

CA No. 25-12664-PBS
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BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
October 1, 2025, 11:49 a.m.

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A P P E A R A N C E S:

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P R O C E E D I N G

THE CLERK: Court calls Civil Action 25-12664, Orellana v. Hyde, et al. Could counsel please identify themselves.

MR. McFADDEN: Good morning, your Honor. Dan McFadden from the ACLU of Massachusetts on behalf of the petitioner, Mr. Guerrero Orellana, who is present.

THE COURT: Thank you.

MS. ARAUJO: Good morning, your Honor. Attorney Annelise Araujo on behalf of the petitioner, Mr. Guerrero Orellana, who is present.

THE COURT: For the government?

MR. FLENTJE: August Flentje on behalf of the United States.

THE COURT: Are you Main DOJ?

MR. FLENTJE: Main Justice.

THE COURT: So welcome.

MR. FLENTJE: Thank you.

MR. KHETARPAL: And good morning, your Honor. Anuj Khetarpal on behalf of the United States.

THE COURT: And I certainly know you from up here. All right, why don't we be seated. Thank you.

So I also should start off by saying that Mr. Orellana is here, and I very much appreciate him being brought in. I think this is an important proceeding, and thank you to the

1 Interpreter for coming, and he's sworn in. Did you swear him
2 in, Maryellen?

3 THE CLERK: I'm sorry. What, Judge?

4 THE COURT: Did you swear him in? You need to swear
5 in the Interpreter.

6 (Interpreter duly sworn.)

7 THE COURT: Okay, so this is a motion for a preliminary
8 injunction. There's been expedited briefing. Many of the
9 arguments aren't surprising to me. Some may be a little new,
10 but I believe that the petitioner should start, and then we'll
11 have -- there was a supplemental filing. I just want to make
12 sure that people know that the petitioner filed a supplemental
13 filing, and I know yours was filed late yesterday evening, so I
14 think everyone has the appropriate submissions.

15 All right, go ahead.

16 MR. McFADDEN: Thank you, your Honor. And, correct,
17 Mr. Guerrero Orellana is moving for an individual preliminary
18 injunction requiring that he be released if he is not provided
19 a bond hearing within seven days.

20 With the Court's permission, we'll divide the
21 argument. I'll address the likelihood of success on the
22 merits, and my cocounsel, Attorney Araujo, will address the
23 irreparable harm and the balance of the interests.

24 In terms of the facts, I think, having now seen the
25 government's submission, it's clear that the facts that are

1 material to this motion are not disputed. Mr. Guerrero
2 Orellana resides in Massachusetts with his wife and with his
3 young daughter who is a U.S. citizen. He has no criminal
4 record.

5 THE COURT: Is he okay? Can you hear? Are you okay?
6 He seems -- his head is in his hands. I want to make sure he's
7 okay.

8 MS. ARAUJO: Your Honor, I think he's just emotional,
9 but he is okay.

10 THE COURT: He's what?

11 MS. ARAUJO: He is just emotional at this moment
12 because of his separation from his family, but he is okay.

13 THE COURT: Okay, I just wanted to make sure. I'm
14 sorry. He just looked distraught.

15 All right, go ahead.

16 MR. McFADDEN: I think he is, your Honor.

17 He has no criminal record. Before this arrest by ICE,
18 he had had no contact of any kind with the immigration
19 authorities. Nobody appears to contend he's dangerous. Nobody
20 appears to contend he's a flight risk. He was arrested about
21 two weeks ago here in Massachusetts. It was a vehicle stop.
22 He was a passenger in the vehicle. After his arrest, the
23 government issued a notice to appear charging him as a
24 noncitizen who's present in the United States, and charging
25 that he's present without being admitted or paroled, and also

1 lacks a valid entry document. After his arrest, the government
2 also generated a warrant, which cited the detention authority
3 of INA 236, which is codified at 8 USC 1226.

4 He's been held in civil detention at the Plymouth
5 County Correctional facility since his arrest. He's now in
6 removal proceedings in the Immigration Court. He is eligible
7 for cancellation of removal, and we anticipate he will be
8 pursuing that as a form of relief from removal in the
9 Immigration Court.

10 There are two factual matters I just wish to address,
11 your Honor, to make sure the record is clear, although I don't
12 think they bear on the outcome of this motion. One is -- and I
13 do this because he has a parallel proceeding in the Immigration
14 Court -- one is, in the opposition we received from the
15 government, at Page 18, there was an assertion that Mr. Guerrero
16 Orellana concedes removability. I just want to be clear: The
17 positions of removability are taken in the Immigration Court.
18 He has not yet had his first appearance in the Immigration
19 Court, and so he's not yet taken a position on removability. I
20 just wanted that to be clear for the record.

21 Additionally, in the Chan declaration that was
22 submitted by the government, at Paragraph 8 there are certain
23 claims about our client's conduct during the arrest process,
24 and I think our client would not agree with those assertions.
25 The assertions appear to be about the driver of the vehicle.

1 Our client was not the driver of the vehicle. Perhaps there's
2 some misunderstanding there, but I just want to be clear that
3 our client does not agree with all of the assertions about what
4 happened at the time of the arrest.

5 THE COURT: There was that other assertion in the Chan
6 affidavit -- I was wondering whether it was true or not --
7 there was no request for bond.

8 MR. McFADDEN: Yes, your Honor. So our client has not
9 requested a bond hearing because the immigration courts,
10 through *Matter of Hurtado*, have been instructed with a binding
11 instruction from the Board of Immigration Appeals that a person
12 like him, where the government contends entered without
13 inspection, is categorically ineligible for a bond hearing.

14 THE COURT: So a futility type of argument?

15 MR. McFADDEN: Yes. I think it would be futile for
16 him to pursue a bond hearing because it's been predecided by
17 the agency. And, of course, also he's seeking expedited relief
18 because he's suffering a lot harm right now from the denial of
19 the bond hearing.

20 THE COURT: That's what I'm trying to get. I mean,
21 obviously this proceeding is a request for a bond hearing, but
22 there was no -- was there a form or a way that he could have
23 requested a bond hearing at Plymouth?

24 MR. McFADDEN: So, your Honor, I have not seen any
25 paperwork generated in the arrest process where he was offered

1 a chance to request a bond hearing.

2 THE COURT: So he was neither offered nor has he
3 affirmatively requested a bond hearing other than through this
4 proceeding here?

5 MR. McFADDEN: I believe that is the case, your Honor.

6 THE COURT: I just wanted to understand that, all
7 right. That was in the Chan affidavit.

8 MR. McFADDEN: But I think, your Honor, it's important
9 to understand that absent action from this Court, there is no
10 world in which he gets a bond hearing from the Immigration
11 Court because he has been deemed categorically ineligible under
12 *Matter of Hurtado*.

13 THE COURT: No, I understand the futility argument,
14 and it's come up in a number of the other cases. I just want
15 to make sure factually I'm correct.

16 MR. McFADDEN: And I'll note, your Honor, also, I
17 don't believe the government asserted any type of administrative
18 exhaustion.

19 THE COURT: I thought they did.

20 MR. McFADDEN: Other than as to the APA claim.

21 THE COURT: Oh, all right.

22 MR. McFADDEN: So the reason this matter is before the
23 Court is exactly because of what I just described. Ordinarily,
24 over the last 30 years, a person like our client who was
25 arrested inside the United States would be subject to detention,

1 if at all, under 8 USC Section 1226. He does not have the type
2 of criminal history that would subject him to mandatory
3 detention under 1226(c), and therefore he would be bond
4 eligible under 1226(a). Ordinarily the agency would make an
5 initial custody determination, and if he disagreed, he could
6 ask for a bond hearing in the Immigration Court. But the
7 government recently reversed those decades of settled practices
8 and policies, and is now misclassifying people like our client
9 not as 1226(a) detainees but as 1225(b)(2) detainees, who are
10 mandatory detention, solely because the government alleges he
11 initially entered the country without being admitted or
12 paroled. And the government started doing that in July when
13 ICE issued a memo saying that in coordination with the
14 Department of Justice, it was pursuing such a policy. And, of
15 course, that was formalized in *Matter of Hurtado* just a few
16 weeks ago, which is a BIA decision which binds all of the
17 immigration judges to that policy.

18 So, again, absent intervention from this Court, our
19 client would be denied the bond hearing to which he's entitled,
20 both as a matter of statute and as a matter of due process, and
21 he would be held, probably for a very long time, in jail with
22 no process whatsoever.

23 Many Federal Courts have addressed this exact issue
24 over the last two or three months that the government has been
25 making this new argument, and we cited many of those cases in

1 our papers. I'm sure the Court was able to review many of
2 them. Many of them are from this district. And also, just
3 yesterday, as the Court referenced, the Federal Court in
4 Washington granted classwide summary judgment on this issue and
5 held that people just like our client should be receiving bond
6 hearings. So I'm not going to restate everything --

7 THE COURT: Did he issue a -- we haven't had a chance
8 to look it up yet -- did he issue a classwide preliminary
9 injunction?

10 MR. McFADDEN: In Washington, your Honor?

11 THE COURT: Yes.

12 MR. McFADDEN: My understanding was, there was an
13 individual preliminary injunction, and it was partial summary
14 judgment that was classwide, and that a --

15 THE COURT: So the class relief hasn't been decided
16 yet?

17 MR. McFADDEN: I believe classwide partial summary
18 judgment on the statutory claim did enter, your Honor, and so
19 it has been decided for that class.

20 THE COURT: Okay, that's for another day.

21 MR. McFADDEN: Okay. And I'm referencing just what we
22 filed yesterday, your Honor --

23 THE COURT: No, I understand. I just wondered whether
24 a preliminary injunction was issued for the class in addition
25 to summary judgment. Maybe you don't know. That's fine.

1 MR. McFADDEN: My understanding in Washington is that
2 there was not a preliminary injunction issued. The government
3 may be able to shed light on that. I believe there was a
4 preliminary injunction for the individual, and then it was
5 followed by classwide partial summary judgment.

6 THE COURT: All right, thank you.

7 MR. McFADDEN: So I won't restate all the arguments
8 that are made in these cases, your Honor, but I do think that
9 there are a few guideposts that show up repeatedly in the cases
10 that are worth discussing. First of all, the courts find that
11 our client should receive a bond hearing under the plain
12 language of Section 1226 and 1225. 1226 certainly contains no
13 language that excludes people solely because they entered
14 without admission or parole. And, in fact, 1226(c) specifically
15 includes some language that refers to people who enter without
16 admission or parole being inside of 1226. So that's
17 1226(c) (1) (E) (1). So that makes clear, I think, that people
18 who entered without inspection are contemplated to be within
19 the umbrella of Section 1226.

20 In contrast, Section 1225(b) (2) contains some
21 significant limitations that exclude our client from
22 Section 1225(b) (2). That provision applies essentially when an
23 examining officer is dealing with an applicant for admission
24 who is seeking admission and is not admissible. Judge Murphy
25 addressed this I think very clearly in the *Romero* and *Martinez*

1 decisions, explaining that a person who is seeking admission is
2 not any applicant for admission but is someone who's making
3 some affirmative act to attempt to enter the United States.

4 THE COURT: Many courts didn't go that far.

5 MR. McFADDEN: I think that a number of courts have --

6 THE COURT: In other words, I understand the present
7 participle argument, it must be "is seeking," but it's a hard
8 statute to understand, actually, because it defines "applicant
9 for admission" in a way that includes people who aren't
10 actively asking for permission, like people who are at a port
11 of entry or are caught just over the border. So it includes
12 people who aren't actually applying for admission, they're
13 trying to sneak in, so I don't think you have to actually be
14 applying for admission.

15 MR. McFADDEN: So, your Honor, I think that the courts
16 that have looked at this language "seeking admission" have
17 looked at it --

18 THE COURT: It's a hard thing to figure out what the
19 statute contemplates, and that's a key issue the government is
20 raising, which is, you have a statutory definition here, even
21 if it isn't clear from the plain English of it.

22 MR. McFADDEN: I think, your Honor -- and particularly
23 like the *Lopez Benitez* case from the Southern District of
24 New York I think is instructive on this as well -- the courts
25 have determined that the rule against surplusage, the canon

1 against surplusage, indicates that "applicant for admission"
2 must mean something different than "seeking admission."
3 Otherwise, there would be no reason to include "seeking
4 admission" in the statute as an additional figuring criteria.

5 THE COURT: So you would say you have to not just take
6 the definition of "applicant for admission," but somebody has
7 to be in the present tense "applying for admission"?

8 MR. McFADDEN: Attempting to enter the country, yes,
9 your Honor, and --

10 THE COURT: So you're defining it differently than I
11 am. You would say "seeking admission" means trying to enter
12 the country, a port of entry or border? Is that what your
13 definition is?

14 MR. McFADDEN: Yes, your Honor, either ports of entry
15 or the border. And there is other supporting information for
16 that. I mean, one is, as Judge Murphy talks about in *Romero*,
17 the Statute 12.2(b)(2) is also talking about "examining
18 immigration officer," and an examination is not just any
19 encounter with an immigration officer. It's referring to a
20 specific process that happens when someone is trying to enter
21 the country.

22 Judge Murphy also talks about how seeking admission
23 does have to mean something different because people who are
24 at, for example, a foreign embassy trying to get a visa are
25 seeking admission, but they're not going to be detained at the

1 foreign embassy simply for applying for a visa. And so
2 therefore "seeking admission" must mean something different
3 than "applicant for admission" for a variety of reasons.

4 And that's also consistent, and I think a number of
5 courts have expressed this, it's also consistent with the
6 Supreme Court's gloss on this statutory scheme as expressed in
7 the *Jennings* case. In *Jennings*, which was a case about
8 interpreting these very statutes, the Supreme Court described
9 1225 as relating to, quote, "borders and ports of entry," and
10 described 1226 as relating to, quote, "people inside the
11 country, present in the country, already in the country."

12 So it's clear that the Supreme Court's gloss on these
13 statutes indicates that our client falls squarely within
14 Section 1226, which is the conclusion that many of these courts
15 have reached. I think overwhelmingly the courts that have
16 looked at this issue have found that people like our client
17 have to be within 1226.

18 Another factor that --

19 THE COURT: Doesn't *Hurtado* itself concede basically,
20 as well as the government did in its brief, that it's changing
21 longstanding practice. So we all understood that's what it
22 meant -- I mean, the Supreme Court, I did, the agency did --
23 but their argument is, "But we've changed, we're not putting
24 that gloss on it anymore, and we're going to take the plain
25 language of the statute." I mean, that was the gist of the

1 opposition.

2 MR. McFADDEN: I understand, your Honor, and I
3 think --

4 THE COURT: The court in *Jennings* definitely understood
5 it the way I always understood it.

6 MR. McFADDEN: I understand, your Honor, and I think
7 there was a few responses to that. One, of course, is that
8 after *Loper Bright*, there is not deference owed to *Hurtado*, and
9 particularly because *Hurtado* is doing a complete U-turn on
10 decades of practice and understanding of this statute.

11 I think, additionally, many courts have said that,
12 look, under *Loper Bright*, actually the thing that would be more
13 informative is to look at what is that longstanding agency
14 practice, if you're looking for some type of interpretive
15 guide. And many of these cases, for example, point to the
16 Department of Justice's interim rule from 1997, shortly after
17 these statutes that we're talking about were created, and that
18 interim rule says that unequivocally --

19 THE COURT: Is that cited, the interim rule?

20 MR. McFADDEN: Yes. It's in our papers. It's
21 Federal Register --

22 THE COURT: The Federal Register cite, yes.

23 MR. McFADDEN: Yes, your Honor. It's I think
24 Volume 62 at 102-23, and there the Department of Justice
25 expressed unequivocally, quote, "Despite being applicants for

1 admission, aliens who are present without having been admitted
2 or paroled, formerly referred to as 'aliens who enter without
3 inspection,' will be eligible for bond and bond redetermination."

4 So it's clear that at the moment these statute were
5 being passed, people understood that they were preserving the
6 opportunity for people like our client to have a bond hearing.
7 And, of course --

8 THE COURT: That was an interim rule? Was that it?

9 MR. McFADDEN: Yes, and that was the practice for
10 years, including multiple decisions of the BIA just within the
11 last three years. I think if you look at the *Rodriguez* case
12 out of the Western District of Washington, and also the
13 *Martinez* case from this district, they talk about how the BIA,
14 just in the last three years, has ordered bond hearings on
15 multiple occasions for people who had entered without inspection,
16 and therefore that indicates that this practice existed and
17 persisted for a very long time. And that is much more
18 relevant, I think, than *Hurtado* to the interpretation of the
19 statute.

20 These courts also looked to Congressional intent, to
21 the extent it can be discerned. Some of them look back to the
22 reports from the House when these statutes were passed in the
23 mid-'90s, and there, there are House reports that say that the
24 Attorney General would retain discretion to release noncitizens
25 like our client. But I think that possibly the more important

1 indicator of Congressional intent is that Congress amended
2 these statutes last January when it passed the Laken Riley Act.
3 And the Laken Riley Act was designed to move people from
4 1226(a) down to 1226(c), and, in doing so, it said that some of
5 those people it was moving were people who met the
6 inadmissibility criteria for having entered without admission
7 or parole or entered without a valid entry document. And so
8 the Laken Riley Act indicates that as recently as this last
9 January, Congress understood and intended that people who had
10 entered without inspection would be within 1226 if they were
11 inside the United States.

12 I also want to point out that many courts have looked
13 at the record evidence in the case about the individual because
14 it often contains admissions that are helpful to the individual,
15 and I think the record for our client does contain admissions
16 by the government that are useful. Here, the government issued
17 a warrant following our client's arrest. That warrant says
18 they're detaining him under Section 1226.

19 THE COURT: I wondered that. Some of the judges put a
20 lot of emphasis on the warrant, whether the warrant was issued
21 under 1226. And is it the practice, when they were seizing
22 people from the street without a warrant, is it typically the
23 practice that they then issue a warrant?

24 MR. McFADDEN: That is my understanding, your Honor.
25 I think it's not only under 1226(a) but also under, I think

1 it's 8 CFR 236.1(b), I believe. Don't quote me on that.

2 THE COURT: I'm impressed.

3 MR. McFADDEN: There's a requirement to issue the
4 warrant in connection with the arrest. So after the arrests,
5 they are generating these warrants.

6 THE COURT: And they're always under 1226?

7 MR. McFADDEN: That's what we typically have seen,
8 your Honor, although obviously I'm not at the --

9 THE COURT: I'll ask, yes. All right.

10 MR. McFADDEN: But I think it's important to just
11 distinguish the fact that whether or not they issued a warrant,
12 he would be subject to detention, if at all, under 1226. But I
13 think the warrant is record evidence; it's an admission by the
14 agency that he is under 1226. That's what they're doing, and
15 so I think it supports the claim.

16 I would not want to be in a situation where the agency
17 could withhold the warrant and then use that as an excuse to
18 say, "Ha-Ha. Now we have blocked you from 1226." But I think
19 that what we have going on here is that we have a warrant that
20 is an admission by the agency that 1226 is what applies.

21 There also in this case is a notice to appear that
22 acknowledges that he was present in the United States, which I
23 think is also a useful admission by the agency in this context.

24 I just would like to cover a couple other quick, quick
25 points that the other courts have raised. The courts have

1 indicated that this interpretation of the statute, that 1225 is
2 about border and ports of entry, 1226 is about inside the
3 United States, that's consistent with the overall logic of the
4 immigration scheme. For example, the *Martinez* case talks about
5 how the Supreme Court's *Zadvydas* case says that this is a
6 distinction, treating people differently in this way, that is
7 longstanding immigration law.

8 And the other thing I would mention is that if our
9 client was deprived of his liberty inside the United States and
10 received no due process whatsoever, that would present a
11 massive due process violation for our client, and I think that
12 is a conclusion that's compelled by both the Supreme Court case
13 law and the First Circuit case law in cases like *Hernandez-Lara*
14 and *Brito*. The Supreme Court has said that due process
15 protections apply to everybody in the United States, regardless
16 of immigration status. The *Zadvydas* case says that, for
17 example. And the Supreme Court has also said that civil
18 commitment for any purpose is a significant deprivation of
19 liberty that requires due process protections, and we see that
20 in the line of cases *Addington* and *Foucha* and *Salerno*.

21 And the First Circuit looked at this issue for people
22 just like our client in *Hernandez-Lara*, *Brito*, and *Doe*. And in
23 *Hernandez-Lara*, for example, that was an individual who had
24 entered without inspection. I think that's in the first
25 sentence or two of the opinion. And the First Circuit held in

1 *Hernandez-Lara* that in order to detain that person who was
2 arrested inside the United States, it was necessary to provide
3 not just a bond hearing but a bond hearing with certain strong
4 procedural protections. This Court reached the same conclusion
5 in the *Brito* case, which also went to the First Circuit. In
6 the *Brito* case, two of the three named class representatives
7 were alleged to have entered without inspection, Mr. Brito and
8 Mr. Avila Lucas.

9 THE COURT: Right, but in the first Trump
10 administration, the main debate was, who bore the burden of
11 proof? What should the burden of proof be? How long could you
12 keep someone? But it was never contested that in some
13 circumstances bail was appropriate. So this is a new issue. I
14 don't even know if it was challenged in *Brito* or *Hernandez-Lara*,
15 right? That wasn't even the debate, right?

16 MR. McFADDEN: No, your Honor, I think that it was --
17 I mean, we had people in the class. We had class
18 representatives, we had the individual petitioner,
19 *Hernandez-Lara*, all of whom were under 1226 and all of whom the
20 First Circuit --

21 THE COURT: I understand, so --

22 MR. McFADDEN: So I think, your Honor, those --

23 THE COURT: But I think it could be resolved, this
24 case, on a strict statutory construction without jumping into
25 due process and the Administrative Procedure Act.

1 MR. McFADDEN: I think you are correct, your Honor.
2 And, for example, in the *Rodriguez* case in Washington, that was
3 the basis for the recently entered classwide partial summary
4 judgment, was the statutory analysis. So I think the Court
5 could resolve it strictly on statutory bases, and that's
6 probably a good place to start, you know. But if the statutory
7 analysis comes out not in our client's favor, it may be
8 necessary to reach other issues.

9 THE COURT: All right, thank you.
10 So did you want to be addressing irreparable harm?

11 MS. ARAUJO: If the Court wants me to address
12 irreparable harm, I'm happy to, your Honor.

13 THE COURT: I don't know that I need much on that,
14 since he's incarcerated, and I view that as if it's permanent
15 incarceration.

16 MS. ARAUJO: That is correct, your Honor. I think
17 there is just one --

18 THE COURT: Not permanent, but, I mean, just a
19 long-term incarceration, but you're welcome to make a few
20 points if you would like.

21 MS. ARAUJO: Maybe just a few points, in view of the
22 government's response that was filed yesterday. I think one
23 point is that the government -- I think Attorney McFadden
24 pointed this out -- stated that my client had conceded
25 removability. That hasn't been the case. I am his immigration

1 counsel in removal proceedings. We have not even had a first
2 hearing at this point. The only two documents that have been
3 filed with the Immigration Court are the notice to appear,
4 which he's charged with being present without admission or
5 parole. He's not filed pleadings in Immigration Court, so
6 there is no conceding of removability in that court.

7 But I also think the other point that is really
8 important to highlight when it comes to harm is that there's
9 this picture that the government has painted that removal
10 proceedings when somebody is detained is some speedy type of
11 process, and I've submitted an affidavit to this Court which
12 takes 18 years of practice in removal proceedings, and it does
13 not matter that a person is detained. The detention for
14 somebody in removal proceedings is often over six months; and
15 if an appeal is taken on that case, it takes over a year. So
16 even if him being detained speeds up removal proceedings, by no
17 means is it really a fast proceeding. So my client would be
18 detained for a significant amount of time, and the harm would
19 be, as this court has now said, daily.

20 THE COURT: One thing that took me by surprise was
21 your approach in the past. I've had many of these cases
22 through the years. I just, if I think that there's relief
23 that's appropriate, I just grant the habe. In other words, I'm
24 not going through the likelihood of success, irreparable harm,
25 balance of the harms, preliminary injunction analysis. I just

1 grant the habe and say that the Immigration Court should
2 provide a bond hearing. I don't know why I should do that
3 differently here. It took me a little by surprise.

4 MS. ARAUJO: So if I can indicate two things to the
5 Court. I think that there is an interest in this Court
6 granting a preliminary injunction because of the current
7 practice of the government. So what we have recently seen is
8 not just the denial of the bond hearing to an individual who
9 entered without inspection. If an immigration judge finds that
10 an individual is to be granted bond, what my current experience
11 is, is that the government is staying the grant of bond,
12 preventing the bond from being granted, and appealing
13 regardless of whether or not there are merits to that appeal.
14 So there is an interest --

15 THE COURT: Even the PI isn't going to stop that.

16 MS. ARAUJO: But a PI will insure that this Court can
17 monitor whether or not --

18 THE COURT: No, it won't. I'm just going to order him
19 to get a bail hearing. I'm not going to stop the government
20 from appealing or getting a stay of appeal. I'm just
21 wondering -- I have to say, I think across the country there
22 are different procedural routes. Some are doing preliminary
23 injunctions; some are doing granting a habe. But, I mean, in
24 the past in this court, we've typically just granted a habe, or
25 at least I have.

1 MS. ARAUJO: And I also think, your Honor, this isn't
2 something that is just affecting Mr. Orellana. It's affecting
3 all individuals, an alien who entered without inspection --

4 THE COURT: I get that, and that's what I'm going to
5 deal with in the class action. But in this, I'm not sure what
6 the right procedural word is, but you're pressing for a
7 preliminary injunction; is that right?

8 MS. ARAUJO: Yes, your Honor, we are pressing for a
9 preliminary injunction.

10 THE COURT: Do you have any cases that say that's the
11 right route here? I just haven't seen someone take that -- I
12 haven't analyzed it, honestly. I mean, we have a couple of
13 cases where it's happened without discussion.

14 MS. ARAUJO: *Maldonado Vazquez* in the District of
15 Nevada, your Honor.

16 THE COURT: Says what?

17 MS. ARAUJO: Says that a preliminary injunction is the
18 appropriate relief in a situation like this.

19 THE COURT: Not in a habe. In *Brito* we did habes in
20 all those cases. But, anyway, let me go to the government at
21 this point. Thank you.

22 Welcome.

23 MR. FLENTJE: Hi. May it please the Court, August --

24 THE COURT: You're coming up from Washington; is that
25 it?

1 MR. FLENTJE: Yes.

2 THE COURT: And you're doing these things all over the
3 country?

4 MR. FLENTJE: This is my first one.

5 THE COURT: It's your first one.

6 MR. FLENTJE: Yes.

7 THE COURT: All right.

8 MR. FLENTJE: Everyone in the courtroom knows more
9 about the issue than me, but I'm going to do my best to present
10 the government's position.

11 THE COURT: Are you a longstanding member of the
12 Department of Justice?

13 MR. FLENTJE: Yes. I've been with the department for
14 almost 30 years.

15 THE COURT: All right. In what division?

16 MR. FLENTJE: I'm in the Civil Division, Special
17 Immigration Counsel in the Civil Division.

18 THE COURT: Okay, all right. Well, welcome. Help us
19 out here.

20 MR. FLENTJE: Thank you.

21 The crux of this dispute is one of statutory
22 interpretation. It's really the plain text of Section 1225
23 that requires detention in this situation. And Congress passed
24 that in 1996 addressing a specific problem, which is that when
25 an alien without papers, or otherwise, comes to the border and

1 does the right thing, reports at a port of entry, they were
2 subject to mandatory detention and something called "exclusion
3 proceedings." But if someone surreptitiously came into the
4 United States and broke U.S. law, they both got the benefit of
5 being in the United States without having been inspected or
6 assessed for the various risks that the admissibility process
7 is designed to protect; and once they were finally apprehended,
8 they then got an extra procedural benefit in a bond hearing
9 during what were then called "deportation proceedings." So
10 Congress stepped in with 1225 to make it work the same way
11 whether you went to the border post or whether you
12 surreptitiously came into the United States.

13 And how did it do that? Well, in 1225(b)(1), it
14 addressed aliens who either were captured immediately, or, if
15 expanded, within the first two years of entry. And at that
16 point someone was treated as a, quote, "arriving alien," and
17 then they could be subject to expedited removal, which, as you
18 know, has no court review. It's a very quick and limited
19 process with limited relief available.

20 And then it also enacted 1225(b)(2), which is more of
21 a catchall. If for whatever reason the alien was put into
22 regular removal proceedings under Section 1229(a), the alien,
23 who was an applicant for admission, would be subject to
24 mandatory detention.

25 Now, plaintiffs agree that their client is an

1 "applicant for admission" -- they're not disputing that --
2 because "applicant for admission" is defined in 1225(a)(1) as
3 an alien present in the United States who has not been
4 admitted, and that cannot be disputed here.

5 They are relying instead on the phrase "alien seeking
6 admission," but their reliance on that is not quite correct.
7 First, they're trying to equate it with entering or like
8 immediate entry or arriving, but Congress already addressed
9 that in 1225(b)(1). For arriving aliens, which Congress
10 carefully defined as someone, at the maximum scope, is
11 apprehended, within two years of entry in the United States are
12 subject to expedited removal. But for other aliens -- and that
13 would be people who must be/have been apprehended further from
14 the border or outside of that two-year period -- it's
15 1225(b)(2)(A) that applies.

16 Now, the second point on seeking admission is, what
17 does seeking admission mean as a practical sense? It means the
18 individual is seeking to remain in the United States, and --

19 THE COURT: That's also a gloss on the term "seeking
20 admission." They're not really seeking admission. They are
21 just living here.

22 MR. FLENTJE: Well, I don't think that's correct
23 because let's talk about it in the context of this specific
24 case.

25 THE COURT: Well, can we just back up for a minute.

1 Your brief seems to concede that longstanding practice was
2 otherwise, and I read *Jennings* closely from this perspective,
3 and the Supreme Court seemed to understand it that way, and
4 certainly all of us did up here. So it's essentially, I guess,
5 the government doing a deep dive and saying, you know, "We're
6 going to change our long-term understanding of the statute."
7 Is that what happened here in *Hurtado*?

8 MR. FLENTJE: Well, that's what the BIA decided in
9 *Hurtado*, for sure.

10 THE COURT: Well, they said that, right?

11 MR. FLENTJE: But I do think it's important --

12 THE COURT: And they concede that, that this isn't the
13 way it's been.

14 MR. FLENTJE: I want to be precise about the
15 longstanding practice. The longstanding practice that *Hurtado*
16 determined was incorrect was that Section 1226 detention was
17 available.

18 THE COURT: Was available.

19 MR. FLENTJE: There's been no longstanding practice
20 that 1225(b)(2)(A) was not available. It's just the
21 longstanding practice was more of a "you could use either
22 avenue."

23 THE COURT: Yes, either way, and they said that that's
24 no longer true, right? So there was a big sea change in the
25 BIA's understanding, right?

1 MR. FLENTJE: I think the BIA determined that it could
2 no longer provide bond hearings under 1226, but that is not to
3 say that the authority under 1225(b)(2)(A) didn't exist or
4 there was a longstanding practice that it did not exist. It
5 was --

6 THE COURT: I agree with that, but the practice -- I
7 mean, I think they -- don't they use the word? I mean, they
8 must have been describing it at the Supreme Court that way
9 because that's the way *Jennings* is written. So I'm not saying
10 the government doesn't have the right to change its mind,
11 but it certainly took everyone by surprise, right?

12 MR. FLENTJE: Uhm, I think -- I mean, the BIA speaks
13 to that, and, yes, I think there was a practice of using 1226,
14 and now the Board has determined that that's not available.

15 THE COURT: Okay. So what's not clear is when you
16 have -- I understand this is a narrow -- you're right, the crux
17 of this is a statutory interpretation where you have two
18 parallel statutory schemes. They're not necessarily mutually
19 exclusive.

20 MR. FLENTJE: They overlap --

21 THE COURT: In other words, I suppose, or maybe I'm
22 wrong, but if you say you're arresting someone under 1226,
23 which is how so many of these cases come down, then 1226 is
24 available.

25 MR. FLENTJE: Well, let me be clear. The petitioner

1 has to show that they are mutually exclusive to prevail, that
2 1225(b)(2)(A) is not legally available. That is a very hard
3 showing to make. They have to show that that statute doesn't
4 apply to them, and *Jennings* said it pretty clearly applies to
5 this situation. It's very hard to interpret it otherwise.

6 And then they turn to the warrant, or maybe there was
7 a procedural step that was taken that was not correct, but the
8 warrant simply cites the authority to issue a warrant. That's
9 why it cites 1226. It also cites 1357, which is the authority
10 to conduct a warrantless arrest. So I don't think the warrant
11 itself -- and if you look at it, it's just in the title of a
12 warrant. It does not assert detention authority under
13 Section 1226.

14 I also note the warrant relies on the notice of
15 appearance -- I'm sorry, not the notice of appearance -- the --
16 the immigration -- the paper that starts the immigration
17 proceeding, the NTA, the notice to appear -- I'm sorry,
18 ECF 16-1 -- and there is where the key determinations are set
19 forth that establish that (b)(2)(A) applies; that the
20 petitioner was not inspected and was an applicant for
21 admission.

22 I want to turn back to the "seeking admission," and,
23 again, if they're right that there's some sort of bureaucratic
24 thing that should have been done differently, the relief is not
25 a bond hearing. The relief is, make sure you do the right

1 thing to invoke 1225(b) (2) (A). They have to show that
2 1225(b) (2) (A) does not and cannot apply in this situation,
3 which relies basically only on the term "alien seeking
4 admission."

5 Now, I've given you one explanation as to why "alien
6 seeking admission" doesn't apply here. It's because it's a
7 reference to --

8 THE COURT: Well, it does apply here is what you're
9 saying?

10 MR. FLENTJE: Why petitioner is an alien seeking
11 admission.

12 THE COURT: Yes.

13 MR. FLENTJE: Because it differentiates the situation
14 from expedited removal, which applies to arriving aliens.

15 THE COURT: But, actually, this is the thing: It's
16 like playing word games. When he was caught, he wasn't
17 actually seeking admission.

18 MR. FLENTJE: I mean, unless he agrees to leave, and
19 that's where 1225(a) (4) comes into play: He's seeking
20 admission. He's trying to stay in the United States. And I
21 want to clarify, for this specific case, petitioner said that
22 they're going to seek cancellation of removal. Well, that's
23 governed by Section 1229(b), subclause B, so it's 1229 little
24 "b" and then a parenthetical "B." And a cancellation of
25 removal is seeking admission because if you get a request of

1 cancellation of removal granted, it allows you to adjust your
2 status to be, quote, "admitted for lawful permanent residency."
3 It's a request to be admitted. How can petitioners say they're
4 not seeking admission when the first thing they're going to do
5 in their immigration proceedings is to apply for cancellation
6 of removal, which is a request to be admitted.

7 THE COURT: So to whom do you say 1226(a) applies, if
8 not to the people who have entered and been here for 10, 20, 30
9 years? Who does it apply to?

10 MR. FLENTJE: Everyone who has been admitted, everyone
11 who went to a border port and was admitted.

12 THE COURT: Why are they even being arrested?

13 MR. FLENTJE: Well, I mean, *Brito* and *Demore*, they
14 involve lawful permanent residents who committed crimes, and
15 those crimes made them removable from the United States. So
16 they had been admitted. They'd gone through the process
17 correctly.

18 THE COURT: Well, that was 1226(c), if you commit a
19 crime.

20 MR. FLENTJE: 1226 applies to some crimes but not all
21 crimes. I mean, 1229 has a host of different removability
22 standards, and, like, you have to look at those. And those are
23 the cases where 1226 is designed to cover, where someone has
24 been admitted, and they get that extra protection. That's kind
25 of the border fiction. If you're admitted, there's extra

1 protection: You get a bond hearing unless you're a serious
2 criminal, and you get the full removal proceeding. You don't
3 have expedited removal --

4 THE COURT: So is there any case in the country that
5 says this other than *Hurtado*?

6 MR. FLENTJE: I mean, we've won a few. We just won a
7 case on this issue in the District of Nebraska late last night,
8 which we can submit to the Court.

9 THE COURT: Okay, good. They're popping up everywhere.

10 MR. FLENTJE: And I think there's one in this district
11 and one in California. So, I mean, this issue is running
12 through the courts, obviously, right now.

13 THE COURT: And there's no Circuit case law on it?

14 MR. FLENTJE: Not yet, not yet.

15 THE COURT: So there's sort of, on the count, sort of
16 close to thirty cases coming out one way, three cases coming
17 out another way, but they're all District Court cases?

18 MR. FLENTJE: Yes. And they're tough, emotional
19 circumstances, I'll concede that, but Congress wrote this law
20 to make it so -- to strongly deter what happened here, which
21 was surreptitious entry into the United States, and to treat
22 folks in that situation the same as if they were requesting
23 entry at the border. That's why they changed the term "entry,"
24 which was the concept in the law prior to 1996, to "admission."
25 The idea is, you need to request and be granted admission to

1 come into the United States and get the benefits of the
2 additional procedural protections.

3 I want to talk --

4 THE COURT: We should probably also discuss due
5 process.

6 MR. FLENTJE: Do you want to talk about the Laken
7 Riley Act at all?

8 THE COURT: Sure.

9 MR. FLENTJE: The petitioner argued that the Laken
10 Riley Act shows that Congress read the law differently. First,
11 I'll say that the Laken Riley Act did not change 1225(b)(2)(A)
12 at all. It simply added an additional mandatory detention
13 provision to 1226(c). And I think our point on that is, like,
14 you have multiple -- Congress wants detention. Like, for
15 better or worse, that's what they have put throughout the
16 immigration laws; and I think multiple overlapping mandatory
17 detention provisions can't be read to say --

18 THE COURT: Well, they were responding to the horrific
19 murder, and so they wanted to -- somebody used the word
20 "double down" and make sure those people were not released,
21 right?

22 MR. FLENTJE: Yes. And, again, the Act does do some
23 work even -- because it does apply to people who were admitted
24 and then fall into the specific categories of inadmissibility
25 in 1182(a)(6) and (a)(7), which are the specific ones cited in

1 the Act. And so it's not inconsistent. At most, it's
2 duplicative of the detention authority here.

3 And, you know, *Jennings* had a very similar argument
4 where they said, one of the mandatory detention provisions is
5 about terrorists, and there's another special terrorist
6 detention provision, and so you can't read them both to be
7 mandatory, and *Jennings* was, like, "No. Congress was doing a
8 belt-and-suspenders approach, and it makes sense." And it
9 especially makes sense given, like, the active litigation now.
10 We have lots of courts saying that 1226 has to be applied, so
11 it makes sense that Congress would be very careful in insuring
12 that there's mandatory detention in every circumstance where it
13 warrants mandatory detention.

14 The petitioner talked about people being detained if
15 they apply for a visa at a foreign embassy. Again, that
16 argument doesn't make any sense because 1225(b)(2)(A) applies
17 to someone who is an applicant for admission, which means an
18 alien present in the United States, so it's really, that point
19 doesn't make sense. And I'm happy to talk about the due
20 process.

21 THE COURT: Well, at some point -- well, the Supreme
22 Court has made it clear that due process rights affect all
23 people, whether they're legally here or not legally here. I
24 don't know that I have to address due process because I think
25 everyone is right: The crux of this is interpreting difficult

1 statutes, but -- but at some point -- you made the point, well,
2 he's only been there for 14 days, that's not a due process
3 violation; but there are so many people who have been here 10,
4 20, 30 years, and you pick them up, and there's no right to any
5 release, and they apply for cancellation of removal. There's
6 no point at which the government is willing to say the Due
7 Process Clause applies?

8 MR. FLENTJE: Well, the detention is just for the
9 purpose of the removal proceedings.

10 THE COURT: No, I know, but it takes forever. I mean,
11 they don't have enough immigration judges. It just takes a
12 long time. So someone who's been here 30 years, never
13 committed a crime, has a family, and they're incarcerated for
14 two years, not even including the appeal, you would say there's
15 no due process concerns I should think about?

16 MR. FLENTJE: Well, first, due process is an
17 individualized inquiry.

18 THE COURT: Right.

19 MR. FLENTJE: So let's look at this case. It's been
20 only two weeks. The petitioner has his master calendar hearing
21 tomorrow. The proceeding is moving quite quickly, much faster
22 than the declaration submitted on behalf of the petitioner.

23 THE COURT: Well, that's just a -- it's like the
24 initial status conference, right?

25 MR. FLENTJE: It's the master calendar hearing.

1 THE COURT: I don't know what that means, but it's
2 like an initial appearance kind of thing, right?

3 MR. FLENTJE: It is, so I think we'll know more about
4 the speed of those proceedings tomorrow, but right now they're
5 moving faster than the declaration submitted in the record.

6 The second point is, is that I think due process
7 concerns, even in other contexts, have arisen after six months,
8 and that's sort of what the courts have talked about. I'm not
9 saying there's a due process problem then. I'm just saying,
10 before six months there's absolutely no due process --

11 THE COURT: That's right. That was the dividing line
12 for *Zadvydas*.

13 MR. FLENTJE: *Zadvydas* is the reason that courts have
14 looked at six months, yes. And that kind of points to our
15 jurisdictional point, which we really are bringing as a matter
16 to preserve it. I think there's some case law in the First
17 Circuit that's not favorable on that, but --

18 THE COURT: What's the jurisdictional point other than
19 you think I don't have the --

20 MR. FLENTJE: I mean, the habeas --

21 THE COURT: The statute pushes me somewhere.

22 MR. FLENTJE: I mean, we view habeas jurisdiction as
23 addressing sort of prolonged detention, and that's the history
24 of cases that have raised due process in habeas. And if it's
25 just about being detained in the first place, it's really tied

1 up with your immigration proceedings and should not get reviewed
2 in a habeas --

3 THE COURT: Habeas is when you're detained contrary to
4 either the Constitution or statute, so both claims are being
5 made here, I think. What would you say -- let me just say,
6 I've usually in the past just, if I felt that they were detained
7 without a bond hearing improperly, I just granted a habe. Do
8 you want a position on whether it should be a preliminary
9 injunction or a habeas?

10 MR. FLENTJE: Well, obviously it's harder to get a
11 preliminary injunction because they have to address the other
12 injunctive factors, and, again, the short period of detention
13 weighs against them on that. It's been a short period.

14 THE COURT: Yes, but every day in prison away from
15 your family is tough. But let me ask you this: If I just
16 granted a habe, all those issues go away, right?

17 MR. FLENTJE: I think that's right because habeas, in
18 our view, is about the legality of someone's detention; and if
19 this Court is evaluating the legality of petitioner's
20 detention, you would grant habeas. It would not be an APA
21 claim. We don't even think an APA claim is appropriate here.
22 And you would look at the individual case. It probably has
23 problems for their effort to get a class certified.

24 THE COURT: Why?

25 MR. FLENTJE: Well, we have argued and we believe that

1 habeas is not suitable for class treatment. But, also, on the
2 due process, like, that's an individualized inquiry. *Jennings*
3 said that at the end, and said you might have to decertify the
4 class because we're now into a due process question. As far as
5 the statutory --

6 THE COURT: I'm glad you mentioned that. If I grant
7 the habe or I grant a PI, I think the inherently transitory
8 cause of action keeps the case alive.

9 MR. FLENTJE: We might dispute that. We'll be
10 briefing that next week, I think.

11 THE COURT: I don't know whether it matters whether I
12 do it through a habe or do it through a preliminary injunction.

13 MR. FLENTJE: I mean, if you grant a habeas, I think
14 the case is over, right?

15 THE COURT: Maybe that's the reason --

16 MR. McFADDEN: Would you like me to address that, your
17 Honor? I can explain.

18 THE COURT: Yes. Actually, it would be helpful. In
19 candor, I've read so many cases now on the subject. I mean,
20 they're coming down one or two a day, no appellate case law on
21 it. So I feel like I understand the statutory thing, but it's
22 the remedy that I wasn't as clear about.

23 MR. McFADDEN: Yes, your Honor. So I think the reason
24 we are pursuing a preliminary injunction is because this has
25 been pled as a class action. I think that the petitioner had a

1 choice of pursuing the final relief or the preliminary relief.
2 The issue is that since *Matter of Hurtado*, and really since the
3 change in policy over the summer in July, there have been many,
4 many people impacted by this decision. Dozens and dozens have
5 filed habeas petitions in this district. It appears that many
6 more are arrested and transferred, maybe within the day,
7 outside of the district where they can't file a habeas
8 petition. So there are many people being impacted, and many of
9 them are bringing individual habeas petitions in this district.

10 In filing the class, it was the hope to try to provide
11 some uniform relief that would also be efficient for the
12 judiciary rather than doing a hundred individual or two hundred
13 individual habeas petitions. So it was the hope to provide
14 some type of collective relief --

15 THE COURT: Well, I understand that for the class, but
16 for this individual.

17 MR. McFADDEN: So I think, your Honor, in some other
18 cases, like the *Rodriguez* case in Washington and *Maldonado*
19 *Vazquez* in Nevada, the courts entered a preliminary injunction
20 for the class representative, holding a bond hearing. I think
21 the reason for that is that if the Court grants final relief
22 for the class representative, I think, as you just heard, the
23 government will argue that the whole case is moot, and no class
24 action will proceed would be their argument. We might disagree
25 with that --

1 THE COURT: Those cases, though, had no discussion
2 about that avenue. I mean, they just did it.

3 MR. McFADDEN: Well, your Honor, I think that in those
4 cases, because a preliminary injunction was granted for the
5 individual, there was not discussion of this mootness question
6 the government will likely raise.

7 MR. FLENTJE: In some of these, the class was certified,
8 I think, before the injunctions were. Not the current round
9 but looking back to *Brito* and, like, *Reed*.

10 THE COURT: Well, *Brito* had -- some of them were, if I
11 remember correctly, we may have granted relief before the class
12 was certified. It didn't seem to be an issue for the First
13 Circuit, but we can deal with that at another point.

14 Okay, this is helpful. Thank you.

15 MR. McFADDEN: And I would like to respond briefly to
16 a couple of other things, but I'll wait till my colleague
17 finishes.

18 THE COURT: All right, go ahead, sir.

19 MR. FLENTJE: I do want to say on the due process
20 issue, I think *Demore* is a very strong case that shows that
21 historically, detention is permitted in the context of
22 immigration removal proceedings. Now, there may be some
23 procedural rights at issue if there are factual issues to be
24 resolved, but here there's no real factual dispute that
25 1225(b) (2) (A) applies, if our interpretation is correct. So I

1 don't think that comes into play, and there's definitely no
2 substantive right to be released, given the long history of the
3 notion that detention is appropriate when dealing with aliens
4 who are in removal proceedings.

5 THE COURT: Thank you.

6 MR. FLENTJE: Thanks.

7 THE COURT: Did you want to respond?

8 MR. McFADDEN: Yes, your Honor. I just wanted to
9 address a couple of things. The government had mentioned that
10 it was preserving the jurisdiction arguments and mentioned that
11 there were some cases adverse to that in the First Circuit. I
12 just wanted to direct the Court's attention. I think that the
13 cases the government is probably referencing are *Aguilar v.*
14 *ICE*, which is 510 F. 3d 1 at Page 11. That is the case that
15 said that detention challenges are not barred by 1252(b)(9),
16 which is one of the statutes they raised. Another one is *Kong*
17 *v. United States*, which is 62 F. 4th 608 at 614 to 18; and that
18 says that 1252(g), which is another statute that the government
19 has cited, does not apply to bar this type of detention
20 challenge. So I think on the jurisdictional point, I think
21 that the First Circuit has essentially ruled.

22 THE COURT: Right, and I understand why they're
23 preserving it, because it will probably go up or might go up
24 even beyond that. So I think the First Circuit is clear that I
25 have jurisdiction in a detention case.

1 All right, thank you.

2 MR. McFADDEN: Thank you, your Honor. If I could just
3 address one more issue. So the government has said our client
4 is seeking admission. I just want to be clear. You know, our
5 position is, he's not seeking admission. He's present in the
6 United States. He's not, within the meaning of (b)(2), seeking
7 admission. By virtue of his presence, he's here. My cocounsel
8 is prepared also to address why --

9 THE COURT: Well, he wants to stay --

10 MR. McFADDEN: -- cancellation is not seeking
11 admission. So if that would be helpful, she could address that
12 for the Court.

13 MS. ARAUJO: Your Honor, my client isn't seeking
14 admission. If -- if the charges are sustained, as they are
15 outlined in the notice to appear, he would be seeking
16 cancellation of removal under 240(a)(B). That is an adjustment
17 of status per statutory grounds. That is not seeking admission.
18 Whether somebody is eligible or not for cancellation of removal
19 is different than whether or not they are inadmissible to the
20 United States, and the grounds for ineligibility for
21 cancellation of removal are separate and apart. For example, a
22 person who is granted a green card, a lawful permanent resident,
23 through a cancellation of removal in the future would be
24 ineligible for certain types of waivers. Whereas, a lawful
25 permanent resident who is actually admitted into the United

1 States would be eligible for those waivers in the future.

2 So the government's contention that my client at any
3 point is an alien seeking admission is incorrect. Not even in
4 removal proceedings that's what he is going to be seeking. If
5 the notice to appear is sustained, he'll be seeking
6 cancellation of removal, which is a different thing than
7 admissibility.

8 I also think that it's important to point out to the
9 Court --

10 THE COURT: You're going very fast. You know this
11 stuff inside out and I don't, so just slow down a little.

12 MS. ARAUJO: So, your Honor, I think that the
13 statement that it's not in dispute that he is an alien seeking
14 admission is incorrect. He will be seeking relief in removal
15 proceedings, if the notice to appear allegations and charges
16 are sustained. However, what he will be seeking is cancellation
17 of removal, which is not the same as seeking admission.

18 1225(b)(2), your Honor, has the term "seeking
19 admission," which has been extensively discussed today. It
20 also has "by an examining officer," an examining immigration
21 officer. The statute refers to different types of immigration
22 officers. There are asylum officers, there are adjudication
23 officers, there are examining officers, and there are enforcement
24 officers. If the Court looks at the definition of an
25 immigration officer, that definition states it's an individual

1 who has the function of an immigration officer. That function
2 is defined by the Attorney General or by regulation.

3 So what the government is arguing now is that an
4 enforcement officer, so an ICE officer who is in charge of
5 enforcing immigration laws, is also an examining officer, when
6 that has never been the case. So when you are looking at
7 1225(b)(2), it makes sense that it is an individual who is
8 actively seeking admission, usually at a border or at a port of
9 entry, because at that point they encounter an examining
10 officer, such as a Customs and Border Protection officer, who
11 will be looking to the question of inadmissibility and as to
12 whether that person can enter the country.

13 That's not my client. He was already here. And right
14 now in removal proceedings, the burden actually lies with the
15 government to show that my client is even an alien. And the
16 reason for that, your Honor, is because he is in the country.
17 He was actually treated differently than an individual at the
18 border, even in regular removal proceedings. If my client had
19 presented seeking admission at the border and the government
20 had subjected him to 240 proceedings like they have now, he
21 would be charged as an arriving alien; and at that point in
22 time, the burden would be on him to show that he's admissible
23 to the United States.

24 That's not the case here, in removal proceedings at
25 this point, because he's charged, and the government said the

1 warrant relies on the notice to appear. So let's rely on the
2 notice to appear. The notice to appear says that my client is
3 present without admission or parole. Therefore, it is the
4 government's burden to show that my client is not an alien to
5 begin with. The government hasn't even done that, and they
6 want to detain my client.

7 There is a reason why it says "seeking admission" and
8 not "an applicant for admission." There are other instances
9 where an individual could be an applicant for admission, none
10 of which are present here. But certainly not everybody who is
11 in the United States, who potentially entered without inspection,
12 is also seeking admission. Maybe they're seeking voluntary
13 departure. That's not an admission, but they're also facing
14 removal proceedings.

15 THE COURT: Okay, thank you. Okay, I think this issue
16 is joined. I will take this under advisement. Don't we have a
17 schedule at this point?

18 THE CLERK: Yes. We have a hearing on the 14th.

19 THE COURT: On the 14th?

20 THE CLERK: Yes. In person?

21 THE COURT: It's a significant case, so -- I'm sorry.
22 Is that not a good time for you?

23 MR. FLENTJE: I do want to flag one thing.

24 THE COURT: Yes.

25 MR. FLENTJE: I do know there is a government shut-

1 down, and we will be filing a motion --

2 THE COURT: I noticed. But you know the courts don't
3 close down.

4 MR. FLENTJE: Well, we will be filing a notice to stay
5 proceedings, given that shutdown, which is what we are obligated
6 to do across the country in civil cases. I think we already
7 know the petitioner will oppose that, and we'll get that on
8 file today.

9 THE COURT: Well, let me put it this way: I'm going
10 to be acting on this individual habeas petition. I don't need
11 anything else from the government.

12 MR. FLENTJE: Understood. There is a lot more coming
13 down the pipeline, though, with the class, so --

14 THE COURT: Yes. With the class, though, I think it's
15 a benefit to both sides to have a ruling on it because it's
16 flooding into the courtrooms, and there needs to be some
17 appellate guidance on this. So I don't know if I have the
18 authority to order you to file a brief, but if you don't file
19 one, I may have to act.

20 MR. FLENTJE: Well, no. If the Court doesn't stay the
21 case, we'll be filing a brief.

22 THE COURT: Well, I'm not staying the case, so --

23 MR. FLENTJE: Well, that might make it unnecessary for
24 us to file a motion this afternoon if the Court makes it
25 clear that you will not --

1 THE COURT: I'm not going to stay the case. I mean,
2 I'm not here to -- his individual liberty is at stake, so I'll
3 expedite. If you need a little bit more time -- I mean, it's
4 not on an individual basis -- I can live with that, but I'm not
5 going to stay the case.

6 MR. FLENTJE: Well, why don't we file our standard
7 motion this afternoon, and the Court can act on that.

8 THE COURT: I know, it's also a holiday tonight and
9 tomorrow, which makes it even more difficult. So I will not be
10 staying the case. If you need additional time, just because of
11 your human circumstances, I can, you know, give you a few more
12 days. But that's not really what you're telling me. Who knows
13 how long this shutdown is going to be, right?

14 MR. FLENTJE: Yeah, I'm not asking for that. We do
15 have to seek stays in cases, given the shutdown.

16 THE COURT: But it's a good reminder because I have
17 other cases, so --

18 MR. FLENTJE: And you might get those motions.

19 THE COURT: Yeah, I bet you are. Is the local U.S.
20 Attorney's Office going to be doing that? Do you know?

21 MR. KHETARPAL: I don't know. We're getting guidance
22 about it today at noon, and here I am. I do not yet know that.

23 THE COURT: Well, my understanding is, the courts stay
24 open. And one thing that's critically clear is, regardless of
25 if the courts run out of money, I'm here. I think they can't

1 stop paying the judges' salaries. So if I have to be typing it
2 out myself, one way or another, I will. So there it is.

3 Okay, thank you. Is there anything else we need to do
4 right now? I once again thank ICE for bringing in the
5 petitioner because that doesn't always happen, and it's a big
6 case, and we can tell how much it means to him -- I can just
7 tell that through his facial expression -- as well as to me
8 that you did bring him in, so thank you very much.

9 FROM THE FLOOR: Your Honor, the docket has the
10 descriptions?

11 THE COURT: I don't know. Just file something, okay?

12 FROM THE FLOOR: I did, but thank you.

13 THE COURT: I remember you from all those bail cases.

14 FROM THE FLOOR: I filed on Friday, so --

15 THE COURT: Maybe you did. Okay, thank you.

16 All right, thank you very much. We stand in recess.

17 THE CLERK: All rise.

18 (Adjourned, 12:53 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 49 inclusive, was recorded by me stenographically at
the time and place aforesaid in CA No. 25-12664-PBS, Jose
Arnulfo Guerrero Orellana v. Patricia H. Hyde, et al, and
thereafter by me reduced to typewriting and is a true and
accurate record of the proceedings.

Dated this 5th day of October, 2025.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER