UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MACKSUEL ALVES DA SILVA *Petitioner,* v. PAMELA BONDI, *in his official capacity as Attorney General Of The United States;* KRISTI NOEM, *in her official capacity as Secretary of the Department of Homeland Security;* THOMAS BROPHY, *in his official capacity as Field Office Director, Ice Buffalo Field Office;* Warden of Buffalo Federal Detention Facility (Batavia, NY) *Respondents.*	**Case No.: 1:25-cv-01220-LJV.**

PETITIONER'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Petitioner **Macksuel Alves da Silva** respectfully submits this expanded reply to the Government's Opposition (ECF No. 7). Respondents' position fundamentally mischaracterizes the facts, misconstrues the statutory framework, and disregards binding and persuasive authority, including two recent federal orders invalidating DHS's new detention policy as applied to noncitizens who entered without inspection and were later placed in full removal proceedings. The

record demonstrates that Petitioner is detained under **8 U.S.C. § 1226(a)**, not **§ 1225(b)**, and is therefore entitled to a bond hearing under controlling Second Circuit precedent.

I. RESPONDENTS INCORRECTLY ASSERT THAT PETITIONER IS AN "ARRIVING ALIEN" OR SUBJECT TO § 1225(b)

Respondents' Opposition relies almost entirely on the claim that Petitioner is an "arriving alien" subject to mandatory detention under 8 U.S.C. § 1225(b). That claim is unsupported by the record, inconsistent with the statutory framework, and contradicted by Petitioner's immigration history as described in his habeas petition.

Petitioner did not present himself for inspection at a port of entry, nor was he apprehended while seeking admission. As set forth in the habeas petition, Petitioner entered the United States without inspection on October 22, 2016, was initially held in immigration custody, and—after demonstrating a **credible fear of persecution**—was **released** and placed into **full removal proceedings under INA § 240**. Placement into § 240 proceedings is incompatible with classification as an "arriving alien," because noncitizens in full removal proceedings are not applicants for admission; they are noncitizens already inside the United States whose removability is adjudicated before an Immigration Judge.

After his release, Petitioner lived continuously in the United States for nearly **nine years**, primarily in **Philadelphia**, where he established work history, community ties, and a stable life. He was **not** encountered at or near the border during this period, nor within the "14-day/100-mile" framework required to invoke the "certain other aliens" provision in § 1225(b)(1)(A)(iii). Respondents cite no evidence—because none appears in the record—suggesting otherwise.

Respondents' insistence that Petitioner should be treated as an "arriving alien" disregards the statutory definitions. The term "arriving alien" applies only to individuals who are seeking admission at the threshold of entry. It does not apply to individuals who, like Petitioner, entered without inspection many years ago, were subsequently placed into § 240 removal proceedings, and have resided in the interior for nearly a decade. Stretching § 1225(b) to cover such individuals would collapse the distinction between the two statutory detention tracks that Congress deliberately separated: expedited removal under § 1225, and full removal proceedings under § 1229a governed by § 1226.

This conclusion is reinforced by the recent decisions in *Maldonado Bautista v. Santacruz, Jr.*, which reject DHS's attempt to broadly reclassify interior noncitizens who entered without inspection as § 1225(b) detainees. Those opinions hold—after detailed statutory analysis—that § 1225(b) applies only to individuals undergoing inspection, not to noncitizens who, like Petitioner, live for years in the interior and are in § 240 proceedings.

For all of these reasons, the Government's attempt to characterize Petitioner as an "arriving alien" subject to § 1225(b) is unsupported by the record and contrary to law. Petitioner is properly considered a noncitizen in full removal proceedings whose detention, if any, is governed by **8 U.S.C. § 1226(a)**.

II. BECAUSE PETITIONER IS IN § 1229A REMOVAL PROCEEDINGS, HIS DETENTION IS GOVERNED BY 8 U.S.C. § 1226(A)

Even assuming that Petitioner was once processed under 8 U.S.C. § 1225, any such authority ended when he was referred into full removal proceedings under **8 U.S.C. § 1229a** after demonstrating a credible fear of persecution. Petitioner has been in § 1229a proceedings for years, and EOIR's Automated Case Information confirms that his case remains **open and active**, with a

Master Calendar Hearing scheduled for March 10, 2026. This procedural posture is determinative: individuals in § 1229a proceedings are detained, if at all, under **8 U.S.C. § 1226(a)**.

Congress designed two distinct statutory tracks. Section **1225(b)** applies to noncitizens who are seeking admission—typically migrants encountered at or immediately after entry who are processed through expedited removal. Section **1226(a)** governs detention of noncitizens already inside the United States who are placed in formal removal proceedings before an Immigration Judge. The Supreme Court confirmed this divide in *Jennings v. Rodriguez*, explaining that § 1226 applies to individuals "already in the country," while § 1225 applies to those "seeking admission." 583 U.S. 281, 289 (2018). Petitioner plainly falls into the former category.

After entering without inspection in 2016, Petitioner resided in the interior—primarily in Philadelphia—for nearly nine years and litigated his removal proceedings before the Immigration Court. Such proceedings occur only under § 1229a, and their existence alone forecloses the Government's attempt to classify him as an "arriving alien." DHS cannot argue in Immigration Court that Petitioner is a respondent in § 240 proceedings while simultaneously claiming in federal court that he is detained under a statutory provision reserved for individuals at the threshold of entry.

Federal courts have already evaluated DHS's recent attempt to expand § 1225(b)'s reach. In *Maldonado Bautista v. Santacruz, Jr.*, the Central District of California granted partial summary judgment rejecting DHS's position that individuals who entered without inspection and were later apprehended in the interior may be treated as § 1225(b) detainees. The court held that once a noncitizen is placed into § 1229a proceedings—regardless of how they initially entered—detention must be governed by § 1226(a). Days later, the same court certified a class of similarly situated

individuals, again confirming that DHS cannot reclassify interior residents as "arriving aliens" to avoid the requirements of § 1226(a).

The Second Circuit is aligned with this reasoning. In *Velasco Lopez v. Decker*, the court held that detention under § 1226(a) requires a bond hearing with the burden on the Government to justify continued confinement. 978 F.3d 842, 849–50 (2d Cir. 2020). Individuals in § 1229a proceedings, like Petitioner, are therefore entitled to full procedural protections, including an individualized custody determination.

Because Petitioner is indisputably in active § 1229a removal proceedings—with a scheduled hearing on March 10, 2026—**§ 1226(a)** governs his detention. Respondents' attempt to reclassify him as an "arriving alien" subject to § 1225(b) is inconsistent with the statutory text, the structure of the INA, and controlling and persuasive precedent.

III. THIS COURT HAS JURISDICTION TO REVIEW THE STATUTORY BASIS OF PETITIONER'S DETENTION

Respondents contend that this Court lacks jurisdiction under 8 U.S.C. §§ 1252(b)(9) and 1252(g). That argument mischaracterizes both the nature of Petitioner's claim and the scope of the statutory provisions they invoke. Petitioner does not challenge his removal proceedings, seek review of any Immigration Judge decision, or request relief that would interfere with the adjudication of his pending immigration case. He challenges only **the statutory authority under which he is being detained**, a quintessential habeas question that remains fully reviewable in federal district court.

Section 1252(b)(9) is not the sweeping jurisdictional bar the Government suggests. The Supreme Court has repeatedly emphasized that the provision is not a "zipper clause" that funnels

all immigration-related claims into petitions for review of final orders of removal. Instead, it applies only to claims that are "inextricably linked" to the review of such an order. *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018). A challenge to the statutory basis of detention—whether DHS is detaining Petitioner under § 1225(b) or § 1226(a)—is **collateral** to the merits of removal, does not require the Court to consider or decide any issue committed to the immigration courts, and therefore falls outside § 1252(b)(9).

Section 1252(g) is similarly narrow. It strips jurisdiction only over challenges to three discrete decisions: the decision to commence removal proceedings, adjudicate removal proceedings, or execute a removal order. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999). Petitioner challenges none of these. He does not contest DHS's choice to initiate or prosecute his removal case, nor is he seeking review of any removal order. His claim concerns **only the lawfulness of his ongoing detention** and the statutory authority governing it—matters that § 1252(g) does not reach.

The Second Circuit has confirmed that habeas jurisdiction exists over challenges to the legality of immigration detention, including which statutory framework applies. In *Velasco Lopez v. Decker*, the court held that district courts retain jurisdiction to determine whether a noncitizen is detained under § 1226(a) and to order the bond hearing that statute requires. 978 F.3d 842, 849–50 (2d Cir. 2020). Similar decisions across the Circuit have recognized that determining the statutory basis of detention is precisely the type of "core habeas" inquiry that Article III courts are empowered to decide.

Recent litigation involving DHS's new detention policy further illustrates this point. In *Maldonado Bautista v. Santacruz, Jr.*, the district court evaluated the same statutory question raised here—whether DHS may treat long-term interior residents as § 1225(b) detainees—and

addressed it on the merits. The fact that federal courts nationwide are adjudicating the legality of DHS's detention classification underscores that such claims fall squarely within district court jurisdiction.

Petitioner seeks nothing more than what habeas has always permitted: judicial review of the statutory authority under which the Government restrains a person's liberty. Sections 1252(b)(9) and 1252(g) do not deprive this Court of jurisdiction to conduct that review.

IV. DHS CANNOT RETROACTIVELY RECLASSIFY PETITIONER'S DETENTION TO AVOID THE REQUIREMENTS OF § 1226(A)

Respondents attempt to justify Petitioner's continued detention by retroactively labeling him an "arriving alien" subject to 8 U.S.C. § 1225(b). This position is inconsistent with the statutory scheme Congress enacted and is legally impermissible. Once a noncitizen has been placed into full removal proceedings under 8 U.S.C. § 1229a, as Petitioner has been for years, the Government cannot later reclassify that individual as a § 1225(b) detainee in order to avoid the procedural protections Congress attached to § 1226(a).

The Supreme Court has long held that agencies may not expand or manipulate statutory authority through reinterpretation, particularly where Congress created distinct legal frameworks for different categories of noncitizens. *Jennings v. Rodriguez* underscores that §§ 1225 and 1226 operate in separate spheres: § 1225 governs individuals at the threshold of entry, while § 1226 governs those already in the United States who are defending themselves in formal removal proceedings. 583 U.S. 281, 289 (2018). Congress could not have been clearer that once a person is in § 1229a proceedings, detention falls under § 1226—not § 1225.

DHS's litigation position asks this Court to ignore that structure. Respondents' theory would allow DHS to detain anyone who ever entered without inspection—no matter how long ago, no matter how long they lived in the interior, and no matter their procedural posture—as if they were encountered at the border that same day. Such an interpretation would erase the distinction between expedited removal and full removal proceedings, collapse the statutory categories Congress established, and render § 1226(a) meaningless for a vast class of noncitizens. Courts do not permit agencies to rewrite statutes in this way.

Recent federal decisions confirm that retroactive reclassification is not allowed. In *Maldonado Bautista v. Santacruz, Jr.*, the district court granted summary judgment against DHS's identical policy, holding that individuals who entered without inspection and were later apprehended in the interior cannot be treated as § 1225(b) detainees after being placed in § 1229a proceedings. The court explained that DHS's new interpretation "cannot be squared with the statutory text and structure," because § 1225(b) applies only to individuals undergoing inspection—not those, like Petitioner, who have long been living in the United States and litigating before an Immigration Judge. Days later, the same court certified a nationwide class and expressly declared that detention of such individuals is governed by § 1226(a), not § 1225(b). These decisions directly refute DHS's theory in this case and underscore that retroactive reclassification violates the INA.

The Second Circuit's precedent reinforces this conclusion. In *Velasco Lopez v. Decker*, the court held that individuals detained under § 1226(a) are entitled to bond hearings and rejected DHS's attempts to circumvent those protections through detention practices inconsistent with the statute. 978 F.3d 842, 849–50 (2d Cir. 2020). Allowing DHS to retroactively reclassify Petitioner as a § 1225(b) detainee would permit precisely the kind of evasion that *Velasco Lopez* forbids.

Ultimately, DHS cannot litigate Petitioner's removal in § 1229a proceedings—where he has an active master hearing scheduled—and simultaneously insist that he is detained under a statutory provision that applies only to individuals seeking admission at the border. The INA does not permit such oscillation, and the Constitution does not tolerate detention authority based on shifting legal labels rather than statutory text.

Because Petitioner remains in active § 1229a proceedings, his detention is governed exclusively by **8 U.S.C. § 1226(a)**. Respondents' effort to reclassify him under § 1225(b) is legally untenable, structurally incompatible with the INA, and rejected by controlling and persuasive authority.

V. PETITIONER FACES IRREPARABLE HARM WITHOUT IMMEDIATE RELIEF

Petitioner continues to suffer irreparable harm from detention without the individualized custody determination required by § 1226(a). The Second Circuit has held that prolonged civil detention without a bond hearing constitutes irreparable harm as a matter of law. *Velasco Lopez v. Decker*, 978 F.3d 842, 855–56 (2d Cir. 2020). Every additional day of confinement under the wrong statutory scheme exacerbates this constitutional injury.

The harm here is especially acute because Petitioner has an **active removal case** and a **Master Calendar Hearing scheduled for March 10, 2026.** Preparing for proceedings in Immigration Court requires regular communication with counsel, access to documents, the ability to gather evidence, and meaningful participation in developing his defense. Detention significantly limits each of these essential tasks. Petitioner has already experienced interruptions in attorney communication, including the cancellation of a scheduled legal call. These access barriers impede

his ability to prepare for his upcoming hearing and threaten his ability to present his case effectively.

Courts in this Circuit have repeatedly recognized that detention that interferes with a noncitizen's ability to participate in removal proceedings intensifies the showing of irreparable harm. See, e.g., *Sajous v. Decker*, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018)*. The ability to consult counsel, collect evidence, and maintain clarity of memory is essential to the fairness of § 1229a proceedings. Detention compromises these interests in ways that cannot later be undone, particularly where the hearing date is approaching.

Petitioner also suffers substantial harm to his physical and emotional well-being. Courts have long acknowledged the psychological strain, isolation, and deterioration associated with prolonged civil detention. These harms cannot be compensated after the fact, nor can they be cured by a later favorable ruling.

Respondents argue that Petitioner cannot show irreparable harm because they assert detention is mandatory. But that argument presumes the outcome they seek to prove. If, as Petitioner has demonstrated, § 1226(a) governs, then continued detention without a bond hearing is not only unauthorized but constitutionally infirm. The absence of a hearing at which the Government must justify confinement by clear and convincing evidence inflicts the very harm courts have found irreparable.

In sum, Petitioner's ongoing loss of liberty, the barriers to preparing for his March 10, 2026 hearing, and the constitutional injury that arises from detention under the wrong statutory authority establish irreparable harm as a matter of law. Immediate judicial intervention is necessary to prevent further injury and to safeguard the fairness of Petitioner's pending removal proceedings.

VI. THE *MALDONADO BAUTISTA* ORDERS CONCLUSIVELY REJECT DHS'S THEORY AND SUPPORT IMMEDIATE TRO RELIEF

Respondents' position is not only inconsistent with the statutory text but has now been squarely rejected in the first federal decisions to consider DHS's newly asserted detention framework. In *Maldonado Bautista v. Santacruz, Jr.*, the U.S. District Court for the Central District of California held that DHS may not treat individuals who entered without inspection and who were later apprehended in the interior as "arriving aliens" subject to 8 U.S.C. § 1225(b). The court reasoned that § 1225(b) applies only to individuals undergoing inspection at or near the time of entry, and that DHS's reinterpretation "cannot be squared with the statutory text and structure." These findings directly undermine Respondents' effort to classify Petitioner—who has resided in the United States for nearly nine years and is in active § 1229a proceedings—as a § 1225(b) detainee.

On November 25, 2025, the same court certified the "Bond Eligible Class," consisting of individuals who entered without inspection and were apprehended in the interior—precisely those whom DHS has recently attempted to reclassify as arriving aliens. In certifying the class, the court extended the declaratory relief granted to the named petitioners to the entire class, declaring that detention of such individuals is governed by **8 U.S.C. § 1226(a)** and that they are eligible for bond hearings. See *Maldonado Bautista*, 2025 WL 3288403, at *9*. Declaratory relief of this kind has the same legal effect as an injunction in fixing the parties' rights and obligations, and courts must presume that federal agencies will comply with such judgments. *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1031 (9th Cir. 2023). That DHS and EOIR continue to advance the very interpretation the court held unlawful underscores the need for judicial enforcement here.

These decisions, though not binding on this Court, represent the most thorough and reasoned analysis of DHS's new detention policy to date and address the exact statutory question presented in this case. They reinforce what the statutory structure already makes clear: once a noncitizen is placed into § 1229a proceedings, detention is governed by § 1226(a), not § 1225(b). Respondents identify no authority to the contrary.

Taken together, the *Maldonado Bautista* orders confirm that DHS's reclassification theory is unlawful, that individuals in Petitioner's position fall within the statutory protection of § 1226(a), and that TRO relief is appropriate to prevent continued detention under a legally impermissible framework.

VII. CONCLUSION

This case presents a straightforward question of statutory authority: whether Petitioner—who has long resided in the United States, who has been in § 1229a removal proceedings for years, and who has an active master calendar hearing scheduled for March 10, 2026—is detained under 8 U.S.C. § 1226(a) or the inapplicable provisions of § 1225(b). The record, the structure of the INA, binding Second Circuit precedent, and the recent *Maldonado Bautista* declaratory judgment all point to the same conclusion: Petitioner is a § 1226(a) detainee entitled to an individualized bond hearing at which the Government bears the burden of proving that continued detention is justified.

Detaining Petitioner under the wrong statutory provision has resulted—and continues to result—in unconstitutional and irreparable harm, including the denial of the procedural protections Congress mandated for individuals in § 1229a proceedings. With his next Immigration Court hearing approaching, immediate judicial intervention is necessary to safeguard both Petitioner's liberty interest and the integrity of his pending removal case.

For these reasons, Petitioner respectfully requests that the Court grant his Emergency Motion for a Temporary Restraining Order, declare that his detention arises under 8 U.S.C. § 1226(a), and order the Department of Homeland Security to provide him with an individualized bond hearing before an Immigration Judge within fourteen (14) days, or grant such other relief as the Court deems just and proper.

Respectfully submitted this 3rd day of December, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on **December 3, 2025**, I electronically filed the foregoing **Reply in Support of Petitioner's Emergency Motion for a Temporary Restraining Order** with the Clerk of the Court using the CM/ECF system. The CM/ECF system will send notice of this filing to all counsel of record, including counsel for Respondents.

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