

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

JAVIER DE JESÚS AGUILAR,

,

Petitioner,

vs.

BRIAN ENGLISH, *in his official capacity as  
Warden of Miami Correctional Facility;* and

SAM OLSON, *Field Office Director for ICE  
Chicago Field Office,* and

TODD LYONS, *in his official capacity as Acting  
Director of Immigration and Customs Enforcement;* and

KRISTI NOEM, *Secretary of Homeland Security;* and  
PAMELA BONDI, *U.S. Attorney General.*

JOSEPH B. EDLOW, *Director of the U.S Citizenship  
& Immigration Services;*

Respondents.

CASE NO.:  
3:25-cv-00898-DRL-JSF

**PETITIONER’S RESPONSE TO RESPONDENT’S RETURN  
AND MOTION TO DISMISS**

Petitioner, Javier De Jesús Aguilar, by and through undersigned counsel, respectfully submits this Response to Respondents’ Return of Show Cause and Motion to Dismiss filed on November 10, 2025 in ECF Dkt. 10.

**I. INTRODUCTION**

Petitioner, Javier De Jesús Aguilar, a Mexican citizen with nearly two decades of continuous residence in the United States, a U.S.-citizen wife and son, and no significant criminal history, is unlawfully detained by ICE as an “arriving alien” under 8 U.S.C. § 1225(b). This reclassification, based on a recent policy shift, is contrary to the plain text of the INA, decades of agency practice, and the overwhelming weight of judicial authority. Petitioner seeks immediate release or, in the alternative, a prompt individualized bond hearing. Federal courts retain jurisdiction over collateral

habeas challenges to immigration detention, which are not barred by 8 U.S.C. §§ 1252(e)(3), 1252(g), 1252(b)(9), or 1252(a)(5). For the reasons set forth below, the Court should deny Respondents' motion to dismiss and grant the relief requested.

Petitioner's claims, which challenge the legality of his detention and the policies underpinning it, are not barred by the jurisdiction-stripping provisions of the Immigration and Nationality Act ("INA"). Federal courts retain jurisdiction over challenges to the legality of detention, as these claims are independent of, and collateral to, the removal process itself (*Ozturk v. Hyde*, 136 F.4th 382, 398-400 (2nd Cir. 2025) ("Ozturk"); *Kong v. United States*, 62 F.4th 608, 613-614 (1st Cir. 2023) ("Kong"); *Mahdawi v. Trump*, 136 F.4th 443, 450-452 (2nd Cir. 2025) ("Mahdawi"). The Supreme Court and circuit courts have consistently held that 8 U.S.C. §§ 1252(g) and 1252(b)(9) are to be **narrowly construed**, applying only to three specific **discretionary** actions related to commencing, adjudicating, or executing removal orders, and not to all detention-related claims (*Kong* at 613). Petitioner, apprehended in the interior of the United States after nearly two decades of residence, challenges ICE's July 2025 policy and the BIA's *Matter of Yajure Hurtado* decision, which reclassify noncitizens like him as "arriving aliens" subject to mandatory detention under 8 U.S.C. § 1225(b). This reclassification is contrary to longstanding agency practice and statutory interpretation, which typically place such individuals under the discretionary detention provisions of 8 U.S.C. § 1226(a). See ECF Dkt. 1-2.

Furthermore, Petitioner's Fifth Amendment due process claims, arising from his prolonged detention without an individualized bond hearing, are cognizable. Noncitizens physically present in the United States, particularly those with long-term ties, are entitled to robust due process protections against arbitrary and prolonged detention. The government's argument that Petitioner failed to exhaust administrative remedies is unavailing, as exhaustion in habeas cases is a prudential,

not jurisdictional, requirement and may be excused where administrative remedies are inadequate, futile, or where irreparable harm would result from delay. Given the nature of Petitioner’s constitutional challenges and his claims under the Administrative Procedure Act (“APA”) regarding unlawful agency action and unreasonable delay in visa adjudication, administrative channels may not provide an adequate or timely remedy. Therefore, the Petition presents substantial legal and constitutional questions that warrant this Court’s immediate review.

## **II. DETENTION CHALLENGES ARE DISTINCT FROM CHALLENGES TO THE REMOVAL PROCESS**

For decades, the statutory and regulatory framework governing immigration detention has recognized that detention is the exception, not the rule, for noncriminal noncitizens in removal proceedings. Historically, the vast majority of noncitizens apprehended in the interior—particularly those without serious criminal convictions—were released on their own recognizance or on low bonds pending the outcome of their cases. Only a narrow class of individuals—those with certain criminal convictions under 8 U.S.C. § 1226(c) or those apprehended at or near the border as “arriving aliens” under § 1225(b)—were subject to mandatory detention. For everyone else, § 1226(a) establishes a presumption of release, with detention permitted only upon a specific showing of flight risk or danger to the community.

The government’s recent policy shift, which seeks to detain noncriminal, long-term residents like Petitioner for the entire duration of protracted removal proceedings, is wholly at odds with this statutory scheme. Detention is not an inherent or necessary part of removal proceedings for noncriminals (or people like Petitioner with minor criminal convictions); it is an extraordinary measure that must be justified by individualized findings. See *Demore v. Kim*, 538 U.S. 510, 523 (2003) (“[I]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”). The statutory structure confirms this:

- **Section 1226(a)** provides for **discretionary** detention with a presumption of release for noncitizens in removal proceedings, subject to individualized bond hearings.
- **Section 1226(c)** mandates detention only for a limited class of criminal aliens, and even then, the Supreme Court has made clear that such detention is constitutional only for the “brief period necessary for their removal proceedings,” not for indefinite or unreasonably prolonged periods. *Demore*, 538 U.S. at 529–31.
- **Section 1231** governs detention only after a final order of removal, and even then, the government may detain an individual for a maximum of 90 days, after which continued detention is permissible only if removal is “reasonably foreseeable.” *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

Given the current backlog of 3–4 million immigration cases and only 28 BIA members, it is not uncommon for removal proceedings and appeals to take five years or more to reach finality. Yet, under the government’s theory, a noncriminal noncitizen like Petitioner could be detained for years before a final order of removal is ever entered—while someone with a final order of removal may only be detained for 90 days, or at most six months, before release is constitutionally required if removal is not reasonably foreseeable. *Zadvydas*, 533 U.S. at 701.

This result is not only illogical, but constitutionally untenable. The Supreme Court has repeatedly held that due process requires a “special justification” for physical detention that outweighs the individual’s constitutionally protected interest in avoiding physical restraint, and that detention must be reasonably related to its regulatory purpose—namely, preventing flight or danger to the community. *Zadvydas*, 533 U.S. at 690–91; *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) (“[A] lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention

became unreasonable or unjustified.”). Even for criminals subject to § 1226(c), the Supreme Court has recognized that if detention becomes unreasonably prolonged or is not necessary to prevent flight or danger, due process may require release or at least an individualized bond hearing. It would be perverse to detain noncriminals for years without individualized review, while criminal aliens and those with final orders of removal are entitled to release after a much shorter period.

In sum, the government’s position would invert the statutory and constitutional scheme, making pre-final order detention for noncriminals more severe and prolonged than post-order detention for those actually ordered removed. This is contrary to the INA, to decades of agency and judicial practice, and to the fundamental requirements of due process. The Court should reject this unprecedented expansion of detention authority and reaffirm that, for people like Petitioner with insignificant criminal issues, detention is the exception—not the rule—and must be justified by individualized findings, not by categorical fiat, which the government is now conducting.

### **III. REFUTING JURISDICTIONAL AND DISMISSAL ARGUMENTS**

The government contends that this Court lacks subject matter jurisdiction over Petitioner’s habeas petition, asserting that his claims are barred by 8 U.S.C. §§ 1252(e)(3), 1252(g), 1252(b)(9) and 1252(a)(5). Specifically, the government argues that Petitioner’s petition directly challenges DHS’s decision to commence and adjudicate removal proceedings, which it claims is outside the district court’s purview, with judicial review limited to the District Court for the District of Columbia or the appropriate court of appeals upon review of a final order of removal. This argument, however, misconstrues the scope of these jurisdiction-stripping provisions and overlooks the fundamental nature of Petitioner’s claims.

Longstanding principles of statutory interpretation dictate that Congress must speak clearly and specifically when it intends to deprive federal courts of jurisdiction (*Ozturk* at 399; *Mahdawi*

at 449). Courts operate under a presumption favoring judicial review, and only upon a showing of **clear and convincing evidence** of a contrary legislative intent should access to judicial review be restricted (*Ozturk*, 399; *Mahdawi*, 449). As the Supreme Court has affirmed, this presumption applies even in the context of the INA. *Ozturk* at 399. Petitioner’s petition challenges the legality and constitutionality of his **detention**, not the underlying removal proceedings themselves, and therefore falls outside the narrow confines of the government’s asserted jurisdictional bars.

**A. § 1252(g) Does Not Bar Habeas Review of Detention**

The government’s reliance on 8 U.S.C. § 1252(g) as a jurisdictional bar is fundamentally flawed and contrary to controlling Supreme Court and circuit precedent. This argument was also rejected by over 212 recent U.S. District Court decisions.<sup>1</sup> By its express terms, § 1252(g) restricts judicial review only with respect to three discrete actions by the DHS Secretary or Attorney General that involve **prosecutorial discretion**: the decision to **commence** removal proceedings, **adjudicate** cases, or **execute** removal orders. It does not sweep in all claims tangentially related to removal, nor does it bar collateral challenges to the legality of detention.

The Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482–83 (1999), unequivocally held that § 1252(g) “is not a ‘zipper’ clause” encompassing every claim arising from removal proceedings. Instead, the Court **narrowly interpreted the statute to apply only to the three enumerated actions**—commencement, adjudication, or execution of removal orders—and **explicitly rejected an expansive reading of “arising from” that would include collateral challenges such as habeas petitions contesting detention**. See also *Hamama v. Adducci*, 912 F.3d 869, 874 (6th Cir. 2018); *Kong*, 61; *Mahdawi*, 450; *Tazu v. Attorney Gen. U.S.*, 975 F.3d 292, 296 (3d Cir. 2020). This narrow construction was reaffirmed in *Jennings v.*

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<sup>1</sup> See Exhibit 1 for a response on why the very few cases cited by the government were erroneously decided. They are few and far between.

*Rodriguez*, 583 U.S. 281, 294 (2018), where the Court held that § 1252(g) “refers only to the three specific actions themselves, not to any claim that can technically be said to ‘arise from’ those actions.” Thus, habeas petitions challenging the lawfulness of immigration detention—such as Petitioner’s—are collateral to removal proceedings and fall outside the scope of § 1252(g).

Recent circuit decisions have repeatedly confirmed this principle. In *Karki v. Jones*, No. 24-3721, 2025 U.S. App. LEXIS 20660, at 8–9 (6th Cir. Aug. 13, 2025), the court emphasized that § 1252(g) **does not clearly state a jurisdictional bar on review of detention claims, and thus does not preclude district court jurisdiction over habeas petitions challenging the legality or constitutionality of immigration detention.** The First Circuit in *Kong*, and the Second Circuit in *Mahdawi* and *Ozturk*, have likewise held that habeas petitions challenging unlawful detention are “independent of, and collateral to, the removal process” and therefore fall outside § 1252(g)’s narrow jurisdictional bar. Challenges to the legality of a noncitizen’s detention are not attempts to constrain prosecutorial discretion in the commencement, adjudication, or execution of removal proceedings, but rather collateral attacks on the lawfulness of custody itself. *See Mahdawi* at 450; *Tazu v. Attorney Gen.* U.S., 975 F.3d at 297. For example, in *Kong*, the First Circuit held that § 1252(g) does not bar review of challenges to the **legality of detention**, as such claims are distinct from challenges to the government’s discretionary decision to execute a removal order. *Kong*, 622–23. Similarly, *Ozturk* at 398 and *Mahdawi* at 450, affirmed that claims of unlawful and retaliatory detention are independent of, and collateral to, the removal process and fall outside § 1252(g)’s narrow jurisdictional bar.

Moreover, general collateral challenges to unconstitutional practices and policies used by the agency—such as Petitioner’s challenge to ICE’s internal memo and *Matter of Yajure Hurtado*, which reinterpret statutory provisions to mandate his detention—are not precluded by § 1252(g), as

they do not implicate the three discrete actions enumerated in the statute. In sum, Petitioner’s habeas petition does not seek to prevent the commencement of removal proceedings, nor does it challenge the adjudication of his case or the execution of a final removal order (as he is not subject to one). Rather, his petition contests the legality of his ongoing detention and the agency policies that mandate such detention without a bond hearing as well as erroneously classifying him as an “arriving alien” or “applicant for admission” after almost two decades in the country. These claims are collateral to removal and are not barred by § 1252(g). Any broader reading would contradict the plain statutory text and controlling precedent, including *Reno* and *Jennings*.

**B. § 1252(b)(9) Does Not Bar Detention Habeas Review—Courts Retain Jurisdiction**

The government’s assertion that 8 U.S.C. § 1252(b)(9) strips this Court of jurisdiction over Petitioner’s habeas challenge is fundamentally flawed and contrary to both the statutory text and controlling Supreme Court precedent. Section 1252(b)(9) is a channeling provision, not a jurisdictional bar. It provides that “[j]udicial review of all questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in **judicial review of a final order** under this section.” By its plain terms, § 1252(b)(9) channels review of issues “arising from” removal proceedings into a petition for review in the court of appeals—but only after a final order of removal has been entered.

Crucially, the Supreme Court in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), squarely rejected the government’s expansive reading of § 1252(b)(9). The Court held that challenges to immigration detention—such as Petitioner’s—are not “questions of law or fact arising from” removal proceedings and thus are not barred or channeled by § 1252(b)(9). Instead, district courts retain habeas jurisdiction over such claims, which are independent of the merits of removal and do not require or result in review of a final order of removal.

This principle is echoed by the First Circuit in *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007), which held that “Section 1252(b)(9) is a judicial channeling provision, not a claim-barring one.” The legislative history of the REAL ID Act of 2005, which amended § 1252(b)(9), explicitly confirms that “nothing in the amendment would preclude habeas review over challenges to detention that are independent of challenges to removal orders.” *Kong*, 614.

Petitioner’s claims regarding the lawfulness of his detention and his right to a bond hearing are wholly distinct from the merits of his removability. These claims can be resolved “without affecting pending removal proceedings.” *Ozturk* at 399. The Second Circuit, in *Ozturk*, and the Ninth Circuit, in *J.E.F.M. v. Whitaker*, 908 F.3d 1157, 1159–60 (9th Cir. 2018), have both emphasized that § 1252(b)(9) does not apply before a final order of removal has been entered, and does not bar claims that are “independent of, or wholly collateral to, the removal process.”

The Third Circuit in *Chehazeh v. Attorney Gen. of the United States*, 666 F.3d 118 (3d Cir. 2012), has explicitly held that § 1252(b)(9) applies only after a final order of removal has been entered and does not preclude judicial review when no such order exists. In Petitioner’s case, no final order of removal has been entered; he is at the outset of his removal proceedings and challenges only the legality of his ongoing detention—not the merits of his removability or the process by which removability will be determined. Furthermore, the Supreme Court has rejected an expansive approach to § 1252(b)(9), holding that it does not present a jurisdictional bar where the petitioner is not seeking review of an order of removal, the decision to seek removal, or the process by which removability will be determined. See *Jennings v. Rodriguez*, 583 U.S. at 285–86; *E.O.H.C.*, 950 F.3d at 185; *Mahdawi v. Trump*, 136 F.4th 443, 452 (2d Cir. 2025).

In sum, Petitioner’s habeas petition does not seek review of a final order of removal, nor does it directly challenge the decision to commence or adjudicate his removal proceedings. His

claims are collateral to removal and challenge only the legality of his ongoing detention and the denial of a bond hearing. Section 1252(b)(9) does not divest this Court of jurisdiction. Any broader reading would contradict the plain statutory text, legislative history, and controlling precedent. This Court retains full authority to adjudicate Petitioner's habeas challenge to his detention.

**C. § 1252(e)(3) Is Also Inapplicable To Petitioner's Habeas Challenge**

The government's reliance on 8 U.S.C. § 1252(e)(3) as a jurisdictional bar is misplaced and unsupported by the statutory text or controlling precedent. Section 1252(e)(3) restricts judicial review of "determinations under section 1225(b) of this title and its implementation" to the District Court in D.C., but only for **facial** or **systemic** challenges to the constitutionality or legality of the expedited removal system or its implementing regulations. This provision was designed to channel broad, programmatic attacks on the expedited removal system to a single forum, not to preclude individualized habeas petitions challenging the lawfulness of detention as applied to a specific petitioner that the government erroneously contends is an "applicant for admission."

Petitioner does not seek to invalidate the expedited removal system or any written policy directive on its face. Rather, he seeks individualized habeas relief from unlawful detention under § 1225(b)(2) as applied to his unique circumstances. Courts have repeatedly recognized that § 1252(e)(3) does not bar district court review of individual habeas petitions that do not challenge the statute or its implementation in a facial or systemic manner. For example, in *M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021), the D.C. Circuit distinguished between **facial** challenges, which are subject to § 1252(e)(3), and **individualized** habeas relief, which is not.

The government's argument conflates these two categories. Petitioner's habeas petition does not challenge the validity of the expedited removal system or its regulations in general; it challenges the government's application of § 1225(b)(2) to his individual detention and the

agency's reinterpretation of this statute through an internal ICE memorandum and the BIA's *Matter of Yajure Hurtado* decision subjecting him for mandatory detention without an opportunity for release on bond. This is a classic as-applied challenge to the legality of Petitioner's detention, which is a core function of habeas review and distinct from the limited determinations outlined in § 1252(e)(2). Moreover, the government's assertion that § 1252(e)(3) deprives this Court of jurisdiction over Petitioner's habeas challenge is contrary to the overwhelming weight of authority. Courts have consistently held that § 1252(e)(3) does not bar individualized habeas petitions challenging the lawfulness of detention under § 1225(b)(2) as applied to a specific petitioner outside the District of Columbia. See *M.M.V. v. Garland*, 1 F.4th at 1109.

The central issue in this case is whether Petitioner is properly classified as an "applicant for admission" under § 1225(b)(2) and thus subject to mandatory detention, or whether he is entitled to a bond hearing under § 1226(a) as a long-term resident apprehended in the interior. Petitioner's challenge to this classification and the resulting mandatory detention falls squarely within the scope of habeas review for unlawful detention. He does not seek to invalidate the expedited removal system or its regulations on their face, but rather to obtain individualized relief from unlawful detention as applied to his circumstances. Accordingly, § 1252(e)(3) does not preclude this Court's jurisdiction over Petitioner's habeas petition. The government's reliance on this provision is therefore inapposite and should be rejected.

**D. § 1252(a)(5) Is Petition-for-Review Channeling, Not A Bar to Habeas**

The government's reliance on 8 U.S.C. § 1252(a)(5) is misplaced. Section 1252(a)(5) provides that "[a] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an **order of removal**." By its plain terms, this provision channels judicial review of **final orders of removal** to the courts of

appeals through the petition-for-review process. It does not, however, bar district court habeas review of collateral challenges to detention where there is no final order of removal.

Petitioner does not challenge any removal order; he is not yet subject to one. He is at the outset of his removal proceedings and seeks only to challenge the legality of his ongoing detention and the denial of a bond hearing. The Supreme Court and multiple circuit courts have made clear that § 1252(a)(5) does not preclude habeas review of detention claims that are independent of the merits of removal.

Petitioner’s claims regarding the lawfulness of his detention and his right to release or a bond hearing are distinct from the merits of his removability and can be resolved “without affecting pending removal proceedings.” *Ozturk v. Hyde*, 136 F.4th 382, 399 (2d Cir. 2025). The government’s argument conflates review of removal orders—which is indeed channeled exclusively to the courts of appeals under § 1252(a)(5)—with collateral habeas challenges to detention, which remain within the jurisdiction of the district courts so long as no final order of removal exists.

Accordingly, § 1252(a)(5) does not bar this Court from exercising habeas jurisdiction over Petitioner’s challenge to the legality of his detention. His claims are collateral to removal and do not seek review of any final order. The government’s argument to the contrary is unsupported by the statutory text, legislative history, and controlling precedent. This Court retains full authority to adjudicate Petitioner’s habeas petition and to grant appropriate relief.

**E. Even if Petitioner’s Habeas Review Was Barred by Statute, Suspension Clause Would Still Supersede and Allow Habeas Review**

Petitioner’s constitutional arguments regarding the Suspension Clause and the necessity of habeas review are fully briefed in the complaint and incorporated here by reference. The Supreme Court has made clear that habeas corpus review is a constitutional minimum that cannot be

eliminated by statute, and any interpretation of jurisdiction-stripping provisions that would foreclose all judicial review of the legality of detention must be avoided. See *Boumediene v. Bush*, 553 U.S. 723, 779–80 (2008). Denying access to habeas relief for individuals detained without a final order of removal, as in this case, would raise serious constitutional concerns and is not supported by the statutory text or controlling precedent. Therefore, even if Petitioner’s habeas review was barred by a statute, the Suspension Clause would still supersede it and allow this Court to conduct habeas review due to a constitutional challenge to Petitioner’s detention.

**F. Legal Standards Governing Immigration Detention and Due Process**

Petitioner’s due process arguments are fully set forth in the Verified Petition and incorporated here by reference. In brief, the Fifth Amendment protects all persons in the United States—including Petitioner—from arbitrary deprivation of liberty. Immigration detention is civil, not punitive, and must be justified by legitimate governmental interests such as preventing flight or danger to the community. Prolonged detention without an individualized bond hearing, especially for a long-term resident with strong family and community ties and no criminal record, violates the Due Process Clause. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Jennings v. Rodriguez*, 583 U.S. 281, 300–01 (2018). Petitioner’s challenge is limited to the denial of individualized review and the government’s failure to justify continued detention under these constitutional standards.

In sum, the government’s jurisdictional arguments fail because Petitioner’s petition challenges the legality and constitutionality of his detention and agency policies, not the discrete actions or final orders of removal that fall under the narrow jurisdiction-stripping provisions of 8 U.S.C. §§ 1252(e)(3), 1252(g), 1252(a)(5) and 1252(b)(9). This Court retains subject matter jurisdiction to hear Petitioner’s claims.

#### IV. STATUTORY FRAMEWORK: 8 U.S.C. § § 1225 and 1226

The Immigration and Nationality Act (“INA”) draws a clear statutory distinction between two categories of noncitizens for detention purposes:

- **“Applicants for admission” under 8 U.S.C. § 1225(b)**—typically those apprehended at or near the border or a port of entry,
- **Noncitizens already present in the United States**—who are subject to discretionary detention and bond eligibility under 8 U.S.C. § 1226(a), unless they fall within the narrow mandatory detention categories of § 1226(c) (certain criminal convictions).

The Supreme Court has confirmed that § 1226(a) is the default provision for interior arrests, requiring individualized bond hearings and judicial review of custody determinations. See *Jennings v. Rodriguez*, 583 U.S. 281, 287–89 (2018).

**Under *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), this Court must interpret the INA de novo, without deference to the agency’s recent policy shift.** The plain text, structure, and legislative history of the INA confirm that § 1225(b) does not apply to long-term residents apprehended in the interior. The government’s attempt to classify Petitioner—a long-term resident with deep family and community ties—as an “applicant for admission” subject to mandatory detention under § 1225(b)(2) is contrary to the statute and decades of agency and judicial practice.

The government’s attempt to classify Petitioner—a long-term resident apprehended in the interior after nearly two decades in the United States, with deep family and community ties—as an “applicant for admission” under § 1225(b)(2) fundamentally misreads the statutory scheme. The concept of “applicant for admission” under § 1225(b) has historically been understood to

apply to individuals “on the threshold of initial entry,” not to those who have established residence and community ties in the interior. See *DHS v. Thuraissigiam*, 591 U.S. 103, 114–15 (2020) (applying the “entry fiction” to recent border crossers, not long-term residents). The concept of an “applicant for admission” under § 1225(b) has historically been understood to apply to individuals “on the threshold of initial entry.” The Supreme Court in *Thuraissigiam*, applied this “entry fiction” doctrine to an alien apprehended just 25 yards from the border, emphasizing that such individuals have only those rights regarding admission that Congress has provided by statute and no constitutional rights as they are at the threshold of entry into the country. See also *Vasquez v. Wolf*, 460 F. Supp. 3d 99, 110 (D. Mass. 2020) (distinguishing between “arriving” and “present” aliens based on the circumstances of apprehension).

The government’s contrary position relies on a recent, abrupt policy shift—reflected in the July 2025 ICE memo and *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025)—which attempts to expand mandatory detention to all noncitizens who entered without inspection, regardless of their long-term presence in the country. This reinterpretation is a significant departure from longstanding agency practice and is unsupported by the statutory and regulatory framework. Accepting the government’s interpretation would render § 1226(a) superfluous for a broad class of noncitizens, contrary to congressional intent and the canon requiring courts to give effect to every provision of a statute.

Petitioner was not apprehended at a border or port of entry, nor was he seeking admission at the time of his arrest. The government’s position—that all noncitizens who entered without inspection remain perpetually “applicants for admission” subject to mandatory detention under § 1225(b)(2)—is unsupported by the statutory text, regulatory definitions, and decades of agency and judicial practice. The regulatory definition at 8 C.F.R. § 1.2 limits “arriving alien” to those

“coming or attempting to come into the United States at a port-of-entry,” or interdicted at sea and brought to the United States—not to long-term residents apprehended in the interior after years of residence. The present-progressive language—“arriving,” “coming,” “attempting”—denotes an ongoing act, not a status that persists indefinitely.<sup>2</sup>

The government’s recent policy shift now includes long-term residents like Petitioner apprehended in the interior, as “applicants for admission” subject to mandatory detention under § 1225(b)(2), regardless of years of residence, family ties, or lack of criminal history. This interpretation departs from decades of agency practice and judicial precedent, which consistently treated interior apprehensions of long-term residents as subject to discretionary detention and bond eligibility under § 1226(a). **Accepting the government’s interpretation would nullify § 1226(a) for a broad class of noncitizens**, including long-term residents apprehended in the interior, contrary to Congress’s intent to maintain distinct procedures for border and interior cases. For further detail, Petitioner incorporates the statutory construction arguments set forth in the complaint.

However, Petitioner’s situation is vastly different. He has been present in the United States since approximately 2006, almost 20 years, establishing deep community ties, including a U.S. citizen wife and son. Courts have consistently distinguished between “arriving” noncitizens and those who have been “present” in the United States for a significant period, even if unlawfully). For example, *Vasquez v. Wolf* noted that if applicants are apprehended while crossing the border, they are “arriving,” but if apprehended at some point thereafter, they are “present”. 460 F.Supp.3d

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<sup>2</sup> The legislative history of the INA, and specifically the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, demonstrates Congress’s intent to distinguish between border apprehensions and interior arrests. While IIRIRA replaced the “entry” doctrine with “admission” to address procedural anomalies, Congress did not eliminate the distinction between those apprehended at the border and those arrested in the interior. The House Report on IIRIRA confirms that the pivotal factor is whether an individual has been lawfully admitted—not mere physical presence. Petitioner incorporates by reference the detailed legislative history and statutory analysis set forth in the complaint.

99, 110 (D. Mass. 2020). Petitioner, having resided in the U.S. for nearly two decades, is clearly not an “arriving” alien or one “on the threshold of initial entry.” This historical practice for over 3 decades even after the REAL ID and the IIRIRA statutes have been passed directly contradicts the government’s current position regarding Petitioner being an “applicant for admission.”

Federal courts across the country have rejected the government’s recent reinterpretation of the INA’s detention authority, holding that § 1226(a)—not § 1225(b)—governs detention for long-term residents apprehended in the interior, including those who entered without inspection. These courts have repeatedly ordered immediate release or bond hearings for similarly situated petitioners, recognizing that the government’s position is unsupported by the statutory text, legislative history, and established case law. Illustrative recent decisions include: *Barrera v. Tindall*, No. 3:25-CV-541-RGJ, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Singh v. Bondi, et al.*, No. 1:25-CV-02101-SEB-TAB, 2025 WL 3029524, (S.D. Ind. Oct. 30, 2025); *Alejandro v. Olson*, No. 1:25-CV-02027-JPH-MKK, 2025 WL 2896348, (S.D. Ind. Oct. 11, 2025); *B.D.V.S. v. Forestal*, No. 1:25-CV-01968-SEB-TAB, 2025 WL 2855743, (S.D. Ind. Oct. 8, 2025); *Ozturk v. Hyde*, 136 F.4th 382, 399 (2d Cir. 2025).<sup>3</sup>

These and other Federal courts across the country have overwhelmingly rejected the government’s interpretation in *Yajure Hurtado* and the position presented in the government’s brief at ECF Dkt. 10. The consensus is clear: 8 U.S.C. § 1226(a), not § 1225(b), governs detention for noncitizens apprehended in the interior, including those who entered without inspection years ago and have established significant ties to the United States, such as Petitioner. These courts have

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<sup>3</sup> See also *Savane v. Francis*, 2025 WL 2774452 (S.D.N.Y. Sept. 28, 2025) (granting habeas and ordering immediate release where petitioner was improperly arrested under § 1225; court found § 1226(a) applied); *Artiga v. Genalo*, 2025 WL 2829434 (E.D.N.Y. Oct. 5, 2025) (granting habeas and ordering immediate release for interior arrest under § 1225); *Cuevas Guzman v. Andrews*, 2025 WL 2617256 (E.D. Cal. Sept. 9, 2025) (petitioner entered without inspection 30 years ago; court found § 1226(a) applied, not § 1225(b));

repeatedly ordered **immediate release** or bond hearings for similarly situated petitioners, recognizing that the government’s position is unsupported by the statutory text, legislative history, and established case law. In Petitioner’s case, the denial of a bond hearing is not only contrary to the overwhelming weight of judicial authority, but also results in the continued detention of a non-criminal, long-term resident with deep family and community ties.

In sum, Petitioner’s circumstances—long-term residence, interior apprehension, and deep family and community ties—fall squarely within the scope of § 1226(a), entitling him to release on recognizance or bond review. The government’s attempt to apply § 1225(b) to Petitioner is unsupported by law, precedent, or the facts of this case.

## V. DUE PROCESS VIOLATIONS

The government’s assertion that Petitioner lacks a viable due process claim—because he never effected a lawful entry and is therefore entitled only to the procedures Congress provides for “applicants for admission”—fundamentally misapprehends the scope of Fifth Amendment protections for noncitizens with long-term presence in the United States. This argument ignores both the constitutional guarantee of due process and the specific nature of Petitioner’s challenge: his prolonged detention without an individualized bond hearing.

The Fifth Amendment’s Due Process Clause protects “any person” within the United States from deprivation of liberty without due process of law, a protection that extends to all noncitizens, regardless of their immigration status or manner of entry. The government’s reliance on the “entry fiction” doctrine—which treats noncitizens at the threshold of initial entry as if they are at the border for due process purposes—applies only to recent arrivals or those apprehended immediately after crossing the border, not to individuals like Petitioner who have resided in the United States for nearly two decades and established deep community and family ties. The Ninth

Circuit in *Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020), held unequivocally that the phrase “application for admission” **refers to a discrete event: an actual attempt to physically enter the United States, describing a specific moment in time when an individual presents themselves at a border or port of entry and seeks to be admitted, not a continuous or indefinite status that persists after entry.** (*Torres* at 926).

Petitioner’s long-term presence in Plainfield, Indiana, his U.S. citizen spouse and son, and his integration into the community distinguish him from an “alien on the threshold of initial entry” and entitle him to robust due process protections. The Supreme Court has recognized that the distinction between an alien who has effected entry and one who has never entered runs throughout immigration law. Indeed, due process rights attach to any individual physically present in the United States, even if unlawfully. *Zadvydas*.

Petitioner’s due process claim centers on his prolonged detention without an individualized bond hearing. The Due Process Clause requires that civil detention not be unreasonably prolonged and that individuals be afforded meaningful procedural protections to challenge the legality of their confinement. Federal courts have repeatedly held that prolonged detention without adequate procedural safeguards raises serious constitutional concerns and requires an individualized bond hearing. At such a hearing, the government must bear the burden of proving by clear and convincing evidence that the noncitizen is a flight risk or a danger to the community. The principle that “liberty is the norm and detention is the exception” is central to this requirement.

Petitioner has been detained since October 2, 2025, over one month ago, without the opportunity for such a hearing, despite significant community ties and no evidence of flight risk or dangerousness. This prolonged detention, mandated by the government’s reinterpretation of § 1225(b)(2), directly implicates his Fifth Amendment liberty interests.

The government's claim that Petitioner has received sufficient process—notice of charges, access to counsel, hearings before an immigration judge, and appeal rights—misses the mark. These procedural safeguards pertain to the determination of removability, not the legality or duration of detention. Immigration Judges and the BIA generally lack jurisdiction to decide constitutional issues such as the constitutionality of prolonged detention or the application of the Due Process Clause to detention statutes. *See Mahdawi v. Trump*, 136 F.4th 443, 452 (2d Cir. 2025). Requiring Petitioner to raise his constitutional detention claim through the administrative process would be futile and would deny him meaningful judicial review of a fundamental liberty interest. The harm of unlawful detention is immediate and cannot be remedied by later review of a final order of removal.

In addition to the statutory provision at § 1226(a), due process requires that civil detention be accompanied by meaningful process and individualized findings. In the immigration context, this means that noncitizens like Petitioner must be afforded notice and a hearing before a neutral decision-maker, with the government bearing the burden to justify continued detention based on flight risk or danger to the community. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Demore v. Kim*, 538 U.S. 510, 523 (2003).

Here, the government's reliance on mandatory detention under § 1225(b)(2) has categorically denied Petitioner any opportunity for a bond hearing, despite his lack of criminal history, deep community ties, and no evidence of flight risk or dangerousness. The binding effect of *Matter of Yajure Hurtado* has rendered any request for bond futile, as immigration judges nationwide lack jurisdiction to consider bond for individuals classified as "arriving aliens" under the current policy. Petitioner's continued detention, without individualized process or any meaningful opportunity to contest his custody, is a clear violation of both substantive and procedural due

process under the Fifth Amendment.

District and circuit courts across the country have recognized that prolonged detention without an individualized bond hearing violates due process and have ordered release or bond hearings for similarly situated noncitizens. See, e.g., *Velasco Lopez v. Decker*, 978 F.3d 842, 853–56 (2d Cir. 2020); *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021).

Petitioner’s detention is not based on any individualized finding of flight risk or danger to the community, but rather on a categorical denial of bond eligibility resulting from the government’s reclassification. This prolonged detention has caused significant hardship to his family and community, and deprives him of the procedural protections afforded under § 1226(a) for interior arrests. Despite nearly two decades of residence, maintaining employment, and having U.S. citizen family members, Petitioner was classified as an “applicant for admission” under § 1225(b)(2) solely due to the government’s recent policy shift. The binding effect of *Matter of Yajure Hurtado* has rendered any request for bond futile, as immigration judges lack jurisdiction to consider bond for individuals so classified. The government’s refusal to provide a bond hearing in these circumstances is unlawful and warrants immediate judicial intervention.

In sum, Petitioner’s prolonged detention without a bond hearing, based on an expansive and unlawful interpretation of § 1225(b)(2), constitutes a clear violation of his Fifth Amendment due process rights. His long-term presence in the U.S. entitles him to more robust procedural protections than those afforded to recent arrivals, and the administrative process is inadequate to address his constitutional challenge. The Court should reject the government’s arguments and grant Petitioner the relief sought.

## **VI. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

The government’s argument that Petitioner must exhaust administrative remedies before

seeking habeas relief is unavailing, particularly in light of the Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Under *Loper Bright*, this Court has an independent and non-deferential duty to interpret the INA de novo. Where, as here, the agency’s interpretation of § 1225(b) is legally erroneous and unsupportable, exhaustion is not required. The Court must resolve the statutory question itself, without deferring to the agency’s view, and may excuse exhaustion where the agency’s position is contrary to law.

Courts have long recognized that exhaustion of administrative remedies in immigration habeas cases is not jurisdictional. It may—and should—be excused where (1) pursuing administrative remedies would be futile, (2) the agency is unable to resolve the constitutional or statutory claims at issue, or (3) the petitioner would suffer irreparable harm from continued unlawful detention. *See, e.g., Chehazeh v. Attorney Gen. of the United States*, 666 F.3d 118, 133–34 (3d Cir. 2012).

**Futility:** Exhaustion is not required where the agency has predetermined the issue or where further administrative proceedings would be an empty formality. Here, the government’s own policy—embodied in *Yajure Hurtado*—categorically forecloses bond hearings for individuals classified as “arriving aliens,” including Petitioner. Immigration judges nationwide lack jurisdiction to grant bond to those so classified, making any attempt to seek a bond hearing futile. Courts routinely excuse exhaustion in such circumstances, recognizing that the agency’s position is fixed and further proceedings would serve no purpose. *See* ECF Dkt. 1-9.

**Inadequacy of Administrative Remedies for Constitutional Claims:** Administrative remedies are also inadequate where, as here, the petitioner raises substantial constitutional claims that the agency lacks authority to resolve. Neither Immigration Judges nor the BIA have jurisdiction to decide constitutional questions, including the constitutionality of prolonged detention or the application of the Due Process Clause. *Mahdawi* at 452. Exhaustion is not

required where meaningful federal court review would otherwise be unavailable or delayed until after irreparable harm has occurred. *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020). Where the BIA cannot address the constitutional claims at issue, requiring exhaustion would serve no purpose and would deny Petitioner meaningful review of his fundamental liberty interests.

**Irreparable Harm:** Petitioner faces immediate and irreparable harm from continued, prolonged detention without a bond hearing. The harm of unlawful detention—especially when it disrupts family unity and the well-being of a dependent child with special needs—is immediate and cannot be fully remedied by later release. With immigration court backlogs now exceeding 3.5 million cases, requiring exhaustion would only prolong Petitioner’s unlawful detention and exacerbate the harm to him and his family.

**Purely Legal and APA Claims:** Petitioner’s claims under the APA challenge unlawful agency action. These are distinct from typical bond appeals and often require judicial intervention to compel agency action or set aside unlawful policies. See 5 U.S.C. § 706(1), (2). The issues raised are purely legal questions regarding statutory interpretation and constitutional rights, which do not require agency expertise or further factual development. See *Rodriguez v. Bostock*, 779 F. Supp. 3d at 1251. The APA expressly authorizes courts to hold unlawful agency actions... “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2). Implemented without public notice or comment, they are precisely the type of agency actions that can be challenged under the APA as unlawful or in excess of statutory authority.

**Judicial Discretion and Precedent:** Federal courts have consistently recognized that exhaustion is a prudential doctrine, not a jurisdictional bar, and may be excused where

administrative remedies are futile, inadequate, or incapable of providing meaningful relief—especially in the context of constitutional claims and unlawful detention. See *Chehazeh v. Attorney Gen. of the United States*, 666 F.3d 118, 133–34 (3d Cir. 2012) (excusing exhaustion where the claim is wholly collateral to the merits of administrative proceedings and where the agency cannot provide meaningful relief). Because the government’s interpretation of § 1225(b) is legally erroneous and not entitled to deference under *Loper Bright*, and because exhaustion would be futile, inadequate, and result in irreparable harm, Petitioner should be excused from any prudential exhaustion requirement. This Court is the proper forum to resolve these statutory and constitutional questions and to grant immediate relief.

## VII. CONCLUSION

For all the reasons set forth above, the Court should deny Respondents’ motion to dismiss, grant the petition for writ of habeas corpus, and order Petitioner’s immediate release from custody as the only adequate remedy for his unlawful arrest and detention under § 1225(b). In the alternative, the Court should order a prompt individualized bond hearing before a neutral decision-maker, with the government bearing the burden to justify continued detention

Petitioner has suffered immediate and irreparable harm as a result of his ongoing, mandatory detention without a bond hearing, separating him from his U.S.-citizen family and depriving his ten-year-old son of his father’s care and stability. This prolonged deprivation of liberty, without any individualized assessment of flight risk or danger, is a clear violation of the Fifth Amendment’s Due Process Clause and the statutory protections afforded by the INA.

The government’s arguments that 8 U.S.C. §§ 1252(e)(3) and 1252(a)(5) bar this Court’s review are meritless. Section 1252(e)(3) applies only to facial or systemic challenges to the expedited removal system and does not preclude individualized habeas petitions challenging the

lawfulness of detention as applied to a specific petitioner. Section 1252(a)(5) channels judicial review of final orders of removal to the courts of appeals, but does not bar district court habeas review of collateral detention challenges where, as here, no final order of removal exists. Petitioner does not challenge any removal order, but only the legality of his ongoing detention.

Petitioner's claims are wholly collateral to removal proceedings and fall squarely within the scope of habeas jurisdiction under 28 U.S.C. § 2241. The denial of an individualized bond hearing violates the Fifth Amendment's Due Process Clause and the statutory framework governing immigration detention. The government's continued reliance on § 1225(b) to justify Petitioner's detention is not only unlawful, but has resulted in ongoing, irreparable harm to Petitioner.

The law, the facts, and the equities all compel this result. Continued detention under § 1225(b) is unlawful in these circumstances. Immediate release is the only remedy that will vindicate Petitioner's statutory and constitutional rights.

Accordingly, this Court should:

- 1) Deny Respondents' motion to dismiss in its entirety;
- 2) Grant the petition for writ of habeas corpus;
- 3) Order Petitioner's immediate release from custody as the only adequate remedy for his unlawful arrest and detention under § 1225(b);
- 4) Alternatively, order a prompt individualized bond hearing before a neutral decision-maker, with the government bearing the burden to justify continued detention;
- 5) Grant such other and further relief as the Court deems just and proper.
- 6) The law, the facts, and the equities all compel this result. Continued detention under § 1225(b) is unlawful in these circumstances. Immediate release is the only remedy that will vindicate Petitioner's statutory and constitutional rights.

Respectfully Submitted,

This 13<sup>th</sup> day of November, 2025.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November, 2025, this PETITIONER'S RESPONSE TO RESPONDENTS' RETURN AND MOTION TO DISMISS was served, via electronic delivery to Respondents' counsel via CM/ECF system which will forward copies to Counsel of Record.

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