IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

JOSE ALTAGRACIA FRANCO DE LA CRUZ,

Petitioner,

v.

PHILIP RHONEY, in his official capacity as Deputy Field Office Director, Buffalo Field Office, U.S. Immigration & Customs Enforcement, et al.,

Respondents.

Civil Action No.
25-CV-6699-MAV

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Comes now, Petitioner, through counsel and opposes the Motion to Dismiss filed by Respondents for the reasons stated herein. The Motion to Dismiss is meritless. First and foremost, this Court has jurisdiction over the matter for the reasons explained herein. Furthermore, Respondents' contentions that Petitioner is properly "mandatorily detained" under § 1225 are without merit; Petitioner is not "seeking admission" and has been physically present in the United States since September 2022 without interruption; as such, the plain language of § 1225 cannot apply to him and thus his detention is governed by § 1226(a), as explained below. Even if this Court were to somehow find that § 1225 properly applies to Petitioner, due process rights apply to *all persons*, and Respondents' contention that Petitioner has a minimal right to due process flies in the face of the plain text of the Fifth Amendment and the weight of authority; as made clear by *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), the *Mathews v. Eldridge*, 424

U.S. 319 (1976) test would be applicable. In either scenario, a bond hearing should be ordered promptly and, pursuant to *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020), the burden should be on the government to prove by clear and convincing evidence that Petitioner is a flight risk or a danger to the community.

I. This Court has Jurisdiction Over the Petition

In *Lieogo v. Freden, et al.*, No. 6:25-CV-06615 EAW, 2025 WL 3290694 (W.D.N.Y. Nov. 26, 2025), this Court held that 8 U.S.C. §§ 1252(e)(3), 1252(g), and 1252(b)(9) do not bar the Court from exercising jurisdiction over a habeas corpus petition for a non-citizen detainee.

Here, the Respondents argue that jurisdiction is barred by subsections (g) and (b)(9), but do not raise any novel arguments beyond those which this Court already addressed in *Lieogo* and numerous other cases. With respect to Respondents' arguments on jurisdiction under § 1252(b)(9), Section 1252(b)(9) provides that "[j]udicial 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 a [noncitizen] from the United States under this subchapter shall be available only in judicial review of a final order." 8 U.S.C. § 1252(b)(9). Remarkably, the Respondents' argue that 8 U.S.C. § 1252(b)(9) bars this Court from exercising jurisdiction despite the fact that Petitioner does not even have a final order of removal – and thus a Petition for Review would be premature in any event. With respect to subsection (b)(9), "the language of § 1252(b) contradicts the government . . . [because it] sets out requirements only with respect to review of an order of removal. . . ." *Mahdawi*, 136 F.4th at 451 (cleaned up). Respondents' position is not supported by Supreme Court precedent. See, e.g., *Zadvydas v.*

Davis, 533 U.S. 678, 688 (2001) ("We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention."); see also *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) ("§ 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." (cleaned up)); *Jennings v. Rodriguez*, 583 U.S. 281, 295 n.3 (2018) ("The question is not whether detention is an action taken to remove an alien but whether the legal questions in this case arise from such an action. . . . [T]hose legal questions are too remote from the actions taken to fall within the scope of § 1252(b)(9).").

Section 1252(g) states that:

> [e]xcept 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, . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any [noncitizen] arising from the decision or action by [ICE] to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen] under this chapter.

8 U.S.C. § 1252(g).

Respondents have "dramatically overstate[d] the reach of § 1252(g). . . ." *Mahdawi v. Trump*, 136 F.4th 443, 450 (2d Cir. 2025) (holding that unlawful detention claims are collateral to removal process and fall outside § 1252(g)'s narrow jurisdictional bar). Section 1252(g) does not strip this Court of jurisdiction because Petitioner "does not challenge the Attorney General's decision or action 'to commence proceedings, adjudicate cases, or execute removal orders'," see *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) ("Noncitizens are ... entitled to challenge through habeas corpus the legality of their ongoing detention.").

II. Relevant Statutory Framework

The Immigration and Nationality Act ("INA") and its implementing regulations set forth the procedures for detaining, paroling, and removing inadmissible noncitizens from the United States. "[O]ur immigration laws have long made a distinction between those [noncitizens] who have come to our shores seeking admission . . . and those who are within the United States after entry, irrespective of its legality." *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958). Recognizing this dichotomy, the INA "authorizes the [g]overnment to detain certain [noncitizens] seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the [g]overnment to detain certain [noncitizens] already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c)." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (emphasis added). Detention is mandatory for the former but discretionary for the latter. Importantly, "a noncitizen cannot be subject to both mandatory detention under § 1225 and discretionary detention under § 1226." *Lopez Benitez v. Francis*, 795 F. Supp. 3d 475, 485 (S.D.N.Y. 2025).

A. Mandatory Detention Under Section 1225(b)(2)

Section 1225(b)(2)(A) provides that "in the case of [a noncitizen] who is an applicant for admission, if the examining immigration officer determines that [a noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A) ("§ 1225" or "§ 1225(b)(2)'") (emphasis added). Thus, for § 1225's mandatory detention requirement to apply, an "'examining immigration officer' must determine that the individual is: (1) an 'applicant for admission'; (2) 'seeking admission'; and (3) 'not clearly and beyond a doubt entitled to be admitted.'" *Lopez*

Benitez, 795 F. Supp. 3d at 487 (quoting *Martinez v. Hyde*, 792 F. Supp. 3d 211, 214 (D. Mass. 2025)); *J.G.O. v. Francis*, No. 25-cv-07233 (AS), 2025 WL 3040142, at *2-3 (S.D.N.Y. Oct. 28, 2025). With the narrow exception of temporary parole under 8 U.S.C. § 1182(d)(5)(A), "there are no other circumstances under which [noncitizens] detained under § 1225(b) may be released." *Jennings*, 583 U.S. at 300 (emphasis omitted).

Pursuant to § 1182(d)(5)(A), noncitizens detained following inspection under § 1225 can be paroled into the United States "for urgent humanitarian reasons or significant public benefit," based on a "case-by-case" assessment by DHS. § 1182(d)(5)(A). Notably, humanitarian or public interest parole may only be granted "provided the [noncitizen] present[s] neither a security risk nor a risk of absconding." See 8 C.F.R § 212.5(b). Parole under 1182(d)(5)(A) is temporary. It may terminate "automatically" upon the noncitizen's "departure from the United States" or "at the expiration of the time for which parole was authorized." 8 C.F.R. § 212.5(e)(1). Alternatively, it may terminate "upon written notice to the [noncitizen]." § 212.5(e)(2)(i). In the latter case, a "charging document," such as a Notice to Appear ("NTA"), may act as "written notice" if it is "served on the [noncitizen]." Id.; see also 8 C.F.R. § 244.1 (defining the term "[c]harging document" to include a "Notice to Appear"). Once parole terminates, § 1182(d)(5)(A) requires the noncitizen to "forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A).

Accordingly, the end of parole — notwithstanding the method of termination — triggers processing under 8 C.F.R. § 212.5(e)(2). See 8 C.F.R. § 212.5(e)(1)(ii) ("[T]he [noncitizen] shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required."). Under § 212.5(e)(2), a noncitizen is "restored to the status that he or she had

at the time of parole," and "[a]ny further inspection or hearing shall be conducted under section 235 or 240 of the [INA] and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed." § 212.5(e)(2)(i)

B. Discretionary Detention Under Section 1226(a)

Section 1226 governs the detention of noncitizens "inside the United States," *Jennings*, 583 U.S. at 288, who are awaiting "a decision on whether [they are] to be removed from the United States," 8 U.S.C. § 1226(a). There are two categories of detention under the statute. The first category, established by Section 1226(a), provides that "[o]n a warrant issued by the Attorney General, [a noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a) ("§ 1226" or "§ 1226(a)"). Under this "discretionary detention framework," *Lopez Benitez*, 795 F. Supp. 3d at 484 (quoting *Gomes v. Hyde*, --- F. Supp. 3d ---, 2025 WL 1869299, at *1 (D. Mass. July 7, 2025)), DHS may (1) continue to detain the noncitizen; (2) release the noncitizen on bond; or (3) release the noncitizen on conditional parole, 8 U.S.C. § 1226(a)(1)-(2). When DHS exercises its discretion to detain, "§ 1226(a) and its implementing regulations require [DHS] to make an individualized custody determination." *Velasaca v. Decker*, 458 F. Supp. 3d 224, 241 (S.D.N.Y. 2000), appeal withdrawn sub nom. *Velasaca v. Wolf*, No. 20-2153, 2020 WL 7973940 (2d Cir. Oct. 13, 2020). Moreover, § 1226(a)'s implementing regulations mandate that DHS officers base their individualized determination on two factors: (1) whether the noncitizen is a "danger to property or persons" and (2) whether the noncitizen is "likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). If, after conducting such an assessment, DHS ultimately decides to detain the noncitizen, that noncitizen has a right to appeal that decision before an

immigration judge, who must consider the same two factors. See 8 C.F.R. §§ 1003.19(d),(e) (allowing immigration judges to review bond and custody determinations); *Matter of Siniauskas*, 27 I. & N. Dec. 207, 207 (BIA 2018) ("[A noncitizen] in a custody determination under [§ 1226], must establish to the satisfaction of the Immigration Judge and the Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.").

The second category, established by Section 1226(c), provides that DHS "shall take into custody any [noncitizen]" who falls under certain enumerated categories related to criminal and terrorist activity. 8 U.S.C. § 1226(c)(1). This "mandatory detention framework . . . 'carves out a statutory category of [noncitizens] who may not be released' from detention pending the conclusion of their removal proceedings.'" *Rodriguez-Acurio v. Almodovar*, --- F. Supp. 3d ---, 2025 WL 3314420, at *10 (E.D.N.Y. Nov. 28, 2025) (emphasis in original) (quoting *Jennings*, 583 U.S. at 289).

III. Petitioner is not "seeking admission" and therefore cannot be subject to § 1225, but rather is detained under § 1226(a)

The elephant in the room that must be addressed, first and foremost, is that ICE initially appears to have actually detained Petitioner under § 1226(a). This is evidenced by the Notice to Appear issued to Petitioner asserting not that he was an arriving alien, but rather that he was "present in the United States without having been admitted or paroled." Exhibit A, NTA.

There is a recent decision by the Hon. Lewis J. Liman in the Southern District of New York in *Qasemi v. Francis, et. al.*, 25-cv-10029 (S.D. New York, December 17, 2025) involving substantially similar facts to the instant case. In *Qasemi*, a non-citizen who entered the country

with an appointment from the "CBP One" application was detained by ICE and put through the credible fear process, and thereafter, during the pendency of removal proceedings against him, was granted humanitarian parole and released from detention. Thus, the only difference between Qasemi and Petitioner here was that Qasemi did not enter without inspection, but rather entered through a CBP One appointment. Like Qasemi, Petitioner was granted parole and released from custody. Like Qasemi, Petitioner was then re-detained by ICE and taken back into custody. The *Qasemi* court held that a person in this posture can only be detained under 1226(a), and not under 1225(b)(1), so as to "avoid potentially absurd outcomes." *Qasemi*, at 25. The Qasemi court ordered Petitioner's immediate release from custody – no bond hearing, just release.

Likewise, the recent decision by the Hon. Jennifer L. Rochon in the Southern District of New York in *Campbell v. Almodovar*, 25-cv-9509-JLR (S.D. New York, December 10, 2025), is highly instructive in its analysis. *Campbell* involved a non-citizen who, like Petitioner, was paroled into the United States, allowed to reside here for years, and then, just last month, detained by ICE. DHS did not commence removal proceedings against Campbell "until September 2025 — four years after he had been paroled into the country, and years after his parole expired." *Id.* at 19. "This re-arrest, then, was not simply a continuation of Campbell's initial border encounter following the termination of his parole. It was an independent decision to detain, years after his parole expired and in connection with a new NTA." *Id.* Thus, the Court found, "while Campbell remained 'legally unadmitted' due to his parole status, he 'ha[d] arrived' in the United States." *Campbell*, citing *Rodriguez-Acurio v. Almodovar*, --- F. Supp. 3d ---, 2025 WL 3314420, at *21 (E.D.N.Y. Nov. 28, 2025), (quoting *Coal. for Humane Immigr. Rts. v. Noem*, --- F. Sup. 3d ---, 2025 WL 2192986, at *28 (D.D.C. Aug. 1, 2025) ("[W]hile a Section

1182(d)(5)(1) parolee remains 'legally unadmitted,' they 'have arrived' — i.e., their arrival is complete, whereas their admission is not.")).

The *Campbell* court's analysis went on to state that mandatory detention under § 1225 is premised on an immigration officer's determination that a noncitizen is: (1) an "applicant for admission"; (2) "seeking admission"; and (3) "not clearly and beyond a doubt entitled to be admitted." *Campbell,* citing 8 U.S.C. § 1225(b)(2)(A); *Lopez Benitez*, 795 F. Supp. 3d at 487; J.G.O., 2025 WL 3040142, at *2-3. At the time of his 2025 re-arrest, Campbell did not meet all three criteria, so he could not have been detained under § 1225. In reaching its conclusion, the Court only needed to address, and distinguish between, the first two criteria. The Court's explanation, starting at page 11, is summarized below.

Because the plain meaning of the statute requires all three elements be satisfied, the Court looked to the meaning of an "applicant for admission" and found that it is a term of art that covers both noncitizens who "arrive in the United States" and those already "present in the United States who ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 91 n.5 (1991) (noting that terms of art "depart from ordinary meaning"). "Admitted" is in turn defined as having gained "lawful entry . . . into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A).

The Court found that Campbell remained an "applicant for admission" despite having been paroled. Section 1182(d)(5)(A) specifically provides that "parole . . . shall not be regarded as an admission of the [noncitizen]." 8 U.S.C. § 1182(d)(5)(A). The applicable DHS regulation further provides that once a noncitizen's parole terminates, he is "restored to the status that he . . . had at the time of parole," 8 C.F.R. 212.5(e)(2)(i) — that of an applicant for admission. See, e.g., *United States v. Balde*, 943 F.3d 73, 84 (2d Cir. 2019) ("Parole does not change

parolees' immigration status: they . . . are treated as applicants for admission into the country."). Thus, at the time of his 2025 re-arrest, Campbell was "present in the United States" and "ha[d] not been admitted," making him an applicant for admission. 8 U.S.C. § 1225(a)(1).

The *Campbell* court, however, went on to find that, though Campbell remained an applicant for admission, Campbell was no longer "seeking admission" at the time of his 2025 re-arrest and detention. Unlike "applicant for admission," "seeking admission" has no statutory definition. Determining the plain meaning of the phrase is straightforward. See *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) ("Where, as here, there is no statutory definition of a term, we consider 'the ordinary, common-sense meaning of the words.'" (quoting *Dauray*, 215 F.3d at 260)); id. ("If the meaning is plain, the inquiry ends there."). First, to "seek" is "to ask for" or "to try to acquire or gain." Seek, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/seek (last visited Dec. 9, 2025). The use of a present participle, "seeking," "necessarily implies some sort of present-tense action." *Lopez Benitez*, 795 F. Supp. 3d at 488 (quoting *Martinez*, 792 F. Supp. 3d at 218); see also J.G.O., 2025 WL 3040142, at *3; *Tumba Huamani v. Francis*, No. 25-cv- 08110 (LJL), 2025 WL 3079014, at *3 (S.D.N.Y. Nov. 4, 2025). Next, the applicant must be seeking "admission," which is statutorily defined as "lawful entry . . . into the United States." 8 U.S.C. § 1101(a)(13)(A). "Entry" is not defined in the INA, see generally id. § 1101, so it can be given its "ordinary, contemporary, common meaning," *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). That meaning is "[t]he action or an act of entering a place." Entry, Oxford English Dictionary, https://doi.org/10.1093/OED/8274517121 (last visited Dec. 9, 2025); see also Entry, Black's Law Dictionary (12th ed. 2024) ("Any entrance of [a noncitizen] into the United States, whether voluntary or involuntary."). Entry therefore implies a geographic

limit of entering a place, here the United States's entrance (i.e., the border). All combined, "seeking admission" means presently trying to enter the United States at or near the border. See *J.G.O.*, 2025 WL 3040142, at *3 (noting that "seeking admission" would "require[] [a noncitizen] . . . to want to go into the country"); *Alvarez Ortiz v. Freden*, --- F. Supp. 3d ---, 2025 WL 3085032, at *7 (W.D.N.Y. Nov. 4, 2025) (observing that "seeking admission" "must refer to seeking physical entry at the border, not the legal right to enter"); *Hyppolite v. Noem*, No. 25-cv-04304 (NRM), 2025 WL 2829511, at *9 (E.D.N.Y. Oct. 6, 2025) (finding that "seeking admission" "refer[s] to those who are presenting themselves at the border, or who were recently apprehended just after entering").

Judge Rochon concluded that, "when DHS agents detained Campbell in 2025, he was no longer seeking to enter the country. He was already in — and had been for several years." *Campbell* at 13, citing *Lopez Benitez*, 795 F. Supp. 3d at 489 (holding that because "§1225(b)(2)(A) applies only to those noncitizens who are actively 'seeking admission' to the United States, it cannot, according to its ordinary meaning, apply to [the petitioner], because he has already been residing in the United States for several years"); *Rodriguez-Acurio*, 2025 WL 3314420, at *16 n.6 ("[A]lthough a Section 1182(d)(5)(A) parolee remains 'at the border' in the sense that they remain an applicant for admission, these parolees have nevertheless entered into the United States by virtue of their parole . . . ."). "If anything, Campbell was seeking 'to obtain a lawful means to remain here' through his asylum application." *Id.*, citing *Lopez Benitez*, 795 F. Supp. 3d at 488 n.7. Therefore, § 1225 does not apply to him.

She also found that Respondents' reading of § 1225 would likewise render superfluous the mandatory detention provisions found in § 1226(c)(1)(A), (D), and (E), and would make the text added by the Laken Riley Act "almost entirely redundant."

Petitioner urges this Court to find that, as in *Campbell*, he is not "seeking admission." Petitioner has lived in the United States since 2008, had a pending asylum application since then, had removal proceedings against him administratively closed in 2016, was paroled into the United States in 2017 pursuant to a grant of advance parole, and has resided here uninterrupted since then until being detained by ICE last month. *See* Exhibit A, Witmer Declaration. He cannot be said to be "seeking admission" and therefore § 1225 does not apply to him; thus he is detained under § 1226(a), as further evidenced by the Notice to Appear with which he was served.

IV. Even if Petitioner is detained under § 1225, he has a due process right to an individualized bond determination

Respondents essentially argue that Petitioner has minimal, or no, due process rights and that, as, such, he cannot challenge his detention without a bond hearing as unlawful. Even if this Court were to somehow find that Petitioner is "seeking admission" and therefore subject to ongoing detention under § 1225, he still is not without due process rights. Respondents argue that applicants for entry like Petitioner have *no* constitutional due-process right to a bond hearing. But the Fifth Amendment provides that, "No *person* shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Cont. amend. V. The Fifth Amendment applies to all persons—it makes no distinction based on citizenship status or otherwise. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of

the United States are entitled to the protection guarant[e]ed by [the Fifth Amendment], and . . . even aliens shall not be . . . deprived of life, liberty, or property without due process of law.").

Against the general rule that due process applies to all persons, courts have recognized an exception known as the "entry fiction" whereby an applicant for admission to the country is treated as if he were stopped at the border for the purposes of his application for admission. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892). Essentially this means that a person seeking entry may be physically allowed into the United States pending a decision on his application for admission, but the mere fact of his physical presence within U.S. borders grants him no greater constitutional protection *as to his application* than if he were outside the country. *See Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958); *see also United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 235 (2d Cir. 1967). This narrowly-tailored legal fiction exists to accommodate the political branches' broad prerogative to exclude. *See Thuraissigiam*, 591 U.S. at 139 ("[T]he Constitution gives the political department of the government plenary authority to decide which aliens to admit, and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted." (cleaned up)). Applicants for admission must look to Congress and the Executive Branch for the procedures determining their legal admission into the country; the Due Process Clause provides no independent font of necessary procedure. But these cases don't suggest that applicants for entry are deprived of all protections of the Constitution. *Cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393 (1953) ("What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account.").

Respondents cite *Dep't of Homeland Sec. v. Thuraissigiam,* 140 S. Ct. 1959 (2020), a case where the Supreme Court held that "arriving aliens" cannot seek judicial review of unfavorable credible fear determinations. *See Thuraissigiam,* 140 S. Ct. at 1983. *Thuraissigiam* is inapposite here, as the Supreme Court only addressed the narrow issue of judicial review of credible fear determinations. Detention matters were not reached at all. The very relief Petitioner seeks here—a bond hearing before an Immigration Judge — closely resembles the administrative review process *Thuraissigiam* necessarily deemed sufficient to obviate the need for judicial review in order to satisfy due process considerations. *See Thuraissigiam,* 140 S. Ct. at 1965-66.

In *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), the Second Circuit was posed with the question as to whether a noncitizen subject to mandatory detention has the constitutional due-process right to a bond hearing when their detention becomes unreasonably prolonged. The provision at issue in *Black* was 8 U.S.C. § 1226(c), which states that the Attorney General "shall take into custody" noncitizens charged with removability based on a prior conviction on specified criminal grounds or on allegations of involvement with terrorism. The *Black* Court found that the statute "makes no explicit provision for an initial or other bond hearing during the period of detention and places no limit on the duration of detention under its authority." 103 F.4th at 137; *see id.* at 142 (observing that "section 1226's text cannot be construed to require a bond hearing after any particular fixed period of detention"). Nevertheless, the Second Circuit held that "[i]n light of the constitutional concerns identified by the Supreme Court and this Court in connection with the Executive's detention of noncitizens . . . due process bars the Executive from detaining such individuals for an unreasonably prolonged period under section 1226(c) without a bond hearing." *Id.* at 143. The Court rejected "a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention," but it

cautioned "that any immigration detention exceeding six months without a bond hearing raises serious due process concerns." *Id.* at 150.

In determining whether a bond hearing is warranted, *Black* instructed district courts to evaluate the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 151 (quoting *Mathews*, 424 U.S. at 335). The Court then applied the *Mathews* factors to the two petitioners in that case: Carol Black, who had been detained for seven months, and Keisy G.M., who had been detained for twenty-one months. *Id.* at 137. The Court concluded that both were entitled to a hearing. As to the specifics of the hearing, the Court held that due process required the Government to demonstrate to an IJ "by clear and convincing evidence, the need for [the noncitizen's] continued detention," (that is, either danger to the community or risk of flight) and that the IJ must "consider [the noncitizen's] ability to pay and alternative means of assuring his appearance." *Id.* at 159.

In *Al Thuraya v. Warden*, 25-cv-02582, (S.D. New York, September 2, 2025), the district court held that Fifth Amendment due process rights apply to applicants for entry, and that *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), necessitates that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976) must be applied to determine whether a remedy is warranted. In doing so, the *Al Thuraya* court rejected the government's arguments that no due process rights exist for applicants for admission. The Court distinguished *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Court explained that Mezei was ordered excluded from the

country (on national security grounds) and was detained solely because no other country would take him and that, therefore, Mezei had been conclusively "denied entry"—he had exhausted all avenues of review. In that context, the Supreme Court said that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* The Court focused on the fact that a release from detention would undermine the Government's determination to exclude Mezei. *Id.* at 216 ("Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding.").

The *Al Thuraya* court also pointed out that, in *Thuraissigiam*, the Court rejected an arriving noncitizen's claim for review of the agency's removal decision, which was based on an asylum officer's finding that he lacked a credible fear of persecution. In that context, the Court stated that "an alien in respondent's position has only those rights *regarding admission* that Congress has provided by statute." 591 U.S. at 140. (emphasis added).

The *Al Thuraya* Petitioner, like Petitioner, stood in a different position. Unlike Mezei and Thuraissigiam, Petitioner has not been definitively "denied entry." Petitioner was granted parole, and has an asylum application pending. The government cannot remove Petitioner at any point in the near future – he must be afforded the opportunity to litigate his asylum claim, and any other claims for relief, that he may have. In other words, just like Al-Thuraya, Petitioner has neither been admitted (*i.e.*, granted asylum) nor excluded (*i.e.*, denied asylum). So, as in Al Thuraya, any concern animating the entry fiction exception—that is, the political branches' authority to legally admit or exclude noncitizens—doesn't apply here. Indeed, the due-process claim Petitioner advances doesn't concern his application at all, just the legality of his detention while that application is being reviewed by the administrative bureaucracy.

Indeed, "the vast majority of courts to address whether individuals detained under § 1225(b) have a right to a bond hearing have held that they do." *Al Thuraya*, citing *Kydyrali v. Wolf,* 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020); *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 848 (E.D. Va. 2020); *Leke v. Hott*, 521 F. Supp. 3d 597, 603-04 (E.D. Va. 2021); *Hong v. Mayorkas*, 2022 WL 1078627, at *7 (W.D. Wash. 2022); *Padilla v. U.S. Immigr. & Customs Enf't*, 704 F. Supp. 3d 1163, 1170-72 (W.D. Wash. 2023); *Arechiga v. Archambeault*, 2023 WL 5207589, at *3 (D. Nev. 2023); *A.L. v. Oddo*, 761 F. Supp. 3d 822, 825-26 (W.D. Pa. 2025); *Abreu v. Crawford*, 2025 WL 51475, at *4, *7 (E.D. Va. Jan. 8, 2025); *Rahman v. Garland*, 2025 WL 1920341, at *3, *6 (W.D. Wash. June 26, 2025), *report and recommendation adopted sub nom. Anisur R. v. Garland*, 2025 WL 1919252 (W.D. Wash. July 11, 2025); *Akhmadjanov v. Oddo*, 2025 WL 660663, at *4 (W.D. Pa. Feb. 28, 2025); *A.E. v. Andrews*, 2025 WL 1424382, at *3 (E.D. Cal. May 16, 2025), *report and recommendation adopted*, 2025 WL 1808676 (E.D. Cal. July 1, 2025); *Rodrigues De Oliveira v. Joyce*, 2025 WL 1826118, at *6 (D. Me. July 2, 2025); *Singh v. Andrews*, 2025 WL 1918679, at *6 (E.D. Cal. July 11, 2025); *Abdul-Samed v. Warden*, 2025 WL 2099343, at *6 (E.D. Cal. July 25, 2025); *Bermudez Paiz v. Decker*, 2018 WL 6928794, at *12 (S.D.N.Y. 2018); *Traore v. Decker*, 2019 WL 3890227, at *3 (S.D.N.Y. 2019); *Birch v. Decker*, 2018 WL 794618, at *6 (S.D.N.Y. 2018); *Destine v. Doll*, 2018 WL 3584695, at *4-*5 (M.D. Pa. 2018); *Otis V. v. Green*, 2018 WL 3302997, at *6-*8 (D.N.J. 2018); *Perez v. Decker*, 2018 WL 3991497, at *3-*4 (S.D.N.Y. 2018).

Thus, even if the Court declines to follow *Campbell* and finds that Petitioner is "seeking admission" and therefore subject to § 1225, it should apply the *Mathews* test and determine that whatever may constitute the government's interest in detaining a non-criminal business-owner and father of a U.S. Citizen, who the government itself chose to stop pursuing removal against in

2016, is far outweighed by the most significant liberty interest there is – the interest in being free from imprisonment – and that even though Petitioner has been detained now for about three months, the likelihood of him being detained for many, many months as his case winds its way through the administrative tribunals – is so very real and highly likely, and given all that Petitioner has to lose – a bond hearing is necessary to comport with due process.

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