Case No. 25-20496 & 25-40701

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Victor Buenrostro-Mendez,
Petitioner-Appellee,

v.

Pamela Bondi, U.S. Attorney General; Kristi Noem, Secretary, U.S. Department of Homeland Security; Todd M. Lyons, Acting Director, U.S. Immigration and Customs Enforcement; Matthew W. Baker, Acting ICE Houston Field Office Director, U.S. Immigration and Customs Enforcement; John Linscott, ICE Director, Houston Contract Detention Facility, U.S. Immigration and Customs Enforcement; Martin Frink, Warden, Houston Contract Detention Facility, CoreCivic,
Respondents-Appellants,

consolidated with

Jose Padron Covarrubias,
Petitioner-Appellee,

v.

Miguel Vergara, ICE Field Office Director, San Antonio ICE Detention and Removal; Kristi Noem, Secretary, U.S. Department of Homeland Security; Susan Aikman, In her official capacity, as Assistant Chief Counsel Office of Chief Counsel, U.S. Immigration and Customs Enforcement; Pamela Bondi, U.S. Attorney General,
Respondents-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Nos. 4:25-cv-3726 and 5:25-cv-112

BRIEF OF LAWYERS DEFENDING AMERICAN DEMOCRACY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR REHEARING *EN BANC*

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to FED. R. APP. P. 26.1 and 5th Cir. R. 29.2, *Amicus Curiae* Lawyers Defending American Democracy (LDAD) submits this supplemental certificate of interested persons to provide the required information as to their corporate status and affiliations and fully disclose all those with an interest in this brief. LDAD is a non-partisan tax-exempt 501(c)(3) organization. LDAD is not owned by any parent corporation and no publicly held corporation has 10% or more ownership.

Pursuant to 5th Cir. R. 29.2, *Amicus Curiae*, through their undersigned counsel, hereby certifies that, in addition to the persons and entities listed in the parties' certificates, the following entity has an interest in the outcome of this case.

Amicus Curiae

Lawyers Defending American Democracy

Counsel for Amicus Curiae

Elissa Steglich

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Elissa Steglich
Elissa Steglich
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Dated: March 30, 2026

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STATEMENT OF *AMICUS CURIAE*

Amicus Curiae Lawyers Defending American Democracy (LDAD) is a non-profit, nonpartisan organization devoted to encouraging the legal profession to enforce and uphold principles of democracy and the rule of law. Matters of executive authority and agency interpretation of statutes, especially in contravention of decades of policy and practice as in this case, are of particular concern for LDAD.

No party's counsel has authored this brief either in whole or in part; no party or its counsel contributed money that was intended to fund the preparation or submission of the brief; and no person other than the amicus curiae or its members has contributed money intended to fund the preparation or submission of the brief. Fed. R. App. P. 29(a)(4)(E). Moreover, Petitioner and Respondent consent to the filing of this brief. Fed. R. App. P. 20(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of exceptional importance with staggering consequences. The panel has allowed the Department of Homeland Security (DHS) sweeping authority, pursuant to an unprecedented statutory interpretation by the Board of Immigration Appeals (BIA), to hold millions of noncitizens in mandatory detention without review or possibility of bail. These people would have been eligible for bond at any time over the last three decades pursuant to an unquestioned understanding of the governing statute by Congress, the federal courts, DHS, the BIA, and the immigration courts in the Department of Justice. This newfound detention authority applies to noncitizens without regard to how long they have been in this country, or the impact of being detained throughout a potentially lengthy removal proceeding.

This unprecedented, expansive authority is based on a new agency interpretation of immigration law that is flatly inconsistent with almost thirty years of unquestioned application of the statute. The 180-degree reversal in policy and practice was sudden and unexplained. If there was careful—or any—deliberation leading to this seismic change, we have not been able to find it.

This abrupt reversal already is having monumental, life-altering consequences for individuals, families, and communities, as well as detention resources and the federal courts, which have been inundated with thousands of petitions for *habeas corpus.*[1] The extent of upheaval will only increase if allowed to continue. This arbitrary, ill-considered agency action should be struck down not only for the cogent reasons explained by Petitioners, but also as an unlawful exercise of administrative power far beyond what Congress could have intended.

This interpretation must be rejected under the major questions doctrine. "Because [an] agency has no inherent or implied authority, its powers to make major decisions must come only from unequivocal statutory text." *Alliance for Fair Board Recruitment v. SEC,* 125 F. 4th 159, 181 (5th Cir. 2024) (en banc). Because the panel in this case did not address this doctrine, rehearing *en banc* is warranted.

[1] "Federal district court judges in 40 states — appointed by every president since Ronald Reagan — have largely recoiled at the policy. More than 400 have rejected the administration's approach, ruling against it in more than 5,000 cases." Kyle Cheney and Josh Gerstein, *Another Appeals Court Backs Trump Administration's Mass Detention Policy*, POLITICO (Mar. 25, 2026).

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH SUPREME COURT PRECEDENT ON THE MAJOR QUESTIONS DOCTRINE.

In *West Virginia v. EPA*, 597 U.S. 697 (2022), the Supreme Court articulated the major questions doctrine as a limitation on administrative actions that go beyond the bounds prescribed by Congress. *See id.* at 721 (whether Congress "meant to confer the power the agency has asserted"). The doctrine applies in "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.* (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). The doctrine prevents agency action that alters by fiat a longstanding, unquestioned understanding of specific statutory terms and how they interact in the statutory scheme. *See id.*

The Supreme Court has applied this interpretive tool to invalidate the executive's imposition of tariffs, *Learning Resources, Inc. v. Trump*, 146 S. Ct. 628 (2026), and the Secretary of Education's forgiveness of

student loans. *Biden v. Nebraska*, 600 U.S. 477 (2023). The statutes at issue in those cases involved explicit delegations of emergency power—a context in which courts often defer to the executive.

The agencies in this case have adopted an interpretation of immigration law that abruptly expands by millions the category of people who are subject to mandatory detention without bail. Their newly-discovered rationale for this massive detention scheme meets all the criteria for the doctrine's application—"unheralded" departure from longstanding policy and practice; transformative breadth of the newly asserted power; and enormous economic and political significance.

1. For over thirty years, it has been unquestioned that noncitizens within the interior of the country are entitled to bond pending removal proceedings, under 8 U.S.C. § 1226(a). *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997) (noncitizens "who are present without having been admitted or paroled . . . will be eligible for bond and bond redetermination"); *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006); *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005). The statute is explicit that § 1226(a) covers "detention

pending a decision on whether [an] alien is to be removed from the United States." Detention is permissible but not required; release on bond is permissible; and immigration court review of a DHS detention decision is available. ROA.25-40701.116–17 (DHS guidance). No agency has ever suggested—let alone insisted—that 8 U.S.C. § 1225(b)(2)(A) and its mandatory detention requirement applied to individuals apprehended within the interior and subjected to removal proceedings, who have always been governed exclusively by § 1226(a).

On July 8, 2025, however, DHS issued a short "[i]nterim [g]uidance" stating that it, "in conjunction with the Department of Justice (DOJ), has revisited its legal position on detention and release authorities," and determined that "section 235 [8 U.S.C. § 1225] . . . , rather than section 236 [8 U.S.C. § 1226]," is "the applicable immigration detention authority," throughout removal proceedings for noncitizens previously covered by § 1226. *Id.* Thus, "[e]ffective immediately," noncitizens in the interior "are now treated in the same manner that 'arriving aliens' have historically been treated." *Id.* While this guidance was supposed to be interim, "*while additional operational guidance is developed,*" *id.* (emphasis added), the agency's interpretation was adopted in a

precedential decision of the BIA, *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), making the interpretation binding on immigration courts such that they no longer can review DHS custody determinations in these cases.

It is hard to imagine a more cavalier discarding of a statutory interpretation under which the relevant agencies had operated in exactly the opposite manner for three decades, unquestioned by Congress or the courts. *See* Petition for Rehearing En Banc of Petitioners-Appellees, at 2–10, *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, Nos. 25-20496 & 25-40701 (5th Cir. 2026). In *West Virginia*, the Environmental Protection Agency (EPA) had not *reversed* its prior statutory interpretation, but rather relied on its broad statutory authority to implement a new approach to address changing environmental conditions. Nevertheless, the Supreme Court invalidated EPA's actions, faulting the agency for finding "'in a long-extant statute an unheralded power' representing a 'transformative expansion in [its regulatory authority.]'" 597 U.S. at 724 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)); *see also Learning Resources*, 146 S. Ct. at 641 (assessing the "lack of historical precedent . . . coupled with the breadth of authority" asserted)

(quoting *Nat'l Fed. of Indep. Bus. v. OSHA*, 595 U.S. 109, 119 (2022)); *Nebraska*, 600 U.S. at 500–02 (assessing both history and breadth of an "unprecedented" asserted authority).

Respondents' statutory interpretation is at least as "unheralded" an assertion of executive power, which should be reviewed with a high degree of skepticism and judicial oversight. *See Learning Resources*, 146 S. Ct. at 640 (executive had never, over five decades, "invoked the statute [at issue] to impose *any* tariffs"); *Nebraska*, 600 U.S. at 501 (executive "never previously claimed powers of this magnitude" under the statute); *West Virginia*, 597 U.S. at 724. In short, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *West Virginia*, 597 U.S. at 725 (quoting *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)).[2]

[2] The panel accepted the agencies' newfound explanation that there is no difference between an "applicant for admission" and someone "seeking admission," *Buenrostro-Mendez v. Bondi*, 166 F.4th at 502. The panel failed to appreciate that these statutory words are terms of art, which play different roles in the statute as a whole, such that people seeking admission at the border are treated differently than those in the interior.

2. The breadth and transformative nature of the asserted detention authority here is astonishing. Respondents' interpretation entirely upends the existing statutory detention scheme and infrastructure by requiring mandatory detention, without possibility of bond, for millions of people. Principal Brief of Petitioners-Appellees, at 50, *Buenrostro-Mendez v. Bondi*, 166 F.4th 494, Nos. 25-20496 & 25-40701 (5th Cir. 2026).

As in *West Virginia*, accepting the agencies' mass detention interpretation would "effect[ ] a 'fundamental revision of the statute'" and lead to an "entirely different" regulatory scheme. 597 U.S. at 701 (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994))*; see also Learning Resources*, 146 S. Ct. at 640; *Nebraska*, 600 U.S. at 501.

3. Respondents' statutory interpretation undoubtedly is enormously significant economically and politically. One analysis suggests that detaining up to six million people could cost $90 billion,[3] not including the costs of new detention facilities or impacts on the labor market.

[3] American Immigration Council, "Mass Deportation: Devastating Costs to America, Its Budget and Economy," at 14 (Oct. 2024).

The political and even constitutional significance of the asserted authority is equally stark. Mandatory mass detention threatens to deprive millions of people of their constitutional liberty interests.[4] While Congress has amended the statute, over the course of decades it has not changed the statute in any way that would alter the settled interpretation of § 1226(a). Instead, it acknowledged its awareness and approval of allowing bond for noncitizens in the interior when it passed the Laken Riley Act, which mandates detention of *certain* explicit categories of noncitizens detained pursuant to § 1226(c), if they have been charged with or convicted of certain crimes. Pub. L. No. 119-1, 139 Stat. 3, 3 (2025); Principal Brief of Petitioners-Appellees at 10, 18–19; Brief for Immigration Law Scholars as Amici Curiae Supporting Petitioners at 26–27. Congress did not mandate detention for all noncitizens who entered without admission and DHS does not have the authority to impose such a draconian rule.

[4] *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("serious constitutional problem"); *see also Demore v. Kim*, 538 U.S. 510, 531–32 (2003) (due process interest in the context of immigration detention) (Kennedy, J., concurring).

II. THE PANEL DECISION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE MAJOR QUESTIONS DOCTRINE

This Court has not been reluctant to invalidate administrative action on major questions grounds, even in circumstances less compelling than those here. Less than two years ago this Court granted rehearing *en banc* and vacated a panel decision that held the doctrine inapplicable. *Board Recruitment*, 125 F.4th at 185, vacating 85 F.4th 226 (5th Cir. 2023).

In *Board Recruitment*, the Securities and Exchange Commission (SEC), after notice and comment, approved a rule promulgated by Nasdaq, a private securities exchange, concerning diversity on the boards of its member companies. 85 F.4th at 237–38. This action was challenged on the ground, *inter alia*, that it violated the major questions doctrine by imposing requirements on companies without clear and explicit congressional authorization.

A panel of this Court held the major questions doctrine inapplicable. After noting that the rule originated with Nasdaq, not the SEC, the panel found that the SEC's approval was "not economically or politically significant enough to trigger the major questions doctrine," *id.*

at 257, and, in any event, the SEC's authority to approve an exchange rule is "plain on the face of the Exchange Act." *Id.* at 258.

This Court granted rehearing *en banc* and vacated the panel decision, holding that the SEC had no authority to approve the Nasdaq rule. It found that the statute granted no such authority, and said that the major questions doctrine "confirm[ed]" its "interpretation of the statute's ordinary meaning." *Board Recruitment*, 125 F.4th at 180. This Court stated that the SEC had discovered newfound power in vague statutory language and had never before "claimed the authority to impose diversity requirements, or anything resembling them, on corporate boards." *Id.* at 181–82. The Court also considered "the 'economic and political significance' of the Secretary's action" to be "'staggering by any measure.'" *Id*. at 181 (quoting *Nebraska*, 600 U.S. at 502)).

Under *Board Recruitment*, an interpretation of the immigration statute at issue here, informed by the major questions doctrine, calls for invalidation of the agencies' radical action. This case raises the same issues of unheralded assertion of power, lack of authority from Congress, dramatic change in course, transformative breadth of the newly claimed

authority, and seismic economic and political consequences. Rehearing *en banc* is necessary to correct the panel's erroneous decision.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(b)(4) because it contains 2463 words, according to the word count feature reported in Microsoft Word, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, size 14 font.

/s/ Elissa Steglich
Elissa Steglich
Counsel for Amicus Curiae

Dated: March 30, 2026

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the CM/ECF system. I further certify that all participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Elissa Steglich
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Dated: March 30, 2026