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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

9 JOSEFA HERNANDEZ BERNAL,

10
11 Petitioner,

12 v.

13 SERGIO ALBARRAN¹, Field Office Director of
14 the San Francisco Immigration and Customs
15 Enforcement Office; TODD LYONS, Acting
16 Director of United States Immigration and
17 Customs Enforcement; KRISTI NOEM,
18 Secretary of the United States Department of
19 Homeland Security, PAMELA BONDI,
20 Attorney General of the United States, acting in
21 their official capacities,

22 Respondents.

CASE No. 3:25-cv-09772-RS

**PETITIONER'S TRAVERSE IN
SUPPORT OF PETITION FOR WRIT
OF HABEAS CORPUS**

¹ Sergio Albarran is Automatically Substituted as a Defendant in This Matter Pursuant to Rule 25(D) of the Federal Rules of Civil Procedure.

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1 INTRODUCTION

2 Respondents do not dispute that Petitioner Josefa Hernandez Bernal (“Petitioner”), an
3 asylum seeker from Venezuela, poses no flight risk or danger to the community. Nor could they;
4 she has complied with every requirement the immigration system has asked of her. Indeed, she was
5 arrested at an immigration check-in that she dutifully attended. Respondents also do not
6 meaningfully respond to Petitioner’s claim that her re-detention would violate the Due Process
7 Clause. Instead, Respondents insist that Petitioner’s detention is mandated by statute, relying on
8 arguments this Court—along with hundreds of judges across the country—has rejected.

9 Although the parties dispute whether Petitioner is subject to 8 U.S.C. § 1226(a) or 8 U.S.C.
10 § 1225(b)(2)(A), that distinction does not bear on outcome of Ms. Hernandez Bernal’s
11 constitutional claims. Respondents violated Petitioner’s due process rights, regardless of which
12 statute applies. *See R.A.N.O. v. Wofford*, No. 1:25-cv-01535-KES-EPG, 2026 U.S. Dist. LEXIS
13 1963, at *n.2 (E.D. Cal. Jan. 6, 2026) (denying request to hold case in abeyance in part because the
14 petitioner raised a constitutional claim and *Rodriguez Vazquez* concerns the scope of §
15 1225(b)(2)(A).) Should the Court reach the detention statute question, however, it should join the
16 overwhelming consensus of district courts nationwide and reject Respondents’ dramatic and
17 implausible interpretation of 8 U.S.C. § 1225(b)(2). *See Barco Mercado v. Francis*, No. 25-cv-6582
18 (LAK), 2025 U.S. Dist. LEXIS 232876, at * 9–10 (S.D.N.Y. Nov. 26, 2025) (documenting over 300
19 cases in which courts have rejected the government’s new interpretation of 8 U.S.C. § 1225).
20 Another court in this district has separately held that the policy authorizing Petitioner’s re-detention
21 is likely unlawful and cannot be justified by DHS’ meritless re-interpretation of § 1225(b)(2). *See*
22 *Garro Pinchi v. Noem*, No. 25-CV-05632-PCP, 2025 U.S. Dist. LEXIS 265062, at *95 (N.D. Cal.
23 Dec. 19, 2025). Because Petitioner has established that her re-detention violates due process, the
24 Court should grant her petition.

25 ARGUMENT

26 **I. Re-detention without a pre-deprivation hearing before a neutral decisionmaker
27 violates Petitioner’s procedural due process rights.**

28 Over 50 years ago, in *Morrissey v. Brewer*, the Supreme Court recognized that individuals
released from government custody have a protected liberty interest in their continued freedom. 408

1 U.S. 471, 482 (1972). The government’s decision to release an individual from custody creates “an
2 implicit promise” that their liberty “will be revoked only if [they] fail[] to live up to the . . .
3 conditions [of release].” *Morrissey*, 408 U.S. at 482. Since then, the Supreme Court has repeatedly
4 affirmed that *Morrissey*’s holding applies to every form of conditional release it has considered.
5 *See, e.g., Young v. Harper*, 520 U.S. 143, 152 (1997) (re-detention after pre-parole conditional
6 supervision); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (same, in probation context);
7 *Morrissey v. Brewer*, 408 U.S. 471 (1972) (same, in parole context).

8 These principles apply with at least equal force to people like Petitioner, who was
9 conditionally released from civil immigration detention. After all, noncitizens living in the United
10 States have a protected liberty interest in their ongoing freedom from confinement. *See Zadvydas*
11 *v. Davis*, 533 U.S. 678, 690 (2017) And, “[g]iven the civil context [of immigration detention],
12 [the] liberty interest [of noncitizens released from custody] is arguably greater than the interest of
13 parolees.” *Ortega v. Bonnar*, 415 F. Supp. 3d 963, 970 (N.D. Cal. 2019). After Petitioner entered
14 the country in 2024, immigration officials classified her as subject to 8 U.S.C. § 1226(a) and
15 released her on an Order of Recognizance, which is a type of conditional parole. *See Ortega-*
16 *Cervantes v. Gonzales*, 501 F.3d 1111, 1115 (9th Cir. 2007) finding “release on recognizance”
17 synonymous with conditional parole); 8 C.F.R. § 236.1(c)(8) (setting standard). That release
18 created a liberty interest that “can be taken away only if the government’s procedure for doing so
19 accord[s] with due process.” *See Tellez v. Bondi*, No. 25-cv-08982-PCP, 2025 U.S. Dist. LEXIS
20 262261, at *12 (N.D. Cal. Dec. 18, 2025).

21 Respondents argue that the liberty interested identified in *Morrissey*—and repeatedly extended
22 to other groups—does not apply to noncitizens. That is wrong. “[D]ecisions defining the
23 constitutional rights of prisoners establish a floor for [noncitizens’] constitutional rights.” *Doe v.*
24 *Kelly*, 878 F.3d 710, 714 (9th Cir. 2017) (holding that civil immigration detention conditions
25 violated due process); *see also Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017)
26 (acknowledging that “criminal detention cases provide useful guidance in determining what
27 process is due non-citizens in immigration detention.”). Respondents do not acknowledge these
28 well-established principles and offer no reason for this Court to depart from them. *See R.A.N.O.*,

1 2026 U.S. Dist. LEXIS 1963, at *n.5 (“To the extent respondents argue that reliance on *Morrissey*
2 is misplaced simply because it arose in the criminal context rather than the immigration context,
3 that argument is unpersuasive.”). Instead, Respondents argue in a footnote that the “goal of
4 integration” into society for parolees is irrelevant to noncitizens in removal proceedings. Return at
5 22, n.6. Respondents’ argument ignores that the immigration laws offer numerous avenues for
6 noncitizens to receive lawful status and join the diverse population of this country. *See, e.g.*, 8
7 U.S.C. § 1154 (family-based immigration); *Id.* 8 U.S.C. § 1158 (asylum); *Id.* 8 U.S.C. §
8 1231(b)(3)(B) (withholding of removal); *Id.* 8 U.S.C. §§ 1255(a), (h) (adjustment of status for
9 special immigrant juveniles and certain victims of crimes). Moreover, the liberty interest in
10 *Morrissey* does not stem from the policy goals of parole; it derives from the parolee’s ability to
11 “form the ... enduring attachments of normal life.” 408 U.S. 471 at 482.

12 Respondents also argue that Petitioner “lacks a liberty interest in *additional* procedures
13 including a custody redetermination or pre-detention bond hearing” beyond what is provided by
14 statute. Return at 21 (emphasis in original). However, “the government’s discretion to incarcerate
15 non-citizens is always constrained by the requirements of due process.” *Hernandez*, 872 F.3d at
16 981. Neither *DHS v. Thuraissigiam* nor *Landon v. Plasencia* hold differently. Those cases
17 concerned due process rights related to procedures for determining *admission* into the United
18 States, not detention. *See Thuraissigiam*, 591 U.S. 103 (2020); *Landon*, 459 U.S. 21, 27 (1982);
19 *see also Jaraba Oliveros v. Kaiser*, No. 25-cv-07117-BLF, at *7–8 (N.D. Cal. Sept. 18, 2025)
20 (finding that *Thuraissigiam* does not apply to detention claim). Respondents’ other authority is
21 similarly unavailing. *Ma v. Barber* concerns the denial of an application for a stay of deportation
22 and did not involve a due process claim. *See* 357 U.S. 185, 187 (1958). *Dave v. Ashcroft*
23 concerned a noncitizen’s interest in “obtaining purely discretionary [immigration] relief”; like
24 *Thuraissigiam*, the case did not involve a challenge to physical custody. 363 F.3d 649, 653 (7th
25 Cir. 2004). In addition, *Pena v. Hyde* did not consider *Morrissey* at all and appears to not involve
26 re-detention at all. No. 25-cv-11983, 2025 WL 2108913 (D. Mass. July 28, 2025); *see also Pico v.*
27 *Noem*, No. 25-cv-08002-JST, 2025 U.S. Dist. LEXIS 232901, at *7 (N.D. Cal. Nov. 26, 2025)
28 (holding that it was unclear from *Pena* whether that petitioner was similarly-situated to a re-

1 detained petitioner). This Court should reject Respondents' unsupported assertion that Petitioner
2 lacks a liberty interest.

3 **A. The *Mathews* Test Applies**

4 Because Petitioner has established a protected liberty interest, the *Mathews* test determines
5 what process is due. *See Johnson v. Ryan*, 55 F.4th 1167, 1179–80 (9th Cir. 2022) (holding that
6 *Mathews* applies to procedural due process claims). Under that test, the court weighs: (1) the
7 private interest affected; (2) the risk of erroneous deprivation and probable value of procedural
8 safeguards; and (3) the government's interest. *Id.*

9 Respondents' claim that *Mathews* does not apply ignores the law in this circuit. As
10 Respondents acknowledge, the Ninth Circuit has "assume[d] without deciding" that *Mathews*
11 applies in the immigration detention context. *See* Return at 21, n.5; *see also Rodriguez Diaz v.*
12 *Garland*, 53 F.4th 1189, 1206–8 (9th Cir. 2022) (applying *Mathews* to § 1226(a) and explaining "it
13 remains a flexible test"); *accord Garro Pinchi v. Noem*, 792 F. Supp. 3d 1025, n.2 (N.D. Cal. July
14 24, 2025) (discussing *Rodriguez Diaz*); *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (applying
15 *Mathews* to due process challenge to immigration hearing procedures). And in *Johnson v. Ryan*,
16 which post-dates *Rodriguez Diaz*, the Ninth Circuit held that *Mathews* applies to procedural due
17 process claims, which this case plainly is. 55 F.4th 1167, 1179–80 (9th Cir. 2022). Respondents
18 offer no basis to depart from this precedent. *See R.A.N.O.*, 2026 U.S. Dist. LEXIS 1963, at *n.7.

19 **B. Petitioner is entitled to a pre-deprivation hearing in which the government bears
20 the burden of proof.**

21 Here, the *Mathews* factors weigh heavily in favor of prohibiting Petitioner's re-detention
22 without a pre-deprivation hearing at which the government bears the burden of proof. *First*, the
23 private interest affected in this case is profound. When considering this factor, courts look to "the
24 degree of potential deprivation." *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1193
25 (9th Cir. 2015) (citing *Mathews*, 424 U.S. at 341). The degree of deprivation here is high.
26 Petitioner has now resided in the United States for over 19 months. Return at 3. She has a pending
27 asylum application. Dkt. 13-1 (Declaration of Josefa Hernandez Bernal) at 2. She lives with her
28 daughter, who is a single mother and relies on her help. *Id.* She provides essential childcare duties
for her seven grandchildren in the United States. *Id.* With these connections, "[her] liberty interest

1 has crystalized into a substantial private interest over time.” See *Valera Chuquillanqui v. Kaiser*,
2 3:25-cv-06320-TLT, slip op. at 11 (N.D. Cal. Oct. 2, 2025).

3 *Second*, “the risk of an erroneous deprivation [of liberty] is high” where “[the petitioner] has
4 not received any bond or custody redetermination hearing,” as is the case here. *A.E. v. Andrews*, No.
5 1:25-cv-00107, 2025 WL 1424382, at *5 (E.D. Cal. May 16, 2025) (quoting *Jimenez v. Wolf*, No.
6 19-cv-07996-NC, 2020 WL 510347, at *3 (N.D. Cal. Jan. 30, 2020)). Normally, an individual
7 subject to U.S.C. § 1226(a), like Petitioner, would be entitled to a post-deprivation bond hearing,
8 which is provided for by the statute. As courts have recognized, the key distinction between
9 detention under § 1225(b)(2) and § 1226(a) is that § 1226(a) allows for post-deprivation bond
10 hearing, whereas § 1225(b)(2) provides no right to review *at all*. *Pablo Sequen v. Kaiser*, 800 F.
11 Supp. 3d 998, 1013 (N.D. Cal. 2025). If Respondents are correct that Petitioner is detained under §
12 1225(b)(2)—for the reasons explained below, they are not—she would have *no* opportunity for
13 review of her custody even after being deprived of her liberty, which would “*strengthen* her due
14 process claim”—not weaken it. *Id.*

15 *Third*, the government has no cognizable interest in detaining the Petitioner without a
16 hearing. As explained below, the only two constitutionally permissible reasons to detain a non-
17 citizen in civil immigration proceedings is if they are a flight risk or danger to the community.
18 And immigration courts routinely conduct custody hearings, which impose a “minimal” cost to the
19 government. See *A.E.*, 2025 WL 1424382, at *5. The harm to the government is therefore
20 negligible at most. See *Florez v. Robbins*, No. 1:25-cv-1897, 2025 U.S. Dist. LEXIS 265346 at
21 *22 (E.D. Cal. Dec. 23, 2025).

22 Respondents argue that *Rodriguez Diaz v. Garland* supports their position, but as they
23 acknowledge, “*Rodriguez Diaz* did not arise in the pre-detention context.” Return at 24, n.7. The
24 petitioner in *Rodriguez Diaz* was already denied bond and seeking an additional bond hearing. See
25 *Rodriguez Diaz*, 53 F.4th at 1204. Here, on the other hand, “the pre-deprivation hearing is not for
26 the government to justify *continuing* the status quo of detention; rather, Petitioner-Plaintiff asks the
27 government to justify a sudden *departure* from the status quo.” See *Diaz v. Kaiser*, No. 25-cv-
28 05071-TLT 2025 U.S. Dist. LEXIS 212851, at *31–32 (Sept. 16, 2025) (emphasis in original). The

1 court in *Rodriguez Diaz* explicitly stated it “did not foreclose all as-applied challenges to §
2 1226(a)’s procedures.” *See Rodriguez Diaz*, 53 F.4th at 1210–12. Its reasoning does not apply here.

3 In this case, a post-deprivation hearing also does not provide sufficient process, because by
4 the time that the Petitioner is arrested, the constitutional violation—re-detention without changed
5 circumstances—will have already occurred. *See E.A. T.B. v. Wamsley*, No. C25-1192-KKE, 2025
6 WL 2402130, at *16 (W.D. Wash. Aug. 19, 2025) (holding that a “post-deprivation hearing cannot
7 serve as an adequate procedural safeguard because it is after the fact and cannot prevent an
8 erroneous deprivation of liberty”); *Guillermo M. R. v. Kaiser*, 791 F. Supp. 3d 1021, 1036 (N.D.
9 Cal. 2025) (same); *Rodriguez v. Kaiser*, No. 1:25-CV-01111-KES-SAB, 2025 WL 2855193, at *7
10 (E.D. Cal. Oct. 8, 2025) (same, collecting cases); *R.A.N.O.*, No. 1:25-cv-01535-KES-EPG, 2026
11 U.S. Dist. LEXIS 1963, at *14–15 (same). Petitioner thus prevails on her *Mathews* claim regardless
12 of the statute governing her detention.

13 Finally, the government bears a clear-and-convincing burden of proof to remedy a due
14 process violation. The Ninth Circuit so held many years ago. *Singh v. Holder*, 638 F.3d 1196, 1203-
15 05 (9th Cir. 2011). Contrary to Respondents’ arguments, the Ninth Circuit has made clear that
16 “*Singh*’s constitutional holding . . . remains binding law of our court.” *Rodriguez Diaz v. Garland*,
17 83 F.4th 1177, 1179 (9th Cir. 2023) (Paez, J., respecting the denial of rehearing en banc); *see*
18 *Martinez v. Clark*, 124 F.4th 775, 784-86 (9th Cir. 2024) (confirming the government bears the
19 “clear-and-convincing burden of proof” at an immigration bond hearing ordered pursuant to the Due
20 Process Clause). The government bears the burden of proof here. For these reasons, this Court
21 should join the numerous district courts in this circuit and hold that Petitioner prevails on her
22 procedural due process claim. *See, e.g., Hernandez Nieves v. Kaiser*, No. 25-CV-06921-LB, 2025
23 U.S. Dist. LEXIS 171892, at *9–10 (N.D. Cal. Sept. 3, 2025). *Cardenas Castellanos, et al. v.*
24 *Kaiser*, 5:25-cv-07962-NW, 2025 U.S. Dist. LEXIS 183957, at *8–9 (N.D. Cal. Oct. 14, 2025).

25 **C. Reclassifying Petitioner from § 1226(a) to § 1225(b)(2) violates procedural due
26 Process.**

27 Even if Respondents’ interpretation of § 1225(b)(2) were correct—and it is not, for the
28 reasons explained below—due process would still prevent the government unilaterally reclassifying
Petitioner as subject to § 1225(b)(2). *See Ramirez Clavijo v. Kaiser*, No. 25-cv-06248-BLF, 2025

1 U.S. Dist. LEXIS 163056, *11 (N.D. Cal. Aug. 21, 2025). Respondents assert that an individual can
2 be reclassified as § 1225(b)(2) “even where the government previously released a[] [noncitizen]
3 under 8 U.S.C. § 1226(a). Return at 22. However, Respondents “fail to contend with the liberty
4 interests created by the fact that the Petitioner[] in this case w[a]s released on recognizance *prior to*
5 *the manifestation*” of the new § 1225(b)(2) interpretation. *See Espinoza v. Kaiser*, No. 1:25-CV-
6 01101 JLT SKO, 2025 U.S. Dist. LEXIS 183811, at *28 (E.D. Cal. Sept. 18, 2025) (emphasis in
7 original). They thus cannot now “switch[] tracks” mid-stream. *See Salcedo Aceros*, 2025 U.S. Dist.
8 LEXIS 179594, at *21. To do so would amount to an impermissible post hoc rationalization. *See*
9 *Lopez Benitez v. Francis*, No. 25-cv-5937, 2025 WL 2371588, at *13–14 (S.D.N.Y. Aug. 13, 2025).

10 II. Petitioner’s re-detention would violate substantive due process.

11 Respondents do not address, and thus waive any opposition to, Petitioner’s substantive due
12 process claim. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). Whereas procedural due
13 process “promotes fairness” in government decisions to deprive persons of their liberty by
14 “require[ing] the government to follow proper procedures,” substantive due process “prevent[s]
15 governmental power from being used for purposes of oppression” by “barring certain actions
16 regardless of the fairness of the procedures used to implement them.” *Daniel v. Williams*, 474 U.S.
17 327, 331 (1986). They thus waive any opposition to Petitioner’s argument that her re-detention
18 violates her substantive due process rights.

19 Freedom from detention “lies at the heart of liberty” protected by the Due Process Clause.
20 *Zadvydas*, 533 U.S. at 690. When, as here, a noncitizen poses no flight risk or danger to the
21 community, immigration detention serves no legitimate government purpose and becomes
22 impermissibly punitive, violating a person’s substantive due process rights. *See Jackson v. Indiana*,
23 406 U.S. 715, 738 (1972) (detention must have a “reasonable relation” to the government’s interests
24 in preventing flight and danger); *see also Valencia Zapata v. Kaiser*, 2025 WL 2741654, at *11-12
25 (N.D. Cal. Sep. 26, 2025) (holding that a similarly situated petitioner demonstrated serious
26 questions going to the merits of their substantive due process claim); *Leiva Flores v. Albarran*, 2025
27 WL 3228306, at *5 (N.D. Cal. Nov. 19, 2025) (same); *Bautista Pico v. Noem*, 2025 WL 3295382,
28 at *3 (N.D. Cal. Nov. 26, 2025) (same); *see also Mahdawi v. Trump*, No. 2:25-CV-389, 2025 WL

1 1243135, at *11 (D. Vt. Apr. 30, 2025) (ordering release from custody after finding petitioner may
2 succeed on claim that the government lacks any legitimate reason to detain him”).

3 Respondents do not attempt to argue that Petitioner is a flight risk or danger to society, the
4 only two constitutionally permissible reasons to detain a noncitizen. *See Zadvydas*, 533 U.S. at 690.
5 As the Ninth Circuit has held, “the government has no legitimate interest in detaining individuals
6 who have been determined not to be a danger to the community and whose appearance at future
7 immigration proceedings can be reasonably ensured by a lesser bond or alternative conditions.”
8 *Hernandez*, 872 F.3d at 994. When immigration officials released Petitioner on an Order of
9 Recognizance in 2024, they made a determination that she was not a danger to the community or a
10 flight risk. *See Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1176 (N.D. Cal. 2017), *aff’d sub nom.*
11 *Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018); 8 C.F.R. § 236.1(c)(8) (allowing
12 release only after making such findings).

13 Respondents have presented no evidence that Petitioner has since become a flight risk or
14 danger to the community, and do not even attempt to argue that the three supervision infractions
15 they allege render her a flight risk or danger to the community. It is undisputed that she has attended
16 all check-ins and immigration court hearings and has no criminal history at all. Because the
17 government does not even argue that Petitioner’s re-detention would advance the only accepted
18 rationales for civil detention—flight risk or danger—Petitioner has demonstrated her re-detention
19 would violate substantive due process. *Zadvydas*, 533 U.S. at 690. Where, as here, the government
20 does not even make bare allegations of flight risk or danger to justify detention, detention violates
21 the Constitution regardless of the procedural protections involved.

22 Here, too, Respondents’ statutory argument cannot insulate them from Petitioner’s
23 constitutional claim. Respondents assert that § 1225(b)(2)’s mandatory detention framework
24 controls Petitioner’s constitutional claim.² Return at 20-21. However, mandatory detention is

25 _____
26 ² In their brief, Respondents cite to *Demore v. Kim*, Return at 20, in which the Supreme Court
27 upheld 8 U.S.C. § 1226(c) because that statute covered people with criminal histories that were
28 related to flight risk and danger to the community. 538 U.S. 510, 527-28 (2003). Nothing in
Demore, or any other precedent, endorses Respondents’ breathtaking new argument that the INA
requires the detention without bond of *every inadmissible noncitizen present in the U.S.*, regardless
of their criminal history or attendance at court proceedings.

1 subject to constitutional limitations. *See Zadvydas*, 533 U.S. at 701. Courts regularly order the
2 government to release noncitizens subject to mandatory detention on substantive due process
3 claims. *See e.g., Doe v. Chestnut*, No. 1:24-cv-00943-EPG, 2025 U.S. Dist. LEXIS 232754, at *72
4 (E.D. Cal. Nov. 26, 2025); *Doe v. Becerra*, 732 F. Supp. 3d 1071 (N.D. Cal. 2024). Although the
5 Supreme Court has upheld facial challenges to mandatory detention, such as 8 U.S.C. § 1226(c), it
6 has not “foreclose[d] as-applied challenges—that is, constitutional challenges to applications of the
7 statute.” *See Nielsen v. Preap*, 586 U.S. 392, 420 (2019). An as-applied challenge, like Petitioner’s
8 substantive due process claim, require a petitioner to show only that “the application of the statute
9 to a specific factual circumstance” is unconstitutional. *Paz Hernandez v. Wofford*, No. 1:25-cv-
10 00986-KES-CDB (HC), 2025 WL 2420390, at * 4 (E.D. Cal. Aug. 21, 2025). Therefore, even if
11 Petitioner were subject to mandatory detention under § 1225(b)(2)—and for the reasons explained
12 below, she is not—she has still established that re-detention in *her* case, where she inarguably poses
13 no risk of flight or danger to the community, violates substantive due process. *See id.*

14 **III. Petitioner is not subject to mandatory detention 8 U.S.C. § 1225(b)(2).**

15 Petitioner is subject to § 1226(a) and not § 1225(b)(2). Courts throughout this district—
16 including this one—have overwhelmingly rejected Respondents’ arguments to the contrary, which
17 they recycle here. Respondents argue that noncitizens like Petitioner, who entered the U.S. without
18 inspection, are “applicants for admission” who are still “seeking admission” years after DHS
19 released them into the interior on their own recognizance, and, as a result, are subject to indefinite
20 mandatory detention under § 1225(b)(2)(A). *See* Return at 10. District courts across the nation have
21 already overwhelmingly rejected this argument. *See Barco Mercado v. Francis*, No. 25-cv-6582
22 (LAK) at * 9–10 (documenting over 300 cases in which courts have rejected the government’s new
23 interpretation of § 1225); *Salcedo Aceros*, No. 3:25-cv-06924-EMC, 2025 U.S. Dist. LEXIS
24 179594, at *21–33.

25 First, the plain text of § 1225(b)(2)(A) limits its application to noncitizens “seeking
26 admission” at the border. Respondents argue that an “applicant for admission” is forever “seeking
27 admission” regardless of their distance from the border or how long they have been in the United
28 States. Return at 10. However, the natural reading of the phrase “seeking admission” implies a

1 “present action, not a continuous state applicable to every noncitizen who already resides in the
2 United States and seeks to obtain legal immigration status.” *See Cordero Pelico*, 2025 U.S. Dist.
3 LEXIS 197865, at *26–27. To not give it meaning independent of the term “applicant for
4 admission” would violate the rule against surplusage. *See Salcedo Aceros*, 2025 U.S. Dist. LEXIS
5 179594, at *16. As this Court already pointed out, if Congress had meant “applicant for
6 admission” and “seeking admission” to be coextensive,” it would have been more natural to refer
7 to *the* alien seeking admission rather than *an* alien in the text. *See* Dkt. 14 (Order Granting
8 Preliminary Injunction) at 6.

9 Respondents’ contention that an applicant for admission is “inherently seeking admission”
10 is wrong. Return at 12. Respondents look to 8 U.S.C. § 1225(a)(3), which refers to noncitizens
11 who “are applicants for admission or otherwise seeking admission,” for support for their
12 argument, but “§ 1225 (a)(3) governs the ‘inspection’—not detention—protocol.” *Valera*
13 *Chuquillanqui*, 3:25-cv-06320-TLT, at slip op. at 14. “All this language indicates is that there may
14 be noncitizens seeking admission who fall outside the statutory definition of ‘applicants for
15 admission.’” *See Cordero Pelico*, 2025 U.S. Dist. LEXIS 197865, at *38. As another court in this
16 district explained:

17 “Otherwise” generally means, ‘in a different way or manner’ or “in
18 different circumstances.’ *Otherwise*, Webster’s Ninth New Collegiate
19 Dictionary 835 (1984). So § 1225(a)(3)’s use of ‘or otherwise’ simply
20 means that immigration officers must inspect any noncitizen who is
21 ‘seeking admission or readmission to or transit through the United
22 States,’ whether the noncitizen is an applicant for admission *or*
23 differently situated. To be sure, § 1225(a)(3) acknowledges some
24 overlap between the categories of ‘applicants for admission’ and
25 noncitizens ‘seeking admission,’ with the latter serving as ‘a ‘catch-all’
26 to describe non-citizens who *must be inspected*.’ 2025 WL 2822876, at
27 14 (N.D. Cal. Oct. 3, 2025) (*quoting Al Otro Lado*, 138 F.4th at 1119).

28 *Garro Pinchi v. Noem*, No. 25-CV-05632-PCP, 2025 U.S. Dist. LEXIS 265062, at *82 (N.D.
Cal. Dec. 19, 2025).

Indeed, it is possible to seek admission without being an applicant for admission; “[f]or
example, those applying for a visa at a consulate abroad would be seeking admission but not be
applicants for admission, since they are neither present in the country nor arriving in it. *Id.* at *84

1 (N.D. Cal. Dec. 19, 2025) (quoting *Cordero Pelico*, 2025 U.S. Dist. LEXIS 197865 *38) (internal
2 quotations omitted).

3 Respondents' proffered interpretation, in which all "applicants for admission" are by default
4 "seeking admission," also cannot be squared with the definition of "admission" in the INA.
5 "[A]dmission" refers only to a "lawful entry ... after inspection and authorization by an
6 immigration officer." 8 U.S.C. § 1101(a)(13). People like Petitioner, who are in removal
7 proceedings in the U.S., are not seeking a "lawful entry," and thus cannot be "seeking admission" as
8 that term is defined by statute. Importantly, "[I]awful status and admission are separate concepts in
9 immigration law," such that seeking a form of lawful status after entry is not the equivalent of
10 seeking admission. *See Sanchez v. Mayorkas*, 593 U.S. 409, 413-15 (2021). The BIA has held that
11 asylum, for example, is not "admission" as that term of art is defined in the INA. *Matter of V-X-*, 26
12 I&N Dec. 147, 151–52 (2013) Accordingly, the steps the Petitioner is taking to seek asylum are *not*
13 related to seeking "admission." *Contrast Matter of V-X-*, 26 I&N Dec. at 152 with Dkt. 14 at 5.

14 Respondents argue that "many people who are not actually requesting permission to enter
15 the United States in the ordinary sense are nevertheless deemed to be 'seeking admission' under the
16 immigration laws." Return at 12–13 (quoting *Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 n.6
17 (BIA 2012)). But unlike Petitioner, Mr. Lemus was in fact seeking admission—he was applying for
18 a family visa from within the U.S. and had to demonstrate he was admissible. *See Lemus-Losa*, 25 I.
19 & N. Dec. at 735. This separate statutory reference to "seeks admission" does not demonstrate that
20 § 1225(b)(2)(A), which addresses the inspection of persons seeking admission into the country,
21 encompasses other persons already residing in the U.S. Instead, it further demonstrates that
22 "seeking admission" is not synonymous with the broader definition of "applicant for admission."

23 Further, Respondents argue that § 1225(b)(2)(A) is not limited to arriving [noncitizens].
24 However, an applicant seeking admission is "roughly interchangeable" with an arriving
25 [noncitizen]." *See Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *14 (D. Mass.
26 July 24, 2025). The emphasis on arriving [noncitizens] is to underscore that 8 U.S.C. § 1225(b)
27 applies to various classes of people arriving at the border or who have just entered the country,
28 rather than people in the interior. *See Jennings v. Rodriguez*, 583 U.S. 281, 297 (2018); *Matter of Q.*

1 *Li*, 29 I&N Dec. 66, 68 (BIA 2025) (“‘arriving’ applies to [noncitizens]...who [are] apprehended’
2 just inside ‘the southern border, and not at a point of entry, on the same day [they] crossed into the
3 United States.’” 29 I&N Dec. 66, 68 (BIA 2025). The statute’s implementing regulations also limit
4 it to arriving [noncitizens]. *See* Dkt. 14 at 8 (citing 8 C.F.R. § 235.3(c)(1)). Indeed, the entire
5 statutory scheme is premised on the idea that an inspection occurs near the border and shortly after
6 arrival, as the statute repeatedly refers to “examining immigration officer[s],” 8 U.S.C. §§
7 1225(b)(2)(A), (b)(4), or officers conducting “inspection[s]” of people “arriving in the United
8 States,” *id.* 8 U.S.C. §§ 1225(a)(3), (b)(1), (b)(2), (d); *see also King v. Burwell*, 576 U.S. 473, 492
9 (2015) (looking to an Act’s “broader structure . . . to determine [the statute’s] meaning”). There is
10 also nothing in the chapter title to suggest it applies in the interior: “Inspection by immigration
11 officers; expedited removal of inadmissible arriving aliens; referral for hearing.” *See* 8 U.S.C. §
12 1225.

13 Moreover, it is Respondents, not Petitioner, who ignore the detention statutes’ plain
14 meaning. In arguing that § 1225(b)(2) covers all non-admitted noncitizens, Respondents disregard
15 § 1226, which provides that DHS “may” arrest and detain a noncitizen “pending a decision on
16 whether the alien is to be *removed* from the United States”—*i.e.*, pending removal proceedings—
17 while also permitting the noncitizen’s release “on bond” or other conditions. 8 U.S.C. § 1226(a)
18 (emphasis added). The word “removed” is significant because, unlike the prior version of the
19 statute, which applied only to individuals “[p]ending a determination of *deportability*,” *see* 8
20 U.S.C. § 1252(a)(1) (1994) (emphasis added), “removed” applies both to individuals facing
21 charges of deportability *or*, like Petitioner, inadmissibility. *See* 8 U.S.C. § 1229a(a)(1) (providing
22 that removal proceedings may decide “the inadmissibility ... of [a noncitizen]”). Thus, Congress
23 clearly intended § 1226(a) to apply to people, like Petitioner, who are in removal proceedings
24 based on charges of inadmissibility.

25 This is reenforced by the plain language of 1226(c), which *expressly* carves out from §
26 1226(a)’s authorization of discretionary detention broad categories of inadmissible noncitizens.
27 *See* 8 U.S.C. §§ 1226(c)(1)(A), (D), (E)(i) (mandating detention of noncitizens inadmissible on
28 certain criminal or national security grounds). *See Jennings*, 583 U.S. at 288 (describing § 1226(a)

1 as the “default rule” providing for discretionary detention of noncitizens inside the country, and §
2 1226(c) as a limited exception). Section 1226(c) is thus the exception that proves the rule: that is,
3 unless they have the required criminal history, Section 1226(a) sets forth a discretionary detention
4 framework for people in the United States, including individuals like Petitioner who are
5 “inadmissible” for having entered without inspection. *See Shady Grove Orthopedic Assocs., P.A.*
6 *v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (the fact that Congress has created specific
7 exceptions to the statute “proves” that the statute applies generally). Respondents concede, as they
8 must, that § 1226(c)—which sets forth the limited mandatory detention exception to § 1226(a)’s
9 discretionary detention rule—applies to noncitizens who have not been admitted and are thus
10 inadmissible.³ Yet Respondents do not and cannot explain how § 1226(a)’s general rule could
11 apply only to people who have been admitted when § 1226(c)’s exception to that rule plainly
12 applies to people who have not.

13 Nor does Respondents’ explanation of the Laken Riley Act help their case. Respondents
14 acknowledge the overlap between the Laken Riley Act and §1225(b)(2)(A) but argue Congress’s
15 intent in passing the Laken Riley Act was to reduce the executive’s authority in releasing
16 inadmissible individuals who committed crimes. Return at 17–18. Respondents also argue the
17 Laken Riley Act is broader than §1225(b)(2)(A) because §1225(b)(2)(A) does not account for
18 small subsections of individuals, such as noncitizens who are inadmissible but were erroneously
19 admitted and crewman. Return at 16–. Respondents ignore, however, that their proposed
20 interpretation renders *all* of § 1226(c)—not just the Laken Riley Act—effectively meaningless,
21 because *everyone inadmissible person it covers* would, in their view, already be mandatorily
22 detained under § 1225(b)(2).

23 The correct interpretation is more simple. Section 1225(b)(2) is clear that it covers only
24 noncitizens who meet three specific criteria: (1) applicants for admission, who (2) are not covered
25 by 8 U.S.C. § 1225(b)(1), and (3) who are “seeking admission,” as “admission” is defined in the

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27 ³ A person who has been “admitted” is subject to grounds of “deportability,” *see* 8 U.S.C. §
28 1227(a), whereas a person who has not been admitted is subject to grounds of “inadmissibility,” *see*
8 U.S.C. § 1182(a). Accordingly, a person can be inadmissible as described in § 1226(c) only if
they have not been admitted.

1 INA. *See Pablo Sequen*, 2025 U.S. Dist. LEXIS 181837, at *4 (N.D. Cal. Sept. 16, 2025). Section
2 1226, which has no language limiting its scope to people who have been admitted, covers
3 *everyone else*. Respondents cite nothing from *Jennings*, Return at 19–20, or any authority, that
4 supports reading into 8 U.S.C. § 1226 an enormous carveout that Congress did not write.

5 Resisting this conclusion, Respondents seek support in the changes Congress sought to
6 make in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).
7 Return at 18–19. But they fail here as well. Before IIRIRA, noncitizens in the interior of the
8 United States were subject to discretionary detention under prior 8 U.S.C. § 1252(a)(1), whether
9 or not they had been formally admitted. In enacting IIRIRA, Congress expressly stated that the
10 new § 1226(a) merely “restates” that prior discretionary framework. H.R. Rep. No. 104-469, pt. 1,
11 at 229 (1996); *see also* H.R. Rep. No. 104-828, at 210 (1996). Had Congress intended a dramatic
12 expansion of mandatory detention for millions of inadmissible noncitizens residing inside the
13 country, it would have said so. The executive branch has also treated noncitizens like Petitioner as
14 subject to discretionary detention under § 1226(a) since then. Just months after IIRIRA’s passage,
15 the executive explained that “[d]espite being applicants for admission, [noncitizens] who are
16 present without having been admitted or paroled ... will be eligible for ... bond redetermination.”
17 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997). That contemporaneous interpretation, mirroring U.S.C.
18 § 1226(a)(2), “is powerful evidence that interpreting the Act in [this] way is natural and
19 reasonable[.]” *Abramski v. United States*, 573 U.S. 169, 203 (2014) (Scalia, J., dissenting); *see*
20 *also Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (similar).

21 The “preferential treatment” IIRIRA sought to resolve, *see* Return at 18, was the disparity
22 between the procedural rights of those who entered without inspection and those who sought entry
23 lawfully. Congress resolved it by amending the statutes governing those *procedural* rights.
24 Congress eliminated “exclusion proceedings” that previously applied to non-citizens at ports of
25 entry who had not yet entered the country and put all non-admitted noncitizens “on equal footing
26 ... in immigration proceedings” that extended more procedural protections to admitted noncitizens
27 than noncitizens without admission. *Torres v. Barr*, 976 F.3d 918, 927–28 (9th Cir. 2020)
28 (describing changes). The cases Respondents cite also do not address detention and thus are

1 inapplicable here. Return at 18–19. Respondents’ cases largely address due process rights relevant
2 to *admission*, not detention. *See* Return at 19; 591 U.S. at 139. *Kaplan v. Tod*, concerned a
3 detention challenge, but turned on whether the question of whether the petitioner was properly
4 subject to deportation. 267 U.S. 228 (1925). And *Yamataya v. Fisher* cuts *against* Respondents’
5 arguments, holding that regardless of a person’s manner of entry into the country, “no person shall
6 be deprived of her liberty without opportunity, at some time, to be heard, before such officers, in
7 respect of the matters upon which that liberty depends.” 189 U.S. 86, 101 (1903).

8 **IV. Petitioner’s re-detention is unlawful under § 1226.**

9 This Court previously held that nothing in § 1226 authorizes Petitioner’s re-detention
10 because Respondents did not show—or even argue—that she is a danger or flight risk. Dkt. 14 at
11 11. Respondents now point to § 1226(b), which permits detention “at any time” during removal
12 proceedings, but do not offer support for their position that the statute allows detention *for any*
13 *reason*—or no reason at all. *See* 8 C.F.R. § 236.1(b) (discussing time period under statute).
14 Respondents’ position cannot be squared with the regulations granting release from custody for
15 people who pose no flight risk or danger, which plainly apply to Petitioner. *See* Dkt. 14 at 11. Nor
16 do Respondents address the constitutional concerns that would arise from a statute that allowed
17 arbitrary detention absent any flight risk or danger. *See Zadvydas*, 533 U.S. at 690. Indeed, a court
18 in this district recently held that the government’s new position that § 1226 permits such arbitrary
19 re-detention likely violates the APA. *See Garro Pinchi*, 2025 U.S. Dist. LEXIS 265062, *95.
20 Section 1226 does not justify re-detention here.

21 **V. Any potential post-final removal order detention cannot be excessive.**

22 Petitioner acknowledges that by statute, Respondents may detain her for the 90-day period
23 following a final removal of order. *See* Return at 24–25. However, a final removal order is not
24 grounds for Respondents to detain Petitioner excessively. *See Zadvydas*, 533 U.S. at 701. Petitioner
25 thus asks the Court to closely scrutinize any post-90 day detention in the unlikely event that
26 Petitioner receives a final order of removal, should Petitioner bring it to the Court’s attention.

27 **CONCLUSION**

28 For the foregoing reasons, the Court should grant the petition.

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Date: January 30, 2025

Respectfully Submitted,

/s/ Jordan Weiner

Jordan Weiner