UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

David Kennedy
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Attorneys for Petitioner

Elsa Marina Escun Barrera Petitioner, VS. **George Sterling**, Deputy Managing Director, Atlanta Field Office, Immigration and Customs Enforcement And Removal Operations ("ICE/ERO") **Jason Streeval**, Warden, Stewart Detention Center; **Todd M. Lyons,** Acting Director of U.S. Immigration and Customs Enforcement; **Kristi Noem,** Secretary of the U.S. Department of Homeland Security; and **Pamela Bondi,** Attorney General of the United States, in their official capacities, Respondents.	)	Case No. 4:25-cv-331

PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Petitioner, Mr. Elsa Marina Escun Barrera ("Petitioner"), by and through undersigned counsel, files this Petition For Writ of Habeas Corpus under *28 U.S.C. § 2241* (habeas corpus); *28 U.S.C. § 1331* (federal question jurisdiction); *5 U.S.C. § 702*, et. seq (Administrative Procedure Act, "APA"); and *28 U.S.C. § 2201* (Declaratory Judgment Act), to review the lawfulness of his detention.

1. Petitioner, Mrs. Elsa Marina Escun Barrera, has been in the United States since the year 2000. In the year 2002, Petitioner, now a mother, gave birth to a U.S. citizen daughter, who is presently 23 years old. *United States v. Wong Kim Ark*, 169 U.S. 649

(1898) (seminary case establishing the principle of birthright citizenship based on the Fourteenth Amendment).

2. Petitioner Elsa Marina was born in the year 1968 and is fifty-seven years old.

3. Petitioner has a Violence Against Women Act petitioner (A "VAWA Petition", or a "Form I-360") pending with U.S. Citizenship and Immigration Services ("USCIS").

4. Officers arrested the Petitioner on June 10, 2025, as the Petitioner showed up for an ICE check-in under an Order of Supervision ("OSUP") with ICE. Since then, Petitioner has been under the custody and control of Respondents. *See also* *28 U.S.C. § 2254 "Advisory Committee Note"* describing that "The boundaries of custody remain somewhat unclear" and that "It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. […]" (Quoting *Morgan v. Thomas*, 32 F.Supp. 565 (S.D.Miss. 1970).

5. After her arrest, Petitioner was placed into immigration detention at the Stewart Detention Center located in Stewart County, Georgia, located within the federal middle district of Georgia.

6. After her arrest and placement into immigration detention under the control of Respondents, Petitioner had been making daily phone calls to her daughter and other family members, on some days calling twice a day, until August 14, 2025, when the phone calls suddenly stopped, and when the daughter of the Petitioner noticed that Petitioner was no longer making any phone calls to herself or to her family.

7. For the next twenty-four days after August 14, 2025, Petitioner's family received no communication from the Petitioner or from the Respondents or any of their various agents regarding where the Petitioner was or what was happening to her.
8. Then, on September 7, 2025, Petitioner's sister received a text message from a doctor at Emory Hospital. That text message from the doctor at Emory Hospital said that the Petitioner was taken to a hospital and had undergone brain surgery. That text message from the doctor included a phone number in the text, which Petitioner's sister then called – during that phone call the hospital declined to give the Petitioner's sister information about the Petitioner. After multiple such phone calls to the hospital, an ICE officer called the Petitioner's sister back and said that if the Petitioner's sister kept calling the hospital then ICE would "deport" the Petitioner.
9. That September 7th, 2025, communication was when the Petitioner's family first became aware that the Petitioner had been taken to a hospital and had been subjected to a brain surgery during the course of her stay in immigration detention at Stewart County Detention Center.
10. Prior to her immigration detention, Petitioner did not have a history of preexisting conditions that suggested Petitioner was at risk of requiring brain surgery. The Petitioner's family believes Petitioner became sick and injured during her immigration detention at the Stewart Detention Center.
11. Then on September 21, 2025, the family of Petitioner received another text message informing them that Petitioner was safely returned to her detention in the Stewart County Detention center, also adding that the Petitioner would be unable to communicate until possible Monday, September 22nd, or Tuesday, September 23rd,

but adding further that the sender of this text message could not communicate anymore at that time because ICE officers were then 'outside.'

12. During the phone calls whereby Petitioner's family member attempted to call the hospital at the number provided in the September 7th, 2025, text message described above in paragraphs 7, et. seq, Petitioner's family members sometimes would reach ICE officers, other times would reach a hospital manager or other hospital staff, but during these calls Petitioners' family was repeatedly informed that under unspecified 'Georgia law' that ICE or the hospital could not release information regarding the Petitioner Elsa Marina.

13. On September 26, 2025, Petitioner's legal counsel had scheduled a Video Teleconference Call ("VTC") whereby instant legal counsel was scheduled to meet over video call to speak with the detained-Petitioner. Fifteen minutes prior to her scheduled VTC appointment, an agent of the Respondents – an ICE officer - sent an email to instant counsel apprising that the VTC appointment was cancelled because Petitioner Elsa Marina was not "at the detention center at this time."

14. In the absence of judicial intervention, it is not reasonably foreseeable that Petitioner will be released; so, he now seeks a writ of habeas corpus to vindicate his regulatory, statutory, and constitutional rights. See *Matter of Yajure-Hurtado* (Board of Immigration Appeals ("BIA") decision dated September 5, 2025, in which BIA states that "…Immigration Judges lack authority to hear bond requests or to grant bond to aliens who are present in the United States without admission." Making a bond request futile as elaborated below).

II. JURISDICTION

15. Petitioner incorporates and re-alleges all other paragraphs of this Petition as if fully set forth herein, and as if fully set forth under all other parts of this Petition.[1]

16. This court has jurisdiction. *U.S. Const. art. I, § 9, Cl. 2* (Suspension Clause); *28 U.S.C. § 1331* (Federal subject matter jurisdiction); *28 U.S.C. § 2241* (Habeas corpus). *See also Zadvydas v. Davis*, 533 U.S. 678 (2001) (holding section 2241 habeas proceedings are available as a forum for statutory and constitutional challenges to post-removal-period detention); *28 U.S.C. § 1651* (All Writs Act); *5 U.S.C. § 702* (Administrative Procedure Act - "Right of review"); *Rasul v. Bush*, 42 U.S. 466 (2004) (Jurisdiction over petitions for habeas corpus exists where the custodian can be reached by service of process from the court in which the petition has been brought).

17. This court may grant relief under the U.S. Constitution and habeas corpus statutes. *U.S. Const. art. I, § 9, Cl. 2* (Suspension Clause); *28 U.S.C. § 2241* (habeas); *Zadvydas, supra*; *28 U.S.C. § 1651* (All Writs Act); *8 U.S.C. § 1252(e)(2)* (Immigration and Nationality Act, "INA").

18. This court is not deprived of jurisdiction by *28 U.S.C. § 2241(e)(1)* (Petitioner has not been determined to be an "enemy alien combatant" and is not "awaiting such determination); or by *8 U.S.C. § 1252(a)(2)(B)* (This Petition does not involve the denial of discretionary relief).

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[1] To avoid duplicity, Petitioner incorporates and re-alleges all paragraphs of this Petition within each other part of this Petition. Petitioner will avoid restating a prefatory sentence of 'incorporation by reference' as, per Rule 10 of the Federal Rules of Civil Procedure, "A statement in a pleading may be adopted by reference elsewhere in the same pleading [...]." Fed. R. Civ. P. 10(c). Petitioner incorporates by reference the totality of assertions in this Petition to be incorporated by reference to the remainder of the totality of the Petition - including every page, paragraph, section, or any other component whatsoever of the Petition.

III. VENUE

19. Venue is proper in the Middle District of Georgia, because Petitioner is detained at the Stewart Detention Center located in Stewart County, Georgia, in the city of Lumpkin[2], Georgia, which is in the middle district.

20. Venue is proper because "a substantial part of the events or omissions giving rise to the claim occurred" in this district. *28 U.S.C. § 1391(b)(2)*.

21. Venue is also proper because one or more of the Defendants is an officer or employee of the United States or an agency thereof acting in his or her official capacity. *28 U.S.C. § 1391(e)*.

IV. EXHAUSTION OF REMEDIES

22. This action is not barred by the exhaustion of remedies doctrine.

23. Under the exhaustion of remedies doctrine, a Petitioner must generally pursue and 'exhaust' all administrative remedies before seeking relief in federal court. *See e.g.* *Thompson v. United States Marine Corp*, D.C. Docket No. 09-80312-CV-KLR (unpublished) (An example of the D.C. Circuit applying the doctrine of exhaustion of remedies in an appeal from an 11th Circuit Case). Exhaustion is described as a prudential consideration rather than jurisdictional. *Hull v. IRS*, No. 10-1410, 2011 WL 3835402 (10th Cir. Aug. 31, 2011) (Baldock, J.); *see also* William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since Darby*, 18 Pace Environmental Law Review 1 (2000) (Tracing the origins of the doctrine of exhaustion of remedies from common law and federal equity jurisdiction).

[2] The city of "Lumpkin" is in Stewart County, Georgia, in the Federal Middle District of Georgia. That city of "Lumpkin" is not located within "Lumpkin County" of the Federal Northern District of Georgia. *See e.g.* *History of Lumpkin*, accessed June 19th, 2025, https://cityoflumpkin.org/history/.

24. Where Congress imposes an exhaustion remedy by statute, exhaustion of remedies is required. *Coit Indep. Jt. Venture v. FSLIC*, 489 U.S. 561, at 579 (1989) (*Citing Weinberger v. Salfi,* 422 U. S. 749, 422 U. S. 766 (1975); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 303 U. S. 50-51 (1938)). If an exhaustion requirement is not *explicit* in the statute, then "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme." *Coit Indep. Jt. Venture v. FSLIC*, 489 U.S. 561, at 579 (1989) (Citing *Patsy v. Florida Board of Regents*, 457 U.S. 496, 502 (1982)).

25. The INA has an exhaustion provision that only in the context of "final orders of removal." *8 U.S.C. § 1252(d)(1)* ("A court may review a final order of removal only if the alien has exhausted all administrative remedies to the alien as of right."). The § 1252(d)(1) exhaustion requirement is not jurisdictional. *Santos-Zacaria v. Garland,* 498 U.S. ___ (2023). Here, as the Petitioner is not subject to a final order of removal, § 1252(d)(1) does not apply; so, § 1252(d)(1) does not *explicitly* impose an exhaustion requirement. Nor can such a requirement be read as *implicit* in INA § 1252(d)(1). For citations describing the interpretation of statutes, *see, e.g. In re Adoption of Doe*, 156 Idaho 345, 349 (Idaho case describing that where statutory language is plain and unambiguous, courts give effect to the statute as written without engaging in statutory construction); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (1st Ed. 2012) (Describing canons of statutory construction including the 'Supremacy of Text Principle', 'Omitted Case Canon', 'Negative Implication Canon' [*expressio unius est exclusio alterius*],

or the 'Whole Text Canon' – each of which supports the claim that Congress did not expressly or implicitly impose an exhaustion of remedies requirement that applies to the issues of this case). Therefore, the exhaustion of remedies doctrine does not apply in this case.

26. Even if the doctrine of exhaustion of remedies does apply, the Petitioner satisfies that doctrine via satisfaction of several exceptions to it. Exhaustion of remedies may be excused if:

(1) Requiring exhaustion of administrative remedies causes prejudice, due to unreasonable delay or an 'indefinite timeframe for administrative action';
(2) The agency lacks the ability or competence to resolve the issue or grant the relief requested;
(3) Appealing through the administrative process would be futile because the agency is biased or has predetermined the issue; or
(4) where substantial constitutional questions are raised.

Iddir v. INS, 301 F.3d 492, 500 (7th circuit case citing McCarthy v. Madigan, 503 U.S. 140, 146-48 (1992); *Bowen v. City of New York,* 476 U.S. 467, 483 (1986); *Mathews v. Diaz,* 426 U.S. 67, 76 (1976); *Gibson v. Berryhill,* 411 U.S. 564, 575 n. 14 (1973); *Houghton v. Shafer,* 392 U.S. 639, 640, 88 (1968); *McNeese v. Board of Educ.* 373 U.S. 668, 675 (1963)).

27. Each of the exceptions of paragraph 17 applies and excuses the exhaustion requirement in this case.

28. Exhaustion would be futile based on recent Board of Immigration Appeals (BIA) case law and BIA interpretations of the INA. On September 5, 2025, the Board of Immigration Appeals (BIA) issued a decision, *Yajure-Hurtado*, which holds that "Based on the plain language of section 235(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2)(A) (2018), Immigration Judges lack authority to hear bond requests or to grant bond to aliens who are present in the United States without admission." *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). The

BIA therefore asserts that aliens who are present without admission, a class that encompasses several million people[3], cannot request or be granted bond by an immigration judge. *See also* *Matter of Q Li*, 29 I&N Dec. 66 (BIA 2025) (BIA holds all "applicant[s] for admission" who are "arrested and detained without a warrant while arriving in the United States, whether or not at a port of entry, and subsequently placed in removal proceedings are subjected to mandatory detention under 8 U.S.C. § 1225(b) (2018), INA § 235(b) and [are] ineligible for release on bond under 8 U.S.C. § 1226(a) (2018), INA § 236(a); *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019); *but see* *Matter of Akhmedov* (In a decision that came out *before* the *Yajure-Hurtado* case and seemingly contradicts that case, and which the Attorney General designated as a precedent decision "all proceedings involving the same issue or issues", the BIA concluded that 8 U.S.C. § 1226(a), INA § 236(a) governed alien's custody redetermination where the alien entered the U.S. unlawfully in January 2022).

29. Petitioner entered the United States without inspection, without a visa, in the year 2007 and has not subsequently been admitted into the U.S.

30. Therefore, Petitioner is arguably an "applicant for admission" and, so long as *Yajure-Hurtado* remains in effect, that BIA interpretation would subject Petitioner to mandatory detention under 8 U.S.C. § 1225(b)(1)(A)(i), INA § 235 making the Petitioner ineligible for bond.

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[3] See Jeffrey S. Passel and Jens Manuel Krogstad, *U.S. Unauthorized Immigrant Population Reached a Record 14 Million in 2023*, Pew Research, Sept. 12, 2025, accessible at https://www.pewresearch.org/race-and-ethnicity/2025/08/21/u-s-unauthorized-immigrant-population-reached-a-record-14-million-in-2023/#:~:text=The%20number%20of%20unauthorized%20immigrants%20in%20the%20United%20States%20reached,a%20comprehensive%20and%20detailed%20estimate (Describing that "Unauthorized immigrants were 27% of the U.S. foreign-born population in 2023", consisting of "14.0 million [people]...")

31. Therefore, it would be "futile", based on the clear language of the BIA holding in *Yajure-Hurtado*, to pursue an immigration bond with that administrative agency because BIA has pre-decided the issue of Petitioner's bond eligibility, along with the bond eligibility of all other "aliens who are present in the United States without admission." *See also McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) ("an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it." Citing *Gibson* v. *Berryhill,* 411 U. S., at 575, n. 14; *Montana National Bank of Billings* v. *Yellowstone County,* 276 U. S. 499, 505 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief" in face of prior controlling court decision – here, similarly, BIA has expressly demonstrated its belief that IJs lack jurisdiction to grant a bond to the Petitioner); *Houghton* v. *Shafer, 392* U. S. 639, 640 (1968); *Association of National Advertisers, Inc.* v. *FTC,* 201 U. S. App. D. C. 165, 170-171, 627 F.2d 1151, 1156-1157 (1979) (bias of Federal Trade Commission chairman), cert. denied, 447 U. S. 921 (1980); *Patsy* v. *Florida International University, 634 F.2d 900, 912-913 (CA5 1981) (en banc)* (administrative procedures must "not be used to harass or otherwise discourage those with legitimate claims"), rev'd on other grounds sub nom. *Patsy v. Board of Regents of Florida*, 457 U. S. 496 (1982)).

32. Requiring exhaustion would furthermore raise a substantial constitutional question, cause prejudice due to an unreasonable delay and indefinite timeframe for agency action, and the agency by its own case law seems to admit that the Executive Office

for Immigration Review (EOIR) and its Immigration Judges (IJs) "lack the ability or competence to resolve the issue or grant the relief requested." *Quoting* Iddir v. INS; *see also* Zadvydas v. Davis, 533 U.S. 678 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem … Freedom from imprisonment-from government custody, detention, or other forms of physical restraint- lies at the heart of the liberty that Clause protects… this Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections [citing United States v. Salerno, discussed below]"; *see also* U.S. Const. amend. V, § 5 (Due Process Clause); Reno v. Flores, 507 U.S. 292, at 292 (1993) (The Due Process Clause applies in the immigration context and extends its protections to noncitizens).

V. REQUIREMENTS OF 28 U.S.C. § 2241, 2243

33. The Petitioner is presently kept in a jail cell at an immigration detention center under the control of Respondents by and through their various agents. The Petitioner is therefore in the "custody" of the Respondents under 28 U.S.C. § 2241. See also *Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968)* ("… the 'in custody' determination is made at the time the habeas petition is filed."); Rumsfeld v. Padilla, 542 U.S. 426, 437 (2004) ("[O]ur understanding of custody has broadened to include restraints short of physical confinement.")
34. Under 28 U.S.C. § 2243, the court "shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto."

35. In a petition for a writ of habeas corpus, the following timeline applies: first, the applicant files the petition, second, the court "shall forthwith" either award the writ or issue an order to show cause, third, the writ or order to show cause "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed." *28 U.S.C. § 2243*. When the writ is 'returned' by the respondent, "a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed." *Id.*; *see also Fay v. Noia*, 372 U.S. 391, 400 (1963) (The Writ of Habeas Corpus is "perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement.")

V. PARTIES

36. The Petitioner is Elsa Marina Escun Barrera. The Petitioner is not a citizen of the United States and is classified as an "alien" under the INA. *28 U.S.C. § 1101(a)(3).*

37. In accordance with *28 U.S.C. § 2242*, Petitioner alleges "the name of the person who has actual custody over the petitioner", for the various Respondent-custodians, are as follows: The Respondents are **George Sterling**, Deputy Managing Director of the Atlanta Field Office of Immigration and Customs Enforcement And Removal Operations ("ICE/ERO"). The Atlanta Field Office is responsible for local custody decisions relating to non-citizens charges with being removable from the United States, including the arrest, detention, and custody status of non-citizens. Respondent Sterling is a legal custodian of the Petitioner; **Jason Streeval**, the Warden of Stewart Detention Center, with immediate physical custody of the Petitioner based on the contracts of that facility with U.S. Immigration and Customs Enforcement (ICE) to

detain noncitizens. Respondent Streeval is a legal custodian of the Petitioner; **Todd M. Lyons** is the Acting Director of U.S. Immigration and Customs Enforcement, and he has authority over the actions of ICE in general. Respondent Lyons is a legal custodian of the Petitioner; **Kristi Noem** is the Secretary of the U.S. Department of Homeland Security (DHS), and has authority over the actions of all other DHS Respondents in this case, as well as the operations of DHS. Respondent Noem is a legal custodian of Petitioner and is charged with faithfully administering the immigration laws of the United States. And **Pamela Bondi** is the Attorney General of the United States of America and a senior official of the U.S. Department of Justice (DOJ), with authority to adjudicate removal cases and to oversee the Executive Office for Immigration Review (EOIR) which administers the immigration court and BIA. Respondent Bondi is a legal custodian of the Petitioner.

38. Each Respondent is sued in his or her official capacity.

39. The Petitioner is presently detained at **Stewart Detention Center** and is under the custody and direct control of the Respondents or their agents.

VI. LEGAL FRAMEWORK

40. Noncitizens in immigration proceedings are entitled to Due Process under the Fifth Amendment of the U.S. Constitution. *Reno v. Flores*, 507 U.S. 292, 306 (1993). Immigration detention should not be used as a punishment and should only be used when, under an individualized determination, a noncitizen is a flight risk because they are unlikely to appear for court or is a danger to the community. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

41. Removal proceedings described in Immigration and Nationality Act (INA) section 240 are used to determine whether individuals, such as Petitioner, are to be removed from the United States. *8 U.S.C. § 1229a* [INA § 240].

42. The INA establishes various procedures through which individuals may be detained pending a decision on whether the noncitizen is to be removed from the United States. *8 U.S.C. § 1226(a)* (Attorney general has discretion to, based on a warrant, arrest and detain an alien pending a decision on whether the alien is to be removed, and discretion to decide whether to release the alien on bond and what amount of bond to set). Individuals detained under § 1226(a) are generally able to apply for an immigration bond out of immigration detention, subject to the applicability of various other exceptional statutory provisions. *Id*.

43. The INA also has provisions describing the limited circumstances under which aliens may *not* be released on a bond. *8 U.S.C. § 1226(c)* (An alien who commits or is convicted of any of a set of specified offenses is ineligible to receive an immigration bond); *8 U.S.C. § 1225(b)* [INA § 235] (Under a statutory heading that reads "Inspection by immigration officers; ***expedited removal*** of inadmissible arriving aliens; referral for hearing" (emphasis added), this statutory provision read plainly seems to apply only in the context of expedited removal proceedings in contrast with 'conventional' removal proceedings conducted under *8 U.S.C. § 1229a(c)(7)* [INA § 240], and only to "aliens arriving in the United States and certain other aliens who have not been admitted or paroled." § 1225(b)(1)); *Jennings v. Rodriguez*, *583 U.S. ___ (2018) (Justice Alito, writing for the Supreme Court majority, analyzes the scope of 8 U.S.C. § 1226(a) contrasted to § 1226(c), and noting that "Like §1225(b),*

§1226(c) does not on its face limit the length of the detention it authorizes. In fact, by allowing aliens to be released "only if" the Attorney General decides that certain conditions are met, §1226(c) reinforces the conclusion that aliens detained under its authority are not entitled to be released under any circumstances other than those expressly recognized by the statute. And together with §1226(a), §1226(c) makes clear that detention of aliens within its scope must continue "pending a decision on whether the alien is to be removed from the United States." §1226(a).")

44. At issue is the lawfulness of the Petitioner's detention. So, at issue is the legal authority by which the Respondents continue to detain the Petitioner and deny her the right to have a request for bond granted by an IJ, and whether that legal authority can withstand scrutiny based on the Constitution of the United States its various amendments, along with scrutiny under various U.S. statutes, regulations, and case law.

45. The primary legal dispute in this case centers on a question of statutory interpretation regarding the various provisions of the INA that describe the procedures by which a non-citizen can be detained, or by which an immigration judge can set a bond in a case. *See* *8 U.S.C. § 1226(a)*; *8 U.S.C. § 1226(c)*; *8 U.S.C. § 1225(b)(1)(A)(i)*; *8 U.S.C. § 1101(a)* (INA definitions section).

46. Put another way, at issue is whether the INA is better read as having 8 U.S.C. § 1226(a) describe a general rule, that Immigration Judges ("IJs") *generally* have discretion to grant bond, with the other provisions of the INA, such as 1226(c) or § 1225(b) describing exceptions to that general rule that might apply when § 1226(a) does not; or conversely, whether the BIA got it right in *Matter of Yajure-Hurtado* in

stripping immigration judges of authority to hear or grant bond for "applicants for admission", and so whether BIA got it right in treating 8 U.S.C. §1225(b) as a sort of 'general rule' with the other statutory provisions rendered as exceptions of limited applicability.

47. The better argument is that 8 U.S.C. § 1226(a) describes a general rule, and applies to the Petitioner's instant immigration detention, and that 8 U.S.C. § 1225(b) applies to a circumscribed limited set of circumstances, since reasoning as if § 1225(b) could be a 'general rule' would render broad swathes of the INA to be superfluous and reckoned akin to dicta. See 8 U.S.C. § 1226(a), Id. § 1226(c).

48. 8 U.S.C. § 1225(b) on its face applies to detention of 'arriving aliens.' This classification does not extend to the Petitioner. Attempts by the government to re-classify the Petitioner as an "arriving alien" violate the INA and the due process clause.

49. Therefore 8 U.S.C. § 1226(a) is the statutory provision of the INA that properly governs the Petitioner's detention. The BIA got it wrong in *Yajure-Hurtado*, supra.

50. Agency interpretations of ambiguous statutory provision are entitled to no deference. *Loper Bright Enterprises v. Raimondo*, 602 U.S. 574 (2024) (*Overruling Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and noting agency interpretations are entitled to "respect" only to the extent those interpretations have the power to persuade, also citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). 8 U.S.C. § 1226(a), § 1226(c), § 1225(b), and so on, are ambiguous statutory provisions of which *Yajure-Hurtado* [while omitting reference to 8 U.S.C. § 1226(a)] provides agency interpretation of. The agency interpretation of the BIA in

Yajure-Hurtado is therefore not entitled to deference. See *Loper Bright Enterprises*, supra.

51. This court is therefore not bound by *Yajure-Hurtado*, *supra*.

VII. CLAIMS FOR RELIEF

COUNT ONE

Violation of Fifth Amendment Right to Due Process

52. The allegations in the above paragraphs are realleged and incorporated herein.

53. The Due Process Clause of the Fifth Amendment provides that "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, § 5. The Due Process Clause entitles aliens to due process in deportation proceedings. *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Demore v. Kim*, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001); *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (Criminal law case in which the Supreme Court noted in dicta that "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.")

54. Respondents have failed to uphold their Fifth Amendment obligations to provide the Petitioner with due process of law. See *Reno v. Flores*, supra; *Matthews v. Eldridge*, 424 U.S. 319 (1976) (Providing a balancing test to evaluate the sufficiency of process under the Fifth Amendment requirements of procedural due process); *Goss v. Lopez*, 419 U.S. 565 (1975) (Students facing temporary school suspensions had interests qualifying for protection of the due process clause which requires "at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from the school" including, inter alia, notice of the charges against

each student and an opportunity to present evidence or argument against those charges).

55. The Supreme Court has noted it would violate substantive due process for a statute to authorize detention that constitutes "impermissible punishment before trial." *United States v. Salerno*, 481 U.S. 739, 746 (1987). In *Salerno*, the Court was tasked with analyzing whether the Bail Reform Act of 1984 survived due process scrutiny. Justice Rehnquist writing for the *Salerno* majority held the Bail Reform Act of 1984 did *not* violate the substantive due process clause, reasoning: "[p]reventing danger to the community is a legitimate regulatory goal and the incidents of detention are not excessive in relation to that goal, *since the Act carefully limits the circumstances under which detention may be sought to the most serious of crimes, the arrestee is entitled to a prompt hearing, the maximum length of detention is limited by the Speedy Trial Act, and detainees must be housed apart from convicts*. Thus the Act constitutes a permissible regulation, rather than impermissible punishment." (emphasis added).

56. The present detention of the Petitioner under the interpretation of the INA the BIA urges in *Yajure-Hurtado* stand in striking contrast to the procedural protections listed in *Salerno* that the Chief Justice reasoned forced the Bail Reform Act to not be an "impermissible punishment." The BIA in *Yajure-Hurtado* envisions the INA as imposing a rule of mandatory detention that applies to a class of several million people, "aliens who are present in the United States without admission." *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025); *United States v. Salerno*, 481 U.S. 739, 746 (1987). Here, the Petitioner is kept in indefinite detention on the basis of no

crime at all. BIA urges that as a noncitizen "applicant for admission", he cannot receive a bond. *Yajure-Hurtado*, supra.

57. This is a habeas action challenging the lawfulness of the present detention of the Petitioner by the custodian-Respondents. The reasoning of *Yajure-Hurtado* is flawed and entitled to no deference. *Loper Bright Enterprises v. Raimondo* 603 U.S. 369 (2024) (Ending the 'Chevron Doctrine' and overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984)).

58. The BIA in *Yajure-Hurtado* looks to 8 U.S.C. § 1225(b)(2) (2018), INA § 235(b) in reaching its holding. That code section is entitled "Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing."

59. A striking contrast exists between the Bail Reform Act in *Salerno* and the present BIA interpretation of INA 235(b) put forth in Yajure-Hurtado – which envisions the INA as imposing a general rule of mandatory detention for a class of millions of people unsettling a decades-settled understanding that detention of a person is exceptional and poses, and that "… Freedom from imprisonment-from government custody, detention, or other forms of physical restraint- lies at the heart of the liberty that Clause protects." *Citing Zadvydas, supra*.

60. Petitioner's continued detention without opportunity to request bond violates the Due Process Clause of the Fifth Amendment, both substantive due process and procedural due process.

COUNT TWO

Violation of the Eighth Amendment Prohibition Against Cruel And Unusual Punishments

61. The allegations in the above paragraphs are realleged and incorporated herein.

62. Under the Eighth Amendment, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend VIII.

63. Deportation is not a "punishment" for a crime. *Wong Wing v. United States*, 163 U.S. 228, 236 (1896) (*Citing Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) *Elia v. Gonzales*, 431 F.3d 268, 276 (6th Cir. 2005); *Briseno v. Immigr. & Naturalization Serv.*, 192 F.3d 1320, 1323 (9th Cir. 1999); *Oliver v. U.S. Dep't of Just., Immigr. & Naturalization Serv.*, 517 F.2d 426, 428 (2d Cir. 1975) (despite its "severe … consequences," deportation is not a criminal punishment) (*Quoting Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952)).

64. Petitioner does *not* assert that deportation - by itself - is cruel and unusual punishment, but *rather*, where the Petitioner is detained based on a warrantless arrest without any immigration charge filed against him and while effectively denied the ability to request a bond hearing, in an immigration detention facility as overcrowded and unsafe as is Stewart Detention Center, *that* Petitioner may have a colorable Eighth Amendment claim. *See Model Rules of Professional Conduct Rule* 3.1 (Lawyers are not ethically barred, under the model rules, from raising good faith arguments for extension, modification or reversal of existing law)

COUNT THREE

Violation of the Immigration and Nationality Act ("INA")

65. Petitioner incorporates by reference the allegations of facts set forth in the preceding paragraphs.

66. The mandatory detention provision of *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, nor can it apply to all "applicants for admission" notwithstanding whether an agency interpretation of the INA concludes otherwise. *See Yajure Hurtado, supra*. The present immigration detention of the Petitioner is governed by *8 U.S.C. § 1226(a)*, and not by *8 U.S.C. § 1225(b)(2)*.

67. The application of § 1225(b)(2) to Petitioner unlawfully mandates her continued detention in violation of the INA.

COUNT FOUR

Violation of Bond Regulations and principles of Judicial Estoppel

68. Petitioner incorporates by reference the allegations of facts set forth in the preceding paragraphs.

69. In 1997, after Congress amended the INA through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). IIRIRA created various statutory provisions including *8 U.S.C. § 1226(a)*, and *8 U.S.C. § 1225(b)*.

70. EOIR and the then-Immigration and Naturalization Service issued an interim rule to interpret and apply IIRIRA. Specifically, under a heading that reads "Apprehension, Custody, and Detention of Aliens," those agencies explained that "[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination." 62 Fed. Reg. at 10323 (emphasis added). The agencies therefore clarified that individuals who had entered without inspection

remained eligible for consideration of a request for bond, which shows that – per that regulatory interpretation – those agencies considered that applicants for admission who become subject to immigration detention should generally be categorized as being subject to detention under *8 U.S.C. § 1226* and its implementing regulations.

71. Despite this regulatory history, the BIA in *Matter of Yajure Hurtado* concludes the other way around and interprets that "applicants for admission" who are detained are properly considered detained under *§ 1225(b)(2)*, rather than *8 U.S.C. § 1226(a)*, and are therefore subject to mandatory detention and per se ineligible to request or receive an immigration bond from an immigration judge.

72. The application of *§ 1225(b)(2)* to Petitioner unlawfully mandates her continued detention and violates *8 C.F.R. §§ 236.1*, *1236.1*, and *1003.19*.

73. The application of § 1225(b)(2) to Petitioner also violates principles of estoppel. *See B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015), requiring courts to respect agency determinations when the ordinary elements of preclusion are met; *but see Loper Bright Enterprises v. Raimondo*, 603 US ___ (2024) (Overruling the *Chevron Doctrine* and concluding that courts are not bound to defer to agency interpretations of ambiguous statutory provisions).

74. Furthermore, in *Jennings v. Rodriguez*, the Department of Homeland Security (DHS) explicitly acknowledged that individuals who have already entered the United States and are not apprehended within 100 miles of the border or within 14 days of entry are subject to discretionary detention under *8 U.S.C. § 1226(a)*, not mandatory detention under *§ 1225(b)*. During oral argument on November 30, 2016, then–Solicitor General Ian Gershengorn stated: "If they are not detained within 100 miles of the

border or within 14 days… then they are under 1226(a) and not 1226(c)" and further clarified, in response to a question concerning "an alien who has come into the United States illegally without being admitted [and] who takes up residence 50 miles from the border," the Government responded, "The answer is they are held under 1226(a) and that they get a bond hearing…" *Transcript of Oral Argument at 7–8, Jennings v. Rodriguez, 583 U.S. ___ (2018)* (No. 15-1204). DHS reiterated that such individuals "would be held under 1226(a)" and cited the administrative record to support that position. *Id*. These statements reflect DHS's prior litigation stance that § 1226(a) governs detention for noncitizens who have entered and are residing in the United States, a position directly contrary to the agency's current interpretation applying § 1225(b)(2)(A) to such individuals. Having prevailed in *Jennings* after taking this position, they should be estopped from taking the contrary position now simply because their political or litigation interests have changed. Estoppel in this case is necessary to preserve the predictability inherent in the rule of law and due process under the Fifth Amendment, as well as to protect the integrity of the judicial system. *See New Hampshire v. Maine*, 532 U.S. 742 (2001), judicial estoppel applies where a party assumes a position, prevails, and then adopts a contrary position to gain an unfair advantage.

WHEREFORE, Petitioner respectfully requests this Court grant the following:

1. Assume jurisdiction over this matter;
2. Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days.

3. Declare that Petitioner's detention violates the Due Process Clause of the Fifth Amendment;
4. Declare that Petitioner's detention violates the Eighth Amendment;
5. Issue a Writ of Habeas Corpus ordering Respondents to release Petitioner immediately or alternatively schedule a bond hearing under 8 U.S.C. § 1226(a) and not under 8 U.S.C. § 1225(b), as the former is the legally applicable statute.
6. Enjoin and prevent Respondents from transferring Petitioner out of her present place of confinement for the duration of the pendency of this litigation.
7. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act, and on any other basis justified under law; and
8. Grant any further relief this court deems just and proper.

Respectfully submitted this 17th day of October, 2025,

/s/ David S. Kennedy
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VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I represent Petitioner, Elsa Marina Escun Barrera, and submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

This 17th day of October, 2025,

/s/ David S. Kennedy
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