Williams,* 4:25-cv-00349 (S.D. Iowa Sept. 30, 2025); *Hernandez Marcelo v. Trump* (S.D. Iowa Sept. 10, 2025); *Brito Barajas v. Noem,*

No. 4:25-cv-00322 (S.D. Iowa Sept. 23, 2025); *Belsai D.S. v. Bondi*, 2025 WL 2802947 (D. Minn. Oct. 1, 2025); *Maldonado v. Olson*, 2025 WL 2374411 (D. Minn. Apr. 15, 2025); *O.E. v. Bondi*, 2025 WL 2466670 (D. Minn. Apr. 27, 2025); *Garcia Jimenez v. Kramer*, 2025 WL 2374223 (D. Neb. Aug. 14, 2025); *Aniscasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025); *Jacinto v. Trump*, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Carmona-Lorenzo v. Trump*, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Cortes Fernandez v. Lyons*, 2025 WL 251539 (D. Neb. Sept. 3, 2025); *Palma Perez v. Berg*, 2025 WL 2531566 (D. Neb. Sept. 3, 2025); *Lorenzo Perez v. Kramer*, 2025 WL 2624387 (D. Neb. Sept. 11, 2025); *Oruna Carlon v. Kramer*, 2025 WL 2624386 (D. Neb. Sept. 11, 2025); *Genchi Palma v. Trump*, 2025 WL 2624385 (D. Neb. Sept. 11, 2025); *Duenas Arcey v. Trump*, 2025 WL 2676934 (D. Neb. Sept. 18, 2025); *Rosado v. Figueroa*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *Arrazola-Gonzalez v. Noem*, 2025 WL 2379235 (C.D. Cal. Aug. 15, 2025); *Zaragoza Mosqueda et al. v. Noem*, 2025 WL 2951930 (C.D. Cal. Sept. 8, 2025); *Cuevas Guzman v. Andrews*, 2025 WL 2617256 (E.D. Cal. Sept. 9, 2025); *Guerrero Lepe v. Andrews*, 2025 WL 2716910 (E.D. Cal. Sept. 23, 2025); *Hernandez Nieves v. Kaiser*, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025); *Caicedo Hinestroza v. Kaiser*, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Salcedo Aceros v. Kaiser*, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Vasquez Garcia v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Maldonado Vazquez*

v. Feeley, 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Sanchez Roman v. Noem*, 2025 WL 2710211 (D. Nev. Sept. 23, 2025); *Rodriguez Vazquez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Garcia Cortes v. Noem*, 2025 WL 2652880 (D. Colo. Sept. 16, 2025); *Salazar v. Dedos*, 2025 WL 2676729 (D.N.M. Sept. 17, 2025); *Gamez Lira v. Noem*, 2025 WL 2676729 (D.N.M. Sept. 24, 2025); *Hernandez Lopez v. Hardin* (M.D. Fla. Sept. 25, 2025). In decision after decision, federal courts— nationwide—have rejected Respondents' sudden reinterpretation of the statutory scheme, and have instead held that § 1226(a), not § 1225(b), applies to noncitizens who are not apprehended upon arrival to the United States. The plain text of the statutory provisions demonstrates that § 1226(a), not § 1225(b), applies to people like Petitioner.

A. The rules of statutory interpretation show that § 1226(a) applies here

Sections 1226(a) and 1225(b)(2)(A) work in tandem to cover different categories of noncitizens: § 1226 provides a discretionary detention scheme for individuals who are "already in the country" and are detained "pending the outcome of removal proceedings," *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018), while § 1225 (including its subsection (b)(2)(A)) is a processing and inspection scheme that applies to those "at the Nation's borders and ports of entry, where the Government must determine whether a[] [noncitizen] seeking to enter the country is admissible," *Id.* at 287. Conversely, § 1226 "authorizes the

Government to detain certain aliens already in the country pending the outcome of removal proceedings." *Id.* at 289. Indeed, there is a "line historically drawn between these two sections" and the categories of noncitizens they respectively cover. *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *8 (D. Mass. July 24, 2025).

This understanding situates each detention provision "in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (citation omitted). *See also Biden v. Texas*, 597 U.S. 785, 799-800 (2022) (looking to statutory structure to inform interpretation of INA provision). Placing a provision in its larger context is especially important where the provision "may seem ambiguous in isolation" but can be "clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). And the one meaning which permits a logical and compatible effect here is that § 1225 and § 1226 each cover different categories of noncitizens.[3]

[3] Respondents are also wrong to claim § 1225(b)(2)(A) somehow takes "priority" over § 1226(a) if they overlap. To the contrary, the U.S. Supreme Court has said the opposite, characterizing § 1226(a) as the "default rule" for "aliens already in the country." *Jennings*, 583 U.S. at 288-89.

Section 1225's plain text shows that it is focused on inspecting people who are arriving or have just entered the United States. *See generally* 8 U.S.C. § 1225(a)-(b), (d). That section repeatedly refers to "examining immigration officer[s]," 8 U.S.C. § 1225(b)(2)(A), (b)(4); sets out procedures for "inspection[s]" of people "arriving in the United States," *id.* § 1225(a)(3), (b)(1), (b)(2), (d); and discusses "stowaways, "crewm[e]n," and noncitizens "arriving from contiguous territory." *Id.* § 1225(a)(2), (b)(2)(B), (b)(2)(C). Even the title of § 1225 refers to the "inspection" of "inadmissible arriving" noncitizens (emphasis added). *Cf. Dubin v. United States*, 599 U.S. 110, 120-21 (2023) (relying on section title to help construe statute). Thus, by its own text, § 1225, read as a whole, makes clear that it is intended to apply to recent arrivals at or near the U.S. border. Mr. Chimborazo Cunin, of course, arrived at the border over twenty years ago and has been residing in the United States since. He has United States citizen children.

On the other hand, § 1226(a) is a separate detention authority that applies broadly to any noncitizen arrested "on a warrant . . . pending a decision on whether [they are] to be removed from the United States." *See also Jennings*, 583 U.S. at 289 (§ 1226(a) applies to those "already in the country" who are detained "pending the outcome of removal proceedings"). On its face, the provision plainly applies to Mr. Chimborazo Cunin, who was arrested "on a warrant" when he was already in the U.S. and is now detained "pending a decision on" his removal. Thus, § 1226(a),

and not § 1225(b)(2)(A), is clearly the proper detention authority for Mr. Chimborazo Cunin.

1. Section 1225(b)(2)(A) cannot apply to Mr. Chimborazo Cunin because he is not an "applicant for admission."

Respondents first argue that, despite having lived in this country for decades, Mr. Chimborazo Cunin is an "applicant for admission" and can be detained under § 1225(b)(2)(A) as if he were fictionally at the border attempting entry. [4] Respondents zoom too far into the statute. The term "applicant for admission," when viewed in its statutory context, cannot be understood without acknowledging Congress's choice to deploy the term within § 1225's border inspection scheme. *See* Section I. By contrast, the term "applicant for admission" appears nowhere in § 1226. This comparative context thus clarifies that the term refers to a specific category of "arriving" noncitizens being "inspected" at or near the border. See 8 U.S.C. § 1225. Indeed, in *Bautista v. Santacruz Jr.*, the court rejected this exact argument, finding that the petitioners—who had been residing in the U.S.—were not "applicants for admission." No. 5:25-CV-1873-BFM (C.D. Cal. July 28, 2025), Dkt. 14 at 7-8.

[4] Respondents' reliance on *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020), to support this statutory fiction is misleading at best. The Supreme Court was clearly referring to the scope of due process protections in the context of people who physically "arrive at ports of entry" (airports are offered as an example). *Id.*

Thus, when § 1225(a)(1) describes "applicants for admission" as a noncitizen "present in the United States who has not been admitted," the larger context of § 1225 clarifies that this definition refers to individuals who were apprehended in the interior of the country after having recently crossed the border. In sum, Mr. Chimborazo Cunin—who has resided here for twenty years—is not an "applicant for admission" as that term should be understood within the INA, and thus he cannot be mandatorily detained under § 1225(b)(2)(A).

2. Section 1225(b)(2)(A) cannot apply to Mr. Chimborazo Cunin because he is not "seeking admission" to the United States.

Even if Mr. Chimborazo Cunin were an "applicant for admission," § 1225(b)(2)(A) also requires an independent and separate showing that he is "seeking admission" to the United States. Respondents' interpretation of "seeking admission" has even less statutory footing: they argue that the term encompasses anyone seeking "a lawful means of entering" the country without regard to where or when that right may be granted, thus mandating the detention of any noncitizen present in the United States who has not been lawfully admitted or paroled. Such a broad interpretation of "seeking admission" flies in the face of the INA's text, structure, and purpose, and defies the common-sense meaning of the term.

Interpreting the INA properly shows that "seeking admission" describes a much narrower class: recent arrivals who are presenting themselves for admission at or near the border. Again, the text and structure of § 1225 clearly show that it

deals with inspections of recent arrivals at or near the border. *See* Section I. By deploying "seeking admission" within § 1225's border inspection scheme—and not § 1226—Congress intended for this term to cover the detention of noncitizens seeking admission at or near the border. That is why the statute's implementing regulations, which were "promulgated mere months after passage of the statute and have remained consistent over time," *Lopez Benitez v. Francis*, 25-CV-5937-DEH, 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025), describe those seeking admission as "arriving aliens," 8 C.F.R. § 235.3(c)(1), who are "coming or attempting to come into the United States," 8 C.F.R. § 1.2 (emphasis added). *See Martinez*, 2025 WL 2084238 at *6 (the regulations' use of "arriving alien" is "roughly interchangeable with an 'applicant . . . seeking admission'" as used in § 1225(b)(2)(A)); *see also Lopez Benitez*, 2025 WL 2371588, at *7 (same). Thus, only those who take affirmative steps to seek admission while "coming or attempting to come into the United States" can reasonably be said to be "seeking admission" under § 1225(b)(2)(A). *See Gonzalez v. Noem*, 25-CV-2054-ODW-BFM at 8 (C.D. Cal. Aug. 13, 2025).

The word "seeking" is the present participle of the verb "seek." It thus has a temporal element-Petitioner must have been in the process of seeking admission at the time of the inspection. *United States v. Balint*, 201 F.3d 928, 933 (7th Cir. 2000) ("[U]se of . . . the present participle, or '-ing' form of an action verb,

generally indicates continuing action."). It is difficult to see how Mr. Chimborazo Cunin could be deemed to be "seeking" admission at the time of his encounter with ICE. By that point, he had been present in the U.S. for many years. If he became an "applicant for admission" at the time of his initial entry, by Respondents' interpretation he would be in a perpetual state of seeking admission the entire time between his entry and encounter. This "would seem to push the statutory text beyond its breaking point." *Echevarria v. Bondi*, 25-03252 at *12 (D. Ariz. Oct. 3, 2025).

A cancellation of removal applicant, 8 U.S.C. § 1229b(b)(1), is not "seeking admission." If granted, the agency will adjust their status to that of a lawful permanent resident and record their "lawful admission for permanent residence." 8 U.S.C. § 1229b(b)(3). The term "lawfully admitted for permanent residence" means "the status of having been accorded the privilege of residing permanently in the United States as an immigrant." 8 U.S.C. § 1101(a)(20); *Stanovsek v. Holder*, 768 F.3d 515, 517 (6th Cir. 2014). On the other hand, an "admission" means "with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

Mr. Chimborazo Cunin is not presenting himself for admission at the border; he arrived at the border over twenty years ago and has been residing in the United

States since. He simply wishes to remain in the country he has called home—not to enter it. All that Respondents can say in response to this obvious fact is that noncitizens like Mr. Chimborazo Cunin must be seeking admission. But even Respondents' massive presumption does not make their case. Regardless of whether Mr. Chimborazo Cunin desired a lawful means of entering, the reality is that he is not trying to enter the United States; he is already here. Thus, he cannot be considered "seeking admission" in any reasonable way, rendering § 1225(b)(2)(A) wholly inapplicable to his detention.

B. Congressional intent shows that § 1226(a) applies to Mr. Chimborazo Cunin

Congress intended for § 1226 to govern the detention of noncitizens who entered the U.S. without inspection. Congress most recently expressed this understanding earlier this year in the Laken Riley Act. This act added a subsection to § 1226 that specifically mandated detention for noncitizens who are inadmissible under §§ 1182(a)(6)(A) (noncitizens present without being admitted or paroled, like Petitioner), 1182(a)(6)(C) (misrepresentation), or 1182(a)(7) (lacking valid documentation) and have been arrested for, charged with, or convicted of certain crimes. *See* 8 U.S.C. § 1226(c)(1)(E); Pub. L. No. 119-1, 139 Stat. 3 (2025).

Respondents' interpretation of the statutes renders this recently amended section superfluous. *Lopez-Campos*, *supra*. If Congress intended or understood §

1225 to govern the detention of noncitizens like Mr. Chimborazo Cunin, who were apprehended years after entering the country, it would have placed these amendments within § 1225, not § 1226.

When Congress amended § 1225(b)'s predecessor statute—which authorized detention only of arriving noncitizens—to include individuals who had not been admitted, legislators expressed concerns about recent arrivals to the United States who lacked the documents to remain in the country. There is no suggestion in the legislative history that Congress intended to subject all people present in the United States after an unlawful entry to mandatory detention and thereby transform immigration detention and sweep millions of noncitizens into § 1225(b). *See* H.R. Rep. No. 104-469, pt. 1, at 157–58, 228–29 (1996); H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.).

C. Long-standing agency practice shows that § 1226(a) applies here

Petitioner's position is not a novel interpretation of the INA. It has been Respondents' own understanding of these provisions since they were first enacted thirty years ago—a view they held until suddenly reversing course two months ago in a policy ICE issued "in coordination with the Department of Justice."

Following IIRIRA, the agency drafted new regulations that provided: "[a]liens 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. 10,312, 10,323 (Mar. 6, 1997). The relevant regulations restrict only "arriving aliens" from an immigration court bond hearing. 8 C.F.R. § 1003.19(h)(2)(i)(B). An "arriving alien" is, as relevant here, "an applicant for admission coming or attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1001.1(q).

In fact, as recently as August 4, the Attorney General designated for publication a decision in which the BIA reviewed under § 1226(a) the merits of a bond request by a noncitizen who unlawfully entered the United States. *Matter of Akhmedov*, 29 I&N Dec. 166, 166 n.1 and 166-67 (BIA 2025). "The longstanding practice of the government can inform a court's determination of 'what the law is.'" *Loper Bright*, 603 U.S. at 385-86.

D. Respondents' conduct in this case suggests they did not view Mr. Chimborazo Cunin as seeking admission

Finally, belying Respondents' entire defense are the facts surrounding Mr. Chimborazo Cunin's initial detention: when he was apprehended, the DHS deliberately chose not to check the box designating Mr. Chimborazo Cunin as an "arriving alien." *See* Notice to Appear, attached as Exhibit A. Instead, DHS only checked the box for an "alien present in the United States" and it only charged him with removability under 8 U.S.C. § 1182(a)(6)(A)(i). *Id.*

III. The Court Should Waive Any Prudential Exhaustion Requirement

The exhaustion of administrative remedies is not a statutory or jurisdictional requirement for a habeas petitioner but is instead a prudential matter of this Court's discretion. There are many circumstances where courts do not require exhaustion of administrative remedies, including when "[1] delay means hardship . . . or when [2] exhaustion would prove 'futile'." *Shalala v. Illinois Council*, 529 U.S. 1, 13 (2000); *see also Fazzini v. Ne. Ohio Corr. Ctr.*, 473 F.3d 229, 236 (6th Cir. 2006). First, exhaustion is futile because the BIA has issued a decision, binding on the agency, mandating the detention without a bond hearing of the millions of noncitizens who are present in the United States without having been inspected and admitted. *Yajure Hurtado*, 29 I&N Dec. 216.

The persuasive authority cited by the Respondents to support their argument to impose the exhaustion requirement are factually distinct from the instant matter. The Respondents' citations involve discretionary bond determinations where the BIA retained discretion to alter the Immigration Judge's decision

In *Pierre*, the Petitioner was a pro se immigrant that asserts that the bail amount is excessive and a strain on his family resources. In *Pierre*, the BIA could have ruled in the Petitioner's favor that the 10k bail was too high and that the Immigration Judge abused his discretion in setting such a high bail amount. *Pierre*

v. Sabol, No. 1:11-CV-2184, 2012 WL 2921794, at *1-2 (M.D. Pa. July 17, 2012). Here, the BIA is bound by *Yahure Hurtado* and their decision will not change. There is no discretion.

In *Anwari*, the court held that the Petitioner failed to exhaust his administrative remedies through an appeal of his bond decision to the BIA. The Immigration Judge found that the petitioner was a flight risk. *Anwari v. Lowe*, No. 3:CV-17- 1512, 2018 WL 2103827, (M.D. Pa. May 7, 2018) (Mariani, J.). This is far different from the analysis in the instant matter.

In *Chajchic*, Petitioner urged the Court to exercise their jurisdiction to set aside the discretionary bond denial decision of the Immigration Judge. *German Chajchic v. Rowley*, No. 1:17-cv-00457, Rep. and Recomm., 2017 WL 4401895, at *78 (M.D. Pa. Jul. 25, 2017) (Carlson, M.J.), adopted by No.1:17-CV-0457, 2017 WL 4387062, at *9 (M.D. Pa. Oct. 3, 2017) (Conner, C.J.). The issue is different from the instant matter. *Chajchic* concerned a discretionary release while the instant matter concerns whether the Petitioner is subjected to mandatory detention. As a result, this Court should waive the exhaustion requirement.

Second, as to delay, the petitioner faces "an unreasonable or indefinite timeframe for administrative action." *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992). This is so "[e]ven where the administrative decisionmaking schedule is otherwise reasonable and definite." *Id.* Agency data shows that, on average, the

BIA took over six months to decide bond appeals in 2024. *See Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1245 (W.D. Wash. 2025). Such a delay surely "means hardship" for Mr. Chimborazo Cunin, who would have to remain unlawfully detained for months—separated from his home, his family, and his community—before the BIA could rule on the legality of his bond denial and on any underlying merits appeal. *Shalala*, 529 U.S. at 13. Indeed, "because of delays inherent in the administrative process, BIA review would result in the very harm that the bond hearing was designed to prevent: prolonged detention without due process." *Hechavarria v. Whitaker*, 358 F. Supp. 3d 227, 237 (W.D.N.Y. 2019).

Third, waiver is appropriate because the petitioner raises non-frivolous constitutional questions. *See Bangura v. Hansen*, 434 F.3d 487, 493 (6th Cir. 2006)). Mr. Chimborazo Cunin's due process arguments, *see* Section IV, are far from frivolous, and raise important questions about whether the government can mandatorily detain a longtime resident without a criminal record before they have been ordered removed. That is an argument "[n]either an immigration judge nor the Board of Immigration Appeals is positioned to properly adjudicate." *Lopez Benitez*, 2025 WL 2371588 at *14.

Fourth, the need for waiver is amplified in the context of a habeas corpus petition, which demands a "swift" remedy in the face of illegal detention. *Fay v. Noia*, 372 U.S. 391, 400 (1963). *See also* 28 U.S.C. § 2243. Requiring prior

administrative exhaustion will only serve to prolong that illegal detention. Unsurprisingly, then, all the Courts to consider habeas petitions raising the same issues present in this case have waived the prudential exhaustion requirements.[5] This Court should again exercise its discretion to do so here and proceed to the merits of this petition—especially in the absence of factual disputes and facing only questions of pure statutory interpretation and constitutional due process analysis. See *Shalala*, 529 U.S. at 13 (waiver appropriate when "the legal question is 'fit' for resolution.").[6]

IV. Due Process Entitles Mr. Chimborazo Cunin to a Bond Hearing

Respondents claim that Mr. Chimborazo Cunin is only due the removal procedures provided by Congress. While that may be true for some people apprehended while crossing the border, *see Thuraissigiam*, 591 U.S. at 139, that is not true for people like Mr. Chimborazo Cunin who have resided in the United States and "develop[ed] the ties that go with" that longtime residence, *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Indeed, there has long been a legal "distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (emphasis added).

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[5] *See supra* n. 1 and 2.

[6] If Petitioner is ordered removed at his merits hearing, his detention will continue to be governed by 8 U.S.C. § 1226 during his administrative appeal because the removal order will not be final. 8 C.F.R. § 1241.1.

And the process due here is governed by the classic balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). Mr. Chimborazo Cunin invokes "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). Meanwhile, the government's interest in detaining Mr. Chimborazo Cunin is limited to ensuring his appearance at future immigration proceedings and preventing danger to the community. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). But because Respondents denied Mr. Chimborazo Cunin a proper bond hearing, "there is nothing in the record demonstrating that [Mr. Chimborazo Cunin] is a flight risk or a danger to the community." *Lopez Benitez,* 2025 WL 2371588 at *12. Therefore, the risk of erroneously depriving Mr. Chimborazo Cunin of his physical freedom is unbearably high. *See id.* Without the bond hearing that he is entitled to under § 1226(a), Mr. Chimborazo Cunin will never be able to present the compelling reasons that he is neither a flight risk nor a danger. Due process thus requires that Mr. Chimborazo Cunin be afforded a bond hearing under § 1226(a). *See Lopez-Campos, supra.*

Opposing counsel states that, "Yet, in the event this Court finds that it has jurisdiction and the Petitioner is detained under 8 U.S.C. § 1226, detention does not violate the due process clause of the Fifth Amendment because it has not been prolonged or arbitrary (approximately 1 month)" *See* Reply at 24. In support of this

statement Opposing Counsel cites to 7 prior District Court decisions in footnote. These decisions are irrelevant to the instant matter because they analyze a different legal issue. For example, Opposing Counsel cites to *Appiah v. Lowe*, 2025 WL 510974, at *4 (M.D.Pa., 2025) where the District Court undertakes an analysis to determine the statute authorizing the Petitioner's detention and then whether his 18 month detention under Section 1226(c) violates due process. Here, the Petitioner is detained pursuant to Section 1226(a). Opposing counsel omits the subsection of Section 1226 which fundamentally alters the relevant analysis. Undersigned counsel is unaware of any prior decision which analyses prolonged detention under 1226(a).

CONCLUSION

Petitioner respectfully request that the Court grant Mr. Chimborazo Cunin's petition for writ of habeas corpus because he is detained in violation of federal law or the Constitution.

Dated: November 10, 2025

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 10, 2025, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

/s/ Paul Grotas

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