

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

DIAEDDIN HATEM YOUNIS
KHUDEISH,

Petitioner,

v.

JOSEPH FREDEN, in his official
capacity as Deputy Field
Office Director, Buffalo Field Office,
U.S. Immigration &
Customs Enforcement, et al.,

Respondents.

Civil Action No. 25-1327

Immigration No. A 

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO
DISMISS

Comes now, Petitioner, Diaeddin Hatem Younis Khudeish, through counsel and opposes the Motion to Dismiss filed by Respondents for the reasons stated herein. The Motion to Dismiss is meritless. First and foremost, this Court has jurisdiction over the matter for the reasons explained herein. Furthermore, Respondents' contentions that Petitioner is properly "mandatorily detained" under § 1225 are without merit; Petitioner is not "seeking admission" and has been physically present in the United States since November 2024 without interruption; as such, the plain language of § 1225 cannot apply to him and thus his detention is governed by § 1226(a), as explained below. Even if this Court were to somehow find that § 1225 properly applies to Petitioner, due process rights apply to *all persons*, and Respondents' contention that Petitioner has a minimal right to due process flies in the face of the plain text of the Fifth Amendment and the weight of authority; as made clear by *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), the

Mathews v. Eldridge, 424 U.S. 319 (1976) test would be applicable. In either scenario, a bond hearing should be ordered promptly and, pursuant to *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020), the burden should be on the government to prove by clear and convincing evidence that Mr. Khudeish is a flight risk or a danger to the community.

I. This Court has Jurisdiction Over the Petition

Here, the Respondents have not raised any jurisdictional arguments. Further, in *Lieogo v. Freden, et al.*, No. 6:25-CV-06615 EAW, 2025 WL 3290694 (W.D.N.Y. Nov. 26, 2025), this Court held that 8 U.S.C. §§ 1252(e)(3), 1252(g), and 1252(b)(9) do not bar the Court from exercising jurisdiction over a habeas corpus petition for a non-citizen detainee.

II. Relevant Statutory Framework

The Immigration and Nationality Act (“INA”) and its implementing regulations set forth the procedures for detaining, paroling, and removing inadmissible noncitizens from the United States. “[O]ur immigration laws have long made a distinction between those [noncitizens] who have come to our shores seeking admission . . . and those who are within the United States after entry, irrespective of its legality.” *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958). Recognizing this dichotomy, the INA “authorizes the [g]overnment to detain certain [noncitizens] seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the [g]overnment to detain certain [noncitizens] already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c).” *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (emphasis added). Detention is mandatory for the former but discretionary for the latter. Importantly, “a noncitizen cannot be subject to both mandatory detention under § 1225 and discretionary detention under § 1226.” *Lopez Benitez v. Francis*, 795 F. Supp. 3d

475, 485 (S.D.N.Y. 2025).

A. Mandatory Detention Under Section 1225(b)(2)

Section 1225(b)(2)(A) provides that “in the case of [a noncitizen] who is an applicant for admission, if the examining immigration officer determines that [a noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained” pending removal proceedings. 8 U.S.C. § 1225(b)(2)(A) (“§ 1225” or “§ 1225(b)(2)”) (emphasis added). Thus, for § 1225’s mandatory detention requirement to apply, an “examining immigration officer” must determine that the individual is: (1) an ‘applicant for admission’; (2) ‘seeking admission’; and (3) ‘not clearly and beyond a doubt entitled to be admitted.’” *Lopez Benitez*, 795 F. Supp. 3d at 487 (quoting *Martinez v. Hyde*, 792 F. Supp. 3d 211, 214 (D. Mass. 2025)); *J.G.O. v. Francis*, No. 25-cv-07233 (AS), 2025 WL 3040142, at *2-3 (S.D.N.Y. Oct. 28, 2025). With the narrow exception of temporary parole under 8 U.S.C. § 1182(d)(5)(A), “there are no other circumstances under which [noncitizens] detained under § 1225(b) may be released.” *Jennings*, 583 U.S. at 300 (emphasis omitted).

Pursuant to § 1182(d)(5)(A), noncitizens detained following inspection under § 1225 can be paroled into the United States “for urgent humanitarian reasons or significant public benefit,” based on a “case-by-case” assessment by DHS. § 1182(d)(5)(A). Notably, humanitarian or public interest parole may only be granted “provided the [noncitizen] present[s] neither a security risk nor a risk of absconding.” See 8 C.F.R. § 212.5(b). Parole under 1182(d)(5)(A) is temporary. It may terminate “automatically” upon the noncitizen’s “departure from the United States” or “at the expiration of the time for which parole was authorized.” 8 C.F.R. § 212.5(e)(1). Alternatively, it may terminate “upon written notice to the [noncitizen].” § 212.5(e)(2)(i). In the latter case, a “charging document,” such as a Notice to Appear (“NTA”), may act as “written

notice” if it is “served on the [noncitizen].” *Id.*; see also 8 C.F.R. § 244.1 (defining the term “[c]harging document” to include a “Notice to Appear”). Once parole terminates, § 1182(d)(5)(A) requires the noncitizen to “forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.” 8 U.S.C. § 1182(d)(5)(A).

Accordingly, the end of parole — notwithstanding the method of termination — triggers processing under 8 C.F.R. § 212.5(e)(2). See 8 C.F.R. § 212.5(e)(1)(ii) (“[T]he [noncitizen] shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.”). Under § 212.5(e)(2), a noncitizen is “restored to the status that he or she had at the time of parole,” and “[a]ny further inspection or hearing shall be conducted under section 235 or 240 of the [INA] and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed.” § 212.5(e)(2)(i)

B. Discretionary Detention Under Section 1226(a)

Section 1226 governs the detention of noncitizens “inside the United States,” *Jennings*, 583 U.S. at 288, who are awaiting “a decision on whether [they are] to be removed from the United States,” 8 U.S.C. § 1226(a). There are two categories of detention under the statute. The first category, established by Section 1226(a), provides that “[o]n 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 from the United States.” 8 U.S.C. § 1226(a) (“§ 1226” or “§ 1226(a)”). Under this “discretionary detention framework,” *Lopez Benitez*, 795 F. Supp. 3d at 484 (quoting *Gomes v. Hyde*, --- F. Supp. 3d ---, 2025 WL 1869299, at *1 (D. Mass. July 7, 2025)), DHS may (1) continue to detain the noncitizen; (2) release the noncitizen on bond; or (3) release the noncitizen on conditional parole, 8 U.S.C. § 1226(a)(1)-(2). When DHS exercises its

discretion to detain, “§ 1226(a) and its implementing regulations require [DHS] to make an individualized custody determination.” *Velasaca v. Decker*, 458 F. Supp. 3d 224, 241 (S.D.N.Y. 2000), appeal withdrawn sub nom. *Velasaca v. Wolf*, No. 20-2153, 2020 WL 7973940 (2d Cir. Oct. 13, 2020). Moreover, § 1226(a)’s implementing regulations mandate that DHS officers base their individualized determination on two factors: (1) whether the noncitizen is a “danger to property or persons” and (2) whether the noncitizen is “likely to appear for any future proceeding.” 8 C.F.R. § 1236.1(c)(8). If, after conducting such an assessment, DHS ultimately decides to detain the noncitizen, that noncitizen has a right to appeal that decision before an immigration judge, who must consider the same two factors. See 8 C.F.R. §§ 1003.19(d),(e) (allowing immigration judges to review bond and custody determinations); *Matter of Siniauskas*, 27 I. & N. Dec. 207, 207 (BIA 2018) (“[A noncitizen] in a custody determination under [§ 1226], must establish to the satisfaction of the Immigration Judge and the Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight.”).

The second category, established by Section 1226(c), provides that DHS “shall take into custody any [noncitizen]” who falls under certain enumerated categories related to criminal and terrorist activity. 8 U.S.C. § 1226(c)(1). This “mandatory detention framework . . . ‘carves out a statutory category of [noncitizens] who may not be released’ from detention pending the conclusion of their removal proceedings.” *Rodriguez-Acurio v. Almodovar*, --- F. Supp. 3d ---, 2025 WL 3314420, at *10 (E.D.N.Y. Nov. 28, 2025) (emphasis in original) (quoting *Jennings*, 583 U.S. at 289).

III. Petitioner is not “seeking admission” and therefore cannot be subject to § 1225, but rather is detained under § 1226(a)

The elephant in the room that must be addressed, first and foremost, is that ICE itself appears to have acknowledged that their detention of Mr. Khudeish was under § 1226(a). This is evidenced by the “Warrant for Arrest of Alien” issued to Khudeish on October 6, 2025, when he was detained, asserting that “Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations”. Document 7-2, at 11. Section 236 of the INA, also known as 8 U.S.C. § 1226, is the section that governs Petitioner’s detention. If ICE was indeed detaining Khudeish under § 1225(b), as they are asserting now, wouldn’t the “Warrant for Arrest of Alien” reference that section instead? No mention is made whatsoever of § 1225(b) or INA Section 235 on that warrant. Section 287 of the INA, 8 USC § 1357, is titled “Powers of immigration officers and employees” and pertains to those powers given; it does not directly address the detention framework.

The recent decision by the Hon. Jennifer L. Rochon in the Southern District of New York in *Campbell v. Almodovar*, 25-cv-9509-JLR (S.D. New York, December 10, 2025), is highly instructive in its analysis. *Campbell* involved a non-citizen who, like Petitioner, was paroled into the United States, allowed to reside here some time, and then re-detained by ICE. DHS did not commence removal proceedings against Campbell “until September 2025 — four years after he had been paroled into the country, and years after his parole expired.” *Id.* at 19. “This re-arrest, then, was not simply a continuation of Campbell’s initial border encounter following the termination of his parole. It was an independent decision to detain, years after his parole expired and in connection with a new NTA.” *Id.* Thus, the Court found, “while Campbell remained ‘legally unadmitted’ due to his parole status, he ‘ha[d] arrived’ in the United States.” *Campbell*, citing *Rodriguez-Acurio v. Almodovar*, --- F. Supp. 3d ---, 2025 WL 3314420, at *21 (E.D.N.Y.

Nov. 28, 2025), (quoting *Coal. for Humane Immigr. Rts. v. Noem*, --- F. Sup. 3d ---, 2025 WL 2192986, at *28 (D.D.C. Aug. 1, 2025) (“[W]hile a Section 1182(d)(5)(1) parolee remains ‘legally unadmitted,’ they ‘have arrived’ — i.e., their arrival is complete, whereas their admission is not.”)).

The *Campbell* court’s analysis went on to state that mandatory detention under § 1225 is premised on an immigration officer’s determination that a noncitizen is: (1) an “applicant for admission”; (2) “seeking admission”; and (3) “not clearly and beyond a doubt entitled to be admitted.” *Campbell*, citing 8 U.S.C. § 1225(b)(2)(A); *Lopez Benitez*, 795 F. Supp. 3d at 487; J.G.O., 2025 WL 3040142, at *2-3. At the time of his 2025 re-arrest, Campbell did not meet all three criteria, so he could not have been detained under § 1225. In reaching its conclusion, the Court only needed to address, and distinguish between, the first two criteria. The Court’s explanation, starting at page 11, is summarized below.

Because the plain meaning of the statute requires all three elements be satisfied, the Court looked to the meaning of an “applicant for admission” and found that it is a term of art that covers both noncitizens who “arrive in the United States” and those already “present in the United States who ha[ve] not been admitted.” 8 U.S.C. § 1225(a)(1); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 91 n.5 (1991) (noting that terms of art “depart from ordinary meaning”). “Admitted” is in turn defined as having gained “lawful entry . . . into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A).

The Court found that Campbell remained an “applicant for admission” despite having been paroled. Section 1182(d)(5)(A) specifically provides that “parole . . . shall not be regarded as an admission of the [noncitizen].” 8 U.S.C. § 1182(d)(5)(A). The applicable DHS regulation further provides that once a noncitizen’s parole terminates, he is “restored to the status that

he . . . had at the time of parole,” 8 C.F.R. 212.5(e)(2)(i) — that of an applicant for admission. See, e.g., *United States v. Balde*, 943 F.3d 73, 84 (2d Cir. 2019) (“Parole does not change parolees’ immigration status: they . . . are treated as applicants for admission into the country.”). Thus, at the time of his 2025 re-arrest, Campbell was “present in the United States” and “ha[d] not been admitted,” making him an applicant for admission. 8 U.S.C. § 1225(a)(1).

The *Campbell* court, however, went on to find that, though Campbell remained an applicant for admission, Campbell was no longer “seeking admission” at the time of his 2025 re-arrest and detention. Unlike “applicant for admission,” “seeking admission” has no statutory definition. Determining the plain meaning of the phrase is straightforward. See *United States v. Rowland*, 826 F.3d 100, 108 (2d Cir. 2016) (“Where, as here, there is no statutory definition of a term, we consider ‘the ordinary, common-sense meaning of the words.’” (quoting *Dauray*, 215 F.3d at 260)); id. (“If the meaning is plain, the inquiry ends there.”). First, to “seek” is “to ask for” or “to try to acquire or gain.” Seek, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/seek> (last visited Dec. 9, 2025). The use of a present participle, “seeking,” “necessarily implies some sort of present-tense action.” *Lopez Benitez*, 795 F. Supp. 3d at 488 (quoting *Martinez*, 792 F. Supp. 3d at 218); see also J.G.O., 2025 WL 3040142, at *3; *Tumba Huamani v. Francis*, No. 25-cv- 08110 (LJL), 2025 WL 3079014, at *3 (S.D.N.Y. Nov. 4, 2025). Next, the applicant must be seeking “admission,” which is statutorily defined as “lawful entry . . . into the United States.” 8 U.S.C. § 1101(a)(13)(A). “Entry” is not defined in the INA, see generally id. § 1101, so it can be given its “ordinary, contemporary, common meaning,” *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). That meaning is “[t]he action or an act of entering a place.” Entry, Oxford English Dictionary, <https://doi.org/10.1093/OED/8274517121> (last visited Dec. 9,

2025); see also Entry, Black's Law Dictionary (12th ed. 2024) ("Any entrance of [a noncitizen] into the United States, whether voluntary or involuntary."). Entry therefore implies a geographic limit of entering a place, here the United States's entrance (i.e., the border). All combined, "seeking admission" means presently trying to enter the United States at or near the border. See *J.G.O.*, 2025 WL 3040142, at *3 (noting that "seeking admission" would "require[] [a noncitizen] . . . to want to go into the country"); *Alvarez Ortiz v. Freden*, --- F. Supp. 3d ---, 2025 WL 3085032, at *7 (W.D.N.Y. Nov. 4, 2025) (observing that "seeking admission" "must refer to seeking physical entry at the border, not the legal right to enter"); *Hyppolite v. Noem*, No. 25-cv-04304 (NRM), 2025 WL 2829511, at *9 (E.D.N.Y. Oct. 6, 2025) (finding that "seeking admission" "refer[s] to those who are presenting themselves at the border, or who were recently apprehended just after entering").

Judge Rochon concluded that, "when DHS agents detained Campbell in 2025, he was no longer seeking to enter the country. He was already in — and had been for several years." *Campbell* at 13, citing *Lopez Benitez*, 795 F. Supp. 3d at 489 (holding that because "§1225(b)(2)(A) applies only to those noncitizens who are actively 'seeking admission' to the United States, it cannot, according to its ordinary meaning, apply to [the petitioner], because he has already been residing in the United States for several years"); *Rodriguez-Acurio*, 2025 WL 3314420, at *16 n.6 ("[A]lthough a Section 1182(d)(5)(A) parolee remains 'at the border' in the sense that they remain an applicant for admission, these parolees have nevertheless entered into the United States by virtue of their parole . . ."). "If anything, Campbell was seeking 'to obtain a lawful means to remain here' through his asylum application." *Id.*, citing *Lopez Benitez*, 795 F. Supp. 3d at 488 n.7. Therefore, § 1225 does not apply to him.

She also found that Respondents' reading of § 1225 would likewise render superfluous the mandatory detention provisions found in § 1226(c)(1)(A), (D), and (E), and would make the text added by the Laken Riley Act "almost entirely redundant."

Petitioner urges this Court to find that, as in *Campbell*, he is not "seeking admission." Petitioner came to the United States on November 7, 2024, was detained initially, was then paroled into the United States in on January 9, 2025, and has resided here uninterrupted since then until being detained by ICE on October 6, 2025. He cannot be said to be "seeking admission" and therefore § 1225 does not apply to him; thus he is detained under § 1226(a), as further evidenced by the Notice to Appear with which he was served.

There was also a recent decision by the Hon. Lewis J. Liman in the Southern District of New York in *Qasemi v. Francis, et. al.*, 25-cv-10029 (S.D. New York, December 17, 2025) involving substantially similar facts to the instant case. In *Qasemi*, a non-citizen who entered the country with an appointment from the "CBP One" application was detained by ICE and put through the credible fear process, and thereafter, during the pendency of removal proceedings against him, was granted humanitarian parole and released from detention. Thus, the only difference between *Qasemi* and Petitioner here was that Qasemi entered through a CBP One appointment and was granted humanitarian parole, whereas Petitioner arrived with a B2 visa and was denied admission by CBP, then subsequently granted humanitarian parole. This is functionally the same scenario. Like Qasemi, Petitioner was granted parole and released from custody. Like Qasemi, Petitioner was then, later re-detained by ICE and taken back into custody. The *Qasemi* court held that a person in this posture can only be detained under 1226(a), and not under 1225(b)(1), so as to "avoid potentially absurd outcomes." *Qasemi*, at 25. The *Qasemi* court ordered Petitioner's immediate release from custody.

The *Qasemi* court's analysis of the effect of the end of Petitioner's parole begins on Page 10 of that decision. Essentially, "[t]he Government argues that because of the termination of Petitioner's parole he is subject to mandatory detention and can be arrested at any time without notice....It relies on the language of the statute that, 'when the purposes of such parole shall, in the opinion of the Secretary of Homeland Security, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.'" *Qasemi* at 10. "In the Government's view, Petitioner must now be treated as he was treated in May 2024 when he first arrived in this country because his parole ended and the Petitioner must be returned 'to the custody from which he was paroled.' In other words, the Government argues that Petitioner must be treated as if he was never paroled, and that Petitioner's detention is now mandatory." *Id.*

The *Qasemi* court summarized that Petitioner's argument as being that, because he "is not an arriving alien and because he was previously paroled into the United States, by the terms of the statute itself he does not fall within the mandatory detention provision of Section 1225(b)(1)." *Id.* at 11. "Instead, he argues that, as a result of the termination of his parole, he may be detained only pursuant to the terms of Section 1226(a), the catchall provision for the 'apprehension and detention of aliens' under which detention is at the discretion of DHS. Section 1226 is the 'default rule that authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings.'" *Id.* citing *O.F.B. v. Maldonado*, 2025 WL 3277677, at *4 (E.D.N.Y. Nov. 25, 2025) (quoting *Jennings*, 583 U.S. at 289).

The *Qasemi* court "[looked] to both the plain meaning of the relevant terms, and the 'fundamental canon of statutory construction that the words of a statute must be read in their

context and with a view to their place in the overall statutory scheme.” (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“A court must interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.”)). The Court stated that, under Section 1225(b)(1), “Qasemi is subject to mandatory detention only if he falls within the categories of noncitizens subjected to expedited removal—that is, if he is either (1) an arriving alien or (2) is described in clause (iii) of that section.” *Id.* The Court held that, while Qasemi is an “applicant for admission” within the meaning of Section 1182(d)(5)(A), he is not a noncitizen “arriving in the United States” within the meaning of Section 1225(b)(1)(A)(i). *Qasemi* at 11-12. This mirrors the logic in *Campbell*. The Court went on to state:

Petitioner is an “applicant for admission” because he “has not been admitted.” 8 U.S.C. § 1225(a)(1). Parole is “not regarded as an admission” to the United States. 8 U.S.C. § 1182(d)(5)(A). It does not follow, however, that Petitioner is “arriving in the United States.” 8 U.S.C. § 1225(B)(1)(A)(i). He has already arrived, was paroled, entered, and has now been present in the United States for over a year. None of that is changed by the fact that he has not been formally admitted.

The Court relied on an earlier decision in *Tumba v. Francis*, 2025 WL 3079014 (S.D.N.Y. Nov. 4, 2025) where it was held that a noncitizen already physically present in the United States, irrespective of whether they presented themselves at the border, does not qualify as “seeking admission” because they are already in the country. *Id.* at *3–4. In reaching that conclusion, the Court cited to the fact that the DHS has long understood the term “applicant seeking admission” to be synonymous with “arriving alien.” *Id.* at *4 (citing *Lopez Benitez v. Francis*, 795 F.3d 475, 489 (S.D.N.Y. 2025)). The Court went on to state:

If a noncitizen who is physically present in the United States and who entered the United States without encountering border authorities is not “seeking admission,” and an applicant “seeking admission” is similarly positioned to one arriving, it necessarily follows that a noncitizen paroled into the country—i.e., a noncitizen residing in the United States—is not an arriving alien. A contrary conclusion would lead to a senseless outcome; the noncitizen like Qasemi who is present and entered the country through a lawful process would still be “arriving” in the country, whereas one who entered without any inspection or without any process whatsoever would not. See *Aviles-Mena v. Kaiser*, 2025 WL 2578215, at *5 (N.D. Cal. Sept. 5, 2025).

Qasemi at 14.

The Court went on to analyze the second category of noncitizens purportedly subject to mandatory detention under Section 1225(b)(1):

Petitioner does not fall within the other category of noncitizens subject to mandatory detention under Section 1225(b)(1)—those described under subsection (b)(1)(iii)(II) of Section 1225. Subsection (b)(1)(iii)(II) explains that mandatory detention applies to a noncitizen who (1) “has not been admitted or paroled into the United States” or (2) “has not affirmatively shown, to the satisfaction of an immigration officer, that [he] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.” 8 U.S.C. § 1225(b)(1)(iii)(II). Removing the negative, the statute states that if a noncitizen has *either* been “admitted or paroled,” or has been continuously in the United States for “a two-year period prior to a determination of inadmissibility,” the noncitizen is not subject to

expedited removal (and the accompanying mandatory detention regime of Section 1225(b)(1)).

Qasemi at 14-15.

With respect to the wording that states that, upon termination of parole, the noncitizen be “returned to the custody from which he was paroled,” the Court found that such wording does not mean a return to physical custody. “The law and the statute draw a distinction between ‘detention’ and ‘custody.’ ‘Custody’ does not necessarily mean physical custody. It concerns any status under which a person or thing is under ‘the care and control of [another] for inspection, preservation or security.’ *Qasemi* at 19-20, citing *Black’s Law Dictionary* 390 (7th ed. 1999). The court noted the contrast with “detention” or “detain,” which Congress uses frequently. *See also Khabazha v. ICE*, 2025 WL 3281514, at *3 (S.D.N.Y. Nov. 25, 2025) (For the purposes of “custody” in the habeas statute, 28 U.S.C. § 2241, the custody requirement “may be satisfied by restraints other than ‘actual, physical custody’ incarceration.” (quoting *Vega v. Schneiderman*, 861 F.3d 72, 74 (2d Cir. 2017))). Nor could custody mean physical custody in Section 1182(d)(5)(A), as the statute does not of its own form “affirmatively authoriz[e] detention, much less indefinite detention.” *Clark v. Martinez*, 543 U.S. 371, 385 (2005).

IV. Even if Petitioner is detained under § 1225, he has a due process right to an individualized bond determination

Respondents argue that Petitioner is “an arriving alien” and as such “entitled only to the most basic of due process.” Document 7-3, Motion to Dismiss at 1. Even if this Court were to find that Petitioner is “seeking admission” and therefore subject to ongoing detention under § 1225, he still is not without due process rights. Respondents argue that applicants for entry like

Khudeish have *no* constitutional due-process right to a bond hearing. But the Fifth Amendment provides that, "No *person* shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fifth Amendment applies to all persons—it makes no distinction based on citizenship status or otherwise. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guarant[e]d by [the Fifth Amendment], and . . . even aliens shall not be . . . deprived of life, liberty, or property without due process of law.").

Against the general rule that due process applies to all persons, courts have recognized an exception known as the "entry fiction" whereby an applicant for admission to the country is treated as if he were stopped at the border for the purposes of his application for admission. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 661 (1892). Essentially this means that a person seeking entry may be physically allowed into the United States pending a decision on his application for admission, but the mere fact of his physical presence within U.S. borders grants him no greater constitutional protection *as to his application* than if he were outside the country. *See Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958); *see also United States ex rel. Kordic v. Esperdy*, 386 F.2d 232, 235 (2d Cir. 1967). This narrowly-tailored legal fiction exists to accommodate the political branches' broad prerogative to exclude. *See Thuraissigiam*, 591 U.S. at 139 ("[T]he Constitution gives the political department of the government plenary authority to decide which aliens to admit, and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted." (cleaned up)). Applicants

for admission must look to Congress and the Executive Branch for the procedures determining their legal admission into the country; the Due Process Clause provides no independent font of necessary procedure. But these cases don't suggest that applicants for entry are deprived of all protections of the Constitution. *Cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1393 (1953) ("What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account.").

Respondents cite *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020), a case where the Supreme Court held that "arriving aliens" cannot seek judicial review of unfavorable credible fear determinations. *See Thuraissigiam*, 140 S. Ct. at 1983. *Thuraissigiam* is inapposite here, as the Supreme Court only addressed the narrow issue of judicial review of credible fear determinations. Detention matters were not reached at all. The very relief Petitioner seeks here—a bond hearing before an Immigration Judge—closely resembles the administrative review process *Thuraissigiam* necessarily deemed sufficient to obviate the need for judicial review in order to satisfy due process considerations. *See Thuraissigiam*, 140 S. Ct. at 1965-66.

In *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), the Second Circuit was posed with the question as to whether a noncitizen subject to mandatory detention has the constitutional due-process right to a bond hearing when their detention becomes unreasonably prolonged. The provision at issue in *Black* was 8 U.S.C. § 1226(c), which states that the Attorney General "shall take into custody" noncitizens charged with removability based on a prior conviction on specified criminal grounds or on allegations of involvement with terrorism. The *Black* Court found that the statute "makes no explicit provision for an initial or other bond hearing during the period of detention and places no limit on the duration of detention under its authority." 103

F.4th at 137; *see id.* at 142 (observing that "section 1226's text cannot be construed to require a bond hearing after any particular fixed period of detention"). Nevertheless, the Second Circuit held that "[i]n light of the constitutional concerns identified by the Supreme Court and this Court in connection with the Executive's detention of noncitizens . . . due process bars the Executive from detaining such individuals for an unreasonably prolonged period under section 1226(c) without a bond hearing." *Id.* at 143. The Court rejected "a bright-line constitutional rule requiring a bond hearing after six months of detention—or after any fixed period of detention," but it cautioned "that any immigration detention exceeding six months without a bond hearing raises serious due process concerns." *Id.* at 150.

In determining whether a bond hearing is warranted, *Black* instructed district courts to evaluate the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (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, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 151 (quoting *Mathews*, 424 U.S. at 335). The Court then applied the *Mathews* factors to the two petitioners in that case: Carol Black, who had been detained for seven months, and Keisy G.M., who had been detained for twenty-one months. *Id.* at 137. The Court concluded that both were entitled to a hearing. As to the specifics of the hearing, the Court held that due process required the Government to demonstrate to an IJ "by clear and convincing evidence, the need for [the noncitizen's] continued detention," (that is, either danger to the community or risk of flight) and that the IJ must "consider [the noncitizen's] ability to pay and alternative means of assuring his appearance." *Id.* at 159.

In *Al Thuraya v. Warden*, 25-cv-02582, (S.D. New York, September 2, 2025), the district court held that Fifth Amendment due process rights apply to applicants for entry, and that *Black v. Decker*, 103 F.4th 133 (2d Cir. 2024), necessitates that the factors from *Mathews v. Eldridge*, 424 U.S. 319 (1976) must be applied to determine whether a remedy is warranted. In doing so, the *Al Thuraya* court rejected the government's arguments that no due process rights exist for applicants for admission. The Court distinguished *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). The Court explained that Mezei was ordered excluded from the country (on national security grounds) and was detained solely because no other country would take him and that, therefore, Mezei had been conclusively "denied entry"—he had exhausted all avenues of review. In that context, the Supreme Court said that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* The Court focused on the fact that a release from detention would undermine the Government's determination to exclude Mezei. *Id.* at 216 ("Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceeding.").

The *Al Thuraya* court also pointed out that, in *Thuraissigiam*, the Court rejected an arriving noncitizen's claim for review of the agency's removal decision, which was based on an asylum officer's finding that he lacked a credible fear of persecution. In that context, the Court stated that "an alien in respondent's position has only those rights *regarding admission* that Congress has provided by statute." 591 U.S. at 140. (emphasis added).

The *Al Thuraya* Petitioner, like Petitioner, stood in a different position. Unlike Mezei and Thuraissigiam, Khudeish has not been definitively "denied entry." Khudeish was granted parole, and has a pending application to adjust status based upon his marriage to a U.S. citizen. The government cannot remove Khudeish at any point in the near future – he must be afforded the

opportunity to litigate any claim for relief that he may have. In other words, just like Al-Thuraya, Khudeish has neither been admitted (*i.e.*, granted asylum, adjustment of status, a visa, or any other form of relief) nor excluded (*i.e.*, denied asylum, adjustment of status, a visa). So, as in *Al Thuraya*, any concern animating the entry fiction exception—that is, the political branches' authority to legally admit or exclude noncitizens—doesn't apply here. Indeed, the due-process claim Khudeish advances doesn't concern his application at all, just the legality of his detention while that application is being reviewed by the administrative bureaucracy.

Indeed, “the vast majority of courts to address whether individuals detained under § 1225(b) have a right to a bond hearing have held that they do.” *Al Thuraya*, citing *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020); *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 848 (E.D. Va. 2020); *Leke v. Hott*, 521 F. Supp. 3d 597, 603-04 (E.D. Va. 2021); *Hong v. Mayorkas*, 2022 WL 1078627, at *7 (W.D. Wash. 2022); *Padilla v. U.S. Immigr. & Customs Enft*, 704 F. Supp. 3d 1163, 1170-72 (W.D. Wash. 2023); *Arechiga v. Archambeault*, 2023 WL 5207589, at *3 (D. Nev. 2023); *A.L. v. Oddo*, 761 F. Supp. 3d 822, 825-26 (W.D. Pa. 2025); *Abreu v. Crawford*, 2025 WL 51475, at *4, *7 (E.D. Va. Jan. 8, 2025); *Rahman v. Garland*, 2025 WL 1920341, at *3, *6 (W.D. Wash. June 26, 2025), *report and recommendation adopted sub nom. Anisur R. v. Garland*, 2025 WL 1919252 (W.D. Wash. July 11, 2025); *Akhmadjanov v. Oddo*, 2025 WL 660663, at *4 (W.D. Pa. Feb. 28, 2025); *A.E. v. Andrews*, 2025 WL 1424382, at *3 (E.D. Cal. May 16, 2025), *report and recommendation adopted*, 2025 WL 1808676 (E.D. Cal. July 1, 2025); *Rodrigues De Oliveira v. Joyce*, 2025 WL 1826118, at *6 (D. Me. July 2, 2025); *Singh v. Andrews*, 2025 WL 1918679, at *6 (E.D. Cal. July 11, 2025); *Abdul-Samed v. Warden*, 2025 WL 2099343, at *6 (E.D. Cal. July 25, 2025); *Bermudez Paiz v. Decker*, 2018 WL 6928794, at *12 (S.D.N.Y. 2018); *Traore v. Decker*, 2019 WL 3890227, at *3 (S.D.N.Y. 2019); *Birch v. Decker*,

2018 WL 794618, at *6 (S.D.N.Y. 2018); *Destine v. Doll*, 2018 WL 3584695, at *4-*5 (M.D. Pa. 2018); *Otis V. v. Green*, 2018 WL 3302997, at *6-*8 (D.N.J. 2018); *Perez v. Decker*, 2018 WL 3991497, at *3-*4 (S.D.N.Y. 2018).

Thus, even if the Court declines to follow *Campbell* and finds that Khudeish is “seeking admission” and therefore subject to § 1225, it should apply the *Mathews* test and determine that whatever may constitute the government’s interest in detaining a non-criminal business-owner and father of a U.S. Citizen, who the government itself chose to stop pursuing removal against in 2016, is far outweighed by the most significant liberty interest there is – the interest in being free from imprisonment – and that even though Petitioner has only been detained now for about three months, which is a significant amount of time, the likelihood of him being detained for many, many months as his case winds its way through the administrative tribunals – is so very real and highly likely, and given all that Mr. Khudeish has to lose – his ability to remain in the country with his spouse and his ability to meaningfully participate in his own removal defense – a bond hearing is necessary to comport with due process.

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