

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SANZHARBEK ASILOV (A240640704))
)
 Petitioner,)
)
 v.)
)
 KRISTI NOEM, Secretary, U.S. Department)
 of Homeland Security; MARY DE ANDA-YBARRA)
 Field Office Director, El Paso Field Office,)
 Immigration and Customs Enforcement,)
)
 Respondents.)

Case No. 3:25-cv-00757

**PETITIONER’S REPLY IN SUPPORT OF
PETITION FOR WRIT OF HABEAS CORPUS
AND COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF**

The Petitioner, SANZHARBEK ASILOV, by and through his own and proper person and through his attorneys, KRIEZELMAN BURTON & ASSOCIATES, LLC, files this reply memorandum to the government’s response filed on December 31, 2025, and in support thereof, states as follows:

A. Petitioner Does Not Challenge His Ongoing Removal Proceedings and 8 U.S.C. § 1252 does not deprive this Court of jurisdiction

As a threshold matter, this Court is not deprived of jurisdiction by 8 U.S.C.

§ 1252(b)(9) and (g) as Petitioner’s claims do not challenge any decision to commence proceedings, adjudicate cases, or execute removal orders. Section 1252(b)(9) provides:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien from the United States* under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision

of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

8 U.S.C. § 1252(b)(9) (emphasis added).

The Supreme Court's decision in *Jennings v. Rodriguez* is instructive here and supports Petitioner's position that this Court does have jurisdiction and that Section 1252(b)(9) does not present a jurisdictional bar. The Supreme Court determined that the "arising from" language of Section 1252(b)(9) should not be interpreted so expansively as to include any action that technically follows the commencement of removal proceedings, because that would bar judicial review of questions of law and fact that are unrelated to the removal proceedings until a final order of removal was issued. *Jennings v. Rodriguez*, 583 U.S. 281, 292-95 (2018). Petitioner, like the class in *Jennings*, "are not asking for review of an order of removal, they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined." *Id.* at 294-95. Section 1252(g) provides:

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, 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.

8 U.S.C. § 1252(g) (emphasis added).

The Supreme Court's decision in *Jennings* assessed Section 1252(g). The *Jennings* court writes that "[w]e did not interpret [section 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves." *Jennings*, 583 U.S. at 294 (citing *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)).

An immigration judge's (IJ) review of a bond determination is a distinct proceeding from an alien's underlying removal proceeding. 8 C.F.R. § 1003.19(d). It is “clear bond hearings are separate and apart from deportation proceedings.” *Gornicka v. INS*, 681 F.2d 501, 505 (7th Cir. 1982). Here, Petitioner is seeking review of his unlawful detention, as he is unable to seek a bond hearing on the merits in front of the Immigration Court as a result of the Board of Immigration Appeals’ decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). In sum, Petitioner is not challenging a removal order or anything else listed in Section 1252(b)(9) and (g) which would strip this court of jurisdiction. This Court has jurisdiction over Petitioner’s matter.

B. Exhaustion is not required and should be excused as seeking an appeal from a bond redetermination before the Board of Immigration Appeals in the first instance would be futile.

Exhaustion is not required, as suggested by Respondents, and requesting the Board of Immigration Appeals to review the order from the Immigration Judge denying bond on the sole basis of no jurisdiction would be futile at this juncture. The Immigration and Nationality Act mandates exhaustion in order to challenge “final order[s] of removal.” 8 U.S.C. § 1252(d)(1). However, this provision does not cover challenges to preliminary custody or bond determinations, which are quite distinct from “final order[s] of removal.” *See Gornicka v. INS*, 681 F.2d 501, 505 (7th Cir. 1982). (“[I]t is clear bond hearings are separate and apart from deportations hearings.... A bond determination is not a final order of deportation ... and does not effect [sic] the deportation proceeding.”).

Congress does require exhaustion for certain types of habeas petitions, but not for those petitions, such as Petitioner’s, brought under 28 U.S.C. § 2241. *See James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (“Section 2254(b)(1) requires state prisoners to exhaust all available

state court remedies before filing a Section 2254 petition, whereas Section 2241 contains no such exhaustion requirement.”).

Several Circuits have held that a due process challenge generally does not require exhaustion since the BIA lacks authority to review constitutional challenges. *See Sterkaj v. Gonzales*, 439 F.3d 273, 279 (6th Cir. 2006); *accord Bangura v. Hansen*, 434 F.3d 487, 494 (6th Cir. 2006) (“exhaustion of administrative remedies may not be required in cases of non-frivolous constitutional challenges to an agency's procedures.”) (citation omitted); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025).

Even so, the three-factor test applied also weighs against requiring exhaustion. Courts may require prudential exhaustion when:

- (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
- (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and
- (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

See Shweika v. Dep't of Homeland Sec., No. 1:06-cv-11781, 2015 WL 6541689, at *12 (E.D. Mich. Oct. 29, 2015). These factors all work in Petitioner’s favor. First, the issues raised in Petitioner’s case are purely legal in nature and do not require the agency to develop the record. Second, because Petitioner’s petition includes a due process claim, the administrative scheme (appeal to the BIA) is futile since, the BIA lacks authority to review constitutional claims. Lastly, while Respondents argue in their reply that “[i]n an appeal to the BIA, Petitioner may seek a new bond hearing and request release,” administrative review is not likely to change Respondents’ position that Section 1225(b)(2)(A) applies in this case, adding to the futility argument.

Additionally, requiring exhaustion would be futile due to the Board of Immigration Appeal’s September 5th decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025),

which proclaimed for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is no longer eligible for release on bond. The Board's decision, in contravention of decades of immigration law, precedent by the Supreme Court, and Executive Office of Immigration Review policies and procedures, takes a new reading of INA § 235(b)(2), 8 U.S.C. § 1225(b)(2), which requires mandatory detention of "Applicants for Admission," to include those present in the United States without having been inspected and admitted and who are later apprehended.

Prior to the Board's decision, noncitizens present in the United States without having been inspected and admitted and who are later apprehended are subject to detention under INA § 236(a), 8 U.S.C. § 1226(a). Noncitizens detained under this section are not subject to mandatory detention and may be released on bond or on their own recognizance. Therefore, requiring Petitioner to appeal a bond redetermination with the Board of Immigration Appeals in the first instance would be futile as the bond appeal would undoubtedly be denied in light of *Matter of Yajure Hurtado*. It would prejudice Petitioner by prolonging his detention to request an appeal to a bond that would simply be denied solely based on no jurisdiction.

Yet even if this Court were to agree that prudential exhaustion should apply, waiver of the exhaustion requirement is warranted here because Petitioner is likely to experience irreparable harm if he is unable to seek habeas relief until the BIA decides an appeal on the denied bond, which the Immigration Judge denied solely based on lack of jurisdiction. *See also Sampiao v. Hyde, et al.* 1:25-cv-11981-JEK, at *11-12 (D. Mass. Sept. 9, 2025); *Romero v. Hyde*, No. 25-cv-11631-BEM, 2025 WL 2403827, at *7 (D. Mass. Aug. 19, 2025) (finding that loss of liberty is a form of irreparable harm and citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004); *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987)). Waiver is appropriate when the interests

of the individual weigh heavily against requiring administrative exhaustion, or exhaustion would be futile and unable to afford the petitioner the relief he seeks. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (noting that “Where Congress specifically mandates, exhaustion is required [...] but where Congress has not clearly required exhaustion, sound judicial discretion governs.”) The Immigration and Nationality Act “mandates exhaustion in order to challenge final orders of removal ... [but not for] challenges to preliminary custody or bond determinations.” *Gonzalez v. O’Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004) (citations omitted). Thus, exhaustion in this case is subject to the Court’s discretion. *See Miguel v. Noem*, 2025 WL 2976480 (N.D. Ill. Oct. 21, 2025).

The average processing time for bond appeals exceeded 200 days (more than 6 months) in 2024. *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1248 (W.D. Wash. 2025). There is no requirement for the BIA to act promptly or decide the appeal quicker than any other case. If the BIA were to act promptly, it would be unlikely to decide Petitioner’s appeal anytime soon, and if it processes the appeal at the same rate as last year’s appeals, the appeal may not be resolved until spring 2026. As such, Petitioner is likely to endure several additional months of detention. Such a prolonged loss of liberty would, in these circumstances, constitute irreparable harm. *Bois v. Marsh*, 801 F.2d 462, 468 (D.C. Cir. 1986).

Additionally, requiring Petitioner to wait six months in detention to reach a decision on whether he can be released on bond would be futile. He has been in detention for over four months, without an opportunity to see an immigration judge, is married and has two young children, and his family needs Petitioner back. *See* Dkt. 1 at 1. As such, exhaustion would not effectively afford him the relief he seeks, given that a removal determination would likely come before the BIA’s determination of whether a bond is appropriate in this case.

Therefore, given the constitutional claims raised by Petitioner, this Court should find that exhaustion is not required according to the Fifth Circuit standards. If it does find the exhaustion applies, then the Court should waive exhaustion since it would be futile and would not provide Petitioner with the relief he requests in a timely manner. *Gonzalez v. O'Connell*, 355 F.3d 1010, 1016 (7th Cir. 2004); *Lopez-Campos v. Raycraft*, No. 2:25-CV-12486, 2025 WL 2496379, at *5 (E.D. Mich. Aug. 29, 2025).

C. Petitioner is detained under 8 U.S.C. § 1226 and not under 8 U.S.C. § 1225.

By way of review, 8 U.S.C. § 1225(b)(2), INA § 235(b)(2), requires mandatory detention of “Applicants for Admission.” Conversely, noncitizens detained under 8 U.S.C. § 1226(a), INA § 236(a), are not subject to mandatory detention and may be released on bond or on their own recognizance. The Board of Immigration Appeals’ decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), determined for the first time that any person who crossed the border unlawfully and is later taken into immigration detention is subject to detention under 8 U.S.C. § 1225(b)(2) and therefore subject to mandatory detention and no longer eligible for release on bond. The decision strips the immigration judge’s authority to hear a bond request for any noncitizen present in the United States without having been inspected and admitted and who are later apprehended by DHS.

Respondents argue in their response that Petitioner is properly detained under 8 U.S.C. § 1225(b)(2) and not under 8 U.S.C. § 1226. This argument fails for several reasons.

First, district courts across the country have unanimously rejected *Matter of Yajure Hurtado*’s new interpretation that those who entered unlawfully and are later apprehended are now subject to mandatory detention under 8 U.S.C. § 1225(b)(2). The following cases are an overall sample of recent circuits that have all disagreed with Respondents’ interpretation and

have subsequently granted relief to habeas petitions since he filed his Petition for Writ of Habeas Corpus in December 2025:

First Circuit

- *Hidigio De Oliveira v. Wesling*, No. 1:25-CV-13730-IT, 2025 WL 3554684 (D. Mass. Dec. 11, 2025)
- *Coj Chingo v. Stamper*, No. 2:25-CV-00590-JAW, 2025 WL 3513833 (D. Me. Dec. 8, 2025)

Second Circuit

- *Walizada v. Trump*, No. 2:25-CV-00768, 2025 WL 3551972 (D. Vt. Dec. 11, 2025)
- *Campbell v. Almodovar*, No. 1:25-CV-09509 (JLR), 2025 WL 3538351 (S.D.N.Y. Dec. 10, 2025)
- *Esperanza v. Francis*, No. 25-CV-8727, 2025 WL 3513983 (S.D.N.Y. Dec. 8, 2025)
- *Maazouz v. Almodovar*, No. 25-CV-9388 (PKC), 2025 WL 3520479 (S.D.N.Y. Dec. 8, 2025)
- *Quintero Campos v. DeLeon*, No. 25-CV-10099 (LJL), 2025 WL 3514120 (S.D.N.Y. Dec. 8, 2025)
- *Ye v. Maldonado, Jr.*, No. 25-CV-6417 (AMD), 2025 WL 3521298 (E.D.N.Y. Dec. 8, 2025)
- *Quispe-Sulcaray v. Noem*, No. 25-CV-09908 (VEC), 2025 WL 3501207 (S.D.N.Y. Dec. 7, 2025)

Third Circuit

- *Alvarez Coeto v. Soto*, No. CV 25-17789 (BRM), 2025 WL 3539219 (D.N.J. Dec. 10, 2025)
- *Paredes Quispe v. Rose*, No. 3:25-CV-02276, 2025 WL 3537279 (M.D. Pa. Dec. 10, 2025)
- *Anirudh v. McShane*, No. CV 25-6458, 2025 WL 3527528 (E.D. Pa. Dec. 9, 2025)
- *Bhatia v. O'Neill*, No. CV 25-6809, 2025 WL 3530075 (E.D. Pa. Dec. 9, 2025)
- *Chen v. Soto*, No. CV 25-17198 (GC), 2025 WL 3527239 (D.N.J. Dec. 9, 2025)
- *Patel v. O'Neil*, No. 3:25-CV-2185, 2025 WL 3516865 (M.D. Pa. Dec. 8, 2025)
- *Rodriguez Pereira v. O'Neill*, No. CV 25-6543-KSM, 2025 WL 3516665 (E.D. Pa. Dec. 8, 2025)
- *Santana-Rivas v. Warden Of Clinton County Correctional Facility*, No. 3:25-CV-01896, 2025 WL 3513152 (M.D. Pa. Dec. 8, 2025)

Fifth Circuit

- *Chavez Garay v. Perry*, No. 1:25-CV-2215 (LMB/WEF), 2025 WL 3540070 (E.D. Va. Dec. 10, 2025)

Sixth Circuit

- *Penagos Robles v. U.S. Department of Homeland Security*, No. 1:25-CV-1578, 2025 WL 3558128 (W.D. Mich. Dec. 12, 2025)
- *Avila Maltos v. Noem*, No. 1:25-CV-1299, 2025 WL 3550605 (W.D. Mich. Dec. 11, 2025)

- *Rakhmatov v. Raycraft*, No. 1:25-CV-1651, 2025 WL 3550798 (W.D. Mich. Dec. 11, 2025)
- *Ramirez v. Lewis*, No. 4:25-CV-143-RGJ, 2025 WL 3553676 (W.D. Ky. Dec. 11, 2025)
- *Singh v. Noem*, No. 1:25-CV-1513, 2025 WL 3550608 (W.D. Mich. Dec. 11, 2025)
- *Velasco-Sanchez v. Raycraft*, No. 2:25-CV-13730, 2025 WL 3553672 (E.D. Mich. Dec. 11, 2025)
- *Cervantes Morales v. Raycraft*, No. 25-CV-13434, 2025 WL 3543611 (E.D. Mich. Dec. 10, 2025)
- *Depaz v. Raycraft*, No. 1:25-CV-1500, 2025 WL 3534974 (W.D. Mich. Dec. 10, 2025)
- *Issahaku v. Olson*, No. CV 25-180-DLB, 2025 WL 3539290 (E.D. Ky. Dec. 10, 2025)
- *Leon Gonzalez v. Dunbar*, No. 1:25-CV-1510, 2025 WL 3534108 (W.D. Mich. Dec. 10, 2025)
- *Martinez Ramirez v. Raycraft*, No. 1:25-CV-13444, 2025 WL 3543612 (E.D. Mich. Dec. 10, 2025)
- *Mendoza Siguencia v. Raycraft*, No. 1:25-CV-1532, 2025 WL 3537550 (W.D. Mich. Dec. 10, 2025)
- *Morales Rodriguez v. Raycraft*, No. 2:25-CV-13560, 2025 WL 3543614 (E.D. Mich. Dec. 10, 2025)
- *Pacheco-Acosta v. Olson*, No. CV 25-186-DLB, 2025 WL 3542128 (E.D. Ky. Dec. 10, 2025)
- *Rivera Coyote v. Unknown Party*, No. 1:25-CV-1503, 2025 WL 3534158 (W.D. Mich. Dec. 10, 2025)
- *Alvarez-Lopez v. U.S. Department of Homeland Security*, No. 25-13098, 2025 WL 3525956 (E.D. Mich. Dec. 9, 2025)
- *Eligio Amaya v. Raycraft*, No. 25-13539, 2025 WL 3530273 (E.D. Mich. Dec. 9, 2025)
- *Guillen Mendez v. Unknown Party #1*, No. 1:25-CV-1407, 2025 WL 3522118 (W.D. Mich. Dec. 9, 2025)
- *Morales v. Bondi*, No. 1:25-CV-1472, 2025 WL 3525488 (W.D. Mich. Dec. 9, 2025)
- *Ramirez Ibanez v. Lynch*, No. 1:25-CV-1493, 2025 WL 3525324 (W.D. Mich. Dec. 9, 2025)
- *Resendiz v. Noem*, No. 4:25-CV-00159-GNS, 2025 WL 3527284 (W.D. Ky. Dec. 9, 2025)
- *Suarez Guerrero v. Noem*, No. 1:25-CV-1572, 2025 WL 3520407 (W.D. Mich. Dec. 9, 2025)
- *Enriques Becerra v. Raycraft*, No. 1:25-CV-1506, 2025 WL 3511095 (W.D. Mich. Dec. 8, 2025)
- *Gramajo Reyna v. Raycraft*, No. 1:25-CV-1575, 2025 WL 3513891 (W.D. Mich. Dec. 8, 2025)

Seventh Circuit

- *Campa Velazquez v. Olson*, No. 25 C 14360, 2025 WL 3552116 (N.D. Ill. Dec. 11, 2025)
- *Mohammed v. Olson*, No. 1:25-CV-02404-TWP-MKK, 2025 WL 3541819 (S.D. Ind. Dec. 10, 2025)

Eighth Circuit

- *Duran Avalos v. Bondi*, No. C25-4063-LTS-KEM, 2025 WL 3530162 (N.D. Iowa Dec. 9, 2025)

- *Mata Fuentes v. Olson*, No. 25-CV-4456 (LMP/ECW), 2025 WL 3524455 (D. Minn. Dec. 9, 2025)
- *Sanchez Lopez v. Jeffreys*, No. 4:25CV3241, 2025 WL 3533875 (D. Neb. Dec. 9, 2025)
- *Lopez-Valdez v. Arnott*, No. 6:25-CV-3365-MDH, 2025 WL 3516477 (W.D. Mo. Dec. 8, 2025)

Ninth Circuit

- *Almonte Hernandez v. Hermosillo*, No. 2:25-CV-02464-TMC, 2025 WL 3554639 (W.D. Wash. Dec. 11, 2025)
- *Lopez-Lugo v. Bondi*, No. 2:25-CV-02380-TMC, 2025 WL 3551435 (W.D. Wash. Dec. 11, 2025)
- *Martinez-Martine v. Noem*, No. 25CV2975-GPC(VET), 2025 WL 3552746 (S.D. Cal. Dec. 11, 2025)
- *Mejia Soto v. Radar*, No. 2:25-CV-02281-RFB-EJY, 2025 WL 3551913 (D. Nev. Dec. 11, 2025)
- *Perez Gonzalez v. Noem*, No. 2:25-CV-02137-RFB-DJA, 2025 WL 3552122 (D. Nev. Dec. 11, 2025)
- *Shen v. Larose*, No. 25CV3235-GPC(BLM), 2025 WL 3552747 (S.D. Cal. Dec. 11, 2025)
- *Gallegos Rangel v. Knight*, No. 2:25-CV-02161-RFB-BNW, 2025 WL 3539303 (D. Nev. Dec. 10, 2025)
- *Garcia Soto v. Knight*, No. 2:25-CV-02138-RFB-BNW, 2025 WL 3537405 (D. Nev. Dec. 10, 2025)
- *H.L.P.F. v. Wamsley*, No. 6:25-CV-01899-AA, 2025 WL 3539252 (D. Or. Dec. 10, 2025)
- *Lima v. Wofford*, No. 1:25-CV-01390-SKO (HC), 2025 WL 3535009 (E.D. Cal. Dec. 10, 2025)
- *Nava Sandoval v. Larose*, No. 25-CV-3408 JLS (VET), 2025 WL 3552748 (S.D. Cal. Dec. 10, 2025)
- *Osorio-Martinez v. Noem*, No. 25-CV-03232-BAS-JLB, 2025 WL 3539267 (S.D. Cal. Dec. 10, 2025)
- *Quinonez Orosco v. Lyons*, No. 2:25-CV-02240-RFB-EJY, 2025 WL 3539275 (D. Nev. Dec. 10, 2025)
- *Cruz-Flores v. Noem*, No. 25-CV-3263 JLS (VET), 2025 WL 3526830 (S.D. Cal. Dec. 9, 2025)

Tenth Circuit

- *Urbina Garcia v. Holt*, No. CIV-25-1225-J, 2025 WL 3516071 (W.D. Okla. Dec. 8, 2025)

Eleventh Circuit

- *Cetino v. Hardin*, No. 2:25-CV-1037-JES-DNF, 2025 WL 3558138 (M.D. Fla. Dec. 12, 2025)
- *Hernandez Perez v. Secretary, Department of Homeland Security*, No. 2:25-CV-1052-KCD-NPM, 2025 WL 3551383 (M.D. Fla. Dec. 11, 2025)
- *Castillo-Castro v. Secretary, Department of Homeland Security*, No. 2:25-CV-1045-KCD-DNF, 2025 WL 3537604 (M.D. Fla. Dec. 10, 2025)
- *Cervantes Orellana v. Noem*, No. 2:25-CV-1038-KCD-NPM, 2025 WL 3537582 (M.D. Fla. Dec. 10, 2025)

- *Espino Avalos v. Hardin*, No. 2:25-CV-1008-KCD-DNF, 2025 WL 3537566 (M.D. Fla. Dec. 10, 2025)
- *Flores Castizo v. Bondi*, No. 2:25-CV-01087-SPC-DNF, 2025 WL 3534105 (M.D. Fla. Dec. 10, 2025)
- *Gonzalez Hernandez v. Bondi*, No. 2:25-CV-01082-SPC-NPM, 2025 WL 3540685 (M.D. Fla. Dec. 10, 2025)
- *Navarro Perera v. Bondi*, No. 2:25-CV-01054-SPC-NPM, 2025 WL 3515616 (M.D. Fla. Dec. 8, 2025)

However, even if this Court considers the argument that Petitioner is in fact subject to mandatory detention, as Respondents argue, courts across the country continue to hold that section 1225 does not apply to individuals who entered without inspection and were detained, years later, within the United States. *See supra*.

Additionally, while Respondents attempt to circumvent the holding of over 1,000 cases nationwide ruling in favor of individuals similarly situated to Petitioner, arguing that *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), and not *Matter of Yajure Hurtado*, applies, they are mischaracterizing the distinct nature of expedited removal proceedings under 8 U.S.C. § 1225 and full removal proceedings under 8 U.S.C. § 1229. Respondents argue that Petitioner's facts are similar to *Matter of M-S-*, because Petitioner's Notice to Appear indicates he passed a credible fear interview. *See* Dkt. 3 at 1. However, there are several factual differences in Petitioner's case that make *Matter of M-S-*, inapplicable. To start, in *Matter of M-S-*, all of the facts related to the discussion of expedited removal, bond, and full removal proceedings under sections 1225 and 1226 happened while *M-S-* was detained. Here, ICE not only chose to release Petitioner and place him in full removal proceedings but, most notably, failed to issue or file the Notice to Appear while he was detained; the NTA was served via regular mail. *See* Dkt. 3, Ex. A. This distinction is material because it supports Petitioner's position that he is in full removal proceedings and is subject to section 1226, not expedited removal proceedings under 1225, because he was apprehended in the interior, years after entering without inspection.

Further, this Court is not required, and should not, give deference to the recent Board decision cited in Respondent's brief. In *Loper Bright*, the Supreme Court was clear that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and indeed "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Rather, this Court can simply look to the Supreme Court's own words in *Jennings* that held that for decades, § 1225 has applied only to noncitizens "seeking admission into the country"—i.e., new arrivals, and that this contrasts with § 1226, which applies to noncitizens "already in the country." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). The Court in *Jennings* was abundantly clear about these interpretations. Petitioner in this case is not a new arrival and had been in the United States for three years at the time of his detention.

The text of sections 1225 and 1226, together with binding Supreme Court precedent interpreting those provisions and the numerous district court decisions confirm that he is subject to section 1226(a)'s discretionary detention scheme.

CONCLUSION

For the foregoing reasons, this Court should order Petitioner's release or in the alternative, order Respondents to schedule a neutral bond hearing under section 1226 for Petitioner's removal proceedings within a reasonable time.

Respectfully Submitted,

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