

No. 26-50183

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

*Alejandro Villegas Angel,
Petitioner-Appellee,*

v.

Markwayne Mullin, Secretary, U.S. Department of Homeland Security;
Pamela Bondi, U.S. Attorney General; Miguel Vergara, San Antonio
Field Office Director for Enforcement and Removal; Charlotte Collins,
Warden, T. Don Hutto Detention Center, Taylor, Texas; United States
Department of Homeland Security; United States Immigration and
Customs Enforcement; Executive Office for Immigration Review, Office
of the General Counsel,

Respondents-Appellants,

No. 26-50183

*Ignacio Sosnava Rodriguez,
Petitioner-Appellee,*

v.

Sylvester M. Ortega, in his official capacity as Director of the San
Antonio Field Office of ICE's Enforcement and Removal Operations;
Markwayne Mullin, Secretary, U.S. Department of Homeland Security;
Pamela Bondi, U.S. Attorney General; Charlotte Collins, in her official
capacity as Warden of the T. Don Hutto Detention Center; Department
of Homeland Security; DOJ Executive Office For Immigration Review,

Respondents-Appellants,

No. 26-50221

Miguel Angel Gomez Alvarado,
Petitioner-Appellee,

v.

Miguel Vergara, in his official capacity as the Acting Director of
San Antonio Field Office for U.S. Immigration and Customs
Enforcement; Todd Lyons, in his capacity as the Acting Director for the
U.S. Immigration and Customs Enforcement; Markwayne Mullin, in
his capacity as the Secretary of the U.S. Department of Homeland
Security,

Respondents-Appellants.

On Appeal from the United States District Court
for the Western District of Texas

No. 1:26-cv-000273

No. 1:26-cv-00309

No. 1:26-cv-00384

**MOTION FOR STAY OF DISTRICT COURT JUDGMENTS
PENDING REHEARING EN BANC**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed non-governmental persons and entities as described in 5th Cir. R. 28.2.1 have an interest in the outcome of this case:

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These representations are made so that this Court's judges may evaluate possible disqualification or recusal.

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CERTIFICATE OF CONFERENCE

Respondents-Appellants have requested Petitioners' positions on this motion. Petitioners, through counsel, indicate they oppose this motion and intend to file an opposition.

INTRODUCTION

This Court held in *Buenrostro-Mendez v. Bondi*, 166 F.4th 494 (5th Cir. 2026), that 8 U.S.C. §1225(b)(2)(A) mandates detention of unadmitted aliens, like Petitioners here, for the duration of their removal proceedings. In these cases, the district courts held §1225(b)(2)(A) facially unconstitutional under the Due Process Clause and ordered Petitioners' immediate release from detention. Showing only slightly more modesty, the panel opinion held §1225(b)(2)(A) unconstitutional for all but the first 90 days of detention. As Judge Wilson explained, the upshot is "reading §1225(b)(2)(A)'s detention requirement out of operable existence." Add.70.

The full Court sua sponte ordered that these appeals be reheard en banc and vacated the panel opinion. *See* Dkt. 174-1. In the meantime, the en banc Court should issue a precedential order staying the district court's judgments pending rehearing by the full Court. That relief is

necessary to rectify the lower courts' facial invalidation of §1225(b)(2)(A), and to alleviate the crushing burden being imposed on U.S. Attorneys' Offices and district courts by the continuing flood of habeas petitions.

The Government is likely to succeed on the merits, as Judge Wilson thoroughly explained in his dissent and as the full Court's order sua sponte granting rehearing en banc strongly suggests. The district courts held that *procedural* due process prohibits the Government from detaining Petitioners under §1225(b)(2)(A) without a bond hearing to justify detention, but they have no such procedural right: "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 9 (2003). Whether Petitioners are a flight risk or dangerous is irrelevant to whether §1225(b)(2)(A) mandates detention, so a bond hearing to assess those issues would be "a bootless exercise." *Id.* at 7-8. Even if Petitioners' claims did sound in procedural due process, the result would be the same: applicants for admission have "only those rights regarding admission that Congress has provided by statute," *DHS v.*

Thuraissigiam, 591 U.S. 103, 140 (2020), and “[t]hat process does not include a bond hearing.” Add.54 (Wilson, J., dissenting).

In reality, Petitioners are not challenging the procedures available under the statute, but Congress’s substantive determination that aliens covered by §1225(b)(2)(A) must be detained without a bond hearing. But §1225(b)(2)(A) “easily clears” rational-basis review, Add.62 (Wilson, J., dissenting), as the Supreme Court has long “recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process,” *Demore v. Kim*, 538 U.S. 510, 523 (2003).

The equitable factors strongly support a stay pending en banc review. The district courts held that §1225(b)(2)(A) violates the Due Process Clause and prohibited the Government from enforcing the statute as written. That alone constitutes irreparable harm. *Trump v. CASA, Inc.*, 606 U.S. 831, 860-61 (2025). Adding insult to injury, the courts below ordered the Government to *immediately* release Petitioners, without an opportunity to cure the purported due process violation with evidence that continued detention is justified (*e.g.*, based on flight risk or dangerousness).

The en banc Court should issue a precedential order staying the district courts' judgments pending en banc review. Absent that relief, district courts and U.S. Attorneys' Offices in this Circuit will continue to be crushed by the *thousands* of habeas petitions that have been filed this year alone, which have drained their resources and sidelined other significant priorities that benefit the public.

STATEMENT

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. §1101 *et seq.*, as amended through the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996), authorizes the detention of aliens pending their removal proceedings. *See* 8 U.S.C. §§1225, 1226.

Section 1225 governs the detention of “applicants for admission”—a category that includes “alien[s] present in the United States who ha[ve] not been admitted or who arrive[] in the United States.” 8 U.S.C. §1225(a). Section 1225(b)(2), in turn, applies to all applicants for admission not expressly excluded, *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018), and requires that they be detained pending removal

proceedings unless they are “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §1225(b)(2)(A).

Section 1226 separately governs the arrest, detention, and release of aliens generally (not “applicants for admission” specifically). The statute provides that “[o]n a warrant,” an alien “may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. §1226(a). Detention under this provision is generally discretionary. *Jennings*, 583 U.S. at 288. That “default rule” of discretionary detention does not apply to certain aliens with criminal history or national security concerns. *Id.* at 288-89; *see* 8 U.S.C. §1226(c).

2. For many years after IIRIRA, the Department of Homeland Security (DHS) and most immigration judges treated unadmitted aliens who entered the United States illegally as being subject to discretionary detention under §1226(a), not mandatory detention under §1225(b)(2)(A). *Buenrostro-Mendez*, 166 F.4th at 500.

In July 2025, DHS revisited the issue and determined that its prior approach contravened the INA’s text. *See* Todd M. Lyons, Acting Director of U.S. Immigration and Customs Enforcement, *Interim Guidance Regarding Detention Authority for Applicants for Admission* (July 8,

2025). DHS concluded that “applicants for admission” are “subject to mandatory detention under [§1225(b)] and may not be released from [U.S. Immigration and Customs Enforcement] custody” except by “parole” under 8 U.S.C. §1182(d)(5). *Id.* The Board of Immigration Appeals later adopted this interpretation in *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 228 (BIA 2025), and this Court adopted this interpretation in *Buenrostro-Mendez*, 166 F.4th 494.

B. Factual and Procedural Background

1. Petitioners’ backgrounds

Petitioners Sosnava Rodriguez, Alejandro Villegas Angel, and Miguel Angel Gomez Alvarado are citizens of Mexico or Honduras, who illegally entered the United States. ROA.26-50183.57; ROA.26-50221.6; ROA.26-50219.10. Each was encountered by U.S. Immigration and Customs Enforcement, determined to be inadmissible, and placed in removal proceedings. ROA.26-50183.127; ROA.26-50221.65-70; ROA.26-50219.57-59. Rodriguez, Angel, and Villegas were encountered by immigration officials and detained under §1225(b)(2)(A) in December 2025, November 2005, and February 2026, respectively, pending their

removal proceedings. ROA.26-50183.57; ROA.26-50221.65-70; ROA.26-50219.11.

Petitioners filed petitions for writs of habeas corpus, alleging that detention under §1225(b)(2)(A) without bond hearings to assess flight risk or dangerousness violates due process. ROA.26-50183.89-91; ROA.26-50221.9-11; ROA.26-50219.6-18. No Petitioner challenged the duration of his detention as unconstitutionally prolonged, only the *fact* of detention without a bond hearing.

2. The district court decisions and the panel opinion

a. The district courts held that Petitioners' detention without bond violates procedural due process without reference to length of detention, applying *Mathews v. Eldridge*, 424 U.S. 319 (1976). ROA.26-50183.130-31; ROA.26-50221.85-86; ROA.26-50219.75-77. The courts ordered Petitioners' immediate release. ROA.26-50183.133; ROA.26-50221.93; ROA.26-50219.85.

b. A panel of this Court (Southwick, Graves, Wilson, JJ.) affirmed in a splintered decision. Judge Southwick, joined (mostly) by Judge Graves, held that detention under §1225(b)(2)(A) violates

procedural due process—though they disagreed on when the violation occurs.

The majority held that aliens who are physically present in the United States have due process rights in removal proceedings, even if they were never lawfully admitted. Add.9-15. According to the panel, “[e]ntry and residence, not legal admission, dictate the extent of the Constitution’s application.” Add.15. The majority acknowledged that *Thuraissigiam* held that an alien who *had* entered the United States had no due process rights beyond those conferred by statute, but limited *Thuraissigiam* to aliens who had only recently entered the country. Add.12-15.

The panel evaluated Petitioners’ claims under procedural, rather than substantive, due process standards. Add.16-20. The panel held that due process entitles aliens detained under §1225(b)(2)(A) to an individualized assessment to justify their detention. Add.28-31. In so doing, the majority rejected the Government’s reliance on *Connecticut Department of Public Safety v. Doe*, which held that procedural “due process does not entitle [a plaintiff] to a hearing to establish a fact that is not material under the ... statute.” 538 U.S. at 7. Instead, the panel

applied the *Mathews* factors and held that the Government must “provide a bond hearing to aliens held under Section 1225(b)(2)(A) within a reasonable time of detention,” which it determined to be 90 days. Add.33, 36.

Judge Graves specially concurred. Add.39-43. He would have held that procedural due process “require[s] currently detained noncitizens to receive a hearing within 30 days of their detention,” and that “the pre-detention due process previously available under §1226(a)” must apply going forward. Add.39.

c. Judge Wilson dissented. Add.44-71. Relying on *Thuraissigiam*, he explained that “admission status—not physical presence—determines what procedural rights are available to an alien.” Add.50. “[B]ecause Petitioners have never been lawfully admitted into the United States, the admission procedures provided by Congress in §1225(b)(2)(A) embody the due process to which they are entitled.” Add.54. Moreover, Judge Wilson concluded that Petitioners “claims would still fail” in any event because the majority “ignores the clear import of *Doe*—that procedural ‘due process does not entitle [Petitioners] to a hearing to establish a fact that is not material under

[the] statute.” Add.58 (quoting *Doe*, 538 U.S. at 7). Because flight risk and dangerousness are irrelevant to the application of §1225(b)(2)(A), “the lack of hearings [to determine those facts] did not render Petitioners’ detention unconstitutional as a matter of procedural due process.” Add.59.

The dissent then rejected Petitioners’ claims as a matter of substantive due process. Add.59-71. As Judge Wilson explained, Petitioners claims fail rational-basis review under longstanding Supreme Court precedent holding that “[d]etention during removal proceedings is a constitutionally permissible part of that process.” Add.62 (quoting *Demore*, 538 U.S. at 526). He also rejected the panel’s creation of a 90-day limit on detention under §1225(b)(2)(A). No Petitioner had “even alleged” that the duration of their detention violated due process, and the majority’s 90-day rule was “cut from whole cloth.” Add.67, 70.

3. The full Court sua sponte ordered rehearing en banc

On July 10, 2026, the full Court sua sponte ordered that these appeals be reheard en banc and vacated the panel opinion. Dkt. 174-1.

ARGUMENT

A stay pending appeal turns on “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009). Each factor weighs heavily in favor of a stay.

I. The Government is Likely to Succeed on the Merits

Petitioners are subject to mandatory detention under §1225(b)(2)(A). Nonetheless, the district courts held that they are entitled to release from detention as a matter of procedural due process. That was error. Petitioners’ claims do not sound in procedural due process. And even if they did, they are meritless.

A. Petitioners’ claims sound in substantive due process

The Constitution prohibits the government from “depriv[ing]” a “person” of “life, liberty, or property, without due process of law.” U.S. Const. amend. V. The Supreme Court has recognized two types of due-process claims—procedural and substantive. *Department of State v.*

Muñoz, 602 U.S. 899, 910 (2024). A procedural due process claim takes as a given the substantive determinations that would justify a deprivation of life, liberty, or property, but challenges the “adequacy of the[] procedures” for making those factual determinations. *Mathews*, 424 U.S. at 335. By contrast, a substantive due process claim challenges the substance of the determinations themselves as being inadequate to justify the deprivation “*at all*, no matter what process is provided.” *Reno v. Flores*, 507 U.S. 292, 302 (1993).

1. Petitioners have not challenged the process for determining whether an alien is an “applicant for admission” or “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §1225(b)(2)(A). Instead, the district courts held that a determination that Petitioners fall within those statutory criteria is a constitutionally insufficient basis on which to justify the deprivation of their liberty, absent an assessment of whether they are flight risks or dangerous. ROA.26-50183.131-33; ROA.26-50221.92-93; ROA.26-50219.84-86. Those criteria, however, are irrelevant under the terms of §1225(b)(2)(A). The district courts’ due process holdings (and Petitioners’ claims) thus do not take §1225(b)(2)(A)’s substantive determinations as a given but challenge the

lawfulness of those determinations as being inadequate to justify detention “*at all*, no matter what process is provided.” *Reno*, 507 U.S. at 302. That is a substantive due process challenge.

Connecticut Department of Public Safety v. Doe is definitive on this point. The statute in that case required sex offenders to register with the State so their information could be published on a sex-offender registry. 538 U.S. at 4-5. Doe, who had previously been convicted of a sex offense, claimed that the statute violated his procedural due process rights by requiring him to register without a “hearing to determine whether” he was “currently dangerous.” *Id.* at 4 (citation omitted). The Court rejected that claim. It explained that “due process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme,” and “the fact that [Doe] seeks to prove—that he is not currently dangerous—[wa]s of no consequence under” the relevant statute, which required him to register based on his prior conviction alone. *Id.* at 7. “Unless [Doe] c[ould] show that the substantive rule of law [wa]s defective (by conflicting with the Constitution), any hearing on current dangerousness [would be] a bootless exercise.” *Id.* at 7-8.

The rule is straightforward: “Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.” *Doe*, 538 U.S. at 9. A claim that a plaintiff is entitled to a hearing to adjudicate facts a legislature had not made relevant “‘must ultimately be analyzed’ in terms of substantive, not procedural, due process.” *Id.* at 7-8.

2. Under *Doe*, Petitioners have no procedural due process right to a bond hearing. Congress decided as a substantive policy matter to impose mandatory detention on aliens, like Petitioners, based on their status as “applicants for admission” who are not “clearly and beyond a doubt entitled to be admitted.” 8 U.S.C. §§1225(a)(1), (b)(2)(A). Whether an alien is a flight risk, dangerous, or anything else is entirely irrelevant to whether §1225(b)(2)(A) mandates detention. Therefore, Petitioners have no procedural due process right to a bond hearing to assess whether they should be detained during their removal proceedings. Add.56 (Wilson, J., dissenting); *Lopez-Campos v. Raycraft*, 175 F.4th 713, 761 (6th Cir. 2026) (Murphy, J., dissenting). As in *Doe*, any claim that

Petitioners are entitled to a bond hearing “‘must ultimately be analyzed’ in terms of substantive, not procedural, due process.” 538 U.S. at 7-8.

3. Two of the district courts below held that *Doe* is “inapposite” because it “arose in an entirely different context: a challenge to a sex offender registration statute.” ROA.26-50221.86-87; ROA.26-50219.79. That is not how precedent works. *Doe* articulated a rule of decision that applies to *all* procedural due process claims. 538 U.S. at 8 (framing holding in terms of “Plaintiffs who assert a right to a hearing under the Due Process Clause” generally). It applies regardless of the particular statute a plaintiff is challenging.

For its part, the now-vacated panel opinion deemed *Doe* irrelevant because Petitioners *also* argued that §1225(b)(2)(A) “*substantively* violates their right to liberty from physical constraint,” Add.18, whereas *Doe* “expressly disavow[ed]” any reliance on substantive due process. 538 U.S. at 8. The Supreme Court has previously rejected this mix-and-match approach and this Court should, too, as the asserted “right would be in a category of one: a substantive due process right that gets only procedural due process protection.” *Muñoz*, 602 U.S. at 911-12. In any event, the fact that Petitioners challenged the

substance of §1225(b)(2)(A) just means that their claims sound in substantive due process.

Ultimately, the now-vacated panel opinion seemed to believe that Petitioners' claims must arise under procedural due process because "they seek ... recognition of a procedural right" to prove they are not dangerous or flight risks. Add.18-19. The same was true in *Doe*; that plaintiff, too, sought a "procedural right" to prove he was not "currently dangerous." 538 U.S. at 7.

B. Petitioners' claims fail under rational-basis review

Petitioners' claims thus sound in substantive due process. The Supreme Court has made clear that substantive due process requires a "careful description of the asserted" liberty interest, but there is no right for unadmitted aliens (like Petitioners) to remain at large in the United States during removal proceedings that is "objectively, deeply rooted in this Nation's history and tradition." Add.61 (Wilson, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)); see *Lopez-Campos*, 175 F.4th at 760-61 (Murphy, J., dissenting).

Accordingly, Petitioners’ due process claims must be evaluated under rational-basis review.¹

1. Section 1225(b)(2)(A) “easily clears” rational-basis review. Add.63 (Wilson, J., dissenting). The Supreme Court has repeatedly upheld the constitutionality of immigration detention pending removal proceedings, and “no Supreme Court case [has] raised due-process concerns” with such detention. *Lopez-Campos*, 175 F.4th at 760 (Murphy, J., dissenting).

In *Demore*, the Supreme Court considered a “substantive due process” challenge to detention under §1226(c). 538 U.S. at 515. Like Petitioners here, the petitioner in *Demore* “argued that his detention under §1226(c) violated due process because the [government] had made no determination that he posed either a danger to society or a flight risk.” *Id.* at 514. The Court rejected that claim. It explained that its cases had long “recognized detention during deportation proceedings as a

¹ The outcome is the same even if *Glucksberg*’s framework did not apply, see Add.21, because “an alien’s right to liberty must also be considered in context” of the basic rule that “in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens,” including with respect to detention. Add.23-24 (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)).

constitutionally valid aspect of the deportation process.” *Id.* at 523; *see also id.* at 526 (reiterating the “Court’s longstanding view that the Government may constitutionally detain deportable aliens during ... removal proceedings”). That detention, the Court explained, serves the legitimate objective of preventing “aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” *Id.* at 528.

Demore broke no new ground. At least twice before, the Court approved mandatory detention of aliens without requiring individualized assessments. In *Carlson v. Landon*, 342 U.S. 524 (1952), the Court addressed a constitutional challenge to detention, “without bail,” of aliens who were deportable because of their Communist activities. *Id.* at 526-28, 542-44. Those aliens challenged their detention on the ground that there had been no finding they were flight risks or dangerous—and indeed one of the plaintiffs had specifically been found *not* to be dangerous. *Id.* at 531-32; *Demore*, 538 U.S. at 525 n.8. The Court held that the Government would detain those aliens solely “by reference to the legislative scheme,” without any individualized determinations. *Carlson*,

342 U.S. at 543 (emphasis added); see *Demore*, 538 U.S. at 523-24 (discussing *Carlson*).

The Court applied the same rule in *Reno* to reject a substantive due process challenge by juvenile aliens to their detention without individualized determinations. 507 U.S. at 299-300. Consistent with *Carlson*, *Reno* held that Congress may employ “reasonable presumptions and generic rules” when legislating with respect to aliens. *Id.* at 313; see *Demore*, 538 U.S. at 526 (discussing *Reno*).

These precedents foreclose Petitioners’ substantive due process claims. Section 1225(b)(2)(A) “satisfies the deferential rational-basis test” for the same reasons as detention under §1226(c): “It *categorically* ‘serves the purpose of preventing [removable immigrants] from fleeing prior to or during their removal proceedings, thus increasing the chance that’ *all* ‘will be successfully removed.’” *Lopez-Campos*, 175 F.4th at 760 (Murphy, J., dissenting) (quoting *Demore*, 538 U.S. at 528); see Add.63-64 (Wilson, J., dissenting) (discussing *Demore* and *Carlson*).

2. The now-vacated panel opinion refused to apply *Demore* and *Carlson* on the theory that here (unlike there) “the Government has made no showing that ‘Congress had before it evidence ... sufficient to

furnish reasonable grounds” for §1225(b)(2)(A). Add.30-31 (quoting *Carlson*, 342 U.S. at 536). To begin, that inquiry flouts rational-basis review, under which “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993); *accord* Add.64 (Wilson, J., dissenting).

Even if such an inquiry were permissible, “Congress’s choice in [§1225(b)(2)(A)] to require detention ... was firmly supported by the evidence in 1996 and remains a rational policy today,” as Judge Wilson thoroughly catalogued. Add.65-66. As this Court recognized in *Buenrostro-Mendez*, “the Department of Justice Inspector General found in 1997 that ‘when aliens are released from custody, nearly 90 percent abscond and are not removed from the United States.’” 166 F.4th at 508 (quoting 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997)). “That situation exists today on a much larger scale.” *Id.*

C. Even if Petitioners were asserting cognizable procedural due process claims, those claims would be meritless

Petitioners’ claims fail even if they do sound in procedural due process. Under longstanding precedent, unadmitted aliens like

Petitioners are entitled only to the procedures Congress has provided in statute.

1. For more than a century, the rule has been that for “foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, *nor even been admitted into the country pursuant to law*,’ the decisions of executive and administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Thuraissigiam*, 591 U.S. at 138 (emphasis added) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)); *see also id.* (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”) (quoting *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)). This includes those who successfully evade inspection at the border: “[A]n alien who tries to enter the country illegally is treated as an ‘applicant for admission’”—*i.e.*, treated the same as if he lawfully presented himself at a port of entry or was caught at the border. *Id.* at 140.

The Supreme Court has long been clear that admission—not physical entry—is the touchstone for when aliens gain due process

interests that could potentially require procedures beyond what Congress has provided. For example, in *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court observed that only “*once an alien gains admission* to our country and begins to develop the ties that go with permanent residence [does] his constitutional status change[.]” *Id.* at 32 (emphasis added). “Th[is] rule,” the Court has explained, “rests on [the] fundamental proposition[.]” that “[t]he power to admit or exclude aliens is a sovereign prerogative,” and “the Constitution gives ‘the political department of the government’ plenary authority to decide which aliens to admit.” *Thuraissigiam*, 591 U.S. at 139 (citing *Nishimura Ekiu*, 142 U.S. at 659).

Consistent with this rule, aliens who have been “paroled elsewhere in the country *for years* pending removal” and who have developed significant ties to the country are “‘treated’ for due process purposes ‘as if stopped at the border.’” *Thuraissigiam*, 591 U.S. at 139 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953)). For example, *Kaplan v. Tod*, 267 U.S. 228 (1925), held that a child paroled into the country for nearly nine years—but never admitted—must be “regarded as stopped at the boundary line” and “had gained no foothold in the United States.” *Id.* at 230-31. That was so even though the child

had been living in the interior of the country with her naturalized-citizen father and thus had presumably formed connections to the United States. *Id.* at 229.

2. The district courts and the now-vacated panel opinion thought *Thuraissigiam* inapplicable because that alien was detained soon after crossing the border and had not domiciled in the United States. ROA.26-50221.85; ROA.26-50219.77-78; ROA.50183.129-30; Add.13-14. As Judge Wilson explained, “this cabined reading ignores the thrust of the decision,” which “repeatedly emphasizes that admission status—not physical presence—determines what procedural rights are available to an alien.” Add.49, 50. The Court “plainly concluded that an ‘applicant for admission,’ like an ‘alien who is detained shortly after unlawful entry[,] cannot be said to have effected an entry.’” Add.50.²

The now-vacated panel opinion also disregarded the Supreme Court decisions holding that unadmitted aliens who are paroled into the United States “for years ... are ‘treated’ for due process purposes ‘as if stopped at the border.’” 591 U.S. at 139 (citing *Mezei*, 345 U.S. at

² As Judge Wilson explained, the cases on which the panel opinion relied (Add.9-11), are “uniformly inapt.” Add.51-53 (Wilson, J., dissenting).

215; *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958); and *Kaplan*, 267 U.S. at 230-31). The panel dismissed those cases as recognizing a “narrow exception” “intended to encourage conditional release.” Add.14. That misses the point. Those cases necessarily establish that even an unadmitted alien who *has* “acquired a[] domicil[e] or residence within the United States,” is “‘treated’ for due process purposes “as if stopped at the border.” *Thuraissigiam*, 591 U.S. at 138, 139.

II. The Equitable Factors Favor a Stay

The remaining stay factors, which merge here, weigh heavily in favor of a stay pending en banc review in a precedential order. *Nken*, 556 U.S. at 435.

The district courts’ judgments’ have irreparably harmed the Government and the public interest by holding §1225(b)(2)(A) to be facially unconstitutional, *see* Add.59 n.1 (Wilson, J., dissenting), and thereby restraining the Executive’s ability to enforce federal law in an area over which the political branches have plenary authority. That is irreparable harm: “Any time a [sovereign] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Trump v. CASA, Inc.*, 606 U.S. 831, 860-61

(2025) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

This harm is even more acute in the immigration context, where the Constitution assigns preeminent power to the political branches, *see Galvan v. Press*, 347 U.S. 522, 531 (1954), and envisions that “the Government’s political departments [will be] largely immune from judicial control,” *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted). For that reason, where the government is making “efforts to prioritize stricter enforcement of the immigration laws enacted by Congress,” the courts should “decline to step outside [their] constitutionally assigned role to improperly restrict reasonable Executive Branch enforcement.” *Noem v. Vasquez Perdomo*, 2025 WL 2585637, at *4, *5-6 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring). The Supreme Court has repeatedly stayed district court orders that infringe on the Executive’s immigration enforcement efforts. *E.g.*, *DHS. v. D.V.D.*, 145 S. Ct. 2153 (2025); *Noem v. Nat’l TPS All.*, 145 S. Ct. 2728, 2729 (2025).

Worse still, the district courts ordered the Government to *immediately release* Petitioners from detention, without giving the Government an opportunity to provide an “individualized justification for

further detention.” Add.37. Numerous other district judges in this Circuit have imposed that same remedy.³ This will only add to the “massive numbers of in absentia orders” that result when aliens are not detaining pending their removal proceedings, which requires the Government to “expend[] tremendous resources ... to locate these aliens.” Add.98. “Many of these fugitives commit further crimes, often having already committed the crimes of illegal entry and fraud.” Add.98. All “[t]his places an unnecessary and unfair burden on the American people.” Add.98.

Absent a precedential stay order from the en banc Court, district courts and U.S. Attorneys’ Offices in this Circuit will continue to face a crushing burden of habeas petitions. Over the past months, thousands of habeas petitions have been filed within this Circuit, inflicting a devastating toll on U.S. Attorneys’ Offices (as well as district courts) and inhibiting those Offices from pursuing other significant priorities. Add.72-91. That was true at the time this Court previously expedited

³ *E.g., de Jesus Sanchez v. Ortega*, 2026 WL 1330079, at *14 (W.D. Tex. May 12, 2026); *Mendoza v. Noem*, 823 F. Supp. 3d 636, 651 (W.D. Tex. 2026); *Bonilla Chicas v. Warden*, 821 F. Supp. 3d 782, 800 (S.D. Tex. 2026); *Betancourth v. Tate*, 822 F. Supp. 3d 762, 770 (S.D. Tex. 2026).

these appeals (5th Cir. Dkt. 27), and it is true today. *Id.* Over 4,000 habeas petitions have been filed in the Western District of Texas this year, with almost 2,500 being filed in the second quarter of 2026 alone. Add.74. Similarly, 2,948 petitions have been filed in the Southern District of Texas this year, with 558 filed in June 2026. Add.84; *see also* Add.79 (314 habeas petitions filed in Eastern District of Texas since January 1, 2026); Add.89 (556 habeas petitions filed in Eastern District of Texas since January 1, 2026).

At the same time, district courts in this Circuit are now ordering U.S. Attorneys' Offices to submit omnibus advisories on *hundreds* of cases on one-week deadlines. Add.100-08 (listing 360 cases); Add.109-22 (listing 408 cases); Add.123-33 (listing 414 cases). These orders only add to the already-crushing burden imposed on U.S. Attorneys' Offices through the *thousands* of habeas petitions have been filed within this Circuit.

The public interest and balance of harms thus strongly favor a stay pending en banc review. It is well settled that the public interest in the enforcement of the United States' immigration laws is significant. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Nken*,

556 U.S. at 435. By contrast, Petitioners’ harm from further detention is significantly reduced. Two were not detained for even the 90 days the now-vacated panel opinion deemed sufficient to trigger a due process violation. Add.37. And all three “ha[ve] the keys in [their] pocket”: they can end their detention by “return[ing] to [their] native land[s], thus ending [their] detention immediately.” *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999); *see* Add.98 (“Aliens eligible for voluntary departure can elect to depart from the United States ... and thereby end their detention.”).

CONCLUSION

The en banc Court should issue a precedential order granting a stay of the district court judgments pending en banc review.

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2)(A) because the motion contains 5,067 words. I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5) and (a)(6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

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ADDENDUM

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