

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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NELSON HERNANDEZ HERRERA,

Petitioner,

v.

SAM OLSON, Field Office Director, Chicago  
Field Office, Immigration and Customs  
Enforcement, in his official capacity; et al,

Respondents.

Case No. 25-CV-1994

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PETITIONER'S REPLY TO RESPONDENT'S RESPONSE FOR WRIT OF HABEAS  
CORPUS

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## INTRODUCTION

Petitioner, Nelson Alejandro Hernandez Herrera, by and through undersigned counsel, hereby submits this Reply to the Government's Response to Mr. Hernandez Herrera's Petition for Writ of Habeas Corpus. The government does not dispute the Court's jurisdiction to hear this petition.

The issue before this Court is a narrow question of statutory interpretation. Until this summer, Courts assumed that distinct sections of law governed the custody of individuals in removal proceedings with a Notice to Appear filed before the immigration court, versus *expedited* removal proceedings in which there is no Notice to Appear. *See Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (outlining this distinction). 8 U.S.C. § 1226 governs custody for people in the United States while they are in removal proceedings and allowing for bond under certain circumstances. In contrast, 8 U.S.C. § 1225 requires the detention of those individuals in expedited removal proceedings without a Notice to Appear—a narrower class of recent arrivals to the United States.

The government does not contest the above premise generally. However, they argue that certain language in 1225 creates a broader detention authority. They combine language in section 1225(a)(1) and 1225(b)(2) for the proposition that all individuals who entered the United States without inspection, no matter when, are ineligible for bond while in removal proceedings. (*Id.*)

Ultimately, the government's sudden reach for a stunningly broad detention authority must be rejected. The superficial appeal of its simple linguistic argument fades upon a closer reading of both section 1225 and 1226. The language in 1225 is qualified, and the bond provisions outlined in section 1226 apply to some individuals who entered the United States without inspection. And finally, while the government states that its interpretation is consistent

with legislative intent (Doc. 8 at p. 8), it offers merely a policy rationalization instead of historical evidence.

**1. The broader context of the statute shows that the language in section 1225 applies only to those individuals in the expedited proceedings described therein.**

First, Mr. Hernandez Herrera agrees with the government that this Court owes no deference to the Agency's interpretations of the law. (*See* Doc. 8 at p. 9). But the plain text matters. And the government's interpretation ignores its broader context. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

Ultimately, the issue here is the same as it has been for many other habeas petitioners filing recently before this court. *See Cirrus Rojas v. Olson*, No. 25-cv-1437 (E.D. Wis. Sept. 17, 2025), *Ramirez Valverde v. Olson*, No. 25-cv-1502 (E.D. Wis. Sept. 29, 2025), *Rivas Alonso v. Olson*, No. 25-cv-1660 (E.D. Wis. Oct. 28, 2025), *Espinoza Hernandez v. Olson*, No. 25-cv-1670 (E.D. Wis. Oct. 28, 2025), *Ugarte-Arenas v. Olson*, No. 25-cv-1721 (E.D. Wis. Nov. 4, 2025), *Cano-Ortega v. Olson*, No. 25-cv-1919 (E.D. Wis. Dec. 5, 2025), *Sarmiento Correa v. Olson*, No. 25-cv-1960 (E.D. Wis. Dec. 11, 2025). Two of the above cases agreed with the Respondent's position, while all the others agreed with the petitioners or are still pending.

None that reach a decision, however, had the benefit of the recent Seventh Circuit decision in *Castanon-Nava v. U.S. Dep't of Homeland Sec.*, 25-3050 (7th Cir. Dec 11, 2025). Respondents try to ignore this decision, citing it only in footnote 4 of their brief. They argue that the decision in that case was "tentative", indeed using the word three times in their footnote. The word tentative does not appear once in the decision of the court, however.

Nothing about the Seventh Circuit's decision was speculative, tentative, qualified, or hypothetical. The court held the government was "likely to fail on the merits" of claiming that section 1225 applied to those arrested already inside the United States for many years. True, they did not have to directly reach the issue to make a decision in that case, as it was an appeal for a stay rather than a decision on the full merits of a case. The court, however, spent 11 paragraphs discussing the issues and differences between 8 USC §§1225 and 1226 – hardly a speculative or tentative decision.

This Court also analyzed this closely in *Ramirez Valverde v. Olson*, 25-CV-1502 (E.D. Wis. Sep. 29, 2025). It concluded that the precise language in section 1225 indicated that its detention provision was limited to individuals in expedited removal proceedings. *Ramirez Valverde*, Slip Opinion at 5-6. Specifically, this Court reasoned that the phrase "seeking admission" more aptly describes an individual who is attempting entry into the United States "at the time of arrest," rather than an individual who has been living and working in the United States for years. (*Id.*) The fine parsing of the phrases "applicant seeking admission" versus "applicant for admission" makes sense because section 1226 already governs the custody of individuals in full removal proceedings.

Indeed, the government does not, in its response, dispute petitioner's argument that its reading renders portions of section 1226 superfluous. As Mr. Hernandez Herrera argued in paragraphs 52-53 in his petition, 8 U.S.C. § 1226(c)(1)(E) specifically requires the custody of individuals who were convicted of certain crimes after entering without inspection. And this Court should not be persuaded by the reasoning on this point in *Cirrus Rojas v. Olson*, No. 25-cv-1437 (E.D. Wis. Sept. 17, 2025) or *Ugarte-Arenas v. Olson*, No. 25-cv-1721 (E.D. Wis. Nov. 4, 2025).

This Court in both *Cirrus Rojas* and *Ugarte Arenas* reasoned that the amendments to section 1226 that passed as part of the Laken Riley Act earlier this year “ha[ve] little bearing on the meaning of legislation passed in 1996.” (*Id.* at 9.) But the canon against surplusage is more than a tool for divining legislative intent. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (“We are governed by laws, not by the intentions of legislators.”) (J. Scalia, concurring).

Furthermore, as a Court in California recently reasoned, the text of section 1225, triggering mandatory detention also anticipates “an examining officer or a requisite determination of inadmissibility.” *Lazaro Maldonado Bautista et al v. Ernesto Santacruz Jr et al.* 5:25-cv-0187 (C.D. Cal. Nov. 25, 2025). These are aspects of the expedited removal process outlined in other subsections of section 1225. The government has not suggested that there was such a “determination” or “officer.”

This court should instead find, as the Seventh Circuit did in *Castanon-Nava*, that 8 USC §1226 governs individuals present inside the United States without inspection, served with a Notice to Appear, and in regular removal proceedings.

## **2. The Government’s legislative history is unpersuasive.**

The government, in its response, argues that the legislative history of The Illegal Immigration Reform and Responsibility Act (IIRIRA) was to mandate custody of all individuals who entered the United States unlawfully. (Doc. 8 at pp. 8-10). In doing so, rather than citing any legislative materials directly, it directs us to the Ninth Circuit Court of Appeals’ decision *Torres v. Barr*, 976 F.3d 918, 928 (2020) and the Board of Immigration Appeals decision in *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216 (2025).

But none of the legislative materials are nearly specific enough to support the government’s claim that IIRIRA created a sweeping detention regime for all individuals who

entered the United States without inspection. The Court in *Torres* cited vague language regarding “equities and privileges,” but nothing about mass detention of tens (hundreds?) of thousands of migrants. 976 F.3d at 928 (citing H.R. Rep. 104-469, pt. 1, at 225.).

And indeed, citing the same House Judiciary Report, the Board acknowledges language suggesting that the Attorney General would maintain the same authority after IIRIRA to “release on bond an alien who is not lawfully present in the United States.” *Matter of Yajure Hurtado*, 29 I.&N. Dec. 216, 224 (BIA 2025) (citing H.R. Rep. 104-469, pt. 1, at 226).

Ultimately, if there is legislative history documentation suggesting that Congress intended to implement a rule requiring the mandatory custody of all individuals present in the United States in the 1990s and after passage of the Laken Riley Act passed early this year, Respondents have not produced it.

**3. It is not clear that Mr. Hernandez Herrera’s due process rights are protected by detained removal proceedings.**

The government has argued that Mr. Hernandez Herrera’s due process rights are adequately protected by the removal proceedings from a detention center. (Doc. 8 at pp. 14-16.) But it is less clear today than at the time of filing that Mr. Hernandez Herrera will be able to continue pursuing an asylum claim. As of today, Mr. Hernandez Herrera’s removal proceedings have been taken off calendar with no new hearing date set despite his continued detention. This is not some momentary glitch, either. Mr. Hernandez Herrera’s removal proceedings were taken off calendar sometime Friday, December 26 without sending notice to undersigned counsel, and still today (December 31), there is nothing scheduled.

**CONCLUSION**

Ultimately, this Court should grant Mr. Hernandez Herrera’s petition on the existing filings, and order either his release or a bond hearing. It should follow the reasoning in

*Castanon-Nava and Ramirez Valverde*, rather than *Cirrus Rojas and Ugarte Arenas* because the reading is consistent with the statutory scheme as a whole.

DATED this 31st day of December 2025

Respectfully submitted,

//Theodore Chadwick//  
*Attorney for Petitioner*