UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOGUEIRA-MENDES,

Petitioner,

v.

MCSHANE, *et al.*

Respondents.

Case No. 2:25-cv-05810-JHS

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

I. INTRODUCTION

Petitioner, Mr. Vitor V. Nogueira-Mendes, submits this reply brief in support of his Petition for Writ of Habeas Corpus.

In sum, Petitioner's habeas rests on the argument that he is being unlawfully detained without bond pursuant to 8 U.S.C. § 1225(b)(2), and that his detention should be governed by § 1226(a). *See* Petition for Habeas Corpus, ECF No. 1, *generally*.

In their opposition, Respondents note that "[i]t cannot be disputed that the majority of courts to have addressed the question have rejected the government's position." *See* Resp'ts' Opposition, ECF No. 8, p. 2 (hereinafter "ECF No. 8"). This is an understatement. Petitioner is aware of 209 decisions issued between July 7, 2025 and November 6, 2025, from 131 Judges in 46 different District Courts that have "addressed the question" and "have rejected the government's position." Pet'r's Ex. D, attached (Spreadsheet of cases finding 8 U.S.C. § 1226(a), not § 1225(b)(2), authorizes detention).

In recent days, the Eastern District of Pennsylvania has joined these courts. *See Cantu-Cortes, v.O'Neill, et al.*, No. 25-CV-6338, 2025 WL 3171639 (E.D. Pa. Nov. 13, 2025); *Kashranov v. J.L. Jamison, et al.*, No. 2:25-CV-05555-JDW, 2025 WL 3188399 (E.D. Pa. Nov. 14, 2025).

Conversely, Respondents cite to just four (4) cases that support their position (ECF No. 8, p. 18), one of which (*Pena v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913 (D. Mass. July 28, 2025)) was issued by a Judge who later reversed course on his position in favor of Petitioner. *See Lema Zamora v. Noem*, 2025 WL 2958879 (D. Mass. Oct. 17, 2025).

Petitioner takes no issue with Respondents' summary of the factual history in this matter (ECF No. 8, p. 2-3); however, it is a stretch to say that Petitioner was "illegally residing in the United States" as his removal proceedings were administratively closed.

II. JURISDICTION

Respondents claim that this Court is statutorily barred from hearing this case because the Immigration and Nationality Act ("INA") contains a variety of jurisdiction stripping provisions, codified at 8 U.S.C. § 1252. ECF No. 8, p. 6-12. Respondents argue that three such provisions prevent this Court from hearing the petitioner's claim. *Id.* As numerous courts have already found, none does.[1]

a. 8 U.S.C. § 1252(g)

The respondents first point to § 1252(g), arguing it strips this Court of jurisdiction to review the decision to detain the petitioner. ECF No. 8, p. 6. That provision states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision

[1] These courts include those that Respondents rely upon in the heart of their Response pertaining to § 1225(b) v. § 1226(a). *See* ECF No. 8, p. 18, *citing Chavez v. Noem,* No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228, at *2 (S.D. Cal. Sept. 24, 2025).

or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." § 1252(g).

Notably, Petitioner's removal proceedings commenced years before his detention, and was and remains actively in the adjudication process (ECF No. 1, Exh. A). Petitioner does not, at any point in his Petition or these proceedings, challenge the Attorney General's authority to commence or adjudicate proceedings.

Respondents quote *Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC")*, 525 U.S. 471 (1999) to assert that "[t]he Secretary's decision to detain is a 'specification of the decision to "commence proceedings" which … § 1252(g) covers.'" ECF No. 8, p. 6-7. While the quoted part of Respondent's citation does exist in *AADC,* the word 'detain' or even reference to detention, let alone the Secretary's decision to detain, is completely absent in *AADC.* It is unclear how Respondents glean that *AADC* supports the principal that § 1252(g) extends to the decision to detain *or* under what section of the INA one is detained under.

In fact, Respondents' analysis flies in the face of *AADC.* In *AADC,* the Supreme Court held that § 1252(g) did not apply to anything beyond those "three discrete actions that the Attorney General may take: her 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" 525 U.S. 471, 482 (1999); *see also Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) ("We did not interpret [the language in § 1252(g)] to sweep in any claim that can technically be said to "arise from" the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves."). The *AADC* Court stated that it made sense for Congress to target these three stages because at each stage the former INS has discretion to abandon the endeavor, and at the time § 1252(g) was enacted, the former INS routinely had been defending suits challenging its exercise of discretion in deportation cases.

DeSousa v. Reno, 190 F.3d 175, 182 (3d Cir. 1999) (internal citations omitted). Interpreting § 1252(g) beyond those three discrete actions – as Respondents ask this Court to do – would treat § 1252(g) as an extremely broad provision that would apply to every deportation-related challenge, because every such challenge could be deemed a suit related to the commencement or adjudication of removal proceedings. *Id.* The Supreme Court and the Third Circuit have explicitly rejected such a broad interpretation of § 1252(g), instead finding that it is "a narrow" provision. *Id.*

Petitioner does not, at any point in his Petition or these proceedings, challenge the three specific decisions made by the executive that are covered by § 1252(g): decisions to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." Petitioner's detention pursuant to § 1225(b)(2) may occur during—but is nonetheless independent of—his removal proceedings. Accordingly, § 1252(g) does not strip this Court of jurisdiction.

b. 8 U.S.C. § 1252(b)(9)

Next, Respondents argue that § 1252(b)(9), deprives this Court of jurisdiction because – according to Respondents – Petitioner's claims arise from Respondents' actions taken to remove him from the United States. ECF No. 8, p. 8.

Section 1252(b)(9) provides:

> "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.... [N]o court shall have jurisdiction ... to review such an order or such questions of law or fact."

Respondents contend this section means that Petitioner's detention, which arose out of Respondents' attempt to remove him from the country, cannot be reviewed until a final removal order is issued, and then only by a circuit court. ECF No. 8, p. 9-10. This argument relies on language of § 1252(a)(5) that states that judicial review of a removal order is only available through

a petition filed "with an appropriate court of appeals." *Id.* at 10. Respondents thus read these two provisions (§ 1252(a)(5) and § 1252(b)(9)) as working together to divert all claims relating to removal proceedings to a court of appeals post-removal order. *Id.*

Respondents cite to *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), in support of their claim that "[t]aken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process." ECF No. 8, p. 9 (emphasis in original). Respondents' reliance is misplaced; they have again cherry-picked select wording without analysis, as they did with *AADC*. The Court in *J.E.F.M.*, on the very next page, goes on to "distinguish[] between claims that 'arise from' removal proceedings under § 1252(b)(9)—which must be channeled through the PFR process—and claims that are collateral to, or independent of, the removal process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016). The *J.E.F.M.* Court then re-affirmed the long-standing principal "that § 1252(b)(9) *does not apply to federal habeas corpus provisions* that do not involve final orders of removal." *Id.* (emphasis added).

Again, the Respondents construe the statutory text too broadly. A careful reader will notice that the language in § 1252(b)(9) is similar to that in § 1252(g)—the words "arising from," which the Supreme Court in *AADC* interpreted narrowly, appear again. Indeed, the Court later held in *Jennings* that § 1252(b)(9) did not bar it from hearing a petition alleging that the plaintiff's detention was overly prolonged in violation of due process. 583 U.S. at 291, 294–95. Just like the petitioner in *Jennings*, Petitioner here is not "challenging the decision to detain [him] in the first place or to seek removal; and [he is] not even challenging any part of the process by which [his] removability will be determined." *Id.* at 294. Rather, Petitioner is challenging his detention under

§ 1225 and his entitlement to a bond hearing. *Jennings* holds that § 1252(b)(9) does not bar this Court from hearing his claim.

c. 8 U.S.C. § 1252(a)(2)(B)(ii)

Respondents next argue that § 1252(a)(2)(B)(ii) shields from judicial review discretionary decisions like what charges of inadmissibility to lodge. ECF No. 8, p. 10. When the Government argues that a statutory scheme "prohibit[s] all judicial review" of agency decision-making, it bears a "heavy burden." *E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 188 (3d Cir. 2020). The entirety of Respondents' argument is:

> "Even if there were any remaining ambiguity as to whether a foreign national could challenge the decision to detain him during removal proceedings, Congress added this additional jurisdictional bar to clarify that courts may not entertain a challenge to a discretionary decision under the INA."

ECF No. 8, p. 11. Respondents fail to meet their "heavy burden." Again, Petitioner is not challenging Respondents' "decision to detain him during removal proceedings." Nor is the Petitioner necessarily challenging the "charges of inadmissibility" lodged against him. Petitioner is challenging his detention under § 1225 and his entitlement to a bond hearing. These are threshold legal questions and are "not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

III. EXHAUSTION

Respondents assert that Petitioner has failed to exhaust administrative remedies, and as such, this matter should be dismissed. ECF No. 8, p. 11. An exhaustion requirement "is a matter of sound judicial discretion." *Cirko on behalf of Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153 (3d Cir. 2020), *quoting Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 970 (3d Cir. 1980).

Respondents do not articulate exactly what administrative remedy Petitioner should have taken before petitioning this Court and aver that "[i]f the BIA has erred as Petitioner alleges, this Court should allow the administrative process to correct itself." ECF No. 8, p. 13. Petitioner interprets Respondents' argument to mean that, prior to bringing this claim, Petitioner should have first challenged *with the* BIA. Given the BIA's September 5, 2025, decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), that would be a fool's errand.

Exhaustion is unnecessary if the issue presented is one that consists purely of statutory construction. *Vasquez v. Strada*, 684 F.3d 431, 433–34 (3d Cir. 2012). And exhaustion "is likewise not required when it would be futile." *Id.* Just two months ago, the BIA held that "Immigration Judges lack authority to hear bond requests or to grant bond to [noncitizens] who are present in the United States without admission." *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Therefore, if Petitioner were to move for a bond hearing, the Immigration Judge would be bound by *Matter of Yajure Hurtado* with no room for discretion.

Further, requiring Petitioner to exhaust his appeal to the BIA prior to litigating his claims before this Court is futile. Such a requirement "would almost certainly result in the BIA persisting in its earlier rulings and applying those rulings to Petitioner, all while he remains in detention without the bond hearing due him." *Del Cid v. Bondi*, No. 3:25-CV-00304, 2025 WL 2985150, at *13 (W.D. Pa. Oct. 23, 2025).

Indeed, Respondents' brief supports the futility of such an appeal – Respondents state:

> The BIA mandate is also sweeping. The *Hurtado* decision was unanimous, conducted by a three-appellate judge panel. *See id. generally.* It is binding on all immigration judges in the United States… In the Board's own words, *Hurtado* is a "precedential opinion." *Id.* at 216… Indeed, this is the law of the land in immigration court today.

ECF No. 8, p. 17, n. 5.

Accordingly, this Court should follow the other decisions within this Court and other federal District Courts and waive exhaustion as futile.

IV. PETITIONER'S DETENTION PURSUANT TO 8 U.S.C. § 1225(b)(2) IS UNLAWFUL

Respondents aver that "Petitioner's argument that he is being held pursuant to the wrong statutory provision fails on the merits." It is worth repeating that at least 209 decisions, from 131 Judges in 46 different District Courts agree with Petitioner's arguments. Pet'r's Ex. D, attached. These decisions do not include the two (2) recent decisions in the Eastern District of Pennsylvania. *See Cantu-Cortes, v.O'Neill, et al.,* No. 25-CV-6338, 2025 WL 3171639 (E.D. Pa. Nov. 13, 2025); *Kashranov v. J.L. Jamison, et al.,* No. 2:25-CV-05555-JDW, 2025 WL 3188399 (E.D. Pa. Nov. 14, 2025).

The crux of this case is a question of statutory interpretation involving the interplay between 8 U.S.C. §§ 1225 and 1226.

Section 1225(b)(2)(A) provides that "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" removal proceedings. 8 U.S.C. § 1225(b)(2)(A). Section 1225(b)(2)(A) "mandate[s] detention of applicants for admission until [removal] proceedings have concluded." *Jennings*, 583 U.S. at 297. Individuals detained following examination § 1225 can only be paroled into the United States "for urgent humanitarian reasons or significant public benefit." *Jennings*, 583 U.S. at 300 (quoting 8 U.S.C. § 1182(d)(5)(A)).

Section 1226 permits the government "to detain certain aliens already in the country pending the outcome of removal proceedings." *Id.* at 289. Under § 1226(a), "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the

alien is to be removed from the United States." 8 U.S.C. § 1226(a). The government then "may continue to detain the arrested" noncitizen during removal proceedings or "may release" the noncitizen on bond or conditional parole. *Id.* § 1226(a)(1)-(2).

A noncitizen whom the government decides to detain under this discretionary provision may seek review of that decision via a bond (i.e., custody redetermination) hearing before an immigration judge. *See* 8 C.F.R. § 236.1(d)(1); *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021). At that hearing, the immigration judge must release the noncitizen unless the government establishes either by clear and convincing evidence that he poses a danger to the community or by a preponderance of the evidence that poses a flight risk. *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 276 (3d Cir. 2018); *see also Matter of Patel*, 15 I&N Dec. 666 (BIA 1976) [Bond should be granted unless there is a finding that the individual is a threat to public safety or national security or is likely to abscond]; *Matter of Daryoush*, 18 I&N Dec. 352 (BIA 1982).

Section 1226(c), however, "'carves out a statutory category of aliens who may not be released' during removal proceedings, outside of certain limited circumstances." *Jennings* at 289; *see* 8 U.S.C. § 1226(a) (authorizing discretionary detention "[e]xcept as provided in subsection (c)"). This mandatory detention provision applies to noncitizens who are inadmissible or deportable on certain criminal or terrorist grounds. *Id.* at 527 n.2.

d. Petitioner is neither an 'applicant for admission' nor is he 'seeking admission' to the United States.

The Respondents emphasize that Petitioner falls squarely within § 1225(a)(1)'s definition of an "applicant for admission" because he was neither admitted nor paroled into the country. ECF No. 8, p. 14 ("Petitioner is present in the United States but has not yet been admitted."). The government asserts that mandatory detention under § 1225(b)(2)(A) applies to any "applicant for admission" – including any noncitizen who entered the United States without inspection,

regardless of how long he has been present in the country – who is not subject to expedited removal. *Id.* p. 18-19.

The interpretation of the applicable statutes by Respondents here and by the BIA in *Yajure Hurtado* overlooks part of the language in § 1225(b)(2)(A), it gives little consideration to the overall statutory scheme, and it ignores § 1226. Section 1225(b)(2)(A) requires mandatory detention of all "applicants for admission" if the examining immigration officer determines that "an alien seeking admission is not clearly beyond a doubt entitled to be admitted." (emphasis added). "Applicant for admission" is defined in the statute as an alien "present in the United States who has not been admitted." § 1225(a)(1). It is undisputed that, when Petitioner was arrested, he was present in the United States and had not been admitted. Therefore, he clearly qualifies as an "applicant for admission" under this broad language.

But that does not end the interpretative inquiry. The statute that mandates detention does not state that all "applicants for admission" shall be detained. It narrows this mandatory detention to aliens who are "seeking admission." Had Congress intended for this subsection to apply to all applicants for admission, it could have said so by simply replacing the phrase "an alien seeking admission" with the term "an applicant for admission"; or, to be even more succinct, it could have replaced the phrase "an alien seeking admission" with the word "alien." Under either of these constructions, it would be clear that "applicant for admission" means the same thing as "alien seeking admission," which is Respondents' interpretation of the statute. But this is not the language that Congress chose.

Instead, Congress chose the phrase, "an alien seeking admission." Because this phrase is not defined in the statute, the Court must construe it based upon its ordinary everyday meaning. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 69 (2012).

"Seeking admission" is a participial phrase that modifies the noun alien. It narrows the meaning of alien to one who is attempting to obtain lawful admission to the United States. "Seek" is an active verb, not a type of status. Seek, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/seek [https://perma.cc/42LS-5YMV] (defining "seek" as "to try to acquire or gain"). The Court cannot simply disregard these words as superfluous. It must assume that Congress intended for them to have a purpose. Scalia & Garner, supra, at 174 (describing the "surplusage canon": "If possible, every word and every provision is to be given effect .... None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

Thus, based on a plain reading of the language and aided by these standard canons of statutory construction, § 1225(b)(2)(A) applies to aliens in the United States who have not been admitted ("applicants for admission" definition) ***and*** who are attempting to obtain lawful admission to the United States. *See, eg. J.A.M. v. Stereval*, et al., No. 4:25-CV-342 (CDL), 2025 WL 3050094, at *3 (M.D. Ga. Nov. 1, 2025).

This interpretation is also consistent with the framework of § 1225, which focuses on the admission of aliens upon their arrival to the United States or upon an attempt to obtain admission after arrival. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (Kennedy, J.) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, *as well as the language and design of the statute as a whole.*") (emphasis added). This so-called "whole-text canon" calls on the interpreter to consider the entire text "in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner, supra, at 167. Its cousin canon counsels that the title and headings for statutory provisions may sometimes be indicators of meaning. *Id.* at 221. Section 1225 focuses on "inspection" of aliens upon their arrival

and/or when they otherwise present themselves for admission. In addition to the statutory language previously discussed, the framework of the statute and the headings within the statute are consistent with the interpretation that the statute applies to aliens who are actively seeking admission to the United States.

At the time of his arrest, Petitioner was an alien in the United States who had not been lawfully admitted, but, based on the present record, he was not attempting to be lawfully admitted. *See* ECF No. 1, Ex. A-C. Therefore, it cannot be said that he qualifies as an "alien seeking admission" subject to mandatory detention under § 1225(b)(2)(A), which requires both presence and seeking admission.

Section 1226(a) supports and bolsters this interpretation. It must be read in conjunction with § 1225. *See Id.* at 252 ("Statutes *in pari materia* are to be interpreted together, as though they were one law."). And these provisions should be read harmoniously when possible. They should not be interpreted in a way that renders them incompatible or contradictory. *Id.* at 180. Section 1226(a) cannot simply be ignored when interpreting the requirements for detention. *United States v. Butler*, 297 U.S. 1, 65 (1936) (Roberts, J.) ("These words cannot be meaningless, else they would not have been used."). Congress clearly intended for some aliens, who are arrested and similarly situated to Petitioner, to be provided with the opportunity for a bond. The plain language of § 1226(a)(2) can mean nothing else. The only way to reach the interpretation urged by Respondents is to ignore the statute's plain language, which the rules of statutory construction do not countenance.

Reading §§ 1226(a)(2) and 1225(b)(2)(A) harmoniously and in context, there is only one reasonable interpretation: for an alien seeking admission upon his arrival to the United States or at some later time, Congress has determined that his detention is mandatory while a determination is

made as to whether he is allowed entry and admission. But, for aliens who are found in the country unlawfully and are arrested, an immigration officer or immigration judge has the discretion, after considering all the circumstances, not to detain such aliens and instead grant them release on bond.

Further, reading § 1226(a) as requiring an initial detention decision by DHS is the only way to make sense of the broader statutory and regulatory scheme, which provides for an opportunity to appeal a detention decision to an immigration judge who then conducts their own assessment of the noncitizens' flight risk and dangerousness, among other factors. *See* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge ... may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service."). If all noncitizens subject to § 1226(a) could simply be detained on a categorical (or arbitrary) basis without any kind of individualized assessment, it would make little sense to permit such individuals an opportunity to challenge their detention by an appeal before an immigration judge on the basis of specific factors such as dangerousness or flight risk.

This conclusion is further confirmed by looking to § 1226(c), which carves out certain disfavored criminal non-citizens whom the Government is required to detain. 8 U.S.C. § 1226(c). There would be little need for such a carveout requiring detention of certain criminal noncitizens if § 1226(a) were intended to authorize the categorical detention of any noncitizen unlawfully present inside the country. Rather, § 1226(a) clearly requires some exercise of discretion when determining whether or not to detain a noncitizen in the first instance.

Respondents argue that this interpretation would lead to incongruous treatment of aliens and subject the lawful applicant to more stringent requirements than the unlawful alien evader. ECF No. 8, p. 16. Respondents, however, focus on the wrong question. The relevant distinction is not between "aliens who unlawfully enter the United States without inspection and subsequently

evade apprehension for a number of years" and those who appear at a port of entry. *Id.* Rather, it is between persons inside the United States and persons outside the United States. That distinction is consistent with the long history of our immigration laws and with the Constitution. "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). It is therefore reasonable to read these statutes against that backdrop. *Romero v. Hyde*, No. CV 25-11631-BEM, 2025 WL 2403827, at *12 (D. Mass. Aug. 19, 2025).

The basic doctrine that treats arriving aliens who appear at a point of entry and apply for admission as not being considered "in the United States" despite their physical presence is known as the entry fiction doctrine. This legal principle, established by the Supreme Court in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), holds that aliens seeking initial admission are legally treated "as if stopped at the border" regardless of whether they are physically detained within U.S. territory. Under this doctrine, physical presence at a port of entry does not constitute legal "entry" or "admission" into the United States for immigration law purposes.

Indeed, the Supreme Court in *Shaughnessy* explained this "incongruous treatment" directly, stating,

> It is true that aliens who have once passed through our gates, **even illegally**, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

Shaughnessy at 212, (emphasis added).

This principal has long been upheld and so it is *not* the lynchpin issue that Respondents make it out to be. *See, eg. Castro v. United States Dep't of Homeland Sec.*, 835 F.3d 422, 447 (3d

Cir. 2016), *citing Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to th[e] constitutional protection [of the Due Process Clause]."); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But, once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* (citations omitted).

Respondents also rely on *Jennings v. Rodriguez*, 583 U.S. 281 (2018) to support their interpretation of § 1225(b)(2). ECF No. 8, p. 13-15. Although that decision did involve the same provisions of the INA at issue here here, the issue presented in *Jennings* was different, and therefore, the Supreme Court did not interpret the precise language of the relevant statutes involved here. The issue before the Supreme Court in *Jennings* was whether the INA implicitly requires periodic bond hearings for certain alien detainees. *Id.* at 296-97. The Supreme Court did not have to decide whether an alien arrested in the United States, after having been in the country illegally for several years, qualified as "an applicant for admission" who was "seeking admission" and thus was subject to mandatory detention under § 1225(b)(2) or whether the alien was entitled to a bond hearing under § 1226(a).

In addition to being distinct and thus not binding precedent for this matter, *Jennings* is not even analogous and thus does not constitute persuasive authority. Respondents pick certain isolated phrases from *Jennings*' general background description of the INA detention framework to bolster their position that every alien arrested in the United States—regardless of their lack of criminal history and the absence of any evidence that they would be a flight risk or a danger to the

community—is now subject to mandatory detention without the opportunity for a bond hearing, notwithstanding the clear language of § 1226(a). Respondents latch on to the majority opinion's description of § 1225(b)(2) as a "catchall" provision that they argue is intended to include all aliens, including those who did not seek admission when they initially entered the United States or who never sought admission thereafter. ECF No. 8, p. 13. It may indeed be a "catchall," but it only catches "aliens seeking admission." Significantly, the Supreme Court did not specifically engage in any statutory construction of the phrase "alien seeking admission" in the context of § 1225(b)(2). It did not need to because that was not the issue in *Jennings*. Accordingly, this Court should find Respondents' reliance upon *Jennings* unpersuasive.

Respondents use (or misuse, more accurately) *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) in the same manner that they use *Jennings*. ECF No. 8, p. 14. Respondents continue their practice of picking certain isolated phrases to support the notion that Petitioner squarely meets the definition of an arriving alien under § 1225. However, *Thuraissigiam* dealt with an individual who was issued an expedited removal order and was then provided an opportunity to establish a "credible fear of persecution." *Thuraissigiam* at 103. An asylum officer rejected his credible-fear claim, a supervising officer agreed, and an Immigration Judge affirmed. *Id.* *Thuraissigiam* sought the Court's intervention requesting a new opportunity to apply for asylum on previously unstated grounds. *Id.* Accordingly, the Supreme Court analyzed an as-applied challenge to whether 8 U.S.C. § 1252(e)(2) violates the Suspension Clause and the Due Process Clause. *Id.* As in *Jennings,* the Supreme Court did not specifically engage in any statutory construction of the phrase "alien seeking admission" in the context of § 1225(b)(2). It did not need to because it was not at issue in *Thuraissigiam*. Accordingly, this Court should find Respondents' reliance upon *Thuraissigiam* unpersuasive.

To be clear, Petitioner has always been treated by Respondents as subject to discretionary detention under § 1226, rather than mandatory detention under § 1225. *See* ECF No. 1, Ex. A-C (including "Notice of Custody Determination," releasing Petitioner on his own recognizance (not paroling him as required by § 1225), "[p]ursuant to the authority contained in section 236 of the Immigration and Nationality Act" and his Notice to Appear, clearing indicating that he is "an alien present in the United States who has not been admitted or paroled" as opposed to "an arriving alien."). It was not until the BIA arbitrarily decided that the uncontested law, practice, and policy of the past thirty years was suddenly incorrect did Respondents decide to treat Petitioner differently.

For these reasons, this Court should find the BIA's recent decision in *Matter of Yajure Hurtado*, and the Respondents' arguments which largely parrot the BIA's rationale as unpersuasive, in the same manner as 209 recent decisions from 131 Judges in 46 different District Courts. *See* Pet'r's Ex. D, attached.

e. 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 interpretation of these provisions since they were first enacted thirty years ago. They held this view 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, 2025 (a mere 30 days before *Matter of Yajure Hurtado* was decided), 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 Enters. v. Raimondo*, 603 U.S. 369, 386 (2024). Here too, Respondents' longstanding practice should inform the Court's decision.

V. DUE PROCESS

Respondents aver that "[i]n light of Congress's interest in regulating immigration, including by keeping specified aliens in detention pending the removal period, the Supreme Court dispensed of any due process concerns without engaging in the *Mathews v. Eldridge* test," citing to *Demore v. Kim,* 538 U.S. 510 (2003), generally. ECF No. 8, p. 22. *Denmore* facially challenged the constitutionality of the mandatory detention provisions of § 1226(c); but there was no dispute in *Denmore* relating to which section of the INA pertained to *Denmore*. 538 U.S. at 522–23. The *Denmore* Court noted that, "it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Id.* at 523. It would be beyond a stretch – an absolute fiction – to read *Denmore* as stating that the Fifth Amendment did not apply to an individual challenging what they believed was an erroneous deprivation of their liberty without due process.

The Fifth Amendment protects the right to be free from deprivation of life, liberty or property without due process of law. U.S. CONST. amend. V. The Due Process Clause extends to all "persons" regardless of status, including non-citizens, whether here lawfully, unlawfully, temporarily, or permanently. *Zadvydas* at 693. To determine whether detention violates procedural due process, courts apply the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under *Mathews*, courts weigh the following three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Further, government detention violates substantive due process unless it is ordered in a criminal proceeding with adequate procedural protections, or in non-punitive circumstances "where a special justification ... outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas* at 690.

f. Petitioner's Private Interest

First, Petitioner's "private interest … affected by the official action is the most elemental of liberty interests—the interest in being free from physical detention." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, (2004). Respondent's reliance on *Demore* and the Congress's interest in regulating immigration does little to tip the scales. "It is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States,* 463 U.S. 354, 361, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983) (emphasis added; internal quotation marks omitted). At this stage in the *Mathews* calculus, the Court must consider the interest of the *erroneously* detained individual. *Carey v. Piphus,* 435 U.S. 247, 259 (1978) ("Procedural due

process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Hamdi* at 2646–47.

g. The Risk of an Erroneous Deprivation

As to the second prong of the *Mathews v. Eldridge* balancing test, the Court should find that the risk of erroneous deprivation is particularly high here. The purpose of requiring an exercise of discretion prior to the decision to detain a noncitizen who is not subject to mandatory detention is to prevent an erroneous deprivation of liberty. This purpose is illustrated clearly here, as Petitioner has raised significant and supported legal arguments against Respondents' detention of Petitioner under §1225(b). *See* ECF No. 8, generally. Further, Respondents have presented no evidence in the record suggesting that Petitioner is a flight risk or a danger to his community; only that he is subject to mandatory detention. *See id.*

As evinced in the underlying petition before this Court, Petitioner was originally held under § 1226(a)'s discretionary provisions and is now being held in mandatory detention through an agency extension of § 1225(b)(2)(A)'s mandatory detention provisions against him. And, "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Loper Bright Ent.*, 603 U.S. at 413.

In Petitioner's case, immigration officials, vested with authority delegated by Congress to the Attorney General and DHS, first determined that standard removal proceedings and discretionary detention under Section 1226(a) applied to his case. ECF No. 1, Exh. A-C. The unilateral decision by the BIA to use *Matter of Yajure Hurtado* to extend a different statute to Petitioner's circumstances despite earlier determining otherwise now leaves his liberty interest at risk. Petitioner contends that the Respondents may not now extend the bounds of their authority to

apply § 1225(b)(2)(A) against him, and this Court must ensure proper application of the laws against Petitioner.

h. The Government's Interest

The final *Mathews* factor concerns the United States' interest in the proceedings, as well as any financial or administrative burdens associated with permissible alternatives. *Mathews*, 424 U.S. at 335. Petitioner recognizes that the United States has an interest in meaningful immigration laws that advance its stated policies. However, the United States has an equal and countervailing interest in consistent application of its laws and ensuring that those laws are applied under the proper means. It is not appropriate to utilize the "wrong" statute against any person to ensure their continued detention. Respondents may not choose unilaterally when and how to apply duly enacted laws.

The Government's interests in detaining noncitizens are (1) ensuring that noncitizens do not abscond and (2) ensuring they do not commit crimes. *Zadvydas,* 533 U.S. at 690, 121 S.Ct. 2491. Respondents have provided no evidence or argument that Petitioner is either a flight risk or a danger, and the record would indicate that he is neither: he has no criminal record whatsoever, and he has attended his ICE and Immigration Court appointments when required, even on October 17, 2025, when he understood that there was a likelihood that ICE would detain him under its new and brazen policies. Respondents cannot show that their interest in detaining Petitioner without a bond hearing outweighs Petitioner's liberty interests; nor can they show that the effort and cost of providing Petitioner with procedural safeguards is burdensome.

Accordingly, all three *Mathews* factors weigh heavily in support of Petitioner.

VI. CONCLUSION

Petitioner respectfully requests that this Honorable Court grant this petition for writ of habeas corpus because he is detained in violation of federal law and/or the Constitution. Petitioner further requests this court order his immediate release from custody.

Respectfully Submitted,

Date: November 17, 2025

s/Christopher M. Casazza

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