Misclassification and Mandatory Detention

by Carrie Mannino[*]

In its upcoming term, the Supreme Court will decide whether ICE has the authority to detain without bond all noncitizens who have entered the country without legal admission even if they have lived in the United States for decades. Sections 1225 and 1226 of U.S. Code Title 8 outline the detention procedures for noncitizens. Historically, § 1225 has been interpreted to apply to noncitizens who are apprehended when they are just entering the country, while § 1226 has been interpreted to apply to noncitizens who are apprehended within the country. In 2025, ICE announced a new interpretation of § 1225, asserting that it mandates the detention of all noncitizens in the country who were not officially admitted, regardless of how long they have been in the United States. This is a radical change from long-standing practice and a mischaracterization of the statute. Subjecting all noncitizens who have not undergone immigration inspection to mandatory detention is not authorized by the statute's text or legislative history, and such an interpretation poses significant constitutional concerns. Courts across the country have heard challenges to this new interpretation of § 1225 and have split over the issue, leading the Supreme Court to grant certiorari earlier this month. The majority of district and circuit courts have reached the correct conclusion: Section 1225, with its mandatory detention provision, should only apply to noncitizens who have not yet entered the country, and Section 1226, which permits bond hearings, should apply to noncitizens living in the country.

On July 8, 2025, United States Immigration and Customs Enforcement ("ICE") circulated a memo to all employees defining a new policy regarding classification of undocumented immigrants who entered the country without authorization ("EWIs").[1] Its asserted authority was rooted in a new

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[1] *ICE Memo: Interim Guidance Regarding Detention Authority for Applications for Admission*, AILA Doc. No. 25071607 (July 8, 2025), https://www.aila.org/library/ice-memo-interim-guidance-regarding-detention-

interpretation of 8 U.S.C. § 1225, which codifies the Immigration and Nationality Act as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). IIRIRA outlines the detention procedures for immigrants in various situations. For nearly three decades, the federal government classified noncitizens apprehended at the border or other ports of entry differently under this statute than EWIs apprehended after residing within the United States.[2] This classification dictates whether an individual is subject to mandatory or discretionary detention during their removal proceedings.[3] Since immigration proceedings routinely take months,[4] this differentiation determines whether noncitizens can spend that time with their families or must be detained in increasingly dangerous facilities.[5]

Two sections of the federal statute address detention of noncitizens: 8 U.S.C. §§ 1225 and 1226. Section 1225 applies to "an applicant for admission" who is "seeking admission,"[6] and it

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authority-for-applications-for-admission [https://perma.cc/5GKM-JYGX] [hereinafter *ICE Memo*]. "EWI" stands for Entry Without Inspection and is a legal term that refers to individuals who have entered the United States without inspection or authorization. These individuals are considered "inadmissible" under the statute. Jason A. Cade, *Welcome to the Trump Administration's Board of Immigration Appeals. The Immigrant Always Loses.*, 136 Yale L.J. 24, 44 (2026) (defining "EWIs").

[2] *See* Detention and Removal of Aliens, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997), https://www.govinfo.gov/content/pkg/FR-1997-03-06/pdf/97-5250.pdf#page=12; 8 U.S.C. § 1225(a)(1), (b)(2)(A).

[3] 8 U.S.C. §§ 1225–1226.

[4] *ICE Detention Statistics FY 2026 YTD*, U.S. IMMIGR. AND CUSTOMS ENF'T (Jul. 20, 2026), https://www.ice.gov/detain/detention-management (indicating that thousands of individuals had been detained for upwards of 181 days).

[5] For information on present detention conditions, see Aaron Reichlin-Melnick, *ICE's Warehouse Purchases Herald New Model for Immigration Detention*, AM. IMMIGR. COUNCIL (Feb. 24, 2026), https://www.americanimmigrationcouncil.org/blog/ice-buys-warehouses-immigration-detention/ (noting concerns about abusive and dangerous conditions in rapidly-created commercial warehouse detention centers) *and Dying in Detention*, HUM. RTS. WATCH (June 25, 2026), https://www.hrw.org/report/2026/06/25/dying-in-detention/rising-deaths-in-an-expanding-us-immigration-detention-system (finding that the mortality rate in ICE custody is "nearly four times that of the Biden administration, and more than two and a half times as high as that of the first Trump administration.").

[6] 8 U.S.C. § 1225(a)(1), (b)(2)(A).

provides for mandatory detention of such applicants.[7] Section 1226(a) outlines the Attorney General's power to issue a warrant to arrest and detain a noncitizen "pending a decision on whether the [noncitizen] is to be removed from the United States,"[8] and § 1226(a)(2) provides that the Attorney General has the discretion to release the noncitizen on bond.[9] Thus, if a noncitizen is detained pursuant to § 1226(a), they may request a bond hearing and be released during their removal proceedings, but if they are detained pursuant to § 1225, they cannot be released and do not have any recourse to appeal their detention.[10]

For decades, the Department of Homeland Security ("DHS") differentiated noncitizens who were "inadmissible"—those who had not been legally admitted but who were residing within the United States (EWIs)[11]—from noncitizens who were "arriving"—those who were attempting to enter the United States.[12] Noncitizens who were classified as "inadmissible" were subject to discretionary detention under § 1226, whereas those who were "arriving" were subject to § 1225's mandatory detention scheme.[13] The Immigration and Naturalization Service ("INS"), a predecessor of ICE,[14] explicitly outlined this policy in an interim rule published shortly after IIRIRA's passage.[15] The Second

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[7] 8 U.S.C. § 1225(b)(2)(A) ("[I]n the case of a [noncitizen] who is an applicant for admission, if the examining immigration officer determines that a [noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] *shall* be detained for a proceeding." (emphasis added)).

[8] 8 U.S.C. § 1226(a).

[9] 8 U.S.C. § 1226(a)(2).

[10] *See* Lopez-Campos v. Raycraft, 175 F.4th 713, 722 (6th Cir. 2026) ("Therefore, whether Petitioners were subject to mandatory detention without an individualized bond hearing hinges on which provision applies to them."); Buenrostro-Mendez v. Bondi, 166 F.4th 494, 501–02 (5th Cir. 2026) (finding that § 1225 applies to petitioners, rendering them ineligible for bond).

[11] 8 U.S.C. § 1182(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.").

[12] 8 C.F.R. § 1001.1(q) (definitions for the Immigration and Nationality Act, as amended); Detention and Removal of Aliens, *supra* note 2.

[13] Detention and Removal of Aliens, *supra* note 2.

[14] U.S. CITIZENSHIP AND IMMIGR. SERV., OVERVIEW OF INS HISTORY 11 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf.

[15] Detention and Removal of Aliens, *supra* note 2.

Circuit has noted that the purposes of immigration detention, as outlined by the government,[16] are served by the interpretation of IIRIRA explained above, which "creates a tiered scheme that makes detention and removal easier for noncitizens who have weaker legal claims and who are either particularly dangerous or about whom the government lacks information [because they have just arrived]."[17]

However, ICE's July 2025 memo announced a radical new interpretation of this classification scheme.[18] The new system would designate all individuals who had not been officially processed when entering the United States as "seeking admission," rendering all such individuals subject to mandatory detention even if they have lived within the country's borders for decades.[19] Courts across the country have split over the question of whether this new policy is a lawful interpretation of IIRIRA, with the majority of courts finding that it is not.[20] On October 1, 2026, the Supreme Court granted certiorari to consider this issue.[21] Based on the canons of statutory construction, legislative history, recent amendments to the statute, and constitutional concerns, the government's new interpretation of § 1225 should be rejected, and the position of the majority of district and circuit courts should be upheld.

The Supreme Court previously discussed the application of §§ 1225 and 1226 in its 2018 decision *Jennings v. Rodriguez*.[22] In *Jennings*, the Court outlined the interpretation of § 1225 that has governed for decades. It stated that § 1225 applies "at the Nation's borders and ports of entry," while § 1226 "authorizes the Government to detain certain [noncitizens] already in the

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[16] *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (noting that the government stated that immigration detention serves to ensure noncitizens appear at future proceedings and to prevent danger to the community).
[17] Cunha v. Freden, 175 F.4th 61, 85 (2d Cir. 2026).
[18] *See ICE Memo*, *supra* note 1.
[19] *Id.*; *see also* 8 U.S.C. § 1225.
[20] *See* Buele Morocho v. Warden Phila. FDC, No. 26-1150, 2026 WL 2546223, at *2 (3d Cir. Aug. 28, 2026) (listing cases that have determined that mandatory detention in such circumstances is not authorized by statute).
[21] Rhoney v. Barbosa da Cunha, No. 26-104, 2026 WL 2942994, at *1 (U.S. Oct. 1, 2026).
[22] Jennings v. Rodriguez, 583 U.S. 281, 287–89 (2018).

country."[23] This accords with the Court's opinion in *Zadvydas v. Davis*, in which it noted that "once [a noncitizen] enters the country, the legal circumstance changes . . . whether their presence here is lawful, unlawful, temporary, or permanent."[24] The First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have continued to interpret § 1225 in line with this classification scheme and have rejected the government's new interpretation of § 1225 as applying to all EWIs.[25] These circuits engaged in statutory interpretation and found that the government's new policy is not a justifiable interpretation of the statute.

As a threshold matter, even though ICE promulgated this memo announcing its new interpretation of § 1225, courts have the authority to interpret the law as they see fit without deferring to agency interpretation.[26] When interpreting a statute, courts employ canons of construction, including the canon of ordinary meaning[27] and the rule against surplusage.[28] Both canons advise against the government's new interpretation.

When Congress gives a phrase a statutory definition, that definition must control its meaning.[29] Section 1225 requires a

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[23] *Id.*

[24] *Zadvydas*, 533 U.S. at 693.

[25] *See, e.g.,* Guerrero Orellana v. Moniz, 188 F.4th 1, 29 (1st Cir. 2026); *Cunha*, 175 F.4th at 69; *Buele Morocho*, 2026 WL 2546223, at *7; Lopez Garcia v. Guadian, Nos. 25-7044, 25-7050, 2026 WL 2661092, at *21 (4th Cir. Sep. 10, 2026); *Lopez-Campos*, 175 F.4th at 734; Cirrus Rojas v. Olson, 183 F.4th 909, 915 (7th Cir. 2026); Rodriguez Vazquez v. Bostock, 183 F.4th 1160, 1165 (9th Cir. 2026); Santillan Quiroz v. Mullin, 180 F.4th 1226, 1238–44, 1251 (10th Cir. 2026); Hernandez Alvarez v. Warden, Fed. Det. Ctr. Mia., 175 F.4th 1258, 1262 (11th Cir. 2026).

[26] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority").

[27] *See, e.g.*, Bostock v. Clayton Cnty., Ga., 590 U.S. 644, 654 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

[28] *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting United States v. Menasche, 348 U.S. 528, 538–39 (1955))).

[29] *Lopez-Campos*, 175 F.4th at 728 ("[W]hen a term is given a statutory definition or used as a term of art, that definition controls the meaning of

noncitizen to be both an applicant for admission and seeking admission.[30] "Admission," in the context of the statute, refers not to the physical act of entering the country, but specifically "the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer."[31] The section defines an applicant for admission as a noncitizen "present in the United States who has not been admitted or who arrives in the United States."[32] This is a statutory definition that deviates from the ordinary meaning of the phrase "applicant for admission": it includes individuals who are not seeking legal admission to the country and who have not applied for citizenship or residency.[33]

However, the statute does not define the phrase "seeking admission."[34] When a statute does not provide a definition for a term, courts should apply its ordinary meaning and refrain from changing the text.[35] Thus, the verb "seeking" should be given its plain meaning, which indicates that individuals already residing within the United States who are not actively applying for legal status are not "seeking admission" in any form. "Seek" is defined to mean "request" or "ask for," and the present participle "seeking" implies present action.[36] The ordinary reading of this phrase indicates that a noncitizen must be requesting lawful entry into the United States (affirmatively "seeking admission") to fall within the bounds of § 1225.[37] Inadmissible individuals who already reside within the United States and who have been

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statutory words in the usual case." (quoting Sanders v. Allison Engine Co., 703 F.3d 930, 938 (6th Cir. 2012))).

[30] *Cunha*, 175 F.4th at 74.

[31] 8 U.S.C. § 1101(a)(13)(A).

[32] 8 U.S.C. § 1225(a)(1).

[33] *See Lopez-Campos v. Raycraft*, 175 F.4th at 728 (noting that "[t]he ordinary meanings of 'apply' and 'applicant' . . . have little application in light of Congress's provided definition.").

[34] 8 U.S.C. § 1225.

[35] *See Bostock*, 590 U.S. at 654–55 ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.").

[36] *See Cunha*, 175 F.4th at 74.

[37] *Id.*; *Lopez-Campos*, 175 F.4th at 729.

detained by ICE are seeking relief from removal, not admission;[38] in fact, EWIs cannot seek admission, since they are unable to apply for an adjustment of status without first leaving the country.[39] Thus, they definitionally do not fall within § 1225, and their detention should be governed by § 1226(a)'s discretionary scheme, as has been the historical practice.[40]

In considering this issue, the Fifth and Eighth Circuits have adopted the government's interpretation by focusing on the ordinary meanings of both "applicant for admission" and "seeking admission" and finding them to be synonymous.[41] They compare seeking admission to the country with seeking admission to a college and conclude that an applicant is always necessarily seeking admission.[42] However, this disregards the statutory definition of "applicant" as outlined in IIRIRA[43] and ignores the reality that EWIs cannot "seek admission" without first leaving

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[38] *See Cunha*, 175 F.4th at 74 ("Petitioner entered the interior unlawfully twenty years ago and is now seeking only relief from removal.").

[39] *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., UNLAWFUL PRESENCE AND INADMISSIBILITY (2026) (outlining statutory bars to adjustment based on unlawful presence); *see also The Three- and Ten-Year Bars*, AM. IMMIGR. COUNCIL, (October 28, 2016), https://www.americanimmigrationcouncil.org/fact-sheet/three-and-ten-year-bars/ [hereinafter *Fact Sheet*] (noting that, even with provisional waivers, EWIs must leave the country to apply for an adjustment of status).

[40] *See Cunha*, 175 F.4th at 74 ("[B]ecause Section 1225(b)(2)(A) applies only to a noncitizen who is both an 'applicant for admission' and 'seeking admission,' it does not apply to petitioner.").

[41] Avila v. Bondi, 170 F.4th 1128, 1134 (8th Cir. 2026); Buenrostro-Mendez v. Bondi, 166 F.4th 494, 502 (5th Cir. 2026); *cf. Lopez-Campos*, 175 F.4th at 723 ("[W]hen Congress deliberately uses different words, we presume those words to have different meanings." (citing Bruce v. Adams & Reese, LLP, 168 F.4th 367, 383 (6th Cir. 2026))).

[42] *See Buenrostro-Mendez*, 166 F.4th at 502; *Avila*, 170 F.4th at 1134.

[43] *See Buenrostro-Mendez*, 166 F.4th at 502 ("[T]he petitioners argue that 'applicant for admission' is a term of art, so it cannot be understood according to its ordinary meaning. But the remaining provisions of § 1225 confirm that applicants for admission are indeed necessarily seeking admission."); *Avila*, 170 F.4th at 1135 ("Because the text does not indicate that 'seeking admission' and 'applicant for admission' are different, they still mean the same thing even if 'applicant for admission' is a term of art.").

the country.[44] As Judge Erickson's dissent in *Avila v. Bondi* notes, "the court uses the statutory definition to deem [petitioner] an 'applicant for admission,' and then turns around and uses the ordinary meaning of the same phrase to find he is also 'seeking admission' when he is not."[45]

These circuits' interpretation disregards the fact that the statute defines "applicant for admission" to include any noncitizen present in the United States who has not obtained lawful entry after inspection and authorization.[46] Since the statutory definition of "applicants" as used in this section differs from the word's ordinary meaning and extends beyond those who are actually in the process of applying for legal status,[47] it is clear that this category is a discrete statutory construction and is distinct from the undefined category of "seeking admission." Even if the ordinary meaning of "applicant for admission" might overlap with the common understanding of one who is "seeking admission," since the former phrase has a distinct statutory definition, the two phrases cannot be assumed to be interchangeable. The statute does not provide a definition of "seeking admission," and, therefore, that phrase should be construed based on its ordinary meaning, which would only

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[44] *Fact Sheet*, *supra* note 39 (noting that individuals in EWI status must leave the country to apply for a waiver to inadmissibility based on unlawful presence).

[45] *Avila*, 170 F.4th at 1138.

[46] 8 U.S.C. § 1225(a)(1) ("[A noncitizen] present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission"); 8 U.S.C. § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to [a noncitizen], the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer."); *see also Cunha*, 175 F.4th at 74 ("Congress defined 'admission' as 'the lawful entry of the [noncitizen] into the United States after inspection and authorization by an immigration officer.").

[47] *See Lopez-Campos*, 175 F.4th at 728 (explaining that Congress's definition of "applicant for admission" only requires the presence of a noncitizen in the United States who has not been admitted and does not involve the verb "apply."); *see also Cunha*, 175 F.4th at 76 (noting that Congress defined "applicant for admission" to include noncitizens who could not be applying for admission).

include individuals who are in the process of seeking legal entry to the United States.[48]

In upholding the government's new interpretation, these two circuits have also ignored the rule against surplusage by conflating the meaning of "applicant for admission" with "seeking admission."[49] Such a reading renders the latter phrase superfluous. Section 1225's grammatical structure requires that a noncitizen is both an applicant for admission and seeking admission,[50] so it would be redundant if these two elements were interchangeable. The rule against surplusage counsels against interpreting a law so as to render part of it superfluous.[51]

Reading § 1225 in the context of the rest of the Act also implicates the rule against surplusage. Section 1226 of the same Act is titled "Apprehension and detention of aliens."[52] Section 1226(c) mandates detention of "criminal aliens" and enumerates the crimes that would bring a noncitizen within this category.[53] In contrast, § 1226(a) allows for discretionary detention and does not provide any further categorization of the noncitizens who fall within its bounds.[54] The title and framework of § 1226 indicate that § 1226(a) is the default rule that should generally apply to EWIs. There would be no need to specify that certain inadmissible individuals must be detained under § 1226(c) if the default rule were not discretionary detention under § 1226(a).[55] As the

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[48] *Cunha*, 175 F.4th at 76 ("[T]he statute is silent on the meaning of 'seeking' and 'applying' and does not establish a legal fiction as to those terms, leaving them with their ordinary meanings.").
[49] *Id.* at 75.
[50] 8 U.S.C. § 1225.
[51] *See, e.g.*, Pulsifer v. United States, 601 U.S. 124, 143 (2024) ("[T]hat kind of superfluity, in and of itself, refutes Pulsifer's reading.").
[52] 8 U.S.C. § 1226.
[53] 8 U.S.C. § 1226(c).
[54] 8 U.S.C. § 1226(a).
[55] Escobar Salgado v. Mattos, 809 F. Supp. 3d 1123, 1147 (D. Nev. 2025) ("A plain reading of the exceptions under § 1226(c), and the fact that such 'exceptions' to the availability of being released on bond exist, supports a finding that § 1226(a) applies to all noncitizens who . . . are charged as being 'present in the United States without being admitted or paroled' . . . but who have *not* been implicated in any of the enumerated crimes set forth in § 1226(c)." (emphasis in original)); *see also Jennings*, 583 U.S. at 288 ("Section 1226 generally governs the process of arresting and detaining [noncitizens who

Supreme Court has noted, "[w]hen a statutory construction . . . 'render[s] an entire subparagraph meaningless,' . . . the canon against surplusage applies with special force."[56]

Considering the full text of IIRIRA at the time of enactment also clarifies that Congress intended § 1225 to apply only to arriving noncitizens. The statute included a safety-valve provision for § 1226(c), which mandates detention of noncitizens with certain criminal history.[57] Congress analyzed the probable effect of this new provision and determined that it would result in the detention of tens of thousands of noncitizens.[58] Recognizing that the government lacked the capacity in 1996 to detain this many individuals, Congress included a provision permitting delayed enforcement of § 1226(c), which the Attorney General immediately triggered.[59]

In contrast, Congress made no mention of capacity when enacting § 1225. If Congress had intended § 1225 to cover every single individual who was in the country without admission, that would have required a detention capacity nearly forty times greater than that estimated for § 1226(c).[60] Thus, it is reasonable to assume that Congress would have also included a provision accounting for that need if it were anticipated. The fact that the enacting Congress included a safety valve for § 1226(c) and not § 1225 indicates that it did not intend for § 1225 to expand the detained population.

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were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission] pending their removal.").

[56] *Pulsifer*, 601 U.S. at 143 (citing Nat'l Ass'n of Mfrs. v. Dep't of Def., 583 U.S. 109, 128 (2018)).

[57] *Cunha*, 175 F.4th at 89.

[58] *Id.*

[59] *Cunha*, 175 F.4th at 89.

[60] *See* Castañon-Nava v. U.S. Dep't of Homeland Sec., 175 F.4th 828, 853 (7th Cir. 2026) (noting that the record indicates § 1226(c) would subject 45,000 individuals to detention, whereas Congress recognized there were "nearly 1.7 million noncitizens . . . living within the United States after entering unlawfully").

When a statute's meaning is clear from its text, it is unnecessary and even impermissible to consider legislative history.[61] The statute's text is clear, as described above, and thus the analysis may stop there. However, for the sake of argument,[62] the legislative history of IIRIRA also supports the traditional interpretation. First, the 1996 House Conference Report on IIRIRA emphasized that § 1225(b) "establishes new procedures for the inspection and in some cases removal of [noncitizens] arriving in the United States," and affirmed that § 1226(a) "restates the current provisions . . . regarding the authority of the Attorney General to arrest, detain, and release on bond [a noncitizen] who is not lawfully in the United States."[63] This report confirms that § 1226(a), not § 1225(b), governs procedures for noncitizens who reside within the United States without authorization.[64] These two definitions clarify that the mandatory detention scheme of § 1225 applies to those arriving to the United States, while the discretionary detention procedures apply to individuals who are already within the country but who have not been admitted. Though a recent Court decision has expanded the population of noncitizens who may be treated "as if stopped at the border" under the "entry fiction" doctrine to include individuals who are detained shortly after entering the country,[65] it strains

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[61] *See Bostock*, 590 U.S. at 674 ("Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." (citing Milner v. Dep't of Navy, 562 U.S. 562, 574 (2011))).

[62] *See id.* at 674–75 ("Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence.").

[63] *Cunha*, 175 F.4th at 89 (quoting H.R. Rep. No. 104-828, at 209 (1996) (Conf. Rep.)).

[64] *Id.* (quoting H.R. Rep. No. 104-828, at 229 (1996) (Conf. Rep.)).

[65] Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (in which the Court found that an individual stopped 25 yards from the border 24 hours after entry could still be treated as if "on the threshold").

credulity to apply such a theory to include individuals who have lived within the country's borders for years, and the Second Circuit has emphasized that such an overreading of the doctrine conflicts with long-settled Supreme Court precedent.[66]

Second, it is notable that the interpretation of these sections had not changed for nearly thirty years and five presidential administrations, including President Trump's first term.[67] Though prior practice is not necessarily dispositive, such consistency supports the conclusion that the statutory interpretation is "natural and reasonable."[68] As the Supreme Court has also recently noted, when the executive suddenly discovers that it possesses a new statutory power, "[t]he fact that no President has ever found such power . . . is strong evidence that it does not exist."[69] Congressional inaction indicates that Congress understood § 1225 to apply only to individuals who were arriving to the United States and not those who had entered the country. As the First Circuit explained, "Congress . . . would not have sat back while the Executive branch implemented a grossly mistaken interpretation [of § 1225(b)(2)(A)]."[70]

Finally, in case there were any doubt about Congress's meaning, the recent amendment to § 1226 via the Laken Riley Act ("LRA") shows that the government's historical interpretation of the classification system was correct. The LRA, passed in January 2025, mandates detention of noncitizens who have been arrested for enumerated crimes, including burglary and shoplifting.[71] It specifies that "DHS must detain an individual who (1) is

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[66] *Cunha*, 175 F.4th at 85–86 (noting that it is long-settled that individuals can effect entry "even by crossing the border illegally" and that "no one could seriously contend that [the entry fiction doctrine] applies to a noncitizen like Petitioner who has been living in the United States for decades."); *see also* Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 212 (1953) (once noncitizens have "passed through our gates, even illegally, [they] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

[67] *See Hernandez Alvarez*, 175 F.4th at 1283.

[68] *Id.* at 1284.

[69] Learning Res., Inc. v. Trump, 607 U.S. 229, 250 (2026); *see also Castañon-Nava*, 175 F.4th at 856 (quoting same).

[70] *Guerrero Orellana*, 188 F.4th at 29.

[71] Laken Riley Act, S.5, 119th Cong. (2025).

unlawfully present in the United States or did not possess the necessary documents when applying for admission; and (2) has been charged with, arrested for, convicted of, or admits to having committed acts that constitute the essential elements of the above crimes."[72] If the government's interpretation of § 1225 were correct, this amendment would apply only to a fraction of noncitizens, specifically those who entered lawfully on a visa and then overstayed.[73] It would not apply to any noncitizen who had entered unlawfully, since all such individuals would already be subject to mandatory detention under § 1225.[74] Senator Katie Britt, who introduced the bill, stated on the Senate floor her understanding of the bill: "[The] individuals that would be subject to this bill . . . crossed our border illegally and then they committed a crime after getting here."[75] Since the government's new interpretation of § 1225 would render every noncitizen who entered the country without inspection subject to mandatory detention, the entire group of noncitizens to which Senator Britt refers would already be detained and the bill would be almost completely superfluous.[76]

In this recent amendment, Congress did not make any statement clarifying that § 1226 should only be applied to individuals who entered lawfully and had overstayed; the recent congressional silence indicates that Congress agreed with the decades-long interpretation which applied § 1226, not § 1225, to EWIs.[77] Attempting to address this issue, the Fifth Circuit stated that,

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[72] *Id.*

[73] *See Cunha*, 175 F.4th at 87 ("[I]t would have been odd for Congress to address the dangers posed by inadmissible . . . unadmitted criminal aliens by amending a narrow provision that the government contends applies primarily to admitted noncitizens who have subsequently become deportable." (internal quotations and citations omitted)).

[74] *See Robledo Gonzalez*, 817 F. Supp. 3d at 471 ("[I]f § 1225(b)(2) authorized detention of all inadmissible noncitizens, criminal record or not, then § 1226(c)(1)(E) [added by the LRA] would be superfluous.").

[75] 171 CONG. REC. S245 (daily ed. Jan. 9, 2025) (statement of Sen. Katie Britt).

[76] *See Cunha*, 175 F.4th at 88 ("By nullifying nearly all applications of Sections 1226(a) and 1226(c), the government's interpretation 'violate[s] the canon against interpreting any statutory provision in a manner that would render another provision superfluous.'" (quoting Bilski v. Kappos, 561 U.S. 593, 607–08 (2010))).

[77] *See Cunha*, 175 F.4th at 92 ("Congressional silence, too, is instructive.").

when the LRA was passed, "the Executive was still declining to exercise its full enforcement authority" under § 1225.[78] In other words, Congress believed that § 1225 authorized the executive to detain all EWIs, but understood that the executive declined to do so. However, this argument does not account for Congress's acceptance of the previous classification scheme, since Congress could have clarified the language of § 1226 if it disagreed with the executive's narrower interpretation of the text. Thus, the passage of the LRA undermines any argument that the historical reading of § 1226 conflicted with Congress's intentions. In fact, it indicates that the current Congress interprets the statute as it has historically been read, bolstering the contention that § 1225 should apply only to a subset of noncitizens.

Setting aside textual analysis and legislative history, constitutional analysis also counsels against embracing the government's new interpretation. The canon of constitutional avoidance cautions against interpreting an ambiguous statute in such a manner as to create constitutional concerns.[79] As discussed above, § 1225 is not ambiguous, so courts need not reach constitutional analysis and can simply read the plain statutory text to reach the conclusion held by the majority of courts.[80] However, even if the text were ambiguous, constitutional avoidance would require courts to reject the government's interpretation.[81] Mandatory detention of all EWIs in the United States would raise constitutional due process issues rooted in the Fifth Amendment.[82] The Supreme Court has recognized that the

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[78] *Buenrostro-Mendez*, 166 F.4th at 505.

[79] *See, e.g., Jennings*, 583 U.S. at 286 ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.").

[80] *Cunha*, 175 F.4th at 93 ("As we have extensively discussed, Petitioner's reading of '[noncitizen] seeking admission' is the proper construction of Section 1225(b)(2)(A)'s plain text and, thus, we need not rely here upon the doctrine of constitutional avoidance.").

[81] *Id.* at 94 ("[E]ven if there were ambiguity in the statutory text, we would reject the government's interpretation because of the grave constitutional concerns it raises.").

[82] *See id.* at 94 (noting that the petitioner was protected by the Due Process Clause and that categorical mandatory detention of all noncitizens in

Fifth Amendment applies to all individuals within the United States,[83] and noncitizens who are living within the country are entitled to greater protections than those who are outside of its borders.[84] As a result, mandatory detention of EWIs without a bond hearing would pose constitutional concerns.[85]

The Supreme Court has noted that "[t]he distinction between [a noncitizen] who has effected an entry into the United States and one who has never entered runs throughout immigration law."[86] Once noncitizens enter the country, "whether their presence . . . is lawful [or] unlawful,"[87] they are afforded due process rights. Immigration detention is a form of civil, not criminal, detention, and thus it must be non-punitive.[88] Its official purposes, according to the government, are to ensure that individuals appear for their immigration hearings and to protect the public.[89] Additionally, detention must "bear[a] reasonable relation to" those stated purposes.[90] Though ICE may argue that detention effectively ensures that individuals appear for their hearings, such a deprivation of rights would likely not pass the *Mathews v. Eldridge* test since the deprivation is far beyond what is necessary to accomplish this goal,[91] especially since there are

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Petitioner's context would not meet the requirement that civil detention be nonpunitive).

[83] *See Zadvydas*, 533 U.S. at 693 ("[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent.").

[84] *See id.* ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to [noncitizens] outside of our geographic borders.").

[85] *See, e.g.*, Jacobo-Ramirez v. Noem, 817 F. Supp. 3d 1037, 1045 (D. Nev. 2025) ("According to this [new] interpretation, detention is mandatory no matter how long a noncitizen has resided in the country, and without any due process to ensure the government has a legitimate interest in their detention.").

[86] *Zadvydas*, 533 U.S. at 693.

[87] *Id.*

[88] *Id.* at 690.

[89] *Id.*

[90] *Id.* (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)); *see also Cunha*, 175 F.4th at 95 ("[Detention] must still 'serve its purported immigration purpose,' which must 'outweigh the individual's constitutionally protected interest in avoiding physical restraint.' (citing Demore v. Kim, 538 U.S. 510, 527 (2003)).

[91] *See* Mercado v. Francis, 811 F. Supp. 3d 487, 504 (S.D.N.Y. 2025) (noting that the government had not indicated a government interest that outweighed the plaintiff's "significant liberty interest in being free from imprisonment" and

alternatives to detention programs that ICE has implemented for over twenty years.[92] Moreover, the government has made no attempt to claim that detention of all individuals who have not been admitted is necessary to protect the public.[93] DHS is arresting individuals at random, many of whom have even been deemed by an immigration judge to pose no flight risk or danger to the community.[94] This new policy does not comport with the stated purposes of civil immigration detention and instead attempts to "arbitrarily detain as many people as possible."[95]

Proper interpretation of §§ 1225 and 1226 is necessary to ensure immigration detention comports with its stated purposes and does not violate the constitutional rights of millions of individuals living within this country's borders. This interpretive question has major consequences for families and communities across the country. As the Second Circuit noted, the government's proposed interpretation "would send a seismic shock through our immigration detention system and society, straining our already overcrowded detention infrastructure, incarcerating millions, separating families, and disrupting communities."[96] The majority of district and circuit courts that have considered this question have correctly determined that the plain text, legislative history, and constitutional implications dictate that § 1225 should only

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that "[t]he current administration's unilateral decision that all noncitizens like [the plaintiff] are to be mandatorily detained affords to such individuals no process, let alone due process." (citing Mathews v. Eldridge, 424 U.S. 319 (1976)); *see also Buele Morocho*, 2026 WL 2546223, at *10 ("[T]he *Mathews* factors weigh in Petitioners' favor, and their detentions without bond hearings violated their procedural due process rights.").

[92] *Featured Issue: ICE's Alternatives to Detention Program,* AILA Doc. No. 24112102 (Nov. 21, 2024), https://www.aila.org/library/featured-issue-ice-alternatives-to-detention-program.

[93] *See, e.g., Cunha,* 175 F.4th at 95 *("*Here, like in *Zadvydas*, mandatory detention of noncitizens like Petitioner (who cannot be said, as a categorical matter, to pose a danger to the community or risk of flight) for a substantial period of time would raise serious constitutional questions, especially because the government has failed to explain how it would bear a 'reasonable relation' to any legitimate, non-punitive purpose.").

[94] Brief for American Immigration Council et al. as Amici Curiae Supporting Appellees at 8–9, Buenrostro-Mendez v. Bondi, 166 F.4th 494 (5th Cir. 2026) (Nos. 25-20496 & 25-40701).

[95] *Id.* at 2.

[96] *Cunha*, 175 F.4th at 93.

apply to noncitizens who have just arrived to the country, and § 1226 should continue to be the default rule for EWIs residing within the country.