UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

TORNIKE MARIKHASVILI

Petitioner,

-against-

KRISTI NOEM, IN HER OFFICIAL CAPACITY, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY;

PAMELA BONDI, IN HER OFFICIAL CAPACITY, U.S. ATTORNEY GENERAL;

TODD LYONS, IN HIS OFFICIAL CAPACITY, ACTING DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT;

MIGUEL VERGARA, IN HIS OFFICIAL CAPACITY ICE FIELD OFFICE DIRECTOR DETENTION AND REMOVAL;

MARIO N. GARCIA, WARDEN, IN HIS OFFICIAL CAPACITY, WEBB COUNTY DETENTION CENTER.

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Case No.5:25-cv-00180

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FIRST AMENDED COMPLAINT FOR PRELIMINARY INJUNCTIVE RELIEF AND PETITION FOR HABEAS CORPUS

1. Petitioner, Tornike Marikhasvili ("Mr. Marikhasvili"), is a citizen and national of Georgia.
2. Mr. Marikhasvili entered the United States on March 13, 2024, after fleeing Georgia because he suffered political persecution by the Georgian government.

3. On March 16, 2024, pursuant to 8 U.S.C. §1229(a), he was issued a Notice to Appear, ordering him to appear at the Newark Immigration Court located at 970 Broad Street, Room 1200, in Newark, New Jersey. Exh. A
4. On March 21, 2024, Mr. Marikhasvili was processed under 8 U.S.C. §1226(a) and issued an Order of Release on Recognizance. Upon release he traveled to New Jersey. Exh. B
5. Mr. Marikhasvili filed Form I-589, Application for Asylum and for Withholding of Removal, which was received by the Immigration Court on July 8, 2024.
4. Mr. Marikhasvili also moved to New York and filed a change of venue from the Newark Immigration Court to New York. This motion was granted and his removal case was proceeding in New York
5. Mr. Marikhasvili has no criminal history.
6. On September 26, 2025, Mr. Mr. Marikhasvili was encountered at a Customs and Border Protection (Hereinafter "CBP") checkpoint near Encinal, Texas. He provided his Employment Authorization Document. Nonetheless, CBP unlawfully detained him and transferred him into immigration custody, Webb County, Texas, where he remains unlawfully detained.
7. On July 8, 2025, DHS issued a new policy memorandum to all , On July 8, 2025, DHS issued a memo to all employees of Immigration and Customs Enforcement (Hereinafter "ICE") stating that "[t]his message serves as notice that DHS, in coordination with the Department of Justice (Hereinafter "DOJ"), has revisited its legal position on detention and release authorities. DHS has determined that section 235 of the Immigration and Nationality Act (INA), rather than section 236, is the applicable immigration detention

authority for all applicants for admission. The following interim guidance is intended to ensure immediate and consistent application of the Department's legal interpretation while additional operational guidance is developed." Memorandum, U.S. Immigration & Customs Enf't, *Interim Guidance Regarding Detention Authority for Applications for Admission* (July 8, 2025), available at AILA Doc. No. 25071607, https://www.aila.org/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission.

6. Through his pending asylum application, Mr.Marikhasvili will have the opportunity to become a lawful permanent resident, and his removal is not reasonably foreseeable due to a pending application for relief.
7. Mr. Marikhasvili is detained at the Webb County Detention Center away from his family and counsel located in New York.
8. On October 10, 2025, Mr. Marikhasvilii requested a custody re-determination from an immigration judge. However, it was denied as the immigration judge found it did not have jurisdiction to review his custody redetermination due to a new policy memo and *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) holding that everyone present in the United States who did not enter with a valid visa is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A).
9. Petitioner's detention pursuant to § 1225(b)(2)(A) violates the plain language of the INA and its implementing regulations. Petitioner, who was apprehended in the interior of the U.S., should not be considered an "applicant for admission" who is "seeking admission." Rather, he should continue to be detained pursuant to 8 U.S.C. § 1226(a), which was

DHS's initial determination for Mr. Marikhasvili and allows for release on conditional parole or bond.

10. Through this petition, Mr. Marikhasvili asks this Court to find that Respondents have unlawfully detained him under § 1225(b)(2)(A), that his detention is appropriate under § 1226(a), which DHS initially processed him under, and immediately release Mr. Marikhasvili from custody in accordance with the initial custody determination made in March 2024. *Zadvydas v. Davis*, 533 U.S. 678, 687-88 (2001).

CUSTODY

11. Petitioner is in the physical custody of Defendant-Respondent MIGUEL VERGARA, Field Office Director for Detention and Removal, U.S. Immigration and Customs Enforcement ("ICE"), DHS, and Respondent DAVID COLE, Warden of the Rio Grande Processing Center in Laredo, Texas. At the time of the filing of this petition, Plaintiff-Petitioner is detained at the WEBB COUNTY DETENTION CENTER in Laredo, Texas. The WEBB COUNTY DETENTION CENTER contracts with DHS to detain noncitizens such as Plaintiff-Petitioner. Plaintiff-Petitioner is under the direct control of Defendants-Respondents and their agents.

JURISDICTION

12. Jurisdiction is proper and relief is available pursuant to 28 U.S.C. 1131 (federal question), 28 USC 1346 (original jurisdiction), 5 USC 702 (waiver of sovereign immunity), 28 USC 2241 (habeas corpus jurisdiction), and Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause).

VENUE

13. Venue is proper because Petitioner was detained in Encinal, TX, and now remains detained at the Webb County Detention Center in 9998 S Highway 83, Laredo, TX 78041, United States. *See* ICE Detainee Locator; *See also generally* Rumsfeld v. Padilla, 542 U.S. 426, 447 (2004) (generally, "[w]henever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States," he must file the petition in the district of confinement and name his immediate custodian as the respondent), *see also* Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484, 493-500 (1973), venue lies in the United States District Court for the Southern District of Texas, the judicial district in which petitioner is currently detained.

PARTIES

Petitioner

14. Petitioner Mr. Tornike Marikhasvili is a citizen and national of Georgia. Previous to his detention, resided with his girlfriend at [redacted] Brooklyn, NY 11228. He is currently in ICE custody and detained at the Webb County Detention Center 9998 S Highway 83 Laredo, TX 78041.

Respondents

15. Respondent Kristi NOEM is the Secretary of the Department of Homeland Security. She is responsible for the implementation and enforcement of the Immigration and Nationality Act and oversees ICE, which is responsible for Petitioner's detention. Ms. Noem has ultimate custodial authority over Petitioner. In this capacity, she is responsible for the administration of immigration laws pursuant to Section 103(a) of the INA, 8 U.S.C. § 1103(a) (2007); routinely transacts business in the District of Texas; is legally responsible for pursuing any effort to detain and remove the Petitioner; and as such is a custodian of the Petitioner. She is sued in her official capacity. Respondent Noem's

address is U.S. Department of Homeland Security, Office of the General Counsel, 2707 Martin Luther King Jr. Ave. SE, Washington, DC 20528-0485.

16. Respondent Pamela BONDI is the Attorney General of the United States. She is responsible for the Department of Justice, of which the Executive Office for Immigration Review and the immigration court system operates as a component agency. She routinely transacts business in the District of Texas in this capacity; is responsible for the administration of the immigration laws pursuant to Section 103(a) of the INA, 8 U.S.C. § 1103(g) (2007); and as such is a custodian of the Petitioner. She is sued in her official capacity. At all times relevant hereto, Respondent Bondi's address is U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530- 0001.

17. Respondent Todd M. LYONS is named in his official capacity as the Acting Director of ICE. He administers and enforces the immigration laws of the United States, routinely conducts business in the District of Texas, Laredo Division, is legally responsible for pursuing efforts to remove the Petitioner, and as such is the custodian of the Petitioner. ICE's responsibilities include operating the immigration detention system. In his capacity as ICE Acting Director, Respondent Lyons exercises control over and is custodian of persons held at ICE facilities nationally. He is the Petitioners's immediate custodian and responsible for Petitioner's detention. He is sued in his official capacity. At all times relevant hereto, Respondent Lyons's address is ICE, Office of the Principal Legal Advisor, 500 12th St. SW, Mail Stop 5900, Washington DC 20536-5900.

18. Defendant-Respondent MIGUEL VERGARA is the Field Office Director for Detention and Removal, ICE, DHS. He is the custodial official acting within the boundaries of the judicial district of the United States District Court for the

Southern District of Texas. Pursuant to Defendant-Respondent's orders, Plaintiff-Petitioner remains in custody. Defendant-Respondent is sued in his official capacity. His address is 1777 NE Loop 410, Floor 15, San Antonio, Texas 78217.

19. Respondent MARIO N. GARCIA, is the Warden at the WEBB COUNTY DETENTION CENTER, where the petitioner is detained. He has immediate physical custody of Petitioner. He is sued in his official capacity.

STATEMENT OF THE FACTS

20. Mr. Marikhasvili is a forty-three-year-old male with no criminal history.
21. On March 13, 2024, Mr. Gudashvili entered the United States without inspection and thereafter requested asylum. He was placed into removal proceedings under 8 U.S.C. § 1229(a), through the issuance of a NTA dated March 16, 2024.
22. Mr. Marikhasvili was authorized, in accordance with 8 U.S.C. § 1226, §236 of the Immigration and Nationality Act, for Release on Recognizance.
23. On July 8, 2024, the New York Immigration Court received Mr. Marikhasvili's Form I-589, Application for Asylum and for Withholding of Removal.
24. His asylum petition is pending.
25. On September 26, 2025, CBP apprehended Mr. Marikhasvili at a checkpoint at Encinal, Texas.Mr. Marikhasvili presented a lawful work authorization and CDL license. He was nonetheless arrested, detained, and transferred into ICE custody without a warrant and without reasonable suspicion of a crime or civil immigration violation.
26. The officers did not disclose the basis for arresting or detaining Mr. Marikhasvili.

27. Mr. Marikhasvili requested a bond redetermination and the Laredo Immigration Court heard his case on October 10, 2025.

28. The Immigration Judge denied Mr. Marikhasvili's request for bond, holding that it did not have jurisdiction to grant bond under *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).

29. Mr. Marikhasvili's finance, which is dependent on him, and his attorney are in the New York area.

30. Without relief from this Court, Mr. Marikhasvili faces continued detention without the possibility of an individualized bond hearing.

LEGAL BACKGROUND

31. Section 2241 of 28 United States Code provides in relevant part that "[w]rits of habeas corpus may be granted by . . . the district courts within their respective jurisdictions" when a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(3); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 305, 121 S. Ct. 2271 (2001).

32. District courts grant writs of habeas corpus to those who demonstrate their custody violates the Constitution or laws of the United States. 28 U.S.C. § 2241(c)(3).

33. Habeas corpus "entitles [a] prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene v. Bush*, 553 U.S. 723, 779, 128 S. Ct. 2229 (2008) (*quoting*, *St. Cyr*, 533 U.S. at 302.

34. The Fifth Amendment's Due Process Clause protects the right of all persons to be free from "depriv[ation] of life, liberty, or property, without due process of law." U.S. Const. amend. V.

35. "It is well established that the Fifth Amendment entitles aliens to due process of law[.]" *Trump v. J. G. G.*, 604 U.S. ---, 145 S. Ct. 1003, 1006 (2025) (*quoting Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439 (1993)).

36. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690.

37. The INA prescribes three basic mechanisms for detention for non-citizens, 8 U.S.C. § 1225, for arriving aliens and applicants for admission, § 1226 the default detention statute, and § 1231 for post–final order detention.

38. The detention provisions at § 1226(a) and § 1225(b)(2) were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208. Div. C, §§ 302-03, 110 Stat. 3009-546, 300-582 to 3009-583, 3009-585. Section 1226 was most recently amended earlier this year by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3 (2025).

39. Following the enactment of the IIRIRA, the U.S. Department of Justice's Executive Office of Immigration Review ("EOIR") drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under § 1225 and that they were instead detained under § 1226(a). See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Despite

being applicants for admission, aliens who are present without having been admitted or paroled (formed referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination").

40. Thus, in the decades that followed, most people who entered without inspection and were thereafter detained and placed in standard removal proceedings were considered for release on bond and also received bond hearings before an Immigration Judge ("IJ"), unless their criminal history rendered them ineligible. That practice was consistent with many more decades of prior practice, in which noncitizens who had entered the United States, even if without inspection, were entitled to a custody hearing before an IJ or other hearing officer. In contrast, those who were stopped at the border were only entitled to release on parole. *See* 8 U.S.C. § 1252(a) (1994); see also H.R. Rep. No. 104-469, pt. 1, at 220 (1996) (noting that § 1226(a) simply "restates" the detention authority previously found at § 1252(a)).

41. For decades, residents of the U.S. who entered without inspection and were subsequently apprehended by ICE in the interior of the country have been detained pursuant to § 1226 and entitled to bond hearings before an IJ, unless barred from doing so due to their criminal history.

42. On July 8, 2025, however, DHS stated a new position with regard to custody determinations as follows:

> An "applicant for admission" is an alien present in the United States who has not been admitted or who arrives in the United States, whether or not at a designated port of arrival. INA § 235(a)(1). **Effective immediately, it is the position of DHS that such aliens are subject to detention under INA § 235(b) and may not be released from ICE custody except by INA § 212(d)(5) parole**. These aliens are also ineligible for a custody redetermination hearing ("bond hearing") before an immigration judge and may not be released for the duration of their removal proceedings absent a parole by DHS. For custody purposes, these aliens are now

> treated in the same manner that "arriving aliens" have historically been treated. **The only aliens eligible for a custody determination and release on recognizance, bond, or other conditions under INA § 236(a) during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237, with the exception of those subject to mandatory detention under INA § 236(c).**
>
> Moving forward, ICE will not issue Form I-286, Notice of Custody Determination, to applicants for admission because Form I-286 applies by its terms only to custody determinations under INA § 236 and part 236 of Title 8 of the Code of Federal Regulations. With a limited exception for certain habeas petitioners, on which the Office of the Principal Legal Advisor (OPLA) will individually advise, if Enforcement and Removal Operations (ERO) previously conducted a custody determination for an applicant for admission still detained in ICE custody, ERO will affirmatively cancel the Form I-286. *See* https://www.aila.org/ice-memo-interim-guidance-regarding-detention-authority-forapplications-for-admission (emphasis original).

43. As a result, according to DHS all noncitizens who have entered the United States without inspection and are subject to the grounds of inadmissibility, including long-time U.S. residents, are now considered to be subject to mandatory detention under INA § 235(b) and ineligible for release on bond. Conversely, according to DHS "[t]he only aliens eligible for a custody determination and release on recognizance, bond, or other conditions under INA § 236(a) during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237, with the exception of those subject to mandatory detention under INA § 236(c)." *Id.*

44. Prior to July 8, 2025, the predominant form of detention authority for anyone arrested in the interior of the United States was 8 U.S.C. § 1226(a). Further, the Petitioner in this case was initially arrested and released pursuant to 8 U.S.C. § 1226(a), and is demonstrated by DHS's own forms.

45. Under § 1226(a) the Attorney General may release a detainee on bond on the authority of ICE or by an Immigration Judge. There are standards for release: bond is available if the

detainee "demonstrate[s] . . . that such release would not pose a danger to property or persons, and that [he] is likely to appear for any future proceeding." 8 C.F.R. § 36.1(c)(8). "[T]he immigration judge is authorized to exercise the authority . . . to detain the alien in custody, release the alien, and determine the amount of bond." Id. § 236.1(d)(1). If denied release at the initial bond hearing, a § 1226(a) detainee may request a custody redetermination hearing before an IJ. That request will "be considered only upon a showing that the alien's circumstances have changed materially." *Id.* § 1003.19(e).

CAUSES OF ACTION

COUNT I

Violation of 8 U.S.C. § 1226(a)
Unlawful Denial of Release on Bond

1. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

2. The mandatory detention provision at 8 U.S.C. § 1225(b)(2) does not apply to all noncitizens residing in the United States who are subject to the grounds of inadmissibility. As relevant here, § 1225(b)(2) does not apply to those persons Respondents previously determined should be detained and released under § 1226(a). Further, § 1225(b)(2) does not justify cancellation of a bond or release order issued under § 1226(a).

3. Nonetheless, Defendants-Respondents have adopted a policy and practice of re-interpreting the detention and release statutory scheme in the INA.

4. The unlawful application of § 1225(b)(2) to Plaintiff-Petitioner unlawfully mandates her continued detention and violates the INA.

COUNT II

Violation of the Bond Regulations, 8 C.F.R. §§ 236.1, 1232.1 and 1003.19
Unlawful Denial of Release on Bond

5. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

6. In 1997, after Congress amended the INA through IIRIRA, EOIR and the then-Immigration and Naturalization Service issued an interim rule to interpret and apply IIRIRA. Specifically, under the heading of "Apprehension, Custody, and Detention of [Noncitizens]," the agencies explained that "[d]espite being applicants for admission, [noncitizens] who are present without having been admitted or paroled (formerly referred to as [noncitizens] who entered without inspection) *will be eligible for bond and bond redetermination.*" 62 Fed. Reg. at 10323 (emphasis added). The agencies thus made clear that individuals who had entered without inspection were eligible for consideration for bond and bond hearings before IJs under 8 U.S.C. § 1226 and its implementing regulations.

7. Nonetheless, Defendants-Respondents have adopted a policy and practice of applying § 1225(b)(2) to noncitizens like Plaintiff-Petitioner whom Defendants-Respondents previously determined should be detained and released pursuant to § 1226(a).

8. The unlawful application of § 1225(b)(2) to Plaintiff-Petitioner unlawfully mandates her continued detention and violates 8 C.F.R. §§ 236.1, 1232.1 and 1003.19.

COUNT III

Violation of the APA
Contrary to Law and Arbitrary and Capricious Agency Policy

9. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

10. The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

11. The mandatory detention provision at 8 U.S.C. § 1225(b)(2) does not apply to all noncitizens residing in the United States who are subject to the grounds of inadmissibility. As relevant here, it does not apply to those whom Defendants-Respondents previously determined should be detained and released under § 1226(a). Such noncitizens are detained (and released) under § 1226(a) and are eligible for release on bond, unless they were initially placed in expedited removal proceedings pursuant to § 1225(b)(1) or (b), or were detained under § 1226(c) or § 1231.

12. Nonetheless, Defendants-Respondents have adopted a policy and practice of applying § 1225(b)(2) to noncitizens like Plaintiff-Petitioner whom Defendant-Respondents previously determined should be detained and released pursuant to § 1226(a).

13. Defendants-Respondents have failed to articulate reasoned explanations for their decisions, which represent changes in the agencies' policies and positions; have considered factors that Congress did not intend to be considered; have entirely failed to consider important aspects of the problem; and have offered explanations for their decisions that run counter to the evidence before the agencies.

14. The application of § 1225(b)(2) to Plaintiff-Petitioner is arbitrary, capricious, and not in accordance with law, and as such, it violates the APA. *See* 5 U.S.C. § 706(2).

COUNT IV

Violation of the APA and Due Process Clause
Impermissibly Retroactive Application of New Legal Interpretation

15. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

16. The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

17. Defendants-Respondents adopted a new interpretation of the INA and its regulations due to the BIA's May 15, 2025 decision in *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025). Prior to *Matter of Q. Li*, Defendants-Respondents interpreted and applied the INA detention and release scheme to empower Defendants-Respondents to detain and release or afford a bond hearing before an immigration judge to most people who entered without inspection, unless their criminal history rendered them ineligible. This was accomplished under § 1226(a).

18. As recently as 2023, the BIA interpreted the INA to empower the DHS to choose whether to detain and release persons who entered without inspection either under § 1226(a) or § 1226(b)(2). *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 748 (BIA 2023). There, the noncitizens entered without inspection or admission and were detained shortly after entering the United States. The DHS detained and released them under § 1226(a). The noncitizens argued that their release constituted

a parole because their detention (and release) could only have been accomplished through § 1225(b). The BIA firmly rejected that reading of the statute.

19. "For applicants for admission charged as inadmissible, DHS has authority to determine whether to initiate expedited removal proceedings under…8 U.S.C. § 1225(b)(1)(A)(i), or removal proceedings under section 240 of the INA, 8 U.S.C. § 1229a."). The BIA explained:

> This authority is illustrated in the Attorney General's decision in *Matter of D-J-*, 23 I&N Dec. 572, 572–76 (A.G. 2003), which involved a similar fact pattern. In that case, DHS apprehended a respondent shortly after he entered the United States without admission or parole and charged him with the same ground of inadmissibility at issue here [having entered without inspection or admission]. The Attorney General reviewed his eligibility for release from custody under section 236(a) of the INA, 8 U.S.C. § 1226(a). *Cf. Matter of M-S-*, 27 I&N Dec. 509, 510–13 (A.G. 2019) (addressing the detention and release of respondents whom DHS initially elects to place in expedited removal proceedings, but who are later transferred to section 240 removal proceedings after establishing a credible fear of persecution or torture). *Id.* at 748-49.

20. And the BIA reiterated this reading of the INA's detention and release statutory scheme again in *Matter of Roque-Izada*, 29 I&N Dec. 106 (BIA 2025). There, the noncitizen entered without inspection or admission and then was released. He argued that he had been paroled because DHS could only detain him under § 1225(b). The BIA rejected the argument concluding that DHS detained him under § 1226(a) and released him conditionally under § 1226(a)(2)(B). The BIA concluded that the noncitizen had "not meaningfully distinguished his release from DHS' custody from the conditional parole at issue in *Matter of Cabrera-Fernandez*, 28 I&N Dec. at 747, 750." *Matter of Roque-Izada*, 29 I&N Dec. at 109.

21. Petitioner was detained and released under § 1226(a). This is confirmed factually and legally by the documentation concerning her release and the state law of the law in effect at that time. *Matter of Cabrera-Fernandez* buttresses this point.

22. *Matter of Q. Li*, as interpreted by the immigration judge and Respondents, is a sea change in immigration law. Retroactive application of this new interpretation of the law to Petitioner's case however is unfair and unlawful.

23. Retroactivity is greatly disfavored in the law. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Supreme Court has been emphatic that this aversion to retroactive rulemaking is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (internal quotation and citations omitted).

24. The Fifth Circuit too has instructed the BIA and immigration courts that it is patently unfair to subject noncitizens to new interpretations of immigration laws. This is a matter of due process and fair notice. The Court explained:

> "The leading case on administrative retroactivity' instructs that any disadvantages from the 'retroactive effects' of deciding a 'case of first impression . . . must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' To apply that instruction, this court 'balances the ills of retroactivity against the disadvantages of prospectivity.' 'If that mischief of prospectivity is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by

law.' *Monteon-Camargo v. Barr*, 918 F.3d 423, 430 (5th Cir. 2019) (internal citations omitted).

25. Thus, if application of the new rule is significant and changes the legal landscape by updating an agency's earlier position, then retroactive application of the new rule alters basic presumptions of this administrative system. *Id.* at 431. "A 'presumption of prospectivity attaches to Congress's own work,' and it should generally attach when an agency 'exercises delegated legislative….authority.'" *Id.* (internal citation omitted).

26. The change here is significant. Petitioner's right to be free from detention is eliminated and she is now subject to mandatory detention.

27. The retroactive application of *Matter of Q. Li* is unfair, unreasonable and unlawful.

28. Further, the application of § 1225(b)(2) to Petitioner is arbitrary, capricious, and not in accordance with law, and as such, it violates the APA. *See* 5 U.S.C. § 706(2). Retroactive application of *Matter of Q. Li* to Petitioner also violates her due process rights.

COUNT V

Violation of the Administrative Procedure Act
Contrary to Law and Arbitrary and Capricious Agency Policy
Failure to Adhere to Prior Published Precedent

29. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

30. The APA provides that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

31. The Executive Office for Immigration Review (EOIR) is an adjudicatory body that functions much like the federal court system. The immigration court renders decisions on legal issues concerning a noncitizens removability, eligibility for relief and fitness for bond. The BIA reviews decisions and from time-to-time issues precedential decisions.

32. The parties expect the BIA and the immigration courts to apply faithfully Supreme Court, circuit court, and BIA precedent as well as decision-making principles that ensure consistency and predictability in deciding cases. The rule of orderliness is one such principle that circuit courts and district courts apply. Under the rule of orderliness, "one panel of [the circuit] court may not overturn another panel's decision, absent an intervening change in law, such as by a statutory amendment, or the Supreme Court, or [the] en banc court." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016). This rule is also applied by the district courts. *See Silo Rest. Inc. v. Allied Prop. & Cas. Ins. Co.*, 420 F. Supp. 3d 562, 575-76 (W.D. Tex. 2019).

33. The EOIR has acknowledged that it does not abide by the rule of orderliness. The EOIR calls it the "prior-panel-precedent" rule. *See* EOIR Policy Memoranda (PM) 25-34 (July 3, 2025) found at https://www.justice.gov/eoir/media/1406956/dl?inline. The EOIR acknowledges that the functional equivalent of the rule of orderliness exists in its regulations and in narrow circumstances, one panel can overrule an earlier panel if a majority of the permanent Board members vote to reject the earlier decision. 8 C.F.R. § 1003.1(g)(3). Nevertheless, there is no rule or guidance for immigration courts for resolving conflicts between prior BIA precedents or which BIA precedent to follow. EOIR PM 25-34 at 2.

34. Instead, EOIR instructs immigration judges to essentially "try their best." *Id.* at 4. "Until the Board or the Attorney General resolves any conflicts in Board precedent… or adopts a clear rule regarding which precedent should control when there is a conflict, Immigration Judges will have to apply their best judgment and traditional legal tools or methods of analysis in order to adjudicate cases before them where Board precedent is in conflict." *Id.* The rule of orderliness thus does not control.

35. Prior BIA precedent requires application of *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747 (BIA 2023). If the facts demonstrate that DHS exercised its authority to detain and release a noncitizen under § 1226(a), then that election controls and the noncitizen is eligible for bond under that provision.

36. The disregard of the rule of orderliness and application of § 1225(b)(2) to Plaintiff-Petitioner are agency actions that are arbitrary, capricious, and not in accordance with law, and as such, they violate the APA. *See* 5 U.S.C. § 706(2).

COUNT VI

Violation of the Due Process Clause

37. Plaintiff-Petitioner re-alleges and incorporates herein by reference every allegation set forth in the preceding paragraphs.

38. Substantive due process protects against arbitrary and unjustified deprivations of liberty. In the immigration context, every detention must rest on a valid statutory foundation and bear a reasonable relationship to the statute's purpose. *See Zadvydas v. Davis*, 533 U.S.690; *Demore v. Kim*, 538 U.S. 523. When the government misapplies the statutory basis for detention, no legitimate justification exists, and due process is infringed. *Id.*

39. DHS affirmatively chose to process Plaintiff-Petitioner under section 1226(a), as demonstrated by her release on recognizance (§ 1226(a)(2)(B)), issuance of a Notice to Appear, and absence of expedited removal forms (I-867AB, I-860). By subsequently detaining her under section 1225(b), DHS did not provide her with the bond protections specified under § 1226(a), resulting in a statutory mismatch that affected the legal basis for her continued detention.

40. Defendants-Respondents' actions violate Plaintiff-Petitioner's substantive due process rights.

CLAIM FOR RELIEF

I. VIOLATION OF 8 U.S.C. § 1226(a) , UNLAWFUL DENIAL OF RELEASE ON BOND

46. Petitioner restates and realleges all paragraphs as if fully set forth here.

47. Mr. Marikhasvili was initially detained in March 2024. At that time, ICE processed him for detention under § 1226(a) and ordered his release on recognizance.

48. On September 26, 2025, Mr. Marikhasvili was apprehended again even though he did not violate the terms of his release on recognizance. At this time, DHS subjected him to detention under § 1225, stating that he is subject to mandatory detention.

49. Petitioner may only be detained, if at all, pursuant to 8 U.S.C. § 1226(a).

50. DHS has already made a custody determination under 8 U.S.C. § 1226(a), and ordered his release from detention.

51. Petitioner's continuing detention is therefore unlawful.

II. CONTINUED DETENTION CONSTITUTES A VIOLATION OF DUE PROCESS

52. Petitioner incorporates all factual allegations as though restated here.

53. ICE detained Mr. Marikhasvili without reasonable suspicion and continues to do so in violation of his constitutional rights protected under the Fifth Amendment.

54. The Due Process Clause of the Fifth Amendment forbids the government from depriving any person of liberty without due process of law. U.S. Const. amend. V.

55. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause [of the Fifth Amendment] protects." *Zadvydas*, 533 U.S. at 690.

56. Mr. Marikhasvili's detention violates his Fifth Amendment rights for at least three related reasons.

57. First, immigration detention must always "bear[] a reasonable relation to the purpose for which the individual was committed." *Demore v. Kim*, 538 U.S. 510, 527 (2003) (*citing Zadvydas*, 533 U.S. at 690).

58. Whereas here, the government has ordered release on recognizance, detention is not reasonably related to its purpose.

59. Second, the Due Process Clause requires that any deprivation of Mr. Marikhasvili's liberty be narrowly tailored to serve a compelling government interest. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (holding that due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Demore*, 538 U.S. at 528 (applying less rigorous standard for "deportable aliens").

60. Petitioner's on-going imprisonment does not satisfy that rigorous standard as he did not commit any crime, was released from custody, and has a pending asylum case joined by his wife.

61. Third, "the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention." *Zadvydas*, 533 U.S. at 718 (2001) (Kennedy, J., dissenting).

62. Detaining Mr. Marikhasvili was arbitrary because he had been initially processed for detention under § 1226, released on recognizance, has authorization to work in the United States, and has no criminal arrests or convictions.

63. Mr. Marikhasvili was initially detained under §1226(a), but for a new policy memorandum now subjecting everyone present in the United States who entered without a valid visa to mandatory detention, deprives the Petitioner of an individualized bond determination.

64. This is true for Mr. Marikhasvili.

PRAYER FOR RELIEF

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

1. Issue an Order declaring that Petitioner is detained under 8 U.S.C. § 1226(a);
2. Issue an Order declaring that application of 8 U.S.C. § 1225(b)(2) to Petitioner is unlawful, arbitrary, capricious and contrary to law;
3. Issue an Order declaring that application of 8 U.S.C. § 1225(b)(2) to Petitioner violates her due process rights;
4. Issue an Order for Preliminary Injunctive Relief ordering Defendants-Respondents to release Petitioner or, alternatively, grant her a bond hearing before an immigration judge.

5. Award Petitioner reasonable costs and attorney's fees under the Equal Access to Justice Act ("EAJA"), as amended, pursuant to 28 U.S.C. § 2412.; and,
6. Grant any other relief which this Court deems just and proper.

Respectfully submitted,

/s/ Alfonso Otero
ALFONSO OTERO
SD TX. Fed. No. 408694
Texas Bar. No. 24009189
ALFONSO OTERO ATTORNEY AT LAW, P.C.
8620 N. New Braunfels
Suite 605
San Antonio, Texas 78217
210-587-4000
Alfonso.otero.briz@gmail.com

DAVID H. SQUARE, ESQ.
SD TX FED. NO. 1155619
TX S. CT. 24076013
LAW OFFICE OF DAVID H. SQUARE, PLLC 225 PALM BLVD.
BROWNSVILLE, TX 78520
T: (956) 421-1010
E: DAVID@LAWOFFICEOFDHS.COM

VERIFICATION OF COUNSEL

I, Alfonso Otero, hereby certify that I am familiar with the case of the named Petitioner and that the facts stated above are true and correct to the best of my knowledge and belief.

/s/ Alfonso Otero
Alfonso Otero

CERTIFICATE OF SERVICE

I, Alfonso Otero, hereby certify that the foregoing document was served on Counsel for the Government on October 24, 2025 by the ECF electronic filing system.

/s/ Alfonso Otero
Alfonso Otero

WORD COUNT CERTIFICATION

The undersigned, counsel of record for Petitioners certifies that this Memo contains **6,264 words**, which complies with the word limit of L.R. 11-6.1.

/s/ Alfonso Otero
Alfonso Otero