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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Julian Flores Marquez, Israel Garcia Plancarte. Petitioners, v. Jason Knight, Acting Las Vegas/Salt Lake City Field Office Director, Enforcement and Removal Operations, United States Immigration and Customs Enforcement (ICE); John Mattos, Warden, Nevada Southern Detention Center; Todd Lyons, Acting Direction, United States Enforcement and Removal Operations; Kristi NOEM, Secretary, United States Department of Homeland Security; Pamela BONDI, Attorney General of the United States; Executive Office for Immigration Review Respondents.	**REPLY TO RESPONDENTS RESPONSE TO THE PETITION FOR WRIT OF HABEAS CORPUS** Case No. 2:25-CV-02203 RFB-NJK

INTRODUCTION

Petitioners, by and through above-named counsel of record, submits this Reply to Respondents Response to Petition for Writ of Habeas Corpus. Petitioners are amenable to receiving a ruling on the pleadings and are willing to waive a hearing,

Respondents rely on their response filed in Morales Rendon, Case No. 2:25-cv-01979-RFB-BNW as their response in the instant case. Therefore, Petitioners will address the arguments raised in that response in this reply. Respondents incorrectly assert that this court lacks jurisdiction. Respondents also incorrectly assert that Petitioners detention is mandated by statute. By contrast, Petitioners are requesting that this court require Respondents to properly apply the Congressionally designed and enacted detention scheme that Respondents have recently chosen to discard via invalid and unconstitutional reinterpretation and decision making. Respondents' new interpretation is invalid because it is both unconstitutional and because it would overrule the explicit decisions made by the agency during the public rulemaking process in 1997. Petitioners are asking this court to require Respondents to properly apply the law as established by statute and regulation. It is Petitioners position that Respondents' recent reinterpretation of the nearly thirty-year-old statutory detention scheme and application of that reinterpretation to preclude their eligibility for release from detention or in the alternative a bond hearing violates their constitutional right to procedural and substantive due process. Respondents' novel statutory interpretation also violates the intent of Congress, as expressed in the statutory scheme and Congressional record, the regulations, Supreme Court and agency precedent. Respondents also incorrectly argue that Petitioners may challenge his detention via a

bond hearing. Respondents argument is just another tactic to deny Petitioners of their due process rights. Respondent Flores Marquez requested a bond hearing and the Immigration Judge determined the Court lacked jurisdiction to hear the motion due to *Matter of Yajure-Hurtado.* As to Petitioner Plancarte it would be futile to request a bond hearing given the position of Immigration Court's throughout the country.

II. ARGUMENT

A. THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S CONSTITUTIONAL AND STATUTORY INTERPRETATION CLAIMS.

Buried in Respondents' response is the assertion that this Court does not have jurisdiction to consider Petitioner's Petition because "Congress has stripped the federal courts of jurisdiction over challenges to the commencement of removal proceedings, including the consequent detention pending removal proceedings." Respondents' Return at 1. Thereafter Respondents cite three specific provisions of 8 U.S.C. 1252 as statutory authority for this claim. Those statutes are 8 U.S.C. 1252(a)(5), 1252 (b)(9), and 1252(g). None of these statutory provisions controls or in any way restricts the jurisdiction of this court to decide Petitioner's Petition for a Writ of Habeas Corpus.

1. 8 U.S.C. § 1252(a)(5)

8 U.S.C. § 1252(a)(5) states:

> Exclusive means of review: Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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). For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review

pursuant to any other provision of law (statutory or nonstatutory).

Petitioners are not challenging a final order of removal, because a final order of removal has yet to be issued in his on-going removal proceedings. Therefore, 8 U.S. C. 1252(a)(5) is neither relevant nor controlling of this court's jurisdiction.

2. 8 U.S.C. § 1252(b)(9)

Often referred to as the "zipper clause," 8 U.S.C. § 1252(b)(9) states:

> (9) Consolidation of questions for judicial review: Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

As noted above, Petitioners are not asking this court to review any question of law or fact or constitutional or statutory provision that has arisen from removal proceedings against him; at this point those proceedings have barely begun. In *Nielsen v. Preap*, 586 U.S. 392 (2019), detainees were denied bond hearings and subjected to mandatory detention pursuant to 8 U.S.C. § 1226(c*). Id.* at 399. The Supreme Court held that § 1252(b)(9) did not bar jurisdiction: "[a]s in *Jennings*, respondents here 'are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal [as opposed to the decision to deny them bond hearings]; and they are not even challenging any part of the process by which their removability will be determined.'" *Id.* at 402 (emphasis added). Thus, *Preap*

makes clear that decisions to deny bond hearings fall outside the purview of § 1252(b)(9)'s jurisdictional bar. The U.S. Supreme Court's further analysis (in addition to *Nielsen v. Preap*) of the applicability of 8 U.S.C. § 1252(b)(9) in *DHS v. Regents of Univ. of Cal.,* 591 U.S. , 140 S. Ct. 1891, 1907 (2020) the U.S. Supreme Court clarified "a claim only 'aris[es] from' a removal proceeding when the parties are challenging ... removal proceedings."

Similarly, the Supreme Court held in *Jennings v. Rodriguez,* 138 S. Ct. 830 (2018) that not every action taken that leads to or is related to an alien's removal should fall within the "zipper clause" of §1252(b)(9). *Jennings* at 840. The Court in *Jennings* held that the dividing line was whether or not the legal questions raised were specifically legal questions raised and addressed in removal proceedings. *Id.* at 841. According to the Court, discerning the dividing line requires answers to the following questions: Are the plaintiffs asking for a review of an order of removal? Are they challenging the decision to seek removal? Are they challenging any part of the process by which their removability will be determined? Id. If not, then the legal questions based on such actions can receive judicial review independent of §1252(b)(9). *Id.* Finally, in *Nasrallah v. Barr*, 140 S.Ct. 1683, 1691 (2020), the Supreme Court stated "For purposes of this statute, final orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals that affect the validity of the final order of removal." *Nasrallah,* at 1691. Based on these authorities, the zipper clause of 8 U.S.C. 1252(b)(9) does not preempt or bar jurisdiction in this matter, because Petitioners are not asking this court to review any ruling that would affect the validity of a final order of removal (that does not presently exist).

3. 8 U.S.C. § 1252(g)

For the similar reasons, these authorities and arguments also support the conclusion that U.S.C. § 1252(g) does not bar this court's jurisdiction over Petitioners Petition for a Writ of Habeas Corpus. The text of the statute is precise and self-limiting:

> (g) Exclusive jurisdiction: Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Section 1252(g) thus, should be read "narrowly" as to apply "only to three discrete actions that the Attorney General may take: the 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.

Again, Petitioners are not contesting any aspect of removal proceedings. Rather, Petitioners are contesting the completely separate collateral decision of Respondents to detain them without bond throughout their removal proceedings, based on the Respondents' novel claim that because they are inadmissible aliens, defined by statute as an applicant for admission 8 U.S.C. § 1225(a), that they are subject to mandatory detention without bond throughout the course of those removal proceedings.

B. CONGRESSES' DETENTION SCHEME

The crux of the issue presented by Petitioners is the question of whether they are detained by the government pursuant to 8 U.S.C. § 1226(a), and is therefore statutorily and regulatorily eligible for a bond hearing before an IJ, or whether, as an "applicant for admission" or "inadmissible alien" his detention is pursuant to 8 U.S.C. § 1225 therefore mandatory, with

no statutory or regulatory right to a bond hearing. Respondents' statutory and legal claims begin with their bald assertion that because Petitioner is "an applicant for admission" he is therefore, inevitably, inescapably, and permanently subject to mandatory detention pursuant to 8 U.S.C. § 1225. According to Respondents, Congress in 1996 clearly intended the detention provisions of 8 U.S.C. § 1225 to apply to all "applicants for admission." But Respondents' recent reinterpretation of that statutory language misunderstands and misinterprets the statutory term "applicants for admission," conflating two subgroups that Congress purposefully and explicitly chose to treat differently for detention purposes. While Congress classed them together for purposes of formal removal proceedings, Congress explicitly recognized that—when it comes to detention, the two subgroups are not identical and therefore cannot, constitutionally, be subject to the same detention regime.

As numerous federal courts have found in the last few months, Respondents' reinterpretation contradicts and ignores the Congressional history, the regulatory history, the regulations themselves, and the intervening precedent. See, e.g., *Martinez v. Hyde*, 1:25-cv-11613, 2025 WL 2084238 (D. Mass. July 24, 2025); *Herrero-Encarnacion v. Moniz*, 25-12237-LTS (D. Mass. Sept. 5, 2025); *Hernandez-Nieves v. Kaiser*, 25-cv-06921-LB, 2025 WL 2533110 (N.D. Cal. Sept. 3, 2025); *Caicedo-Hinestroza v. Kaiser*, 3:25-cv-07559, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Salcedo Aceros v. Kaiser*, 25-cv-06924-EMC, 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Pablo-Sequen v. Kaiser*, 25-cv-06487-PCP, 2025 WL 2650637 (N.D. Cal. Sept. 16, 2025), subsequent decision 2025 WL 2935630 (N.D. Cal. Oct. 15, 2025); *Lopez- Arevalo v. Ripa*, EP-25-cv-337, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Acosta-Roa v. Albarran*, 3:25-cv-07802-RS, 2025 WL 2732923 (N.D. Cal. Sept. 25, 2025);

Valencia-Zapata v. Kaiser, 25-cv-07492-RFL, 2025 WL 2741654 (N.D. Cal. Sept. 26, 2025); *Santiago-Helbrum v. Williams*, 4:25-cv-00349-SHL-SBJ, (S.D. Iowa Sept. 30, 2025*); Quispe-Ardiles v. Noem*, 1:25- cv-01382-MSN-WEF, 2025 WL 2783800 (E.D. Va. Sept. 30, 2025); *Cordero Pelico, et. al. v. Kaiser*, 25-cv-07286-EMC, 2025 WL 2822876 (N.D. Cal. Oct. 3, 2025); Sanchez-Ballesteros v. Noem, et.al., 3:25-cv-594-RGJ, 2025 WL 2880831 (W.D. Ky. Oct. 9, 2025); *Ochoa-Ochoa v. Noem*, 25-cv-10865, 2025 WL 2938779 (N.D. Ill. Oct. 16, 2025); *J.S.H.M. v. Wofford*, 1:25-cv- 01309-JLT-SKO, 2025 WL 2938808 (E.D. Cal. Oct. 16, 2025); *Sabi Polo v. Chestnut*, 1:25-cv-01342-JLT-HBK, 2025 WL 2959346 (E.D. Cal. Oct. 17, 2025).

As they did here, across the U.S. Respondents are routinely citing *Chavez v. Noem,* 3:25- cv-02325, 2025 WL 2730228 (S.C. Cal. Sept. 24, 2025) as one of the minority decisions where the federal court, for one reason or another, denied the Petition for Writ of Habeas Corpus. The reasoning in that decision is analyzed and rejected in *Cordero Pelico, et. al. v. Kaiser*, 25-cv- 07286-EMC, 2025 WL 2822876 (N.D. Cal. Oct. 3, 2025), and Petitioners would refer the court to that analysis.

1. 8 U.S.C. § 1225 or 8 U.S.C. § 1226?

Respondents assert that because Petitioners, as individuals present in the U.S. without lawful admission, is deemed by 8 U.S.C. § 1225(a) to be an "applicant for admission," they are inescapably and permanently subject to mandatory detention pursuant to the terms of 8 U.S.C. § 1225, including 8 U.S.C. § 1225(b)(2)(A). Respondents analysis fails to recognize the explicit distinctions between Immigration and Nationality Act's (INA) precise classifications and sub classifications. More specifically, Respondents analysis erases a deliberate,

congressionally created, subdivision in the larger class of noncitizens classified by law as "applicants for admission." Respondents then assert, having erased the subdivision, that the statutory provisions congress explicitly made applicable solely to a subdivision of the larger class are now applicable to the entire class.

i. The Statutory Text and the Record of Congressional Intent

As a starting point, compare the largest of the INA's classifications--found in 8 U.S.C. § 1101 (a)(15). That section defines two classes of non-citizens or aliens: immigrants and non-immigrants. In that section, the sub-classes of non-immigrants are precisely and exhaustively defined, while the immigrant class is defined as "every alien except an alien who is within one of the following classes of nonimmigrant aliens. . ." 8 U.S.C. § 1101 (a)(15). Similarly, in 8 U.S.C. § 1225(a), revised and enacted as section 302 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (IIRIRA), Congress defines another large class, that of "applicants for admission" in opposition to aliens who have been lawfully admitted, specifically in order to collapse the prior legal distinctions between exclusion and deportation proceedings. Report of the Committee on the Judiciary on H.R. 2202, Report No. 104-469, 225, Part I (March 1996). ("This subsection is intended to replace certain aspects of the current 'entry doctrine,' under which 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 at a port of entry. Hence, the pivotal factor in determining an alien's status will be whether or not the alien has been lawfully admitted.") Id. In other words, in IIRIRA, Congress deliberately created and defined the class of "applicants for admission" and explicitly added provisions to 8 U.S.C. §

1182 so as to collapse what it saw as procedural advantages gained by aliens subject to deportation as opposed to exclusion, and to explicitly combine into one single "removal" proceeding all efforts to remove noncitizens unlawfully present in the U.S., regardless of how and when they arrived. In other words, Congress intended with the enactment of IIRIRA to divide all non-citizens into two large classes: admitted aliens and inadmissible aliens. The class of admitted aliens can be further subdivided into admitted aliens who remain in lawful status, and those admitted aliens who are subject to the grounds of removal found at 8 U.S.C. § 1227, while the class of inadmissible aliens is also known as "applicants for admission" and was also deliberately subdivided by Congress in IIRIRA.

As the statutory language makes clear, while Congress intended to collapse the prior legal distinctions between those who have made an entry, and those who have not, and to combine both exclusion and deportation into one single removal procedure, Congress in 1996 also recognized the constitutional constraints of due process. Consistent with that awareness, IIRIRA draws very careful lines. The class of inadmissible aliens, also known as "applicants for admission" is defined in opposition to the class of "admitted but removable" aliens. IIRIRA added 8 U.S.C. § 1182(a)(6)(A)(i) explicitly to ensure that all noncitizens who had not been lawfully admitted or paroled would be charged with a ground of inadmissibility:

> This subsection will conform the grounds of inadmissibility under section 212(a) with the new doctrine of ''admission'' established in section 301(a) of the bill. Currently, aliens who have entered without inspection are deportable under section 241(a)(1)(B). Under the new ''admission'' doctrine, such aliens will not be considered to have been admitted, and thus, must be subject to a ground of inadmissibility, rather than a ground of deportation, based on their presence without admission. (Deportation grounds will be reserved for aliens who have been admitted to the United States.)

Report of the Committee on the Judiciary on H.R. 2202, Report No. 104-469, 226, Part I (March

1996). But because Congress also explicitly understood the constitutional constraints of due process, the definition of "applicants for admission" includes two separate and clearly identifiable subclasses: A) aliens "present without admission" and B) aliens "who arrive in the United States." 8 U.S.C. § 1225(a). Note that these two groups are parallel, although not identical, to the two groups that under prior law fell within each of the two separate procedures—deportation and exclusion. As part of the enabling regulations, the government precisely defined the second subclass, also known as "arriving aliens." 8 C.F.R. § 1.2. Congress had solid constitutional reasons for distinguishing between the subclass of "arriving alien" applicants for admission at the nation's borders, and those merely deemed 'applicants for admission' as a legal fiction for purposes of removal proceedings. Principal among those reasons is the recognition that foreign nationals are persons included within the protections of the U.S. Constitution, and that the constitutional requirements of due process are at their strongest when the government is depriving a human person of her liberty:

> But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers in respect of the matters upon which that liberty depends -- not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

Yamataya v. Fisher (Japanese Immigrant Case), 189 U.S. 86, 100-101 (1903). [As referenced in *Reno v. Flores,* 507 U.S. 292, 306 (1993)]. When Congress drafted and passed IRRIRA, it deliberately chose to define the class of all aliens who have not been lawfully admitted to the U.S. as "applicants for admission." But Congress just as deliberately recognized and enshrined in the statute the two subclasses composing "applicants for admission:" arriving aliens--actual aliens seeking admission—and individuals present in the United States who have not been admitted, who have never sought admission, but who Congress nevertheless deems "applicants for admission" as a legal fiction. The distinction between these two subclasses is squarely based in the long history of Supreme Court precedent recognizing that A) the requirements of constitutional due process are lowest for those arriving at the nations' borders, and B) aliens arrested and detained within the United States, regardless of how they entered, and especially when they have been present for extended periods, cannot be taken into custody and held arbitrarily. *e.g., Yamataya; Reno v. Flores*. See also, the extended discussion of these intertwined issues in *Make the Road New York, el. al. v. Noem* 1:25-cv-190 (D.D.C.) Memorandum Opinion August 29, 2025, pp. 23-25; and *Coalition for Humane Immigrant Rights v. Noem,* 1:25-cv-872 (D.D.C.) Memorandum Opinion August 1, 2025. It is precisely because of these constitutional due process requirements that, following the combination of "arriving aliens" and "aliens present without admission" into one single class of "applicants for admission" in 8 U.S.C. 1225(a), Congress carefully distinguishes and focuses on actual "arriving alien" applicants for admission throughout 8 U.S.C. 1225(b)(1). The provisions of (b)(1)(A) are explicitly applied to any "alien who is arriving" in the U.S.[1] For the same

[1] Petitioners recognize\ that the statute also authorizes the potential inclusion of the special class described in clause (iii). Petitioner would point the Court to the thorough analysis of clause (iii)

constitutional reasons, Congress deliberately drafted the syntactically convoluted text of 8 U.S.C. § 1225(b)(2)(A) to maintain this distinction between the two sub-classes of "applicants for admission." There is no other explanation for the addition of the "seeking admission" qualifier.

The BIA's reading of the text in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), supported and argued to be controlling by the Respondents, renders that 'seeking admission' superfluous. The BIA and Respondents seek to interpret the text to expand the most restricted form of constitutional due process—that provided to non-citizen aliens seeking admission at the U.S. borders—throughout the entire territory of the United States. As the Supreme Court wrote in *Landon v. Plascencia,* 459 U.S. 21, 33 (1982) "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." *Plascencia* at 33. In order to reduce the constitutional rights of noncitizens within the U.S., the BIA and the Defendants would read the "seeking admission" qualifier completely out of the text. They would read 8 U.S.C. § 1225(b)(2)(A) to say: "in the case of an alien who is an applicant for admission, if 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." In essence, this reading would convert every immigration agent throughout the United States into an examining officer. But Congress included that "seeking admission" phrase to reemphasize that the examination procedures laid out in 8 U.S.C. § 1225

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in *Coalition for Humane Immigrant Rights v. Noem,* 1:25-cv-872 (D.D.C.) Memorandum Opinion August 1, 2025.

are applicable at the nation's borders. Threaded through the Report of the House Judiciary Committee's explication of the text of INA § 235/8 U.S.C. § 1225, are the qualifiers: "arriving alien" "aliens seeking admission" "an alien applying for admission" "aliens arriving". Regarding the (b)(2) provisions at issue here, Congress explicitly applies them to "inspection of other arriving aliens". House Judiciary Report, supra. at 229.

ii. The Implementing Regulations

The regulations published in 1997 by the Respondent departments, agencies and their predecessors, 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), also directly contradict Respondents' current interpretation, and instead squarely support the intended distinction between the two sub-classes of "applicants for admission." To begin, the caption of 8 C.F.R. § 236 explicitly includes within the scope of its detention provisions both inadmissible and deportable aliens. If, as Respondents argue, all "applicants for admission" are always and only covered by the detention provisions of 8 C.F.R. § 235, then which inadmissible aliens is 8 C.F.R. § 236 referencing? As noted above, the primary Congressional purpose for creating the "applicant for admission" class was to separate the "inadmissible" noncitizens, who had never been lawfully paroled or admitted from the "deportable" aliens who had been admitted, but were now removable. Inadmissible aliens and "applicants for admission" are two different terms for the same group of people.

But the caption is not the only challenge to Respondents' new interpretation of the statutory language. That is the case because Respondents' predecessor agencies initially proposed regulations which would have done precisely what Respondents now assert Congress

intended. That is, the proposed regulations published in January 1997 included explicit language stating, with regard to the 8 U.S.C. 1226, "An immigration judge may not exercise authority provided in this section and the review process described in paragraph (d) of this section shall not apply with respect to: (i) inadmissible aliens in removal proceedings." 62 F.R. 444, 483 (January 3, 1997) [236.1(c)(5)(i)]. Had that regulation remained as proposed, the BIA's recent decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) would not be novel: instead, it would have been the law for the past nearly thirty years. But in 1997 when the government published the final regulations that proposed language was explicitly and deliberately removed, with the following explanation:

> The supplementary information stated the Department's intended approach, and clause (i) of the proposed regulation was in error. Accordingly, the interim rule removes paragraph (c)(5)(i) of § 236.1 and renumbers the remaining paragraphs (c)(5)(ii), (iii), and (iv). The effect of this change is that inadmissible aliens, except for arriving aliens, have available to them bond redetermination hearings before an immigration judge, while arriving aliens do not.

62 F.R. 10312, 10323 (March 6, 1997). Compare 62 F.R. 10312, 10361 [236.1(c)(5)(i)] with 62 F.R. 444, 483 [236.1(c)(5)(i)]. In other words, the BIA's assertion in *Yajure Hurtado* that the Immigration Judges do not have authority to adjudicate bonds for any inadmissible alien, (otherwise defined in 8 U.S.C. § 1225(a) as an "applicant for admission") was considered and explicitly rejected when the implementing regulations were published in 1997.

The Ninth Circuit has held that an executive branch agency such as the BIA cannot 'overrule' by adjudication regulations that were promulgated after notice and comment. *Patel v. INS*, 638 F.2d 1199, 1202 (9th Cir. 1980). ["Thus, by adjudication, the Board attempted to add a requirement to the 1973 regulation which had been expressly discarded during its rule-making

proceedings."] And yet that is precisely the action that Respondents are here asking this Court to support, as they ask this Court to sustain the BIA's decision in *Yajure Hurtado* that Immigration Judges do not have authority to grant bond to any member of the entire class of "inadmissible aliens" otherwise known as "applicants for admission."

iii. Governing DHS Policy Prior to 2025

Respondents argument boils down to the claim that—read and interpreted as they chose to read and interpret the statutory language in 2025—because Petitioner has never been admitted, he could only ever, as a matter of law, be detained pursuant to 8 U.S.C. 1225. But as the above statutory and regulatory history documents, the Respondents' interpretation of the statutory text finds little to no support in the legislative history, and is directly opposed to the clear choice of the March 1997 implementing regulations. For the last nearly thirty years, the government policy has been that DHS has the right to chose how it wishes to detain and process individuals who are encountered in the U.S. near the U.S. border, and that the provisions of 8 U.S.C. 1226(a) applied to all individuals present without admission who are encountered for the first time within the interior of the United States. This is supported by the judge's finding in *Cordero Pelico v. Kaiser*, 3:25-cv-07286-EMC (N.D. Cal. Oct. 3, 2025):

> [T]he government has conceded in other contexts that "DHS's long-standing interpretation has been that 1226(a) [discretionary detention] applies to those who have crossed the border between ports of entry and are shortly thereafter apprehended." Dkt. No. 17 (citing Solicitor General, Transcript of Oral Argument at 44:24–45:2, *Biden v. Texas*, 597 U.S. 785 (2022) (No. 21-954)). And in its briefing before this Court, the Government acknowledges that "until recently," it considered § 1226(a) to be an available detention authority for noncitizens who might also be subject to § 1225.

Cordero Pelico, at 6. *See also, Martinez v. Hyde,* 1:25-cv-11613-BEM, at 9, ftnt 9.

Petitioner Flores Marquez was not encountered at the U.S. Border. Petitioner has been residing in the United States since 2001--for over two decades. He has had two incidents, one for a DUI in 2006 and an incident in 2025 which was dismissed by the state criminal courts. Petitioner Flores Marqusez provided evidence of the DUI conviction and the dismissal of the 2025 incident. However, Respondents conveniently disregard the dismissal of the latest arrest when they state on page 3, lines 13-14 of their Response. *See* Respondents Response in Flores Marquez et al. Petitioner Plancarte was also not encountered at the U.S. Border. Petitioner has been residing in the United States since 2006--for almost two decades. He has a recent arrest for a misdemeanor Public Intoxication. Again, documents regarding this incident were previously provided to the Court and Respondents. In both cases, Respondents have issued no arrest warrant, and that failure calls into question the legal basis for Petitioners arrest and detention. Respondents do not assert that Petitioners were arrested or detained during or shortly after crossing the border without authorization. Respondents merely assert that Congress in 1996 intended the entire class of "applicants for admission" without regard to subclass, to be subject to mandatory detention. Respondents again make a bald assertion without evidence that Petitioner Flores Marquez applied for a visa in 2008. Presumably to argue that Petitioner Flores Marquez was an "applicant for admission." An assertion that Petitioner Flores Marquez denied to Respondents upon an initial interview. Respondents once again conveniently leave out any evidence regarding this bald assertion.

The U.S. Supreme Court's analysis of 8 U.S.C. 1225 and 1226 in *Jennings v. Rodriguez*, 583 U.S. 281, (2018) recognizes the distinctions at issue, stating:

> In sum, U. S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§1225(b)(1) and (b)(2). It also authorizes the Governm-ent to detain certain aliens already in the country

pending the outcome of removal proceedings under §§1226(a) and (c).

Jennings at 289. Note the clear recognition that while "aliens seeking admission" (or arriving aliens, as defined in the regulations) are subject to detention under §§1225(b)(1) and (b)(2), "aliens already in the country may be detained . . . under §§1226(a) and (c)." The Supreme Court further wrote "As noted, §1226 applies to aliens already present in the United States. Section 1226(a) creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings." *Id.* at 303. In other words, the Supreme Court in *Jennings* recognized that 8 U.S.C. §1225(b) applied only to the subclass of "applicants for admission" who were actually "seeking admission" at the border. The other subclass of "applicants for admission," "an alien present . . . who has not been admitted" or "certain aliens already in the country" or "aliens already in the country" may be detained under §1226(a). *Jennings* does not support a legal conclusion that individuals who are not seeking admission, who are already present in the country, who have never sought admission, are subject to detention pursuant to 8 U.S.C. § 1225.

Respondents novel arguments amount to an implicit assertion that for nearly thirty years, the regulations stating that inadmissible aliens detained within the United States were subject to detention pursuant to 8 U.S.C. § 1226(a) were unlawful, ultra vires. But merely because Congress has suddenly granted the U.S. government enormous sums of money to fund detention does not magically erase all the government's prior regulatory choices. The governments' implicit argument that its policies and procedures over the past 29 years have been invalid and illegal, and the Respondents' argument that the statutory language can only be read as they now propose to read it, are unsupported by the Congressional record or the statutory text,

and at its core the agency's new interpretation is nothing more than an invalid and unconstitutional attempt by an executive branch agency to impose via adjudication a statutory interpretation rejected in the Congressional Record and thereafter proposed and then explicitly rejected as part of the implementing regulations.

C. THE AUTOMATIC STAY REGULATION AT 8 C.F.R. § 1003.19(i)(2) IS ULTRA VIRES AND UNCONSTITUTIONAL

Petitioners concede that they are not detained due to an automatic stay and such assertion was a mistake made by Petitioners counsel. Rather Petitioners detention is due to Respondents illegal interpretation of the mandatory detention regulations. However, as this Court is very much aware the issue of Respondents filing automatic stays in bond cases in this jurisdiction alone raises the likelihood that should Petitioners be ordered released on bond Respondents are likely to file an automatic stay given their recent conduct on a majority of bond cases. Thus, the issue also needs to be addressed by the Court.

The automatic stay regulation is both *ultra vires* and unconstitutional. Petitioner swill not restate those arguments here. s will, however, point the court to further persuasive analysis and evaluation not previously cited. *See, e.g.*, the analysis of the constitutionality and ultra vires nature of the regulation in *Garcia Jimenez v. Kramer*, 4:25-cv-03162, 2025 WL 2374223 (D. Neb. Aug. 14, 2025). The court in *Garcia-Jimenez* held:

> By permitting DHS to unliterally extend the detention of an individual, in contravention of the findings of an agent (the IJ) properly delegated the authority to make such a determination, 8 C.F.R § 1003.19(i)(2) exceeds the statutory authority Congress gave to the Attorney General. "Because this back-ended approach effectively transforms a discretionary decision by the immigration judge to a mandatory detention imposed by[DHS], it flouts the express intent of Congress and is ultra vires to the statute." *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1079 (N.D. Cal. 2004). Accordingly, the challenged regulation is invalid and Petitioner's detention on that basis is unlawful.

Garcia Jimenez at 10. Other courts reaching the same conclusions regarding the either or both the unconstitutionality and ultra virus nature of the automatic stay regulation at 8 C.F.R. § 1003.19(i)(2) include *Encarnacion v. Moniz, supra*; *da Silva v. ICE*, 1:25-cv-00284, 2025 WL 2778083 (D.N.H. Sept. 29, 2025); *Ayala Casun v. Hyde,* 25-cv-427, 2025 WL 2806769 (D.R.I. Oct. 2, 2025); *Leal-Hernandez v. Noem*, 1:25-cv-02428, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Hasan v. Crawford*, 1:25-cv-01408, 2025 WL 2682255 (E.D. Va. Sept. 19, 2025); *Campos-Leon v. Forestal*, 1:25-cv-01174, 2025 WL 2695763 (S.D. Ind. Sept. 22, 2025). Petitioners further note, as many of these decisions have also held, that requiring them to remain detained and separated from their families while the government seeks to overrule the IJ's decision granting them bond, would constitute a further violation of their constitutional rights. Filing an automatic stay by Respondents would allow them to continue to detain Petitioners unlawfully. There is no foundation in the statutory language to support the retroactive application of the government's new border detention and expanded expedited removal policy, to override and reverse the prior government decision to process the Petitioners pursuant to 8 U.S.C. § 1226, rather than 8 U.S.C. § 1225. The regulations that would keep Petitioners detained even with a grant of a bond is ultra vires to the statute and unconstitutional.

D. CONTINUED DETENTION OF PETITIONERS VIOLATES DUE PROCESS.

Respondents generally assert that Petitioner's continued temporary detention does not offend due process because Congress has authorized mandatory detention of noncitizens pending the resolution of their removal proceedings under § 1225. The Due Process Clause prohibits deprivations of life, liberty, and property without due process of law. See U.S.

CONST., amend. v_. There is no question that these protections extend to noncitizens present in the United States. *See e.g., Trump v. J.G.G.*, 604 U.S. 145 S. Ct. 1003, 1006 (2025) (per curiam) ("'It is well established that the Fifth Amendment entitles aliens to due process of law' in the context of removal proceedings ... ") (*quoting Reno v. Flores*, 507 U.S. 292, 306 (1993)); *Zadyydas v. Davis*, 533 U.S. 678, 693, (2001) ("[T]he Dre Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *Hussain v. Rosen,* 985 F.3d 34, 642 (9th Cir. 2021) (holding the "Fifth Amendment entitles aliens to due process of aw in deportation proceedings.").

A constitutional due process challenge can be either facial, as applied, or both. *See Rodriguez Diaz*, 53 F.4th at 1203. A facial challenge is "a claim that the legislature [or administrative agency] has violated the Constitution" meaning that "the plaintiff must show that no set of circumstances exists under which the statute would be valid." Id. [(internal quotation and citations omitted). "An as-applied challenge, meanwhile, 'focuses on the statute's [or regulation's] application to the plaintiff' and requires the court to only assess the circumstances of the case at hand." *Id.* (*quoting Wells Fargo Bank, N.A. v. Mahogany Meaaows Ave. Tr.,* 979 F.3d 1209, 1217 (9th Cir. 2020).) Regardless of the type of challenge, however, the underlying constitutional standard remains the same. *Regino v. Staley*. 133 F.4th 951, 96 (9th Cir. 2025) (*citing Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th br. 2010)) Noncitizen detainees charged with being in the U.S. illegally are entitled to procedural due process, meaning "notice and opportunity to be heard 'appropriate to the nature of the case.'" *J.G.G.,* 145 S.Ct. at 1006; *see also A. A. R. P. v. Trump* 145 S. Ct. 1364, 1367 (2025). Due process "is a flexible concept that varies with the particular situation." *Zihermon v. Burch,*

494 U.S. 113, 127 (1990). "[T]he government's discretion to incarcerate noncitizens is always constrained by the requirements of due process." *Hernandez v. Sessions,* 872 F.3d 976, 981 (9th Cir. 2017).

Thus, in the instant case the decision to deny hearing regarding bond without the opportunity to be heard "appropriate to the nature of the case" is a violation of Petitioners' procedural and substantive due process rights.

E. PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully ask that this Court grant:

1. The Petition for a Writ of Habeas Corpus;
2. Order Respondents to release them upon posting of a security bond of $1,500.00 to this Court;
3. In the alternative Order that the Immigration Court conduct an individualized bond hearing within 5 days of this Order;
4. Prohibit Respondents from filing an automatic stay if Petitioners are granted bond;
5. An award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 28 U.S.C. § 2412, and on any other basis justified under the law; and
6. Grant any other and further relief that this Court deems just and proper.

RESPECTFULLY SUBMITTED this 21st day of November, 2025.

FILLMORE SPENCER LLC

/s/ T Laura Lui
Attorney for Petitioners