UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Shawnet Nickesha Mcdonald *Petitioner*, v. LaDeon Francis, *Respondent*.	Case No. 1:25–cv–09355–JAV

PETITIONER'S MEMORANDUM OF LAW IN REPLY TO RESPONDENTS' RETURN TO PETITION

Paul O'Dwyer
Law Office of Paul O'Dwyer, P.C.
Attorneys for Petitioner
11 Broadway Suite 715
New York NY 10004

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INTRODUCTION

This Petition alleges that Petitioner was apprehended by Respondents at the US-Mexico border and released on her own recognizance pursuant to 8 U.S.C. § 1226 pending removal proceedings. She was then arbitrarily re-detained during an Immigration Court "sweep" by Respondents in November 2025, and is now being held without possibility of release on a bond, because Respondents now claim she is detained under 8 U.S.C. § 1225(b)(2) and is thus ineligible for release on bond.

In their return, Respondents acknowledge that Petitioner was detained at the US border in January 2023, that she was then served with a Notice to Appear in removal proceedings alleging that she is present in the US without having been admitted or paroled, that she was released on her own recognizance pursuant to 8 U.S.C. § 1226 and informed that she was eligible for a custody redetermination (also known as a bond hearing) before an Immigration Judge, and that in November 2025 her release on recognizance was revoked via an arrest warrant issued pursuant to INA § 236 (8 U.S.C. § 1226). Nonetheless, Respondents argue that Petitioner is now actually detained pursuant to 8 U.S.C. § 1225(b)(2) and not eligible for a bond hearing, because "'[a]n administrative agency is not disqualified from changing its mind' (Resp. Memo at 16). Respondents also that Petitioner has no due process rights, and so she is not eligible for re-release based on the revocation of her release on recognizance.

Respondents' arguments are based on a September 2025 Board of Immigration Appeals decision in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025) which ignores plain statutory language and flies in the face of decades case law and agency practice and which would allow Respondents to detain indefinitely several millions of non-citizens without access to a bond hearing or any possibility of release from custody. In the short two months since *Hurtado*

was decided, close to three hundred judges have reviewed it and of those, about two hundred and ninety have resoundingly rejected its reasoning. (see *Demirel v. Federal Detention Center, Philadelphia*, Case 2:25-cv-05488 (E.D. PA, November 18, 2025), ("there are 288 district court decisions addressing this issue. In all but six, the Government's interpretation of the INA—the same interpretation it urges here—was rejected." * 1); Appendix A (listing cases) (ECF 11-1)) That decision and appendix are annexed hereto as Exhibit B.

On November 26, 2025, a US District Court for the Central District of California considering a similar issue, in *Maldonado Bautista v Santacruz*, Case No. 5:25-cv-01873-SSS-BFM (CD CA), granted nationwide class certification to "All noncitizens in the United States without lawful status who (1) have entered or will enter the United States without inspection; (2) were not or will not be apprehended upon arrival; and (3) are not or will not be subject to detention under 8 U.S.C. § 1226(c), § 1225(b)(1), or § 1231 at the time the Department of Homeland Security makes an initial custody determination." *Id.*, ECF 82, p. 15). It also granted partial summary judgment declaring that the class members are detained under INA 236, and are entitled to be considered for release on bond. (*id,* ECF 81).

While the class certification would seem to exclude Petitioner, as she was apprehended on arrival in the US, the District Court's summary judgment reasoning applies to her, in rejecting similar arguments which Respondents make here, concluding that to accept them would "effectively nullify a portion of the INA through the DHS's legislative or interpretive exercise of power."

This Court should do likewise here, and find that Petitioner is detained pursuant to 8 U.S.C. § 1226(a) and eligible for a bond hearing. However, the Court should also find that Respondents' deprivation of Petitioner's due process rights warrant her immediate release from

custody, and only order a bond hearing in the event the Court does not order her immediate release from custody.

STATEMENT OF FACTS

As alleged in the Petition and in Respondents' return, Petitioner is a native and citizen of Jamaica who was detained by US Customs and Border Protection at the US Mexican border on or about January 30, 2023. On January 31, 2023, she was served with a Notice to Appear in removal proceedings, alleging that she is a non-citizen present in the US without having been admitted or paroled, and was then released on her own recognizance under 8 U.S.C. § 1226. (Petition, ECF 1, ¶ 9; Hapton Declaration, ECF 15, ¶¶ 4 – 7) According to Respondents, Petitioner was arrested in New York in September 2023 and in March 2024 (Hapton Declaration, ECF 15, ¶¶ 11, 12). However, there is no evidence that she was convicted, or that ICE moved to terminate her release on recognizance in response to those arrests.

On or about November 7, 2025, Petitioner attended a scheduled immigration court hearing, after which she was arrested by Respondents without explanation and without the presentation of any legal document to her. (ECF 1, ¶ 11; ECF 16, ¶ 16) Respondents detained numerous people leaving their court hearings that same day, without providing any individualized assessments as to whether they posed a flight risk or a danger to the community. Petitioner was not provided any opportunity to be heard as to whether a change of custody was warranted, or to have a bond hearing. (ECF 1, ¶¶ 11 – 15). The pPtition alleges that her detention lacked justification (ECF 1, ¶ 12) and also lacked prior notice, any showing of changed circumstances or an opportunity to respond, which violated her due process rights. (*id*, ¶¶ 18 –

24). It asks that she be released "on her own recognizance or under parole, a low bond, or reasonable conditions of supervision…" (*id*, Prayer for Relief).

In their return, Respondents argue that the Petition should be dismissed because Petitioner is detained pursuant to 8 U.S.C. § 1225(b)(2) and thus is not eligible for a bond redetermination or custody hearing before an Immigration Judge (Resp. Memorandum in response to Habeas petition, ("Resp. Memo"), ECF 14, pp. 8 – 12), and that as a non-citizen "seeking admission", her detention without bond does not violate due process (*id*, pp. 12 – 18). Respondents further argue that in the event this Court finds that Petitioner is detained pursuant to 8 U.S.C. § 1226(a), the proper remedy is a bond hearing rather than immediate release.

ARGUMENT

The Court should follow the overwhelming majority of courts in this District and nationwide who have rejected Respondents' arguments on this issue, and find that Petitioner is properly detained pursuant to 8 U.S.C. § 1226(a) and thus eligible for a bond hearing. However, rather than ordering a bond hearing, the Court should restore Petitioner to the status she had before her unconstitutional arrest on November 5, and order her immediate release from custody.

1. This Court has jurisdiction over the Petition.

As an initial matter, and although Respondents do not raise any jurisdictional challenges, Petitioner submits that the Court has jurisdiction over the claims in the Petition.

8 U.S.C. § 1252(g) states that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). However, this bar "does not preclude jurisdiction over the

challenges to the legality of [a noncitizen's] detention", which are "collateral to the Government's decision to execute the final order of removal, and instead involve whether the Government complied with its own revocation procedures and whether the length of his detention after the removal period is constitutional." *Zhu v. Genalo*, No. 1:25-cv-06523, 2025 WL 2452352, * 3, (SDNY 2025), citing *Öztürk v. Hyde*, 136 F.4th 382, 396 - 397 (2d Cir. 2025) and *Ceesay v. Kurzdorfer*, 781 F.Supp.3d 137 (W.D.N.Y. 2025) (explaining that "district courts ... have distinguished between challenges to ICE's discretion to execute a removal order, which are barred, and challenges to the manner in which ICE executes the removal order, which are not", *id*, 152). As a result, the Court's jurisdiction is not barred by section 1252(g).

2. Respondents' argument, that Petitioner is detained pursuant to 8 U.S.C § 1225(b)(2) rather than § 1226(a), lacks merit.

Respondents claim that Petitioner, and all others similarly situated — a number likely in the many millions – are detained under 8 USC § 1225(b)(2) and not § 1226(a), and thus ineligible for bond because they are "applicants for admission" who have not been admitted, and that all such non-citizens are subject to mandatory detention (Resp. Memo at pp. 8 -12, citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018).

However, as explained more fully below, Respondents utterly ignore the plain language § 1225(b)(2), which requires the detention without bond, not of all "applicants for admission ", but instead only those "applicants for admission" who are also "seeking admission". The plain language of the statute, its structure, history and purpose, relevant Supreme Court decisions, and decades of agency decisions and practice, all show that people like Petitioner, who have been physically present in the US for many years after entering without inspection, are not considered to be "seeking admission", even though they are "applicants for admission". Accordingly, their

custody is governed by 8 US.C. § 1226(a), not § 1225(c), and so they are eligible for a bond hearing before an immigration judge.

i. The plain language of the statute

Two statutory provisions govern the detention of non-citizens present in the US pending the outcome of their removal proceedings. Broadly speaking, 8 U.S.C. § 1225 governs detention of non-citizens arriving in the US, while 8 U.S.C. § 1226 governs detention of non-citizens already physically present here.

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. § 1226(a) states that "On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.", and that after such arrest, they can be continued in detention or released on a bond or a conditional parole, id, § 1226(a)(1), (2).

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), see also *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238 (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). Obviously, people who have entered the US without inspection years ago cannot be found to be

trying to obtain an authorized entry, or "seeking admission". So, "seeking admission" cannot be synonymous with "applicant for admission." and instead must "refer to seeking physical entry at the border, not the legal right to enter." *Alvarez Ortiz v. Freden*, No. 25-CV-960-LJV, 2025 WL 3085032, at *7 (W.D.N.Y. Nov. 4, 2025) See also, *Morales Rodriguez v Arnott*, Case No. 6:25-cv-00836-MDH (W.D. MO) (November 18, 2025, at pp. 4 – 8)

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).

This distinction between being an applicant for admission and seeking admission has also been recognized by the Board of Immigration Appeals (BIA), see *Matter of Y-N-P-*, 26 I&N Dec. 10 (BIA 2012), holding that a noncitizen who was present without admission was not "applying for admission" to the United States (in the context of an application for a waiver of inadmissibility under 8 U.S.C. § 1182(h)), id. at 12-13, and that "being an 'applicant for admission' under section 235(a)(1) is distinguishable from 'applying … for admission to the United States'.

Thus, 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). *See, Vazquez v. Feeley, supra*, 2025 WL 2676082, at *4.

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)." *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 non-citizens who 1) were present in the U.S. either without inspection or for lacking valid documentation to enter the U.S. and 2) who are charged with, convicted of, or admits to committing the essential elements of "any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person,".

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. See *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025) ("if, as Respondents suggest, "a non-citizen's inadmissibility were alone already sufficient to mandate detention under section 1225(b)(2)(A), then the 2025 amendment," which requires detention for noncitizens who are both inadmissible and meet certain criminal criteria, "would have no effect.', *id*, at * 7)

In instances where a new reading of a statute that has existed for years results in an agency gaining "unheralded power… [the courts] typically greet its announcement with a measure of skepticism." *Util. Air Regul. Grp. V. EPA*, 573 U.S. 302, 324 (2014). In applying this skepticism, courts have used the principle that "[w]hen Congress adopts a new law against the backdrop of a 'longstanding administrative construction,'" it is "generally presume[d] the new provision should be understood to work in harmony with what has come before." *Vazquez v. Feeley, supra*, 2025 WL 2676082, at *16, citing *Monsalvo Velazquez v. Bondi*, 145 S.Ct. 1232, 1242 (2025). The

reading of § 1225(b) must therefore be consistent with Congress' intent in passing the Laken Riley amendments to § 1226(c), and cannot be merely a "redundancy".

Other BIA decisions have held similarly. In *Matter of Cabrera-Fernandez*, 28 I. & N. Dec. 747, 748 (BIA 2023) the BIA found that inadmissible non-citizens such as Petitioner detained after entry and placed in removal proceedings were detained under § 1226(a). In *Matter of R-A-V-P-*, 27 I. & N. Dec. 803 (BIA 2020), the Board addressed the standard to be applied to an application for release on bond under § 1226(a) filed by a non-citizen who was as "applicant for admission" – i.e., who had entered the country without being inspected or admitted, thus implicitly finding him detained under § 1226(a) and bond eligible. Accord, *Matter of Garcia-Garcia*, 25 I&N Dec. 93, 94 (BIA 2009). In *Matter of D-J-*, 23 I. & N. Dec. 572, 575 (2003), the Board held, unequivocally, with regard to a bond application filed by a non-citizen inadmissible for having entered the country without inspection, that "The law governing the detention or release of aliens such as respondent (i.e., aliens arrested and detained pending a decision on removal) is set forth in [8 U.S.C. § 1226(a)." Thus, these decisions all considered the question at issue here, and found that inadmissible non-citizens placed in removal proceedings are detained under § 1226(a) and are bond eligible.

In *Matter of M-S-*, 27 I. & N. Dec. 509, 515 - 516 (AG 2019) the Attorney General held that someone placed in expedited removal proceedings and then placed in removal proceedings pursuant to 8 U.S.C. § 1229a after a credible fear is established is detained under 1225(b) and subject to mandatory detention. This would have been unnecessary if everyone who entered without inspection was subject to mandatory detention.

iii. Respondents' own regulations are also consistent with Petitioner's reading of the statute.

8 C.F.R. § 1236.1(d)(1) gives Immigration Judges the general authority to grant bond to noncitizens in removal proceedings "except as otherwise provided in this chapter". 8 C.F.R. 1003.19(h)(2)(i)(A) then provides the exceptions - five categories of noncitizens who may not receive bond: (1) respondents in exclusion proceedings, § 1003.19(h)(2)(i)(A); (2) "arriving aliens" in removal proceedings, § 1003.19(h)(2)(i)(B); (3) noncitizens described in section 237(a)(4) of the INA, § 1003.19(h)(2)(i)(C); (4) noncitizens subject to mandatory detention under section 236(c)(1) of the INA, § 1003.19(h)(2)(i)(D); and (5) noncitizens in deportation proceedings under former section 242(a)(2) of the INA, § 1003.19(h)(2)(i)(E). According to Respondents' own regulations, then, noncitizens who are present without admission are thus eligible for bond unless they fall under one of the five aforementioned categories.

This regulation was adopted by the then-Attorney General following the passage of the IIRIRA in 1996 with the specific intent of allowing immigration judges to grant bond to all inadmissible noncitizens except for those deemed "arriving aliens". The initial proposed rule provided that all "[i]nadmissible aliens in removal proceedings" would be ineligible for bond. See, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal, 62 Fed. Reg. 444, 483 (Jan. 3, 1997). After receiving comments on the proposed rule, however, the Attorney General deleted the proposed provision and replaced it with one that would apply only to "[a]rriving aliens", id, 62 Fed. Reg. 10312, 10361 (March 6, 1997). The Attorney General explained that "[t]he effect of this change is that inadmissible aliens, except for arriving aliens, have available to them bond redetermination hearings before an immigration judge, while arriving aliens do not." Id. at 10323. The Attorney General's response by modifying the proposed rule to only deny bond to "arriving aliens" is further evidence that 8

U.S.C. § 1226(a) is the proper section under which, Petitioner is currently detained, and thus eligible for bond.

iv. 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").

During oral argument, the Solicitor General repeatedly confirmed that noncitizens who previously entered the country without inspection and had been living in the United States are subject to detention, if at all, under 8 U.S.C. § 1226(a), not § 1225(b) (making the point, presumably, that the subset of non-citizens who could be detained indefinitely without a bond hearing didn't include the millions of such non-citizens living in the US who had entered the

country without inspection). See *Jennings v. Rodriguez*, supra, 583 U.S. 281, Transcript of Oral Argument (No. 15-1204), at pp. 7 – 8 (and annexed hereto as Exhibit B):

> 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….

Thus, even the Government's position has always been that detention of non-citizens physically present in the US who have not been admitted is governed by § 1226(a), and they are eligible for a bond hearing. And while it is true that the Supreme Court held in Jennings that applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *id* at 287, and that those under § 1225(b) must be detained until proceedings have concluded, that is not inconsistent with the fact that (b)(2) by its express language only covers those applicants for admission who are also "seeking admission", which

the Board of Immigration Appeals has found in *Matter of Y-N-P-, supra*, 26 I&N Dec. 10, to be a distinct subset of applicants for admission.

Further, the issue in *Jennings, supra*, was not whether everyone who entered the US without inspection is subject to mandatory detention under § 1225(b)(2). Instead, it was whether or not the constitution required a bond hearing after six months for those who were subject to mandatory detention, either because they were detained at the border or because they had criminal convictions. Undoubtedly, if the Court meant to include every single person who had entered without inspection in the scope of its decision, it would surely have said so. And *Jennings* was decided in February 2018, almost eight years ago, yet in the interim – until the decision in *Yajure Hurtado* two months ago - Respondents have continued to treat people who have entered without inspection and are apprehended years later as being detained under § 1226(a) and eligible for a bond hearing. Respondents' claim that the statute now suddenly mandates a different outcome rings hollow.

Finally, an overwhelming chorus of district court judges have ruled against the precise arguments that Respondent is making here, in the short time since Respondents adopted their new policy of denying bond hearings to all non-citizens who have not been admitted to the US. As stated above, as of November 18, "there are 288 district court decisions addressing this issue. In all but six, the Government's interpretation of the INA—the same interpretation it urges here—was rejected." * 1) (see Exhibit A).

v. 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.

Indeed, in this case, Respondents' own paperwork states explicitly that Petitioner was detained and then released on her own recognizance on February 1, 2023 pursuant to 8 U.S.C. § 1226 (INA § 236) (ECF 16-3, 16-4), while the warrant of arrest served on her on November 6, 2025 also states that it was pursuant to § 1226(a) (ECF 16-5). § 1225(b)(2) does not require a warrant, whereas § 1226(a) explicitly does ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed

from the United States." *id*). Several district courts addressing this same issue have found the existence of a warrant of arrest to be a significant, if not dispositive, factor, in granting habeas relief, see *Pizarro Reyes v. Raycraft,* No. 25-CV-12546, 2025 WL 2609425, at *6 (E.D. Mich. Sept. 9, 2025) ("Taking § 1226(a) at face value, Pizarro Reyes' arrest and detention via warrant falls within the statute's strictures given the warrant.", id, at 6); *Gomes v. Hyde*, No. 1:25-CV-11571-JEK, 2025 WL 1869299, at *7 (D. Mass. July 7, 2025) ("Because Gomes was arrested on such a warrant and detained pursuant to Section 1226, he is subject to Section 1226(a)'s discretionary detention framework", id, at *7); *Inlago Tocagon v. Moniz*, No. 25-CV-12453-MJJ, 2025 WL 2778023, at *3 (D. Mass. Sept. 29, 2025) ("Mr. Inlago Tocagon was arrested on a warrant issued under 8 U.S.C. § 1226(a). These facts make clear that Mr. Inlago Tocagon is not subject to Section 1225(b)(2)(A)." id at * 3); accord, *Barrera v. Tindall*, No. 3:25-CV-541-RGJ, 2025 WL 2690565, at *4 (W.D. Ky. Sept. 19, 2025), *Desgazons v Nessinger*, No. 1:25-cv-00459-MRD-PAS (D. RI, October 22, 2025, ECF 8 ("DHS' stated basis of authority in the Warrant for Arrest [ ] used to detain Mr. Desgazons in September is dispositive of the pending petition.", * 3).

For all of the foregoing reasons, therefore, the Court should find that Petitioner is detained pursuant to 8 U.S.C. § 1226(a) and thus eligible for a bond hearing before an Immigration Judge.

3. Respondents' detention of Petitioner violated her right to due process.

Petitioner was released from custody on her own recognizance on February 1, 2023, and then re-detained on November 5, 2025. In their return/response to the Petition, Respondents do not cite any reason or justification for their revocation of her release other than that the agency

apparently changed its mind about what the law is (Resp. Memo at 16), and that Petitioner has no due process interest in her continued liberty (*id*, pp. 12 – 18). Respondents are wrong.

It is well settled that the due process clause of the Fifth Amendment "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.", *Reno v. Flores*, 507 U.S. 292, 306 (1993). The protections of the due process clause of the Fifth Amendment extend to non-citizens, including those who are in removal proceedings. Further, "Freedom 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 v. Davis*, 533 U.S. 678, 690 (2001).

As in other cases, "the issue here is not the permissibility of immigration detention, but rather the process required in connection with such detention. Detention during removal proceedings is a constitutionally valid aspect of the deportation process ... our concern is ... with the important constitutional limitations on that power's exercise. The Government's discretionary authority to detain individuals for immigration purposes does not free it from the constraints of the Constitution." *Valdez v. Joyce*, No. 25 CIV. 4627 (GBD), 2025 WL 1707737, at *3 (S.D.N.Y. June 18, 2025), (cleaned up) citing *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020).

"The Second Circuit has held that the Mathews v. Eldridge balancing test applies when determining the adequacy of process in the context of civil immigration confinement." *Id*, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976). The first prong of this three-prong test is Petitioner's private interest in being free from imprisonment, which is clearly well established. *Valdez v. Joyce*, *supra*, 2025 WL 1707737, at *3. Second is "the risk of erroneous deprivation of Petitioner's liberty interest" which is high "in the context of re-detention absent a change in circumstances, procedure, or evidentiary findings", *id*. Here, Petitioner's release on

recognizance was revoked without any alleged change in circumstances, or opportunity for a pre-revocation or even a post-revocation hearing. This "establishes a high risk of erroneous deprivation of [her] protected liberty interest." *Id.* The third prong is "the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Mathews*, *supra,* 424 U.S. at 335. Here, Respondents do not allege that Petitioner's release was revoked based on any type of individualized assessment of risk or flight, and thus they have failed to show "a significant interest in Petitioner's detention." *Valdez v. Joyce, supra*, 2025 WL 1707737, at *4.

Respondents' re-detention of Petitioner with no process at all, much less prior notice, no showing of changed circumstances, or an opportunity to respond, violates her due process rights. *Id.* The proper remedy for this violation is an immediate release from custody, and not a bond hearing, because "[s]uch a hearing is no substitute for the requirement that ICE engage in a deliberative process prior to, or contemporaneous with, the initial decision to strip a person of the freedom that lies at the heart of the Due Process Clause. [T]he fact that Plaintiffs may seek review by an IJ of their initial bond determination does nothing to mitigate the harm to Plaintiffs in the time they are in detention awaiting review.". *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *13 (S.D.N.Y. Aug. 13, 2025) (cleaned up), citing *Velesaca v. Decker*, 458 F. Supp.3d 224 (S.D.N.Y. 2020).

CONCLUSION

For the foregoing reasons, it is requested that the Petition be granted, and that the Court order Petitioner's immediate release. In the event the Court does not order immediate release, it should order a bond hearing before an Immigration Judge within seven days, at which the

government shall have the burden of proof by clear and convincing evidence that Petitioner's continued detention is justified based on dangerousness to the community or risk of flight. *Barbosa da Cunha v. Moniz*, Case No. 6:25-cv-06532-MAV (WDNY) (ECF 25), citing *Velasco Lopez v. Decker*, 978 F.3d 842, 855-57 (2d Cir. 2020).

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Paul O'Dwyer

Paul O'Dwyer
Law Office of Paul O'Dwyer PC
Attorneys for Petitioner
11 Broadway Suite 715
New York NY 10004
Paul.odwyer@paulodwyerlaw.com
646-230-7444