UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JORGE LUIS CULCAY VELETANGA, Petitioner, v. KRISTI NOEM, in her Official Capacity as the Secretary of the U.S. Department of Homeland Security, *et al.*, Respondents.	No. 25-CV-09211 (NSR) PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

REPLY TO GOVERNMENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Petitioner Jorge Luis Culcay Veletanga respectfully submits this Reply to Respondents' opposition to the Petition for Writ of Habeas Corpus. The Government's effort to retroactively treat a long-term interior resident as an "arriving alien" subject to mandatory detention under § 1225(b) is unsupported by the statute, Second Circuit precedent, or due process. The ICE declaration cited by the Government likewise fails to establish lawful detention. This Reply addresses the Government's reliance on § 1225(b), *Matter of Yajure Hurtado*, and § 1226(c), none of which provides authority for Petitioner's continued detention.

PROCEDURAL HISTORY

Petitioner respectfully refers the Court to the Petition for a full statement of facts and procedural history and files this Reply solely to address the legal errors and post hoc justifications raised for the first time in the Government's opposition.

ARGUMENT

I. PETITIONER IS NOT SUBJECT TO MANDATORY DETENTION UNDER THE EXPEDITED REMOVAL STATUTE, 8 U.S.C. § 1225(b)(2)(A)

The Government argues that Petitioner is subject to mandatory detention under the expedited removal statute, 8 U.S.C. § 1225(b)(2)(A). That argument has no application here. 8 U.S.C. § 1225(b)(2)(A) governs noncitizens who are "applicants for admission, if the examining officer determines" the noncitizen seeking admission "is not clearly and beyond a doubt entitled to be admitted." Petitioner entered the United States in 2003, at the age of six. When DHS encountered him, he had already lived in the United States for over two decades. DHS chose to initiate full removal proceedings by issuing a Notice to Appear under 8 U.S.C. § 1229a, because they could not impose an expedited process. The checkbox on the NTA confirming that an asylum officer found credible fear is blank. This confirms that DHS did not initiate the statutory process that triggers § 1225(b)(1)'s mandatory-detention clause. *See* **Exhibit "A".**

Full removal proceedings under § 1229a are mutually exclusive from expedited removal under § 1225. Congress expressly provided that proceedings under § 1229a "shall be the sole and exclusive procedure" for determining removability once DHS elects that pathway. 8 U.S.C. § 1229a(a)(3). Once DHS elected that statutory framework, § 236(a) governed custody.

Administrative guidance confirms this reading. In *Matter of M-S-*, the Attorney General explained that 8 U.S.C. § 1225 requires detention only for individuals originally placed in expedited removal and undergoing Credible Fear Interviews. 27 I&N Dec. 509, 512 (A.G. 2019). Individuals apprehended in the interior and issued NTAs are governed instead by §1226(a), under which DHS may detain or release the person on bond or parole. This distinction is reflected in DHS's own arrest practices. The record here shows that DHS processed Petitioner under § 1226(a) and recognized Immigration Judge custody jurisdiction, before reversing course based on subsequent BIA decisions.

The Government also argues that § 1225(b)(2)(A) applies because Petitioner is an "applicant for admission." § 1225(b)(2)(A) applies to individuals who are seeking admission at the time they encounter immigration officers, before DHS files an NTA. The statute itself makes this clear: it applies where an officer determines that "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." *Matter* of *M-S-*, 27 I. & N. Dec. 509 (emphasis added). That statutory language does not describe Petitioner. He was not seeking admission; he was living in the United States and was apprehended years after entry.

The Second Circuit has made clear DHS may not attempt to reclassify noncitizens as "arriving" after the agency elects to initiate full removal proceedings under these circumstances. Once DHS files a Notice to Appear and invokes the § 240 process, custody is governed by § 1226(a), and DHS may not later rely on § 1225(b)(2) to impose mandatory detention. *Velasco*

Lopez v. Decker, 978 F.3d 842, 852–55 (2d Cir. 2020) (holding that long-term interior residents detained after initiation of removal proceedings are governed by § 1226 and entitled to individualized custody determinations). DHS may not invoke § 1225(b)(2)'s mandatory-detention framework after choosing to proceed under § 240, because the statutory basis for detention flows from the procedural posture DHS itself selects. *See Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018) (emphasizing that detention authority depends on the statutory framework governing removal proceedings, not post hoc agency characterization).

Nothing about Petitioner's posture aligns with the statutory scheme of § 1225(b). He was not seeking admission at the port of entry. He was not placed in expedited removal. He was not referred for a Credible Fear Interview. He was arrested while he was already present in the United States, with the knowledge of DHS, for more than twenty years. He was placed directly into § 240 proceedings, and DHS's own actions reflect an initial determination that § 1226(a), not § 1225(b), governed custody.

To the extent the Government relies on *Matter of Q. Li*, this Court should decline to follow it. After *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), no deference is owed to agency interpretations that expand or rewrite the statute Congress enacted. Second Circuit law is clear that detention authority flows from the statutory framework governing the removal proceedings DHS chooses to initiate, not from post hoc agency labels. Where, as here, DHS apprehends a noncitizen in the interior and places him in full removal proceedings under INA § 240, custody is governed by 8 U.S.C. § 1226, not § 1225. See *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020); *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018). *Q. Li* impermissibly attempts to extend § 1225(b)(2) beyond its statutory limits by treating long-term interior arrestees as if they remained at the threshold of entry, an interpretation that

cannot survive *Loper Bright* and directly conflicts with binding circuit precedent. Because DHS relied exclusively on § 1225(b), it lacks lawful authority to continue Petitioner's detention.

II. DHS ELECTED § 1225(b) AS THE SOLE BASIS FOR DETENTION AND OBTAINED A JURISDICTIONAL DENIAL OF BOND ON THAT BASIS

From the outset of Petitioner's removal proceedings, DHS affirmatively took the position that Petitioner was subject to mandatory detention under INA § 1225(b). DHS classified Petitioner as an "applicant for admission," asserted that the Immigration Court lacked jurisdiction to conduct a custody redetermination, and opposed bond solely on that ground. *See* **Exhibit "B".** The Immigration Judge accepted DHS's representation and denied bond for lack of jurisdiction, without reaching the merits of custody.

DHS did not present § 1226 as an alternative basis for detention, did not request findings under that statute, and did not ask the Immigration Court to make any determination regarding mandatory detention. DHS thus obtained a jurisdictional denial of bond based entirely on its § 1225(b) theory. As the Second Circuit has made clear, detention authority flows from the statutory framework DHS elects to invoke. See *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018). Having chosen § 1225(b) as the sole basis for detention and having secured a ruling on that basis, the Government cannot now disavow that choice.

A. The Immigration Court Never Made, and DHS Never Argued, Findings Under § 1226(c)

Critically, no mandatory-detention determination under § 1226(c) was ever made. DHS never argued before the Immigration Court that Petitioner was subject to § 1226(c), never identified which statutory subsection purportedly applied, and never sought findings regarding the statute's prerequisites. As a result, the Immigration Judge did not make any legal or factual findings under § 1226(c).

Mandatory detention under § 1226(c) requires DHS to invoke the statute and establish that its conditions are met. Where DHS fails to do so, there is no administrative determination to which a reviewing court may defer. See *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006).

DHS's attempt to invoke § 1226(c) now, after obtaining a jurisdictional denial of bond based on § 1225(b), is a classic post hoc rationalization. Habeas review does not permit DHS to retroactively supply a detention theory it chose not to present when custody was properly before the agency. See *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020). Because DHS never argued § 1226(c) and the Immigration Court never adjudicated it, § 1226(c) cannot now serve as a basis to sustain Petitioner's detention.

III. THE GOVERNMENT CANNOT CURE UNLAWFUL DETENTION BY INVOKING § 1226(c) FOR THE FIRST TIME IN A HABEAS PROCEEDING

In an effort to salvage an unlawful detention, the Government now asserts, for the first time in this proceeding, that Petitioner is subject to mandatory detention under 8 U.S.C. § 1226(c). That argument comes too late and cannot justify continued custody. In habeas proceedings, the Government bears the burden of establishing that detention is authorized by the statute it actually invoked and applied, not by a post hoc alternative theory advanced after the fact. See *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018) (explaining that detention authority depends on the statutory framework governing the removal proceedings DHS elects to initiate); *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020) (holding that courts must independently assess whether DHS has relied on the correct detention statute).

At the administrative level, DHS never invoked § 1226(c) as the basis for detention. Instead, DHS affirmatively proceeded under INA § 235(b) and obtained a denial of bond on the sole ground that the Immigration Court lacked jurisdiction. Where DHS fails to raise a

mandatory-detention theory before the Immigration Court, there is no administrative determination to which a reviewing court may defer. See *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999).

Having elected its detention authority and secured a jurisdictional denial of bond on that basis, the Government does not get a second bite at the apple by advancing a new statutory theory only after Petitioner sought habeas relief.

Habeas proceedings are not a forum for DHS to retroactively supply detention authority that it failed to invoke when custody determinations were properly before the agency. Allowing the Government to change its posture to § 1226(c) only after its chosen § 1225(b) theory proved unlawful would permit detention first and statutory justification later, an approach fundamentally incompatible with habeas corpus. See *Zadvydas v. Davis*, 533 U.S. 678, 690–99 (2001); *Abimbola v. Ridge*, 181 F. App'x 97, 99 (2d Cir. 2006).

Moreover, allowing DHS to change its posture now would convert habeas review into a cure-all for unlawful detention, permitting the Government to hold individuals first and identify a legal basis later. This is precisely what habeas corpus forbids. See *Velasco Lopez*, 978 F.3d at 854; *Zadvydas*, 533 U.S. at 699. Because DHS failed to invoke § 1226(c) before the Immigration Court, and because Petitioner's continued detention rests entirely on an invalid § 1225(b) theory, the Government cannot now justify custody by invoking a statute it deliberately chose not to use. The detention is therefore unlawful, and Petitioner must be released.

The Government's reliance on the Laken Riley Act is also unfounded. DHS never invoked the Act before the Immigration Court, never sought a mandatory-detention determination under its provisions, and never litigated its applicability administratively. As with § 1226(c), the Act cannot be applied absent DHS invocation and administrative application.

Therefore, it cannot be invoked now, for the first time in habeas proceedings to retroactively justify detention. Moreover, nothing in the Laken Riley Act expands the scope of § 1225(b) or authorizes DHS to detain long-term interior residents under the expedited-removal detention framework after DHS has elected to initiate § 240 proceedings. The Act presupposes a lawful detention posture under § 1226; it does not cure DHS's reliance on an inapplicable statute. Because DHS failed to invoke the Act administratively and lacked authority to detain Petitioner under § 1225(b), the Act cannot now supply a lawful basis for continued detention by the Government.

A. Habeas Is Not a Forum for Post Hoc Justifications for Civil Detention

Habeas corpus tests whether the Government has lawful authority to detain, not whether it can identify a different statutory theory after the fact. The Government bears the burden of establishing that detention is authorized by the statute it actually invoked and applied. See *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018); *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020).

Here, DHS never invoked § 1226(c) before the Immigration Court, and no mandatory-detention determination was ever made. Habeas review does not permit DHS to cure that defect by supplying a new statutory justification for the first time in federal court. See *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006). Allowing post hoc statutory rationalizations would invert habeas review, permitting detention first and legal authority later.

B. Allowing Invocation of § 1226(c) Now Would Undermine the INA's Administrative Scheme

The INA establishes a structured administrative scheme in which custody determinations are made by Immigration Judges in the first instance, based on the detention authority DHS

affirmatively invokes. See 8 U.S.C. § 1226(e); 8 C.F.R. § 1003.19. That scheme depends on DHS identifying the statutory basis for detention during removal proceedings so that the agency charged with adjudicating custody may make the required legal and factual findings.

The Second Circuit has emphasized that courts reviewing immigration detention must evaluate the legality of custody as it was imposed, not as the Government later reframes it. See *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018) (holding that detention authority flows from the statutory framework governing the removal proceedings DHS elects to initiate). Permitting DHS to invoke § 1226(c) now, after obtaining a jurisdictional denial of bond based solely on § 1225(b), would effectively allow the agency to circumvent the INA's custody framework. Immigration Judges would be deprived of the opportunity to determine whether mandatory detention applies, and habeas courts would be forced to adjudicate detention questions that Congress assigned to the agency in the first instance. The Second Circuit has cautioned against precisely this type of end-run around the administrative process. See *INS v. Ventura*, 537 U.S. 12, 16–17 (2002) (per curiam); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006) (courts may not decide issues the agency never addressed).

Moreover, allowing DHS to withhold a § 1226(c) theory at the administrative stage and assert it only after judicial review is sought would undermine the INA's decision-making authority. As the Second Circuit has recognized, habeas review exists to test whether detention is lawful, not to supply a missing statutory basis that the agency failed to invoke. See *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020); *Zadvydas v. Davis*, 533 U.S. 678, 688–99 (2001).

IV. EVEN IF § 1226(C) COULD BE CONSIDERED, THE GOVERNMENT HAS NOT ESTABLISHED IT APPLIES

Even if § 1226(c) could be considered, the Government has not established that Petitioner

falls within its scope. The Government relies primarily on a 2016 youthful offender adjudication for robbery and subsequent misdemeanor offenses. See So Decl. ¶¶ 5–11. But DHS never identified which subsection of § 1226(c) purportedly applies, never made the required determinations before the Immigration Court, and never litigated whether any conviction qualifies as a triggering offense under the statute as amended. Mandatory detention under § 1226(c) is not self-executing and requires DHS to invoke the statute and establish its applicability in the first instance. Because DHS failed to do so, § 1226(c) cannot now be used to justify continued detention. Mandatory detention is the exception, not the rule, and applies only where DHS satisfies the statute's narrow predicates. See *Nielsen v. Preap*, 586 U.S. 392, 401–02 (2019); *Demore v. Kim*, 538 U.S. 510, 517–18 (2003).

Critically, DHS never invoked § 1226(c) before the Immigration Court. As a result, the Immigration Judge made no findings, legal or factual, regarding whether mandatory detention applied, whether the statutory prerequisites were satisfied, or whether Congress authorized detention without bond in this case. Where the agency never made a mandatory-detention determination, there is nothing for this Court to defer to. See *INS v. Ventura*, 537 U.S. 12, 16–17 (2002); *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006).

In habeas proceedings, the burden rests with the Government to establish that detention is authorized by statute. See *Hechavarria v. Sessions*, 891 F.3d 49, 56–58 (2d Cir. 2018); *Velasco Lopez v. Decker*, 978 F.3d 842, 852–55 (2d Cir. 2020). The Government cannot meet that burden through post hoc assertions or conclusory ICE declarations. However, this is all Respondents offer here, a declaration reciting criminal history and asserting § 1226(c) applicability, without establishing the required custodial nexus, and without demonstrating that the statute's conditions were ever met. See *Gonzalez v. Decker*, 2020 WL 363877, at *4–5 (S.D.N.Y. Jan. 22, 2020).

Accordingly, even if § 1226(c) were properly before this Court, which it is not, the Government has failed to carry its burden. Where detention is unauthorized, habeas relief is not a remand or a do-over. The remedy is release. See *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001); *Velasco Lopez*, 978 F.3d at 854.

Because DHS initiated § 240 proceedings, processed Petitioner under § 1226(a), failed to invoke § 1226(c) administratively, and lacked authority to detain under § 1225(b)(2), Petitioner's continued detention is ultra vires and must end.

CONCLUSION

DHS detained Petitioner under an inapplicable statute, obtained a jurisdictional denial of bond based on that misclassification, and now seeks to retroactively justify detention by invoking a different statute it never raised administratively. The law does not permit such after-the-fact rationalizations. Because Respondents lack lawful statutory authority to continue Petitioner's detention, the Court should grant the Petition for Writ of Habeas Corpus and order Petitioner's immediate release.

Dated: White Plains, New York
December 24, 2025

Respectfully Submitted,
/s/ *Andrea C. Soto*

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