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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Edy Noe Baten Perez,

Petitioner,

v.

John Cantu, et al.,

Respondents.

Case No. 2:25-CV-03854-PHX-SMB (MTM)

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

The government's opposition (Doc. 7) to Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) only confirms why the petition should be granted.

The government does not dispute that Petitioner is entitled to a bond hearing under regulations that have existed since 1997 and has thereby forfeited any argument regarding Petitioner's second claim. The Court may thus grant the petition for that reason alone.

The government instead claims that Petitioner is subject to mandatory detention because he is an "applicant for admission" under 8 U.S.C. § 1225(a)(1). However, this position ignores that applicants for admission are subject to mandatory detention only if they are also "seeking admission" under § 1225(b)(2)(A)—Petitioner is not. As dozens of federal judges have already found, § 1225(b)(2)(A) only applies to noncitizens who are detained while seeking to enter the country. Holding otherwise would render superfluous not only the phrase "seeking admission", but several provisions in § 1226(c), which requires the mandatory detention of noncitizens who entered without admission *and* have engaged in various forms of criminal or terrorist activity.

ARGUMENT

I. The Government Has Forfeited Any Opposition to Petitioner's Claim That He Is Entitled to a Bond Hearing Under Federal Regulations.

Petitioner argues that Respondents are violating both the Immigration and Nationality Act (INA) and federal regulations by detaining him without a bond hearing. The government argues that Petitioner is subject to mandatory detention, but it does not dispute that he is entitled to a bond hearing under regulations that the Attorney General

(AG) herself promulgated nearly three decades ago. The government thus forfeits any opposition to Petitioner's claim that he must receive a bond hearing under the regulations.

As Petitioner previously explained, the regulations at 8 C.F.R. § 1236.1(d)(1) give immigration judges (IJs) the general authority to grant bond to noncitizens in removal proceedings. The only noncitizens ineligible for bond are those subject to final orders of removal or referenced in 8 C.F.R. § 1003.19. *Id.* Meanwhile, the regulations at 8 C.F.R. § 1003.19(h)(2) list five categories of noncitizens for whom IJs may not grant bond, including (as relevant) "arriving aliens" in removal proceedings, § 1003.19(h)(2)(i)(B).

The decision to allow IJs to grant bond to noncitizens who are present without admission was deliberately made by then-AG Janet Reno following the passage of the Illegal Immigration Reform and Immigration Responsibility Act of 1996.[1] *See* Doc. 1 at ¶¶ 33-35. Specifically, an initial proposed rule provided that IJs could not grant bond to "[i]nadmissible aliens in removal proceedings." 62 Fed. Reg. 444, 483 (Jan. 3, 1997). That provision was replaced, however, with one that would apply only to "[a]rriving aliens . . . in removal proceedings."[2] 62 Fed. Reg. 10312, 10361 (March 6, 1997). As the AG explained, "[t]he effect of this change is that inadmissible aliens, except for arriving aliens, have available to them bond redetermination hearings before an IJ[.]" *Id.* at 10323.

Relatedly, the AG also considered how to define "arriving alien." In the proposed rule, "arriving alien" applied to "aliens arriving at a port-of-entry, aliens interdicted at sea,

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[1] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA).

[2] This provision was originally promulgated as 8 C.F.R. 236.1(c)(5)(i) and was later transferred to 8 C.F.R. 1003.19(h)(2)(i)(B).

and aliens previously paroled upon arrival." 62 Fed. Reg. at 445. The AG noted that the phrase might "also include other classes of aliens, e.g., those apprehended crossing a land border between ports-of-entry," and solicited comments. *Id.* Despite suggestions to expand it, the AG chose not to modify the proposed definition of "arriving alien," which remains materially identical today. 62 Fed. Reg. at 10303; *see* 8 C.F.R. § 1001.1(q).

As this discussion illustrates, the decision to afford bond hearings to noncitizens who are present without admission was conscious and deliberate. Notably, agencies must "use the same procedures when they amend or repeal a rule as they used to issue [it] in the first instance." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101 (2015) (citation omitted). As a result, the agency "may not slip by the notice and comment rule-making requirements . . . by merely adopting a *de facto* amendment to its regulation through adjudication." *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003).

To be sure, *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), principally relied on the text of the INA rather than regulations. But "it is well established that regulations promulgated by the Attorney General are binding on the Board and the Immigration Judges," *Matter of Akram*, 25 I. & N. Dec. 874, 880 (BIA 2012) (citation omitted), and the Board thus "ha[s] no authority to declare regulations to be invalid or constitutionally defective." *Id.* (citation omitted).

II. The Government's "Plain Language" Argument Is Wrong

A. The Government Ignores the Definition of "Admission," Which Only Applies to Noncitizens Seeking to Enter the Country

Respondents claim that Petitioner is subject to mandatory detention under the

"plain language" of section 1225. Doc. 7 at 1. This argument rests on a syllogism. The government states that every noncitizen who is present without admission is subject to mandatory detention because, under 1225(a)(1), every such person must be deemed to be an "applicant for admission." Doc. 7. at 4-5; *id.* at 6-7 ("applicant[s] for admission" are subject to mandatory detention while in removal proceedings under 1225(b)(2)(A)).[3]

The government is mistaken for a simple reason: being an "applicant for admission" is necessary but not sufficient for a noncitizen to be subject to 1225(b)(2)(A). A noncitizen is subject to mandatory detention under 1225(b)(2)(A) only if he is (1) an "applicant for admission," (2) "seeking admission," *and* (3) not "clearly and beyond a doubt entitled to be admitted." *Id.* While all noncitizens who enter the country without admission may satisfy the first condition, they do not necessarily satisfy the second.

Meanwhile, Congress defined "admission" as "the lawful *entry* of the alien *into* the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (emphasis added). "[A] definition which declares what a term 'means' excludes any meaning that is not stated." *Colautti v. Franklin*, 439 U.S. 379, 392 n. 10 (1979). Accordingly, "the phrase 'seeking admission' means that one must be actively 'seeking' 'lawful entry.'" *Lepe v. Andrews*, 2025 WL 2716910 at *10 (E.D. Cal. Sept. 23, 2025) (citation omitted)). "Construing section 1225(b)(2) to apply to noncitizens already

[3] The government's assertion raises an obvious question: "if Congress's intention was so clear, why did it take thirty years to notice?" *Romero v. Hyde*, No. 25-11631, 2025 WL 2403827 at *29 (D. Mass. Aug. 19, 2025). The assertion is also undermined by its concession in at least one other case that noncitizens in Petitioner's position would have been eligible for bond prior to July 8—the date on which ICE "revisited" its legal position. *Zumba v. Bondi*, No. 25-14626, 2025 WL 2753496 at *11 (D.N.J. Sept. 26, 2025).

residing in the country would read the word 'entry' out of the definitions of 'admitted' and 'admission.'" *Chafla v. Scott*, No. 25-437, 2025 WL 2688541 at *19 (D. Maine Sept. 21, 2025) (citing § 1101(a)(13)(A)). "By contrast, § 1226(a) sets forth 'the default rule' for detaining and removing aliens 'already present in the United States.'" *Quispe-Ardiles v. Noem*, No. 25-1382, 2025 WL 2783800 at *12 (E.D. Va. Sept. 30, 2025).

The government's claim further contradicts long-standing BIA case law. For example, in *Matter of Y-N-P-*, 26 I. & N. Dec. 10, 12-13 (BIA 2012), the Board held that a noncitizen who was present without admission was not "applying for admission" for purposes of a waiver because "being an 'applicant for admission' under. Accordingly, just as being an applicant for admission does not mean a noncitizen is "applying for admission" for purposes of 1182(h), nor does it mean a noncitizen is "seeking admission" for purposes of 1225(b)(2)(A). *Torres v. Barr*, 976 F.3d 918, 929 (9th Cir. 2020) (en banc).

The government also cites a report from the House Judiciary Committee for the proposition that Congress intended to replace "'certain aspects of the current 'entry doctrine,' under which illegal aliens who entered the United States without inspection gained equities and privileges in immigration proceedings unavailable to aliens who presented themselves for inspection at a port of entry." Doc. 7 at 5-6 (citing H.R. Rep. 104-469, pt. 1, at 225). But simply because Congress wished to replace certain aspects of the entry doctrine does not mean it intended to replace *all* aspects of the doctrine. Further, the actual Conference Report twice stated that 1225 would only apply to "aliens arriving" and that the newly enacted "[1226(a)] restates the current provisions . . . regarding the authority of the Attorney General to arrest, detain, and release on bond an alien *who is not*

lawfully in the United States." H.R. Conf. Rep. No. 104-828 at 208, 209, 210 (1996).

Notably, whereas Petitioner cited dozens of district court decisions that have rejected the government's position, the government cites only two that have accepted it. [4] But those decisions are manifestly unpersuasive. In *Vargas Lopez v. Trump*, No. 25-562, 2025 WL 2780351 (D. Neb. Sept. 30, 2025), the court stated that 1225(b)(2)(A) and 1226 overlap like a "Venn diagram," that some noncitizens fall under both sections, and that DHS can choose in such cases whether to subject such a noncitizen to mandatory detention under 1225(b)(2) or discretionary detention under 1226(a). *Id.*

The court's reasoning does not withstand scrutiny. Congress provided that those subject to 1225(b)(2)(A) "shall be detained" during removal proceedings, while those subject to 1226(a) "may [be] release[d]" during such proceedings. Thus, the government has repeatedly conceded that 1225(b)(2)(A) and 1226 are "mutually exclusive." *J.U. v. Maldonado*, No. 25-4836, 2025 WL 2772765 at *11-12 (E.D.N.Y. Sept. 29, 2025); *Lopez Benitez v. Francis*, No. 25-5937, 2025 WL 2267803 at *10 (S.D.N.Y. Aug. 8, 2025).

Meanwhile, in *Chavez v. Noem*, No. 3:25-cv- 02325-CAB, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025), the court relied on an overreading of legislative history. The court stated that prior to the enactment of 1225(a)(1), "an 'anomaly' existed 'whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully.'" *Id.* at 12 (quoting *Torres*

[4] Dozens more federal judges have since joined the list of those who have rejected the government's position. POLITICO, *More than 100 judges have ruled against the Trump admin's mandatory detention policy*, https://www.politico.com/news/2025/10/31/trump-administration-mandatory-detention-deportation-00632086.

v. Barr, 976 F.3d at 918). The court thus believed that Congress enacted 1225(a)(1) to ensure "'that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission.'" *Id.*

In truth, far from being designed to subject all noncitizens who are present without admission to mandatory detention, section 1225(a)(1) was enacted for a far more mundane purpose—namely, that Congress was merely trying to fill a potential gap in the INA created by *Matter of Badalamenti*, 19 I. & N. Dec. 623 (BIA 1988). There, the Board held that a noncitizen who had been paroled into the United States for criminal prosecution, but who was acquitted of all charges, could not be considered an "applicant for admission"—and thus not subject to the grounds of inadmissibility—until he had been given a reasonable period of time to voluntarily leave the country. *Id.* at 625-27.

According to then-General Counsel of the former Immigration and Naturalization Service (INS), Congress was concerned that *Matter of Badalamenti* could allow noncitizens who entered the country without inspection to defeat charges of inadmissibility.[5] Specifically, authorities worried that such noncitizens would not be regarded as "applicants for admission"—and would thus remain immune from detention and placement in removal proceedings—unless and until they were given a reasonable time to depart the country. Congress enacted section 1225(a)(1) to foreclose this argument.

Finally, although the government relies on *Jennings v. Rodriguez*, the Supreme

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[5] David Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 Yale L.J. Online 167, 176-77 (2012).

Court's analysis undercuts its position. *Jennings* made clear that sections 1225 and 1226 govern the detention of two distinct and mutually exclusive classes of noncitizens: those who were "apprehended trying to enter the country," and those "who are already present inside the country." *Id.* at 285. The Court explained that 1225 applies "at the Nation's borders and ports of entry," while 1226 applies to those "inside the United States."[6] *Id.* at 287-88. The government's belief that 1225(b)(2)(A) applies to noncitizens who have already effected an entry into the United States thus conflicts with *Jennings* itself, along with *Clark v. Martinez*, 543 U.S. 371, 373 (2005), which similarly described 1225(b)(2)(A) as applying to "alien[s] *arriving* in the United States."

B. The Government's Argument Renders Superfluous Multiple Provisions of 8 U.S.C. § 1226(c), Including the Key Provision of the Laken Riley Act

Even if section 1225(b)(2)(A) was not clear on its face, the government's argument would still be wrong because it renders multiple provisions of section 1226(c) completely superfluous. As explained, 1226(c) sets forth various categories of noncitizens who are subject to mandatory detention while in removal proceedings for having engaged in criminal or terrorist activity. Doc. 1 at ¶¶ 28, 36, 59. Thus, if it was "correct that § 1225(b)'s mandatory detention provisions apply to all persons who have not been admitted into the United States, that would render superfluous those provisions of § 1226 that apply to certain categories of inadmissible aliens, such as § 1226(c)(1)(A), (D), and (E)." *Hasan*

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[6] During oral argument in *Jennings*, the Solicitor General confirmed that noncitizens who previously entered the country without inspection and had been living in the United States are subject to detention under § 1226, not § 1225. *Jennings v. Rodriguez*, 583 U.S. 281 (2018), Transcript of Oral Argument (No. 15-1204), p.8.

v. Crawford, 2025 WL 268225 at *22 (E.D. Va. Sept. 19, 2025). *See also Quispe-Ardiles*, 2025 WL 2783800 at *16 ("If § 1225(b) already required mandatory detention of all noncitizens who have not been admitted, these provisions would be meaningless."). [7]

Notably, the government does not respond to this argument. And in *Matter of Yajure Hurtado*, the BIA did not dispute that its reading of 1225(b)(2)(A) rendered multiple provisions of 1226(c) completely superfluous. It simply stated that "'redundancies are common in statutory drafting,'" and that "'[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text.'" 29 I. & N. Dec. at 222 (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)). The Board was gravely mistaken: the text of 1225(b)(2)(A) mandates the contrary result.

Additionally, Respondents disregard a fundamental maxim of statutory construction—that "'Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Sackett v. EPA*, 598 U.S. 651, 677 (2023) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001)). As the Board recognized, noncitizens who entered the country without admission were entitled to request release on bond prior to the passage of IIRIRA. 29 I. & N. Dec. at 223 (citing 8 U.S.C. § 1252(a)(1), 8 C.F.R. § 242.2(c)(1) (1995)). At the time of IIRIRA's enactment, approximately 5 million noncitizens were living in the country illegally, of which approximately 3 million were present without

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[7] Section 1226(c)(1)(E) was enacted earlier this year in the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3, and applies to noncitizens who entered the country without admission and were thereafter charged with, arrested for, convicted of, or admitted committing various offenses. Tellingly, the government's opposition makes no mention of the Laken Riley Act.

admission.[8] If Congress intended to make those 3 million noncitizens subject to mandatory detention—along with the untold numbers who might enter without admission in the future—it stands to reason that lawmakers would have done so directly, particularly given that it enacted other provisions that expressly set forth categories of noncitizens subject to mandatory detention. *See*, *e.g.*, §§ 1225(b)(1)(B)(ii), 1225(b)(1)(B)(iii)(IV), 1226(c).

C. Granting Bond Hearings to Noncitizen Who are Present Without Admission Would Not Reward Them for Entering the Country Unlawfully

Finally, and contrary to what the BIA suggested in *Matter of Yajure Hurtado*, accepting Petitioner's argument would not "reward[]" noncitizens for entering without admission by bestowing upon them a right to a bond hearing that is unavailable to noncitizens who present themselves at a port of entry. 29 I&N Dec. at 228.

First, the BIA's assertion ignores the distinct constitutional implications of requiring mandatory detention for noncitizens who seek admission at a port of entry versus those who are present without admission. The Supreme Court has (in)famously held that noncitizens who seek admission at a port of entry can be indefinitely detained precisely because they have no Due Process rights. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215-16 (1953). By contrast, once a noncitizen "enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the

[8] Department of Homeland Security, Office of Homeland Security Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1996*, https://ohss.dhs.gov/sites/default/files/2023-12/Unauthorized%2520Immigrant%2520Population%2520Estimates%2520in%2520the%2520US%25201996.pdf.

United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 698 (2001).

Second, the BIA's assertion ignores the distinction the AG herself drew when she promulgated the regulations described in Part I, *supra*. If Congress truly believed these regulations were *ultra vires*, lawmakers could have amended the INA to explicitly require detention of noncitizens who are present without admission during removal proceedings.

Finally, the BIA's assertion implies that adopting Petitioner's position would somehow make noncitizens who are present without admission better off than they were before the enactment of the IIRIRA. In truth, noncitizens who were present without admission had been eligible for bond for at least four decades prior to IIRIRA. Thus, the question is not whether Congress intended to "reward" noncitizens for entering without admission, but whether Congress intended to entirely eliminate the right to a bond hearing for every noncitizen who entered without admission, regardless of their equities.

As Judge Lanza recently put it, the government's argument is "directed to the wrong branch of government—[a] Court's role is simply to interpret the relevant statutory provisions." *Echevarria v. Bondi*, No. 25-3252, 2025 WL 2821282 at *29 (D. Ariz. Oct. 3, 2025). "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton County*, 590 U.S. 644, 680-81 (2020). Accordingly, if Congress wishes to preclude immigration judges from granting bond to all noncitizens who entered without admission, it can amend the INA.

CONCLUSION

For these reasons, the Court should grant the Petition.

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Respectfully submitted,

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