

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

MARVIN BERNARDINO CUN CHITAY,

A# 

v.

PAM BONDI, ET AL.

PETITIONER

CIVIL ACTION NO. 5:25-cv-113-DCB-ASH

RESPONDENTS

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE

Petitioner, by and through Counsel, respectfully files this Reply to Respondents' Response in opposition to Petitioner's Habeas petition.

INTRODUCTION

Petitioner Cun Chitay has been detained since July 14, 2025. Proceedings against the Petitioner were terminated by an Immigration Judge on July 28, 2025. The government filed an appeal to this judgment on August 22, 2025. Despite filing an appeal, the government failed to properly serve the Petitioner with the appeal notice and briefing schedule as he was not represented by Counsel before the Board of Immigration Appeals ("BIA"). Because DHS failed to file a change of address showing that the Petitioner was detained in Mississippi, the briefing schedule was instead sent to the detention center as he was detained previously. (*See* attached **Exhibit A, Returned Mail**). The government filed the change of address form with the BIA on October 29, 2025. (*See* attached **Exhibit B, I-830E**). The government tried to oppose the Petitioner's Motion for Summary Dismissal of the Appeal but was rejected for failing to file it on time. (*See* attached **Exhibit C, BIA Rejection Notice**). So, while the government initially sought to appeal the immigration judge's termination of proceedings, it has thoroughly failed to follow the regulations

and court procedures in pursuing the appeal. This is meant to update this Honorable Court regarding the Petitioner's immigration court proceedings.

I. PROPER RESPONDENTS

"The federal habeas statute straightforwardly provides that the proper respondent to a habeas petitioner is 'the person who has custody over [the petitioner].'" *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (quoting 28 U.S.C. § 2243 ("The writ . . . shall be directed to the person having custody of the person detained.")). The *Padilla* Court continues to provide that the warden is the proper respondent not the Attorney General or some other remote supervisory official." *Padilla*, 542 U.S. at 435. In *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003), the court held that the ICE Field Office Director is the immediate custodian of an individual in immigration detention. *Id.* at 322. ICE maintains multiple regional field offices to oversee the day-to-day operations of its enforcement and detention apparatus. The New Orleans Field Office is responsible for enforcement operations and detention in Louisiana and Mississippi. As such, Director Acuna is a proper respondent. This does not mean that the remaining individuals and entities are not also properly named.

Petitioner is being detained under a new ICE directive, issued in coordination with the Department of Justice, instructing that Section 235(b) of the INA, 8 U.S.C. § 1225(b), rather than Section 236, 8 U.S.C. § 1226(a), applies to all illegal immigrants except those admitted to the United States and chargeable with deportability under Section 237 of the statute. Petitioner is not seeking only his immediate release or a bond hearing in this action, but also asks the Court to declare that § 1226(a), rather than § 1225(b)(2)(A), is the appropriate statutory provision governing the detention of noncitizens like him-that being, individuals who were not at the border or a port of entry seeking admission to the United States when they were detained, but who were already

residing in the country when they were apprehended and charged as inadmissible. Secretary Noem, through Homeland Security, and Attorney General Bondi, through the Department of Justice, are responsible for the directive at issue, the implementation and enforcement of the INA (including the detention and removal of noncitizens), and the immigration court system where Petitioner is being denied a bond hearing.

For these reasons, the Court should not dismiss the named Respondents from this action.

II. EXHAUSTION OF REMEDIES

No statutory requirement of administrative exhaustion applies to Petitioner's case. Moreover, the judicially created "general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts" does not apply to Petitioner's present challenge, as there are no prescribed administrative remedies to which he could resort. *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992), superseded by statute on other grounds as recognized in *Woodford v. Ngo*, 548 U.S. 81 (2006).

The Respondents inadvertently conflate removal proceedings with bond/custody proceedings. In Bond or Custody proceedings, DHS has taken the position that a noncitizen like Petitioner, who entered without inspection, is subject to mandatory detention under 8 U.S.C. § 1225, and the Executive Office for Immigration Review has affirmed that view. In a published decision, the Board of Immigration Appeals recently held that "Immigration Judges lack authority to hear bond requests or to grant bond to [noncitizens] who are present in the United States without admission." *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Under the BIA's interpretation, Petitioner is ineligible for bond as a noncitizen who entered the United States without inspection. Accordingly, there are no administrative remedies that he could exhaust before seeking habeas relief. *See Singh v. Lewis*, No. 4:25-CV-96-RGJ, 2025 WL 2699219, at *3 (W.D. Ky. Sept. 22,

2025) (“[t]he United States has made clear their position on Section 1225, and it is being applied at all levels within the DHS. Therefore, it is unlikely that any administrative review would lead to the United States changing its position and precluding judicial review”); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *4 (E.D. Mich. Aug. 29, 2025) (“Because exhaustion would be futile and unable to provide Lopez-Campos with the relief he requests in a timely manner, the Court waives administrative exhaustion and will address the merits of the habeas petition.”).

Further, neither an immigration judge nor the Board of Immigration Appeals can rule on a petitioner’s constitutional claims. *See Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 n.2 (BIA 2020) (holding that IJs and the BIA lack any authority to consider the constitutionality of the statutes or regulations governing immigration detention that they administer and are bound to follow); *Matter of C--*, 20 I. & N. Dec. 529, 532 (B.I.A. 1992) (“[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.”); *see also Gonzalez v. O’Connell*, 355 F.3d 1010, 1017 (7th Cir. 2004) (noting that “the BIA has no jurisdiction to adjudicate constitutional issues”).

Petitioner is therefore properly before this Court.

III. PETITIONER IS ENTITLED TO RELEASE OR A BOND HEARING

A. Section 1252(g) does not apply to this Petition

Petitioner does not challenge the commencement, adjudication, or execution of his removal before this Court. This statute provides that: “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter.” 8 U.S.C. § 1252(g). “[T]he provision applies only to [these] three discrete

actions.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999). Section 1252(g) is thus even “narrower” than § 1252(b)(9) and should not be read as a “general jurisdictional limitation.” *Reno*, 583 U.S. at 487; *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020).

As noted at the top of this Reply, there is no need to challenge these, as the government has largely failed to perfect its appeal in opposition to the termination of proceedings ordered back in July. Petitioner is only asking this Court to consider that he should be released from detention or given a bond hearing.

B. Section 1252(b)(9) does not apply to this Petition

This statute provides that: legal claims “arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.” 8 U.S.C. § 1252(b)(9). Those claims must be filed “with an appropriate court of appeals.” § 1252(a)(2)(D). Respondents urge that because Petitioner’s claims “arise from” the commencement of removal proceedings, they are barred by § 1252(b)(9).

Yet, § 1252(b)(9) “does not reach ‘claims that are independent of, or wholly collateral to, the removal process.’” *E.O.H.C. v. Sec’y United States Dep’t of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (quoting *Aguilar v. U.S. Immigr. & Customs Enf’t Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007)). The Supreme Court has defined “removal process” with respect to those undocumented immigrants who seek to be heard on their continuing detention:

[Habeas Petitioners] are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined. Under these circumstances, § 1252(b)(9) does not present a jurisdictional bar.

Jennings v. Rodriguez, 583 U.S. 281, 294-95 (2018)

Petitioner challenges the denial of a bond hearing, which regulations of the Executive Office for Immigration Review provide is “independent of” and “collateral to” the removal process. *E.O.H.C.*, 950 F.3d at 186. *See* 8 C.F.R. § 1003.19(d) (“Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding.”)

Moreover, § 1252(b)(9) “does not strip jurisdiction when aliens seek relief that courts cannot meaningfully provide alongside review of a final order of removal.” *E.O.H.C.*, 950 F.3d at 186; *id.* at 180 (“If ‘later’ is not an option, review is available now.”) This is an immediate issue, because the Court of Appeals could not “meaningfully” redress Petitioner’s purportedly unlawful denial of release on bond should his final removal be ordered.

This Court need not consider Petitioner’s removal proceedings as we only seek review of the unlawful denial of a bond hearing.

C. Petitioner is detained pursuant to 8 U.S.C. § 1226(a) and should be entitled to release or a bond hearing

The bulk of Petitioner’s habeas petition addresses this issue. Petitioner will seek to address the developments in the law since this Petitioner was initially filed in October. At its heart, this issue comes down to statutory interpretation.

i. Statutory Interpretation

Section 1225(b) provides that: “in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding.” 8

U.S.C. § 1225(b)(2)(A) (*emphasis added*). Detention is mandatory in those circumstances. *See Jennings*, 583 U.S. at 300.

Section 1226(a) provides that: “[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Aliens detained under § 1226(a) may appeal an “initial custody determination”—including the setting of bond—to an IJ. 8 C.F.R. § 1236.1(d)(1). *See also Jennings*, 583 U.S. at 288–89 (the AG “may release” noncitizens on “bond” or “conditional parole,” “except as provided in subsection (c)”) (quoting §§ 1226(a) and (c)).

Petitioner has never applied for admission to the United States. He entered the country without inspection or admission in 2008. He did not enter through a port of entry. Petitioner was detained on July 14, 2025, without ever having been in removal proceedings. He has an approved spousal petition (I-130) and provisional waiver of unlawful presence (I-601A) and a pending case with the Department of State’s National Visa Center. He was preparing to leave the United States for a yet-to-be-scheduled visa interview before he was detained. The Supreme Court has explained that “aliens already in the country pending the outcome of removal proceedings” may be detained pursuant to § 1226(a). *Jennings*, 583 U.S. at 289.

If, as the Government argues, § 1225(b) applies to all “applicant[s] for admission,” then there was no need for Congress to limit the statute’s application to “alien[s] seeking admission.” This Court should avoid reading this part of § 1225(b) out of existence. *See United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (“[E]very clause and word of a statute should have meaning.”)

The court should give each and every word meaning and this includes the title. A “title is especially valuable [where] it reinforces what the text’s nouns and verbs independently suggest.”

Yates v. United States, 574 U.S. 528, 552 (Alito, J., concurring in judgment). Section 1225 is titled: “Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.” The added word of “arriving” indicates that the statute governs “arriving” noncitizens, not those present already. *See Pizarro Reyes v. Raycraft*, 2025 WL 2609425 at *5 (E.D. Mich. Sep. 9, 2025). This is supported by the text of the statute itself, which is focused on inspections for noncitizens when they arrive via “crewman” or as “stowaways.” 8 U.S.C. § 1225(b)(2). These limited, and more specific methods of entry suggest that Section 1225 is limited to noncitizens arriving at a border or port of entry and are presently “seeking admission” into the United States. *Pizarro Reyes v. Raycraft*, 2025 WL 2609425 at *5 (citing *Dubin v. United States*, 599 U.S. 110, 118 (2023)). This further supports an interpretation that Section 1225 is much more limited in scope than the Respondents assert. *Id.*

In addition to the title and language of Section 1225, the statutory scheme is also helpful in identifying the intent of Congress when enacting it. Courts are generally tasked with “constru[ing] statutes, not isolated provisions.” *King v. Burwell*, 576 U.S. 473, 486 (2015). The Supreme Court has explained that Section 1226 is the “default rule” and “applies to aliens already present in the United States.” *Jennings v. Rodriguez*, 583 U.S. 281, 288, 301 (2018). The inclusion of the “catchall” provision, after a more specific and detailed Section 1225, is likely no coincidence, but rather a way for Congress to capture noncitizens who fall outside of the specified categories.” *Pizarro Reyes v. Raycraft*, 2025 WL 2609425 at *5, *See Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1258 (W.D. Wash. 2025).

Further, if all aliens here illegally are already subject to mandatory detention under § 1225(b), then the Laken Riley Act’s recent expansion of mandatory detention under § 1226(c)(1)(E) would also be beside the point. *See Pub. L. No. 119-1*, 139 Stat. 3 (2025).

Respectfully, this Court should not render an Act of Congress superfluous. *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).

Respondents cite to *Garibary-Roblero v. Noem* in support of their contention that “applicants for admission” can “encompass both arriving aliens and illegal entrants” See Respondents’ Response in opposition at 19; (citing *Garibary-Roblero v. Noem* No. 1:25-CV-177-H, 2025 WL 3264478, at *2 (N.D. Tex. Oct. 24, 2025)). Petitioner wants to make it clear that he is not an arriving alien. Respondents did not classify the Petitioner as an “arriving alien” when they initiated removal proceedings against the Petitioner by serving him with a Notice to Appear (“NTA”). Respondents, instead, classified Petitioner as “an alien present in the United States who has not been admitted or paroled.” (See attached **Exhibit D, Petitioner’s Notice to Appear**). Petitioner’s immigration court counsel filed written pleadings with the Court admitting factual allegations (1), (2), (4), and (5) of the NTA, denying the other two allegations. Counsel conceded the 212(a)(6)(A)(i) charge but denied the 212(a)(7)(A)(i)(I) charge. (See attached **Exhibit E, Immigration Court transcript**).

Beyond the cases cited in the Response, there are no appellate or trial courts that can be cited to support the Respondents’ interpretation. It is also important to note that while some courts have sided with the Respondents’ novel statutory interpretation, *hundreds* of District Court cases have found that the Respondents’ interpretation lacks merit. (See attached **Exhibit F, Appendix of Cases**).

ii. Legal Developments under Maldonado Bautista

On November 20, 2025, the district court for the Central District of California granted partial summary judgment on behalf of individual plaintiffs and on November 25, 2025, certified

a nationwide class and extended declaratory judgment to the certified class. *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, --- F. Supp. 3d ----, 2025 WL 3289861, at *11 (C.D. Cal. Nov. 20, 2025) (order granting partial summary judgment to named Plaintiffs-Petitioners); *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, --- F. Supp. 3d ----, 2025 WL 3288403, at *9 (C.D. Cal. Nov. 25, 2025) (order certifying Plaintiffs-Petitioners' proposed nationwide Bond Eligible Class, incorporating and extending declaratory judgment from Order Granting Petitioners' Motion for Partial Summary Judgment).

The declaratory judgment held that the Bond Denial Class members are detained under 8 U.S.C. § 1226(a) and thus may not be denied consideration for release on bond under § 1225(b)(2)(A). *Maldonado Bautista*, 2025 WL 3289861, at *11. Nonetheless, the Executive Office for Immigration Review and its subagency the Immigration Court and the Department of Homeland Security (DHS) have largely decided this order does not apply beyond the jurisdiction of the *Maldonado Bautista* Court.

If the declaratory judgment were to be extended to all eligible class members across the United States, Petitioner would be an eligible class member.¹

IV. PETITIONERS DETENTION DOES VIOLATE DUE PROCESS

The Due Process Clause of the Constitution extends to all persons regardless of status. *A.A.R.P. v. Trump*, 605 U.S. 91, 94 (2025). This is meant to include noncitizens, even those who entered the country without permission. *Id.* To determine whether a civil detention violates a detainee's due process right, courts apply a three-part balancing test set forth in *Mathews v. Eldridge*, 424

¹ Petitioner is a member of the Bond Eligible Class, as he:

- a. does not have lawful status in the United States and is currently detained at the Adams County Correctional Center. He was apprehended by immigration authorities on July 14, 2025;
- b. entered the United States without inspection over fifteen (15) years ago and was not apprehended upon arrival, and
- c. is not detained under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231.

U.S. 319 (1976). The Court must weigh: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the United States' interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

Respondents do not address these factors so Petitioner will. Respondents do, however, discuss the Petitioner's detention as if it were to effectuate his removal. Petitioner would remind the Court that the immigration judge, utilizing his discretion and applicable caselaw, ordered those proceedings be terminated. The government did appeal but has failed to file any support for their appeal. Respondents also cite to caselaw suggesting that detention is necessary while awaiting removal, post order. Petitioner is not subject to a removal order.

A. Matthews Analysis Suggests there is a Due Process Violation

i. Private Interest

Petitioner has a significant private interest in not being detained. One of the "most elemental of liberty interests" is to be free from detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the very liberty that [the Due Process Clause] protects." *Zadydas v. Davis*, 533 U.S. 678, 690 (2001). Courts can also consider the detainee's condition of confinement. *Martinez v. Noem*, 2025 WL 2598379, at *2 (W.D. Tex. Sep. 8, 2025). This is to determine if the conditions are indistinguishable from criminal incarceration. *Id.* In this case, Petitioner is separated from his United States citizen wife and children. The family has been deeply affected by his detention and are now faced with the stark reality that they may have to spend the holidays without their husband/father. Petitioner's appeal has been pending for several months but given the backlog

currently faced by the Board of Immigration Appeals, it is unclear how long he will have to wait for the Board's decision. Therefore, this first factor strongly favors Petitioner.

ii. Risk of Error

The second factor concerns the risk of erroneous deprivation of Petitioner's liberty interest because he has been unable to seek a bond under the government's new policy. Given the immigration judge's decision to terminate the removal proceedings, it is unlikely, absent the appeal, that Petitioner would still be detained. Petitioner's inability to seek a bond based on the government's change of policy means he is at a severe risk of his liberty interest being deprived. In other words, but for the government's bond policy, he likely would have been released on bond while the appeal is pending. Petitioner has extensive ties to the United States and no criminal history in this country or any other country for that matter. He has worked for years to pursue legal status through his petition based on marriage to a United States citizen and the approval of a provisional waiver of his unlawful presence. USCIS, in approving the I-601A waiver, found that his United States wife would suffer extreme hardship if he were to be denied entry back into the United States, following his immigrant visa interview in Guatemala. Despite this finding, he has been forcibly separated from his spouse without legal recourse regarding his detention.

The procedures under § 1226(a), including an individualized bond hearing by an immigration judge substantially mitigate the risk of erroneous deprivation of Petitioner's liberty, because those procedures require the government to analyze whether Petitioner is a flight risk or a danger to the community. Petitioner is neither a flight risk nor a danger to the community and would easily prove both if given an opportunity. Further, if for some reason the immigration judge did find flight risk, Petitioner could appeal that decision to a higher court or refile with proof of a changed circumstances. The outcome of the bond hearing would be subject to "numerous levels of review,

each offering [Petitioner] the opportunity to be heard by a neutral decisionmaker.” *Rodriguez Diaz v. Garland*, 55 F.4th 1189, 1210 (9th Cir. 2022) (finding the bond hearing procedures available through the implementing regulations of § 1226(a) would render “the risk of erroneous deprivation . . . relatively small.”)

As such, this factor also weighs heavily in favor of Petitioner.

iii. United States’ Interest

The final *Mathews* factor concerns the United States’ interest in the procedure, as well as any financial or administrative burdens associated with permissible alternatives. *Mathews*, 424 U.S. at 335. Petitioner concedes that the United States has a strong interest in ensuring that noncitizens do not present harms to their communities and that they appear for future immigration court proceedings. However, in this case, Petitioner has never been convicted of any crime and has never missed a court hearing. The only arguable negative in his case would be his initial illegal entry into the United States more than fifteen years ago. An independent, neutral arbitrator determined that removal proceedings were not needed for Petitioner and terminated those proceedings. The Court would not have done this if the government was seeking his immediate removal. Further, despite the appeal being initiated, Petitioner has shown this Court proof of DHS’s failure to pursue the appeal. It is abundantly clear that if the government’s bond policy, to detain Petitioner without a bond, was no longer in place that, “existing statutory and regulatory safeguards adequately serve the governmental interest in promotion public safety.” *Gunaydin v. Trump*, 2025 WL 1459154, at *10 (D. Minn. May 21, 2025).

This final factor also weighs heavily in favor of Petitioner.

V. THIS COURT HAS JURISDICTION TO GRANT DECLARATORY RELIEF

As has been argued throughout this Reply, Petitioner does not seek review of his immigration court proceedings. In fact, the immigration judge ruled in favor of his motion to terminate the proceedings. Respondents again confuse the requirements under 8 U.S.C. § 1252(g) with the purpose of this Habeas petition. As previously stated, **hundreds** of District Court cases have ended in orders, declaring Petitioners are detained under § 1226(a) **not** § 1225(b)(2), declaring that such a policy is in violation of the plain language of the INA, granting Habeas relief, ordering bond hearings be held, and in many cases ordering the release of the Petitioners straightaway. This Honorable Court has the same authority and in this particular case, should exercise that authority in favor of Petitioner.

CONCLUSION

Given the overwhelming support for release from detention or a bond hearing being ordered for Petitioner in this case, we respectfully ask this Court to grant the Habeas Petition.

Dated: December 14, 2025

Respectfully submitted,

/s/Brandon H. Riches

Brandon H. Riches

The Riches Law Firm, PLLC

Mississippi Bar # 105273

P.O. Box 1526

Ocean Springs, MS 39566

Cell/WhatsApp:(228) 800-4178

Email: Brandon@Richeslawfirm.com