UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MAYNOR ESPINOZA HERNANDEZ,

Petitioner,

v.

Case No. 25-CV-1670

SAMUEL OLSON, Field Office Director of Enforcement and Removal Operations, Chicago Field Office, Immigration and Customs Enforcement; *et al.*,

Respondents.

ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. § 2243 and the Court's Rule 4 Screening Order (ECF 3), respondents Samuel Olson, Marcos Charles, Kristi Noem, and Pamela Bondi (collectively the "Respondents"),[1] by and through undersigned counsel, hereby answer the Petition for Writ of Habeas Corpus (ECF 1) ("Petition") filed by the petitioner, Maynor Espinoza Hernandez ("Petitioner").

INTRODUCTION

Petitioner is a Honduran citizen who, though not admitted to the United States, has been present in the United States since 2016. In September, DHS officials arrested him based on his lack of immigration status, and he has been detained since then pending resolution of his removal proceedings. Petitioner seeks habeas relief under 28 U.S.C. § 2241, claiming that his detention

[1] The United States Attorney's Office does not formally represent Petitioner's jail custodians; however, counsel for the custodians have authorized the undersigned to state they join in this answer and do not intend to submit a separate response to the habeas petition.

violates the Immigration and Nationality Act ("INA") and the Fifth Amendment's Due Process Clause.

Respondents' position is that, because Petitioner was never lawfully admitted into the United States, he meets the INA's definition of an "applicant for admission," 8 U.S.C. § 1225(a)(1), and therefore his detention is mandatory under 8 U.S.C. § 1225(b)(2)(A). Petitioner contends his detention should be governed instead by 8 U.S.C. § 1226, which permits foreign nationals[2] to be released on bond during their removal proceedings under 8 U.S.C § 1226(a)(2). He argues that DHS's decision to detain him pursuant to § 1225(b)(2)(A) turns decades of agency practice on its head, contradicts a previous order of release on recognizance, and that government is judicially estopped from asserting this interpretation.

This Court has already affirmed Respondents' interpretation of the INA's detention provisions in *Cirrus Rojas v. Olson*, No. 25-cv-1437-bhl, 2025 WL 3033967 (E.D. Wis. Oct. 30, 2025), and Petitioner's other arguments do not counsel a different result here. Because Petitioner's detention in no way exceeds the government's broad authority and discretion in immigration matters or deprives Petitioner of due process, the Court should deny relief.

BACKGROUND

A. Procedural Posture

Petitioner, who acknowledges he is a citizen of Honduras, alleges that he has resided in the United States since November 16, 2016, when he was detained and allegedly issued a Form I-220 Order of Release on Recognizance ("OREC"). (ECF 1 at ¶¶ 48-49.) According to DHS records, however, Petitioner entered the United States on August 25, 2016, and was apprehended by Border Patrol agents near Brownsville, Texas, on September 1, 2016. (Declaration of

[2] For purposes of this response, the terms "foreign national" and "alien" (which is the INA's nomenclature) are used interchangeably.

Supervisory Detention and Deportation Officer Joseph Canella ("Canella Decl."), attached hereto, ¶ 7; Decl. Ex. A (Record of Deportable/Inadmissible Alien), p. 1.) On September 2, 2016, DHS served Petitioner with an arrest warrant, notice of custody determination, and notice to appear, the latter of which charged him with being subject to removal under 8 U.S.C. § 1182(a)(6)(A)(i), as "an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General." (Canella Decl., ¶ 8; Decl. Ex. B (Warrant for Arrest of Alien), C (Notice of Custody Determination), D (Notice to Appear).)

According to DHS records, Petitioner was not issued an OREC.[3] (Canella Decl., ¶ 12.) Petitioner was unaccompanied minor when he crossed the border and was apprehended. (Canella Decl., ¶ 7.) As explained below, federal law requires DHS to transfer custody of unaccompanied minors to the Office of Refugee Resettlement ("ORR"), part of the Department of Health and Human Services ("HHS"). Consequently, DHS transferred custody to ORR pending the removal proceedings, and ORR determined on November 16, 2016, that Petitioner should be released to the custody of a family member in Wisconsin. (Canella Decl., ¶ 9; Decl. Ex. E (Office of Refugee Resettlement Verification of Release).) Importantly, releasing a minor to a family member is not release on recognizance. *See* 6 U.S.C. § 279(2)(B). DHS notified the immigration court of ORR's release. (Canella Decl. Ex. F (Unaccompanied Child (UC) Notice to Appear (NTA) Filing).)

On February 15, 2019, Petitioner filed for relief from removal in the form of an application for asylum and withholding of removal. (Canella Decl., ¶ 10; Decl. Ex. G (I-589, Application for Asylum and for Withholding of Removal).) Before Petitioner's asylum

[3] The Form I-220A may be found at https://www.ice.gov/doclib/detention/checkin/I_220A_OREC.pdf (last visited November 12, 2025).

application was decided, the immigration judge administratively closed the removal proceedings because Petitioner "is not an enforcement priority for DHS." (Canella Decl. ¶ 11; Decl. Ex. H (Order of the Immigration Judge).) The order indicated, however, that the case "remains under the jurisdiction and docket control of the immigration court," and that "[i]f either party in this case desires further action on this matter, at any time hereafter, a written motion to recalendar the case (including a certificate of service on the opposing party) must be filed with the Office of the Immigration Court having administrative control over the Record of Proceeding in this case." (Canella Decl. Ex. H.)

Then, on September 9, 2025, DHS issued an arrest warrant for Petitioner because he "lacks immigration status or notwithstanding such status is removable under U.S. immigration law." (Canella Decl. Ex. I (Warrant for Arrest of Alien).) Immigration officials located and arrested Petitioner on September 25, 2025, at a dairy farm in Cleveland, which is near Manitowoc, Wisconsin. (Canella Decl., ¶ 13; Decl. Ex. J (Record of Deportable/Inadmissible Alien), p. 2.)

DHS then filed a motion to re-calendar Petitioner's removal proceedings which the IJ granted as unopposed. (Canella Decl., ¶ 13; Decl. Ex. K (Motion to Re-Calendar), L (Order of the Immigration Judge).) On October 7, 2025, Petitioner submitted a bond request to the immigration court, and a bond hearing was initially scheduled for October 27, 2025, and later rescheduled to October 29, 2025. (ECF 1, ¶ 57.) On October 29, 2025, the immigration judge denied bond, finding it "lacks jurisdiction to consider the respondent's request for a bond pursuant to *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025)." (Canella Decl., ¶ 15; Decl. Ex. M (Order of the Immigration Judge).

Petitioner is currently being held in the Dodge County Jail in Juneau, Wisconsin. (Canella Decl., ¶ 14.) The next hearing scheduled in his removal proceedings, which will pertain to his asylum application, is December 8, 2025. (*Id.* ¶ 16.)

B. Statutory and Regulatory Framework

Foreign nationals who are "present in the United States without being admitted or paroled," or "who arrive[] in the United States at any time or place other than as designated by the Attorney General" are deemed "inadmissible" and subject to removal from the country. 8 U.S.C. § 1182(a)(6)(A)(i). Immigration officers are authorized to arrest foreign nationals who are present in the country illegally and to detain such individuals during removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960) (detailing the "impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation"); *see also Denmore v. Kim*, 538 U.S. 510, 523 (2003) (explaining that detention during removal proceedings "is a constitutionally valid aspect of the process"). This is true under the INA, in which Congress enacted various provisions authorizing the detention of foreign nationals subject to removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1225(b)(2)(A), 1226(a)(1), 1231(a)(2)(A).

1. Applicants for Admission

Different detention provisions apply to different categories of foreign nationals. Most relevant here, 8 U.S.C. § 1225 governs the processes for the detention and removal of "applicants for admission," which is a term defined in the statute as "[a]n alien present in the United States who has not been admitted *or* who arrives in the United States." 8 U.S.C. § 1225(a)(1) (emphasis added); *see also Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018)

("Under … 8 U.S.C. § 1225, an alien who 'arrives in the United States,' or 'is present' in this country but 'has not been admitted,' is treated as 'an applicant for admission.'").

To have been "admitted" to the United States requires that the foreign national must have lawfully entered the country "after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Thus, the provisions of 8 U.S.C. § 1225 apply to any foreign national who either (1) entered the country illegally without being inspected and authorized by an immigration officer, or (2) who arrives in the United States. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (a foreign national "who tries to enter the country illegally is treated as an 'applicant for admission'").

The Supreme Court has explained that "applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings*, 583 U.S. at 287. Section 1225(b)(1) applies to aliens who are "determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation," while section 1225(b)(2) "is broader" and "serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Id.*

Applicants for admission who fall under 8 U.S.C. § 1225(b)(1) are subject to expedited removal proceedings and "shall be detained" until removed (or until the end of asylum or credible-fear proceedings). 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV). With respect to applicants for admission subject to 8 U.S.C. § 1225(b)(2)'s catchall provision, if an immigration officer determines that they are "not clearly and beyond a doubt entitled to be admitted" then they "shall be detained" during removal proceedings. 8 U.S.C. § 1225(b)(2)(A). None of the provisions of § 1225 provide a bond process whereby applicants for admission may be released pending resolution of their removal proceedings, so detention is mandatory. *See Jennings*, 583 U.S. at 302

("In sum, §§ 1225(b)(1) and (b)(2) mandate detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin.").[4]

2. Other Removable Foreign Nationals

The INA also provides procedures for the arrest, detention, and removal of foreign nationals who do not fall under the definition of an "applicant for admission" (*e.g.*, foreign nationals who commit crimes, overstay a visa, or otherwise violate the conditions of their lawful admission). *Cf. Jennings*, 583 U.S. at 288 ("Even once inside the United States, aliens do not have an absolute right to remain here."). This occurs under 8 U.S.C. § 1226, which authorizes immigration officers to arrest and detain foreign nationals pending a removal decision. 8 U.S.C. § 1226(a). Unlike 8 U.S.C. § 1225, § 1226 expressly authorizes immigration officers to release foreign nationals on bond pending the adjudication of their removal proceedings. 8 U.S.C. § 1226(a)(2)(A).[5] DHS regulations provide for bonded release if the foreign national "would not pose a danger to property or persons" and "is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8).

To summarize, 8 U.S.C. § 1225(b) governs the detention of "applicants for admission"—which Congress has defined to include any foreign national "present in the United States who has not been admitted"—while 8 U.S.C. § 1226(a) governs the detention of foreign nationals who have been previously admitted but are subject to removal proceedings. Section 1225(b) does not provide for release on bond during the removal process, while § 1226(a) does.

[4] DHS may still, in the exercise of discretion, temporarily release an applicant for admission on parole "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

[5] Under 8 U.S.C. § 1226(c), foreign nationals who have committed certain crimes, who have engaged in terrorism-related activities, or who present special foreign-policy considerations are ineligible for release on bond and must remain in custody.

3. Detention and Release of Minors

There are two more statutes that govern the care and custody of unaccompanied minors pending their removal proceedings. The Homeland Security Act makes the ORR, which is part of HHS, responsible for "the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status." 6 U.S.C. § 279(b)(1)(A). An "unaccompanied alien child" is defined as any child who "has no lawful immigration status in the United States," "has not attained 18 years of age," and either has no parent or legal guardian in the United States or has "no parent or legal guardian in the United States" who is "available to provide care and physical custody." *Id.* § 279(g)(2). The Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") requires that, except in exceptional cases, any federal agency that has custody of an unaccompanied minor must transfer the custody to HHS within 72 hours of determining they are an unaccompanied alien child. 8 U.S.C. § 1232(b)(3). Transferring the responsibility for the care and custody of an unaccompanied child to ORR does not impact the child's lack of immigration status. *See Mendez Ramirez v. Decker*, 612 F. Supp. 3d 200, 206 (S.D.N.Y. 2020) ("The TVPRA transferred responsibility for care and custody of UACs who were in federal custody by virtue of their immigration status to ORR; it did not alter their immigration status.").

ORR is required to place an unaccompanied minor "in the least restrictive setting that is in the best interest of the child," and it cannot place them in a secure facility unless the child "poses a danger to self or others or has been charged with having committed a criminal offense." *Id.* § 1232(c)(2)(A). Once transferred to ORR, the child "shall not [be] release[d] ... upon their own recognizance." 6 U.S.C. § 279(2)(B). However, despite the fact that an unaccompanied child lacks legal immigration status, ORR is authorized to release a minor to the custody of a

third party if it determines that the "proposed custodian is capable of providing for the child's physical and mental well-being," including by verifying the proposed custodian's identity and making an "independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child." *Id.* § 1232(c)(3)(A).

STANDARD OF REVIEW

A petition for a writ of habeas corpus challenges the legality or constitutionality of the government's restraint or imprisonment of the petitioner. 28 U.S.C. § 2241. A habeas petitioner bears the burden to show their detention is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). When reviewing a habeas petition, the court may consider affidavits and documentary evidence, such as records from any underlying proceeding. *Amponsah v. Beth*, No. 18-cv-199, 2018 WL 2944546, at *2 (E.D. Wis. June 12, 2018) (citing 28 U.S.C. §§ 2246, 2247). The court is not required to hold an evidentiary hearing when the petition and answer present only issues of law. *Toe v. Schmidt*, No. 24-cv-13, 2024 WL 493289, at *2 (E.D. Wis. Jan. 18, 2024) (citing 28 U.S.C. § 2243).

ARGUMENT

Respondents' position is simple: until such time as a foreign national is admitted into the United States by an immigration officer, the INA treats him as an "applicant for admission" if found in the United States. That is what the plain text of the INA provides. 8 U.S.C. § 1225(a)(1). Section 1225 is the statutory provision that governs the processes for arresting, detaining, and removing applicants for admission. And that statute says that an "applicant for admission … shall be detained" pending removal proceedings "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Thus, as an "applicant for admission," Petitioner is

rightfully detained under § 1225(b)(2)(A), pending his re-calendared removal proceedings. Respondents' interpretation is in harmony with the INA and the Due Process Clause, and previous agency practice and statements made during litigation in *Jennings* do not change this.

A. Petitioner's Detention Does Not Violate the INA.

The plain text of the INA supports Respondents' position that Petitioner is subject to mandatory detention under § 1225(b)(2), which is further supported by the relevant legislative history. DHS has charged Petitioner as being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) (present in the United States without admission or parole and/or arrived at any time or place other than a port of entry) and § 1182(a)(7)(A)(i) (lacking documentation).

The statutory text defines foreign nationals who have not been admitted to the United States, but who are present inside the United States, as "applicants for admission." 8 U.S.C. § 1225(a)(1). And it mandates that applicants for admission "shall be detained" pending removal proceedings (without the potential for release on bond) if an immigration officer determines that the applicant cannot show that he is "clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). This is exactly what Congress intended when it passed the Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-579 ("IIRIRA"), amending the INA.

1. The Statutory Text

The Court must begin with the text of the statute. *See Lackey v. Stinnie*, 604 U.S. 192, 199 (2025) ("When interpreting a statute, we begin with the text."). Section 1225 defines any foreign national "present in the United States who has not been admitted or who arrives in the United States" to be an "applicant for admission." 8 U.S.C. § 1225(a)(1). For a foreign national to be "admitted" into the United States, they must have lawfully entered the country "after

inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Here, Petitioner has not been admitted into the United States.

Because DHS has not initiated expedited removal proceedings, the applicable statutory provision is 8 U.S.C. § 1225(b)(2)(A). Under that provision, an applicant for admission "shall be detained" during removal proceedings if an immigration officer determines that the "alien seeking admission is not clearly and beyond a doubt entitled to be admitted." *Id.* Petitioner cannot demonstrate to an immigration officer that he is "clearly and beyond a doubt entitled to be admitted" because he is present in the United States without having been admitted or paroled, as evidenced by his asylum application, and is, therefore, inadmissible per 8 U.S.C. §§ 1182(a)(6) and (a)(7)(A)(i)(I), such that his detention is mandatory. 8 U.S.C. § 1225(b)(2)(A).

2. The Legislative History

Given that the statutory text is clear, the Court need not consider legislative history, but that history only further supports Respondents' position. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 459 (2012) ("Indeed, although we need not rely on legislative history given the text's clarity, we note that the history only supports our interpretation… ."). Congress enacted both 8 U.S.C. § 1225(b)(2) and 8 U.S.C. § 1226(a) as part of the IIRIRA in 1996. Before passage of that act, the INA only provided for inspection of foreign nationals when they arrived at ports of entry. *See* former 8 U.S.C. § 1225(a) (1994). If, after inspection, immigration officers at a port of entry determined the foreign national was inadmissible, they would be placed into "exclusion" proceedings and were subject to mandatory detention. *See* former 8 U.S.C. § 1182(d)(5) (1994). By contrast, under this former statutory regime, foreign nationals who illegally entered the United States and were later discovered were placed into "deportation" proceedings and were eligible to request release on bond. *See* former 8 U.S.C. § 1252(a)(1) (1994).

This structure led to an incongruous result: foreign nationals who had lawfully appeared at a port of entry for inspection but were deemed inadmissible were ineligible for release on bond, while those who surreptitiously entered the country without inspection were entitled to request release on bond. *See Matter of Yajure Hurtado*, 29 I.&N. Dec. 216, 2025 WL 2674169, at *6–8 (BIA Sept. 5, 2025) (discussing statutory history); *see also Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010) ("This so-called 'entry doctrine' resulted in an anomaly. Under this regime, non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings."); *Chavez v. Noem*, No. 25-cv-02325, 2025 WL 2730228, at *4 (S.D. Cal. Sept. 24, 2025) ("Prior to IIRIRA, an 'anomaly' existed 'whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully.") (quoting *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020)).

Congress found this unintended and undesirable result to be unacceptable. It chose to amend the INA through the IIRIRA to replace the previous term "entry" with the term "admission" and to replace the former "exclusion" and "deportation" proceedings with more general "removal" proceedings. *See Martinez v. Att'y Gen. of the U.S.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012). The House Report on the IIRIRA explained Congress's logic as follows:

> This subsection is intended to replace certain aspects of the current "entry doctrine," under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry. Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted.

H.R. Rep. No. 104-469(I), 1996 WL 168995, at 225 (Leg. Hist. Mar. 4, 1996).

In essence, Petitioner's attempt to graft geographic and/or temporal limitations onto the definition of "applicants for admission" provided in 8 U.S.C. § 1225(a)(1) seeks to override Congress's deliberate legislative choice in passing the IIRIRA and restore the former immigration regime that Congress determined was unacceptable. *Cf. Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (explaining that Congress's addition of 8 U.S.C. § 1225(a)(1) "ensures that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission'"). Petitioner's interpretation would afford foreign nationals who illegally enter the country and evade detection by immigration officers greater procedural protections than those available to foreign nationals who lawfully present themselves for inspection at a port of entry. Yet such a counterintuitive and unjust result is belied by the plain text of the statute and is not the policy enacted into law by Congress.

3. Petitioner's Substantive Arguments

Petitioner raises several substantive arguments, none of which is persuasive. He first argues that 8 U.S.C. § 1225(b)(2)(A) does not apply to foreign nationals who previously entered and are now residing in the United States; instead, he contends, they are subject to discretionary detention under § 1226(a) and may request and be granted bond or parole. ECF 1 at ¶ 5. Only those "seeking admission," Petitioner argues, are subject to § 1225(b). *Id.* at ¶ 45. Petitioner believes Respondents' position is contrary to statutory framework, and upturns "decades of agency practice applying § 1226(a) to people like [him]." *Id.* at ¶ 6. But this Court has already affirmed Respondents' interpretation of the INA. *See Cirrus Rojas v. Olson*, No. 25-cv-1437-bhl, 2025 WL 3033967 (E.D. Wis. Oct. 30, 2025).

The petitioner in *Cirrus Rojas* was an undocumented foreign national who had lived in the United States for several years without ever encountering immigration officials. *Id.* at *1. He was arrested, placed in removal proceedings, and ordered released on bond by an immigration judge, which DHS appealed, triggering the automatic stay of 8 C.F.R. § 1003.19(i)(2). *Ibid.* The petitioner sought habeas relief, arguing that his detention pending his removal proceedings was governed by 8 U.S.C. § 1226 rather than 8 U.S.C. § 1225. *Id.* at *7. The petitioner also argued that DHS's historic practice of treating unadmitted foreign nationals as subject to detention under 8 U.S.C. § 1226 (thus rendering them eligible for potential release on bond under 8 U.S.C. § 1226(a)(2)) undermined the respondents' argument that detention was mandatory under 8 U.S.C. § 1225(b)(2)(A). *Id.*

This Court conducted a thorough analysis of the text of 8 U.S.C. § 1225 and 8 U.S.C. § 1226, walking through the various provisions of the respective statutes. *Id.* at *5–10. While the Court acknowledged that "the statutory language and interplay between [§ 1225 and § 1226] could certainly be more clear," it concluded "[b]ased on the text" that the respondents' position was correct and held that § 1225(b)(2)(A) applies to unadmitted foreign nationals found inside the United States and mandates their detention throughout the pendency of removal proceedings. *Id.* at *8. After carefully reviewing the language of § 1225(a)(1) and considering the INA as a whole, the Court determined that it could "not find a statutory basis to exclude [the petitioner] from the definition of 'applicant for admission' in Section 1225(a)(1)." *Id.*

In so holding, this Court rejected several arguments also raised by Petitioner in the present case. First, the Court found "unpersuasive" the argument that 8 U.S.C. § 1225(b)(2)(A)'s use of the phrase "seeking admission" limits the scope of DHS's detention authority to foreign nationals presenting themselves for inspection at the border. (*Compare id.* at *8 *with* ECF 1 at ¶

45.) In *Cirrus Rojas*, this Court concluded that the statute's use of that phrase—in conjunction with also using the defined term "applicants for admission"—was "best read as simply another way of referring to aliens who are applicants for admission" and that the petitioner's alternative interpretation "would pack a lot of meaning into what appears to be an alternate phrasing." *Cirrus Rojas*, 2025 WL 3033967, at *8.

As a practical matter, the Court noted the inherent tension created by Petitioner's argument that unadmitted aliens are not "applicants of admission" governed by 8 U.S.C. § 1225: "Indeed, one suspects that upon apprehension most unadmitted aliens promptly seek admission and permission to stay; their alternative is to elect to remove themselves voluntarily." *Id.* at *9. Here, Petitioner has filed an application for asylum in an attempt to gain lawful admission into the United States. (Canella Decl. Ex. G.) Yet Petitioner may not have his cake and eat it too. Having not presented himself to an immigration officer for admission upon arrival, he is either an "applicant for admission" who is "seeking admission" to the country (and thus governed by 8 U.S.C. § 1225(b)(2)(A)) or he has withdrawn his application for admission and must "depart immediately from the United States." 8 U.S.C. § 1225(a)(4). He cannot simultaneously attempt to remain in the United States while denouncing that he is "seeking admission" into the country.

Next, this Court rejected the argument that the text of 8 U.S.C. § 1225 should be overridden by the historical practice of federal immigration agencies permitting unadmitted foreign nationals living in the United States to seek release on bond under 8 U.S.C. § 1226(a)(2). *Cirrus Rojas*, 2025 WL 3033967, at *9. As this Court noted, "[p]rior administrations' generous interpretations of these laws, while relevant to understanding that text, do not and cannot rewrite it." *Id.* The Supreme Court has recently explained that while "the longstanding practice of the government—like any other interpretive aid—can inform a court's determination of what the law

is… the interpretation of the meaning of statutes, as applied to justiciable controversies, [i]s exclusively a judicial function." *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 386–87 (2024) (internal punctuation and citations omitted). Just as Article III "[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations," *Bostock v. Clayton Cty.*, 590 U.S. 644, 683 (2020), Article II executive agencies may not rewrite the laws passed by Congress under its Article I powers. *Cf. Fed. Commc'ns Comm'n v. Consumers' Research*, 606 U.S. 656, 672 (2025) ("Legislative power, we have held, belongs to the legislative branch, and to no other.").

To bolster his argument on this point, Petitioner alleges that DHS issued an OREC, which he contends reflected the government's understanding that Petitioner was detained under the discretionary detention provision of 8 U.S.C. § 1226(a). ECF 1 at ¶ 47. But Petitioner has not provided a copy of the OREC, and as noted above, DHS has no record of ever having released Petitioner on his own recognizance. (Canella Decl., ¶ 12.) To the extent Petitioner equates his ORR placement with a family member in 2016 to a release on his own recognizance, he is misguided. Federal law is very clear that an unaccompanied child "shall not [be] release[d] ... upon their own recognizance." 6 U.S.C. § 279(2)(B).[6]

Similarly, this Court rejected the *Cirrus Rojas* petitioner's effort to "preclude ICE from adopting a new, different interpretation based on its past practice," which the Court construed as "akin to estoppel." *Cirrus Rojas*, 2025 WL 3033967, at *9. This Court noted that there is no estoppel against the federal government and applied the statute as written. *Id.* (citing *Off. of Pers.*

[6] Even if Petitioner had previously been released on his recognizance, which is akin to conditional parole under 8 U.S.C. § 1226(a), he still would not have been considered inspected and admitted or paroled. *Cf. Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115–20 (9th Cir. 2007) (distinguishing "conditional parole" under § 1226(a) (which is another name for release on recognizance) from being "paroled into the United States" under § 1182(d)(5)(A) and concluding petitioner did not meet qualifications of an "alien who was inspected and admitted or paroled into the United States" for purposes of adjusting status to lawful permanent residence under § 1255(a)).

Mgmt. v. Richmond, 496 U.S. 414, 420 (1990); *Gutierrez v. Gonzales*, 458 F.3d 688, 691 (7th Cir. 2006)).

Respondents acknowledge that a number of federal district courts have addressed this same issue recently and reached the opposite conclusion—that the detention of unadmitted foreign nationals living in the United States is governed by 8 U.S.C. § 1226 rather than 8 U.S.C. § 1225. Notably, the same week this Court entered its order in *Cirrus Rojas*—and the same day Petitioner filed this case—another judge in this district issued an order so holding in *Ramirez Valverde v. Olson*, No. 25-cv-1502-bbc, 2025 WL 3022700 (E.D. Wis. Oct. 29, 2025). Respondents respectfully submit that this line of nonbinding decisions is unpersuasive, for the reasons explained by this Court in *Cirrus Rojas*. 2025 WL 3033967, at *9–10.[7] Although the Court in *Valverde* described 8 U.S.C. § 1226 as the "default rule" for the detention of noncitizens in the United States, it never explained why unadmitted foreign nationals present in the United States would not meet the statutory definition of "applicants for admission" provided in 8 U.S.C. § 1225(a)(1). *See generally Valverde*, 2025 WL 3022700, at *1.

The Court in *Valverde* noted that "[o]ne line that courts have drawn is that § 1226 is for noncitizens who have been residing in or have otherwise established themselves in the United States," while "§ 1225 is for persons stopped [at] the border or soon upon their entry into the United States." *Id.* at *2. But the Court itself recognized that distinction is "somewhat simplistic in that it could be seen as being inconsistent with the definition of 'applicants for admission'

[7] Though not mentioned by Petitioner, it is notable that several courts outside the Seventh Circuit have reached the same conclusion as this Court in *Cirrus Rojas*. *See Oliveira v. Patterson*, 6:25-CV-01463, 2025 WL 3095972, at *1 (W.D. La. Nov. 4, 2025); *Sandoval v. Acuna*, No. 6:25-CV-01467, 2025 WL 3048926, at *1 (W.D. La. Oct. 31, 2025); *Vargas Lopez v. Trump*, No. 8:25CV526, 2025 WL 2780351, at *1 (D. Neb. Sept. 30, 2025); *Chavez v. Noem*, No. 25-CV-23250CAB-SBC, 2025 WL 2730228 at **1 (S.D. Cal. Sept. 24, 2025); *Pena v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913, at *1 (D. Mass. July 28, 2025).

contained in § 1225." *Ibid.* This Court acknowledged that "Section 1225(a)(1) has no temporal element; there is nothing to suggest that an alien can be regarded as admitted based on the passage of time from his entry into the United States." *Ibid.*

Nevertheless, the Court in *Valverde* concluded that Congress's use of the phrase "an alien seeking admission" in 8 U.S.C. § 1225(b)(2)(A) must mean that it intended that term to have a different meaning from "applicant for admission" as defined in 8 U.S.C. § 1225(a)(1). *Id.* at *3. The Court thus interpreted 8 U.S.C. § 1225(b)(2)(A) as only applying to unadmitted foreign nationals who are "actively and presenting pursuing inspection and authorization by an immigration officer to lawfully enter the United State[s]." *Ibid.* The Court cited no case law, legislative history, or federal regulations to support this interpretation of the statute. *Ibid.*

Respectfully, Respondents' position is that this Court's interpretation in *Cirrus Rojas* of 8 U.S.C. § 1225(b)(2)(A)'s use of the phrase "an alien seeking admission"—just seven words after referring to "an applicant for admission"—as an alternate phrasing is more consistent with the interpretation of the statute as a whole and with the legislative history behind the statute. Practically speaking, if a foreign national is unadmitted to the United States but present in the country, then he must either be deemed an "applicant for admission" or to have withdrawn his application for admission to "depart immediately from the United States." 8 U.S.C. § 1225(a)(4). The INA does not permit unadmitted foreign nationals to simply elect to flaunt the United States' immigration laws to remain in the country without seeking lawful admission.

Regardless, the facts of this case amply demonstrate that Petitioner does in fact wish to remain in the United States, as he has filed an application for asylum. The immigration court will hold a hearing on Petitioner's application, at which Petitioner (through his counsel of record in this case) will presumably argue that he should be granted lawful status in the United States.

Under any definition of the phrase, Petitioner is thus "an alien seeking admission" to the United States and subject to § 1225(b)(2)(A).

B. Judicial Estoppel Does Not Bar Respondents' Interpretation of 8 U.S.C. §§ 1225(b)(2)(A) and 1226(a).

In addition to his substantive arguments, Petitioner challenges Respondents' ability to assert that Petitioner is subject to mandatory detention under § 1225(b)(2)(A). ECF 1 at ¶¶ 32, 71–72. Citing (without analysis) to the Supreme Court's decision in *New Hampshire v. Maine*, 532 U.S. 742 (2001), Petitioner argues that Respondents should be judicially estopped from arguing that he is subject to mandatory detention because in *Jennings* the government took a "position directly contrary," namely "that § 1226(a) governs detention for noncitizens who have entered and are residing in the United States." ECF 1 at ¶ 32.[8] But even a cursory review shows that judicial estoppel is not appropriate. Because the Supreme Court has never applied judicial estoppel against the federal government, and because *Jennings* did not hold that foreign nationals in Petitioner's position are subject to § 1226(a) detention, this Court should decline to apply the doctrine here.

Some background on the *New Hampshire* case is warranted. It involved a boundary dispute between the states of New Hampshire and Maine. 532 U.S. at 745. In 1740, King George II issued a decree that a portion of the boundary line fell in the middle of the Piscataqua River, which flows between the two states from its headwaters at Salmon Falls south to Portsmouth Harbor. *Id.* at 746. Then, in the 1970s, a controversy arose between the two states over lobster fishing rights which was resolved when the Supreme Court accepted and entered a consent judgment proposed by both states in which they agreed that the "Middle of the River" was "the

[8] The oral argument transcript Petitioner references is available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1204_k536.pdf (last visited November 13, 2025).

middle of the main channel of navigation of the Piscataqua River." *Id.* at 747. The fight between the two states was not over, though. In 2000, New Hampshire brought an original action against Maine, this time claiming that the inland river boundary runs along the Maine shore such that the entire Piscataqua River and all of Portsmouth Harbor belong to New Hampshire. *Id.* at 745. Maine moved to dismiss the action because the 1970s litigation barred it. *Id.*

The Supreme Court analyzed and applied the doctrine of judicial estoppel. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position," the Court stated, "he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* at 749. The Court noted that judicial estoppel's application is discretionary and articulated three factors for courts to consider when deciding whether to apply judicial estoppel: (1) whether the party against whom judicial estoppel would be applied is taking a position "clearly inconsistent" with its earlier position; (2) whether that party "succeeded in persuading a court to accept [the] earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled';" and (3) whether that party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750–51.

The Supreme Court found these factors favored application of judicial estoppel. *Id.* at 751. First, New Hampshire's claim that the river boundary runs along the Maine shore was clearly inconsistent with its positions in the 1970s litigation, which located the boundary at either the middle of the main channel of navigation or the geographic middle of the river. *Id.* Second, New Hampshire's previous position prevailed when the Supreme Court accepted the consent decree fixing the boundary in the middle of the river's navigable channel. *Id.* at 752. And finally,

New Hampshire benefited from that interpretation and now sought to change the interpretation to gain additional advantage at Maine's expense. *Id.* at 752, 755. The Supreme Court held that New Hampshire was barred from asserting, contrary to its position in the 1970s litigation, that the Piscataqua River boundary runs along the Maine shore and dismissed the action. *Id.* at 749.

Critically, the *New Hampshire* case did not apply judicial estoppel to prevent the federal government from taking a litigation position. Petitioner does not cite to any case in which the Supreme Court has done so, and indeed the Supreme Court does not appear to have ever done so. Petitioner also does not articulate why judicial estoppel should be applied in this case, which is particularly important given that estoppel is generally limited when it comes to the federal government. Because of the geographic breadth of government litigation and the nature of the issues the government litigates, the federal government is in a different position than a private litigant. *See United States v. Mendoza*, 464 U.S. 154, 159 (1984); *see also Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984) (the federal government "may not be estopped on the same terms as any other litigant."). As this Court has observed, equitable estoppel does not apply against the federal government. *Cirrus Rojas*, 2025 WL 3033967, at *9. And the Supreme Court has expressly declined to extend the doctrine of nonmutual offensive collateral estoppel to the federal government. *Mendoza*, 464 U.S. at 162–63.

Petitioner does not articulate why judicial estoppel should extend to the federal government here. He does not address what impact it would have on the government's ability to litigate the issue nationally. Applying it in this case would implicate one of the very problems the *Mendoza* court cited in rejecting application of nonmutual offensive collateral estoppel against the government: it "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160.

As the Petition suggests, the central issue in this case continues to be litigated across the country, and permitting Petitioner to invoke judicial estoppel to prevent Respondents from making their argument here—one which this Court has already affirmed—would thwart the development of this important legal question.

With that said, the Seventh Circuit has entertained judicial estoppel arguments against the federal government without specifically addressing whether judicial estoppel properly applies. *See, e.g., United States v. Santana-Cabrera*, No. 22-2056, 2023 WL 2674363, at *2 (7th Cir. Mar. 29, 2023) (declining to apply judicial estoppel because federal government had not prevailed on pertinent issue in previous litigation); *United States v. Trudeau*, 812 F.3d 578, 584 (7th Cir. 2016) (same); *Levinson v. United States*, 969 F.2d 260, 264–65 (7th Cir. 1992) (declining to apply judicial estoppel because government's positions were not inconsistent).

Assuming for argument's sake that judicial estoppel does apply to the federal government, the Court should not apply it in this case. To the extent the Solicitor General's statement during *Jennings* oral argument is inconsistent with Respondents' position in this case, the facts at issue are not the same and the government did not succeed in persuading the Supreme Court to adopt any position in *Jennings* that is contrary to its decision in this case. *See Urbania v. Cent. States, Se. & Sw. Areas Pension Fund*, 421 F.3d 580, 589 (7th Cir. 2005) (judicial estoppel requires that "(1) the latter position must be clearly inconsistent with the earlier position; (2) the facts at issue must be the same in both cases; and (3) the party to be estopped must have prevailed upon the first court to adopt the position.").

The issue in *Jennings* was not whether the foreign nationals were subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) or discretionary detention under 8 U.S.C. § 1226(a). Rather, the issue was whether the Ninth Circuit was correct to infer from the text of §§ 1225(b),

1226(a), or 1226(c) a requirement for periodic bond hearings beginning at six months of detention, and that detention beyond the initial six-month period is permitted only if the government proves by clear and convincing evidence that further detention is justified. *Jennings*, 583 U.S. at 291–92. Writing for the majority, Justice Alito found nothing in the statutory text of those provisions from which to infer such a requirement. *Id.* at 297–306.

The *Jennings* holding applies to both mandatory and discretionary detention provisions alike, without regard to whether a foreign national residing in the United States without legal status is detained under § 1226(a) or § 1225(b)(2)(A). Thus, for purposes of judicial estoppel, it cannot be said that the government prevailed in *Jennings* by persuading the Supreme Court to adopt any position on whether § 1225 or § 1226 applied to an alien similarly situated to Petitioner, such that taking a different position in this case would amount to "seek[ing] to prevail, twice, on opposite theories." *See Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992) (explaining judicial estoppel's purpose to protect courts from being manipulated by "chameleonic litigants").

Indeed, if judicial estoppel was appropriate here, one would think *Jennings* undermined Respondents' position in this case. But it does not—rather, Respondents' position is in harmony with *Jennings*. Writing for the majority, Justice Alito stated that "[u]nder … 8 U.S.C. § 1225, an alien who 'arrives in the United States,' *or* 'is present' in this country but 'has not been admitted,' is treated as 'an applicant for admission.'" *Jennings*, 583 U.S. at 287. And then he noted that, "[r]ead most naturally, §§ 1225(b)(1) and (b)(2) [] mandate detention for applicants for admission until certain proceedings have concluded." *Id.* at 297 (cleaned up). This is Respondents' argument in a nutshell. *See Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1218 (6th Cir. 1990) (observing that parties are permitted by the federal rules to plead inconsistent

claims, so "judicial estoppel does not bar a party from contradicting itself, but from contradicting a court's determination that was based on that party's position.").

As to the third *New Hampshire* factor, Petitioner does not articulate how Respondents themselves will derive an unfair advantage or impose an unfair detriment on Petitioner. *New Hampshire*, 532 U.S. at 751. In that case, the Supreme Court highlighted that New Hampshire had "convinced this Court to accept one interpretation..., and having benefited from that interpretation, New Hampshire now urges an inconsistent interpretation to gain an additional advantage at Maine's expense." *New Hampshire*, 532 U.S. at 755. The Seventh Circuit's opinion in *Levinson* similarly indicates judicial estoppel requires some modicum of ill intent. There, the Seventh Circuit stated that judicial estoppel "prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so." *Levinson*, 969 F.2d at 264. But there is no evidence of taking opposite litigation positions for purposes of disadvantaging Petitioner.

Respondents' position in this case, to the extent it is inconsistent with what the Solicitor General said in 2016, results from a policy shift with respect to statutory interpretation and DHS enforcement priorities. Petitioner himself acknowledges this, noting that Respondents announced a "new policy" interpreting the INA to mandate detention under 8 U.C.S. § 1225(b)(2)(A) for all foreign nationals who entered without inspection. ECF 1 at ¶¶ 33-38, 40; *see also Cirrus Rojas*, 2025 WL 3033967, at *1–2 (describing "change from longstanding immigration practice...based upon recent (non-public) interim guidance").

This is critical because the *New Hampshire* decision was careful to qualify its application of judicial estoppel by noting New Hampshire's inconsistent position did not result from a policy shift, and it would not compromise a governmental interest in enforcing the law. *New*

Hampshire, 532 U.S. at 755–56. Such is the case here. If DHS's policy shift resulted in an interpretation at odds with the law, that would be one thing. *See New Hampshire*, 532 U.S. at 750 (judicial estoppel is "intended to prevent improper use of judicial machinery"). But as argued above, and held by this Court in *Cirrus Rojas*, Respondents' current interpretation is in harmony with the INA. Thus, applying the doctrine of judicial estoppel to this case would compromise the government's ability to enforce immigration laws in a manner consistent with the INA.

For these reasons, the Court should decline to exercise its discretion to judicially estop Respondents from arguing that Petitioner is an "applicant for admission" and, as such, is subject to mandatory detention under § 1225(b)(2)(A).

C. Petitioner's Detention Does Not Violate the Due Process Clause.

Beyond alleging that his continuing detention violates the INA, Petitioner alleges that it violates his due process rights under the Fifth Amendment. ECF 1 at ¶¶ 67–70. As noted above, Congress has specifically authorized immigration officers to arrest and detain foreign nationals for purposes of removing them from the country, and such procedures have consistently withstood due process challenges. *See, e.g., Jennings*, 583 U.S. at 323 ("This Court has never held that detention during removal proceedings is unconstitutional. To the contrary, this Court has repeatedly recognized the constitutionality of that practice.") (Thomas, J., concurring in part and concurring in the judgment) (citations omitted); *see also Denmore*, 538 U.S. at 523 ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (explaining that deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character").

Petitioner remains in removal proceedings, which although administratively closed for several years, are now continuing to progress. He was detained on September 25, 2025, and received a bond hearing a month later. (Canella Decl., ¶¶ 13, 15; Decl. Ex. M.) Although the immigration court denied bond because of *Hurtado*, Petitioner may continue to pursue his claim for asylum and withholding of removal based on his alleged fear of persecution or torture in Honduras through the administrative adjudication process. (Canella Decl. Ex. G.) Petitioner's next immigration hearing is set for December 8, 2025. (Canella Decl., ¶ 16.)

Given this procedural posture, Petitioner's detention has neither been prolonged, nor indefinite, and he cannot demonstrate that there exists "no reasonable likelihood of his removal in the foreseeable future." *Zadvydas v. Davis*, 533 U.S. 678, 702 (2001). Even though the immigration court denied Petitioner bond and concluded that his detention is mandatory under 8 U.S.C. § 1225(b)(2)(A), his detention "has a definite termination point: *the conclusion of removal proceedings.*" *Castaneda v. Perry*, 95 F.4th 750, 757 (4th Cir. 2024) (emphasis in original).

This Court aptly summarized this issue in last week's opinion in *Cirrus Rojas*:

> Given the caselaw and the well-defined procedures governing (and limiting) Cirrus Rojas's detention, the Court rejects his due process challenge. Consistent with *Zadvydas* and *Denmore*, Cirrus Rojas has a recognizable liberty interest in connection with his pre-removal detention. But as *Denmore* held, and *Parra* explains, that liberty interest is limited. Cirrus Rojas is an alien who was found in the United States without authorization and is subject to removal proceedings. Consistent with federal law, he is being provided with the opportunity to oppose removal and using that opportunity to pursue an asylum claim. As explained in *Parra*, Cirrus Rojas's liberty interest is limited, and he has the key to his release in his own pocket; he can choose to accept removal to his homeland under Section 1229a.

Cirrus Rojas, 2025 WL 3033967, at *12 (citing *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999)).

In short, Petitioner is receiving the process to which he is due through his removal proceedings under 8 U.S.C. § 1229a(b)(4). The United States has "a powerful interest in maintaining the detention in order to ensure that removal actually occurs." *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999). The Petition fails to show that the deprivation of Petitioner's liberty—as an unadmitted foreign national with no status in the United States—while he awaits the conclusion of his removal proceedings violates due process. *Denmore*, 538 U.S. at 531 (no due process violation in detaining foreign national pending removal proceedings); *Parra*, 172 F.3d at 958 ("The private interest here is not liberty in the abstract, but liberty *in the United States* by someone no longer entitled to remain in this country but eligible to live at liberty in his native land[.]").

CONCLUSION

For all these reasons, Respondents respectfully request that the Court deny Petitioner's habeas petition, grant them judgment as a matter of law, and dismiss this case with prejudice.

Dated at Milwaukee, Wisconsin this 17th day of November 2025.

Respectfully submitted,

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