

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

TOMAS ALFREDO MOLINA OCHOA,

Petitioner,

v.

No. 1:25-cv-00881-JB-LF

KRISTI NOEM, in her official capacity as Secretary of the U.S. Department of Homeland Security; PAMELA BONDI, in her official capacity as Attorney General of the United States; TODD LYONS, in his official capacity as Acting Director and Senior Official Performing the Duties of the Director of U.S. Immigration and Customs Enforcement; MARY DE ANDA-YBARRA, in her official capacity as Field Office Director of the El Paso Field Office of U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations; GEORGE DEDOS, in his official capacity as Warden of the Cibola County Correctional Center,

Respondents.

**RESPONDENTS' OBJECTIONS TO THE
PROPOSED FINDINGS & RECOMMENDED DISPOSITION**

Respondents, Immigration and Customs Enforcement (“ICE”), and the Department of Homeland Security (“DHS”) (collectively “Respondents”),¹ hereby submit these objections to the Honorable Judge Fashing’s Proposed Findings and Recommended Disposition (“PFRD”), filed November 7, 2025. Doc. 21.

¹ The undersigned counsel do not represent George Dedos, Warden, Cibola County Correctional Center, as that is a private facility, and Warden Dedos is not a federal employee. However, all arguments made on behalf of the remaining Respondents apply with equal force to Warden Dedos, as he is detaining the Petitioner at the request of the United States.

I. Respondents object to the recommendation that the Court has subject matter jurisdiction over the petition.

The PFRD asserts that the Court has subject matter jurisdiction because Petitioner challenges his detention, which is reviewable by a district court, rather than a removal order, which is reviewable only by a circuit court of appeals. *Id.* at 8-11. Respondents disagree because at least three provisions of 8 U.S.C. § 1252 bar district court review of Petitioner’s claims.

A. 8 U.S.C. § 1252(e)(3) bars review of Petitioner’s claims.

Section 1252(e)(3) deprives this court of jurisdiction, including habeas corpus jurisdiction, over Petitioner’s challenge to his detention under § 1225(b)(2)(A). Section 1252(e)(3) limits judicial review of “determinations under § 1225(b) of this title and its implementation” to only the District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3). Paragraph (e)(3) further confines this limited review to (1) whether § 1225(b) or an implementing regulation is constitutional or (2) whether a regulation or other written policy directive, guideline, or procedure implementing the section violates the law. *See* 8 U.S.C. § 1252(e)(3)(A)(i)-(ii); *see also M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021). Unlike other provisions within § 1252(e), § 1252(e)(3) applies broadly to judicial review of § 1225(b), not just determinations under § 1225(b)(1). *Compare* 8 U.S.C. § 1252(e)(1)(A), (e)(2), *with* 8 U.S.C. § 1252(e)(3)(A); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’ . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”).

Here, Petitioner challenges the determination, set forth in writing by both the Department of Justice and DHS, that aliens who entered the United States without inspection are subject to mandatory detention under § 1225(b)(2). Petitioner thus seeks judicial review of a written policy or guideline implementing § 1225(b), which is covered by § 1252(e)(3)(A)(ii).

B. 8 U.S.C. § 1252(g) bars review of Petitioner’s claims.

Section 1252(g) categorically bars jurisdiction over “*any* cause or claim by or on behalf of any alien *arising from* the decision or action by the [Secretary of Homeland Security] to *commence proceedings*, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g) (emphasis added). The Secretary of Homeland Security’s decision to *commence removal proceedings*, including the decision to detain an alien pending such removal proceedings, squarely falls within this jurisdictional bar. In other words, detention clearly “aris[es] from” the decision to commence removal proceedings against an alien. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s discretionary decisions to commence removal” and also to review “ICE’s decision to take [plaintiff] into custody and to detain him during removal proceedings”); *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 298 (3d Cir. 2020) (“The text of § 1252(g) . . . strips us of jurisdiction to review [the claim] . . . [T]o perform or complete a removal, the [Secretary of Homeland Security] must exercise [her] discretionary power to detain an alien for a few days. That detention does not fall within some other part of the deportation process.”) (internal quotations and citations omitted); *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) (“The decision to detain plaintiff until his hearing before the Immigration Judge *arose from* this decision to commence proceedings[.]”) (emphasis added); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010) (citing *Khorrami v. Rolince*, 493 F.

Supp. 2d 1061 (N.D. Ill. 2007)) (“[Plaintiff’s] detention necessarily *arises from* the decision to initiate removal proceedings against him.”) (emphasis added); *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008) (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)) (“The [Secretary] may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings . . . Thus, an alien’s detention throughout this process *arises from* the [Secretary]’s decision to commence proceedings[]” and review of claims arising from such detention is barred under § 1252(g)) (emphasis added). Put in the Supreme Court’s words, detention pending removal is a “specification” of the decision to commence proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n.9 (1999) (“§ 1252(g) covers” a “specification of the decision to ‘commence proceedings’”). As such, judicial review of the Petitioner’s claims is barred by § 1252(g).

C. 8 U.S.C. § 1252(b)(9) bars review of Petitioner’s claims.

Under § 1252(b)(9), “judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States” is only proper before the appropriate court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels judicial review of all [claims arising from deportation proceedings]” to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

Notwithstanding any other provision of law (statutory or non-statutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5).

“Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they ‘arise from’ removal proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is “unrelated to any removal action or proceeding” is it within the district court’s jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple”) (internal quotation marks omitted).

Critically, “[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and “receive their day in

court.” *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (“The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns” by permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional claims or questions of law.”).

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (§ 1252(b)(9) includes challenges to the “decision to detain [an alien] in the first place or to seek removal[.]”).

Here, Petitioner challenges the decision and action to detain him, which arises from DHS’s decision to commence removal proceedings, and is thus an “action taken . . . to remove [him] from the United States.” *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government’s decision to “commence proceedings”). As such, the Court lacks jurisdiction over this action. The reasoning in *Jennings* outlines why the Petitioner’s claims cannot be reviewed by the Court.

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that “§

1252(b)(9) [did] not present a jurisdictional bar” in situations where “respondents . . . [were] not challenging the decision to detain them in the first place.” *Id.* at 294–95. In this case, the Petitioner *does* challenge the government’s decision to detain him in the first place. Though the Petitioner frames his challenge as relating to detention authority, rather than a challenge to DHS’s decision to detain him in the first instance, such creative argument does not evade the preclusive effect of § 1252(b)(9).

The fact that the Petitioner is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because “detention *is* an ‘action taken . . . to remove’ an alien.” *See Jennings*, 583 U.S. at 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the Petitioner’s claims for lack of jurisdiction under § 1252(b)(9). The Petitioner must present his claims before the appropriate appeals court because he challenges the government’s decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

II. Respondents object to the implication, if any, that they made a concession about jurisdiction when asked at the hearing if the Court retains jurisdiction until the order of removal becomes administratively final.

The PFRD asserts that the Court retains jurisdiction over the case until the order of removal becomes administratively final and notes that the parties acknowledged this continuing jurisdiction during the hearing. Doc. 21 at 12. To the extent, if any, that the Court construes the hearing colloquy against Respondents as a waiver of any jurisdictional argument, Respondents object. During the hearing, Respondents’ statement about jurisdiction assumed, for the sake of argument, that the Court had jurisdiction to review the petition, but Respondents maintain that the Court lacks jurisdiction to review the petition.

III. Respondents object to the recommendation that § 1226 applies, and that Petitioner’s due process rights were violated because he was detained under an improper statutory section, i.e., § 1225.

The PFRD concludes that Petitioner was erroneously detained without bond under 8 U.S.C. § 1225 and therefore a due process violation occurred. Doc. 21 at 13-19. The PFRD cites numerous cases discussing this proposition. However, at least three district courts that have considered this issue upheld the application of § 1225 in similar circumstances, and the Court should do the same here. *See Peña v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913 (D. Mass. July 28, 2025) (finding unlawfully present alien, who had been in the country for approximately twenty years, was nonetheless an “applicant for admission” upon plain language reading of the statute); *Vargas Lopez v. Trump*, No. 8:25CV526, 2025 WL 2780351 (D. Neb. Sept. 30, 2025) (finding that § 1225(b) applied to warrantless arrest of alien unlawfully present for over 10 years; that alien remained an applicant for admission given his desire to stay in the United States; and that an alien’s removal procedure can fall under both §§ 1225 and 1226, which overlap); *Chavez v. Noem*, No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025) (finding under plain language reading of § 1225 that petitioners remained applicants for admission).

Regarding the PFRD’s assertion that a due process violation occurred, Doc. 21 at 13, Respondents object because the due process clause only prohibits “the unduly prolonged detention of an alien.” *Peña*, 2025 WL 2108913, at *1. Here, the detention has lasted fewer than six months—which is not unduly prolonged—and Petitioner’s underlying immigration case is progressing quickly. Also, and more generally, without an erroneous detention, there can be no due process violation.

IV. Respondents object to the recommendation that Petitioner was not required to exhaust his administrative remedies and, even if he was, exhaustion would be futile.

The PFRD minimizes the importance of the prudential exhaustion requirement and asserts that the futility exception excuses Petitioner's failure to appeal the July 30, 2025, order of the immigration judge denying his request for custody redetermination. Doc. 21 at 20-23. However, in the prisoner habeas context, the Tenth Circuit has applied the prudential exhaustion requirement more strictly, noting that "exhaustion of available administrative remedies is a prerequisite for § 2241 habeas relief, although we recognize that the statute itself does not expressly contain such a requirement." *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). Policy considerations also underscore the importance of exhaustion. *See Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007) ("Prudential exhaustion may be required if (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review."); *see also Moscato v. Fed. Bureau of Prisons*, 98 F.3d 757, 761 (3d Cir. 1996) (requirement for exhaustion grounded in the same three reasons).

Here, the Court should not allow Petitioner to shortcut the administrative process. The District Court for the Northern District of Ohio has dismissed at least three petitions in similar circumstances as premature, and the Court should do the same here. *See Monroy Villalta v. Greene*, No. 4:25-cv-1594, 2025 WL 2472886 (Aug. 25, 2025 N.D. Ohio); *Laguna Espinoza v. Dir. of Detroit Field Off.*, No. 4:25-cv-02107, 2025 WL 2878173 (N.D. Ohio Oct. 9, 2025); *Abdoulaye Ba v. Dir. of Detroit Field Off.*, No. 4:25-cv-02208, 2025 WL 2977712 (N.D. Ohio Oct. 22, 2025).

The PFRD recommends excusing Petitioner's failure to exhaust administrative remedies by asserting that an appeal would be futile given the precedential decision in *Matter of Yajure Hurtado*. Doc. 21 at 21. However, at least one court has disagreed with that reasoning. In *Laguna*

Espinoza, the court found that the futility exception did not apply, despite petitioner's awareness of *Matter of Yajure Hurtado*, because even "a high probability of denial" does not weigh in favor of waiving exhaustion. 2025 WL 2878173, at *3 (citation omitted). The *Laguna Espinoza* court discussed the policy justifications favoring exhaustion in the immigration context, "include[ing] protecting the authority of administrative agencies, limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary." *Id.* Here, the Court should not speculate about the viability of the appeal and instead require proper exhaustion.

A necessary question when considering exhaustion is which party bears the burden of proof. In other words, must the petitioner show that he exhausted remedies or must the respondent show that he failed to do so. In the immigration context, there does not appear to be a Tenth Circuit case on point, and none of the district court decisions from the Northern District of Ohio cited above discuss the burden. However, in the prisoner habeas context, the burden appears to be on the respondents. *See Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007) (stating that "the burden of proof for the exhaustion of administrative remedies in a suit governed by the [Prison Litigation Reform Act] lies with the defendant").

Here, should the court follow *Roberts*, at least two key pieces of evidence show that Respondents have met their burden. First, the declaration submitted by William S. Shaw, Assistant Field Office Director with ICE Albuquerque, states that "Molina Ochoa's appeal due date was on August 30, 2025, and there was no notice to appeal filed to the Board of Immigration Appeals." Doc. 5-1 at 3. In other words, there is no record that Petitioner submitted his pro se appeal. Second, a review of Petitioner's purported notice of appeal reveals numerous facial deficiencies, including that he did not sign his name and did not write the name of person to whom he served the appeal.

See Doc. 1-3 at 2-4. This corroborates the conclusion that Petitioner never submitted a pro se appeal and therefore failed to follow the administrative appeal process, which bars his claim.

V. Respondents object to the recommendation for burden shifting at the bond hearing.

The PFRD relies heavily on analysis in *Salazar v. Dedos*, No. 1:25-cv-00835-DHU-JMR, 2025 WL 2676729 (D.N.M. Sept. 17, 2025), for the proposition that the government should bear the burden of clear and convincing evidence at the bond review hearing. Doc. 21 at 23. *Salazar* applied two different legal tests to analyze the burden shifting question: (1) the three-factor test from *Matthews v. Eldridge*, 424 U.S. 319 (1976), applied in *L.G. v. Choate*, 744 F. Supp. 3d 1172 (D. Colo. 2024), and (2) the more general balancing test from *Diaz-Ceja v. McAleenan*, No. 19-cv-00824-NYW, 2019 WL 2774211, at *9 (D. Colo. 2019). Should the Court conclude that § 1226 applies, and a bond hearing is authorized—which Respondents dispute—Respondents disagree with the PFRD’s conclusions and believe that burden shifting is not justified under either legal test.

Regarding the first test, the PFRD references the facts in *Choate*, but that reliance is misplaced because *Choate* is largely distinguishable. There, the petitioner’s detention lasted 30 months, compared to just 5 months here. *Id.* at 1178. Further, applying the *Matthews* factors anew to this case reveals that burden shifting is not warranted. Under the first factor—balancing the private interest affected by the official action—Petitioner’s brief detention is part of noncitizen removal proceedings, his case is moving quickly, and his order of removal is currently under appeal, which is akin to civil confinement, not incarceration. *Compare with Choate*, 744 F. Supp. 3d at 1182 (“Petitioner has been detained for over 30 months under conditions another court in this District has recognized as more akin to incarceration than civil confinement.”). Under the second factor—risk of erroneous deprivation of the petitioner’s private interest through procedures

used and the probable value of additional or different procedural safeguards—it is not clear why Petitioner needs additional procedural safeguards because he is represented by counsel in a fast-moving immigration case. The PFRD appears to disagree, noting that the immigration judge issued a “one-paragraph order,” suggesting that the immigration judge failed to consider Petitioner’s position justifying release and may have the same disregard in future hearings. Doc. 21 at 26. However, a terse order without extensive factual findings is understandable here because the immigration judge believed his court lacked jurisdiction to review Petitioner’s bond redetermination. In this case, if the Court finds that the immigration judge has jurisdiction and must conduct a bond hearing, there is no evidence to suggest the immigration judge will disregard Petitioner’s arguments at the hearing. Finally, under the third factor—the government’s interest in avoiding additional procedures—the interests are significant. The government should not be tasked with higher burdens of proof than those proscribed by statute in the absence of a prolonged detention, like the 30-month detention in *Choate*.

Burden shifting is also not warranted under the alternative dual balancing test used in *Diaz-Ceja*. Simply put, there is a statutory process for a bond hearing, and absent specific facts present in *Diaz-Ceja*, like the 27-month detention and circuitous procedural path, Petitioner is not entitled to burden shifting. *See* 2019 WL 2774211, at *1 (D. Colo. 2019).

WHEREFORE, Respondents submit the foregoing objections to the Honorable Judge Fashing’s Proposed Findings and Recommended Disposition, filed November 7, 2025, and request the District Court sustain said objections in reaching a decision in this matter.

Respectfully Submitted,

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/s/ Peter Haynes 11/21/25

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 21, 2025, I filed the foregoing pleading electronically through the CM/ECF system, which caused all parties and counsel of record to be served, as more fully reflected on the Notice of Electronic Filing.

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