IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MAIKEL AMADOR DIAZ

PETITIONER,

v.

KRISTI NOEM, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY; Todd Lyons, Acting Director of ICE; Pamela BONDI, U.S. Attorney General; Kelei WALKER, Deputy Field Office Director, ERO Denver Field Office,

RESPONDENTS.

Case No. 1:26-cv-882

PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241, BY A PERSON SUBJECT TO UNLAWFUL DETENTION

PETITION FOR WRIT OF HABEAS CORPUS

RESPECTFULLY SUBMITTED,

/s/ Dan Gividen

Dan Gividen
Attorney for Petitioner
Texas State Bar No. 24075434
18208 Preston Rd., Ste. D9-284
Dallas, TX 75252
972-256-8641
Dan@GividenLaw.com

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INTRODUCTION

1. Petitioner, Maikel Amador Diaz, is a native and citizen of Cuba who entered the United States without inspection. On July 9, 2025, the Immigration Judge granted the Department of Homeland Security's motion to dismiss removal proceedings over Petitioner's opposition. As explained below, Petitioner seeks this Court's urgent intervention, without which, ICE will continue to unlawfully detain him at the outset of and for the duration of removal proceedings.

2. The central issue presented by this habeas petition, like countless others nationwide, is straightforward: Are noncitizens like Petitioner, who are placed in removal proceedings after being encountered in the U.S. based on being present after entering without inspection (EWI), entitled to a bond hearing before a neutral adjudicator under 8 U.S.C. § 1226? Or, as the government now claims, are they subject to mandatory detention without any possibility of a bond hearing?

3. Petitioner's position affirms nearly three decades of settled agency practice and judicial interpretation.[1] The government's position, in stark contrast, asks this Court to adopt a radical reinterpretation of a thirty-year-old statutory scheme—a theory announced and taken by the agencies in the last couple months. This new theory would require the Court to believe that for thirty years, the agencies charged with administering

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[1] *See e.g., Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425, at *6–7 (E.D. Mich. Sept. 9, 2025) ("The BIA's decision to pivot from three decades of consistent statutory interpretation and call for [Petitioner's] detention under § 1225(b)(2)(A) is at odds with every District Court that has been confronted with the same question of statutory interpretation.").

these laws and the federal courts reviewing their actions have all profoundly misunderstood the statute's "plain language."

4. This Court need not indulge such a sweeping and unsupported revision of established law. Petitioner's interpretation is consistent with historical practice as well as the U.S. constitution. Moreover, Petitioner's positions are supported by reasoned, persuasive, and detailed analysis from Article III courts across the country who have granted similar habeas petitions in recent weeks.[2] The government's new novel position, meanwhile, stands in direct opposition to this judicial consensus.

5. Critically, Petitioner's reading gives full effect to all the INA's provisions, including the statutory definitions given to the terms "admission," "admitted," and

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[2] *See e.g., Lopez-Arevelo v. Ripa,* No. EP-25-CV-337-KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025); *Buenrostro-Mendez v. Bondi, et al.,* No. CV H-25-3726, 2025 WL 2886346, at *3 (S.D. Tex. Oct. 7, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Jose J.O.E. v. Bondi*, No. 25-CV-3051 (ECT/DJF), 2025 WL 2466670 (D. Minn. Aug. 27, 2025); *Carmona-Lorenzo v. Trump*, No. 4:25CV3172, 2025 WL 2531521 (D. Neb. Sept. 3, 2025); *Giron Reyes v. Lyons*, No. C25-4048-LTS-MAR, 2025 WL 2712427 (N.D. Iowa Sept. 23, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Jimenez v. FCI Berlin*, No. 25-cv-326-LM-AJ (D.N.H. Sept. 8, 2025); *Choglio Chafla v. Scott*, 2025 WL 2688541 (D. Me. Sept. 21, 2025); *Samb v. Joyce*, No. 25 CIV. 6373 (DEH), 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *Leal-Hernandez v. Noem*, No. 1:25-CV-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255 (E.D. Va. Sept. 19, 2025); *Beltran Barrera v. Tindall*, 2025 WL 2690565 (W.D. Ky. Sept. 19, 2025); *Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425 (E.D. Mich. Sept. 9, 2025); *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239 (W.D. Wash. 2025); *Cuevas Guzman v. Andrews*, No. 1:25-CV-01015-KES-SKO (HC), 2025 WL 2617256 (E.D. Cal. Sept. 9, 2025); *Caicedo Hinestroza v. Kaiser*, No. 25-CV-07559-JD, 2025 WL 2606983 (N.D. Cal. Sept. 9, 2025); *Zaragoza Mosqueda v. Noem*, No. 5:25-CV-02304 CAS (BFM), 2025 WL 2591530 (C.D. Cal. Sept. 8, 2025); *Garcia v. Noem*, No. 25-CV-02180-DMS-MMP, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Rosado v. Figueroa*, No. CV 25-02157 PHX DLR (CDB), 2025 WL 2337099 (D. Ariz. Aug. 11, 2025); *J.U. v. Maldonado*, 25-CV-04836, 2025 WL 2772765, at *5 (E.D.N.Y. Sept. 29, 2025);*Lopez v. Hardin*, No. 25-cv-830, 2025 WL 2732717, at *2 (M.D. Fla. Sept. 25, 2025)(agreeing on substantive claim but oddly not ordering any real relief in this decision);*Maldonado Vazquez v. Feeley*, 2:25-CV-01542-RFB-EJY, 2025 WL 2676082 (D. Nev. Sept. 17, 2025); *Rivera Zumba v. Bondi*, No. 25-cv-14626, 2025 WL 2753496, at *7 (D.N.J. Sept. 26, 2025); *S.D.B.B. v. Johnson et. al.*, No. 1:25-CV-882, 2025 WL 2845170, at *5 (M.D.N.C. Oct. 7, 2025); *Velasquez Salazar v. Dedos*, No. 25-cv-835, 2025 WL 2676729 (D.N.M. Sept. 17, 2025).

"application for admission" by Congress when IIRIRA was passed.[3] Meanwhile, the government asks the Court to ignore those definitions as well as circuit court precedent rejecting prior attempts by the government to ignore these definitions. Similarly, Petitioner's position harmonizes the statutes, regulations, decades of agency practice, and caselaw with the U.S. Constitution in a way that gives meaning to all the relevant provisions. Meanwhile, the government's interpretation renders that entire Laken Rile Act (LRA) superfluous, violates multiple constitutional provisions, decades of agency practice, and the most basic canons of statutory construction.

6. The government's continued detention of Petitioner without a bond hearing before an IJ is unlawful. This conclusion is difficult to doubt given decades of agency practice since the passage of IIRIRA in 1996. While the statutes at issue in this case have not changed in those decades, the agencies who administer them have. Drastically. In addition to the changes in the agencies administering the statutes, the decades since IIRIRA have seen countless provisions of the INA litigated ad nauseum and the entire first Trump presidency. Not once, however, did anyone ever suggest that all EWI aliens are subject to mandatory detention for the duration of removal proceedings.

7. For these reasons and those discussed below as well as in prior filings, Petitioner respectfully requests the Court grant his Motion for a Preliminary Injunction and Habeas Petition, and as a result, order the government to either promptly provide him with a bond hearing before a neutral IJ or release him.

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[3] 8 U.S.C. §§ 1101(a)(4) and (a)(13)(A).

JURISDICTION

8. This case arises under the Constitution of the United States, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq.*, and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500-596, 701-706.

9. This Court has subject matter jurisdiction under 28 U.S.C. § 2241, *et seq.* (habeas corpus), U.S. Const. art. I, § 9, cl. 2 (Suspension Clause), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United States as Respondent), and 28 U.S.C. § 1651 (All Writs Act). Respondents have waived sovereign immunity for purposes of this suit. 5 U.S.C. §§ 702, 706.

10. The Court may grant relief under the habeas corpus statutes, 28 U.S.C. § 2241, *et. seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*; the All Writs Act, 28 U.S.C. § 1651; and the Court's inherent equitable powers.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(1) because Respondents are agencies or officers of agencies of the United States, Respondents and Petitioner reside in this District, Petitioner is detained in this District at ERO Denver Contract Detention Facility, and a substantial part of the events or omissions giving rise to Petitioner's claims occurred in this District.

THE NEED FOR IMMEDIATE CONSIDERATION IN ACCORDANCE WITH HABEAS CORPUS PURPOSE AND REQUIREMENTS

12. The writ of habeas corpus is "available to every individual detained within the United States."[4] "The essence of habeas corpus is an attack by a person in custody upon

[4] *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (citing U.S. Const., Art I, § 9, cl. 2).

the legality of that custody, and ... the traditional function of the writ is to secure release from illegal custody."[5] "Historically, 'the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.'"[6] "A district court's habeas jurisdiction," therefore, "includes challenges to immigration-related detention."[7]

13. Pursuant to 28 U.S.C. § 2243, a court may grant the petition for writ of habeas corpus or issue an order to show cause ("OSC") to the respondents "forthwith."[8] If an order to show cause is issued, respondents should generally be required to file a return "within *three* days unless for good cause additional time . . . is allowed."[9]

14. This Motion is predicated on a petition for a Writ of Habeas Corpus under 28 U.S.C. § 2241, a remedy that Congress and the courts have long recognized demands swift judicial review. Indeed, 28 U.S.C. § 2243 mandates an expedited show-cause response precisely because the petition's central claim is an ongoing, unlawful deprivation of liberty. It is axiomatic that the loss of liberty, even for a single day, constitutes profound and irreparable harm. Therefore, the failure to rule on the requested injunction within 14 days is not mere delay; it is a constructive denial of the motion itself. Each day of inaction inflicts

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[5] *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

[6] *Vazquez v. Feeley,* No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3–6 (D. Nev. Sept. 17, 2025) (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001)).

[7] *Id.* (citing *Zadvydas v. Davis*, 533 U.S. 678, 687 (2001) and *Demore v. Kim*, 538 U.S. 510, 517 (2003)).

[8] 28 U.S.C. § 2243.

[9] *Id.* (emphasis added).

the very irreparable injury the petition seeks to prevent, rendering the extraordinary remedy of habeas functionally meaningless and frustrating the "swift" relief that § 2243 requires.

PARTIES

15. Petitioner Maikel Amador Diaz is a native and citizen of Cuba who entered the United States without inspection. On July 9, 2025, the Immigration Judge granted DHS's motion to dismiss removal proceedings over Petitioner's opposition. Immediately following the dismissal of proceedings, officers of U.S. Immigration and Customs Enforcement (ICE) detained Petitioner on the premises of the Orlando Immigration Court. Since that time, ICE has continued to detain Petitioner without setting bond or providing an opportunity for a bond hearing. Based on DHS' novel new interpretation and the BIA's decision in in *Matter of Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), he will not be provided with a bond hearing; rather, since *Hurtado*, every EWI alien bond request is denied either by a written or oral order that includes some form of the phrase "the BIA's decision in *Hurtado* is what I am required to follow, so I do not have jurisdiction to give you a bond." This, to be clear, will be the result based on the government's new position—not because he is a flight risk, danger, or described in § 1226(c)--but because he entered the United States without inspection. Nothing more.

16. Respondent Kristi Noem is the Secretary of the Department of Homeland Security. She is responsible for the implementation and enforcement of the Immigration and Nationality Act (INA), and oversees ICE, which is responsible for Petitioner's detention. Ms. Noem has ultimate custodial authority over Petitioner and is sued in her official capacity.

17. Respondent Department of Homeland Security (DHS) is the federal agency responsible for implementing and enforcing the INA, including the detention and removal of noncitizens.

18. Respondent Pamela Bondi is the Attorney General of the United States. She is responsible for the Department of Justice, of which the Executive Office for Immigration Review and the immigration court system it operates is a component agency. She is sued in her official capacity.

19. Respondent Todd Lyons is Acting Director and Senior Official Performing the Duties of the Director of ICE. Respondent Lyons is responsible for ICE's policies, practices, and procedures, including those relating to removal procedures and the detention of immigrants during their removal procedures. Respondent Lyons is a legal custodian of Petitioner. Respondent Lyons is sued in his official capacity.

20. Respondent Kelei Walker is the Deputy Field Office Director of the ERO Denver Field Office, Immigration and Customs Enforcement and Removal Operations division. As such, Ms. Walker is Petitioner's immediate custodian and is responsible for Petitioner's detention and removal. He is named in his official capacity.

21. Respondent Warden of the Denver Contract Detention Facility is who has immediate physical custody of Petitioner. Warden is sued in their official capacity.

STATEMENT OF FACTS

22. Petitioner Maikel Amador Diaz, citizen of Cuba, entered the United States at or near Eagle Pass, Texas, on or about February 1, 2022. He was served with a Notice to Appear the following day and released from ICE custody on his own recognizance on

February 6, 2022, pursuant to an ICE Form I-220A, after ICE officials at the Karnes County Family Staging Center made the determination to release Petitioner, subject to the conditions of his order of supervision. That form explicitly stated that any violation of the release conditions could result in his return to ICE custody.

23. Petitioner is the brother of a U.S. citizen, who is also acting as his sponsor for his custody and bond proceedings.

24. On June 2, 2022, Petitioner timely applied for Asylum, Withholding of Removal and CAT before the Orlando Immigration Court.

25. On July 9, 2025, the IJ granted DHS's motion to dismiss removal proceedings over Petitioner's opposition. Immediately following the dismissal of the proceedings, ICE officials detained Petitioner on the premises of the Orlando Immigration Court.

26. On July 18, 2025, Petitioner filed an appeal before the Board of Immigration Appeals. The appeal is pending, and no brief has been requested by the board.

27. Since that time, ICE has continued to detain Petitioner without setting bond or providing an opportunity for a bond hearing. Petitioner has fully complied with all terms and conditions imposed by ICE. His re-detention violates the spirit and terms of his initial release and imposes and unnecessary hardship in the absence of any changed circumstances justifying custody.

28. On February 10, 2026, the IJ declined to set a bond hearing stating: "Respondent is an applicant for admission as defined under section 235(b)(2)(A) of the

Immigration and Nationality Act (INA), 8 U.S.C. § 1225(b)(2)(A), and, under the plain language of the statute, shall be detained for a proceeding under section 240."

LEGAL FRAMEWORK

I. Overview of Relevant Constitutional Principles.

29. Congress may expand the protections granted by the Constitution through statute, but it cannot legislate away fundamental constitutional guarantees. The Fourth Amendment's protection against unreasonable seizures applies to all persons within the territory of the United States, including noncitizens. Immigration officials may not detain individuals encountered in the interior indefinitely or without probable cause; the Fourth Amendment simply does not permit it.

30. ""Longstanding precedent establishes that '[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'"[10] The law in this area is not grey. Rather, for decades, it has been "clearly established . . . that immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention."[11] The clarity of the law in this area is bolstered by the statutes proscribing its arrest authority: 8 U.S.C. § 1226(a) and 8 U.S.C. § 1357. These statutes, "[c]ourts have consistently held," "must be read in

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[10] *Morales v. Chadbourne*, 793 F.3d 208, 215 (2015) (quoting *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, (1975) (citing *Davis v. Mississippi,* 394 U.S. 721 (1969); *Terry v. Ohio,* 392 U.S. 1, 16–19, (1968)); *see also Dunaway v. New York,* 442 U.S. 200, 216 (1979) ("[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

[11] *Id* at 215.

light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause." [12] The "robust consensus of cases [and] persuasive authority" in this area makes it "beyond debate that an immigration officer . . . would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status."[13]

31. The Due Process Clause of the Fifth Amendment guarantees that no person in the United States shall be deprived of liberty without due process.[14] These substantive and procedural due process protections apply to all people, including noncitizens, regardless of their immigration status.[15] The Due Process Clause provides heightened protection against government interference with certain fundamental rights—and freedom from detention lies at the heart of the Due Process Clause's protections. For persons in the United States (even unlawfully), courts have found that noncitizens who have established a life here—albeit without authorization—possess a strong liberty interest in their freedom from detention.

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[12] *Id.* at 216-17 (citing *Au Yi Lau,* 445 F.2d at 222; *see, e.g., Tejeda–Mata v. Immigration & Naturalization Serv.,* 626 F.2d 721, 725 (9th Cir.1980) ("The phrase 'has reason to believe' [in § 1357] has been equated with the constitutional requirement of probable cause."); *United States v. Cantu,* 519 F.2d 494, 496 (7th Cir.1975) ("The words [in § 1357] of the statute 'reason to believe' are properly taken to signify probable cause."); *see also 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.").

[13] (*Id.*)

[14] U.S. Const. amend. V.

[15] *Trump v. J.G.G.*, 604 U. S. ---145 S. Ct. 1003, 1006 (2025) (*per curiam*) ("'It is well established that the Fifth Amendment entitles aliens to due process of law' in the context of removal proceedings." (quoting *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439 (1993)).

32. The Supreme Court has explained the critical distinction between those outside the U.S. and those within it when it comes to the due process required before they may be deprived of their liberty:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance. [16]

33. In *Zadvydas v. Davis*, the Supreme Court left no doubt that civil detention, including in the immigration context, requires a sufficient justification— namely preventing flight or danger to the communityy. [17] Where no such justification exists detention without due process is unconstitutional. [18]

34. At the nation's borders, however, the constitution's protections are lowered, even nonexistent for those who are not in the U.S. (including those who are at the border still under the legal fiction of parole). The history of the INA, the constitution's protections as well as the lowered protections at or near the border, are reflected in the INA's statutory scheme.

II. Congress specifically defined the terms "Application for Admission," "Admission," and "Admitted," to leave no doubt that that one who is

[16] *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001)

[17] *Id.*

[18] *Id.*

"seeking admission" must be physically outside of the United States and asking to come in."

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

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

36. Meanwhile, the related term "application for admission" (also added by IIRIRA) defined at 8 U.S.C. § 1101(a)(4), provides: "The term 'application for admission' has reference to the application for admission *into the United States* and not to the application for the issuance of an immigrant or nonimmigrant visa." [19]

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

> This definition "is limited and does not encompass a post-entry adjustment of status," because it "refers expressly to *entry into* the United States, denoting by its plain terms passage into the country from abroad at a port of entry." [20]

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[19] 8 U.S.C. § 1101(a)(4) (emphasis added).

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

38. By explicitly defining these terms, the "work" of determining their meaning and the meaning of statutes using them has been done by Congress.[21] And in so doing, courts analyzing such provisions have rejected the government's claims that an admission can happen from within the U.S.[22] This has been repeatedly affirmed by courts interpreting INA provisions containing these terms.[23]

A. Caselaw interpreting eligibility for a waiver under 8 U.S.C. § 1182(h) affirms that the definition found at § 1101(a)(13) leaves no doubt an admission requires "passage into the country from abroad at a port of entry."

39. An illustration of the fact that by defining admission the way it did Congress unambiguously defined admission to " encompasses the action of an entry into the United States, accompanied by an inspection or authorization."[24] This is illustrated by the caselaw interpreting eligibility for a waiver under 8 U.S.C. § 1182(h). Specifically, courts tasked with determining whether an alien who had adjusted their status inside the United States, (rather than being admitted as a LPR at a POE), and subsequently was convicted of an

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

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

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

[24] *Papazoglou v. Holder,* 725 F.3d 790, 792–94 (7th Cir.2013).

aggravated felony, could apply for a waiver under § 1182(h).[25] The relevant portion of the statute in those cases provided:

> No waiver shall be granted under this subsection *in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if ... since the date of such admission* the alien has been convicted of an aggravated felony…[26]

40. The Tenth Circuit, interpreting this provision, explained the consensus and clarity on this issue in *Medina Rosales v. Holder,* stating:

> Eight circuits . . . have held that this language clearly and unambiguously precludes eligibility for a waiver after conviction of an aggravated felony only if the alien received LPR status at the time the alien lawfully entered the United States, but it does not apply to an alien who obtained LPR status after having been present in the United States before acquiring that status.[27]

This interpretation is consistent with the statutory definition given to the terms admission and admitted by Congress. That being said, it has (at first blush) an illogic to it: Aliens who entered EWI or overstayed their visa then adjusted their status to that of a LPR in the U.S. are eligible for the waiver; meanwhile, aliens who waited until they had legal status to enter the U.S. are ineligible for it.[28]

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[25] *Id.*

[26] 8 U.S.C. § 1182(h) (emphasis added).

[27] *Medina-Rosales v. Holder*, 778 F.3d 1140, 1144 (10th Cir. 2015) (citing *Husic v. Holder,* 776 F.3d 59, 60–67 (2nd Cir.2015); *Stanovsek v. Holder,* 768 F.3d 515, 516, 517–19 (6th Cir.2014); *Negrete–Ramirez v. Holder,* 741 F.3d 1047, 1050–54 (9th Cir.2014); *Papazoglou v. Holder,* 725 F.3d 790, 792–94 (7th Cir.2013); *Leiba v. Holder,* 699 F.3d 346, 348–56 (4th Cir.2012); *Hanif v. Att'y Gen.,* 694 F.3d 479, 483–87 (3rd Cir.2012); *Bracamontes v. Holder,* 675 F.3d 380, 382, 384–89 (4th Cir.2012); *Lanier v. U.S. Att'y Gen.,* 631 F.3d 1363, 1365–67 (11th Cir.2011); *Martinez,* 519 F.3d at 541–46.).

[28] *See Medina-Rosales*, 778 F.3d at 1144-1146; *see also Martinez*, 519 F.3d at 544-546 (discussing the debatably absurd result of those who did everything legally by entering for the first time as a LPR and suggesting possible reasons for it, but ultimately pointing out that Congress' reasoning for the distinction is irrelevant where the text of § 1101(a)(13) and § 1182(h) are unambiguous).

41. While some courts suggested possible reasons for the distinction,[29] most courts correctly pointed out that due to the unambiguous text of § 1101(a)(13) and § 1182(h) the reasons for the distinction were irrelevant to interpreting the statutes.[30] The *Medina-Rosales* court quoting from a Sixth Circuit decision explained:

> Why would Congress distinguish between those who obtained lawful permanent resident status at the time of lawful entry and those who adjusted status later, for purposes of barring permanent residents who have committed aggravated felonies from discretionary hardship relief? Our inability to answer such a question does not, however, warrant expanding the scope of a statutory provision beyond a meaning as plainly limited as the one in question here.[31].

B. Post-IIRIRA it is the action of an entry into the United States, accompanied by an inspection or authorization which matters—not one's legal status at the time of such admission.

42. Caselaw applying the definition to other provisions has left no doubt that the single most important requirement for an "admission" post-IIRIRA is being outside of the United States and passing through a POE after inspection by an immigration officer. This is true even when the alien does not have documents giving them lawful status. Subsequent to IIRIRA the BIA and every circuit court to address the issue has concluded that "the terms 'admitted' and 'admission,' as defined in [§ 1101(a)(13)(A)], denote procedural regularity . . . rather than compliance with substantive legal requirements.'" [32] This means that an

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[29] *See e.g., Martinez*, 519 F.3d at 544-546.

[30] *See e.g., Medina-Rosales*, 778 F.3d at 1146.

[31] *Id.* at 1146.

[32] *Matter of Quilantan,* 25 I. & N. Dec. 285, 290 (BIA 2010); *see also Martinez v. Att'y Gen.,* 693 F.3d 408, 414 (3d Cir.2012); *Sum v. Holder,* 602 F.3d 1092, 1096 (9th Cir.2010); *Emokah v. Mukasey,* 523 F.3d 110, 118 (2d Cir.2008).

alien who does not have documents allowing them to enter the U.S. who is nonetheless waived through a POE by an immigration officer has been admitted.[33] Significantly, an alien waived through the POE has been admitted, and as a result, is not an applicant for admission as defined by § 1225(a)(1).[34]

43. The statutory definitions provided by Congress both by their use of the language "into the United States" and the case law applying those definitions throughout the INA where those terms appear, leave little room to dispute that the focus is on coming into the U.S. from outside at a designated POE.

III. Section 1225's real world application and purpose is to set forth the procedures for inspection of the millions of "applicants for admission" who arrive at the country's POEs every year.

44. Annually, millions of foreign nationals arrive at United States Ports of Entry (POEs)[35] seeking entry.[36] In 2022 for example, DHS granted approximately 97 million admissions into the U.S., with an estimated 45 million of those admissions being nonimmigrants who were issued an I-94.[37] The majority of these individuals present

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[33] *Id.*

[34] *Id.*

[35] The term "POE" is used throughout this brief as a short hand reference to any time or place designated by the attorney general for the admission of aliens.

[36] (*See* Ex. 1 – Annual Flow Report, U.S. Nonimmigrant Admissions: 2022, Alice Ward, Office of Homeland Security Statistics, U.S. Dept. of Homeland Security.)

[37] (*Id.*)

facially valid non-immigrant visas, such as B-1/B-2 visitor, F-1 student, or H-1B temporary worker visas.[38]

45. Upon arrival, every such individual, regardless of their documentation, is legally deemed an "applicant for admission" pursuant to INA § 1225(a)(1). This foundational statute, which governs the inspection procedures at all POEs, defines an "applicant for admission" as either "[1] An alien present in the United States who has not been admitted or [2] who arrives in the United States..." 8 U.S.C. § 1225(a)(1).

46. The inspection process mandated by INA § 1225 functions as a critical sorting mechanism, resulting in one of three primary outcomes. First, an inspecting officer may determine that the alien possesses valid, unexpired documents and is admissible, thereby admitting them into the United States.

47. Second, if the officer determines the alien is inadmissible either for seeking entry through fraud or material misrepresentation (8 U.S.C. § 1182(a)(6)(C)) or for lacking valid entry documents (8 U.S.C. § 1182(a)(7)), the alien will be subject to expedited removal (ER) pursuant to 8 U.S.C. § 1225(b)(1). Significantly, there are many grounds of inadmissibility,[39] but only aliens determined to be inadmissible under § 1182(a)(6)(C) or § 1182(a)(7) may be processed for ER.[40]

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[38] (*Id.*)

[39] *See generally* 8 U.S.C. § 1182(a).

[40] § 1225(b)(1)(A)(1).

48. In the second scenario, the alien is subject to expedited removal under INA § 1225(b)(1)(A). This is a summary process intended to be completed in a matter of hours, if not minutes. At airports and seaports, this authority is most commonly invoked not for lack of documents, but for alleged fraud or willful misrepresentation under § 1182(a)(6)(C).

49. For example, an inspecting officer may conclude that an alien arriving with a validly issued B-2 visitor visa is misrepresenting their nonimmigrant intent and secretly plans to remain permanently. Following questioning, the officer issues a Form I-860, a summary order of removal. Critically, this expedited removal order is immediate and final. The alien receives no hearing before an Immigration Judge. No appeal. And none of the procedural rights afforded in full removal proceedings under § 1229a.[41] While such aliens may claim a fear of return, triggering a separate review process, that distinct process itself does not shed light on the issues presented in this matter.[42]

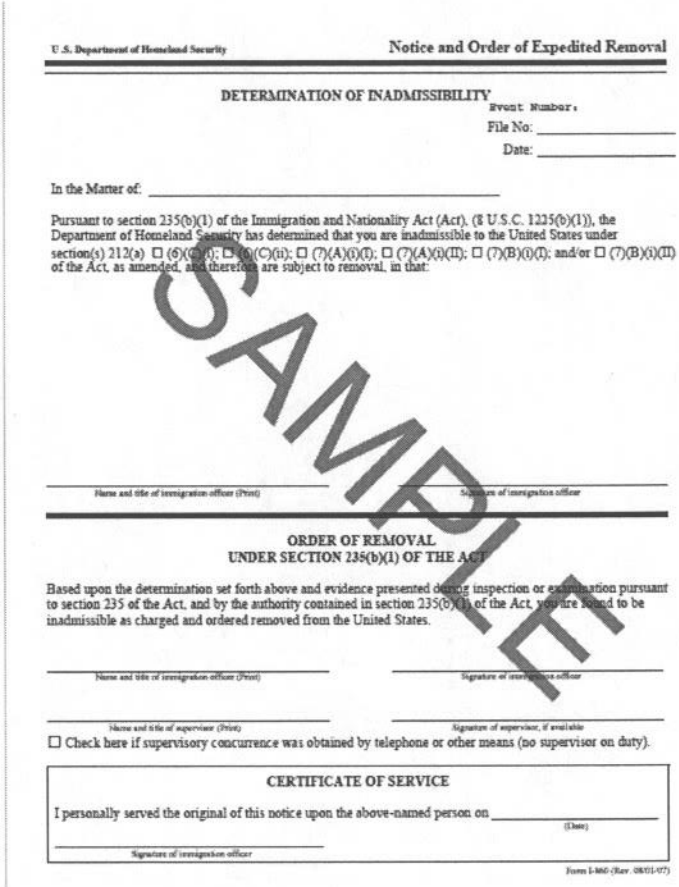
50. Significantly, once an alien is issued an ER order, the alien's subsequent removal (as well as any incidental detention) is under the custody and detention authority proscribed by 8 U.S.C. § 1231. The goal is for such removal immediately either by return

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[41] § 1225(b)(1)(C).

[42] It is, nonetheless, important to point out that Congress was careful to unambiguously state its intent that aliens placed in this fear review process through § 1225(b)(2)(B)(iii)(I), explicitly titled "Mandatory detention" proscribes exactly that: "Any alien subject to procedures under this clause shall be detained pending a final determination of credible fear of persecution, and, if found not to have such a fear, until removed. The fact that Congress went out of its way to specifically mandate detention for those in this process but never sought to provide a similarly worded provision accompanying § 1225(b)(2)(A) is consistent with both Petitioner's interpretation under the statutory terms and the plain language interpretation employed by many.

to the contiguous territory the alien arrived from or on the carrier/vessel they arrived on if by sea or land. Issued without anything resembling a hearing or process, the ER order is issued on a single page I-860, an earlier version of which can be seen below.



U.S. Department of Homeland Security

Notice and Order of Expedited Removal

DETERMINATION OF INADMISSIBILITY

Event Number:

File No: _____

Date: _____

In the Matter of: _____

Pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act), (8 U.S.C. 1225(b)(1)), the Department of Homeland Security has determined that you are inadmissible to the United States under section(s) 212(a) ☐ (6)(C)(i); ☐ (6)(C)(ii); ☐ (7)(A)(i)(I); ☐ (7)(A)(i)(II); ☐ (7)(B)(i)(I); and/or ☐ (7)(B)(i)(II) of the Act, as amended, and therefore are subject to removal, in that:

SAMPLE

_____ _____

Name and title of immigration officer (Print) Signature of immigration officer

ORDER OF REMOVAL
UNDER SECTION 235(b)(1) OF THE ACT

Based upon the determination set forth above and evidence presented during inspection or examination pursuant to section 235 of the Act, and by the authority contained in section 235(b)(1) of the Act, you are found to be inadmissible as charged and ordered removed from the United States.

_____ _____

Name and title of immigration officer (Print) Signature of immigration officer

_____ _____

Name and title of supervisor (Print) Signature of supervisor, if available

☐ Check here if supervisory concurrence was obtained by telephone or other means (no supervisor on duty).

CERTIFICATE OF SERVICE

I personally served the original of this notice upon the above-named person on _____ (Date)

_____

Signature of immigration officer

Form I-860 (Rev. 08/01/07)

51. The third category encompasses all "other aliens" specified in § 1225(b)(2)(A). These are applicants whom the inspecting officer does not believe to be admissible based on one of the grounds of inadmissibility set forth in § 1182 (other than § 1182(a)(6)(C) or § 1182(a)(7)).[43] Every one of the grounds of inadmissibility in § 1182—

[43] § 1225(b)(2)(A)

except EWI—may be applicable at the POEs, and therefore, may result in a referral to § 1229a proceedings.

52. For instance, if an inspecting officer at an airport encounters a LPR with a conviction that potentially renders them inadmissible under the criminal grounds at § 1182(a)(2), that officer lacks the authority to issue an expedited removal order.[44] Instead, the officer's sole recourse under the statute is to refer the alien for full removal proceedings before an Immigration Judge pursuant to § 1229a, where the alien will have the opportunity to be heard, contest the charges, and apply for any relief from removal which they are eligible to seek before an IJ.[45] As this statutory framework demonstrates, the procedures detailed in § 1225 are designed for, and overwhelmingly applied at, the nation's ports of entry. Just as the plurality in *Jennings v. Rodriguez*, repeatedly alluded to, § 1225(b) authorizes detention of those applicants for admission who are "seeking admission into the country"—while it is 8 U.S.C. § 1226 which authorizes detention of those "already in the country."[46]

53. In sum, far from a "detention" statute, § 1225 is the precise mechanism by which millions of applicants for admission arriving at the POEs are inspected, admitted, referred for proceedings, or summarily removed every year.

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[44] *See id.* (proscribing its application only to those applicants for admission found inadmissible pursuant to § 1182(a)(6)(C) or § 1182(a)(7)).

[45] *Id.*

[46] *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018).

IV. liens who may be ordered removed (and removed) without being placed in proceedings before an IJ under § 1229a versus those who must be placed in § 1229a proceedings first.

54. Millions of aliens present in the United States are amenable to removal from it. The reasons, laws, and proceedings, if any, available to such aliens depends on a number of circumstances. It is crucial to distinguish between those noncitizens who may only be ordered removed by an IJ through § 1229a proceedings, versus those who do not have any right to a hearing before an IJ. Not every alien who is encountered in the U.S. or at a POE who is amenable to removal is placed in § 1229a proceedings.

55. As discussed above, aliens who are subject to expedited removal under § 1225(b)(1) have no right to a hearing before an IJ or § 1229a proceedings. Similarly, aliens present in the U.S. after previously being removed are subject to reinstatement of removal, a process completed entirely by DHS officials without a hearing.[47] Another example are aliens, including conditional residents but not LPRs, who have been convicted of an aggravated felony (as defined by 8 U.S.C. § 1101(a)(43)). These aliens are subject to being ordered without any hearing before an IJ—rather, the process is initiated and completed entirely by DHS officials.[48]

56. Practically, these statutes which allow for removal orders without the alien being placed in proceedings under 8 U.S.C. § 1229a are simply a means of statutory triage. This is because generally aliens who are not entitled to be placed in § 1229a proceedings

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[47] *See* 8 U.S.C. § 1231(a)(5) (proscribing for reinstatement of removal orders for aliens found in the U.S. after being removed).

[48] 8 U.S.C. § 1228.

would not be eligible for any of the statutorily provided forms of relief from removal which may be sought before an IJ. Because most of the forms of relief that may be sought from an IJ in § 1229a proceedings require a minimum of three years presence in the U.S. and can rarely be obtained after conviction for an aggravated felony, placing such aliens in § 1229a proceedings does not have a practical purpose. Conversely, increasing efficiency in the removal proceeding process by reducing the categories of aliens entitled to such proceedings serves (at least in theory) the valuable purpose of efficiency.[49]

57. The overwhelming majority of all other aliens who are removable from the United States, however, are entitled to be placed in § 1229a proceedings before an IJ and the opportunity to seek the relief available in proceedings under 8 U.S.C. § 1229a. Aliens who may only be ordered removed after being placed in § 1229a proceedings may not be removed unless and until an order of removal from an IJ becomes final.

V. Aspects of § 1229a removal proceedings relevant to understanding the issues in this case.

A. Removal proceedings under § 1229a are *not* commenced via 8 U.S.C. § 1225 or § 1226—rather, § 1229a proceedings are only commenced when DHS files a NTA, issued in accordance with § 1229, with EOIR.

58. First, it is important to point out that once referred to full § 1229a proceedings an alien is no longer being processed, detained, or in proceedings under § 1225.[50] Rather, at the point, the alien is in proceedings under § 1229a. Second, it is well-established that

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[49] Unfortunately, EOIR's decades long commitment to working harder rather than smarter, along with its aversion to online case filing technology that has existed for longer than DHS, made any benefits to EOIR intended through IIRIRA short-lived at best. s

[50] *Matter of X-K-*, 23 I&N Dec. 731, 734-36 (BIA 2005).

removal proceedings under § 1229a are *not* commenced via 8 U.S.C. § 1225 or § 1226. Formal § 1229a proceedings are only commenced when DHS files a Notice to Appear (NTA), issued in accordance with § 1229, with EOIR.[51]

B. U.S.C. §§ 1182 and 1227 provide the two mutually exclusive statutes for charging an alien as removable.

59. Aliens may only be placed in removal proceedings if they are "removable" under one of the statutory grounds established by Congress.[52] These grounds are set forth in two distinct and mutually exclusive statutory sections: 8 U.S.C. § 1182 which provides grounds of "inadmissibility" and 8 U.S.C. § 1227 which provides grounds of "deportability" or "removability."

60. Significantly, DHS does not get to choose which statute to use. Rather, the applicable section is dictated by the alien's circumstances, primarily focusing on their location (e.g., at a port of entry vs. inside the U.S.) and the "procedural regularity" of their last entry. Though there are only two statutes with potential charges of removal, in practice, IJs and immigration practitioners typically say there are three general categories of aliens in § 1229a proceedings. These categories are listed at the top of every NTA, including Petitioner's, as seen here:

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[51] *See* 8 U.S.C. §§ 1229 and 1229a (providing the procedures for initiating § 1229a proceedings through the issuance and filing of a NTA).

[52] § 1229a(a)(2).

☐ You are an arriving alien.

☒ You are an alien present in the United States who has not been admitted or paroled.

☐ You have been admitted to the United States, but are removable for the reasons stated below.

61. A more detailed description of each of these categories is as follows:

a. **"Arriving Aliens" (Charged under § 1182):** These are noncitizens encountered at a port of entry (POE) who are seeking admission but are determined by an officer not to be "clearly and beyond doubt entitled to admission." If not required to wait outside the U.S., they may be "paroled" into the country for proceedings. This parole, however, does not constitute an admission; it maintains the legal fiction that the alien is still "at the door." Every single alien in this category is an "applicant for admission" under § 1225(a)(1).

b. **"Entered Without Inspection" Aliens (Charged under § 1182):** This category includes any alien encountered *inside* the U.S. who last entered "without inspection" (EWI), and therefore, are placed in removal proceedings under § 1182(a)(6)(A)(i). Every single alien in this category is an "applicant for admission" under § 1225(a)(1).

c. **"Admitted But Removable" Aliens (Charged under § 1227):** This group includes any alien who entered the U.S. through a POE after an inspection or authorization. This includes LPRs, those admitted on non-immigrant visas, "waive through" admissions, and even those admitted at a POE based on fraudulent documents. When these aliens are encountered in the U.S., they may *only* be placed in removal proceedings if a ground of removal under § 1227 applies to them.

62. These categories, specifically delineated at the top of every NTA, create a critical, absolute distinction: 100% of aliens in the first two categories (arriving aliens and EWI aliens) fall under the definition of "applicant for admission" and must be placed in removal proceedings under § 1182. Conversely, 100% of aliens in the last category are not "applicants for admission," and therefore, are placed in proceedings under § 1227. Simply put, an "applicant for admission" can only be charged under § 1182, and only an alien who is *not* an "applicant for admission" (i.e., one who was already lawfully admitted) can be charged under § 1227.

63. EWI aliens, (like visa overstays, student visa violators, and LPRs who commit offenses that make them removable), who are not "arriving aliens" may be encountered within the interior of the country and placed in removal proceedings in a variety of ways. Though mailing a "NTA" is one way to place them in proceedings, more often then not, ICE will arrest the alien and process them for § 1229a removal proceedings. These arrests or *Terry* stops are subject to the Fourth Amendment (as discussed above and below).

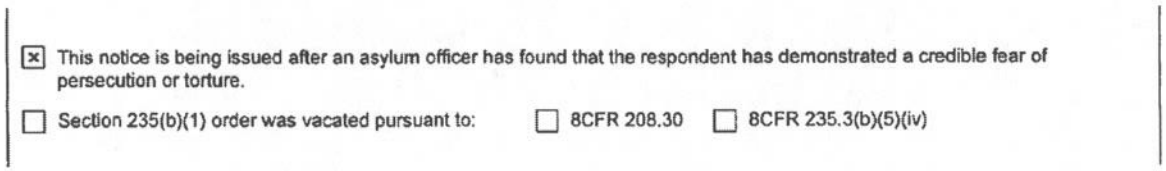
64. To this end, 8 U.S.C. § 1226(a) applies to noncitizens already in the Country and authorizes the arrest and detention of noncitizens, pursuant to a warrant for the purpose of removal proceedings under 8 U.S.C. § 1229a.[53] In accordance with the Fourth

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[53] *See id.* at *3; *Hasan v. Crawford*, No. 1:25-CV-1408 (LMB/IDD), 2025 WL 2682255, at *8 (E.D. Va. Sept. 19, 2025) ("In *Jennings*, the Court explained that § 1225(b) governs 'aliens seeking admission into the country' whereas § 1226(a) governs 'aliens already in the country' who are subject to removal proceedings.")(quoting *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018)).

Amendment and operational realities, 8 U.S.C. § 1357, provides certain officers with the authority to make an arrest under circumstances which parallel established exceptions to the Fourth Amendment's warrant requirement, but such arrests must be followed by the issuance of a warrant by an official who has been given such authority[54]

65. Before moving on to applying all the above to this case, it is important to point out that aliens are not and cannot simultaneously be in proceedings under § 1225(b) and § 1229a. In fact, when an alien who was initially processed for removal under § 1225(b)(1) is subsequently placed in § 1229a proceedings, the NTA will indicate it. Likewise, when an alien is placed in § 1229a proceedings due to a positive credible fear finding which was made after an expedited removal order had actually been issued, DHS must indicate the regulation under which the order was vacated on the NTA. The way these things appear on the NTA can be seen below.


☒ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

[54] The first two paragraphs of 8 U.S.C. §1357(a), titled "Powers without warrant" expressly provide:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant— (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; (2) to arrest *any alien who in his presence or view is entering or attempting to enter the United States* in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States

U.S.C. § 1357(a)(1)-(2)(emphasis added).

C. In removal proceedings, the significance of being an "applicant for admission" has nothing to do with bond and everything to do with the allocation of the burden of proof.

66. The rights provided to aliens in removal proceedings and the conduct of those proceedings are set forth in § 1229a. Specifically, § 1229a(c)(3) allocates the burden on the government to prove removability in cases involving "deportable" aliens (i.e. aliens charges under § 1227); meanwhile, aliens in removal proceedings under § 1182, have the burden pursuant to § 1229a(c)(2), which states.

> In the proceeding the alien has the burden of establishing—(A) if the alien is an *applicant for admission*, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or (B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission."[55]

67. It is helpful to consider (c)(2) part (A) versus (B) in context. Paragraph (A), by its very terms applies to an alien who is arriving and seeking to be admitted but is alleged to be inadmissible at the POE. Said differently, this option is plainly for those arriving aliens referred to as "other aliens" in § 1225(b)(2)(A) seeking admission who are referred for removal proceedings under § 1229a. Paragraph (B) on the other hand, by its terms contemplates the alien's physical presence in the U.S., and therefore, does not ask that they demonstrate they should be admitted; instead, these aliens would only be successful in denying they are inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) if they can demonstrate they were previously admitted. Admission, after all, cannot take place anywhere but from the outside coming in.

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[55] 8 U.S.C. § 1229a(c)(emphasis added).

D. Removal Proceedings under 8 U.S.C. § 1229(a): Bifurcated Process and Statutory Relief from Removal.

68. Removal proceedings under 8 U.S.C. § 1229a are initiated when DHS files a Notice to Appear (NTA) with EOIR. These "quasi-judicial" proceedings are bifurcated, unfolding in two distinct stages: the first determines removability as charged on the NTA and if the removability is established and the alien will be seeking relief before the IJ then it proceeds to the relief stage.

Stage 1: The Master Calendar Hearing—Determining Removability

69. The primary purpose of the first stage is to determine whether the individual, referred to as the respondent, is removable as charged in the NTA. The charge may be based on grounds of inadmissibility under 8 U.S.C. § 1182 or deportability under 8 U.S.C. § 1227.

70. Master hearings are typically conducted on high-volume dockets. The timeline between the issuance of the NTA and the initial hearing varies significantly, with detained cases being prioritized over non-detained cases, which can sometimes wait months or years for an initial appearance.

71. At the initial master hearing, an unrepresented respondent is formally advised of their rights—including the right to obtain counsel at their own expense and to examine the evidence presented by the government. The Immigration Judge (IJ) also ensures the respondent understands their responsibilities, such as reporting address changes and appearing at all future hearings. Respondents are typically granted a continuance if they wish to seek legal representation.

72. During a master hearing, the IJ will ask the respondent to plead to the factual allegations and the charge of removability listed in the NTA. In many cases, a respondent may admit to the allegations and concede the charge of removability. This concession is often a necessary procedural step to become eligible to apply for forms of relief from removal.

73. If the IJ determines that the charge of removability is not sustained, the proceedings are terminated. If the charge is sustained, either by the IJ's finding or the respondent's concession, the case progresses toward the second stage. The respondent must then identify any forms of relief from removal for which they intend to apply and demonstrate prima facie eligibility for such relief. Upon a showing of prima facie eligibility, the IJ will set deadlines for the submission of applications and evidence and schedule the case for an Individual Merits Hearing.

Stage 2: The Individual Merits Hearing—Adjudicating Relief

74. The second stage consists of an individual, or merits, hearing focused on the respondent's application for relief from removal. This is a formal evidentiary hearing where both the respondent and the government have the opportunity to present evidence, call and cross-examine witnesses, and make legal arguments regarding the respondent's eligibility for relief. Following the hearing, the Immigration Judge will issue a decision granting or denying the application and ordering removal or terminating proceedings.

75. Relief in removal proceedings that may be sought by those without status, (e.g. EWIs and overstays) include but are not limited to: Cancellation of removal for certain

non-permanent residents under 8 U.S.C. § 1229b(b)(1);[56] Special rule cancellation of removal for certain non-permanent residents under 8 U.S.C. § 1229b(b)(2) for battered spouses and children;[57] and adjustment of status.

VI. The default rule is that aliens encountered in the U.S. and placed in § 1229a removal proceedings are, at any point prior to the entry of a final order of removal, entitled to a bond hearing before an IJ unless one of the exceptions set forth in 8 C.F.R. § 1003.19(h)(2) applies.

76. Pursuant to the INA, its implementing regulations, and decades of consistent agency practice, aliens placed into full § 1229a proceedings who are not described in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) are entitled to a bond hearing before an IJ. Indeed, Section 1226(a) applies by default to all persons "pending a decision on whether the [noncitizen] is to be removed from the United States."

77. When the provisions related to inspection, expedited removal, and removal proceedings before an IJ were amended by IIRIRA, Congress clarified "the amendment of § 1226(a) simply "restate[d]" the detention authority previously found at § 1252(a) "to arrest, detain, and release on bond an alien who is not lawfully in the United States."[58] Meanwhile, the amendments did not disturb "the existing mandatory detention scheme for noncitizens arriving in the U.S. without a clear right to admission and expanded the scope

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[56] 8 U.S.C. § 1229b(b)(1)(proscribing the requirements for this relief to include 10-years continued presence in the U.S., no disqualifying offenses, proof of "exceptional and extremely unusual hardship" to a qualifying relative, and good moral character).

[57] 8 U.S.C. § 1229b(b)(2)(proscribing the requirements for relief to include 3-years continued presence in the U.S., no disqualifying offenses, they have been battered by a U.S. citizen or LPR spouse or parent, and good moral character

[58] *Id.* (citing H.R. Rep. No. 104-469, pt. 1, at 229 (1996) and H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.).

of" expedited removal to "include certain recently arrived noncitizens."[59] These amendments and the statutory scheme simply "reflected [Congress'] 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."[60]

78. Following the enactment of the IIRIRA, EOIR drafted new regulations explaining that, in general, EWI aliens, while applicants for admission, are detained for § 1229a proceedings under § 1226(a).[61] Thus, in the decades that followed, most people who entered without inspection and were placed in standard removal proceedings received bond hearings, unless their criminal history rendered them ineligible.[62]

79. This, as every agency administering the INA and immigration attorney practicing when IIRIRA was passed knows, is nothing more than the obvious conclusion from the INA's statutory scheme (post-IIRIRA), the implementing regulations, and their actual application in millions of § 1229a proceedings for decades.

VII. Decades after IIRIRA Congress further limited IJ jurisdiction to grant bond to certain aliens through the Laken Riley Act which amended

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[59] *Id.*

[60] *Id.* (citing 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) (citing *Knauff v. Shaughnessy*, 338 U.S 537 (1950)).

[61] *See id.* ("The EOIR's regulations drafted following the enactment of the IIRIRA explained this distinction.") (citing Inspection and Expedited Removal of Aliens, 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).

[62] *Id.* ("[I]n the decades since IIRIRA was enacted, DHS and the EOIR have applied § 1226(a) to the detention of individuals apprehended within the continental U.S. who entered without inspection and provided them access to release on bond.").

amended § 1226(c)(1) to add subparagraph (E) which is only applicable to aliens who are applicants for admission as defined by § 1225(a)(1).

80. For decades, (i.e. since IIRIRA was passed in 1996) two indisputable facts coexisted in immigration proceedings throughout the country: (1) Immigration Judges have been granting bond to noncitizens who were "EWI" (i.e. inadmissible under 8 U.S.C. § 1182(a)(6)(A)), and 2) All individuals who are EWI are considered an "applicant for admission" under 8 U.S.C. § 1225(a)(1). Indeed, one of the most trusted law treatises, *Kurzban*'s, has long explained:

> Although a person who enters EWI is considered an applicant for admission under [8 U.S.C. § 1225(a)(1)] and inadmissible under [8 U.S.C. § 1182(a)(6)(A)(i)], because they are not apprehended at the border, they do not fall within the definition of "arriving aliens" under 8 C.F.R. §§ 1.2, 1001.1(q). Therefore, an IJ is not precluded from conducting a bond hearing.[63]

81. Simply put, being an applicant for admission has never been understood to subject someone to mandatory detention.[64] In January 2025, Congress passed the Laken Riley Act in which it added a new subparagraph to the mandatory detention provisions of § 1226(c). This statute, as amended by the LRA to add subparagraph (E) (in its entirety), can be seen below. The version below has been altered to underline those provisions which are only applicable to aliens who are applicants for admission underlined and the LRA's amendments both underlined and italicized.

> **(c) Detention of criminal aliens (1) Custody** The Attorney General shall take into custody any alien who-- <u>(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,</u> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii),

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[63] Kurzban, Chapter 3, Admission and Removal, M-3, p. 235 (2018-19) 16th Ed.

[64] See n. 25, supra.

> (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, or *(E)(i) is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and (ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute 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.*[65]

82. As illustrated above, subparagraph (c)(1)(A), the first clause of subparagraph (c)(1)(D), and subparagraph (c)(1)(E), do not apply to anyone who is removable under 8 U.S.C. § 1227 (i.e. those who entered the United States legally after inspection by an immigration officer). Put another way, of § 1226(c)'s five subparagraphs two and a half of them are only applicable to aliens falling within 1225(a)(1)'s definition of "applicant for admission."[66]

83. The amendments made by the LRA were specific to proscribe mandatory detention of noncitizens who meet both the status requirement of subclause (i) (inadmissibility for EWI, fraud, or lack of documents; aka "applicants for admission") *and* the conduct requirement of subclause (ii) (a criminal charge, arrest, or conviction for a specified offense).[67] After signing the LRA into law, the president touted its importance,

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[65] 8 U.S.C. § 1226(c)(emphasis added).

[66] *Id.*

[67] *Id.*; *see also Vazquez v. Feeley, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *5* ("1226(c)(1)(E) (enacted by the Laken Riley Act) requires mandatory detention for people who were charged as being (1) inadmissible under § 1182(a)(6)(A)(i) (the inadmissibility ground for entry without inspection) or (a)(7) (the inadmissibility ground for lacking valid documentation to enter the U.S.) *and* who (2) have been arrested, charged with, or convicted of certain crimes not relevant here.").

stating: "It's a landmark law that we are doing today, it will save countless innocent American lives."[68]

VIII. IIRIRA's Twin Goals of Deterring Illegal Immigration and Fraud

84. IIRIRA's primary goals were to disincentivize illegal entry and fraud in immigration. But the provisions enacted to achieve this goal are unrelated to detention during INA § 1229a proceedings. The "anomaly" IIRIRA aimed to fix had nothing to do with bond. Rather, it concerned the disparate *procedural* treatment (i.e. expedited removal) of aliens arriving at a Port of Entry (POE) versus those who entered without inspection (EWI).

85. Prior to IIRIRA, aliens arriving at a POE without proper documents were subject to expedited removal under INA § 1225(b)—a summary process culminating in immediate removal without a hearing before an Immigration Judge (IJ).[69] In stark contrast, an alien who entered without inspection, even if apprehended near the border moments after entry, was, prior to IIRIRA, statutorily entitled to full removal proceedings under § 1229a. IIRIRA corrected this procedural disparity by expanding the expedited removal provisions to EWI aliens who were encountered within two years of entry and within a geographic area defined by regulation and inadmissible under INA § 1182(a)(6)(C) or § 1182(a)(7) to expedite removal just as they would have been if at a POE.[70] This "anomaly"

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[68] After signing the LRA into law, the president touted its importance, stating: "It's a landmark law that we are doing today, it will save countless innocent American lives. https://www.npr.org/2025/01/29/g-s1-45275/trump-laken-riley-act.

[69] *See generally* § 1225(b)(1).

[70] See id.

of giving aliens found a few miles from the border and hours after entering full § 1229a proceedings while those similarly situated at a POE were order removed without any hearing under the expedited removal statute was corrected by IIRIRA's expansion of expedited removal to such aliens.[71]

86. Both pre- and post- IIRIRA, aliens who are subjected to expedited removal that do not claim any fear of return are not supposed to be "detained" in custody—rather, the purpose and goal is immediate removal. Indeed, the very purpose of expedited removal is to effectuate an *immediate* removal, entirely bypassing the need for any detention or hearing. This goal of immediacy is codified in INA § 1231(c), which governs the "removal of aliens arriving at [a POE]" and mandates they "shall be removed immediately," unless impracticable. This focus on *immediacy*, not custodial detention, was the paradigm IIRIRA extended to recent EWI aliens.

87. Notably, the scope of expedited removal (its temporal and geographic limits) is explicitly subject to expansion by the Secretary through, of course, the proper notice and comment rule making process.[72] And shortly after the current administration took office it began the required process for making such a change by posting the required notice of expanding the "Designation of Aliens for Expedited Removal."[73] In stark contrast, no

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[71] See id.

[72] 8 U.S.C. § 1225(b)(1)(A)(iii)(providing the Attorney General, now Secretary of DHS, with the authority to apply expedited removal to any alien encountered up no more than two years after the entering without inspection).

[73] The first posted notice of this can be found at https://www.federalregister.gov/documents/2025/01/24/2025-01720/designating-aliens-for-expedited-removal

analogous provision exists in 8 U.S.C. § 1226 that would permit anyone—much less the Acting ICE Director or three panel members of the BIA—to unilaterally alter which categories of aliens are entitled to a bond hearing before an IJ. If it were that simple, the BIA's decision in *Hurtado* would have been a single paragraph that said DHS decided to exercise the full extent of its "mandatory detention" powers and now EWI aliens cannot get bond. That would have been much simpler than trying to explain the multitude of INA provisions rendered superfluous by the new policy or its oversight on this issue for so many years.

88. Significantly, the Government's new position is further undermined by IIRIRA's parallel goal of eradicating immigration fraud. IIRIRA enacted severe penalties for fraud, such as the permanent, non-waivable bar for falsely claiming U.S. citizenship under INA § 1182(a)(6)(C)(ii). Yet, under the Government's strained interpretation of the detention statutes, those aliens who *would* remain eligible for a bond hearing under § 1226(a) after being placed in § 1229a proceedings for *committing* fraud—such as successfully committing fraud at a POE, engaging in marriage fraud, or violating the terms of their nonimmigrant visas. It defies logic and congressional intent to suggest IIRIRA created a scheme where those who commit affirmative fraud are entitled to a bond hearing, while aliens whose sole charge is entry without inspection are subject to mandatory detention.

IX. The real deterrent to entering the country EWI established by IIRIRA were the 3-year and 10-year bars for unlawful presence.

A. IIRIRA put provisions in place to deter illegally entering as well as extended stays of unlawful presence in the U.S. by penalizing such actions through bars to becoming a LPR

89. Beyond expanding expedited removal, IIRIRA employed other significant statutory tools to deter illegal entry. Chief among these was the creation of the 3- and 10-year unlawful presence (ULP) bars found at INA § 1182(a)(9)(B). Because EWI aliens are generally ineligible to adjust status within the United States under § 1255(a), they must depart and seek admission via consular processing.[74] IIRIRA's new bars ensured that such a departure, after accruing sufficient unlawful presence, would trigger a multi-year, or even decade-long, bar to their lawful return.[75] IIRIRA did provide a waiver for these bars in the case of aliens who have either a spouse or parent that is a U.S. citizen or LPR who will suffer hardship if the alien's application for admission as a LPR is denied.[76] This, not mandatory detention, was yet another deterrent aimed at the EWI population.

B. Adjustment of status for EWI aliens under § 1255(i) provides a reprieve from the departure requirement, and therefore, ULP bars for those whom a petition was filed before April 30, 2000—a date extended twice after the passage of IIRIRA.

90. The usual rule that an EWI alien cannot adjust their status in the United States is not applicable if such alien is eligible for adjustment of status under § 1255(i).[77] This provision provides a critical reprieve to the normal requirement that such aliens must depart

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[74] 8 U.S.C. § 1255(a) (proscribing the classes of aliens who are eligible to adjust their status to LPRs in the United States and exempting those present in the U.S. after entering without inspection).

[75] § 1182(a)(9)(B)(i)(I)-(I).

[76] § 1182(a)(9)(B)(v).

[77] This is referred to in the immigration world as being "245(i) eligible."

the U.S. and then return by seeking admission through consular processing. First passed in 1994, it was amended twice after IIRIRA to extend the deadlines by which a petition must have been filed for the alien beneficiary to be eligible for adjustment under, provided their adjustment application was submitted along with a $1,000 penalty fee."[78]

91. After being amended by Legal Immigration Family Equity (LIFE) Act of 2000, § 1255(i) provides that an EWI alien "who is the beneficiary . . .of—(i) a petition for classification under § 1154 of this title that was filed with the Attorney General on or before April 30, 2001" may apply for adjustment of status.[79] This extension further provided, however, that when such EWI aliens who are the "beneficiary of a petition" "filed after January 14, 1998" the alien must also be "physically present in the United States on December 21, 2000."[80] To be clear, this last amendment literally meant EWI aliens were required to be unlawfully present in the U.S. on December 21, 2000 to receive the benefit of § 1255(i).

92. It is logically irreconcilable to argue that Congress intended to subject every EWI alien to the harsh loss of liberty that is mandatory detention, while simultaneously passing legislation *twice* to expand a benefit that not only requires their continued presence but, in its final form, legislatively conditioned that benefit on their physical (and unlawful) presence in the country *after* IIRIRA's passage.

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[78] § 1255(i).

[79] *Id.*

[80] *Id.*

93. Significantly, an alien who has an approved petition may not file an application for adjustment of status unless and until their "priority date" becomes current. Whether a visa is available for an alien's category and priority date is determined by looking at the Visa Bulletin. This November 2025 Visa Bulletin for family based petition categories subject to the cap can be seen below:[81]

FAMILY-SPONSORED PREFERENCES

First: (**F1**) Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.

Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:

A. (**F2A**) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;

B. (**F2B**) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.

Third: (**F3**) Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.

Fourth: (**F4**) Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

A. FINAL ACTION DATES FOR FAMILY-SPONSORED PREFERENCE CASES

On the chart below, the listing of a date for any class indicates that the class is oversubscribed (see paragraph 1); "C" means current, i.e., numbers are authorized for issuance to all qualified applicants; and "U" means unauthorized, i.e., numbers are not authorized for issuance. (NOTE: Numbers are authorized for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08NOV16	08NOV16	08NOV16	22NOV05	22JAN13
F2A	01FEB24	01FEB24	01FEB24	01FEB23	01FEB24
F2B	01DEC16	01DEC16	01DEC16	15DEC07	01OCT12
F3	08SEP11	08SEP11	08SEP11	01MAY01	22SEP04
F4	08JAN08	08JAN08	01NOV06	08APR01	22MAR06

[81] https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2026/visa-bulletin-for-november-2025.html

94. The added highlight to the screenshot below shows that beneficiaries of petitions filed by their U.S. citizen sibling still do not have a currently available visa. Said differently, there are EWI aliens who will be able to adjust their status under § 1255(i) once their priority date is current who have been waiting more than 24-years now for an available visa.

95. Hardly consistent with a harsh rule subjecting every EWI alien to mandatory detention for the duration of § 1229a proceedings, Congress passed legislation to alleviate the potential impacts of the ULP bars twice after the passage of IIRIRA.

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

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

97. This understanding was evident during the *Jennings* oral argument. Justice Breyer, for instance, pointed out the difficult task aliens faced regarding § 1225 due to it

being applied at the border.[82] Furthermore, there is no question the Supreme Court understood § 1226(a)—not § 1225(b)—to apply to aliens who entered without inspection (EWI) and were encountered *within* the United States (and not subject to expedited removal).

98. Indeed, the Court presented the precise question this Court is being asked to answer now to the Solicitor General more than once. For example, Justice Sotomayor asked, "Clarifying question. For an alien who is found in the United States illegally, has not been admitted, are they held under 1225(b) or are they held under 1226(a)?"[83]

99. The Solicitor General responded, "So they are held under – if they are not – if they are not detained within 100 miles of the border or within 14 days... then they are under 1226(a) and not (c).[84]

100. Seeking further clarity, Justice Sotomayor posed a hypothetical of an EWI alien stating, "I'm talking about an alien who has come into the United States illegally without being admitted who takes up residence 50 miles from the border.""[85]

101. Without hesitation, the Solicitor General confirmed: "The answer is they are held under 1226(a) and that they get a bond hearing under it - - and this is at page 156a of the appendix."[86]

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[82] (App. - Ex. 1 – Transcript of Oral Arguments in *Jennings v. Rodriguez*.)

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

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

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

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

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

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

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

105. Furthermore, the statute's implementing regulations affirm this understanding. The very first section, 8 C.F.R. § 235.1(a), states: "Generally. Application

to lawfully enter the United States shall be made in person to an immigration officer at a U.S. port-of-entry when the port is open for inspection, or as otherwise designated in this section." The subsequent regulatory sections under 8 C.F.R. § 235 *et. seq.* consistently address procedures at the point of entry. Furthermore, most the implementing regulations have to do with airports, vessels, and other things that are clearly taking place at the border.

APPLICATION OF THE RELEVANT LEGAL FRAMEWORK

I. DHS in Conjunction with the Immigration Court Take New Position Interpreting 8 U.S.C. § 1225(b)(2)(A) to Subject Every EWI NonCitizen to Mandatory Detention (i.e. Bond Hearings No Longer Provided for EWIs).

106. On July 8, 2025, ICE, "in coordination with" DOJ, announced a new policy that rejected well-established understanding of the statutory framework and reversed decades of practice.[87]

107. The new policy, entitled "Interim Guidance Regarding Detention Authority for Applicants for Admission,"[88] claims that all persons who entered the United States without inspection shall now be deemed "applicants for admission" under 8 U.S.C. § 1225, and therefore are subject to mandatory detention provision under § 1225(b)(2)(A). The "policy" ICE announced applies regardless of when a person is apprehended and affects those who have resided in the United States for months, years, and even decades.[89]

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[87] *Available at* https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-authority-for-applications-for-admission.

[88] *Id.*

[89] *Id.*

108. On September 5, 2025, the BIA issued a decision in *Matter of Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), which acted as a rubberstamp to the new DHS interpretation taken in "conjunction with" the immigration courts.[90] The decision claimed to simply be interpreting the "plain language" of 8 U.S.C. § 1225(b)(2)(A) which states,

> [I]n 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 [noncitizen] shall be detained for a proceeding under section 1229a of this title.[91]

109. The BIA's reasoning per *Hurtado* is that the plain language above means every "applicant for admission . . . shall be detained for" removal proceedings.[92] But as several district courts have already pointed out:

> the government's "interpretation of the statute (1) disregards the plain meaning of section 1225(b)(2)(A); (2) disregards the relationship between sections 1225 and 1226; (3) would render a recent amendment to section 1226(c) superfluous; and (4) is inconsistent with decades of prior statutory interpretation and practice.[93]

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[90] *Matter of Hurtado,* 29 I&N Dec. 216.

[91] § 1225(b)(2)(A) (emphasis added).

[92] *Hurtado*, 29 I&N Dec. at 219.

[93] *Lepe v. Andrews*, No. 1:25-CV-01163-KES-SKO (HC), 2025 WL 2716910, at *4 (E.D. Cal. Sept. 23, 2025) ; s*ee also*, *Lopez Benitez v. Francis*, No. 25-Civ-5937, 2025 WL 2267803 (S.D.N.Y. Aug. 8, 2025); *Martinez v. Hyde*, No. CV 25-11613-BEM, — F.Supp.3d ——, ——, 2025 WL 2084238, at *9 (D. Mass. July 24, 2025); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at *8 (D. Mass. July 7, 2025); *Vasquez Garcia v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Lopez-Campos v. Raycraft*, No. 2:25-cv-12486, — F.Supp.3d ——, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Kostak v. Trump*, No. 3:25-cv-01093-JE, Doc. 20 (W.D. La. Aug. 27, 2025); Doc. 11, *Benitez v. Noem*, No. 5:25-cv-02190 (C.D. Cal. Aug. 26, 2025); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Romero v. Hyde*, No. 25-11631-BEM, — F.Supp.3d ——, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Arrazola-Gonzalez v. Noem*, No. 5:25-cv-01789-ODW, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025); *Aguilar Maldonado v. Olson*, No. 25-cv-3142, — F.Supp.3d ——, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Dos Santos v. Noem*, No. 1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Rocha Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted* 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); Doc. 11, *Maldonado Bautista v. Santacruz*, No. 5:25-cv-01874-SSS-BFM, *13 (C.D. Cal. July 28, 2025).

II. The Statutory and Regulatory Framework of the Entire Act Demonstrates the Government's New Position is Simply Untenable Under Any One of Many Cannons of Statutory Construction

110. The government's new position hinges on a simplistic and overbroad reading of § 1225(b)(2)(A) and the definition of "applicant for admission" found in § 1225(a)(1).[94] More specifically, the government takes the definition of applicant for admission in (a)(1), and leaps to the conclusion that all such applicants for admission must be "seeking admission," and therefore, subject to detention under § 1225(b)(2)(A) regardless of when or where they are encountered.[95] This interpretation ignores the careful distinctions drawn throughout the INA and its implementing regulations.

111. As an initial matter, *Hurtado* ironically claims to read the plain language of § 1225(b)(2)(A), but as many courts have pointed out the BIA only reaches its conclusion by omitting "plain language" contradicting its interpretation. Specifically, to be subject to § 1225(b)(2)(A), the plain text requires an individual to be 1) an "applicant for admission"; 2) "seeking admission"; and 3) determined by an examining immigration officer to be "not clearly and beyond a doubt entitled to be admitted."[96] The second element of Sec. 1225(b)(2)(A)—which requires that he be *seeking admission*—is not met in the case of EWI aliens who are found miles away from the land border and years after their entry.

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

[95] *Id.*

[96] 8 U.S.C. § 1225(b)(2)(A); *see also Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *2 (D. Mass. July 24, 2025) (affirming these "several conditions must be met" for a noncitizen to be subject to mandatory detention under § 1225(b)(2)(A)).

112. As explained above, Congress left no room to dispute that an admission may only take place at a designated POE when asking to enter after inspection by an immigration officer. Accordingly, EWI aliens, like Petitioner, cannot be said to be *seeking admission* when arrested and detained in the interior well after entering. Rather, consistent with pre-IIRIRA detention provisions and decades of agency action, § 1225(b)(2) only implicates noncitizens who are "*seeking admission*" into the United States.[97]

113. The government's position not only asks the Court to ignore the definitions given to "admission" in the INA, as well as the decisions from most circuits, including the Fifth Circuit, making it clear that those definitions—requiring a very specific event at the threshold of the country—must be applied where they appear throughout the INA.[98]

114. To ignore the defined terms as well as the plain language in which they are used, which limits the application of 8 U.S.C. § 1225(b)(2) to noncitizens seeking admission into the United States, is to not give effect to the meaning of words and to make the words included in the statute superfluous.[99] It would violate the most basic of interpretive canons, which is that "'[a] statute should be construed so that effect is given to

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[97] *Id.*

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

[99] *Corley v. United States*, 556 U.S. 303, 314 (U.S. 2009).

all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....'"[100]

115. The statutory use of the present and present progressive tenses—"is an applicant for admission" "seeking admission"—excludes noncitizens apprehended in the interior, because they are no longer in the process of arriving in or seeking admission to the United States.[101] Throughout the country district courts have agreed with this plain reading, which gives effect to the meaning of each word, holding that 8 § 1225(b)(2)(A) must be read to apply only to noncitizens who are apprehended while seeking to enter the country, and that noncitizens already residing in the United States, including those who are charged with inadmissibility, continue to fall under the discretionary detention scheme in § 1226.[102]

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[100] . *Id.* (citing *Hibbs v. Winn,* 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181–186 (rev. 6th ed.2000)).

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

[102] *See Lopez Santos v. Noem*, No. 3:25-CV-01193, 2025 WL 2642278 (W.D. La. Sept. 11, 2025); *Sampiao v. Hyde*, No. 1:25-CV-11981-JEK, 2025 WL 2607924 (D. Mass. Sept. 9, 2025); *Kostak v. Trump*, No. CV 3:25-1093, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Rodriguez v. Bostock*, No. 3:25-CV-05240-TMC, 779 F. Supp. 3d 1239, 1256–59 (W.D. Wash. 2025) (granting preliminary injunction prohibiting I.J.s from denying bond to individuals apprehended in the interior based on INA § 1225(b)(2)); *see also Gomes v. Hyde*, 2025 WL 1869299 at *6-7 (D. Mass. July 7, 2025) (relying on statutory structure and Laken Riley Act amendments to § 1226 to find that recent entrant re-detained on a warrant was not subject to § 1225(b)(2)); *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *6–8 (D. Mass. July 24, 2025); *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *7 (S.D.N.Y. Aug. 13, 2025); *Rocha Rosado v. Figueroa*, 2025 WL 2337099, at *8–10 (D. Ariz. Aug. 11, 2025); *Aguilar Maldonado v. Olson*, 2025 WL 2374411, at *11–13 (D. Minn. Aug. 15, 2025); *accord Castillo Lachapel v.*

116. Further support for the overwhelming conclusion reached by courts can be found in the various statutes proscribing various arrest and detention authorities depending on the circumstances.[103]

III. The bond and detention provisions rendered superflous by the government's new interpretation

117. For decades, noncitizens in removal proceedings found in the U.S. who are not described in 8 U.S.C. § 1226(c) or 8 C.F.R. § 1003.19(h)(2) were able to request a bond hearing and obtain a bond from an IJ.[104] ***An illustration of the provisions in § 1226(c) and 1003.19(h)(2)(i) that are rendered superfluous under the government's new (incorrect) interpretation seeking to apply § 1225(b)(2)(A) to all EWIs can be seen below:

> 8 U.S.C. § 1226(c): Detention of criminal aliens (1) Custody The Attorney General shall take into custody any alien who-- ~~**(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,**~~ **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, **(D)** is ~~inadmissible under section 1182(a)(3)(B)~~ of this title or deportable under section 1227(a)(4)(B) of this title, or ~~**(E)(i)** is inadmissible under paragraph (6)(A), (6)(C), or (7) of section 1182(a) of this title; and **(ii)** is charged with, is~~

Joyce, 2025 WL 1685576, at *2 (S.D.N.Y. June 16, 2025) (parties agreed that a person who had entered without inspection and was arrested in the interior was detained under § 1226(a)).

[103] *See* 8 U.S.C. § 1226(a) and 8 U.S.C. § 1357; *see also United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("Congress, since the beginning of our Government, has granted the Executive Plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant . . .") (internal citations omitted); United States v. Cotterman, 637 F.3d 1068, 1076 (9th Cir. 2011) ("[T]here is [no] room for disagreement over the compelling underpinnings of the doctrine" exempting border searches and seizures from the Fourth Amendment's warrant requirement. "It is well established that the sovereign need not make any special showing to justify its search of persons and property at the international border."

[104] *Vazquez v. Feeley*, No. 2:25-CV-01542-RFB-EJY, 2025 WL 2676082, at *3-4 ("Until DHS and DOJ adopted the policy described below, the longstanding practice of the agencies charged with interpreting and enforcing the INA applied § 1226(a) to noncitizens like Petitioner, who entered the U.S. without inspection and were apprehended while residing in the U.S.").

~~arrested for, is convicted of, admits having committed, or admits committing acts which constitute 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.~~[105]

8 C.F.R. § 1003.19(h)(2)(i): ~~(A) Aliens in exclusion proceedings; (B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;~~ (C) Aliens described in section 237(a)(4) of the Act; (D) Aliens in removal proceedings subject to section 236(c)(1) of the Act . . .; and (E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act.

118. One need not look any further than 8 C.F.R. § 1003.19(h)(2)(iii)(B) to see that the statutory and regulatory scheme was always intended to give Immigration Judges jurisdiction to grant bond to most noncitizens falling under the definition of "applicant for admission." This is demonstrated by the fact that the regulations governing an Immigration Judge's bond jurisdiction explicitly strip the Judge of authority over "arriving aliens" which are a subset of noncitizens who fall under the definition of "applicants for admission."[106] Specifically, 8 C.F.R. § 1.2 defines an arriving alien as:

> Arriving alien *means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry*, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section [§ 1182(d)(5)] of the Act, and even after any such parole is terminated or revoked. However, an arriving alien who was paroled into the United States before April 1, 1997, or who was paroled into the United States on or after April 1, 1997, pursuant to a grant of advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the

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[105] 8 U.S.C. § 1226(c)(1)(E).

[106] 8 C.F.R. § 1003.19(h)(2)(iii)(B).

> United States, will not be treated, solely by reason of that grant of parole, as an arriving alien under section [1225(b)(1)(A)(i)] of the Act.[107]

119. If, as the government now contends, every noncitizen who is an "applicants for admission" is subject to mandatory detention for bond purposes, there would have been no need for a regulation stating immigration judges do not have jurisdiction to grant "arriving aliens" a bond. The regulations specific prohibition against bond for "arriving aliens" implicitly confirms that Immigration Judges *do* have jurisdiction over other categories of "applicants for admission," such as those like Petitioner, who were apprehended years after entry and deep in the nation's interior.[108] Petitioner is not an "arriving alien"; nor is he subject mandatory detention under § 1225. Rather, he is an alien arrested within the United States and detained under § 1226.

120. Recently, countless courts have repeatedly pointed out that under the government's new theory, the LRA is completely devoid of any meaning as every person described in § 1226(c)(1)(E)(i) was already subject to mandatory detention under the government's new interpretation of § 1225(b)(2)(A).[109] Congress, therefore, would have

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[107] 8 C.F.R. § 1.2 (emphasis added).

[108] *See Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018) (recognizing that "U.S. immigration law authorizes the Government to detain certain aliens *seeking admission into the country* under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c)") (emphasis added); *see also Lopez-Campos v. Raycraft*, 2025 WL 2496379, at *8 (E.D. Mich. Aug. 29, 2025) ("There can be no genuine dispute that Section 1226(a), and not Section 1225(b)(2)(A), applies to a noncitizen who has resided in this country for . . .years.")

[109] *See e.g., Pizarro Reyes v. Raycraft*, No. 25-CV-12546, 2025 WL 2609425, at *6–7 (E.D. Mich. Sept. 9, 2025) ("The BIA also argued that § 1225(b)(2)(A) does not render superfluous the Laken Riley Act. . . But. . . considering both §§ 1225(b)(2)(A) and 1226(c)(1)(E) mandate detention for inadmissible citizens, whether one includes additional conditions for such detention does not alter the redundant impact.").

enacted a statute that accomplished nothing. It is a foundational principle of statutory construction that courts must "give effect, if possible, to every clause and word of a statute,"[110] and must avoid interpretations that render statutory language superfluous.[111] The government's position violates this canon in the most profound way, effectively nullifying an entire act of Congress. The only logical conclusion is that Congress enacted § 1226(c)(1)(E) precisely because being EWI or an "applicant for admission" alone *does not* trigger mandatory detention.[112]

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

121. In *Matter of Hurtado,* the BIA claims that the Supreme Court's decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018) dictates this result. This claim, as one court put it, however, "is, to say the least, not without some doubt."[113] Contrary to the BIA's claims about *Jennings*, Article III courts have seemingly uniformly pointed out that *Jenning* actually said: ""U.S. immigration law authorizes the Government to detain certain aliens *seeking admission into the country* under §§ 1225(b)(1) and (b)(2) ... [and] to detain certain aliens *already in the country* pending the outcome of removal proceedings under

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[110] *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

[111] See Marx v. Gen. Revenue Corp., 568 U.S. 371, 385 (2013).

[112] Another (of many) applicable cannons of statutory construction is the principle of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—further clarifies congressional intent. Within INA § 235 itself, Congress knew precisely how to mandate detention when it intended to. For example, INA § 235(b)(1)(B)(iii)(IV), titled "Mandatory detention," explicitly states that noncitizens found *not* to have a credible fear of persecution "shall be detained" pending removal. Congress's choice to use specific mandatory language in that subsection, while omitting it for all other "applicants for admission" under § 235(a), demonstrates a clear intent not to subject all such individuals to mandatory detention.

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

§§ 1226(a) and (c)."[114] Furthermore, as discussed above and illustrated by the oral argument transcript provided in the Appendix, the *Jennings* court was operating under the belief that the application of § 1225 was at or near the border. A change in this fact completely changes the constitutional analysis. This is particularly true given the fact that when the Solicitor General was directly asked—more than once and in more than one way—what statute an alien who entered illegally who was not subject to expedited removal was detained under, he unequivocally responded § 1226(a) every time.

V. **Congress can give more rights than the constitution through statute, but it cannot lower the protections it provides—another fatal fact for the government's position.**

122. Congress may expand procedural protections through statute, but it cannot legislate away fundamental constitutional guarantees. The Fourth Amendment's protection against unreasonable seizures applies to all persons within the territory of the United States, including noncitizens. Immigration officials may not § 1225(b)(2)(A) detain individuals encountered in the interior indefinitely or without probable cause; the Fourth Amendment simply does not permit it. Likewise, the constitution's due process clause protections must be afforded to all those living in the U.S. before being deprived of their liberty.**

123. At the nation's borders, however, the constitution's protections are lowered and almost nonexistent for those who are not in the U.S. (including those who are at the border still under the legal fiction of parole). The absence of a warrant requirement in 8 U.S.C § 1225, therefore, is in line with the longstanding principle that the search and

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

seizure of persons at our country's borders are not subject to the Fourth Amendment's warrant requirement. [115]

A. The absence of a warrant requirement in § 1225(b)(2)(A) requires that the statute continues to be interpreted as limited to arriving aliens at the POE, border, or in close proximity to the border, otherwise it is unconstitutional.

124. Just as established as the border exception to the Fourth Amendment is the fact that immigration stops and arrests elsewhere are subject to the Fourth Amendment's protections. Indeed, "[l]ongstanding precedent establishes that '[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'" [116] The law in this area is not grey. Rather, since at least 2009, it has been "clearly established . . . that immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention." [117]

125. The clarity of the law in this area is bolstered by the proscriptions of 8 U.S.C. § 1357, which "[c]ourts have consistently held" the inclusion of the phrase "reason to

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[115] *See United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("Congress, since the beginning of our Government, has granted the Executive Plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant . . .") (internal citations omitted); *United States v. Cotterman*, 637 F.3d 1068, 1076 (9th Cir. 2011) ("[T]here is [no] room for disagreement over the compelling underpinnings of the doctrine" exempting border searches and seizures from the Fourth Amendment's warrant requirement. "It is well established that the sovereign need not make any special showing to justify its search of persons and property at the international border.").

[116] *Morales v. Chadbourne*, 793 F.3d 208, 215 (2015) (quoting *United States v. Brignoni–Ponce,* 422 U.S. 873, 878, (1975) (citing *Davis v. Mississippi,* 394 U.S. 721 (1969); *Terry v. Ohio,* 392 U.S. 1, 16–19, (1968)); *see also Dunaway v. New York,* 442 U.S. 200, 216 (1979) ("[D]etention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

[117] *Id* at 215.

believe" in § 1357 "must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause."[118] The "robust consensus of cases [and] persuasive authority" in this area makes it "beyond debate that an immigration officer . . . would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status."[119]

126. Despite the abundantly clear requirements of the Fourth Amendment, the government now argues that a statute with no warrant requirement (§ 1225(b)(2)(A)), historically applied at or near the border, allows DHS to arrest or detain aliens in the interior of the United States without any concern for the Fourth Amendment's protections. Such an interpretation is unconstitutional and any interpretation that would have such a result must be avoided.

127. Given the clarity of the law in this area, the point need not be belabored. That being said, it does merit pointing out that Petitioner's position—not the government's—is supported by *Dep't of Homeland Sec. v. Thuraissigiam.* Indeed, the facts of that case indicated that the alien there only made it 25-yards into the U.S. before being detained.[120]

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[118] *Id.* at 216-17 (citing *Au Yi Lau,* 445 F.2d at 222; *see, e.g., Tejeda–Mata v. Immigration & Naturalization Serv.,* 626 F.2d 721, 725 (9th Cir.1980) ("The phrase 'has reason to believe' [in § 1357] has been equated with the constitutional requirement of probable cause."); *United States v. Cantu,* 519 F.2d 494, 496 (7th Cir.1975) ("The words [in § 1357] of the statute 'reason to believe' are properly taken to signify probable cause."); *see also 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.").

[119] *Id.*

[120] *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138–39 (2020)

Its difficult to think of circumstances more illustrative of the border exception—after all the alien there was a mere 25-yards from it.

B. The deprivation of liberty in the form of detaining someone is limited to confinement for punishment related to a criminal offense, and is not permitted for civil purposes absent the only permissible significantly compelling justifications for it—namely preventing risk of flight or danger to the community.

128. The Supreme Court has explained the critical distinction between those outside the U.S. and those within it when it comes to the due process required before they may be deprived of their liberty:

> The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. Indeed, this Court has held that the Due Process Clause protects an alien subject to a final order of deportation, though the nature of that protection may vary depending upon status and circumstance. [121]

129. Moreover, *Zadyvdas* left no doubt that civil detention, including in the immigration context, requires a sufficient justification—namely preventing flight or danger to the community. [122] Where no such justification exists detention without due process is unconstitutional. [123]

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[121] *Zadvydas v. Davis*, 533 U.S. 678, 693–94 (2001)

[122] *Id.*

[123] *Id.*

130. Here, the notion that Petitioner, who is not a flight risk or danger to anyone may be held without a bond hearing to determine if there is a special justification for such detention is contrary to the due process everyone was once afforded in this country.

131. Before moving on, it is important to point out that the actual mandatory detention provisions, § 1226(c), § 1231, and 8 C.F.R. § 1003.19(h)(ii), are simply a codification of circumstances typically believed to be indicative of flight risk or danger to the community. Whether it be as a result of having no ties in the U.S. for arriving aliens, or a criminal conviction indicative of danger, these detention provisions all are rooted in flight risk and danger, which are the only two justifications for depriving one of their liberty.

VI. DHS has consistently treated Petitioner as though they are subject to § 1226, and therefore, have created a liberty interest that cannot be abrogated by the government unilaterally deciding to "switch tracks."

132. Significantly, every DHS created, authored, and signed document issued in conjunction with Petitioner's encounter with DHS explicitly cited § 1226 for authority; meanwhile, § 1225 is not referenced anywhere in any of those documents. Nonetheless, the government now attempts to switch Petitioner's detention to being under § 1225. This attempted switch is not new to this case. Indeed, it seems to be an argument attempted by the government—and rejected by courts—from coast to coast.[124]

133. Courts faced with such arguments from the government in cases where DHS had previously consistently treated the alien as being subject to § 1226 have rejected this

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[124] *See e.g. Salcedo Aceros v. Kaiser*, No. 25-CV-06924-EMC (EMC), 2025 WL 2637503 (N.D. Cal. Sept. 12, 2025); *Patel v. Crowley,* No. 25 C 11180, 2025 WL 2996787, at *6 (N.D. Ill. Oct. 24, 2025); *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *5 (S.D.N.Y. Aug. 13, 2025).

purported switching. In so doing, courts have explained that "settled law precludes the Government from now switching gears to contend that he has actually been detained under Section 1225(b)(2)."[125] In this context, courts have also found DHS' prior treatment of an alien as though they are subject to § 1226 has resulted in concluding such an alien "enjoys a liberty interest under § 1226(a) and the procedural protections thereunder that cannot be unilaterally abrogated without process by the Government simply "switching tracks."[126]

VII. Even if *Hurtado* were decided correctly (which it was not), it still would be unlawful to detain Petitioner under the new interpretation as it constitutes an expansion amounting to a new rule which cannot be applied retroactively under longstanding Supreme Court precedent.

134. The United States Constitution's Ex Post Facto Clause and the judicial presumption against statutory retroactivity form a bedrock principle of American jurisprudence. This principle is animated by what the Supreme Court has termed the "familiar considerations of fair notice, reasonable reliance, and settled expectations."[127] In the immigration context, where the stakes of deportation are immense, the Supreme Court has been particularly vigilant in guarding against the retroactive application of laws that alter the legal consequences of past actions.

135. In *INS v. St. Cyr*, the Supreme Court held that the repeal of a form of discretionary relief from deportation could not be applied retroactively to individuals who

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[125] *Patel v. Crowley,* No. 25 C 11180, 2025 WL 2996787, at *6 (N.D. Ill. Oct. 24, 2025).

[126] *Salcedo Aceros v. Kaiser*, No. 25-CV-06924-EMC (EMC), 2025 WL 2637503, at *7–8 (N.D. Cal. Sept. 12, 2025) (cleaned up).

[127] *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

had pleaded guilty to criminal offenses at a time when that relief was available.[128] The Court emphasized that "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[129]

136. Similarly, in *Vartelas v. Holder*, the Court found that an amendment to the INA that broadened the definition of who is "seeking admission"—thereby subjecting certain returning lawful permanent residents to new grounds of inadmissibility—could not be applied to an individual whose conviction predated the statutory change.[130] The Court reasoned that to do so would "attach a new disability, in respect to transactions or considerations already past."[131]

137. This principle against retroactivity extends not only to statutory amendments but also to new judicial interpretations of existing law that dramatically shift the legal landscape. The United States Court of Appeals for the Fifth Circuit, in *Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019), addressed the retroactive application of the BIA's decision in *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) which significantly expanded the scope of what constitutes a "crime involving moral turpitude" (CIMT). The Fifth Circuit held that applying this new, broader definition to conduct that occurred before the decision was issued would be impermissibly retroactive because it would upend the

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[128] *St. Cyr*, 533 U.S. at 325.

[129] *Id.* at 321.

[130] *See generally Vartelas*, 566 U.S. 257.

[131] *Id.* at 266 (internal quotation marks omitted).

"settled expectations" of individuals concerning the immigration consequences of their actions.[132] The court conducted a balancing test, weighing the "ills of retroactivity against the disadvantages of prospectivity" and found that the frustration of the parties' expectations outweighed any benefit of retroactive application.[133]

138. This consistent and robust body of case law establishes a clear rule: new statutory provisions or judicial interpretations that impose new, adverse immigration consequences for past conduct cannot be applied retroactively. Accordingly, even if the government's new interpretation were correct, its detention of Petitioner based on an Ex Post Facto rule change is nonetheless unlawful under the Constitution.

VIII. Irreparable Harm

139. Continued unlawful detention is, by its very nature, an irreparable injury.[134] The Supreme Court has affirmed that "[f]reedom from imprisonment...lies at the heart of the liberty" protected by the Due Process Clause.[135] "Where, as here, the 'alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary'."[136]

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[132] *Id.* at 430-31.

[133] *Id.* (quoting *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998)).

[134] *Phan*, 2025 WL 1993735, at *5 ("Further, '[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

[135] *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

[136] *Phan*, 2025 WL 1993735, at *5 (citing *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005) (quoting Wright, Miller, & Kane, Federal Practice and Procedure, § 2948.1 (2d ed. 2004)).

140. Everyday Petitioner is detained in ICE custody in direct contravention of the statute and U.S. constitution he suffers irreparable harm. The complete sudden loss of one's freedom and liberty takes a significant toll on anyone in Petitioner's circumstances.

141. Recently, many aliens in ICE custody of suffered the ultimate irreparable harm of death while in ICE custody. On May 14, 2025, in an oversight hearing before the House Appropriations Committee, Todd Lyons, acting director of Immigration and Customs Enforcement, testified that 9 people have died in ICE custody since January 20, 2025.[137] A month after this testimony, on June 23, 2025, a 49-year old Canadian citizen died in ICE custody.[138] Reports of overcrowding, individuals being detained at facilities that are meant for processing and not set up for detention beyond a few hours are increasing, and other inhumane detention practices continue to rise. The risk of death, emotional trauma, and/or other irreparable harm coming to Petitioner is, tragically, all too real a possibility.

142. Meanwhile, there will be ZERO harm to Respondents if Petitioner is immediately released from ICE custody, or at a minimum, granted the bond hearing she is entitled to by statute.

143. There are no administrative remedies to exhaust that would not be futile. DHS and the immigration courts have repeatedly indicated that DHS' novel position is now the formal position taken in a precedential decision by the BIA. Accordingly, IJs believe

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[137] This testimony can be found at the following link: https://www.youtube.com/watch?v=QvoURiaxBmA.

[138] The ICE press release on this death can be found at the following link: https://www.ice.gov/news/releases/canadian-national-ice-custody-passes-away

they are bound by the BIA's decision and will not grant bond to EWI noncitizens—no matter how long they've lived here and no matter how squeaky clean they have lived their lives in this Country.

IX. Procedural Due Process Violation Under Mathews

144. Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.[139] Petitioner received no such opportunity and/or no such opportunity is available through the immigration courts at this time as a result of DHS' position and *Hurtado*.

145. To determine whether government conduct violates procedural due process, the Court weighs three factors in *Mathews* for courts to weigh: (1) the private interest affected by the government action; (2) the risk that current procedures will cause an erroneous deprivation of the private interest, and the extent to which that risk could be reduced by additional safeguards; and (3) the government's interest in maintaining the current procedures.[140]

A. Private Interest

146. Petitioner's private interest is the right to be free from government detention. Being free from physical detention by the government is at the core of due process protection, and "is the most elemental of liberty interests."[141] In our country,

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[139] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[140] *Id.* at 335.

[141] *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

"liberty is the norm, and detention without trial "is the carefully limited exception."[142] Petitioner's interest in being free from government detention is magnified by the fact that he has a family who loves and depends on him.

147. Further, detention at a remote detention center miles away from Ochopee, Florida, and with limited visiting hours makes it unnecessarily difficult for his family to see him. And, even when they do, they are separated by a glass barrier that prevents them from touching and hugging one another. While detained, Petitioner is unable to financially provide for his family members, who are now suffering financial difficulties.

148. Though Petitioner should have been able to reunite with his family after a bond hearing before an IJ, such hearing is not available to him without federal court intervention.

149. The private interest here is fundamental: freedom from detention. It weighs heavily in the consideration of the *Mathews* factors.

B. Risk of Erroneous Deprivation

150. The second factor—the risk of erroneous deprivation of Petitioner's liberty—is likewise substantial. The government's sudden about face in the way it interpreted § 1225(b)(2)(A) prevents Petitioner from having a bond hearing at all—much less a fair one. This is particularly true when there is significant evidence that this new position was reached by DHS, the "prosecuting agency" in conjunction with "EOIR" the agency that is supposed to be providing neutral adjudication of the noncitizens proceedings. "Such a rule

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[142] *Id.*

[and process] is anomalous in our legal system," and it represents a basic conflict that has been disapproved of in this context and others.[143] When procedural protections are almost non-existent, it markedly increases the risk of erroneous deprivation of Petitioner's liberty interests.[144]

151. The erroneous deprivation of Petitioner's likely is particularly likely here where the government has categorically foreclosed any individualized determination of flight risk or danger based solely on Petitioner's manner of entry, without regard to his personal circumstances, equities, or statutory eligibility for release under 8 U.S.C. § 1226(a). Under Respondents' current position, no neutral adjudicator is permitted to assess whether detention is justified in this case; instead, detention is automatic, mandatory, and conclusively presumed. This creates an unacceptably high risk of error because it replaces the individualized fact-finding historically required in civil detention cases with a blanket rule that assumes detention is necessary in every case, regardless of evidence to the contrary.

152. That risk is compounded here because the agency responsible for prosecuting Petitioner's removal proceedings is the same agency that unilaterally reinterpreted the detention statute to eliminate bond hearings altogether, while the immigration courts—bound by the BIA's decision in *Matter of Hurtado*—believe they lack jurisdiction to correct

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[143] *Günaydın*, 2025 WL 1459154, at *8; *see also Marcello v. Bonds*, 349 U.S. 302, 305–06, 75 S. Ct. 757 (1955) (holding that officer adjudicating immigration case cannot undertake prosecutorial role in the same matter).

[144] *See Black v. Dir. Thomas Decker*, 103 F.4th 133, 152 (2d Cir. 2024).

that error. As a result, there is no meaningful opportunity at any stage of the administrative process to challenge the factual or legal basis for Petitioner's detention. Without access to an IJ empowered to weigh evidence, test the government's assurances, or consider less restrictive alternatives to detention, the risk that Petitioner is being unlawfully deprived of his liberty is not merely theoretical—it is inevitable.

153. Additional procedural safeguards, namely a prompt bond hearing before a neutral IJ pursuant to 8 U.S.C. § 1226(a), would substantially reduce that risk by ensuring that detention is imposed only where the government can demonstrate that it is necessary to serve a legitimate regulatory purpose, rather than as the result of a categorical rule untethered from individualized facts.

C. Government Interest

154. The government has no valid interest in depriving Petitioner of a bond hearing. The government's interest is supposed to be in upholding the Constitution and laws, both of which are plainly violated by its recent actions and continued unlawful detention of Petitioner. Depriving anyone of their liberty is a serious thing that should only be done as punishment or when necessary to prevent flight or danger to the community.

155. To balance liberty interests against interests in assuring appearance and safety, the INA explicitly provides bond hearings for noncitizens who are not described in § 1226(c) or 8 C.F.R. § 1003.19(h). The government, however, wants to detain everyone

without any regard to whether they are a danger or a flight risk.[145] On balance, the private interests affected and the risk of erroneous deprivation under the current procedures greatly outweigh the government's interest in detaining anyone they want regardless of whether it is necessary or lawful. Petitioner's arbitrary detention without a bond hearing by a neutral adjudicator violates Petitioner's substantive due process rights as guaranteed by the Fifth Amendment.

CLAIMS FOR RELIEF

COUNT I: VIOLATION OF THE INA

156. Petitioner incorporates by reference the allegations of fact set forth in the preceding paragraphs.

157. The mandatory detention provision at 8 U.S.C. § 1225(b)(2) does not apply to all noncitizens residing in the United States who are subject to the grounds of inadmissibility. As relevant here, it does not apply to those who previously entered the country and have been residing in the United States prior to being apprehended and placed in removal proceedings by Respondents. Such noncitizens are detained under § 1226(a), unless they are subject to § 1225(b)(1), § 1226(c), § 1231, or 8 C.F.R. § 1003.19(h).

158. The continued detention of Petitioner, who is not described in § 1226(c) or § 1003.19(h)(2), without a bond hearing before an IJ on the purported basis of being detained

[145] *Jacinto v. Trump*, 2025 WL 2402271, at *4 ("The governmental interest in the continued detention of these least-dangerous individuals, in contravention of the order of a neutral fact-finder, does not outweigh the liberty interest at stake.").

under § 1225(b)(2)(A), violates the INA as well as the U.S. Constitution. Accordingly, it is unlawful.

COUNT II: VIOLATION OF DUE PROCESS

159. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

160. 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."[146]

161. Petitioner has a fundamental interest in liberty and being free from official restraint.

162. The government's detention of Petitioner without a bond redetermination hearing to determine whether she is a flight risk or danger to others violates her right to due process.

COUNT III: ICE'S VIOLATION OF ITS OWN REGULATIONS & STATUTORY VIOLATION

163. Petitioner re-alleges and incorporates by reference all the foregoing paragraphs above.

164. Petitioner's continued detention by Respondents without a bond hearing pursuant to the process set forth by 8 U.S.C. § 1226 or 8 C.F.R. § 1003.19 is unlawful as ICE and EOIR failed to adhere to the law and mandatory process. As here, "'where an

[146] *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

immigration regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute ... and [ICE] fails to adhere to it, the challenged [action] is invalid.'"[147] Petitioner's detention is unlawful and his immediate release is appropriate.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant the following relief:

a. Assume jurisdiction over this matter and issue a writ of habeas corpus requiring that Respondents release Petitioner Immediately, or provide Petitioner with a bond hearing before a neutral IJ pursuant to 8 U.S.C. § 1226(a) within three days;

b. Issue an Order to Show Cause ordering Respondents to show cause why this Petition should not be granted within three days;

c. Declaratory judgment pursuant to 28 U.S.C. § 2201, declaring that EWI noncitizens encountered in the interior long after their entry who are placed in removal proceedings and are not described in § 1226(c) or 8 C.F.R. § 1003.19(h)(2), are entitled to a bond hearing before a neutral adjudicator;

d. Award Petitioner attorney's fees and costs under the Equal Access to Justice Act ("EAJA"); and

e. Grant any other and further relief that this Court deems just and proper.

RESPECTFULLY SUBMITTED,

/s/ Dan Gividen

Dan Gividen
Texas State Bar No. 24075434
18208 Preston Rd., Ste. D9-284
Dallas, TX 75252
972-256-8641
Dan@GividenLaw.com

[147] *Nguyen v. Hyde*, 2025 WL 1725791, at *5 (quoting *Rombot v. Souza*, 296 F. Supp. 3d 383, 388 (D. Mass. 2017)); *see also Zadvydas,* 533 U.S. at 690 ("The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]" any "person ... of ... liberty ... without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.").