IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NERY VIDAL REMIREZ ZAPET, Petitioner, v. LADEON FRANCIS, *et al.*, Respondents.	Civil Action No. 1:25-CV-07085-VMC

RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Petitioner Nery Vidal Remirez Zapet ("Zapet")[1] entered the United States without inspection by immigration officials more than 10 years ago. He was recently detained after a traffic stop. He is a non-citizen (an "alien," in legal terms) who admits that he is subject to potential removal from the United States. He is currently being held without bond under the authority of 8 U.S.C. § 1225(b)(2)(A).

Zapet petitioned this Court for a writ of habeas corpus. He argues that 8 U.S.C. § 1225 does not authorize his detention, so he must either be released or

[1] The original petition named a second defendant, but the second defendant recently filed a voluntary dismissal. (Doc. 6.)

held under a different statute, like 8 U.S.C. § 1226, that provides for bond hearings. He also argues that his initial arrest was illegal, and that officers pulled over the car in which he was riding because he "looked Hispanic."

After filing his petition, Zapet filed a motion for a temporary restraining order and/or a preliminary injunction, asking this Court to order his release while his petition is pending. This Court should deny the motion because 8 U.S.C. § 1225 authorizes his detention and because his arrest occurred collateral to a lawful arrest of another individual (not to mention the fact that Congress has barred district courts from hearing such claims). Because his underlying petition is likely to fail, Zapet has not met his burden of justifying a TRO/PI.

FACTS

Zapet is a 40-year-old non-citizen who has resided in the United States since at least 2015, having entered without inspection. (Doc. 1 ("Pet.") ¶ 32.) He was detained by an Immigration and Customs Enforcement (ICE) official on December 8. (*Id.* ¶ 34.) He claims that the officers who stopped the car did so solely because he looked Hispanic. (Id. ¶ 3.) In fact, this detention was collateral; he was riding in the car with an alien who had an order of removal and who was under surveillance. (Graumenz Decl., Ex. A. (Form I-213).) ICE agents stopped the car to arrest the target and then conducted field interviews of the other occupants. (*Id.*) Zapet was detained after he admitted that he was present in the

country illegally. (*Id.*) He is currently charged with removability and has an initial hearing in immigration court set for January 6, 2026. (Graumenz Decl. ¶ 4.) He is detained at the Stewart Detention Center under the authority of Immigration and Nationality Act § 235(b)(2)(A) (codified at 8 U.S.C. § 1225).

On December 12, while he was still in this District and before he was transferred to the Stewart Detention Center, Zapet filed his petition for habeas corpus. (Doc. 1.) He argues in his petition that he was unlawfully arrested and also that ICE cannot use 8 U.S.C. § 1225 to detain without bond someone like him, who was apprehended in the country's interior years after arriving. (Pet., generally.) He contests only his detention without bond; he does not contest whether he can be removed from the country. (*Id.* ¶ 16.) He asserts eleven overlapping counts for relief. (*Id.* ¶¶ 139–200.) Zapet asks that he be released or, as an alternative, that his detention be changed to be under 8 U.S.C. § 1226, which provides for a bond hearing. (*Id.* at p.110–11.)

The same day he filed his petition, Zapet also filed a motion for seeking a temporary restraining order or preliminary injunction. (Doc. 3.) The motion asks that he be immediately released and that Respondents be enjoined from re-detaining him. The Court ordered Respondents to respond to the motion within three business days. (Doc. 4.)

LEGAL STANDRD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983). It should be granted only where: (1) the movant has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) the injunction, if issued, would not disserve the public interest. *Horton v. City of Augustine, Fla.*, 272 F.3d 1318, 1326 (11th Cir. 2001).

ARGUMENT

Zapet has not proven a likelihood of success on the merits, the first injunction factor. That factor is the most important, and if Zapet is unable to establish it then this Court need not consider the remaining factors. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002).

Zapet's motion for a TRO/PI is short and does not explain which of his eleven claims for relief is being pursued on an interim basis, so this brief presumes that he is pursuing all of them. This brief responds in two parts. The first part explains why Counts 1–10 are not likely to succeed; those ten counts all deal with the underlying question of whether 8 U.S.C. § 1225(b)(2) can be used to

detain Zapet. The second part explains why Count 11 is not likely to succeed; that count deals with the lawfulness of his arrest.

1. Zapet's petition is not likely to succeed on Counts 1–10 of his petition because he is properly being held under 8 U.S.C. § 1225.

This section will review the text and then the history of 8 U.S.C. § 1225 to show why that statute applies to petitioner Zapet. Next, this section reviews the counterarguments raised by Zapet (and accepted by some other courts) and explains why they are not convincing. Finally, this section addresses the first ten counts for relief raised in Zapet's petition and shows why they are not likely to succeed.

A. The text of 8 U.S.C. § 1225 applies to Zapet because he was never lawfully admitted to the United States.

This case primarily concerns Section 235 of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1225. That statute concerns the inspection of aliens before their legal admission into the country. It starts with paragraph (a)(1), which defines a set of aliens who are or who are *construed to be* applying for admission. It reads:

> **(1) Aliens treated as applicants for admission** – 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 and including an alien [brought here from the sea]) shall be deemed for purposes of this chapter an applicant for admission.

The word "deemed" is important. That word recognizes that the definition of "applicant for admission" is unusual because it applies to aliens who are not actively, currently seeking admission. They are already here. Nonetheless, the statute *deems* them to be applying for admission. It's a legal fiction. *See Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 (BIA 2012) (stating that § 1225 does not follow "ordinary parlance").[2]

This subsection goes on, in paragraph (a)(3), to say that aliens who are applicants for admission "shall be inspected by immigration officers." The purpose of that inspection is "to ensure that they may be admitted into the country consistent with U.S. immigration law." *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). The effect of the language is to require all "applicants for admission"—even those that are merely "deemed" to be applicants—to be inspected before they are admitted. The words "admission" and "admitted" refer to an alien's formal, authorized, legal entry into the country after inspection by an immigration officer. *See* 8 U.S.C. § 1101(a)(13)(A) (definition).

---

[2] The Board of Immigration Affairs (BIA) hears appeals from decisions of immigration judges. Many of BIA's decisions can be appealed to the relevant U.S. Circuit Court of Appeals. *See, e.g.*, 8 U.S.C. § 1252(a). As the subject-matter expert, BIA's decisions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance …." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The statute continues, in subsection (b), to describe the consequences of a negative inspection. For this purpose, the statute divides alien applicants into "one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings*, 583 U.S. at 287.

Paragraph (b)(1) applies primarily to "arriving" aliens, meaning those "attempting to come into the United States at a port-of-entry." 8 C.F.R. § 1.2. As for these "arriving" aliens, if the immigration officer determines that they are inadmissible, then "the officer shall order the alien removed from the United States without further hearing or review" unless the alien is seeking asylum. *See* § 1225(b)(1)(A)(i).[3]

Paragraph (b)(2) applies to "other" aliens, meaning those who are *not* "arriving" aliens. It reads:

> **(2) Inspection of other aliens**
> **(A) In general**
> Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

The Supreme Court described § 1225(b)(2) as the "broader . . . catchall provision" that applies to applicants not covered by (b)(1). *Jennings*, 583 U.S. at 287. As to

[3] Paragraph (b)(1) can also apply to specific aliens designated by the Attorney General, but this brief will put that dense language aside and return to it later.

these aliens, the examining immigration officer can admit them if they are "clearly and beyond a doubt entitled to be admitted." *Id.* § (b)(2)(A). Otherwise, "the alien shall be detained" for a removal proceeding. *Id.*

In sum, Paragraphs (b)(1) and (b)(2) work together to cover the field. Paragraph (b)(1) deals with applicants for admission who are arriving in the country, and it allows for their prompt exclusion via an expedited removal proceeding with limited procedural protections. Paragraph (b)(2) deals with "other" applicants for admission, and it allows for their detention and then exclusion via a removal proceeding.

Under the above statutory text, Zapet is subject to detention under (b)(2). First, he qualifies as an "applicant for admission" under § 1225(a). He is an alien "present in the United States who has not been admitted." *Id.* The statute has no time limit on its application. Whether Zapet has been here for two years or twenty, he was not "admitted" under the law and so is still deemed to be applying for admission. Legal status in the United States cannot be obtained through adverse possession. *See I.N.S. v. Pangilinan*, 486 U.S. 875, 883–84 (1988). Next, Zapet is not an "arriving" alien under (b)(1). He admits that he entered this country without inspection many years ago. Therefore, he does not fall within (b)(1) and is an "other" alien subject to (b)(2), the catch-all provision. Finally, Zapet admits that he is not clearly and beyond a doubt entitled to admission, so

the statute says he "shall be detained" for a removal proceeding. This is exactly what is currently happening to Zapet. He has been detained, and his removal proceeding is underway.

B. The history behind 8 U.S.C. § 1225 and other related provisions suggest that this statute was meant to apply to aliens like Zapet.

Respondents concede that § 1225 has not historically been applied to aliens in Zapet's situation, but Respondents submit that this was because of a policy choice made by prior administrations and not some shortfall in the statute. This view is supported by the history of the statute, particularly by contemporaneous statements and regulations issued by the Executive branch.

The statute at issue was substantially revised as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (commonly called IIRIRA or "eye-ruh-eye-ruh"), included in the omnibus bill passed as Pub. L. 104-208.[4] The legislative history has many statements that are consistent with

[4] The legislative history in this section comes from H.R. 2202, which was reported out of conference before being tucked inside H.R. 3610 and passed as Division C of the Omnibus Consolidated Appropriations Act of 1997. When debating that omnibus bill, Congressman Smith (TX)—the architect of IIRIRA—confirmed that the two bills were the same and that the legislative history of one applied to the other. *See* Conf. Rep. on H.R. 3610, at H12099 ("Every illegal immigration measure that we passed in the stand-alone bill last week, every phrase, every word, every comma remains in this omnibus bill."); *and* H12104 (stating that the legislative history of IIRIRA "shall be considered to include" the prior history from H.R. 2202).

Respondent's reading of the statute. In particular, the existing law at that time gave additional protections to anyone who made "entry" to the United States, whether that entry was legal or not. One of the significant changes enacted in IIRIRA was to replace the entry doctrine with the new concept of admission, where someone who entered illegally is not considered "admitted." *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 222–25 (BIA 2025) (discussing this aspect of the legislative history). Respondents admit, however, that the legislative history contains no *definitive* statement, in either direction, as to the precise question raised in the current lawsuit.[5]

Soon after the law was passed, the Executive branch began issuing regulations implementing the new law. These regulations were issued by the

---

[5] Many statements in the Congressional record could be read to support Respondent's position here, such as when Representatives stated that the bill would "streamline" or "expedite" the process of removing illegal aliens. Conference Rpt. On H.R. 2202, H11071 at H11087 (Rep. Smith) (stating that the bill "streamlines the current system of removing illegal aliens from the United States to make it both quick and efficient"); H11081 (Rep. Hyde) (stating that the bill provides for more expeditious removal of persons not legally present in the United States"); *see also* H1107 (Rep. Velazquez) (complaining that the bill was crafted in a "frenzy to shove undocumented immigrants out of the country"). But none of these statements are precise enough to address the narrow issue raised in this lawsuit, and Respondents will not advocate the use of legislative history beyond narrow boundaries. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (warning against using legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends).

Immigration and Naturalization Service (INS, the precursor to ICE) in the Federal Register and then enacted via interim rulemaking. These publications contain three statements that are relevant to the current lawsuit.[6]

First, in the preamble to the proposed rule, the INS discussed the significance of the new term "applicants for admission," noting that the term now covers "both aliens who are arriving in the United States ... and aliens present in the United States who have not been admitted." 62 Fed. Reg. at 444. The INS noted that this was a change from the prior law. "Prior to the enactment of the IIRIRA, aliens apprehended after entering the United States without inspection were subject to deportation proceedings under section 242 of the Act. By considering such aliens to be applicants for admission, this amendment significantly changes the manner in which aliens who have entered the United States without inspection are considered under the Act." *Id.* at 444–45.[7] The language does not specify the exact nature of the "significant[] change" in how

---

[6] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 444 (Jan. 3, 1997) (proposed rule); 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (interim rule). No final rule was enacted, so the interim rule remains in effect.

[7] Before IIRIRA, Section 242 discussed (a) the detention of aliens pending removal, and (b) deportation proceedings. *See* 8 U.S.C. § 1252(a), (b) (1994). Those provisions were broken apart, rewritten, and placed into 8 U.S.C. § 1226 and 8 U.S.C. § 1229a. So the above sentence is saying that apprehended aliens *used to be* subject to deportation proceedings under (what is now) § 1226, but the statute "significantly changes" how they are inspected.

these aliens are considered. Still, this language supports the Respondents' reading of the statute because, under Petitioner's reading, no change occurred. According to Petitioner, aliens here without inspection were subject to detention-via-warrant-and-bond both before *and* after IIRIRA, which is no change at all.

Next, the same preamble also discusses the provision of IIRIRA that prevents aliens who have been convicted of an aggravated felony from receiving a bond under § 1226. At the end of that discussion, the preamble makes a cryptic statement that § 1226 will also be applied to aliens present without admission: "Despite being applicants for admission, aliens who are present without having been admitted ... will be eligible for bond and bond redetermination." 62 Fed. Reg. at 450; 62 Fed. Reg. 10323. Once again, the language is not entirely clear, but the word "despite" suggests that the INS recognized that it was deviating from the statutory text. In other words, the INS stated that it was going to keep giving aliens like Zapet bond hearings *even though* the statute said not to do this. The INS did not offer any further explanation of why it was doing this. Perhaps the INS thought such detentions would be too expensive. Perhaps the INS thought this was the best way to implement the statute ("despite" its text). But the logical reading of this statement is as a recognition that IIRIRA does not textually require bond hearings for aliens like Zapet.

Finally, in the substantive regulations, the INS addressed the Attorney General's power (under § 1225(b)(1)(A)(iii)) to designate aliens for expedited removal under (b)(1). New regulations delegated that power to the INS Commissioner. *See* 8 C.F.R. § 235.3(b). The delegation tracked the language of the statute, particularly the limits preventing the A.G. from using this power against an alien who had been present for more than two years. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II). (This was the dense language that was skipped over, earlier in this brief.) What matters here is that the regulation also mentioned, in passing, what would occur if an alien demonstrated that he had been present for over two years. This alien "shall be detained in accordance with section 235(b)(2)." 8 C.F.R. § 235.3(b)(2). In other words, if an alien is present in the United States without admission, then in some circumstances the A.G. can designate that alien for expedited removal under § 1225(b)(1). But when the A.G. lacks that power, then the regulation recognizes that the alien should still be detained under § 1225(b)(2). That is the Respondents' position in this case.

C. The counterarguments offered by Zapet and other courts fail to justify deviating from the text of 8 U.S.C. § 1225.

Given the clarity of the text, this Court should simply apply it as written. The text of the statute is the most important consideration, *United States v. Dawson*, 64 F.4th 1227, 1236 (11th Cir. 2023), and the text of § 1225 supports the

government's actions. But Respondents admit that many district courts have refused to do so, offering multiple reasons why the text of § 1225 must mean something other than what it seems to say. This brief will address the most common arguments advanced by those courts and explain why they are insufficient to overcome the clear text.

The word "seeking" in (b)(2) does not change the analysis. Several courts have latched on to a slight change of wording found in (b)(2), which says 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 …." *Id.* § (b)(2)(A) (underlining added). These courts point out that "seeking" is used in present-tense. Therefore, they say, the best reading of the statute is that (b)(2) is not just a catchall category that applies to all "other" aliens. Rather, they say, (b)(2) is *further* subdivided into two types of "other" aliens: those who are actively "seeking" admission and those who are not seeking admission. In this reading, only those "seeking" admission are subject to detention. This argument was adopted by Judge Cohen in *Rojano-Gonzalez v. Sterung*, No. 1:25-cv-06080-MHC (N.D. Ga. Nov. 3, 2025) (Doc. 18), by Judge Grimberg in *Jimenez v. Warden*, No. 1:25-cv-05650-SDG (N.D. Ga. Nov. 6, 2025) (Doc. 24), by Judge Ross in *Lima v. Warden*, No. 1:25-CV-6304-ELR (N.D. Ga. Nov.

18, 2025), and by Judge Ray in *Ortiz De Leon v. Pierce*, No. 4:25-CV-315 (N.D. Ga. Dec. 9, 2025).

Respectfully, this reading of the statute does not persuade for two reasons. *First*, this reading creates a strange gap in the statute. Under this reading, the statute creates three categories of aliens ([1] arriving, [2] non-arriving-but-seeking-admission, and [3] non-arriving-non-seeking) and then explains what to do with the first and second category, but not the third. That would leave a strange and unjustifiable gap in the statute *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 221 (BIA 2025) (making this same point). A flowchart attached to the end of this brief illustrates the two different readings. The better reading is the one adopted by the Supreme Court, that the statute creates just two categories: "arriving" aliens and a catchall "other" category. *Jennings*, 583 U.S. at 287.

If the word "seeking" is used to create two new subcategories of aliens, this would create further problems. Courts will need to ask what it means to be "seeking" admission. What specific actions must an alien take? Also, when is an alien no longer "seeking" admission? Are there deadlines for applying or withdrawing such a request? None of these questions are answered by the statute. Notice also that this reading of the statute creates a paradox where aliens with worse behavior receive better treatment. An alien who entered the country illegally but filed some (unspecified) paperwork seeking legal admission is

subject to detention without bond. But an alien like Zapet who entered illegally and then made no effort to legalize his status would be subject to detention with bond, a better outcome. Zapet offers no substantive defense of why Congress would do this. The legislative history and the enacting regulations also contain no discussion of this topic.

Second, this reading ignores the importance of the word "deemed" at the beginning of the statute—that those who are "present in the United States" but who have not been admitted "shall be *deemed* ... an applicant for admission." § 1225(a)(1) (emphasis added). This is well understood to be a legal fiction. *See Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 (BIA 2012) (stating that § 1225 operates "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"). But if (b)(2) is limited only to aliens who *really are* still seeking admission to the country, then (a)(1) has no purpose. Under this reading, Paragraph (a)(1) deems certain aliens to be applicants but then the remainder of the statute applies only to those who really are applicants. Petitioner's reading makes (a)(1) a pointless provision. Adopting such a construction would violate the important principle of statutory construction that courts should try to give effect to statutes rather than

emasculating entire sections. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (so stating).[8]

Several district judges (including Judges Grimberg and Ross) have also argued that the words "seeking admission" must be given *some* meaningful effect because the statute elsewhere refers to an alien "applying" for admission or being "an applicant for admission," and different words must be given different meanings. But that's not exactly right. The leading treatise on statutory interpretation, which was cited by Judge Grimberg, says that "where the document has used one term in one place, and a ***materially different term*** in another, the presumption is that the different term denotes a different idea." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (1st ed. 2012) (emphasis added). None of the judges who have adopted this argument have considered whether "seeking" admission and "applying" for admission are ***materially*** different terms. They are not.

The government's past practice of relying on § 1226 does not change the meaning of § 1225. Respondents admit that the Executive has not previously

---

[8] A district judge in New York used the analogy of someone who sneaks into a movie theater. The judge said that once the person takes a seat and starts watching the film, the person is no longer "seeking" admission. *Lopez Benitez v. Francis*, No. 25-CV-5937, 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025). That analogy is faulty; it ignores the issue of whether a statute *deems* such a person to still be seeking admission.

used § 1225 to detain aliens who were unlawfully present in the country and instead used § 1226 for that purpose. But, as discussed above, this appears to have been an unexplained policy choice made by INS soon after § 1225 was revised. INS did not justify its choice based on the statutory text and instead conceded that this policy was "[d]espite" the statutory text. Yet some courts have argued that the prior practice should inform what the statute means. *See, e.g.*, *Rosado v. Figueroa*, No. 25-CV-02157, 2025 WL 2337099, at *10 (D. Ariz. Aug. 11, 2025) (arguing that the new policy is "belied by" the previous practice). Respectfully, that is not correct. Although longstanding agency practice can inform a court's determination of what the law is, that rule applies only when the Executive issues an "interpretation" of the statute in the first instance. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385–86 (2024) (describing the due respect due to Executive Branch *interpretations* of federal statutes). The 1997 regulations did not purport to be interpreting § 1225 to require bond hearings for aliens like Zapet. If anything, the agency admitted that its position contravened the statutory text. For this reason, prior practice should not now be taken to limit the text. Indeed, the Executive's position is that it is now enforcing the law the way it was meant to be enforced all along.

Zapet argues that the Executive could use § 1226 to detain an alien like him. That statute gives the Attorney General authority to detain aliens during

removal proceedings while allowing for the possibility of bond.[9] But just because the Executive could use § 1226 does not mean that the Executive cannot use § 1225. Nor does this partial overlap make § 1225 redundant. The statutes have different scopes. Section 1226 can be used only when a removal proceeding is "pending" against the alien. The statute has no other trigger, such as legal status. The statute could apply equally to someone who evaded detection at the border or to someone who arrived legally and then violated their visa.

But nothing in § 1226 suggests that this is the *only* authority for detaining aliens like Zapet. Indeed, the INA provides multiple, sometimes overlapping authorities for detaining aliens, including § 1222 (detention for public health), § 1225(b)(1) (mandatory detention for ineligible arriving aliens), § 1226a (detention of suspected terrorists), and § 1231 (detention after removal proceedings). The mere fact that the Executive can—and historically has—relied on § 1226 is not evidence that the Executive cannot also use § 1225(b)(2).

The Supreme Court's summary of the relevant statutes in *Jennings* should not be exaggerated. At the beginning of his opinion in *Jennings*, Justice Alito summarized § 1225 and § 1226. In doing so, he generally described § 1225

[9] The statute actually says that the Attorney General *may* release the alien on bond, but regulations authorize immigration judges to conduct bond hearings by default. This brief treats Section 1226 as requiring a bond hearing.

as the statute that applies to detain aliens "seeking admission into the country" and § 1226 as the statute that applies to detain aliens "already in the country." *Jennings*, 583 U.S. at 289. Some courts have seized on this language as supporting the idea that § 1225 does not apply to aliens who are already in the country. Judges Grimberg and Ross made this argument, and Judge Cohen favorably quoted it as made by another court. *Jimenez*, Order at 12–13; *Lima*, Order at 9; *Gonzalez*, Order at 16–17 (quoting *Guerrero Orellana v. Moniz*, No. 25-CV-12664, 2025 WL 2809996, at *8 (D. Mass. Oct. 3, 2025)).

Respectfully, these arguments overread Justice Alito's opinion. His opinion carefully summarized both statutes and noted that aliens who are present in the country but who have not been admitted are deemed to be applicants for admission. *Jennings*, 583 U.S. at 287. Only after this did he describe § 1226 as the statute that applies to aliens "inside the United States" or "already in the country." *Id.* at 288–89. In context, Justice Alito was referring to aliens who are *lawfully* inside the country, meaning those who had been formally admitted. At no point does Justice Alito say that § 1225 cannot apply to someone who is present but not lawfully admitted.

Reading § 1225 according to its text does not make § 1226(c) superfluous. Finally, some courts have argued that reading § 1225 according to its text would make superfluous Congress's recent amendment to § 1226(c) in the Laken Riley

Act. Judges Cohen, Grimberg, and Ross all agreed with this. *See Gonzales*, Order at 18; *Jimenez*, Order at 13; *Lima*, Order at 9.

Section 1226(c) lists aliens who are ineligible for the bond hearings provided by that statute, such as aliens convicted of certain crimes. Included in this ineligibility list (in § 1226(c)(1)(E)(i)) are aliens who are inadmissible under § 1182(a)(6)(A), which describes aliens "present in the United States without being admitted or paroled." This language was added in the Laken Riley Act. So, the argument goes, the Laken Riley Act did not need to list these aliens as ineligible for bond because they were already ineligible for bond (under the government's current application of § 1225). Therefore, either Congress did something redundant or the government's current application of § 1225 is wrong.

This is a false choice. The Laken Riley Act was passed in January 2025, before the Executive began enforcing § 1225 according to its text in July 2025. Thus, at the time the Laken Riley Act was passed, it had a real effect. It blocked the Executive from using § 1226 in the way that statute was being used at the time. And if a future administration decides to stop using § 1225 and go back to the old policy, then the Act will block that too.

Even if this Court disagrees and thinks that the recent amendment is redundant under Respondent's view, that does not mean the Respondents are wrong. Sometimes Congress does redundant things. A redundancy does not give

a court license to ignore the otherwise clear text of a statute. *Barton v. Barr*, 590 U.S. 222, 239 (2020).

D. The first ten counts in Zapet's petition for habeas corpus are each not likely to succeed on the merits.

This section explains why each of the first ten counts is not likely to succeed on the merits.

Count 1 – Declaratory Judgment. This count seeks a declaration that Zapet cannot be detained under 8 U.S.C. § 1225. That topic has already been addressed.

Count 2 – Violation of 8 U.S.C. § 1226. This count argues that ICE is violating the Administrative Procedure Act (APA) by failing to provide a bond hearing, as required by 8 U.S.C. § 1226(a). This count fails because ICE is not detaining Zapet under § 1226 but rather is doing so under § 1225. Whether that action is lawful has already been addressed.

Count 3 – Violation of bond regulations. This count argues that ICE is bound by regulation not to apply § 1225 to aliens like Zapet. This follows, he says, from the 1997 publication in the federal register when ICE's precursor agency announced that it would not detain aliens present without bond "[d]espite" their being applicants for admission under that statute. The problem with this argument is that the language Zapet quotes appeared in the introductory section of that publication. There is no regulation that prevents ICE

from relying on § 1225. Zapet cites three regulations that he says require bond hearings for aliens like him, but he quotes no language from these long regulations. None of the regulations appear to say such a thing. If anything, they say the opposite. *See* 8 C.F.R. § 236.1(c)(2) (an alien "who is not lawfully admitted is not eligible to be considered for release from custody"); 8 C.F.R. § 1236.1(c)(2) (same).

Count 4 – Substantive Due Process. This count argues that Zapet's detention under § 1225 without a bond hearing violates his right to due process recognized by the Supreme Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and its progeny. But that case did not recognize such a right.

Zadvydas concerned resident aliens who had been ordered removed from the country. By statute, the government has 90 days to remove such aliens and may hold them in custody during this time. *See* 8 U.S.C. § 1231(a)(1). The problem in *Zadvydas* was that the government had nowhere to send the aliens at issue—no other country would take them—and the 90-day period had run out. In general, aliens in this situation are eligible for supervised release, but the statute says that the Attorney General "may" order detention to continue as to certain aliens, such as those that pose a risk to the community. *Id.* § (a)(6). The statute places no time limit on how long such aliens can be detained. The *Zadvydas* Court held that there was an implicit statutory time limit, which can

continue "no longer than reasonably necessary" to bring about that alien's removal from the United States. *Zadvydas*, 533 U.S. at 689. The Court did not reach the question of the alien's right to be free from detention.[10]

Moving past *Zadvydas*, Zapet admits that the Government may deprive a non-citizen of physical liberty when the confinement serves "a legitimate purpose." (Pet. ¶ 154.) Indeed, 8 U.S.C. § 1225(b)(2) says the same thing: that the alien "shall be detained *for* a [removal] proceeding" (emphasis added). Since that is what is happening here, Zapet's arguments in his petition that he is being held for no purpose or that he will be detained for years are meritless. He is being held for a removal proceeding, and then the outcome of that proceeding will dictate what happens next. That process adequately respects his constitutional rights for two reasons. First, Zapet was never properly admitted and so has limited constitutional rights. *See Poonjani v. Shanahan*, 319 F. Supp. 3d 644, 647–49

[10] Notably, the aliens in *Zadvydas* had entered the country legally. The Court relied on this fact to distinguish an earlier case, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), where the Court had allowed unlimited detention. The Court emphasized that it was central to immigration law that different rights are accorded to an alien who has effected a legal entry into the United States compared to one who has never legally entered. *Zadvydas*, 533 U.S. at 693 (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); *Leng May Ma v. Barber*, 357 U.S. 185, 188–190 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry")).

(S.D.N.Y. 2018) (accepting this argument); *see also Jean v. Nelson*, 727 F.2d 957, 967–68 (11th Cir. 1984) (discussing topic). Second, even if Zapet has such rights, § 1225(b)(2) is constitutional as applied to him because he is being held no longer than necessary to complete his removal proceeding. Until his detention becomes prolonged, meaning longer than reasonably necessary to accomplish its goal, then he cannot assert a ripe violation of his constitutional rights. *See, e.g., Diouf v. Napolitano*, 634 F.3d 1081, 1085 (9th Cir. 2011) (arguing that only prolonged detention is subject to constitutional limits).

Count 5 – Procedural Due Process. This count argues that Zapet's detention violates his right to procedural due process, as established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). This argument appears to simply be another way of saying that § 1225 cannot be applied to Zapet. To the extent he is arguing that there was some other *procedural* failure here, his argument fails. Before Zapet was detained, an immigration officer determined that he was not lawfully admitted to the United States. That was the procedure given to him. Importantly, Zapet does not argue that this procedure reached the wrong factual result. He admits that he was never lawfully admitted. (Pet. ¶ 24.) Therefore, he has no legitimate challenge to the procedural aspects of his initial detention.

Count 6 – Violation of the APA (contrary to law). This count argues that ICE exceeded its legal authority by applying § 1225 beyond its terms. That argument has already been addressed.

Count 7 – Violation of the APA (arbitrary and capricious). This count argues that ICE's actions are arbitrary and capricious because the agency's actions are not in accordance with law. That argument has already been addressed.

Count 8 – Violation of the APA (in excess of authority). This count also argues that ICE exceeded its legal authority, which has already been addressed.

Count 9 – Ultra vires. This count again argues that ICE exceeded its legal authority, which has already been addressed.

Count 10 – Violation of the* Accardi *doctrine. This count argues that the Supreme Court's decision in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), requires federal agencies to follow their own rules and regulations. Zapet argues that ICE is violating *Accardi* by failing to follow its own rules, but this appears to be just another argument that § 1225 does not apply to Zapet. He's wrong about that for the reasons given above. To the extent Zapet is instead arguing that an agency can never change its policies because doing so would contravene its previous policies, then he is distorting *Accardi* beyond recognition. The *Accardi* doctrine prevents agencies from ignoring their own procedural rules,

such as rules requiring that a decision be made first by one agency body and then appealed to a higher agency body (the situation in *Accardi* itself). Nothing in *Accardi* requires agencies to ossify their current policies.

2. Zapet is not likely to succeed on the merits of his unlawful arrest claim (Count 11).[11]

Zapet is not likely to succeed on Count 11 for two reasons. First, the Court lacks jurisdiction to address his claims. Second, his claims are factually baseless.

As to jurisdiction, 8 U.S.C. § 1252(g) provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." "When asking if a claim is barred by § 1252(g), courts must focus on the action being challenged." *Canal A Media Holding, LLC v. U.S. Citizenship & Imm. Servs.*, 964 F.3d 1250, 1257-58 (11th Cir. 2020). Section 1252(g) applies "to three discrete actions that the Attorney General may take: [the] 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (emphasis in original).

[11] If the Court grants the TRO/PI on the basis of Counts 1–10, then the Court need not address Count 11.

The Eleventh Circuit's opinion in *Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013), makes clear that the Court lacks jurisdiction over Petitioner's claim concerning the circumstances of his arrest. There, a non-citizen raised Fourth Amendment claims under *Bivens*, alleging, among other things, that ICE officers "wrongfully procur[ed] a warrant for his arrest" and "arrest[ed] him unlawfully." *Gupta*, 709 F.3d at 1064. The district court dismissed the non-citizen's complaint, finding that 8 U.S.C. § 1252(g) deprived it of subject-matter jurisdiction. *Id.* On appeal, the Eleventh Circuit affirmed, finding that "securing a[] [non-citizen] while awaiting a removal determination constitutes an action taken to commence proceedings" within the purview of section 1252(g). *Id.* at 1065; *see also id.* (holding that the non-citizen's "claims that [the ICE agents] illegally procured an arrest warrant, that the agents illegally arrested him, and that the agents illegally detained him each arise from an action taken to commence removal proceedings.").

Here, Zapet challenges the lawfulness of his initial arrest. His arrest "constitutes an action taken to commence proceedings" within the meaning of section 1252(g), and so this Court lacks jurisdiction to hear that claim. *Gupta*, 709 F.3d at 1065; *see also Cho v. United States*, No. 5:13-cv-153-MTT, 2016 WL 1611476, at *7 (M.D. Ga. Apr. 21, 2016) ("Plaintiff's claims that she was falsely arrested when she was transferred into ICE custody . . . 'challenge[] the actions the agents

took to commence removal proceedings—exactly the claims that § 1252(g) bars from the subject-matter jurisdiction of federal courts.'" (quoting *Gupta*, 709 F.3d at 1065 (alterations in original))).

Even if the Court did have jurisdiction to hear Zapet's unlawful-arrest claim, he is not likely to succeed on the facts. Zapet claims that ICE officers stopped the car he was riding in simply because he looked Hispanic, but ICE records show that officers had been tracking another individual who was in the car and who was subject to arrest for different reasons. (Graumenz Decl., Ex. A. (Form I-213).) After the officers stopped the car to arrest the other individual, they interviewed Zapet, who disclosed that he was not legally present. (*Id.*)

SCOPE OF THE INJUNCTION

This section of the brief discusses what injunction the Court should issue if the Court grants the TRO/PI on one of the first ten counts. In that event, the Court should not award the relief requested by Zapet, who asks that he be immediately released from custody and that Respondents be enjoined from re-detaining him unless he has "committed a new violation of any federal, state, or local law," has "failed to attend any properly noticed immigration or court hearing," or is "subject to detention pursuant to a final order of removal." (TRO/PI Mot. at 4–5.) These two remedies are both inappropriate.

As to immediate release, that remedy is inappropriate because Zapet is, in fact, unlawfully present and subject to removal. Perhaps he cannot be held without bond under 8 U.S.C. § 1225(b)(2), but everyone agrees that he *could* be held with the possibility of bond under 8 U.S.C. § 1226. (See Pet. ¶¶ 2, 5 (agreeing that he could be held).) If the Court orders that he not be held under § 1225, then ICE intends instead to rely on § 1226. In that event, ICE estimates that he can be given a bond hearing within ten days. Usually bond hearings occur within a week, but fewer Immigration Judges will be working next week because of the holidays.[12]

As to his redetention, the language offered by Zapet is too narrow and improperly restricts ICE's ability to execute its mission. For example, if he is given a bond hearing and then conditions are placed on his release (like not travelling out of state), ICE should be able to rearrest him for violating those conditions. But the language he offers could presumably prevent that. This concern is not hypothetical. Zapet's counsel recently filed a motion for contempt

[12] The Court should ignore Zapet's baseless arguments in his petition that he must be released (and not given a bond hearing) because the Immigration Judges are all biased or because ICE will file a meritless appeal. (Pet. ¶¶ 207–210.) Several cases like this one have been decided in this district, and every time that a Court has ordered a bond hearing the alien has been granted bond. Zapet cannot support his claim that immigration courts are systemically biased.

in another case, where an alien was released and then ICE placed conditions on his release. The petitioner in that case argued that ICE had violated Judge Story's order that he not be rearrested—language that closely tracks the language Zapet is asking this Court to adopt. (Judge Story denied the contempt motion. *See Hernandez v. Udzinski*, No. 2:25-CV-373-RWS (N.D. Ga. Dec. 16, 2025).)

The heart of Zapet's petition and motion is that ICE is improperly relying on § 1225(b)(2)(A) to detain him. If the Court is inclined to grant injunctive relief to cure that issue, the Court can merely direct Respondents to cease relying on § 1225(b)(2)(A) to detain petitioner now or in the future. That language suffices.

CONCLUSION

The Court should deny Zapet's motion for a TRO/PI because his detention without bond for the purpose of conducting a removal hearing is authorized by 8 U.S.C. § 1225. Also, his allegations that he was unlawfully arrested are beyond the Court's jurisdiction, and the facts show that he is likely wrong about the reason why he was stopped.

If the Court is inclined to grant the motion, the Court should issue a narrow injunction directing the Respondents to no longer rely on § 1225 to detain Zapet, now or in the future. This language recognizes that he can be detained under any other appropriate authority.

Respectfully submitted,

THEODORE S. HERTZBERG
United States Attorney

s/ Anthony C. DeCinque
ANTHONY C. DECINQUE
Assistant United States Attorney

Georgia Bar No. 130906
Anthony.DeCinque@usdoj.gov
600 U.S. Courthouse
75 Ted Turner Drive, S.W.
Atlanta, GA 30303
Ph: (404) 581-6000 Fx: (404) 581-6181

Counsel for the Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Local Rule 7.1(D), that the above memorandum was prepared in 13-point, Book Antiqua font.

s/ Anthony C. DeCinque
ANTHONY C. DECINQUE
Assistant United States Attorney

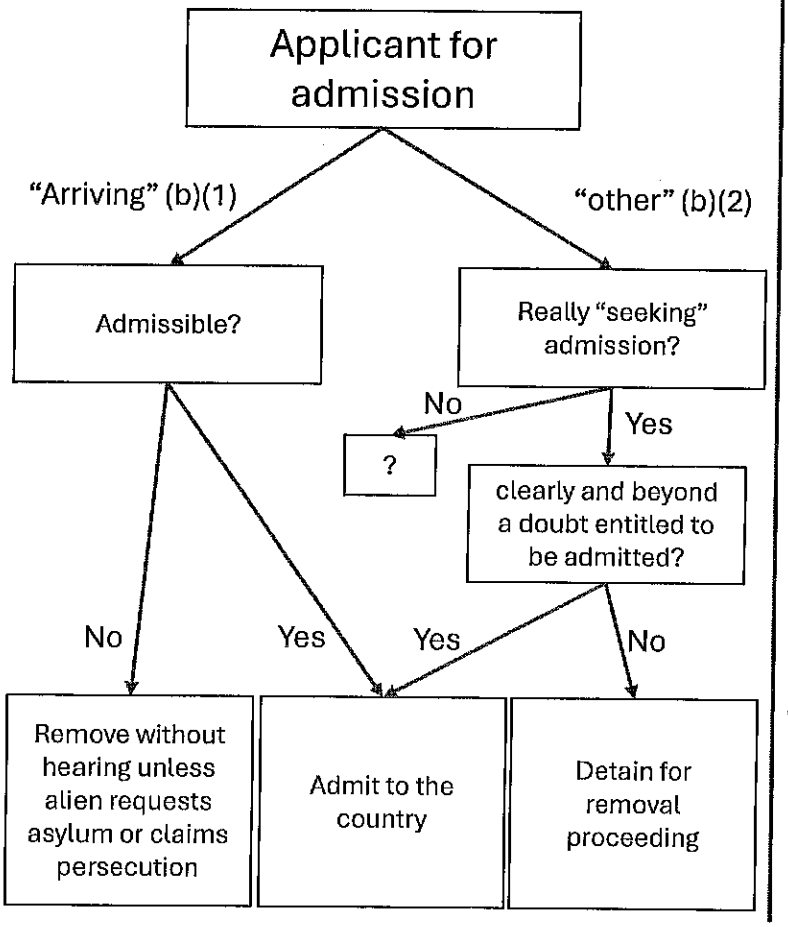
CERTIFICATE OF SERVICE

I hereby certify that the above document was filed using the Court's CM/ECF system, which will provide notice to all counsel of record.

This 18th day of December, 2025.

s/ Anthony C. DeCinque
ANTHONY C. DECINQUE

PETITIONER'S VIEW



RESPONDENT'S VIEW