

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSE JAVIER CUY COMES,

Petitioner,

v.

25 Civ. 9283 (AT)

FRANCIS DELEON, in his official capacity as
Acting Assistant Field Office Director for the
Newark Field Office for Immigration and Customs
Enforcement, *et al.*,

Respondents.

**RESPONDENTS' MEMORANDUM OF LAW IN RESPONSE TO ORDER TO SHOW
CAUSE AND IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS**

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Respondents (the “Government”) respectfully submit this memorandum of law in response to the Order to Show Cause entered by this Court on November 7, 2025 (ECF No. 4), and in opposition to the petition for writ of habeas corpus (“Petition” or “Pet.”) filed by petitioner Jose Javier Cuy Comes (“Petitioner”) on November 6, 2025 (ECF No. 1).

PRELIMINARY STATEMENT

Petitioner is a 28-year-old native and citizen of Guatemala who entered the United States at some undetermined time and location without being inspected. Declaration of Supervisory Detention and Deportation Officer Kareem Johnson, dated November 11, 2025 (“ICE Decl.”) ¶ 3; Pet. ¶¶ 4, 12. Petitioner has never applied for any type of legal status, and he has no legal authorization to remain in the United States. *See* Pet. ¶ 12; ICE Decl. ¶ 4. On November 4, 2025, U.S. Immigration and Customs Enforcement (“ICE”) agents, assisted by other federal law enforcement officers, were conducting an operation in Queens, New York and observed Petitioner on the street. ICE Decl. ¶ 4; Return Ex. A (Form I-213) at 2. After approaching Petitioner, the agents engaged him in conversation and Petitioner voluntarily admitted that he was not a United States citizen and had no status in the United States. ICE Decl. ¶ 4; Return Ex. A at 2. ICE served Petitioner with a warrant of arrest and detained him. ICE Decl. ¶¶ 4-6; Return Ex. A at 2, Ex. B (Warrant for Arrest). On the same day, ICE also served Petitioner with a Notice to Appear charging him with removability as, among other things, an alien unlawfully present in the United States who has not been admitted or paroled. ICE Decl. ¶ 6; Return Ex. C (Notice to Appear). This was Petitioner’s first encounter with immigration authorities since his unlawful entry. ICE Decl. ¶ 9.

Petitioner contends that his detention violates the Immigration and Nationality Act (“INA”) and implementing bond regulations, his substantive and procedural due process rights under the

Fifth Amendment, and the Administrative Procedure Act (“APA”), and that Respondents lacked reasonable suspicion to arrest Petitioner in violation of the Fourth Amendment. Pet. ¶¶ 44-74. For relief, he requests, *inter alia*, a declaration that his detention is unlawful and an order requiring his immediate release or, alternatively, an order requiring that a bond hearing be held before a neutral arbitrator at which the Government bears the burden of proof. *Id.* Prayer for Relief ¶¶ a-e.

The Petition should be denied. By statute, Petitioner is deemed an applicant for admission who is subject to removal. As such, he is being detained pursuant to 8 U.S.C. § 1225(b)(2)(A) and is subject to mandatory detention (with potential release only on discretionary parole). Under Section 1225(b)(2)(A), Petitioner is not entitled to a bond hearing. *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018).

To the extent the Court were to disagree and hold that Petitioner is being detained under 8 U.S.C. § 1226(a), he would then be entitled to a bond hearing before an immigration judge, if he requests one. In that event, the Court should require Petitioner to exhaust this administrative remedy before entertaining his challenge to his detention through a habeas petition.

BACKGROUND

Petitioner is a 28-year-old native of Guatemala who was in Corona, Queens on the day of his arrest by immigration authorities. ICE Decl. ¶¶ 3-4; Return Ex. A at 2. Petitioner does not specify how or when he entered the United States, but he alleges that he “has lived in the U.S. continuously for at least five years.” Pet. ¶ 4.¹ Petitioner does not contend that he has lawful

¹ It is unclear why Petitioner also asserts that he has been present in the United States “for over two decades” and has “strong ties” and “nearly 20 years of residence” in this country, particularly when he does not allege that he was a child arrival and has alleged no facts supporting the claim of residence for that period of time or any particular ties to the community. Pet. ¶¶ 2, 51.

status in this country or that he has applied for any immigration benefit, and he concedes that November 4, 2025, was his first encounter with immigration authorities. *See id.* ¶ 12 (“prior to his unlawful detention on November 4, 2025, [Petitioner] had not had contact with immigration authorities in the U.S.”).

On November 4, 2025, ICE’s Fugitive Operations Team, along with Special Agents from other federal law enforcement agencies, were conducting a targeted enforcement operation in Queens, New York directed at another individual. ICE Decl. ¶ 4; Return Ex. A at 2. While conducting this operation, officers witnessed Petitioner exiting the targeted residence. ICE Decl. ¶ 4; Return Ex. A at 2. Officers approached Petitioner and engaged him in a consensual conversation. ICE Decl. ¶ 4; Return Ex. A at 2. Prior to this encounter, ICE never previously had an encounter with Petitioner. ICE Decl. ¶ 9; Return Ex. A at 2. During the course of the conversation, Petitioner voluntarily admitted to the officers that he was a native of Guatemala and had no lawful status in the United States. ICE Decl. ¶ 4; Return Ex. A at 2.

At this time, ICE determined that Petitioner was present in the United States in violation of the INA. *Id.* ¶ 4; Return, Ex. A at 2; Return, Ex. B. ICE served Petitioner with a warrant of arrest and detained him. ICE Decl. ¶¶ 4-6; Return, Ex. B. During processing, ICE issued and served Petitioner with a Notice to Appear (“NTA”) charging him as removable: (i) pursuant to INA Section 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), 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 (ii) pursuant to INA Section 212(a)(7)(A)(i)(I), 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or any

other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under 8 U.S.C. § 1181. ICE Decl. ¶ 6; Return, Ex. C.

ARGUMENT

I. PETITIONER’S CHALLENGES TO HIS DETENTION FAIL

Petitioner contends that his detention violates the INA, bond regulations, the Due Process Clause of the Fifth Amendment and the APA, and that he is entitled to immediate release or, in the alternative, a bond hearing. Pet. ¶¶ 44-74. For the reasons set forth below, these claims lack merit.

A. Petitioner’s Detention Is Governed by 8 U.S.C. § 1225(b)(2)(A)

Petitioner’s assertion that his detention is governed by 8 U.S.C. § 1226(a), Pet. ¶ 39, is mistaken. Petitioner, who illegally entered and was never permitted entry into the United States on any terms, is statutorily deemed an applicant for admission whose detention is instead governed by 8 U.S.C. § 1225(b).

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

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

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

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

Thus, the INA’s prior framework distinguishing between aliens based on physical “entry” had

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

Hurtado, 29 I. & N. Dec. at 223 (emphasis added) (quoting *Martinez v. Att’y General of U.S.*, 693 F.3d 408, 413 n.5 (3d Cir. 2012)); H.R. Rep. No. 104-469, pt. 1, at 225 (1996) (“House Rep.”) (“illegal aliens who have entered the United States without inspection gain equities and privileges

in immigration proceedings that are not available to aliens who present themselves for inspection”).

Congress discarded that regime through enactment of IIRIRA, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996). IIRIRA replaced the focus on physical “entry” with a focus on lawful “admission.” IIRIRA defined “admission” to mean “the *lawful* entry of the alien into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A) (emphasis added). In other words, the immigration laws would no longer distinguish aliens based on whether they had managed to evade detection and enter the country without permission. Instead, the “pivotal factor in determining an alien’s status” would be “whether or not the alien has been *lawfully* admitted.” House Rep., *supra*, at 226 (emphasis added). IIRIRA also eliminated the exclusion-deportation dichotomy and consolidated both sets of proceedings into “removal proceedings.” *Hurtado*, 29 I. & N. Dec. at 223.

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

Applicants for admission fall under two categories, *i.e.*, those covered by Section 1225(b)(1) and those covered by Section 1225(b)(2). *See Jennings*, 583 U.S. at 287. Section 1225(b)(1) applies to aliens arriving in the United States who are determined to be inadmissible

due to fraud, misrepresentation, or lack of valid documentation. *See* 8 U.S.C. § 1225(b)(1)(A)(i). Section 1225(b)(2) is broader and applies to any applicant for admission who an immigration officer determines to be “not clearly and beyond a doubt entitled to be admitted” to the United States (with limited exceptions). *See id.* § 1225(b)(2)(A); *Jennings*, 583 U.S. at 287 (noting that Section 1225(b)(2) is “broader” and “serves as a catchall provision that applies to *all* applicants for admission not covered by § 1225(b)(1)”). Under Section 1225(b)(2), if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, detention is mandatory: the statute provides that he or she “*shall be detained* for a proceeding under section 1229a.”² *Id.* § 1225(b)(2)(A) (emphasis added).³

In the present case, Petitioner falls within the ambit of Section 1225(b)(2)(A)’s mandatory detention requirement. First, by statute Petitioner is deemed an “applicant for admission” to the United States because he is “[a]n alien present in the United States who has not been admitted or who arrives in the United States.” 8 U.S.C. § 1225(a)(1). Second, Petitioner is “seeking admission” into this country. *Id.* Prior to his arrest, Petitioner had never been encountered by U.S. immigration officials. Pet. ¶ 12; Return Ex. A at 2. Likewise, he was never released on his own recognizance pursuant 8 U.S.C. § 1226, and he has never applied for asylum of any other immigration benefit. Pet. ¶ 12; Return Ex. A at 2. Moreover, Petitioner has not demonstrated to

² Section 240 of the INA, codified at 8 U.S.C. § 1229a, refers to the full removal proceedings to which the Petitioner is currently subject before the Immigration Court.

³ That detention authority has long been recognized as a permissible means of ensuring the security of the border and controlling entry into the United States. Indeed, the Supreme Court has rejected a due process challenge to arriving aliens’ detention at the border, explaining that “an alien on the threshold of initial entry stands on a different footing” than an alien within the United States, which justifies detention at the border. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

an examining immigration officer that he is “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A). Indeed, Petitioner cannot demonstrate that he is “clearly and beyond a doubt entitled to be admitted” because he is present in the United States without being admitted or paroled, and therefore inadmissible under 8 U.S.C. § 1182(a)(6). Accordingly, Petitioner’s detention is pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he “shall be” detained pending removal proceedings.⁴

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

Petitioner does not specify when he entered the United States, but avers that he has lived in the U.S. continuously for at least five years.” Pet. ¶ 4. However, Petitioner’s unauthorized physical entrance into the country did not constitute an “admission” into the country. Furthermore, as intended by Congress when it enacted IIRIRA, Section 1225 applies to non-citizens who are found unlawfully present in the United States. Section 1225(b)(1) is titled “Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled” and Section 1225(b)(2) is titled “Inspection of Other aliens.” Section 1225 thus applies to more than

⁴ Because Petitioner’s detention is mandatory pursuant to section 1225, it does not violate bond regulations, contrary to Petitioner’s assertions. *See* Pet. ¶¶ 65–69.

just non-citizens who are stopped at the border prior to making an entry. It also applies where, as here, ICE agents first encounter and arrest the non-citizen after he entered the country illegally. Thus, Petitioner is an applicant for admission who is seeking admission, and his detention is pursuant to Section 1225(b)(2)(A).⁵

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

This Court’s decision in *Gonzalez v. Joyce*, No. 25 Civ. 8250 (AT), 2025 WL 2961626 (S.D.N.Y. Oct. 19, 2025), does not require a contrary result. In that case, the petitioner attempted to enter the country in 2023 (after previously being removed) and was encountered by U.S. Customs and Border Protection (“CBP”) officers soon after crossing the border. *Id.* at *1. The

⁵ Reading 8 U.S.C. § 1225(b)(2) to mandate detention for any “applicant for admission” is in accordance with the plain meaning of the text. *See Vargas Lopez v. Trump*, No. 25 Civ. 526, 2025 WL 2780351, at *9 (D. Neb. Sept. 30, 2025) (denying habeas petition and holding that petitioner was “an alien within the ‘catchall’ scope of § 1225(b)(2) subject to detention without possibility of release on bond through a proceeding on removal under § 1229a”). This reading does not render Section 1226 superfluous. Section 1226 continues to apply, for example, to aliens who have been convicted of certain criminal offenses since admission. *See Chavez v. Noem*, No. 25 Civ. 02325 (CAB) (SBC), 2025 WL 2730228, at *5 (S.D. Cal. Sept. 24, 2025) (discussing interplay between sections 1225(b) and 1226(a) and denying application for temporary restraining order brought by aliens contending that they were entitled to a bond hearing pursuant to section 1226(a)).

petitioner was placed in removal proceedings and released on his own recognizance, which this Court held was pursuant to 8 U.S.C. § 1226. *Id.* at *1, *4. Subsequently, the petitioner applied for asylum in March 2025. *Id.* at *1. Following a hearing in immigration court on October 6, 2025, the petitioner was arrested and detained by ICE, and he filed a habeas petition challenging the lawfulness of his detention. *Id.* at *1.

This Court granted the petition and ordered petitioner's immediate release, ruling, among other things, that the petitioner's detention was governed by Section 1226, not Section 1225. In reaching that conclusion, the Court relied on its view that after encountering the petitioner at the border, "CBP officers released him on his own recognizance pursuant to § 1226 and similarly arrested him purportedly pursuant to the same statutory provision." *Id.* at *4.⁶ The Court also noted that it was "undisputed that [petitioner] sought asylum in the United States" prior to his arrest. *Id.* Based on those and other facts, the Court concluded that Section 1225 did not apply to the petitioner who was "already in the country pending the outcome of removal proceedings." *Id.*

Here, by contrast, Petitioner was never arrested pursuant to Section 1226, never released on his own recognizance pursuant to Section 1226, and was not already in removal proceedings at the time he was arrested and detained when immigration authorities encountered him for the first time on November 4. Also, Petitioner had not applied for asylum at the time he was arrested.

⁶ Although this Court believed that the Government did not dispute that Gonzalez was "released on his own recognizance pursuant to 8 U.S.C. § 1226," 2025 WL 2961626, at *4, that is not entirely correct in the Government's view. The Government acknowledged that the petitioner was released on recognizance but did not concede that Section 1226 applied to his detention; in fact, the Government maintained that "his status as an applicant for admission has remained unchanged." Gov't Br., No. 25 Civ. 8250 (AT), ECF No. 18, at 8. Regardless, in this case, Petitioner was never released on recognizance.

Rather, ICE took Petitioner into custody at his first encounter pursuant to Section 1225.⁷ As such, the law, post-IIRIRA, requires that Petitioner be treated as a noncitizen “applicant for admission” who is “seeking admission” to the country under Section 1225. *See* 8 U.S.C. § 1225(a) (“[a]n alien present in the United States who has not been admitted or who arrives in the United States” is deemed an “applicant for admission”).⁸

B. Petitioner Is Not Entitled to a Bond Hearing

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

⁷ Petitioner’s assertion that he should have been afforded extensive pre-detention process, Pet. ¶ 46, is puzzling in the context of a first-time encounter with ICE, as ICE was unaware of Petitioner’s unlawful presence in the United States prior to the encounter, at which time Petitioner voluntarily admitted that he was present without lawful status.

⁸ The Government respectfully disagrees with this Court’s decision in *Gonzalez* as well as the decisions of other judges in this District who similarly determined that detention of a petitioner who entered without inspection, was initially encountered near the border, and later arrested was governed by section 1226, not section 1225, *see, e.g., Lopez Benitez v. Francis*, No. 25. Civ. 5937 (DEH), 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025), or that, even if section 1225 governs, such a petitioner’s due process rights were violated, *see Savane v. Francis*, No. 25 Civ. 6666 (GHW), 2025 WL 2774452 (S.D.N.Y. Sept. 28, 2025).

provided by statute”). Here, “the procedure authorized by Congress,” *Mezei*, 345 U.S. at 212, in section 1225(b) and related provisions expressly excludes the possibility of a bond hearing, and as such, no further process is due.

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

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

Though he was physically present in the United States when he was arrested, because Petitioner entered the United States unlawfully and was never admitted into the country, he is “treated, for constitutional purposes, as if stopped at the border.” *Zadvydas*, 533 U.S. at 693. Thus,

he is entitled to the procedure authorized by Congress, and no more. And the procedure Congress has established for applicants for admission like Petitioner does not include any right to a bond hearing. Instead, for applicants for admission, “if the examining immigration officer determines that [the alien] is not clearly and beyond a doubt entitled to be admitted, the alien *shall be detained* for a proceeding under section 240 [8 U.S.C. § 1229a].” 8 U.S.C. § 1225(b)(2)(A) (emphasis added). That is, Congress has provided that Petitioner shall be detained for removal proceedings before an immigration judge, which afford Petitioner numerous procedural protections.⁹ *See* 8 U.S.C. § 1229a.

Aliens detained under 8 U.S.C. § 1225(b)(2)(A) generally cannot be released from custody during their removal proceedings. The exclusive means of release for an applicant for admission under the statute is the Department of Homeland Security’s discretionary parole authority. *See Jennings*, 583 U.S. at 298-301; 8 U.S.C. § 1182(d)(5)(A) (parole may be granted for “urgent humanitarian reasons or significant public benefit”); 8 C.F.R. §§ 212.5(b), 235.3(c) (elaborating on instances where parole may be appropriate). As the Supreme Court has emphasized, “neither

⁹ During removal proceedings, aliens may apply for various forms of relief or protection from removal, such as asylum, withholding of removal, and protection under the Convention Against Torture. *See, e.g.*, 8 U.S.C. § 1158(a); 8 U.S.C. § 1231(b)(3). The decision whether to order such an alien removed is made by an immigration judge (not an immigration officer). 8 U.S.C. § 1101(b)(4); 8 U.S.C. § 1229a (a)(1). Aliens may obtain continuances during their proceedings for good cause. 8 C.F.R. § 1003.29. They have a right to counsel of their choice at no expense to the government, 8 U.S.C. § 1229a(b)(4)(A); the right to testify; and the right to “examine the evidence against [them],” “to present evidence,” and “to cross-examine witnesses presented by the Government,” 8 U.S.C. § 1229a(b)(4)(B); *see* 8 C.F.R. §§ 1240.7(a), 1240.46(c). Aliens ordered removed may ask the immigration judge to reconsider that determination. 8 U.S.C. § 1229a(c)(6). They also have a right to appeal to the Board of Immigration Appeals (“BIA”). 8 U.S.C. § 1229a(c)(5); 8 C.F.R. §§ 1003.1(b), 1003.38(a). If an alien appeals and the BIA enters a final removal order, the alien may file a petition for review in a court of appeals, 8 U.S.C. § 1252, and thereafter seek review in the Supreme Court, 28 U.S.C. § 1254(1).

§ 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.” *Jennings*, 583 U.S. at 297. Petitioner is therefore lawfully detained pursuant to section 1225(b) and is not entitled to a bond hearing.

C. Petitioner’s Due Process Rights Have Not Been Violated

For similar reasons, Petitioner’s claim that his due process rights have been violated is mistaken. *See* Pet. ¶¶ 45–57. Because Petitioner is deemed an applicant for admission who was never permitted to enter the interior and thus treated for constitutional purposes as if stopped at the border, he is lawfully detained pursuant to Section 1225(b), and neither his procedural nor substantive due process rights have been violated. First, with respect to his procedural due process rights, as discussed *supra*, the Supreme Court has instructed that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *Mezei*, 345 U.S. at 212 (citing *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)); *cf. Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997) (the rights of excluded aliens “are determined by the procedures established by Congress and not by the due process protections of the Fifth Amendment”). Indeed, as a court in this district recognized in a case decided after *Jennings*, involving an applicant for admission, “because the immigration statutes at issue here do not authorize a bond hearing, *Mezei* dictates that due process does not require one here.” *Poonjani v. Shanahan*, 319 F. Supp. 3d 644, 649 (S.D.N.Y. 2018); *see also Mendez Ramirez v. Decker*, 612 F. Supp. 3d 200, 220-21 (S.D.N.Y. 2020) (following *Mezei*, holding constitutional due process rights for alien deemed at threshold of entry extended no further than the process outlined by statute); *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 333-36 (W.D.N.Y. 2021) (same applying *Mezei* and *Thuraissigiam*); *Salim v. Tryon*, No. 13 Civ. 6659 (JTC), 2014 WL 1664413, at *2 (W.D.N.Y. Apr. 25, 2014) (“The Due Process Clause provides an inadmissible alien no procedural protection

beyond the procedure explicitly authorized by Congress, nor any right to be free from detention pending removal proceedings.”).

Moreover, more than a century of Supreme Court precedent confirms that applicants for admission are treated differently under the law for due process purposes from other categories of detained aliens. *See, e.g., Zadvydas*, 533 U.S. at 693 (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”). In the relevant provisions of the INA, Congress has decided to treat applicants for admission differently and detain them during ongoing proceedings in order to more easily effectuate their exclusion from the United States if necessary (and post-IIRIRA, this includes those found in the interior who are present without having been admitted). Unlike admitted aliens later placed in removal proceedings and detained under section 1226, applicants for admission are “request[ing] a privilege,” *Landon*, 459 U.S. at 32, and therefore “stand[] on a different footing,” *Mezei*, 345 U.S. at 212-13. Their lack of entitlement to a bond hearing thus flows from their lack of admission to the United States in the first instance. Given that the constitutional due process rights of applicants for admission are limited to the process that Congress chooses to provide, Petitioner cannot show that he has suffered a procedural due process violation.

Petitioner’s detention for the time-limited pendency of his removal proceedings also does not run afoul of his substantive due process rights. For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 523–26 (2003); *Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). “Detention during removal

proceedings is a constitutionally valid aspect of the deportation process.” *Velasco Lopez*, 978 F.3d at 848; *see Demore*, 538 U.S. at 523 n.7 (“prior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of [the] deportation procedure.”). As the Supreme Court observed, removal proceedings ““would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.”” *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)); *cf. Reno v. Flores*, 507 U.S. 292, 306 (1993) (“Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.”). Accordingly, Petitioner’s due process claims should be denied.

II. PETITIONER’S ARREST DOES NOT VIOLATE THE FOURTH AMENDMENT

Petitioner’s Fourth Amendment claim—namely, that Government officials questioned him without reasonable suspicion that he was not a United States citizen and arrested him without probable cause, *see* Pet. ¶¶ 58–64—should also be rejected. As an initial matter, the Fourth Amendment has no applicability in the context of an immigration arrest. *See Abel*, 362 U.S. at 232–37 (discussing longstanding administrative arrest procedures in deportation cases). Instead, there is “overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens such as petitioner.” *Abel*, 362 U.S. at 233; *cf. Gerstein v. Pugh*, 420 U.S. 103, 127 n. 27 (1973) (noting that “the Fourth Amendment was tailored explicitly for the criminal justice system,” and that its “probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of *criminal conduct*” (emphasis added)). In any event, here, ICE arrested Petitioner after he

voluntarily admitted to law enforcement officers that he did not have lawful status in this country, Return Ex. A at 2, thereby providing probable cause.

Similarly, Petitioner's assertion that it was unlawful for Government law enforcement officers to question him prior to his arrest also fails. Government law officers engaged Petitioner in a consensual conversation because he matched the physical description of the intended target of their operation. Return Ex. A at 2. Petitioner then voluntarily admitted that he had no lawful status in the United States. *Id.* This brief interaction does not constitute a detention, is consistent with ICE's authority under Section 287(a)(1) of the INA, 8 U.S.C. § 1357(a)(1), and does not implicate the Fourth Amendment. *See, e.g., Ojeda-Vinales v. Immigration and Naturalization Service*, 523 F.2d 286, 287-88 (2d Cir. 1975); *U.S. v. Rodriguez-Franco*, 749 F.2d 1555, 1560 (11th Cir. 1985) (request that noncitizen accompany INS agents to nearby bench did not transform initial questioning concerning citizenship into a "detention").

III. TO THE EXTENT THE COURT DETERMINES SECTION 1226(a) GOVERNS, PETITIONER MAY CHALLENGE HIS DETENTION VIA A BOND HEARING

A. Background Regarding Section 1226

Section 1226 "generally governs the process of arresting and detaining [aliens who have already entered the United States] pending their removal." *Jennings*, 583 U.S. at 288. Section 1226(a) provides that "an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a) (emphasis added). The Attorney General and the Department of Homeland Security ("DHS") have broad discretion to detain an alien during removal proceedings. *See* 8 U.S.C. § 1226(a)(1) (DHS "may continue to

detain the arrested alien” during the pendency of removal proceedings);¹⁰ *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (highlighting that “subsection (a) creates authority for anyone’s arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions”). When an alien is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) (2020)). If DHS decides to release the alien, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8).¹¹ Even after DHS decides to release an alien, it may “at any time” revoke such release, “rearrest the alien under the original warrant, and detain the alien.” 8 U.S.C. § 1226(b).

If DHS determines that an alien should remain detained during the pendency of his removal proceedings, the alien may request a post-deprivation custody redetermination hearing (*i.e.*, a

¹⁰ Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General’s authority—delegated to immigration judges, *see* 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for noncitizens under section 1226(a) is “one of the authorities [s]he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings.” *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

¹¹ In addition to bond, the government may release an alien detained under section 1226(a) on his own recognizance, which is a form of conditional parole. *See* 8 U.S.C. § 1226(a)(2)(B); *Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747, 747 (BIA 2023) (“The respondents were . . . released on their own recognizance pursuant to DHS[’s] conditional parole authority under . . . 8 U.S.C. § 1226(a)(2)(B)[.]”); *see also Ortega-Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007) (“It is apparent that the [government] used the phrase ‘release on recognizance’ as another name for ‘conditional parole’ under § 1226(a).”); *Cruz-Miguel v. Holder*, 650 F.3d 189, 191 (2d Cir. 2011) (similar).

“bond hearing”) before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the alien based on a variety of factors that account for the alien’s ties to the United States and whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006); *see also* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) does not provide an alien with an absolute right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson v. Landon*, 342 U.S. 524, 534 (1952)). Nor does the Constitution. *See Velasco Lopez*, 978 F.3d at 848. Furthermore, the BIA—whose decisions are binding on immigration judges—has placed the burden of proof on the alien, who “must establish to the satisfaction of the Immigration Judge . . . that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.” *Matter of Guerra*, 24 I. & N. Dec. at 38. The BIA’s “to the satisfaction” test is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).¹² If, after the bond hearing, the immigration judge concludes that the alien should not be released, or the immigration judge has set a bond amount that the alien believes is too high,

¹² The Second Circuit has not issued a generally applicable rule with respect to the allocation and quantum of the burden of proof at initial section 1226(a) immigration court bond hearings. Rather, the Second Circuit held only that when an alien demonstrates that his detention has become unreasonably prolonged in violation of due process, the alien is entitled to receive a new bond hearing at which DHS bears the burden of demonstrating by clear and convincing evidence that the alien is either a danger to the community or a flight risk. *See Velasco Lopez*, 978 F.3d at 855.

the alien may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

B. Petitioner May Not Challenge His Detention Through a Habeas Petition Before Exhausting His Administrative Remedies

If the Court nevertheless determines that Petitioner's current detention is pursuant to Section 1226(a), then Petitioner would be entitled to a bond hearing in immigration court.¹³ *See Guzman v. Joyce*, No. 25 Civ. 4777 (RA), 2025 WL 1696891, at *2–*3 (S.D.N.Y. June 17, 2025). In that event, Petitioner he should be required to exhaust his challenges to his detention before the immigration judge and at the BIA before bringing filing a habeas petition in federal court.

While it is true that “[t]here is no statutory requirement that a habeas petitioner exhaust his administrative remedies before challenging his immigration detention [in federal court],” *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533, 538 (S.D.N.Y. 2014), “district courts in this Circuit have recognized such a requirement as a prudential matter,” *Castillo Lachapel v. Joyce*, No. 25 Civ. 4693 (JHR), 2025 WL 1685576, at *2 (S.D.N.Y. June 16, 2025) (citation and internal quotation marks omitted). “Under the doctrine of exhaustion of administrative remedies, ‘a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.’” *Howell v. I.N.S.*, 72 F.3d 288, 291 (2d Cir. 1995) (quoting *Guitard v. United States Sec’y of Navy*, 967 F.2d 737, 740 (2d Cir. 1992)); *see also Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) (“We have been nothing if not clear in requiring that

¹³ Petitioner also seeks this relief in the alternative. Pet., Prayer for Relief ¶ e. To be clear, in light of *Matter of Yajure Hurtado*, a holding from this Court in Petitioner's individual case that he was detained under § 1226(a) would be required for Petitioner to then request and receive the bond hearing.

a party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.”) (internal quotation marks omitted); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 819 (9th Cir. 2003) (a petitioner “must exhaust administrative remedies before raising . . . constitutional claims in a habeas petition when those claims are reviewable by the BIA on appeal”); *cf. Ceballos v. Ridge*, No. 04 Civ. 7304 (LAK), 2004 WL 2849604, at *2 (S.D.N.Y. Nov. 12, 2004) (alien’s request for release from custody was unexhausted and would not be considered by district court); *Diaz v. McElroy*, 134 F. Supp. 2d 315, 319-20 (S.D.N.Y. 2001) (claim unexhausted where petitioner failed to appeal custody decision by INS District Director to BIA). Indeed, judicial exhaustion “serves myriad purposes, including limiting judicial interference in agency affairs, conserving judicial resources, and preventing the frequent and deliberate flouting of administrative processes [that] could weaken the effectiveness of an agency.” *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90, 93-94 (2d Cir. 1998) (internal quotation marks and citation omitted).

Where the exhaustion requirement is “judicially imposed instead of statutorily imposed,” several exceptions permit courts to excuse a party’s failure to exhaust administrative remedies. Such exceptions include when: “(1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain instances a plaintiff has raised a substantial constitutional question.” *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (internal quotation marks omitted). However, “[e]xhaustion is the rule, waiver the exception.” *Abbey v. Sullivan*, 978 F.2d 37, 44 (2d Cir. 1992). In light of the extensive process available to Petitioner

(if the Court determines he is detained under Section 1226(a)), his detention challenge is premature. Petitioner can seek a custody redetermination with the immigration court.

This Court's decision in *Gonzalez* again does not require a different result. There, the Court ruled that administrative exhaustion was not required because the petitioner had been "detained pursuant to a policy that is defined by its systematic denial of the administrative remedy that Respondents urge Gonzalez to pursue," and because Gonzalez "has raised a substantial constitutional question." 2025 WL 2961626, at *5 (internal quotation marks and citation omitted). But in *Gonzalez*, the Court held that the petitioner had been released by DHS on his own recognizance pursuant to Section 1226 after being encountered at the border and was rearrested two years later after a scheduled immigration hearing. *Id.* at *1-*2. His habeas petition therefore raised factually different constitutional and statutory claims.

Here, ICE detained Petitioner pursuant to Section 1225 after his first encounter with DHS. After his arrest, Petitioner, to the Government's belief, was subject to mandatory detention and therefore a custody determination based on Petitioner's dangerousness and flight risk was not required. However, if this Court were to rule that Petitioner's detention is governed by Section 1226, then he should be required to seek a custody redetermination, prior to pursuing a habeas petition, at which an immigration judge will weigh the appropriate factors. *See Castillo Lachapel*, 2025 WL 1685576, at *3-*4 (non-citizens detained under Section 1226(a) should be required to exhaust administrative remedies before resorting to habeas petition); *Guzman*, 2025 WL 1696891, at *2-*3 (same).

Further, none of the exceptions to exhaustion applies here. To date, Petitioner has been detained for a little over one week and there is no indication that he has requested a bond hearing

by an immigration judge. He cannot demonstrate that requesting a bond hearing would be futile or that it would not provide a genuine opportunity for adequate relief if this Court were to order a bond hearing pursuant to Section 1226(a). Nor can he avoid the requirement of exhaustion by merely invoking the language of due process. *See, e.g., United States v. Gonzalez-Roque*, 301 F.3d 39, 48 (2d Cir. 2002) (“‘Due process’ is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal.”). Accordingly, Petitioner should be required to exhaust his request for a bond hearing with the immigration court (and any related administrative appeals) in the first instance. *Cf. Michalski v. Decker*, 279 F. Supp. 3d 487, 496-97 (S.D.N.Y. 2018) (“Because [petitioner’s] bond hearing may provide him with the relief he seeks . . . this Court concludes in the exercise of discretion that [petitioner] must exhaust these avenues before seeking judicial relief.”).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of habeas corpus.

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Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 7515 words.