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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILIAM ABNER MAZARIEGOS-LOPEZ Alien Number: [redacted] Petitioner, v. PAMELA BONDI, *et al.*, Respondents.	Case No.: 0:26-CV-60220-XXXX **PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS**

PETITIONER'S REPLY TO RESPONDENT'S RETURN IN OPPOSITION TO THE PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, by and through undersigned counsel, submits the following reply to Respondent's response to Petitioner's Writ of Habeas Corpus. First, the government's expansive interpretation of § 1225 has been uniformly rejected by countless other courts. *See Pacheco-Guzman v. Bondi*, No. CV-26-20897 (S.D. Fla. Feb. 20, 2026); (listing the overwhelming majority of district court decisions across the United States rejecting Respondents' interpretation of § 1225).[1] In *Pacheco-Guzman v. Bondi*, the Honorable United States District Judge, Kathleen

[1] This Court is not bound by the Fifth Circuit's recent decision in *Buenrostro-Mendez v. Bondi*, Nos. 25-20496, 25-40701, 2026 U.S. App. LEXIS 3899 (5th Cir. Feb. 6, 2026), a decision which ignores the overwhelming majority of courts in its Circuit and elsewhere. *See Pacheco-Guzman v. Bondi*, 26-20897 (S.D. Fla Feb. 20, 2026) at footnote 3 in attachment 3.

M. Williams, specifically sets forth and addressed the Fifth Circuit's recent decision and states that this decision is not binding. "Accordingly, without Eleventh Circuit guidance, this court will not adopt the Government's expansive reading of § 1225." *See Pacheco-Guzman v. Bondi*, 26-20897 (S.D. Fla Feb. 20, 2026) at footnote 3. To support her decision, Judge Williams cites the following cases: *Puga*, No. 25- 24535, 2025 WL 2938369, at *3–6; *Merino v. Ripa*, No. 25-23845, 2025 WL 2941609, at *3 (S.D. Fla. Oct. 15, 2025); *Lopez v. Hardin*, No. 25-cv-830, 2025 WL 2732717, at *2(M.D. Fla. Sep. 25, 2025); *Harsh Patel v. Crowley*, No. 25-11180, 2025 U.S. Dist. LEXIS 209958, at *9–12 (N.D. Ill. Oct. 24, 2024); *Esquivel-Ipina v. Larose*, No. 25-cv-2672, 2025 U.S. Dist. LEXIS 210275, at *9–12 (C.D. Cal. Oct. 24, 2025); *Carmona v. Noem*, No. 25-cv-1131, 2025 U.S. Dist. LEXIS 209629, at *14–17 (W.D. Mich. Oct. 24, 2025); *Lopez v. Hyde*, 25-12680, 2025 U.S. Dist. LEXIS 209916, at *4–5 (D. Mass. Oct. 24, 2025); *Guerra v. Joyce*, No. 25-cv-00534, 2025 WL 2986316, at *3 (D. Me. Oct. 23, 2025); *Lomeu v. Soto*, 25-cv-16589, 2025 WL 2981296, at *7–8 (D.N.J. Oct. 23, 2025); *Maldonado v. Cabezas*, No. 25-13004, 2025 WL 2985256, at *4 (D.N.J. Oct. 23, 2025); *Aparicio v. Noem*, 2025 U.S. Dist. LEXIS 208898, at *12–13 (D. Nev. Oct. 23, 2025); *Loa Caballero v. Baltazar*, No. 25-cv-03120, 2025 WL 2977650, at *5–6 (D. Colo. Oct. 22, 2025); *Soto v. Soto*, No. 25-cv-16200, 2025 U.S. Dist. LEXIS 207818, at *16–19 (D.N.J. Oct. 22, 2025); *Garcia v. Noem*, 25-cv-02771, 2025 U.S. Dist. LEXIS 209286, at *10–15 (C.D. Cal. Oct. 22, 2025); *Aguiar v. Moniz*, No. 25-cv-12706, 2025 WL 2987656, at *3 (D. Mass Oct. 22, 2025); *Rivera v. Moniz*, 25-cv-12833, 2025 WL 2977900, at *1–2 (D. Mass. Oct. 22, 2025); *Avila v. Bondi*, No. 25-3741, 2025 WL 2976539, at *5–7 (D. Minn. Oct. 21, 2025); *Contreras-Lomeli v. Raycraft*, No. 25-cv-12826, 2025 U.S. Dist. LEXIS 207162, at *22 (E.D. Mich. Oct. 21, 2025); *Maldonado de Leon v. Baker*, No. 25-3084, 2025 WL 2968042, at *7 (D. Md. Oct. 21, 2025); *Casio-Mejia v. Raycraft*, No. 25-cv-13032,

2025 U.S. Dist. LEXIS 207165, at *12, 16–17 (E.D. Mich. Oct. 21, 2025); *Miguel v. Noem*, 25-11137, 2025 WL 2976480, at *6 (N.D. Ill. Oct. 21, 2025); *Pineda v. Simon*, No. 25-cv-01616, 2025 WL 2980729, at *2 (E.D. Va. Oct. 21, 2025); *Matheus Araujo DA Silva v. Bondi*, No. 25-cv- 12672, 2025 WL 2969163, at *2 (D. Mass. Oct. 21, 2025); *Barahona v. Hyde*, No. 25-cv-12551, 2025 U.S. Dist. LEXIS 205964, at *4–5 (D. Mass. Oct. 20, 2025); *H.G.V.U. v. Smith*, No. 25-cv-10931, 2025 WL 2962610, at *4–6 (N.D. Ill. Oct. 20, 2025); *Gonzalez v. Hyde*, No. 25-8250, 2025 U.S. Dist. LEXIS 208578, at *10–11 (S.D.N.Y. Oct. 19, 2025); *Polo v. Chestnut*, No. 25-cv-01342, 2025 WL 2959346, at *11 (E.D. Cal. Oct. 17, 2025); *Sanchez v. Minga Wofford, Warden, Mesa Verde Immigr. Processing Ctr.*, No. 25-cv-01187, 2025 WL 2959274, at *3 (E.D. Cal. Oct. 17, 2025); *Gutierrez v. Juan Baltasar, Warden, Denver Cont. Det. Facility*, No. 25-cv-2720, 2025 U.S. Dist. LEXIS 208448, at *12–27 (D. Colo. Oct. 17, 2025); *Alvarez v. Noem*, No. 25-cv-1090, 2025 WL 2942648, at *4–6 (W.D. Mich. Oct. 17, 2025); *Zamora v. Noem*, No. 25-12750, 2025 WL 2958879, at *1 (D. Mass. Oct. 17, 2025); *Pacheco Mayen v. Raycraft*, 25-cv-13056, 2025 WL 2978529, at *6–9 (E.D. Mich. Oct. 17, 2025); *Diaz Sandoval v. Raycraft*, No. 25-cv-12987, 2025 WL 2977517, at *6–9 (E.D. Mich. Oct. 17, 2025); *Contreras-Cervantes v. Raycraft*, No. 25-cv-13073, 2025 WL 2952796, at *6–8 (E.D. Mich. Oct. 17, 2025); *Ochoa v. Noem*, No. 25-10865, 2025 WL 2938779, at *4–6 (N.D. Ill. Oct. 16, 2025); *Hernandez v. Crawford*, No. 25-cv-01565, 2025 WL 2940702, at *2 (E.D. Va. Oct. 16, 2025); *Piña v. Stamper*, No. 25-cv-00509, 2025 WL 2939298, at *3 (D. Me. Oct. 16, 2025); *Tut v. Noem*, No. 25-cv-02701, 2025 U.S. Dist. LEXIS 204616, at *9 (C.D. Cal. Oct. 16, 2025); *Sequen v. Albarran*, No. 25-cv-06487, 2025 WL 2935630, at *8 (N.D. Cal. Oct. 15, 2025); *Teyim v. Perry*, No. 25-cv-01615, 2025 WL 2950184, at *2–3 (E.D. Va. Oct. 15, 2025); *Singh v.*

Lyons, 25-cv-01606, 2025 WL 2932635, at *2–3 (E.D. Va. Oct. 14, 2025); *Alejandro v. Olson*, 25-cv-02027, 2025 WL 2896348, at *7–9 (S.D. Ind. Oct. 11, 2025); *Rico-Tapia v. Smith*, No. 25-00379, 2025 U.S. Dist. LEXIS 206547, at *21 (D. Haw. Oct. 10, 2025); *Chavez v. Kaiser*, No. 25-cv-06984, 2025 WL 2909526, at *5 (N.D. Cal. Oct. 9, 2025); *Donis v. Chestnut*, No. 25-01228, 2025 WL 287514, at *11 (E.D. Cal. Oct. 9, 2025); *Eliseo A.A. v. Olson*, No. 25-3381, 2025 WL 2886729, at *2–4 (D. Minn. Oct. 8, 2025); *Covarrubias v. Vergara*, No. 25-cv-112, 2025 WL 2950097, at *3 (S.D. Tex. Oct. 8, 2025); *Buenrostro-Mendez v. Bondi*, No. 25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025); *S.D.B.B. v. Johnson*, No. 25-cv-882, 2025 WL 2845170, at *5 (M.D.N.C. Oct. 7, 2025); *Gonzalez v. Bostock*, 25-cv-01404, 2025 WL 2841574, at *3–4 (W.D. Wash. Oct. 7, 2025); *Hyppolite*, 2025 WL 2829511, at *12; *Artiga v. Genalo*, No. 25-5208, 2025 WL 2829434, at *7 (E.D.N.Y. Oct. 5, 2025); *Cordero Pelico v. Kaiser*, No. 25-cv-07826, 2025 WL 2822876, at *15 (N.D. Cal. Oct. 3, 2025); *Orellana v. Moniz*, 25-cv-12664, 2025 WL 2809996, at *5 (D. Mass. Oct. 3, 2025); *Elias Escobar v. Hyde*, No. 25-cv-12620, 2025 WL 2823324, at *3 (D. Mass. Oct. 3, 2025); *Belsai D.S. v. Bondi*, No. 25-cv-3682, 2025 WL 2802947, at *5–6 (D. Minn. Oct. 1, 2025); *Silva v. United States Immigr. & Customs Enf't*, No. 25-cv-284, 2025 U.S. Dist. LEXIS 191101, at *6–7 (D.N.H. Sep. 29, 2025); *Barrios v. Shepley*, No. 25-cv-00406, 2025 WL 2772579, at *10 (D. Me. Sep. 29, 2025); *Lepe v. Andrews*, No. 25-cv-01163, 2025 WL 2716910, at *4 (E.D. Cal. Sep. 23, 2025); *Chogllo Chafla v. Scott*, Nos. 25-cv-00437, 25-cv-00438, 25-cv-00439, 2025 WL 2688541, at *6–9 (D. Me. Sep. 22, 2025); *Barrera v Tindall*, No. 25-cv-541, 2025 WL 2690565, at *5 (W.D. Ky. Sep. 19, 2025); *Pablo Sequen v. Kaiser*, No. 25-cv-06487, 2025 WL 2650637, at *6–8 (N.D. Cal. Sep. 16, 2025); *Salcedo Aceros v. Kaiser*, No. 25-cv-

06924, 2025 WL 2637503, at *8–12 (N.D. Cal. Sep. 12, 2025); *Lopez Santos v. Noem*, No. 3:25-cv-01193, 2025 WL 2642278, at *3–5 (W.D. La. Sep. 11, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-326, 2025 WL 2639390, at *5–10 (D.N.H. Sep. 8, 2025); *Doe v. Moniz*, 25-cv-12094, 2025 WL 2576819, at *5 (D. Mass. Sep. 5, 2025); *Garcia v. Noem*, No. 25-cv-01180, 2025 WL 2549431, at *5–7 (S.D. Cal. Sep. 3, 2025); *Francisco v. Bondi*, No. 25-cv-03219, 2025 WL 2629839, at *2–4 (D. Minn. Aug. 29, 2025); *Lopez-Campos v. Raycraft*, No. 25-cv-12486, 2025 WL 2496379, at *5–8 (E.D. Mich. Aug. 29, 2025); *Diaz v. Mattivelo*, No. 25-cv-12226, 2025 WL 2457610, at *3 (D. Mass. Aug. 27, 2025); *Kostak v. Trump*, No. 25-1093, 2025 WL 2472136, at *2–3 (W.D. La. Aug. 27, 2025); *Benitez v. Noem*, No. 25-cv-02190, 2025 U.S. Dist. LEXIS 171945, at *8–12 (C.D. Cal. Aug. 25, 2025); *Romero v. Hyde*, No. 25-11631, 2025 WL 2403827, at *11–13 (D. Mass. Aug. 19, 2025); *Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411, at *11–12 (D. Minn. Aug. 15, 2025); *dos Santos v. Noem*, 25-cv-12052, 2025 WL 2370988, at *6–8 (D. Mass. Aug. 14, 2025); *Lopez Benitez v. Francis*, No. 25-cv-5937, 2025 WL 2371588, at *4–9 (S.D.N.Y. Aug. 13, 2025); *Rosado v. Figueroa*, No. 25-12157, 2025 WL 2337099, at *6–11 (D. Ariz. Aug. 11, 2025) *report and recommendation adopted by*, 2025 WL 2349133 (Aug. 13, 2025); *Bautista v. Santacruz*, No. 25-cv-01873, 2025 U.S. Dist. LEXIS 171364, at *13–16 (C.D. Cal. July 28, 2025); *Martinez v. Hyde*, No. 25-11613, 2025 WL 2084238, at *5–9 (D. Mass. July 24, 2025); *Gomes*, 2025 WL 1869299, at *5–8; *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1256–61 (W.D. Wash. 2025).

1. **Petitioner is Not Subject to Mandatory Detention under 8 U.S.C. § 1225.**

Under the post-IIRIRA INA, it is admission, not entry, that matters. The term "admission" and "admitted," previously absent from the INA were added and defined at 8 U.S.C. § 1101(a)(13)(A), which provides:

> The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien *into the United States* after inspection and authorization by an immigration officer.

Meanwhile, the related term "application for admission" (also added by IIRIRA) defined at 8 U.S.C. § 1101(a)(4), provides: "The term 'application for admission' has reference to the application for admission *into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa."[2]

The terms "application for admission," "admission," and "admitted" all make Congress' intent clear: Admission cannot happen anywhere other than when at the proverbial door asking to come in. Circuit courts interpreting INA provisions referencing the definition of "admission" at 8 U.S.C. § 1101(a)(13), have explained:

> This definition "is limited and does not encompass a post-entry adjustment of status," because it "refers expressly to *entry into* the United States, denoting by its plain terms passage into the country from abroad at a port of entry." [3]

By explicitly defining these terms, the "work" of determining their meaning and the meaning of statutes using them has been done by Congress.[4] And in so doing, courts analyzing

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[2] 8 U.S.C. § 1101(a)(4) (emphasis added).

[3] *Medina-Rosales v. Holder*, 778 F.3d 1140, 1145 (10th Cir. 2015) (quoting *Negrete–Ramirez*, 741 F.3d at 1051); *see also Papazoglou*, 725 F.3d at 793 ("That provision therefore encompasses the action of an entry into the United States, accompanied by an inspection or authorization."); *Bracamontes*, 675 F.3d at 385 ("Clearly, neither term includes an adjustment of status; instead, both contemplate a physical crossing of the border following the sanction and approval of United States authorities."); *Martinez*, 519 F.3d at 544 (recognizing that " 'admission' is the lawful *entry* of an alien after inspection, something quite different ... from post-entry adjustment of status").

[4] *Martinez v. Mukasey*, 519 F.3d 532, 543-44 (5th Cir. 2008).

such provisions have rejected the government's claims that an admission can happen from within the U.S. [5] This has been repeatedly affirmed by courts interpreting INA provisions containing these terms.[6]

To address Respondent's contention that IIRIRA was specifically enacted to put a halt to the paradox of conferring greater privileges to those who presented at ports of entries than those who unlawfully entered: IIRIRA put provisions in place to deter illegally entering as well as extended stays of unlawful presence in the U.S. by penalizing such actions through bars to becoming a LPR. Beyond expanding expedited removal, IIRIRA employed other significant statutory tools to deter illegal entry. Chief among these was the creation of the 3- and 10-year unlawful presence (ULP) bars found at INA § 1182(a)(9)(B). Because EWI aliens are generally ineligible to adjust status within the United States under § 1255(a), they must depart and seek admission via consular processing.[7] IIRIRA's new bars ensured that such a departure, after accruing sufficient unlawful presence, would trigger a multi-year, or even decade-long, bar to their lawful return. [8] IIRIRA did provide a waiver for these bars in the case of aliens who have either a spouse or parent that is a U.S. citizen or LPR who will suffer hardship if the alien's application for admission as a LPR is denied. This, not mandatory detention, was yet another deterrent aimed at the EWI population.

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[5] *See e.g. id.* (rejecting the government's argument that an alien's adjustment of status within the United States was the equivalent of "being admitted to the United States as an alien lawfully admitted for permanent residence" as that phrase is used in 8 U.S.C. § 1182(h)).

[6] *See generally Vartelas v. Holder*, 566 U.S. 257 (2012)(discussing IIRIRA's elimination of the entry doctrine through defining admission in 8 U.S.C. § 1101(a)(13) and the application of subparagraphs (C)(i)-(vi) to LPRs who, after a departure, are returning to the U.S. and seeking admission into it which it ultimately held violated the constitution's prohibition against retroactivity).

[7] § 1182(a)(9)(B)(i)(I)-(I).
[8] § 1182(a)(9)(B)(i)(I)-(I).

The government's new position hinges on a simplistic and overbroad reading of § 1225(b)(2)(A) and the definition of "applicant for admission" found in § 1225(a)(1).[9] More specifically, the government takes the definition of applicant for admission in (a)(1), and leaps to the conclusion that all such applicants for admission must be "seeking admission," and therefore, subject to detention under § 1225(b)(2)(A) regardless of when or where they are encountered.[10] This interpretation ignores the careful distinctions drawn throughout the INA and its implementing regulations.

As an initial matter, *Hurtado* and the Respondents in their response claim to read the plain language of § 1225(b)(2)(A), but as many courts have pointed out the BIA only reaches its conclusion by omitting "plain language" contradicting its interpretation. Specifically, to be subject to § 1225(b)(2)(A), the plain text requires an individual to be 1) an "applicant for admission"; 2) "seeking admission"; and 3) determined by an examining immigration officer to be "not clearly and beyond a doubt entitled to be admitted."[11] The second element of Sec. 1225(b)(2)(A)—which requires that a noncitizen be *seeking admission*—is not met in the case of EWI aliens who are found miles away from the land border and years after their entry.

As reasoned above, Congress left no room to dispute that an admission may only take place at a designated POE when asking to enter after inspection by an immigration officer. Accordingly, EWI aliens, like Petitioner, cannot be said to be *seeking admission* when arrested and detained in the interior well after entering. Rather, consistent with pre-IIRIRA detention provisions and

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[9] *See Hurtado*, 29 I&N Dec. at 216-220.

[10] *Id.*

[11] 8 U.S.C. § 1225(b)(2)(A); *see also Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *2 (D. Mass. July 24, 2025) (affirming these "several conditions must be met" for a noncitizen to be subject to mandatory detention under § 1225(b)(2)(A)).

decades of agency action, § 1225(b)(2) only implicates noncitizens who are "*seeking admission*" into the United States.[12]

The statutory use of the present and present progressive tenses—"is an applicant for admission" "seeking admission"—excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States.[13] Throughout the country district courts have agreed with this plain reading, which gives effect to the meaning of each word, holding that 8 § 1225(b)(2)(A) must be read to apply only to noncitizens who are apprehended while seeking to enter the country, and that noncitizens already residing in the United States, including those who are charged with inadmissibility, continue to fall under the discretionary detention scheme in § 1226.[14]

i. There is no question that *Jennings* reached the conclusion it did with the understanding that § 1225(b) applies at or near the border and § 1226(a) to those encountered in the interior and not subject to expedited removal—these are key distinctions that would have otherwise changed the analysis.

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[12] *Id.*

[13] *See Martinez v. Hyde*, 2025 WL 2084238, at *6 (D. Mass. July 24, 2025) (citing the use of present and present progressive tense to support conclusion that INA § 1225(b)(2) does not apply to individuals apprehended in the interior); accord Lopez Benitez v. Francis, 2025 WL 2371588, at *6–7 (S.D.N.Y. Aug. 13, 2025). See also United States v. Wilson, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, 1200 (S.D. Cal. 2019) (construing "is arriving" in 8 U.S.C. Sec. 1225 (1)(A)(i) and observing that "[t]he use of the present progressive, like use of the present participle, denotes an ongoing process").

[14] *See Lopez Santos v. Noem*, No. 3:25-CV-01193, 2025 WL 2642278 (W.D. La. Sept. 11, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Rodriguez v. Bostock*, No. 3:25-CV-05240-TMC, 779 F. Supp. 3d 1239, 1256–59 (W.D. Wash. 2025) (granting preliminary injunction prohibiting I.J.s from denying bond to individuals apprehended in the interior based on INA § 1225(b)(2)); *see also Gomes v. Hyde*, 2025 WL 1869299 at *6-7 (D. Mass. July 7, 2025) (relying on statutory structure and Laken Riley Act amendments to § 1226 to find that recent entrant re-detained on a warrant was not subject to § 1225(b)(2)); *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *6–8 (D. Mass. July 24, 2025); *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025); *Rocha Rosado v. Figueroa*, 2025 WL 2337099, at *8–10 (D. Ariz. Aug. 11, 2025); *Aguilar Maldonado v. Olson*, 2025 WL 2374411, at *11–13 (D. Minn. Aug. 15, 2025); *accord Castillo Lachapel v. Joyce*, 2025 WL 1685576, at *2 (S.D.N.Y. June 16, 2025) (parties agreed that a person who had entered without inspection and was arrested in the interior was detained under § 1226(a)).

While 8 U.S.C. § 1225 does not explicitly state that its application is limited to ports of entry (POEs) or their immediate vicinity, this was without question the Supreme Court's understanding in *Jennings*. The Court's conclusions regarding the statute's interpretation and constitutionality relied heavily on the historically limited rights afforded to aliens at the country's borders. This was not an incidental assumption; the Supreme Court is fully cognizant of the limited constitutional rights at the border, and the government itself argued this precise distinction in support of its interpretation of § 1225 and § 1226.

Indeed, the Court presented the precise question this Court is being asked to answer now to the Solicitor General more than once. For example, Justice Sotomayor asked, "Clarifying question. For an alien who is found in the United States illegally, has not been admitted, are they held under 1225(b) or are they held under 1226(a)?"[15]

The Solicitor General responded, "So they are held under – if they are not – if they are not detained within 100 miles of the border or within 14 days... then they are under 1226(a) and not (c).[16]

Seeking further clarity, Justice Sotomayor posed a hypothetical of an EWI alien stating, "I'm talking about an alien who has come into the United States illegally without being admitted who takes up residence 50 miles from the border."[17]

Without hesitation, the Solicitor General confirmed: "The answer is they are held under 1226(a) and that they get a bond hearing under it - - and this is at page 156a of the appendix."[18]

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[15] (*Id.* at p. 7.)

[16] (*Id.* at pp. 7-8.)

[17] (*Id.* at p. 8.)

[18] (*Id.* at p. 8-9.)

As discussed below, the simple reality is that the Supreme Court and all the litigants in *Jennings* recognized that § 1225 is a statute applicable at or near the border, and therefore, the warrant requirement of the Fourth Amendment and the due process clause of the Fifth Amendment have little or no application.

Those advocating for the government's new position have often asserted that nothing in § 1225 says it applies only at POEs and near the border so it must apply everywhere and anywhere. But this ignores context and the assumption that Congress seeks to legislate constitutionally. Moreover, just as the § 1225 does not explicitly state its application is at or near the border, § 1226 does not say its application is in the interior of the United States. The absence of such language does not change the fact that its application is in the interior of the United States. This distinction between the geographical location of their application was explicitly acknowledged in *Jennings*.

The application of § 1225 at POEs and near the border is clear, unless one's entire test for interpretation is whether the statute explicitly states: "this statute applies only at X." The placement of § 1225 strongly supports its border-centric application. It is preceded by statutes plainly applying at POEs: § 1221 (arrival/departure manifests), § 1222 (detention and health examinations of arriving aliens), § 1223 (contracts with transportation companies regarding arriving aliens), and § 1224 (designation of POEs for aircraft). It is immediately followed by § 1225A, governing pre-inspection at airports. Simply put, § 1225 is surrounded by statutes that obviously apply at the borders and POEs.

Furthermore, the statute's implementing regulations affirm this understanding. The very first section, 8 C.F.R. § 235.1(a), states: "Generally. Application to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section." The subsequent regulatory sections under 8

C.F.R. § 235 et. seq. consistently address procedures at the point of entry. In addition, most the implementing regulations have to do with airports, vessels, and other things that are clearly taking place at the border.

2. **Reliance on Jennings is Misplaced at Best and Misleading at Worst.**

In *Matter of Hurtado*, and the Respondent in their response, claims that the Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018) dictates their preferred result. This claim, as one court put it, however, "is, to say the least, not without some doubt."[19] Contrary to the BIA's claims about *Jennings*, Article III courts have seemingly uniformly pointed out that *Jennings* actually said: ""U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c)."[20] Furthermore, as discussed above and illustrated by the oral argument transcript provided in the attached Exhibit, the *Jennings* court was operating under the belief that the application of § 1225 was at or near the border. A change in this fact completely changes the constitutional analysis. This is particularly true given the fact that when the Solicitor General was directly asked—more than once and in more than one way—what statute an alien who entered illegally who was not subject to expedited removal was detained under, he unequivocally responded § 1226(a) every time.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Habeas Corpus should be granted, and an order should be issued immediately releasing Petitioner from his three-month unlawful

[19] *Arce v. Trump*, No. 8:25CV520, 2025 WL 2675934, at *4–6 (D. Neb. Sept. 18, 2025).

[20] *Jennings*, 583 U.S. at 289 (emphasis added).

detention or an immediate deadline should be imposed before which Respondents must provide Petitioner with a discretionary custody redetermination (bond) hearing.

/s/ Jan Peter Weiss

Dated: February 19, 2026

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WILIAM ABNER MAZARIEGOS-LOPEZ)
Alien Number: [redacted]) Case No.: 0:26-CV-60220-XXXX
)
Petitioner,)
v.)
)
PAMELA BONDI, U.S. Attorney General, et al.)

INDEX OF SUPPORTING DOCUMENTS

Attachment No.	Document Title
1	2022 Annual Flow Report – Department of State
2	Jennings Oral Argument Transcript
3	Copy of Pacheco-Guzman, No. 26-20897-cv-Williams Opinion

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2026, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

Dated: February 19, 2026

By: */s/ Jan Peter Weiss*

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Annual Flow Report

NOVEMBER 2023

U.S. Nonimmigrant Admissions: 2022

ALICIA WARD

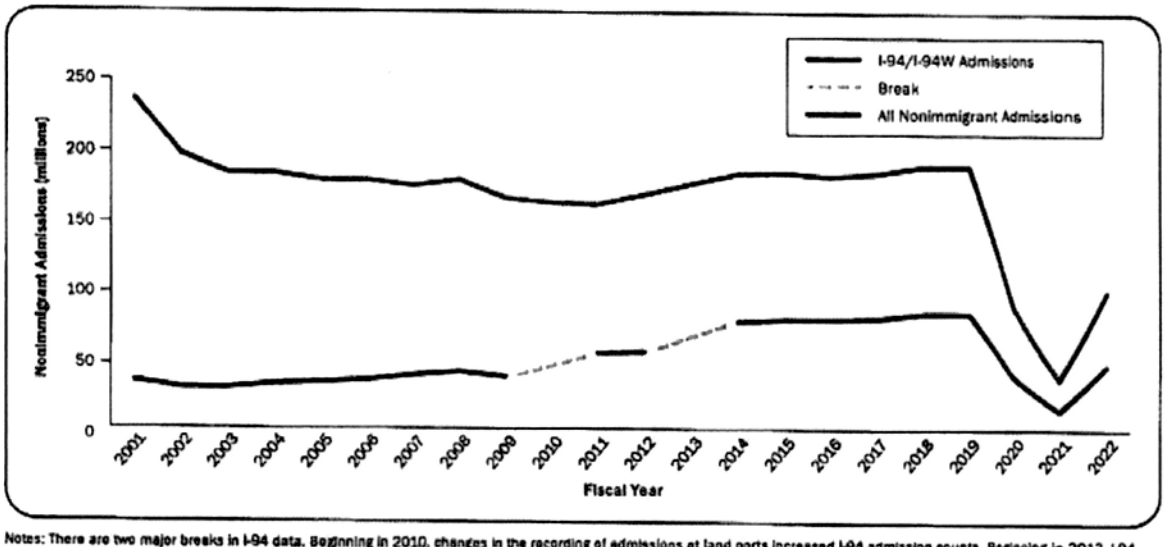
Nonimmigrants are foreign nationals with permanent residence outside the United States who are granted temporary admission to the United States for a specific purpose, including temporary visits for business or pleasure, academic or vocational study, temporary employment, and to act as a representative of a foreign government or international organization. The U.S. Department of Homeland Security (DHS) collects information regarding nonimmigrant admissions at ports of entry (POEs) and from DHS Form I-94/I-94W.[1] The 2022 *U.S. Nonimmigrant Admissions Annual Flow Report*, authored by the Office of Homeland Security Statistics (OHSS), presents workload information on total nonimmigrant admissions and detailed data gathered from I-94 arrival records on the number and characteristics of nonimmigrant admissions to the United States in Fiscal Year 2022.[2, 3, 4, 5]

SUMMARY

In 2022, DHS granted an estimated 97 million nonimmigrant admissions to the United States (Figure 1).[6] These included 45 million admissions of nonimmigrants who were issued Form I-94—the primary focus of this report.[7] Nonimmigrant admissions in 2022 increased 174 percent from 2021. This large increase in nonimmigrant admissions reflects policy changes resulting from the global pandemic.[8] Of the nearly 45 million I-94 admissions,

Figure 1.

Nonimmigrant Admissions: Fiscal Years 2001 to 2022



Notes: There are two major breaks in I-94 data. Beginning in 2010, changes in the recording of admissions at land ports increased I-94 admission counts. Beginning in 2013, I-94 automation at air and sea ports increased the number of admissions recorded in I-94 data.
Source: Office of Homeland Security Statistics.

[1] All references to Form I-94, *Arrival Record*, include Form I-94W, *Visa Waiver Arrival Record*, where applicable. The I-94 form is also named the *Departure Record*.

[2] This report was prepared by the OHSS, which replaced the Office of Immigration Statistics in September 2023. The OHSS's mission is to provide quality assurance and governance of Department-wide statistical data, support data-driven decision-making, and improve the efficiency and transparency of statistical reporting. The DHS Statistical Official heads OHSS.

[3] This report includes OHSS's analysis of relevant statutes, policy, and processes to provide background and context for DHS statistical data. The report has been reviewed for accuracy by relevant DHS Components.

[4] In this report, years refer to fiscal years, which run from October 1 to September 30. Fiscal Year 2022 ran from October 1, 2021 – September 30, 2022.

[5] Additional context may be found in the 2022 *Yearbook of Immigration Statistics*, available at https://www.dhs.gov/ohss/topics/immigration/yearbook, and other OHSS and legacy Office of Immigration Statistics (OIS) reports. Not all numbers reported are contained in this report's tables.

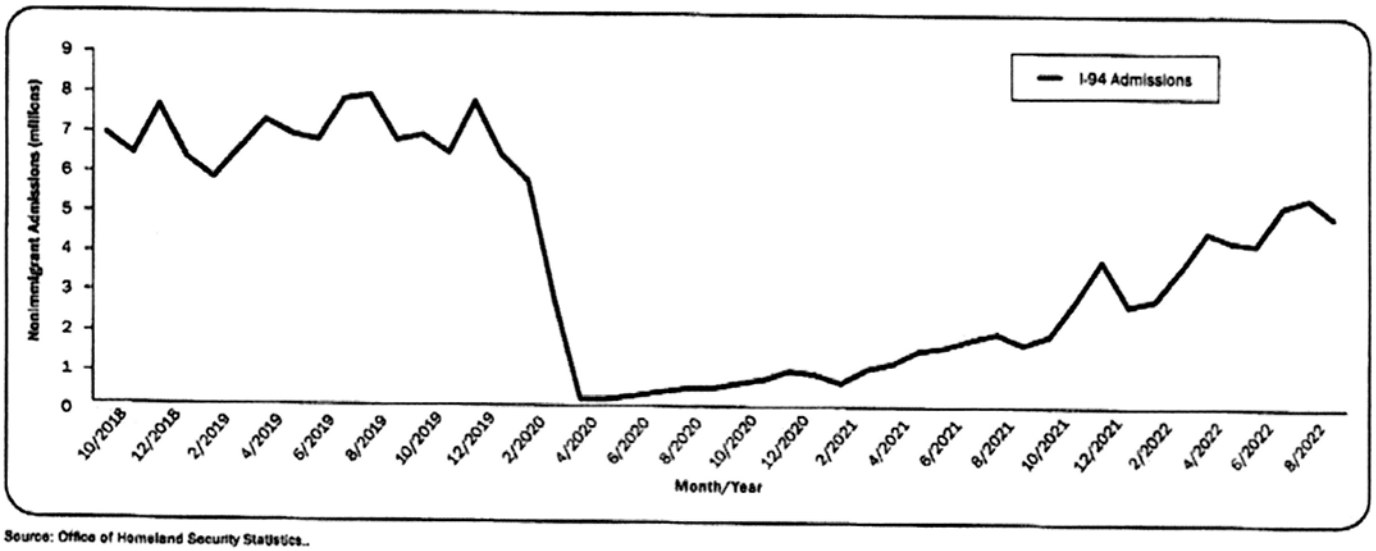
[6] Workload estimates based on U.S. Customs and Border Protection (CBP), Operations Management Reporting, Fiscal Year 2022.

[7] I-94 data do not describe all nonimmigrant admissions because certain visitors are not required to fill out an I-94 form, including all sea and air crew admissions (D1 and D2 visas) and a large share of Mexican and Canadian business and tourist travelers, as discussed elsewhere in this report. Current DHS data systems limit this report to the I-94 population, but OHSS is working to describe characteristics of all nonimmigrant admissions in future reports.

[8] Information on global pandemic travel restrictions is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/25/a-proclamation-on-advancing-the-safe-resumption-of-global-travel-during-the-covid-19-pandemic/.

Office of Homeland Security Statistics
U.S. Department of Homeland Security

Figure 2.
I-94 Nonimmigrant Admissions by Month: Fiscal Years 2019 to 2022



Source: Office of Homeland Security Statistics.

87 percent were temporary visitors for business and pleasure, 7.0 percent were temporary workers and their families, and 2.8 percent were students and their families (Table 1). The five leading countries of citizenship for I-94 admissions were Mexico (30 percent), Canada (15 percent), the United Kingdom (6.9 percent), India (4.0 percent), and France (3.3 percent) (Table 2). In 2021, Mexico, Canada, Colombia, India, and the Dominican Republic were the five leading countries of citizenship.

NONIMMIGRANT DEFINITION, PROCESS, AND REQUIREMENTS

Defining "Nonimmigrant"

Nonimmigrants are foreign nationals admitted temporarily to the United States within classes of admission defined in section 101(a)(15) of the Immigration and Nationality Act (INA).[9] Examples of nonimmigrant classes of admission include temporary visitors for pleasure and for business, temporary workers, academic and vocational students, treaty traders and investors, foreign nationals in transit, exchange visitors, foreign government officials, athletes and entertainers, and victims of certain crimes. Unlike individuals granted lawful permanent residence (LPR), or "green card" status, nonimmigrants are authorized to enter the country for specific purposes and limited periods of time. Nonimmigrants' duration of stay and the scope of their lawful activities, such as employment, travel, and accompaniment by dependents, are governed by their respective classes of admission.[10]

[9] Three nonimmigrant classes are authorized in sections other than INA § 101(a)(15). They include: (1) North American Free Trade Agreement (NAFTA) nonimmigrants; (2) Nationals of the Freely Associated States admitted under the Compacts of Free Association between the United States and the Republic of the Marshall Islands, the Federated States of Micronesia, and Palau; and (3) The Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Concerning Mutual Visits by Inhabitants of the Bering Straits Region.

[10] Information relating to duration of stay can be found at https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-expiration-date.html.

Nonimmigrant Admissions vs. Estimated Nonimmigrant Individuals vs. Nonimmigrant Visas Issued

This report covers admission *events* in 2022, not the number of *individuals* who entered the United States, nor the number of *visas issued*. Many nonimmigrants are admitted to the United States more than once in a year, and each admission is recorded separately and issued a new I-94 document at arrival. As a result, the count of admission events exceeds the number of individuals arriving. For more information on unique arrivals, see OIS Fact Sheet, *Nonimmigrant Admissions and Estimated Nonimmigrant Individuals: 2016*.[11] Admission events also differ from the number of nonimmigrant visas issued by the U.S. Deparument of State (DOS), for reasons such as: (1) a citizen or national from a country participating in the U.S. Visa Waiver Program (VWP) may travel to the United States for business or tourism for stays of up to 90 days without a visa; (2) a visa recipient may be admitted to the United States more than once on each visa, as is the case with many nonimmigrants; (3) a visa recipient may decide not to travel to the United States or decide to travel during the following year (subject to the validity of the visa); or (4) an individual arriving with a visa is determined to be inadmissible to the United States upon arrival.

[11] OHSS plans to update the factsheet in fiscal year 2024; the current factsheet is available at https://www.dhs.gov/ohss/topics/immigration/nonimmigrant.

Table 1.

Nonimmigrant Admissions (I-94 only) by Class of Admission: Fiscal Years 2020 to 2022

Class of admission	2020		2021		2022	
	Number	Percent	Number	Percent	Number	Percent
Total I-94 admissions[1]	37,176,105	100.0	13,623,118	100.0	44,897,662	100.0
Temporary workers and families	2,572,815	6.9	1,843,944	13.5	3,176,965	6.7
Temporary workers and trainees	1,791,758	4.8	1,448,739	10.6	2,335,451	5.2
CNMI-only transitional workers (CW1)	984	0.0	374	0.0	987	0.0
Workers in specialty occupations (H1B)	368,440	1.0	148,603	1.1	425,126	0.9
Chile and Singapore Free Trade Agreement aliens (H1B1)	631	0.0	373	0.0	1,306	0.0
Registered nurses participating in the Nursing Relief for Disadvantaged Areas (H1C)	11	0.0	0	0.0	0	0.0
Agricultural workers (H2A)	510,343	1.4	586,992	4.3	684,002	1.5
Nonagricultural workers and returning H2B workers (H2B, H2R)[2]	86,739	0.2	123,071	0.9	152,716	0.3
Trainees (H3)	820	0.0	400	0.0	950	0.0
Workers with extraordinary ability or achievement and their assistants (O1, O2)	79,089	0.2	34,907	0.3	118,420	0.3
Internationally recognized athletes or entertainers (P1)	54,816	0.1	37,213	0.3	89,800	0.2
Artists or entertainers in reciprocal exchange or culturally unique programs (P2, P3)	13,337	0.0	2,814	0.0	16,578	0.0
Workers in international cultural exchange programs (Q1)	1555	0.0	102	0.0	821	0.0
Workers in religious occupations (R1)	7,015	0.0	4,374	0.0	8,121	0.0
North American Free Trade Agreement (NAFTA) professional workers (TN)	485,948	1.3	385,869	2.8	550,399	1.2
Spouses and children of temporary workers and trainees (CW2, H4, O3, P4, R2, TD)	182,030	0.5	123,647	0.9	286,425	0.6
Intracompany transferees	470,641	1.3	182,379	1.3	478,352	0.7
Intracompany transferees (L1)	336,676	0.9	116,120	0.9	305,520	0.7
Spouses and children of intracompany transferees (L2)[3]	133,965	0.4	66,259	0.5	172,832	0.1
Treaty traders and investors and spouses and children (E1 to E3)[4]	291,588	0.8	200,672	1.5	337,888	0.7
Representatives of foreign media and spouses and children (I1)	18,826	0.1	12,154	0.1	25,274	0.1
Students	918,442	2.5	798,977	5.9	1,264,285	2.8
Academic students (F1)	876,157	2.4	758,458	5.6	1,199,088	2.7
Vocational students (M1)	9,454	0.0	7,872	0.1	9,892	0.0
Spouses and children of academic and vocational students (F2, M2)	32,831	0.1	32,647	0.2	55,305	0.1
Exchange visitors	226,474	0.60	174,412	1.30	432,432	1.00
Exchange visitors (J1)	195,459	0.5	151,257	1.1	384,707	0.9
Spouses and children of exchange visitors (J2)	31,015	0.1	23,155	0.2	47,725	0.1
Diplomats and other representatives	218,895	0.6	161,041	1.2	331,226	0.7
Ambassadors, public ministers, career diplomats, consular officers, other foreign government officials and their spouses, children, and attendants (A1 to A3)	106,451	0.3	87,679	0.6	169,588	0.4
Representatives to international organizations and their spouses, children, and attendants (G1 to G5)	82,939	0.2	50,760	0.4	112,424	0.3
North Atlantic Treaty Organization (NATO) officials, spouses, and children (N1 to N7)	29,505	0.1	22,602	0.2	49,214	0.1
Temporary visitors for pleasure	28,731,613	77.3	9,055,378	66.5	34,945,932	77.8
Temporary visitors for pleasure (B2)	20,175,009	54.3	8,169,825	60	24,516,995	54.6
Visa Waiver Program - temporary visitors for pleasure (WT)	7,991,484	21.5	883,556	6.5	10,298,435	22.9
Guam-CNMI Visa Waiver Program - temporary visitors for pleasure to Guam or Northern Mariana Islands (GMT)	565,120	1.5	1,997	0.0	130,502	0.3
Temporary visitors for business	4,209,153	11.3	1,346,208	9.9	4,234,792	9.4
Temporary visitors for business (B1)	2,825,830	7.6	1,223,567	9	3,037,742	6.8
Visa Waiver Program - temporary visitors for business (WB)	1,381,838	3.7	122,576	0.9	1,196,519	2.7
Guam-CNMI Visa Waiver Program - temporary visitors for business to Guam or Northern Mariana Islands (GMB)	1485	0.0	65	0.0	531	0.0
Transit aliens	252,201	0.7	211,283	1.6	447,494	1.0
Aliens in continuous and immediate transit through the United States (C1)	245,463	0.7	207,307	1.5	440,444	1.0
Aliens in transit to the United Nations (C2)	595	0.0	132	0.0	189	0.0
Foreign government officials, their spouses, children, and attendants in transit (C3)	6,143	0.0	3,844	0.0	6,861	0.0
Commuter Students	2753	0.0	514	0.0	999	0.0
Canadian or Mexican national academic commuter students (F3)	2753	0.0	514	0.0	999	0.0
Alien fiancé(e)s of U.S. citizens and children	22,708	0.1	18,974	0.1	25,679	0.1
Fiancé(e)s of U.S. citizens (K1)	19,957	0.1	16,643	0.1	22,255	0.0
Children of K1 (K2)	2,751	0.0	2,331	0.0	3,424	0.0
Alien spouses of U.S. citizens and children, immigrant visa pending	16	0.0	0	0.0	9	0.0
Spouses of U.S. citizens, visa pending (K3)	9	0.0	0	0.0	D	D
Children of U.S. citizens, visa pending (K4)	7	0.0	0	0.0	D	D
Alien spouses of U.S. permanent residents and children, immigrant visa pending	6	0.0	D	D	0	0.0
Spouses of permanent residents, visa pending (V1)	D	D	D	D	0	0.0
Children of permanent residents, visa pending (V2)	D	D	0	0.0	0	0.0
Dependents of V1 or V2, visa pending (V3)	0	0.0	0	0.0	0	0.0
Other[5]	31	0.0	31	0.0	58	0.0
Unknown	20,998	0.1	12,355	0.1	37,791	0.4

D Data withheld to limit disclosure.

[1] Excludes sea and air crew admissions (D1 and D2 visas).

[2] Issuances of H2R (returning H2B workers not subject to annual numerical limits) ceased at the end of 2007.

[3] On January 27, 2022 two new classes of admission were approved (L2S and L2Y) to differentiate between spouses and children of the principal applicant L1. The original L2 class has been retired. Previous years show spouses and children of principal applicants as L2; use of L2S and L2Y starts in 2022.

[4] New classes of admission were approved January 27, 2022 to differentiate spouses and children from principal applicants for classes of admission E1, E2, and E3. Spouses and children of principal applicants are included in visas E1, E2, and E3 for years prior to 2022.

[5] Other includes Q2, Q3, N8, N9.

Source: Office of Homeland Security Statistics.

I-94 Nonimmigrants

The remainder of this report focuses exclusively on nonimmigrants who fill out paper and electronic I-94s, which CBP collects from most classes of nonimmigrants arriving in the United States. Information collected from these I-94 records includes arrival and departure dates, POE, class of admission, country of citizenship, state of destination, age, and sex. I-94 data do not describe all nonimmigrant admissions because certain visitors are not required to fill out an I-94 form—including the majority of short-term visitors from Mexico and Canada. Specific information regarding the I-94 form is located at the end of this report.

Process

Individuals seeking to travel to the United States as a nonimmigrant can apply for a visa through U.S. embassies or consulates, or they may travel to the United States without a visa under the VWP if they are a citizen or national of one of the currently 40 participating countries and meet eligibility requirements for traveling under that program.[12] When arriving in the United States at a POE, an applicant for admission in nonimmigrant status has the burden of satisfying the inspecting officer that they are admissible to the United States and qualify for the intended nonimmigrant class of admission. Such individuals must show valid travel documents as part of the inspection process. CBP officers conduct arrival inspections and make admissibility determinations at the POEs.

Eligibility

To be admitted in a nonimmigrant status, a foreign national generally must:

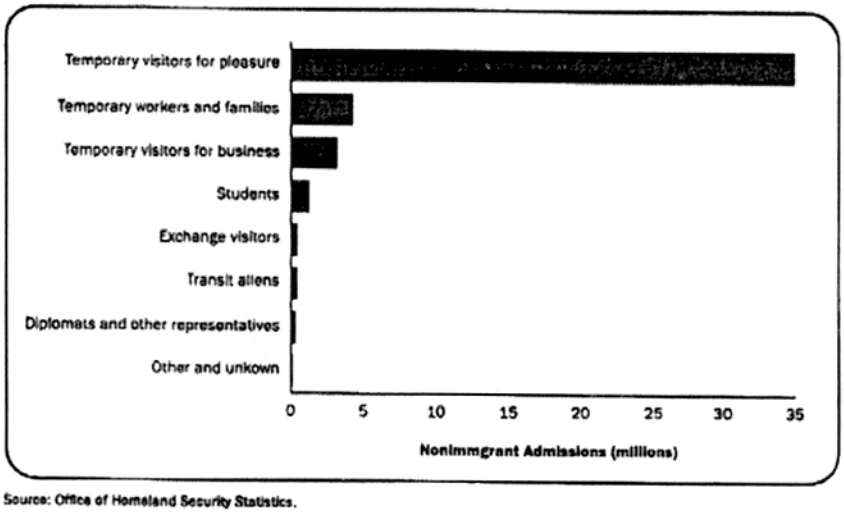
1. establish that the visit will be temporary;
2. agree to depart at the end of the authorized stay;
3. possess a valid passport;
4. maintain a foreign residence (in most cases);
5. be admissible to the United States or have been granted a waiver for any grounds of inadmissibility; and
6. agree to abide by the terms and conditions of the relevant class of admission, including establishing that the purpose of their travel falls within the relevant class of admission.

[12] A full list of VWP countries and requirements is available at https://www.dhs.gov/visa-waiver-program-requirements.

Figure 3.

Nonimmigrant Admissions (I-94 only) by Class of Admission: Fiscal Year 2022

(Ranked by Class of Admission Group)



Source: Office of Homeland Security Statistics.

Table 2.

Nonimmigrant Admissions (I-94 only) by Country of Citizenship: Fiscal Years 2020 to 2022

(Ranked by 2022 nonimmigrant admissions)

Country of citizenship	2020		2021		2022	
	Number	Percent	Number	Percent	Number	Percent
Total	37,176,105	100.0	13,623,116	100.0	44,897,662	100
Mexico	11,004,919	29.6	4,551,988	33.4	13,644,287	30.4
Canada	6,737,778	18.1	1,512,473	11.1	6,903,580	15.4
United Kingdom	2,169,835	5.8	212,084	1.6	3,090,439	6.9
India	1,059,774	2.9	540,303	4.0	1,793,061	4.0
France	966,849	2.6	127,069	0.9	1,469,979	3.3
Germany	941,831	2.5	144,766	1.1	1,404,348	3.1
Colombia	466,993	1.3	915,230	6.7	1,124,998	2.5
Brazil	1,079,508	2.9	122,941	0.9	1,063,680	2.4
Spain	507,711	1.4	185,244	1.4	885,632	2.0
Italy	563,266	1.5	145,088	1.1	865,392	1.9
Other, including unknown	11,677,641	31.4	5,165,932	37.9	12,652,266	28.1

Source: Office of Homeland Security Statistics.

In general, nonimmigrants must acquire a visa or other form of authorization abroad prior to traveling to the United States, with the specific requirements determined by a foreign national's country of citizenship[13] and the conditions of their visit. Yet possession of a valid travel document does not guarantee admission: CBP officers at POEs make the final determination whether a nonimmigrant is admitted to the United States and the authorized duration of stay.

[13] Presidential Proclamation 9645, issued on September 24, 2017 and upheld by the U.S. Supreme Court on June 26, 2018, limited the types of nonimmigrant visas that may be issued to nationals of Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen. Restrictions on Chad were lifted on April 10, 2019. Presidential Proclamation 10141, issued on January 20, 2021, ended the travel restrictions under Presidential Proclamation 9645. See https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html.

Document Requirements

Most classes of nonimmigrants are required to obtain a visa to enter the United States. In these cases, foreign nationals must fill out a Form DS-160, *Online Nonimmigrant Visa Application*, or a Form DS-156, *Nonimmigrant Visa Application*. In addition, applicants aged 14 to 79 years generally are required to visit a U.S. embassy or consulate and be interviewed by a consular official.[14]

U.S. Visa Waiver Program. The VWP, administered by DHS in consultation with DOS, permits citizens or nationals of designated participating countries to travel to the United States as tourists or business travelers without a visa for periods not to exceed 90 days. There are currently 40 countries participating in the VWP. Qualified citizens or nationals of VWP countries must be admissible to the United States and not have violated the terms of any previous admission under the VWP, possess a valid machine-readable passport, travel on an approved carrier and possess a round trip ticket if arriving by air or sea, and obtain travel authorization through the Electronic System for Travel Authorization (ESTA). VWP travelers also waive their right to contest an immigration officer's determination of admissibility as well as their right to contest removal, other than on the basis of an application for asylum and related protections. Citizens or nationals of participating VWP countries traveling to the United States for a purpose other than tourism or business or whose stay will exceed 90 days must obtain a visa.[15]

Mexican Tourist and Business Admissions. Mexican citizens residing in Mexico who meet the requirements for a B1/B2 visa (temporary visitor for business or pleasure), who have a valid Mexican passport, and who demonstrate that they will return to Mexico upon completion of their stay may be eligible for a Border Crossing Card (BCC) or "laser visa." The BCC is a machine-readable card that is valid for 10 years and contains fingerprint and other biometric data.[16] Stand-alone BCC cards authorize travel for up to 30 days within the U.S.-Mexico border region,[17] or BCCs may be used in combination with a Mexican passport as a regular B1/B2 visa for admission for up to 180 days anywhere in the United States. Mexican nationals also may apply for regular B1/B2 visas, which are affixed to their passports. Most Mexican nationals remaining in the border zone are not required to fill out an I-94 and are excluded from this report's data tables, as described in detail below.

Canadian Tourist and Business Admissions. Temporary Canadian visitors for business or pleasure to the United States are required to possess a valid Canadian passport or other Western Hemisphere Travel Initiative-approved form of identification, but generally are not required to obtain a visa or apply for travel authorization through ESTA or to fill out I-94s. They are excluded from this report's data tables.

[14] The Online Nonimmigrant Visa Application and related information are available at https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html.

[15] See https://www.dhs.gov/visa-waiver-program for additional details on the VWP.

[16] Mexican children under 15 years pay a reduced fee for a BCC. BCCs issued for the reduced fee expire on the child's 15th birthday unless the full fee is paid, in which case the child receives a BCC valid for the full 10 years. Visit https://travel.state.gov/content/travel/en/us-visas/tourism-visit/border-crossing-card.html for additional information on BCCs.

[17] The current BCC border zone is within 25 miles of the border in California and Texas, within 55 miles of the border in New Mexico, and within 75 miles of the border in Arizona.

TRENDS AND CHARACTERISTICS OF I-94 NONIMMIGRANT ADMISSIONS

Historical Trends

The number of I-94 admissions has generally grown over time and increased each year from just over 53 million in 2013 to over 81 million in 2019 (Figure 1). This trend was interrupted during the Coronavirus-2019 (COVID-19) pandemic when travel restrictions, processing shutdowns, and other disruptions impacted foreign nationals living within the United States and prospective travelers. Total I-94 admissions decreased 54 percent from 2019 to 2020 and a further 63 percent from 2020 to 2021, while employment-based admissions decreased 37 percent in 2020 and a further 28 percent in 2021 (Figure 2). As pandemic restrictions eased in 2022, total I-94 admissions increased 230 percent over 2021 to 45 million– though still down 45 percent from their 2019 level; and employment-based admissions increased 72 percent over 2021 to 3.2 million, but still represented a drop of 22 percent compared to 2019 (Figures 1 and 2).

Class of Admission[18]

The largest major class of admission in 2022 remained temporary visitors for pleasure (tourists), which represented 78 percent of I-94 admissions (Table 1, Figure 3). Tourists include nonimmigrants admitted under the Tourist Visitor Visa (B2), the Visa Waiver Program (WT), and the Guam-CNMI Visa Waiver Program (GMT). Admissions on B2 visas accounted for 55 percent of total admissions, and the Visa Waiver Program for another 23 percent.

Business visitors include nonimmigrants admitted under the Business Visitor Visa (B1), the Visa Waiver Program (WB), and the Guam-CNMI Visa Waiver Program (GMB). Of I-94 admissions in 2022, 9.4 percent were in the temporary visitors for business category, almost the same as 2021 (9.9 percent). B1 visitors made up 6.8 percent of total admissions, down from 9.0 percent in 2021. On the other hand, business visitors under the Visa Waiver program (WB) increased from 0.9 percent in 2021 to 2.7 percent in 2022.

Temporary workers and their families accounted for 7.0 percent of I-94 admissions in 2022. Leading classes of admission among the worker visas were H2A temporary agricultural workers (1.5 percent), TN (NAFTA) professional workers (1.2 percent),[19] H1B temporary workers in specialty occupations (0.9 percent), and L1 intracompany transferees (0.7 percent).[20] Students and their families (F1, M1, F2, and M2 visas) represented 2.8 percent of I-94 admissions, decreasing proportionally by over one half from 5.9 percent in 2021, but representing nearly 465,000 more admissions than the previous fiscal year.[21] Prior to the pandemic, the

[18] For more information and definitions of the various classes of admission mentioned in this report, please visit: https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html.

[19] TN class of admission allows qualified Canadian and Mexican citizens temporary entry into the United States for business activities at a professional level. These include, for example, accountants, engineers, lawyers, pharmacists, scientists, and teachers.

[20] Intra-company transferees include executive, managerial, and specialized personnel entering to continue employment with an office of the same employer, its parent, branch, subsidiary, or affiliate.

[21] For more information on the Nonimmigrant Students and SEVP-Certified Schools COVID-19 Archived Guidance, please visit: https://www.ice.gov/sevis/schools#nonimmigrant-students-and-sevp-certified-schools-covid-19-archived-guidance.

three-year average number of admissions of students and their families admitted as nonimmigrants was 1.9 million, compared to the 2020-2022 average of 990,000 admissions.

Country of Citizenship

While overall I-94 admissions dropped steeply from 2019 to 2021, the extent of the decrease and pace of recovery of I-94 admissions differed substantially by citizenship. Admissions of Colombian nationals, for example, declined by 57 percent from 2019 to 2020, but increased 95 percent between 2021 and 2022, as Colombia was the only country with I-94 admissions exceeding pre-pandemic levels in 2022. Other countries whose I-94 admissions recovered more quickly than the overall average include Canada, Brazil, France, Germany, Italy, Spain, and the United Kingdom, all of whose I-94 admissions in 2022 were within 50 percent of their 2019 levels.

Overall, the top five leading countries of citizenship for I-94 admissions to the United States in 2022 were Mexico, Canada, the United Kingdom, India, and France, totaling 27 million or 60 percent of total I-94 admissions (Table 2). In comparison, the top five leading countries in 2021 were Mexico, Canada, Colombia, India, and the Dominican Republic, totaling 8 million nonimmigrant admissions or 58 percent of the total. Overall, Mexicans and Canadians accounted for 21 million, or 46 percent, of total I-94 admissions in 2022. I-94 admissions from VWP countries totaled nearly 12 million, or 26 percent of the total.

Ports of Entry

The 10 largest POEs accounted for almost 22 million I-94 nonimmigrant admissions, almost half (49 percent) of the overall total in 2022 (Table 3). The top five POEs accounted for 34 percent of nonimmigrant admissions: Miami (4.5 million), New York (4.2 million), Toronto, Canada (2.5 million), Los Angeles (2.4 million), and Newark, NJ (1.5 million). Of the top ten POEs, Toronto, Canada and San Ysidro, CA[22] saw the largest increases in admissions compared to 2021, up more than 5- and 11-fold, respectively. Houston, TX and Chicago, IL began to recover to pre-pandemic levels of admissions with 2022 levels representing a little more than 500,000 and 780,000 fewer admissions than 2019, respectively. The remaining six POEs have yet to see similar rebounds in I-94 nonimmigrant admissions.

[22] Nonimmigrants admitted to the United States through Toronto are admitted via the CBP preclearance program, through which CBP officers conduct the same immigration, customs, and agriculture inspections of international air passengers that are normally performed on arrival in the United States before passenger departures. Preclearance operations currently take place at 15 foreign airports in six different countries, including Toronto and Vancouver in Canada.

Reported State of Destination[23]

The most frequently reported states of destination for I-94 admissions in 2022 were California (18 percent of the total), Florida (17 percent), Texas (13 percent), New York (11 percent), and Arizona (4.6 percent) (Table 4). These five states were the recorded destinations for 63 percent of the total, or 28 million I-94 admissions in 2022, similar to 2021 when their recorded 8.7 million admissions accounted for 64 percent of the total.

[23] The state of destination is not a required field on an I-94 form, and the state reported may not be that of the nonimmigrants' final destination. Data on nonimmigrant state of destination should therefore be interpreted with caution.

Table 3.

Nonimmigrant Admissions (I-94 only) by Port of Entry: Fiscal Years 2020 to 2022

(Ranked by 2022 nonimmigrant admissions)

Port of entry	2020		2021		2022	
	Number	Percent	Number	Percent	Number	Percent
Total	37,176,105	100.0	13,623,118	100.0	44,897,662	100
Miami, FL	2,866,240	7.7	2,346,017	17.2	4,503,547	10.0
New York, NY	3,109,094	8.4	1,150,489	8.4	4,229,237	9.4
Toronto, Canada	2,274,627	6.1	470,838	3.5	2,476,077	5.5
Los Angeles, CA	2,216,733	6.0	892,926	6.6	2,417,611	5.4
Newark, NJ	1,035,496	2.8	453,234	3.3	1,530,887	3.4
Houston, TX	941,159	2.5	1,022,867	7.5	1,422,849	3.2
San Francisco, CA	1,132,267	3.0	311,716	2.3	1,375,000	3.1
Boston, MA	1,030,273	2.8	719,661	5.3	1,374,674	3.1
San Ysidro, CA	1,355,297	3.6	115,148	0.8	1,342,503	3.0
Chicago, IL	778,485	2.1	460,120	3.4	1,233,147	2.7

Source: Office of Homeland Security Statistics.

Table 4.

Nonimmigrant Admissions (I-94 only) by State of Destination: Fiscal Years 2020 to 2022

(Ranked by 2022 nonimmigrant admissions)

State of destination	2020		2021		2022	
	Number	Percent	Number	Percent	Number	Percent
Total	37,176,105	100.0	13,623,118	100.0	44,897,662	100.0
California	7,167,202	19.3	1,859,671	13.7	8,162,885	18.2
Florida	5,835,658	15.7	3,157,503	23.2	7,526,315	16.8
Texas	4,634,077	12.5	2,002,632	14.7	5,766,528	12.8
New York	3,826,288	10.3	1,183,339	8.7	4,889,507	10.9
Arizona	1,615,484	4.3	486,163	3.6	2,044,138	4.6
Nevada	1,276,475	3.4	251,956	1.8	1,462,571	3.3
Illinois	688,509	1.9	341,868	2.5	1,020,578	2.3
New Jersey	603,570	1.6	364,637	2.7	896,883	2.0
Massachusetts	581,584	1.6	232,671	1.7	852,269	1.9
Washington	625,315	1.7	243,103	1.8	829,308	1.8
Other, including unknown	10,321,943	27.7	3,499,575	25.7	11,446,680	25.5

Source: Office of Homeland Security Statistics.

Table 5.

Nonimmigrant Admissions (I-94 only) by Age and Sex: Fiscal Years 2020 to 2022

Age Group	2020			2021			2022		
	Female	Male	Total	Female	Male	Total	Female	Male	Total
Total	17,570,000	19,600,000	37,180,000	6,112,397	7,509,504	13,620,000	21,517,256	23,380,660	44,897,662
Under 18 years	1,783,682	1,728,552	3,512,406	607,046	587,993	1,195,182	2,332,649	2,246,654	4,580,154
18 to 24 years	1,654,121	1,602,501	3,256,762	737,749	888,840	1,626,675	2,110,696	2,100,716	4,213,673
25 to 34 years	3,761,300	4,296,383	8,058,082	1,288,613	1,822,061	3,110,932	4,457,429	5,038,931	9,502,933
35 to 44 years	3,136,456	4,305,372	7,442,162	1,065,040	1,653,718	2,719,051	3,733,953	4,920,991	8,659,494
45 to 54 years	2,960,927	3,671,634	6,632,882	972,521	1,293,212	2,265,936	3,597,264	4,274,196	7,874,606
55 to 64 years	2,481,868	2,430,315	4,912,449	810,306	771,137	1,581,574	2,986,039	2,855,009	5,842,616
65 years and over	1,795,299	1,563,692	3,359,333	631,090	492,488	1,123,669	2,298,823	1,923,645	4,223,119
Unknown	964	899	2,029	32	55	99	403	518	1,087

Source: Office of Homeland Security Statistics.

Age and Sex

In 2022, 58 percent of I-94 admissions (26 million) were individuals between the ages of 25 and 54, a similar proportion as in 2021 (Table 5, Figure 4). The number of nonimmigrant admissions of those aged 55 to 64 years increased from 1.6 million (12 percent) in 2021 to 5.8 million (13 percent) in 2022. In 2022, 48 percent of I-94 admissions were female, and 52 percent were male. In comparison, 45 percent were female, and 55 percent were male in 2021.

THE I-94 FORM

Detailed nonimmigrant data in this report were obtained from CBP's TECS database, which maintains I-94 information.

In general, Canadians traveling to the United States on B1 business or B2 tourist visas are not required to complete an I-94 form; Canadian nonimmigrants in all other visa classes are required to do so. Mexican tourists and business visitors traveling with a BCC or a Form I–872, *American Indian Card*, and remaining in the border zone generally are not required to complete an I-94, depending on the length of their visits.[24] These exceptions are significant because Canadian and Mexican tourists and business visitors make up the majority of all nonimmigrant admissions.[25]

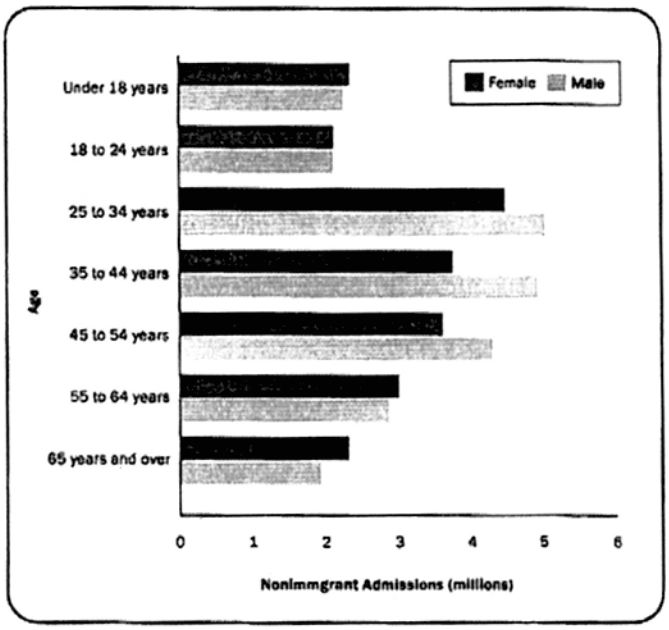
Readers should exercise caution when interpreting trends in I-94 admissions because I-94 policies and processing have changed in recent years. Between 2005 and March 2010, DHS completed updates to computer systems at vehicular lanes and pedestrian crossings along the Northern and Southwest Borders to record land admissions that previously were excluded from I-94 data systems. Consequently, the ratio of I-94 admissions to all nonimmigrant admissions in 2010 and 2011 exceeded those in previous years. Beginning in April 2013, CBP automated the I-94 process for nonimmigrants admitted at air and seaports. As part of this automation, CBP began generating electronic I-94s for short-term Canadian tourists and business travelers admitted at air and seaports who had previously been exempted from the form—a change resulting in additional increases in I-94 data. (Canadian tourists and business travelers entering at land POEs are still largely excluded from I-94 data.) CBP also implemented a new Electronic System for Travel Authorization (ESTA) in 2009 and a new I-94 data-collection system in 2013, through the Automated Passport Control (APC) and Global Entry trusted traveler programs.[26] These updates have resulted in more complete recording of country of citizenship, but less complete recording of country of residence, sex, and state of destination.

FOR MORE INFORMATION

Visit the OHSS web page at http://www.ohss.dhs.gov.

Figure 4.

Nonimmigrant Admissions (I-94 only) by Age and Sex: Fiscal Year 2022



Source: Office of Homeland Security Statistics.

[24] Mexicans with BCCs may remain in the border zone for up to 30 days without obtaining an I-94; Mexicans entering with a passport and visa or an I–872 may remain in the border zone for up to 72 hours without obtaining an I–94. Mexicans traveling beyond the border zone, those who will remain beyond the time periods indicated above, and those who seek entry for purposes other than as a temporary visitor for business or pleasure are required to obtain and complete an I–94.

[25] In addition to the Mexican and Canadian exemptions from I-94 requirements, North Atlantic Treaty Organization officials seeking N1-N5 nonimmigrant classification also are not required to submit an I-94 but may do so to document their admissions. Members of the foreign military generally are not issued an I-94 when entering the United States under military orders.

[26] See the ESTA implementation Timeline at https://www.cbp.gov/travel/international-visitors/frequently-asked-questions-about-visa-waiver-program-vwp-and-electronic-system-travel

IN THE SUPREME COURT OF THE UNITED STATES

- x

DAVID JENNINGS, ET AL., :

Petitioners : No. 15-1204

v. :

ALEJANDRO RODRIGUEZ, ET AL., :

INDIVIDUALLY AND ON BEHALF OF :

ALL OTHERS SIMILARLY SITUATED, :

Respondents. :

- x

Washington, D.C.

Wednesday, November 30, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

IAN H. GERSHENGORN, ESQ., Acting Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

AHILAN T. ARULANANTHAM, ESQ., Los Angeles, Cal.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case No. 15-1204, Jennings v. Rodriguez.

General Gershengorn.

ORAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

GENERAL GERSHENGORN: Mr. Chief Justice, and may it please the Court:

Congress provided extensive substantive and procedural protections for aliens whom the government wishes to remove, but at the same time, addressed the real concerns about recidivism and flight risk by providing for mandatory detention during removal proceedings for certain categories of criminal aliens and aliens arriving at our shores.

The Ninth Circuit undid that legislative balance, invoking principles of constitutional avoidance to require the government to release those aliens unless the government can prove by a preponderance of the evidence every six months that detention remains necessary.

The Ninth Circuit's decision is a serious misuse of the constitutional avoidance canon. With

respect to arriving aliens, there is no constitutional problem to avoid. As even the Ninth Circuit recognized, the statute is constitutional in the vast majority of applications, and any concerns about outlier cases involving lawful permanent residents can be dressed in as-applied challenges.

And with respect to criminal aliens, the text of the statute forecloses the Ninth Circuit's approach, and in any event, the statute is constitutional as written under this Court's decision in Demore.

The net result of the Ninth Circuit's one-size-fits-all rule is -- is a regime that's at odds with the text that Congress enacted. It undermines DHS's enforcement priorities, and it creates incentives for individual aliens to delay their removal proceedings.

JUSTICE GINSBURG: What about 1225(a), that is, aliens who don't fit in either of the categories that you discussed? They are not entrants, and they are not people who have committed qualifying criminal offenses. So they are the 1225(a) people.

GENERAL GERSHENGORN: That's right, Your Honor. So for those individuals, they have had bond hearings, or at least they often have had bond hearings.

And -- and so we're talking about individuals who either had bond hearings and had them denied or have been unable to post bond.

With respect to those --

JUSTICE SOTOMAYOR: What would be the constitutional entitlement to keeping those people, if they're not a flight risk or a -- a risk to the safety of the country?

GENERAL GERSHENGORN: So --

JUSTICE SOTOMAYOR: Or to others? However you want to define that danger element.

So what's the constitutional entitlement, just arbitrarily, to keep someone who's neither of those two things?

GENERAL GERSHENGORN: So with respect to the 1225(a)(1) individuals that Justice Ginsburg was talking about, those are individuals who have had bond hearings and had them denied or have been unable to post bond. And the requirement that we are concerned about there is that the government bears the burden of proof to show by clear and convincing evidence every six months that they are not a flight risk or not a -- or not likely to -- to recidivate.

And --

JUSTICE GINSBURG: Clarify two things. One,

what are the -- what have the people in that category done that would make them subject to removal; and two, does the government read the bond specification in 1225(a) as discretionary?

GENERAL GERSHENGORN: So, Your Honor, the -- I think the government's practice with respect to the latter question is to provide bond hearings consistent with the -- consistent with the statute is my understanding, and that -- and so those are people who have had bond hearings and we do provide them there.

And, I'm sorry, Your Honor, your first question?

JUSTICE GINSBURG: Who would --

GENERAL GERSHENGORN: So they may be individuals who have -- who have entered illegally but have not committed the kinds of crimes that would make them inadmissible under 1182(a)(2) or -- or deportable under -- that would subject them -- the types of crimes that would subject you to 1226(c) for the mandatory detention there. And so, again, for that class, we are objecting principally to the clear and convincing evidence standard which we think the Ninth Circuit really had no basis in the statute for adopting. And there are --

JUSTICE KENNEDY: Am I right that in -- in

bail hearings, it's clear and convincing to show that there is a public danger, but only by a preponderance of the evidence to show flight risk in regular bail hearings?

GENERAL GERSHENGORN: So, Your Honor, it does vary by the type of crime. In some cases it's the alien who has to -- I'm sorry. In some cases it's the criminal who has to show by a preponderance that he is not likely to -- to recidivate or to be a flight risk. In some cases the government bears the burden by showing in clear and convincing evidence.

JUSTICE SOTOMAYOR: May I ask a --

JUSTICE KENNEDY: I think -- I'll check it. I think not for flight risk.

GENERAL GERSHENGORN: That might be right, Your Honor.

Yes. I'm sorry, Justice --

JUSTICE SOTOMAYOR: Clarifying question. For an alien who is found in the United States illegally, has not been admitted, are they held under 1225(b) or are they held under 1226(a)?

GENERAL GERSHENGORN: So they are held under -- if they are not -- if they are not detained within 100 miles of the border or within 14 days, so they've been there longer than those two things, then

they are under 1220 -- 1226(a) and not 1226(c).

JUSTICE SOTOMAYOR: So what happens to -- I don't know how many of these would exist, but an alien who has resided within 14 miles of the border, not 14 -- how many miles?

GENERAL GERSHENGORN: Within a hundred miles of the border and 14 --

JUSTICE SOTOMAYOR: Hundred miles from the border, that's possible, who has been there for 20 years, they would still be held under 1225?

GENERAL GERSHENGORN: So I'm sorry, Your Honor. They would be held under 1226(a). So this is on -- on -- they -- if they hadn't committed other crimes, and -- and so, therefore, were not subject to the mandatory detention under 1226(c).

JUSTICE SOTOMAYOR: I'm assuming no criminal alien.

GENERAL GERSHENGORN: Okay.

JUSTICE SOTOMAYOR: I'm talking about an alien who has come into the United States illegally without being admitted who takes up residence 50 miles from the border.

GENERAL GERSHENGORN: The answer is they are held under 1226(a) and that they get a bond hearing under -- and this is at page 156a of the appendix.

JUSTICE SOTOMAYOR: Let me finish my -- your question. Earlier you said you were objecting to the burden of proof.

GENERAL GERSHENGORN: Yes, Your Honor.

JUSTICE SOTOMAYOR: Are you objecting to the concept that prolonged detention without reason is not appropriate for these aliens?

GENERAL GERSHENGORN: So, Your Honor, we believe that they -- and I don't think --

JUSTICE SOTOMAYOR: And the reasons being flight risk or danger.

GENERAL GERSHENGORN: We believe that the -- whatever due process rights that they have are met by the statutory scheme which gives them an initial bond hearing and then allows them, if there are changed circumstances, to seek a redetermination. And we believe that that satisfies --

JUSTICE SOTOMAYOR: Except that that bond hearing, that additional regulation says that the length of detention is not one of the factors that justifies reconsideration.

GENERAL GERSHENGORN: That's correct, Your Honor, under our --

JUSTICE SOTOMAYOR: And so if these are people who have been here for decades, let's say, don't

you think due process would require some periodic review to ensure that these people are properly being held?

GENERAL GERSHENGORN: So, Your Honor, we don't think that. But two things: First of all, the Ninth Circuit went beyond that and -- and -- and imposed a clear and convincing evidence standard which we think really does materially change the calculus and change the government's burden there; and, second, we do think that the initial bond hearing in conjunction with the -- with the opportunity to bring forth changed circumstances -- and that may be -- that could be --

JUSTICE SOTOMAYOR: Except that regulations are saying that you don't consider the length of detention. But that's what a judge does in bail hearings. That's what a judge does in almost every other detention, which is, at a certain point, your -- your calculus changes, the balance changes when the detention becomes unreasonable.

GENERAL GERSHENGORN: Your Honor, so if I can --

JUSTICE SOTOMAYOR: The length of detention becomes unreasonable.

GENERAL GERSHENGORN: Yeah. If I could step back. We do think that the way to think about the case for -- for the people who are not in the arriving aliens

category is that the -- as long -- what -- what the Court said in Demore, and I think this is the focus of Justice Kennedy's concurrence in Demore, that if the purpose of detention is being served, that the government is moving reason -- reasonably quickly to -- to accomplish removal, and so that we are not in a Zadvydas situation where the end of the government detention can't be observed, then the -- then absent -- absent very unusual circumstances, that -- that detention is constitutional. And so we do think that -- we do think that the scheme we have in place for the 1226(a) individuals that Your Honor is identifying is constitutional.

I will say that hasn't --

JUSTICE KAGAN: May I ask, General -- I'm sorry.

GENERAL GERSHENGORN: No, Your Honor, I was going to shift to something else.

JUSTICE KAGAN: I was going to shift to something else too.

GENERAL GERSHENGORN: Let's do it.

JUSTICE KAGAN: Let's -- let's shift to 1226(c).

GENERAL GERSHENGORN: Okay.

JUSTICE KAGAN: And not focus on the statute

so much but focus on the constitutional question, and I think your brief indicates that you think that there are some constitutional bounds, and so I'd like you to talk to me about what those constitutional bounds are and -- and when a judge would find them.

GENERAL GERSHENGORN: So, Your Honor, we think the constitutional bound is -- is the standard that Justice Kennedy's concurrence set forth in Demore, and we think it is that where there be, as -- as he said there -- were there to be an unreasonable delay by the government -- he said the INS, but by the government in pursuing and completing deportation proceedings, it could become necessary, then, to inquire whether the purpose of detention is not to facilitate deportation but for some other reason.

So it seems to us that the analysis that a court would undertake is, has there been some sort of unusual situation or misconduct on the part of the government or delay on the part of the government that suggests the purpose of detention was not to effectuate removal, but as long as --

JUSTICE KAGAN: What happens if -- what happens if you can't point to any particular evidence of government misconduct, but that you're in a situation where the government just has very, very big backlogs

and everything is taking a long time? So let's say the average would be that the government wouldn't make a decision for three years. Could the Court simply say, well, three years is too long? It doesn't really matter what kind of evidence you have; three years is too long.

GENERAL GERSHENGORN: So, Your Honor, I -- I think our position in that -- in that situation would be that as long as the government was diligently -- we -- I mean, if it were 20 years, I mean, we could go on, then, of course, that might be a concern that, in fact, we were no longer trying to effectuate removal. I think we would make the argument in the three years Your Honor was hypothesizing, but that's not the situation we have here. It's been steady --

JUSTICE BREYER: Right. That's -- that's -- right there you said, of course, 20 years, dot, dot, dot, dot. As soon as you utter words like that, you are outside. And it's in conceding, I take it, that where it says, the AG may release an alien described in paragraph 1, these are the criminal ones.

GENERAL GERSHENGORN: This is 1226(a).

JUSTICE BREYER: This is 1226(2). It's (c)(2).

GENERAL GERSHENGORN: I'm sorry --

JUSTICE BREYER: The words that are

strongest for you, in my opinion, are those words, "only if."

GENERAL GERSHENGORN: Yes.

JUSTICE BREYER: "Only if."

GENERAL GERSHENGORN: Correct, and --

JUSTICE BREYER: Only if the witness program. Now, you're saying, well, it's not really only if. There are exceptional circumstances where he has been there for 20 years and we haven't started the removal proceeding, or let's say he has an emergency operation, has to be in the hospital, we all can exercise our wonderful legal imaginations and think of weird instances where it's going to prove that "only if" isn't literally "only if" witness.

GENERAL GERSHENGORN: So, Your Honor, I want to be clear about what I'm saying there. I don't think the Attorney General has discretion to release in a situation I was just discussing with Justice Kagan.

JUSTICE BREYER: No. I knew that. I know that.

GENERAL GERSHENGORN: I think that's a constitutional requirement. In other words, due process would be implicated at that -- at that point. So I'm not saying that at some point the Attorney General has discretion to release. The statute is mandatory, and we

read the statute --

JUSTICE BREYER: It says "only if." Only if you go to the witness program.

GENERAL GERSHENGORN: Correct.

JUSTICE BREYER: But my point was, and you did it accidentally but on purpose. You said, well, 20 years would be different, and -- and --

GENERAL GERSHENGORN: I did it -- to be clear, Your Honor, I did it as a matter of constitutional law.

JUSTICE BREYER: Why? Why do it as a matter -- why not just say --

GENERAL GERSHENGORN: Because we don't --

JUSTICE BREYER: -- like all -- many type same things in the law, words like "any" or "only if" are always interpreted in light of unusual circumstances, not being absolute and you get something unusual.

GENERAL GERSHENGORN: Right.

JUSTICE BREYER: Okay. Now, why not do that rather than appeal to the Constitution? That may be a picky point, but -- but one --

GENERAL GERSHENGORN: But I think it's important.

JUSTICE KAGAN: The one -- that's --

GENERAL GERSHENGORN: Justice Kagan --

JUSTICE KAGAN: -- I asked about it.

GENERAL GERSHENGORN: I was just going to say, Justice Kagan had asked me to set aside the statute, so it really was a constitutional analysis.

JUSTICE BREYER: Yes.

GENERAL GERSHENGORN: And we don't -- we really think that Congress -- this was a deliberate categorical judgment by Congress based on experience over a long number of years where Congress had tried to deal with the concerns about recidivism and flight for criminal aliens through a number of different mechanisms. And what Congress found was that -- that it was very hard to predict and it had very serious consequences, and Congress opted for a categorical judgment.

CHIEF JUSTICE ROBERTS: I suppose it's an area where your safety valve, the availability of habeas corpus might come into play..

GENERAL GERSHENGORN: Absolutely, Your Honor. And I think that goes into the interpretation of constitutional avoidance, both with respect to criminal aliens and arriving aliens. What Congress understood was that it was legislating against the backdrop of habeas, which provides the kind of failsafe that Justice

Kennedy had identified in Demore. And, therefore, Congress legislated on an absolute -- with absolute text, and that doesn't admit for the kind of exceptions that I think Your Honor is pressing. I understand --

JUSTICE KAGAN: But if I could go back, General, to the constitutional point. Because if you put Demore aside, I think we would all look at our precedent and we would say, you can't just lock people up without any finding of dangerousness, without any finding of flight risk, for an indefinite period of time, and not run into due process.

Now, you have Demore, but Demore was based on the assumption that it was going to be a brief time. It was based on statistics that have now proved to be inaccurate. And the question is, why the Constitution itself -- and you can do it through habeas proceedings or whatever the procedure is -- but why the Constitution itself does not set an outer bound in the way that we've consistently required in, for example, civil commitment cases?

GENERAL GERSHENGORN: All right. So, Your Honor, you've packed a lot in there, and I'd like to -- I'd like to take on a number of things there.

But the answer to your last question is that I don't think it's the focus on the amount of time

that's really the way the Court should look at it here. And this, I think, was the insight in Justice Kennedy's concurrence in Demore. The amount of time increases here in part precisely because, as I indicated at the start, Congress has provided a substantial number of substantive and procedural protections for individuals: They have the right to lawyer at their own expense. They have the right to an interpreter. They have the right to present evidence and to gather evidence and to use subpoenas to get evidence. They can appeal to the BIA. They can appeal to the Court of Appeals.

But with that process comes time. And I think a focus on just the length of time without the reasons for the delay, without looking at the fact that aliens routinely and understandably file for continuances, and to impose a rigid six-month rule like the Court of Appeals did is really a mistake.

With respect to Demore, I really would like to address Your Honor's concern there on a number of situations. Your Honor is right that the statistics we provided to the Court were inaccurate, and we apologize.

JUSTICE KAGAN: So I wasn't even blaming you, because I think it was partly the statistics that were provided and partly what the Court did with them. It doesn't really matter who was to blame or who wasn't

to blame. I was just suggesting that, in fact, Demore -- Demore says that the average is five months; it turns out that the average is more like a little bit over a year.

GENERAL GERSHENGORN: So, Your Honor, so I -- the reason why I think Demore still is good is this reason: I think Demore rested on two pillars.

First was the judgment that flight risk and recidivism are real problems and that IJ's are really bad at predicting, and that, therefore, Congress could make a categorical judgment in this area of immigration law that mandatory detention was appropriate.

And, second, that unlike Zadvydas, the purpose of the detention was still being served. The purpose of the detention was to effectuate removal, and the detention was not going to be permanent and it was not going to be indefinite. Those are true.

It is true that this Court assumed incorrectly that the length of detention was five and a half months. But in Kim -- in Demore itself, the alien had already been in -- had been detained for more than six months, for 197 days, and the Court was sending that individual back for an IJ hearing and a BIA appeal. And so even under the Court's erroneous assumption that there was going to be five and a half months tacked on,

we're talking about a detention for a year.

Now, with respect to the time limits, they are not trivial. These are serious -- these are serious matters, and we recognize that. The current median time for -- for the Demore figures is around 233 days now, but it's gone from seven to nine months over the years. And the average time, which is not what we think the Court --

JUSTICE SOTOMAYOR: So when is it, in theory --

GENERAL GERSHENGORN: -- it's more like 10 to 12 months.

I'm sorry.

JUSTICE SOTOMAYOR: -- when it's not the alien's fault, and you seem to suggest that if budgetary matters or personnel matters are what are inflicting the delay that that's okay. Is there any -- you said 20 years is the end point. But given that we have a due process right not to be held indefinitely, even though it may have a distant point of release somewhere in an unknown period, because the government now, I understand, if a alien asks for an adjournment, BIA judges who are overbooked are sometimes taking months to give them another date.

At what point does the government's behavior

come into this analysis?

GENERAL GERSHENGORN: So, Your Honor, I think the government's behavior --

JUSTICE SOTOMAYOR: Intentionally or not. I mean, I would assume that if the government was just delaying because it wanted to, you would say that's unconstitutional.

GENERAL GERSHENGORN: Absolutely, Your Honor. And that is --

JUSTICE SOTOMAYOR: All right. But at what point does indefinite, albeit with a lengthy, far-off detention date, become unconstitutional?

GENERAL GERSHENGORN: So, Your Honor, we don't think that the mere date itself is what makes it unconstitutional. But to be clear --

JUSTICE SOTOMAYOR: No. What makes it unconstitutional in my mind is the unreasonable delay or detention.

GENERAL GERSHENGORN: Right. The -- so a couple of points on that, Your Honor.

First of all, the -- it is not our view that most of the delays that we are talking about here in the lengthy cases are situations that are resulting from government-resource problems or things of that nature. A lot -- the record indicates that aliens routinely seek

continuances and they seek multiple continuances. And they do that for good reason, which is to build a record. What most of the aliens here are seeking is discretionary relief. And if they're seeking discretionary relief, then they're going to want to build the record.

So I don't think the record is -- is that most of the delay is IJ, lack of immigration judges or BIA resources. And, indeed, UR expedites the proceedings that involve detained aliens. And so that is a -- a government policy to deal with Your Honor's question.

JUSTICE ALITO: Assuming -- assuming that there is a constitutional limit of the type that's been discussed, is that -- do you think that can be addressed in a class action, or is it something that can be addressed only in individual habeas cases?

GENERAL GERSHENGORN: So, Your Honor, we think it's clearly the latter, and we really think that that is one of the major flaws of the Ninth Circuit's decision, is that it adopted a class-wide rigid rule that applies to aliens no matter what is the cause of the delay, no matter whether the alien is a criminal alien or arriving alien, no matter whether the alien is seeking discretionary relief or not discretionary

relief. That one-size-fits-all approach is not the right way to do it. The way to do it is in individual, as-applied challenges through habeas proceedings, which is what the Court --

JUSTICE KAGAN: I guess I don't quite understand that. Why couldn't a court, whether it's the Ninth Circuit or whether it's this Court in reviewing the Ninth Circuit, say, here are the constitutional guidelines. Here's the way to -- it might -- it might not be a one-size-fits-all. It might be a presumptive limit, but the ability to go beyond that in individual cases, but to set those -- to set those guideposts and then let the individual determinations take place.

GENERAL GERSHENGORN: So in theory, Your Honor, the short answer is the Due Process Clause doesn't usually permit that kind of broad-based approach that doesn't take advantage -- take cognizance of the various differences between the aliens on the ground. I think, for example, the difference between --

JUSTICE KAGAN: Well, wouldn't it be better to set some guideposts that everybody in the country would know to follow rather than having one suit pop up here and one suit pop up here and another in another place and everybody would be treated differently? That does not seem like a good immigration system.

GENERAL GERSHENGORN: So the first thing I would say, Your Honor, is that the one thing that we know shouldn't be the case is what the Ninth Circuit has done, which is the opposite of that, which is apply a single standard to everybody regardless of -- regardless of the cause of the delay. I mean, this gets at the very concern that the Court -- that the dissent in Zadvydas, Justice Kennedy's dissent, and then the majority in Demore highlighted, which is that kind of rigid rule creates an incentive for an alien to delay, and we wouldn't adopt the clear-and-convincing standard, which --

JUSTICE KAGAN: Well, I wasn't -- I wasn't suggesting a rule that was quite as rigid as that. But I was suggesting more that the Court, say, pick up some of your language in your brief and say that the detention has to serve the purposes for which the detention is meant. And, presumptively, that is -- pick a number -- nine months, a year --

GENERAL GERSHENGORN: So, Your Honor --

JUSTICE KAGAN: -- six months, whatever, something pretty reasonable, but only presumptively if there is some exceptional circumstance that could be extended.

GENERAL GERSHENGORN: So, Your Honor, I

think it would be within the Court's power to do that. We don't think that's the way we would approach. I think our -- our --

JUSTICE KAGAN: I'm sorry. You do or you don't?

GENERAL GERSHENGORN: We do not think that's the way we would advise the Court to approach --

JUSTICE KAGAN: No, no, no. I'm sorry --

GENERAL GERSHENGORN: We think the Court would have power to do that --

JUSTICE KAGAN: Okay. Sorry.

GENERAL GERSHENGORN: -- but we don't think that's the way the Court should do it. But what the Court is -- what the Court has generally done in a due process situation is have as-applied challenges, and we think that's the sensible way to go --

JUSTICE KAGAN: Well --

GENERAL GERSHENGORN: -- given the tremendous variation --

JUSTICE KENNEDY: In a class action, the Court has to grant or deny relief. And I don't know. What would be the relief if -- if the Court says, well, we're not going to say, you know, what the situation is going to be for any of the members of this class, but here are our thoughts about how individual determination

should be made.

GENERAL GERSHENGORN: I agree with that, Your Honor, and that is why we don't think that's what the courts should do. I think -- and so -- I mean, to be clear, I think the Court has the power to give guidance, but we don't think that that is the -- the approach that's most consistent with the Due Process Clause or the way to think about these categories of cases.

JUSTICE SOTOMAYOR: Well, how about the ABA amicus brief here?

GENERAL GERSHENGORN: I'm sorry. Can I just finish --

JUSTICE SOTOMAYOR: Is that -- go ahead.

GENERAL GERSHENGORN: We do suggest in our brief that there are -- there are indicators, you know, that -- that 90 percent of the IJ hearings are done within 14 months, and 90 percent of the BIA proceedings are done within 19 months. And what I think those -- we would -- those -- we would offer those to the Court, not as -- as indication that the Due Process Clause has been violated, but those are situations in which one might reasonably, in a -- in a as-applied challenge take advantage of -- take Justice Kennedy's opinion up on its standard and -- and do the kind of searching inquiry

that we would think about.

JUSTICE SOTOMAYOR: We are in an upended world when we think 14 months or 19 months is a reasonable time to detain a person.

GENERAL GERSHENGORN: So, Your Honor, what I -- I totally understand --

JUSTICE SOTOMAYOR: -- understand that.

GENERAL GERSHENGORN: But what I'm trying to suggest to Your Honor is that that is part and parcel of an overall scheme that offers tremendous process to the individual alien, and that part of the reason for that delay is the government --

JUSTICE SOTOMAYOR: But you would think that that process, at least with respect to 1226(b), is to ensure that the person is not a flight risk or a danger.

GENERAL GERSHENGORN: Your Honor, it is -- it is to effectuate Congress's categorical judgment that those -- either that there -- that they -- is a risk, a flight risk, and a risk of recidivism, and that it's very hard to predict those.

JUSTICE BREYER: I have a couple of questions I'd like to ask, actually, because it's a complicated statute. And you can correct me. I think you have some extra --

CHIEF JUSTICE ROBERTS: Yeah. I'll -- I'll

give you extra time to answer the questions if --

JUSTICE BREYER: We're -- we're talking about three categories. The first category is people who show up on the border. That's mostly 1225. I've looked at that. I don't see any words there that would prevent interpreting the statute from saying, of course, you have a bail hearing after six months, and under whatever standards. I'm not going with the Ninth Circuit standards, et cetera. I don't see the words. So put that in your mind, because you're going to tell me the words in a minute.

GENERAL GERSHENGORN: Right.

JUSTICE BREYER: But the more important part, I think, is the criminal part. And there I have divided my mind into three -- three stages.

Stage one, the person is released from jail, let's say. And the statute says, Attorney General, pick him up. And then there is a period of time where he says, I have a right to stay in the United States, and the AG says you don't. And during that period of time we have the "only if" language.

And then we go to the period of there is a final removal order, and that's a 90-day order. And there I see no way around the statute. I agree with you. That 90 days, you cannot get out of the statute.

I mean, it's definite.

Then the removal period ends, and we are in Zadvydas. And unlike you, I don't think Demore overruled Zadvydas. Demore was talking about a brief period of time.

So now, let's start with the criminal.

GENERAL GERSHENGORN: Okay.

JUSTICE BREYER: Let's look at that statute. As you would like to interpret it, during that first period -- remember, the second period I'm with you, the 90 days. The third period settled. That's Zadvydas. You got to let him go after six months. So we are talking about the first period.

If there's a -- I think -- take my word for it. I might be wrong. I go back and did it. I wrote the Zadvydas thing. I think it said six months.

(Laughter.)

GENERAL GERSHENGORN: I trust you on that.

JUSTICE BREYER: I might be wrong. I'm often wrong in what I think I said. All right?

(Laughter.)

JUSTICE BREYER: So -- so we are in the first part.

Now, on that first part, it's a pretty odd statute that can say you don't have -- you -- we can

keep you for two years, you know, or three, or four. You've just been out of jail, hey, your term is over. Your punishment's over, but you've got four more years here of punishment while we try to get to stage two, which is called the removal order. That's what's bothering me.

It is bothering me that, as a lawyer, it produces an odd statute. As a person who tries to interpret the Constitution, I'd say what happened to the notion that you do let people out on bail when, in fact, they're not a flight risk. And how can they be punished for four more years? Maybe it's the Constitution. Maybe there is a way around that "only if" language. But the concern is the same.

So now -- now you have all my questions out there, and I -- I know they're -- they're -- do what you can.

(Laughter.)

GENERAL GERSHENGORN: Okay. And I'll try to be -- I'll try to be brief because I'm cognizant of the Chief Justice's generosity here.

I do think that the statute squarely forecloses it at both stages, Your Honor. If we're at page 156(a) --

JUSTICE BREYER: Yeah.

GENERAL GERSHENGORN: -- of the appendix to the petition, the statute starts out 1226(a) that, "The alien may be arrested and detained pending a decision on whether the alien is to be removed" --

JUSTICE BREYER: May. May.

GENERAL GERSHENGORN: -- "from the United States."

But then -- it does say "may" there, but then it says, "Except as provided in Subsection C of the section and pending such decision, the Attorney General may continue" --

JUSTICE BREYER: May.

GENERAL GERSHENGORN: But it says "except for Subsection C," and then Subsection C is the one that says, unambiguously, "Shall be taken into custody and released only if."

JUSTICE BREYER: C is the criminals. C is the criminals, isn't it?

GENERAL GERSHENGORN: Yes, Your Honor.

JUSTICE BREYER: Okay. I agree. Criminal is a different matter. I'm just talking about -- go ahead. Go ahead.

GENERAL GERSHENGORN: All right. Thank you. I'll reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Arulanantham.

ORAL ARGUMENT OF AHILAN T. ARULANANTHAM

ON BEHALF OF THE RESPONDENTS

MR. ARULANANTHAM: Thank you, Mr. Chief Justice, and may it please the Court:

I actually think the dispute between the parties is narrower than it seems based on what my friend, Acting Solicitor General, has just said, because we agree that length by itself doesn't make detention unconstitutional. We agree that there doesn't need to be a hard cap on detention. We're just talking about the need for an inquiry, that is, the need for a hearing that is individualized rather than a categorical presumption that someone is a danger and flight risk.

JUSTICE ALITO: Are you making a statutory argument? And the Ninth Circuit's decision was based on the -- an interpretation of the statute, wasn't it?

MR. ARULANANTHAM: Yes. And what --

JUSTICE ALITO: So are you making a statutory argument or are you making a constitutional argument?

MR. ARULANANTHAM: We are making both. Section one makes the constitutional argument. But I still think the dispute is -- is narrower, because really, the primary focus, Your Honor, is about whether

the mechanism for implementing that, whether it's constitutional or statutory constraint, has to be habeas, or instead, as Justice Kagan suggested, it could be as I understood --

JUSTICE ALITO: Well, I understand that. But to me, at least, it makes a difference whether we're interpreting the statute or whether we're interpreting the Constitution.

MR. ARULANANTHAM: It -- it --

JUSTICE ALITO: And I'll tell you, on the language of the statute, I think you have a pretty tough -- you have a pretty tough argument.

MR. ARULANANTHAM: Your Honor, we concede that as to 1226(c), the -- what you're calling the criminal or mandatory detention subclass, we have to win that there is a serious constitutional problem because their interpretation is not -- I mean, they're completely unreasonable --

JUSTICE ALITO: Well, you can't -- you're -- is that a constitutional argument or a statutory argument?

MR. ARULANANTHAM: Well, if there's an alien --

JUSTICE ALITO: Constitutional avoidance isn't just sort of, well, we really don't think we can

interpret the statute this way, but we don't have the guts to say that it's unconstitutional. So we're going to put the two things together and say, well, by constitutional avoidance --

MR. ARULANANTHAM: Well, I think --

JUSTICE ALITO: -- is what it means -- this is what it means.

MR. ARULANANTHAM: Understood, Your Honor. But we think that the constitutional -- the statutory interpretation here is no less plausible than the one in Zadvydas. I mean, Zadvydas, you've got a 90-day mandatory detention period followed by a requirement for release and then an exception. And the exception says you may --

JUSTICE BREYER: What do you do with "only if"?

MR. ARULANANTHAM: Well, "only if" applies to the initial detention. It authorizes people to be released even immediately after they are being picked up if they are in the Witness Protection Program. But it still doesn't speak clearly to what happens when detention becomes prolonged.

And as I said, in Zadvydas, the statute said you can detain beyond the removal period. But the Court found that that wasn't clear enough to authorize

long-term detention in Justice Breyer's --

JUSTICE BREYER: You've got most -- most -- Zadvydas turned on the "may," you see. It gave him permission. And as -- as he just pointed out, there's may, may, may, may, may, but then in the criminal side, see, on the criminal side -- I'm not talking about people on the border. I -- you -- pretty strong argument, people on the border -- but there it says, "The Attorney General may release an alien described in paragraph (1)" -- those are the criminals coming out -- "only if" -- and then it's the Witness Protection Program.

So he says, how do you get around that one?

MR. ARULANANTHAM: Understood, Your Honor. I -- I only want to say one more thing about the statute, because I -- I don't want to belabor the point. But five months -- four months after the Zadvydas decision, Congress passed the Patriot Act.

The Patriot Act didn't only -- it clearly authorized long-term detention in six-month intervals; it said six months. It did it not only in post order cases, which was speaking directly to Zadvydas, but also in pending cases, that is, cases like this one.

So Subsection (a)(7) of that statute authorizes long-term detention, six-month intervals

while the case is pending. And it authorizes substantive review over whether the detention should continue, whether the certification remains valid, but only in national security cases, and that's the rest of our statutory argument. I mean, that provision that specifically authorizes long-term detention, it is limited to national security cases, in pending cases, really makes -- makes the government's interpretation hard to make sense of, because why -- you know, under their view they actually have more authority to detain people with simple possession offenses or with petty thefts than they have people who are accused of terrorism grounds. And they actually have even more authority in terrorism cases under 1226(c), under (c)(1)(D), than they have under the Patriot Act that Congress gave them four months after.

JUSTICE ALITO: So are you saying that 1226(a), the Patriot Act provision, makes the government's interpretation of 1226(c) superfluous?

MR. ARULANANTHAM: Yes, as to terrorism cases, as to all the terrorism cases, that is cases where a person is inadmissible or deportable on a terrorism ground, they already had on their view more authority in 1996 than Congress gave them --

JUSTICE ALITO: Well, there -- there are

different -- there are quite noticeable differences between the two provisions, so I don't know how far this argument can go.

For one thing, the -- the list of -- in 1226(a) -- (a) -- (a)(3)(A), there are listed one, two, three, four, five, six categories, and four of those are not included in the Patriot Act provision; isn't that right?

MR. ARULANANTHAM: That's true, but the terrorism grounds are invoked.

JUSTICE ALITO: That's one thing --

MR. ARULANANTHAM: And the Patriot Act presumably did -- meant to focus on terrorism.

JUSTICE ALITO: Yes. Okay. That's one thing.

Under 1226(c)(1), the Attorney General shall take any -- shall take into custody any alien who under then sub (d) of that is inadmissible or deportable. So the person must be inadmissible or deportable. And under 1226(a), the Attorney General -- (a)(1)(A), the Attorney General -- well, what is it, (a)(3)(A), the Attorney General has reasonable grounds to believe. So it's a different standard.

MR. ARULANANTHAM: Yes. Although the government interprets the language you read about in --

is it admissible just to mean that they believe whether or not it's been charged.

But I don't want to belabor the point, Your Honor. We have to establish there is a serious constitutional problem. There's no question about that.

JUSTICE KAGAN: Can I ask about your statutory interpretation on 1225?

MR. ARULANANTHAM: Yes, please, Your Honor.

JUSTICE KAGAN: That's the one where it says, the alien shall be detained for, and then one provision says, for further consideration of the application for asylum, and the other says, for a removal proceeding. And you say that -- that that applies only until the relevant proceedings starts.

What applies after that, in your view, and where would we find it in the statute?

MR. ARULANANTHAM: It's 1226(a) which says the Attorney General may detain or may release pending a decision on whether the alien --

JUSTICE KENNEDY: It's really not interpreting. It says, "for the proceeding." If I tell my children I'm going to visit them for Christmas, that doesn't mean I have to leave on Christmas Eve.

MR. ARULANANTHAM: It does not, Your Honor. I would hope --

JUSTICE KENNEDY: That's your interpretation.

MR. ARULANANTHAM: No. Because sometimes "for" is read that way. Other times "for" means for the purpose of. And the way you know that in this provision, Your Honor, there is two ways you know it.

First, if you are denied a credible fear interview, when Congress rewrote this whole statute, right, they wrote the word "pending" rather than "for" into a different subsection, a neighboring subsection, and that's the subsection for people who lose the credible fear interview. They're not in our class. Our class is only people who pass the credible fear interview, are found to have a significant possibility of prevailing in their asylum --

JUSTICE KENNEDY: As I under -- as I understood, here the -- the authority ends once the proceeding begins, then you go to 1226.

MR. ARULANANTHAM: That's right, then you go to 1226(a). You still had detention authority. And here's the other thing --

JUSTICE KENNEDY: It seems to me that's a very odd interpretation for the statute.

MR. ARULANANTHAM: Well, Your Honor, the other argument for that interpretation is that the

government already provides bond hearings to people detained under cover of that same statute that you're talking about, the one that says, you shall be detained for further consideration of the asylum application. So if you cross the border in the desert, and then are arrested, and then pass your credible fear interview, the government -- you're still under that same statute, shall be detained for consideration of the asylum application -- the government gives bond hearings to those people, and it doesn't wait for six months. It gives it to them as soon as they are in the immigration court, and, therefore, pursuing the removal proceedings.

So here we have a very straightforward application of Clark v. Martinez. You've got the same statute. It applies to two groups. One are our class members who present themselves at the border. The other are the people who cross in the desert. The government is already providing bond hearings to people who cross in the desert. And that statute doesn't distinguish between the two people.

JUSTICE BREYER: What happens -- what happens if they present themselves at the border --

MR. ARULANANTHAM: Then --

JUSTICE BREYER: -- or the desert, and they say, I have a right to live in the United States?

You've made a mistake in respect to me. What happens to that person?

MR. ARULANANTHAM: If you're -- if you're crossed in the desert, you get a bond hearing at -- assuming that you establish -- I mean, you could be summarily moved, but if you --

JUSTICE BREYER: But, of course, I say I don't want to leave. I'm a right -- I have a right to live here.

MR. ARULANANTHAM: Right. Then -- then you get a bond hearing under 1226(a). If you establish that you have a credible fear --

JUSTICE BREYER: What happens if you're at the border and you come up and you --

MR. ARULANANTHAM: You don't get a bond hearing. Instead you're only subject to the parole process under which you never get a hearing on danger and flight risk. The deportation officer, the jailer, is the one deciding whether you can be detained even for years.

JUSTICE BREYER: And what's the language of the statute that you believe the government points to, to say you never get a bond hearing?

MR. ARULANANTHAM: I mean, it says, shall be detained for, as Justice Kennedy said. It's -- that's

what the statute said. The bare reading of that language to permit bond hearings for one set of people who are detained under them, and if you can read it for them, you can read it for the other people. This is BIA's decision in the matter of XK.

Now, going back to the constitutional question we were discussing earlier and habeas, and, Your Honor, I think it's actually critically important whether the enforcement mechanism for the right we are talking about here is available to -- to immigrants and immigration court directly or instead has to come via habeas, and the reason why -- there is two reasons.

The first, this is a class of mostly unrepresented people who are obviously not familiar with our legal system. The vast majority are -- and we know both from this record and from experience for years in the lower courts on this, that most of them cannot file habeas petitions. So if you make the only enforcement mechanism habeas, you are --

CHIEF JUSTICE ROBERTS: You mean cannot as a -- as a practical matter as opposed to a legal matter?

MR. ARULANANTHAM: Yes, Your Honor, no suspension problem here. As a practical matter, they cannot, and we know this as a matter of experience.

In addition, the habeas cases take months to

decide. There's a particular -- and in the Eleventh Circuit they take about 19 months. In the Third Circuit, which is the fastest circuit, they still take almost six. So as a practical matter, it's not a meaningful remedy for prolonged detention, if that's the claim that you're bringing.

The second serious problem with it is that this Court has never before held that a due process right can be vindicated simply by the availability of habeas. I mean, think about it. Pretrial detainees, they have habeas. Why do they get a bond hearing in a matter of days? Civil commitments. They -- they have habeas. Why is there a requirement that you have a hearing at the outset of civil detention? So it would be a -- a fundamental shift.

CHIEF JUSTICE ROBERTS: I'm sorry. I missed your -- your argument. They have hearings, why do they meet habeas?

MR. ARULANANTHAM: No. Excuse me, Your Honor. I apologize for that.

This Court has held that there is a hearing requirement as a matter of due process for people in pretrial detention, for people facing civil commitment, et cetera, and that is not dependent on their filing a habeas petition. The Due Process Clause gives that

right, and so the hearing has to be provided whether or not you file a habeas, and so similarly here, if the Due Process Clause requires a hearing at some point in time, it should require that hearing whether or not the detainee has a lawyer who they can get to file a habeas petition.

JUSTICE KAGAN: But suppose the Due Process Clause requires something a little bit more complex than a simple date. Suppose that it does require a little bit of individualized determination as to whether it should be six months or, in a particular case, a little bit longer, how does that get decided and what vehicle?

MR. ARULANANTHAM: Well, I still think the vehicle would be this case, and I don't think the fact that it's a class action is a barrier to that. We have -- we have sought relief on behalf of people detained for years, and if this Court said, for example, that a detainee who is engaged in dilatory tactics is not entitled to a danger and flight risk determination in their case, that's relief that would then be available because you'd still get the inquiry, right? Because somebody has to look at the case at some point and see, is this a case where there's dilatory tactics, or is this a case where the person didn't spend even a day in jail or --

CHIEF JUSTICE ROBERTS: Well, that seems to me to be a strong argument against using the class action as a vehicle to resolve these questions. I mean, if the nature of relief depends upon peculiar circumstances, it seems to me that the commonality requirement is lacking.

MR. ARULANANTHAM: So let me give a procedural and a substantive answer to that, Mr. Chief Justice.

The government did not seek cert on class cert. They litigated it. They lost it in the Ninth Circuit. They actually re-raised it in the summary judgment. They didn't seek review of it. So they have conceded both typicality and commonality for purposes of this proceedings.

JUSTICE ALITO: Well, but the decision of the Ninth Circuit was based on interpretation of this statute, and you want to go -- you want to -- you want to affirm on an alternative ground, which is that it's unconstitutional, so I don't know how far you can get with that argument.

But we could -- if you want to be very strict about what's before us, we could simply say the Ninth Circuit's interpretation of the statute is wrong and remand for further proceedings to the Ninth Circuit.

MR. ARULANANTHAM: Yes, Your Honor. I think that -- that -- that would be consistent with the class -- the way the government has litigated the class certification.

But let me also give a substantive answer to Your Honor --

JUSTICE KENNEDY: But -- and it would also be consistent with the way the Ninth Circuit interpreted the case and the case that's here. We do not have the constitutional issue before us.

MR. ARULANANTHAM: We've argued it in Section I of our brief, but you're correct that the Ninth Circuit didn't rule on a constitutional ground. Absolutely, Your Honor.

The second point I want to make, though, is everybody in the class, in our view, is entitled to an inquiry. Someone has to look at the detention and decide, is this a detention which remains reasonable? Does it continue to be reasonable in relation to its purpose? That's our argument.

Many of the people under the injunction don't get out. About 30 percent of them don't even get a bond set. And even of those who do get a bond set, another 30 percent don't actually get out under the bond. So --

CHIEF JUSTICE ROBERTS: Does that represent a typical remedy in habeas to require inquiries in every case? Perhaps I'm wrong, but I would have thought habeas is either you can be detained or you can't be detained, as opposed to a procedural across-the-board requirement of a hearing.

MR. ARULANANTHAM: No, Your Honor. For example, the Hamdi decision, the Court requires hearings. That particular case was a habeas, but it sets a due process rule that then applies in other cases. The Court has to determine the conditions under which the detention would be lawful. And, as I said, to confine individual detainees here to habeas petitions is effectively to close the house door.

JUSTICE SOTOMAYOR: So tell me why the regulations under 1226(a) are inadequate. There is an entitlement -- Zadvydas is an administrative -- or the response by the BIA or the INS, whatever they're calling it today, was to create an administrative process. So why is the one here inadequate?

MR. ARULANANTHAM: I mean, we have very few quarrels with the 1226(a) regulations that govern people who are entitled to bond hearings. I mean, obviously, as they're promulgated, now they wholly exclude people who have certain criminal convictions and --

JUSTICE SOTOMAYOR: Well, standing on its own --

MR. ARULANANTHAM: Right. But --

JUSTICE SOTOMAYOR: -- those aliens -- those aliens who have been here for a long time but didn't commit a crime.

MR. ARULANANTHAM: Yes, Your Honor. I mean, our view, it said on the briefs we believe the burden of proof should be on the government by clear and convincing, because that's the standard used in significant deprivations of liberty and for periodic hearings and such.

But the most important thing to us is that it be a meaningful hearing. So there has to be a way for the detainee to raise, I was not -- spent even a day in jail. I was not sentenced to even a day in jail, and yet I've spent 10 months in immigration detention.

Or like Mr. Rodriguez, I came here at the age of one. I don't know anybody in the place I'm from, so I'm not a flight risk. Or I'm going to win my case because I'm eligible for cancellation of removal, which is true of more than half of the mandatory subclass. There has to be a way where they can make these kinds of arguments.

JUSTICE SOTOMAYOR: Why are those arguments

not available in the administrative process?

MR. ARULANANTHAM: They are available under 1226(a). If we could get everyone onto that statute, then they would be available and --

JUSTICE SOTOMAYOR: I'm looking just at that statute.

MR. ARULANANTHAM: Yes.

JUSTICE SOTOMAYOR: I know you want to look at 1225 and 1226(c), but I'm looking just at 1226(a).

MR. ARULANANTHAM: Yes. So our position is all of the class should properly be understood -- receive the benefit of the 1226(a) procedures. And our only disagreements with those are in Section III of our brief, as I said, the burden of proof, and that the hearings be periodic, because sometimes people get detained for, you know, three, four years. I've had clients detained seven years. And so there has to be some kind of periodic --

JUSTICE SOTOMAYOR: Periodic review of long-term detentions under 1226(a).

MR. ARULANANTHAM: Correct, Your Honor.

JUSTICE SOTOMAYOR: But you're not -- you're not arguing that they have to be, like the Ninth Circuit said, a court review. It can be simply an administrative review.

MR. ARULANANTHAM: Oh, no, Your Honor. It has to be by a neutral decisionmaker, which, you know, we draw in parts from Morris v. Brewer, which Justice Kennedy cited in the -- in your defense against Zadvydas, that there has to be a neutral decisionmaker. The ICE officials who are making these decisions are essentially the jailer. They're local detention officers.

JUSTICE SOTOMAYOR: But you're not -- you're not -- you wouldn't be quarrelling if it was an immigration judge.

MR. ARULANANTHAM: Yeah, absolutely not. An immigration judge is all that we are seeking with respect to that, Your Honor.

JUSTICE SOTOMAYOR: And that's not what exists today?

MR. ARULANANTHAM: Correct. For -- it exists for people detained under 1226(a) as they understand the statute, but it doesn't apply to the people with criminal convictions or --

JUSTICE SOTOMAYOR: I'm trying to concentrate on 1226(a).

MR. ARULANANTHAM: Okay, Your Honor.

JUSTICE SOTOMAYOR: What's wrong with the administrative process?

MR. ARULANANTHAM: For --

JUSTICE SOTOMAYOR: As it exists today.

MR. ARULANANTHAM: Only that the burden of proof, in our view, should be clear and convincing on the government and that there should be a periodic hearing, or, as Your Honor had suggested, if you take -- make them say the length of detention is a relevant factor so that you can get a new hearing just based on the fact that the time has passed, that would help.

But to be clear, Your Honor, well over half of this class is not under 1226(a) now; right? So we'd have to win -- for it to be meaningful relief for the vast majority of people, we'd also have to win that when detention becomes prolonged, the regulations that govern 1226(a) then come to govern the -- both the arrivings and the people who --

JUSTICE SOTOMAYOR: That -- that's pretty hard to do with 1226(c) --

MR. ARULANANTHAM: So then --

JUSTICE SOTOMAYOR: -- when 1226(a) says this applies to everything but. The statute is pretty clear on that.

MR. ARULANANTHAM: Okay. So in that case, Your Honor, let me go back to, then, the constitutional discussion that we were having earlier. My friend had

suggested that that hearing that's available, even perhaps only as a matter of the Due Process Clause, that it's sufficient for it to focus on whether the government has engaged -- you know, has run proceedings very quickly so that if a person is engaged in good faith litigation of a substantial defense that, in the government's view, as I understand it, that's a sufficient justification for detention.

And that is actually the most serious problem with their view on the Due Process Clause. Because if a person has a substantial defense and they are litigating that in good faith, that does not necessarily mean that their detention is serving a reasonable purpose. In fact, it's almost inversely correlated to it; right? I mean, if a person has a substantial defense, then it's far more likely that they are not a flight risk because they're going to want to go to immigration court to maintain their immigration status.

And similarly, if a person has a substantial defense, that means they're not in a class of people that Congress wanted to mandate the deportation of, which probably means they have a less serious crime. If you are an aggravated felon, for example, you're not eligible for LPR cancellation of removal. Most of the

mandatory subclass is eligible for that.

JUSTICE ALITO: Do you think that the flight risk and danger to the community are both continuums?

MR. ARULANANTHAM: Yes, Your Honor, but I think it has to be reasonably related to the detention. So -- excuse me, Your Honor.

JUSTICE ALITO: Well, so if you have the situation where the person is litigating in -- for -- in a -- there has been lengthy litigation, but the judge can't say this is done in bad faith or it's dilatory, it's just very lengthy and it keeps going on and on and on and on, and then you have a flight risk that's someplace on this scale and you have a risk to the community that's someplace on this scale, how can you address how something like that can come out -- should come out with any kind of a categorical role?

MR. ARULANANTHAM: So we don't advocate how that person -- releasing that person on a categorical rule. We're only talking about getting the inquiry. So we agree: That is a very individualized judgment that the judge has to look at: How serious is the criminal history here? How strong are the equities as to flight risk?

JUSTICE KENNEDY: You do say -- or the Ninth Circuit says there has to be clear and convincing

evidence which is higher than the flight risk standard in a standard bail case.

MR. ARULANANTHAM: It is, Your Honor. Although, remember, these are only hearings happening after six months. So, you know, you got that bail hearing in a matter of days in the criminal context. But --

JUSTICE BREYER: Is this -- is this -- right. I'm focusing now right on the people who want to come into the United States. If they're in the desert and they say, I won't go back because I have a right to live here, they do get a bail hearing. So if the whole is taking a long time, they'll at least have a bail hearing.

If they're at the border and they're coming in under the same statute, 1225, they say, I'm not going back. I have a right to live here. And then there is no hearing?

MR. ARULANANTHAM: That's correct, Your Honor.

JUSTICE BREYER: Well, how can that -- I don't get that, because what it says is "may" throughout, until you get to the word "shall be detained for a proceeding under Section 1229(a)"; is that right?

MR. ARULANANTHAM: That's correct.

JUSTICE BREYER: So I look up Section 1229(a). And Section 1229(a), which I've been reading, doesn't say anything about keeping them in detention. So why isn't it the simplest thing in the world once that person's at the border and they say, we're going to detain you for 1229(a). You say, have the 1229(a) tomorrow. And if they don't have it tomorrow, then you say, but I'm into the 1229(a); it just hasn't been scheduled yet. And therefore, you get bail after six months?

Have you tried that one?

MR. ARULANANTHAM: I mean, that's --

JUSTICE BREYER: What did they say?

MR. ARULANANTHAM: That's our statutory argument. The government says that the regulations, even though -- even though the person is in front of an immigration judge, the government says that the regulations prevent the immigration judge from having the power to release the person on bail. So even though --

JUSTICE BREYER: So it's the regulations; it's not the statute. So we could say -- I mean, I'm just saying -- you're going to agree with this, which is the problem. I need a disagreement.

But the -- the -- you could say they do it

for the desert. The language doesn't forbid it. It throws you into 1229(a). It's possible to interpret the statute as saying for purposes of a bail hearing, the 1229(a) starts tomorrow.

MR. ARULANANTHAM: Yes, sir.

JUSTICE BREYER: Okay. So we could do that one on the statute if it is correct that you should not hold a person for years in the United States without giving him a chance to get back to his freedom through a bail hearing, if appropriate.

Okay. (c). Now, I'm still stuck on (c). And the reason, the value of a statutory interpretation is that we're dealing with tens of thousands, hundreds of thousands, or millions of people, possibly. And it's an administrative agency organization, and they need a rule. They need a rule. And if we can interpret the statute, you can give them a rule. And that rule, then, can have lots of discretion in it through bail hearings, et cetera.

MR. ARULANANTHAM: Yes.

JUSTICE BREYER: But I haven't heard from you yet what I -- I see no way -- if you want to tell me -- I see no way of getting around the 90 days. That 90 days, it seems to me to be they don't get a hearing around the 90 days. The removal order is there.

MR. ARULANANTHAM: So, Your Honor, those people -- I won't indulge you with disagreement except --

JUSTICE BREYER: Good.

MR. ARULANANTHAM: -- on this one point: Those people are not in our class. If you are --

JUSTICE BREYER: You are -- you are not worried on a --

MR. ARULANANTHAM: We are not worried. If the government --

JUSTICE BREYER: Okay. Then after, we've got Zadvydas. And then before --

MR. ARULANANTHAM: Correct.

JUSTICE BREYER: -- the 90 days starts, they say, well, gee, shouldn't we -- shouldn't there be an exception here so that the period between the time they are released from their punishment to the time we have the hearing, if that goes on for 10 years, you know, you can't -- the person was supposed to be punished for six months, not for 10 years.

MR. ARULANANTHAM: Yes. And --

JUSTICE BREYER: I got your argument.

MR. ARULANANTHAM: That's right.

JUSTICE BREYER: But I want to know, what do I do with the language?

MR. ARULANANTHAM: Right.

JUSTICE BREYER: And -- and -- and the -- the -- you know, language counts.

MR. ARULANANTHAM: Yes.

JUSTICE BREYER: So I --

MR. ARULANANTHAM: Yes. Two -- two thoughts to work on the language, Your Honor.

First, assuming nobody is willing to accept 1226(c) can be interpreted, every court of appeals said that it could be interpreted, at least to have some reasonableness limit in it, whether a six-month rule or another one.

But if -- if I can't persuade Your Honors of that, the Due Process Clause often -- the court does use rules of administrability where they are needed to create uniformity of practice and --

CHIEF JUSTICE ROBERTS: Well, the court below didn't reach your constitutional argument, right?

MR. ARULANANTHAM: It did not, Your Honor.

CHIEF JUSTICE ROBERTS: Well, do you expect us to do it in the first instance?

MR. ARULANANTHAM: There's a voluminous record, and it's entirely briefed, but certainly the Court could. But the Court could also remand for consideration --

JUSTICE KAGAN: I'm a little bit surprised that you answered the question that way, because it seems to me that it's quite obvious what the court below thinks as to the constitutional question where did they get this from, except as an understanding of what the Constitution required.

MR. ARULANANTHAM: Yes, Your Honor. The court, I think --

CHIEF JUSTICE ROBERTS: Well, maybe they didn't have the courage of their convictions. I mean, if they do think it's unconstitutional, they could have said so rather than stretching the principles of constitutional avoidance to the length they did.

MR. ARULANANTHAM: Your Honor, I won't pretend to understand what was in the heads of the -- the Ninth Circuit judges, except that they had seen prolonged detention problems for years. They had decided in 2005 that mandatory detention applied only to expeditious removal proceedings, and there continued to be cases floating up, individual habeas cases, four years.

I had a client four and a half years detained by the government, was appealing seven years, and that was part of why the court thought we needed a -- a system, whether -- I would suggest even if it's on

due process grounds, you need a system that is administrable.

And, you know, the person doesn't even know -- the judge doesn't know when to pull the case off the shelf and look at whether or not to conduct the inquiry, Justice Alito, that you were talking about, unless you have some kind of trigger that allows them to do that.

And the time periods -- and if you look at, say, the Third Circuit experience, right, they said in 2011 that it had a reasonableness limit as a statutory matter, and that then there should be an inquiry into whether or not the detention remains permissible. And they say we reject the time period because of Demore -- in a -- it would be inconsistent with Demore.

JUSTICE SOTOMAYOR: So why is the Zadvydas -- this went -- the Ninth Circuit remedy went a lot further than Zadvydas did. Zadvydas just created a presumption, or did away from -- with a presumption. Here the court is actually requiring --

MR. ARULANANTHAM: But, Your Honor, it's requiring -- Zadvydas requires release. This is just the inquiry. So it's actually quite similar.

You know, what we're saying is unless removal is imminent -- okay, it's just a presumption -- unless removal is imminent, there -- there's a two-week

window to conduct the hearing under the injunction, you should look into conduct an inquiry to see whether or not danger or flight risk actually justifies the continued detention of this person. It's not -- it's not a cap on detention at all. And as I said, many people don't get out. So I think it's quite consistent with the approach that the Court took in Zadvydas.

But you know, going back to the question of habeas, you know, versus the constitutional rule, Your Honor, in the Third Circuit, four years later, they are still seeing individual habeases. There's massive disagreement in the lower courts, and amongst the immigration judges, about, you know, how you count this or how you count that. And then they say, you know, maybe it would be good to have a nine-month, 12-month window.

The Eleventh Circuit does the same thing in the supra decision. They say, we want to give some guidance, because it can't be that you have to file a habeas petition just to get the inquiry that the statutes -- whether -- and it might even -- the Due Process should require.

And so having some kind of guide, even if it's not as fixed as you have to do it within two weeks or six months, you know, some kind of temporal limit so

that the person can go directly to the immigration judge, not to try to get to Federal court, which most of them can't do, go directly to the immigration judge and say, can you please now conduct an individualized inquiry --

CHIEF JUSTICE ROBERTS: Of course, the problem is that that looks an awful lot like drafting a statute or a regulation. And it -- it seems to me that that's quite a leap.

We -- our job is to read the statute, and if it presents -- if it's unconstitutional, that's our job. But we can't just write a different statute because we think it would be more administrable.

MR. ARULANANTHAM: Your Honor, I think it's not that different from what the Court did in a number of cases, in Riverside v. McLaughlin, in Schnackenberg, where the Court said six months is the maximum time that you can go to prison without a jury trial.

Now, here, it's just a similar kind of administrable rule. You know, even Zadvydas --

JUSTICE KAGAN: An administrable constitutional rule, you're saying.

MR. ARULANANTHAM: Yeah. And these are constitutional cases.

JUSTICE KAGAN: We're not making up a

statute; we're devising a constitutional limit.

MR. ARULANANTHAM: Correct, Your Honor. These are all administrable --

JUSTICE KAGAN: So we're beyond --

MR. ARULANANTHAM: -- rules of the Constitution I'm talking about. McNeil, and the civil commitment context, is a constitutional rule that touched some --

CHIEF JUSTICE ROBERTS: Well, just let me make sure. So we're now in the context of deciding the constitutional question, and we put the statute -- I know you want us to, and that's -- that's fine. I'm just saying it's pretty unusual for us to do that in the first instance. But when you're talking about the administrable rule, that argument is being made on the assumption that it's otherwise unconstitutional.

MR. ARULANANTHAM: The -- the cases that we cite in our brief are all constitutional administratable rules that have been -- got into effect, the ones that I was mentioning.

I actually thought that there was a colorable claim that, because Congress specifically authorized six months of detention, prolonged detention in national security cases, you could actually read the statute that way. But obviously, that doesn't seem to

be particularly persuasive.

The last things I'll say, Your Honor -- I know my time must be limited -- on the relevance of what --

CHIEF JUSTICE ROBERTS: Well, you get a few extra minutes too.

(Laughter.)

MR. ARULANANTHAM: Thank you. Thank you so much, Mr. Chief Justice.

You know, if you -- the record is replete with examples where the immigration judge makes such a big difference because they're just a hearing where you can second-guess -- excuse me -- not second-guess, assess the decision of the jailing authority.

So, you know, the Merida Declaration at Joint Appendix page 518 is one such example. If a person with a nonviolent criminal history who is detained for three years, he finally gets the individualized assessment, he gets out on $5,000 bail.

You know, Exhibit 73 to my declaration -- this is this Ethiopian asylum-seeker. He has passed the background check. He has passed the background check, and he is found to have a significant possibility of asylum. And now he is going in front of the deportation officer who is conducting his parole review. And the

deportation officer just chooses not to believe him.

When he finally gets in front of an immigration judge who grants him asylum, the immigration judge says, but you've already passed the background check, and there -- there's no question from here. And we have a witness now because we are having a hearing, that this person is who he says he is.

And that's all we are talking about, just the minimal requirement of a hearing in front of a neutral decisionmaker for people who have been -- had very, very long periods of incarceration. And that minimal requirement we think is available under the statute and also under the Due Process Clause.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Four minutes, General Gershengorn.

REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

GENERAL GERSHENGORN: Thank you, Mr. Chief Justice. I'll be brief.

I wanted to make first a short point on the Patriot Act to shore up the construction of 1226(c).

There are two, as Justice Alito suggested, two fundamental differences with the Patriot Act. The first is that it allows for a certification. It has to be by the attorney general or the deputy attorney

general. It can't be delegated, but then that is not reviewable. It's very different from the 1226(c) where the alien gets a Joseph hearing and it's subject to -- to BIA review.

The second piece of the Patriot Act that makes it very different is that it overrides Zadvydas and actually permits the attorney general to provide for detention, even when there's no foreseeable likelihood of relief.

And so it's -- it is a situation in which there is, of course, some overlap, as one would expect in a situation -- in a series of statutes dealing with terrorists, but the -- there is no superfluity, and they're dealing with very different things. It gives extraordinary powers to the attorney general for a -- a limited group.

I also wanted to touch base on -- to address some of the statutory arguments with respect to 1225. I don't believe that -- for the reasons Justice Kennedy said, I don't believe that the statute really is ambiguous. It says, and this is on page 152(a) of the appendix to the petition, "The alien shall be detained for further consideration of the application for asylum." And then on 155(a) it says, "The alien shall be detained for a proceeding under Section 1229(a)."

What Justice Kennedy said --

JUSTICE BREYER: Well, I wasn't -- I wasn't thinking of necessarily asylum seeker. I was thinking of a man who goes to a foreign country who is an alien. He has a family in the United States. He comes back, and he says, I want to go home. And the immigration officer says, no, we're going to keep you locked up for five years because there was something wrong with your initial application. He says, no, there wasn't. They say, yes, there was.

So I'm simply asking, if that human being, who has a family in the United States is, in the view of the government, locked up for five years without any hearing whatsoever, without any opportunity for bail, even though he can get out of it simply by abandoning his family and returning to another country, is that the position of the government as to what this statute means?

GENERAL GERSHENGORN: So, Your Honor, the position of the government is that that individual would have an individualized as-applied challenge in a habeas proceeding, but that is not what should drive the statutory interpretation, which is principally what we are talking about here.

And not only is it correct -- is that

correct for the reasons Justice Kennedy suggested about his -- his Christmas visit, but that has been the interpretation of the statute -- of -- of that language in the statute since 1917. The "shall be detained for" formulation exists -- was in the original statute in 1917. It was in the statute that was enacted in 1952. It has always been understood --

JUSTICE KAGAN: It's odd language, though, General. I mean, easy enough to say pending a removal decision, or pending an asylum decision.

GENERAL GERSHENGORN: And that's the --

JUSTICE KAGAN: And they didn't say that. They said for the consideration of an asylum application. Like, why would you say that, to say pending an asylum decision?

GENERAL GERSHENGORN: And that's precisely, Your Honor, why I wanted to invoke the history. It's because that is how it's been understood for a hundred years, for literally 100 years or 99 years, and -- and -- and it has always been understood that the exclusive way to get into the country while those proceedings are pending is through parole.

Now, the government does use parole for a lot of these individuals, and so they do -- the government is not saying that these individuals don't

get any process. They actually get process. They have an IJ look at their -- their credible fear determination. They have -- a lot of those individuals are paroled in, but we don't think you get there as a matter of statutory constructs.

JUSTICE SOTOMAYOR: What gives you the right to parole?

GENERAL GERSHENGORN: There is 1182(d)(5) is separate parole authority, and the -- the government's -- I'll just finish up with this. The government's position on parole is at JA44, and it explains how the government applies parole in these situations. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 26-20897-CV-WILLIAMS

DOMINGO PACHECO-GUZMAN,

Petitioner,

v.

PAMELA BONDI, *et al.*,

Respondents.
_____/

ORDER

THIS MATTER is before the Court on the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 ("***Petition***") filed by Petitioner Domingo Pacheco-Guzman ("***Petitioner***") (DE 1). For the reasons set forth below, the Petition (DE 1) is **GRANTED IN PART**.

I. FACTUAL BACKGROUND

Petitioner Domingo Pacheco-Guzman is a citizen of Guatemala who entered the United States in 2011 and has presumably resided here since. (DE 1 ¶ 18). Petitioner encountered U.S. Immigration and Customs Enforcement ("***ICE***") during a traffic stop on September 16, 2025. (*Id.* ¶ 26). Petitioner was charged with Driving Without a Valid License and taken to the Krome North Service Processing Center in Miami, Florida. (*Id.* ¶¶ 26-27). On the same day, the Department of Homeland Security ("***DHS***") filed a Notice to Appear and commenced removal proceedings against Petitioner. Petitioner now seeks habeas relief, arguing that his continued detention without a bond hearing is unlawful. (DE 1).

II. LEGAL STANDARD

District courts have the authority to grant writs of habeas corpus. *See* 28 U.S.C. § 2241(a). Habeas corpus is fundamentally "a remedy for unlawful executive detention." *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (citation omitted). A writ may be issued to a petitioner who demonstrates that he is being held in custody in violation of the Constitution or federal law. *See* 28 U.S.C. § 2241(c)(3). The Court's jurisdiction extends to challenges involving immigration-related detention. *See Zadvydas v. Davis*, 533 U.S. 678, 687 (2001).

III. DISCUSSION

Respondents do not contest jurisdiction.[1] Accordingly, the Court proceeds to the merits of the Petition.

A. *Relevant Immigration Statutes*

There are three statutes that govern the detention of noncitizens: 8 U.S.C. §§§ 1225, 1226, and 1231. Section 1231 provides for the detention of noncitizens who have been ordered removed, including individuals in withholding-only proceedings. Because Petitioner has not yet been ordered removed, Section 1231 does not apply. Accordingly, the Court begins with an analysis of 8 U.S.C. §§ 1225 and 1226.

i. 8 U.S.C. § 1225

Section 1225 governs the inspection, detention, and removal of applicants for admission. *See* 8 U.S.C. § 1225 *et seq*. Applicants for admission are defined as

[1] Indeed, Respondents filed an "abbreviated response . . . in lieu of a formal responsive memorandum of law." In its abbreviated response, Respondents focus their arguments on the fact that "Petitioner is subject to mandatory detention under § 1225(b)." (DE 8 at 2).

noncitizens "present in the United States who ha[ve] not been admitted" or those "arriv[ing] in the United States." *Id.* All applicants for admission "must be inspected by immigration officers 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).[2] To that end, "U.S. immigration law authorizes the Government to detain certain aliens *seeking admission* into the country under §§ 1225(b)(1) and (b)(2)." *Id.* at 289 (emphasis added).

Moreover, "Section 1225(b)(1) applies to all aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Id.* Such non-citizens are generally subject to expedited removal "without further hearing or review." 8 U.S.C. § 1225(b)(1). However, if the non-citizen expresses "an intention to apply for asylum" or a fear of persecution," the statute requires referral to an interview with an immigration officer. *Id.* § 1225(b)(1)(A)(ii). If the immigration officer finds a "credible fear," the non-citizen "shall be detained for further consideration of the application for asylum." *Id.*

On the other hand, "Section 1225(b)(2) is broader" and "serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1)." *Jennings*, 583 U.S. at 287. Non-citizens covered under § 1225(b)(2) are detained for removal proceedings "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted" into the

[2] Indeed, *Jennings* began its analysis by emphasizing the temporal and categorical distinction between the detention statutes. Section 1225 applies to noncitizens who are "seeking admission into the country" at the border or a port of entry, whereas § 1226 governs those "already in the country pending the outcome of removal proceedings." *Jennings*, 583 U.S. at 285-89.

country. 8 U.S.C. § 1225(b)(2)(A). Importantly, detention under § 1225(b)(2) is mandatory. *See Gomes v. Hyde*, No. 25-cv-11571, 2025 WL 1869299, at *8 (D. Mass. July 7, 2025).

ii. 8 U.S.C. § 1226

Federal immigration law "also authorizes the Government to detain certain aliens *already in the country* pending the outcome of removal proceedings." *Jennings*, 583 U.S. at 289 (emphasis added). Section 1226(a) provides that when a noncitizen has been "arrested and detained pending a decision on whether the alien is to be removed from the United States," the Attorney General may either continue to detain the individual or release them on bond or conditional release. *See* 8 U.S.C. § 1226(a). The statute thus "establishes a discretionary detention framework." *Gomes*, 2025 WL 1869299, at *2. With this background in mind, the Court now analyzes which statute applies to Petitioner.

B. *Whether § 1225 or § 1226 Applies*

The primary issue before the Court is whether § 1225 or § 1226 governs Petitioner's detention. Respondents argue that Petitioner is mandatorily detained under § 1225. The Court disagrees.

As a threshold matter, this is a question of statutory interpretation squarely within the Court's jurisdiction. *Pizarro Reyes v. Raycraft*, No. 25-cv-12546, 2025 WL 2609425, at *3 (E.D. Mich. Sep. 9, 2025) ("[This case] requires the Court to decide whether § 1226(a) or § 1225(b)(2)(A) applies to [Petitioner]. To answer the question, the Court must determine how the two sections interplay with one another. . . . Ultimately, the issue boils down to a matter of statutory interpretation. And matters of statutory interpretation belong historically within the province of the courts.") (citing *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 386 (2024)); *Barrios v. Shepley*, No. 25-cv-00406, 2025 WL 2772579, at *5 (D.

Me. Sep. 25, 2025) (district court had jurisdiction to review petitioner's challenge to the "statutory framework" regarding his detention); *See Gomes*, 2025 WL 1869299, at *8 n.9 ("[T]o the extent . . . the BIA would conclude that Gomes is subject to mandatory detention under Section 1225(b)(2), this Court respectfully disagrees with that conclusion. Courts must exercise independent judgment in determining the meaning of statutory provisions"); *Mosqueda*, 2025 WL 2591530, at *7 (district court had jurisdiction to decide whether § 1225 or § 1226 applied as "[t]hese are purely legal questions of statutory interpretation.").

This Court and countless others have uniformly rejected the Government's expansive interpretation of § 1225.[3] *See e.g., Gil-Paulino v. Sec'y of the U.S. Dep't of Homeland Sec.*, 25-cv-24292, DE 41, (S.D. Fla. Oct. 10, 2025) (respondent's interpretation of the INA "directly contravenes the statute" and "disregards decades of settled precedent"); *see also Pizarro Reyes*, 2025 WL 2609425, at *7 ("Finally, the BIA's decision to pivot from three decades of consistent statutory interpretation and call for Pizarro Reyes' detention under § 1225(b)(2)(A) is at odds with every District Court that has been confronted with the same question of statutory interpretation."); *Puga*, No. 25-

[3] The Court recognizes the Fifth Circuit's recent, divided opinion in *Victor Buenrostro-Mendez v. Bondi, et al.*, which runs contrary to the legion of lower court decisions cited in this Order. No. 25-20496, 2026 WL 323330 (5th Cir. 2026). However, the Fifth Circuit's decision is not binding on this Court. *Carmichael v. United States*, No. 19-12298, 2022 WL 908943, at *3 (11th Cir. 2022) ("The decisions of other circuit courts are not binding on district courts within this Circuit."). Moreover, as Judge Douglas sets forth in her dissent, the majority opinion ignores the fact that the Government's "newly discovered mandate arrives without historical precedent . . . [and the fact that] the overwhelming majority of courts in [the Fifth Circuit] and elsewhere have recognized that the government's position is totally unsupported . . . [and] ignore[s] the Supreme Court's clearly stated understanding of the statutory scheme[.]" *Id.* at 10. Accordingly, without Eleventh Circuit guidance, this Court will not adopt the Government's expansive reading of § 1225.

24535, 2025 WL 2938369, at *3–6; *Merino v. Ripa*, No. 25-23845, 2025 WL 2941609, at *3 (S.D. Fla. Oct. 15, 2025); *Lopez v. Hardin*, No. 25-cv-830, 2025 WL 2732717, at *2 (M.D. Fla. Sep. 25, 2025); *Harsh Patel v. Crowley*, No. 25-11180, 2025 U.S. Dist. LEXIS 209958, at *9–12 (N.D. Ill. Oct. 24, 2024); *Esquivel-Ipina v. Larose*, No. 25-cv-2672, 2025 U.S. Dist. LEXIS 210275, at *9–12 (C.D. Cal. Oct. 24, 2025); *Carmona v. Noem*, No. 25-cv-1131, 2025 U.S. Dist. LEXIS 209629, at *14–17 (W.D. Mich. Oct. 24, 2025); *Lopez v. Hyde*, 25-12680, 2025 U.S. Dist. LEXIS 209916, at *4–5 (D. Mass. Oct. 24, 2025); *Guerra v. Joyce*, No. 25-cv-00534, 2025 WL 2986316, at *3 (D. Me. Oct. 23, 2025); *Lomeu v. Soto*, 25-cv-16589, 2025 WL 2981296, at *7–8 (D.N.J. Oct. 23, 2025); *Maldonado v. Cabezas*, No. 25-13004, 2025 WL 2985256, at *4 (D.N.J. Oct. 23, 2025); *Aparicio v. Noem*, 2025 U.S. Dist. LEXIS 208898, at *12–13 (D. Nev. Oct. 23, 2025); *Loa Caballero v. Baltazar,* No. 25-cv-03120, 2025 WL 2977650, at *5–6 (D. Colo. Oct. 22, 2025); *Soto v. Soto,* No. 25-cv-16200, 2025 U.S. Dist. LEXIS 207818, at *16–19 (D.N.J. Oct. 22, 2025); *Garcia v. Noem*, 25-cv-02771, 2025 U.S. Dist. LEXIS 209286, at *10–15 (C.D. Cal. Oct. 22, 2025); *Aguiar v. Moniz*, No. 25-cv-12706, 2025 WL 2987656, at *3 (D. Mass. Oct. 22, 2025); *Rivera v. Moniz*, 25-cv-12833, 2025 WL 2977900, at *1–2 (D. Mass. Oct. 22, 2025); *Avila v. Bondi*, No. 25-3741, 2025 WL 2976539, at *5–7 (D. Minn. Oct. 21, 2025); *Contreras-Lomeli v. Raycraft*, No. 25-cv-12826, 2025 U.S. Dist. LEXIS 207162, at *22 (E.D. Mich. Oct. 21, 2025); *Maldonado de Leon v. Baker*, No. 25-3084, 2025 WL 2968042, at *7 (D. Md. Oct. 21, 2025); *Casio-Mejia v. Raycraft*, No. 25-cv-13032, 2025 U.S. Dist. LEXIS 207165, at *12, 16–17 (E.D. Mich. Oct. 21, 2025); *Miguel v. Noem*, 25-11137, 2025 WL 2976480, at *6 (N.D. Ill. Oct. 21, 2025); *Pineda v. Simon*, No. 25-cv-01616, 2025 WL 2980729, at *2 (E.D. Va. Oct. 21, 2025); *Matheus Araujo DA Silva v. Bondi*, No. 25-cv-

12672, 2025 WL 2969163, at *2 (D. Mass. Oct. 21, 2025); *Barahona v. Hyde*, No. 25-cv-12551, 2025 U.S. Dist. LEXIS 205964, at *4–5 (D. Mass. Oct. 20, 2025); *H.G.V.U. v. Smith*, No. 25-cv-10931, 2025 WL 2962610, at *4–6 (N.D. Ill. Oct. 20, 2025); *Gonzalez v. Hyde*, No. 25-8250, 2025 U.S. Dist. LEXIS 208578, at *10–11 (S.D.N.Y. Oct. 19, 2025); *Polo v. Chestnut*, No. 25-cv-01342, 2025 WL 2959346, at *11 (E.D. Cal. Oct. 17, 2025); *Sanchez v. Minga Wofford, Warden, Mesa Verde Immigr. Processing Ctr.*, No. 25-cv-01187, 2025 WL 2959274, at *3 (E.D. Cal. Oct. 17, 2025); *Gutierrez v. Juan Baltasar, Warden, Denver Cont. Det. Facility*, No. 25-cv-2720, 2025 U.S. Dist. LEXIS 208448, at *12–27 (D. Colo. Oct. 17, 2025); *Alvarez v. Noem*, No. 25-cv-1090, 2025 WL 2942648, at *4–6 (W.D. Mich. Oct. 17, 2025); *Zamora v. Noem*, No. 25-12750, 2025 WL 2958879, at *1 (D. Mass. Oct. 17, 2025); *Pacheco Mayen v. Raycraft*, 25-cv-13056, 2025 WL 2978529, at *6–9 (E.D. Mich. Oct. 17, 2025); *Diaz Sandoval v. Raycraft*, No. 25-cv-12987, 2025 WL 2977517, at *6–9 (E.D. Mich. Oct. 17, 2025); *Contreras-Cervantes v. Raycraft*, No. 25-cv-13073, 2025 WL 2952796, at *6–8 (E.D. Mich. Oct. 17, 2025); *Ochoa v. Noem*, No. 25-10865, 2025 WL 2938779, at *4–6 (N.D. Ill. Oct. 16, 2025); *Hernandez v. Crawford*, No. 25-cv-01565, 2025 WL 2940702, at *2 (E.D. Va. Oct. 16, 2025); *Piña v. Stamper*, No. 25-cv-00509, 2025 WL 2939298, at *3 (D. Me. Oct. 16, 2025); *Tut v. Noem*, No. 25-cv-02701, 2025 U.S. Dist. LEXIS 204616, at *9 (C.D. Cal. Oct. 16, 2025); *Sequen v. Albarran*, No. 25-cv-06487, 2025 WL 2935630, at *8 (N.D. Cal. Oct. 15, 2025); *Teyim v. Perry*, No. 25-cv-01615, 2025 WL 2950184, at *2–3 (E.D. Va. Oct. 15, 2025); *Singh v. Lyons*, 25-cv-01606, 2025 WL 2932635, at *2–3 (E.D. Va. Oct. 14, 2025); *Alejandro v. Olson*, 25-cv-02027, 2025 WL 2896348, at *7–9 (S.D. Ind. Oct. 11, 2025); *Rico-Tapia v. Smith*, No. 25-00379, 2025 U.S. Dist. LEXIS 206547, at *21 (D. Haw. Oct. 10, 2025);

Chavez v. Kaiser, No. 25-cv-06984, 2025 WL 2909526, at *5 (N.D. Cal. Oct. 9, 2025); *Donis v. Chestnut*, No. 25-01228, 2025 WL 287514, at *11 (E.D. Cal. Oct. 9, 2025); *Eliseo A.A. v. Olson*, No. 25-3381, 2025 WL 2886729, at *2–4 (D. Minn. Oct. 8, 2025); *Covarrubias v. Vergara*, No. 25-cv-112, 2025 WL 2950097, at *3 (S.D. Tex. Oct. 8, 2025); *Buenrostro-Mendez v. Bondi*, No. 25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025); *S.D.B.B. v. Johnson*, No. 25-cv-882, 2025 WL 2845170, at *5 (M.D.N.C. Oct. 7, 2025); *Gonzalez v. Bostock*, 25-cv-01404, 2025 WL 2841574, at *3–4 (W.D. Wash. Oct. 7, 2025); *Hyppolite*, 2025 WL 2829511, at *12; *Artiga v. Genalo*, No. 25-5208, 2025 WL 2829434, at *7 (E.D.N.Y. Oct. 5, 2025); *Cordero Pelico v. Kaiser*, No. 25-cv-07826, 2025 WL 2822876, at *15 (N.D. Cal. Oct. 3, 2025); *Orellana v. Moniz*, 25-cv-12664, 2025 WL 2809996, at *5 (D. Mass. Oct. 3, 2025); *Elias Escobar v. Hyde*, No. 25-cv-12620, 2025 WL 2823324, at *3 (D. Mass. Oct. 3, 2025); *Belsai D.S. v. Bondi*, No. 25-cv-3682, 2025 WL 2802947, at *5–6 (D. Minn. Oct. 1, 2025); *Silva v. United States Immigr. & Customs Enf't*, No. 25-cv-284, 2025 U.S. Dist. LEXIS 191101, at *6–7 (D.N.H. Sep. 29, 2025); *Barrios v. Shepley*, No. 25-cv-00406, 2025 WL 2772579, at *10 (D. Me. Sep. 29, 2025); *Lepe v. Andrews*, No. 25-cv-01163, 2025 WL 2716910, at *4 (E.D. Cal. Sep. 23, 2025); *Chogllo Chafla v. Scott*, Nos. 25-cv-00437, 25-cv-00438, 25-cv-00439, 2025 WL 2688541, at *6–9 (D. Me. Sep. 22, 2025); *Barrera v Tindall*, No. 25-cv-541, 2025 WL 2690565, at *5 (W.D. Ky. Sep. 19, 2025); *Pablo Sequen v. Kaiser*, No. 25-cv-06487, 2025 WL 2650637, at *6–8 (N.D. Cal. Sep. 16, 2025); *Salcedo Aceros v. Kaiser*, No. 25-cv-06924, 2025 WL 2637503, at *8–12 (N.D. Cal. Sep. 12, 2025); *Lopez Santos v. Noem*, No. 3:25-cv-01193, 2025 WL 2642278, at *3–5 (W.D. La. Sep. 11, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-326, 2025 WL 2639390, at *5–10 (D.N.H. Sep. 8, 2025); *Doe v. Moniz*,

25-cv-12094, 2025 WL 2576819, at *5 (D. Mass. Sep. 5, 2025); *Garcia v. Noem*, No. 25-cv-01180, 2025 WL 2549431, at *5–7 (S.D. Cal. Sep. 3, 2025); *Francisco v. Bondi*, No. 25-cv-03219, 2025 WL 2629839, at *2–4 (D. Minn. Aug. 29, 2025); *Lopez-Campos v. Raycraft*, No. 25-cv-12486, 2025 WL 2496379, at *5–8 (E.D. Mich. Aug. 29, 2025); *Diaz v. Mattivelo*, No. 25-cv-12226, 2025 WL 2457610, at *3 (D. Mass. Aug. 27, 2025); *Kostak v. Trump*, No. 25-1093, 2025 WL 2472136, at *2–3 (W.D. La. Aug. 27, 2025); *Benitez v. Noem*, No. 25-cv-02190, 2025 U.S. Dist. LEXIS 171945, at *8–12 (C.D. Cal. Aug. 25, 2025); *Romero v. Hyde*, No. 25-11631, 2025 WL 2403827, at *11–13 (D. Mass. Aug. 19, 2025); *Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411, at *11–12 (D. Minn. Aug. 15, 2025); *dos Santos v. Noem*, 25-cv-12052, 2025 WL 2370988, at *6–8 (D. Mass. Aug. 14, 2025); *Lopez Benitez v. Francis*, No. 25-cv-5937, 2025 WL 2371588, at *4–9 (S.D.N.Y. Aug. 13, 2025); *Rosado v. Figueroa*, No. 25-12157, 2025 WL 2337099, at *6–11 (D. Ariz. Aug. 11, 2025) *report and recommendation adopted by*, 2025 WL 2349133 (Aug. 13, 2025); *Bautista v. Santacruz*, No. 25-cv-01873, 2025 U.S. Dist. LEXIS 171364, at *13–16 (C.D. Cal. July 28, 2025); *Martinez v. Hyde*, No. 25-11613, 2025 WL 2084238, at *5–9 (D. Mass. July 24, 2025); *Gomes*, 2025 WL 1869299, at *5–8; *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1256–61 (W.D. Wash. 2025). The Court finds no reason to depart from these decisions here.

Because Petitioner is detained under § 1226, he is entitled to an individualized bond hearing before an immigration judge.

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus (DE 1) is **GRANTED IN PART**.

2. Respondents shall afford Petitioner an individualized bond hearing consistent with 8 U.S.C. § 1226(a) on or before **February 18, 2026**, or otherwise release Petitioner.

3. Respondents shall file a notice with the Court on or before **February 20, 2026,** confirming and detailing their compliance with this Order.

DONE AND ORDERED in Chambers in Miami, Florida, this 13th day of February, 2026.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE