

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

O.G.

Petitioner,

v.

LaDeon FRANCIS, New York Field Office
Director for U.S. Immigration and Customs
Enforcement; Paul ARTETA, Director of
Orange County Correctional Facility; Teresa
L. RILEY, Chief Immigration Judge,
Executive Office of Immigration Review;
Daren K. MARGOLIN, Director, Executive
Office of Immigration Review; Pamela
BONDI, Attorney General of the United
States; Kristi NOEM, Secretary of Homeland
Security; and Todd M. LYONS, Acting
Director, U.S. Immigration and
Customs Enforcement,

Respondents.

Civil Action No. _____

PETITION FOR WRIT OF HABEAS
CORPUS PURSUANT TO 28 U.S.C. § 2241

Petitioner O.G. (“O.G.”) brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, the All Writs Act, 28 U.S.C. § 1651, and Article I, Section 9, of the Constitution of the United States. Petitioner alleges in support of his petition:

PRELIMINARY STATEMENT

1. This is a case about the prolonged immigration detention of an asylum seeker and survivor of domestic violence, who continues to be detained by the government without ever being afforded individualized review of that detention or a proper bond hearing, in violation of the basic constitutional protections guaranteed to all people in the United States regardless of immigration status.

2. O.G. has been detained for over six months at the Orange County Correctional Facility (“Orange County Jail” or “OCJ”) in Goshen, New York pursuant to Immigration and Custom Enforcement’s (“ICE”) discretionary detention authority as provided in 8 U.S.C. § 1226(a). The government, however, has erroneously categorized him as subject to mandatory detention under 8 U.S.C. § 1225(b)(2). As such, it maintains he is ineligible for any bond hearing at all, pursuant to a recently adopted Department of Homeland Security (“DHS”) policy and subsequent Board of Immigration Appeals (“BIA” or “Board”) decision that miscategorizes noncitizens nationwide.

3. At no time during his now over six-month detention has O.G. had a proper individualized review of the need for his custody, either by immigration officials in the first instance or an immigration court. At a scheduled bond hearing, an immigration judge (“IJ”) first sided with the government’s position that the court was not empowered to consider release on bond. The IJ, however, went on to hypothetically consider bond, and wrongly placed the burden on O.G. of proving that he was neither a danger nor a flight risk.

4. The misclassification of which statute O.G. is detained under, as well as the burden inversion in his bond hearing, fundamentally violated his due process rights, as well as the INA and ICE's own regulations. The severity of the impingement on O.G.'s liberty rights increases with each day his unjustified six-month long detention persists, with no end in sight.

5. As a survivor of domestic violence, both in his childhood and in his former marital relationship, O.G. has endured tremendous challenges to his mental and physical health. Despite being eligible for and seeking protection under the Violence Against Women Act ("VAWA") as a survivor of domestic violence, he is now languishing in a facility with conditions indistinguishable from criminal confinement where his physical and mental health are greatly at risk of further deterioration.

6. O.G. thus seeks immediate release or, at minimum, a constitutionally adequate bond hearing in which DHS bears the burden of proving by clear and convincing evidence that he is a danger to the community or a flight risk.

PARTIES

7. Petitioner O.G. is a Mexican citizen who came to the United States in approximately 1999 as a teenager, fleeing severe physical and emotional abuse. Further, he is a victim of domestic partner violence and is actively pursuing relief from removal on that basis. He has lived and worked consistently in the United States for over 25 years. In April 2025, ICE arrested O.G. and incarcerated him at the Orange County Jail, where he continues to be improperly detained and denied a fair bond hearing with sufficient procedural protections. O.G.'s removal proceedings were venued at 201 Varick Street, in New York, NY, and his case is currently on appeal at the BIA.

8. Respondent LADEON FRANCIS is named in his official capacity as the Field Office Director for ICE's New York Field Office. He is responsible for the administration of immigration laws and the execution of detention warrants and removal orders.

9. Respondent PAUL ARTETA is named in his official capacity as the Sheriff of Orange County and the Director of the Orange County Jail.

10. Respondent TERESA L. RILEY is named in her official capacity as Chief Immigration Judge for the Executive Office of Immigration Review ("EOIR"), the sub-agency within the Department of Justice ("DOJ") that administers the nation's immigration courts and the BIA. She is responsible for oversight of the Varick Street Immigration Court and presides over removal and bond proceedings.

11. Respondent DAREN K. MARGOLIN is named in his official capacity as the Director of the EOIR. He is responsible for the policies and operations of the immigration courts.

12. Respondent PAMELA BONDI is named in her official capacity as the Attorney General of the United States. She is responsible for the policies and operations of the DOJ.

13. Respondent KRISTI NOEM is named in her official capacity as the Secretary of DHS. She directs each of the component agencies within DHS, including ICE.

14. Respondent TODD M. LYONS is named in his official capacity as Acting Director of ICE. He directs ICE operations and is responsible for the administration of the immigration laws.

JURISDICTION AND VENUE

15. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. § 1331 (federal question); Article I, § 9, cl. 2 of the United States Constitution (Suspension Clause); and 28 U.S.C. § 1651 (All Writs Act).

16. The federal district courts have jurisdiction to hear habeas corpus claims by noncitizens challenge the lawfulness of their detention by DHS. *See, e.g., Demore v. Kim*, 538 U.S. 510, 516-17 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

17. Pursuant to *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 493-500 (1973), venue is proper in this District under 28 U.S.C. § 2241 and 28 U.S.C. § 1391. O.G. is incarcerated at OCJ, within this District; his immigration proceedings are venued here; the ICE office that controls the location of his detention is based in New York City; and a substantial part of the events giving rise to the claims and relevant facts occurred in this District.

EXHAUSTION

18. O.G. is not required to exhaust administrative remedies because doing so would be futile.

19. Exhaustion of administrative remedies in immigration detention cases is considered a prudential concern, rather than a statutory requirement. *Quintanilla v. Decker*, No. 21 Civ. 417 (GBD), 2021 WL 707062, at *2 (S.D.N.Y. Feb. 22, 2021) (citing *Joseph v. Decker*, No. 18 Civ. 2640 (RA), 2018 WL 6075067, at *5 (S.D.N.Y. Nov. 21, 2018)).

20. Such exhaustion may be excused when any of the following apply: “(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question.” *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003).

21. O.G.’s case meets every requirement. Not only will he face irreparable injury if his detention continues, *see* Parts II.A, *infra*, and not only does his petition raise substantial

constitutional questions, *see* Parts II.A, III, IV.C *infra*, but intervening events have rendered administrative appeal futile and unable to provide a genuine opportunity for adequate relief.

22. On September 5, 2025, after O.G. filed notice of his intent to appeal the IJ's custody determination to the Board of Immigration Appeals, the Board decided *Matter of Yajure Hurtado*, a precedential decision finding that all noncitizens who, like O.G., have not been admitted to the United States are *per se* ineligible for bond, even if they are neither a danger nor a flight risk. 29 I. & N. Dec. 216 (BIA 2025).

23. Thus, the BIA will be bound to affirm the IJ's decision that he is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) and deny him release. This is true although every single district court in the country that has heard a challenge to this reading of the statute has rejected it out of hand. *See* Part I, *infra*.

24. Further, the BIA has recently rejected the argument that DHS, rather than the noncitizen, should bear the burden of proof in a noncitizen's bond hearing. *See Matter of R-A-V-P-*, 27 I&N Dec. 803, 804 (BIA 2020). Thus, O.G.'s argument that he should not have to prove his own lack of dangerousness, *see* Part II.A, *infra*, would be futile to raise on appeal and raises a substantial constitutional claim which cannot, or will not, be adequately addressed by the agency.

25. This is a quintessential case of futility. Binding BIA precedent mandates that, even if DHS cannot prove that O.G. is a flight risk or a danger, he must be detained. Because there is nothing for him to challenge before the Board, he is not required to exhaust a futile administrative remedy. He can turn only to this court to challenge his detention.

STATEMENT OF FACTS

26. O.G. was born on [REDACTED], in the town of Tehuitzingo in Puebla, Mexico. In approximately 1999, he fled to the United States to escape [REDACTED] severe and ongoing physical and emotional abuse.

27. He spent the next two decades working various jobs to support himself, as well as his U.S. citizen daughter when she was born. His employers have described him as hardworking, and have even offered him continued employment and housing upon release. *See* Respondent's Bond Evidence Packet, Exh. A2 at 3-4.¹

28. O.G. met his now ex-wife around 2018 and they got married in 2020. His ex-wife was a United States Citizen.

29. O.G. was hospitalized due to COVID soon after the marriage and continues to deal with asthma and arrhythmia as a result.

30. Over the course of the relationship, his wife became increasingly controlling and physically violent toward O.G.. *See* Exh. A1 at 17-24. She also used his immigration status to prevent him from leaving her, delaying petitioning for lawful status on his behalf.

31. In June 2024, his wife accused O.G. of physical violence when neighbors called the police after overhearing an argument. Although O.G. asserted his innocence and that his wife had initiated the argument and been the aggressor, he ultimately decided to plead guilty in order to be released on time served.

¹ All page numbers refer to the ECF page number of the exhibit. Because of its large size, the bond packet that O.G. submitted in immigration court is divided into five parts and is cited as it is divided and paginated in the exhibits submitted to this Court.

O.G.'s Detention in Orange County Correctional Facility

32. On April 8, 2025, O.G. was arrested by ICE while reporting to the probation department in compliance with the terms of his supervision. He was subsequently detained in the Orange County Jail and placed into removal proceedings.

33. As a result of his past experiences with abusive relationships, O.G. is suffering emotionally and psychologically in detention. He suffers from symptoms of a trauma and stressor-related disorder and remains “emotionally fragile,” as well as “vulnerable to decompensation as his life stressors increase.” Exh. A1 at 36.

34. During his time in OCJ, O.G. has strived to keep himself busy to avoid worsening his mental health. He attends church, has advocated for and started an AA program for Spanish-speaking detainees, and is helping three young men learn English. However, this is not a sufficient or long-term solution for his mental well-being. Exh. A1 at 36.

35. Besides his mental health, O.G.'s physical health is also at risk of permanent harm in detention. On April 24, 2025, O.G. was hospitalized due to an acute respiratory failure with hypoxia following his first week detained at OCJ. *See* Orange County Correctional Facility Medication and Hospitalization Records, Exh. E at 12. This is a life-threatening condition where the lungs cannot provide enough oxygen to the body, leading to low blood oxygen levels. *Id.* at 20, 21.

36. Over the course of his detention and following his hospitalization, O.G. has increasingly needed to depend on his inhaler because the lack of access to outdoor space for walking and fresh air has exacerbated his asthma. Besides his increased use of his inhaler, O.G. must also take heart medication daily to ensure his body is receiving enough oxygen. *Id.* at 5. Unfortunately, individuals detained in OCJ who suffer from chronic disease are not given the

care they need to manage their symptoms, including “self-management education, exercise, and social support,” which can lead to preventable suffering and long-term harm. NYLPI, *Denied Care, Denied Dignity: Systemic Medical Failures in Immigration Detention at Orange County Jail* 21 (2025), <https://www.nylpi.org/denied-care-denied-dignity>. Both of O.G.'s chronic conditions have only worsened while in detention.

37. Further, O.G. also struggles with receiving the nutrition he needs because the food portions at OCJ are inadequate and the food itself is lacking in proper nutrients or not fully cooked. As such, O.G.'s meals are limited to what he can trade for with others and soup he buys from commissary through his own efforts, leaving him hungry most days.

38. Because of his detention conditions, O.G. is unable to take care of his physical health because he has restricted access to the outdoors and is not receiving adequate nutrition. Indeed, OCJ neglects the “nutritional and lifestyle health needs” of people detained there, greatly putting at risk those with chronic conditions. *Denied Care, Denied Dignity* at 25.

39. Each day O.G. spends detained in OCJ is another day in which his physical and mental wellbeing are put at risk of further harm.

O.G.'s Bond Hearing

40. After O.G. was taken into ICE custody on April 8, he received a Notice to Appear at the Varick Immigration Court on April 15, 2025. He was assigned pro-bono counsel, who then filed applications for relief from removal and moved for bond.

41. On July 17, 2025, O.G.'s counsel filed 132 pages worth of exhibits in preparation for O.G.'s bond hearing. The exhibit list detailed the positive equities in O.G.'s case, including various letters of support from family, friends, and employers, a psychological evaluation, and a

thorough declaration from O.G.. *See* Exh. A1-5. DHS filed a “RAP sheet” and a few routine forms amounting to 11 pages of evidence. *See* DHS Bond Evidence Packet, Exh. B.

42. On July 18, 2025, an immigration judge denied O.G. release on bond. He first erroneously found that O.G. was subject to mandatory detention under 8 U.S.C. § 1225(b)(2) and thus that he did not have jurisdiction to consider release on bond. *See* Bond Decision of the Immigration Judge, Exh. C at 2. Despite finding he had no jurisdiction to evaluate bond, however, the IJ went on to make an alternate finding that he would not order O.G.’s release even if he was subject to discretionary detention under 8 U.S.C. § 1226(a). *Id.* The IJ’s alternate finding consisted of a single paragraph finding that O.G. did not meet his burden of proof by failing to establish that he did not pose a danger to the community. *Id.* at 6. That finding relied solely on the fact that O.G. had once pled guilty to attempted assault. The IJ did not consider any of the context or evidence showing that his ex-wife was the abuser in the situation. *Id.*

43. A notice of appeal of the bond decision to the BIA was filed on July 23, 2025. The Board decided *Yajure Hurtado* on September 5, 2025, which held that individuals who were not previously admitted to the United States (like O.G.) are ineligible for bond. 29 I. & N. Dec. at 216.

O.G.’s Merits Hearing

44. On July 25, 2025, O.G. had an individual hearing (akin to an evidentiary hearing or trial) on his applications for relief from removal. He sought cancellation of removal under VAWA because of his abusive relationship with his ex-wife, as well as asylum, withholding of removal, and protection under the Convention Against Torture.

45. Cancellation of removal under the Violence Against Women Act, or VAWA Cancellation, is a form of relief available to noncitizen survivors of domestic abuse who are

facing removal. 8 U.S.C. § 1229b(b)(2). Contrary to its title, VAWA cancellation is a form of relief that may apply to all noncitizen survivors of domestic violence, regardless of their gender identity.

46. To be eligible for VAWA cancellation, a petitioner must meet a list of requirements listed at 8 U.S.C. § 1229(b)(2), which include showing they were battered by or subjected to extreme cruelty by a U.S. citizen spouse and that they merit a favorable exercise of discretion.

47. During the hearing, O.G. testified regarding the physical, emotional, and financial abuse he suffered at the hands of his ex-wife. He also testified regarding the events that led to his arrest in 2024, and how his ex-wife had been the aggressor.

48. [REDACTED]

[REDACTED]

[REDACTED] The IJ ultimately found O.G.'s testimony was overall credible and did not doubt the pain and suffering he endured over the course of the relationship. Merits, Exh. D at 12.² He also stated that "on balance he would have merited an exercise of discretion." *Id.* at 14.

² Although the transcript of the oral decision of the IJ on the merits was signed by the IJ and serves as his final decision on the matter, it contains numerous transcription errors throughout. Counsel have listened to the audio recording of the decision and verified that all language cited to herein accurately reflects the IJ's oral decision. In addition, O.G.'s immigration counsel has filed a motion to the BIA requesting that it issue a corrected transcript.

50. However, the IJ proceeded to deny O.G.'s application for VAWA cancellation on the ground that O.G.'s abuse did not rise to a level of extreme cruelty or battery required to merit relief under VAWA, even though the IJ found O.G.'s testimony about [REDACTED] [REDACTED] *Id.* at 10. The IJ also denied O.G.'s asylum and withholding of removal claims and ordered him removed to Mexico. *Id.* at 25.

51. The appeal of the IJ's merits denial is currently pending before the BIA. The BIA generally takes at least several months or more to issue a decision. If the BIA affirms the IJ's denials of relief, O.G. will have the right to petition for review to the Second Circuit Court of Appeals, a process that also generally takes at least six months to a year or more. If the BIA remands the IJ's decisions, there will be further proceedings at the immigration court level, again which take at least several months or more, again with both sides having the right to appeal any subsequent decision of the IJ.

52. As of this filing, O.G. remains in detention. Without release from this court, he faces the prospect of months, or even years, in immigration custody, separated from his community.

LEGAL BACKGROUND

Immigration Detention Framework and Bond Hearing Eligibility

53. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

54. For decades, the immigration system has implemented this balance through a network of three mutually exclusive detention statutes.

55. First, at the border, "applicants for admission" who are "seeking admission" are placed into expedited removal proceedings and subject to detention without a bond hearing under

8 U.S.C. § 1225(b)(2).³ See *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018) (describing § 1225 as relating to “borders and ports of entry”). These individuals may request release through humanitarian parole under 8 U.S.C. § 1182(d)(5)(A).

56. Second, individuals arrested inside the United States are generally placed into removal proceedings under 8 U.S.C. § 1229(a), during which an Immigration Judge—and later potentially the BIA and a U.S. Court of Appeals—will decide whether or not the person should be deported. During these proceedings, a noncitizen may apply for various forms of relief from deportation, such as asylum, withholding of removal, cancellation of removal, and adjustment of status. This process can take months or even years. Any detention of individuals who are arrested inside the United States and placed in removal proceedings is subject to 8 U.S.C. § 1226. See *Jennings*, 583 U.S. at 288–89 (describing § 1226 detention as relating to people “inside the United States” and “present in the country”). Most of these individuals are eligible for release on bond under § 1226(a), and they are consequently entitled to a custody redetermination (colloquially called a “bond hearing”) before an IJ to decide whether they should be detained or released pending the adjudication of their removal proceedings. See 8 C.F.R. §§ 1003.19(a), 236.1(d).

57. The Supreme Court and Second Circuit have recognized only one exception to this constitutional requirement for a bond hearing for § 1226 detainees: In 2003, in *Demore v. Kim*, the Court held that, under 8 U.S.C. § 1226(c), there is a narrow category of people who can be held in mandatory detention for a brief period of time, if the person has conceded

³ Separately, there is also a limited subset of individuals in and around the border who may be placed into the Expedited Removal process and are subject to mandatory detention under 8 U.S.C. § 1225(b)(1). See *Make the Road N.Y. v. Noem*, No. 25-190, 2025 WL 2494908, at *23 (D.D.C. Aug. 29, 2025).

removability and has been convicted of certain crimes following all of the due process afforded by a criminal adjudication. 538 U.S. 510, 513 (2003).

58. Section 1226 was most recently amended earlier this year by the Laken Riley Act (“LRA”). Pub. L. No. 119-1, 139 Stat. 3 (2025) (codified at 8 U.S.C. § 1226(c)(1)(E)). Congress passed the LRA to expand mandatory detention under § 1226(c), the statute that subjects noncitizens convicted of certain crimes to detention without initial bond eligibility. *See id.* The LRA amendments require detention for noncitizens who have been charged as inadmissible under sections 1182(a)(6)(A) (the inadmissibility ground for a noncitizen “present in the United States without being admitted or paroled”), 1182(a)(6)(C) (misrepresentation), or 1182(a)(7) (lacking valid documentation) *and* have been arrested for, charged with, or convicted of certain crimes—expressly contemplating the inclusion of people who entered without inspection within the scope of § 1226 detention. *Id.*; *see Romero v. Hyde*, No. CV 25-11631 (BEM), 2025 WL 2403827, at *11 (D. Mass. Aug. 19, 2025); *Sampiao v. Hyde*, No. 25-11981 (JEK), 2025 WL 2607924, at *8 (D. Mass. Sept. 9, 2025).

59. Last, the INA provides for detention of noncitizens who are subject to final orders of removal. *See* 8 U.S.C. § 1231(a)–(b). As relevant here, a removal order is not final until the Board of Immigration Appeals has dismissed any appeal of an immigration judge’s decision. 8 C.F.R. § 1241.1(a).

60. This system—in which people arrested inside the United States are generally eligible for a bond hearing and release during immigration proceedings—has existed in essentially its current form since Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 3003, 110 Stat. 3009-546, 3009-585 to 3009-587.

The Burden of Proof in Immigration Court Bond Hearings

61. By contrast with § 1225, individuals who are detained under 8 U.S.C. § 1226(a) are not subject to mandatory detention and are thus detained pursuant to ICE discretion. 8 C.F.R. § 236.1(d)(1). However, the noncitizen may request review of ICE's detention determination at a bond hearing. *Id.*

62. Neither the statute nor applicable regulations directly dictate the burden of proof in such proceedings. *See* 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1.

63. However, in *In Re Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999), the BIA interpreted regulations to hold that Mr. Adenji was required to prove that he was neither a danger to the community nor a flight risk. *Id.* Later cases broadened that holding to individuals like O.G., who are subject to § 1226(a). *See In Re Guerra*, 24 I. & N. Dec. 37 (BIA 2006).

64. The Supreme Court has consistently held, however, that when the government seeks to hold individuals in civil detention, it must justify their detention by clear and convincing evidence. *See, e.g., United States v. Comstock*, 560 U.S. 126, 129–31 (2010); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Addington v. Texas*, 441 U.S. 418, 432–43 (1979).

65. The Court's cases have applied that standard to hearings regarding initial detention. *See Addington*, 441 U.S. at 432–43 (applying clear and convincing standard to initial civil commitment hearing); *United States v. Salerno*, 481 U.S. at 751 (approving initial pretrial detention determination where justified by clear and convincing standard). Where the Court has dealt with custody redetermination, it has given no indication that the amount of time an individual had already been confined alters the burden placed on the government. *See Foucha*, 504 U.S. 71; *Comstock*, 560 U.S. 126.

66. The Second Circuit has applied these precedents to adopt the same standard in the immigration bond context when hearing claims of individuals who have been subjected to prolonged detention *See Velasco Lopez v. Decker*, 978 F.3d 842, 855-57 (2d Cir. 2020), 855–57; *Black v. Decker*, 103 F.4th 133, 155-56 (2d Cir. 2024).

Due Process Constraints on Prolonged Immigration Detention

67. The Second Circuit has held that, whether an individual is subject to discretionary or mandatory detention, due process prohibits them from being detained for an unreasonable amount of time without a constitutionally sufficient bond hearing. *Velasco Lopez*, 978 F.3d at 846; *Black*, 103 F.4th at 138. Both cases applied the tripartite test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine what process was due to the petitioners. *Velasco Lopez*, 978 F.3d at 851; *Black*, 103 F.4th at 138.

68. *Velasco Lopez* dealt with individuals who, like O.G., are detained subject to § 1226(a). In *Black*, the Court found that detainees subject to mandatory detention based on certain criminal convictions, *see* 8 U.S.C. § 1226(c), were constitutionally entitled to a bond hearing after prolonged detention despite the statute’s requirement of mandatory detention. 103 F.4th at 143.

69. Both *Velasco Lopez* and *Black* found that all three *Mathews* factors favored the noncitizen and ordered a bond hearing that required DHS to justify the petitioner’s detention by clear and convincing evidence. *Velasco Lopez*, 978 F.3d at 852–55; *Black*, 103 F.4th at 152–55. In *Black*, the Circuit further ordered the Immigration Judge to consider alternatives to detention and ability to pay. *Black*, 103 F.4th at 159.

ARGUMENT

I. Because O.G. is Not Subject to Mandatory Detention under 8 U.S.C. § 1225(b)(2), the Government Cannot Deny Him Bond on that Basis.

70. After more than 25 years of building a life here in the United States, O.G. was detained by ICE while complying with his probation check-in and subsequently unlawfully classified as “seeking admission” under 8 U.S.C § 1225(b)(2), in direct contradiction to the plain reading of the detention statutory scheme.

71. O.G.’s misclassification came pursuant to a newly announced DHS policy that rejected the well-established understanding of the statutory detention framework, reversed decades of practice, and rolled out this unlawful practice nationwide.⁴ Pursuant to this policy, DHS’s representatives in the immigration courts began to request that immigration judges nationwide misclassify bond-eligible § 1226(a) detainees as mandatory § 1225(b)(2) detainees and refuse to conduct bond hearings on that basis.

72. On September 5, 2025, the BIA adopted this same position in a published decision, *Yajure Hurtado*. 29 I. & N. Dec. 216. There, the Board held that all noncitizens who entered the United States without admission or parole were “seeking admission” and thus subject to § 1225(b)(2) and ineligible for bond. Therefore, all immigration judges are directed to misclassify people in this manner, making them ineligible for bond throughout the course of proceedings that can take at least several months and, in many cases, years.

73. Even before ICE or the BIA introduced these nationwide policies, IJs in the Tacoma, Washington, immigration court stopped providing bond hearings for persons who

⁴ See ICE, Interim Guidance Regarding Detention Authority for Applicants for Admission, <https://www.aila.org/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission>.

entered the United States without inspection and who have since resided here. There, the U.S. District Court in the Western District of Washington granted a motion for summary judgment to a class of noncitizens being misclassified in this way and declared that the “members are detained under 8 U.S.C. § 1226(a) and are not subject to mandatory detention under 8 U.S.C. § 1225(b)(2).” *Rodriguez v. Bostock*, No. 3:25-CV-05240 (TMC), 2025 WL 2782499, at *27 (W.D. Wash. Sept. 30, 2025). Further, the Court declared that “the Tacoma Immigration Court’s practice of denying bond to Bond Denial Class members on the basis of § 1225(b)(2) violates the Immigration and Nationality Act.” *Id.*

74. Since Respondents adopted their new policy, “[e]very district court to address this question has concluded that the government’s [new] position belies the statutory text of the INA, canons of statutory interpretation, legislative history, and longstanding agency practice.” *Rodriguez*, 2025 WL 2782499, at *1 (collecting 22 recent cases finding against the government’s interpretation);⁵ *see also Hyppolite v. Noem*, No. 25-CV-4304 (NRM), 2025 WL 2829511

⁵ *See, e.g., Lopez Benitez v. Francis*, 25 CIV. 5937 (DEH), 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Barbosa Da Cunha v. Moniz*, 6:25-cv-06532 (MAV) (W.D.N.Y. Oct. 20, 2025), *Aceros, v. Kaiser, et al.*, 25-CV-06924 (EMC), 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Maldonado Vazquez v. Feeley*, 2:25-CV-01542-RFB (EJY), 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Romero v. Hyde*, CV 25-11631 (BEM), 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Martinez v. Hyde*, CV 25-11613 (BEM), 2025 WL 2084238 (D. Mass. July 24, 2025) (denying government’s motion for reconsideration); *Gomes v. Hyde*, No. 1:25-CV-11571 (JEK), 2025 WL 1869299 (D. Mass. July 7, 2025); *dos Santos v. Lyons*, No. 1:25-CV-12052 (JEK), 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted sub nom. Rocha Rosado v. Figueroa*, No. CV-25-02157-PHX-DLR (CDB), 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Aguilar Maldonado v. Olson*, --- F. Supp. 3d ----, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Velasquez Salazar v. Dedos*, No. 25-cv-835, 2025 WL 2676729 (D.N.M. Sept. 17, 2025); *Beltran Barrera v. Tindall*, 3:25-CV-541 (RGJ), 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Lopez-Campos v. Raycraft*, 2:25-CV-12486, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Jimenez v. FCI Berlin, Warden*, 25-CV-326-LM-AJ, 2025 WL 2639390 (D.N.H. Sept. 8, 2025); *Chogollo Chafra v. Scott*, 2:25-CV-00437 (SDN), 2025 WL 2688541 (D. Me. Sept. 21, 2025); *Arrazola-Gonzalez v. Noem*, No. 5:25-CV-01789-ODW (DFMX), 2025 WL 2379285 (C.D. Cal.

(E.D.N.Y. Oct. 6, 2025) (finding that the government cannot point to an Article III court that has adopted their expansive construction of § 1225(b)(2)); *Artiga v. Genalo*, No. 25-CV-5208 (OEM), 2025 WL 2829434 (E.D.N.Y. Oct. 5, 2025) (same).

75. The government's new position belies the statutory text of the INA because if § 1226(a) did not cover inadmissible noncitizens, as they now purport, there would be no reason for § 1226(c), a carve out to § 1226(a), to specify that it governs certain persons who are inadmissible because inadmissible noncitizens would not be subject to the baseline statute. Instead, it would have only needed to address people who are deportable for certain offenses.

76. By including inadmissible individuals under § 1226(c), Congress clarified that, by default, § 1226(a) covers persons who are inadmissible. In other words, if someone is charged as inadmissible and the additional crime-related provisions of § 1226(c)(1)(E) do not apply, then § 1226(a) governs that person's detention. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (observing that a statutory exception would be unnecessary if the statute at issue did not otherwise cover the excepted conduct).

77. A contrary interpretation would ignore § 1226(a)'s plain text and structure and render meaningless § 1226's language that specifically addresses individuals who have entered without inspection.

78. The government's recently adopted position also ignores the text of § 1225(b)(2). For § 1225(b)(2) to apply, an examining immigration officer must make three separate

Aug. 15, 2025) (granting individualized bond hearings on ex parte motion for temporary restraining order after finding likelihood of success); *Mosqueda v. Noem*, 5:25- CV-02304 CAS (BFM), 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025) (same); *Kostak v. Trump*, CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025) (same); *Garcia Jimenez v. Kramer*, No. 4:25CV3162, 2025 WL 2374223 (D. Neb. Aug. 14, 2025) (granting relief from stay of bond order pending BIA appeal); *Mayo Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025) (same).

determinations: that a person is 1) an applicant for admission; 2) seeking admission; and 3) not clearly and beyond a doubt entitled to be admitted. Section 1225(a)(1) defines an “applicant for admission” as [a noncitizen] present in the United States who has not been admitted or who arrives in the United States.” The term “seeking admission . . . necessarily implies some sort of present-tense action.” *Martinez v. Hyde*, No. CV 25-11613 (BEM), 2025 WL 2084238, at *6 (D. Mass. July 24, 2025). The government’s interpretation that all inadmissible individuals are “seeking admission” within the meaning of § 1225(b) renders the meaning of the term identical to the statutorily defined term “applicant for admission.” Such an interpretation violates rule of surplusage and negates the plain meaning of text.

79. The legislative history further shows that § 1226(a) was intended to “restate[] the [then-]current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States.” *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1260 (W.D. Wash. 2025) (quoting H.R. Rep. No. 104-469, at 229 (1996)). It also reflected nearly a century of law in the United States of allowing people inside the country to seek release while the government decided whether or not to deport them. *See* 34 Stat. 904-05, § 20 (1907) (providing for release on bond for noncitizens alleged to have entered the United States unlawfully); 39 Stat. 874, 890-91, §§ 19, 20 (1917) (similar); 66 Stat. 163, §§ 241(a)(2), 242(a) (1952) (last codified at 8 U.S.C. § 1252(a)(1) (1994)) (providing for release on bond, including for noncitizens alleged to have entered the United States without inspection).

80. Indeed, shortly after IIRIRA’s enactment, the former Immigration and Naturalization Service and the Executive Office for Immigration Review (“EOIR,” which houses the Immigration Courts and BIA) issued an interim rule to implement the statute that expressly

stated: “Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.” 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

81. Thus, for almost 30 years, all participants in the immigration system have understood that people arrested inside the United States generally fall within § 1226 for detention purposes and therefore, unless subject to bars not applicable here, are required to receive a bond hearing upon request—even if they initially entered the country without permission. Such a longstanding and consistent interpretation “is powerful evidence that interpreting the Act in [this] way is natural and reasonable.” *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); see also *Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (relying in part on “over 60 years” of government interpretation and practice to reject government’s new proposed interpretation of the law at issue).

82. The LRA amendments to § 1226 that occurred just this year, § 119, 139 Stat. 3, also confirmed widespread understanding that individuals not admitted or paroled were still detained pursuant to § 1226(a) if they were detained while already in the United States. Congress expressly included inadmissible individuals who have been convicted of certain crimes as subject to mandatory detention under § 1226(c)(1)(E). Again, if every noncitizen who was present without being admitted was already subject to mandatory detention under § 1225(b)(2), Congress would have had no reason to pass an entirely new provision in order to make those individual subject to mandatory detention under § 1226(c)(1)(E) if they committed one of the listed crimes.

83. Despite the IJ’s decision to side with the agency’s recently adopted interpretation of the 8 U.S.C. § 1225(b)(2) and find O.G. ineligible for bond on that basis, § 1226 leaves no

doubt that it applies to people who face charges of being inadmissible to the United States, including those who are present without admission or parole, such as O.G..

84. As the Supreme Court has recently held, this Court is not required to defer to the agency's contrary interpretation. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412–13 (2024). While “the judgment of the Executive Branch may help inform” the Court's inquiry, *id.* at 413, it does so only to the extent of its “power to persuade.” *Id.* at 402 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

85. O.G. was arrested after 25 years of continuous presence in the United States, not while “seeking admission.” Further, neither his pending asylum application nor VAWA cancellation of removal application are legally considered a process of “seeking admission.” *See Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *6 n.7 (S.D.N.Y. Aug. 13, 2025); *Garcia-Mendez v. Lynch*, 788 F.3d. 1058 (9th Cir. 2015).

86. As a result, O.G. does not meet the requirements of § 1225(b)(2). His detention is governed by § 1226(a), and his continued detention under § 1225(b)(2) is in excess of statutory authority and *ultra vires*.

87. As a result of this unlawful classification, O.G. remains in detention with no end in sight. Without relief from this court, he faces the prospect of months, or even years, in immigration custody, separated from his community.

II. O.G.'s Initial Bond Hearing was Procedurally Inadequate Because It Did Not Require ICE to Justify His Detention

88. O.G.'s detention further violates due process because, in making an alternative bond finding, the IJ placed the burden on O.G. to show that he was neither a danger nor a flight risk. ICE has thus continued to detain him without ever being required to demonstrate that his

detention serves a legitimate purpose. This initial bond hearing was therefore constitutionally inadequate, inconsistent with the INA, and a violation of the Administrative Procedure Act.

A. Placing the Burden of Proof on O.G. Violated His Right to Due Process

89. The Immigration Judge's alternate ruling that he would deny O.G. bond even if he were subject to discretionary detention falls well short of the process O.G. is due under the Constitution.

90. In holding that O.G. "did not meet his burden of proof to establish that he does not pose a danger if released," Exh. C at 6, the IJ allowed O.G. to be detained even if ICE could not demonstrate a legitimate reason for his detention. All that mattered was that O.G. could not prove that he was *not* a danger.

91. Court after court has found this to be an unconstitutional inversion of the burden of proof in situations where a noncitizen's liberty is at stake. *See, e.g., Velasco Lopez*, 978 F.3d at 855–57; *Black*, 103 F.4th at 155–56; *Hernandez-Lara v. Lyons*, 10 F.4th 19, 30–41 (1st Cir. 2021); *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213–214 (3d Cir. 2020).

92. Instead, the Supreme Court has held that the government must justify civil detention by clear and convincing evidence. *See, e.g., Comstock*, 560 U.S. at 129–31; *Foucha*, 504 U.S. at 80; *Addington*, 441 U.S. at 432–43. These precedents apply to immigration detainees as well. *See Zadvydas*, 533 U.S. at 690–91 (citing *Salerno*, *Foucha*, and *Kansas v. Hendricks*, 521 U.S. 346 (1997)) (“[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.”)

93. The Second Circuit has applied the same burden to individuals like O.G., who have been detained for an unconstitutional amount of time. *See Velasco Lopez*, 978 F.3d at 855–

57. Although *Velasco Lopez* dealt with prolonged detention, its rationale extends equally to initial bond hearings like O.G.'s.

94. Though the Court in *Velasco Lopez* did not address the standard of proof in an initial bond hearing, the Supreme Court doctrine relied upon by *Velasco Lopez* make no distinction between the process required for hearings regarding initial detention and those required to justify continued detention. *See Addington*, 441 U.S. at 432–43 (applying clear and convincing standard to initial civil commitment hearing); *Salerno*, 481 U.S. at 751 (approving initial pretrial detention determination where justified by clear and convincing standard).

95. This is also why it is the “overwhelming consensus of judges in this District” that the Due Process Clause requires the government to bear the burden of proof by clear and convincing evidence regardless of the length of detention. *Roman v. Decker*, No. 20-cv-6752 (AJN), 2020 WL 5743522, at *2 (S.D.N.Y. Sept. 25, 2020) (citation omitted). *See also Darko v. Sessions*, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (“There has emerged a consensus view that where, as here, the government seeks to detain an alien pending removal proceedings, it bears the burden of proving that such detention is justified.”) (collecting cases); *P.M. v. Joyce*, No. 22-cv-6321 (VEC), 2023 WL 2401458, at *3 (S.D.N.Y. Mar. 8, 2023) (“[N]either the Circuit's decision in *Velasco Lopez* nor any other binding appellate authority overrules the overwhelming consensus of courts in this District that the Due Process Clause of the Fifth Amendment requires the Government to bear the burden to justify continued detention of a noncitizen who is detained pursuant to § 1226(a), even absent prolonged detention.”) (quoting *Banegas v. Decker*, No. 21-CV-2359 (VEC), 2021 WL 1852000, at *3 (S.D.N.Y. May 7, 2021) (cleaned up); *Quintanilla*, 2021 WL 707062, at *3 (collecting cases).

96. To determine the process due in an initial bond hearing, the Court should apply the *Mathews* test. “The three *Mathews* factors are: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Velasco Lopez*, 978 F.3d at 851 (quoting *Mathews*, 424 U.S. at 335). The Court in *Velasco Lopez* found that all three factors weighed heavily in favor of the petitioner. 978 F.3d at 852, 854, 855. The same is true of O.G..

97. “Here, the private interest affected by the official action is the most significant liberty interest there is—the interest in being free from imprisonment. Case after case instructs us that in this country liberty is the norm and detention ‘is the carefully limited exception.’” *Velasco Lopez*, 978 F.3d at 851 (quoting *Salerno*, 481 U.S. at 755, and citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004)).

98. Conditions at the Orange County Jail only exacerbate the deprivation of O.G.’s liberty. A recent report found that the jail fails to provide adequate medical care for detainees with chronic conditions, placing individuals like O.G. at further risk. *See* ¶ 36, *supra*. O.G., who suffers from lung issues as a result of severe COVID-19, was hospitalized for respiratory failure after entering OCJ. *See* ¶ 35, *supra*. Meager portions and poor food quality, which O.G. must supplement with his own commissary funds to get enough to eat, pose further threats to O.G.’s health and wellbeing. Nutritional deficiencies at OCJ have been well documented. *See* ¶¶ 37–38, *supra*.

99. In addition, as a survivor of domestic violence, both as a child and an adult, incarceration is especially harmful for O.G.. As his psychological evaluation indicates, he has dealt with significant trauma which has left him “emotionally fragile” and “vulnerable to decompensation as his life stressors increase.” Exh. A1 at 36. Prolonged incarceration is undoubtably a source of significant stress, such that every day that O.G. remains detained increases the risk to his mental health and wellbeing.

100. The second *Mathews* factor— “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards” *Velasco Lopez*, 978 F.3d at 851—also weighs heavily in O.G.’s favor.

101. As O.G.’s case so effectively demonstrates, a bond hearing in which the government does not bear the burden of proof significantly raises the risk of an erroneous deprivation of liberty. Because he was unable to prove his case to the satisfaction of the IJ, O.G., who is neither a danger nor a flight risk, has been erroneously detained for months.

102. O.G. presented 132 pages of evidence in support of his request for a custody redetermination. *See* Exhs. A1–A5. These included ten letters of support, an extensive declaration from O.G. himself, and the evaluations of a psychologist and a licensed social worker. *Id.* DHS presented only a “RAP sheet” and some routine forms like an I-213 Record of Deportable/Inadmissible Alien, a printout of ICE’s EARM internal database, and a worksheet questionnaire completed by O.G.. *See* Exh. B. An unauthenticated RAP sheet is not even admissible evidence to prove one’s criminal history, let alone clear and convincing evidence. *See Matter of J.R. Velasquez*, 25 I&N Dec. 680, 684–85 (BIA 2012); *Francis v. Gonzales*, 442 F.3d 131, 143 (2d Cir. 2006) (holding that RAP sheets “do not necessarily emanate from a neutral, reliable source”). But that was all that was required of the government to deprive O.G. of his

liberty for over six months. Instead, the IJ required *O.G.* to prove that he was *not* a danger to the community. The historical fact of his prior arrest was the only reason given that *O.G.* could not prove he was not a danger. The IJ did not consider the broader context of the pattern of abuse or whether on current facts, where *O.G.* was no longer in a relationship with his ex-wife, there was any risk of future danger. Exh. C at 6.

103. Just a week later, hearing the merits of *O.G.*'s immigration case, the same IJ made several findings that show how the bond hearing might have gone differently had the burden been on DHS. Not only did the IJ find *O.G.* credible overall, Exh. D at 13, he found that, even considering his conviction, *O.G.* would merit a favorable exercise of discretion had he been deemed to qualify for VAWA relief. *Id.* at 14. The IJ considered persuasive his long record of living in the United States, his employment history, his family and community ties, and the fact that this was *O.G.*'s only criminal conviction. *Id.* at 13–14.

104. The IJ's perfunctory bond denial illustrates why "proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern." *Black*, 103 F.4th at 156 (quoting *Hernandez-Lara*, 10 F.4th at 31).

105. Finally, as in *Velasco Lopez*, the third factor—the government interest—likewise weighs in favor of *O.G.*.

106. Because "the Government has not articulated an interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight[,]" the detention of individuals like *O.G.*, who are neither, is not in the government's interest at all. *Id.* at 854. In fact, additional procedures requiring DHS to justify *O.G.*'s detention, would promote "the Government's interest—one we believe to be paramount—in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Id.*

B. Placing the Burden on O.G. Also Violates the INA and the APA

107. Reading § 1226 as a whole, and in the context of its enactment, it is clear that Congress did not intend for § 1226(a) detainees to bear the burden of proving such a negative.

108. First, the very same statute shows that where Congress intended such a burden, it knew how to say so. *See* 8 U.S.C. § 1226(c)(4) (“The Attorney General may release an alien” subject to mandatory detention only if, *inter alia*, “the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other person or of property and is likely to appear for any scheduled proceeding”) (emphasis added).

109. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Nken v. Holder*, 556 U.S. 418, 430 (2009) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)). Thus, it is clear that Congress could have placed the burden on the non-citizen detained under § 1226(a) but chose not to.

110. Second, “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

111. When Congress enacted § 1226(a), it replaced former 8 U.S.C. § 1252(a)(1) without any meaningful changes to the language of the original. Thus, Congress is presumed to have adopted the BIA’s decision in *Matter of Patel*, 15 I. & N. Dec. 666 (BIA 1976), which interpreted the former statute. That decision established a presumption that a noncitizen generally should not be detained unless a court finds that they are a threat to national security or a poor bail risk. *Id.* In enacting § 1226(a), Congress saw no reason to alter the status quo, thereby

adopting *Patel*'s presumption in favor of liberty and ratifying the requirement that the government prove the need for detention.

112. Accordingly, placing the burden on O.G. to justify his detention runs contrary to Congressional intent in passing the INA.

113. In addition, placing the burden of proof on O.G. was arbitrary and capricious because it was based on the BIA's holding in *Adenji*, 22 I. & N. Dec. 1102, which, in placing the burden on Mr. Adenji, was itself arbitrary and capricious and wrongfully decided. *See* 5 U.S.C. § 706(2)(A).

114. *Adenji* itself was arbitrary and capricious because (1) it derived its holding by analyzing an inapplicable regulation and (2) the decision was an unacknowledged departure from prior agency policy. In addition, applying *Adenji* to immigrants such as O.G. is arbitrary and capricious because that case involved unique circumstances that were not generally applicable and cannot reasonably be applied in the case at bar.

115. First, *Adenji* cited 8 C.F.R. § 236.1(c)(8), which places the burden on the noncitizen to show to the satisfaction of an *immigration officer*, that they would not pose a danger or a flight risk if released. But, as discussed in Part IV.C, *infra*, this regulation applies to ICE's exercise of its discretion and doesn't apply to immigration court bond hearings at all.

116. This is abundantly clear because the applicable regulation to immigration judges appears just below, conveniently labeled. Section 236.1(d)(1) is titled "Application to immigration judge." That regulation, which *actually* governs bond hearings before an IJ, says nothing about the appropriate burden of proof.

117. Second, *Adenji* was an unacknowledged departure from the presumption of liberty established by *Patel*. 15 I. & N. Dec. 666. The decision only mentions *Patel* once and does not

purport to overrule it. 22 I. & N. Dec. at 1103. However, it effected a sea change in immigration law without so much as an acknowledgment that it was defying its past precedent. Because “[a]n agency may not . . . depart from prior policy sub silentio,” *F.C.C. v. Fox Television Stations*, 556 U.S. 502, 515 (2009), this was arbitrary and capricious.

118. In addition, *Adenji* crafted an anomalous solution for an anomalous case and is thus not properly applicable to noncitizens such as O.G.. Accordingly, reliance on that case as precedent for § 1226(a) detainees like O.G. is arbitrary and capricious.

119. Mr. Adenji, due to his aggravated felony conviction, would today be subject to mandatory detention under 8 U.S.C. § 1226(c). 22 I & N Dec. at 1109. However, Mr. Adenji was not then subject to the new statute, nor did he fall under the transitional rules at the time. *Id.* Thus, his unusual circumstances “seem[ed] to [] warrant[]” a rule that required him to show more than what is required in a bond hearing pursuant to § 1226(a). *Id.* at 1112. Mr. Adenji’s situation was so unusual that the parties *agreed* that placing the burden on Mr. Adenji was a sensible solution considering the unique circumstances of his case. *See id.* at 1111-12.

120. Applying *Adenji* to noncitizens who, like O.G., are subject to § 1226(a), the BIA never engaged in substantive analysis about the implications or rationale for the burden shift. *See Guerra*, 24 I. & N. Dec. 37.

121. Thus, reliance on the Board’s decision in *Adenji* to place the burden on O.G. is arbitrary and capricious in violation of the APA.

122. Because placing the burden on O.G. violated his right to due process, the INA, and the APA, the bond hearing he received before the Immigration Court was procedurally and constitutionally deficient.

III. O.G.'s Detention Has Become Unconstitutionally Prolonged

123. Even if O.G.'s initial bond hearing were constitutionally sufficient, his detention for over six months without requiring ICE to ever demonstrate that he is a danger or a flight risk deprives him of liberty without due process of law.

124. Noncitizens who have been detained for an unreasonably prolonged amount of time under § 1226(a) are entitled to a bond hearing in which the government must justify their continued detention. *Velasco Lopez*, 978 F.3d at 846.

125. Even if, as ICE contends, O.G. is subject to mandatory detention under § 1225(b)(2), the government should still have to justify his ongoing detention at a bond hearing.

126. The same logic applied by the Second Circuit to mandatory detainees based on certain criminal convictions in *Black*, 103 F.4th at 143, would apply to § 1225(b)(2). If anything, it would apply with *more* force since, unlike § 1226(c) detainees, § 1225(b)(2) detainees do not have a criminal history that Congress believed made them more likely to be a danger.

127. Numerous district courts have therefore concluded that prolonged detention without a bond hearing, even in the context of § 1225 detainees, violates due process. *See, e.g., Al-Thuraya v. Warden*, No. 25-CV-2582 (AS), 2025 WL 2858422 (S.D.N.Y. Oct. 9, 2025) (collecting cases where courts have found § 1225(b) detainees have the right to a bond hearing and applying *Black v. Decker* to Petitioner detained under that statute); *Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497, at *4 (S.D.N.Y. Aug. 20, 2018) (applying pre-*Black* due process framework to § 1225(b) detainee and ordering a bond hearing).

128. Accordingly, it is clear that, whether O.G. is detained under § 1226(a) or § 1225(b)(2), his detention has become unconstitutionally prolonged and the government must justify his detention by clear and convincing evidence.

129. As noted above, all *Mathews* factors weigh in favor of O.G.. See Part II.A, *supra*. Considering the fact that his detention now exceeds six months, the liberty interest weighs even stronger in O.G.'s favor. His detention exceeds the amount of time declared presumptively unreasonable by *Zadvydas* in the post-removal order context. 533 U.S. at 701. It is also significantly longer than the length of detention that the Court emphasized as reasonable in *Demore*. 538 U.S. at 529 (a month and a half in 85% of cases, and an average of four months in cases where a noncitizen appeals). *Velasco Lopez* relied on both of these timelines in finding that the Petitioner's detention had become unreasonably prolonged. 978 F.3d at 852; see also *Black*, 103 F.4th at 137 (Petitioner's 7-month detention was unconstitutionally prolonged).

130. O.G.'s detention also has no end in sight. "Absent release on bond, detention lasts through the initial removal determination proceedings (which themselves can take months or years) and all inter-agency and federal court appeals, even where an individual has prevailed and the Government appeals." *Velasco Lopez*, 978 F.3d at 852. Having filed a notice of appeal from the Immigration Judge's denial of relief, O.G. is facing incarceration that could last months or even years while his appeal is heard.

131. Because every *Mathews* factor weighs in O.G.'s favor, his continuing detention, whether under § 1225(b)(2) or § 1226(a), violates his right to due process of law.

IV. The Court Should Remedy These Violations by Ordering a Bond Hearing or Releasing O.G.

132. As the Second Circuit has repeatedly held, the remedy for O.G.'s prolonged detention without an adequate bond hearing is a new bond hearing at which DHS must justify his continued detention by clear and convincing evidence, and which must consider alternatives to detention and his ability to pay. Because DHS has recently begun to use an unconstitutional

mechanism to unilaterally override the decision of an Immigration Judge, the Court should conduct a bond hearing itself in order to ensure effective relief.

133. However, because ICE detained O.G. under a discretionary statute without exercising any discretion at all, the Court can and should follow others in this district that have remedied this due process violation by ordering petitioners' immediate release.

A. The Remedy for O.G.'s Inadequate Initial Bond Hearing and Prolonged Detention Is a Bond Hearing in Which the Government Must Bear the Burden of Proof

134. Due Process required O.G. to receive a constitutionally adequate bond hearing at the outset and, now that he has been detained for a significant amount of time, it requires him to receive such a bond hearing now.

135. In order for the bond hearing to be constitutionally adequate, the government must bear the burden of proof to justify continued detention by "clear and convincing evidence." *See Velasco Lopez*, 978 F.3d at 855-57 (affirming District Court's conclusion that "a clear and convincing standard was appropriate" for Petitioner's new bond hearing after facing prolonged detention under § 1226(a)); *Black*, 103 F.4th at 157 (affirming District Court conclusion that DHS was required to show "by clear and convincing evidence" the need for Petitioner's continued detention under § 1226(c)).

136. Courts have continuously found that, when the government seeks to hold somebody in detention, it must justify its decision by clear and convincing evidence or risk erroneously depriving individuals of their liberty interests. *See Velasco Lopez*, 978 F.3d at 855-57; *Black*, 103 F.4th at 155-56; *Roman*, 2020 WL 5743522, at *2 (citation omitted).

137. Furthermore, the court must consider the person's ability to pay and alternatives to detention when setting a bond amount in order to ensure a detained individual's liberty interest is meaningfully safeguarded. *See Black*, 103 F.4th at 158 ("refusing to consider ability to pay and

alternative means of assuring appearance creates a serious risk that the noncitizen will erroneously be deprived of the right to liberty purely for financial reasons.”).

138. Because O.G.’s initial bond hearing was constitutionally inadequate and because he has now been detained for an unconstitutional amount of time, the Court should order a new bond hearing where the government must justify O.G.’s continued detention by clear and convincing evidence and O.G.’s ability to pay and alternatives to detention are sincerely taken into consideration.

B. This Court Should Conduct Such a Bond Hearing in O.G.’s Case, or At Least Retain Jurisdiction Over the Matter

139. Given recent events, a bond hearing in immigration court is no longer adequate to protect O.G.’s liberty interest. ICE has recently begun to unilaterally override IJ bond decisions by continuing to detain noncitizens for over 3 months longer, even after they are ordered released. This is unconstitutional, renders the prospect of release on bond in immigration court illusory, and would inefficiently force O.G. to seek additional relief in habeas.

140. Under applicable regulations, when an individual is granted bond by an immigration judge, if DHS files a notice of intent to appeal, it may unilaterally stay the order of an immigration judge, preventing that individual from being released. 8 C.F.R. § 1003.19(i)(2). DHS then has 10 business days in which to file a notice of appeal before the BIA, after which the automatic stay remains active until it expires 90 days later. 8 C.F.R. §§ 1003.6(c)(1), (4). Thus, ICE may *unilaterally override* the decision of a neutral adjudicator for over 100 days, denying release to a noncitizen who is properly entitled to release on bond.

141. Unsurprisingly, when DHS has evoked this provision in the past, numerous courts have found it to be unconstitutional. *See Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004); *Ashley v. Ridge*, 288 F. Supp. 2d 662, 673 (D.N.J. 2003); *Uritsky v. Ridge*, 286 F. Supp.

2d 842 (E.D. Mich. 2003); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003); *Zabadi v. Chertoff*, No. 05-CV-1796 (WHA), 2005 WL 1514122 (N.D. Cal. June 17, 2005).

142. Despite its clear unconstitutionality, in “what appears to have been a policy change[,]” *Vargas Lopez v. Trump*, No. 8:25-cv-526, 2025 WL 2780351, at *10 (D. Neb. Sep. 30, 2025), ICE has been applying this automatic stay provision with greater frequency than ever before—and meeting the same judicial response. “[S]ince DHS began regularly invoking the automatic stay provision earlier this year, no district court has held that it comports with due process.” *J.M.P. v. Arteta*, No. 1:25-cv-04987 (DEH), slip op. at 28 (S.D.N.Y. Oct. 23, 2025) (collecting *thirty-two* cases from the last three months alone).

143. Perhaps recognizing the flagrant unconstitutionality of the automatic stay, DHS has attempted to move the goalposts when challenged. In *J.M.P.*, after the District Court ordered a bond hearing and the IJ granted release, DHS invoked the automatic stay to hold the petitioner in custody. *Id.* at 13. When the petitioner sought a TRO in the District Court, DHS withdrew its automatic stay the very next day and instead sought a discretionary stay before the BIA. *Id.* at 14–15. In just two hours, without access to the IJ’s reasoning or any of the evidence submitted by the Petitioner, the BIA granted the stay *ex parte* in a three-sentence order. *Id.* at 15–16. The District Court, recognizing that this second stay followed no legal standard and was “‘discretionary’ in name but automatic in practice[,]” ordered the petitioner’s immediate release. *Id.* at 49–50.

144. As the deluge of decisions around the country show, *J.M.P.* was no outlier. ICE appears to have adopted a policy of unilaterally overruling immigration judges when they order release on bond, even if the hearing takes place at the direction of a habeas court. And even when petitioners are able to challenge these decisions, ICE may seek a purportedly “discretionary” stay

that accomplishes the same result. These conditions increasingly render immigration court a pointless detour on the way back to a habeas court, as petitioners seek to obtain due process before a neutral adjudicator.

145. A bond hearing before the IJ is therefore not an adequate remedy. Instead, the Court, having all of the information that would also be available to an IJ at its disposal, should itself conduct a bond hearing to determine whether O.G. is entitled to be released. *See L.G.M. v. LaRocco*, No. 2:25-CV-2631 (PKC), 2025 WL 2092027, at *3–5 (E.D.N.Y. June 25, 2025) (ordering bond hearing to be conducted by District Court); Transcript of Record at 13, *Celestin v. Decker*, No. 1:17-cv-02419 (RA) (S.D.N.Y. June 14, 2017), at ECF No. 29 (ordering bond hearing conducted by District Court to remedy IJ’s failure to consider ability to pay at bond hearing); *see also Ostrer v. United States*, 584 F.2d 594, 596 n. 1 (2d Cir. 1978) (“[A] district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody.”); *Mapp v. Reno*, 241 F.3d 221, 227 (2d Cir. 2001) (District Court has inherent authority to grant bail in immigration habeas cases).

146. At least, the Court should enjoin ICE from invoking the automatic stay regulation, *see, e.g., Sixto Hernandez Hernandez v. Crawford*, No. 1:25-CV-01565-AJT-WBP, 2025 WL 2940702 (E.D. Va. Oct. 16, 2025), or retain jurisdiction over any Immigration Court bond hearing in order to ensure that ICE cannot unilaterally override the decision of the Immigration Judge.

C. The Remedy for ICE’s Failure to Exercise its Discretion in Detaining O.G. is Immediate Release

147. However, the Court need not order a bond hearing at all, because O.G. is entitled to be immediately released from detention in order to cure ICE’s failure to exercise its discretion in detaining him.

148. Noncitizens who, like O.G., are subject to detention under § 1226(a), are detained pursuant to an exercise of ICE discretion. That exercise of discretion is ongoing for the entire length of a noncitizen's detention because that individual can be released at any time. *See* 8 U.S.C. § 1226(a) (after initial arrest and detention, “the Attorney General . . . (1) *may* continue to detain the arrested alien; and (2) *may* release the alien . . .”) (emphasis added); *see also* 8 C.F.R. § 236.1(c)(8) (once ICE makes the initial decision to detain someone under § 1226(a)(1), that noncitizen may be released if they “demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”)

149. In *Velesaca v. Decker*, a class of § 1226(a) detainees brought suit alleging that ICE had adopted a policy of refusing to release the vast majority of discretionary detainees under the statute. 458 F. Supp. 3d 224, 227 (S.D.N.Y. 2020), *appeal withdrawn sub nom. Velesaca v. Wolf*, No. 20 Civ. 2153, 2020 WL 7973940 (2d Cir. Oct. 13, 2020). The court granted a preliminary injunction, finding that the policy violated § 1226(a) and 8 C.F.R. § 236.1(c)(8), among other violations. 458 F. Supp. 3d at 242. Importantly, in that case, the government *acknowledged* that a no-release policy is inconsistent with the INA and applicable regulations but simply argued that such a policy did not exist. *Id.*

150. Here, by contrast, DHS has openly admitted, and even argued, that its agents are barred from releasing O.G.. *See* Exh. C at 4. Because the government wrongly subjected him to mandatory detention under 8 U.S.C. § 1225(b)(2), ICE was prevented from ever exercising its discretion to release him from custody. This exceeds the practice that the government conceded to be unlawful in *Velesaca* and denies O.G. the exercise of discretion he is entitled to under the law.

151. In *Lopez Benitez v. Francis*, a court in this district applied the analysis in *Velesaca* to a petitioner who, like O.G., was wrongfully subjected to mandatory detention under § 1225(b)(2) but was properly subject to § 1226(a). 2025 WL 2371588, at *10–12. The Court found that the government assertion that the petitioner’s detention was mandatory was “precisely the opposite of an exercise of discretion, which entails some sort of judgment.” *Id.* Accordingly, the Court ordered the petitioner’s immediate release. *Id.* at *14; *see also* *Chipantiza-Sisalema v. Francis*, No. 25 CIV. 5528 (AT), 2025 WL 1927931, at *3 (S.D.N.Y. July 13, 2025) (ordering release where Government did not properly exercise its discretion under § 1226(a)); *Hyppolite v. Noem*, 2025 WL 2829511, at *12, 17 (same); *Kelly v. Almodovar*, No. 25 CIV. 6448 (AT), 2025 WL 2381591, at *3–4 (S.D.N.Y. Aug. 15, 2025) (same); *Gonzalez v. Joyce*, No. 25 CIV. 8250 (AT), 2025 WL 2961626, at *3, 5 (S.D.N.Y. Oct. 19, 2025) (same).

152. Likewise, in *Contreras Maldonado v. Cabezas*, the court ordered release for a petitioner who was falsely detained under § 1225(b)(2), as a remedy for ICE’s failure to exercise its discretion. No. 2:25-cv-13004-JKS-JBC, slip op. at 10–12 (D.N.J. Oct. 23, 2025). Notably, the Petitioner in that case, like O.G., had a bond hearing in which the IJ found that she should not be released under § 1226(a). *Id.* However, the Court found the hearing inadequate to remedy ICE’s prior failure to exercise its discretion and ordered her release. *Id.*

153. The same is true of O.G.. Because a § 1226(a) detainee may be released as a matter of discretion at any time, *see* 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(c)(8), ICE could have exercised its discretion to release him the day before his bond hearing, the day after, and every day since. However, because ICE has taken the position (affirmed by the IJ and now BIA) that O.G. is subject to mandatory detention, it failed to do so.

154. Thus, the only appropriate remedy for O.G.'s non-discretionary detention under a discretionary statute is for the Court to order his immediate release.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION:

**PETITIONER'S DETENTION UNDER 8 U.S.C. § 1225(b)(2) IS ULTRA VIRES
8 U.S.C. § 1225(b)(2)**

155. Petitioner repeats and realleges the preceding paragraphs of this Petition.

156. Because Petitioner is not "seeking admission," he is not lawfully detained under 8 U.S.C. § 1225(b)(2) and his detention pursuant to that statute is *ultra vires* and not lawful.

157. Rather, the proper statutory interpretation of the INA, consistent with decades of practice, is that an individual in Petitioner's circumstances who is placed into removal proceedings is detained under 8 U.S.C. § 1226(a)

SECOND CAUSE OF ACTION:

**ICE'S FAILURE TO EXERCISE ITS DISCRETION VIOLATES DUE PROCESS AND
THE INA**

U.S. Const. amend. V; 8 U.S.C. § 1226(a)

158. Petitioner repeats and realleges the preceding paragraphs of this Petition.

159. Because Petitioner was detained by ICE under a discretionary statute, 8 U.S.C. § 1226(a), the agency was required to exercise its discretion in deciding whether or not to detain him. However, because ICE declared itself unable to release Petitioner under 8 U.S.C. § 1225(b)(2), the agency necessarily found itself unable to exercise its discretion.

160. By refusing to exercise any discretion at all in his case, ICE denied Petitioner the process that he was due under the discretionary detention statute, violating both the statute itself and the Due Process Clause of the Constitution.

**THIRD CAUSE OF ACTION:
PETITIONER'S BOND HEARING VIOLATED HIS RIGHT TO DUE PROCESS
U.S. Const. amend V**

161. Petitioner repeats and realleges the preceding paragraphs of this Petition.
162. Because Petitioner's bond hearing placed the burden on him to prove a negative—that he is neither a danger nor a flight risk—it is not a constitutionally adequate procedure to safeguard him from unwarranted civil detention. *Foucha*, 504 U.S. at 80. Thus, it violates his right to due process.

**FOURTH CAUSE OF ACTION:
PETITIONER'S BOND HEARING VIOLATED THE INA
8 U.S.C. § 1226**

163. Petitioner repeats and realleges the preceding paragraphs of this Petition.
164. Because Petitioner's bond hearing absolved DHS of its burden to justify his continued detention, it violated Congress's intentional choice in drafting 8 U.S.C. § 1226(a) not to place the burden of proof on the respondent.

**FIFTH CAUSE OF ACTION:
PETITIONER'S BOND HEARING VIOLATED THE APA
5 U.S.C. § 706(2)(A)**

165. Petitioner repeats and realleges the preceding paragraphs of this Petition.
166. The bond hearing afforded to Petitioner was arbitrary and capricious because it followed the BIA precedent in *In Re Adeniji*, 22 I. & N. Dec. 1102, which itself was arbitrarily and capriciously decided and has since been erroneously applied.

**SIXTH CAUSE OF ACTION:
PETITIONER'S PROLONGED DETENTION WITHOUT AN ADEQUATE BOND
HEARING VIOLATES HIS RIGHT TO DUE PROCESS OF LAW
U.S. Const. amend V**

167. Petitioner repeats and realleges the preceding paragraphs of this Petition.

168. Because Petitioner has been incarcerated for an unreasonable amount of time without requiring DHS to justify why his continued detention is necessary, he has been denied due process of law. *See Velasco Lopez*, 978 F.3d at 846; *Black*, 103 F.4th at 159 (2d Cir. 2024); *Al-Thuraya v. Warden*, No. 25-CV-2582 (AS), 2025 WL 2858422 (S.D.N.Y. Oct. 9, 2025).

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Assume jurisdiction over this matter;
2. Enjoin Respondents from transferring O.G. outside the jurisdiction of this Court or removing him from the United States pending the resolution of this case, pursuant to the All Writs Act;⁶
3. Issue a writ of habeas corpus directing Respondents to immediately release O.G. from custody without any additional restraints on his liberty;
4. In the alternative, the Court should conduct a constitutionally adequate, individualized bond hearing for the Petitioner within fourteen days. If, instead, Respondents are ordered to carry out such a hearing in front of an impartial adjudicator, the Court should direct that at that hearing:
 - a. ICE must bear the burden of establishing by clear and convincing evidence that continued detention is justified;

⁶ *See Local 1814, Intern. Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n, Inc.*, 965 F.2d 1224, 1237 (2d Cir. 1992) ("Once the district court acquires jurisdiction over the subject matter of, and the parties to, the litigation, the All Writs Act [28 U.S.C. § 1651] authorizes a federal court to protect that jurisdiction" (cleaned up)); *Khalil v. Joyce*, No. 1:25-cv-1935 (JMF) (S.D.N.Y. Mar. 10, 2025), ECF No. 9. *See also* Order, *Ozturk v. Hyde*, No. 25-cv-374 at 68 (WKS) (D.Vt. Apr. 18, 2025), ECF No. 104 (ordering Petitioner's transfer from Louisiana back to Vermont).

- b. The adjudicator must meaningfully consider alternatives to imprisonment such as release on recognizance, parole or electronic monitoring; and
 - c. The adjudicator must meaningfully consider O.G.'s ability to pay if setting a monetary bond.
5. Award O.G. his costs and reasonable attorneys' fees in this action as provided for by the Equal Access to Justice Act, 28 U.S.C. § 2412; and
6. Grant such further relief as the Court deems just and proper.

Respectfully Submitted,

Dated: October 29, 2025
Brooklyn, NY

/s/ Alexandra Lampert
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**VERIFICATION BY SOMEONE ACTING ON PETITIONER'S BEHALF PURSUANT
TO 28 U.S.C. § 2242.**

I, Alexandra Lampert, am submitting this verification on behalf of the Petitioner as an attorney for Petitioner. I, or my co-counsel, have discussed with the Petitioner the events described in the Petition. Based on those discussions, I hereby verify that the statements made in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Dated: October 29, 2025
Brooklyn, NY

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