**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

**MARLON EDISON CRUZ LOPEZ LOPEZ,**
[redacted]

**EULALIO RAFAEL LOPEZ VAIL,**
[redacted]

**JOSE VENTURA CABRERA AGUILAR,**
[redacted]

***Petitioners,***

**v.**

**KRISTI NOEM,**
**Secretary, U.S. Department of Homeland Security;**

**PAMELA BONDI,**
**U.S. Attorney General;**

**RUSSELL HOTT,**
**Field Office Director of Enforcement and Removal Operations, Washington, D.C. Field Office, Immigration and Customs Enforcement; and**

**JEFFEREY CRAWFORD,**
**Warden of Farmville Detention Center.**

***Respondents.***

**Case No. 1:25-CV-1780**

**PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241**

## INTRODUCTION

1. Petitioners Marlon Edison Cruz Lopez Lopez, Eulalio Rafael Lopez Vail, and Jose Ventura Cabrera Aguilar are all noncitizens who entered the United States years ago and have resided continuously in this country since their entries. On October 10, 2025, U.S. Immigration and Customs Enforcement ("ICE") separately stopped all three individuals on their way to work and placed them in immigration custody pending completion of removal proceedings.[1] Although none of the Petitioners have a significant criminal history, and despite their actual arrival in the United States years ago, the Department of Homeland Security ("DHS") and the Executive Office of Immigration Review ("EOIR") have concluded that Petitioners are subject to mandatory immigration detention because they should be deemed to be "seeking admission" to the United States.

2. DHS has determined that the Petitioners are subject to mandatory detention under 8 U.S.C. § 1225(b)(2), concluding that they are "seeking admission" into the country they have lived in for over five years.

3. DHS's interpretation of its detention authority under 8 U.S.C. § 1225(b)(2) marks a complete reversal of the interpretation of the statute that the government has embraced since its inception three decades ago, its prior practice, Supreme Court precedent, and the plain language of the Immigration and Nationality Act ("INA").

4. This Court should grant Petitioners' petition for writ of habeas corpus and order their release from immigration custody or, in the alternative, require EOIR to conduct a bond hearing under 8 U.S.C. § 1226(a) at which DHS bears the burden to prove that continued detention is required to protect the community and/or ensure his appearance for future removal proceedings.

[1] Mr. Lopez and Mr. Vail were detained together.

## JURISDICTION AND VENUE

5. Petitioners Eulalio Rafael Lopez Vail ("Mr. Vail"), Marlon Edison Cruz Lopez Lopez ("Mr. Lopez"), and Jose Ventura Cabrera Aguilar ("Mr. Cabrera") are detained at the Farmville Detention Centr in Farmville, Virginia, and is in the physical custody of Respondents. *See* Exh. A, ICE Detainee Locator.

6. This action arises under the Due Process Clause of the Fifth Amendment and the INA, 8 U.S.C. § 1101 et seq.

7. This Court has jurisdiction under 28 U.S.C. § 2241 (habeas corpus), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. §§ 2201-02 (declaratory relief). Petitioners' detention by Respondents is a "severe restraint" on each of their individual liberty "in custody in violation of the ... laws … of the United States." *See Hensley v. Municipal Court, San Jose-Milpitas Jud. Dist.*, 411 U.S. 345, 351 (1973).

8. This Court may grant relief pursuant to 28 U.S.C. § 2241, the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the All Writs Act, 28 U.S.C. § 1651.

9. Venue lies in the United States District Court for the Eastern District of Virginia, the judicial district in which Petitioners are detained when the petition was filed. 28 U.S.C. § 1391(e); *Rumsfeld v. Padilla*, 542 U.S. 426, 434, 447 (2004).

## REQUIREMENTS OF 28 U.S.C. § 2243

10. Under 28 U.S.C. § 2243, a court "entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant . . . is not entitled thereto." 28 U.S.C. § 2243. If the Court issues an order to show cause, Respondents must file a return "within three days unless for good cause additional time, not exceeding twenty days, is allowed." *Id.*

11. Habeas corpus is "perhaps the most important writ known to the constitutional law … affording

as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Fay v. Noia*, 372 U.S. 391, 400 (1963) (emphasis added). "The application for the writ usurps the attention and displaces the calendar of the judge or justice who entertains it and receives prompt action from him within the four corners of the application." *Yong v. I.N.S.*, 208 F.3d 1116, 1120 (9th Cir. 2000) (citation omitted).

12. The reading of 8 U.S.C. § 1225(b)(2) offered by DHS to argue that his detention is mandated by the INA has been almost universally rejected by district courts across the country, including this Court, over the past three months. Allowing Respondents to continue detaining the Petitioners without the opportunity to seek release on bond based on a strained reading of the INA that has been overwhelmingly rejected only compounds the due process concerns in this case.

13. The Petitioners request the Court issue an Order to Show Cause, and direct Respondents to file a response within three days, given the significant and unlawful restraint on Petitioners' liberty.

**PARTIES**

14. Mr. Vail is a native and citizen of Guatemala who has been in immigration detention since October 10, 2025. ICE is currently detaining him at the Farmville Detention Center in Farmville, Virginia.

15. Mr. Lopez is a native and citizen of Guatemala who has been in immigration detention since October 10, 2025. ICE is currently detaining him at the Farmville Detention Center in Farmville, Virginia.

16. Mr. Cabrera is a native and citizen of Guatemala who has been in immigration detention since October 10, 2025. ICE is currently detaining him at the Farmville Detention Center in Farmville, Virginia.

17. Respondent Kristi Noem is the Secretary of the Department of Homeland Security. She is responsible for the implementation and enforcement of the INA, and oversees ICE, the agency

responsible for Petitioners' detention. Secretary Noem has ultimate custodial authority over the Petitioners and is sued in her official capacity.

18. Respondent Pamela Jo Bondi is the United States Attorney General. She has supervisory authority over the Executive Office of Immigration Review, which oversees the immigration courts and the Board of Immigration Appeals. She is sued in her official capacity.

19. Respondent Russell Hott is the Field Office Director for ICE's Washington D.C. Field Office. He oversees the operation of detention facilities within the Washington D.C. Field Office's area of responsibility, including Farmville Detention Center and Riverside Regional Jail. Mr. Hott is sued in his official capacity.

20. Respondent Jeffrey Crawford is the Warden of Farmville Detention Facility and is the immediate custodian of all three Petitioners. Mr. Crawford is sued in his official capacity.

**EXHAUSTION**

21. The failure to exhaust administrative remedies does not bar Petitioners' claims unless "Congress specifically mandates" exhaustion. *Miranda v. Garland*, 34 F.4th 338, 351 (4th Cir. 2022) (1993) (quoting *McCarthy v. Madigan*, 503. U.S. 140, 144 (1992)).

22. Moreover, because Petitioners' continued detention violates their constitutional right to due process, administrative exhaustion is excused. *See Guitard v. U.S. Sec'y of the Navy*, 967 F.2d 737, 741 (2d Cir. 1992) ("Exhaustion of administrative remedies may not be required when . . . a plaintiff has raised a 'substantial constitutional question.'").

23. Although the Court may impose exhaustion requirements as a prudential matter, it should not do so in this case because seeking administrative relief from either DHS or EOIR in this case would be futile. Critically, the Board of Immigration Appeals ("Board") recently issued a precedential decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), adopting the new interpretation of 8 U.S.C. § 1225(b)(2) that DHS announced in its recent July 8, 2025 policy memorandum. *Matter*

*of Yajure Hurtado* holds that noncitizens who entered the United States without inspection at any point are considered to be "arriving aliens" who are "seeking admission" and therefore subject to mandatory detention under 8 U.S.C. § 1225(b)(2). Although, as discussed below, this decision is legally erroneous, all immigration judges—including Appellate Immigration Judges at the Board of Immigration Appeals—are obligated to apply the Board's published precedent and deny any motion for a custody redetermination filed by Petitioners. 8 C.F.R. § 103.10(b). For this reason, Petitioners have not gone through the futile exercise of moving the immigration court for release on bond.

**STATEMENT OF FACTS**

24. Mr. Vail entered the United States over twenty-four years ago without inspection and has continuously resided in this country ever since, residing in the Washington, DC metro area.

25. Over the past twenty-four years in the United States, Mr. Vail has formed strong ties with the community. For example, he has several family members in the United States. He has also attended Our Lady of Sorrow Parish Catholic Church for over ten years and offers support to people from Guatemala in the area if needed. For example, he has helped raise money for his community members when a person passes away so that they have the funds to pay the funeral expenses.

26. Mr. Vail has never been arrested for any crime in the United States.[2]

27. On October 10, 2025, ICE officers stopped Mr. Vail while he was riding to work with his nephew. Despite the fact that ICE has no authority to enforce traffic laws, they pulled over the vehicle Mr. Vail was riding in. Nevertheless, ICE promptly arrested him and took him into custody at Chantilly Hold Room, then transferred him to Riverside Regional Jail, finally transferring him to the Farmville Detention Center where he remains. *See* Ex. A, ICE Detainee Locator Search, at 1-2.

28. ICE subsequently issued Mr. Vail a Notice to Appear ("NTA") placing him in removal

[2] Mr. Vail was civilly sued for a tort, but that suit was dismissed with prejudice.

proceedings under 8 U.S.C. § 1229a.

29. Mr. Lopez entered the United States over nineteen years ago without inspection at the age of thirteen and has continuously resided in this country ever since, residing in the Maryland area since 2014. He has worked with his uncle, Mr. Vail, in construction for the past seven years.

30. Over the past nineteen years in the United States, Mr. Lopez has formed strong ties with the community. He has attended Our Lady of Sorrow Parish Catholic Church for almost four years with many of his family members, who are also in the United States.

31. Mr. Lopez has never been arrested for any crime in the United States.

32. On October 10, 2025, ICE officers stopped Mr. Lopez with his uncle, Mr. Vail, while they were driving to work. Despite the fact that ICE has no authority to enforce traffic laws, they pulled over the vehicle Mr. Lopez and Mr. Vail were riding in. ICE promptly arrested Mr. Lopez and took him into custody at Chantilly Hold Room, then transferred him to Riverside Regional Jail, before transferring him to Farmville Detention Center where he remains. *See id.* at 3-4

33. ICE subsequently issued Mr. Lopez a NTA placing him in removal proceedings under 8 U.S.C. § 1229a.

34. Mr. Cabrera entered the United States over seven years ago without inspection and has resided continuously in this country ever since, residing in Virginia since his entry and at his most current address for the past four years.

35. Over the past seven years in the United States, Mr. Cabrera has established strong ties to the community. He is the father to a three-year-old United States citizen daughter and has a partner who is a Lawful Permanent Resident of the United States. He resides with both his partner and his daughter in Virginia.

36. Mr. Cabrera has never been convicted of a crime in or outside the United States.

37. On October 10, 2025, ICE officers stopped Mr. Cabrera while he was walking to his place of

employment in Washington, DC. Mr. Cabrera was not engaged in any criminal activity while walking to his job and no one informed him that he had been accused of illegal activity. Nevertheless, ICE promptly arrested him and took him into custody at Riverside Regional Jail before moving him to the Farmville Detention Center. *See id.* at 5-8.

38. ICE subsequently issued Mr. Cabrera a NTA placing him in removal proceedings under 8 U.S.C. § 1229a.

## LEGAL BACKGROUND

*Warrantless Arrests*

39. The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "Except at the border and its functional equivalents," immigration officers may stop individuals in public only after identifying "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" of a violation of immigration law. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

40. A stop, however brief, must be supported by reasonable suspicion if "a reasonable person would [believe] that he was not free to leave." *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

41. Reasonable suspicion cannot be based "on broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped." *United States v. Rodriguez Sanchez*, 23 F.3d 1488, 1492 (9th Cir. 1994). Further, "ethnicity alone cannot supply reasonable suspicion." *United States v. Lopez*, 817 F. Supp. 2d 918, 926 n.57 (S.D. Miss. 2011) (citing *Brignoni-Prince*, 422 U.S. at 885-87); *Sanchez v. Sessions*, 885 F.3d 782, 792 (4th Cir. 2018) (recognizing that "a stop based *solely* on race or ethnicity is *per se* egregious. In other words, since race or ethnicity cannot provide reasonable suspicion for a stop or seizure,

where an officer relies *only* on race or ethnicity, he necessarily lacks reasonable suspicion for his actions.").

42. Like the authority to stop and question individuals, both the INA and the Fourth Amendment limit ICE's authority to arrest noncitizens without a warrant. *See* 8 U.S.C. § 1357(a); *Brignoni-Ponce*, 422 U.S. at 884 (1975).

43. Under the INA, immigration officers are generally required to obtain a warrant prior to arresting and detaining noncitizens. *See* 8 U.S.C. § 1226(a) ("*On a warrant issued by the Attorney General*, a [noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed.").

44. The INA allows ICE officers to make warrantless arrests. 8 U.S.C. § 1357(a). But its authority is limited to exigent circumstances and constrained by Fourth Amendment principles.

45. Apart from noncitizens observed at the border entering or attempting to enter the United States, the statute only authorizes ICE to "arrest a[ noncitizen] in the United States [without a warrant], if he has reason to believe that the [noncitizen] so arrested is in the United States in violation of any [immigration] law or regulation *and is likely to escape before a warrant can be obtained for his arrest.*" *Id.* U.S.C. § 1357(a)(2) (emphasis added).

46. Courts "have consistently held that the 'reason to believe' phrase in § 1357 "must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause." *United States v. Varkonyi*, 645 F.2d 453, 458 (5th Cir. 1981); *see also United States v. Santos-Portillo*, 997 F.3d 159, 163 (4th Cir. 2021) (recognizing that probable cause is required for a warrantless arrest under § 1357); *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) ("Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause."); *Tejeda-Mata v. I.N.S.*, 626 F.2d 721, 725 (9th Cir. 1980) ("The phrase 'has reason to believe' has been equated

with the constitutional requirement of probable cause.") (citing *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975)); *Lau v. U.S. Immigr. & Naturalization Serv.*, 445 F.2d 217, 222 (D.C. Cir. 1971) (Reason to believe" is "considered the equivalent of probable cause.").

47. The likelihood of escape requirement "is always seriously applied." *Cantu*, 519 F.2d at 496-97; *see also Diogo v. Holland*, 243 F.2d 571 (3d Cir. 1957).

48. Courts have repeatedly held, consistent with the statute's plain language, that ICE exceeds its statutory authority under 8 U.S.C. § 1357(a) when it makes a warrantless arrest without a determination that a suspected removable individual is likely to escape before a warrant can be obtained. *De La Paz v. Coy*, 786 F.3d 367, 376 (5th Cir. 2015) ("[E]ven if an agent has reasonable belief, before making an arrest, there must also be a likelihood of the person escaping before a warrant can be obtained for his arrest.") (internal quotations omitted); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) ("Section 1357(a)(2) requires that the arresting officer reasonably believe that the alien is in the country illegally *and* that she 'is likely to escape before a warrant can be obtained for [her] arrest.'") (quoting 8 U.S.C. § 1357(a)(2)) (emphasis in original); *Westover v. Reno*, 202 F.3d 475, 479-80 (1st Cir. 2000) (noting that an immigration arrest was "in direct violation" of Section 1357(a)(2) because "[w]hile INS agents may have had probable cause to arrest [plaintiff] by the time they took her into custody, there is no evidence that [plaintiff] was likely to escape before a warrant could be obtained for her arrest").

49. Federal regulations track these strict limitations on warrantless arrests. *See* 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.").

*Detention Authority*

50. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, which set forth separates procedures for the removal and detention of

arriving or recently arrived noncitizens and noncitizens who have entered and established a presence in the United States, even those who did so in violation of the immigration laws. *Compare* 8 U.S.C. § 1225, *with* 8 U.S.C. §§ 1226, 1229a. For individuals with an established presence in the United States, the INA mandates that "an immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of a [noncitizen]." 8 U.S.C. § 1229a(a)(1). Removal proceedings under 8 U.S.C. § 1229a(a)(1) "shall be the sole and exclusive procedure from the United States" unless otherwise specified in the INA. 8 U.S.C. § 1229a(a)(3).

51. During the pendency of standard removal proceedings under 8 U.S.C. § 1229a, § 1226 provides for the detention of noncitizens already in the United States, even those who entered illegally or without inspection. For noncitizens subject to detention under § 1226, § 1226(a) sets for the default rule, giving the government the discretion to arrest and detain noncitizens "pending a decision on whether the alien is to be removed from the United States," while § 1226(c) mandates the detention of certain classes of criminal noncitizens. 8 U.S.C. § 1226(a), (c). After an initial arrest, a noncitizen subject to detention under § 1226(a) may continue to be detained, released on conditional parole, or released on a bond of at least $1,500. *Id.*

52. Once a noncitizen is detained under § 1226(a), DHS makes an initial custody determination. 8 C.F.R. §§ 1003.19(a), 1236.1(d). The noncitizen may have DHS's initial custody determination reviewed by an immigration judge, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), and ultimately by the Board, *see* 8 C.F.R. § 1236.1(d)(3).

53. In contrast to the discretionary detention scheme established for noncitizens already in the United States, IIRIRA created a separate, expedited removal process for certain "applicants for admission" deemed to be "arriving aliens." 8 U.S.C. § 1225(b). The INA defines an applicant for admission as a noncitizen "present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including a [noncitizen] who

is brought to the United States after having been interdicted in international or United States waters)." 8 U.S.C. § 1225(a)(1). The INA further clarifies that the term "application for admission" has "reference to the application for admission *into* the United States," making clear that the term applies to those applying to enter into the United States. 8 U.S.C. § 1101(a)(4) (emphasis added). Notably, individuals subject to expedited removal are not eligible for bond pending completion of their expedited removal hearings. *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018); *see id.* at 303 (distinguishing individuals subject to § 1225(b) from those "already present in the United States").

54. Critically, expedited removal proceedings do not apply to all "applicants for admission." Instead, they may be applied only to: (1) individuals who are arriving in the United States at a port of entry without valid documents; and (2) those without valid documents who have been in the United States for less than two years and have not been admitted or paroled. 8 U.S.C. § 1225(b)(1)(A)(iii)(II); *see Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109 (2020). Further, this second subset of individuals—noncitizens who have been in the United States for less than two years and have not been admitted or paroled—only become subject to expedited removal if so designated by DHS. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (granting discretionary authority to apply expedited removal to any or all noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II)); *see also* Notice, Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139, 8139 (Jan. 24, 2025) (designating the entire subset of noncitizens described in 8 U.S.C. § 1225(b)(1)(A)(iii)(II) subject to expedited removal: i.e., noncitizens "determined to be inadmissible under [8 U.S.C. §§ 1182(a)(6)(C) or (a)(7)] who have not been admitted or paroled into the United States and who have not affirmatively shown . . . that they have been physically present in the United States continuously for the two-year period immediately preceding the date of the determination of inadmissibility").

55. Noncitizens placed in expedited removal proceedings are referred to standard removal proceedings under § 1229a if they establish that they have a credible fear of persecution if removed.

*See* 8 U.S.C. § 1225(b). Otherwise, the noncitizen is ordered removed "without further hearing or review." 8 U.S.C. § 1225(b)(1)(B)(iii). Further, any noncitizen "subject to the procedures under [8 U.S.C. § 1225(b)] shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iv).

56. Finally, § 1225(b)(2) mandates the detention of certain "applicants for admission" not covered by § 1225(b)(1). Yet in keeping with the statute's focus on arriving aliens, the statute does not mandate detention for all applicants for admission but only those who are "seeking admission" to the United States. 8 U.S.C. § 1225(b)(2).

57. Since IIRIRA was first enacted, courts and the U.S. Government have consistently taken the position that noncitizens who have entered without inspection and are encountered in the United States years after their initial entry are entitled to removal proceedings under § 1229a and subject to detention under § 1226. *See, e.g., Jennings*, 583 U.S. at 303 ("While the language of §§ 1225(b)(1) and (b)(2) is quite clear, §1226(c) is even clearer. As noted, § 1226 applies to aliens *already present in the United States*.") (emphasis added); IIRIRA Implementing Regulation, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) ("Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination."); *see also Lopez Benitez v. Francis*, No. 25-cv-5937, -- F. Supp. 3d --, 2025 WL 2371588 (S.D.N.Y. Aug. 8, 2025) (holding that a noncitizen who has been residing in the United States for more than two years cannot be classified as an "alien seeking admission"); *Martinez v. Hyde*, No. 25-cv-11613, --- F. Supp. 3d ---, 2025 WL 2084238, at *8 (D. Mass. July 24, 2025) (rejecting the Government's "novel interpretation" that 1225(b) applies to noncitizens detained while present in the United States).

58. Despite amending the Immigration and Nationality Act numerous times since passing IIRIRA, *see, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, Congress has never seen fit to

clarify or alter this universally accepted interpretation of the statute.

59. Yet on July 8, 2025, the Government abruptly rejected its understanding of the interplay between 8 U.S.C. § 1226(a) and § 1225(b) that it adopted when IIRIRA was first enacted and embraced for the next three decades. In a complete reversal, "DHS, in coordination with the Department of Justice (DOJ) . . . revisited its legal position on detention and release authorities," and issued guidance instructing all ICE employees that 8 U.S.C. § 1225 rather than § 1226 "is the applicable immigration detention authority for all applicants for admission." Exh. B, ICE Memo: Interim Guidance Regarding Detention Authority for Applicants for Admission.

60. On September 5, 2025, the Board adopted DHS's novel statutory reading of 8 U.S.C. § 1225(b)(2)(A) in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216. The Board found no distinction between the statutory terms "applicant for admission" and "seeking admission," and concluded that § 1225(b)(2) must be read to include all noncitizens who have not been inspected and admitted at any point.[3] *Id.* at 221-22. Further, the Board asserted that legislative history supported its construction, although it did not cite any legislative history addressing the detention statutes. *Id.* at 223-25.

61. In fact, legislative history actually contradicts the Board's analysis. In February 1997, Congressman Lamar Smith, then Chair of the House Subcommittee on Immigration and Claims for the Committee on the Judiciary, wrote to the former Immigration and Naturalization Service ("INS") in response to the INS's proposed rulemaking to implement the provisions of IIRIRA. *See* Exh. C, IIRIRA Legislative History. In his comment on the proposed regulation, he explained the legislative intent behind several provisions of IIRIRA that focused on "prompt apprehension, adjudication, and

[3] Indeed, nearly 30 years of agency interpretation of the law would have provided Petitioners with an opportunity to seek review of DHS's custody determination in a hearing before an immigration judge under 8 U.S.C. § 1226(a). In fact, just weeks prior to *Matter of Hurtado*, the Attorney General designated for publication a decision recognizing that a noncitizen arrested in the interior of the United States and placed into removal proceedings under 8 U.S.C. § 1229a is detained under 8 U.S.C. § 1226(a) and eligible for release on bond. *See Matter of Akhmedov*, 29 I. & N. Dec. 166 (BIA 2025).

removal of aliens who are not lawfully present in the United States." *Id.* at 4. Specifically, he discussed expedited removal, the concept of arriving aliens, limitations on relief, changes to proceedings before an immigration judge, and limitations of appeals. *See generally id.*

62. Relevant here, Congressman Smith explained that the definition of "arriving alien" should be limited. He noted that the legislation used the term "arriving alien" "to distinguish aliens at the border of the United States from those who have made a substantial physical entry into the United States." *Id.* at 5-6. Congressman Smith thus recommended that the proposed regulations adopt a temporally limited measure as to who is considered "arriving," because "[c]riteria based on time are preferable . . . [and] would embrace both those who remain close to the border as well as those who escape shortly after having made an entry." *Id.* at 6. Congressman Smith continued, "[b]riefly put, if the alien is caught on the day he or she arrives, the alien is an 'arriving' alien, but not otherwise. This is a common sense approach that should be easy for INS officials to understand and implement." *Id.*ex

63. Indeed, courts that have reviewed this issue have almost universally agreed with this "common sense approach" and overwhelmingly rejected Respondents' new reading of the statute. *Maldonado Merlos v. Noem*, No. 1:25-cv-1645 (E.D. Va. Oct. 9, 2025); *Singh v. Noem*, No. 1:25-cv-1525 (E.D. Va. Oct. 7, 2025); *Ortiz Ventura v. Noem*, No. 1:25-cv-01429-MSN-WBP (E.D. Va. Oct. 2, 2025); *Quispe-Ardiles v. Noem*, No. 1:25-cv-01382-MSN-WEF (E.D. Va. Sept. 30, 2025); *Hasan v. Crawford*, 1:25-cv-01408-LMB-IDD, 2025 WL 2682255 (E.D. Va. Sept. 19, 2025)*; see also Lopez-Arevelo v. Ripa*, No. EP-25-CV-337-KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Alvarez-Martinez v. Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379 at *4 (W.D. Tex., Sept. 8, 2025); *Lopez Benitez*, --- F. Supp. 3d ---, 2025 WL 2371588 (holding that a noncitizens who has been residing in the United States for more than two years cannot be classified as an "alien seeking admission"); *Martinez*, No. 25-cv-11613, 2025 WL 2084238.

64. The new Board precedent deprives Petitioners of any process by subjecting them, men who

have resided for many years in the United States with no criminal history to speak of, to the same mandatory detention regime reserved for applicants at the border seeking initial entry into the United States.

## CLAIMS FOR RELIEF

### COUNT ONE
***Violation of Procedural Due Process***
***(Accardi Claim – No Probable Cause for Arrest)***

65. Petitioner reallege and incorporate by reference the paragraphs above.

66. The Supreme Court's decision in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) established the well-settled principle that agency actions in violation of its own regulations and procedures offends due process. 347 U.S. 260, 267-68 (1954) (finding that the agency must exercise its judgment in a habeas case because the agency committed itself by regulation).

67. The *Accardi* doctrine applies with particular force "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The doctrine's purpose is "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures." *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969).

68. Under 8 U.S.C. § 1357(a)(2), an agent may make an immigration arrest without a warrant only if they have "reason to believe" that (1) the individual "is in the United States in violation of any [immigration] law or regulation," and (2) the individual "is likely to escape before a warrant can be obtained for his arrest." *See also* 8 C.F.R. § 287.8(c)(2)(i), (ii) (same). Reason to believe must be considered the equivalent of probable cause. *See supra*, ¶ 46.

69. In detaining Petitioners, ICE failed to abide by 8 U.S.C. § 1357 and its own regulations limiting the circumstances under which it may make warrantless arrests. 8 C.F.R. § 287.8(c)(2)(i) ("An arrest shall be made only when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United

States."). There is no indication that ICE had probable cause to arrest any of the Petitioners in this case.

**COUNT TWO**
***Violation of Procedural Due Process***
***(Accardi Claim – No Flight Risk Analysis)***

70. Petitioner reallege and incorporate by reference the paragraphs above.

71. The Supreme Court's decision in *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) established the well-settled principle that agency actions in violation of its own regulations and procedures offends due process. 347 U.S. 260, 267-68 (1954) (finding that the agency must exercise its judgment in a habeas case because the agency committed itself by regulation).

72. The *Accardi* doctrine applies with particular force "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). The doctrine's purpose is "to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures." *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969).

73. Under 8 U.S.C. § 1357(a)(2), an agent may make an immigration arrest without a warrant only if they have "reason to believe" that (1) the individual "is in the United States in violation of any [immigration] law or regulation," and (2) the individual "is likely to escape before a warrant can be obtained for his arrest." *See also* 8 C.F.R. § 287.8(c)(2)(i), (ii) (same). Reason to believe must be considered the equivalent of probable cause. *See supra*, ¶ 46.

74. In detaining Petitioners, ICE failed to abide by its own regulations limiting the circumstances under which it may make warrantless arrests. 8 C.F.R. § 287.8(c)(2)(ii) ("A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained."). There is no indication that ICE conducted any analysis of flight risk before arresting the Petitioners in this case.

**COUNT THREE**
***Violation of Substantive Due Process***
***Arbitrary Detention; 8 U.S.C. §§ 1225 and 1226***

75. Petitioners reallege and incorporate by reference the paragraphs above.

76. As individuals living within the United States for many years, Petitioners are entitled to due process of law. U.S. Const. amend. V; *see generally Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause protects." *Zadvydas*, 533 U.S. at 690.

77. The "Fifth and Fourteenth Amendments' guarantee of 'due process of law' [] include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (emphasis in original). Substantive due process "prevents the government from engaging in conduct that shocks the conscience, or interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

78. The substantive due process right to be free from arbitrary detention extends to noncitizens detained during removal proceedings, and indeed even those who have already been ordered removed from the United States on account of past criminal violations. *Zadvydas*, 533 U.S. at 690 (permitting detention in non-punitive circumstances only where "special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint.").

79. Indeed, the liberty interest in freedom from detention "is the most elemental of liberty interests." *Hamdi v. Rumsfeld*, 542 FU.S. 507, 529 (2004).

80. Petitioners have a fundamental interest in liberty and being free from official restraint. Their detention without a bond hearing before a neutral arbiter to determine whether that continued detention is necessary to ameliorate any flight risk or protect the community violates their substantive due process rights.

**COUNT FOUR**
***Violation of Procedural Due Process***
***Arbitrary Detention; 8 U.S.C. §§ 1225 and 1226***

81. Petitioners reallege and incorporate by reference the paragraphs above.

82. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). While the Supreme Court has been clear that for noncitizens "on the threshold of initial entry . . . [w]hatever the procedure authorized by Congress is, it is due process." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953), this maxim does not apply to the Petitioners.

83. After more than seven years in this country, the Petitioners are not on the threshold of initial entry. Indeed, it is well established that noncitizens who "once passed through our gates, even illegally" are entitled to greater constitutional protections. *Id.*; *see also Zadvydas*, 553 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of our geographic borders."). Thus, even if the Court were to agree that the Petitioners are properly detained under § 1225(b)(2)—which they are not—their mandatory detention does not comply with due process. As individuals who have "passed through our gates," the Petitioners are entitled to greater constitutional protections than those at the threshold of initial entry for whom due process is defined by the procedures set by Congress. *Miranda*, 34 F.4th at 346-47 (recognizing due process rights for those who have entered without inspection).

84. A procedural due process challenge is governed by a three-factor balancing test weighing: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous

deprivation of such interest through the procedures used, and the probable value, if any, or additional or substitute procedural safeguards"; and (3) "the Government's interest" *United States v. White*, 927 F.3d 257, 264 (4th Cir. 2019) (citing *Mathews*, 424 U.S. at 335).

85. Each of these factors weigh in Petitioners' favor and support a finding that they may not be detained without an opportunity to seek release on bond before an immigration judge.

86. Petitioners have a strong private interest in remaining free from detention. Indeed, the Supreme Court has affirmed that even for noncitizens, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. And the Supreme Court, recognizing the strong private interest in remaining free from detention, has held "that detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and narrow non-punitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* (cleaned up).

87. While the government has an interest in ensuring Petitioners' appearance at their removal proceedings and protecting the community, *see id.*, the bond procedures established under § 1226(a) adequately serve both interests by allowing an immigration judge to make an individualized assessment of a noncitizen's flight risk and the danger he may pose to the community. And the government cannot plausibly justify denying a bond hearing based on "administrative burdens" when it has, for the past three decades, consistently provided bond hearings to noncitizens like Petitioners who have established a presence in the United States after previously entering without inspection.

88. Finally, this case demonstrates the high risk of erroneous deprivation that would result from allowing DHS to detain noncitizens like Petitioners without any opportunity to challenge their detention before the administrative agency. Without a bond hearing, there is a high probability that

Petitioners would be detained even though their continued detention serves no non-punitive purpose as it is unnecessary to protect the community or to ensure their appearance at removal proceedings.

89. In short, denying Petitioners any opportunity to demonstrate that their continued detention is unnecessary to protect the community or ensure their appearance at proceedings and violates their procedural due process rights.

**COUNT FIVE**
***Violation of Immigration and Nationality Act***
***Arbitrary Detention; 8 U.S.C. §§ 1225 and 1226***

90. Petitioners reallege and incorporate by reference the paragraphs above.

91. Petitioners are not subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A). They are properly subject to detention under § 1226(a) and entitled to a bond hearing by statute and regulation as countless district court decisions have affirmed. *See supra* ¶ 63.

92. The plain language of the INA is clear: § 1225(b)(2) "authorizes the Government to detain aliens *seeking admission into the country*," and § 1226(a) "authorizes the Government to detain certain aliens *already in the country* pending the outcome of removal proceedings." *Jennings*, 583 U.S. at 289; *accord Sampiao v. Hyde*, No. 1:25-cv-11981, -- F. Supp. 3d --, 2025 WL 2607924, at *8 (D. Mass. Sept. 9, 2025); *Gomes v. Hyde*, No. 1:25-cv-11571, 2025 WL 1869299, at *5 (D. Mass. July 7, 2025).

93. As the Supreme Court recognized in *Jennings*, § 1225(b) focuses on individuals arriving at the border and ports of entry and thus are in the process of "seeking admission." *Jennings*, 583 U.S. at 297, 303; *see also* 8 C.F.R. § 1.2 (addressing noncitizens who are geographically "coming or attempting to come into the United States."). Conversely, § 1226(a) focuses on individuals who are already in the United States and who the Government is seeking to remove through removal proceedings. *Id.* at 303. The INA further clarifies that the term "application for admission" has "reference to the application for admission into the United States," making clear that the term applies to those applying to enter into the United States physically. 8 U.S.C. § 1101(a)(4). The Petitioners

cannot reasonably be described as "seeking admission" to a country they have resided in for over seven years.

94. Conversely, to apply the statute to "all applicants for admission" regardless of whether they are "seeking admission" (as EOIR has concluded in *Matter of Yajure Hurtado*) would render the phrase "seeking admission" redundant. *See Martinez*, -- F. Supp. 3d --, 2025 WL 2084238, at *2. And to "treat[] the terms 'applicant for admission' and 'alien seeking admission' as synonymous [would] violate[] the principle that Congress is presumed to have acted intentionally in choosing different words in a statute, such that different words and phrases should be accorded different meanings." *Lopez Benitez*, ---F. Supp. 3d ---2025 WL 2371588, at *6.

95. Additionally, applying § 1225(b)(2) to all noncitizens except those who have been admitted could not have been Congress's intent because it would render other mandatory detention provisions, such as § 1226(c)(1), redundant. *Sampiao*, -- F. Supp. 3d --, 2025 WL 2607924, at *8; *Rodriguez*, 779 F. Supp. 3d at 1259; *Gomes*, 2025 WL 1869299, at *7. Section 1226(c)(1) requires mandatory detention for individuals who are present in the United States without being admitted or paroled *and* who have committed certain criminal offenses. *Sampiao*, 2025 WL 2607924, at *8. Yet if all noncitizens who are inadmissible are subject to mandatory detention under § 1225(b)(2), as Respondents contend, there would be no need for Congress to identify subcategories of inadmissible noncitizens who are subject to mandatory detention under § 1226(c), rendering the provision completely redundant. *Sampiao*, 2025 WL 2607924, at *8 (citing the *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

96. Thus, this Court must find that subjecting Petitioners to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) and denying them the bond hearings they are entitled to under § 1226(a) violates the INA.

**PRAYER FOR RELIEF**

Based on the foregoing, Petitioners request that this Court:

(1) Assume jurisdiction over this matter;

(2) Issue an order requiring Respondents to show cause why this Petition should not be granted within three days;

(3) Declare that the government violated its regulations at 8 C.F.R. § 287.8(c)(2)(i)-(ii) and arrested Petitioners without probable cause or an analysis of flight risk;

(4) Declare that 8 U.S.C. § 1226(a) governs Petitioners' detention by U.S. immigration authorities;

(5) Order that Petitioners be released from immigration custody with all of the personal belongings based on their warrantless arrests;

(6) Alternatively, order a bond hearing as authorized under 8 U.S.C. § 1226(a) at which 8 U.S.C. § 1225(b)(2)(A) cannot be applied, DHS bears the burden of proof, and the immigration judge considers Petitioners' ability to pay bond as part of the factors in setting bond; and

(7) Grant any other and further relief this Court deems just and proper.

Dated: October 15, 2025

Respectfully submitted,

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**CERTIFICATE OF REPRESENTATION**

Undersigned counsel certify that they represent Petitioners in this action and submit this pleading on their behalf. 28 U.S.C. § 2242.

Dated: October 15, 2025

Respectfully submitted,

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