

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

JOSE ARNULFO GUERRERO ORELLANA,
on behalf of himself and others similarly
situated,

Petitioner-Plaintiff,

v.

ANTONE MONIZ, Superintendent, Plymouth
County Correctional Facility, et al.,

Respondents-Defendants.

Case No. 25-12664-PBS

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENT OF
UNCONTROVERTED FACTS IN SUPPORT OF CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff-Petitioner (“Plaintiff”) hereby responds to Respondent-Defendants’ (“Defendants”) L.R. 56.1 Statement of Uncontroverted Facts in Support of Cross-Motion for Partial Summary Judgment (D.E. 94). For the Court’s convenience, Defendants’ Responses to Plaintiff’s Statement of Uncontroverted Facts have been included below as well.

I. PLAINTIFF’S RESPONSE TO DEFENDANTS’ STATEMENT OF FACTS

1. Petitioner/Plaintiff, Jose Arnulfo Guerrero Orellana, is a native and citizen of El Salvador. Declaration of Keith M. Chan (“Chan Decl.”) (ECF No. 47) ¶ 6.

Plaintiff’s Response: Not disputed solely for purposes of this motion.

2. Mr. Guerrero Orellana is not a citizen of the United States. Chan Decl. ¶ 6; *see also* Am. Petition (ECF No. 10) ¶ 26.

Plaintiff’s Response: Not disputed solely for purposes of this motion.

3. Mr. Guerrero Orellana entered the United States without inspection, admission, or parole by an immigration officer. Am. Petition (ECF No. 10) ¶ 27; Declaration of Annelise Araujo (“Araujo Decl.”) (ECF No. 16) ¶ 7; Chan Decl. ¶¶ 6-7.

Plaintiff’s Response: Not disputed solely for purposes of this motion.

4. Mr. Guerrero Orellana has not been admitted to the United States. Chan Decl. ¶¶ 7-8.

Plaintiff’s Response: Not disputed solely for purposes of this motion.

5. U.S. Immigration and Customs Enforcement (ICE) encountered Mr. Guerrero Orellana on September 18, 2025, in Everett, Massachusetts, determined he was inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(7)(A)(i)(I), served him with a notice to appear in removal proceedings under 8 U.S.C. § 1229a, and detained him pursuant to its authority under 8 U.S.C. § 1225(b)(2). Chan Decl. ¶ 8; 8 U.S.C. § 1229(a); 8 C.F.R. §§ 239.1, 1239.1; Araujo Decl. Ex. A (Form I-862).

Plaintiff’s Response: Not disputed that federal immigration agents encountered and arrested Mr. Guerrero Orellana in Everett, Massachusetts on September 18, 2025. Not disputed that Mr. Guerrero Orellana was served after arrest with a Notice to Appear charging him as subject to removal under INA 212(a)(6)(A)(i) and (a)(7)(A)(i)(I) and ordering him to appear for removal proceedings. Disputed that ICE “detained him pursuant to its authority under 8 U.S.C. § 1225(b)(2)” as a statement of law and, in all events, as not supported by the cited evidence. Any other assertions in this paragraph are disputed as not supported by the cited evidence.

6. The Notice to Appear explains: “[y]ou were not . . . admitted or paroled after inspection by an Immigration Officer.” Araujo Decl. Ex. A (Form I-862).

Plaintiff’s Response: Not disputed that the Notice to Appear contains those words. Disputed that this is the complete language in that document, as the ellipses omit the word “then,” referring to the time Mr. Guerrero Orellana allegedly “entered.” Any other assertions in this paragraph are disputed as not supported by the cited evidence.

7. On September 22, 2025, ICE filed the Notice to Appear with the immigration court in Chelmsford, Massachusetts. Chan Decl. ¶ 10.

Plaintiff’s Response: Not disputed.

8. Mr. Guerrero Orellana is in removal proceedings under 8 U.S.C. § 1229a. Araujo Decl. ¶ 10 & Ex. A.

Plaintiff’s Response: Not disputed.

9. Plaintiff's first hearing in his removal proceedings was held on October 2, 2025. *See id.*; Chan Decl. ¶ 10.

Plaintiff's Response: Not disputed.

10. Mr. Guerrero Orellana intends to seek discretionary cancellation of removal under 8 U.S.C. § 1229b(b), or other relief or protection from removal, in his removal proceedings. *See Araujo Decl.* ¶ 9.

Plaintiff's Response: Not disputed.

II. DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

A. Defendants' Historical Practice and New Policy¹

1. The Immigration and Nationality Act (INA) provides for the detention of certain noncitizens, including, as relevant to this case, under 8 U.S.C. § 1226(a) and § 1225(b)(2)(A).

- a. 8 U.S.C. § 1226(a); *id.*, § 1225(b)(2)(A).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, this statement is partially disputed. Defendants dispute that 8 U.S.C. § 1226(a) is relevant to this case, but admit that the Immigration and Nationality Act provides for the detention of certain aliens, including under 8 U.S.C. § 1226(a) and § 1225(b)(2)(A), and admit that 8 U.S.C. § 1225(b)(2)(A) is relevant to this case.

2. Detention under 8 U.S.C. § 1226(a) allows for release on bond by immigration authorities, *see* 8 C.F.R. 236.1(c)(8), and a "custody redetermination"—also known as a bond hearing—before an immigration judge (IJ) in the event the immigration authorities deny bond, *see* 8 C.F.R. § 1236.1(d).

- a. 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(c)(8), 1236.1(d).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. Defendants respectfully direct the Court to the cited statutes for a true and accurate representation of their contents and deny to the extent Plaintiff's descriptions are inconsistent therewith. To the extent a response is required, Defendants admit.

¹ Defendants repeat Plaintiff's headings for ease of reference, but these require no response. To the extent a response is required, Defendants dispute the statements in the first heading.

3. By contrast, detention under 8 U.S.C. § 1225(b)(2)(A) is mandatory and provides no right to a bond hearing. A person detained pursuant to this subparagraph may only be released if an immigration officer grants humanitarian parole under 8 U.S.C. § 1182(d)(5).

- a. 8 U.S.C. § 1225(b)(2)(A); *id.* § 1182(d)(5).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. Defendants respectfully direct the Court to the cited statutes for a true and accurate representation of their contents and deny to the extent Plaintiffs' descriptions are inconsistent therewith. To the extent a response is required, Defendants admit.

4. Prior to a May 22, 2025, unpublished Board of Immigration Appeals (BIA or Board) decision and a July 8, 2025 Immigration and Customs Enforcement's (ICE) detention directive, Defendants Department of Homeland Security (DHS) and ICE considered noncitizens who entered the United States without inspection and who were not apprehended while arriving at the border and continuously detained to be detained under 8 U.S.C. § 1226(a), unless that person was subject to the expedited removal provisions of 8 U.S.C. § 1225(b)(1) or the detention provisions of § 1226(c) or § 1231.

- a. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997); 8 C.F.R. § 1003.19(h)(2); *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 803-04 (B.I.A 2020); Exhibit A to Hart Decl. (unpublished BIA decisions applying § 1226(a) to persons who entered without inspection).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, Defendants dispute this statement. *See, e.g.*, 8 C.F.R. § 235.3(b)(1)(ii); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10355 (Mar. 6, 1997); *Maldonado v. Bostick*, No. 2:23-cv-760-LK-BAT, 2023 WL 5804021, at *3-4 (W.D. Wash. Aug. 8, 2023) (rejecting DHS's prior position that "DHS may 'choose,' pursuant to its 'prosecutorial discretion,' to detain a noncitizen under Section 1226(a) by issuing an NTA and arrest warrant").

5. This interpretation has been consistent during the nearly thirty years that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) has been in effect.

- a. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997); 8 C.F.R. § 1003.19(h)(2); *Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 803-04 (B.I.A 2020); Exhibit A to Hart Decl. (unpublished BIA decisions applying § 1226(a) to persons who entered without inspection).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, Defendants dispute this statement. *See, e.g.*, 8 C.F.R. § 235.3(b)(1)(ii); Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10355 (Mar. 6, 1997); *Maldonado v. Bostick*, No. 2:23-cv-760-LK-BAT, 2023 WL 5804021, at *3-4 (W.D.

Wash. Aug. 8, 2023) (rejecting DHS’s prior position that “DHS may ‘choose,’ pursuant to its ‘prosecutorial discretion,’ to detain a noncitizen under Section 1226(a) by issuing an NTA and arrest warrant”).

6. It was also true for the law in effect prior to IIRIRA. Under that preceding removal and detention scheme, any person physically inside the United States who faced removal (unless the person had been paroled at the border) was placed in “deportation” proceedings and was considered detained under 8 U.S.C. § 1252(a) (1994), which provided authority to release on bond. Separately, “exclusion” proceedings covered those who arrived at U.S. ports of entry and had never entered the United States. These proceedings had their own detention scheme. *See* 8 U.S.C. § 1225 (1994); *id.* § 1226 (1994).
 - a. 8 U.S.C. § 1225 (1994); *id.* § 1226 (1994); 62 Fed. Reg. 10312; *Martinez v. Hyde*, No. 25-11613, 2025 U.S. Dist. LEXIS 141724, at *12 n.9 (D. Mass. July 24, 2025).

Defendants’ Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, this statement is partially disputed. Defendants dispute the first sentence. *See, e.g.*, 8 C.F.R. § 235.3(b)(1)(ii), Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10355 (Mar. 6, 1997). Defendants admit the remaining sentences, and note that one purpose of IIRIRA was to fix this difference in treatment whereby people who surreptitiously cross the border receive more procedural protections in deportation proceedings than people who arrive at the port of entry and were subject to exclusion proceedings. *See, e.g., Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc).

7. According to IIRIRA’s legislative history, 8 U.S.C. § 1226(a) was intended to “restate[] the [then-] current provisions in [8 U.S.C. § 1252(a)(1) (1994)] regarding the authority of the Attorney General to arrest, detain, and release on bond an alien who is not lawfully in the United States.” H.R. Rep. No. 104-469, at 229 (1996).
 - a. H.R. Rep. No. 104-469, at 229 (1996).

Defendants’ Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, Defendants dispute the characterization of the House Report and of Congressional intent, and respectfully direct the Court to the cited report. Defendants admit that the quoted language is contained in a House Report relating to the legislative process that culminated in IIRIRA, but dispute that this language is relevant, because one of the primary purposes of IIRIRA’s amendments to the Immigration and Nationality Act was to render “whether or not the alien has been lawfully admitted” the “pivotal factor in determining the alien’s status” and thus to “treat[] persons present in the United States without authorization as not admitted.” H.R. Rep. No. 104469, pt. 1 at 226.

8. The Immigration and Naturalization Service (INS) and Executive Office for Immigration Review (EOIR) reiterated this understanding shortly after IIRIRA's enactment: "Despite being applicants for admission, aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination." Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).
 - a. Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

Defendants' Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, Defendants dispute the characterization of the understanding of the INS and EOIR. See, e.g., 8 C.F.R. § 235.3(b)(1)(ii), Inspection and Expedited Removal of Aliens, 62 Fed. Reg. 10312, 10355 (Mar. 6, 1997). Defendants admit that the quoted language appears in the preamble to regulations promulgated to implement IIRIRA shortly after IIRIRA's enactment.

9. On July 8, 2025, the Acting Director of ICE, Todd Lyons, issued a new policy entitled "Interim Guidance Regarding Detention Authority for Applicants for Admission," describing how DHS had, "in coordination with the Department of Justice (DOJ), revisited its legal position on detention and release authorities."
 - a. Ex. B to Hart Decl. (July 8, 2025 ICE Memorandum).

Defendants' Response: Defendants admit the existence of the July 8, 2025 guidance document, but dispute the characterization of the guidance document, which speaks for itself and is the best evidence of its contents.

10. Pursuant to this new policy, it is the "position of DHS" that anyone "who has not been admitted" is "subject to detention under [8 U.S.C. § 1225(b)] and may not be released from ICE custody except by [8 U.S.C. § 1182(d)(5)] parole."
 - a. Ex. B to Hart Decl. (July 8, 2025 ICE Memorandum).

Defendants' Response: Defendants admit the existence of the July 8, 2025 guidance document, but dispute the characterization of the guidance document, which speaks for itself and is the best evidence of its contents.

11. According to Defendants, the result of this new position is that only noncitizens "admitted to the United States and chargeable with deportability under [8 U.S.C. § 1227]" are entitled to bond hearings, and that anyone who has not been admitted is "ineligible for a custody redetermination hearing ('bond hearing') before an [IJ] and may not be released for the duration of their removal proceedings absent a parole by DHS." This means that any person who entered the United States without inspection is

considered subject to 8 U.S.C. § 1225(b)(2)(A), regardless of how long the person has lived in the United States. Such persons will not be considered for release on bond.

- a. Ex. B to Hart Decl. (July 8, 2025 ICE Memorandum).

Defendants’ Response: Defendants admit the existence of the July 8, 2025 guidance document, but dispute the characterization of the guidance document, which speaks for itself and is the best evidence of its contents.

- 12. On September 5, 2025, the Board of Immigration Appeals (“BIA”) issued a precedential decision, *Matter of Yajure Hurtado* (“Hurtado”), which makes this policy legally binding on all IJs. 29 I. & N. Dec. 216 (B.I.A. 2025).
 - a. *Matter of Yajure Hurtado* (“*Matter of Hurtado*”), 29 I. & N. Dec. 216 (B.I.A. 2025).

Defendants’ Response: This is a statement of law, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, Defendants admit.

- 13. Under *Matter of Hurtado*, the BIA has adopted the policy that “aliens who are present in the United States without admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings.” The result of this policy is the routine and systematic misclassification of noncitizens as subject to a policy of mandatory detention without right to a bond hearing.
 - a. *Matter of Yajure Hurtado* (“*Matter of Hurtado*”), 29 I. & N. Dec. 216 (B.I.A. 2025).

Defendants’ Response: This is a statement of law and argument, not of fact, and is improperly included in this Local Rule 56.1 statement. To the extent a response is required, with respect to the first sentence of this paragraph, Defendants admit the existence of the *Hurtado* decision, but dispute the characterization of the decision, which speaks for itself and is the best evidence of its contents, as a “policy.” Defendants dispute the legal arguments in the second sentence of this paragraph.

B. Plaintiff Jose Arnulfo Guerrero Orellana

- 14. Mr. Guerrero Orellana resides in Massachusetts.
 - a. Declaration of Annelise Araujo, Esq. Dkt. 16 (“Araujo Decl.”), ¶ 4.

Defendants’ Response: Defendants have no basis to dispute.

- 15. Mr. Guerrero Orellana has resided in the United States since 2013.

- a. Araujo Decl., ¶ 4.

Defendants' Response: Defendants have no basis to dispute, because Mr. Guerrero Orellana evaded detection by immigration authorities by entering without inspection and thus the government has no way of verifying how long Mr. Guerrero Orellana has been residing illegally in the United States.

- 16. Mr. Guerrero Orellana resides in Massachusetts with his family, including his one-year-old daughter who is a United States citizen.

- a. Araujo Decl., ¶ 4.

Defendants' Response: Defendants have no basis to dispute.

- 17. Mr. Guerrero Orellana has no criminal history.

- a. Araujo Decl., ¶ 8.

Defendants' Response: Defendants have no basis to dispute.

- 18. Mr. Guerrero Orellana had not had any contact with the immigration authorities prior to his most recent arrest.

- a. Araujo Decl., ¶ 7.

Defendants' Response: Admit.

- 19. On or about September 18, 2025, Mr. Guerrero Orellana was arrested by immigration authorities inside the United States and taken into ICE custody at the Plymouth County Correctional Facility.

- a. Araujo Decl., ¶¶ 5-6.

Defendants' Response: Admit.

- 20. The government alleged he entered the United States without inspection or parole.

- a. Araujo Decl., ¶ 10.

Defendants' Response: Admit.

- 21. Thereafter, ICE issued him a Notice to Appear, charging him with being “present in the United States” without admission or parole.

- a. Araujo Decl., ¶ 10.

Defendants' Response: Admit.

22. On September 18, 2025, Mr. Guerrero Orellana filed a habeas petition under 28 U.S.C. § 2241 challenging the legality of his ongoing detention without a bond hearing.

a. Dkt. 1.

Defendants' Response: Admit.

23. On October 3, 2025, the Court issued a preliminary injunction requiring the government to release Mr. Guerrero Orellana unless he was provided with a bond hearing before an immigration judge within seven business days.

a. Dkt. 54.

Defendants' Response: Admit.

24. On October 9, 2025, an immigration judge held a bond hearing and ordered Mr. Guerrero Orellana released on bond of \$3,500.

a. Dkt. 68-1.

Defendants' Response: Admit.

25. Mr. Guerrero Orellana posted bond the following day and was released from custody.

a. Dkt. 68-1.

Defendants' Response: Admit.

Respectfully submitted,

/s/ Christopher E. Hart

Anthony D. Mirenda (BBO #550587)

Christopher E. Hart (BBO # 625031)

Gilleun Kang (BBO #715312)

FOLEY HOAG LLP

155 Seaport Blvd.

Boston, MA 02210

(617) 832-1000

adm@foleyhoag.com

chart@foleyhoag.com

gkang@foleyhoag.com

Jessie J. Rossman (BBO # 670685)

Adriana Lafaille (BBO # 680210)

Daniel L. McFadden (BBO # 676612)

Julian Bava (BBO # 712829)

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS,
INC.

One Center Plaza, Suite 850
Boston, MA 02108
(617) 482-3170
jrossman@aclum.org
alafaille@aclum.org
dmcfadden@aclum.org
jbava@aclum.org

My Khanh Ngo (admitted *pro hac vice*)
Michael K.T. Tan (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
425 California Street, Suite 700
San Francisco, CA 94104
(415) 343-0770
mngo@aclu.org
m.tan@aclu.org

Gilles R. Bissonnette (BBO # 669225)
SangYeob Kim (admitted *pro hac vice*)
Chelsea Eddy (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
Phone: 603.333.2081
gilles@aclu-nh.org
sangyeob@aclu-nh.org
chelsea@aclu-nh.org

Carol J. Garvan (admitted *pro hac vice*)
Max I. Brooks (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION
P.O. Box 7860
Portland, ME 04112
(207) 619-8687
cgarvan@aclumaine.org
mbrooks@aclumaine.org

Annelise M. Jatoba de Araujo
(BBO # 669913)
ARAUJO & FISHER, LLC

75 Federal St., Ste. 910
Boston, MA 02110
617-716-6400
annelise@araujofisher.com

Sameer Ahmed (BBO #688952)
Sabrineh Ardalan (BBO # 706806)
HARVARD IMMIGRATION AND
REFUGEE CLINICAL PROGRAM
Harvard Law School
6 Everett Street
Cambridge, MA 02138
T: (617) 384-0088
F: (617) 495-8595
sahmed@law.harvard.edu
sardalan@law.harvard.edu

*Counsel for Petitioner-Plaintiff and
Certified Class*

Dated: December 5, 2025

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be served on counsel for all parties through the Court's CM/ECF system.

Date: December 5, 2025

/s/ Gilleun Kang
Gilleun Kang