UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:25-cv-25773-KMW

MICHEL HERNANDEZ-HERNANDEZ,

Plaintiff,

vs.

ELISA M. SUKKAR, *et al.*,

Defendants.
_____/

RESPONDENTS' RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND RESPONSE TO ORDER TO SHOW CAUSE

Defendants file this Return to Plaintiff's Verified Petition for Writ of Habeas Corpus [D.E. 1] (hereinafter the "Petition") and Response to Court's Order to Show Cause [D.E. 5]. As set forth below, this action should be dismissed as Plaintiff seeks the identical injunctive and declaratory relief in a related class action. Regardless, if the Court looks to the merits, Plaintiff's petition should be dismissed as he is properly detained pursuant to INA § 235(b)(2), 8 U.S.C. § 1225(b)(2)(A).

I. FACTUAL BACKGROUND

Plaintiff Michel Hernandez-Hernandez ("Petitioner") is a native and citizen of Cuba, who entered the United States at or near Mayaguez, Puerto Rico, on or about October 6, 2004, at a place other than designated by the Attorney General and was not then inspected, admitted, or paroled. *See* **Exhibit A**, Form I-213, Record of Deportable/Inadmissible Alien, (Form I-213), dated October 8, 2004. On October 7, 2004, the Puerto Rico Department of Natural Resources encountered Petitioner and contacted Customs and Border Protection (CBP), upon the Petitioner's arrival to Mona Island. Immigration and Customs Enforcement (ICE) Air Branch of Aguadilla retrieved

Petitioner from Mona Island and transported him to Aguadilla, Puerto Rico. *See* Exh. A, Form I-213, dated October 8, 2004. That same day, Petitioner was turned over to CBP, who then determined Petitioner was inadmissible to the United States. *See* Exh. A, Form I-213, dated October 8, 2004.

Petitioner remained in DHS custody until his release on October 7, 2004, on a section 212(d)(5) parole, valid for one year. *See* **Exhibit B**, Form I-94, valid until October 7, 2005. On October 8, 2004, DHS filed a Notice to Appear, charging him with inadmissibility under INA § 212(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *See* **Exhibit C**, Form I-862, Notice to Appear (NTA), dated October 8, 2004. Petitioner was served the Notice to Appear on October 8, 2004. *See* Exh. C, Form I-862, NTA.

On September 26, 2006, Petitioner failed to appear at his master calendar hearing before the Executive Office for Immigration Review ("EOIR") Miami Immigration Court. *See* **Exhibit D**, Notice of Hearing, dated March 30, 2006. On September 26, 2006, Petitioner was ordered removed in absentia. *See* **Exhibit E**, Immigration Judge (IJ) Order, dated September 26, 2006.

On May 14, 2012, ICE Enforcement and Removal Operations encountered Petitioner while in the custody of the Florida Department of Corrections after having been convicted of numerous crimes and having completed his criminal sentence. *See* **Exhibit F**, Declaration. Specifically, on November 10, 2009, the Petitioner was convicted of Marijuana Producing Schedule I, in violation of Florida Statute § 893.13(1)(a)(2), and sentenced to 231 days in jail. *See* **Exhibit G**, Judgement and Conviction, Case No. 2007-CF-15571, dated November 18, 2009. On December 4, 2009, Petitioner was convicted of Obstructing an Officer by a Disguised Person, in violation of Florida

Statute § 843.03, and sentenced to 185 days in jail. *See* **Exhibit H**, Judgement and Conviction, Case No. 2007-MM-1997, dated December 4, 2009.

On May 10, 2010, Petitioner was convicted of Fleeing, Attempt to Elude, Drive at High Speed or with Wanton Disregard for Safety Person, Property involving a Law Enforcement Officer with Lights Sirens Activated, in violation of Florida Statute § 316.1935(3)(a), and sentenced to three years in state prison. *See* **Exhibit I**, Judgement and Conviction, Case No. 2007-CF-1655, dated May 10, 2010. On May 28, 2010, Petitioner was convicted of Affray, in violation of Florida Statute § 870.01(1). *See* **Exhibit J**, Judgement and Conviction, Case No. 2010-MM-1358, dated May 28, 2010.

On May 21, 2012, Petitioner was transferred from the Florida Department of Corrections to ICE ERO's custody. *See* **Exhibit K**, Detention History; *see also* Exh. A, Form I-213. On August 20, 2012, Petitioner was released on an Order of Supervision (OSUP). *See* **Exhibit L**, Form I-220B, dated August 20, 2012. On or about October 15, 2025, Petitioner filed a motion to reopen with EOIR, claiming he did not receive notice of the hearing where he was removed in absentia. *See* Exh. F, Declaration. On November 10, 2025, an Immigration Judge granted the Petitioner's motion to reopen the removal proceedings. *See* **Exhibit M**, IJ Order, dated November 10, 2025.

On November 16, 2025, during a check in, ICE ERO revoked Petitioner's OSUP, and he was taken into custody. *See* **Exhibit N**, Notice of Revocation of Release, dated November 16, 2025; *see also* **Exhibit O**, Form I-213, dated November 16, 2025. ICE ERO conducted an informal interview on that same date. On November 25, 2025, Petitioner requested a custody redetermination at the Krome Immigration Court. *See* **Exhibit P**, Notice of Hearing, dated November 28, 2025. On December 4, 2025, the Immigration Judge denied Petitioner's request for a bond redetermination, stating the Immigration Judge lacked jurisdiction to grant bond pursuant

to *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). *See* **Exhibit Q**, IJ Order, dated December 4, 2025. Petitioner reserved appeal of the Immigration Judge's bond decision, which is due to the Board of Immigration Appeals on or before January 5, 2026. *See* Exh. Q, IJ Order, dated December 4, 2025. To date, Petitioner has not filed an appeal. *See* Exh. F ¶ 26. Petitioner is currently detained at Krome North Service Processing Center[1], pursuant to section 235(b)(2) of the INA. *Id.* ¶ 27.

In the Petition, Plaintiff argues that he is entitled to a custody redetermination/bond hearing for two reasons. First, he erroneously claims he is in custody under 8 U.S.C. § 1226, as opposed to 8 U.S.C. § 1225(b)(2)(A), which would entitle to him to a bond hearing. Second, Plaintiff claims that the issue of his bond hearing has been decided by another court federal court in *Maldonado Bautista et.al v. Santacruz,* No. 5:25-CV-01873-SSS-BFM, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025), in which he admits being a current plaintiff and wherein he seeks the identical relief he seeks from this Court. On the one hand, Plaintiff claims that the relief he seeks in *Maldonado Bautista* is not identical to that which he seeks so as to not bar this action, while on the other hand, Plaintiff contradictorily argues that *Maldonado Bautista* is preclusive in entitling to him that very same relief despite no final declaratory decision being issued in that matter. Regardless, Plaintiff's petition should be dismissed for the reasons explained below.

II. ARGUMENT

A. This Action Should be Dismissed because Plaintiff seeks the same relief in

[1] Petitioner was moved from the Florida Soft-sided Facility South (FSSFS, or"Alligator Alcatraz") formerly known as the Dade-Collier Training and Transition Airport located in Ochopee, Florida to Krome North Service Processing Center on December 11, 2025. Although undersigned notified the Department of Homeland Security on December 10, 2025 at 4:49 pm of this Court's Order to Show Cause [DE 5], the notification of the Court's instructions did not reach the facility before Petitioner was moved on December 11, 2025 and the move was inadvertent of this Court's order. Exh. F ¶ 27. Defendants acknowledge that Petitioner is currently within this Court's jurisdiction and that he will not be moved absent a court order or dismissal of this action.

Maldonado Bautista

Plaintiff claims to be a member of the nationwide class certified in another habeas corpus petition, *Maldonado Bautista et.al v. Santacruz,* No. 5:25-CV-01873-SSS-BFM, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025). D.E. 1 at ¶¶ 46, 56. Because Petitioner alleges he is a member of the *Maldonado Bautista* certified class, his status as member precludes any individual suits for the *same* injunctive or declaratory relief. *See U.S. v. Sanchez-Gomez*, 584 U.S. 381, 387 (2018)(noting that "[t]he certification of a suit as a class action has important consequences for the unnamed members of the class, including being "bound by the judgment") (cleaned up); *Horns v. Whalen*, 922 F.2d 835 (4th Cir. 1991) (affirming district court's decision to decline jurisdiction in a habeas mandamus action where the issue at bar was pending in a class action); *McNeil v. Guthrie*, 945 F.2d 1163, 1165-66 (10th Cir. 1991) (finding that "[i]ndividual suits for injunctive and declaratory relief from alleged unconstitutional prison conditions cannot be brought where there is an existing class action. To permit them would allow interference with the ongoing class action"); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) ("To allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications"); *Rahman v. Blinken*, 2024 WL 4332603, at *8 (D.D.C. Sept. 27, 2024) (dismissing mandamus and APA claims where the same claims were being litigated in a class action of which the plaintiff was a member); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) ("To allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications.").

In *Gillespie*, the Fifth Circuit held that an individual class member is barred from pursuing his own individual lawsuit that seeks equitable relief within the subject matter of the class action. *Gillespie*, 858 F.2d at 1103. In so holding, the Fifth Circuit explained that "[i]ndividual members

of the class . . . may assert any equitable or declaratory claims they have, but they must do so by urging further action through the class representative and attorney, including contempt proceedings, or by intervention in the class action." *Id.* Thus, Petitioner, as an alleged individual class member cannot bring claims seeking equitable relief in this action and the habeas petition should be dismissed. *See, e.g., Oliver v. Scott*, No. CIV. 3:98-CV-2246-H, 2000 WL 140745, at *3 (N.D. Tex. Feb. 4, 2000) (dismissing claims based on *Gillespie*).

Prior to class certification, the *Maldonado Bautista* court granted Petitioners' motion for partial summary judgment but denied the request to enter a final judgment because there was a pending motion for class certification. *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025). The *Maldonado Bautista* Court explained that the each of the plaintiff class members "requested bond hearings, all of which were denied" citing "Section 235(b) of the INA (i.e., 8 U.S.C. § 1225) as grounds for lack of jurisdiction". *Id.* at 1. The court further stated that issue presented before it by the yet class was the legality of the DHS's "new" policy in denying bond hearings to "anyone arrested in the United States and charged with being inadmissible as an 'applicant for admission' under 8 U.S.C. § 1225(b)(2)(A) [because] [u]nder § 1225(b)(2)(A), 'applicants for admission' are subject to mandatory detention for proceedings under 8 U.S.C. § 1229(a) and not entitled to the due process protections found within § 1226(a)." *Id.* at 1. This policy "has now become binding precedent in immigration courts that the DHS Policy is lawful. *See Matter of Yajure-Hurtado*, 29 I. & N. Dec. 216 (BIA 2025)." *Id.* at 4. It is the application of this "new policy" that is the exclusive issue to be decided by the *Maldonado Bautista* Court. *Id.* at 4.

The relief Plaintiff seeks here, namely a bond hearing, is expressly premised on his argument that he is detained pursuant to 8 U.S.C. § 1226(a), rather than 8 U.S.C. § 1225(b)(2)(A),

and that the Immigration Judge improperly applied *Matter of Yajure-Hurtado* in reaching that conclusion. D.E. 1 at ¶¶ 4, 27, 29, 40, 47. This is the identical legal issue that Plaintiff seeks be adjudicated in *Maldonado Bautista.* Although Plaintiff mistakenly claims he "**seeks relief different from that requested by the class representatives**" [D.E. 1 at ¶ 50 (emphasis in original)], this position is incorrect and contradicted by the plain language of his petition wherein he sets forth the identical issue considered in *Maldonado Bautista.* Essentially, Plaintiff is presenting the same issue before two courts without providing any evidence of distinction or explanation as to how they are different. Nevertheless, given that the habeas petitions in *Maldonado Bautista* and in plaintiff's instant case both seek to challenge the policy set forth in *Hurtado* on the same grounds for the purpose of obtaining a bond hearing, Plaintiff's position that the relief is different is inapposite. Consequently, because Plaintiff represents to be a member of the *Maldonado Bautista* class and seeks the identical relief here as he seeks in *Maldonado Bautista*, this action must be dismissed.

B. *Maldonado Bautista*'s non-final order granting partial summary judgment is not preclusive

Plaintiff next contradicts himself and admits that the injunctive and declaratory relief sought in *Maldonado Bautista* is exactly what he seeks from this Court when he argues the *Maldonado Bautista* Court already decided he was entitled to declaratory relief granting him a bond hearing and repudiated *Hurtado*. D.E. 1 at ¶ 52-53.[2] According to Plaintiff, the *Maldonado Bautista* court's non-final decision is a preclusive declaration on the issue of whether he should be entitled to a bond hearing and whether *Hurtado* applies. [3]

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[2] This is a bold and blatant contradiction to Plaintiff's prior argument that the individualized injunctive relief sought here is different than in *Maldonado Bautista*. D.E. 1 at ¶¶ 50. If the injunctive and declaratory relief sought in *Maldonado Bautista* was different, then it could not be preclusive as a matter of law or fact.

[3] Notably, if the *Maldonado Bautista* Court had granted the declaratory relief he sought in a final order there would be no need for this action. Instead, Plaintiff could just proceed to enforce his "judgment".

However, the *Maldonado Bautista* Court granting a partial summary judgment motion does not have preclusive effect until such decision is reduced to a judgment. It is true that prior to class certification, the *Maldonado Bautista* Court granted a motion for partial summary judgment motion by the petitioners, however, it denied their request to enter final judgment because there was a pending motion for class certification. *Maldonado Bautista v. Santacruz*, No. 5:25-CV-01873-SSS-BFM, 2025 WL 3289861 (C.D. Cal. Nov. 20, 2025). Importantly, as a matter of law a court cannot grant declaratory relief prior to the entry of a final judgment, *i.e.*, a declaratory judgment. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction"). A preliminary ruling is, by its nature, not a declaratory judgment "[b]ecause a preliminary declaration—unlike a final declaration—does not specifically bind anyone, it is more akin to an advisory opinion, which the Court is precluded from issuing by history and the implicit policies embodied in Article III." *Vazquez Perez v. Decker*, No. 18-CV-10683 (AJN), 2019 WL 4784950, at *10 (S.D.N.Y. Sept. 30, 2019). As such, "an order granting or denying partial summary judgment is not a final order." *Samsung Semiconductor, Inc. v. AASI Liquidating Tr. ex rel. Welt*, No. 12-23707-CIV, 2013 WL 704775, at *3 (S.D. Fla. Feb. 26, 2013) (internal citations omitted).

Absent an entry of final judgment or final order with respect to the class, or a certification of partial final judgment under Rule 54(b), there is no declaratory judgment in *Maldonado Bautista* that can be given effect. The granting of a motion for partial summary judgment ruling does not operate as a "judgment" because it is not an appealable order and "does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(a), (b). Thus,

there is no class-wide judgment, let alone any final judgment that could have preclusive effect as to class members.

Notably, Plaintiff conflates enforcement of a final judgment with issue preclusion. As explained by Plaintiff's own authority collateral estoppel (also known as issue preclusion) as with res judicata are doctrines that protect "litigants from the burden of relitigating an identical issue with the same party or his privy and of [promote] judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Additionally, "[f]inality is an essential element of both res judicata and collateral estoppel." *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1253 (11th Cir. 2006). As noted, these doctrines are designed to prevent needless duplicative litigation, not allow a plaintiff to institute the same claim with a different court before the first court's decision is final, nor is there any authority that supports such a use of these doctrines. Moreover, as Plaintiff concedes, collateral estoppel requires finality, which is not present based on the nature of the preliminary order he relies upon.

Instead of issue or claim preclusion, the circumstances of this case fall under the first-filed rule. "When a complaint involving overlapping parties and issues has been filed in another federal district, the 'first-to-file' rule creates 'a strong presumption' that the case should be heard by the court in which the matter was first filed." *Elliott v. Williams*, 549 F. Supp. 3d 1333, 1338 (S.D. Fla. 2021) (explaining that the first to file rule "requires that the second-filed case be dismissed or transferred to the district where the first-filed case is pending") citing *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005) (holding that the 11th Circuit has adopted the first to file rule). By admission, Plaintiff has two pending federal habeas corpus petitions seeking the identical injunctive and declaratory relief and involving identical legal issues. Plaintiff offers no exceptional circumstances that would involve an exception to the first to file rule nor does he give any

reasonable explanation as to why he should be allowed to proceed in a separate case after admitting to being a class plaintiff in a prior case litigating the same claim and issue. *See Lianne Yao v. Ulta Beauty Inc.*, No. 18-22213-CIV, 2018 WL 4208324, at *4 (S.D. Fla. Aug. 8, 2018) (applying the first to file rule in the class action setting); *Kelly v. Gerber Prods. Co.*, No. 21-60602-CIV, 2021 WL 2410158, at *2 (S.D. Fla. June 11, 2021) ("If the first-to-file rule were to require a strict comparison only of the named plaintiffs in the two actions, the rule would almost never apply in class actions. This result would be in direct conflict to the purposes of the first-to-file rule because class actions are frequently complex affairs which tax judicial resources – the very cases in which the principles of avoiding duplicative proceedings and inconsistent holdings are at their zenith.")[4]. Accordingly, given that this action is the second filed case, it must be dismissed pending the resolution of the *Maldonado Bautista* action of which Plaintiff claims being member.

Nevertheless, the *Maldonado Bautista* court has not entered a class-wide judgment. As such, there is currently no declaratory relief, let alone relief with preclusive effect on *Maldonado Bautista* class members' claims concerning the proper interpretation of 8 U.S.C. § 1225(b)(2)(A)'s mandatory detention provision. For these reasons, the Court should dismiss the Petition due to the related class action.

C. Petitioner is an Applicant for Admission subject to Detention pursuant to 8 U.S.C. § 1225(b)(2)(A) and discretionary detention under § 1226(a) is Inapplicable which was Clarified in the BIA's Decision in *Matter of Yajure Hurtado*.

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[4] Plaintiff cannot claim to be unaware that his rights are being adjudicated in the first filed *Maldonado Bautista* case or that he has not opted-in to the class action as he references it and relies upon its preliminary ruling throughout his initial petition. Moreover, Plaintiff explicitly refers to himself as a member of the class. D.E. 1 at ¶ 46, 56. *But see Czupryna v. Uncle Julio's Corp.*, No. 16-80821-CIV, 2016 WL 10954509, at *1 (S.D. Fla. Aug. 17, 2016) (finding exceptional circumstances where plaintiff did not opt-in to class action and time to opt in has passed). Nevertheless, if Plaintiff is not a class member, there would be no legal basis for issue preclusion because there would be no identity of parties or their proxies as required. *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1285 (11th Cir. 2004) ("If identity or privity of parties cannot be established, then there is no need to examine the other factors in determining whether res judicata or collateral estoppel applies."). Note, Defendants are uncertain of whether Plaintiff is a member of the class or not; however, it is immaterial because if he is a member then this matter has to be dismissed under the first to file rule, and if he is not, then *Maldonado Bautista* offers him no preclusive relief.

"As with any question of statutory interpretation, [the] analysis begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). Section 1225(a)(1) defines an "applicant for admission" as an "alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .) . . . ." 8 U.S.C. § 1225(a)(1); *see Matter of Velasquez-Cruz*, 26 I&N Dec. 458, 463 n.5 (BIA 2014) ("[R]egardless of whether an alien who illegally enters the United States is caught at the border or inside the country, he or she will still be required to prove eligibility for admission.").

By its very definition, the term "applicant for admission" includes two categories of aliens: (1) arriving aliens, and (2) aliens present without admission. *See Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020) (explaining that "an alien who tries to enter the country illegally is treated as an 'applicant for admission'"); *Matter of Lemus*, 25 I&N Dec. 734, 743 (BIA 2012) ("Congress has defined the concept of an 'applicant for admission' in an unconventional sense, to include not just those who are expressly seeking permission to enter, but also those who are present in this country without having formally requested or received such permission . . . ."); *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 523 (BIA 2011) (stating that "the broad category of applicants for admission . . . includes, *inter alia*, any alien present in the United States who has not been admitted"). An arriving alien is defined, in pertinent part, as "an applicant for admission coming or attempting to come into the United States at a port-of-entry [("POE")] . . . ." 8 C.F.R. §§ 1.2, 1001.1(q).

All aliens who are applicants for admission "shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3); *see also* 8 C.F.R. § 235.1(a) ("Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. [POE] when the port is open for

inspection . . . ."). An applicant for admission at a United States POE "must present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal . . . and is entitled, under all of the applicable provisions of the immigration laws . . . to enter the United States." 8 C.F.R. § 235.1(f)(1); *see also* 8 U.S.C. § 1229a(c)(2)(A) (explaining that an applicant for admission has the burden to establish that he or she is clearly and beyond doubt entitled to be admitted and is not inadmissible under 8 U.S.C. § 1182 in removal proceedings pursuant to § 1229a). "An alien present in the United States who has not been admitted or paroled or an alien who seeks entry at other than an open, designated [POE] . . . is subject to the provisions of [8 U.S.C. § 1182(a)] and to removal under [8 U.S.C. § 1225(b)] or [8 U.S.C. § 1229a]." 8 C.F.R. § 235.1(f)(2).

Petitioner did not present himself at a POE but instead entered the United States without having been admitted or paroled after inspection by an immigration officer. *See* Exh. F ¶ 5. Petitioner is, therefore, an alien present in the United States without admission or parole and, consequently, an applicant for admission. The recently published decision issued by the BIA in *Matter of Yajure Hurtado* is instructive here. In *Matter of Yajure Hurtado*, the BIA rejected the alien's argument that "because he has been residing in the interior of the United States for almost 3 years . . . he cannot be considered as 'seeking admission.'" 29 I&N Dec. at 221. The BIA determined that this argument "is not supported by the plain language of the INA" and creates a "legal conundrum." *Id.* If the alien "is not admitted to the United States (as he admits) but he is not 'seeking admission' (as he contends), then what is his legal status?" *Id.* (parentheticals in original). The BIA's decision is consistent not only with the plain language of § 1225(b)(2), but also with the Supreme Court's decision in *Jennings v. Rodriguez,* 583 U.S. 281 (2018), and subsequent caselaw post *Jennings*. Specifically, in *Jennings*, the Supreme Court explained that §

1225(b) applies to all applicants for admission, noting that the language of § 1225(b)(2) is "quite clear" and "unequivocally mandate[s]" detention. 583 U.S. at 300, 303.

Similarly, relying on *Jennings* and the plain language of §§ 1225 and 1226(a), the Attorney General, in *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), recognized that §§ 1225 and 1226(a) do not overlap but describe "different classes of aliens." 27 I&N Dec. at 516. The Attorney General also held—in an analogous context—that aliens present without admission or parole who are placed into expedited removal proceedings are detained under § 1225 even if later placed in § 1229a removal proceedings after establishing a credible fear of persecution or torture. *Id.* at 518-19; *see also* 8 § U.S.C. 1225(b)(1)(B)(ii)(providing that if an alien subject to expedited removal demonstrates a credible fear of persecution or torture, the alien "shall be detained" for further consideration of an asylum application in § 1229a removal proceedings).

Additionally, in *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025), the BIA held that an alien who unlawfully entered the United States between POEs, was arrested and detained without a warrant while arriving, and was previously released from DHS custody pursuant to an 8 U.S.C. § 1182(d)(5)(A) parole is detained under § 1225(b) upon re-detention. 29 I&N Dec. at 70-71. This ongoing evolution of the law makes clear that all applicants for admission in various procedural postures are subject to detention under § 1225(b). *Cf. Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021) (stating that "no amount of policy-talk can overcome a plain statutory command"); *see generally Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023) (explaining that "the 1996 expansion of § 1225(b) to include illegal border crossers would make little sense if DHS retained discretion to apply § 1226(a) and release illegal border crossers whenever the agency saw fit"). *Florida's* conclusion "that § 1225(b)'s 'shall be detained' means what it says and . . . is a mandatory requirement . . . flows directly from *Jennings*." *Florida*, 660 F. Supp. 3d at 1273.

D. Petitioner is an Applicant for Admission in 8 U.S.C. § 1229a Removal Proceedings and as such his Detention Pursuant to 8 U.S.C. § 1225(b)(2)(A) is Proper.

Both arriving aliens and aliens present without admission or parole, as applicants for admission, may be removed from the United States by, *inter alia*, expedited removal procedures under § 1225(b)(1) or removal proceedings before an immigration judge under § 1229a. §§ 1225(b)(1), (b)(2)(A). *See Jennings,* 583 U.S. at 287 (describing how "applicants for admission fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)"). For aliens amenable to expedited removal, immigration officers have discretion to apply expedited removal under § 1225(b)(1) or to initiate removal proceedings before an immigration judge under § 1229a. *See also Matter of Q. Li*, 29 I&N Dec. 66, 68 (BIA 2025) ("DHS may place aliens arriving in the United States in either expedited removal proceedings under [8 U.S.C. § 1225(b)(1)], or full removal proceedings under [8 U.S.C. § 1229a]" (citations omitted)).

Petitioner is currently in § 1229a removal proceedings and is subject to detention under § 1225(b)(2)(A). *See* Ex. 2, NTA. Hence, under § 1225(b)(2)(A), "an alien who is an applicant for admission" "*shall be detained* for a proceeding under [8 U.S.C. § 1229a]" "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A) (emphasis added); 8 C.F.R. § 235.3(b)(3) (providing that an alien placed into § 1229a removal proceedings in lieu of expedited removal proceedings under 8 U.S.C. § 1225 "shall be detained" pursuant to § 1225(b)(2)). As the Supreme Court observed in *Jennings*, nothing in § 1225(b)(2)(A) "says anything whatsoever about bond hearings." 583 U.S. at 297. Further, there is no textual basis for arguing that § 1225(b)(2)(A) applies only to arriving aliens as no provision therein refers to "arriving aliens," or limits that paragraph to arriving aliens. Where Congress means for a rule to apply only to "arriving aliens,"

it uses that specific term of art or similar phrasing. *See, e.g.*, 8 U.S.C. §§ 1182(a)(9)(A)(i), 1225(c)(1).

E. Section 1226 does Not Impact the Detention Authority that Governs with respect to Applicants for Admission in removal proceedings.

Section 1226(a) is the applicable detention authority for aliens who have been admitted and are subject to removal proceedings under § 1229 and this does not impact the directive in § 1225(b)(2)(A) that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceedings under [8 U.S.C. § 1229a]," § 1225(b)(2)(A). As the Supreme Court explained, § 1226(a) "applies to aliens already present in the United States" and "creates a default rule for those aliens by permitting—but not requiring—the [Secretary] to issue warrants for their arrest and detention pending removal proceedings." *Jennings*, 583 U.S. at 289, 303; *Q. Li*, 29 I&N Dec. at 70; *see also M-S-*, 27 I&N Dec. at 516 (describing 8 U.S.C. § 1226(a) as a "permissive" detention authority separate from the "mandatory" detention authority under 8 U.S.C. § 1225).

Generally, such aliens may be released on bond or their own recognizance, also known as "conditional parole." 8 U.S.C. § 1226(a); *Jennings*, 583 U.S. at 303, 306. Section 1226(a) does not, however, confer the *right* to be released on bond; rather, both DHS and immigration judges have broad discretion in determining whether to release an alien on bond as long as the alien establishes that he or she is not a flight risk or a danger to the community. *See* 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Guerra*, 24 I&N Dec. 37, 39 (BIA 2006); *Matter of Adeniji*, 22 I&N Dec. 1102 (BIA 1999). To interpret § 1225(b)(2)(A) as not applying to all applicants for admission would render it meaningless. As explained above, Congress expanded § 1225(b) in 1996 to apply to a broader category of aliens, including those aliens who crossed the border illegally.

There would have been no need for Congress to make such a change if § 1226(a) was meant to apply to aliens present without admission.

F. Applicants for Admission may Only be Released from Detention on an 8 U.S.C. § 1182(d)(5) Parole.

DHS has the exclusive authority to temporarily release on parole "any alien applying for admission to the United States" on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5); *see* 8 C.F.R. § 212.5(b). In *Jennings*, the Supreme Court placed significance on the fact that § 1182(d)(5) is the specific provision that authorizes temporary release from detention under § 1225(b). 583 U.S. at 300.

Parole, like an admission, is a factual occurrence. *See Hing Sum*, 602 F.3d at 1098; *Matter of Roque-Izada*, 29 I&N Dec. 106 (BIA 2025) (treating whether an alien was paroled as a question of fact). The parole authority under 8 U.S.C. § 1182(d)(5) is "delegated solely to the Secretary of Homeland Security." *Matter of Castillo-Padilla*, 25 I&N Dec. 257, 261 (BIA 2010); *see* 8 C.F.R. § 212.5(a). Thus, neither the BIA nor immigration judges have authority to parole an alien into the United States under § 1182(d)(5). *Castillo-Padilla*, 25 I&N Dec. at 261; *see also Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771, 777 n.5 (BIA 2002) (indicating that "parole authority [under 8 U.S.C. § 1182(d)(5)] is now exercised exclusively by the DHS" and "reference to the Attorney General in [8 U.S.C. § 1182(d)(5)] is thus deemed to refer to the Secretary of Homeland Security"). Lastly, because DHS has exclusive jurisdiction to parole an alien into the United States, the manner in which DHS exercises its parole authority may not be reviewed by an immigration judge or the BIA. *Castillo-Padilla*, 25 I&N Dec. at 261; *see Matter of Castellon*, 17 I&N Dec. 616, 620 (BIA 1981) (noting that the BIA does not have authority to review the way DHS exercises its parole authority).

G. Petitioner failed to Exhaust his Administrative Remedies

Lastly, the Court should dismiss the petition for writ of habeas corpus for failure to exhaust administrative remedies. A habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention. The exhaustion requirement "aims to provide the agency with a chance to correct its own errors, 'protect[] the authority of administrative agencies,' and otherwise conserve judicial resources by 'limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary." *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003) (Sotomayor, J.).

Petitioner has not availed himself the administrative remedies available to him. Although his request for a bond was denied by an Immigration Judge, Petitioner has a right to appeal the decision to the BIA. By regulation, the BIA has authority to review IJ custody determinations. *See* 8 C.F.R. §§ 1003.1(b)(7), 1003.19(f), 1003.38, 1236.1(d)(3). Notably, Petitioner reserved his right to appeal and appeal brief is due January 5, 2026. Exh. F ¶ 26. Although Petitioner conclusively asserts that exhaustion of remedies - ie, appealing to the BIA - is futile, in September 2025, EOIR issued Policy Memo 25-45 where it clarified that BIA and IJs can consider constitutional challenges to the INA – such could include a Fifth Amendment challenge to the BIA's interpretation of 235(b)(2) in *Yajure*. *See* https://www.justice.gov/eoir/eoir-policy-manual/memoranda-pm-list. Moreover, "the BIA plainly has jurisdiction to determine whether an IJ properly denied an alien detainee's motion for bond redetermination." *J.G. v. Warden, Irwin Cnty. Det. Ctr.*, 501 F. Supp. 3d 1331, 1349 (M.D. Ga. 2020) (holding that habeas petitioner failed exhaust his administrative remedies in appealing an IJ's denial of bond redetermination to the BIA). Accordingly, the Petition should be dismissed for failure to exhaust administrative remedies.

H. CONCLUSION

Based upon the foregoing, the Petition should be dismissed because Plaintiff seeks the same relief in another case, *Maldonado Bautista*, or alternatively denied as detention is lawful under § 8 U.S.C. § 1225(b) and Petitioner has failed to exhaust his administrative remedies before seeking relief from the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 13, 2025, I electronically filed the foregoing with the Clerk of Court using CM/ECF.

Respectfully submitted,

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