UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 25-cv-25099-DPG

OSMAN OMAR TORRES HUETE,

Petitioner

v.

KRISTI NOEM et al.

Respondents.

_____/

RESPONDENTS' RETURN AND MEMORANDUM OF LAW

Respondents, by and through the undersigned Assistant U.S. Attorney, hereby respond to the Court's Order to Show Cause (ECF No. 4). As set forth fully below, the Court should deny the "Petition for Writ of Habeas Corpus" (ECF No. 1) ("Petition").

I. BACKGROUND

Petitioner, Osman Omar Torres-Huete, (Petitioner), is a native and citizen of Honduras. *See* Exh. A, Form I-213, Record of Deportable/Inadmissible Alien, dated October 16, 2025. On or about January 3, 2016, the U.S. Customs and Border Protection (CBP) encountered Petitioner near Big Pine Key, Florida. *See* Exh. B, Declaration of Deportation Officer Jesús González Alverio (DO González). When Petitioner admitted he had unlawfully entered the United States by crossing the U.S./Mexico border on or about January 1, 2014, on foot and without valid travel documents, CBP determined that Petitioner was inadmissible. *See* Exh. B, Declaration of DO González. On

January 3, 2016, CBP released Petitioner from the Marathon Border Patrol Station. *See* Exh. B, Declaration of DO González.

On July 6, 2017, CBP encountered Petitioner after the Monroe County Sheriff's Office arrested him for driving without a license. *See* Exh. A; *see also* Exh. B, Declaration of DO González. Petitioner was later released from the Monroe County Sheriff's Office. *See* Exh. B, Declaration of DO González.

On April 2, 2018, CPB encountered Petitioner after the Monroe County Sheriff's Office arrested him for driving without a license. *See* Exh. A, *see also* Exh. B, Declaration of DO González. On May 22, 2018, Enforcement and Removal Operations (ERO) initiated removal proceedings, pursuant to section 240 of the Immigration and Nationality Act (INA), by filing a Notice to Appear (NTA), dated May 22, 2018, with the Executive Office for Immigration Review (EOIR). *See* Hab. Pet. at Exh. B. The NTA charged Petitioner with being removable under section 212(a)(6)(A)(i) of the INA, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *See id.*

On May 23, 2018, ERO took Petitioner into custody. *See* Exh. B, Declaration of DO González, and Exh. C, Detention History. On May 31, 2018, the Immigration Judge granted Petitioner a $3,000.00 bond, pursuant to 8 C.F.R § 236.1(c). *See* Hab. Pet. at Exh. D. On June 1, 2018, Petitioner was released from ICE custody upon posting the bond. Exh. C. On February 5, 2019, the Immigration Judge terminated proceedings without prejudice, noting that the NTA had

been improvidently issued. *See* Hab. Pet. at Exh. F. On June 10, 2022, ERO cancelled Petitioner's Bond. *See* Exh. B, Declaration of DO González.

On October 16, 2025, CBP encountered Petitioner during a vehicle stop, after CBP had learned Petitioner was the registered owner of a vehicle from which two individuals had previously fled from DHS. *See* Exh. A. On October 16, 2025, CBP issued and personally served Petitioner with an NTA. *See* Exh. A. The NTA charged Petitioner with inadmissibility under section 212(a)(6)(A)(i) of the INA, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General, and section 212(a)(7)(A)(i)(I) of the INA, as an alien who lacks valid entry documents. *See* Exh. A.

On October 17, 2025, ERO booked Petitioner at the Florida Soft-Sided Facility-South (FSSFS). *See* Exh. C, Detention History, and Exh. B, Declaration of DO González. On October 21, 2025, EOIR dismissed the case upon a failure to prosecute because the NTA was not filed with the immigration court. *See* Exh. B, Declaration of DO González. On November 4, 2025, ERO transferred Petitioner to the Krome Service Processing Center (KSPC). *See* Exh. C, Detention History, and Exh. B, Declaration of DO González.

On November 6, 2025, ERO issued, served on Petitioner, and filed with EOIR, a new NTA. *See* Exh. D, NTA dated November 6, 2025. The NTA charges Petitioner with being removable under section 212(a)(6)(A)(i) of the INA, as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *See id.*

To date, Petitioner remains in ICE custody at the KSPC, located in Miami, Florida. *See* Exh. C, Detention History, and Exh. B, Declaration of DO González. On November 19, 2025, Petitioner appeared with his attorney at a master calendar hearing and sought termination, arguing that the United States Citizenship and Immigration Services (USCIS) has jurisdiction over a pending application for relief. *See* Exh. B, Declaration of DO González. The Immigration Judge indicated that the immigration court has jurisdiction over Petitioner's application, and Petitioner, through his attorney, requested time to brief the issue. *See* Exh. B, Declaration of DO González. The Immigration Judge continued the case to December 22, 2025, at 9:00 AM. *See* Exh. B, Declaration of DO González. To date, Petitioner remains in ICE custody at the KSPC, located in Miami, Florida. *See* Exh. C, Detention History, and Exh. B, Declaration of DO González.

II. ARGUMENT

Petition should be Dismissed for Lack of Jurisdiction

Section 1252(g) categorically bars jurisdiction over "*any* cause or claim by or on behalf of any alien *arising from* the decision or action by the [Secretary of Homeland Security] to *commence proceedings*, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g) (emphasis added). The Secretary of Homeland Security's decision to *commence removal proceedings*, including the decision to detain an alien pending such removal proceedings, squarely falls within this jurisdictional bar. In other words, detention clearly "aris[es] from" the decision to commence removal proceedings against an alien. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings"); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298 (3d Cir.

2020) ("The text of § 1252(g)... strips us of jurisdiction to review... [T]o perform or complete a removal, the [Secretary of Homeland Security] must exercise [her] discretionary power to detain an alien for a few days. That detention does not fall within some other part of the deportation process.") (cleaned up) (internal quotations and citations omitted); *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge *arose from* this decision to commence proceedings[.]") (emphasis added); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010) (citing *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007) ("[Plaintiff's] detention necessarily *arises from* the decision to initiate removal proceedings against him.") (emphasis added); *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008) (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) ("The [Secretary] may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings. ... Thus, an alien's detention throughout this process *arises from* the [Secretary]'s decision to commence proceedings[]" and review of claims arising from such detention is barred under § 1252(g)) (emphasis added).

Put in the Supreme Court's words, detention pending removal is a "specification" of the decision to commence proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 485 n.9 (1999) ("§ 1252(g) covers" a "specification of the decision to 'commence proceedings'"). As such, judicial review of the Petitioner's claim[s] is barred by § 1252(g).

Furthermore, 8 U.S.C. § 1252(b)(9) bars review of Petitioner's claim in this case. Under § 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States" is only proper before the appropriate court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("*AADC*"). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings.

> Notwithstanding any other provision of law (statutory or non-statutory), . . . 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 entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 ("§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they 'arise from' removal proceedings"); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is "unrelated

to any removal action or proceeding" is it within the district court's jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a "primary effect" of the REAL ID Act is to "limit all aliens to one bite of the apple" (internal quotation marks omitted)).

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]"). Here, Petitioner challenges

the decision and action to detain him, which arises from DHS's decision to commence removal proceedings, and is thus an "action taken . . . to remove him from the United States." *See* 8 U.S.C. § 1252(b)(9); *see also, e.g.*, *Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev v. Garland*,

No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government's decision to "commence proceedings"). As such, the Court lacks jurisdiction over this action. The reasoning in *Jennings* outlines why the Petitioner's claims cannot be reviewed by the Court.

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that "§1252(b)(9) [did] not present a jurisdictional bar" in situations where "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at 294–95. In this case, the Petitioner *does* challenge the government's decision to detain him in the first place. Though the Petitioner frames his challenge as relating to detention authority, rather than a challenge to DHS's decision to detain him in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

The fact that the Petitioner is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. at 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the

Petitioner's claims for lack of jurisdiction under § 1252(b)(9). The Petitioner must present his claims before the appropriate court of appeals because he challenges the government's decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

Petitioner has Failed to Exhaust Administrative Remedies

The Court should dismiss the petition for writ of habeas corpus for lack of jurisdiction as Petitioner has failed to exhaust administrative remedies. A habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention. The exhaustion requirement "aims to provide the agency with a chance to correct its own errors, 'protect[] the authority of administrative agencies,' and otherwise conserve judicial resources by 'limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary." *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.). Here, Petitioner has not availed himself of the administrative remedies available to him.

In addition, Petitioner does not have standing to bring his APA claim. By the APA's terms, it is available only for final agency action "for which there is no other adequate remedy in court." 5 U.S.C. § 704. Thus, Petitioner's APA claim is independently barred by this limitation in 5 U.S.C. § 704. by Justice Kavanaugh in his concurrence in *J.G.G.*, "given 5 U.S.C. § 704, which states that claims under the APA are not available when there is another adequate remedy in court, I agree with the Court that habeas corpus, not the APA, is the proper vehicle here." *Id.* at 1007 (Kavanaugh, J. concurring). Here, as in *J.G.G.*, habeas is an "adequate remedy" through which

Petitioner can challenge his detention. Even if Petitioner's APA claim had merit, which it does not, the result would be the same as that in habeas – release from detention. The Supreme Court's holding is consistent with well-established law that habeas is generally the only possible district court vehicle for challenges brought pursuant to the immigration statutes. *Id.* (citing *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953)).

Petitioner is Properly Detained Under 8 U.S.C. § 1225

"As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). Section 1225(a)(1) defines an "applicant for admission" as either an "alien *present in the United States who has not been admitted* or [an alien] who arrives in the United States []whether or not at a designated port of arrival." 8 U.S.C. § 1225(a)(1) (emphasis added); *see generally Matter of Velasquez-Cruz*, 26 I&N Dec. 458, 463 n.5 (BIA 2014) ("[R]egardless of whether an alien who illegally enters the United States is caught at the border or inside the country, he or she will still be required to prove eligibility for admission."). Accordingly, by its very definition, the term "applicant for admission" as used in § 1225 includes two categories of aliens: (1) aliens, such as Petitioner, present in the United States without admission; and (2) arriving aliens. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (explaining that "an alien who tries to enter the country illegally is treated as an 'applicant for admission'" (citing 8 U.S.C. § 1225(a)(1)); *Matter of Lemus*, 25 I&N Dec. 734, 743 (BIA 2012) ("Congress has defined the concept of an 'applicant for admission' in an unconventional sense, to include not just those who are expressly seeking permission to enter, but

also those who are present in this country without having formally requested or received such permission"); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011) (stating that "the broad category of applicants for admission … includes, inter alia, any alien present in the United States who has not been admitted" (citing 8 U.S.C. § 1225(a)(1))).

All aliens who are applicants for admission "shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3); *see also* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. [POE] when the port is open for inspection"). An applicant for admission seeking admission at a United States POE "must present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal … and is entitled, under all of the applicable provisions of the immigration laws … to enter the United States." 8 C.F.R. § 235.1(f)(1); *see* 8 U.S.C. § 1229a(c)(2)(A) (describing the related burden of an applicant for admission in removal proceedings). "An alien present in the United States who has not been admitted or paroled or an alien who seeks entry at other than an open, designated [POE] … is subject to the provisions of [8 U.S.C. § 1182(a)] and to removal under [8 U.S.C. § 1225(b)] or [8 U.S.C. § 1229a]." 8 C.F.R. § 235.1(f)(2).

Here, Petitioner does not allege that he was admitted into the United States or that he presented himself at a POE. Rather, Petitioner merely alleges that he is a citizen of Honduras who has been residing in the United States. Petitioner is, therefore, an alien present without admission and, consequently, an applicant for admission.

Pursuant to § 1225(b)(2), "an alien who is an applicant for admission," such as Petitioner, "shall be detained for a proceeding under section 1229a of this title" "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Aliens present in the United States without admission placed in § 1229a removal proceedings are applicants for admission as defined in 8 U.S.C. § 1225(a)(1) and are, therefore, aliens "seeking admission," as contemplated in § 1225(b)(2)(A). The term "seeking admission" as used in § 1225(b)(2)(A) refers to legal admission, not mere entry into the United States. Such aliens are subject to mandatory detention under § 1225(b)(2)(A) and are not eligible for release on bond.

On September 5, 2025, the Board of Immigration Appeals (BIA) issued a published decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). In its decision, the BIA affirmed "the Immigration Judge's determination that he did not have authority over [a] bond request because aliens who are present in the United States without admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings." *Yajure Hurtado*, 29 I&N Dec. at 220.[1] The BIA concluded that aliens "who surreptitiously cross into the United States remain applicants for admission until and unless they are lawfully inspected and admitted by an immigration officer.

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[1] Previously, as alluded to in BIA decisions, DHS and the Department of Justice interpreted 8 U.S.C. § 1226(a) to be an available detention authority for aliens present without admission placed directly in 8 U.S.C. § 1229a removal proceedings. *See, e.g.*, *Matter of Cabrera-Fernandez*, 28 I&N Dec. 747, 747 (BIA 2023); *Matter of R-A-V-P-*, 27 I&N Dec. 803, 803 (BIA 2020); *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 94 (BIA 2009); *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003). However, as noted by the BIA, the BIA had not previously addressed this issue in a precedential decision. *Matter of Yajure Hurtado*, 29 I. & N. Dec. at 216.

Remaining in the United States for a lengthy period of time following entry without inspection, by itself, does not constitute an 'admission.'" *Id.* at 228. To hold otherwise would lead to an "incongruous result" that rewards aliens who unlawfully enter the United States without inspection and subsequently evade apprehension for number of years. *Id.*; *see Martinez v. Att'y Gen. of U.S.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012) (concluding that 1996 amendments to the INA were passed to address the unintended and undesirable result of the pre-1996 law in which "non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who actually presented themselves to authorities for inspection were restrained by more summary exclusion proceedings" (internal quotation marks omitted)). In so concluding, the BIA rejected the alien's argument that "because he has been residing in the interior of the United States for almost 3 years . . . he cannot be considered as 'seeking admission.'" *Yajure Hurtado*, 29 I&N Dec. at 221. The BIA determined that this argument "is not supported by the plain language of the INA" and creates a "legal conundrum." *Id.* If the alien "is not admitted to the United States (as he admits) but he is not 'seeking admission' (as he contends), then what is his legal status?" *Id.* (parentheticals in original).

The BIA's decision in *Matter of Yajure Hurtado* is consistent not only with the plain language of § 1225(b)(2), but also with *Jennings v. Rodriguez*, 583 U.S. 281 (2018) and other caselaw issued subsequent to *Jennings*. Specifically, in *Jennings*, the Supreme Court explained that § 1225(b) applies to all applicants for admission, noting that the language of § 1225(b)(2) is "quite clear" and "unequivocally mandate[s]" detention. 583 U.S. at 300, 303 (explaining that

"the word 'shall' usually connotes a requirement" (quoting *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 171 (2016))).[2]

A review of the 1996 amendments to the INA support the reading advocated by the Respondents here. "The statutory definition of an 'applicant for admission' at … § 1225(a)(1), was added to the INA in 1996, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA'), Pub. L. No. 104-208, Div. C, § 302(a), 110 Stat. 3009-546, 3009-579." *Yajure Hurtado*, 29 I&N Dec. at 222.

> Prior to the 1996 amendment, the INA assessed status on the basis of "entry" as opposed to "admission." *See* 8 U.S.C. § 1101(a)(13) (1994) (defining "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise"). Non-citizens who had "entered" the United States were processed for deportation; those who had not "entered" were sent into exclusion proceedings. Charles Gordon, Stanley Mailman & Stephen Yale–Loehr, 1–1 IMMIGRATION LAW AND PROCEDURE § 1.03(2)(b) (2010). As a result, "non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings," while non-citizens who actually presented themselves to authorities for inspection were restrained by "more summary exclusion proceedings." *Hing Sum*, 602 F.3d at 1100. To remedy this unintended and undesirable consequence, the IIRIRA substituted "admission" for "entry," and replaced deportation and exclusion proceedings with the more general "removal" proceeding.

Martinez, 693 F.3d at 413 n.5 (quoting *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010)).

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[2] There is no textual basis for arguing that § 1225(b)(2)(A) applies only to arriving aliens. Where Congress means for a rule to apply only to "arriving aliens," it uses that specific term of art or similar phrasing. See, e.g., id. §§ 1182(a)(9)(A)(i), 1225(c)(1).

If, as Petitioner argues, § 1225(b)(2)(A) detention does not apply to him because he entered the United States without presenting himself for inspection or admission, he would be afforded greater substantive rights—specifically permissive detention under § 1226(a) and a bond hearing—than non-citizens who followed the law and presented themselves to authorities for inspection. This is the undesirable result Congress was seeking to avoid by passing the IIRIRA.

Moreover, Congress's use of the present participle—seeking—in § 1225(b)(2)(A) further supports the Respondents' position. *See generally United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). By using the present participle "seeking" § 1225(b)(2)(A) "signal[s] present and continuing action." *Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, 48 F.4th 1298, 1307 (11th Cir. 2022). Present participle, such as "seeking admission," "do[] not include something in the past that has ended or something yet to come." *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 336 (7th Cir. 2019) (concluding that "having" is a present participle, which is "used to form a progressive tense" that "means presently and continuously" (citing Bryan A. Garner, *Garner's Modern American Usage* 1020 (4th ed. 2016))).

Accordingly, for the reasons discussed above, Petitioner is an applicant for admission and an alien seeking admission and is therefore subject to detention under § 1225(b)(2)(A) and ineligible for release on bond.

Therefore, while Petitioner may have been detained under INA 236 in 2018, legal developments and the ongoing evolution of law, starting with *Jennings* and the caselaw that

followed, through and including *Hurtado*, have led us to the conclusion that INA 235(b)(2) is the appropriate detention authority, and the one that applies now.

III. CONCLUSION

For the reasons set forth above, the Court should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/Michele S. Vigilance

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