IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANSELMO FLORES PEREZ, Petitioner, v. U.S. DEPT. OF HOMELAND SECURITY, KRISTI NOEM, in her capacity as Secretary of Department of Homeland Security; et. al., Respondents.	Case No. 3:25-CV-02920-K-BN

PETITIONER'S REPLY BRIEF IN SUPPORT OF HABEAS PETITION & MOTION FOR PRELIMINARY INJUNCTION

RESPECTFULLY SUBMITTED,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Mr. Flores Perez, a devoted partner and loving father, has been detained in ICE custody without being provided a bond hearing as required by the INA and U.S. Constitution. The immediate impacts the loss of one's liberty are often far reaching and significant. For Mr. Flores Perez and his family, his current detention has significant impacts particularly for the family's oldest child who has been battling leukemia since 2023. For him, the loss of his father's liberty means the loss of the person who both physically and emotionally as his father is the primary financial provider and the person who got him to doctors' appointments. Mr. Flores Perez seeks this Court's urgent intervention and asks it to do the same Article III courts across the country have done in similar cases: find that without being provided a bond hearing before an IJ in accordance with the INA Mr. Flores Perez' detention is unlawful and order the government to promptly remedy it or immediately release him.

The central issue before this Court is straightforward: Are noncitizens like Petitioner, who are placed in removal proceedings after being encountered in the U.S. based on being present after entering without inspection (EWI), entitled to a bond hearing before a neutral adjudicator under 8 U.S.C. § 1226? Or, as the government now claims, are they subject to mandatory detention without any possibility of a bond hearing?

Petitioner's position affirms nearly three decades of settled agency practice and judicial interpretation.[1] The government's position, in stark contrast, asks this Court to

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[1] *See e.g., Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425, at *6–7 (E.D. Mich. Sept. 9, 2025) ("The BIA's decision to pivot from three decades of consistent statutory interpretation and call for

adopt a radical reinterpretation of a thirty-year-old statutory scheme—a theory announced and taken by the agencies in the last couple months. This new theory would require the Court to believe that for thirty years, the agencies charged with administering these laws and the federal courts reviewing their actions have all profoundly misunderstood the statute's "plain language."

This Court need not indulge such a sweeping and unsupported revision of established law. Petitioner's interpretation is consistent with historical practice as well as the U.S. constitution. Moreover, Petitioner's positions are supported by reasoned, persuasive, and detailed analysis from Article III courts across the country who have granted similar habeas petitions in recent weeks.[2] The government's new novel position, meanwhile, stands in direct opposition to this judicial consensus.

[Petitioner's] detention under § 1225(b)(2)(A) is at odds with every District Court that has been confronted with the same question of statutory interpretation.").

[2] *See e.g., Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Buenrostro-Mendez v. Bondi, et al.*, No. CV H-25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Jose J.O.E. v. Bondi*, No. 25-CV-3051 (ECT/DJF), 2025 WL 2466670 (D. Minn. Aug. 27, 2025); *Carmona-Lorenzo v. Trump*, No. 4:25CV3172, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Giron Reyes v. Lyons*, No. C25-4048-LTS-MAR, 2025 WL 2712427 (N.D. Iowa Sept. 23, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-326-LM-AJ (D.N.H. Sept. 8, 2025); *Choglio Chafla v. Scott*, 2025 WL 2688541 (D. Me. Sept. 21, 2025); *Samb v. Joyce*, No. 25 CIV. 6373 (DEH), 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *Leal-Hernandez v. Noem*, No. 1:25-CV-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255 (E.D. Va. Sept. 19, 2025); *Beltran Barrera v. Tindall*, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Cuevas Guzman v. Andrews*, No. 1:25-CV-01015-KES-SKO (HC), 2025 WL 2617256 (E.D. Cal. Sept. 9, 2025); *Caicedo Hinestroza v. Kaiser*, No. 25-CV-07559-JD, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Zaragoza Mosqueda v. Noem*, No. 5:25-CV-02304 CAS (BFM), 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025); *Garcia v. Noem*, No. 25-CV-02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *J.U. v. Maldonado*, 25-CV-04836, 2025 WL 2772765, at *5 (E.D.N.Y. Sept. 29, 2025);*Lopez v. Hardin*, No. 25-cv-830, 2025 WL 2732717, at *2 (M.D. Fla. Sept. 25, 2025)(agreeing on substantive claim but oddly not ordering any real relief in this decision);*Maldonado Vazquez v. Feeley*, 2:25-CV-01542-RFB-EJY, 2025 WL 2676082 (D. Nev. Sept. 17,

Critically, Petitioner's reading gives full effect to all the INA's provisions, including the statutory definitions given to the terms "admission," "admitted," and "application for admission" by Congress when IIRIRA was passed.[3] Meanwhile, the government asks the Court to ignore those definitions as well as circuit court precedent rejecting prior attempts by the government to ignore these definitions. Similarly, Petitioner's position harmonizes the statutes, regulations, decades of agency practice, and caselaw with the U.S. Constitution in a way that gives meaning to all the relevant provisions. Meanwhile, the government's interpretation renders that entire Laken Rile Act (LRA) superfluous, violates multiple constitutional provisions, decades of agency practice, and the most basic canons of statutory construction

The government's continued detention of Mr. Flores Perez without a bond hearing before an IJ is unlawful. This conclusion is difficult to doubt given decades of agency practice since the passage of IIRIRA in 1996. While the statutes at issue in this case have not changed in those decades, the agencies who administer them have. Drastically. In addition to the changes in the agencies administering the statutes, the decades since IIRIRA have seen countless provisions of the INA litigated ad nauseum and the entire first Trump presidency. Not once, however, did anyone ever suggest that all EWI aliens are subject to mandatory detention for the duration of removal proceedings.

2025); *Rivera Zumba v. Bondi*, No. 25-cv-14626, 2025 WL 2753496, at *7 (D.N.J. Sept. 26, 2025); *S.D.B.B. v. Johnson et. al.*, No. 1:25-CV-882, 2025 WL 2845170, at *5 (M.D.N.C. Oct. 7, 2025); *Velasquez Salazar v. Dedos*, No. 25-cv-835, 2025 WL 2676729 (D.N.M. Sept. 17, 2025).

[3] 8 U.S.C. §§ 1101(a)(4) and (a)(13)(A).

For these reasons and those discussed below as well as in prior filings, Mr. Flores Perez respectfully requests the Court grant his Motion for a Preliminary Injunction and Habeas Petition, and as a result, order the government to either promptly provide him with a bond hearing before a neutral IJ or release him.

OVERVIEW OF RELEVANT LEGAL FRAMEWORK

"The complex provisions of the INA have provoked comparisons to a 'morass.',[4] a "Gordian knot,"[5], and 'King Minos's labyrinth in ancient Crete.'"[6] These comparisons are well-deserved. Without any background or experience with immigration law it is easy to get lost in the INA's labyrinth of statutes and terms. Worse, the INA has a unique way of making it difficult for non-practitioners to realize that an interpretation they are confident is right—is actually incorrect. To facilitate an understanding of the applicable statutory provisions, their meaning, and the way they work in practice, Mr. Flores Perez believes it would be helpful to provide an overview of the most relevant legal authorities to the issues presented here.

I. Relevant Constitutional Provisions.

The Fourth Amendment's protection against unreasonable seizures applies to all persons within the territory of the United States, including noncitizens. Immigration

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[4] *Torres v. Barr*, 976 F.3d 918, 923 (9th Cir. 2020) (quoting *Lacsina Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009) (quoting *Agyeman v. I.N.S.*, 296 F.3d 871, 877 (9th Cir. 2002))

[5] *Id.* (quoting *Aguilar v. U.S. Immig. & Customs Enf't*, 510 F.3d 1, 6 (1st Cir. 2007)).

[6] *Id.* (quoting *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d Cir. 1977)).

officials may not detain individuals encountered in the interior indefinitely or without probable cause; the Fourth Amendment simply does not permit it.

"Longstanding precedent establishes that '[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'"[7] The law in this area is not grey. Rather, for decades, it has been "clearly established . . . that immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention."[8] The clarity of the law in this area is bolstered by the statutes proscribing its arrest authority: 8 U.S.C. § 1226(a) and 8 U.S.C. § 1357. These statutes, "[c]ourts have consistently held," "must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause."[9] The "robust consensus of cases [and] persuasive authority" in this area makes it "beyond debate that an immigration officer . . . would need probable

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[7] *Morales v. Chadbourne*, 793 F.3d 208, 215 (2015) (quoting *United States v. Brignoni–Ponce*, 422 U.S. 873, 878, (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16–19, (1968)); *see also Dunaway v. New York*, 442 U.S. 200, 216 (1979) ("[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

[8] *Id* at 215.

[9] *Id.* at 216-17 (citing *Au Yi Lau*, 445 F.2d at 222; *see, e.g., Tejeda–Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir.1980) ("The phrase 'has reason to believe' [in § 1357] has been equated with the constitutional requirement of probable cause."); *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir.1975) ("The words [in § 1357] of the statute 'reason to believe' are properly taken to signify probable cause."); *see also United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir.2010) ("Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause.").

cause to arrest and detain individuals for the purpose of investigating their immigration status."[10]

Likewise, everyone in the United States is entitled to the protections of the constitution's due process clauses which prevents a person's liberty from being taken from them for non-criminal matters unless one of two Supreme Court approved justifications exists (i.e., flight risk or danger). The Supreme Court has explained the critical distinction between those outside the U.S. and those within it in this regard, stating:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance.[11]

In *Zadvydas v. Davis*, the Supreme Court left no doubt that civil detention, including in the immigration context, requires a sufficient justification—namely preventing flight or danger to the community.[12] Where no such justification exists detention without due process is unconstitutional.[13]

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[10] (*Id.*)

[11] *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001)

[12] *Id.*

[13] *Id.*

At the nation's borders, however, the constitution's protections are lowered, even nonexistent for those who are not in the U.S. (including those who are at a POE). The history of the INA, the constitution's protections as well as the lowered protections at or near the border, are reflected in the INA's statutory scheme.

II. Congress specifically defined the terms "Application for Admission," "Admission," and "Admitted," to leave no doubt that that one who is "seeking admission" must be physically outside of the United States and asking to come in.

Under the post-IIRIRA INA, it is admission, not entry, that matters. The term "admission" and "admitted," previously absent from the INA were added and defined at 8 U.S.C. § 1101(a)(13)(A), which provides:

> The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien *into the United States* after inspection and authorization by an immigration officer.

Meanwhile, the related term "application for admission" (also added by IIRIRA) defined at 8 U.S.C. § 1101(a)(4), provides: "The term 'application for admission' has reference to the application for admission *into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa."[14]

The terms "application for admission," "admission," and "admitted" all make Congress' intent clear that admission cannot happen anywhere other than when at the proverbial door asking to come in. In *Medina-Rosales v. Holder*, the Tenth Circuit referencing the definition of "admitted" at 8 U.S.C. § 1101(a)(13), explained:

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[14] 8 U.S.C. § 1101(a)(4) (emphasis added).

> This definition "is limited and does not encompass a post-entry adjustment of status," because it "refers expressly to *entry into* the United States, denoting by its plain terms passage into the country from abroad at a port of entry."[15]

By explicitly defining these terms, the "work" of determining their meaning and the meaning of statutes using them has been done by Congress.[16] And in so doing, courts analyzing such provisions have rejected the government's claims that an admission can happen from within the U.S.[17] This has been repeatedly affirmed by courts interpreting INA provisions containing these terms.[18]

A. Caselaw interpreting eligibility for a waiver under 8 U.S.C. § 1182(h) affirmed that the definition found at § 1101(a)(13) leaves no doubt an admission requires "passage into the country from abroad at a port of entry."

An illustration of the fact that by defining admission the way it did Congress

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[15] *Medina-Rosales v. Holder*, 778 F.3d 1140, 1145 (10th Cir. 2015) (quoting *Negrete–Ramirez*, 741 F.3d at 1051); *see also Papazoglou*, 725 F.3d at 793 ("That provision therefore encompasses the action of an entry into the United States, accompanied by an inspection or authorization."); *Bracamontes*, 675 F.3d at 385 ("Clearly, neither term includes an adjustment of status; instead, both contemplate a physical crossing of the border following the sanction and approval of United States authorities."); *Martinez*, 519 F.3d at 544 (recognizing that " 'admission' is the lawful *entry* of an alien after inspection, something quite different ... from post-entry adjustment of status").

[16] *Martinez v. Mukasey*, 519 F.3d 532, 543-44 (5th Cir. 2008).

[17] *See e.g. id.* (rejecting the government's argument that an alien's adjustment of status within the United States was the equivalent of "being admitted to the United States as an alien lawfully admitted for permanent residence" as that phrase is used in 8 U.S.C. § 1182(h)).

[18] In its response, the government claims "if a former legal permanent resident is found within the country after having relinquished their status, the noncitizen is deemed to be 'seeking admission.'" The plethora of ways in which this single sentence is wrong are many. As an initial matter, LPRs who formally and voluntarily abandon their status would not be a LPR anymore. Alternatively, a LPR who has been absent from the U.S. for a long period of time may upon their return to the U.S. be questioned at a POE about their absence and other circumstances which may lead the officer to conclude they abandoned their status. In such case, such an alien necessarily is at a POE and seeking admission into it. The Supreme Court's decision in *Vartelas v. Holder* was entirely about the "new disability" § 1101(a)(13)(C) placed on LPR ability to travel outside the country due to the potential consequences on their return. Simply put, this attempt to use § 1101(a)(13)(C) to support its case is completely meritless and based entirely on false premises.

unambiguously defined admission to " encompasses the action of an entry into the United States, accompanied by an inspection or authorization."[19]

This is illustrated by the caselaw interpreting eligibility for a waiver under 8 U.S.C. § 1182(h). Specifically, courts tasked with determining whether an alien who had adjusted their status inside the United States, (rather than being admitted as a LPR at a POE), and subsequently was convicted of an aggravated felony, could apply for a waiver under § 1182(h).[20] The relevant portion of the statute in that case provided:

> No waiver shall be granted under this subsection *in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ... since the date of such admission* the alien has been convicted of an aggravated felony...[21]

The Tenth Circuit, interpreting this provision, explained the consensus and clarity on this issue in *Medina Rosales v. Holder*, stating:

> Eight circuits . . . have held that this language clearly and unambiguously precludes eligibility for a waiver after conviction of an aggravated felony only if the alien received LPR status at the time the alien lawfully entered the United States, but it does not apply to an alien who obtained LPR status after having been present in the United States before acquiring that status.[22]

This interpretation is consistent with the statutory definition given to the terms admission

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[19] *Papazoglou v. Holder*, 725 F.3d 790, 792–94 (7th Cir.2013).

[20] *Id.*

[21] 8 U.S.C. § 1182(h) (emphasis added).

[22] *Medina-Rosales v. Holder*, 778 F.3d 1140, 1144 (10th Cir. 2015) (citing *Husic v. Holder*, 776 F.3d 59, 60–67 (2nd Cir.2015); *Stanovsek v. Holder*, 768 F.3d 515, 516, 517–19 (6th Cir.2014); *Negrete–Ramirez v. Holder*, 741 F.3d 1047, 1050–54 (9th Cir.2014); *Papazoglou v. Holder*, 725 F.3d 790, 792–94 (7th Cir.2013); *Leiba v. Holder*, 699 F.3d 346, 348–56 (4th Cir.2012); *Hanif v. Att'y Gen.*, 694 F.3d 479, 483–87 (3rd Cir.2012); *Bracamontes v. Holder*, 675 F.3d 380, 382, 384–89 (4th Cir.2012); *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1365–67 (11th Cir.2011); *Martinez*, 519 F.3d at 541–46.).

and admitted by Congress. That being said, it has (at first blush) an illogic to it: Aliens who entered EWI or overstayed their visa then adjusted their status to that of a LPR in the U.S. are eligible for the waiver; meanwhile, aliens who waited until they had legal status to enter the U.S. are ineligible for it.[23]

While some courts suggested possible reasons for the distinction,[24] most courts correctly pointed out that due to the unambiguous text of § 1101(a)(13) and § 1182(h) the reasons for the distinction were irrelevant to interpreting the statutes.[25] The *Medina-Rosales* court quoting from a Sixth Circuit decision explained:

> Why would Congress distinguish between those who obtained lawful permanent resident status at the time of lawful entry and those who adjusted status later, for purposes of barring permanent residents who have committed aggravated felonies from discretionary hardship relief? Our inability to answer such a question does not, however, warrant expanding the scope of a statutory provision beyond a meaning as plainly limited as the one in question here.[26]

In sum, the government's arguments that an "admission" could take place from within the U.S. when litigating the issue of eligibility for a § 1182(h) waiver are strikingly similar to its arguments on this issue. And, for all of the exact same reasons, its arguments are simply incorrect.

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[23] *See Medina-Rosales*, 778 F.3d at 1144-1146; *see also Martinez*, 519 F.3d at 544-546 (discussing the debatably absurd result of those who did everything legally by entering for the first time as a LPR and suggesting possible reasons for it, but ultimately pointing out that Congress' reasoning for the distinction is irrelevant where the text of § 1101(a)(13) and § 1182(h) are unambiguous).

[24] *See e.g., Martinez*, 519 F.3d at 544-546.

[25] *See e.g., Medina-Rosales*, 778 F.3d at 1146.

[26] *Id.* at 1146.

B. Post-IIRIRA it is the action of an entry into the United States, accompanied by an inspection or authorization which matters—not one's legal status at the time of such admission.

Other cases have left no doubt that the single most important requirement for an "admission" post-IIRIRA is being outside of the United States and passing through a POE after inspection by an immigration officer. This is true even when the alien does not have documents giving them lawful status.

Subsequent to IIRIRA the BIA and every circuit court to address the issue has concluded that "the terms 'admitted' and 'admission,' as defined in [§ 1101(a)(13)(A)], denote procedural regularity . . . rather than compliance with substantive legal requirements.'" [27] This means that an alien who does not have documents allowing them to enter the U.S. who is nonetheless waived through a POE by an immigration officer has been admitted.[28] Significantly, an alien waived through the POE has been admitted, and as a result, is not an applicant for admission as defined by § 1225(a)(1).[29]

In sum, the statutory definitions provided by Congress both by their use of the language "into the United States" and the case law applying those definitions throughout the INA where those terms appear, leave little room to dispute that the focus is on coming into the U.S. from outside at a designated POE.

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[27] *Matter of Quilantan*, 25 I. & N. Dec. 285, 290 (BIA 2010); *see also Martinez v. Att'y Gen.*, 693 F.3d 408, 414 (3d Cir.2012); *Sum v. Holder*, 602 F.3d 1092, 1096 (9th Cir.2010); *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir.2008).

[28] *Id.*

[29] *Id.*

III. Section 1225's real world application and purpose is to set forth the procedures for inspection of the millions of "applicants for admission" who arrive at the country's POEs every year.

Annually, millions of foreign nationals arrive at United States Ports of Entry (POEs)[30] seeking entry.[31] In 2022 for example, DHS granted approximately 97 million admissions into the U.S., with an estimated 45 million of those admissions being nonimmigrants who were issued an I-94.[32] The majority of these individuals present facially valid non-immigrant visas, such as B-1/B-2 visitor, F-1 student, or H-1B temporary worker visas.[33]

Upon arrival, every such individual, regardless of their documentation, is legally deemed an "applicant for admission" pursuant to INA § 1225(a)(1). This foundational statute, which governs the inspection procedures at all POEs, defines an "applicant for admission" as either "[1] An alien present in the United States who has not been admitted or [2] who arrives in the United States..." 8 U.S.C. § 1225(a)(1).

The inspection process mandated by INA § 1225 functions as a critical sorting mechanism, resulting in one of three primary outcomes. First, an inspecting officer may determine that the alien possesses valid, unexpired documents and is admissible, thereby admitting them into the United States.

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[30] The term "POE" is used throughout this brief as a short hand reference to any time or place designated by the attorney general for the admission of aliens.

[31] (*See* Consl. App. Ex. 1 – Annual Flow Report, U.S. Nonimmigrant Admissions: 2022, Alice Ward, Office of Homeland Security Statistics, U.S. Dept. of Homeland Security.)

[32] (*Id.*)

[33] (*Id.*)

Second, if the officer determines the alien is inadmissible either for seeking entry through fraud or material misrepresentation (8 U.S.C. § 1182(a)(6)(C)) or for lacking valid entry documents (8 U.S.C. § 1182(a)(7)), the alien will be subject to expedited removal (ER) pursuant to 8 U.S.C. § 1225(b)(1). Significantly, there are many grounds of inadmissibility,[34] but only aliens determined to be inadmissible under § 1182(a)(6)(C) or § 1182(a)(7) may be processed for ER.[35]

In the second scenario, the alien is subject to expedited removal under INA § 1225(b)(1)(A). This is a summary process intended to be completed in a matter of hours, if not minutes. At airports and seaports, this authority is most commonly invoked not for lack of documents, but for alleged fraud or willful misrepresentation under § 1182(a)(6)(C).

For example, an inspecting officer may conclude that an alien arriving with a validly issued B-2 visitor visa is misrepresenting their nonimmigrant intent and secretly plans to remain permanently. Following questioning, the officer issues a Form I-860, a summary order of removal. Critically, this expedited removal order is immediate and final. The alien receives no hearing before an Immigration Judge. No appeal. And none of the procedural rights afforded in full removal proceedings under § 1229a.[36] While such aliens may claim a fear of return, triggering a separate review process, that distinct process itself does not

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[34] *See generally* 8 U.S.C. § 1182(a).

[35] § 1225(b)(1)(A)(1).

[36] § 1225(b)(1)(C).

shed light on the issues presented in this matter. Accordingly, this brief is not going to address that processes' intricate web of statutes and regulations.[37]

Significantly, once an alien is issued an ER order, the alien's subsequent removal (as well as any incidental detention) is under the custody and detention authority proscribed by 8 U.S.C. § 1231. The goal is for such removal immediately either by return to the contiguous territory the alien arrived from or on the carrier/vessel they arrived on if by sea or land. Issued without anything resembling a hearing or process, the ER order is issued on a single page I-860, an earlier version of which can be seen below:

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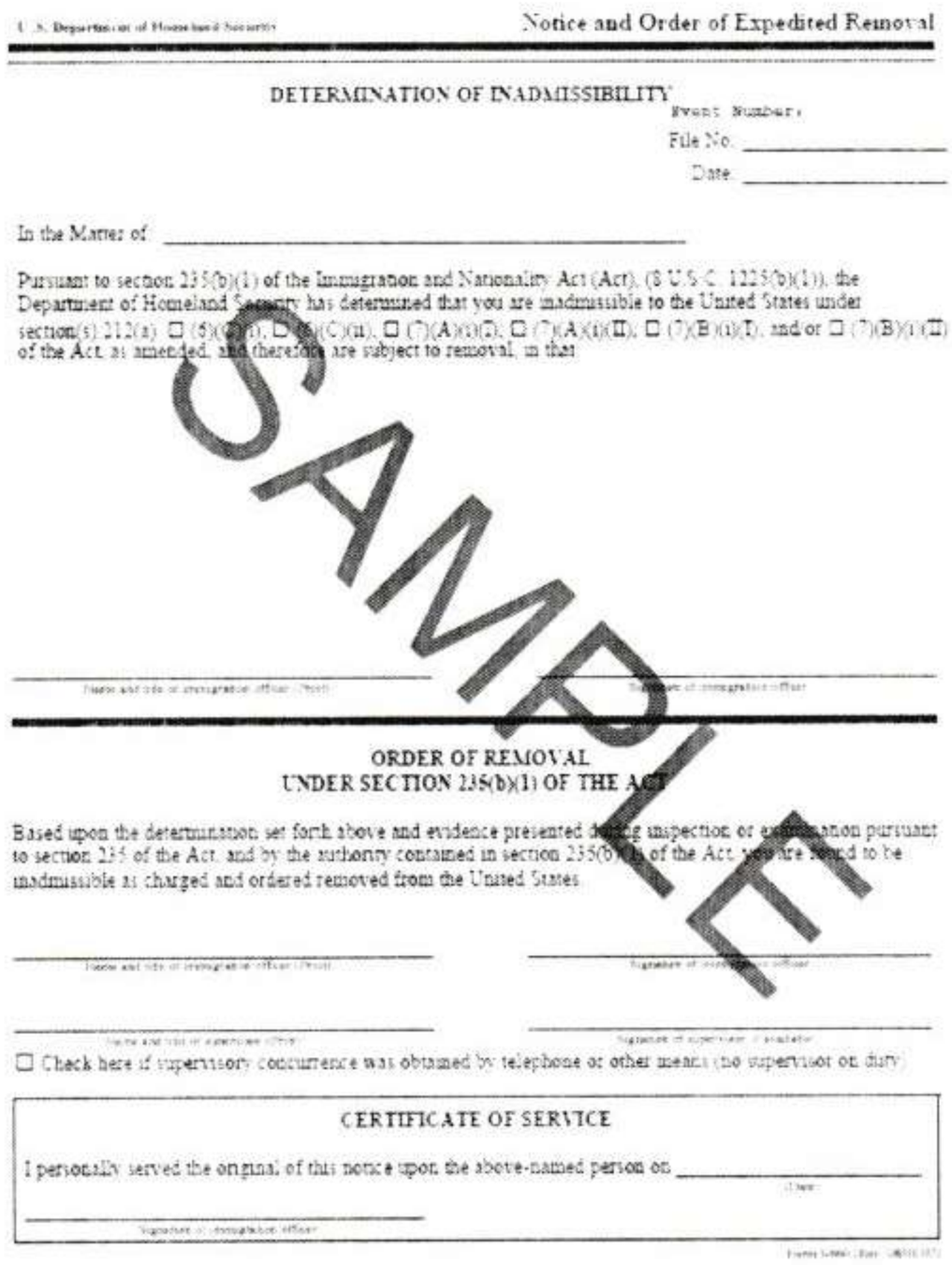
[37] It is, nonetheless, important to point out that Congress was careful to unambiguously state its intent that aliens placed in this fear review process through § 1225(b)(2)(B)(iii)(I), explicitly titled "Mandatory detention" proscribes exactly that: "Any alien subject to procedures under this clause shall be detained pending a final determination of credible fear of persecution, and, if found not to have such a fear, until removed. The fact that Congress went out of its way to specifically mandate detention for those in this process but never sought to provide a similarly worded provision accompanying § 1225(b)(2)(A) is consistent with both Petitioner's interpretation under the statutory terms and the plain language interpretation employed by many.


U. S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event Number:

File No. _____

Date _____

In the Matter of _____

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i), ☐ (6)(C)(ii), ☐ (7)(A)(i)(I), ☐ (7)(A)(i)(II), ☐ (7)(B)(i)(I), and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that

SAMPLE

_____ _____

Name and title of immigration officer (Print) Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

_____ _____

Name and title of immigration officer (Print) Signature of immigration officer

_____ _____

Name and title of supervisor (if applicable) Signature of supervisor (if applicable)

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty)

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on _____
(Date)

_____
Signature of immigration officer

Form I-860 (Rev. 08/01/07)

The third category encompasses all "other aliens" specified in § 1225(b)(2)(A). These are applicants whom the inspecting officer does not believe to be admissible based on one of the grounds of inadmissibility set forth in § 1182 (other than § 1182(a)(6)(C) or § 1182(a)(7)).[38] Every one of the grounds of inadmissibility in § 1182—except EWI—may be applicable at the POEs, and therefore, may result in a referral to § 1229a proceedings.

For instance, if an inspecting officer at an airport encounters a LPR with a conviction that potentially renders them inadmissible under the criminal grounds at §

[38] § 1225(b)(2)(A)

1182(a)(2), that officer lacks the authority to issue an expedited removal order.[39] Instead, the officer's sole recourse under the statute is to refer the alien for full removal proceedings before an Immigration Judge pursuant to § 1229a, where the alien will have the opportunity to be heard and contest the charges.[40]

As this statutory framework demonstrates, the procedures detailed in § 1225 are designed for, and overwhelmingly applied at, the nation's ports of entry. Just as the plurality in *Jennings v. Rodriguez*, repeatedly alluded to, § 1225(b) authorizes detention of those applicants for admission who are "seeking admission into the country"—while it is 8 U.S.C. § 1226 which authorizes detention of those "already in the country."[41]

In sum, far from a "detention" statute, § 1225 is the precise mechanism by which millions of applicants for admission arriving at the POEs are inspected, admitted, referred for proceedings, or summarily removed every year.

IV. Aliens who may be ordered removed (and removed) without being placed in proceedings before an IJ under § 1229a versus those who must be placed in § 1229a proceedings first.

Millions of aliens present in the United States are amenable to removal from it. The reasons, laws, and proceedings, if any, available to such aliens depends on a number of circumstances. It is crucial to distinguish between those noncitizens who may only be

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[39] *See id.* (proscribing its application only to those applicants for admission found inadmissible pursuant to § 1182(a)(6)(C) or § 1182(a)(7)).

[40] *Id.*

[41] *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018).

ordered removed by an IJ through § 1229a proceedings, versus those who do not have any right to a hearing before an IJ.

Not every alien who is encountered in the U.S. or at a POE who is amenable to removal is placed in § 1229a proceedings. As discussed above, aliens who are subject to expedited removal under § 1225(b)(1) have no right to a hearing before an IJ or § 1229a proceedings. Similarly, aliens present in the U.S. after previously being removed are subject to reinstatement of removal, a process completed entirely by DHS officials without a hearing.[42] Another example are aliens, including conditional residents but not LPRs, who have been convicted of an aggravated felony (as defined by 8 U.S.C. § 1101(a)(43)). These aliens are subject to being ordered without any hearing before an IJ—rather, the process is initiated and completed entirely by DHS officials.[43]

Practically, these statutes which allow for removal orders without the alien being placed in proceedings under 8 U.S.C. § 1229a are simply a means of statutory triage. This is because generally aliens who are not entitled to be placed in § 1229a proceedings would not be eligible for any of the statutorily provided forms of relief from removal which may be sought before an IJ. Because most of these forms of relief that may be sought from an IJ in § 1229a proceedings require certain lengths of presence in the U.S. and can rarely be obtained after conviction for an aggravated felony, placing such aliens in removal proceedings does not have a practical purpose. Conversely, increasing efficiency in the

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[42] *See* 8 U.S.C. § 1231(a)(5) (proscribing for reinstatement of removal orders for aliens found in the U.S. after being removed).

[43] 8 U.S.C. § 1228.

removal proceeding process by reducing the categories of aliens entitled to such proceedings, should serve a valuable purpose.[44] Before an IJ has a greater impact on the EOIR backlog aliens who are not entitled to be placed in such proceedings are not—in reality—being described above would not be eligible for relief in § 1229a proceedings.

The overwhelming majority of all other aliens who are removable from the United States, however, are entitled to be placed in removal proceedings before an IJ and all the rights that come along with those proceedings under 8 U.S.C. § 1229a. Aliens who may only be ordered removed after being placed in § 1229a proceedings may not be removed unless and until an order of removal from an IJ becomes final.

V. Aspects of § 1229a removal proceedings relevant to understanding the issues in this case.

A. Removal proceedings under § 1229a are *not* commenced via 8 U.S.C. § 1225 or § 1226—rather, § 1229a proceedings are only commenced when DHS files a NTA, issued in accordance with § 1229, with EOIR.

First and foremost, it is important to point out that once referred to full § 1229a proceedings an alien is no longer being processed, detained, or in proceedings under § 1225(b)(2)(A).[45] Rather, at the point, the alien is in proceedings under § 1229a.

Second, it is well-established that removal proceedings under § 1229a are *not* commenced via 8 U.S.C. § 1225 or § 1226. Formal § 1229a proceedings are only

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[44] Unfortunately, EOIR's decades long commitment to working harder rather than smarter, along with its aversion to online case filing technology that has existed for longer than DHS, made any benefits to EOIR intended through IIRIRA short-lived at best. s

[45] *Matter of X-K-*, 23 I&N Dec. 731, 734-36 (BIA 2005).

commenced when DHS files a Notice to Appear (NTA), issued in accordance with § 1229, with the Executive Office for Immigration Review (EOIR).[46]

B. 8 U.S.C. §§ 1182 and 1227 provide the two mutually exclusive statutes for charging an alien as removable.

Aliens may only be placed in removal proceedings if they are "removable" under one of the statutory grounds established by Congress.[47] These grounds are set forth in two distinct and mutually exclusive statutory sections: 8 U.S.C. § 1182 which provides grounds of "inadmissibility" and 8 U.S.C. § 1227 which provides grounds of "deportability" or "removability."

Significantly, DHS does not get to choose which statute to use. Rather, as alluded to immediately above, the applicable section is dictated by the alien's circumstances, primarily focusing on their location (e.g., at a port of entry vs. inside the U.S.) and the "procedural regularity" of their last entry. Though there are only two statutes with potential charges of removal, in practice, most practitioners would say there are three general categories of aliens in § 1229a proceedings. These categories are listed at the top of every NTA, including Mr. Flores Perez's, as seen here:

☐ You are an arriving alien.

☒ You are an alien present in the United States who has not been admitted or paroled.

☐ You have been admitted to the United States, but are removable for the reasons stated below.

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[46] *See* 8 U.S.C. §§ 1229 and 1229a (providing the procedures for initiating § 1229a proceedings through the issuance and filing of a NTA).

[47] § 1229a(a)(2).

A more detailed description of each of these categories is as follows:

1. **"Arriving Aliens" (Charged under § 1182):** These are noncitizens encountered at a port of entry (POE) who are seeking admission but are determined by an officer not to be "clearly and beyond doubt entitled to admission." If not required to wait outside the U.S., they may be "paroled" into the country for proceedings. This parole, however, does not constitute an admission; it maintains the legal fiction that the alien is still "at the door."

   Every single alien in this category is an "applicant for admission" under § 1225(a)(1).

2. **"Entered Without Inspection" Aliens (Charged under § 1182):** This category includes any alien encountered *inside* the U.S. who last entered "without inspection" (EWI), and therefore, are placed in removal proceedings under § 1182(a)(6)(A)(i).

   Every single alien in this category is an "applicant for admission" under § 1225(a)(1).

3. **"Admitted But Removable" Aliens (Charged under § 1227):** This group includes any alien who entered the U.S. through a POE after an inspection or authorization. This includes LPRs, those admitted on non-immigrant visas, "waive through" admissions, and even those admitted at a POE based on fraudulent documents. When these aliens are encountered in the U.S., they may *only* be placed in removal proceedings if a ground of removal under § 1227 applies to them.

These categories, specifically delineated at the top of every NTA, create a critical, absolute distinction: 100% of aliens in the first two categories (arriving aliens and EWI aliens) fall under the definition of "applicant for admission" and must be placed in removal proceedings under § 1182. Conversely, 100% of aliens in the last category are not "applicants for admission," and therefore, are placed in proceedings under § 1227. Simply put, an "applicant for admission" can only be charged under § 1182, and only an alien who is *not* an "applicant for admission" (i.e., one who was already lawfully admitted) can be charged under § 1227.

Before moving on to applying all the above to this case, it is important to point out that aliens are not and cannot simultaneously be in proceedings under § 1225(b) and § 1229a. In fact, when an alien who was initially processed for removal under § 1225(b)(1) is subsequently placed in § 1229a proceedings, the NTA will indicate it. Likewise, when an alien is placed in § 1229a proceedings due to a positive credible fear finding which was made after an expedited removal order had actually been issued, DHS must indicate the regulation under which the order was vacated on the NTA. The way these things appear on the NTA can be seen below:

> ☒ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
>
> ☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

C. In removal proceedings, the significance of being an "applicant for admission" has nothing to do with bond and everything to do with the allocation of the burden of proof.

The rights provided to aliens in removal proceedings and the conduct of those proceedings are set forth in § 1229a. Specifically, § 1229a(c)(3) allocates the burden on the government to prove removability in cases involving "deportable" aliens (i.e. aliens charges under § 1227); meanwhile, aliens in removal proceedings under § 1182, have the burden pursuant to § 1229a(c)(2), which states:

> In the proceeding the alien has the burden of establishing—(A) if the alien is an *applicant for admission*, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States

pursuant to a prior admission."[48]

It is helpful to consider (c)(2) part (A) versus (B) in context. Paragraph (A), by its very terms applies to an alien who is arriving and seeking to be admitted but is alleged to be inadmissible at the POE. Said differently, this option is plainly for those arriving aliens referred to as "other aliens" in § 1225(b)(2)(A) seeking admission who are referred for removal proceedings under § 1229a. Paragraph (B) on the other hand, by its terms contemplates the alien's physical presence in the U.S., and therefore, does not ask that they demonstrate they should be admitted; instead, these aliens would only be successful in denying they are inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) if they can demonstrate they were previously admitted. Admission, after all, cannot take place anywhere but from the outside coming in.

VI. The default rule is that aliens encountered in the U.S. and placed in § 1229a removal proceedings are, at any point prior to the entry of a final order of removal, entitled to a bond hearing before an IJ unless one of the exceptions set forth in 8 C.F.R. § 1003.19(h)(2) applies.

Pursuant to the INA, its implementing regulations, and decades of consistent agency practice, aliens placed into full § 1229a proceedings who are not described in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) are entitled to a bond hearing before an IJ. This, as every agency administering the INA and immigration attorney practicing when IIRIRA was passed knows, is nothing more than the obvious conclusion from the INA's statutory scheme (post-IIRIRA), the implementing regulations, and their actual application in

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[48] 8 U.S.C. § 1229a(c)(emphasis added).

millions of § 1229a proceedings for decades. As an initial matter, this conclusion was reached based on both the statutes and the implementing regulations which state more than once that aliens in § 1229a proceedings may seek a bond redetermination from the IJ (provided none of the exceptions in § 1003.19(h)(2) apply).

It is important to point out that, in addition to the INA's scheme and regulations, the constitution does not permit the detention of individuals like Mr. Flores Perez encountered in the U.S. years after entering unless one of two permissible justifications exist: to prevent flight or danger. Indeed, "[b]oth the *Zadvydas* Court and the *Demore* Court explained that there are two justifications for immigration detention—(1) ensuring the appearance of aliens at future immigration proceedings, and (2) preventing danger to the community."[49]

The provisions contained in the INA which actually do subject an alien to "mandatory detention," found at § 1226(c) and 8 C.F.R. § 1003.19(h)(2), reflect Congressional determinations as to classes of aliens whose detention during removal proceedings is justified on the basis of being a danger or flight risk (or both).[50] But when an alien is not described in any of these classes AND neither poses a danger nor a flight risk they are entitled to a bond pending § 1229a removal proceedings.[51]

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[49] *Maldonado v. Macias*, 150 F. Supp. 3d 788, 806 (W.D. Tex. 2015) (citing *Zadvydas*, 533 U.S. at 692 and *Demore*, 538 U.S. at 513).

[50] *Matter of X-K-*, 23 I. & N. Dec. 731, 736 (BIA 2005)(stating the rule is that aliens in § 1229a proceedings are entitled to a bond hearing before an IJ and discussing the fact that the exceptions to this rule, set forth in 8 C.F.R. § 1003.19(h)(2), reflect Congressional determinations about flight risk and danger).

[51] *Id.*

Less than a decade after IIRIRA was passed, this default rule (i.e. aliens in § 1229a proceedings have the right to request a bond hearing from an IJ) was explained by the BIA, which stated:

> Immigration Judges have custody jurisdiction over aliens in section [1229a] removal proceedings, with specifically designated exceptions. The regulations at 8 C.F.R. § 1236.1(d) provide that after the DHS has made an initial custody determination, a respondent in section [1229a] removal proceedings may seek a change in custody status at any time before he is subject to a final removal order. The regulation specifically states that until there is a final removal order in the section [1229a] removal proceedings, Immigration Judges have jurisdiction "to exercise the authority in section [122]6 of the Act ... to detain the alien in custody, release the alien, and determine the amount of bond ... as provided in § 1003.19." 8 C.F.R. § 1236.1(d)(1). Specific classes of aliens that are excluded from the Immigration Judges' general custody jurisdiction are listed in 8 C.F.R. § 1003.19(h)(2)(i) (2004). However, that list does not include aliens, such as the respondent, who have been placed in section 240 removal proceedings after having been initially screened and detained for expedited removal as "certain other aliens" pursuant to the authority in section [122]5(b)(1)(A)(iii) . . ..[52]

The above reasoning led the BIA to hold there that IJs have jurisdiction to grant bond to an alien encountered in the U.S. and initially subject to expedited removal under § 1225(b)(1) who was subsequently placed in full § 1229a proceedings after a positive credible fear finding.[53] Notably, the BIA's decision in that case came shortly after 9/11 in 2005, while President George W. Bush was in the White House and his administration was famously litigating the executive's ability to detain "enemy combatants" at Guantanamo. Needless to say, the BIA's decision in that case surely cannot be said to have been one of "discretion" or an administration lax on immigration.

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[52] *Id.* at 731-32.

[53] *Id.*

That decision and its holding remained the "law" for the next fourteen years until 2019 when AG Barr issued a decision in *Matter of M-S* which overturned *Matter of X-K-* on what can only be described as questionable reasoning. While undersigned counsel firmly believes *Matter of X-K-* was correctly decided and *M-S-* was not, those cases are of anecdotal value only to this case. Anecdotally, the fact that for the majority of IIRIRA's existence even aliens initially processed for expedited removal under § 1225(b)(1) before being placed in § 1229a proceedings were entitled to a bond hearing before an IJ—makes it difficult, if not impossible, to find any merit in the government's positions here.

APPLICATION OF THE LAW TO MR. FLORES PEREZ'S DETENTION

I. The government's silence on the Laken Riley Act being rendered superflous by its new reading of § 1225(b)(2)(A) speaks volumes.

Before addressing the arguments contained in the government's response, it important to point out the response's complete silence as to the points countless courts and the filings in this case made: The government's new position renders meaningless many provisions, including an entire act of Congress passed just this year. As stated in previous filings, in January 2025, Congress passed the Laken Riley Act (hereinafter "LRA"), which added a new subparagraph to 1226(c) which is only applicable to non-citizens who (1) fall within § 1225(a)(1)'s definition of "applicant for admission" and (2) have been arrested, charged with, or convicted of one of several offenses. When it was signed into law the president touted the LRA as a necessary and important amendment that would "save lives." In other words, if Congress and the president are to be believed, the LRA's amendments mattered and made an important change to the existing laws.

The structure of this amendment leaves no doubt that mandatory detention under this new provision applies *only* to a noncitizen who meets both the status requirement of subclause (i) (all of which are applicants for admission) *and* the conduct requirement of subclause (ii) (a criminal charge, arrest, or conviction for a specified offense). Accordingly, the LRA, as the Petition in this case and countless courts have repeatedly pointed out, is completely devoid of any meaning under the government's new theory.[54] Indeed, "If § 1225(b)(2) already mandated detention of any alien who has not been admitted, regardless of how long they have been here, then adding § 1226(c)(1)(E) to the statutory scheme was pointless...."[55]

The government's response does not attempt to dispute or cast doubt on this, a fatal fact, for its position. It is, after all, a foundational principle of statutory construction that courts must "give effect, if possible, to every clause and word of a statute,"[56] and must avoid interpretations that render statutory language superfluous.[57] The government's position violates this canon in the most profound way, effectively nullifying an entire act

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[54] *Lepe v. Andrews*, No. 1:25-CV-01163-KES-SKO (HC), 2025 WL 2716910, at *6 (E.D. Cal. Sept. 23, 2025) (Reading section 1225 as the government proposes would thus render section 1226(c)(1)(E) superfluous."); *see also Maldonado v. Olson*, No. 25-CV-3142 (SRN/SGE), — F.Supp.3d —, —, 2025 WL 2374411, at *12 (D. Minn. Aug. 15, 2025) ("The Court will not find that Congress passed the Laken Riley Act to 'perform the same work' that was already covered by § 1225(b)(2)."); *see also Lopez Benitez*, — F.Supp.3d at —, 2025 WL 2371588, at *7 (same); *Romero v. Hyde*, No. CV 25-11631-BEM, — F.Supp.3d at —,2025 WL 2403827, at *11 (D. Mass. Aug. 19, 2025) (same).

[55] *Berrera v. Tindall*, No. 3:25-CV-541-RGJ, 2025 WL 2690565, at *4 (W.D. Ky. Sept. 19, 2025) (quoting *Lopez-Campos v. Raycraft*, 2025 WL 2496379 at *8 (E.D. Mich. Aug. 29, 2025)).

[56] *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

[57] *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

of Congress. The only logical conclusion is that Congress enacted § 1226(c)(1)(E) precisely because being EWI or an "applicant for admission" alone *does not* trigger mandatory detention.[58]

II. Mr. Flores Perez is an "applicant for admission" but he is NOT "seeking admission" which is an absolute predicate for § 1225(b)(2)(A).

The two specific statutes which the government combines (out of context) in a tortured effort to support its new position are: § 1225(a)(1) defining "applicants for admission" and § 1225(b)(2)(A) providing for "inspection of other aliens." The first of these statutes, as discussed above, defines applicants for admission to include all aliens who, if placed in removal proceedings, would have to be charged as removable under § 1182, including all EWI aliens.

The fact that all aliens who are subject to removal under the grounds set forth in § 1182 are applicants for admission has always been true. Indeed, one of the most trusted law treatises, *Kurzban*'s, has long explained:

> Although a person who enters EWI is considered an applicant for admission under [8 U.S.C. § 1225(a)(1)] and inadmissible under [8 U.S.C. § 1182(a)(6)(A)(i)], because they are not apprehended at the border, they do not fall within the definition of "arriving aliens" under 8 C.F.R. §§ 1.2, 1001.1(q). Therefore, an IJ is not precluded from conducting a bond hearing.[59]

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[58] Another (of many) applicable cannons of statutory construction is the principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—further clarifies congressional intent. Within INA § 235 itself, Congress knew precisely how to mandate detention when it intended to. For example, INA § 235(b)(1)(B)(iii)(IV), titled "Mandatory detention," explicitly states that noncitizens found *not* to have a credible fear of persecution "shall be detained" pending removal. Congress's choice to use specific mandatory language in that subsection, while omitting it for all other "applicants for admission" under § 235(a), demonstrates a clear intent not to subject all such individuals to mandatory detention.

[59] Kurzban, Chapter 3, Admission and Removal, M-3, p. 235 (2018-19) 16th Ed.

Simply put, for decades, two indisputable facts coexisted in immigration proceedings throughout the country: (1) Immigration Judges have been granting bond to noncitizens who were "EWI" (i.e. inadmissible under 8 U.S.C. § 1182(a)(6)(A)), and (2) All individuals who are EWI are considered an "applicant for admission" under 8 U.S.C. § 1225(a)(1).

Nonetheless, the government attempts to claim they have suddenly realized that because all EWIs are considered "applicants for admission" they are subject to mandatory detention throughout removal proceedings under § 1225(b)(2)(A). This provision states in relevant part:

> [I]n 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 proceeding under section 1229a of this title.[60]

This statute, as countless courts have repeatedly found, does not apply to every "applicant for admission" encountered anywhere and at any time. To be subject to mandatory detention under § 1225(b)(2)(A), the plain text requires an individual to be 1) an "applicant for admission"; 2) "seeking admission"; and 3) determined by an examining immigration officer to be "not clearly and beyond a doubt entitled to be admitted."[61]

As discussed below, the government's new interpretation conveniently ignores the emphasis Congress placed on an admission being an act that requires one to be at the door

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[60] § 1225(b)(2)(A) (emphasis added).

[61] 8 U.S.C. § 1225(b)(2)(A); *see also Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *2 (D. Mass. July 24, 2025) (affirming these "several conditions must be met" for a noncitizen to be subject to mandatory detention under § 1225(b)(2)(A)).

asking to come in at a POE and the second, critical element: that the person must be actively "seeking admission." Worse still, the government's response appears to claim that applying for relief from removal in § 1229a proceedings is "seeking admission." This is not simply false but wholly ignores Congress' definitions and the terms of art associated with relief inside the U.S. versus seeking it at a POE.

A. The government's new interpretation conveniently ignores the emphasis Congress placed on an admission being an act that requires one to be at the door asking to come in at a POE.

The government's position on this issue is predicated on its own beliefs about the "plain meaning" of terms "admission," "admitted," and "application for admission." This is problematic because, as discussed above, Congress defined these terms, and those definitions have been applied in the many different provisions that include them throughout the INA. Significantly, the government's position and arguments on this issue are remarkably similar to those it made with respect to "admission" and "admitted" during prior litigation on eligibility for a waiver under § 1182(h).

Here, the government asks the Court to find an EWI alien who is present in the interior of the U.S. as somehow "seeking admission" from within it, and in so doing, ignores the definitions found at §§ 1101(a)(4) and (a)(13). Meanwhile, in *Medina-Rosales*, the government argued that an alien's adjustment of status to that of a LPR inside the U.S. should be interpreted to constitute being "admitted to the United States as an alien lawfully admitted for permanent residence."[62] The Tenth Circuit, like numerous others addressing

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[62] *Medina-Rosales*, 778 F.3d at 1446.

the issue, rejected the government's attempts to effectively nullify the unambiguous definition of admission proscribed by Congress.

Just as it did in *Medina-Rosales*, the government here argues for an interpretation of an INA provision that completely ignores the statutory definition given to the term admission which "contemplate[s] a physical crossing of the border following the sanction and approval of United States authorities."[63] Accordingly, the government's arguments should once again be soundly rejected.

The result of rejecting the government's arguments in the § 1182(h) litigation was that an alien who convicted of an aggravated felony who had adjusted his status to that of a LPR inside the U.S. was deemed eligible to seek the waiver in removal proceedings; aliens who waited and entered the first time as a LPRs on the other hand could not. The result of rejecting the government's similar arguments in this case is that Mr. Flores Perez—a devoted husband, loving father, and valued employee—gets exactly what the INA, Constitution, and IJ in 2019 provides: due process through a bond hearing before an IJ. This does not dismiss his removal proceedings. It simply means his removal proceedings will proceed with him non-detained.

Given the juxtaposition of these two issues, the government's repeated banging of the "IIRIRA meant to punish EWI aliens" drum rings hollow. As will be discussed later, this is true for more than one reason.

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[63] *Bracamontes v. Holder*, 675 F.3d 380, 382, 384–89 (4th Cir.2012).

B. The government's position also conveniently ignores a critical element of § 1225(b)(2)(A): that the alien must be actively "seeking admission"

Further, when attributed the meaning given to it by Congress and the plain language used in § 1225(b)(2)(A), it is equally apparent that an alien who entered years ago and has since resided in the United States is not, by any plain sense meaning of the term, "seeking admission," when apprehended by interior enforcement officers. The statute's use of the present progressive tense—"seeking"—unambiguously limits its application to the context of an arrival at a port of entry or the border, not to an arrest occurring long after the act of entry is complete.[64]

By reading the phrase "seeking admission" out of the statute, the government violates the foundational interpretive canon against surplusage, which requires that courts "give effect, if possible, to every clause and word of a statute."[65] At the risk of beating the proverbial dead horse, this is what the government did in *Medina-Rosales*: read the phrase "admitted to the United States" out of § 1182(h).

III. Every alien in removal proceedings is alleged to have violated the immigration laws, and therefore, the attempt to single out those whose only violation is the equivalent of a class B misdemenaor as particularly nefarious should be taken for it is: grasping at proverbial straws.

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[64] *See Martinez v. Hyde*, 2025 WL 2084238, at *6 (D. Mass. July 24, 2025) (citing the use of present and present progressive tense to support conclusion that INA § 1225(b)(2) does not apply to individuals apprehended in the interior); *accord Lopez Benitez v. Francis*, 2025 WL 2371588, at *6–7 (S.D.N.Y. Aug. 13, 2025). *See also United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Al Otro Lado v. McAleenan*, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in 8 U.S.C. Sec. 1225 (1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

[65] *Corley v. United States*, 556 U.S. 303, 314 (U.S. 2009).

The government's argument, both in its briefing and in *Hurtado*, fundamentally mischaracterizes the landscape of removal proceedings. The repeated assertion that granting a bond hearing to an individual who entered without inspection would contravene Congressional intent by "rewarding" a violation of law creates a false and unsupported distinction. This position critically ignores the dispositive fact that every noncitizen in removal proceedings is present in those proceedings precisely because they have violated a provision of the INA. The government's attempt to carve out a uniquely disfavored class from a universe of violators is not only illogical but also contrary to established jurisprudence.

Under its theory, a noncitizen who entered twenty years ago on a visitor visa, made an express promise to an inspecting officer to depart, and then willfully violated that promise by absconding for two decades is entitled to a bond hearing. Likewise, an individual who perpetrated an affirmative fraud upon consular and immigration officials to secure a fiancé visa would be granted a bond hearing. Yet, the government insists that Petitioner, who entered without inspection but have not committed any offenses that would subject them to mandatory detention, must be mandatorily detained without any reason to believe or consideration of whether they are a danger or flight risk. This arbitrary distinction finds no support in reason or justice and elevates the form of an immigration violation over its substance, creating indefensible and inequitable outcomes

IV. <u>Congress can give more rights than the constitution through statute, but they cannot lower the protections it provides.</u>

Congress may expand procedural protections for through statute, but it cannot legislate away fundamental constitutional guarantees. The Fourth Amendment's protection against unreasonable seizures applies to all persons within the territory of the United States, including noncitizens. Immigration officials may not § 1225(b)(2)(A) detain individuals encountered in the interior indefinitely or without probable cause; the Fourth Amendment simply does not permit it. Likewise, the constitution's due process clause protections must be afforded to all those living in the U.S. before being deprived of their liberty.

At the nation's borders, however, the constitution's protections are lowered and almost nonexistent for those who are not in the U.S. (including those who are at the border still under the legal fiction of parole). The absence of a warrant requirement in 8 U.S.C § 1225, therefore, is in line with the longstanding principle that the search and seizure of persons at our country's borders are not subject to the Fourth Amendment's warrant requirement.[66]

A. The absence of a warrant requirement in § 1225(b)(2)(A) requires that the statute continues to be interpreted as limited to arriving aliens at the POE, border, or in close proximity to the border, otherwise it is unconstitutional.

Just as established as the border exception to the Fourth Amendment is the fact immigration stops and arrests elsewhere are subject to the Fourth Amendment's

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[66] *See United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("Congress, since the beginning of our Government, has granted the Executive Plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant . . .") (internal citations omitted); *United States v. Cotterman*, 637 F.3d 1068, 1076 (9th Cir. 2011) ("[T]here is [no] room for disagreement over the compelling underpinnings of the doctrine" exempting border searches and seizures from the Fourth Amendment's warrant requirement. "It is well established that the sovereign need not make any special showing to justify its search of persons and property at the international border.").

protections. Indeed, "[l]ongstanding precedent establishes that '[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'"[67] The law in this area is not grey. Rather, since at least 2009, it has been "clearly established . . . that immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention."[68]

The clarity of the law in this area is bolstered by the proscriptions of 8 U.S.C. § 1357, which "[c]ourts have consistently held" the inclusion of the phrase "reason to believe" in § 1357 "must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause."[69] The "robust consensus of cases [and] persuasive authority" in this area makes it "beyond debate that an immigration officer . . . would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status."[70]

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[67] *Morales v. Chadbourne*, 793 F.3d 208, 215 (2015) (quoting *United States v. Brignoni–Ponce*, 422 U.S. 873, 878, (1975) (citing *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16–19, (1968)); *see also Dunaway v. New York*, 442 U.S. 200, 216 (1979) ("[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

[68] *Id* at 215.

[69] *Id.* at 216-17 (citing *Au Yi Lau*, 445 F.2d at 222; *see, e.g., Tejeda–Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir.1980) ("The phrase 'has reason to believe' [in § 1357] has been equated with the constitutional requirement of probable cause."); *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir.1975) ("The words [in § 1357] of the statute 'reason to believe' are properly taken to signify probable cause."); *see also United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir.2010) ("Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause.").

[70] *Id.*

Despite the abundantly clear requirements of the Fourth Amendment, the government now argues that a statute with no warrant requirement (§ 1225(b)(2)(A)), historically applied at or near the border, allows DHS to arrest or detain aliens in the interior of the United States without any concern for the Fourth Amendment's protections. Such an interpretation is unconstitutional and any interpretation that would have such a result should be avoided.

Given the clarity of the law in this area, the point need not be belabored. That being said, it does merit pointing out that contrary to the government's assertions, Petitioner's position—not the government's—is supported by *Dep't of Homeland Sec. v. Thuraissigiam*. Indeed, the facts of that case indicated that the alien there only made it 25-yards into the U.S. before being detained.[71] Its difficult to think of anything too much closer to the border than a mere 25-yards.

B. <u>The deprivation of liberty in the form of detaining someoneis limited to confinement for punishment related to a criminal offense, and is not permitted for civil purposes absent as significantly compelling reason to do so such as risk of flight or danger to the community—things which require due process to determine.</u>

The Supreme Court has explained the critical distinction between those outside the U.S. and those within it when it comes to the due process required before they may be deprived of their liberty:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic

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[71] *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138–39 (2020)

> borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance.[72]

Moreover, *Zadyvdas* left no doubt that civil detention, including in the immigration context, requires a sufficient justification—namely preventing flight or danger to the community.[73] Where no such justification exists detention without due process is unconstitutional.[74]

Here, the notion that Petitioner, who is not a flight risk or danger to anyone may be held without a bond hearing to determine if there is a special justification for his detention is contrary to the due process everyone was once afforded in this country.

Before moving on, it is important to point out that the actual mandatory detention provisions, § 1226(c), § 1231, and 8 C.F.R. § 1003.19(h)(ii), are simply a codification of circumstances typically believed to be indicative of flight risk or danger to the community. Whether it be as a result of having no ties in the U.S. for arriving aliens, or a criminal conviction indicative of danger, these detention provisions all are rooted in flight risk and danger, which are the only two justifications for depriving one of their liberty. [75]

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[72] *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001)

[73] *Id.*

[74] *Id.*

[75] *Id.*; *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

V. The *Matthews* test, applied by nearly every district court analyzing this issue including within the 5th Circuit, demonsrates Mr. Flores Perez's detention is unlawful.

The three-part test set out in *Matthews v. Eldridge*, 424 U.S. 319 (1976) is the test to determine whether civil detention violates a detainee's due process rights.[76] Mr. Flores Perez is currently being civilly detained, and he asserts that this detention is violating his due process rights. Courts across jurisdictions are applying *Matthews* to EWI cases and granting relief to petitioners on this basis.[77] These courts expressed no issue as to applying *Matthews* in this context. This Court should follow suit and find *Matthews* applies here, and because all three *Matthews* factors favor Mr. Flores Perez's position[78], this Court should find that Mr. Flores Perez is likely to succeed in demonstrating that his detention without a bond hearing based on nothing more than being EWI contravenes his due process rights under the Fifth Amendment.[79]

Mr. Flores Perez provided a detailed analysis of the application of the *Mathews* factors to his case in both the habeas petition and preliminary injunction motion previously filed. Though the government's response indicates disagreement with Mr. Flores-Perez' conclusion, it does so without even mentioning the most compelling circumstances specific

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[76] *See Hernandez-Fernandez v. Todd Lyons*, 2025 WL 2976923, at *8 (W.D. Tex. Oct. 21, 2025).

[77] *See Martinez v. Kristi Noem*, No. EP-25-CV-430-KC, 2025 WL 2965859 (W.D. Tex. Oct. 21, 2025); *Martinez v. Secretary of Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379, at *(W.D. Tex. Sept. 8. 2025) (granting petitioner's request for a temporary restraining order).

[78] (ECF 6 at 11-13).

[79] *See Martinez v. Secretary of Noem*, No. 5:25-cv-01007-JKP, 2025 WL 2598379, at *1 (W.D. Tex. Sept. 8, 2025).

to his case. For example, the response indicates there is no real harm but completely ignores the fact that he is the primary provider for a family's whose oldest child is battling leukemia.

Meanwhile, the government argues Mr. Flores Perez "is being detained for the limited purpose of removal proceedings and determining his removability."[80] The problem with this is explanation is it describes the purpose of removal proceedings before an IJ under § 1229a—but detention is not now nor has it ever been necessary to such proceedings. This, of course, is why there are literally close to if not more than a million aliens currently in § 1229a removal proceedings who are not in ICE custody. In fact, the Dallas immigration court, located in the same building a few floors below this Court, does not handle an removal proceedings for detained aliens.

Given the compelling circumstances in Mr. Flores Perez' case, the lack-luster arguments in the government's response, and countless courts repeatedly stating that the loss of liberty is irreparable harm which more than satisfies the applicable legal standard, the point will not be belabored. Instead, Mr. Flores Perez simply and respectfully requests the Court grant his petition and the preliminary injunction so he may return to his family.

VI. Exhaustion is not necesary, would be futile, and would do nothing but further backlog the always complaining about being backlogged immigratoin courts

[80] (ECF No. 10 p. 15.)

The government's brief argues Petitioner should be required to exhaust "administrative remedies."[81] It is well established, however, that there is no statutory requirement to exhaust remedies for alien detention claims; rather, " '[u]nder the INA exhaustion of administrative remedies is only required by Congress for appeals on final orders of removal.' "[82] In *Lopez-Arevelo*, the court in the Western District of Texas found that "[r]equiring [the petitioner] to wait, indefinitely, for a ruling on that appeal would be inappropriate because it would exacerbate his alleged constitutional injury—detention without a bond hearing."[83]

Here, there is no question that both an IJ and the BIA did or would apply the *Hurtado* decision to this and every other case raising the exact same issue. Said differently, the only thing filing a bond request for an EWI alien will do is create more paperwork for the immigration courts to process. In fact, in another case out of the Western District, the fact that the petitioner did not even request a bond from the IJ as there was no question the IJ would claim they are required to listen to the BIA and the BIA definitively spoke on the issue when it issue *Hurtado*.[84] There the government readily conceded all of this was true and indicated it was no longer advancing an exhaustion requirement.

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[81] (ECF No. 10 pp. 1-2.)

[82] *Lopez-Arevelo v. Ripa*, No. EP-25-CV-337, 2025 WL 2691828, at *6 (W.D. Tex. Sept. 22, 2025) (citing *Garza-Garcia v. Moore*, 539 F. Supp. 2d 899, 904 (S.D. Tex. 2007); *see also* 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." (emphasis added)).

[83] *Id.* at *6 (citing *Petgrave v. Aleman*, 529 F. Supp. 3d 665, 672 n.14 (S.D. Tex. 2021)).

[84] *See Martinez v. Kristi Noem*, No. EP-25-CV-430-KC, 2025 WL 2965859 (W.D. Tex. Oct. 21, 2025).

In sum, exhaustion is neither necessary nor is there any prudential considerations that warrant applying this doctrine to this case.

VII. The Court's habeas jurisdiction allows it to determine whether Petitioner is being unlawfully detained, and if so, to remedy it by ordering his immediate release.

It is Petitioner's position that (1) ordering his immediate release is the most appropriate remedy under the statute, and (2) to the extent that courts have found the government's detention of EWI aliens under its new interpretation of § 1225(b)(2)(A) and ordered a bond hearing within 24-hours, such an order is not ordering the government to conduct a bond hearing; rather, it is simply providing the government with notice the detention is unlawful and short window to cure the detention's unlawfulness. That being said, Petitioner believes the most appropriate remedy at this point is to simply order release.

[Nothing further on this page.]

CONCLUSION

For the above stated reasons, Mr. Flores Perez respectfully requests the Court find Respondent's detention of him without a bond hearing is contrary to the both the statutory scheme and the U.S. Constitution for the reasons set forth in his petition and above. Furthermore, for the same reasons, Mr. Flores Perez respectfully requests this Court grant the following relief:

a. Assume jurisdiction over this matter;

b. Issue a writ of habeas corpus requiring that Respondents release Petitioner or provide Petitioner with a bond hearing pursuant to 8 U.S.C. § 1226(a) within 48-hours;

c. Declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that noncitizens who are placed in removal proceedings under 8 U.S.C. § 1229a and charged as inadmissible under § 1182(a)(6)(A) are not, absent one of the provisions found in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) being applicable, subject to mandatory detention, and therefore, are entitled to a bond hearing before an Immigration Judge who has jurisdiction pursuant to the INA § 236(a) and 8 C.F.R. § 1003.19;

d. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"); and

e. Grant any other and further relief that this Court deems just and proper.

RESPECTFULLY SUBMITTED,

/s/ Dan Gividen

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the U.S. District Court and counsel for the government in accordance with the Federal Rules of Civil Procedure on November 10, 2025.

/s/ Dan Givіden
DAN GIVIDEN
Attorney for Defendant