

No.

In the Supreme Court of the United States

PHILIP L. RHONEY, ACTING FIELD OFFICE DIRECTOR,
BUFFALO FIELD OFFICE, U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, PETITIONER

v.

RICARDO APARECIDO BARBOSA DA CUNHA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 8 U.S.C. 1225(b)(2)(A) mandates the detention pending removal proceedings of aliens who, like respondent, are present in the United States without having been admitted.

PARTIES TO THE PROCEEDING

Petitioner (respondent-appellant below) is Philip L. Rhoney, Acting Field Office Director of the Buffalo Field Office of U.S. Immigration and Customs Enforcement.*

Respondent (petitioner-appellee below) is Ricardo Aparecido Barbosa da Cunha.

RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

Barbosa da Cunha v. Freden, No. 25-cv-6532 (Nov. 25, 2025)

United States Court of Appeals (2d Cir.):

Barbosa da Cunha v. Freden, No. 25-3141 (Apr. 28, 2026)

* Acting Field Office Director Rhoney is automatically substituted for his predecessor. See Sup. Ct. R. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-68a) is reported at 175 F.4th 61. The decision and order of the district court (App., *infra*, 69a-85a) is available at 2025 WL 3280575.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this petition. App., *infra*, 86a-102a.

INTRODUCTION

In the decision below, the Second Circuit determined that 8 U.S.C. 1225(b)(2)(A), which mandates the detention without bond hearings of certain aliens while their removal proceedings unfold, does not apply to aliens who are present in the United States for some time after having entered the country unlawfully. The Second Circuit's decision conflicts with decisions of the Fifth and Eighth Circuits, both of which have held that aliens present without admission are subject to Section 1225(b)(2)(A)'s detention mandate. In *Raycraft v. Lopez-Campos*, petition for cert. pending, No. 25-1415 (filed June 22, 2026), the government filed a petition for a writ of certiorari asking this Court to resolve that conflict. The Court should hold the petition in this case pending the resolution of the petition in *Lopez-Campos* and then dispose of this petition as appropriate.

STATEMENT

A. Legal Background

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the removal of certain classes of aliens from the United States. See 8 U.S.C. 1182, 1227. Various provisions of the INA further authorize the detention of certain aliens pending their removal proceedings. See, *e.g.*, 8 U.S.C. 1225, 1226. This case concerns several INA provisions addressing removal and detention that were enacted in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

1. Before 1996, the applicable procedures for detaining and expelling an alien under the INA depended largely on whether the alien had physically “entered” the United States, regardless of whether that entry had been lawful. “[E]xpelling an alien who had already en-

tered required a *deportation* proceeding.” *Jama v. ICE*, 543 U.S. 335, 349 (2005). Aliens in deportation proceedings could be released on bond while those proceedings unfolded. 8 U.S.C. 1252(a)(1) (1994).

By contrast, expelling an alien seeking to physically enter the United States “could be achieved through the more summary exclusion proceeding.” *Jama*, 543 U.S. at 349. The INA mandated that all such aliens arriving at a port of entry—except those “clearly and beyond a doubt entitled” to enter—“shall be detained” for further inquiry, unless they were granted parole. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 422(a), 110 Stat. 1271; 8 U.S.C. 1225(b) (1994); see 8 U.S.C. 1182(d)(5)(A) (1994).

Under that physical-entry-based regime, aliens who managed to evade detection and physically “enter” the United States illegally were subject to deportation proceedings and eligible for bond. 8 U.S.C. 1252(a)(1) (1994). Conversely, aliens who presented themselves for inspection at a port of entry on American soil were deemed not to have “entered” the United States. See *Leng May Ma v. Barber*, 357 U.S. 185, 188-190 (1958). Those aliens therefore were subject to exclusion proceedings, and to mandatory detention during such proceedings. See 8 U.S.C. 1225(a) and (b) (1994). Thus, aliens who illegally “entered the United States without inspection gain[ed] equities and privileges in immigration proceedings that [we]re not available to aliens who present[ed] themselves for inspection at a port of entry.” H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 225 (1996) (House Report).

2. In IIRIRA, Congress acted to correct that disparity. Congress replaced the defined term “entry” with the term “admission,” which it defined as “the *lawful*

entry of the alien into the United States after inspection and authorization by an immigration officer.” IIRIRA § 301(a), 110 Stat. 3009-575 (8 U.S.C. 1101(a)(13)(A)) (emphasis added). Members of Congress described the significance of that change as follows: Instead of making physical entry into the United States the touchstone of an alien’s status, the “pivotal factor” became “whether or not the alien has been *lawfully* admitted.” House Report 225 (emphasis added).

IIRIRA also eliminated the prior distinction between “deportation” and “exclusion” proceedings, consolidating both sets of hearings into “removal proceedings.” § 304(a)(3), 110 Stat. 3009-589 (8 U.S.C. 1229a) (capitalization omitted); see *Jama*, 543 U.S. at 349. Now, in removal proceedings, the burden of proof depends on whether the alien has been lawfully admitted. An alien who is an “applicant for admission” must establish that he is “clearly and beyond doubt entitled to be admitted” and “not inadmissible.” 8 U.S.C. 1229a(c)(2)(A). By contrast, the government bears “the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable.” 8 U.S.C. 1229a(c)(3)(A).

3. In 8 U.S.C. 1225 and 1226, Congress fleshed out the details of its revised removal and detention scheme.

Section 1225. Section 1225(a) codifies Congress’s decision to make lawful admission, not physical entry, the touchstone for an alien’s status. See IIRIRA § 302(a), 110 Stat. 3009-579 to 3009-580 (8 U.S.C. 1225(a)). Specifically:

- **Section 1225(a)(1)**, titled “Aliens treated as applicants for admission,” provides that “[a]n alien present in the United States who has not been admitted or who arrives in the United States * * *

shall be deemed for purposes of this chapter an applicant for admission.” 8 U.S.C. 1225(a)(1).

- **Section 1225(a)(3)** adds that “[a]ll aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.” 8 U.S.C. 1225(a)(3). That inspection is to determine whether the alien may be “admitted” to the country or instead must be referred to immigration proceedings.

Section 1225(b) sets out procedures for removing aliens who have not been admitted, and mandates that aliens be detained during those proceedings. See IIRIRA § 302(b), 110 Stat. 3009-580 to 3009-583 (8 U.S.C. 1225(b)). Specifically:

- **Section 1225(b)(1)** creates an “expedited removal” process “for certain ‘applicants for admission.’” *DHS v. Thuraissigiam*, 591 U.S. 103, 108-109 (2020). Those procedures apply to certain inadmissible aliens who are (1) “arriving in the United States,” or (2) as designated by the Secretary of Homeland Security, have not “been admitted or paroled into the United States” and have not shown that they have been “physically present in the United States continuously” for two years prior to the date of the inadmissibility determination. 8 U.S.C. 1225(b)(1)(A)(i)-(iii).
- **Section 1225(b)(2)**, titled “Inspection of other aliens,” supplies the removal and detention procedures relevant here. 8 U.S.C. 1225(b)(2). Subject to certain narrow exceptions not applicable here, Section 1225(b)(2)(A) provides that: “in the case

of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for” a removal proceeding under Section 1229a. 8 U.S.C. 1225(b)(2)(A). Though Section 1225(b)(2)(A) speaks in mandatory language, the Department of Homeland Security (DHS) has the discretion to release “any alien applying for admission to the United States” on parole, albeit “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. 1182(d)(5)(A).

Section 1226. Section 1226 addresses the arrest and detention of aliens more generally, without limitation to applicants for admission. Unlike Section 1225, detention under Section 1226 is discretionary for many aliens; only certain classes of criminal aliens are subject to mandatory detention under Section 1226. Specifically:

- **Section 1226(a)** authorizes the arrest and detention of aliens “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. 1226(a). Such detention is discretionary; the government “may continue to detain the arrested alien” or “may release the alien” on “bond” or “conditional parole.” 8 U.S.C. 1226(a)(1) and (2). By regulation, the alien is entitled to a “custody redetermination” (a bond hearing) before an immigration judge, which can be appealed to the Board of Immigration Appeals. 8 C.F.R. 236.1(d), 1003.19, 1236.1(d)(1).
- **Section 1226(c)** mandates detention for certain criminal aliens. In IIRIRA, Congress required the

detention of any alien who is inadmissible or deportable because he (1) committed certain covered offenses, or (2) engaged in terrorism-related activities. § 303(a), 110 Stat. 3009-585 to 3009-586; see *Nielsen v. Preap*, 586 U.S. 392, 398-399 (2019). Recently, Congress amended Section 1226(c) to require the detention of additional categories of criminal aliens. See Laken Riley Act, Pub. L. No. 119-1, § 2, 139 Stat. 3 (8 U.S.C. 1226(c)(1)(E)). Section 1226(c) prohibits the release of covered criminal aliens except for narrow, witness-protection purposes. 8 U.S.C. 1226(c)(4).

4. After IIRIRA was enacted, the government continued to treat aliens who were present in the United States without having been admitted as eligible for bond hearings—just as they had been before IIRIRA’s comprehensive immigration reforms. See 8 U.S.C. 1252(a)(1) (1994). The preamble to interim rules promulgated in 1997 announced: “Despite being applicants for admission, aliens who are present without having been admitted or paroled * * * will be eligible for bond and bond redetermination.” 62 Fed. Reg. 10,312, 10,323 (Mar. 6, 1997). The preamble did not explain why Section 1225(b)(2)(A)’s new mandatory-detention regime did not apply to such aliens, whom the government recognized were “applicants for admission.” *Ibid.*

The regulations then contradicted that preamble, stating that Section 1225(b)(2)(A) *did* apply to certain aliens who were physically present in the United States after an unlawful entry. See 8 C.F.R. 235.3(b)(1)(ii). Even so, the government continued to grant bond hearings to aliens present without admission.

In July 2025, DHS revisited the issue and determined that its prior approach was inconsistent with the

INA’s text. See Todd M. Lyons, Acting Director of U.S. Immigration and Customs Enforcement, *Interim Guidance Regarding Detention Authority for Applicants for Admission* (July 8, 2025). DHS concluded that “applicants for admission” are “subject to detention under [Section 1225(b)] and may not be released from ICE custody” except by “parole” under Section 1182(d)(5). *Ibid.* (emphasis omitted). As a result, except for aliens subject to Section 1226(c), the “only aliens eligible for a custody determination and release on recognizance, bond, or other conditions under [Section 1226(a)] are aliens admitted to the United States and chargeable with deportability under [Section 1227].” *Ibid.* (emphasis omitted). The Board of Immigration Appeals reached the same conclusion in a published opinion. *In re Yajure Hurtado*, 29 I. & N. Dec. 216 (2025).

B. Factual And Procedural Background

1. Respondent is a native and citizen of Brazil who entered the United States illegally around 2004 or 2005 and has remained in the country since then. App., *infra*, 7a. In September 2025, ICE officers encountered respondent at a traffic stop in Norwood, Massachusetts, determined that he had entered the country without inspection or admission, and took respondent into custody. *Id.* at 7a, 73a. DHS officers initiated removal proceedings against respondent, charging him with being inadmissible under 8 U.S.C. 1182(a)(6)(A)(i), for being present in the United States without being admitted or paroled, and being inadmissible under 8 U.S.C. 1182(a)(7)(A)(i)(I), for not possessing valid immigration documents. App., *infra*, 8a.

DHS determined that respondent must be detained for the duration of his removal proceedings pursuant to Section 1225(b)(2)(A)’s detention mandate. Respondent

requested a bond hearing, which the immigration judge denied on the grounds that respondent was subject to mandatory detention without the possibility of bond under Section 1225(b)(2)(A). See App., *infra*, 8a.

2. Since the government implemented its revised interpretation of Section 1225(b)(2)(A), thousands of aliens who are present in the country without having been admitted have filed petitions for habeas corpus seeking release from detention or a bond hearing under 8 U.S.C. 1226(a). Respondent is among that group. See App., *infra*, 70a. The day he was detained, he filed a habeas petition alleging that his detention without a bond hearing violated the INA and the Fifth Amendment's Due Process Clause. *Ibid.* Although respondent initially filed his habeas petition in the United States District Court for the District of Massachusetts, his case was transferred to the United States District Court for the Western District of New York on the stipulation of the parties after respondent was moved to an immigration detention facility in Buffalo, New York. *Ibid.*

The Western District of New York district court granted respondent's habeas petition. App., *infra*, 69a-85a. The court held that Section 1225(b)(2)(A) does not apply to respondent, and that instead his detention is governed by Section 1226(a), which permits release on bond or conditional parole while an alien's removal proceedings unfold. *Id.* at 84a. In particular, the court determined that the phrase "seeking admission" in Section 1225(b)(2)(A) "involves active efforts to obtain 'admission,'" thus limiting the provision to aliens actively trying to obtain lawful entry after inspection by an immigration official. *Id.* at 79a. In the court's view, this interpretation was necessary to avoid rendering language in Section 1225(b)(2)(A) superfluous. *Id.* at 80a.

Because the court ruled for respondent on his statutory claim, it declined to reach his alternative argument that detention under Section 1225(b)(2)(A) would violate his due-process rights. *Id.* at 84a.

The district court ordered the government to hold a bond hearing within ten days of its initial text order granting respondent’s habeas petition. App., *infra*, 84a. A bond hearing was held on October 28, 2025, and respondent was released on bond the next day. *Id.* at 84a-85a. The government then appealed.

3. The court of appeals affirmed. App., *infra*, 1a-68a. The court concluded that Section 1225(b)(2)(A)’s detention mandate covers only “those noncitizens who present themselves at a port of entry for admission, or who cross the physical border into the United States but are apprehended at the ‘threshold of initial entry.’” *Id.* at 17a (citation omitted); see *id.* at 7a (interpreting Section 1225(b)(2)(A) to cover “noncitizens who are apprehended for removal proceedings while entering the country or shortly thereafter”). The court interpreted the phrase “‘seeking admission’” in Section 1225(b)(2)(A) to refer to the process of “requesting” “lawful entry into the United States after inspection and authorization.” *Id.* at 16a-17a. Like the district court, the court of appeals found its interpretation of that phrase necessary to avoid surplusage. *Id.* at 16a. The court also rejected the government’s arguments based on statutory context, structure, and history. *Id.* at 26a-45a. It asserted that its interpretation was supported by this Court’s decision in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), because that decision described Section 1225 as operating “at the Nation’s borders and ports of entry.” App., *infra*, 36a (quoting *Jennings*, 583 U.S. at 287) (emphasis omitted).

The court of appeals further explained that “[e]ven assuming” that the statute is ambiguous, prior Executive Branch practice “strongly counsels against adopting” the government’s interpretation of Section 1225(b)(2)(A). App., *infra*, 50a; see *id.* at 50a-55a. Finally, the court reasoned, were the statute ambiguous, constitutional-avoidance principles would support respondent given the court’s “grave” concern that applying Section 1225(b)(2)(A) to aliens in respondent’s shoes would violate due process. *Id.* at 55a; see *id.* at 55a-59a.

Judge Cabranes concurred separately “to emphasize key points.” App., *infra*, 61a; see *id.* at 61a-68a.

REASONS FOR GRANTING THE PETITION

This case presents the question whether 8 U.S.C. 1225(b)(2)(A) mandates the detention of aliens like respondent who are present in the United States without having been admitted. The government recently filed a petition for a writ of certiorari in another case involving the same question, *Raycraft v. Lopez-Campos*, petition for cert. pending, No. 25-1415 (filed June 22, 2026). This Court should hold this petition pending the disposition of the petition in *Lopez-Campos* and then dispose of this petition as appropriate.

As the government explained in *Lopez-Campos*, the courts of appeals are divided as to the lawfulness of applying Section 1225(b)(2)(A) to aliens present in the country without admission, such as after an illegal entry. The Fifth and Eighth Circuits have correctly held that Section 1225(b)(2)(A)’s plain language covers such aliens and mandates their detention pending removal proceedings. *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026), petition for cert. pending, No. 26-43 (filed July 2, 2026); *Avila v. Bondi*, 170 F.4th 1128 (8th Cir. 2026). The Second Circuit below, along with the

Sixth, Tenth, and Eleventh Circuits, have held that such aliens are not covered by Section 1225(b)(2)(A) but rather subject to discretionary detention under Section 1226(a) and entitled to bond hearings. See App., *infra*, 60a; *Lopez-Campos v. Raycraft*, 175 F.4th 713 (6th Cir. 2026), petition for cert. pending, No. 25-1415 (filed June 22, 2026); *Santillan Quiroz v. Mullin*, No. 26-6019, 2026 WL 1876709 (10th Cir. June 30, 2026); *Hernandez Alvarez v. Warden*, 175 F.4th 1258 (11th Cir. 2026).¹

Lopez-Campos is a better vehicle than this case for resolving the lawfulness of applying Section 1225(b)(2)(A) to aliens who are present in the country without having been admitted. In addition to the statutory question presented in this case, *Lopez-Campos* also squarely presents the question whether applying Section 1225(b)(2)(A)'s mandatory-detention scheme to such aliens comports with due process. As the government explained in its petition in *Lopez-Campos*, aliens around the country have been challenging their detention under Section 1225(b)(2)(A) on both statutory and due-process grounds, so the Court should address both issues simultaneously to provide clarity to the lower courts. See Pet. at 32-34,

¹ At the time the government filed its petition in *Lopez-Campos*, the Tenth Circuit had not yet decided the issue. Since that filing, the Tenth Circuit has joined the Second, Sixth, and Eleventh Circuits in finding Section 1225(b)(2)(A) inapplicable to aliens present without admission. *Santillan Quiroz*, 2026 WL 1876709, at *17. In addition, since the government filed its petition in *Lopez-Campos*, it has filed a petition for hearing en banc in the Eleventh Circuit, asking for the court to vacate the panel decision in *Hernandez Alvarez* so that the government can at least be relieved of that court's erroneous decision while the issue pends before this Court. See C.A. Pet. for Reh'g, *Hernandez Alvarez*, *supra* (No. 25-14075). That rehearing petition is still pending.

Lopez-Campos, supra (No. 25-1415).² In this case, the Second Circuit addressed due process in the context of constitutional avoidance—underscoring that the statutory and constitutional issues are inextricably linked. However, the Second Circuit did not reach a standalone holding on the constitutionality of detaining respondent without a bond hearing under Section 1225(b)(2)(A). See App., *infra*, 55a-59a. *Lopez-Campos* more directly presents the due-process issue, making it a superior vehicle for considering the lawfulness of the government’s mandatory detention pending removal proceedings of aliens present without admission under Section 1225(b)(2)(A).

² After the government filed its petition in *Lopez-Campos*, a panel of the Fifth Circuit held that as a matter of procedural due process, “the Government may detain aliens under Section 1225(b)(2)(A) for ninety days but no longer without a bond hearing.” *Sosnava Rodriguez v. Ortega*, No. 26-50183, 2026 WL 1906557, at *16 (July 2, 2026). The Fifth Circuit then sua sponte ordered rehearing en banc and vacated the panel decision. *Sosnava Rodriguez v. Ortega*, No. 26-50183, 2026 WL 2014647, at *1 (July 10, 2026).

CONCLUSION

This Court should hold the petition for a writ of certiorari pending the disposition of the petition in *Raycraft v. Lopez-Campos*, No. 25-1415 (filed June 22, 2026), and should then dispose of this petition as appropriate.

Respectfully submitted.

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JULY 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 25-3141-pr
August Term 2025

RICARDO APARECIDO BARBOSA DA CUNHA,
PETITIONER, APPELLEE

v.

JOSEPH E. FREDEN, DEPUTY FIELD OFFICE DIRECTOR,
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,
RESPONDENT-APPELLANT*

Argued: Apr. 6, 2026
Decided: Apr. 28, 2026

Appeal from the United States District Court
for the Western District of New York
No. 6:25-cv-6532, Meredith A. Vacca, *Judge*.

Before: CABRANES, BIANCO, and NATHAN, *Circuit Judges*.

The government appeals from a grant of a writ of habeas corpus. Petitioner-Appellee Ricardo Aparecido Barbosa da Cunha (“Petitioner”) is a noncitizen from Brazil, who entered the United States without inspection and admission in or around 2005 and has lived in the

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

United States ever since. He applied for asylum in 2016 and was granted a valid work permit. In September 2025, the government arrested him on an administrative warrant, placed him in removal proceedings, and asserted that, while his removal proceedings are pending, he must be detained pursuant to 8 U.S.C. § 1225(b)(2)(A). After an immigration judge found that he was subject to mandatory detention under Section 1225(b)(2)(A), Petitioner brought this habeas petition challenging his detention.

The district court agreed with Petitioner that Section 1225(b)(2)(A) did not apply to him and that, instead, his detention was governed by 8 U.S.C. § 1226(a), under which he was eligible for release on bond. Thus, the district court ordered the government to either provide him with a bond hearing or release him. An immigration judge held such a hearing and, after determining that Petitioner did not present a flight risk or danger to persons or property, ordered him released on bond.

On appeal, the government argues Petitioner is subject to mandatory detention under Section 1225(b)(2)(A). We disagree. The plain text of both Sections 1225(b)(2)(A) and 1226(a) make clear that only one applies to a noncitizen like Petitioner: Section 1226(a). Section 1225(b)(2)(A) does not apply to noncitizens, such as Petitioner, who are present in the United States after entering the country without inspection and admission, and who were not apprehended at or near the border at the time of entry.

This result is dictated by the plain text of these provisions, and further confirmed by the statute's context, structure, history, and purpose. It likewise comports with the Supreme Court's established understanding of Sections 1225 and 1226. It reflects Executive Branch

practice over thirty years and across five Presidential administrations. Moreover, it explains why Congress has never challenged that settled practice despite making numerous amendments to the immigration laws. Finally, even if the government’s newfound interpretation of Section 1225(b)(2)(A) were plausible—and it is not—we would nonetheless reject it based on our obligation to construe these statutes in a manner that would avoid the serious constitutional questions attendant to what would be the broadest mass-detention-without-bond mandate in our Nation’s history for millions of noncitizens.

Accordingly, we conclude that Petitioner’s detention is governed by Section 1226(a), not Section 1225(b)(2)(A), and we **AFFIRM** the district court’s grant of the writ of habeas corpus.

Judge Cabranes concurs in the judgment and opinion of the Court and files a separate opinion.

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MICHAEL K.T. TAN, American Civil Liberties Union Foundation, San Francisco, CA (My Khanh Ngo, Oscar Sarabia Roman, American Civil Liberties Union Foundation, San Francisco, CA; Judy Rabinovitz, Natalie Behr, American Civil Liberties Union Foundation, New York, NY; Amy

Belsher, New York Civil Liberties Union, New York, NY; Paul O'Dwyer, Law Office of Paul O'Dwyer, PC, New York, NY, *on the brief*), for Petitioner-Appellee.

Amit Jain, Roderick & Solange MacArthur Justice Center, Washington, DC, *for Amici Curiae Immigration Law Scholars, in support of Petitioner-Appellee*.

Suchita Mathur and Emma Winger, American Immigration Council, Washington, DC, *for Amici Curiae American Immigration Council and American Immigration Lawyers Association, in support of Petitioner-Appellee*.

JOSEPH F. BIANCO, *Circuit Judge*:

Petitioner-Appellee Ricardo Aparecido Barbosa da Cunha (“Petitioner”) is a noncitizen from Brazil who has lived in the United States for more than twenty years after entering the country without inspection and admission. He owns a home in Massachusetts, is married with two children, and has never been convicted of a crime. Because he has had an asylum application under agency review since 2016, he was granted legal authorization to work, and he operates a small construction business. Then, in 2025, immigration officials arrested Petitioner on his drive to work, detained him, and sought his removal from the United States.

Petitioner, hoping to return to his family during the removal proceedings, requested a bond hearing. For nearly thirty years, that request would have been granted and Petitioner—whom the government concedes poses no danger to the community nor risk of flight—would have been released during the pendency of his removal proceedings, pursuant to 8 U.S.C. § 1226. However, in July 2025, the government changed that long-settled practice. *See* U.S. Immigr. & Customs Enf’t, Interim Guidance Regarding Detention Authority for Applicants for Admission (July 8, 2025). To justify detaining noncitizens (or “aliens”¹) who clearly meet the government’s own criteria for release, the government began arguing that 8 U.S.C. § 1225(b)(2)(A) prohibits the setting of bond for all inadmissible noncitizens, like Petitioner, unlawfully present in the United States—by all accounts, millions of men, women, and children. The government claims that mandatory detention must continue regard-

¹ “The term ‘alien’ means any person not a citizen or national of the United States.” 8 U.S.C. § 1101(3).

less of how long removal proceedings take—even if the noncitizen poses no danger to the community or risk of flight.

That is not what the law says. Today, although we part ways with two other circuits that have addressed this question, we join the overwhelming majority of federal judges across the Nation to consider it and conclude that the government’s novel interpretation of the immigration statutes defies their plain text. That text makes clear that Section 1226(a) governs detention of noncitizens like Petitioner. Section 1225(b)(2)(A) does not apply to such noncitizens, who are present in the United States after entering the country without inspection and admission, and who were not apprehended while entering the country or shortly thereafter.

This result is dictated by the plain text of these provisions, and further confirmed by the statute’s context, structure, history, and purpose. It likewise comports with the Supreme Court’s established understanding of Sections 1225 and 1226. It reflects Executive Branch practice over thirty years and across five Presidential administrations. Moreover, it explains why Congress has never challenged that settled practice despite making numerous amendments to the immigration laws. Finally, even if the government’s newfound interpretation of Section 1225(b)(2)(A) were plausible—and it is not—we would nonetheless reject it based on our obligation to construe these statutes in a manner that would avoid the serious constitutional questions attendant to what would be the broadest mass-detention-without-bond mandate in our Nation’s history for millions of noncitizens.

To be clear, our holding does not alter Section 1225(b)'s mandate that the government detain noncitizens who are apprehended for removal proceedings while entering the country or shortly thereafter, nor Section 1226(c)'s mandate that the government detain noncitizens on certain criminal or terrorism-related grounds. Instead, consistent with the plain text of the statutory provisions at issue here, our holding allows noncitizens like Petitioner, who are already present in the United States and are determined not to be a flight risk or danger to the community, to be released on bond under Section 1226(a) while their removal proceedings are pending.

Accordingly, we conclude that Petitioner's detention is governed by Section 1226(a), not Section 1225(b)(2)(A), and we **AFFIRM** the district court's grant of the writ of habeas corpus.

BACKGROUND

Petitioner, a citizen of Brazil, entered the United States without inspection and admission over twenty years ago (in either 2004 or 2005) and has remained here ever since. In 2016, he applied for asylum and was granted work authorization while his application was under review. He lives in Massachusetts with his wife and two U.S.-citizen children, owns his home, and owns and runs a small construction business. Petitioner has never been arrested for or charged with a crime.

On September 26, 2025, officers from U.S. Immigration and Customs Enforcement ("ICE") arrested Petitioner while he was driving to work in Norwood, Massachusetts, pursuant to an administrative warrant that cited Section 236 of the Immigration and Nationality Act ("INA") (*i.e.*, 8 U.S.C. § 1226) as the basis for his arrest.

The United States Department of Homeland Security (“DHS” or the “Agency”) initiated removal proceedings pursuant to 8 U.S.C. § 1229a, and charged Petitioner with inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i) (presence in the United States without being admitted or paroled) and 8 U.S.C. § 1182(a)(7)(A)(i)(I) (lack of documentation). Petitioner requested a bond hearing, which an immigration judge denied based on a determination that he was subject to mandatory detention under Section 1225(b)(2)(A), and thus ineligible for bond under Section 1226(a). Petitioner then filed a habeas petition,² arguing that his putative detention under Section 1225(b)(2)(A) violated Section 1226, its associated regulations, and the Fifth Amendment’s Due Process Clause. The respondent is Joseph E. Freden, a deputy field office director for ICE. The district court granted the petition and ordered the government to either provide a bond hearing or release Petitioner within ten days. An immigration judge, recognizing that Petitioner presents no danger to persons or property or risk of flight, released him on bond.

DISCUSSION

The sole question presented by this appeal is whether Section 1226 or Section 1225 governs Petitioner’s detention. If Section 1226 applies, then Petitioner is eligible for release on bond pending the duration of his removal proceedings, including adjudication of his requests for asylum and cancellation of removal. If Section 1225 ap-

² Petitioner initially filed his petition in the District of Massachusetts, but the petition was transferred to the Western District of New York, on consent of the parties, because he had already been transported to an ICE detention facility in Buffalo.

plies, then he *must* be detained during the removal process with no opportunity for release on bond.

We review *de novo* a district court’s grant of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. *Black v. Decker*, 103 F.4th 133, 142 (2d Cir. 2024). We likewise review questions of statutory interpretation *de novo*. *Giovinco v. Pullen*, 118 F.4th 527, 530 (2d Cir. 2024).

We interpret statutes “based on the traditional tools of statutory construction, not individual policy preferences.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 403 (2024). We begin “by examining the language of [the] statute, starting with the common meaning of the words in it.” *Puello v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 328 (2d Cir. 2007). We “interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.” *Abramski v. United States*, 573 U.S. 169, 179 (2014) (internal quotation marks and citation omitted); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”).

“When the statutory text is plain and unambiguous, our sole function is to enforce it according to its terms.” *United States v. Bedi*, 15 F.4th 222, 226 (2d Cir. 2021) (internal quotation marks and citations omitted); *see also Peralta-Taveras v. Att’y Gen.*, 488 F.3d 580, 584 (2d Cir. 2007) (“[T]he well-established rules of statutory construction . . . instruct that [the court’s] inquiry begins with the plain language of the statute and where the statutory language provides a clear answer, it ends

there as well.”) (internal quotation marks and citation omitted). “If the statutory language is ambiguous, however, we resort first to canons of statutory construction, and, if the statutory meaning remains ambiguous, to legislative history, to see if these interpretive clues clearly reveal Congress’s intent.” *Mizrahi v. Gonzales*, 492 F.3d 156, 158 (2d Cir. 2007) (alteration adopted) (internal quotation marks and citation omitted). When interpreting an ambiguous statute, one of the available canons of statutory construction is that of constitutional avoidance, “which provides that if one of two competing statutory interpretations would raise a multitude of constitutional problems, the other should prevail.” *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 519 (2d Cir. 2017) (internal quotation marks and citation omitted).

As set forth below, based on the plain language of Section 1225 and Section 1226, we agree with the district court that Petitioner’s detention is governed by Section 1226 and that he is entitled to a bond hearing. That determination is reinforced by the statutory context, structure, history, and purpose, as well as the nearly three decades of Executive Branch practice enforcing the immigration laws with that understanding and the accompanying congressional silence in light of that practice. Finally, even if the statutory language was ambiguous, we would reach the same conclusion under the doctrine of constitutional avoidance.

Our holding is consistent with the decisions of over 370 district judges across the Nation who (as of mid-February 2026) have also rejected the government’s position. In other words, over ninety percent of district court judges have sided with Petitioner. *See American*

Immigration Council and American Immigration Lawyers Association *Amici* Br. at 5 n.6 (citing Kyle Cheney, *Even Trump’s Own Appointees are Ruling Against ICE’s Mass Detention Strategy*, POLITICO (Feb. 12, 2026) [<https://tinyurl.com/yc7e5sbd>]). Indeed, in this Circuit, as of mid-February 2026, the government has prevailed in only approximately fifteen cases, while losing in approximately 145 cases. *Id.* at 27-32. The Seventh Circuit has preliminarily reached the same conclusion in reviewing a stay motion. *See Castañon-Nava v. U.S. Dep’t of Homeland Sec.*, 161 F.4th 1048, 1062 (7th Cir. 2025). Although divided panels in two other circuits have agreed with the government, *see Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 508 (5th Cir. 2026); *Avila v. Bondi*, 170 F.4th 1128, 1138 (8th Cir. 2026), we respectfully find the statutory analysis in those decisions, which largely mirrors the government’s flawed arguments in this case, to be unpersuasive for the reasons discussed below.

I. Statutory Text

As is required, our analysis begins with the statutory text of the key provisions at issue. *See United States v. Helm*, 58 F.4th 75, 90 (2d Cir. 2023). We first analyze Section 1226(a), which was cited in Petitioner’s warrant as the basis for the arrest, and then turn to Section 1225(b)(2)(A).

A. Section 1226(a)

An analysis of the plain text of Section 1226(a) demonstrates that it clearly applies to Petitioner. The provision provides:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision

on whether the alien is to be removed from the United States.

8 U.S.C. § 1226(a).

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), amending portions of the Immigration and Nationality Act of 1952 (“INA”). Pub. L. No. 104-208, 110 Stat. 3009. “IIRIRA eliminated the bright-line distinction between exclusion and deportation, merging the two into proceedings for ‘removal’ and replacing the definition of ‘entry’ with that for ‘admission.’” *Cruz-Miguel v. Holder*, 650 F.3d 189, 197 (2d Cir. 2011). IIRIRA distinguished between noncitizens who are “inadmissible” and those who are “deportable”: “inadmissible aliens” are removable because they are “ineligible to be admitted to the United States,” while “deportable aliens” are noncitizens subject to removal after previously being admitted. Compare 8 U.S.C. § 1182(a), with *id.* § 1227(a). Thus, removal proceedings cover noncitizens who are both inadmissible and deportable. See *id.* § 1229a(a)(1) (directing the immigration judge to “conduct proceedings for deciding the inadmissibility or deportability of an alien”); see also *id.* § 1229a(a)(2), (c)(2)(A), (e)(2)(A) (referring to charges and determinations of inadmissibility).

Under Section 1226(a), detention is discretionary and “the Attorney General . . . may release the alien on bond . . . or conditional parole,” *id.* § 1226(a)(2)(A)-(B), with the exception of noncitizens involved in certain criminal or terrorism-related activity, *id.* § 1226(c). Moreover, a noncitizen detained under Section 1226 may appeal the Agency’s custody determinations, including the setting of bond, to an immigration judge, and may

appeal an immigration judge's redetermination to the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 1003.19(a), (f); *id.* § 1236.1(d)(1).

Here, it is undisputed that Petitioner (1) was served a warrant issued by the Attorney General, (2) is a noncitizen, (3) is subject to a decision on whether he is to be removed from the country, and (4) does not fall within any of the enumerated grounds for mandatory detention under Section 1226(c). Thus, the Attorney General may release Petitioner on bond under the plain language of Section 1226(a).

The government argues that Section 1226(a) applies only to "aliens who were admitted to the country but later become deportable and are subject to removal proceedings under [Section] 1229a—for example, admitted aliens who overstay or otherwise violate the terms of their visas." Appellant's Br. at 11. But the government's position is untenable based on the plain text of the statute, which obviously does not limit its application to that narrower category of noncitizens. To the contrary, the release authority in Section 1226 applies to "an alien . . . pending a decision on whether the alien is to be *removed*"—a word that sweeps in both inadmissible and deportable aliens, as discussed above. 8 U.S.C. § 1226(a) (emphasis added). If Congress had wanted to limit Section 1226(a)(2) only to those noncitizens charged with deportability as opposed to inadmissibility, it would have said so, as it did repeatedly in other parts of IIRIRA. *See Blake v. Carbone*, 489 F.3d 88, 96 n.6 (2d Cir. 2007) ("IIRIRA consolidated [deportation and exclusion] proceedings into removal proceedings. Nevertheless, the distinction between deportable and excludable (also referred to as inadmissible) persons remains.").

“We must presume that the legislature says in a statute what it means and means in a statute what it says there.” *Dodd v. United States*, 545 U.S. 353, 357 (2005) (alteration adopted) (internal quotation marks and citation omitted); *see also Magwood v. Patterson*, 561 U.S. 320, 334 (2010) (“We cannot replace the actual text with speculation as to Congress’ intent.”).

In sum, Section 1226(a) plainly applies to noncitizens, like Petitioner, who are present in the United States, but charged as inadmissible for entering the country without inspection and admission. Although the government seeks to sidestep the clear language in Section 1226(a) and support its mandatory-detention position by pointing to Section 1225(b)(2)(a), we now examine how the plain text of that statute likewise soundly defeats the government’s position.

B. Section 1225(b)(2)(A)

The government asserts that Petitioner’s mandatory detention is lawful pursuant to Section 1225(b)(2)(A), which provides:

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

8 U.S.C. § 1225(b)(2)(A). According to the government, “[u]nder the plain language of § 1225(b)(2), DHS is required to detain all aliens, like Petitioner, who are present in the United States without admission and are subject to removal proceedings—regardless of how long the alien has been in the United States or how far inland

from the border they managed to migrate before being detained.” Appellant’s Br. at 21. We disagree.

The government contends that Petitioner is subject to mandatory detention because he is an “applicant for admission” who “is not clearly and beyond a doubt entitled to be admitted.” However, the government’s proposed statutory construction suffers from a fatal defect: it disregards the second requirement for this provision to apply. Section 1225(b)(2)(A) applies “in the case of an alien who is an applicant for admission” and provides for detention of “an alien seeking admission.” It therefore applies only to a noncitizen who is both an “applicant for admission” and who is “seeking admission.” Petitioner may be an “applicant for admission,” but he is not “seeking admission.”

First, “applicant for admission” is defined by statute to mean any noncitizen who is present in the United States and has not been admitted, or is arriving in the United States. 8 U.S.C. § 1225(a)(1). More specifically, Section 1225(a)(1) provides:

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

Id.

Second, “admission” is defined by statute as “the lawful entry of the alien into the United States after inspection and authorization.” *Id.* § 1101(a)(13)(A). “Entry,” which has no statutory definition, commonly means “the

act of entering.” *Entry*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 759 (1993); *see also Entry*, BLACK’S LAW DICTIONARY (7th ed. 1999) (“Immigration. Any entrance of an alien into the United States, whether voluntary or involuntary.”). And to “enter” means “to go or come into a material place.” *Enter*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 756 (1993). That common meaning was articulated by the Supreme Court long ago, when it noted that “‘entry’ by its own force implies a coming from outside.” *United States ex rel. Claussen v. Day*, 279 U.S. 398, 401 (1929); *see also United States ex rel. Volpe v. Smith*, 289 U.S. 422, 425 (1933) (defining “entry” as the “coming of an alien from a foreign country into the United States”).

Third, although also not defined in the statute, the term “seek” means, as the government agrees, to “request” or “ask for.” Appellant’s Br. at 26-27 (quoting *Seek*, WEBSTER’S NEW WORLD COLLEGE DICTIONARY 1299 (4th ed.)); *see also Seek*, MERRIAM WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/seek> [<https://perma.cc/XRA7-RPYF>] (last visited Apr. 27, 2026) (defining “seek” as, *inter alia*, “to go in search of; look for” or “to try to acquire or gain; aim at” or “to make an attempt”). The term “seeking” is in the present participle form, which expresses present action. *See Present Participle*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1794 (1993).

Together, Section 1225(b)(2) therefore applies only to (1) noncitizens who are present and have not been admitted, and (2) are requesting (3) lawful entry into the United States after inspection and authorization. Here, although Petitioner is an applicant for admission under the statutory definition because he is present in the

country and has never been admitted, it simply cannot be said that he is “seeking admission,” as he is not requesting lawful entry into the United States.

By total contrast, Petitioner entered the interior unlawfully twenty years ago and is now seeking only relief from removal. Therefore, because Section 1225(b)(2)(A) applies only to a noncitizen who is both an “applicant for admission” and “seeking admission,” it does not apply to Petitioner. *See also Castañon-Nava*, 161 F.4th at 1061 (“[W]hile a noncitizen arrested in the Midwest might qualify as ‘an alien present in the United States who had not been admitted,’ § 1225(a)(1), the mandatory detention provision upon which Defendants rely, limits its scope to an ‘applicant for admission’ who is ‘seeking admission,’ § 1225(b)(2)(A).”). Instead, Section 1225(b)(2)(A) applies to those noncitizens who present themselves at a port of entry for admission, or who cross the physical border into the United States but are apprehended at the “threshold of initial entry.” *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 107, 140 (2020) (holding that a noncitizen “apprehended just 25 yards from the border” had not effected an “entry”); *see also Leng May Ma v. Barber*, 357 U.S. 185, 189 (1958) (treating noncitizens paroled into the country “as [if] stopped at the boundary line”).

We cannot ignore the phrase “seeking admission,” as the government’s interpretation would have us do. Doing so would render it “mere surplus,” *Hechavarria v. Sessions*, 891 F.3d 49, 55 (2d Cir. 2018), *as amended* (May 22, 2018), and “[i]t is our duty to give effect, if possible, to every clause and word of a statute,” *id.* (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Here, it *is* possible to give effect to each term, as each

has a clear statutory definition or, if undefined by the statute, an ordinary, judicially-settled meaning. *See Feliciano v. Dep't of Transp.*, 605 U.S. 38, 45 (2025).

The government's arguments to the contrary neither ameliorate this superfluity problem nor overcome the plain text. First, the government, relying on the analysis in the Fifth Circuit and Eighth Circuit majority opinions, argues that "the ordinary meanings of the phrases 'applicant for admission' and 'seeking admission' are the same." Appellant's Rule 28(j) Ltr. (Mar. 26, 2026) at 1 (internal quotation marks and citation omitted); *see Buenrostro-Mendez*, 166 F.4th at 502 ("There is no material disjunction—by the terms of the statute or the English language—between the concept of 'applying' for something and 'seeking' something. When a person applies for something, they are necessarily seeking it. . . . The everyday meaning of the statute's terms confirms that being an 'applicant for admission' is not a condition independent from 'seeking admission.'") (internal quotation marks and citations omitted); *see also Avila*, 170 F.4th at 1134 ("[W]e agree with the Fifth Circuit that the ordinary meanings of the phrases 'applicant for admission' and 'seeking admission' are the same.").

That argument, however, mistakenly assumes that the statute uses the ordinary meaning of "applicant for admission." It does not. Instead, it introduces an explicit definition and we must follow the statute. *See Digit. Realty Tr., Inc. v. Somers*, 583 U.S. 149, 160 (2018).

"Applicant" ordinarily means "one who applies for something." *Applicant*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 105 (1993). However, Section 1225(a)(1) gives "applicant for admission" an "artificial"

meaning, covering “constructive” applicants who never applied for anything. *See Matter of Lemus-Losa*, 25 I. & N. Dec. 734, 743 n.6 (B.I.A. 2012). That must be the case, because the statutory meaning of “applicant for admission” extends to noncitizens who have not and could not apply for what the statute defines as “admission”— “lawful entry . . . into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A). A noncitizen like Petitioner is unlawfully present, and thus an “applicant for admission,” but indisputably never sought or applied for lawful entry after inspection and authorization, and is not doing so now. To the contrary, he evaded immigration inspectors, snuck into the country, and today applies only for non-admission forms of relief, including asylum and cancellation of removal. Petitioner can therefore only be an “applicant for admission” *because* the statute uses “applicant” in a “specialized” way, rather than in its ordinary meaning. *Feliciano*, 605 U.S. at 45.

Congress reinforced this artificiality by using the word “deemed” in Section 1225(a). To “deem” a term is to “treat [it] as if (1) it were really something else, or (2) it has qualities that it does not have.” *Deem*, BLACK’S LAW DICTIONARY (7th ed. 1999); *see also Shi Liang Lin v. U.S. Dep’t of Just.*, 494 F.3d 296, 307 n.9 (2d Cir. 2007) (en banc). Congress therefore traditionally uses “deem” to “establish a legal fiction either positively by ‘deeming’ something to be what it is not or negatively by ‘deeming’ something not to be what it is.” *Shi Liang Lin*, 494 F.3d at 307 n.9 (internal quotation marks and citations omitted). “All other uses of the word should be avoided.” *Id.* (internal quotation marks and citations omitted); *see also Sturgeon v. Frost*, 587 U.S. 28, 47 (2019) (adopting this definition of “deemed”).

Thus, Congress here deemed, “abracadabra-style,” *Sturgeon*, 587 U.S. at 47, “applicant for admission” to cover noncitizens who literally cannot be applying for or seeking “admission.” By contrast, the statute is silent on the meaning of “seeking” and “applying” and does not establish a legal fiction as to those terms, leaving them with their ordinary meanings. *See Feliciano*, 605 U.S. at 45. We therefore cannot “abracadabra-style” deem Petitioner to be “seeking admission.”

It is precisely because Congress employed a statutory term of art for “applicant for admission” but not for “seeking admission” that the analogy to an applicant for college, relied upon heavily by the government and our two sister circuits, is inapposite. *See, e.g., Buenrostro-Mendez*, 166 F.4th at 502 (“Just as an applicant to a college seeks admission, an applicant for admission to the United States is ‘seeking admission’ to the same, regardless [of] whether the person actively engages in further affirmative acts to gain admission.”); *accord Avila*, 170 F.4th at 1134. Where a statute deems a term to have a particularized meaning, an analogy to its use in everyday conversation is of limited help. Even sticking with it, though, for the college analogy to make sense here, a college would have to deem an individual physically located on its campus at any point in time to be an “applicant for admission” to that college, including an individual who had never filed an application and had no intention of doing so. But giving “applicant for admission” such a technical meaning would not automatically affect the ordinary meaning of “seeking admission” merely because the two phrases appear similar.³ Using the ordi-

³ The government acknowledges, as it must, that the phrases are not literally synonymous, as noncitizens may be “seeking admis-

nary meaning of “seeking admission,” no one would consider an individual who never applied to also be “seeking admission” to the college. Here is a better analogy. If someone sneaks into Yankee Stadium at the start of the game with no ticket for admission (and no intention of ever paying) and he is later found by security in a seat in the seventh inning, no one would consider that fan to be “seeking admission” to the game.

Even if it were appropriate in this context—and it is not—the government’s ordinary meaning analysis is not even persuasive on its own terms. The government contends that “applicant for admission” is a subset of “alien seeking admission,” such that all those who are “seeking admission” must also be “applicants for admission.” This is incorrect. The difference between the two phrases is their temporal scope. While an “applicant for admission” may be either someone applying right now or someone who applied in the past, a noncitizen “seeking” admission refers only to a noncitizen currently seeking admission.

As we have already explained, “alien seeking admission” is a present participle, which “denotes the verb’s action as being in progress or incomplete at the time expressed by the sentence’s principal verb.” THE CHICAGO MANUAL OF STYLE ¶ 5.114 (18th ed. 2024). Here, as the government conceded at oral argument, that principal verb is “is,” such that “alien seeking admission” means an “alien *who is* seeking admission.” This is reinforced by the statute’s parallel use of “alien *who is* an applicant for admission” earlier in the same sentence, and by the fact that “the examining immigration officer

sion” without being “applicants for admission” in the sense of Section 1225(a)(1). See Appellant’s Br. at 27-28.

determines [whether] an alien seeking admission *is* . . . entitled to be admitted.” 8 U.S.C. § 1225(b)(2)(A) (emphasis added).⁴ When the statute says, “alien seeking admission,” it therefore refers to a noncitizen who is seeking admission *right now*, not one who sought admission in the past but no longer is. See *Carr v. United States*, 560 U.S. 438, 448 (2010) (“Consistent with normal usage, we have frequently looked to Congress’ choice of verb tense to ascertain a statute’s temporal reach.”).

In contrast, the noun “applicant” lacks a defined “temporal scope.” *Robinson*, 519 U.S. at 344. In other words, like most nouns, the word does not refer to any particular time period. For example, a job “applicant” can refer to individuals who are no longer applying, such as “[u]nsuccessful applicants or those who turn down a job offer.” *Id.* Thus, employing the ordinary meaning of the terms, not everyone who is an “applicant for admission” is necessarily “seeking admission.” While those “seeking admission” must be doing so in the present, “applicants for admission” may be presently “seeking” admission but need not be—as Petitioner’s case illustrates.

The government’s faulty analogy of a student applying to college again helps illuminate the difference. It would be natural to say that “the college rejected the applicant,” referring to a student whose application had already been denied. However, no one would say that “the college rejected the person who *is* seeking admis-

⁴ Similarly, subsection (b)(2)(B) creates multiple exceptions for noncitizens using the present tense “is.” 8 U.S.C. § 1225(b)(2)(B). And subsection (b)(2)(C) uses the parallel construction “an alien . . . who is arriving on land” to describe a subset of noncitizens covered by subsection (b)(2)(A). *Id.* § 1225(b)(2)(C).

sion.” It would instead be natural to say that “the college rejected the person who *was* seeking admission” or “*sought* admission.” Since the statute is written to refer to those “seeking admission,” the government’s college-applicant analogy cuts against its argument.

Finally, if the government were right that “applicant for admission” is a subset of “seeking admission,” there would have been no reason for Congress to use both. The government argues that “applicant for admission” has *some* meaning because it narrows the scope of “seeking admission” in Section 1225(b)(2)(A). But Congress could have achieved the same outcome by using “applicant for admission” alone and omitting “seeking admission” entirely. *See Biden v. Texas*, 597 U.S. 785, 798 (2022) (“If Congress had wanted the provision to have that effect, it could have said so in words far simpler than those that it wrote.”). It did not do so, and it is not our role to second-guess that choice by unilaterally editing the statute now.

In contrast, Petitioner’s interpretation provides a clear explanation for what role both terms play in the statute. Only because the statute includes both terms does it authorize bond for noncitizens who fit into only *one* category but mandate detention for noncitizens who fit into *both*. As we discuss further below regarding the structure and purpose of these provisions, Congress did not intend to mandate detention of noncitizens “seeking admission” who are not “applicants for admission,” such as noncitizens who apply for a visa at a consulate abroad. *See Lemus-Losa*, 25 I. & N. Dec. at 741. Nor did Congress intend to mandate detention of noncitizens who are “applicants for admission” but not “seeking admission,” such as illegal entrants, like Petitioner, who have

nonetheless lived in the United States for a substantial time. That result makes sense, as the strong rationale for detaining noncitizens who are *both* “applicants for admission” and “seeking admission” does not apply to noncitizens who are one but not the other.

In sum, our commonsense reading of the text in Section 1225(b)(2)(A) squares with the plain meaning of “seeking admission” and gives effect to each clause and word that Congress chose to write.

II. Other IIRIRA Provisions

Given Section 1225(b)(2)(A)’s straightforward text, the government attempts to cobble together language from other parts of IIRIRA with similar phrases or terms—including Sections 1225(a)(3), 1225(a)(4), 1225(a)(5), 1182(a)(9)(B)(i)(I), and 1225(b)(2)(B)(iii)—and argues that inferences drawn from those provisions shed light on congressional intent with respect to the language in Section 1225(b)(2)(A), and support the government’s position. We reject each argument in turn.

A. Section 1225(a)(3)

Section 1225(a)(3) provides for inspection of “[a]ll aliens . . . who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States.” 8 U.S.C. § 1225(a)(3). From the phrase “or otherwise,” the government infers that “applicants for admission” must be a subset of “seeking admission.” However, that is only one possible meaning of “or otherwise,” and is one that fits poorly with the statute here.

Although the government is correct that “or otherwise” can sometimes mean “in a different way or manner,” it can also simply “refer to something that is dif-

ferent from something already mentioned.” *Or otherwise*, MERRIAM-WEBSTER ONLINE, <https://www.merriam-webster.com/dictionary/or%20otherwise> [<https://perma.cc/9F9H-PH6Q>] (last visited Apr. 27, 2026); *see also Otherwise*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1993) (defining otherwise as “in a different way or manner,” but also as “in different circumstances,” “under other conditions,” and “in other respects”).

The Supreme Court has rejected the argument that “or otherwise” mandates the subset-superset interpretation urged by the government. Particularly, in *Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc.*, the Court considered language in the America Invents Act, 35 U.S.C. § 102(a)(1), barring patents on any invention that was “in public use, on sale, *or otherwise* available to the public before the effective filing date of the claimed invention.” 586 U.S. 123, 125 (2019) (emphasis added). The plaintiff argued that “or otherwise” must mean that “on sale” is just one way of describing something “available to the public,” and that the statute therefore only covers sales to the public, not to private buyers. *Id.* at 132. The Court disagreed, explaining that, “[l]ike other such phrases, ‘otherwise available to the public’ captures material that does not fit neatly into the statute’s enumerated categories but is nevertheless meant to be covered.” *Id.* Thus, the Court rejected the plaintiff’s contention that such a construction “reads ‘otherwise’ out of the statute,” and concluded that the statute covers even sales that do not “make the claimed invention available to the public.” *Id.*

Similarly, the Supreme Court has long rejected arguments that the phrase “or otherwise” in criminal resid-

ual clauses means that language after the catchall limits the types of crimes enumerated before the catchall. Therefore, a criminal statute covering “burglary,” as well as conduct that “or otherwise” involves a “serious potential risk” of harm, covers even burglaries that involve no actual risk of harm at all. *Taylor v. United States*, 495 U.S. 575, 597 (1990). That result was possible only because burglary is not a mere subset of harmful conduct.

As these cases illustrate, determining whether a particular catchall phrase is “conjunctive” or “disjunctive” requires a context-specific approach. *See Flora v. United States*, 362 U.S. 145, 149-50 (1960). Here, the text and context strongly suggest that “or otherwise” in Section 1225(a)(3) has its disjunctive meaning. In the government’s cited cases, the statutes at issue were structured to set forth a list of specific examples followed by an “or otherwise” catchall clause. For example, *Kleber* and *Villarreal* interpreted a section of the Age Discrimination in Employment Act making it unlawful “to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.” *Kleber v. CareFusion Corp.*, 914 F.3d 480, 482 (7th Cir. 2019) (quoting 29 U.S.C. § 623(a)(2)); *see also Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963 (11th Cir. 2016) (en banc). Similarly, *Wynn* interpreted a provision of the Foreign Agents Registration Act covering persons “engaged in or about to engage in any acts which constitute or will constitute a violation of any provision of this subchapter, or regulations issued thereunder, or whenever any agent of a foreign principal fails to comply with any of the provisions of this subchapter or

the regulations issued thereunder, *or otherwise* is in violation of the subchapter.” *Att’y Gen. v. Wynn*, 104 F.4th 348, 353-54 (D.C. Cir. 2024) (emphasis added) (quoting 22 U.S.C. § 618(f)). Such texts easily warrant a subset-superset interpretation. When Congress uses “a list of specific items separated by commas and followed by a general or collective term,” it raises the “inference . . . that Congress remained focused on the common attribute when it used the catchall phrase.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (discussing the similar, but distinct, *ejusdem generis* canon).

By contrast, “applicant for admission” is not narrower or more specific than “alien seeking admission,” nor does the statute enumerate multiple examples of “seeking admission.” In fact, it does the opposite, beginning with the general “applicant for admission” and then following “or otherwise” with a more specific list—“seeking admission or readmission to or transit through the United States.” 8 U.S.C. § 1225(a)(3). Petitioner’s interpretation thus fits well with that framework—Section 1225(a)(3) applies to applicants for admission, and also applies to three further categories of noncitizens, which may overlap with but are not the same as “applicant for admission.”

B. Section 1225(a)(4)

Section 1225(a)(4) omits “applicant for admission” entirely, instead providing that “[a]n alien applying for admission may . . . be permitted to withdraw the application for admission and depart immediately from the United States.” 8 U.S.C. § 1225(a)(4). The government nevertheless argues that the fact that a noncitizen “applying for admission” can withdraw his application

shows that “applying for admission” is the same as being an “applicant for admission.”

As an initial matter, this argument is circular, assuming the very point it aims to prove (that “alien applying for admission” is synonymous with “applicant for admission”). But even more fundamentally, the text of Section 1225(a)(4) undermines the government’s argument. Where Congress wanted to write a tailored provision that applies only to those noncitizens currently seeking “lawful entry,” it used “alien applying for admission” (a present participle) instead of “applicant for admission” (a noun). Grammatically, the section works only if, as explained above, the implied finite verb corresponding to “applying” is the present-tense “is.” It would make no sense for a noncitizen who *was* rather than *is* applying for admission to withdraw his application—there would be nothing to withdraw.

Petitioner’s interpretation of Section 1225(a)(4) also fits well with its function. The section allows a noncitizen to voluntarily depart and thereby avoid the initiation of removal proceedings, after which the noncitizen would be subject to a strict waiting period before reapplying for admission. *See* 8 U.S.C. § 1182(a)(9)(B)(i) (setting the waiting period at three years for those who voluntarily depart prior to removal proceedings, but ten years for those who do not). The Agency’s own regulations confirm that this voluntary withdrawal provision is available “only [to] an arriving alien.” 8 C.F.R. § 1240.1(d). That makes sense. There is simply no reason for a noncitizen who unlawfully entered twenty years ago to request permission from the Attorney General to “withdraw” anything, because he never submitted anything in the first place.

That reading aligns with the Agency’s own interpretation of “applying for admission” in other sections. For example, Section 1182(h) allows certain noncitizens who have committed a crime involving moral turpitude to apply for a waiver of inadmissibility if the Attorney General “has consented to the alien’s applying . . . for admission to the United States.” 8 U.S.C. § 1182(h)(2). As the Agency has explained, being an “‘applicant for admission’ under [Section 1125(a)(1)] is distinguishable from ‘applying . . . for admission to the United States’ within the meaning of [Section 1182(h)].” *Matter of YN-P-*, 26 I. & N. Dec. 10, 13 (B.I.A. 2012). The Section 1125(a)(1) language “merely entitles [a noncitizen] to a removal hearing,” “despite her actual presence in the United States.” *Id.* By contrast, the phrase “applying . . . for admission” in Section 1182(h) refers only to those noncitizens who “have some *basis* for being admitted” and are not already present. *Id.* (emphasis in original). Where a noncitizen like Petitioner “does not contend that there is any basis for [his] admission to the United States,” and instead “is requesting that the Attorney General exercise his discretion to cancel [his] removal” or provide asylum, he is not applying for (or seeking) admission. *Id.*; see also *Garcia-Mendez v. Lynch*, 788 F.3d 1058, 1065 (9th Cir. 2015) (adopting *Matter of Y-N-P-* at *Chevron* step two); *Arevalo v. Att’y Gen.*, 872 F.3d 1184, 1195 (11th Cir. 2017) (same); *Torres v. Barr*, 976 F.3d 918, 929 (9th Cir. 2020) (invoking *Matter of Y-N-P-* for the principle that the “deeming provision of § 1225(a)(1) ‘merely’ determines a respondent’s legal status for purposes of removal proceedings”). That interpretation is correct. Not all applicants for admission are applying for or seeking admission at all

points in time. To hold otherwise would disregard the distinctions that Congress wrote into the statutes.

C. Section 1225(a)(5)

The government also turns to Section 1225(a)(5), at least in its reply brief.⁵ That section permits immigration officers to require applicants for admission to “state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States.” 8 U.S.C. § 1225(a)(5). The government argues that this means all applicants for admission are necessarily “seeking admission.”

The text does not bear this weight. Instead, Section 1225(a)(5) provides that applicants for admission “*may* be required to state under oath” certain information, implicitly recognizing that some applicants for admission will not be required to do so. *Id.* (emphasis added); *see also Yoo v. United States*, 43 F.4th 64, 72 (2d Cir. 2022) (“The use of the word ‘may’—in contrast to words like ‘shall’ or ‘must’—authorizes, rather than commands.”). That makes sense, because much of the information described—intended length of stay and intent to remain permanently—applies to only a subset of applicants for admission, such as those who are seeking temporary nonimmigrant visas. *See, e.g.*, USCIS Form I-134, Declaration of Financial Support, at 5-6 (Jan. 20, 2025) (requesting an applicant’s anticipated length of stay and

⁵ Generally, we would not consider an argument not raised in an appellant’s opening brief. *See Tripathy v. McKoy*, 103 F.4th 106, 118 (2d Cir. 2024). However, given our preference for resolving disputes on the merits and the importance of the question presented, we exercise our discretion to consider the substance of the government’s argument about Section 1225(a)(5).

certification of ability “to pay for necessary expenses for the duration of [the applicant’s] temporary stay in the United States”); USCIS Form I-192, Application for Advance Permission to Enter as a Nonimmigrant, at 6 (Jan. 20, 2025) (“Approximate Length of Stay in the United States”). It would be absurd for an immigration officer to ask someone like Petitioner—who entered unlawfully and has been living here for twenty years—to attest to his “intended length of stay.” Section 1225(a)(5) is therefore consistent with the notion that some, but not all, applicants for admission are seeking admission. Just like Section 1225(b)(2)(A), Section 1225(a)(5) applies only to such noncitizens, who *may* be required to attest to their “purposes and intentions . . . in seeking admission.”

Again, Petitioner is not presently “seeking admission,” despite being deemed an applicant for admission. And Section 1225(a)(5) makes perfect sense as a matter of grammar and logic, even acknowledging that not all applicants for admission are also seeking admission. This subsection therefore does nothing to push the government’s argument forward.

D. Section 1182(a)(9)(B)(i)(I)

The government also raises Section 1182(a)(9)(B)(i)(I), which renders inadmissible certain noncitizens who were “unlawfully present in the United States” and “again seek[] admission” after they depart or are removed. 8 U.S.C. § 1182(a)(9)(B)(i)(I). Even though the government focuses on subsection (B)(i)(I), “again seeks admission” is used in two other subsections within Section 1182(a)(9). Because Section 1182(a)(9)(B)(i)(I) does not explicitly exclude noncitizens who initially entered the United States unlawfully, the government reads

“again” to mean that all such noncitizens must have at some point sought admission by operation of law. The government then takes the additional step of inferring that if such noncitizens once *sought* admission, they must still be *seeking* admission in the present.

Although the Agency has espoused that view of Section 1182(a)(9) for some time, *see Lemus-Losa*, 25 I. & N. Dec. at 743 n.6, it is such a counterintuitive reading of the text that the Agency initially held that “the word ‘again’ [w]as an apparent drafting mistake that has no bearing on the” scope of § 1182(a)(9), *In Re Lemus-Losa*, 24 I. & N. Dec. 373, 376 n.3 (B.I.A. 2007). In any event, we are not bound by the BIA’s interpretation of Section 1182(a)(9). *See Loper Bright Enters.*, 603 U.S. at 385-86, 400-01; *see also Penaranda Arevalo v. Bondi*, 130 F.4th 325, 336 (2d Cir. 2025) (making a determination independent of a BIA decision).

The most natural reading of “again seeks admission” in Section 1182(a)(9)(B)(i)(I) is the one that is consistent with Petitioner’s reading of the plain text of Section 1225(b)(2)(A). Seeking admission means seeking lawful entry, and there is no reason to diverge from the plain reading that “again seeks admission” applies only to those noncitizens who previously sought lawful entry. The government assumes that this would be a problem only because it cherry-picks portions of Section 1182(a)(9) and reads them in isolation. For example, the government worries that limiting Section 1182(a)(9)(B)(i)(I) to those who actually seek lawful admission would create inequities between them and noncitizens who evade inspection at the border. That concern is misplaced. Any noncitizen who evades inspection at the border, is removed, and later “seeks admission” is covered not by

Section 1182(a)(9)(B)(i)(I), but instead by the harsher provision of Section 1182(a)(9)(A)(ii). Unlike subsection (B)(i)(I), which imposes waiting periods of either three or ten years and includes exceptions for, *inter alia*, minors, asylees, battered women, and victims of sex trafficking, subsection (A)(ii) imposes a flat ten-year waiting period and includes only one exception for readmission with the Attorney General’s consent.

This interpretation also honors Congress’s use of different terminology throughout Section 1182(a)(9). Some subsections use “again seeks admission,” 8 U.S.C. § 1182(a)(9)(B)(i)(I), some use only “seeks admission,” *id.* § 1182(a)(9)(A)(ii), and others use “enters or attempts to reenter,” *id.* § 1182(a)(9)(C)(i)(II). We presume that such choices by Congress are meaningful. *See FDA v. R.J. Reynolds Vapor Co.*, 606 U.S. 226, 238-39 (2025) (“When Congress uses ‘one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.’”) (quoting A. SCALIA & B. GARNER, *READING LAW* 170 (2012)). If the government were correct that every “applicant for admission” has, by operation of law, sought admission, then there would be no need to specify “again,” nor would there be any difference between “again seeks admission” and “seeks admission.” In addition, if entering the country unlawfully amounted to constructively seeking admission, then “enters or attempts to reenter” too would cover the exact same people as “seeks admission” and “again seeks admission.”

Finally, even if *Lemus-Losa* were correct, it would not support the government’s position in this case. More specifically, even if noncitizens like Petitioner are construed as having sought admission at some point in the

past, it does not follow that they are presently seeking admission. That is because someone who is presently “seeking admission” cannot “again” seek admission. Cf. *Lemus-Losa*, 25 I. & N. Dec. at 743 n.6; *Buenrostro-Mendez*, 166 F.4th at 503. Thus, for *Lemus-Losa*’s interpretation of Section 1182(a)(9) to work, noncitizens who “again seek admission” must have at some point stopped seeking admission. But merely departing the country does not necessarily end one’s process of “seeking admission” because, as the BIA recognized, “many aliens . . . will be outside the United States and seeking admission from abroad.” *Lemus-Losa*, 25 I. & N. Dec. at 741 (emphasis omitted). If anything, then, the use of “again” in Section 1182(a)(9) supports Petitioner’s view that he at least is no longer “seeking admission,” even if the government were right that he once was.

In any event, whatever “again” means in Section 1182(a)(9), no reasonable interpretation of that provision supports the government’s present understanding of Section 1225(b)(2). We need not conclusively determine the scope of Section 1182(a)(9) to decide that Congress did not indirectly and implicitly mandate the detention of millions of noncitizens—a proverbial “elephant[]”—by inserting a surreptitious “again” into an unrelated section of the INA—the epitome of all “mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

E. Section 1225(b)(2)(B)(iii)

The government, relying on the Eighth Circuit’s decision in *Avila*, also argues that Section 1225(b)(2)(B)(iii), which exempts “stowaway[s]” from Section 1225(b)(2)(A), supports its interpretation. In *Avila*, the majority reasoned that there would be no reason to exclude stowa-

ways from Section 1225(b)(2)(A) unless a stowaway could otherwise be an “applicant for admission” who is “seeking admission.” *Avila*, 170 F.4th at 1135. Any reliance on this exemption to support the government’s position is misplaced.

First, the majority in *Avila* failed to consider at all that Section 1225(a)(2) states that “[i]n no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.” 8 U.S.C. § 1225(a)(2). Thus, the *Avila* majority started from the premise that a stowaway could be an “applicant for admission” but for Section 1225(b)(2)(B)(iii), even though that possibility is flatly foreclosed by Section 1225(a)(2).

Second, the *Avila* majority decided without basis that a stowaway “unquestionably” cannot seek lawful entry to the United States. *Avila*, 170 F.4th at 1135. The statute defines “stowaway” as “any alien who obtains transportation without the consent of the owner, charterer, master or person in command of any vessel or aircraft through concealment aboard.” 8 U.S.C. § 1101(a)(49). The definition thus speaks only to the noncitizen’s journey to the United States, not to the way the noncitizen seeks entry once he arrives (such as pursuant to a valid visa). The definition also covers a noncitizen who completes only a portion of his journey as a stowaway but otherwise disembarks lawfully at a port of entry. But for the exclusion of stowaways in Section 1225(a)(2), such a noncitizen could seek lawful entry just like anyone else presenting at the border.

Accordingly, the only coherent interpretation of Section 1225(b)(2)(B)(iii) is that it clarifies that Section 1225(b)(2)(A)’s broad referral of noncitizens to full re-

moval proceedings under Section 1229a does not apply to stowaways.

* * *

In sum, the plain meaning of “seeking admission” in Section 1225(b)(2)(A)—presently pursuing lawful entry into the United States—is not undermined by any of the other statutory provisions to which the government retreats to find support. Therefore, we find no basis to justify departing from the unambiguous meaning of the text, under which Petitioner is not subject to mandatory detention, because he is not “seeking admission” under Section 1225(b)(2)(A).

III. Statutory Context and Structure

Our interpretation of Sections 1225 and 1226, based on their plain text, is reinforced by the broader context and structure of those provisions in the overall statutory scheme. *See United States v. Epskamp*, 832 F.3d 154, 162 (2d Cir. 2016); *see also Gundy v. United States*, 588 U.S. 128, 141 (2019) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (internal quotation marks and citation omitted).

As an initial matter, the Supreme Court has long understood IIRIRA exactly how Petitioner does. *See Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). In rejecting the Ninth Circuit’s view that the doctrine of constitutional avoidance imposed an implicit six-month time limit on detention under Sections 1225(b) and 1226, the Court explained that Section 1225 operates “*at the Nation’s borders and ports of entry*, where the Government must determine whether an alien seeking to enter the

country is admissible,” *id.* (emphasis added), and “U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2),” *id.* at 289. By contrast, the Court described Section 1226 as “authoriz[ing] the Government to detain certain aliens *already in the country* pending the outcome of removal proceedings under §§ 1226(a) and (c).” *Id.* (emphasis added).

Although the government suggests that there is also language in *Jennings* that supports its reading—because the Court noted that Section 1225(b)(2) “serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1),” *id.* at 287—we are unpersuaded. Indeed, the Court left no doubt as to its view regarding the differences between Sections 1225 and 1226, which squarely fits with Petitioner’s interpretation, because it repeated later in the opinion that Section 1226 “applies to aliens already present in the United States.” *Id.* at 303. Thus, as the Court explained, Section 1226 “creates a default rule for those aliens by permitting—but not requiring—the Attorney General to issue warrants for their arrest and detention pending removal proceedings” and “permits the Attorney General to release those aliens on bond, except as provided in subsection (c).” *Id.* (alteration adopted) (internal quotation marks omitted).

To the extent that the government alternatively attempts to downplay the language in *Jennings* as mere dicta, it is well settled that “we are obligated to accord great deference to Supreme Court dicta, absent a change in the legal landscape.” *United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) (typeface altered) (internal quotation marks and citation omitted); *see also*

Clemente v. Lee, 72 F.4th 466, 474 (2d Cir. 2023). The government points to no change in the legal landscape, and thus we afford great deference to the Court’s description of the statutory scheme in *Jennings*.

Even without deferring, though, the framework set forth in *Jennings* makes good sense in light of Congress’ overall approach to immigration detention. The statute creates a tiered scheme that makes detention and removal easier for noncitizens who have weaker legal claims and who are either particularly dangerous or about whom the government lacks information. Noncitizens who just arrived without documentation or who misrepresented themselves are subject to expedited removal and must be detained. 8 U.S.C. § 1225(b)(1)(A)(i). Noncitizens who snuck across the border less than two years ago may be treated the same way, but only if so designated by the Attorney General. *Id.* § 1225(b)(1)(A)(iii). Noncitizens who present themselves to immigration officials at the border but are likely inadmissible for reasons other than a lack of documentation or misrepresentation must be detained, but they get full (not expedited) removal proceedings. *Id.* § 1225(b)(2)(A). Finally, noncitizens who have been in the United States for more than two years get full removal proceedings, may be detained, and may be granted release on bond or conditional parole, *id.* § 1226(a), unless they have committed certain crimes, *id.* § 1226(c). Only that construction reads the detention and removal provisions as a “symmetrical and coherent” statutory scheme that fits “all parts into an harmonious whole.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted).

We are equally unpersuaded by the government's contention that its reading "brings the statute in line with the longstanding 'entry fiction'" repeated throughout Supreme Court precedent, suggesting that noncitizens like Petitioner can be treated "as if stopped at the border" because they have never lawfully entered. Appellant's Br. at 43-44 (quoting *Thuraissigiam*, 591 U.S. at 139). Under the government's reading, Petitioner is still "seeking admission" because he had not lawfully entered. However, that approach overreads the Supreme Court's "entry fiction" precedents and disregards a century of immigration law establishing the meaning of "entry" as the "coming of an alien from a foreign country into the United States." *Volpe*, 289 U.S. at 425. Indeed, it has long been settled that a noncitizen can effect an entry even by crossing the border illegally. See *Yamataya v. Fisher*, 189 U.S. 86, 99-102 (1903). The pre-1996 INA sought to "giv[e] due recognition to the[se] judicial precedents" by defining entry as the "coming of an alien from a foreign port or place or an outlying possession into the United States." *Landon v. Plasencia*, 459 U.S. 21, 29 n.6 (1982) (quoting S. Rep. No. 1137, at 4 (1952)). While IIRIRA replaced that statutory definition of "entry" with "admission," it did not redefine "entry" or give any indication that it departed from these longstanding precedents.

Although the "entry fiction" doctrine allows the government to treat physical entrants as if still "on the threshold" if they are "detained shortly after unlawful entry," the reach of that doctrine is sharply limited. *Thuraissigiam*, 591 U.S. at 140 (internal quotation marks omitted). While the doctrine may extend further than the twenty-five yards and twenty-four hours at issue in *Thuraissigiam*, *id.* at 113, no one could seriously

contend that it applies to a noncitizen like Petitioner who has been living in the United States for decades. Under settled Supreme Court precedent, “aliens who have once passed through our gates, *even illegally*, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (emphasis added). That is, “once an alien enters the country, the legal circumstance changes, . . . whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The government’s reading runs afoul of these fundamental principles.

Moreover, the government’s argument turns on Section 1225 existing in a vacuum. The government argues that Section 1225(b)(2)(A) applies to Petitioner because all “applicants for admission” necessarily fall into one of two exhaustive categories set forth in Section 1225 that mandate detention pending removal. According to the government, some subset falls under Section 1225(b)(1), which requires detention pending expedited removal proceedings for noncitizens who are inadmissible on certain grounds and “who (1) are ‘arriving in the United States,’ or (2) have ‘not been admitted or paroled into the United States’ and have not ‘affirmatively shown . . . that [they] ha[ve] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility.’” Appellant’s Br. at 9 (quoting 8 U.S.C. § 1225(b)(1)(A)(i)-(iii)).⁶ All other applicants for admis-

⁶ Noncitizens in the latter category are only subject to detention and expedited removal under Sections 1225(b)(1)(A)(i) and (iii) if so

sion, the government argues, fall into Section 1225(b)(2)(A) as a “catchall.” The sole exception from mandatory detention is parole, granted “only on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A).

However, the government’s argument rests on an unjustified assumption that every “applicant for admission” must be covered by either Section 1225(b)(1) or Section 1226(b)(2). There is no textual basis in Section 1225 for that assumption, and it undermines the central role that Section 1226 plays in the statutory scheme.

For one, the government’s interpretation reduces the applicability of Section 1226(a) to a subset of applicants for admission (*i.e.*, “the detention of any of the multitude of aliens who have overstayed their visas,” Appellant’s Br. at 38) narrower than the statutory text authorizes. Had Congress intended Section 1226(a) to apply more narrowly, it would not have written the section to cover “an alien” without any further qualifications. 8 U.S.C. § 1226(a). Section 1226’s breadth is reinforced by its title, which refers broadly to “[a]pprehension and detention of aliens”—again with no qualifying language. *Cf. Dubin v. United States*, 599 U.S. 110, 120-21 (2023) (“[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.”) (internal quotation marks and citation omitted); *see also* Pub. L. 104-208, 110 Stat. 3009, 585 (1996) (enacting Section 1226 with its present title).

The government’s interpretation also renders superfluous much of Section 1226(c), including amendments

“designated” by the Attorney General in his discretion. 8 U.S.C. § 1225(b)(1)(A)(iii)(I).

to that provision in the Laken Riley Act, which was passed by Congress in 2025. *See* Pub. L. No. 119-1, 139 Stat. 3 (2025). As enacted in IIRIRA, Section 1226(c) mandates detention without bond or parole for noncitizens who enter the United States illegally, are released pending removal, and *inter alia* are inadmissible for certain reasons, including having committed a crime involving moral turpitude, 8 U.S.C. § 1226(c)(1)(A), or having engaged in terrorist activity, *id.* § 1226(c)(1)(D). It thereby acts as “a limit on the authority conferred by subsection [1226](a),” “subtract[ing] some of [the Agency’s] discretion when it comes to the arrest and release of criminal aliens.” *Nielsen v. Preap*, 586 U.S. 392, 409 (2019) (emphasis omitted).

If, as the government argues, all applicants for admission are subject to mandatory detention under Section 1225(b)(2), Section 1226(c) would apply only to two narrow subsets of noncitizens: “admitted aliens who overstayed visas and are deportable” and then also commit an enumerated crime, Appellant’s Br. at 19; and the rare criminal detainee who receives humanitarian parole under Section 1182(d)(5)(A).⁷ The vast majority of noncitizens covered by Section 1226(c)’s text, however, would be completely unaffected in the government’s view, since they would already have been subject to mandatory detention without bond under Section 1225(b). It would be surprising if Congress wrote Sec-

⁷ The parties dispute whether Section 1226(c) restricts humanitarian parole granted pursuant to Section 1182(d)(5)(A). We assume without deciding that the government is correct that Section 1226(c) prohibits humanitarian parole, not just conditional parole under Section 1226(a)(2)(B).

tion 1226(c) so broadly if it were meant to apply to so few individuals.

When Congress amended Section 1226 in the Laken Riley Act, it enumerated additional crimes requiring detention, including “burglary, theft, larceny, shoplifting, or assault of a law enforcement officer, . . . or any crime that results in death or serious bodily injury to another person.” 8 U.S.C. § 1226(c)(1)(E). Again, Congress added no language suggesting that Section 1226 was limited to noncitizens who overstay visas. Moreover, it would have been odd for Congress to address the dangers posed by “inadmissible . . . unadmitted criminal aliens,” Appellant’s Br. at 42, by amending a narrow provision that the government contends applies primarily to *admitted* noncitizens who have subsequently become *deportable*.⁸ See *Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).

By nullifying nearly all applications of Sections 1226(a) and 1226(c), the government’s interpretation “violate[s] the canon against interpreting any statutory provision in a manner that would render another provi-

⁸ Indeed, the noncitizen who murdered Laken Riley and inspired the Act—Jose Antonio Ibarra—entered the country illegally before being paroled pending further proceedings and had not overstayed a visa. See Debate Concerning the Laken Riley Act, 171 Cong. Rec. S161-01, S165 (daily ed. Jan. 15, 2025) (Sen. Ricketts); see also Daniella Silva, *Man Found Guilty of Murdering Georgia Nursing Student Laken Riley and Is Sentenced to Life*, NBC NEWS (Nov. 20, 2024), <https://www.nbcnews.com/news/us-news/man-found-guilty-murder-killing-georgia-nursing-student-laken-riley-rcna180377> [<https://perma.cc/4NCL-5C8S>] (last visited Apr. 27, 2026).

sion superfluous.” *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010); *see also Castañon-Nava*, 161 F.4th at 1061 (rejecting the government’s construction of Section 1225(b)(2) because it would “render superfluous another part of the same statutory scheme”) (internal quotation marks omitted). That canon is “strongest when,” as here, “an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013); *Henderson v. United States*, 568 U.S. 266, 281 (2013) (Scalia, *J.*, dissenting) (“A rudimentary principle of textual interpretation—so commonsensical that it scarcely needs citation—is that if one interpretation of an ambiguous provision causes it to serve a purpose consistent with the entire text, and the other interpretation renders it pointless, the former prevails.”). And the canon applies to these provisions even though the Laken Riley Act was enacted later in time. *See Bilski*, 561 U.S. at 608.

As explained above, the more coherent explanation is that Section 1226(a) sets forth the default rule for discretionary detention of noncitizens, which Sections 1225(b) and 1226(c) modify for certain subsets of high-risk noncitizens. That interpretation of the statutory scheme honors the text of each section and fits them together into a “symmetrical and coherent” whole. *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks and citation omitted).

In sum, Petitioner’s interpretation of “seeking admission” under Section 1225(b)(2)(A) is completely consistent with the consideration of that provision in the overall structure and context of the detention framework set forth in the statutory scheme.

IV. Statutory History and Purpose

The government roots much of its argument in “Congress’s manifest purposes” in adopting Section 1225(b)(2)(A). Appellant’s Br. at 21. It claims that “one of IIRIRA’s express objectives,” *id.* at 43, was to prevent unlawful entrants from obtaining “equities and privileges in immigration proceedings that [were] not available to aliens who present[ed] themselves for inspection,” *id.* (quoting H.R. Rep. No. 104-469, pt. 1, at 225 (1996) [hereinafter House Report I]).

As a threshold matter, the government’s argument about the legislative history is irrelevant because the plain statutory text controls. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 458 (2012) (“[R]eliance on legislative history is unnecessary in light of the statute’s unambiguous language.”) (internal quotation marks and citation omitted); *see also Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (“Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous.”). In any event, the government’s conclusions from the legislative history are incorrect. Indeed, the government’s use of legislative history illustrates the worst pitfalls of that method, derided as “looking over a crowd and picking out your friends.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotation marks and citation omitted). Fittingly, the government derives its view of “congressional purpose” from a single quote in the legislative history and omits the first half of the quoted sentence. As a result, the government erroneously concludes that IIRIRA sought to abolish all distinctions between arriving and already present noncitizens. It did not. Rather, IIRIRA had the much more

modest goal of altering “*certain aspects* of the [then] current ‘entry doctrine’”: namely, it reoriented “whether or not the alien has been lawfully admitted” as “the pivotal factor in determining an alien’s status.” House Report I, at 225 (emphasis added).⁹

The statutory lineage of Section 1226(a) further reinforces this reading. The same House Judiciary Committee Report on which the government relies explains that Section 1226(a) “restates the [then] current provisions in [Section 1252(a)(1)] regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States.” House Report I, at 229; *see also* H.R. Rep. No. 104-828, at 210 (1996) (Conf. Rep.) (same). The old Section 1252(a)(1) authorized bond for “any alien” pending deportation, not exclusion, proceedings—that is, noncitizens like Petitioner whom the government wants to exclude from bond under Section 1226(a). 8 U.S.C. § 1252(a)(1) (1995). The report gave no indication that bond eligibility under

⁹ The key to understanding this is the focus on *status* rather than *detention*. One aim of IIRIRA was to eliminate the dual track for removal that had previously placed some noncitizens into exclusion proceedings and others into deportation proceedings. That regime granted substantial legal privileges and rights only to noncitizens in deportation proceedings, including rights to notice and direct appeal. *See Landon*, 459 U.S. at 25-27. Those were the “equities and privileges” that IIRIRA aimed to standardize. Appellant’s Br. at 43. As we have explained, IIRIRA’s consolidation of deportation and exclusion proceedings into the singular removal proceeding did not eliminate all distinctions between deportable (admitted) and inadmissible (unadmitted) noncitizens. *See Blake*, 489 F.3d at 96 n.6. There are no clues in the House Report, or anywhere else in the legislative record, that Congress understood the detention regime as one of the “certain aspects” of the prior system it sought to change.

Section 1226(a) was intended to be narrower than under the old Section 1252(a)(1), despite explicitly noting that certain judicial review provisions in the old Section 1252(a)(1) were “not retained.” House Report I, at 229. The only relevant change that IIRIRA made to the old Section 1252(a)(1) was replacing “[p]ending a determination of deportability” with “pending a decision on whether the alien is to be removed”—a shift that broadened, rather than narrowed, the section’s scope. *Compare* 8 U.S.C. § 1252(a)(1) (1995), *with id.* § 1226(a) (2026).

The administrability safeguards that Congress wrote into IIRIRA provide further evidence that Section 1225 was not meant to have a broader scope than Section 1226. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (interpreting IIRIRA by reference to its transitional provisions). The enacting Congress estimated the number of criminal noncitizens then covered by Section 1226(c)’s detention mandate was in the range of 100,000 to 200,000. *See* House Report I, at 118-20. To account for the government’s then-limited detention capacity, IIRIRA included a safety-valve provision, allowing the Attorney General to delay enforcement of Section 1226(c) for up to two years upon notifying Congress “that there is insufficient detention space and . . . personnel available to carry out section [1226(c)].” Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009, 586-87 (1996). Following passage of IIRIRA, the Attorney General immediately triggered the safety valve and delayed implementation. *See* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209, 216-17 (1997).

By contrast, Congress apparently made no effort to estimate the number of individuals covered by Section

1225(b)(2)(A)’s detention mandate, nor included any similar safety-valve provision applying to that section of IIRIRA. The government offers no explanation for why the same Congress that was so concerned with the detention of 100,000 people under Section 1226(c) would have turned a blind eye to the consequences of mandating detention for all applicants for admission under Section 1225—an estimated two million people at the time. *See* Oral Argument at 11:15-24 (acknowledging that the number was “likely” “at least millions” in the late 1990s and that the number “has obviously increased” over time). Moreover, it is even harder to explain why the government, if tasked with detaining the huge number of noncitizens covered by Section 1225, would have neglected for almost *thirty years* to increase its detention capacity enough to actually implement that mandate. Even without the government’s suggested expansion of Section 1225(b)(2)(A), “DHS has never had sufficient detention capacity to maintain in custody every single person described in” that section. *Biden*, 597 U.S. at 792 (internal quotation marks and citation omitted).

Finally, the government’s interpretation undermines the very purpose that it purports to advance—treating similarly situated noncitizens alike. If the government is correct about Section 1225(b)(2)(A), then an unlawfully present noncitizen who entered illegally must be detained, but an unlawfully present noncitizen who overstayed a once-valid visa need not be, even if both noncitizens are identical in all other respects. Thus, even if both noncitizens had lived in the country for many years and were enmeshed in their communities, only the unlawful entrant would need to be detained, even though both noncitizens violated our immigration laws. At bottom, an illegal entrant and a visa overstayer who have

both lived in the country for many years are much more similar to each other than to an unknown noncitizen who has just arrived at the border for inspection and admission. The government’s interpretation therefore results in a much more problematic form of unequal treatment than Petitioner’s does.

Overall, IIRIRA retained much of the preexisting law’s differential treatment of noncitizens at the border and in the country’s interior. For instance, IIRIRA retained the distinction between deportability and inadmissibility grounds for removal. *Blake*, 489 F.3d at 96 n.6. While there is overlap between them, they are not coterminous. For instance, while noncitizens who have engaged in terrorist activity are both deportable and inadmissible, *see* 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B), a noncitizen who commits domestic violence or stalking offenses is only deportable, not inadmissible, *see id.* § 1227(a)(2)(E). As was true before IIRIRA, certain features of inadmissibility (as opposed to deportability) apply specifically to arriving (rather than already present) noncitizens. *See, e.g., id.* § 1225(b)(1)(A)(i) (providing for expedited removal of “arriving” noncitizens deemed inadmissible under Sections 1182(a)(6)(C) and 1182(a)(7)). IIRIRA’s nuanced retention of some but not other distinctions between deportable and excludable noncitizens reflects the well-established principle that “[l]aws are the product of compromise, and no law pursues its purposes at all costs.” *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 150 (2023) (alterations adopted) (internal quotation marks and citation omitted).

In sum, neither the government’s reliance on legislative history nor Congress’s overall purpose in enacting IIRIRA can rescue the newfound interpretation of Sec-

tion 1225(b)(2)(A), which casts aside the plain text and the context, structure, and history that supports our reading of that provision.

V. Prior Executive Practice and Congressional Silence

Even assuming *arguendo* that ambiguity existed in Section 1225(b)(2) with respect to its application to Petitioner and such ambiguity could support the government’s position, the fact that the Executive Branch has for nearly three decades acted inconsistently with the newfound interpretation strongly counsels against adopting it.

It is well-settled that we may consider the “consistency” of an agency’s interpretation of a statute in deciding how persuasive it is. *See Loper Bright Enters.*, 603 U.S. at 388 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In particular, the Supreme Court has explained:

Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

FTC v. Bunte Bros., 312 U.S. 349, 352 (1941). Accordingly, “[w]hen an agency claims to discover in a long-existent statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (internal quotation marks and citation omitted).

Here, although the parties quarrel over whether regulations issued in 1997 when IIRIRA was enacted support their respective interpretations of Section 1225(b)(2), *see* 8 C.F.R. §§ 1003.19(a) & (h)(2), 1236.1(d), there can be no debate that the Department of Justice’s contemporaneous understanding of the statute was the same as Petitioner’s. *See* *Detention and 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 . . . will be eligible for bond and bond redetermination.”). The government argues that this regulation shows that the Department of Justice in 1997 thought that noncitizens like Petitioner were “applicants for admission.” Appellant’s Reply Br. at 21-22; *see also Buenrostro-Mendez*, 166 F.4th at 506-07. But again, this makes the mistake of ignoring the phrase “seeking admission.” Of course the interim regulation acknowledges that “aliens who are present without having been admitted or paroled” are “applicants for admission,” because that is what Section 1225(a)(1) deems them to be. But the regulation clarifies that such noncitizens are still eligible for bond because they are not also “seeking admission.” It is therefore consistent with Petitioner’s interpretation of the statute, not the government’s.

In any event, the government concedes that, for five Presidential administrations over nearly three decades, it did consistently release detainees on bond whom the government now argues are covered by Section 1225(b)(2)(A). Even in President Trump’s first term (and the first few months of his second), the Agency adhered to the decades-old understanding on the relative scopes of Sections 1225 and 1226. Under these circumstances, “[t]he fact that no President has ever found

such power [in the statute] is strong evidence that it does not exist.” *Learning Res., Inc. v. Trump*, 146 S. Ct. 628, 643 (2026); *see also id.* at 641 (plurality opinion) (explaining that the “breadth of authority” the government claims, coupled with its “lack of historical precedent,” “is a telling indication” that the claimed power “extend[s] beyond the President’s legitimate reach”) (internal quotation marks and citation omitted).¹⁰

Congressional silence, too, is instructive. Despite enacting numerous amendments to IIRIRA over the years, Congress never inserted any language correcting the Executive’s supposed misinterpretation of Section 1225 or consistent application of Section 1226. As noted *supra*, even when it enacted the Laken Riley Act in January 2025, Congress mandated detention only for a narrow subset of criminal noncitizens, effectively blessing the practice of releasing non-criminal noncitizens, like

¹⁰ The government suggests that this reliance on Executive Branch inaction also “falls short” because, *inter alia*, “the Executive has not wholly failed to exercise the power it now claims” and “every prior administration interpreted and applied § 1225(b)(2)(A) to mandate detention of *some* aliens—just a subset of those subject to § 1225(b)(2)(A).” Appellant’s Reply Br. at 22 (alterations adopted) (emphasis in original) (internal quotation marks and citation omitted). That argument, however, misses the mark. Even when an agency has historically exercised *some* power pursuant a statute, its longstanding lack of any prior assertion of the expanded power that it now seeks to employ under that same statute can still be “significant in determining whether such power was actually conferred.” *Bunte Bros.*, 312 U.S. at 352; *see id.* at 351-52 (holding that, even though the Federal Trade Commission exercised authority under a statute against business practices employed in *interstate* commerce, it was significant “[t]hat for a quarter century the Commission has made no such claim” of similar power with respect to *intrastate* transactions).

Petitioner, on bond. As with agency practice, “Congress’ failure to repeal or revise the statute in the face of such administrative interpretation is persuasive evidence that that interpretation is the one intended by Congress.” *CBS, Inc. v. FCC*, 453 U.S. 367, 385 (1981) (alterations adopted) (internal quotation marks and citation omitted); *see also United States v. Chestman*, 947 F.2d 551, 560 (2d Cir. 1991) (en banc) (“Congressional silence in the face of administrative construction of a statute lends support to the validity of that interpretation.”).

Of course, as the government argues, courts can reject a longstanding agency interpretation. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (“[T]he mere failure of administrative agencies to act is in no sense a binding administrative interpretation that the Government lacks the authority to act.”) (internal quotation marks and citation omitted). But a longstanding, incorrect interpretation by an agency is more easily explained when the effect of that interpretation was to aggrandize an agency’s power. *See, e.g., Pereira v. Sessions*, 585 U.S. 198, 202 (2018) (holding that DHS’s notices to appear were inadequate). We recognize that agencies have strong incentives to maximize their own power and discretion. *See Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 119 (2022). Accordingly, where an agency has long failed to reach for a power and only later changes its mind, we may consider that as persuasive evidence that the power was never conferred in the first place. *See id.*

To be sure, we also agree with the government, and the Fifth Circuit, that “[y]ears of consistent practice

cannot vindicate an interpretation that is inconsistent with a statute’s plain text.” Appellant’s Reply Br. at 22 (quoting *Buenrostro-Mendez*, 166 F.4th at 506). However, even if we are incorrect in our view that the unambiguous language of the statute unquestionably favors Petitioner’s interpretation, it is hard to fathom how the plain text could be read to somehow unambiguously favor the government—especially where over 370 different judges across the Nation have rejected the government’s plain text argument—such that we could not consider the long-standing agency practice that contradicts the government’s position.

Moreover, “[i]n extraordinary cases[,] there may be reason to hesitate before accepting a reading of a statute that would, under more ordinary circumstances, be upheld.” *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022) (alteration adopted) (internal quotation marks and citation omitted). Rather than credulously accepting that Congress meant to entirely overhaul the pre-IIRIRA detention regime through “ambiguous statutory text,” “we typically greet assertions of extravagant statutory power . . . with skepticism.” *Id.* (internal quotation marks and citation omitted). The government’s interpretation of Section 1225(b)(2)(A) would send a seismic shock through our immigration detention system and society, straining our already overcrowded detention infrastructure, incarcerating millions, separating families, and disrupting communities. If Congress meant to achieve such a radical break from the past, it would not have done so in such an indirect and ambiguous way. As noted *supra*, Congress does not “hide elephants in mouseholes.” *Whitman*, 531 U.S. at 468. Given the enormous consequences of its interpretation and the “vast” breadth of our nation’s immigration laws, the gov-

ernment here “seeks to cram a veritable legislative zoo” into an exceptionally small mousehole. *Patel v. Garland*, 596 U.S. 328, 365 (2022) (Gorsuch, *J.*, dissenting); *see also Learning Res.*, 146 S. Ct. at 642 (“It stands to reason that had Congress intended to convey [this] distinct and extraordinary power . . . it would have done so expressly.”); *see also id.* at 639 (plurality opinion) (emphasizing that “a practical understanding of legislative intent suggest[s] Congress would have not delegated highly consequential power through ambiguous language”) (internal quotation marks and citation omitted).

VI. Constitutional Avoidance

Finally, even if there were ambiguity in the statutory text, we would reject the government’s interpretation because of the grave constitutional concerns it raises.

“Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.” *Jennings*, 583 U.S. at 286. Importantly, “[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction,” and, otherwise, it “simply has no application.” *Id.* at 296 (internal quotation marks and citations omitted). As we have extensively discussed, Petitioner’s reading of “alien seeking admission” is the proper construction of Section 1225(b)(2)(A)’s plain text and, thus, we need not rely here upon the doctrine of constitutional avoidance.

However, again assuming *arguendo* that the statutory language is ambiguous and the government’s inter-

pretation is a plausible one, it sounds constitutional alarms that would warrant its rejection. *See Biden v. Nebraska*, 600 U.S. 477, 509 (2023) (Barrett, *J.*, concurring) (“[I]f the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it.”). Petitioner is protected by the Fifth Amendment’s Due Process Clause, requiring any civil detention to be “nonpunitive in purpose and effect.” *Zadvydas*, 533 U.S. at 690; *see also Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (“[T]he Due Process Clause covers noncitizens, whether their presence here is lawful, unlawful, temporary, or permanent.”). While noncitizens can be detained temporarily to “give[] immigration officials time to determine an alien’s status without running the risk of the alien’s either absconding or engaging in criminal activity,” *Jennings*, 583 U.S. at 286, that is not what is going on here, where detention is mandatory regardless of these risks. We discern no basis for subjecting all noncitizens in Petitioner’s shoes to categorical detention without bond. As the government conceded at oral argument, Petitioner, like many unlawfully present noncitizens, presents no risk of flight nor any danger to the community. Indeed, when ordered by the district court to provide Petitioner with a bond hearing, the Agency agreed that he presented no such risks and released him.

The government’s interpretation would also likely subject Petitioner to unconstitutionally prolonged detention. Before he was arrested, Petitioner’s asylum application was pending for nearly a decade, and it still has not been resolved. And while the government represents that removal is “practically attainable” for Petitioner, Appellant’s Reply Br. at 32, proceedings have al-

ready lasted more than six months since his arrest with no clear end in sight. In fact, his next hearing is scheduled for June 28, 2027. See *EOIR Automated Case Info.*, EXEC. OFF. FOR IMMIGR. REV., <https://acis.eoir.justice.gov/en> (search by 209 454 653, Brazil, or access an archived version at <https://perma.cc/257V-4KT2>) (last visited Apr. 27, 2026). Detaining Petitioner without a bond hearing until then would “raise[] serious due process concerns” under our precedents. *Black*, 103 F.4th at 150; see *Velasco Lopez*, 978 F.3d at 855 (holding that continued detention of a noncitizen under Section 1226(a) for fifteen months pending removal violated due process).

These concerns are compounded by the fact that noncitizens have no right to counsel and are therefore often unrepresented in removal proceedings. See 8 U.S.C. § 1229a(b)(4)(A). Unlike criminals detained for punitive purposes, noncitizens like Petitioner thus lack the ability to reliably challenge their detention or the conditions in which they are being held.

The government cites *Demore v. Kim*, 538 U.S. 510 (2003), to argue that *Zadvydas*, *Velasco Lopez*, and *Black* do not apply because detention under Section 1225(b)(2)(A) is not “indefinite.” Appellant’s Reply Br. at 31-32 (emphasis omitted). But that assertion does not dispose of the constitutional concerns for two reasons. First, even if detention never becomes prolonged, the government’s interpretation would require a legitimate rationale, which the government has not attempted to articulate with respect to noncitizens like Petitioner. Whatever the duration of detention, it must still “serve its purported immigration purpose,” *Demore*, 538 U.S. at 527, which must “outweigh[] the individual’s constitutionally protected interest in avoiding physical re-

straint,” *Zadvydas*, 533 U.S. at 690 (internal quotation marks and citation omitted). In *Demore*, that justification was satisfied because Section 1226(c) applies only to “criminal aliens.” 538 U.S. at 517-23 (discussing at length Congress’s specific concerns with removing criminals). In *Zadvydas*, it was not, because the statute at issue “applie[d] not only to terrorists and criminals, but also to ordinary visa violators.” 533 U.S. at 697. Here, like in *Zadvydas*, mandatory detention of noncitizens like Petitioner (who cannot be said, as a categorical matter, to pose a danger to the community or risk of flight) for a substantial period of time would raise serious constitutional questions, especially because the government has failed to explain how it would bear a “reasonable relation” to any legitimate, non-punitive purpose. *Id.* at 690 (internal quotation marks and citation omitted). That conclusion is bolstered by our decision in *Velasco Lopez*. The core of our decision was that detention without justification serves “no public interest” that could outweigh the substantial harm it causes to detainees and the community. *Velasco Lopez*, 978 F.3d at 855. We explicitly declined to “establish a brightline rule for when due process entitles an individual” to a bond hearing, instead holding that “the longer detention continues, the greater the need for the Government to justify its continuation.” *Id.* at 855 & n.13.¹¹

Second, the Court in *Demore* assumed that detention would be relatively brief because of the criminal context. It focused on the narrow scope of Section 1226(c) and emphasized that “the detention at stake . . . lasts roughly a month and a half in the vast majority of cases

¹¹ The detainee in *Velasco Lopez* had received an initial bond determination, as Section 1226(a) requires. 978 F.3d at 846-47.

. . . and about five months in the minority of cases in which the alien chooses to appeal.” *Demore*, 538 U.S. at 530. The Court explained that proceedings against “criminal aliens” are typically completed so swiftly because they are prioritized by the Agency over the mine run of removal cases. *Id.* at 530 n.13. If the government is right that Section 1225(b)(2)(A) mandates detention of millions of non-criminal noncitizens, there is no reason to think that removal can be completed so swiftly for all or even most of those detained.¹²

It is not hyperbolic to project that the government’s interpretation would result in Petitioner, and many similarly situated noncitizens, being detained longer than permissible under *Zadvydas* and its progeny. Thus, although this case can be resolved based on the text of Sections 1225(b)(2)(A) and 1226(a) alone, the serious constitutional concerns raised by the government’s interpretation would alternatively warrant its rejection based on the constitutional-avoidance canon.

CONCLUSION

Petitioner entered the United States unlawfully in 2004 or 2005 and has resided here ever since. He is therefore deemed to be an “applicant for admission” by

¹² Indeed, the average wait time today for an initial decision in removal proceedings is more than two years. See *Immigration Court Legal Representation Dashboard*, VERA INST., <https://www.vera.org/ending-massincarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative/immigration-court-legal-representation-dashboard> [<https://perma.cc/H56B-TV2P>] (last visited Apr. 27, 2026). If the government were forced to detain all unlawfully present noncitizens until removal, it could not even complete removal of Section 1226(c) detainees as quickly as the Court assumed in *Demore*.

Section 1225(a), but he is not “seeking admission” because he is not requesting lawful entry into the United States after inspection and authorization. The government’s attempt to muddy these textually clear waters defies the statute’s context, structure, history, and purpose; contradicts the Supreme Court’s dicta in *Jennings* and longstanding Executive Branch practice; and its interpretation of the statute raises serious constitutional questions that should be avoided even if the statutory language were ambiguous. “If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.” *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654-55 (2020). We will not do so here.

Accordingly, we conclude that Petitioner’s detention is governed by Section 1226(a), not Section 1225(b)(2)(A), and we **AFFIRM** the district court’s grant of the writ of habeas corpus.

JOSÉ A. CABRANES, *Circuit Judge*, concurring 1 in the judgment and opinion of the Court:

I join Judge Bianco's thoughtful and learned opinion wholeheartedly and without reservation. I also write separately to applaud that opinion and to emphasize key points.

* * *

Twenty-one years ago, a Brazilian man crossed the southern border to enter the United States. He now has two children who are U.S. citizens and a small construction company. He has no criminal record. In September, near a Home Depot in Norwood, Massachusetts, immigration agents arrested him, launched removal proceedings against him, and detained him without bond, though he posed no flight risk or danger.¹

The man applied for habeas corpus. Petitioner, as he became, argued that he was properly detained under 8 U.S.C. § 1226(a), which allows for release on bond, not § 1225(b)(2)(A), which mandates detention. The District Court agreed and ordered a bond hearing that led to his release.²

On appeal, Respondent argues that Congress clearly required the Executive to detain millions of people like Petitioner—parents of American children, owners of American businesses, members of American communities—but that some thirty years passed before anyone noticed. In the meantime, fifteen Congresses stood silently by as five presidents ignored the plain text of the statute. Immigration officials also failed to grasp that

¹ *Post* at 5.

² *Id.* at 8.

Congress had told them to round up people by the millions. The capacity to carry out the largest detention in American history went unbuilt.³

Today this Court, in the majority’s exhaustive opinion, refuses to credit Respondent’s tale. This is good news.

* * *

Respondent’s basic argument is that § 1225(b)(2)(A) governs Petitioner’s detention. This provision reads, “in the case of an alien who is an applicant for admission,⁴ if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding.” It is undisputed that Petitioner is “an applicant for admission.” But the parties contest whether he is also “seeking admission.” If he is, they agree that mandatory detention kicks in.

At first glance, Respondent’s argument that Petitioner is “seeking admission” has some force. Petitioner is concededly an “applicant for admission,” and an “applicant” for something—whether a job, grant, or admission—is typically “seeking” it. Language elsewhere in § 1225 might be taken to back up this view, suggesting some relationship between applicants for admission and those seeking admission. *See* § 1225(a)(3) (“All aliens

³ *Id.* at 48-49.

⁴ “An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.” § 1225(a)(1).

. . . who are applicants for admission *or otherwise seeking admission* . . . shall be inspected by immigration officers.”) (emphasis added).

But Petitioner’s reply—that he falls outside § 1225(b)(2)(A)’s reach because he is not “seeking admission”—counteracts Respondent’s argument and then some. As Judge Bianco’s opinion for the panel makes abundantly clear, this reading must prevail for three core reasons.

First, the Supreme Court has said that it is right. “U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§ 1226(a) and (c).”⁵ Because Petitioner was “already in the country” and not “seeking admission into” it, his detention is governed by § 1226.

Second, even if the Supreme Court’s observations are dicta, as Respondent claims,⁶ they are right. To see why, properly define “seeking admission” within the meaning of the statute and ask if that is what Petitioner is doing.

Congress defined “admission” as “the lawful *entry* of the alien into the United States after inspection and authorization by an immigration officer.”⁷ And, in an immigration case long ago, the Supreme Court confirmed the obvious: “The word ‘entry’ by its own force implies

⁵ *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018).

⁶ Resp’t’s Br. at 46; *see also Buenrostro-Mendez v. Bondi*, 166 F.4th 494, 505 (5th Cir. 2026) (crediting this argument).

⁷ § 1101(a)(13)(A) (emphasis added).

a coming from outside.”⁸ Now put those two definitions together. To be “seeking admission,” Petitioner must be seeking to come inside from outside. Established judicial usage of the term “seeking admission” confirms this understanding. The Supreme Court has repeatedly used that term to refer to aliens arriving from abroad—including, instructively, in the run-up to § 1225(b)(2)(A)’s enactment.⁹ In short, someone who is “seeking admission” is trying to go from the exterior to the interior.

Against this background, no one can seriously contend that Petitioner is “seeking admission” twenty-one years after he entered the country. The words, properly defined, are clear. That ought to be the end of the matter. Yet Respondent’s counsel urges us to subordinate these settled definitions to his sense of “everyday meaning.”¹⁰ Because statutory definitions and established ju-

⁸ *United States ex rel. Claussen v. Day*, 279 U. S. 398, 401 (1929); see also *post* at 40 (explaining that the definition of “entry” has not changed).

⁹ See, e.g., *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 574, 583 (2017) (“[F]oreign nationals seeking admission have no constitutional right to entry.”); *Landon v. Plasencia*, 459 U.S. 21, 30-33 (1982) (“The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.”); *Reid v. INS*, 420 U.S. 619, 621 (1975) (“Section 212 of the Act as amended, 8 U.S.C. § 1182, specifies various grounds for exclusion of aliens seeking admission to this country. Section 241 of the Act, 8 U.S.C. § 1251, specifies grounds for deportation of aliens already in this country.”).

¹⁰ Resp’t’s Br. at 26-27.

dicial constructions override everyday meaning,¹¹ the Court rightly passes on that offer.

And even if Petitioner were somehow seeking “entry,” he surely is not seeking “entry . . . after *inspection*.” Long-settled case law says that “inspection” ordinarily takes place at a port of entry,¹² not outside a Home Depot in Massachusetts.

Third, Respondent’s argument that all “applicants for admission” are necessarily “seeking admission” turns that latter phrase into surplusage. If every “applicant for admission” were “seeking admission,” as Respondent claims, Congress would not need to have written that mandatory detention applies only to those applicants for admission who are seeking admission. As always, we are loath to find any of Congress’s words hollow.

¹¹ See *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020) (“When a statute includes an explicit definition, we must follow that definition, even if it varies from a term’s ordinary meaning.”) (cleaned up); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011).

¹² See *Guamanrrigra v. Holder*, 670 F.3d 404, 406 (2d Cir. 2012) (“The term of art ‘without inspection’ . . . means entering the United States borders without being admitted or paroled by United States immigration officials *at a port of entry*.”) (emphasis added); *Reid v. INS*, 492 F.2d 251, 255 (2d Cir. 1974) (“Next he must submit himself at the point of entry to an INS official for ‘inspection’ as an alien.”), *aff’d*, 420 U.S. 619 (1975); *Posos-Sanchez v. Garland*, 3 F.4th 1176, 1183 (9th Cir. 2021) (holding that admission inspection must take place “at a port of entry”); *Ex parte Saadi*, 23 F.2d 334, 336 (S.D. Cal. 1927) (“‘Inspection,’ to my mind, as used in the Immigration Act, means that the immigration officers are given the opportunity to check the right of the alien to enter the United States when he presents himself as an alien.”), *aff’d*, 26 F.2d 458 (9th Cir. 1928).

Zoom out to see the broader statutory context, and Petitioner’s lead lengthens. That is because “§ 1225(b) applies primarily to aliens seeking entry into the United States,”¹³ the Supreme Court has said, whereas “§ 1226 applies to aliens already present in the United States.”¹⁴ These observations suggest that § 1225(b)(2)(A)’s detention mandate does not cover those inland like Petitioner.

Once again, the statutory text confirms the Supreme Court’s words. Section 1225(b)(2)’s title, “[i]nspection of other aliens,” refers to a process that, as just noted, takes place at the border. Move along to § 1226, and its focus on the interior is likewise clear. It provides for the detention of certain aliens who violate *state* law,¹⁵ presumes that *local* authorities far from the border may investigate and detain the aliens in question,¹⁶ and gives state attorneys general standing to sue when the release of an alien “harms [a] *State* or its residents.”¹⁷

The history of the immigration laws is also in Petitioner’s corner. When Congress enacted § 1225(b)(2) in 1996, it said that the provision would concern arriving aliens, not those inland like Petitioner. The Conference Report—“the most persuasive evidence of congressional intent” other than the text itself¹⁸—was not mealy mouthed about this: it says § 1225(b) covers “aliens *ar-*

¹³ *Jennings*, 583 U.S. at 297.

¹⁴ *Id.* at 303.

¹⁵ § 1226(c)(1)(B) (citing § 1227(a)(2)(B)).

¹⁶ § 1226(c)(3), (d)(1)(A).

¹⁷ § 1226(f) (emphasis added).

¹⁸ *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000).

living in the United States.”¹⁹ And for the first twenty-nine years, nobody said otherwise. The Clinton, Bush, Obama, Trump I, and Biden administrations all agreed with Petitioner that § 1226, not § 1225, governs interior detention.²⁰ We give “substantial weight” to that “early (and consistent) view of [the] statute.”²¹ If Respondent is right that in 1996 Congress ordered the largest mass detention in American history, the world would have likely noticed sooner. Small wonder that some 90 percent of the hundreds of district judges across the land who have heard Respondent’s argument have rejected it.²²

One last fact is telling. In 1996 Congress mandated the detention of certain aliens, mostly criminals, under § 1226(c)(1). At the time, Congress knew that immigration-detention facilities had around 8,500 beds, enough to detain some 100,000 aliens yearly.²³ That might have been inadequate in light of the new detention mandates. So Congress gave the Attorney General two years during which certain aliens could be released while five hundred beds were added.²⁴ Notably, Congress allowed no

¹⁹ H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.) (emphasis added); *accord* H.R. Rep. No. 104-469, pt. 1, at 229 (1996).

²⁰ *Post* at 52-53.

²¹ *Safdieh v. Comm’r of Internal Revenue*, 169 F.4th 102, 108 & n.31 (2d Cir. 2026); *accord Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 386, 394 (2024).

²² Kyle Cheney & Josh Gerstein, *Another Appeals Court Backs Trump Administration’s Mass Detention Policy*, Politico (Mar. 25, 2026, at 12:25 PM), <https://www.politico.com/news/2026/03/25/mandatory-detention-ruling-8th-circuit-00844386>.

²³ H.R. Rep. No. 104-469, pt. 1, at 123 (1996).

²⁴ 8 U.S.C. § 1368(a); Pub. L. No. 104-208, § 303(b)(2), 110 Stat. 3009, 586-87 (1996).

such grace period for the mandatory detention of the *two million* aliens that Respondent says then came within § 1225(b)(2)'s sweep.²⁵ That discrepancy is inexplicable. And, as a final piece in the textual, structural, and historical puzzle, it is yet another reason why the judgment of the District Court has been quite rightly affirmed.

²⁵ *Post* at 48-49.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

25-CV-6532-MAV

RICARDO APARECIDO BARBOSA DA CUNHA, PETITIONER

v.

JOSEPH FREDEN, DEPUTY FIELD OFFICE DIRECTOR,
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,¹
RESPONDENT

Filed: Nov. 25, 2025

DECISION AND ORDER

¹ Notwithstanding Petitioner’s listing of the Acting Director of Immigration and Customs Enforcement, the Secretary of Homeland Security, and the Attorney General as respondents to the petition in addition to Joseph Freden, Freden is the only proper respondent. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (stating that the proper respondent in a federal habeas petition is generally “the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.”); *see also, e.g., Gutierrez v. Barr*, No. 20-CV-6078-FPG, 2020 WL 2059845, at *3 (W.D.N.Y. Apr. 29, 2020) (“[T]he only proper respondent is Jeffrey Searls, Officer in Charge at the Buffalo Federal Detention Facility. . . .”). Accordingly, the other Respondents are dismissed from this case and the Clerk of Court is directed to remove them from the docket.

INTRODUCTION

Petitioner Ricardo Aparecido Barbosa Da Cunha, a citizen of Brazil who has been physically present in the United States for approximately 20 years, was apprehended by federal agents in Massachusetts, and transferred to the Buffalo Federal Detention Facility (“BFDF”) in the custody of U.S. Immigration and Customs Enforcement (“ICE”) on September 26, 2025. ECF No. 15 ¶ 1. He has filed this action pursuant to 28 U.S.C. § 2241, arguing that his continued detention without a bond hearing is a violation of the Immigration and Nationality Act (“INA”) and associated regulations, as well as his due process rights under the Constitution. *Id.* ¶¶ 31-43.

Though the original petition in the instant case was filed in the District of Massachusetts on the day Petitioner was detained (ECF No. 1), the matter was transferred to this District on October 2, 2025, after the parties agreed that Petitioner was already in the custody of Respondent Freden at the time of filing. ECF Nos. 10-11. Plaintiff filed his First Amended Petition on October 3, 2025, and the Court issued an order to show cause that same day. ECF Nos. 15-16. On October 14, 2025, Respondent filed a motion to dismiss the petition. ECF No. 21. Petitioner filed his reply on October 16, 2025. ECF No. 23.

The Court held a virtual hearing on the parties’ submissions on October 20, 2025. ECF No. 24. Following the hearing, the Court issued a text order granting Petitioner’s application for habeas relief to the extent that Respondent is directed to hold a bond hearing for Petitioner before an Immigration Judge, and denying Respondent’s motion to dismiss. ECF No. 25. The present

decision and order memorializes the Court’s reasoning and supersedes the text order.

LEGAL STANDARD

28 U.S.C. § 2241(c)(3) authorizes federal courts to grant habeas relief to prisoners or detainees who are “in custody in violation of the Constitution or laws or treaties of the United States.” Federal courts retain jurisdiction under § 2241 to review purely legal statutory and constitutional claims regarding the government’s detention authority, but jurisdiction does not extend to “discretionary judgment,” “action,” or “decision” by the Attorney General with respect to either detention or removal.² *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (citing, *inter alia*, *Demore v. Kim*, 538 U.S. 510, 516-17 (2003)).

In addition to the Petition, Respondent has filed a motion to dismiss. ECF No. 21. “A motion to dismiss a habeas petition is reviewed under the same standard as a motion to dismiss a civil complaint under Fed. R. Civ. P. 12(b)(6).” *Petrova v. U.S. Dep’t of Homeland Sec.*, No. 2:25-CV-00240, 2025 WL 2772764, at *10 (D. Vt. Sept. 26, 2025) (quoting *Pittman v. Cook*, 2020 WL 2840256, at *3 (D. Conn. June 1, 2020)). To survive a motion to dismiss under Rule 12(b)(6), the petition “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ash-*

² For instance, 8 U.S.C. § 1226(e) provides that “[t]he Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review.” Additionally, judicial review of removal orders is available only through filing a “petition for review” in a Circuit Court pursuant to 8 U.S.C. § 1252.

croft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In ruling on a motion to dismiss, even in a habeas context, a court “‘may consider all papers and exhibits appended to the complaint, as well as any matters of which judicial notice may be taken.’” *Tripathy v. Schneider*, 473 F. Supp. 3d 220, 226 (W.D.N.Y. 2020) (quoting *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995)). Under Rule 201 of the Federal Rules of Evidence, the Court may, on its own, take judicial notice of facts that are not subject to reasonable dispute because they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). For instance, the Second Circuit has noted that “courts routinely take judicial notice of documents filed in other courts, . . . not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.” *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (finding, among other things, that documents filed with the Securities and Exchange Commission were judicially noticeable on a motion to dismiss.).

BACKGROUND

The following background is drawn from Petitioner’s First Amended Petition (ECF No. 15). Further, the Court takes judicial notice of the following documents filed by Respondent’s counsel: a Notice to Appear, Form I-213, and an I-200 Warrant for arrest, both issued by ICE. ECF No. 22; *see e.g., Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010) (taking judicial notice of the existence of documents in an alien’s “A-file” on the basis that “they are official agency records”).

Petitioner entered the country in or about 2004 by crossing the U.S. border with Mexico.³ ECF No. 15 ¶ 2. He owns his own construction business and his own home, and is married to a Brazilian citizen, with whom he has two children who are United States citizens, aged twelve and seventeen. *Id.* ¶ 3. In 2016, Petitioner filed an application for asylum with the United States Citizenship and Immigration Services, alleging a fear of persecution if returned to Brazil. *Id.* ¶ 3. On September 26, 2025, Petitioner was detained by federal agents in Norwood, Massachusetts while on his way to work. *Id.* ¶ 4. Until the September 26 detention, Petitioner had never been detained or held in custody by U.S. immigration officials, and he has no known criminal history. *Id.* ¶ 2.

After his detention, Petitioner was promptly transferred from Massachusetts to the BFDF. *Id.* ¶ 24. While at the BFDF, he was served with a Notice to Appear⁴ and a Form I-200 warrant for arrest. ECF No. 22 at 6-10. By the time the amended Petition was filed on October 3, 2025, Petitioner had requested a bond hearing from an Immigration Judge, but the Judge “alleged

³ Though he does not allege as much in the Petition, the circumstances surrounding his detention suggest that he crossed the border without detection or authorization.

⁴ Section 1229(a)(1) of Title 8 of the United States Code provides that removal proceedings are initiated against an alien when he is served with a written notice to appear that specifies—among other things—the nature of the proceedings against the alien, the legal authority under which the proceedings are conducted, the acts or conduct alleged to be in violation of the law, the charges against the alien and statutory provisions alleged to have been violated, the time and place at which removal proceedings will be held, and the consequences for failing to appear at the proceedings.

in response that [Petitioner] is not eligible for one, based on the recent [Board of Immigration Appeals (“BIA”)] decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).” ECF No. 15 ¶ 15. *Hurtado* holds, in pertinent part, that “Immigration Judges . . . have no authority to redetermine the custody conditions of an alien who crossed the border unlawfully without inspection, even if that alien has avoided apprehension for more than 2 years.” *Hurtado*, 29 I. & N. Dec. at 228. Thus, at the time of the hearing on the Court’s Order to Show Cause, Petitioner was still being held in custody at the BFDF without a bond hearing. ECF No. 15 ¶ 24, 29.

DISCUSSION

The First Amended Petition (“FAP”) states three relevant grounds⁵ for relief: (1) violation of 8 U.S.C. § 1226(a) and associated regulations; (2) violation of Petitioner’s Fifth Amendment right to due process based on Respondent’s failure to provide a bond hearing under 8 U.S.C. § 1226(a); and, (3) violation of Petitioner’s Fifth Amendment right to due process based on Petitioner’s civil detention without an individualized hearing. Respondent’s motion to dismiss maintains that because Petitioner is detained under 8 U.S.C. § 1225(b)(2)(A)—and not § 1226(a) as Petitioner claims—his detention is mandatory by statute until he is removed, and Petitioner is not entitled to any further process under the Fifth Amendment at this time. ECF No. 21-1 at 2, 5-10.

⁵ The FAP also included a fourth ground for relief—violation of Petitioner’s Fifth Amendment right to *substantive* due process (FAP ¶ 41-43)—but Petitioner’s brief concedes that this argument is moot given the initiation of removal proceedings against Petitioner. ECF No. 23 at 3, n.1.

I. Congress' Plenary Power over Immigration Laws

Article I, Section 8, Clause 4 of the Constitution gives Congress the power “[t]o establish an uniform Rule of Naturalization.” In that regard, while the Supreme Court has recognized that immigration officials have “broad discretion” in carrying out immigration laws, it has repeatedly held that Congress—not the Executive Branch—has “plenary power” over the admission and exclusion of aliens. *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138-140 (2020); *Arizona v. United States*, 567 U.S. 387, 396 (2012); *Kleindienst u. Mandel*, 408 U.S. 753, 766 (1972); *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, 123 (1967).

Under the laws established by Congress, an alien gains “admission” or is “admitted” to the United States if he or she gains “lawful entry . . . into the United States after inspection and authorization by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A). Certain classes of aliens are, by law, inadmissible. Thus, 8 U.S.C. § 1182(a)(1)-(10) identifies several grounds for finding that an alien is ineligible to be admitted to the United States, including health conditions, criminal history, security threats, likelihood of becoming a public charge, labor certifications and qualifications (or lack thereof), prior removals and—as most relevant here—illegal entry and violation of immigration laws (§ 1182(a)(6)) and inadequate documentation (§ 1182(a)(7)).

Where an alien is inadmissible, he may depart voluntarily (e.g., § 1225(a)(4)), be subject to expedited removal by immigration officials (e.g., § 1225(b)(1)), or be entered into removal proceedings (§ 1229a). Further, even after admission, any alien in the United States can be removed if the alien was inadmissible at the time of en-

try or adjustment of status, violates his status, commits a specified crime, fails to register or falsifies documents, threatens the security of the United States, becomes a public charge within a specified period of time, or votes unlawfully. 8 U.S.C. §§ 1227, 1229, 1229a.

Depending upon the reason for the denial of the alien's admission or the initiation of removal proceedings, the alien either must be detained pending removal, or may be detained at the discretion of immigration officials. 8 U.S.C. §§ 1225(b)(1)-(2), 1226, 1231.

II. The Statutory Language at Issue

The issue for decision in the instant matter is not whether Petitioner is admissible, nor even whether he is removable. Rather, the issue is whether he is entitled to a bond hearing and the potential for release during the pendency of his removal proceedings. To resolve this issue, the Court must determine whether Petitioner is detained under 8 U.S.C. § 1225(b)(2)(A) as Respondent argues, or 8 U.S.C. § 1226(a) as Petitioner maintains.

A. The Parties' Arguments

Respondent maintains that Petitioner is detained under 8 U.S.C. § 1225(b)(2)(A), which states, in pertinent part, that:

in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title [i.e., removal proceedings].

Respondent argues that Petitioner is properly detained under this provision because not only is he an “applicant for admission,” but also because he is “not clearly and beyond a doubt entitled to be admitted.” Under Respondent’s interpretation of the provision, the terms “applicant for admission” and “seeking admission” are used interchangeably. ECF No. 21-1 at 5-6.

On the other hand, Petitioner maintains that he is detained under 8 U.S.C. § 1226(a), which provides that:

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) [mandating the detention of certain criminal aliens] and pending such decision, the Attorney General—

- (1) may continue to detain the arrested alien; and
- (2) may release the alien on—
 - (A) bond of at least \$1,500 with security approved by, and containing conditions described by, the Attorney General; or
 - (B) conditional parole; but
- (3) may not provide the alien with work authorization . . . unless the alien is lawfully admitted for permanent residence or otherwise would . . . be provided such authorization.

Petitioner argues that he is properly detained under this provision, in part, because he was arrested on a warrant, and § 1226(a) provides for arrest on a warrant where § 1225 does not. ECF No. 23 at 7 n.2. In addition to the warrant argument, Petitioner also contends that he cannot be detained under § 1225(b)(2)(A) because he does

not meet all three of the elements required for detention under that provision: i.e., that he is “(1) an ‘applicant for admission,’ (2) ‘seeking admission,’ and (3) not ‘clearly beyond a doubt entitled to be admitted.’” *Id.* at 8. Under Petitioner’s reading of § 1225(b)(2)(A), “seeking admission” is not interchangeable with “applicant for admission,” but rather requires the additional performance of “some kind of affirmative action taken to obtain authorized entry.” *Id.* at 7 (quoting *Vasquez v. Feeley*, No. CV 25-2542-RFB-EJY, 2025 WL 2676082, at* 23 (D. Nev. Sept. 17, 2025)).

Thus, whether Petitioner is detained under § 1225(b)(2) or § 1226(a) is an issue of statutory interpretation that hinges to a large degree on the meaning of “seeking admission.” See *Puga v. Assistant Field Off. Dir., Krome N. Serv. Processing Ctr.*, No. 25-24535-CIV, 2025 WL 2938369, at *4 (S.D. Fla. Oct. 15, 2025).

B. Section 1225(b)

As discussed above, Respondent maintains that Petitioner is detained under § 1225(b)(2)(A), and argues that “applicant for admission” and “seeking admission” are used interchangeably in that provision. Although “applicant for admission” is defined in § 1225(a)(1) as “an alien present in the United States who has not been admitted or who arrives in the United States . . . ,” and the term “admission” is defined in § 1101(13)(A) as “lawful entry . . . into the United States after inspection and authorization by an immigration officer,” the phrase “seeking admission” is not defined.

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park ‘N Fly, Inc. v.*

Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Thus, the Court’s “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” *Id.* (citing, *inter alia*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)).

“When a term is not defined by statute, courts may ‘look to its ordinary meaning found in contemporary dictionary definitions,’ that is, in dictionaries that were available when the statute was enacted.” *Nero v. Uphold HQ Inc.*, 688 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2023) (quoting *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264, 269 (2d Cir. 2023)). Section 1225(b) in its present form was passed into law in 1996. *See* Pub. L. 104-208, Div. C, Title III, § 302(a) (Sept. 30, 1996). That same year, Webster’s Dictionary included the following relevant definitions of the term “seek”:

1. to go in search or quest of. . . . 2. to try to find or discover by searching or questioning. . . . 3. to try to obtain. . . . 4. to try or attempt. . . . 5. To go to. . . . 6. to ask for; request. . . .

Seek, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996), available at <https://archive.org/> (last accessed Nov. 6, 2025). These definitions suggest, as Petitioner argues, that “seeking admission” involves active efforts to obtain “admission.” Thus, whereas an “applicant for admission” is an alien present in the United States without ad-

mission or arriving from outside of the United States, an alien who is “seeking admission” is an alien in search of or trying to obtain “lawful entry after inspection and authorization by an immigration official.” The two meanings are related, but distinct.

This reading of “seeking admission” is supported by the context of § 1225(b)(2). First, using “seeking admission” interchangeably with “applicant for admission” would render the former “superfluous,” a clear violation of the rule against surplusage in statutory construction. *See, e.g., Artiga v. Genalo*, No. 25-CV-5208 (OEM), 2025 WL 2829434, at *7 (E.D.N.Y. Oct. 5, 2025) (collecting cases). That is, “if . . . § 1225(b)(2) applied to all noncitizens who are ‘applicants for admission,’ then there would be no need for Congress to have separately referenced a sub-category of persons ‘seeking admission’ in the specific section. . . .” *Hyppolite v. Noem*, No. 25-CV-4304 (NRM), 2025 WL 2829511, at *9 (E.D.N.Y. Oct. 6, 2025) (quoting *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023) (“every clause and word of a statute should have meaning”)). In addition, using the two terms interchangeably would ignore their grammatical construction; as several other courts have discussed, the conjugation of the verb “to seek” in the provision “necessarily implies some sort of present tense action,” but present tense action is not “necessarily implied” in the term “applicant for admission.” *Lopez Benitez v. Francis*, No. 25 CIV. 5937 (DEH), 2025 WL 2371588, at *6 (S.D.N.Y. Aug. 13, 2025) (quoting *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *6 (D. Mass. July 24, 2025)).

Moreover, the phrase “seeking admission” is used in two other places in the statute, both of which suggest

that the meaning of “seeking admission” is related to, but distinct from, “applicant for admission.” Section 1225(a)(3) requires that all aliens “who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.” 8 U.S.C. § 1225(a)(3). “Otherwise” means “under other circumstances,” “in another manner; differently,” “in other respects.” *Otherwise*, WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996), available at <https://archive.org> (last accessed Nov. 6, 2025). Thus, an alien may be “seeking admission,” but may do so “under other circumstances” or “in another manner” than as an applicant for admission. Similarly, § 1225(a)(5) provides that “[a]n applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States. . . .” Both uses of the phrase “seeking admission” indicate that an applicant for admission may be seeking admission, but that the terms are distinct and the latter suggests an active effort to obtain lawful entry through inspection by an immigration officer.

Lastly, the context of § 1225 as a whole supports a limited scope for § 1225(b). As another district court recently explained:

The title of § 1225 is revealing: “Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.” (emphasis added). The use of “arriving” to describe noncitizens strongly indicates that the statute governs the entrance of noncitizens to the United States. This reading is bolstered by the fact that § 1225 clearly estab-

lishes an inspection scheme for when to let noncitizens into the country. *See* § 1225; *see Dublin v. United States*, 599 U.S. 110, 121 (2023) (“a title ‘is especially valuable [where] it reinforces what the text’s nouns and verbs independently suggest’”). . . . In fact, the subheading for § 1225(b)(2)(A) reads “Inspection of Other Aliens,” reinforcing the idea that the subsection applies to those coming in, not already present.

The statute also explicitly addresses its effect on “stowaways” and “crewm[e]n,” words that suggest arrival at a border or port of entry. That Congress separated removal of arriving aliens from its more general section for “Apprehension and detention of aliens,” § 1226, implies that Congress enacted § 1225 for a specific, limited purpose. *See Dublin*, 599 U.S. at 122. . . .

Pizarro Reyes v. Raycraft, No. 25-CV-12546, 2025 WL 2609425, at *5 (E.D. Mich. Sept. 9, 2025). *See also Ortiz v. Freden*, No. 25-CV-960-LJV, 2025 WL 3085032, at *9 (W.D.N.Y. Nov. 4, 2025) (examining § 1225 in “the statutory scheme of immigration law.”).

Because Respondent has failed to show that Petitioner was “seeking admission” at the time of his arrest, the Court agrees with Petitioner that Respondents have failed to demonstrate that § 1225(b)(2)(A), and not § 1226(a), applies in Petitioner’s case.

III. Petitioner is Detained under § 1226(a)

Moreover, the Court finds that Petitioner’s circumstances support the conclusion that his detention was under § 1226(a). Contrary to the language of § 1225(b), § 1226(a) does not specify a class or classes of aliens who

should be detained under the provision, but governs more generally the “apprehension and detention of aliens.” As opposed to the inspection regime for aliens entering the United States set forth in § 1225, the Supreme Court has characterized § 1226(a) as “authoriz[ing] the government to detain certain aliens *already in the country* pending the outcome of removal proceedings[.]” *Jennings*, 583 U.S. at 289 (emphasis added).

Here, Petitioner had not presented himself to an immigration officer for inspection prior to his arrest; rather, he was in Norwood, Massachusetts and on his way to work. ECF No. 15 ¶ 4. Indeed, he had been at liberty in the interior of the United States after an admittedly unlawful entry some 20 years before. *Id.* Additionally, the Court agrees with Petitioner that the issuance of a warrant was significant, and supports the inference that even the agency originally considered Petitioner to be detained under § 1226(a). ECF No. 23 at 7 n.2.; see, e.g., *Hyppolite*, 2025 WL 2829511 at *8 (agreeing with the Court in *Lopez Benitez*, 2025 WL 2371588, at *5 that the agency’s initial treatment of the petitioner is a relevant consideration). In fact, the references on the warrant itself were to authorization for detention under INA Section 236 (§ 1226) and Section 287 (§ 1357), and not Section 235 (§ 1225).⁶

⁶ Until a few months ago, it seems that even the Government believed aliens in Petitioner’s position were detained under § 1226. See, e.g., *J.G.O. v. Francis*, No. 25-CV-7233 (AS), 2025 WL 3040142, at *2 (S.D.N.Y. Oct. 28, 2025) (noting the recent influx of cases in which the government “has detained noncitizens pursuant to § 1226(a), then, only afterward, argued that they were instead detained under § 1225(b)(2) and ineligible for bond.”).

Thus, the Court finds that Petitioner was detained under § 1226(a), and not subject to mandatory detention under § 1225(b)(2). As such, he is entitled to a bond hearing “at the outset of detention” as established by existing federal regulations. *Jennings*, 583 U.S. at 306 (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)).

IV. Due Process

Although the Court’s text order suggested a due process analysis, upon further consideration the Court declines to reach the merits of Petitioner’s Fifth Amendment due process claim in this decision. *See, e.g., Pizarro Reyes*, 2025 WL 2609425, at *8. Petitioner has received the relief he requested based on the Court’s finding regarding his first cause of action, entitlement to a bond hearing under § 1226(a) and its implementing regulations. ECF No. 15 ¶¶ 31-34. Moreover, Petitioner did not elaborate on his due process claims in his brief, but rather focused entirely on the interpretation of § 1225(b) and § 1226(a). ECF No. 23.

CONCLUSION

Accordingly, as indicated in the Court’s text order, Respondent’s motion to dismiss [ECF No. 21] is DENIED; and Petitioner’s application for habeas relief [ECF No. 15] is GRANTED to the extent that the Court finds he is detained under 8 U.S.C. § 1226(a) and is therefore entitled to a bond hearing under the relevant regulations. ECF No. 24.

In its prior text order, the Court ORDERED that Respondent hold a bond hearing for Petitioner within ten (10) days of the date of this order. ECF No. 25. The bond hearing was held on October 28, 2025. ECF No. 26. After some initial difficulty with the process of post-

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ing bond, Petitioner's counsel has confirmed that Petitioner was released on bond as of October 29, 2025. ECF No. 29.

Therefore, the Clerk of Court is directed to close this action.

SO ORDERED.

Dated: November 25, 2025
Rochester, New York

ENTER:

/s/ MEREDITH A. VACCA
HON. MEREDITH A. VACCA
United States District Judge

APPENDIX C

1. 8 U.S.C. 1225 provides:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

(2) Stowaways

An arriving alien who is a stowaway is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection by an immigration officer. Upon such inspection if the alien indicates an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B). In no case may a stowaway be considered an applicant for admission or eligible for a hearing under section 1229a of this title.

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission

or readmission to or transit through the United States shall be inspected by immigration officers.

(4) Withdrawal of application for admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States.

(5) Statements

An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an

intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately

prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not

established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the 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.

(iv) Information about interviews

The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations

prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.

(v) “Credible fear of persecution” defined

For purposes of this subparagraph, the term “credible fear of persecution” means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to

hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

(E) “Asylum officer” defined

As used in this paragraph, the term “asylum officer” means an immigration officer who—

(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and

(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.

(F) Exception

Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry.

(G) Commonwealth of the Northern Mariana Islands

Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.

(2) Inspection of other aliens**(A) In general**

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

- (i) who is a crewman,
- (ii) to whom paragraph (1) applies, or
- (iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Enforcement by attorney general of a state

The attorney general of a State, or other authorized State officer, alleging a violation of the detention and removal requirements under paragraph (1) or (2) that harms such State or its residents shall have standing to bring an action against the Secretary of Homeland Security on behalf of such State or the res-

idents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this paragraph to the greatest extent practicable. For purposes of this paragraph, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of \$100.

(4) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

(c) Removal of aliens inadmissible on security and related grounds

(1) Removal without further hearing

If an immigration officer or an immigration judge suspects that an arriving alien may be inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, the officer or judge shall—

(A) order the alien removed, subject to review under paragraph (2);

(B) report the order of removal to the Attorney General; and

(C) not conduct any further inquiry or hearing until ordered by the Attorney General.

(2) Review of order

(A) The Attorney General shall review orders issued under paragraph (1).

(B) If the Attorney General—

(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title, and

(ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security,

the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge.

(C) If the Attorney General does not order the removal of the alien under subparagraph (B), the Attorney General shall specify the further inquiry or hearing that shall be conducted in the case.

(3) Submission of statement and information

The alien or the alien's representative may submit a written statement and additional information for consideration by the Attorney General.

(d) Authority relating to inspections**(1) Authority to search conveyances**

Immigration officers are authorized to board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States.

(2) Authority to order detention and delivery of arriving aliens

Immigration officers are authorized to order an owner, agent, master, commanding officer, person in charge, purser, or consignee of a vessel or aircraft bringing an alien (except an alien crewmember) to the United States—

(A) to detain the alien on the vessel or at the airport of arrival, and

(B) to deliver the alien to an immigration officer for inspection or to a medical officer for examination.

(3) Administration of oath and consideration of evidence

The Attorney General and any immigration officer shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, transit through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service.

(4) Subpoena authority

(A) The Attorney General and any immigration officer shall have power to require by subpoena the attendance and testimony of witnesses before immigration officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and

the administration of the Service, and to that end may invoke the aid of any court of the United States.

(B) Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer may, in the event of neglect or refusal to respond to a subpoena issued under this paragraph or refusal to testify before an immigration officer, issue an order requiring such persons to appear before an immigration officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

2. 8 U.S.C. 1226, as amended by the Laken Riley Act, Pub. L. No. 119-1, 139 Stat. 3, provides:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least \$1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an “employment authorized” endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(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 sentence¹ 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

¹ So in original. Probably should be “sentenced”.

(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,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Definition

For purposes of paragraph (1)(E), the terms “burglary”, “theft”, “larceny”, “shoplifting”, “assault of a law enforcement officer”, and “serious bodily injury” have the meanings given such terms in the jurisdiction in which the acts occurred.

(3) Detainer

The Secretary of Homeland Security shall issue a detainer for an alien described in paragraph (1)(E) and, if the alien is not otherwise detained by Federal, State, or local officials, shall effectively and expeditiously take custody of the alien.

(4) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to pro-

vide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system—

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

(f) Enforcement by attorney general of a State

The attorney general of a State, or other authorized State officer, alleging an action or decision by the Attorney General or Secretary of Homeland Security under this section to release any alien or grant bond or parole to any alien that harms such State or its residents shall have standing to bring an action against the Attorney General or Secretary of Homeland Security on behalf of such State or the residents of such State in an appropriate district court of the United States to obtain appropriate injunctive relief. The court shall advance on the docket and expedite the disposition of a civil action filed under this subsection to the greatest extent practicable.

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For purposes of this subsection, a State or its residents shall be considered to have been harmed if the State or its residents experience harm, including financial harm in excess of \$100.