UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Alejandro Pena Toledo,

Petitioner,

v.

Kristi Noem, *Secretary of Homeland Security*,

Todd Lyons, *Acting Director, U.S. Immigration and Customs Enforcement*,

Robert Guardian, *Denver Field Office Director, U.S. Immigration and Customs Enforcement*,

Pamela Bondi, *Attorney General*,

Juan Baltasar, *Warden, Denver Contract Detention Facility*,

Respondents.

Civil Action No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner is a citizen of Mexico who entered the United States when he was two years old, over 30 years ago. Petitioner has been detained by U.S. Immigration and Customs Enforcement ("ICE"), under facts and circumstances that place him squarely within ICE's general detention authority 8 U.S.C. § 1226(a). Under that statute, Petitioner is eligible to seek discretionary release on bond from an Immigration Judge ("IJ"). However, due to a new policy announced by ICE in July 2025, and a September 2025 Board of Immigration Appeals (BIA) decision that overturns decades of settled law, Respondents contend that Petitioner is actually detained under 8 U.S.C. § 1225(b)(2). But while § 1225 requires mandatory detention and does not allow release on bond, it only applies to noncitizens apprehended at the border "seeking admission." Petitioner therefore

bring this action for a declaratory judgment from this Court that he is properly detained (if at all) only pursuant to 8 U.S.C. § 1226(a); and seeking an order that Respondents schedule him for a discretionary bond hearing pursuant to § 1226(a) before an IJ within 15 days.

JURISDICTION AND VENUE

1. This Court has jurisdiction to hear this case under 28 U.S.C. § 2241; 28 U.S.C. § 2201, the Declaratory Judgment Act; and 28 U.S.C. § 1331, Federal Question Jurisdiction. In addition, the individual Respondents are United States officials. 28 U.S.C. § 1346(a)(2).

2. The Court has authority to enter a declaratory judgment and to provide temporary, preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, 28 U.S.C. §§ 2201-2202, the All Writs Act, and the Court's inherent equitable powers, as well as issue a writ of habeas corpus pursuant to 28 U.S.C. § 2241.

3. This Court also has federal question jurisdiction, through the APA, to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). APA review of a final agency action may proceed, absent a special statutory review proceeding, by "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction." 5 U.S.C. § 703.

4. Venue lies in this District because Petitioner id currently detained within the territorial jurisdiction of this division of this District; and each Respondent is an agency or officer of the United States sued in his or her official capacity. 28 U.S.C. § 2241; 28 U.S.C. § 1391(e)(1).

THE PARTIES

5. Petitioner Alejandro Pena Toledo is a citizen and native of Mexico and is currently detained by Respondents in the Denver Contract Detention Facility in Aurora, CO within the

territorial jurisdiction of this Court.

6. Respondent Kristi Noem is the Secretary of the Department of Homeland Security ("DHS"). She is the cabinet-level secretary responsible for all immigration enforcement in the United States.

7. Respondent Todd Lyons is the Acting Director of U.S. Immigration and Customs Enforcement ("ICE"). He is the head of the federal agency responsible for all immigration enforcement in the United States.

8. Respondent Robert Guardian is the Director of the Denver ICE Field Office. He is the head of the ICE office that is unlawfully detaining Petitioner, and such detention is taking place under his direction and supervision. He is the immediate legal custodian of the Petitioner.

9. Respondent Pamela Bondi is the Attorney General of the United States. The Immigration Judges who decide removal cases and applications for bond and relief from removal do so as her designees.

10. Respondent Juan Baltasar is the warden of the Denver Contract Detention Facility in Aurora, Co., where Petitioner is currently detained. He is the immediate custodian who is currently holding the Petitioner in physical custody. He is sued in his official capacity.

11. All government Respondents are sued in their official capacities.

LEGAL BACKGROUND

A. Immigration Detention Legal Framework

12. When a noncitizen is alleged to have violated immigration laws, they are generally placed into traditional removal proceedings, during which an immigration judge will determine whether they are removable and then whether they have a legal basis to remain in the United States. 8 U.S.C. § 1229a.

13. Detention is authorized for "certain aliens already in the country pending the outcome of removal proceedings under § 1226(a) and 1126(c)." *See Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). The statute provides that an individual may be subject to either discretionary detention under 8 U.S.C. § 1226(a) generally, or mandatory detention under 8 U.S.C. § 1226(c) if they have been arrested or convicted of certain crimes. Discretionary detention under § 1226(a) has been described as the "default" provision for immigration detention for those subject to traditional removal proceedings. *Id.* at 288. Under § 1226(a), "'[e]xcept as provided in subsection (c) of this section,' the Attorney General 'may release' an alien detained under § 1226(a) 'on ...bond' or 'conditional parole.'" *Id.*

14. Alternatively, mandatory detention is authorized for "certain aliens *seeking admission* into the country under §§ 1225(b)(1) and 1225(b)(2)," [emphasis added]. *Jennings*, 583 U.S. at 289. Individuals inspected under § 1225(b) and determined to be "applicants for admission" may be subject to mandatory detention under two separate subsections. Applicants for admission include someone:

> "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for the purposes of this chapter to be an applicant for admission."

§ 1225(a)(1).

15. The first subset, under 8 U.S.C. § 1225(b)(1), may be subject to expedited removal and mandatory detention if they are determined to be an "arriving alien," and if they have not been physically present in the United States continuously for a two-year period immediately prior. Regulations define an "arriving alien" as:

> "an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-

> entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport."

8 C.F.R. § 1.2.

16. Otherwise, 8 U.S.C. § 1225(b)(2) provides for the detention of "applicant for admission" specifically when "the examining immigration officer determines that an alien *seeking admission* is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title," i.e. for traditional removal proceedings [emphasis added].

17. An "arriving alien" or an applicant for admission "seeking admission" may only be released from detention on parole (which is a form of release on recognizance), under 8 U.S.C. § 1182(d)(5). *Jennings*, 583 U.S. at 288. There is no bond available to an arriving alien or applicant for admission seeking admission. *Id.* There is no such thing as a "parole bond" – a release must be either parole under § 1182(d)(5) or a bond (conditional parole) under § 1226(a). *Id.*

18. For a noncitizen subject to discretionary detention under 8 U.S.C. § 1226(a), ICE makes an initial custody determination to either set a bond or hold the individual at no bond. The noncitizen may then seek a review of ICE's initial custody determination before the IJ (a "custody review hearing"), who has the authority to modify ICE's custody determination and set bond in a case in which ICE has designated no bond, lower bond when ICE has set a cash bond amount, or deny bond completely. 8 C.F.R. § 1003.19.

19. Custody review hearings are separate from hearings in the underlying removal proceedings. 8 C.F.R. § 1003.19(d). If a noncitizen is granted bond by the IJ, she must still appear in immigration court for the IJ to determine her removability and hear any claim for relief from removal. At a custody review hearing, once jurisdiction over bond is established, the IJ's inquiry

is limited to whether the detainee is a danger to the community or a flight risk, and bond may only be granted when an IJ has determined that the detainee meets his burden of proof that he is neither. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006).

20. For decades, it has been Respondents' practice to afford § 1226(a) discretionary bond hearings and custody review hearings to those individuals who have been encountered neither at a point of entry nor seeking admission to the United States. *See Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099, at *10 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted sub nom. Rocha Rosado v. Figueroa*, No. CV-25-02157-PHX-DLR (CDB), 2025 WL 2349133 (D. Ariz. Aug. 13, 2025) ("Respondents' proposed application of § 1226 is also belied by the Department of Homeland Security's 'longstanding practice' of treating noncitizens taken into custody while living in the United States, including those detained and found inadmissible upon inspection and then released into the United States with the government's acquiescence, who have committed no crime after release, as detained under § 1226(a)." citing *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 386 (2024)).

B. New ICE memo reinterpreting 8 U.S.C. § 1225(b)(2)

21. On July 8, 2025, Respondent ICE issued new interim guidance that announced a breathtakingly broad interpretation of 8 U.S.C. § 1225(b)(2). *See* ICE memorandum "Interim Guidance Regarding Detention Authority for Applications for Admission."[1] This memo concerns the detention of "applicants for admission" as defined by § 1225(a)(1). "Effective immediately, it is the position of DHS that such aliens are subject to detention under INA § 235(b) [8 U.S.C. § 1225(b)(2)] and may not be released from ICE custody except by INA § 212(d)(5) [8 U.S.C. §

[1] *Available at* https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission (last visited Sept. 25, 2025).

1182(d)(5)]." *Id.* DHS is explicit that this new policy is a marked deviation from prior interpretation and treatment of affected noncitizens. *Id.* ("For custody purposes, these aliens are now treated in the same manner that "arriving aliens" have historically been treated.")

22. In addition to the announcement re-interpreting § 1225(b)(2), the memo further clarifies that "[t]he only aliens eligible for a custody determination and release on recognizance, bond or other conditions under INA § 236(a) [8 U.S.C. § 1226(a)] during removal proceedings are aliens admitted to the United States and chargeable with deportability under INA § 237 [8 U.S.C. § 1227], with the exception of those subject to mandatory detention under INA § 236(c) [8 U.S.C. § 1226(c)]." *Id.*

23. Moreover, ICE maintains that "DHS does not take the position that prior releases of applicants for admission pursuant to INA § 236(a) were releases on parole under INA § 212(d)(5) based on this change in legal position." *Id.* ICE fails to clarify under what legal authority, then, those prior releases were effectuated. Rather, ICE signals the resulting lack of "correct" paperwork is nonetheless permissible. *Id.* ("Accordingly, ERO and HIS are not required to 'correct' the release paperwork by issuing INA § 212(d)(5) parole paperwork.")

24. Nationwide implementation of the ICE § 1225(b)(2) mass detention policy ensued.

C. Recent BIA decision *Matter of Yajure Hurtado*

25. On September 5, 2025, the Board of Immigration Appeals (BIA), which oversees all appeals of IJ decisions including custody redeterminations, upheld ICE's re-interpretation of § 1225(b)(2). *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).

26. The BIA held that noncitizen was an "applicant for admission" within the scope of § 1225(b), and therefore subject to mandatory detention.

27. The BIA characterized the issue before it as "one of statutory construction: Does the INA require that *all* applicants for admission, even those like the respondent who have entered without admission or inspection and have been residing in the United States for years without lawful status, be subject to mandatory detention for the duration of their immigration proceedings, and thus the Immigration Judge lacks authority over a bond request filed by an alien in this category?" [emphasis added]. *Id.* at 220.

28. The BIA reasoned that individuals "who surreptitiously cross into the United States remain applicants for admission until and unless they are lawfully inspected and admitted by an immigration officer." *Id.* at 228.

29. The BIA acknowledged the decades of precedent preceding its decision that authorized release of individuals present without having been inspected and admitted or paroled under § 1226(a). *Id.* at 225, FN6 ("We acknowledge that for years Immigration Judges have conducted bond hearings for aliens who entered the United States without inspection. However, we do not recall either DHS or its predecessor, the Immigration and Naturalization Service, previously raising the current issue that is before us. In fact, the supplemental information for the 1997 Interim Rule titled 'Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures,' 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997), reflects that the Immigration and Naturalization Service took the position at that time that '[d]espite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination.'")

30. Ultimately, the BIA upheld the decision that the IJ lacked jurisdiction under 8 U.S.C. § 1225(b)(2) to consider the respondent for discretionary bond. *Id.* at 229.

31. The BIA decision is binding on all immigration judges nationwide.

32. Respondents' new policy and interpretation of 8 U.S.C. § 1225(b)(2) stand to sweep millions of noncitizens into mandatory detention, without any consideration for release on bond (regardless of their ties to their community or lack of dangerousness or flight risk). *Rosado*, 2025 WL 2337099, at *11 ("It has been estimated that this novel interpretation would require the detention of millions of immigrants currently residing in the United States.")

FACTS

33. Petitioner is a citizen of Mexico. He entered the United States at the age of two, on or about July 1995, on a tourist visa.

34. Petitioner then made his way to the Virginia area, where he established a life. He currently resides in Falls Church, Virginia with his mother and fiancée.

35. On September 9, 2019, an Immigration Judge ordered Petitioner removed from the United States, but also granted him withholding of removal to Mexico. *See* Ex. 1, Order of the Immigration Judge (Sept. 9, 2019).

36. On May 8, 2025, Petitioner was detained by ICE at a regularly scheduled check-in, without any forewarning.

37. Petitioner filed a Motion to Reopen his removal proceedings, which was granted on July 2, 2025. *See* Ex. 2, Order of the Immigration Judge (July 2, 2025).

38. Petitioner then requested bond from the Immigration Judge pursuant to 8 U.S.C. § 1226(a). The Immigration Judge conducted a bond hearing on October 6, 2025, and denied bond for the following reason: "the court lacks jurisdiction because respondent is detained under section 235 of the Act [8 U.S.C. § 1225]. See Matter of Yajure Hurtado, 29 I&N Dec. 216 (BIA 2025). While the respondent now alleges a prior lawful entry, the respondent previously admitted that he

was not admitted or paroled after inspection by an immigration officer, the charge of removability under section 212(a)(6)(A)(i) was previously sustained, and that finding has not been disturbed. See Matter of Joseph, 22 I&N Dec. 799 (BIA 1999)." *See* Ex. 3, Order of the Immigration Judge (Oct. 6, 2025). In other words, the Immigration Judge did not believe that Petitioner had entered the United States with a visa, and found that he entered unlawfully; and therefore denied him bond under *Yajure Hurtado*.

39. Petitioner is currently detained at the Denver Contract Detention Facility in Aurora, CO, within the territorial jurisdiction of this Court.

40. Petitioner has pending removal proceedings, and is no longer subject to a final order of removal.

41. Petitioner's detention has severely affected his physical and mental health, as well as his family's stability. He has a history of serious medical conditions, including a pre-heart attack at age sixteen, liver complications, depression, panic attacks, anxiety, and insomnia. These conditions have worsened during his detention, as ICE has failed to provide him with his prescribed medications and necessary care. Petitioner is the main breadwinner for his household, and his absence has left his family in financial hardship. His mother has been forced to work double shifts to cover living expenses and medical costs, while the family struggles emotionally with the uncertainty of his health and detention.

42. All Respondents consider that Petitioner Pena Toledo is detained pursuant to 8 U.S.C. § 1225(b)(2). *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216.

43. In this action, Petitioner does not seek review of the Immigration Judge's factual finding (that Petitioner entered unlawfully, not with a visa). Nonetheless, even taking the Immigration Judge's factual finding at face value, Petitioner's detention is permitted only under 8

U.S.C. § 1226(a), not Section 1225. *Yajure Hurtado* was wrongly decided, and this Court has jurisdiction to determine the correct statute of detention even accepting *arguendo* that Petitioner entered without inspection.

FIRST CLAIM FOR RELIEF:
Declaratory Judgment

44. Petitioner re-alleges and incorporates by reference the preceding paragraphs 1-43.

45. Petitioner requests a declaration from this Court that he is not an applicant for admission "seeking admission" or "an arriving alien" subject to mandatory detention under 8 U.S.C. §§ 1225(b)(1) or (b)(2), and that his current detention by Respondents is proper, if at all, only under 8 U.S.C. § 1226(a).

SECOND CLAIM FOR RELIEF:
No-Bond Detention in Violation of 8 U.S.C. § 1226(a)

46. Petitioner re-alleges and incorporates by reference the preceding paragraphs 1-43.

47. Since Petitioner is not an applicant for admission "seeking admission" or "an arriving alien" subject to 8 U.S.C. §§ 1225(b)(1) or (b)(2), and has no disqualifying criminal arrests or convictions subject to 8 U.S.C. § 1226(c), he is entitled to a bond redetermination hearing by an immigration judge pursuant to 8 U.S.C. § 1226(a).

48. Respondents' actions, as set forth herein, violate Petitioner's statutory right to seek bond from an immigration judge.

THIRD CLAIM FOR RELIEF:
Detention in Violation of Due Process

49. Petitioner re-alleges and incorporates by reference the preceding paragraphs 1-43.

50. Immigration detention is civil, not criminal, in nature. There are only two permissible reasons for immigration detention: to avoid flight risk, and to avoid danger to the community.

51. After entering the United States some 30 years ago, Petitioner went on to develop ties to the community over the course of several years. Petitioner is therefore a "person" within the meaning of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and has a liberty interest in freedom from physical restraint.

52. Respondents' actions in detaining Petitioner without a bond hearing before a neutral and detached magistrate deprives Petitioner of his rights without due process of law.

REQUEST FOR RELIEF

Petitioner prays for judgment against Respondents and respectfully requests that the Court enters an order:

a) Issuing an Order to Show Cause, ordering Respondents to justify the basis of Petitioner's detention in fact and in law, forthwith;

b) Enjoin Petitioner's transfer outside of this judicial district pending this litigation;

c) Declare that Petitioner is not an applicant for admission "seeking admission" or "an arriving alien" subject to 8 U.S.C. § 1225(b);

d) Declare that Respondents' actions, as set forth herein, violate Petitioner's due process rights;

e) Declare that Respondents may properly detain Petitioner, if at all, only pursuant to 8 U.S.C. § 1226(a);

f) Order that Respondents conduct a bond hearing for Petitioner pursuant to 8 U.S.C. § 1226(a) within 15 days;

g) Grant the writ of habeas corpus and order Respondents to release Petitioner forthwith, upon payment of any bond ordered by the Immigration Judge;

h) Award Petitioner his costs of suit and reasonable attorney's fees pursuant to the Equal Access to Justice Act; and

i) Grant any other relief that this Court deems just and proper.

Respectfully submitted,

Date: November 7, 2025

/s/ Simon Sandoval-Moshenberg
Simon Sandoval-Moshenberg, Esq.
Virginia State Bar no. 77110
Murray Osorio PLLC
4103 Chain Bridge Road, Suite 300
Fairfax, Virginia 22030
Telephone: 703-352-2399
Facsimile: 703-763-2304
ssandoval@murrayosorio.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this date, I uploaded the foregoing, with all attachments thereto, to this court's CM/ECF system, which will send a Notice of Electronic Filing (NEF) to all case participants. I furthermore will send a copy by certified U.S. mail, return receipt requested, to:

Civil Process Clerk
U.S. Attorney's Office for the District of Colorado
1801 California Street, Suite 1600
Denver, CO 80202

Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW, Mail Stop 0485
Washington, DC 20528-0485

Pamela Bondi, Attorney General of the United States
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
500 12th Street SW, Mail Stop 5902
Washington, DC 20536-5902

Juan Baltasar, Warden
Denver Contract Detention Center
3130 N. Oakland St.
Aurora, CO 80010

Respectfully submitted,

Date: November 7, 2025

/s/ Simon Sandoval-Moshenberg
Simon Sandoval-Moshenberg, Esq.
Virginia State Bar no. 77110
Murray Osorio PLLC
4103 Chain Bridge Road, Suite 300
Fairfax, Virginia 22030
Telephone: 703-352-2399
Facsimile: 703-763-2304
ssandoval@murrayosorio.com

Counsel for Petitioner