UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

O.G. *Petitioner,* v. LaDeon FRANCIS, *et al.*, *Respondents.*	Civil Action No. 25-CV-8977 (JAV)

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Respondents believe Petitioner O.G. should be treated as if he were standing on the threshold of entry to the United States, even though he has lived here for over two decades. As such, in Respondents' view, O.G. has no right to review of his now over seven months of immigration detention because the statute Respondents maintain applies to that detention, 8 U.S.C. § 1225(b)(2)(A), provides for none. That cannot be correct. As hundreds of recent decisions from district courts across the country have concluded, non-citizens present inside the U.S. like Petitioner do not satisfy Section 1225(b)(2)(A)'s requirement that they be "seeking admission." Instead, the only statutory authority for Petitioner's detention can be 8 U.S.C. § 1226(a). Under that statute, Respondents must make an individualized determination of the necessity of Petitioner's detention. But Respondents never even attempt to argue this was done because they simply assert he is subject to mandatory detention. That violation alone requires release.

Separately, Respondents fail to engage with the caselaw in this circuit that governs the standards applicable to Section 1226(a) bond hearings, looking to out-of-circuit law directly at odds with precedent here. Applying this circuit's law, it is clear that Petitioner's initial bond hearing, at which he was forced to bear the burden of proof, violated due process. At the very least, now that Petitioner's detention has lasted more than seven months, Respondents must bear the burden of proving that continued detention is necessary and a neutral adjudicator should consider whether Petitioner could instead be released on reasonable conditions of supervision.

Petitioner therefore respectfully requests that this Court order his immediate release or, in the alternative, schedule a bond hearing before this Court.

ARGUMENT

I. Section 1226 applies to Petitioner's detention and Respondents' misclassification requires release.

As courts around the country have articulated, three separate conditions must be met for an individual to be subject to § 1225(b)(2)(A) mandatory detention. An "examining immigration officer" must determine that the individual is: (1) an "applicant for admission"; (2) "seeking admission"; and (3) "not clearly and beyond a doubt entitled to be admitted." *See, e.g., Romero Perez v. Francis, et al.,* No. 25-CV-8112 (JGK), 2025 WL 3110459, at *2 (S.D.N.Y. Nov. 6, 2025). Although Respondents spend significant time arguing that Petitioner is an "applicant for admission" under Section 1225(a)(1) as someone present in the country without being admitted, *see* Resp. Mem. of Law, ECF No. 23 at 6–8 (hereinafter Resp.), Petitioner never contests that point. However, after a 25-year continuous presence in the United States, he is far from "seeking admission." *See* Pet. ¶ 85.

Respondents never explain why Petitioner is "seeking admission," instead pointing to the definition of "applicant for admission." *See* Resp. at 7.[1] This circular logic leaves no daylight between those terms. As court after court in this circuit has found, Respondents' reading of the statute "would render the phrase 'seeking admission' surplusage and disregard the statute's present-tense requirement." *Romero Perez,* 2025 WL 3110459, at *2; *J.G.O. v. Francis*, No. 25-CV-7233 (AS), 2025 WL 3040142 (S.D.N.Y. Oct. 28, 2025); *J.U. v. Maldonado*, No. 25-cv-

[1] Respondent notes that O.G. was not previously encountered by ICE nor did he seek asylum prior to his recent ICE arrest, Resp. at 7, but neither is relevant to whether he is "seeking admission." The forms of relief Petitioner now seeks in removal proceedings (VAWA cancellation and asylum) are not "admissions" in immigration law. *See* Pet. ¶ 85; *see also Matter of V-X-*, 26 I&N Dec. 147 (BIA 2013) (finding grant of asylum is not an "admission"); *Matter of Y-N-P*, 26 I&N Dec. 10, 12 (BIA 2012) (finding a grant of cancellation is not an admission, and explaining that "being an "applicant for admission" under [INA] section 235(a)(1) [8 U.S.C. § 1225(a)(1)] is distinguishable from 'applying . . . for admission to the United States").

04836, 2025 WL 2772765, at *7 (E.D.N.Y. Sept. 29, 2025); *Alvarez Ortiz v. Freden*, No. 25-CV-960-LJV, 2025 WL 3085032, at *15 (W.D.N.Y. Nov. 4, 2025). District courts around the country have likewise unequivocally dismissed the government's novel interpretation.[2]

For support, Respondents point to four cases from outside of this circuit. Resp. at 9. These are outliers. They either neglect to address the "seeking admission" requirement or, like Respondents, fail to engage with the legislative history. For one, Respondents offer no explanation as to how their interpretation could be correct when Sections 1226(a) and 1226(c) expressly apply to those who are present in the United States without a prior admission like Petitioner. *See* 8 U.S.C. 1182(a)(6)(A)(i); Pet. ¶ 75–77. Nor do Respondents address Congress's amendments to Section 1226(c) in the Laken Riley Act this year, which would have been unnecessary if the covered individuals were already barred from bond under § 1225(b)(2). *See* Pet. ¶ 82.

Respondents further argue that *Jennings v. Rodriguez*, 583 U.S. 281 (2018), supports their view. However, a non-cursory reading of *Jennings* compels a different conclusion. The Supreme Court explained that "U.S. immigration law authorizes the Government to detain certain [noncitizens] *seeking admission* into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain [noncitizens] *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c)." *Id.* at 289 (emphasis added). Respondents ignore this general overview, instead focusing on the Court's one-off reference to the "catchall" provision of section 1225(b)(2), which the Court refers to when describing immigration enforcement "at the Nation's borders and ports of entry." *Id.* at 287.

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[2] *See Demirel v. FDC*, 25-cv-5488, Dkt No. 11 (E.D. Pa. Nov. 18, 2025), explaining that there are now "288 district court decisions addressing this issue" and in "all but six, the Government's interpretation of the INA . . . was rejected), attaching cases at appendix at Dkt. 11-1.

Respondents likewise rely on patchwork quotes in the legislative history. Resp. at 5–6. However, Respondents fail to acknowledge that the concern animating Congress in 1996 in the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) was *removal* proceedings—not detention. Congress worried that noncitizens who entered without inspection "could take advantage of the greater procedural and substantive rights afforded in deportation proceedings" versus "exclusion proceedings." *Martinez v. Att'y General of U.S.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012). Congress remedied those concerns by creating a unified scheme of "removal" proceedings. *See id.* It also enacted a new scheme of "expedited removal" that allowed for some individuals present in the country less than two years to be stripped of the additional "equities and privileges in immigration proceedings" that were "not available to [noncitizens] who present themselves for inspection at a port of entry." H.R. Rep. No. 104-469, pt. 1, at 225 (1996).

On the other hand, the *detention* provisions remained untouched. Legislative history is clear that Congress intended to "restate [then-]current provisions" that reflected a century of law allowing for release of noncitizens already in the country pending decisions on their deportation. H.R. Rep. No. 104-469, at 229 (1996). This was further confirmed by agency regulations promulgated immediately after IIRIRA that explicitly authorize bond for applicants for admission who entered without inspection. *See* 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). "[Respondents cannot] enlarge Congress's stated concern that noncitizens living in the United States had an advantage during *removal* proceedings pre-IIRIRA to an unarticulated aim to mandate *detention* for all such noncitizens post-IIRIRA." *Rodriguez v. Bostock*, No. 3:25-CV-05240 (TMC), 2025 WL 2782499, at *51 (W.D. Wash. Sept. 30, 2025) (emphasis in original).

Finally, Respondents try to bypass the statutory text of Section 1225(b)(2) entirely, arguing that because Petitioner did not lawfully enter the country he is "treated, for constitutional purposes, as if stopped at the border." Resp. at 8. First, Respondents vastly overstate the application of the "entry fiction" to this case. *See infra*, Part II.C. Regardless, however, the entry fiction plays no part in analyzing how the *text* of Section 1225(b)(2) should be applied.

Respondents do not address Petitioner's claim that, by misclassifying him as subject to Section 1225(b)(2), Respondents failed to exercise the discretion required under Section 1226(a) to consider his release. *See* Pet. at §§ 158–60 (Second Cause of Action). This requires release. *See, e.g.*, *Lopez Benitez v. Francis*, No. 25-CV-5937, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025).

II. The government should bear the burden of proof in any bond hearing.

A. Petitioner's detention is prolonged and requires a burden-shifted hearing under *Velasco Lopez.*

Respondents do not dispute that if Petitioner has been detained under § 1226(a) for an unreasonable amount of time, he is entitled to a burden-shifted bond hearing under *Velasco Lopez v. Decker*, 978 F.3d 842 (2d Cir. 2020). Resp. at 22. Notably, Respondents also never argue that seven months of detention is reasonable. *Id.* Nor can they. The Second Circuit and the Supreme Court have made clear that seven months of detention is presumptively *unreasonable*. *See* Pet. ¶ 129.

In an attempt to distinguish this case, Respondents try a new way of counting. They claim that "Petitioner has not established . . . that the time that has lapsed since his previous bond hearing is excessive." Resp. at 22. That is not the test. Respondents point to nowhere in *Velasco Lopez*, or any other prolonged detention case, where length of detention is counted this way. Instead, the Second Circuit repeatedly emphasized the *total* length of Velasco Lopez's detention,

not the amount of time since his last bond hearing. 978 F.3d. at 847; *see also G.F.F. v. Francis*, No. 25-CV-7368 (JGK), 2025 WL 3141735, at *3 (S.D.N.Y. Nov. 10, 2025) (same). Indeed, the entire thrust of *Velasco Lopez* is that a bond hearing with the burden on the noncitizen is insufficient process to justify prolonged detention and that greater procedures are required. *Id.* at 852–54. Velasco Lopez himself was denied release at two bond hearings and ordered released only once the burden shifted. *Id.* at 847–48. By Respondents' logic, he might have had the same inadequate bond hearing again and again, but so long as the last hearing was less than six months ago, detention would never become prolonged.

Respondents also defend that there has been no "unreasonable delay" and object that, if anything, Petitioner's counsel has caused delay by requesting briefing extensions. Resp. at 23. First, Respondents misstate the record.[3] But in any case, this is not a relevant factor. Respondents cite only *Huanga v. Decker*, 599 F. Supp. 3d 131 (S.D.N.Y. 2022), but *Huanga*—a magistrate report and recommendation that was not adopted by a district court[4]—erroneously applied this factor from the test applied by district courts prior to *Velasco Lopez*. *See, e.g.*, *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at * 10 (S.D.N.Y. May 23, 2018). *Velasco Lopez* established that the *Mathews* balancing test governs questions of prolonged detention, not the multi-factor test. 978 F.3d at 851.

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[3] Respondents' brief asserts that the appeal briefing "has been pushed back a few times due to request *from Petitioner's counsel*." Resp. at 23 (emphasis in original). This is incorrect. Petitioner requested one extension in order to allow for transcript correction, which was granted. Pet. ¶ 49 n.2. The BIA has suspended its briefing schedule *twice* more without explanation or request from Petitioner. *See* ECF No. 24 (Declaration of Deportation Officer So) ¶¶ 28–36.

[4] *See* No. 22-CV-1301 (AT) (GWG), ECF Nos. 29, 40 (S.D.N.Y. April 14, 2023) (dismissing case as moot before district court could rule on objections to report and recommendation).

B. Petitioner's initial bond hearing violated due process, the INA and the APA.

Although the Court need not reach the question, as Petitioner's detention has now become prolonged, Petitioner's initial bond hearing also violated due process by requiring him to bear the burden of proof. Respondents do not dispute that *Mathews* applies here as well. Resp. at 18. However, their analysis of its factors is far afield.

Applying the first factor, Respondents pay lip service to "the most significant liberty interest there is—the interest in being free from imprisonment[,]" *Velasco Lopez*, 978 F.3d at 851, but cite *Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022), to argue that Congress can make rules that would be unacceptable if applied to citizens. Resp. at 18. However, the liberty interest *Velasco Lopez* discussed *was* that of a noncitizen, undercutting any suggestion that this factor should favor Respondents.

Respondents' analysis of the second factor—the likelihood of error absent additional procedures—likewise relies on *Miranda*'s analysis that noncitizens are better able to present information at bond hearings than the government, and that access to counsel was irrelevant. Resp. at 18–19; 34 F.4th at 361–62. This Circuit, however, has found exactly the opposite. *See Velasco Lopez*, 978 F.3d at 851, 853; *Black v. Decker*, 103 F.4th 133, 156 (2d Cir. 2024).

Respondents also argue that the significant evidence presented by Petitioner shows that he was "not hampered" in making his case for bond. Resp. at 20. But this only reinforces that "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 v. Lyons*, 10 F.4th 19, 31 (1st Cir. 2021)).[5]

[5] The IJ was unable to consider Petitioner's testimony at his merits hearing in the bond decision, *see* Resp. at 20, because the IJ issued an oral decision on bond before the merits hearing.

Finally, Respondents admit that there is no government interest in detaining noncitizens who are neither a danger nor a flight risk. Resp. at 19. However, they claim this does not bear on the burden of proof. *Id.* To the contrary, the burden advocated by Respondents would enable detention of exactly those noncitizens. *See Velasco Lopez*, 978 F.3d at 855 ("When the Government incarcerates individuals it cannot show to be a poor bail risk for prolonged periods of time, as in this case, it separates families and removes from the community breadwinners, caregivers, parents, siblings and employees.").

Respondents look to other out-of-circuit cases, *Borbot v. Warden Hudson Cnty. Corr. Facility*, 906 F.3d 274, 276, 280 (3d Cir. 2018), and *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1194–95, 1203 (9th Cir. 2022), for support. *See* Resp. at 16–17. However, these decisions are not the law in this circuit and directly conflict with *Velasco Lopez*. By contrast, the First Circuit, reasoning consistently with *Velasco Lopez,* required the Government to bear the burden in all bond hearings regardless of length of detention. *Hernandez-Lara v. Lyons*, 10 F.4th 19, 44 (1st Cir. 2021); *see also Black*, 103 F.4th at 155–56 (citing *Herandez-Lara* as persuasive).

Velasco Lopez does not "confirm" that the burden at the initial bond hearing should remain on the noncitizen. Resp. at 15. "Rather, the Circuit found that the case before it did not require it 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, precisely because of the petitioner's prolonged detention." *Quintanilla v. Decker*, No. 21 CIV. 417 (GBD), 2021 WL 707062, at *3 (S.D.N.Y. Feb. 22, 2021).

Petitioner also argued that the burden allocation at his bond hearing violated the APA and INA. *See* Pet. ¶¶ 107–122; 163–66. (citing *In re Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999), placing the burden on the noncitizen). Respondents point to decisions dismissing similar APA

claims, but all but one were decided prior to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and defer to the agency. Resp. at 20–21. The one case that post-dates *Loper Bright* found that placing the burden on the noncitizen violated due process and rejected the APA claim as a lesser remedy. *L.G. v. Choate*, 744 F. Supp. 3d 1172, 1186 (D. Colo. 2024). Finally, the dissent in *Hernandez-Lara* is instructive. 10 F.4th at 46–53 (Lynch, J., dissenting). There, Judge Lynch, despite her disagreement with the majority's holding that the burden allocation violated due process, found *In re Adeniji* arbitrary and capricious. *Id.* Though the majority opinion rests on due process, it did not disagree with Judge Lynch on that score. *See id.* at 42.

Finally, Respondents do not address Petitioner's claim that his bond hearing violated the INA at all, and simply say the Court "should reject" it. *See* Resp. at 15. To dismiss an entire claim in such a cursory manner is effectively to concede it. *See, e.g.*, *Munoz Materano v. Arteta*, No. 25-cv-6137 (ER), 2025 WL 2630826, at *17 (S.D.N.Y. Sept. 12, 2025) ("Respondents do not provide any arguments in opposition . . . and therefore, the Court deems this claim uncontested.").

C. Regardless of the statute of detention, due process requires a burden-shifted hearing.

As described above, Section 1226(a) should apply to Petitioner's detention. However, even if Respondents were correct that Section 1225(b)(2) applies, Petitioner should still receive a burden-shifted bond hearing. Petitioner's rights against prolonged detention without due process do not hinge on the statute used to detain him. *C.f. Black v. Decker*, 103 F.4th at 143 (finding unconstitutionally prolonged detention despite mandatory nature of statute). Respondents' attempt to distinguish other cases by statute, *see* Resp. at 21, misses that point entirely. *See also Perez v. Decker*, No. 18-CV-5279 (VEC), 2018 WL 3991497 (S.D.N.Y. Aug. 20, 2018) (finding § 1225(b)(2) detention unconstitutionally prolonged).

In addition, Respondents' argument that these cases do not apply because Petitioner already had a bond hearing fails to acknowledge that *Velasco Lopez* would apply equally to a mandatory detainee who received a bond hearing insufficient to justify prolonged detention. *See Black*, 103 F.4th at 149 n.21 ("the dispositive issue is the same").

More remarkably, Respondents claim that if Petitioner's detention is governed by Section 1225(b)(2), he "is entitled to only the process Congress has provided by statute." Resp. at 3. In other words, he has *only* statutory rights; and no due process rights *at all*. This defies the bedrock principle that "all persons within the territory of the United States" are protected by the Fifth Amendment. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *see also* Resp. at 11 ("'once passed through our gates, even illegally,'" noncitizens are entitled to due process in removal proceedings) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

Respondents' cases are inapposite. Both *Mezei* and *Dep't of Homeland Sec. v. Thuraissigiam* dealt with individuals who sought *entry* into the United States through habeas proceedings. *See Mezei*, 345 U.S. at 215 (noncitizen denied entry and "treated as if stopped at the border" had no right to enter the United States); *Thuraissigiam*, 591 U.S. 103, 140 (2020) (noncitizen "detained shortly after unlawful entry cannot be said to have "effected an entry," and "has only those rights *regarding admission* that Congress has provided by statute."). Here, Petitioner is not seeking additional process with respect to his entry or relief from removal. Instead, he seeks review of the necessity of his detention. *See also Munoz Materano*, 2025 WL 2630826, at * 12 (rejecting this argument).

D. Any bond hearing should be held by this Court.

In a footnote, the government argues that if a bond hearing is held, the immigration judge assigned to Petitioner's case should conduct it. Resp. at 23 n.8. But Petitioner's case is no longer before that IJ; it is on appeal. Thus, the prior IJ would not necessarily conduct any bond hearing.

More fundamentally, Respondents cite nothing to contradict the well-established authority of district courts to conduct bail hearings. *See* Pet. ¶ 145; *see also Centeno-Martinez v. Jamison*, No. CV 25-3593, 2025 WL 3157711 (E.D. Pa. Nov. 12, 2025) (ordering hearing conducted by district court); *Chiguano v. Lowe*, No. 1:24-CV-02210, 2025 WL 3187161 (M.D. Pa. Nov. 14, 2025) (same); *Flores-Powell v. Chadbourne*, 677 F. Supp. 2d 474 (D. Mass. 2010) (discussing habeas judge's equitable power, including power to hold a bail hearing); *Ramirez v. Watkins*, No. 10-126, 2010 WL 6269226, at *17-19 (S.D. Tex. Nov. 3, 2010) (same).

This Court, having all the necessary information and being more familiar with the case, should conduct any bond hearing to conserve judicial resources and efficiency. Bond hearings before immigration judges have, in recent months, resulted in well-documented due process violations and motions to enforce in district courts. *See, e.g.*, Emergency Amended Motion to Enforce, *Romero Perez v. Francis*, No. 25-CV-8112-JGK, ECF No. 33 at 5 (S.D.N.Y. Nov, 13, 2025) (after order finding Petitioner detained under § 1226(a), IJ disobeyed court order and denied bond under § 1225(b), then, after a second bond hearing to remedy the first deficiency, DHS invoked an automatic stay of the bond grant); *J.M.P. v. Arteta*, No. 25 CIV. 4987 (DEH), 2025 WL 2984913, at *14 nn.20, 21 (S.D.N.Y. Oct. 23, 2025) (collecting thirty-two cases in the last three months where DHS invoked the automatic stay to prevent release on bond).

CONCLUSION

For the foregoing reasons, this Court should order Petitioner's immediate release, or in the alternative, conduct a bond hearing in which the government bears the burden of proof to justify Petitioner's ongoing detention by clear and convincing evidence.

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 3,499 words.