UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

O.G.,

Petitioner,

- against -

LADEON FRANCIS *et al.*,

Respondents.

No. 25 Civ. 8977 (JAV)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondents, by their attorney, Jay Clayton, United States Attorney for the Southern District of New York, respectfully submit this memorandum of law in opposition to the petition for a writ of habeas corpus ("Pet.," ECF No. 1) filed by petitioner O.G. ("Petitioner").[1] For the reasons explained below, Petitioner's habeas petition should be denied. Petitioner has been lawfully detained pursuant to the mandatory detention provision in 8 U.S.C. § 1225(b)(2)(A) as an "applicant for admission" to the United States. But even if the Court were to conclude that Petitioner could be detained only discretionarily pursuant to 8 U.S.C. § 1226(a), his continued detention would be justified because the immigration judge recently considered, and properly rejected, his application for release on bond. Nor is it problematic that Petitioner continues to be detained during his appeal of the immigration judge's denial of his motions for relief from removal given the recent bond determination and the lack of unreasonable delay in Petitioner's administrative proceedings.

BACKGROUND

Petitioner is native and citizen of Mexico. *See* Declaration of Mincheol So ("So Decl.") ¶ 3. On June 14, 1999, a Border Patrol Agent encountered Petitioner, who had unlawfully entered the United States without inspection, near Pisinimo, Arizona. *Id.* ¶ 4. Petitioner voluntarily returned to Mexico but subsequently unlawfully re-entered the United States without authorization at an unknown place and date. *Id.* ¶¶ 4-5.

On June 13, 2024, Petitioner was arrested by the New York State Police in Sullivan County and charged with attempted assault in the second degree, criminal contempt, assault in the second degree, criminal possession of a weapon in the fourth degree, and menacing, all in violation of the

[1] The Court has granted Petitioner's motion to proceed in this case via pseudonym. ECF No. 16.

New York State Penal Code. *Id.* ¶ 6. On December 13, 2024, Petitioner pleaded guilty to attempted assault in the second degree, and in March 2025, he was sentenced to six months' incarceration and five years of probation. *Id.* ¶¶ 8, 10.[2]

On April 8, 2025, after having previously received a referral from the Sullivan County Probation Department, U.S. Immigration and Customs Enforcement ("ICE") took Petitioner into custody and detained him at the Orange County Jail. *Id.* ¶¶ 7, 11. On the same day, ICE served Petitioner with a Notice to Appear, the charging document used to commence removal proceedings, charging him with inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i), and commenced removal proceedings against him. *Id.* ¶¶ 13-14.

On May 13, 2025, during the course of his removal proceedings, Petitioner conceded his inadmissibility before the immigration judge, and on June 2, submitted an application for relief from removal. *Id.* ¶¶ 18-19. At a hearing on July 25, 2025, the immigration judge denied Petitioner's application for relief and ordered him removed. *Id.* ¶ 27. At that hearing the immigration judge heard detailed testimony and evidence regarding Petitioner's family history, his difficult relationship with his ex-wife (the victim of the attempted assault of which he was convicted), and his other personal circumstances. Pet. Ex. D at 2-7. The judge found Petitioner's testimony credible in certain respects, *id.* at 9, but held that Petitioner had not established entitlement to relief from removal, *see id.* at 8-23.

Meanwhile, on June 26, Petitioner moved for a custody redetermination (bond) hearing before the immigration judge. *See* So Decl. ¶ 23. On July 18, 2025, the immigration judge held a hearing and denied Petitioner's bond request, and issued a written decision dated August 5, 2025,

[2] On January 26, 2025, Petitioner was arrested by the New York State Police in Sullivan County and charged with criminal contempt in the second degree. *Id.* ¶ 9. That charge was dismissed as a result of Petitioner's conviction on the prior charges. *Id.* ¶ 10.

explaining his analysis. *Id.* ¶ 25; Return Ex. 6 ("Bond Decision"). The immigration judge first concluded that Petitioner was subject to mandatory detention pursuant to section 235(b) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1225(b), and was thus ineligible for release on bond. *See* Bond Decision at 2-3. The judge proceeded to consider whether, "[i]n the alternative," Petitioner would be entitled to release on bond if he were detained discretionarily under INA section 236(a), 8 U.S.C. § 1226(a)—and concluded that Petitioner would not "because he poses a danger to the community of the United States." *Id.* at 4. The judge reviewed the factors governing release on bond, *id.*, considered the "particular circumstances surrounding [Petitioner's] conviction, including [his] relationship with his now ex-wife," and recognized the "positive equities" in favor of releasing Petitioner on bond, including "his U.S. citizen daughter and letters of support from employers, friends, and family, as well as a psychological evaluation." *Id.* at 4-5. Weighing these factors, the immigration judge concluded that Petitioner had "failed to establish that he does not pose a risk of danger to the community" in light of his criminal conviction. *Id.* at 5. Given this finding, the immigration judge did not proceed to consider whether Petitioner would be a flight risk. *Id.*

Petitioner has appealed both his bond determination and the immigration judge's decision to deny him relief from removal to the Board of Immigration Appeals ("BIA"). *See* So Decl. ¶¶ 26, 28. The BIA has granted several briefing extensions requested by Petitioner's counsel on the appeal of his removal order, and the appeal remains pending. *Id.* ¶¶ 30-36.

ARGUMENT

The Court should deny Petitioner's habeas petition. Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) as an "applicant for admission" to the United States. *See infra* Point I. And as an applicant for admission, Petitioner is entitled only to the process Congress has provided by statute. *See infra* Point II. But Petitioner would not be entitled to relief even if he

was considered to be subject only to discretionary detention under 8 U.S.C. § 1226(a) because the immigration judge made an alternative finding and considered whether Petitioner would be eligible for release on bond, and concluded that bond would be denied because he presents a danger to the community. *See infra* Point III. Nor is there any constitutional defect in Petitioner's continued detention—regardless of the statutory provision authorizing it—as the immigration judge considered Petitioner's bond eligibility around three months ago and Petitioner's administrative proceedings have not been unreasonably delayed. *See infra* Point IV.

I. Petitioner Is Lawfully Detained Pursuant to Section 1225(b)(2)(A) and Is Not Entitled to a Bond Hearing

Petitioner's assertion that his detention is governed by 8 U.S.C. § 1226(a), Pet. ¶ 2, is mistaken. Petitioner, who illegally entered and was never permitted entry into the United States on any terms, is statutorily deemed an applicant for admission whose detention is governed by 8 U.S.C. § 1225(b).

In the INA, Congress has enacted a multi-layered statutory scheme for the civil detention of aliens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. "Detention during removal proceedings is a constitutionally valid aspect of the deportation process." *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)).

Prior to 1996, the INA treated aliens differently based on whether the alien had *physically* "entered" the United States. *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 222-23 (B.I.A. 2025) (citing 8 U.S.C. §§ 1225(a), 1251 (1994)); *see Judulang v. Holder*, 565 U.S. 42, 45-46 (2011) ("Before 1996, these two kinds of action occurred in different procedural settings, with an alien seeking entry (whether for the first time or upon return from a trip abroad) placed in an

'exclusion proceeding' and an alien already here channeled to a 'deportation proceeding.'" (citing *Landon v. Plasencia*, 459 U.S. 21, 25–26 (1982))). "Entry" referred to "any coming of an alien into the United States," 8 U.S.C. § 1101(a)(13) (1994), and whether an alien had physically entered the United States (or not) "dictated what type of [removal] proceeding applied" and whether the alien would be detained pending those proceedings, *Hing Sum v. Holder*, 602 F.3d 1092, 1099 (9th Cir. 2011).

An alien who arrived at a port of entry would be placed in "exclusion proceedings and subject to mandatory detention, with potential release solely by means of a grant of parole." *Hurtado*, 29 I. & N. Dec. at 223; *see* 8 U.S.C. § 1225(a)-(b) (1995); *id.* § 1226(a) (1995). By contrast, an alien who physically entered the United States unlawfully would be placed in deportation proceedings. *Id.*; *Judulang*, 565 U.S. at 45. Aliens in deportation proceedings, unlike those in exclusion proceedings, "were entitled to request release on bond." *Hurtado*, 29 I. & N. Dec. at 223 (citing 8 U.S.C. § 1252(a)(1) (1994)).

Thus, the INA's prior framework distinguishing between aliens based on physical "entry" had:

> the 'unintended and undesirable consequence' of having created a statutory scheme where aliens who entered without inspection 'could take advantage of the greater procedural and substantive rights afforded in deportation proceedings,' *including the right to request release on bond*, while aliens who had 'actually presented themselves to authorities for inspection . . . were subject to mandatory custody.

Id. (quoting *Martinez v. Att'y General of U.S.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012)) (emphasis added); *see also* H.R. Rep. No. 104-469, pt. 1, at 225 (1996) ("[I]llegal 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").

Congress discarded that regime by enacting the Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996),

which replaced the focus on physical "entry" with a focus on lawful "admission." IIRIRA defined "admission" as "the *lawful* entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (emphasis added). In other words, the immigration laws would no longer distinguish aliens based on whether they had managed to evade detection and enter the country without permission. Instead, the "pivotal factor in determining an alien's status" would be "whether or not the alien has been *lawfully* admitted." H.R. Rep. No. 104-469, pt. 1, at 226 (emphasis added). IIRIRA also eliminated the exclusion-deportation dichotomy and consolidated both sets of proceedings into "removal proceedings." *Hurtado*, 29 I. & N. Dec. at 223.

Post-IIRIRA, pursuant to Section 1225, an alien present in the United States who has not been admitted is "deemed . . . an applicant for admission." 8 U.S.C. § 1225(a)(1). All applicants for admission are subject to inspection by immigration officers to determine if they are admissible to the United States. *See id.* § 1225(a)(3). The term "admission" is a term of art defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A); *see also* 8 C.F.R. § 235.1 (setting forth inspection procedures).

Applicants for admission fall under two categories, those covered by Section 1225(b)(1) and those covered by Section 1225(b)(2). *See Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). Section 1225(b)(1) applies to aliens arriving in the United States who are determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. *See* 8 U.S.C. § 1225(b)(1)(A)(i) . Section 1225(b)(2) is broader and applies to any applicant for admission who an immigration officer determines to be "not clearly and beyond a doubt entitled to be admitted" to the United States (with limited exceptions). *Id.* § 1225(b)(2)(A); *Jennings*, 583 U.S. at 287 (noting that 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)"). Under Section 1225(b)(2), if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, detention is mandatory: the statute provides that he or she "*shall be detained* for a proceeding under section 1229a."[3] *Id.* § 1225(b)(2)(A) (emphasis added).[4]

Here, Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement, as the immigration judge correctly concluded. *See* Bond Decision at 2-3. First, by statute, Petitioner is deemed an "applicant for admission" to the United States because he is "[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). Second, Petitioner is "seeking admission" into this country. *Id.* Prior to his arrest by ICE in April 2025, Petitioner had not been encountered by U.S. immigration officials after he unlawfully re-entered the United States. *See* So Decl. ¶¶ 4-5. Likewise, he was never released on his own recognizance pursuant to 8 U.S.C. § 1226, and he had never applied for asylum or any other immigration benefit until after he was arrested and placed into removal proceedings. *Id.* ¶¶ 4-5, 19; *cf. Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *4 (S.D.N.Y. Aug. 13, 2025) ("[A] release on recognizance is not 'humanitarian' or 'public benefit' 'parole into the United States' under §§ 1225 and 1182(d)(5)(A), but rather a form of 'conditional parole' from detention, authorized under § 1226."). Moreover, Petitioner has not demonstrated to an examining immigration officer that he is "clearly and beyond a doubt entitled

[3] Section 240 of the INA, 8 U.S.C. § 1229a, refers to the full removal proceedings to which the Petitioner is currently subject before the Immigration Court.

[4] That detention authority has long been recognized as a permissible means of ensuring the security of the border and controlling entry into the United States. Indeed, the Supreme Court has rejected a due process challenge to arriving aliens' detention at the border, explaining that "an alien on the threshold of initial entry stands on a different footing" than an alien within the United States, which justifies detention at the border. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

to be admitted." 8 U.S.C. § 1225(b)(2)(A). Indeed, Petitioner cannot demonstrate that he is "clearly and beyond a doubt entitled to be admitted" because he is present in the United States without being admitted or paroled, and is therefore inadmissible under 8 U.S.C. § 1182(a)(6). Accordingly, as the immigration judge held, Petitioner's detention is pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he "shall be" detained pending removal proceedings. *See* Bond Decision at 2-3.

Moreover, Petitioner is an applicant for admission notwithstanding his presence in the United States. "[A]n alien who tries to enter the country illegally is treated as an 'applicant for admission.'" *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (quoting 8 U.S.C. § 1225(a)(1)); *see also* 8 U.S.C. § 1225(a)(1) (deeming "[a]n alien present in the United States who has not been admitted or who arrives in the United States" as an "applicant for admission"). Applicants for admission, such as Petitioner, are "treated, for constitutional purposes, as if stopped at the border." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (internal quotation marks omitted).

Petitioner alleges that he entered the United States in "approximately 1999." Pet. ¶ 26. But his unauthorized physical entrance into the country did not constitute an "admission." Furthermore, as intended by Congress when it enacted IIRIRA, Section 1225 applies to non-citizens who are found unlawfully present in the United States. Section 1225(b)(1) is titled "Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled" and Section 1225(b)(2) is titled "Inspection of Other aliens." Section 1225 thus applies not only to aliens who are stopped at the border prior to making an entry. It also applies where, as here, ICE agents first encounter and arrest the alien after he entered the country illegally. Thus, Petitioner is an applicant for admission who is seeking admission, and his detention is pursuant to Section 1225(b)(2)(A).

This reasoning comports with Supreme Court's decision in *Jennings v. Rodriguez*, which explains that Section 1225(b)(2)—the provision relevant here—"serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here)," 583 U.S. at 287, and mandates detention, *id.* at 297; *see also* 8 U.S.C. § 1225(b)(2). Moreover, the Supreme Court has confirmed that this statutory mandate for detention extends for the entirety of removal proceedings. *See Jennings*, 583 U.S. at 302 ("[Section] 1225(b)(2) . . . mandate[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin.").

Reading 8 U.S.C. § 1225(b)(2) to mandate detention for any "applicant for admission," as explained above, accords with the plain meaning of the text. *See Vargas Lopez v. Trump*, No. 25 Civ. 526, 2025 WL 2780351, at *9 (D. Neb. Sept. 30, 2025) (denying habeas petition and holding that petitioner was "an alien within the 'catchall' scope of § 1225(b)(2) subject to detention without possibility of release on bond through a proceeding on removal under § 1229a"); *accord Barrios Sandoval v. Acuna*, No. 6:25-CV-01467, 2025 WL 3048926, at *5 (W.D. La. Oct. 31, 2025). This reading does not render Section 1226 superfluous; Section 1226 continues to apply, for example, to aliens who have been convicted of certain criminal offenses since their admission. *See Barrios Sandoval*, 2025 WL 3048926, at *5-6; *Rojas, v. Olson*, No. 25-CV-1437-BHL, 2025 WL 3033967, at *7-9 (E.D. Wis. Oct. 30, 2025); *Chavez v. Noem*, No. 25 Civ. 02325 (CAB) (SBC), 2025 WL 2730228, at *5 (S.D. Cal. Sept. 24, 2025) (discussing interplay between sections 1225(b) and 1226(a) and denying application for temporary restraining order brought by aliens contending that they were entitled to a bond hearing pursuant to section 1226(a)).

Thus, even though Petitioner alleges to have been in the country for many years since his illegal reentry, he remains an applicant for admission for purposes of the INA. *See* Pet. ¶ 26. ICE

took Petitioner into custody in April 2025, at his first encounter with U.S. immigration authorities since his reentry. *See* So Decl. ¶ 11. As such, the law, post-IIRIRA, requires that Petitioner be treated as a noncitizen "applicant for admission" who is "seeking admission" to the country under Section 1225. *See* 8 U.S.C. § 1225(a) ("[a]n alien present in the United States who has not been admitted or who arrives in the United States" is deemed an "applicant for admission").[5]

As a result of his mandatory detention, Petitioner is not entitled to a bond hearing. *See Jennings*, 583 U.S. at 297. The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon*, 459 U.S. at 32 (collecting cases). Because applicants for admission, such as Petitioner, have not been admitted to the United States, their constitutional rights are truncated: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); *see also Thuraissigiam*, 591 U.S. at 140 (under the Due Process Clause, applicants for admission have "only those rights regarding admission that Congress has provided by statute"). Here, "the procedure authorized by Congress," *Mezei*, 345 U.S. at 212, in Section 1225(b) and related

[5] The Government acknowledges that courts, including several judges in this district, have determined that detention of a petitioner who entered without inspection, was initially encountered by DHS by the border and released, and then later arrested by ICE, was governed by Section 1226(a) and not Section 1225(b). *See, e.g.*, Pet. ¶ 74 & n.5 (collecting cases); *J.G.O. v. Francis*, No. 25 Civ. 7233 (AS), 2025 WL 3040142, at *2-4 (S.D.N.Y. Oct. 28, 2025); *Gonzalez v. Joyce*, No. 25 Civ. 8250 (AT), 2025 WL 2961626, at *4 (S.D.N.Y. Oct. 19, 2025); *Samb v. Joyce*, No. 25 Civ. 6373 (DEH), 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *see also Savane v. Francis*, No. 25 Civ. 6666 (GHW), 2025 WL 2774452 (S.D.N.Y. Sept. 28, 2025) (even if Section 1225(b) governs, petitioner's due process rights were violated). The Government respectfully disagrees with those decisions and submits that these cases are at odds with the statutory text and Supreme Court precedent for the reasons set forth here.

provisions expressly precludes the possibility of a bond hearing, and as such, no further process is due.

Aliens seeking admission may be detained without a bond hearing pending admission or removal. The Supreme Court has held that an alien's detention at the border without a hearing to effectuate his exclusion from the United States did not violate due process. *Mezei*, 345 U.S. at 206. The alien in that case arrived at Ellis Island seeking admission into the United States; although he had resided in the United States previously, he had since been "permanently excluded from the United States on security grounds." *Id.* at 207. His home country would not accept him, and he had been detained for more than a year and a half to effectuate his exclusion when he filed a habeas petition seeking release into the United States. *Id.* at 207-08.

The Supreme Court held that the alien's detention did not "deprive[ ] him of any statutory or constitutional right." *Id.* at 215. The Court emphasized that "the power to expel or exclude aliens" is a "fundamental sovereign attribute exercised by the Government's political departments" that is "largely immune from judicial control." *Id.* at 210. The Court recognized that "once passed through our gates, even illegally," aliens "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Id.* at 212. "But an alien on the threshold of initial entry stands on a different footing." *Id.* For aliens seeking admission, "[w]hatever the procedure authorized by Congress is, it is due process." *Id.*

Though he was physically present in the United States when he was arrested, because Petitioner entered the United States unlawfully and was never admitted into the country, he is "treated, for constitutional purposes, as if stopped at the border." *Zadvydas*, 533 U.S. at 693. Thus, he is entitled to the procedure authorized by Congress, and no more. And the procedure Congress has established for applicants for admission like Petitioner does not include any right to a bond

hearing. Instead, for applicants for admission, "if the examining immigration officer determines that [he] is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 240 [8 U.S.C. § 1229a]." 8 U.S.C. § 1225(b)(2)(A) (emphasis added). That is, Congress has provided that Petitioner shall be detained for removal proceedings before an immigration judge, which afford Petitioner numerous procedural protections. *See id.* § 1229a.[6]

Aliens detained under 8 U.S.C. § 1225(b)(2)(A) generally cannot be released from custody during their removal proceedings. The exclusive means of release for an applicant for admission under the statute is the discretionary parole authority of the U.S. Department of Homeland Security ("DHS"). *See Jennings*, 583 U.S. at 298-301; 8 U.S.C. § 1182(d)(5)(A) (parole may be granted for "urgent humanitarian reasons or significant public benefit"); 8 C.F.R. §§ 212.5(b), 235.3(c) (elaborating on instances where parole may be appropriate). As the Supreme Court has emphasized, "neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings." *Jennings*, 583 U.S. at 297. Petitioner is therefore lawfully detained pursuant to Section 1225(b) and is not entitled to a bond hearing.

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[6] During removal proceedings, aliens may, as Petitioner has done, seek various forms of relief or protection from removal. *See, e.g.*, 8 U.S.C. §§ 1158(a), 1229b(b)(2), 1231(b)(3). The decision whether to order such an alien removed is made by an immigration judge (not an immigration officer). *Id.* §§ 1101(b)(4), 1229a(a)(1). Aliens may obtain continuances during their proceedings for good cause. 8 C.F.R. § 1003.29. They have a right to counsel of their choice at no expense to the government, 8 U.S.C. § 1229a(b)(4)(A); the right to testify; and the right to "examine the evidence against [them]," "to present evidence," and "to cross-examine witnesses presented by the Government," *id.* § 1229a(b)(4)(B); *see* 8 C.F.R. §§ 1240.7(a), 1240.46(c). Aliens ordered removed may ask the immigration judge to reconsider that determination. 8 U.S.C. § 1229a(c)(6). They are also informed that they have a right to appeal, *id.* § 1229a(c)(5), and they may file an appeal with the BIA, 8 C.F.R. §§ 1003.1(b), 1003.38(a). If an alien appeals and the BIA enters a final removal order, the alien may petition for review in a court of appeals, 8 U.S.C. § 1252, and thereafter seek review in the Supreme Court, 28 U.S.C. § 1254(1).

II. Petitioner's Due Process Rights Have Not Been Violated

For similar reasons, Petitioner's assertion that his due process rights have been violated is mistaken. Pet. ¶ 4. Because Petitioner is deemed an applicant for admission who was never permitted to enter the interior, and thus treated for constitutional purposes as if stopped at the border, he is lawfully detained pursuant to Section 1225(b), and neither his procedural nor substantive due process rights have been violated. First, with respect to his procedural due process rights, as discussed above, the Supreme Court has instructed that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212; *cf. Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997) (the rights of excluded aliens "are determined by the procedures established by Congress and not by the due process protections of the Fifth Amendment"). Indeed, as a judge in this district recognized in a case decided after *Jennings* involving an applicant for admission, "because the immigration statutes at issue here do not authorize a bond hearing, *Mezei* dictates that due process does not require one here." *Poonjani v. Shanahan*, 319 F. Supp. 3d 644, 649 (S.D.N.Y. 2018); *see also Mendez Ramirez v. Decker*, 612 F. Supp. 3d 200, 220-21 (S.D.N.Y. 2020) (following *Mezei*, holding constitutional due process rights for alien deemed at threshold of entry extended no further than the process outlined by statute); *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 333-36 (W.D.N.Y. 2021) (same applying *Mezei* and *Thuraissigiam*); *Salim v. Tryon*, No. 13 Civ. 6659 (JTC), 2014 WL 1664413, at *2 (W.D.N.Y. Apr. 25, 2014) ("The Due Process Clause provides an inadmissible alien no procedural protection beyond the procedure explicitly authorized by Congress, nor any right to be free from detention pending removal proceedings.").

Moreover, more than a century of Supreme Court precedent confirms that applicants for admission are treated differently under the law for due process purposes from other categories of detained aliens. *See, e.g.*, *Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has

effected an entry into the United States and one who has never entered runs throughout immigration law."). In the relevant provisions of the INA, Congress has decided to treat applicants for admission differently and detain them during ongoing proceedings in order to more easily effectuate their exclusion from the United States if necessary (and post-IIRIRA, this includes those found in the interior who are present without having been admitted). Unlike admitted aliens later placed in removal proceedings and detained under Section 1226, applicants for admission are "request[ing] a privilege," *Landon*, 459 U.S. at 32, and therefore "stand[ ] on a different footing," *Mezei*, 345 U.S. at 212-13. Their lack of entitlement to a bond hearing thus flows from their lack of admission to the United States in the first instance. Given that the constitutional due process rights of applicants for admission are limited to the process that Congress chooses to provide, Petitioner cannot show that he has suffered a procedural due process violation.

Petitioner's detention for the time-limited pendency of his removal proceedings also does not run afoul of his substantive due process rights. For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Demore*, 538 U.S. at 523-26; *Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). "Detention during removal proceedings is a constitutionally valid aspect of the deportation process." *Velasco Lopez*, 978 F.3d at 848; *see Demore*, 538 U.S. at 523 n.7 ("[P]rior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings"); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of [the] deportation procedure."). Indeed, removal proceedings "would be [in] vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (internal quotation marks omitted); *cf. Reno v.*

Flores, 507 U.S. 292, 306 (1993) ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General."). Accordingly, Petitioner's due process claims should be denied.

III. Even If Petitioner Were Detained Under Section 1226(a), the Immigration Court Properly Denied His Release

Even if this Court concluded that Petitioner's detention could be authorized only under Section 1226(a), rather than under Section 1225(b)(2)(A), Petitioner would not be entitled to relief because an immigration judge decided, in the alternative, to deny him a bond based on an assessment of dangerousness, *see* Bond Decision at 6—a discretionary determination that this Court lacks jurisdiction to re-weigh. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole."). Petitioner's sole challenge to his bond hearing is that the immigration judge should not have placed the burden of proof on him to justify that he would not pose a danger if released, Pet. ¶¶ 88-122—a longtime BIA requirement, *see Matter of Guerra*, 24 I. & N. Dec. 37, 38 (B.I.A. 2006); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112 (B.I.A. 1999)—and instead should have demanded that ICE bear the burden of justifying his continued detention. The Court should reject Petitioner's argument that this allocation of the burden of proof is unconstitutional and contrary to statute.

Contrary to Petitioner's assertions, at an initial bond hearing under Section 1226(a), due process does not require the government to bear the burden of establishing that an alien is a danger or flight risk, much less by clear and convincing evidence. Indeed, *Velasco Lopez* confirms that due process does not require the burden always to be placed on the government at a section 1226(a) bond hearing. *See* 978 F.3d at 851-55. When assessing the validity of procedures in the

immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon*, 459 U.S. at 34. The district court in *Velasco Lopez v. Decker*, No. 19 Civ. 2912 (ALC), 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019), agreed with the alien's primary argument that, regardless of the length of his detention, his prior bond hearings violated due process because the government had not borne the burden to justify detention by clear and convincing evidence. *Id.* The district court did not reach the alien's secondary argument regarding his prolonged detention. *Id.* On appeal, despite the government squarely presenting the issue of burden of proof at an initial Section 1226(a) bond hearing, the Second Circuit affirmed the district court's judgment based solely on its application of the three-factor balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to the alien's alternative prolonged-detention claim. *See Velasco Lopez*, 978 F.3d at 855. In its *Mathews* analysis, the Second Circuit repeatedly emphasized the petitioner's length of detention—15 months—and expressly declined "to establish a bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden." *Id.* at 855 n.13. This strongly supports the government's position that placing the burden of proof on the alien at an initial Section 1226(a) bond hearing comports with due process.

Although the Second Circuit has not addressed the issue of the burden of proof at an initial bond hearing, the other courts of appeals are split on it. *See Black v. Almodovar*, __ F.4th __, 2025 WL 2989687, at *6 (2d Cir. Oct. 24, 2025) (Nardini, J., dissenting from denial of en banc rehearing) (summarizing the state of the law on this point). The Fourth and Ninth Circuits (as well as the Third Circuit, arguably in dicta) have concluded that the allocation of the burden of proof to the alien in initial bond hearings under Section 1226(a) comports with due process. *See Miranda*

v. Garland, 34 F.4th 338, 359-66 (4th Cir. 2022); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1213 (9th Cir. 2022); *see also Borbot v. Warden Hudson County Corr. Facility*, 906 F. 3d 274, 279 (3d Cir. 2018) (stating "we perceive no problem with" the alien bearing the burden of proof under § 1226(a)). The First Circuit has found to the contrary, *see Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (1st Cir. 2021), as have some judges in this district, *see, e.g.*, Pet. ¶ 95 (collecting cases finding due process violations); *but cf. Huanga v. Decker*, 599 F. Supp. 3d 131, 141-46 (S.D.N.Y. 2022) ("[W]e cannot say that the Government has violated Huanga's right to due process. . . . through the placement of the burden of proof on him at his initial bond hearing." (collecting cases)).

In decisions cited by Petitioner, the Second Circuit has held that due process requires aliens detained under a different provision, 8 U.S.C. § 1226(c) (which requires mandatory pre-removal detention for certain categories of "criminal aliens"), to a bond hearing at which ICE bears the burden of proving the alien's danger if released, *see Black v. Decker*, 103 F.4th 133, 155-58 (2d Cir. 2024), and to a similar inversion of the burden of proof in certain subsequent—but not initial—bond hearings under section 1226(a), *see Velasco Lopez*, 978 F.3d at 850-55; *id.* at 850 ("Velasco Lopez raises a due process challenge not to his initial detention but to the procedures that resulted in his prolonged incarceration without a determination that he poses a heightened bail risk."); *id.* at 855 n.13 (declining to create a "bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden"). But those decisions do not mandate the relief Petitioner seeks here. *But cf. Black*, 103 F.4th at 155-56 ("[W]e find persuasive the First Circuit's reasoning in the context of section 1226(a)." (citing *Hernandez-Lara*, 10 F.4th at 30-32)).

Rather, the Court should reject Petitioner's constitutional challenge to the immigration judge's allocation of the burden of proof at his initial bond hearing for the reasons provided by the

Fourth and Ninth Circuits. Courts examining the due process interests implicated by the burden of proof have almost uniformly used the balancing test of *Mathews v. Eldridge*, which "requires consideration of three distinct factors": "the private interest that will be affected by the official action," "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 "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *See, e.g.*, *Miranda*, 34 F.4th at 358.

Starting with the first factor, while a person's interest in freedom from detention is plainly substantial, *see, e.g.*, *Velasco Lopez*, 978 F.3d at 851, the Supreme Court has instructed that aliens in removal proceedings are entitled to less process than U.S. citizens, *see Miranda*, 34 F.4th at 359-61 ("[I]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (citing *Jennings*, 583 U.S. at 300-03, and *Demore*, 538 U.S. at 521, 527-28)). With regard to the second *Mathews* factor, several courts have decided not to examine the question of the burden of proof in a vacuum, and instead to examine the entire set of procedures for Section 1226(a) bond hearings, *see Miranda*, 34 F.4th at 362-63, and to look at whether those procedures substantively interfered with the ability of the particular alien bringing the habeas petition to marshal evidence and argue for his release, *see Rodriguez Diaz*, 53 F.4th at 1212.[7] Courts have also considered the fact that immigration detainees likely know more about their own circumstances (such as their criminal histories and

[7] Under this analysis, courts have noted that "the Constitution does not require the government to undertake every possible effort to mitigate the risk of erroneous deprivation and the potential harm to the private party"; instead, "'[t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.'" *Rodriguez Diaz*, 53 F.4th at 1213 (some internal quotation marks omitted) (quoting *Landon*, 459 U.S. at 34-35).

family and employment) than DHS, and are thus less likely to be prejudiced by bearing the burden of proof in this particular context, *see Miranda*, 34 F.4th at 362—especially relatively early during the alien's detention, *cf. Velasco Lopez*, 978 F.3d at 853 ("The Government also claims that in some cases it has little to no information about a detained individual. Perhaps so. But the longer detention lasts, the less persuasive this 'lack of information' rationale becomes."). As for the third and final *Mathews* factor, the government's interest in detaining aliens pending their removal proceedings to ensure that they do not abscond or commit crimes is "well established and not disputed." *Velasco Lopez*, 978 F.3d at 854; *see Miranda*, 34 F.4th at 364-65. While there may conversely not be a strong "interest in the prolonged detention of noncitizens who are neither dangerous nor a risk of flight," *Velasco Lopez*, 978 F.3d at 854, this does not answer the question of how immigration courts should ascertain which aliens are or are not dangerous or a flight risk or who should bear the burden of proof in making such an assessment.

An individualized inquiry into Petitioner's bond hearing undercuts his constitutional challenge. As discussed above, even though Petitioner is subject to mandatory detention under Section 1225(b)(2)(A), the immigration judge considered his bond request in the alternative and denied it. *See* Bond Decision at 4-5. The immigration judge first looked at Petitioner's potential danger to the community and reviewed his criminal conviction for assault in the second degree. *Id.* at 5. The judge did not make his finding based on the simple fact of the conviction, but instead "considered the particular circumstances surrounding this conviction, including [Petitioner's] relationship with his now ex-wife" (the victim of the assault); the judge also reviewed Petitioner's "positive equities . . . , including his U.S. citizen daughter and letters of support from employers, friends, and family, as well as a psychological evaluation." *Id.*

While Petitioner may disagree with the immigration judge's bond analysis, *see* Pet. ¶ 102-04, it is hard to see how the allocation of the burden of proof prejudiced Petitioner's ability to argue for release on bond. Petitioner notes that in a subsequent hearing on the merits of his requests for relief from removal, the immigration judge found Petitioner's testimony credible and discussed in detail Petitioner's difficult relationship with his ex-wife and the circumstances leading to his guilty plea. *Id.* ¶ 103 (citing Pet. Ex. D at 13-14). But this does not mean the judge would have come to a different conclusion about Petitioner's bond had the burden of proof been reversed; the bond hearing took place on July 18, 2025, one week before the hearing on the merits of Petitioner's withholding requests at which he testified in greater length about his personal circumstances (July 25), and the bond decision was issued a couple of weeks later (August 8), so the immigration judge was undoubtedly able to consider the relevant facts and testimony in deciding whether to release Petitioner on bond. Moreover, as Petitioner points out, most of the evidence the immigration judge considered was provided by Petitioner about his own circumstances—DHS provided only a copy of his rap sheet and other ministerial documents, *id.* ¶ 102—so Petitioner was evidently not hampered in his ability to make a case for his release on bond.

The Court should also reject Petitioner's arguments, *id.* ¶¶ 107-22, that the BIA's decision to allocate the burden of proof as it did—more than a quarter century ago, in 1999, *see Matter of Adeniji*, 22 I. & N. Dec. at 1112-13—is contrary to the Administrative Procedure Act ("APA") or INA. This argument has been rejected by each of the handful courts to have examined its merits, including at least one judge in this district. *See Huanga*, 599 F. Supp. 3d at 148-51; *J.G. v. Warden, Irwin County Det. Ctr.*, 501 F. Supp. 3d 1331, 1347-48 (M.D. Ga. 2020); *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 14 n.1 (D. Mass. 2017), *vacated as moot*, No. 17-1918, 2018 WL 11444979 (1st Cir. Mar. 22, 2018); *cf. L.G. v. Choate*, 744 F. Supp. 3d 1172, 1186 (D. Colo. 2024)

(finding no APA violation but concluding scheme violated due process); *but cf. Hernandez-Lara*, 10 F.4th at 41-42 (deciding against granting APA relief because of decision on due process grounds). These courts concluded that the BIA in *Adeniji* appropriately relied on an analogous (but not directly applicable) regulation in deciding that the burden of proof to establish lack of dangerousness or flight risk should rest with the alien; and that the BIA could permissibly depart from its prior different rule on the subject so long as it provided (as it did) a reasoned explanation for the change. *E.g.*, *Huanga*, 599 F. Supp. 3d at 148-51. This Court should do so as well.

IV. Petitioner's Continued Detention Is Constitutional

Finally, the Court should also reject Petitioner's claim that his ongoing detention since April 2025 is "[u]nconstitutionally [p]rolonged," Pet. at 31, and he is therefore entitled to a new bond hearing at which the government must bear the burden of proof by clear and convincing evidence, *id.* ¶¶ 123-31. None of the cases Petitioner cites requires immigration courts to provide bond hearings for detained aliens on a specific schedule or that the burden of proof at each bond hearing after the first be placed on the government.

As discussed above, Petitioner is being held pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates detention for aliens seeking admission to the United States. Petitioner cites a Second Circuit decision holding that "criminal aliens" mandatorily detained pursuant to a different provision, 8 U.S.C. § 1226(c), may not be held indefinitely without a bond hearing. *Black*, 103 F.4th at 143 (cited in Pet. ¶ 126). In another case cited by Petitioner, a judge in this district held that an asylum applicant mandatorily detained under yet another provision, 8 U.S.C. § 1225(b)(1)(B)(ii), also could not be held indefinitely without a bond hearing. *See Al-Thuraya v. Warden, Orange County Corr. Facility*, No. 25 Civ. 2582 (AS), 2025 WL 2858422, at *2 (S.D.N.Y. Oct. 9, 2025) (cited in Pet. ¶ 127).

But, even putting aside the different statutory provisions governing their detention, Petitioner and the aliens in *Black* and *Al-Thuraya* are not similarly situated in a critical respect: Petitioner *has* had a bond hearing already. The immigration judge in this case held a bond hearing for Petitioner in July 2025, and issued his decision in early August 2025 (only a few months after Petitioner was detained in April 2025), considered the extensive evidence Petitioner submitted, and denied his release on bond on the merits in a written decision based on a finding of potential danger to the community. *See* Bond Decision at 4-5. In *Black*, in contrast, the two aliens had been detained for much longer (seven and fifteen months), had never had a bond hearing, and were expected to continue to stay detained for lengthy periods without the prospect of such hearings. 103 F.4th at 137-40. The court of appeals found that their possible long-lasting detention with no bond hearing denied them due process. *Id.* at 142-55. Similarly, the alien in *Al-Thuraya* had been detained for eleven months with no bond hearing or prospect of one, and the district court concluded this deprived him of due process. 2025 WL 2854822, at *6-7.

Even if Petitioner could persuade the Court that he should be considered detained discretionarily under 8 U.S.C. § 1226(a), *see supra* Point II, that would not entitle him to another bond hearing either. While Petitioner accurately cites *Velasco Lopez*, 978 F.3d at 846, for the proposition that "[n]oncitizens who have been detained for an unreasonably long amount of time under § 1226(a) are entitled to a bond hearing in which the government must justify their continued detention," Pet. ¶ 124, Petitioner has not established that he has been detained for an "*unreasonably* long period of time" or that the time that has lapsed since his previous bond hearing is excessive. As the Second Circuit indicated, there is no "bright-line rule for when due process entitles an individual detained under § 1226(a) to a new bond hearing with a shifted burden." *Velasco Lopez*, 978 F.3d at 855 n.13. But any such rule is unlikely to be triggered when an alien

such as Petitioner had a bond hearing just three months ago, at which—regardless of which party bore the burden of proof—the immigration judge carefully considered extensive evidence relating to the circumstances of his criminal conviction and his personal life. *See* Bond Decision at 4-5.[8]

Moreover, there has been no "unreasonable delay" caused by DHS in Petitioner's underlying removal proceedings. *See, e.g.*, *Huanga*, 599 F. Supp. 3d at 142 ("One indicator of unreasonable detention is unreasonable delay by the Government in pursuing and completing removal proceedings." (internal quotation marks omitted)). As discussed above, the immigration judge held prompt hearings on both Petitioner's bond request and his request for relief from removal, and the briefing on Petitioner's appeal to the BIA of his removal order has been pushed back a few times due to requests *from Petitioner's counsel* but the appeal is still moving forward relatively quickly. *See* So Decl. ¶¶ 28-36. This is thus not a case where DHS is unduly drawing out an alien's removal proceedings in a way that unnecessarily extends his pre-removal detention.

This Court should thus reject Petitioner's argument that his continued detention is improper.

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[8] If the Court nonetheless concludes that Petitioner is entitled to another bond hearing with a different burden of proof, it should direct the immigration judge to conduct such a hearing rather than this Court conducting the hearing itself, *see* Pet. ¶¶ 139-46, or immediately releasing Petitioner because such a hearing has not taken place to date, *see id.* ¶¶ 147-54. The immigration judge in this case has not indicated any categorical objection to releasing aliens on bond, *cf. id.* ¶¶ 151-52, and indeed closely examined the appropriateness of such relief despite concluding that Petitioner was subject to mandatory detention under Section 1225(b), *see* Bond Decision at 4-5.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's petition for habeas corpus.

Dated: New York, New York
November 12, 2025

Respectfully submitted,

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 7919 words.