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8 **UNITED STATES DISTRICT COURT**  
9 **DISTRICT OF NEVADA**

10 KERVIN ABRAHAM MORALES RONDON

Case No. 2:25-cv-01979-RFB-BNW

11 Petitioner,

**Federal Respondents' Response to the  
Petition for Writ of Habeas Corpus  
(ECF No. 1)**

12 v.

13 Michael BERNACKE, Field Office Director of  
Enforcement and Removal Operations, Salt  
Lake City Field Office, Immigration and  
14 Customs Enforcement; Kristi NOEM,  
Secretary, U.S. Department of Homeland  
15 Security; U.S. DEPARTMENT OF  
HOMELAND SECURITY; Pamela BONDI,  
16 U.S. Attorney General; EXECUTIVE  
OFFICE FOR IMMIGRATION REVIEW;  
17 John MATTOS, Warden of NEVADA  
SOUTHERN DETENTION CENTER,

18 Respondents.  
19

20 The Federal Respondents hereby submit this Response to Petitioner Kervin  
21 Abraham Morales Rondon's ("Petitioner" or "Morales Rondon") Petition for Writ of  
22 Habeas Corpus (ECF No. 1).

23 **I. Background**

24 **A. Statutory and Regulatory Background**

25 **1. Applicants for Admission**

26 "The phrase 'applicant for admission' is a term of art denoting a particular legal  
27 status." *Torres v. Barr*, 976 F.3d 918, 927 (9th Cir. 2020) (en banc). Section 1225(a)(1) states:  
28

1 (1) Aliens treated as applicants for admission.— An alien present in the  
2 United States who has not been admitted or who arrives in the United States  
3 (whether or not at a designated port of arrival ...) shall be deemed for the  
4 purposes of this Act an applicant for admission.

5 8 U.S.C. § 1225(a)(1).<sup>1</sup> Section 1225(a)(1) was added to the INA as part of the Illegal  
6 Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). Pub. L. No.  
7 104-208, § 302, 110 Stat. 3009-546. “The distinction between an alien who has effected an  
8 entry into the United States and one who has never entered runs throughout immigration  
9 law.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

10 Before IIRIRA, “immigration law provided for two types of removal proceedings:  
11 deportation hearings and exclusion hearings.” *Hose v. I.N.S.*, 180 F.3d 992, 994 (9th Cir.  
12 1999) (en banc). A deportation hearing was a proceeding against an alien already physically  
13 present in the United States, whereas an exclusion hearing was against an alien outside of  
14 the United States seeking admission *Id.* (quoting *Landon v. Plasencia*, 459 U.S. 21, 25 (1982)).  
15 Whether an applicant was eligible for “admission” was determined only in exclusion  
16 proceedings, and exclusion proceedings were limited to “entering” aliens—those aliens  
17 “coming ... into the United States, from a foreign port or place or from an outlying  
18 possession.” *Plasencia*, 459 U.S. at 24 n.3 (quoting 8 U.S.C. § 1101(a)(13) (1982)). “[N]on-  
19 citizens who had entered without inspection could take advantage of greater procedural and  
20 substantive rights afforded in deportation proceedings, while non-citizens who presented  
21 themselves at a port of entry for inspection were subjected to more summary exclusion  
22 proceedings.” *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010); *see also Plasencia*, 459  
23 U.S. at 25-26. Prior to IIRIRA, aliens who attempted to lawfully enter the United States  
24 were in a worse position than aliens who crossed the border unlawfully. *See Hing Sum*, 602  
25 F.3d at 1100; *see also H.R. Rep. No. 104-469*, pt. 1, at 225-229 (1996). IIRIRA “replaced  
26 deportation and exclusion proceedings with a general removal proceeding.” *Hing Sum*, 602  
27 F.3d at 1100.

28 <sup>1</sup> Admission is the “lawful entry of an alien into the United States after inspection and  
authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13).

1 IIRIRA added Section 1225(a)(1) to “ensure[] that all immigrants who have not been  
2 lawfully admitted, regardless of their physical presence in the country, are placed on equal  
3 footing in removal proceedings under the INA.” *Torres*, 976 F.3d at 928; *see also* H.R. Rep.  
4 104-469, pt. 1, at 225 (explaining that § 1225(a)(1) replaced “certain aspects of the current  
5 ‘entry doctrine,’” under which illegal aliens who entered the United States without  
6 inspection gained equities and privileges in immigration proceedings unavailable to aliens  
7 who presented themselves for inspection at a port of entry). The provision “places some  
8 physically-but not-lawfully present noncitizens into a fictive legal status for purposes of  
9 removal proceedings.” *Torres*, 976 F.3d at 928.

## 10 2. Detention under the INA

### 11 i. Detention under 8 U.S.C. § 1225

12 Section 1225 applies to “applicants for admission,” who are defined as “alien[s]  
13 present in the United States who [have] not been admitted” or “who arrive[] in the United  
14 States.” 8 U.S.C. § 1225(a)(1). Applicants for admission “fall into one of two categories,  
15 those covered by § 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings v. Rodriguez*, 583  
16 U.S. 281, 287 (2018); *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 218 (BIA 2025).

17 Section 1225(b)(1) applies to arriving aliens and “certain other” aliens “initially  
18 determined to be inadmissible due to fraud, misrepresentation, or lack of valid  
19 documentation.” *Jennings*, 583 U.S. at 287; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These aliens  
20 are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But  
21 if the alien “indicates an intention to apply for asylum . . . or a fear of persecution,”  
22 immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii).  
23 An alien “with a credible fear of persecution” is “detained for further consideration of the  
24 application for asylum.” *Id.* § 1225(b)(1)(B)(ii). If the alien does not indicate an intent to  
25 apply for asylum, express a fear of persecution, or is “found not to have such a fear,” they  
26 are detained until removed from the United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

27 Section 1225(b)(2) is “broader” and “serves as a catchall provision.” *Jennings*, 583  
28 U.S. at 287. It “applies to all applicants for admission not covered by § 1225(b)(1).” *Id.*

1 Under § 1225(b)(2), an alien “who is an applicant for admission” shall be detained for a  
2 removal proceeding “if the examining immigration officer determines that [the] alien  
3 seeking admission is not clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §  
4 1225(b)(2)(A); *see Hurtado*, 29 I. & N. Dec. at 220 (“[A]liens who are present in the United  
5 States without admission are applicants for admission as defined under section 235(b)(2)(A)  
6 of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their  
7 removal proceedings.”); *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) (“for aliens  
8 arriving in and seeking admission into the United States who are placed directly in full  
9 removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates  
10 detention ‘until removal proceedings have concluded.’”) (citing *Jennings*, 583 U.S. at 299).  
11 However, the DHS has the sole discretionary authority to temporarily release on parole  
12 “any alien applying for admission to the United States” on a “case-by-case basis for urgent  
13 humanitarian reasons or significant public benefit.” *Id.* § 1182(d)(5)(A); *see Biden v. Texas*,  
14 597 U.S. 785, 806 (2022).

15 **ii. Detention under 8 U.S.C. § 1226(a)**

16 Section 1226 provides the general detention authority for aliens in removal  
17 proceedings. An alien “may be arrested and detained pending a decision on whether the  
18 alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a), the  
19 United States may detain an alien during his removal proceedings, release him on bond, or  
20 release him on conditional parole. By regulation, immigration officers can release aliens if  
21 the alien demonstrates that he “would not pose a danger to property or persons” and “is  
22 likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). An alien can also request  
23 a custody redetermination (often called a bond hearing) by an IJ at any time before a final  
24 order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1),  
25 1003.19.

26 At a custody redetermination, the IJ may continue detention or release the alien on  
27 bond or conditional parole. 8 U.S.C. § 1226(a); 8 C.F.R. § 1236.1(d)(1). Immigration judges  
28 have broad discretion in deciding whether to release an alien on bond. *In re Guerra*, 24 I. &

1 N. Dec. 37, 39–40 (BIA 2006). The IJ should consider the following factors during a  
2 custody redetermination: (1) whether the alien has a fixed address in the United States; (2)  
3 the alien’s length of residence in the United States; (3) the alien’s family ties in the United  
4 States; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6)  
5 the alien’s criminal record, including the extensiveness of criminal activity, time since such  
6 activity, and the seriousness of the offense; (7) the alien’s history of immigration violations;  
7 (8) any attempts by the alien to flee prosecution or otherwise escape authorities; and (9) the  
8 alien’s manner of entry to the United States. *Id.* at 40. But regardless of these factors, an  
9 alien “who presents a danger to persons or property should not be released during the  
10 pendency of removal proceedings.” *Id.* at 38.

11 **iii. Review Before the Board of Immigration Appeals**

12 The Board of Immigration Appeals (BIA) is an appellate body within the Executive  
13 Office for Immigration Review (EOIR) “charged with the review of those administrative  
14 adjudications under the [INA] that the Attorney General may by regulation assign to it.” 8  
15 C.F.R. § 1003.1(d)(1). By regulation, it has authority to review IJ custody determinations. 8  
16 C.F.R. §§ 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also  
17 “through precedent decisions, shall provide clear and uniform guidance to DHS, the  
18 immigration judges, and the general public on the proper interpretation and administration  
19 of the [INA] and its implementing regulations.” *Id.* § 1003.1(d)(1). Decisions rendered by  
20 the BIA are final, except for those reviewed by the Attorney General. 8 C.F.R. §  
21 1003.1(d)(7).

22 **B. Factual Background**

23 Petitioner is a citizen of Venezuela who was placed in removal proceedings through  
24 the issuance of a Notice to Appear on March 11, 2024. ECF No. 2-2, at 2. Petitioner entered  
25 the United States at El Paso, Texas, on or about March 9, 2024. *Id.* He entered the United  
26 States without admission or parole after inspection by an immigration officer. *Id.*

27 Although Petitioner was initially detained, he was released from custody on his own  
28 recognizance on or around March 11, 2024. Upon information and belief, DHS detained

1 Petitioner anew after Petitioner’s encounter with law enforcement while driving on  
2 September 12, 2025. ECF No. 1. Petitioner is thus currently in ICE custody at the Southern  
3 Nevada Detention Center. *Id.*

## 4 **II. Standard of Review**

5 In a petition for a writ of habeas corpus, the petitioner is challenging the legality of  
6 his restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show  
7 the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Specifically,  
8 here, Petitioner challenges his temporary civil immigration detention pending his removal  
9 proceeding.

## 10 **III. Argument**

### 11 **A. Petitioner is Lawfully Detained Under 8 U.S.C. § 1225**

#### 12 **1. Under the Plain Text of 8 U.S.C. § 1225, Petitioner Must Be Detained** 13 **Pending the Outcome of His Removal Proceedings**

14 The Court should reject Petitioner’s argument that Section 1226(a) governs his  
15 detention instead of Section 1225. When there is “an irreconcilable conflict in two legal  
16 provisions,” then “the specific governs over the general.” *Karczewski v. DCH Mission Valley*  
17 *LLC*, 862 F.3d 1006, 1015 (9th Cir. 2017). Section 1226(a) applies to aliens “arrested and  
18 detained pending a decision” on removal. 8 U.S.C. § 1226(a). In contrast, Section 1225 is  
19 narrower. *See* 8 U.S.C. § 1225. It applies only to “applicants for admission;” that is, as  
20 relevant here, aliens present in the United States who have not be admitted. *See id.*; *see also*  
21 *Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023). Because Petitioner falls  
22 within that category, the specific detention authority under Section 1225 governs over the  
23 general authority found at Section 1226(a).

24 Under 8 U.S.C. § 1225(a), an “applicant for admission” is defined as an “alien  
25 present in the United States who has not been admitted or who arrives in the United  
26 States.” Applicants for admission “fall into one of two categories, those covered by Section  
27 1225(b)(1) and those covered by § 1225(b)(2).” *Jennings*, 583 U.S. at 287. Section  
28 1225(b)(2)—the provision relevant here—is the “broader” of the two. *Id.* It “serves as a

1 catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)  
2 (with specific exceptions not relevant here).” *Id.* And Section 1225(b)(2) mandates  
3 detention. *Id.* at 297; *see also* 8 U.S.C. § 1225(b)(2); *Matter of Q. Li*, 29 I & N. Dec. at 69  
4 (“[A]n applicant for admission who is arrested and detained without a warrant while  
5 arriving in the United States, whether or not at a port of entry, and subsequently placed in  
6 removal proceedings is detained under section 235(b) of the INA, 8 U.S.C. § 1225(b), and is  
7 ineligible for any subsequent release on bond under section 236(a) of the INA, 8 U.S.C. §  
8 1226(a).”). Section 1225(b) therefore applies because Petitioner is present in the United  
9 States without being admitted.

10 The BIA has long recognized that “many people who are not *actually* requesting  
11 permission to enter the United States in the ordinary sense are nevertheless deemed to be  
12 ‘seeking admission’ under the immigration laws.” *Hurtado*, 29 I. &N. Dec. at 221–222  
13 (finding that an alien who entered without inspection is an “applicant for admission” and  
14 his argument that he cannot be considered as “seeking admission” is unsupported by the  
15 plain language of the INA, and further stating, “[if] he is not admitted to the United States .  
16 . . . but he is not ‘seeking admission’ . . . then what is his legal status?”); *Matter of Lemus-Losa*,  
17 25 I. & N. Dec. 734, 743 (BIA 2012). Statutory language “is known by the company it  
18 keeps.” *Marquez-Reyes v. Garland*, 36 F.4th 1195, 1202 (9th Cir. 2022) (quoting *McDonnell v.*  
19 *United States*, 579 U.S. 550, 569 (2016)). The phrase “seeking admission” in Section  
20 1225(b)(2)(A) must be read in the context of the definition of “applicant for admission” in  
21 Section 1225(a)(1). Applicants for admission are both those individuals present without  
22 admission and those who arrive in the United States. *See* 8 U.S.C. § 1225(a)(1). Both are  
23 understood to be “seeking admission” under §1225(a)(1). *See Lemus-Losa*, 25 I. & N. Dec. at  
24 743. Congress made that clear in Section 1225(a)(3), which requires all aliens “who are  
25 applicants for admission or otherwise seeking admission” to be inspected by immigration  
26 officers. 8 U.S.C. § 1225(a)(3). The word “or” here “introduce[s] an appositive—a word or  
27 phrase that is synonymous with what precedes it (‘Vienna or Wien,’ ‘Batman or the Caped  
28 Crusader’).” *United States v. Woods*, 571 U.S. 31, 45 (2013).

1 Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory  
2 detention requirement as Petitioner is an "applicant for admission" to the United States. As  
3 described above, an "applicant for admission" is an alien present in the United States who  
4 has not been admitted. 8 U.S.C. § 1225(a)(1). Congress's broad language here is  
5 unequivocally intentional—an undocumented alien is to be "deemed for purposes of this  
6 chapter an applicant for admission." *Id.* Petitioner is "deemed" an applicant for admission  
7 based on Petitioner's failure to seek lawful admission to the United States before an  
8 immigration officer and because he is an alien present in the United States who has not been  
9 admitted or paroled, which is undisputed. *See generally* ECF No. 1. And because Petitioner  
10 has not demonstrated to an examining immigration officer that Petitioner is "clearly and  
11 beyond a doubt entitled to be admitted," Petitioner's detention is mandatory. 8 U.S.C. §  
12 1225(b)(2)(A). Thus, the Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A),  
13 which mandates that Petitioner "shall be" detained.

14 The Supreme Court has confirmed an alien present in the country but never admitted  
15 is deemed "an applicant for admission" and that "detention must continue" "until removal  
16 proceedings have concluded" based on the "plain meaning" of 8 U.S.C. § 1225. *Jennings*, 583  
17 U.S. at 289 & 299. At issue in *Jennings* was the statutory interpretation. The Supreme Court  
18 reversed the Ninth Circuit Court of Appeal's imposition of a six-month detention time limit  
19 into the statute. *Id.* at 297. The Court clarified there is no such limitation in the statute and  
20 reversed on these grounds, remanding the constitutional Due Process claims for initial  
21 consideration before the lower court. *Id.* But under the words of the statute, as explained by  
22 the Supreme Court, 8 U.S.C. § 1225 includes aliens like the Petitioner who are present but  
23 have not been admitted and they shall be detained pending their removal proceedings.

24 Specifically, the Supreme Court declared, "an alien who 'arrives in the United States,'  
25 or 'is present' in this country but 'has not been admitted,' is treated as 'an applicant for  
26 admission.'" *Id.* at 287 (emphasis on "or" added). In doing so, the Court explained both aliens  
27 captured at the border and those illegally residing within the United States would fall under §  
28

1 1225. This would include Petitioner as an alien who is present in the country without being  
2 admitted.

3 And now, the Board of Immigration Appeals (BIA) has confirmed the application of  
4 § 1225 in a published formal decision: “Based on the plain language of section 235(b)(2)(A)  
5 of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration Judges  
6 lack authority to hear bond requests or to grant bond to aliens who are present in the United  
7 States without admission.” *Hurtado*, 29 I&N Dec. at 216. Indeed, §1225 applies to aliens who  
8 are present in the country *even for years* and who have not been admitted. *See Hurtado*, 29 I&N  
9 Dec. at 226 (“the statutory text of the INA . . . is instead clear and explicit in requiring  
10 mandatory detention of all aliens who are applicants for admission, without regard to how  
11 many years the alien has been residing in the United States without lawful status.” (citing 8  
12 U.S.C. §1225)).

13 In *Hurtado*, the BIA affirmed the decision of the immigration judge finding the  
14 Immigration Court lacked jurisdiction to conduct a bond hearing because the alien who was  
15 present in the United States for almost three years but was never admitted shall be detained  
16 under 8 U.S.C. §1225 for the duration of his removal proceedings. *Id.* The case involved an  
17 alien who unlawfully entered the United States in 2022 and was granted temporary protected  
18 status in 2024. *Id.* at 216-17. However, that status was revoked in 2025, and the alien was  
19 subsequently apprehended and placed in removal proceedings. *Id.* at 217. It is clear from the  
20 decision, the alien was initially served with a Notice of Custody Determination, informing  
21 him of his detention under 8 U.S.C. § 1226 and his ability to request bond, like the Petitioner  
22 was in this case. *Id.* at 226. However, when the alien sought a redetermination of his custody  
23 status, the immigration judge held the Court did not have jurisdiction under § 1225. *Id.* at 216.  
24 The alien appealed to the BIA. *Id.*

25 In affirming the decision of the immigration judge who determined he lacked  
26 jurisdiction, the BIA found § 1225 clear and unambiguous as explained above. Thus, because  
27 the alien was present in the United States (regardless of how long) and because he was never  
28 admitted, he shall be detained during his removal proceedings. *See id.* at 228. In doing so, the

1 BIA rejected the same arguments raised by Petitioner and by other similar petitioners in this  
2 District. For example, the BIA rejected the “legal conundrum” postulated by the alien that  
3 while he may be an applicant for admission under the statute, he is somehow not actually  
4 “seeking admission.” *Id.* at 221. The BIA explained that such a leap failed to make sense and  
5 violated the plain meaning of the statute. *See id.*

6 Next, the BIA rejected the alien’s argument that the mandatory detention scheme  
7 under § 1225 rendered the recent amendment to § 1226 under the Laken Riley Act  
8 superfluous. *Id.* The BIA explained, “nothing in the statutory text of section 236(c), including  
9 the text of the amendments made by the Laken Riley Act, purports to alter or undermine the  
10 provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens  
11 who fall within the definition of the statute ‘shall be detained for [removal proceedings].’” *Id.*  
12 at 222. The BIA explained further that any redundancy between the two statutes does not give  
13 license to “rewrite or eviscerate” one of the statutes. *See id.* (quoting *Barton v. Barr*, 590 U.S.  
14 222, 239 (2020)).

15 The BIA mandate is clear: “under a plain language reading of section 235(b)(2)(A) of  
16 the INA, 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests  
17 or to grant bond to aliens, like the respondent, who are present in the United States without  
18 admission.” *Id.* at 225. Indeed, this ruling emphasizes that § 1225 applies to aliens like the  
19 Petitioner who is also present in the United States but has not been admitted.

20 The BIA mandate is also sweeping. The *Hurtado* decision was unanimous, conducted  
21 by a three-appellate judge panel. *See id. generally.* It is binding on all immigration judges in the  
22 United States. 8 C.F.R. § 1003.1(g)(1) (“[D]ecisions of the Board and decisions of the  
23 Attorney General are binding on all officers and employees of DHS or immigration judges in  
24 the administration of the immigration laws of the United States.”). And because the decision  
25 was published, a majority of the entire Board must have voted to publish it, which establishes  
26 the decision “to serve as precedent[] in all proceedings involving the same issue or issues.”  
27 *See* 8 C.F.R. § 1003.1(g)(2)-(3). Indeed, this is the law of the land in immigration court today.  
28 *See also* 8 C.F.R. § 1003.1(d)(1) (explaining “the Board, through precedent decisions, shall

1 provide clear and uniform guidance to DHS, the immigration judges, and the general public  
2 on the proper interpretation and administration of the Act and its implementing  
3 regulations.”). And in the Board’s own words, *Hurtado* is a “precedential opinion.” *Id.* at 216.

4 Because Petitioner shall be detained during the removal proceedings and these  
5 proceedings are uncontrovertibly ongoing, his temporary detention is lawful. Any argument  
6 by Petitioner that his detention exceeds statutory authority is clearly invalid and should be  
7 rejected. The United States is aware of prior rulings in this District and others rejecting this  
8 argument (*see e.g., Herrera-Torralba v. Knight*, 2:25-cv-01366-RFB-DJA (D. Nev. Sep 05, 2025);  
9 *Maldonado-Vazquez v. Feeley*, 2:25-cv-01542-RFB-EJY (D. Nev. Sep 17, 2025)), but the United  
10 States respectfully maintains §1225 straightforwardly applies to Petitioner, especially in light  
11 of *Jennings*. *See Jennings*, 583 U.S. at 287 (explaining “an alien who “arrives in the United  
12 States,” or “is present” in this country but “has not been admitted,” is treated as “an applicant  
13 for admission.” § 1225(a)(1)).

14 **2. The *Vargas Lopez v. Trump* Decision Is Highly Instructive and Supports**  
15 **Petitioner’s Detention Under 8 U.S.C. § 1225**

16 The United States District Court for the District of Nebraska’s decision denying the  
17 habeas corpus petition in *Vargas Lopez v. Trump* is particularly relevant here. In *Vargas Lopez*,  
18 the petitioner, an undocumented alien who had been residing in the United States since 2013,  
19 sought immediate release from detention. *Vargas Lopez*, No. 8:25CV526, 2025 WL 2780351,  
20 at \*1 (D. Neb. Sept. 30, 2025). Prior to filing his petition, Vargas Lopez had received a bond  
21 hearing, and the immigration judge ordered that he be released from custody under bond of  
22 \$10,000. *Id.* at \*3. DHS however appealed the bond determination, which automatically  
23 stayed Vargas Lopez’s release on bond. *Id.* Vargas Lopez then filed a petition for habeas  
24 corpus alleging that the automatic stay was *ultra vires* and violated his due process rights. *Id.*  
25 He also alleged that application of 8 U.S.C. § 1225 in his case was unlawful because 8 U.S.C.  
26 § 1226 should control his detention. *Id.*

27 First, the court denied the petition because Vargas Lopez failed to carry his burden of  
28 demonstrating by a preponderance of the evidence that his detention was unlawful. *Id.* at \*6.

1 Vargas Lopez argued that he fell under § 1226, not 1225, but his petition and filings failed to  
2 provide proof of the “warrant for Vargas Lopez’s arrest” that § 1226 requires.

3 Second, the court concluded that Vargas Lopez was subject to detention without  
4 possibility of bond under § 1225(b)(2). To do so, the court analyzed the Supreme Court’s  
5 decision in *Jennings* to reject the notion that § 1225(b)(2) and § 1226(a) apply to two distinct  
6 groups of aliens; the two sections are not mutually exclusive. *Id.* at \*6–8. The court then  
7 concluded that Vargas Lopez is an alien within the “catchall” scope of § 1225(b)(2), subject  
8 to detention without possibility of release on bond through a proceeding on removal under §  
9 1229a. *Id.* at \*9. The court found that Vargas Lopez was an “applicant for admission” because  
10 his counsel admitted that Vargas Lopez “wishe[d] to stay in this country.” *Id.* That finding,  
11 according to the court, was consistent with the conclusions of the BIA  
12 in *Hurtado* and *Jennings*.

13 Pursuant to the language of the statute and the holding of *Jennings*, the court said that  
14 “just because Vargas Lopez illegally remained in this country *for years* does not mean that he  
15 is suddenly not an ‘applicant for admission’ under § 1225(b)(2).” *Id.* “Even if Vargas Lopez  
16 might have fallen within the scope of § 1226(a),” the court found “he also certainly fit within  
17 the language of § 1225(b)(2) as well.” *Id.* “The Court thus conclude[d] that the *plain language*  
18 of § 1225(b)(2) and the “all applicants for admission” language of *Jennings* permitted the DHS  
19 to detain Vargas Lopez under § 1225(b)(2).” *Id.*

### 20 3. The *Chavez v. Noem* Decision Is Also Instructive

21 The United States District Court for the Southern District of California’s decision in  
22 *Chavez v. Noem*, No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228, at \*1 (S.D. Cal. Sept. 24,  
23 2025), is also instructive. In *Chavez*, the court denied a motion for a temporary restraining  
24 order (“TRO”) filed by the petitioners who were detained under 8 U.S.C. § 1225(b)(2). *Chavez*,  
25 2025 WL 2730228, at \*1. The *Chavez* petitioners argued they should not have been  
26 mandatorily detained and instead they should have received bond redetermination hearings  
27 under § 1226(a). *Id.* The *Chavez* petitioners filed a motion for TRO, seeking to “enjoin[]  
28

1 Respondents from continuing to detain them unless [they received] an individualized bond  
2 hearing . . . pursuant to 8 U.S.C. § 1226(a) within fourteen days of the TRO.” *Id.*

3 In denying the TRO, the *Chavez* court went no further than the plain language of §  
4 1225(a)(1). *Id.* at \*4. Beginning and ending with the statutory text, the *Chavez* court correctly  
5 found that because petitioners did not contest that they are “alien[s] present in the United  
6 States who ha[ve] not been admitted,” then the *Chavez* petitioners are “applicants for  
7 admission” and thus subject to the mandatory detention provisions of “applicants for  
8 admission” under § 1225(b)(2). *Id.*; see also *Hurtado*, 29 I. & N. Dec. at 221–222 (finding that  
9 an alien who entered without inspection is an “applicant for admission” and his argument  
10 that he cannot be considered as “seeking admission” is unsupported by the plain language of  
11 the INA, and further stating, “[i]f he is not admitted to the United States . . . but he is not  
12 ‘seeking admission’ . . . then what is his legal status?”).

13 **4. The Legislative History Supports Petitioner’s Detention Under 8 U.S.C. §**  
14 **1225**

15 When the plain text of a statute is clear, “that meaning is controlling” and courts “need  
16 not examine legislative history.” *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848 (9th  
17 Cir. 2011). But to the extent legislative history is relevant here, nothing “refutes the plain  
18 language” of § 1225. *Suzlon Energy Ltd. v. Microsoft Corp.*, 671 F.3d 726, 730 (9th Cir. 2011).  
19 Congress passed IIRIRA to correct “an anomaly whereby immigrants who were attempting  
20 to lawfully enter the United States were in a worse position than persons who had crossed the  
21 border unlawfully.” *Torres v. Barr*, 976 F.3d at 928; *Chavez*, 2025 WL 2730228, at \*4. It  
22 “intended to replace certain aspects of the [then] current ‘entry doctrine,’ under which illegal  
23 aliens who have entered the United States without inspection gain equities and privileges in  
24 immigration proceedings that are not available to aliens who present themselves for  
25 inspection at a port of entry.” *Torres*, 976 F.3d at 928 (quoting H.R. Rep. 104-469, pt. 1, at  
26 225); *Chavez*, 2025 WL 2730228, at \*4 (The addition of § 1225(a)(1) “ensure[d] that all  
27 immigrants who have not been lawfully admitted, regardless of their physical presence in the  
28

1 country, are placed on equal footing in removal proceedings under the INA—in the position  
2 of an ‘applicant for admission.’ ”).

3 As the pertinent House Judiciary Committee Report explains: “[Before the IIRIRA],  
4 aliens who [had] entered without inspection [were] deportable under section 241(a)(1)(B).”  
5 H.R. Rep. No. 104-469, pt. 1, at 225 (1996). But “[u]nder the new ‘admission’ doctrine, such  
6 aliens *will not be considered to have been admitted*, and thus, must be subject to a ground of  
7 inadmissibility, rather than a ground of deportation, *based on their presence without admission*.”  
8 *Id.* Thus, applicants for admission remain such unless an immigration officer determines that  
9 they are “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A);  
10 *Hurtado*, 29 I. & N. Dec. at 228. Failing to clearly and beyond a doubt demonstrate that they  
11 are entitled to admission, such aliens “shall be detained for a proceeding under section 240.”  
12 8 U.S.C. § 1225(b)(2)(A); *see also Jennings*, 583 U.S. at 288.

13 The Court should thus reject Petitioner’s proposed statutory interpretation and request  
14 to be released because Petitioner’s requests would make aliens who presented at a port of  
15 entry subject to mandatory detention under § 1225, but those who crossed illegally would be  
16 eligible for a bond under § 1226(a).

#### 17 **5. Under *Loper Bright*, the Statute Controls, Not Prior Agency Practices**

18 Any argument that prior agency practice supports applying § 1226(a) to Petitioner is  
19 unavailing because under *Loper Bright*, the plain language of the statute and not prior practice  
20 controls. *Hurtado*, 29 I. & N. Dec. at 225–26. In overturning *Chevron*, the Supreme Court  
21 recognized that courts often change precedents and “correct[] our own mistakes” *Loper Bright*  
22 *Enters. v. Raimondo*, 603 U.S. 369, 411 (2024) (overturning *Chevron, U.S.A., Inc. v. Nat. Res. Def.*  
23 *Council, Inc.*, 467 U.S. 837 (1984)). *Loper Bright* overturned a decades old agency interpretation  
24 of the Magnuson-Stevens Fishery Conservation and Management Act that itself predated  
25 IIRIRA by twenty years. *Loper Bright Enterprises*, 603 U.S. at 380. Thus, longstanding agency  
26 practice carries little, if any, weight under *Loper Bright*. The weight given to agency  
27 interpretations “must always ‘depend upon their thoroughness, the validity of their reasoning,  
28 the consistency with earlier and later pronouncements, and all those factors which give them

1 power to persuade.” *Loper Bright Enterprises*, 603 U.S. at 432–33 (quoting *Skidmore.*, 323 U.S.  
2 at 140 (cleaned up)).

3 For example, here Petitioner points to 62 Fed. Reg. at 10323, where the agency  
4 provided no analysis of its reasoning. In contrast, the BIA’s recent precedent decision in  
5 *Hurtado* includes thorough reasoning. *Hurtado*, 29 I. & N. Dec. at 221–22. In *Hurtado*, the BIA  
6 analyzed the statutory text and legislative history. *Id.* at 223–225. It highlighted congressional  
7 intent that aliens present without inspection be considered “seeking admission.” *Id.* at 224.  
8 The BIA concluded that rewarding aliens who entered unlawfully with bond hearings while  
9 subjecting those presenting themselves at the border to mandatory detention would be an  
10 “incongruous result” unsupported by the plain language “or any reasonable interpretation of  
11 the INA.” *Id.* at 228.

12 To be sure, “when the best reading of the statute is that it delegates discretionary  
13 authority to an agency,” the Court must “independently interpret the statute and effectuate  
14 the will of Congress.” *Loper Bright Enterprises*, 603 U.S. at 395. But “read most naturally, §§  
15 1225(b)(1) and (b)(2) mandate detention for applicants for admission until certain proceedings  
16 have concluded.” *Jennings*, 583 U.S. at 297 (cleaned up). Prior practice does not support  
17 Petitioner’s position that the plain language mandates detention under § 1226(a).

#### 18 **B. Petitioner’s Temporary Detention Does Not Offend Due Process**

19 The Supreme Court “has long held that an alien seeking initial admission to the  
20 United States requests a privilege and has no constitutional rights regarding his application,  
21 for the power to admit or exclude aliens is a sovereign prerogative.” *Landon v. Plasencia*, 459  
22 U.S. 21, 32 (1982) (citing cases). Because applicants for admission have not been admitted  
23 to the United States, their constitutional rights are truncated: “[w]hatever the procedure  
24 authorized by Congress is, it is due process as far as an alien denied entry is concerned.”  
25 *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *U.S. ex rel. Knauff*  
26 *v. Shaughnessy*, 338 U.S. 537, 544 (1950)); see also *Thuraissigiam*, 591 U.S. at 140 (under the  
27 Due Process Clause, applicants for admission have “only those rights regarding admission  
28 that Congress has provided by statute”). Here, “the procedure authorized by Congress” in §

1 1225(b) and related provisions expressly exclude the possibility of a bond hearing.

2 *Shaughnessy*, 345 U.S. at 212.

3 As mentioned above, Congress broadly crafted “applicants for admission” to include  
4 undocumented aliens present within the United States like Petitioner. *See* 8 U.S.C. §  
5 1225(a)(1). And Congress directed aliens like the Petitioner to be detained during their  
6 removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *Jennings*, 583 U.S. at 297 (“Read most  
7 naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until  
8 certain proceedings have concluded.”). In so doing, Congress made a legislative judgment to  
9 detain undocumented aliens during removal proceedings, as they—by definition—have  
10 crossed borders and traveled in violation of United States law. That is the prerogative of the  
11 legislative branch serving the interest of the government and the United States.

12 The Supreme Court has recognized this profound interest. *See Shaughnessy*, 345 U.S.  
13 at 210 (“Courts have long recognized the power to expel or exclude aliens as a fundamental  
14 sovereign attribute exercised by the Government's political departments largely immune  
15 from judicial control.”). And with this power to remove aliens, the Supreme Court has  
16 recognized the United States’ longtime Constitutional ability to detain those in removal  
17 proceedings. *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of  
18 this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)  
19 (“Proceedings to exclude or expel would be vain if those accused could not be held in  
20 custody pending the inquiry into their true character, and while arrangements were being  
21 made for their deportation.”); *Demore v. Kim*, 538 U.S. 510, at 531 (2003) (“Detention  
22 during removal proceedings is a constitutionally permissible part of that process.”); *Jennings*,  
23 583 U.S. at 286 (“Congress has authorized immigration officials to detain some classes of  
24 aliens during the course of certain immigration proceedings. Detention during those  
25 proceedings gives immigration officials time to determine an alien's status without running  
26 the risk of the alien's either absconding or engaging in criminal activity before a final  
27 decision can be made.”).

1 In another immigration context (aliens already ordered removed awaiting their  
2 removal), the Supreme Court has explained that detaining these aliens less than six months  
3 is presumed constitutional. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). But even this  
4 presumptive constitutional limit has been subsequently distinguished as perhaps  
5 unnecessarily restrictive in other contexts. For example, in *Demore*, the Supreme Court  
6 explained Congress was justified in detaining aliens during the entire course of their removal  
7 proceedings who were convicted of certain crimes. *Demore*, 538 U.S. at 513. In that case,  
8 similar to undocumented aliens like Petitioner, Congress provided for the detention of  
9 certain convicted aliens during their removal in 8 U.S.C. § 1226(c). *See id.* The Court  
10 emphasized the constitutionality of the “definite termination point” of the detention, which  
11 was the length of the removal proceedings. *Id.* at 512 (“In contrast, because the statutory  
12 provision at issue in this case governs detention of deportable criminal aliens *pending their*  
13 *removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from  
14 fleeing prior to or during such proceedings. Second, while the period of detention at issue in  
15 *Zadvydas* was “indefinite” and “potentially permanent,” *id.*, at 690–691, 121 S.Ct. 2491, the  
16 record shows that § 1226(c) detention not only has a definite termination point, but lasts, in  
17 the majority of cases, for less than the 90 days the Court considered presumptively valid in  
18 *Zadvydas*.”).<sup>2</sup> In light of Congress’s interest in dealing with illegal immigration by keeping  
19 specified aliens in detention pending the removal period, the Supreme Court dispensed of  
20 any Due Process concerns without engaging in the “*Mathews v. Eldridge* test” *See id. generally.*

21 Likewise, in the case at bar, Petitioner’s temporary detention pending his removal  
22 proceedings does not violate Due Process. Petitioner has been detained for a few months as  
23 his *process* unfolds. The procedure Congress has established for applicants for admission like  
24 Petitioner does not include the provision of bond hearings or the right to be released during  
25 their removal proceedings. Instead, for applicants for admission such as Petitioner, “if the  
26 examining immigration officer determines that [he] is not clearly and beyond a doubt

27 \_\_\_\_\_  
28 <sup>2</sup> In 2018 the Court again highlighted the significance of a “definite termination point” for  
detention of certain aliens pending removal. *See Jennings*, 583 U.S. at 304.

1 entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a.”  
2 U.S.C. § 1225(b)(2)(A). That is, Congress has provided that Petitioner shall be detained for  
3 removal proceedings before an immigration judge, which afford the alien a host of  
4 procedural protections. *See* 8 U.S.C. § 1229a.

5 More than a century of precedent from the Supreme Court confirms that applicants  
6 for admission are treated differently under the law for due process purposes from other  
7 categories of detained aliens. *See, e.g., Zadvydas*, 533 U.S. at 693 (“The distinction between  
8 an alien who has effected an entry into the United States and one who has never entered  
9 runs throughout immigration law.”). In the relevant provisions of the INA, Congress has  
10 decided to treat applicants for admission differently, in order to effectuate their exclusion  
11 from the United States while considering whether to admit them, by holding them in  
12 detention during those ongoing proceedings. Unlike admitted aliens placed in removal  
13 proceedings and detained under 8 U.S.C. § 1226, applicants for admission are “request[ing]  
14 a privilege,” *Landon*, 459 U.S. at 32, and therefore “stand[ ] on a different footing,”  
15 *Shaughnessy*, 345 U.S. at 212-13.

16 In sum, the constitutional due process rights of applicants for admission are limited  
17 to the process that Congress chooses to provide. In § 1225(b) and related provisions,  
18 Congress has afforded applicants for admission a variety of protections, but has excluded  
19 the possibility of release pursuant to bond hearings. *See Jennings*, 583 U.S. at 297 (“[N]either  
20 § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”). The United  
21 States thus respectfully maintains Petitioner has not been deprived of Due Process in light of  
22 the aforementioned precedent.

23 **C. To the extent the Court determines Section 1226(a) governs, Petitioner may**  
24 **challenge his detention via a bond hearing**

25 Section 1226 “generally governs the process of arresting and detaining [aliens who  
26 have already entered the United States] pending their removal.” *Jennings*, 583 U.S. at 288.  
27 Section 1226(a) provides that “an alien *may* be arrested and detained pending a decision on  
28 whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a) (emphasis

1 added). The Attorney General and DHS thus have broad discretionary authority to detain  
2 an alien during removal proceedings. *See* 8 U.S.C. § 1226(a)(1) (DHS “may continue to  
3 detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*,  
4 586 U.S. 392, 409 (2019) (highlighting that “subsection (a) creates authority for *anyone’s*  
5 arrest or release under § 1226—and it gives the Secretary broad discretion as to both  
6 actions”). When an alien is apprehended, a DHS officer makes an initial custody  
7 determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested  
8 alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose  
9 a danger to the community and that he is likely to appear for future proceedings.” *Johnson*  
10 *v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8). If  
11 DHS decides to release the alien, it may set a bond or place other conditions on release. *See*  
12 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). Even after DHS decides to release an alien, it  
13 may “at any time revoke such release, “rearrest the alien under the original warrant, and  
14 detain the alien.” 8 U.S.C. § 1226(b).

15 If DHS determines that an alien should remain detained during the pendency of his  
16 removal proceedings, the alien may request a custody redetermination hearing (*i.e.*, a  
17 “bond hearing”) before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19,  
18 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to  
19 release the alien, based on a variety of factors that account for the alien’s ties to the United  
20 States and evaluate whether the alien poses a flight risk or danger to the community. *See*  
21 *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) (“The  
22 determination of the Immigration Judge as to custody status or bond may be based upon  
23 any information that is available to the Immigration Judge or that is presented to him or  
24 her by the alien or [DHS].”).

25 Section 1226(a) does not provide an alien with an absolute right to release on bond.  
26 *See Matter of D-J*, 23 I. & N. Dec. at 575 (citing *Carlson v. Landon*, 342 U.S. 524, 534  
27 (1952)). Nor does the Constitution. *Velasco Lopez*, 978 F.3d at 848. Furthermore, Section  
28 1226(a) grants DHS and the Attorney General broad discretionary authority to determine

1 whether to detain or release an alien during his removal proceedings. *See id.* In the exercise  
2 of this broad discretion, and consistent with DHS regulations, the BIA—whose decisions  
3 are binding on immigration judges—has placed the burden of proof on the alien, who  
4 “must establish to the satisfaction of the Immigration Judge . . . that he or she does not  
5 present a danger to persons or property, is not a threat to the national security, and does  
6 not pose a risk of flight.” *Matter of Guerra*, 24 I. & N. Dec. at 38. The BIA’s “to the  
7 satisfaction” standard is equivalent to a preponderance of the evidence standard. *See Matter*  
8 *of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964). If, after the bond hearing, the  
9 immigration judge concludes that the alien should not be released, or the immigration  
10 judge has set a bond amount that the alien believes is too high, the alien may appeal that  
11 decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

12 **D. The Court Lacks Jurisdiction to Entertain Petitioner’s Action under 8 U.S.C. §**  
13 **1252**

14 As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of Petitioner’s  
15 claims. Accordingly, Petitioner is unable to show a likelihood of success on the merits.

16 First, Section 1252(g) specifically deprives courts of jurisdiction, including habeas  
17 corpus jurisdiction, to review “any cause or claim by or on behalf of an alien arising from  
18 the decision or action by the Attorney General to [1] *commence proceedings*, [2] *adjudicate*  
19 *cases*, or [3] *execute removal orders* against any alien under this chapter.”<sup>3</sup> 8 U.S.C. §  
20 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction “[e]xcept as provided in  
21 this section and notwithstanding any other provision of law (statutory or nonstatutory),  
22 including section 2241 of title 28, United States Code, or any other habeas corpus provision,  
23 and sections 1361 and 1651 of such title.”<sup>4</sup> Except as provided in Section 1252, courts

24 <sup>3</sup> Much of the Attorney General’s authority has been transferred to the Secretary of Homeland  
25 Security and many references to the Attorney General are understood to refer to the Secretary.  
*See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005)

26 <sup>4</sup> Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005,  
27 Congress amended § 1252(g) by adding “(statutory or nonstatutory), including section 2241  
28 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and  
1651 of such title” after “notwithstanding any other provision of law.” REAL ID Act of 2005,  
Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

1 “cannot entertain challenges to the enumerated executive branch decisions or actions.”  
2 *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

3 Section 1252(g) also bars district courts from hearing challenges to the method by  
4 which the Secretary of Homeland Security chooses to commence removal proceedings,  
5 including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194,  
6 1203 (11th Cir. 2016) (“By its plain terms, [Section 1252(g)] bars us from questioning ICE’s  
7 discretionary decisions to commence removal” and also to review “ICE’s decision to take  
8 [plaintiff] into custody and to detain him during removal proceedings”).

9 Petitioner’s claim stems from his detention during removal proceedings. That  
10 detention arises from the decision to commence such proceedings against them. *See, e.g.,*  
11 *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at \*4  
12 (C.D. Cal. Sept. 15, 2008) (“The decision to detain plaintiff until his hearing before the  
13 Immigration Judge arose from this decision to commence proceedings[.]”); *Wang v. United*  
14 *States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at \*6 (C.D. Cal. Aug. 18, 2010);  
15 *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g)  
16 and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

17 As other courts have held, “[f]or the purposes of § 1252, the Attorney General  
18 commences proceedings against an alien when the alien is issued a Notice to Appear before  
19 an immigration court.” *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008  
20 WL 11336833, at \*3 (C.D. Cal. Sept. 11, 2008). “The Attorney General may arrest the alien  
21 against whom proceedings are commenced and detain that individual until the conclusion  
22 of those proceedings.” *Id.* at \*3. “Thus, an alien’s detention throughout this process arises  
23 from the Attorney General’s decision to commence proceedings” and review of claims  
24 arising from such detention is barred under Section 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509  
25 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at \*6; 8 U.S.C. § 1252(g). As  
26 such, the Court should dismiss Petitioner’s Motion for lack of jurisdiction.

27 Second, under Section 1252(b)(9), “judicial review of all questions of  
28 law . . . including interpretation and application of statutory provisions . . . arising from any

1 action taken . . . to remove an alien from the United States” is only proper before the  
2 appropriate federal court of appeals in the form of a petition for review of a final removal  
3 order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S.  
4 471, 483 (1999). Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels  
5 judicial review of all [claims arising from deportation proceedings]” to a court of appeals in  
6 the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at \*2  
7 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

8 Moreover, Section 1252(a)(5) provides that a petition for review is the exclusive  
9 means for judicial review of immigration proceedings:

10 Notwithstanding any other provision of law (statutory or nonstatutory), . . . a  
11 petition for review filed with an appropriate court of appeals in accordance with  
12 this section shall be the sole and exclusive means for judicial review of an order  
13 of removal entered or issued under any provision of this chapter, except as  
14 provided in subsection (e) [concerning aliens not admitted to the United States].

15 8 U.S.C. § 1252(a)(5). “Taken together, Sections 1252(a)(5) and 1252(b)(9) mean that *any*  
16 issue—whether legal or factual—arising from *any* removal-related activity can be reviewed  
17 *only* through the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th  
18 Cir. 2016) (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review  
19 of all claims, including policies-and-practices challenges . . . whenever they ‘arise from’  
20 removal proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only  
21 when the action is “unrelated to any removal action or proceeding” is it within the district  
22 court’s jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir.  
23 2006) (a “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple”  
24 (internal quotation marks omitted)).

25 Critically, Section “1252(b)(9) is a judicial channeling provision, not a claim-barring  
26 one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D)  
27 provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed as  
28

1 precluding review of constitutional claims or questions of law raised upon a petition for  
2 review filed with an appropriate court of appeals in accordance with this section.” *See also*  
3 *Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review such claims is  
4 vested exclusively in the courts of appeals[.]”). The petition-for-review process before the  
5 court of appeals ensures that aliens have a proper forum for claims arising from their  
6 immigration proceedings and “receive their day in court.” *J.E.F.M.*, 837 F.3d at 1031–32  
7 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (“The  
8 REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns” by  
9 permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional  
10 claims or questions of law.”).

11 In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained  
12 that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d  
13 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review  
14 challenges regarding decisions to detain aliens for purposes of removal or for proceedings.  
15 *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the “decision to  
16 detain [an alien] in the first place or to seek removal[.]”). Here, Petitioner challenges the  
17 United States’ decision and action to detain them, which arises from DHS’s decision to  
18 commence removal proceedings, and is thus an “action taken . . . to remove [them] from the  
19 United States.” *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco*  
20 *Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar  
21 review in that case because the petitioner did not challenge “his initial detention”);  
22 *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at \*3 (W.D. Pa. Mar. 12,  
23 2024) (recognizing that there is no judicial review of the threshold detention decision, which  
24 flows from the government’s decision to “commence proceedings”). As such, the Court  
25 lacks jurisdiction over this action. The reasoning in *Jennings* outlines why Petitioner’s claims  
26 are unreviewable here.

27 While holding that it was unnecessary to comprehensively address the scope of  
28 Section 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of

1 challenges that may fall within the scope of Section 1252(b)(9). *See Jennings*, 583 U.S. at  
2 293–94. The Supreme Court found that “§1252(b)(9) [did] not present a jurisdictional bar”  
3 in situations where “respondents . . . [were] not challenging the decision to detain them in  
4 the first place.” *Id.* at 294–95. In this case, however, Petitioner *does* challenge the United  
5 States’ decision to detain him in the first place. Petitioner ultimately challenges DHS’s  
6 decision to detain him in the first instance under Section 1225, and thus Petitioner’s Motion  
7 cannot not evade the preclusive effect of Section 1252(b)(9).

8 Indeed, the fact that Petitioner is challenging the basis upon which they are detained  
9 is enough to trigger Section 1252(b)(9) because “detention is an ‘action taken . . . to  
10 remove’ an alien.” *See Jennings*, 583 U.S. 318, 319 (Thomas, J., concurring); 8 U.S.C.  
11 § 1252(b)(9). The Court should deny Petitioner’s Motion and Petition for lack of  
12 jurisdiction under Section 1252(b)(9). If anything, Petitioner must present his claims before  
13 the appropriate federal court of appeals because he challenges the United States’ decision  
14 or action to detain him, which must be raised before a court of appeals, not this Court. *See*  
15 8 U.S.C. § 1252(b)(9).

16 **E. Request for EAJA Fees Should be Denied**

17 Petitioner seeks attorney’s fees and costs pursuant to § 2412 of the Equal Access for  
18 Justice Act (“EAJA”), which allows fee-shifting in civil actions by or against the United  
19 States. EAJA has two parts, agency adversarial adjudication fee-shifting, 5 U.S.C. § 504,  
20 and fee-shifting in civil actions in federal court, 28 U.S.C. § 2412. Petitioner cannot obtain  
21 fees in this case under 5 U.S.C. § 504 since that provision excludes administrative  
22 immigration proceedings. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129  
23 (1991). His only recourse for fees is pursuant to § 2412(d)(1)(A), which provides, subject to  
24 exceptions not relevant here, that in an action brought by or against the United States, a  
25 court must award fees and expenses to a prevailing non-government party “unless the court  
26 finds that the position of the United States was substantially justified or that special  
27 circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A).

1 Here, Petitioner's request is premature because he is not a prevailing party. Second,  
2 even if Petitioner were to prevail in this case, the Federal Respondents' position asserted in  
3 this Response is substantially justified because other courts have found the arguments  
4 presented herein to be persuasive and that DHS can lawfully detain, under the mandatory  
5 detention provisions of 8 U.S.C. § 1225, other petitioners who are similarly situated as  
6 Perez Sales.

7 As described above, the United States District Court for the District of Nebraska  
8 and the United States District Court for the Southern District of California have both  
9 issued decisions holding that, under the plain language of § 1225(a)(1), aliens present in the  
10 United States who have not been admitted are "applicants for admission" and are thus  
11 subject to the mandatory detention provisions of "applicants for admission" under §  
12 1225(b)(2). *See Vargas Lopez*, 2025 WL 2780351; *Chavez*, 2025 WL 2730228. Because other  
13 federal judges have found persuasive the positions advanced by the Federal Respondents in  
14 this case, the Federal Respondents' position is substantially justified. *See Medina Tovar v.*  
15 *Zuchowski*, 41 F.4th 1085, 1091 (9th Cir. 2022) (finding that the district court did not abuse  
16 its discretion, in finding that the United States' position was substantially justified for  
17 purposes of EAJA, where different judges disagreed about the proper reading of the statute  
18 and the case involved an issue of first impression).

19 Because the United States' position in this case is substantially justified, Petitioner's  
20 request for attorney's fees under EAJA cannot prevail.

#### 21 **IV. Conclusion**

22 For these reasons, Federal Respondents request that the Petition be denied.

23 Respectfully submitted this 31st day of October 2025.

24  
25 SIGAL CHATTAH  
Acting United States Attorney

26  
27 /s/ Christian R. Ruiz  
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