

TUCSON FEDERAL BAR ASSOCIATION

CONTINUING LEGAL EDUCATION

CERTIFICATE OF ATTENDANCE

Date of Program: **February 19, 2026**

Start/Finish: 12:00pm – 1:30pm

Program Topic: **Immigration Seminar: National Defense Area Prosecutions and Immigrant Habeas Petitions**

Location: **Evo A. DeConcini United States Courthouse
405 W. Congress St., Jury Assembly Room
Tucson, Arizona 85701**

In its entirety, this program may qualify for up to **1.5 CLE credit hour(s)**, based on a 60-minute hour. Of this total 0 hours may be applied to professional responsibility. Introductory remarks, keynote addresses, business meetings, breaks, receptions, etc. are not to be included in the computation of credit.



Tucson Chapter of FBA, Program Organizer

Attendee's Printed Name and Bar Number

Attendee's Signature

Do not return this form to the State Bar unless you are audited.
You are only required to file the Affidavit of Compliance on an annual basis.

**THE STATE BAR DOES NOT MAINTAIN CLE RECORDS FOR ATTORNEYS
KEEP THIS IN YOUR CLE FILE**



SAVE THE DATE!!!

Thursday, February 19, 2026

12:00 pm – 1:30 pm

Evo A. DeConcini Federal Courthouse

Jury Assembly Room

FBA William D. Browning (Tucson) Chapter presents

**Immigration Seminar:
National Detention Area Prosecutions and
Immigrant Habeas Petitions**

Speakers:

- Former AUSA Robert Fellrath will present on the National Detention Area Prosecutions
- Federal Public Defender Keith Hilzendeger and Florence Project Attorneys Laura Belous and Katie Ruhl will speak on Immigrant Habeas Petitions

1.5 hours of CLE credit will be provided.

Fee: \$15 for FBA members, \$30 for Non-Members,
Free for law students and law clerks

Lunch Provided

[Registration Link](#)

**William D. Browning Chapter of the Federal Bar Association's
2026 Immigration Seminar:**

**National Detention Area Prosecutions and
Immigrant Habeas Petitions**

Thursday, February 19, 2026

Evo. A. DeConcini Federal Courthouse, Tucson AZ 85701

Jury Assembly Room

Agenda

- 12:00-12:45pm, Immigrant Habeas Petitions
 - o Keith Kilzendeger (Federal Public Defender), Laura Belous (Florence Project), Katie Ruhl (Florence Project)
- 12:45-1:30pm, National Detention Area Prosecutions
 - o Robert Fellrath (National Security Law Firm)

Speaker Bios

Keith Kilzendeger

Keith Hilzendeger has been with the Office of the Federal Public Defender since 2008, where he has handled numerous habeas petitions filed on behalf of state and federal prisoners, immigration detainees, tribal-court prisoners, and others seeking habeas relief from illegal confinement. Before he joined the Federal Public Defender's Office, he was a staff attorney with the Ninth Circuit Court of Appeals. He earned his bachelor's degree from the University of Arizona and his law degree from the Arizona State University College of Law, and keeps his diplomas on opposite walls to avoid fights.

Laura Belous

Laura Belous is a managing attorney on the Florence Immigrant and Refugee Rights Project's Advocacy Team, where she regularly practices in federal court. Her team litigates habeas petitions, FOIA complaints, Federal Tort Claim Acts cases, and other civil litigation. She started with the Florence Project as an intern in 2008 and has a law degree from the University of Arizona College of Law.

Katie Ruhl

Katharine Ruhl is the Managing Attorney for the Adult Pro Bono Team at the Florence Immigrant and Refugee Rights Project. In this role she recruits, trains, and mentors pro bono attorneys in direct representation before the Immigration Court, the Board of Immigration Appeals, the Ninth Circuit, and in habeas petitions before the Arizona District Court. She has practiced removal defense in Arizona, primarily in the detained setting, for eighteen years, both in private practice and with the Florence Project. She has been with the Florence Project for a total of fourteen years.

Robert Fellrath

Robert Fellrath began his legal career as an Army JAG in January 2000. He served approximately seven and a half years on active duty, with assignments as a trial counsel and defense. He served at Fort Huachuca, Arizona, Fort Hood, Texas, and Kaiserslautern, Germany. Following active duty, he served another 15 years in the Army Reserve, where he worked as a defense attorney, supervisory defense attorney, special victims' counsel, and a military judge. He spent most of the last seventeen years as an Assistant U.S. Attorney in Tucson, where he served as a general crimes attorney, a drug investigations attorney, and a supervisor for approximately nine years. He has also served as an Assistant Federal Public Defender and an Immigration Judge. He is now employed at the National Security Law Firm, where he works in the military law and federal law sections, handling criminal and administrative cases.

Immigrant Habeas Petitions Materials

Immigration Habeas Litigation in the District of Arizona: A Report from the Trenches

Laura Belous & Katharine Ruhl
Florence Immigrant and Refugee Rights Project

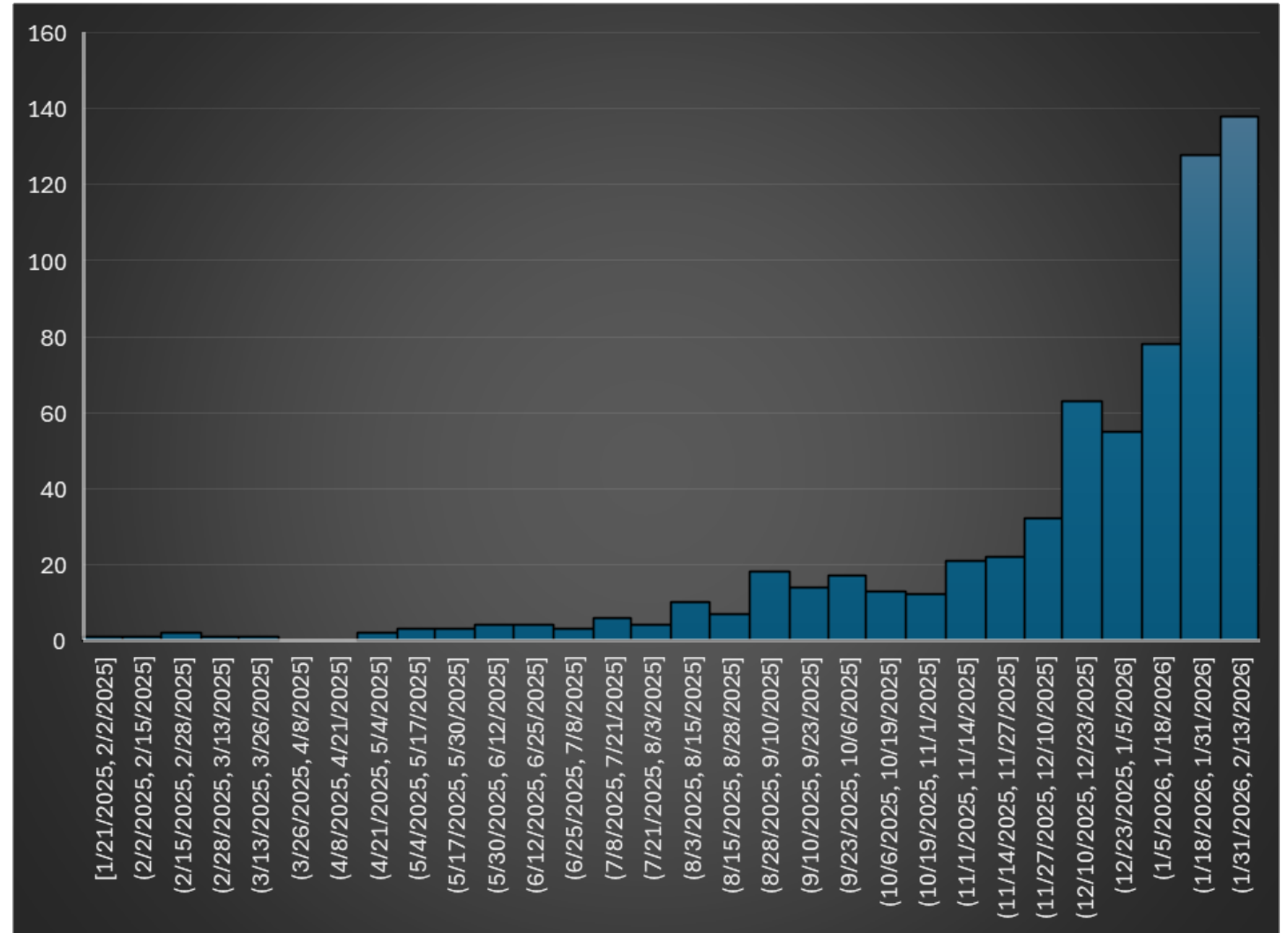
Keith Hilzendeger
Assistant Federal Public Defender

Arizona habeas petitions by the numbers

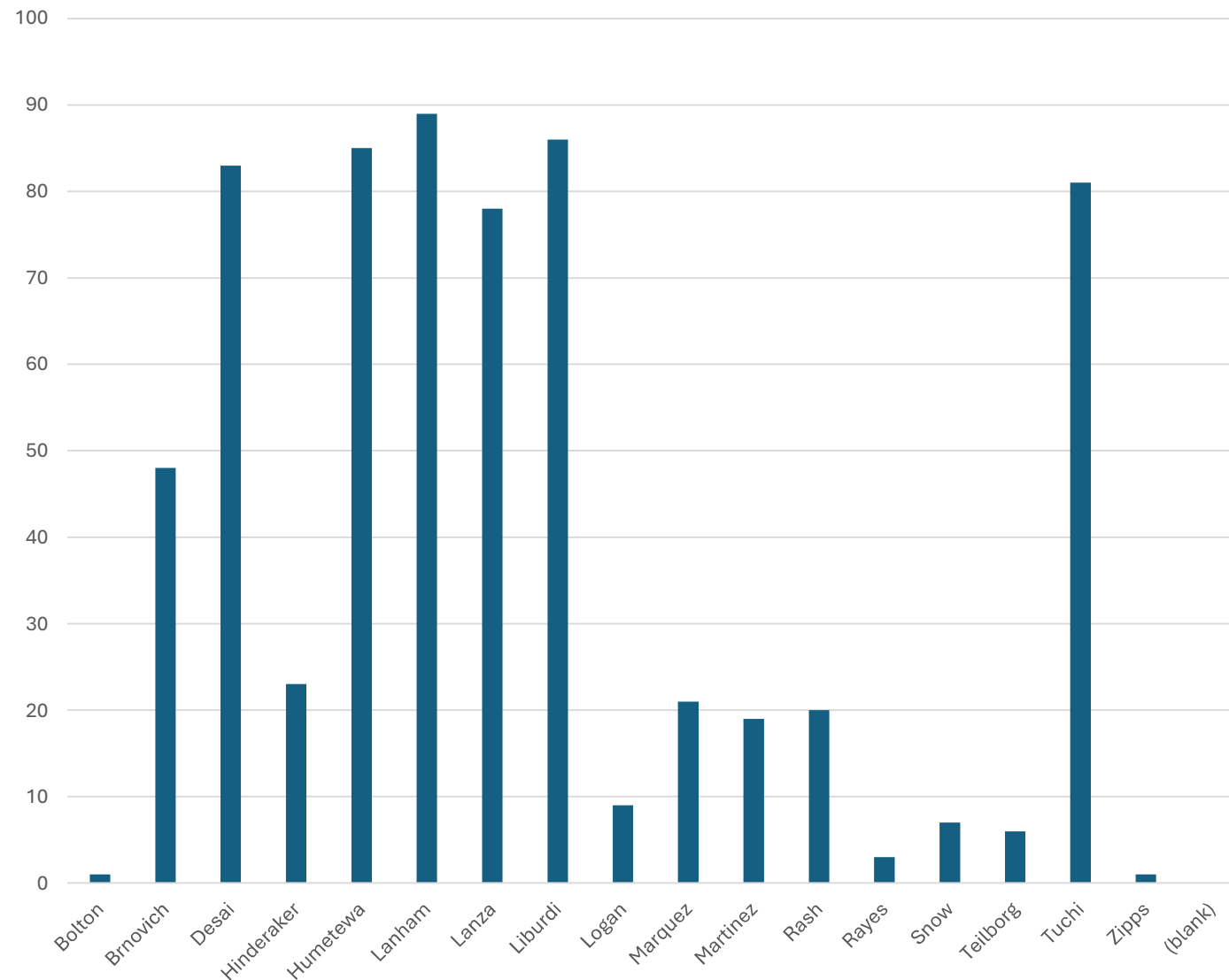
As of February 16, 2026:

- 663 petitions filed in Arizona
- 340 granted on the merits (mostly bond hearings)
- 82% represented by counsel
- 24 total appeals filed (23 by government, 1 by petitioner)

Petitions filed bi-weekly since 1/20/2025

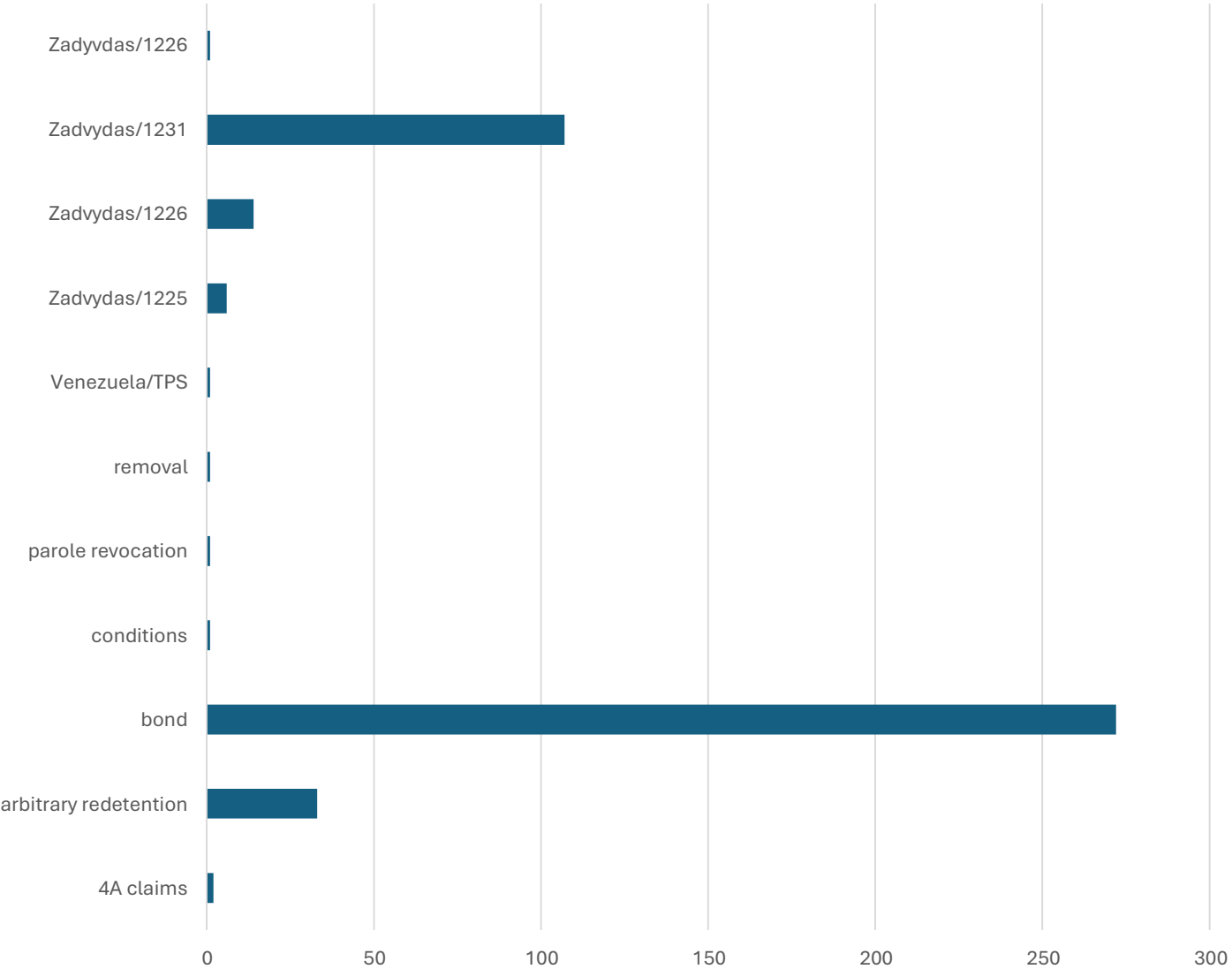


Who are assigned to these cases?





Common grounds for relief



Statutory sources of detention authority

- 8 U.S.C. § 1225, INA § 235—
mandatory detention for “arriving”
aliens
- 8 U.S.C. § 1226(a), INA § 236(a)—
detention pending removal
proceedings, but allows for bond
- 8 U.S.C. § 1226(c), INA § 236(c)—
mandatory detention for aliens with
certain criminal convictions
- 8 U.S.C. § 1231, INA § 241—
detention following a final order of
removal (and discretionary release)

Immigration Detention Bond Jurisprudence: Doctrinal Evolution

- ***Demore v. Kim*** (2003): Mandatory detention under §1226(c) upheld based on assumption of brief detention.
- ***Casas-Castrillon*** (9th Cir. 2008) & ***Diouf II*** (9th Cir. 2011): Court implied bond hearings via constitutional avoidance for prolonged detention.
- ***Singh*** (9th Cir. 2011): Articulated procedures for implied bond hearings, premised on statutory entitlement.
- ***Rodriguez v. Robbins*** (2013): Extended implied bond-hearing framework on a class-wide basis.
- ***Aleman Gonzalez***: Those with prior orders in withholding only receive bond hearing at 180 days

Supreme Court Retrenchment and Its Consequences

- ***Jennings v. Rodriguez*** (2018):
Constitutional avoidance unavailable where statute unambiguous.
- ***Johnson v. Arteaga-Martinez*** (2022): No implied bond hearing right under §1231(a)(6).
- ***Garland v. Aleman Gonzalez*** (2022):
§1252(f)(1) bars lower courts from ordering classwide injunctive relief.
- *Effect*: Prior Ninth Circuit precedents largely abrogated insofar as they relied on implied statutory rights.

Ninth Circuit After Jennings

- ***Avilez v. Garland*** (2022): §§1226(a) and (c) apply to categories of noncitizens, not procedural stages.
- ***Rodriguez Diaz v. Garland*** (2022): No automatic entitlement to a second bond hearing under §1226(a).
- Court declines to adopt bright-line temporal rules or categorical burden-shifting requirements.
- *Due process analysis remains available only on an individualized, as-applied basis.*

Other Release Avenues Foreclosed

- Parole by ICE: Pregnant women, arriving alien asylum seekers, *Fraihat* (medical vulnerability), people who pass CFI
- Laken Riley Act (January 2025) expanded EWI mandatory detention grounds under section 1226(c)
- *Matter of Yajure Hurtado*, 29 I & N Dec. 216 (BIA 2025)(September 2025)

***Echevarria v. Bondi* and bond eligibility**

- Are noncitizens who have lived in the United States for a long time entitled to a bond hearing while they go through removal proceedings?
- Government says no, because they're "arriving" aliens.
- Most courts, including *Echevarria* (DWL) reject the government's position.
- The Fifth Circuit recently agreed with the government, over the dissent of Judge Douglas.

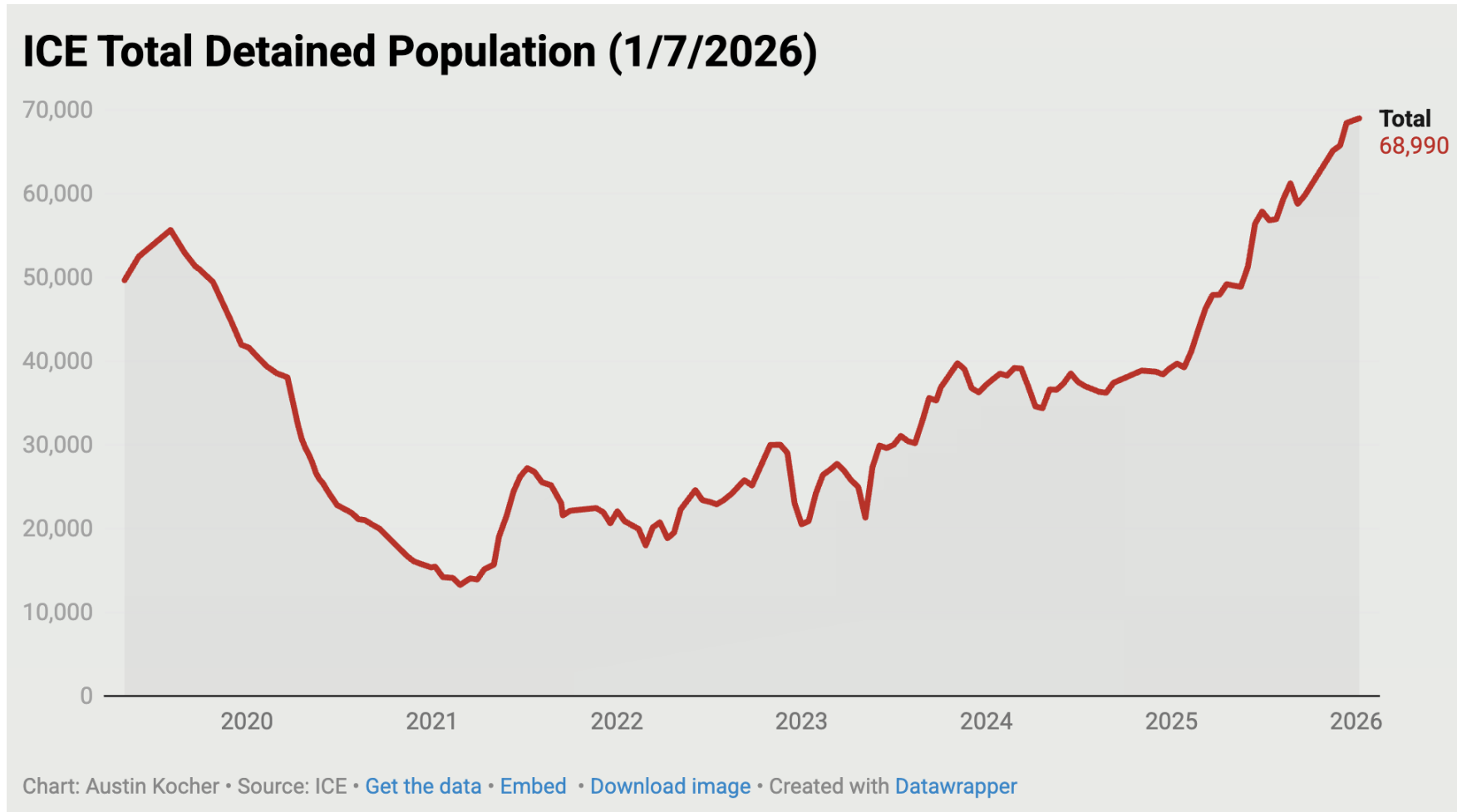
Prolonged detention of aliens ordered removed

- Mandatory detention for 90 days after a removal order becomes final. § 1231(a)(1) and (2).
- Afterward, the alien may be released on an order of supervision. § 1231(a)(3) and (6).
- But if there's no *significant likelihood of removal in the reasonably foreseeable future*, detention could be indefinite.
- In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court held that § 1231 does not authorize indefinite detention.
- Six months of post-finality detention gives rise to a presumption of no likelihood of removal.
- Government must then rebut the presumption.
- Many of these cases involve petitioners who were previously released on OSUP.

Other Common Habeas Petitions

- Prolonged Detention
- Parole/Order of Supervision Revocation
- Bond Revocation
- Due process

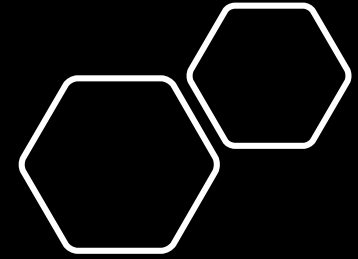
DETENTION DATA

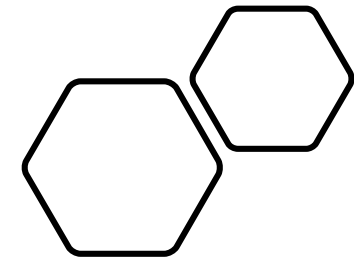


Recommended Resources: TRAC; austinkocher.substack.com; enforcementdashboard.com











ELOY DETENTION CENTER DEATH

THIRD SINCE OCTOBER 1ST

6:53 48°
KGUN 9
.COM

TUCSON 🌤️ HI 57° LOW 32°

CASE OF MEASLES CONFIRMED IN ARIZONA ICE FACILITY

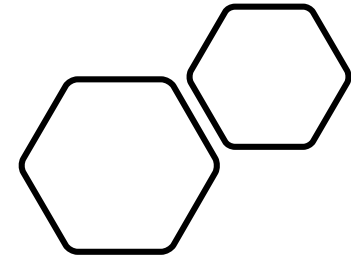




Stanton demands answers from ICE on detention center measles outbreak

Three measles cases have been linked to ICE detention centers in Florence in recent weeks.

PRESENTER
NT

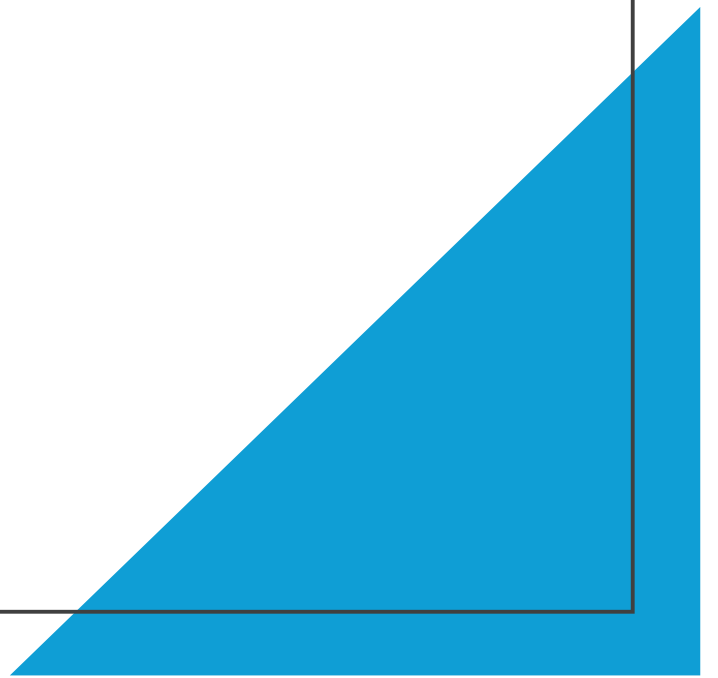


Context: Law and Climate in EOIR

- Expansion of expedited removal, dismissal, detention;
- Cancellation of Legal Orientation Program Contracts
- Changes from Board of Immigration Appeals
 - Proposed Rule, Dir. Order No. 02-2026: default of summary dismissal, 10-day notice of appeal window
 - Over 70 published decisions since January 2025, nearly all for DHS
- Immense pressure on Immigration Judges- under AG

Context: Asylum and Third Country Removal

- Asylum: (most protection, lowest burden of proof)
 - Path to citizenship, family reunification;
- Withholding of Removal under the Act (limited protection)
 - Mandatory, but higher burden (more likely than not will be *persecuted*)
 - No path to citizenship or family reunification – work permit only;
 - Can be removed, but not to country of protection;
- Protection under the Convention Against Torture ("CAT")
 - Mandatory, but higher burden (more likely than not be *tortured*)
 - No path to citizenship or family reunification – work permit only
 - Can be removed, but not to country of protection;
- Circumvention of Lawful Pathways Rule ("CLP")



- *At What Cost? Inside the Trump Administration's Secret Deportation Deals*, Senate Foreign Relations Committee Minority Report, February 2026

Countries With Third Country Deportation Agreements or That Have Received Third Country Nationals



ANTIGUA & BARBUDA
BELIZE
CABO VERDE
CAMEROON
COSTA RICA

DOMINICA
ECUADOR
EL SALVADOR
EQUATORIAL GUINEA
ESWATINI

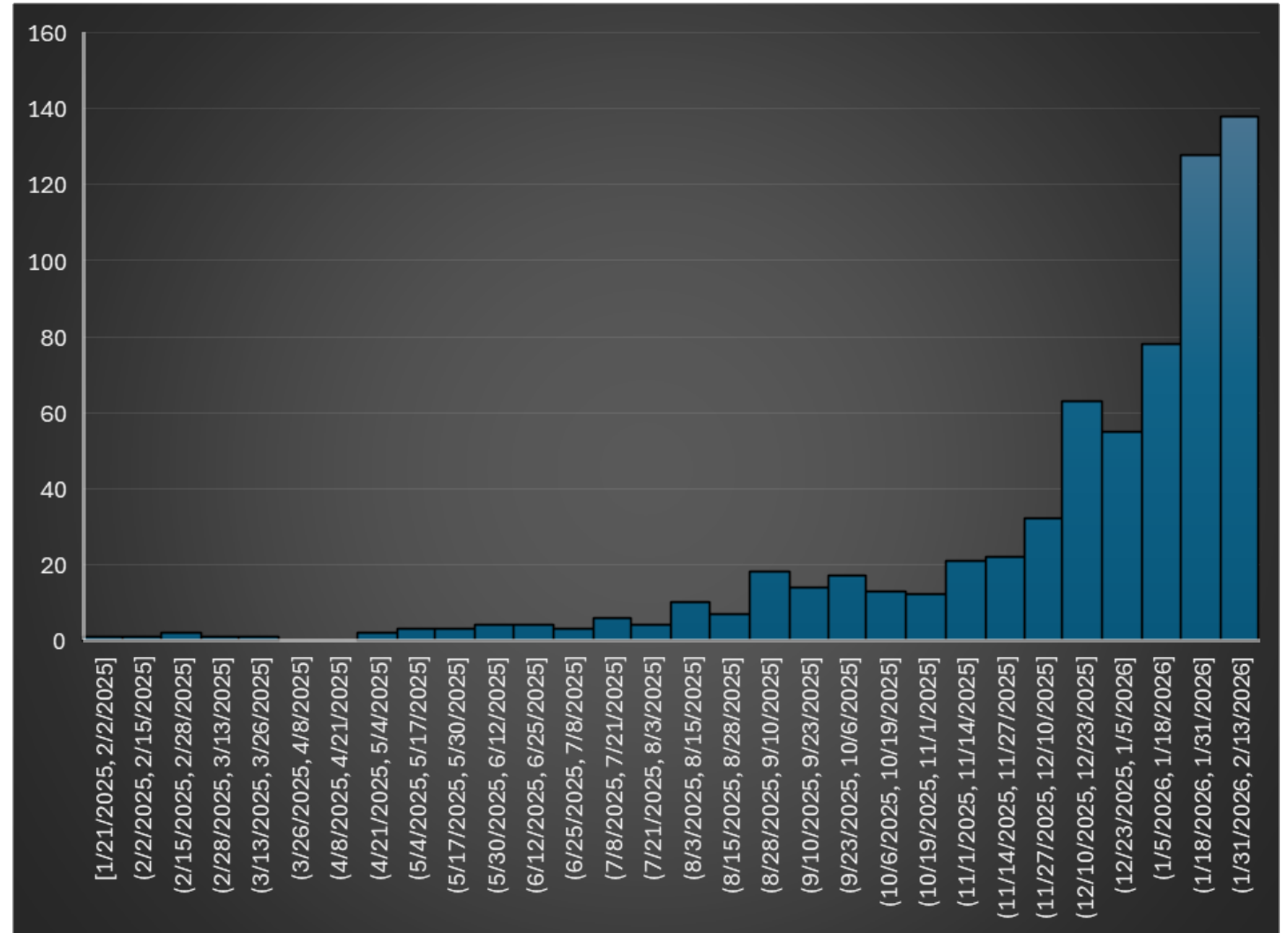
GHANA
GUATEMALA
GUYANA
HONDURAS
KOSOVO

LIBERIA
MEXICO
PALAU
PANAMA
PARAGUAY

RWANDA
SAINT KITTS & NEVIS
SOUTH SUDAN
UGANDA
UZBEKISTAN

As of January 31, 2026.

Petitions filed bi-weekly since 1/20/2025



Issues on the Horizon

- Fourth Amendment challenges
- Due process challenges
- Increased *pro se* filings
- Out-of-state transfers
- New detention centers and increased detention numbers
- Unaccompanied children challenging detention and lack of reunification

1 **WO**

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Francisco Cerritos Echevarria,

10 Petitioner,

11 v.

12 Pam Bondi, et al.,

13 Respondents.
14

No. CV-25-03252-PHX-DWL (ESW)

ORDER

15 On September 5, 2025, Petitioner, through counsel, filed a habeas corpus petition
16 under 28 U.S.C. § 2241 challenging his immigration detention, as well as a motion for
17 temporary restraining order and preliminary injunction. (Docs. 1, 2.) After the motion for
18 injunctive relief became fully briefed (Doc. 9), the Court notified the parties of its intent to
19 consolidate the request for preliminary injunction with the merits of this action pursuant to
20 Rule 65(a)(2) of the Federal Rules of Civil Procedure (Doc. 10), issued a tentative ruling
21 (Doc. 11), and held a hearing (Doc. 12). The Court now grants the petition to the extent it
22 seeks an order compelling a prompt bond hearing before an immigration judge (“IJ”).

23 I. Relevant Background

24 Petitioner is a native and citizen of El Salvador. (Doc. 1 ¶ 14; Doc. 9-1 at 3 ¶ 4.)

25 On May 1, 2001, the United States Border Patrol (“USBP”) encountered Petitioner
26 at or near Douglas, Arizona. (Doc. 9-1 at 3 ¶ 5.) Petitioner was processed as a voluntary
27 return and returned to Mexico. (*Id.*)

28 At an unspecified time later in 2001, Plaintiff returned to the United States. (Doc.

1 ¶ 37 [“Petitioner has resided in the United States for approximately twenty-four years
2 Petitioner has a prior voluntary return; however, since his entry in 2001, he has had
3 no contact with immigration authorities.”].)

4 On three occasions between 2011 and 2019, Petitioner was convicted of the crime
5 of driving under the influence of alcohol (“DUI”) and sentenced to a short jail term
6 followed by a period of probation. (Doc. 9-1 at 3 ¶¶ 6-8.)

7 On July 2, 2025, Petitioner was arrested outside his home in Los Angeles, California
8 and placed in removal proceedings. (Doc. 1 ¶¶ 38, 39; Doc. 3-2 at 3; Doc. 9-1 at 3 ¶¶ 9,
9 12.) In the “Notice to Appear,” issued that same day, the issuing officer had the option of
10 identifying Petitioner as (1) “an arriving alien”; (2) “an alien present in the United States
11 who has not been admitted or paroled”; or (3) an alien who has “been admitted to the United
12 States, but are removable for the reasons stated below.” (Doc. 9-1 at 6.) The issuing officer
13 checked the box indicating that Petitioner is “an alien present in the United States who has
14 not been admitted or paroled.” (*Id.*)

15 A July 8, 2025 policy guidance memorandum issued by the U.S. Department of
16 Homeland Security (“DHS”) announced that DHS “has revisited its legal position on
17 detention and release authorities.” (Doc. 3-2 at 10.) Under this “revisited” legal position,
18 “[e]ffective immediately, it is the position of DHS that” any “alien present in the United
19 States who has not been admitted or who arrives in the United States, whether or not at a
20 designated port of arrival,” should be deemed an “applicant for admission” and thus subject
21 to mandatory detention under 8 U.S.C. § 1225(b). (*Id.*) “For custody purposes, these aliens
22 are now treated in the same manner that ‘arriving aliens’ have historically been treated.”
23 (*Id.*)

24 On July 14, 2025, an IJ denied Petitioner’s request for bond. (Doc. 9-1 at 3 ¶ 12.)
25 The order stated: “This Court lacks jurisdiction pursuant to *Matter of Q Li*.” (Doc. 9-1 at
26 10.) The cited decision, *Matter of Q. Li*, 29 I. & N. Dec. 66 (B.I.A. 2025), held that the IJ
27 in that case “lack[ed] jurisdiction to consider the respondent’s request for release on bond”
28 because the respondent should be “treated as an applicant for admission” and was “detained

1 under . . . 8 U.S.C. § 1225(b)(2)(A) and thus ineligible for release on bond.” *Id.* at 66-68
 2 (cleaned up).

3 On August 20, 2025, an IJ denied Petitioner’s request to reconsider the bond
 4 decision. (Doc. 9-1 at 4 ¶ 15.)

5 II. Petitioner’s Position

6 Petitioner’s overarching argument is that the “[t]he denial of bond hearing to
 7 Petitioner and his ongoing detention on the basis of the new DHS policy violates the plain
 8 language of the Immigration and Nationality Act Despite the new DHS policy’s
 9 assertions to the contrary, 8 U.S.C. § 1225(b)(2)(A) does not apply to individuals like
 10 Petitioner who previously entered and are now residing in the United States. Instead, such
 11 individuals are subject to a different statute, § 1226(a), that allows for release on bond or
 12 conditional parole. Section 1226(a) expressly applies to people who, like Petitioner, are
 13 charged as removable for having entered the United States without inspection and being
 14 present without admission. Respondents’ new legal interpretation set forth in the policy is
 15 contrary to the statutory framework and contrary to decades of agency practice applying
 16 § 1226(a) to people like Petitioner who are present within the United States. Respondents’
 17 new policy and the resulting ongoing detention of Petitioner without a bond hearing is
 18 depriving Petitioner of statutory and constitutional rights and unquestionably constitutes
 19 irreparable injury.” (Doc. 3 at 2-3.)

20 As relief, Petition seeks an order “enjoining Respondents from continuing to detain
 21 him unless Petitioner is provided an individualized bond hearing before an immigration
 22 judge pursuant to 8 U.S.C. § 1226(a) within seven days.” (*Id.* at 3.)

23 III. Jurisdiction-Stripping Arguments

24 In their response brief, Respondents argue that 8 U.S.C. § 1252(g), § 1252(b)(9),
 25 § 1252(e), and/or § 1252(a)(2)(A) “unambiguously strip” this Court of jurisdiction to
 26 consider Petitioner’s claims. (Doc. 9 at 1, 4-7.) However, during oral argument,
 27 Respondents withdrew this contention. Nevertheless, because “Article III generally
 28 requires a federal court to satisfy itself of its jurisdiction over the subject matter before it

1 considers the merits of a case,” *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999),
 2 the Court has an independent duty to determine whether those jurisdiction-stripping
 3 provisions apply here. As explained below, they do not. *Barrajas v. Noem*, 2025 WL
 4 2717650, *3 (S.D. Iowa 2025) (“The Federal Defendants argue that sections 1252(g) and
 5 (b)(9) preclude this Court from weighing in on active deportation cases, even for the limited
 6 purpose of evaluating whether respondents in those proceedings are entitled to bond
 7 hearings and other forms of due process. Federal officials have raised this argument in
 8 recent months in cases similar to this one. The Court agrees with these well-reasoned
 9 decisions and will not repeat their analysis in its entirety.”).

10 First, § 1252(g)¹ “does not preclude jurisdiction over the challenges to the legality
 11 of [an alien’s] detention.” *Kong v. United States*, 62 F.4th 608, 609 (1st Cir. 2023). See
 12 also *Hasan v. Crawford*, 2025 WL 2682255, *4 (E.D. Va. 2025) (“Because Hasan’s
 13 custody proceedings are independent of, and collateral to, the removal process, § 1252(g)
 14 does not serve as a jurisdictional bar. Accordingly, the Court finds that it possesses
 15 jurisdiction to entertain Hasan’s Petition to the extent he challenges the constitutionality of
 16 his detention.”). Indeed, the Supreme Court has already “rejected as ‘implausible’ the
 17 Government’s suggestion that § 1252(g) covers ‘all claims arising from deportation
 18 proceedings’ or imposes ‘a general jurisdictional limitation.’” *Dep’t of Homeland Sec. v.*
 19 *Regents of the Univ. of California*, 591 U.S. 1, 19 (quoting *Reno v. Am.-Arab Anti-*
 20 *Discrimination Comm. (AADC)*, 525 U.S. 471, 482 (1999)). Additionally, the Ninth
 21 Circuit recently reinforced that “[i]nstead of sweeping in any claim that can technically be
 22 said to arise from the three listed actions, the provision refers to just those three specific
 23 actions themselves.” *Ibarra-Perez v. United States.*, __ F.4th __, 2025 WL 2461663, *7
 24 (9th Cir. 2025) (cleaned up) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018)).

25 Because “the phrase ‘arising from’ is not ‘infinitely elastic,’” it “does not reach
 26 ‘claims that are independent of, or wholly collateral to, the removal process.’” *Kong*, 62

27 ¹ “[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any
 28 alien arising from the decision or action by the Attorney General to commence
 proceedings, adjudicate cases, or execute removal orders.” 8 U.S.C. § 1252(g).

1 F.4th at 614 (citation omitted). “Among such ‘collateral’ claims” not subject to the
 2 § 1252(g) bar on judicial review are “claims seeking review of the legality of a petitioner’s
 3 detention.” *Id.* Even though, “[i]n a but-for sense,” a claim of unlawful detention might
 4 arise from the government’s decision to commence proceedings, adjudicate a case, or
 5 execute a removal, challenges to unlawful detention “do not ‘arise from’ the government’s
 6 decision to ‘execute removal orders’ within the meaning of § 1252(g) simply because the
 7 claims relate to that discretionary, prosecutorial decision.” *Id.* at 613.

8 Next, as for § 1252(b)(9),² *Ibarra-Perez* reiterated that this provision does not bar
 9 claims that are “independent of or collateral to the removal process.” *Ibarra-Perez*, 2025
 10 WL 2461663 at *9. Likewise, in *Nielsen v. Preap*, 586 U.S. 392 (2019), the Supreme Court
 11 held that § 1252(b)(9) did not bar a lawsuit that, like this one, sought to challenge the
 12 government’s contention that it was statutorily entitled to detain aliens without a bond
 13 hearing during the pendency of their removal proceedings. *Id.* at 402 (“Nor are we stripped
 14 of jurisdiction by § 1252(b)(9) . . . [because] respondents here are not asking for review of
 15 an order of removal; they are not challenging the decision to detain them in the first place
 16 or to seek removal [as opposed to the decision to deny them bond hearings]; and they are
 17 not even challenging any part of the process by which their removability will be
 18 determined.”) (cleaned up). *See also Hasan*, 2025 WL 2682255 at *4 (“Section 1252(b)(9)
 19 does not insulate detention orders from judicial review because they are ‘separate and apart
 20 from’ orders of removal.”).

21 Next, § 1252(e) only applies “in any action pertaining to an order to exclude an
 22 alien.”³ Here, Petitioner does not seek to challenge an exclusion order and only challenges
 23 the denial of a bond hearing.

24 ² “Judicial review of all questions of law and fact . . . arising from any action taken or
 25 proceeding brought to remove an alien from the United States under this subchapter shall
 26 be available only in judicial review of a final order under this section.” 8 U.S.C.
 § 1252(b)(9).

27 ³ “Without regard to the nature of the action or claim and without regard to the
 28 identity of the party or parties bringing the action, no court may enter declaratory,
 injunctive, other equitable relief in any action pertaining to an order to exclude an alien in
 accordance with section § 1225(b)(1) of this title except as specifically authorized in a
 subsequent paragraph of this subsection.” 8 U.S.C. § 1252(e)(1)(A).

1 Finally, for similar reasons, § 1252(a)(2)(A)⁴ is inapplicable here. *Padilla v. U.S.*
 2 *Immigration and Customs Enforcement*, 704 F. Supp. 3d 1163, 1170 (W.D. Wash. 2023)
 3 (“[T]he Court continues to find that § 1252(a)(2)(A) has no application to Plaintiffs’
 4 claims. This provision only applies to the procedures and policies necessary to implement
 5 the removal process. Here, Plaintiffs’ bond hearing claims do not challenge the removal
 6 process—just whether they should be afforded a bond hearing . . .”).

7 IV. Whether Petitioner Is Subject To Mandatory Detention Under § 1225(b)(2)(A) Or
 8 Is Entitled To A Bond Hearing Under § 1226(a)

9 Under 8 U.S.C. § 1225(b)(2)(A), and absent exceptions that are inapplicable here,
 10 “in the case of an alien who is an applicant for admission, if the examining immigration
 11 officer determines that an alien seeking admission is not clearly and beyond a doubt entitled
 12 to be admitted, the alien shall be detained for a [removal] proceeding.” *Id.* Respondents
 13 contend that Petitioner qualifies an “applicant for admission” for purposes of this provision,
 14 even though he has never formally applied for admission, by operation of law under
 15 § 1225(a)(1), which provides: “An alien present in the United States who has not been
 16 admitted or who arrives in the United States (whether or not at a designated port of arrival
 17 and including an alien who is brought to the United States after having been interdicted in
 18 international or United States waters) shall be deemed for purposes of this chapter an
 19 applicant for admission.” *Id.* Petitioner disagrees, arguing that the question of his
 20 detention is governed not by § 1225(b)(2)(A) but by § 1226(a), which provides, in pertinent
 21 part, that “an alien may be arrested and detained pending a decision on whether the alien
 22 is to be removed from the United States. Except as provided in subsection (c) and pending
 23 such decision, the Attorney General . . . may continue to detain the arrested alien; and . . .
 24 may release the alien on . . . bond of at least \$1,500 with security approved by, and
 25

26 ⁴ “Notwithstanding any other provision of law (statutory or nonstatutory), including
 27 section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651
 28 of such title, no court shall have jurisdiction to review—(i) except as provided in subsection
 (e), any individual determination or to entertain any other cause or claim arising from or
 relating to the implementation or operation of an order of removal pursuant to section
 1225(b)(1) of this title . . .” 8 U.S.C. § 1252(a)(2)(A).

1 containing conditions prescribed by, the Attorney General; or . . . conditional parole.” *Id.*

2 In recent months, many district courts across the country have grappled with the
 3 same issue, and it appears that all but one of them has rejected Respondents’ position and
 4 concluded that an alien in Petitioner’s situation (*i.e.*, an alien who entered the United States
 5 without inspection, never formally applied for admission, and has been living in the United
 6 States for years or decades) is entitled to a bond hearing under § 1226(a). *See, e.g., Hasan*,
 7 2025 WL 2682255 at *9 (“For all these reasons, . . . Hasan’s detention is governed by
 8 § 1226(a)’s discretionary framework, not § 1225(b)’s mandatory detention procedures.”);
 9 *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1261 (W.D. Wash. 2025) (“Rodriguez has
 10 shown that the text of Section 1226, canons of interpretation, legislative history, and
 11 longstanding agency practice indicate that he is governed under Section 1226(a)’s ‘default’
 12 rule for discretionary detention. The Court is persuaded that Rodriguez is likely to succeed
 13 on the merits that he is unlawfully detained under Section 1225(b)(2)’s mandatory
 14 detention provision.”); *Pizarro Reyes v. Raycraft*, 2025 WL 2609425, *7 (E.D. Mich. 2025)
 15 (“The BIA’s decision to pivot from three decades of consistent statutory interpretation and
 16 call for Pizarro Reyes’ detention under § 1225(b)(2)(A) is at odds with every District Court
 17 that has been confronted with the same question of statutory interpretation. At least a dozen
 18 federal courts concur generally with this Court’s interpretation of the statutory language as
 19 applied in this context.”); *Barrera v. Tindall*, 2025 WL 2690565, *5 (W.D. Ky. 2025)
 20 (“Courts across the country have been faced with similar questions of law and fact
 21 presented by the United States. And every court who has examined this novel
 22 interpretation of Section 1225 by the United States has rejected their theory and adopted
 23 Petitioner’s. This includes courts within the Sixth Circuit, and across the country.”);
 24 *Vazquez v. Feeley*, 2025 WL 2676082, *16 (D. Nev. 2025) (“In sum, the Court finds that
 25 the text and canons of statutory interpretation, including the legislative history, regulations,
 26 and long history of consistent agency practice, as well as the doctrine of constitutional
 27 avoidance, demonstrate that Petitioner is likely to succeed in establishing he and similarly
 28 situated noncitizens are subject to detention under § 1226(a) and its implementing

1 regulations, not § 1225(b)(2)(A).”). The one apparent exception is *Chavez v. Noem*, 2025
 2 WL 2730228 (S.D. Cal. 2025), which recently concluded that “aliens present in the United
 3 States who have not been admitted” are, “[b]y the plain language of § 1225(a)(1), . . .
 4 ‘applicants for admission’ and thus subject to the mandatory detention provisions of
 5 ‘applicants for admission’ under § 1225(b)(2).” *Id.* at *4 (cleaned up).

6 The Court has carefully reviewed those decisions and, for the reasons set forth
 7 below, agrees with the majority of courts that have concluded that § 1226(a), rather than
 8 § 1225(b)(2)(A), applies in this circumstance. The Court clarifies, however, that it views
 9 this issue as presenting a complicated and debatable question. Indeed, Respondents’
 10 presentation during oral argument has persuaded the Court to substantially revise the
 11 reasoning in the tentative ruling that was issued before oral argument.

12 Turning to the merits, the parties’ dispute is fundamentally a dispute about statutory
 13 interpretation. It is a truism that such “analysis begins with the language of the statute,”
 14 *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 391 (2017), and Respondents’ position
 15 appears, at first blush, to be consistent with this principle. Respondents simply point to
 16 § 1225(a)(1)’s specification that “[a]n alien present in the United States who has not been
 17 admitted . . . shall be deemed for purposes of this chapter an applicant for admission” and
 18 argue that such an alien is therefore an “applicant for admission” for purposes of
 19 § 1225(b)(2)(A)’s detention mandate. Although this approach has surface appeal, the
 20 Court perceives at least two problems with it: first, it ignores some of the additional
 21 requirements imposed by § 1225(b)(2)(A); and second, it fails to account for the broader
 22 statutory scheme, particularly in light of how that broader scheme has been interpreted by
 23 the Supreme Court.

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

25 Even assuming Petitioner is deemed an “applicant for admission” by operation of
 26 law under § 1225(a)(1), it doesn’t necessarily follow that § 1225(b)(2)(A) would govern
 27 the question of Petitioner’s detention during a removal proceeding. As noted,
 28 § 1225(b)(2)(A), which falls under the heading “Inspection of Other Aliens,” provides that

1 “in the case of an alien who is an applicant for admission, *if the examining immigration*
 2 *officer* determines that an alien *seeking admission is not clearly and beyond a doubt entitled*
 3 *to be admitted*, the alien shall be detained for a proceeding under section 1229a of this
 4 title.” *Id.* (emphases added).

5 The first and third italicized phrases require Petitioner to have undergone an
 6 inspection by an “examining immigration officer,” who in turn made a finding that
 7 Petitioner is “not clearly and beyond a doubt entitled to be admitted.” Respondents’ brief
 8 makes no effort to address these requirements. Other courts have identified this as a flaw
 9 in Respondents’ position. *See, e.g., Lepe v. Andrews*, 2025 WL 2716910, *4 (E.D. Cal.
 10 2025) (“As other courts have concluded, for section 1225(b)(2)(A) to apply, several
 11 conditions must be met—in particular, an ‘examining immigration officer’ must determine
 12 that the individual is: (1) an ‘applicant for admission’; (2) ‘seeking admission’; and (3) ‘not
 13 clearly and beyond a doubt entitled to be admitted.’ As an initial matter, respondents have
 14 failed to show in this case that an ‘examining immigration officer’ made these
 15 determinations. The government points solely to the Notice to Appear issued on July 1,
 16 2025. But that document does not contain any such findings by the immigration officer.”)
 17 (citations omitted).

18 If the outcome turned solely on this issue, the Court might solicit supplemental
 19 briefing from the parties. On the one hand, the record reveals that on July 2, 2025,
 20 Petitioner was “brought into custody” by “ICE/ERO⁵ along with DEA” (Doc. 9-1 at 2 ¶ 9)
 21 and that during that encounter, “ICE/ERO Officers conducting an investigation . . .
 22 conducted a field interview to determine [Petitioner’s] removability and alienage” and
 23 made a determination that Petitioner “is amenable to removal” (Doc. 3-2 at 2-5). The
 24 document memorializing this encounter, known as a Form I-213, contains a signature block
 25 indicating that it was completed by an “Examining Officer.” (*Id.* at 2.) Although the form
 26 does not contain the magic words “not clearly and beyond a doubt entitled to be admitted,”
 27

28 ⁵ “ERO” stands for Enforcement and Removal Operations. *See*
<https://www.ice.gov/about-ice/ero>.

1 the formal “Charge[] of Removability,” which states that Petitioner “makes no
 2 claim/appears to have no claim to USC [United States citizenship] and is amendable to
 3 removal under Section 212(a)(6)(A)(i) of the Immigration and Nationality Act” (*id.* at 5),
 4 may functionally operate as such a finding. Thus, it might be argued that this document
 5 constitutes proof that an “examining immigration officer” performed an inspection and
 6 made the finding required by § 1225(b)(2)(A).

7 On the other hand, some courts have questioned whether an ICE/ERO officer
 8 conducting removal operations qualifies as the sort of “examining immigration officer”
 9 contemplated by § 1225(b)(2)(A). *Jimenez v. FCI Berlin, Warden*, 2025 WL 2639390, *7
 10 (D.N.H. 2025) (“With respect to the requirements that the ‘examining immigration officer’
 11 conduct an ‘inspection’ of the person, ‘examination’ is not an unbounded concept. Rather,
 12 it is the specific legal process one undergoes while trying to enter the country. Not every
 13 encounter with an immigration officer necessarily constitutes an examination or inspection
 14 under section 1225.”) (cleaned up). Indeed, § 1225(b) is entitled “Inspection of Applicants
 15 for Admission” and § 1225(a)(3), entitled “Inspection,” provides that “[a]ll aliens
 16 (including alien crewmen) who are applicants for admission or otherwise seeking
 17 admission or readmission to or transit through the United States shall be inspected by
 18 immigration officers.” Such verbiage suggests that the sort of “inspection” contemplated
 19 by § 1225(b)(2)(A) is an inspection by an examining immigration officer that occurs at the
 20 time an alien first applies for or otherwise seeks admission to the United States—not an
 21 encounter with an ICE/ERO officer 24 years later.

22 At any rate, the Court concludes that further briefing on this issue is unnecessary
 23 because the second italicized phrase above in § 1225(b)(2)(A), which presupposes that the
 24 inspection occurred at a time when the applicant for admission was “seeking admission,”
 25 poses a bigger obstacle to Respondents’ position. The word “seeking” is the present
 26 participle of the verb “seek.” It thus has a temporal element—Petitioner must have been
 27 in the process of seeking admission at the time of the inspection. *United States v. Balint*,
 28 201 F.3d 928, 933 (7th Cir. 2000) (“[U]se of . . . the present participle, or ‘-ing’ form of

1 an action verb, generally indicates continuing action.”).

2 It is hard to see how Petitioner could be deemed to have been “seeking” admission
 3 at the time of the encounter on July 2, 2025. By that point, Petitioner had already been
 4 present in the United States for 24 years, having arrived and entered in 2001. (Doc. 1
 5 ¶ 37.) Moreover, under Respondents’ interpretation of § 1225(a)(1), Petitioner became an
 6 “applicant for admission” in 2001, upon his arrival and entry. (Doc. 3-2 at 10 [DHS memo:
 7 “An ‘applicant for admission’ is an alien present in the United States who has not been
 8 admitted or who arrives in the United States, whether or not at a designated port of
 9 arrival.”]; Doc. 9 at 7 [“Section 1225 applies to ‘applicants for admission’ such as
 10 Petitioner, who are defined as ‘alien[s] present in the United States who [have] not been
 11 admitted’ or ‘who arrive[] in the United States.’”].) Implicit in Respondents’ position,
 12 then, is that Petitioner somehow existed in a perpetual state of “seeking” admission during
 13 the 24-year period between when he first became an “applicant for admission” in 2001, by
 14 virtue of his entry into the country, and when he was encountered and inspected by an
 15 immigration officer in 2025.

16 This logic is difficult to reconcile with *Torres v. Barr*, 976 F.3d 918 (9th Cir. 2020)
 17 (en banc). There, the plaintiff was charged with being removable under a provision of the
 18 Immigration and Nationality Act (“INA”) that renders inadmissible any alien who is not in
 19 possession of certain valid immigration documents “at the time of application for
 20 admission.” *Id.* at 924 (citation omitted). A prior court had ruled that if an alien lacks such
 21 documents at the time the alien is deemed by operation of law under § 1225(a)(1) to be an
 22 “applicant for admission,” the alien “should therefore be deemed to have made an actual
 23 application for admission.” *Id.* at 927 (emphasis omitted). *Torres* reversed, explaining
 24 that this approach improperly “conflated the term ‘applicant for admission’ from
 25 § 1225(a)(1) with the term ‘application for admission’ in § 1182(a)(7).” *Id.* The court
 26 emphasized that the phrase “at the time of application for admission” refers “to the
 27 particular point in time when a noncitizen submits an application to physically enter into
 28 the United States.” *Id.* at 924. In the course of reaching this conclusion, the court rejected

1 the government’s argument “that even if ‘the time of application for admission’ begins at
 2 the moment when an immigrant applies to enter the country, this moment *continues*,
 3 potentially for years or decades, until the immigrant appears before the IJ in removal
 4 proceedings.” *Id.* at 926. The court explained: “Given that an immigrant submits an
 5 ‘application for admission’ at a distinct point in time, stretching the phrase ‘at the time of
 6 application for admission’ to refer to a period of years would push the statutory text beyond
 7 its breaking point.” *Id.*

8 Here, too, it would seem to push the statutory text beyond its breaking point to
 9 conclude that Plaintiff became an “applicant for admission” by operation of law in 2001,
 10 due to his arrival in the United States at that time, yet was still “seeking admission” 24
 11 years later. Other courts have reached similar conclusions. *See, e.g., Vazquez*, 2025 WL
 12 2676082 at *12-13 (“To reiterate, § 1225(b)(2)(A) narrows the above broader definition of
 13 ‘applicants for admission’ and applies in the context of (1) ‘inspection’ by an ‘examining
 14 immigration officer’ only to (2) ‘applicants for admission’ as defined [in § 1225(a)(1)],
 15 who are (3) ‘seeking admission,’ and (4) whom § 1225(b)(1) does not address.
 16 Respondents assert that this definition of ‘applicant for admission’ is the key provision
 17 [b]ut as the Ninth Circuit held in interpreting the phrase ‘applicant for admission’
 18 within the context of the application of § 1225(b)(1) to a noncitizen who was placed in
 19 expedited removal proceedings thirteen years after entry, an immigrant submits an
 20 ‘application for admission’ at a distinct point in time and stretching the phrase to continue
 21 potentially for years or decades would push the statutory text beyond its breaking point
 22 Moreover, Respondents’ sweeping and unlimited reading of ‘applicants for
 23 admission’ ignores the fact that that term is further limited in § 1225(b)(2) by the active
 24 construction of the phrase ‘seeking admission’ which entails some kind of affirmative
 25 action taken to obtain authorized entry.”) (citations omitted); *Jimenez*, 2025 WL 2639390
 26 at *8 (“The government’s assertion that § 1225 applies to all applicants for admission
 27 would also read out of § 1225(b)(2)(A) the requirement that the noncitizen be ‘seeking
 28 admission.’ This phrase, to the extent possible, must be given meaning independent of the

1 requirement that the person be an applicant for admission. . . . Because § 1225(b)(2)(A)
 2 applies to applicants for admission who are seeking to enter the United States, it cannot
 3 apply to Jimenez, who has already entered the country and has been residing here for over
 4 two years.”) (citations omitted); *Romero v. Hyde*, 2025 WL 2403827, *10 (D. Mass. 2025)
 5 (“[I]t is at least clear that ‘applicant for admission’ and ‘seeking admission’ are not
 6 synonymous. Nevertheless, one might try to argue (as Respondents have) that all
 7 ‘applicants for admission’ are necessarily (and continuously) ‘seeking admission,’ so long
 8 as they continue to exist in the United States. This is an obvious violation of the rule
 9 against surplusage. It also goes against the plain, ordinary meaning of the words ‘seeking’
 10 and ‘admission.’”) (citations omitted).

11 **B. The Broader Statutory Scheme**

12 Putting aside these textual problems with Respondents’ position, Respondents’
 13 narrow focus on § 1225(a)(1) also ignores the complexities of interpreting the INA, a
 14 “dense statute” whose “complex provisions . . . have provoked comparisons to a morass, a
 15 Gordian knot, and King Minos’s labyrinth in ancient Crete” and which must be interpreted
 16 “against the backdrop of our constitutional principles, administrative law, and international
 17 treaty obligations. Divining its meaning is ordinarily not for the faint of heart.” *Torres*,
 18 976 F.3d at 923 (cleaned up). To that end, “[i]n determining whether Congress has
 19 specifically addressed the question at issue, the court should not confine itself to examining
 20 a particular statutory provision in isolation. Rather, it must place the provision in context,
 21 interpreting the statute to create a symmetrical and coherent regulatory scheme.” *FDA v.*
 22 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000). *See also Roberts v. Sea-*
 23 *Land Services, Inc.*, 566 U.S. 93, 101-02 (2012) (“Statutory language . . . cannot be
 24 construed in a vacuum. It is a fundamental canon of statutory construction that the words
 25 of a statute must be read in their context and with a view to their place in the overall
 26 statutory scheme.”) (cleaned up).

27 Several recent decisions by the Supreme Court provide guidance in understanding
 28 this context. In its 2018 decision in *Jennings*, the Supreme Court addressed “the proper

1 interpretation of §§ 1225(b), 1226(a), and 1226(c).” *Jennings*, 583 U.S. at 289. The Court
 2 held: “In sum, U.S. immigration law authorizes the Government to detain certain aliens
 3 seeking admission into the country under §§ 1225(b)(1) and (b)(2). It also authorizes the
 4 Government to detain certain aliens already in the country pending the outcome of removal
 5 proceedings under §§ 1226(a) and (c).” *Id.* Elsewhere, the Court characterized § 1226(a)
 6 as the “default rule” governing “the process of arresting and detaining” aliens who are
 7 already “*inside the United States.*” *Id.* at 288 (emphasis added). Later, the Court added:
 8 “§ 1226 applies to aliens already present in the United States. Section 1226(a) creates a
 9 default rule for those aliens” *Id.* at 303 (emphasis added). Accepting Respondents’
 10 position would turn those statements on their head.

11 Similarly, in its 2019 decision in *Nielsen*, the Supreme Court reiterated that
 12 § 1226(a) “applies to most [deportable] aliens,” “sets out the general rule regarding their
 13 arrest and detention pending a decision and removal,” and creates a default rule that
 14 “[a]liens who are arrested because they are believed to be deportable may generally apply
 15 for release on bond or parole while the question of their removal is being decided.” *Nielsen*,
 16 586 U.S. at 395, 397. Again, those statements would not make sense under Respondents’
 17 new interpretation. Notably, during oral argument, Respondents were unable to identify
 18 any class of aliens whose detention would be governed by § 1226(a), rather than
 19 § 1225(b)(2)(A), if Respondents’ new interpretation were adopted. Such an outcome
 20 would conflict with *Nielsen*’s observation that § 1226(a) applies to “most” deportable
 21 aliens and *Jennings*’s observation that § 1226(a) provides the “default rule” governing the
 22 detention of aliens “inside the United States” or “already present in the United States.”⁶

23 On the other hand, the Court acknowledges that *Torres* suggests that the enactment
 24 of § 1225(a)(1) may have been intended to achieve a more consequential alteration of the
 25 scope and structure of the INA than *Jennings* and *Nielsen* seem to contemplate. The
 26

27 ⁶ To that end, even assuming § 1226(a) would still apply under Respondents’ new
 28 interpretation to small, discrete groups of aliens, it still would not apply to “most”
 deportable aliens in the manner that *Nielsen* contemplates or provide the “default rule” that
Jennings contemplates.

1 question of statutory interpretation addressed in *Torres* was different than the question
 2 presented here—as discussed in detail above, *Torres* “construe[d] the meaning of the
 3 phrase ‘at the time of application for admission’” and “conclude[d] that the phrase refers
 4 to the particular point in time when a noncitizen submits an application to physically enter
 5 into the United States.” *Torres*, 976 F.3d at 924. Nevertheless, in the course of interpreting
 6 that phrase, the court also discussed “the phrase ‘applicant for admission,’” which it
 7 deemed “a term of art denoting a particular legal status, as the history of its enactment
 8 makes clear.” *Id.* at 927. The court continued:

9 Section 1225(a)(1) was added to the INA as part of the Illegal Immigration
 10 Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Prior to the
 11 passage of IIRIRA, immigration law . . . created an anomaly whereby
 12 immigrants who were attempting to lawfully enter the United States were in
 13 a worse position than persons who had crossed the border unlawfully.
 14 IIRIRA did away with this entry doctrine . . . anomaly. . . . [M]ost
 15 importantly for our purposes, IIRIRA added § 1225(a)(1). This provision
 16 ensures that all immigrants who have not been lawfully admitted, regardless
 17 of their physical presence in the country, are placed on equal footing in
 18 removal proceedings under the INA—in the position of an “applicant for
 19 admission.” Now, in removal proceedings, the relevant distinction for
 20 procedural purposes is whether the immigrant has been lawfully admitted,
 21 regardless of actual physical presence.

22 *Id.* at 927-28 (cleaned up). As *Chavez* notes, this passage can be viewed, at least in
 23 isolation, as consistent with Respondents’ position. *Chavez*, 2025 WL 2730228 at *4
 24 (citing *Torres* in support of the conclusion that the government’s “reading of the statute
 25 comports with Congress’ addition of § 1225(a)(1) by IIRIRA in 1996” and stating that a
 26 contrary conclusion “would in effect repeal that statutory fix intended by Congress in
 27 enacting IIRIRA”).

28 An added difficulty in determining how to reconcile and apply these precedents is
 that none of them addressed the precise issue of statutory interpretation presented in this
 case. *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the
 record, neither brought to the attention of the court nor ruled upon, are not to be considered
 as having been so decided as to constitute precedents.”); *Sloan v. State Farm Mut. Auto.*

1 *Ins. Co.*, 360 F.3d 1220, 1231 (10th Cir. 2004) (“[C]ases are not authority for propositions
 2 not considered.”) (internal quotation marks omitted). Even so, a “lower federal court . . .
 3 [is] advised to follow the Supreme Court’s considered dicta” and “afford them a weight
 4 that is greater than ordinary judicial dicta as a prophecy of what the Court might hold.”
 5 *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 841 n.4 (9th Cir. 2020) (cleaned up).

6 Ultimately, the Court concludes that it must give the most credence to *Jennings* and
 7 *Nielsen* when evaluating whether Respondents’ position is consistent with the entire
 8 statutory scheme. Both of those cases, unlike *Torres*, specifically addressed the question
 9 of detention and bond hearings during removal proceedings. Additionally, *Jennings*
 10 addressed how §§ 1225 and 1226 fit together in that context. The Court simply cannot see
 11 how it could adopt Respondents’ position without running afoul of *Jennings*’s reasoning.
 12 *Nat. Institutes of Health v. Am. Public Health Ass’n*, 145 S. Ct. 2658, 2663-65 (2025)
 13 (Gorsuch, J., concurring in part and dissenting in part) (“[A] precedent of this Court must
 14 be followed by the lower federal courts [W]hen this Court issues a decision, it
 15 constitutes a precedent that commands respect in lower courts. . . . [R]egardless of a
 16 decision’s procedural posture, its reasoning—its ratio decidendi—carries precedential
 17 weight in future cases. . . . [J]udges are duty-bound to respect the hierarchy of the federal
 18 court system created by the Constitution and Congress.”) (cleaned up).

19 *Torres*, in contrast, did not cite § 1226 or mention the concept of detention or bond
 20 hearings. Additionally, Ninth Circuit cases decided after *Torres* reiterate, consistent with
 21 *Jennings* and *Nielsen*, that aliens who are “present” in the United States are, as a general
 22 rule, entitled to a bond hearing under § 1226(a). *Rodriguez Diaz v. Garland*, 53 F.4th 1189,
 23 1196-97 (9th Cir. 2022) (“The provision at issue in this case, 8 U.S.C. § 1226, provides the
 24 general process for arresting and detaining aliens who are present in the United States and
 25 eligible for removal. . . . Under § 1226(a) and its implementing regulations, a detainee may
 26 request a bond hearing before an IJ at any time before a removal order becomes final. . . .
 27 Additional provisions supplement § 1226’s detention scheme. Section 1225(b) applies to
 28 an ‘applicant for admission’”) (citations omitted). Again, it would make no sense for

1 *Rodriguez Diaz* to have characterized § 1225(b) as a “supplement” to § 1226’s “detention
 2 scheme” if, as Respondents now contend, § 1225(b)(2)(A) actually provides for mandatory
 3 detention in all (or nearly all) cases involving aliens present in the United States.⁷

4 The Court thus concludes, as have many other courts addressing the same issue, that
 5 Respondents’ narrow focus on the language of § 1225(a)(1) fails to take account of the
 6 entirety of the statutory scheme. For example, in *Giron Reyes v. Lyons*, 2025 WL 2712427
 7 (N.D. Iowa), the court acknowledged that the government’s interpretation of §§ 1225(a)(1)
 8 and 1225(b)(2)(A) was “intuitive” when the statutory language was read “in isolation” but
 9 concluded that the government’s interpretation nevertheless failed to carry the day because
 10 when § 1225 was considered “alongside its § 1226 companion,” this comparison
 11 “demonstrates that the most natural interpretation of § 1225 is that it applies to aliens
 12 encountered as they are attempting to enter the United States or shortly after they gained
 13 entry without inspection. Section 1225 repeatedly refers to aliens entering the country.
 14 The statute further explicitly addresses ‘crewm[e]n’ and ‘stowaway[s]’ in § 1225(b)(2),
 15 reflecting that Congress envisions applicants for admission as being arriving aliens. In
 16 addition, its sister statute, 8 U.S.C. § 1225a, focuses on the pre-inspection of aliens entering
 17 the country at foreign airports. In sum, § 1225 is set up with arriving aliens in mind.
 18 Compare that to § 1226’s broader language that realistically applies to any alien awaiting
 19 a removal decision. Considering § 1225 in its entirety, and in relation to § 1226, reveals
 20 that § 1225 is more limited than what that plain text of § 1225(a)(1) might indicate when

21 ⁷ Many other courts agree that Respondents’ position conflicts with *Jennings* and
 22 other relevant Supreme Court precedents. See, e.g., *Hasan*, 2025 WL 2682255 at *8
 23 (“[T]he federal respondents’ theory contradicts how the Supreme Court has traditionally
 24 construed the relationship between §§ 1225(b) and 1226(a). In *Jennings*, the Court
 25 explained that § 1225(b) governs ‘aliens seeking admission into the country’ whereas
 26 § 1226(a) governs ‘aliens already in the country’ who are subject to removal proceedings.
 27 This distinction makes sense in the broader context of U.S. immigration law. Indeed, the
 28 distinction between an alien who has effected an entry into the United States and one who
 has never entered runs throughout immigration law. For those who have already entered
 to United States, the [Supreme] Court has recognized additional rights and privileges not
 extended to those in the former category who are merely on the threshold of initial entry.”)
 (citations omitted); *Barrajas*, 2025 WL 2717650 at *5 (“The Supreme Court itself has
 recognized the difference between §§ 1225 and 1226. . . . Thus, even if principles of
 statutory interpretation did not defeat the Federal Defendants’ position (which they do), the
 Court would be obligated to follow the Supreme Court’s guidance anyway.”).

1 construed in the abstract.” *Id.* at *4-6.

2 C. Further Considerations

3 The additional points raised by Respondents during oral argument do not compel a
4 different conclusion.

5 Respondents placed heavy emphasis on what they deemed “public policy”
6 considerations, arguing that it would be preferable to have an immigration system in which
7 aliens who enter the country without inspection and evade detection for years or decades
8 are not effectively treated more favorably, at least for detention purposes, than other aliens.
9 But such arguments are directed to the wrong branch of government—the Court’s role is
10 simply to interpret the relevant statutory provisions. *Manufacturers Hanover Tr. Co. v.*
11 *C.I.R.*, 431 F.2d 664, 668 (2d Cir. 1970) (“[I]t transcends the judicial function to rewrite
12 the statute to conform to considerations of policy. If the facts of this case demonstrate a
13 . . . loophole Congress, not the courts, should plug it.”) (cleaned up).

14 Respondents also suggested that because the INA vests the Attorney General with
15 significant discretion when it comes to the enforcement of the immigration laws,
16 Respondents’ new interpretation of the relevant statutes should be reviewed deferentially.
17 But as the Supreme Court recently emphasized, “courts must exercise independent
18 judgment in determining the meaning of statutory provisions” and “need not . . . defer to
19 an agency interpretation of the law simply because a statute is ambiguous.” *Loper Bright*
20 *Enterprises v. Raimondo*, 603 U.S. 369, 394, 413 (2024). This is particularly true where
21 the agency adopted the opposite interpretation for nearly three decades. *Pizarro Reyes*,
22 2025 WL 2609425, at *8 (“For almost three decades, most noncitizens who entered without
23 inspection that were placed in standard removal proceedings received bond hearings,
24 unless subject to an exception. Accordingly, the Respondents’ proposed statutory
25 interpretation does not align with the executive branch’s contemporaneous guidance when
26 the IIRIA passed or with the expectations the guidance established.”).

27 The bottom line is that Petitioner is entitled to a bond hearing under § 1226(a) as a
28 matter of statutory construction, albeit statutory construction that is complicated and not

1 entirely free of doubt.⁸

2 V. Respondents' Remaining Arguments

3 Respondents advance a variety of reasons why Petitioner's continued detention
4 without a bond hearing would not violate his due process rights. (Doc. 9 at 9-11.)
5 Respondents also contend that Petitioner cannot seek relief under the Administrative
6 Procedure Act ("APA"). (*Id.* at 12-13.) It is unnecessary to reach those arguments because
7 the analysis in the preceding section of this order demonstrates that Petitioner is entitled to
8 relief on Count One, which is a claim that his "Detention is in Violation of 8 U.S.C.
9 § 1226(a)." (Doc. 1 ¶¶ 42-44.) This obviates the need to decide whether Petitioner is also
10 entitled to relief based on his due process-based claim in Count Two or his APA claim in
11 Count Three. *Pizarro Reyes*, 2025 WL 2609425 at *8 ("The Court will decline to decide
12 the merits of Pizarro Reyes' due process claim given that the Court will grant the relief he
13 seeks based on its interpretation of the applicability of § 1226(a).").

14 Respondents also contend that Petitioner's claims should be rejected because they
15 are "improper habeas claims" and do not "sound[] in habeas jurisdiction" (Doc. 9 at 11-
16 12.) In support, Respondents rely on *Pinson v. Carvajal*, 69 F.4th 1059 (9th Cir. 2023).
17 (*Id.*) This argument is unavailing. True, *Pinson* holds that "release from confinement is
18 the only available remedy for claims at the writ's core" and that "the relevant question is
19 whether, based on the allegations in the petition, release is legally required irrespective of
20 the relief requested." *Id.* at 1070, 1072. The Court thus interprets Respondents' brief as
21 suggesting that because Petitioner is merely demanding a bond hearing—which will not
22 necessarily result in his release from custody—his claims fall outside the scope of habeas
23 jurisdiction. But any such argument is foreclosed by *Doe v. Garland*, 109 F.4th 1188 (9th
24 Cir. 2024), which held that a similar request fell within *Pinson*'s "core of habeas." *Id.* at
25 1194 ("Doe relies primarily on *Pinson* and *Nettles* for the proposition that, because he did

26
27 ⁸ Given these determinations, it is unnecessary to wade into some of the additional
28 reasons that courts have provided for rejecting Respondents' position, which include that
the position is inconsistent with the recent amendment to § 1226 as part of the Laken Riley
Act and inconsistent with the relevant legislative history materials.

1 not challenge the underlying legal basis for his detention, but rather sought a process
 2 remedy in the form of a bond hearing, it follows that his petition falls within the ‘core of
 3 habeas’ as defined in *Pinson* We are unpersuaded that either of those cases support
 4 such a conclusion.”).⁹

5 Last, Respondents advance a variety of arguments regarding the standards for
 6 granting temporary or preliminary injunctive relief. (Doc. 9 at 13-16.) But it is
 7 unnecessary to address those arguments now that Plaintiff’s request for a preliminary
 8 injunction has been consolidated with a trial on the merits, as permitted by Rule 65(a)(2).

9 Accordingly,

10 **IT IS ORDERED** that:

11 1. Pursuant to Federal Rule of Civil Procedure 65(a), the decision on
 12 Petitioner’s Motion for Preliminary Injunction (Doc. 2) is consolidated with the merits.
 13 Post-consolidation, Petitioner’s Motion for Preliminary Injunction (Doc. 2) is **granted**.

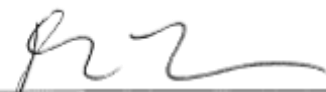
14 2. Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1) is **granted** as to
 15 Ground One. The Petition is otherwise denied without prejudice as moot.

16 3. Respondents must provide Petitioner a bond redetermination hearing within
 17 seven days or otherwise release him from custody under the same conditions that existed
 18 before his detention.

19 4. Respondents must provide a Notice of Compliance within seven days of
 20 providing Petitioner with a bond redetermination hearing.

21 5. The Clerk shall enter judgment in Petitioner’s favor and close this case.

22 Dated this 3rd day of October, 2025.

23
 24 
 25 _____
 26 Dominic W. Lanza
 United States District Judge

27 ⁹ In their response brief, Respondents also cited *Castaneda v. Souza*, 810 F.3d 15 (1st
 28 Cir. 2015) (en banc), for the proposition that “Petitioner is not entitled to a bond hearing”
 in light of 8 U.S.C. § 1226(c). (Doc. 9 at 12.) However, during oral argument,
 Respondents withdrew this argument.

National Defense Area Prosecution Materials

NATIONAL DEFENSE AREAS

Recent Developments



Rob Fellrath

National Security Law Firm, LLC

Background – Roosevelt Reservation

- The 60-foot-wide (18 m) strip of land owned by the United States' federal government along the U.S. side of the U.S.–Mexico Border in California, Arizona, and New Mexico
- Established in 1907 by President Theodore Roosevelt in order to ensure the border is “free from obstruction as a protection against the smuggling of goods between the United States and Mexico[.]”
- Helps form the basis of some federal criminal charges related to border activity and allows federal regulation of area
- Texas is excluded from the Roosevelt Reservation because of the terms of its entry into the union.

May 27, 1907.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Mexican bound-
ary.
Preamble.

WHEREAS, it is necessary for the public welfare that a strip of land lying along the boundary line between the United States and the Republic of Mexico be reserved from the operation of the public land laws and kept free from obstruction as a protection against the smuggling of goods between the United States and said Republic;

Reservation of a
strip of land 60
feet wide.

Now, therefore, I, THEODORE ROOSEVELT, President of the United States, do hereby declare, proclaim and make known that there are hereby reserved from entry, settlement or other form of appropriation under the public land laws and set apart as a public reservation, all public lands within sixty feet of the international boundary between the United States and the Republic of Mexico, within the State of California and the Territories of Arizona and New Mexico; and where any river or stream forms any part of said international boundary line, this reservation shall be construed and taken as extending to and including all public lands belonging to the United States which lie within sixty feet of the margin of such river or stream.

Location.

Lands excepted.

Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing, selection or rights of way duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose to which this reservation for customs purposes is repugnant; PROVIDED, that these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made, or unless the reservation or withdrawal to which this reservation is inconsistent

Background - Roosevelt Reservation



Background – Roosevelt Reservation

- 2019 – Trump Administration temporarily transferred authority over part of the Roosevelt Reservation from Department of Interior to Department of Defense in order to facilitate construction of border wall
- April 2025 – President Trump transfers additional portions of Roosevelt Reservation to the U.S. military



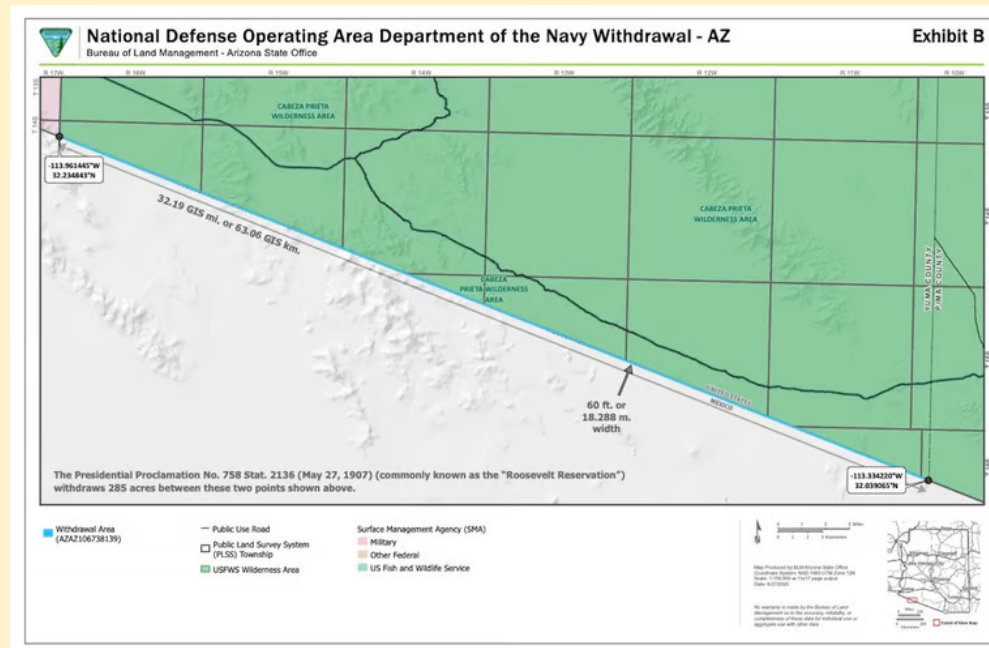
National Defense Areas

- April 2025 – New Mexico portion of Roosevelt Reservation transferred to Department of Defense and placed under control of Fort Huachuca, AZ
- May 2025 – portions of Texas border transferred from International Boundary and Water Commission to Department of Defense and placed under the control of Fort Bliss, TX



National Defense Areas - Arizona

- July 2025 – Department of Interior transferred public lands (Cabeza Prieta National Wildlife Refuge) near Yuma, AZ to the Department of Navy, placed under Marine Corps Air Station Yuma – approximately 70 miles of border



National Defense Areas - Arizona

- August 2025 – Officially announced for Arizona and includes the area along the Barry M. Goldwater Range and the Cabeza Prieta Wildlife Refuge.
- Conflicting reports about inclusion of Organ Pipe National Monument.



- No announced plans to incorporate remaining parts of Arizona border/Roosevelt Reservation into Fort Huachuca (yet).
 - Note: Tohono O'odham nation has much of the border and is excluded from the Roosevelt Reservation

National Defense Areas

- Dec. 10, 2025 – Dept of Interior announced plans to transfer “roughly 760 acres of public land in San Diego and Imperial Counties, California, to the Department of the Navy for a three-year period for the Navy to establish a National Defense Area to support ongoing border security operations.”
- Proposed NDA goes from western boundary of the Otay Mountain Wilderness Area (eastern outskirts of San Diego metro area) to about one mile west of the California–Arizona state line.
- Will be administered by Naval Air Facility El Centro
- As of Feb. 5, 2026, no record that it has been formally established.

Role of the Military

- Executive Order 14167 – “CLARIFYING THE MILITARY'S ROLE IN PROTECTING THE TERRITORIAL INTEGRITY OF THE UNITED STATES”
 - Tasks DoD with planning “to seal the borders and maintain the sovereignty, territorial integrity, and security of the United States by repelling forms of invasion including unlawful mass migration, narcotics trafficking, human smuggling and trafficking, and other criminal activities.”
- NATIONAL SECURITY PRESIDENTIAL MEMORANDUM/NSPM-4 (“Military Mission for Sealing the Southern Border of the United States and Repelling Invasions”)
- Relies on 10 U.S.C. § 2672 (Protection of buildings, grounds, property, and persons); 50 U.S.C. § 797 (Penalty for violation of security regulations and orders); and 18 U.S.C. § 1382 (Entering military, naval, or Coast Guard property) to justify use of military for protection of the installation

Role of the Military

- March 2025 – DoD creates Joint Task Force-Southern Border
 - New headquarters established at Fort Huachuca
 - 500 soldiers from Fort Drum, NY transferred to Fort Huachuca to assist with the border mission
 - Additional units sent to Forts Huachuca and Bliss to assist the mission
 - Replaces Joint Task Force North (which has been in existence since early 90s and tasked with supporting counter-drug efforts)
- Troops can “temporarily detain, search, enforce crowd control and provide medical treatment” to anyone found in these areas



Background – Posse Comitatus Act

- 18 U.S.C. § 1385
- First passed in 1878 after Reconstruction in post-Civil War
- Traditionally, a “posse comitatus” is a group of people who are mobilized by the sheriff to suppress lawlessness in the county
- Prohibits U.S. military services from participating in domestic law enforcement on U.S. soil (does not include Coast Guard)
 - Began as Army only but expanded to include all armed services over the years
- Exceptions incl. National Guard acting under state orders, Insurrection Act, Enforcement Acts (allowed when state authorities were either unable or unwilling to suppress violence that was in opposition to the citizens' constitutional rights), nuclear threats, terrorist threats
- Did not prohibit: non-direct support roles
- Traditionally viewed very seriously and enforced rigorously
- Punishable criminally by up to 2 years imprisonment

Does the Posse Comitatus Act still apply?

- 10 U.S.C. § 2672 - Protection of buildings, grounds, property, and persons
 - Allows military to “enforce Federal laws and regulations for the protection of persons and property”
 - Make arrests –
 - without a warrant for **any offense against the United States** committed in the presence of the officer or agent
 - for **any felony cognizable under the laws of the United States** if the officer or agent has reasonable grounds to believe that the person to be arrested has committed or is committing a felony
 - Conduct investigations, on and off the property in question

New Charges

- Most prosecutions for standard illegal entry/reentry cases originating in the National Defense Areas now include 3 charges:
 - 8 U.S.C. § 1325(a) or 1326 – illegal entry or reentry of removed alien
 - 50 U.S.C. § 797 – penalty for violation of security regulations and orders
 - 18 U.S.C. § 1328 – entering military, naval, or coast guard property

UNITED STATES DISTRICT COURT
for the
District of New Mexico

United States of America)
v.)
Rosario ALCARAZ-Beltran) Case No.
)
)
)
)
)
Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.
On or about the date(s) of 05/02/2025 in the county of Dona Ana in the
District of New Mexico, the defendant(s) violated:

Code Section	Offense Description
Count 1: 8 USC 1325(a)(1)	Entry or attempted by an alien into the United States at a time or place other than as designated by immigration officers.
Count 2: 50 USC 797	Penalty for violation of security regulations and orders
Count 3: 18 USC 1382	Entering military, naval, or coast guard property

This criminal complaint is based on these facts:

I, the complainant in this case, state that the following is true to the best of my knowledge and belief. On or about the date of April 27, 2025 in the county of Dona Ana in the State and District of New Mexico, the defendant violated 8 U.S.C. § 1325(a)(1) EWI (Misdemeanor), 18 U.S.C. 1382 (Misdemeanor) (Entry of Military Property for Any Purpose Prohibited by Law), 50 U.S.C. 797 (Class A Misdemeanor) (Penalty for Violations an offense described as follows:

☒ Continued on the attached sheet.

Complainant's signature

Daniel Calzada, Agent
Printed name and title

Electronically submitted and telephonically sworn to before me:

Date: 05/06/2025

Judge's signature

City and state: Las Cruces, N.M.

Printed name and title

UNITED STATES DISTRICT COURT
for the
Western District of Texas

United States of America)
vs.)
Leonel SOTELO-Santillan) Case No.
)
)
)
)
Defendant(s)

FILED

May 08, 2025

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: Fidel Morales
DEPUTY

EP:25-MJ-2164-MAT

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.
On or about the date(s) of May 2, 2025 in the county of El Paso in the
Western District of Texas, the defendant(s) violated:

Count I: In violation of Title 50, USC 797(1) and (2)(A): willfully violate a defense property security regulation, that is a property security regulation which, pursuant to lawful authority was promulgated or approved by the Secretary of Defense, or by a military commander designated by the Secretary of Defense;

Count II: In violation of Title 18, USC 1382: within the jurisdiction of the United States, entered a military post, fort, or yard, that is, upon a TEXAS National Defense Area, for a purpose prohibited by law or lawful regulation, that is illegal entry into the United States; and

Count III: In violation of Title 8, USC 1326(a): being an alien to the United States, enter, attempt to enter, or was found in the United States after having been previously excluded, deported, or removed from the United States without receiving permission to reapply for admission to the United States from the Attorney General of the United States and the Secretary of Homeland Security, the successor pursuant to Title 6, United States Code, Sections 202(3), 202(4), and 557

This criminal complaint is based on these facts:
On May 2, 2025, DEFENDANT, an alien to the United States, entered on property of the United States Army specifically, the Texas National Defense Area (Tx-NDA), without having received authorization from the U.S. ARMY or any other appropriate United States official, to be in, enter upon or access said area.

Continued on the attached sheet and made a part hereof: ☒ Yes ☐ No

Complaint sworn to telephonically on
May 08, 2025 at 02:00 PM and signed
electronically. FED.R.CRIM.P. 4.1(b)(2)(A)

Complainant's signature

Fabiola Cintron, Border Patrol Agent
Printed name and title

Sworn to before me and signed in my presence.

Date: May 8, 2025

Judge's signature

City and state: El Paso, Texas

Miguel A. Torres, U.S. Magistrate Judge
Printed name and title

50 U.S.C. § 797 - Penalty for violation of security regulations and orders

- (a)(1) **Misdemeanor** - Whoever *willfully* violates any defense property security regulation shall be fined under title 18 or imprisoned not more than one year, or both
 - Class A misdemeanor (1 year jail, \$100,000 fine, \$25 special assessment)
 - Right to a jury trial before Magistrate Judge (Rule 58(b)(2)(F))
- (a)(2) **Defense property security regulation described** - a defense property security regulation is a property security regulation that, pursuant to lawful authority—
 - (A) shall be or has been promulgated or approved by the Secretary of Defense (or by a military commander designated by the Secretary of Defense)
- (a)(3)(A) – relating to . . . the ingress or egress or removal of persons therefrom

50 U.S.C. § 797 - Penalty for violation of security regulations and orders

- New Mexico NDA:
 - April 15, 2025 – Public Land Order No. 7963 transfers DoI land (Roosevelt Reservation) in New Mexico to DoD
 - April 18, 2025 – U.S. Army General Order No. 2025-10 assigns lands to become part of Fort Huachuca
 - April 18, 2025 – Commander, Fort Huachuca, issues a security regulation designating the NM NDA as both a restricted area and a controlled area under Army Regulation 190-13 prohibiting the unauthorized entry into the National Defense Areas.
- Texas NDA:
 - Complaint does not lay out the specific defense property security regulation

50 U.S.C. § 797 - Elements

the elements of the crime are:

- (1) the NMNDA is lawfully regulated by a “defense property security regulation;”
- (2) such regulation prohibits unauthorized entry;
- (3) defendant entered the NMNDA; and
- (4) defendant’s entry was unauthorized.

“to establish a willful violation of a security regulation, the government need not show knowledge of the regulation, but only knowledge that the conduct is unlawful.”

Court held ***willful*** applied to elements 3 and 4

United States v. Acosta-Garcia, No. 25-mj-1418 GBW (D.N.M. May 14, 2025)

50 U.S.C. § 797 – Appellate History

- “Federal law makes the commander responsible ‘for the protection or security of’ ‘property subject to the jurisdiction, administration, or in the custody of the Department of Defense.’” *United States v. Apel*, 571 U.S. 359 (2014).
 - I read this to suggest that the installation commander should be promulgating the “defense property security regulation”
- There is no substantive Tenth Circuit case on this, but *United States v. Toirov*, 2025 U.S. App. LEXIS 31715 (10th Cir., Aug. 1, 2025) deals with a collateral detention issue.
- The District Court opinions in New Mexico have upheld the dismissal of the 797 counts based on the lack of knowledge alleged in the complaints.
- At least one of the District Court opinions is presently on appeal with the 10th Circuit (*US v. Escobedo-Molina*, 790 F. Supp. 3d 1283 (10th Cir., July 11, 2025))
- The District Court opinions from WD Texas all reflect guilty pleas to the 797 charges.
- There are no 9th Circuit opinions, either Ct. of Appeals or District Ct., reflecting this has been charged yet.

18 U.S.C. § 1382 – Entering military property

Whoever, within the jurisdiction of the United States, **goes upon any military**, naval, or Coast Guard **reservation**, post, fort, arsenal, yard, station, or installation, **for any purpose prohibited by law or lawful regulation**; . . .

Shall be fined under this title or **imprisoned not more than six months**, or both.

- Class B misdemeanor (up to 6 months imprisonment, \$5000 fine, \$25 special assessment)

18 U.S.C. § 1382 – Entering military property

- Elements:

- (1) a person “goes upon” a military reservation; and

- (2) does so for any unlawful purpose

BUT IF THE UNLAWFUL PURPOSE IS THE ENTRY, THEN GOVERNMENT MUST PROVE THAT DEFENDANT KNEW ENTRY WAS UNLAWFUL

- (3) defendant was prohibited from entering the base;

- (4) defendant intentionally entered the base;

- (5) defendant knew they were prohibited from entry.

United States v. Acosta-Garcia, No. 25-mj-1418 GBW (D.N.M. May 14, 2025); *see also United States v. Hall*, 742 F.2d 1153, 1154-55 (9th Cir. 1984) and *United States v. Omondi*, 818 Fed. Appx. 623 (9th Cir., June 11, 2020) (there is no right to a warning to leave the property).

18 U.S.C. § 1382 – Appellate history

- All of the citing decisions are the same from the New Mexico and Texas applications of 50 U.S.C. § 797
- No 9th Circuit citing decisions yet that are relevant to this scenario

Defenses and Strategies

- Attack the knowledge element of both new offenses
 - Government is trying to prove by saying they put up signs in English and Spanish
 - Potential mistake of fact about presence on military reservation
- Trial
 - 50 U.S.C. § 797 authorizes a jury trial
- Discovery
 - Push for disclosure of military regulations and orders
 - Push for disclosure of military operation orders (OPORD) regarding role of servicemembers in law enforcement

Defenses and Strategies

- Nuclear Option – Attack the transfer to Department of Defense
 - Under the *Engle Act*, approval by Congress is required for withdrawal, reservation, or restriction of over 5,000 acres for any Department of Defense project or facility. 43 U.S.C. § 156
 - But this limitation does not apply due to Trump's declaration of a national emergency at the southern border. 43 U.S.C. § 155
 - Need to attack the declaration of a national emergency – unlikely to succeed

QUESTIONS?

Rob Fellrath

rfellrath@nationalsecuritylawfirm.com

Robert.Fellrath@gmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES,

Plaintiff,

v.

Case No. 25-mj-1418 GBW

JUAN ANTONIO ACOSTA-GARCIA,

Defendant.

ORDER DISMISSING CHARGES

I. PROCEDURAL POSTURE

The United States has filed a Criminal Complaint against Defendant alleging three misdemeanor crimes: Entry Without Inspection in violation of Title 8 U.S.C. § 1325; Violation of a Security Regulation in violation of Title 50 U.S.C. § 797; and Entering Military Property for an Unlawful Purpose in violation of Title 18 U.S.C. § 1382. *See doc. 1*. The Court has sworn the agent to the factual allegations of the complaint and conducted an initial appearance. *See doc 3*. Counsel from the Federal Public Defender's Office represented Defendant for the purposes of the initial appearance and orally moved for dismissal of the Title 50 and 18 charges. *See Criminal Clerk's Minutes, United States v. Lucas-Curiel*, No. 2:25-mj-01417 GBW, *doc. 3* (D.N.M. May 12, 2025) (oral motion to dismiss for all such charges on docket); *See Criminal Clerk's Minutes, United States v. Campos-Vega*, No. 2:25-mj-01477 GBW, *doc. 3* (D.N.M.

May 13, 2025) (same); *See* Criminal Clerk's Minutes, *United States v. Batres-Alvarado*, No. 2:25-mj-01527 GBW, *doc. 3* (D.N.M. May 14, 2025) (same). Even if a motion had not been made, "anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate [judge]'s review of probable cause...." *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) (citation omitted).¹ This review requires that the court determine that the facts alleged in "the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it[.]" Fed. R. Crim. P. 4. Having concluded its probable cause review in this case, the court finds that the facts alleged in the complaint do not establish probable cause for either the 50 U.S.C. § 797 or 18 U.S.C. § 1382 charge.² As such, those charges will be dismissed without prejudice.

¹ Indeed, the review is required within 48 hours of arrest. While the Court took longer to finish the review in this case, it had, within that time period, concluded that probable cause existed as to the Entry Without Inspection charge which supported a warrantless arrest.

² Notwithstanding the United States' belated objection to the Court's order for briefing, the Court has considered its arguments as well as those of the Federal Public Defender. *See In the Matter of: MISDEMEANOR CHARGES PURSUANT TO 50 U.S.C. § 797 AND 18 U.S.C. § 1382*, No. 2:25-mc-00019 GBW, *doc. 4* ("USA Brief"), *doc. 5* ("FPD Brief"), *doc. 6* ("USA Objection") (D.N.M. May 2025). While the Court need not address every argument in the United States' Objection, given its remarkable tone and content, some points must be made. Incredibly, this histrionic filing is in response to the Court's order for the United States Attorney's Office to file a brief on a legal question about a criminal charge it had brought. Notably, the United States made no timely objection to the briefing order. In fact, United States filed its brief before apparently realizing days later that the mere request for briefing was "an improper exercise of the Court's authority" and an "extraordinary departure from ... foundational principles [.]" *USA Objection* at 2-3. According to the government, the briefing order was in error because it was "issued without any prompting from any party." *Id.* at 2. However, as noted above and as the government must be aware, this Court has a *sua sponte* obligation to conduct a probable cause review of all charges involving a warrantless arrest. Moreover, this Court has the independent obligation in any guilty plea proceeding to determine whether the proffered factual basis satisfies the elements of the crime. Thus, for both probable cause review and the Court's Rule 11 obligations, conclusions about the requisite elements of charged crimes are essential. The Court simply wanted to provide the government and defense

II. TITLE 50 U.S.C. § 797

This statute makes it a crime to “willfully violate[] any defense property security regulation.” 50 U.S.C. § 797. Specifically, in the instant case, Defendant is charged with violating a regulation promulgated by the military commander at Fort Huachuca prohibiting unauthorized entry into the NM National Defense Area (“NMNDA”) which was created out of the “Roosevelt Reservation.” *Doc. 1*. Under these circumstances, outside of *mens rea*, the elements of the crime are: (1) the NMNDA is lawfully regulated by a “defense property security regulation;” (2) such regulation prohibits unauthorized entry; (3) defendant entered the NMNDA; and (4) defendant’s entry was unauthorized. As quoted above, Defendant must “willfully violate” the regulation. Thus, the Court must determine how that “willfully” requirement applies here.

counsel an opportunity to weigh in on that analysis. Regardless, the government contends that this briefing would lead to an improper advisory opinion. However, as should be clear from this Order, the Court is applying its legal analysis to particular cases. To be sure, the Court’s briefing order was not filed in a particular case, but instead in a miscellaneous matter. Indeed, to fulfill its probable cause review, the Court could have filed the briefing order in the hundreds of cases filed by the government pursuant to the two “military trespass” statutes. Nonetheless, this attempt at efficiency did not constitute constitutional error. This conclusion is particularly true when the factual allegations in the complaints in question are virtually identical with respect to the two “military trespass” charges across hundreds of cases. While the Court appreciates the government’s newfound concern about the “particular facts of any case,” the government’s cut-and-paste approach to factual allegations in the complaints allows this Court to apply the legal analysis contained herein across every criminal complaint charging these crimes filed thus far and still pending. Finally, the government objects to the Court’s briefing order because it contends it would be improper for the Court to critically examine pending Informations. Even assuming that the caselaw regarding challenging indictments cited by the government is fully applicable to informations which have not passed the review of a grand jury, it would have no bearing on the instant order which addresses a criminal complaint in a case where no information has been filed.

The Federal Public Defender, who represented Defendant at the initial appearance, has argued that “the *mens rea* requirement of § 797 plainly requires knowledge of the security regulation at issue and an act in defiance of that regulation for some nefarious purpose.” *FPD Brief* at 4. Put another way, they argue that “not only does the term ‘willful’ unambiguously require a culpable state of mind, but that culpable state of mind must also be specifically directed toward committing a defense property security regulation.” *Id.* at 5. There is no citation for this proposition, and it contradicts Supreme Court precedent on the definition of “willfulness.”

The primary case on the meaning of “willfulness” in criminal statutes is *Bryan v. United States*, 524 U.S. 184 (1998). As the Court explained, the

word “willfully” is sometimes said to be “a word of many meanings” whose construction is often dependent on the context in which it appears. Most obviously it differentiates between deliberate and unwitting conduct, but in the criminal law it also typically refers to a culpable state of mind. ... As a general matter, when used in the criminal context, a “willful” act is one undertaken with a “bad purpose.” In other words, in order to establish a “willful” violation of a statute, “the Government must prove that the defendant acted with knowledge that his conduct was unlawful.”

Id. at 191 (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). Of course, one could conclude that “acting with knowledge that one’s conduct is unlawful” means that a defendant must indeed know the law. However, the Supreme Court expressly rejected this interpretation. The Court explained that a statutory willfulness requirement “does not [ordinarily] carve out an exception to the traditional rule that ignorance of the law is

no excuse; knowledge that the conduct is unlawful is all that is required.” *Id.* at 195-96.

The only exception to the traditional rule “involve[s] highly technical statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct.” *Id.* at 195 (citing *Cheek v. United States*, 498 U.S. 192 (1991) and *Ratzlaf v. United States*, 510 U.S. 135 (1994)). This court does not find that 50 U.S.C. § 797 as applied here is a statute which would fit within this exception. Notwithstanding the fact that the jurisdictional prerequisites to the crime – military property with a security regulation – may be legally intricate, the crime simply outlaws trespass on property administered by the military. Not only is this crime straightforward, its application along the border where individuals are allegedly attempting to enter the United States illegally does not risk ensnaring individuals engaged in apparently innocent conduct. Therefore, this court concludes that, to establish a willful violation of a security regulation, the government need not show knowledge of the regulation, but only knowledge that the conduct is unlawful.

The United States argues that this knowledge can be sufficiently shown by Defendant’s simultaneous illegal entry into the United States in violation of 8 U.S.C. § 1325. *USA Brief* at 6-8. In response, the Federal Public Defender contends that the United States has failed to cite any cases which stand for the proposition that “general intent to commit a completed crime can form the basis of any willfulness and/or *mens*

rea to commit a trespassing crime.” *FPD Brief* at 6 n.4. Having reviewed the cases cited by the parties, this court agrees with the United States.

First, the court finds no authority to support the distinction the Federal Public Defender attempts to make here. In *Bryan*, the Supreme Court required only “knowledge that his conduct was unlawful.” 524 U.S. at 191. There was no discussion of whether that knowledge was limited to another specific intent crime or whether it was completed or inchoate. Counsel provides no authority for making such a distinction and the court has found no cases interpreting willfulness which would support it. In fact, courts routinely support jury instructions on “willfulness” which state simply that the government must establish that the defendant knew his conduct was “unlawful.” See *United States v. Wyatt*, 964 F.3d 947 (10th Cir. 2020) (remanding two counts which required willfulness for retrial while implicitly endorsing the willfulness instruction which had been given by the trial court); *United States v. Robertson*, 709 F.3d 741, 745-46 (8th Cir. 2013).

Second, the analysis in *Bryan* supports the proposition that the defendant’s knowledge that his particular conduct was unlawful in some fashion would constitute willfulness. In *Bryan*, the defendant was convicted of willfully dealing in firearms without a federal license. 524 U.S. at 186. There was “no evidence that he was aware of the federal law that prohibits dealing in firearms without a federal license.” *Id.* at 189. The Court, however, found that willfulness was established because the evidence

showed defendant “knew that his conduct was unlawful.” *Id.* Specifically, the Court pointed to defendant’s (i) use of straw purchasers; (ii) promises to purchasers that he would shave off serial numbers; and (iii) practice of selling guns on street corners. *Id.* at 189 n.8. As the dissent noted, when the Court accepted “only [a] ‘general’ knowledge of illegality,” it did “not even limit ... the universe of relevant laws to federal *firearms* statutes.” *Id.* at 202 (Scalia, J., dissenting). Putting a fine point on it, Justice Scalia worried that, according to the Court’s holding, “it ought to suffice if [defendant] knew that the car out of which he sold the guns was illegally double-parked, or if, in order to meet the appointed time for the sale, he intentionally violated Pennsylvania’s speed limit on the drive back from the gun purchase in Ohio.” *Id.* This Court is confident that *Bryan* does not stand for such a broad a proposition and will instead assume that the apparent unlawfulness of a defendant’s conduct must bear a reasonable relationship to the crime the defendant is accused of willfully violating. That standard is met here. Defendant is alleged to have crossed an international border at a location (or place) not designated as an official port of entry -- a crime that, in essence, functions as a national trespass statute. Moreover, such illegal entry is generally intended to avoid detection by law enforcement and will almost always occur over property whose ownership and control the person neither knows nor considers. Consequently, the unlawfulness of illegal entry under 8 U.S.C. § 1325 is reasonably related to the crime of military trespass under 50 U.S.C. § 797.

However, the conclusion that Defendant’s knowledge of unlawfully entering the United States may be sufficient to establish knowledge of unlawful conduct under 50 U.S.C. § 797 does not end the *mens rea* inquiry. Whether and how a criminal statute requires the government to prove the *mens rea* of a defendant is a question of congressional intent. *See Rehaif v. United States*, 588 U.S. 225, 228 (2019).

In determining Congress’ intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding “each of the statutory elements that criminalize otherwise innocent conduct.” We normally characterize this interpretive maxim as a presumption in favor of “scienter,” by which we mean a presumption that criminal statutes require the degree of knowledge sufficient to “make a person legally responsible for the consequences of his or her act or omission.”

Id. at 228-29 (internal citations omitted). This presumption of scienter is generally applied to all but a statute’s “jurisdictional elements.” *Id.* at 229-30. “Jurisdictional elements do not describe the ‘evil Congress seeks to prevent,’” but instead establish the authority of the government to regulate the conduct. *Id.* at 230. As applied here, the first two elements of the 50 U.S.C. § 797 charge fit into the “jurisdictional elements” category — that NMNDA is lawfully regulated by a “defense property security regulation;” and that such regulation prohibits unauthorized entry. Together, these elements establish the legal and jurisdictional basis for this charge. Essentially, those elements are the “law” Defendant is accused of violating and, as explained in *Bryan*, “ignorance of the law is no excuse” outside of highly technical statutes. 524 U.S. at 196.

That leaves the final two elements of the 50 U.S.C. § 797 crime as applied here – that defendant entered the NMNDA; and that defendant’s entry was unauthorized. The court will apply the statute’s “willfully” *mens rea* requirement to both these elements. *See Rehaif*, 588 U.S. at 229-31 (“[B]y specifying that a defendant may be convicted only if he ‘knowingly violates’ § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g).”). As detailed above, Defendant’s intent to illegally enter the United States can satisfy the “willfully” requirement that Defendant knew that his conduct was unlawful under 50 U.S.C. § 797. However, that knowledge is not the only requirement of the “willfully” *mens rea*.

This court again returns to *Bryan* which defined “willfully” in comparison to the *mens rea* requirement of “knowingly.” 524 U.S. at 191-96. The *Bryan* Court explained that,

unless the text of the statute dictates a different result, the term “knowingly” ... requires proof of knowledge of the facts that constitute the offense. ... **More is required, however**, with respect to [] conduct ... that is only criminal when done “willfully.” [For such the] jury must find that the defendant ... acted with knowledge that his conduct was unlawful.

Id. at 193 (emphasis added). In short, to establish willfulness, the government must show “knowledge of the facts that constitute the offense” **and** “knowledge that his conduct is unlawful.” *Id.* (emphasis added). While the government’s allegations in the

instant case may satisfy the requirement of understanding that the conduct was unlawful, they fail to establish knowledge of the facts that constitute the offense.

As stated above, the government must show that Defendant entered the NMNDA and that Defendant's entry was unauthorized. Therefore, knowledge of the facts that constitute that offense includes knowledge that the defendant has entered the NMNDA. Requiring knowledge of the entry is also consistent with Congressional intent given the statute's requirement that "the regulation ... shall be posted in conspicuous and appropriate places."³ 50 U.S.C. § 797(b). Relevant to knowledge, the Criminal Complaint alleges that "on April 24, 2025, signs were posted in the [NMNDA] stating in both English and Spanish that this is a restricted area, and that unauthorized entry is prohibited." *Doc. 1* at 3. As the United States concedes, the NMNDA spans over 180 miles of "often difficult and mountainous terrain." *USA Brief* at 9.

Consequently, the mere fact that some "signs" were posted in the NMNDA provides no basis on which to conclude that the Defendant could have seen, let alone did see, the signs. Relevant facts on this matter would include: (i) the words on the signs; (ii) the size of the signs; (iii) the height of the signs; (iv) the density of the signage; (v) evidence regarding how close Defendant was to a sign at any time prior to apprehension; and (vi)

³ Notwithstanding the court's conclusion that this provision supports the requirement of knowledge of entry, the Court is persuaded by the cases cited by the government that posting is not an independent element of the offense. See *United States v. Strong*, 724 F.3d 51, 57-58 (1st Cir. 2013); *United States v. Irby*, 269 Fed. App'x 246, 248-29 (4th Cir. 2008) (per curiam).

the lighting conditions at the relevant time and whether the signs were lighted or otherwise visible.⁴ Beyond the reference to signage, the United States provides no facts from which one could reasonably conclude that the Defendant knew he was entering the NMNDA. Consequently, the Criminal Complaint fails to establish probable cause to believe that Defendant knew he/she was entering the NMNDA. As the court has held that such knowledge is an essential element of the 50 U.S.C. § 797 charge brought against Defendant, that charge fails and must be dismissed.

III. TITLE 18 U.S.C. § 1382

This statute makes it a crime to “go[] upon any military ... reservation ... for any purpose prohibited by law or lawful regulation....” 18 U.S.C. § 1382. The basic elements of the crime are not hidden – (1) a person “goes upon” a military reservation; and (2) does so for any unlawful purpose.

As both the United States and the Federal Public Defender spend considerable time on the second element, the court will begin there. The court agrees with the briefing from both counsel that violations of the relevant paragraph of 18 U.S.C. § 1382 fall into two categories. First, a defendant can “go[] upon” military property for a purpose that is unlawful for reasons apart from the entry itself. *See, e.g., United States v.*

⁴ The court recognizes that some of these facts are touched upon in the briefing. *See USA Brief* at 1-2. However, as these facts are not alleged in the Criminal Complaint, they are not relevant to determining the probable cause contained therein.

Allen, 924 F.2d 29 (2d Cir. 1991). Second, a defendant violates the same paragraph by “go[ing] upon” restricted military property without authorization. In such a case, the unauthorized entry itself can provide the unlawful purpose. *See, e.g., United States v. Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981).

The United States argues that Defendant’s case falls into the first category. Under this theory, Defendant entered the military property for the purpose of entering the United States without inspection as prohibited by 8 U.S.C. § 1325. Notwithstanding the contrary arguments of the Federal Public Defender, the court broadly agrees with the United States on this point. As alleged in the Criminal Complaint, the NMNDA entered by Defendant is contiguous to and parallel with the international border between the United States and Mexico. The Criminal Complaint further alleges that Defendant entered the NMNDA in the process of illegally entering the United States at a place quite distant from the nearest Port of Entry. *See* 8 U.S.C. § 1325(a)(1).⁵ For the purposes of probable cause, it is also reasonable to conclude that Defendant was intending to elude any examination by entering the United States in the location he

⁵ The Federal Public Defender argues that, at “a bare minimum, the purposeful requirement of 18 U.S.C. § 1382 requires the Government to prove an additional element beyond what is required under 8 U.S.C. § 1325; that the undocumented person did in fact know, for certain, that they are an ‘alien’ as that term is used under 8 U.S.C. § 1325.” *FPD Brief* at 11. The Court disagrees given that it is unlawful even for a United States citizen to enter the United States at a place not designated for entry. *See* 19 U.S.C. § 1459; *see also United States v. Nunez-Soberanis*, 406 F. Supp. 3d 835, 843-44 (S.D.Cal. 2019) (concluding that United States citizen would be subject to at least civil penalties for entering at a place not designated for entry).

chose. *See* 8 U.S.C. § 1325(a)(2). Under these circumstances, the Complaint establishes probable cause to believe that Defendant’s entry and presence in the NMNDA was for an unlawful purpose.

The Court now turns to the first element – “goes upon” the military reservation. Unlike the 50 U.S.C. § 797 charge, the statute contains no comprehensive *mens rea* requirement. Instead, the statute contains a distinct specific intent requirement which adds to the first element. *See, e.g.*, 21 U.S.C. § 841(a) (“[I]t shall be unlawful for any person to knowingly or intentionally ... to possess with intent to ... distribute ... a controlled substance....”). Thus, the court must first determine whether there is any scienter requirement with respect to the “goes upon” element. The United States argues that, as long as the specific intent of the second element is met, no additional *mens rea* is necessary. *See USA Brief* at 11.

As quoted above, the Supreme Court has held that we presume “that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct.” *Rehaif*, 588 U.S. at 228-29 (quotations omitted). Consequently, we presume “that criminal statutes require the degree of knowledge sufficient to make a person legally responsible for the consequences of his or her act or omission.” *Id.* at 229 (quotations and citations omitted). This presumption applies “even when Congress does not specify any scienter in the statutory text,” except as a statute’s “jurisdictional elements.” *Id.* at 229-30.

Certainly, the sole *actus reus* of this crime – going upon the military property – is not a mere jurisdictional element. Consequently, the presumption of scienter applies. This general presumption is bolstered by the fact that the entry (“goes upon”) is the only act elementally required from a defendant committing this crime. Finally, the context of 18 U.S.C. § 1382 supports a knowledge requirement for the “goes upon” element. By their nature, military reservations are generally obvious and well-marked. However, in many circumstances, public roads surrounding a military reservation pass through and are within the formal boundaries of the military property. *See, e.g. United States v. Apel*, 571 U.S. 359, 361-63 (2014) (Pacific Coast Highway passes through and is part of military property of Vandenberg Air Force Base). Consequently, individuals could easily enter military property without being aware that they had crossed a meaningful boundary assuming no signs were posted. If a person were driving along such a road intending to commit a crime in the next town, they would be guilty of a 18 U.S.C. § 1382 crime by the government’s logic. In fact, they would be guilty even if they never committed the crime when they arrived at the next town and thus had never engaged in any knowingly culpable conduct. The absurdity of such a result strongly suggests that Congress intended only to criminalize the “go[ing] upon” in 18 U.S.C. § 1382 if it was done knowingly.

The United States argues that, only in the second category of 18 U.S.C. § 1382 cases – the alleged unlawful purpose is unauthorized entry itself – should it have to

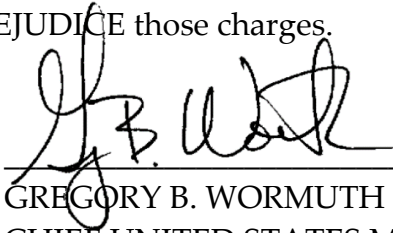
establish knowledge. The United States is correct that, in this second category, it must prove that the defendant knew they were prohibited from entering. *See, e.g., Parrilla Bonilla*, 648 F.2d at 1377; *United States v. Cottier*, 759 F.2d 760, 762 (9th Cir. 1985); *United States v. Hall*, 742 F.2d 1153, 1154-55 (9th Cir. 1984); *United States v. Floyd*, 477 F.2d 217, 224 (10th Cir. 1973). But knowledge that they were specifically or generally prohibited is not the only element the government must prove. As the *Floyd* court affirmed, it “becomes a matter of proof as to whether the Defendants were [prohibited] persons and intended to enter the base knowing that they were so prohibited.” 477 F.2d at 224. Thus, under *Floyd*, three elements must be established to prove the second category of 18 U.S.C. § 1382 offenses: (i) defendant was prohibited from entering the base; (ii) defendant intentionally entered the base; (iii) defendant knew they were prohibited from entry. Requiring an intentional entry means that the defendant must know they were entering the military property. Unsurprisingly, in the other cases cited by the United States where § 1382 convictions were upheld, the facts clearly demonstrate that the respective defendant knew they had entered the military property AND knew they were prohibited from doing so. *See Cottier*, 759 F.2d at 762 (defendant apprehended inside area enclosed by barbed wire fence); *Hall*, 742 F.2d at 1154 (defendant apprehended on base which was closed and fenced-in); *cf. Parrilla Bonilla*, 648 F.2d at 1377 (expressing great concern about the lack of knowledge given that defendants entered an area on the base “without any visible boundary marking” while reversing

the convictions on other grounds). Indeed, not requiring knowledge of entry would again lead to absurd and unfair results. For example, an individual, knowing they were prohibited from entering a military base, who steps on land he does not know is part of that base would be guilty without having any culpable intent. This conclusion that knowledge of entry is required for the second category of 18 U.S.C. § 1382 cases supports, rather than undermines, the court's conclusion that knowledge that one is entering the military property is an element under both categories.

For the same reasons described above, the Criminal Complaint fails to establish probable cause to believe that Defendant knew he/she was entering the NMNDA. Given the lack of probable on this essential element, the 18 U.S.C. § 1382 charge fails and must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court finds that the factual allegations in the Criminal Complaint fail to establish probable cause on an essential element of Violation of a Security Regulation in violation of Title 50 U.S.C. § 797 and Entering Military Property for an Unlawful Purpose in violation of Title 18 U.S.C. § 1382. Therefore, the Court DISMISSES WITHOUT PREJUDICE those charges.



GREGORY B. WORMUTH
CHIEF UNITED STATES MAGISTRATE JUDGE