UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

A.J. *Petitioner*, v. MARICH, et al., *Respondents*.	Case No. 1:26-cv-00324-JLS

PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION

This is Petitioner's Reply to Respondent's Motion to Dismiss (ECF 5), in which Respondents argue that the Court lacks jurisdiction over the claims in the Petition, and that the statutory authority for Petitioner's detention is 8 U.S.C. § 1255(b)(2), and so he is lawfully detained without the possibility of seeking release on bond.[1]

ARGUMENT

Point 1. Neither 8 U.S.C. §§ 1252(b)(3), (e)(3), nor (g) bars this Court's jurisdiction over Petitioner's claims.

Respondents argue that the Court lacks jurisdiction over the Petition because of 8 U.S.C. § 1252(e)(3), which is entitled "Challenges on validity of the system". (Resp. Memo at pp. 2 – 3) That statutory provision limits "judicial review of determinations under section 1225(b) of this title and its implementation" to the District Court for the District of Columbia and confines such review to an implementing regulation is constitutional or (2) whether a regulation or other written policy directive, guideline, or procedure implementing the section violates the law.

Respondents' argument is misplaced. 8 U.S.C. § 1252(e), including the sub-section (3) on which Respondents rely, is by its title, limited to "[J]udicial review of orders issued under 8 U.S.C. § 1225(b)(1)", which sets forth a detailed and exhaustive procedure for the inspection and screening of certain classes of non-citizens arriving in the US through a procedure commonly

[1] This precise issue – whether detention of an inadmissible non-citizen detained in the interior of the country, often many years after entering the US, is governed by 8 U.S.C. §§ 1225(a)(2) or 1226(a) – is currently pending before the US Court of Appeals for the Second Circuit in *Barbosa da Cunha v. Muniz*, Case No. 25-3141, has been briefed and argued on an expedited basis, and a decision is expected imminently. Nonetheless, Respondents will not agree to stay briefing on their motion to dismiss pending a decision in that case, and the Court has not yet ruled on Petitioner's request to stay briefing (ECF 6). Accordingly, Petitioner is submitting this response to Respondents' motion in order to preserve his arguments for appellate review should such become necessary.

known as "expedited removal." Petitioner is not subject to an expedited removal order, nor has he been placed in expedited removal proceedings, and he does not challenge the 8 U.S.C. § 1225(b)(1) procedure or statutory scheme. Instead, his claim is that his detention is governed by 8 U.S.C. § 1226 and that he is entitled to a bond hearing. 8 U.S.C. § 1252(e)(3) has no bearing on this case.

Respondents also argue that 8 U.S.C. § 1252(g) strips the Court of jurisdiction. (Resp. Memo at 3 - 5) This section of the INA provides that, other than as provided elsewhere in the section (see § 1251(a)(1)), "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Petitioner does not challenge any of these three discrete actions, which the Supreme Court cautions is "drawn in a [ ] narrow [ ] way and applies only to three discrete actions, namely, the decision or action to commence proceedings, adjudicate cases, or execute removal orders.' *Reno v. American–Arab Anti–Discrimination Committee (AADC)*, 525 U.S. 471, 478 (1999). To get around this problem, Respondents argue that their decision "to commence removal proceedings, including the decision to detain [Petitioner] pending such removal proceedings, squarely falls within this jurisdictional bar." (Resp. Memo, p. 3-4).

But this is not true. Respondents decided to take Petitioner into custody now because of a change in their policy regarding detention, and not because they decided to place him into removal proceedings. None of the decisions Respondents cite in this part of their brief counsel a different outcome, as they all address Federal Tort Claims Act claims for unlawful imprisonment, other than *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292 (3d Cir. 2020), which involved a post-final order detention; the Court found that "Tazu's challenge to his short re-detention for removal attacks a

key part of executing his removal order." *Id.* 298. Here, Petitioner is not subject to a removal order and so the Petitioner cannot be construed as attacking it.

Further, the Second Circuit has flatly rejected Respondents argument that § 1252(g) precludes an unlawful detention claim, holding that because unlawful detention claims "may be resolved without affecting pending [removal] proceedings, they do not arise from the three discrete exercises of prosecutorial discretion that are shielded by § 1252(g).", *Ozturk v. Hyde*, 136 F.4th 382, 398 (2d Cir. 2025).

Respondents also argue that 8 U.S.C. § 1252(b)(9) bars review of this Habeas petition. (Resp. Memo, pp. 5 - 8) That statutory provision limits judicial review of "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter" to "judicial review of a final order under this section."

However, Petitioner's unlawful detention claim does not challenge any aspect of his removal proceeding. Again, this argument– that 8 U.S.C. § 1252(b)(9) bars review of an unlawful detention claim while removal proceedings are ongoing – is foreclosed by the Second Circuit's decision in *Ozturk v. Hyde, supra*, 136 F.4th 382, 398 (2d Cir. 2025), wherein the Court resoundingly rejected the contention "that the mere fact of Öztürk's detention funnels all her unlawful detention claims into § 1252(b)(9), irrespective of how tangentially related the claims may be to removal proceedings." The Court noted that "the Supreme Court has rejected the proposed approach, holding that § 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined. Regents, 591 U.S. at 19, 140 S.Ct. 1891 (cleaned up) (quoting Jennings, 583 U.S. at 294, 138 S.Ct. 830)."

In short, Respondents' jurisdictional arguments lack merit, and are squarely foreclosed by binding Second Circuit precedent.

Point 2. Respondents' arguments that Petitioner is detained under 8 U.S.C. § 1225(b) lack merit.

Respondents next argue that the Petition should be dismissed for failure to state a claim on the sole basis that this Court has already decided the statutory detention issue, in *Candido v. Bondi*, No. 25-CV-867 (JLS), 2025 WL 3484932 (W.D.N.Y. Dec. 4, 2025)). However, the fact that this Court has decided the issue in an earlier case does not mean that this Petition fails to state a claim.

Respondents argument is, essentially, that all persons present in the United States who have not been admitted are subject to mandatory detention without bond under 8 U.S.C. § 1225(b)(2). However, that position is inconsistent with the plain language of the statute, its context and legislative history, relevant case law, as well as decades of agency practice.

i. The plain language of the statute

8 U.S.C. § 1225(b)(2) states in relevant part that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under" 8 U.S.C. § 1229a. (emphasis added). 8 U.S.C. § 1225(a)(1) defines an "applicant for admission" as "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)." 8 U.S.C.

There is no statutory definition of "seeking admission" but court decisions have held that it requires "some kind of affirmative action taken to obtain authorized entry" *Vasquez v. Feeley,* No. CV 25-1542-RFB-EJY, 2025 WL 2676082, at * 23 (D. Nev. Sept. 17, 2025), Lopez Benitez

v. Francis, No. 25 CIV. 5937 (DEH), 2025 WL 2371588 at *7 (S.D.N.Y. Aug. 13, 2025). Obviously, people who have entered the US without inspection years ago cannot be found to be trying to obtain an authorized entry.

Further, "conflating the phrases "applicants for admission" and "seeking admission" as synonymous would render the phrase "seeking admission" redundant, and… [o]ne of the most basic interpretative canons instructs that a 'statute should be construed so that effect is given to all its provisions.' *Vazquez v. Feeley, supra*, 2025 WL 2676082, at *13, citing *Corley v. United States*, 556 U.S. 303, 314 (2009)

To be subject to mandatory detention under § 1225(b)(2), the non-citizen must be (1) an "applicant for admission," (2) "seeking admission," and (3) not "clearly and beyond a doubt entitled to be admitted." So even though a non-citizen who enters the country without inspection or without admission may satisfy the first condition (i.e., being an "applicant for admission"), they do not necessarily satisfy the second condition (i.e., "seeking admission"). Accordingly, 8 U.S.C. § 1225(b)(2)(A) only applies to applicants for admission who are also "seeking admission". If all applicants for admission were to be automatically considered as seeking admission, then the "seeking admission" qualifier in 8 U.S.C. § 1225(b)(2) would be redundant.

ii. The Context and Legislative History of the Statute.

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, §§ 302–03, 110 Stat., the INA at sections 236 and 242 (8 U.S.C. §§ 1225(b) (1994 ed.), 1252(a) (1994), respectively) provided that persons who were detained at a port of entry were placed into "exclusion" proceedings and were not eligible for release on a bond, while other noncitizens who entered without inspection and were

apprehended in the interior of the country were placed into "deportation" proceedings and were eligible for bond.

IIRIRA collapsed both exclusion and deportation proceedings into one single form of proceeding known as removal proceedings, and in 8 U.S.C. § 1226(a), simply "restate[d]" the detention authority previously found at § 1252(a) "to arrest, detain, and release on bond a[] [noncitizen] who is not lawfully in the United States.". See H.R. Rep. No. 104-469, pt. 1, at 229 (1996); see also H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.). Congress separately maintained the existing mandatory detention scheme for noncitizens arriving in the U.S. without a clear right to admission and expanded the scope of that detention scheme to include certain recently arrived noncitizens.

In distinguishing between noncitizens arriving versus noncitizens residing in the U.S., Congress reflected its understanding of longstanding due process precedent that recognizes the more substantial due process rights of noncitizens already residing in the U.S. with those of noncitizens recently arriving. See H.R. Rep. No. 104-469, p. 1, at 163-66 (recognizing the "constitutional liberty interest[s]" of noncitizens present in the U.S., versus the assumed minimal due process rights of arriving noncitizens).

The Conference Report, H.R. Conf. Rep. No. 104-828 at 208, 209 (1996), also states that the newly enacted "section 236(c) [1226(c)] provides that the Attorney General must detain an alien who is inadmissible under section 212(a)(2) or deportable under new section 237(a)(2)."3 Id. at 211. If all inadmissible non-citizens were already subject to mandatory detention under § 1225(c), then there would have been no need to enact § 1226(c). The Conference Report also stated that the newly enacted "section 236(a) restates the current provisions in section 242(a)(1) regarding the authority of the Attorney General to arrest, detain, and release on bond an alien

who is not lawfully in the United States." *Id.* at 210 Thus, the legislative history shows that it was never the intent of Congress to make all unadmitted non-citizens subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A), and that instead, it was the express intent of Congress in enacting § 1226(a) to authorize the detention of people like Petitioner who are apprehended while physically present in the interior of the US (and who are not subject to expedited removal proceedings, see § 1225(b)(1)) and preserve their eligibility for release on a bond while their removal proceedings continue.

Recent statutory amendments also support Petitioner's position.

Under § 1226(a), non-citizens already in the U.S. can be detained during the pendency of their Immigration Court removal proceedings. A bond hearing would then be provided, unless the alien was subject to detention under § 1226(c), usually as a result of committing an offense covered by 8 U.S.C. §§ 1182(a)(2) or 1227(a)(2) (setting forth the criminal grounds of inadmissibility or removability). This subsection 1226(c) was then amended by the passage of the Laken Riley Act of 2025, Pub. L. No. 119-1, 139 Stat. 3 (2025), which added subparagraph E to § 1226(c), requiring mandatory detention of inadmissible non-citizens charged with or convicted of certain criminal offenses. There would have been no need for Congress to add this language if such non-citizens were already subject to mandatory detention under § 1225(b). The passage of this amendment to § 1226(c) is strong evidence that Congress does not intend and did not intent § 1225(b)(2) to require detention without bond of all unadmitted non-citizens, such as Petitioner.

iii. Relevant case law supports Petitioner's position.

Case law also supports Petitioner's claim and flatly contradicts Respondents' position that all non-citizens present in the US who have not been admitted and inspected are all subject to mandatory detention without bond under 8 U.S.C. § 1225(b)(2) pending the conclusion of their removal proceedings. *Jennings v. Rodriguez*, 583 U.S. 281 (2018) addressed whether non-citizens subject to mandatory detention without a bond hearing, either under § 1226(b) or § 1226(c), were constitutionally entitled to a hearing after detention lasted for a specified period of time. The Supreme Court made clear that that sections 1225 and 1226 govern the detention of two distinct and mutually exclusive classes of noncitizens: those who were "apprehended trying to enter the country," (§ 1225) and those "who are already present inside the country." (§ 1226). Id. at 285. The Court explained that Section 1225 applies "at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible," while Section 1226 applies to those "inside the United States." id. at 287-88. See also id. at 289 (§ 1225 applies to noncitizens "seeking admission into the country," while § 1226 applies to "aliens already in the country").

iv. Agency Practice

Respondents' reading of § 1225 is irreconcilable with decades of agency practice, during which noncitizens, like Petitioner, were detained under § 1226 and afforded bond hearings. In those prior decades, detention under § 1226(a) and (c) was used for non-citizens who were already within the country, and § 1225 was used for "arriving aliens" who were "apprehended trying to enter the country". *Jennings v. Rodriguez*, 583 U.S. at 287–88. This long-settled agency practice, built around decades of jurisprudence and legislation on issues directly impacting the most fundamental constitutional rights of non-citizens, some of whom may have lived in the US for decades, should not be so easily discarded, and with so little respect. The Supreme Court

decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411 (2024) is instructive, holding that "the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect… especially [ ] when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time. That is because "the longstanding 'practice of the government' "—like any other interpretive aid—"can inform [a court's] determination of 'what the law is.'" id, 603 U.S. 386.

Here, as shown above, the contemporaneous construction of the statutory provisions at issue – the regulations adopted by Respondents at the time of IIRIRA's enactment in 1996 – which put the law into effect and which have remained a consistent longstanding 'practice of the government' in the thirty years since then, should strongly inform this Court's determination of what the correct law is.

CONCLUSION

The Court should deny Respondents' motion in its entirety, and grant the Petition, and either order Petitioner's immediate release or else direct a bond hearing before an immigration judge, with the burden on the government to show that Petitioner is either a flight risk or a danger to the community.

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