

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JACIEL CIRRUS ROJAS,

Petitioner,

v.

Case No. 25-CV-1437

SAMUEL OLSON, Field Office Director,
Chicago Field Office, Immigration and
Customs Enforcement; SCOTT SMITH,
Jail Administrator, Dodge County Jail,

Respondents.

**RESPONDENTS' ANSWER AND RESPONSE TO
(1) PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR
EMERGENCY INJUNCTIVE RELIEF AND
(2) MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Pursuant to 28 U.S.C. § 2243 and the Court's Rule 4 Screening Order, ECF 5, respondents Samuel Olson, Field Office Director, Chicago Field Office, U.S. Immigration and Customs Enforcement ("ICE"), and Scott Smith, Jail Administrator Dodge County Jail (collectively the "Respondents"),¹ by and through undersigned counsel, hereby answer the Petition for Writ of Habeas Corpus and Complaint for Emergency Injunctive Relief ("Petition"), ECF 1, and respond to the Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Motion"), ECF 4, filed by the petitioner, Jaciel Cirrus Rojas ("Petitioner").

¹ This response is filed on behalf of the Dodge County jail administrator as well, because Petitioner is held there on an ICE detainer.

INTRODUCTION

Petitioner is an undocumented foreign national who has been present in the United States since 2018. He is temporarily detained, pending ICE's appeal of an immigration judge's order releasing Petitioner on bond, under 8 C.F.R. § 1003.19(i)(2) (which provides for a temporary 90-day stay on such an order). Petitioner seeks habeas relief under 28 U.S.C. § 2241, claiming that his temporary detention violates the Due Process Clause of the Fifth Amendment, the Immigration and Nationality Act ("INA"), and is *ultra vires*. He also seeks a TRO under Federal Rule of Civil Procedure 65 ordering his immediate release and enjoining further detention.

Because the Immigration and Nationality Act limits the Court's jurisdiction, and because Petitioner's temporary detention in no way exceeds the government's broad authority and discretion in immigration matters or deprive Petitioner of due process, the Court should deny Petitioner relief.

BACKGROUND

For well over a century, American immigration law has authorized immigration officials to charge foreign nationals² as removable, detain them subject to removal, and confine them during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). In the INA, Congress enacted a multi-layered statutory framework for the civil detention of foreign nationals pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. Detention during removal proceedings "is a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003).³ Removal proceedings "would be [in] vain

² For purposes of this brief, the terms "foreign national" and "alien" (which is the INA's nomenclature) are used interchangeably.

³ "[P]rior to 1907 there was no provision permitting bail for any aliens during the pendency of their deportation proceedings." *Demore*, 538 U.S. at 523 n.7.

if those accused could not be held in custody pending the inquiry into their true character.”⁴ *Id.* (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

In the INA, Congress established rules governing when certain foreign nationals may be detained or removed. As relevant here, 8 U.S.C. § 1225 governs the processes for the detention and removal of “applicants for admission.” Section 1225 defines an “applicant for admission” as any “alien present in the United States who has not been admitted *or* who arrives in the United States.” 8 U.S.C. § 1225(a)(1) (emphasis added). The INA defines “admission” and “admitted” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” *Id.* § 1101(a)(13)(A). In other words, an applicant for admission is an alien who is (1) present in the United States who has not lawfully entered the country or (2) who is arriving in the United States. Per 8 U.S.C. § 1225(a)(3), all applicants for admission are subject to inspection by immigration officers to determine if they are admissible.

Section 1225(b)(1) describes two categories of applicants for admission, which together describe many—but not all—of those applicants. The first category includes those individuals who are arriving and inadmissible under 8 U.S.C. § 1182(a)(6)(c) or (a)(7).⁴ *Id.* § 1225(b)(1)(A)(i). The second category includes those who have “not been admitted or paroled into the United States” who have not “affirmatively shown, to the satisfaction of an immigration officer, that [they] have been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility,” and who also are inadmissible under § 1182(a)(6)(c) or (a)(7). *Id.* § 1225(b)(1)(A)(i), (iii)(II). Individuals within the two categories described in § 1225(b)(1) are subject to expedited removal, *see* 8 C.F.R. § 235.3(b), and “shall be detained” until removed (or until the end of asylum or credible fear

⁴ These subsections address inadmissibility based on misrepresentation or the lack of valid entry documents.

proceedings), 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV).⁵

But those two categories do not encompass *all* applicants for admission. Section 1225(b)(2) serves as a catchall for all remaining applicants for admission. Under § 1225(b)(2)(A), all other applicants for admission who an immigration officer determines are “not clearly and beyond a doubt entitled to be admitted” shall be detained for removal proceedings under 8 U.S.C. § 1229a. Section 1225(b)(2)(A) thus generally provides for detention, during removal proceedings, for foreign nationals who are applicants for admission but who do not fall within one of the two categories described in Section 1225(b)(1) (i.e., arriving foreign nationals, or others subject to expedited removal). Section 1225 does not provide a bond hearing for those detained under that provision.

The two categories of individuals described in § 1225(b)(1), and the additional catchall category of aliens described in § 1225(b)(2) who also meet the definition of “applicants for admission,” do not encompass all foreign nationals who may be subject to removal. For foreign nationals who fall outside those categories, another provision—§ 1226—provides procedures for detention and removal. Unlike § 1225, § 1226 is not limited to applicants for admission, but broadly applies to aliens facing removal.

Section 1226 provides procedures for detention and removal of foreign nationals that are different from those provided for aliens subject to detention under § 1225. Section 1226(a) provides that if the Attorney General issues a warrant, a foreign national may be arrested and detained “pending a decision on whether the alien is to be removed from the United States.” Following arrest, and subject to certain restrictions, the foreign national may remain detained or

⁵ Depending on the circumstances, a foreign national who is ordered removed under § 1125(b)(1)(A)(i) but who is not removed within 90 days of the removal order may be released under an order of supervision. 8 U.S.C. § 1231(a)(3).

may be released on bond or conditional parole. *Id.* By regulation, immigration officers can release such an individual if he demonstrates that he “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8).

If not released by an immigration officer, the foreign national can request a custody redetermination by an immigration judge (“IJ”) at any time before a final order of removal is issued. *See id.* §§ 236.1(d)(1), 1236.1(d)(1), 1003.19. At a custody hearing, the IJ may decide whether to continue detention or release the individual on bond or conditional parole, based on a variety of factors that account for their ties to the United States, and evaluate whether they pose a flight risk or danger to the community. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3); *Lopez v. Barr*, 458 F. Supp. 3d 171, 178 (W.D.N.Y. 2020) (“The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).⁶

Although not applicable in this case, 8 U.S.C. § 1226(c) also requires the Attorney General to take into custody certain defined categories of “criminal aliens” when they are released from other forms of custody (or upon DHS’s own initiative), and to detain them during their removal proceedings—i.e., they are not able to receive bond hearings. 8 U.S.C. § 1226(c). There is one narrow exception for criminal foreign nationals who are assisting with or essential

⁶ For purposes of custody redeterminations, the Board of Immigration Appeals has identified a non-exhaustive list of factors for consideration: “(1) whether the alien has a fixed address in the United States; (2) the alien’s length of residence in the United States; (3) the alien’s family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien’s manner of entry to the United States.” *In re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006).

to investigations into major criminal activity. 8 U.S.C. § 1226(c)(4).

If, after a custody redetermination hearing, either party disagrees with the IJ's decision, they may appeal that decision to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). The BIA is an appellate body within the Executive Office for Immigration Review ("EOIR") which possesses delegated authority from the Attorney General. *Id.* §§ 1003.1(a)(1), (d)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including IJ custody determinations. *Id.* §§ 1003.1(d)(1), 236.1, 1236.1. The BIA not only resolves particular disputes before it, but is also directed to, "through precedent decisions, [] provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). Decisions rendered by the BIA are final, except for those reviewed by the Attorney General. *Id.* § 1003.1(d)(7).

Included within the Attorney General and DHS's discretionary authority is a provision that allows DHS to invoke an automatic stay of any decision by an IJ to release an individual on bond when DHS files an appeal of the custody redetermination. *Id.* § 1003.19(i)(2) ("The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary."). If the automatic stay is invoked, regulations require the BIA to track the progress of the custody appeal "to avoid unnecessary delays in completing the record for decision." *Id.* § 1003.6(c)(3). The automatic stay lapses after 90 days, though DHS may seek a discretionary stay if the BIA has not decided the custodial appeal. *Id.* § 1003.6(c)(4), (5).

FACTUAL AND PROCEDURAL BACKGROUND

According to the Petition and TRO Motion, Petitioner is a native and citizen of Mexico, and he entered the United States at some point in 2018. ECF 1 at ¶¶ 2, 17.⁷ On June 3, 2025, ICE detained him without bond, and an arrest warrant issued under sections 236 and 287 of the INA, 8 U.S.C. §§ 1226 and 1357. *Id.* at ¶¶ 6, 22; ECF 1-2; ECF 1-4. That same day, ICE issued Petitioner a notice to appear, which had the effect of initiating removal proceedings against him. ECF 1 at ¶ 7; ECF 1-3; *see* 8 C.F.R. § 1239.1.

The notice to appear charged Petitioner with being subject to removal based on section “212(a)(6)(A)(i) of the [INA] [8 U.S.C. § 1182(a)(6)(A)(i)], as amended, in that you are an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.” ECF 1-3.

On July 15, 2025, an IJ took up Petitioner’s request for a custody redetermination. ECF 1-1. After considering the request, and over the objection of ICE, which argued that Petitioner was subject to mandatory detention under 8 U.S.C. § 1225(b)(2), the IJ granted the request and ordered Petitioner released on a \$1,500 bond. ECF 1 at ¶ 24; ECF 1-1.

ICE immediately filed a notice of intent to appeal the IJ’s custody redetermination (Form EOIR-43), which automatically stayed IJ’s decision under 8 C.F.R. § 1003.19(i)(2). ECF 1 at ¶ 26; ECF 1-6. On July 24, 2025, ICE perfected its appeal by filing a notice of appeal (Form EOIR-26), arguing that the IJ improperly granted release to Petitioner. ECF 1-7, at p. 4. The basis for this is that Petitioner is “an applicant for admission in INA § 240 [8 U.S.C. § 1229a] removal

⁷ Petitioner indicates elsewhere that he has been present in the United States for 12 years. ECF 1 at ¶ 44. The amount of time he has been present is not particularly relevant to the issues at hand.

proceedings and is therefore detained pursuant to INA § 235(b)(2)(A) [8 U.S.C. §1225(b)(2)(A)].”⁸ *Id.*

ICE’s appeal is pending, and Petitioner’s temporary detention under the automatic stay continues at the Dodge County Jail in Juneau, Wisconsin. ECR 1 at ¶ 8. His next scheduled immigration hearing is October 29, 2025, *Id.* at ¶¶ 8, 31.

STANDARD OF REVIEW

A petition for a writ of habeas corpus challenges the legality or constitutionality of the government’s restraint or imprisonment of the petitioner. 28 U.S.C. § 2241. Petitioner bears the burden to show his detention is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). A hearing is not required where, as here, the petition and response present only legal issues. 28 U.S.C. § 2243.

Injunctive relief under Rule 65 is “an exercise of very far-reaching power, never to be indulged in except in a case clearly demanding it.” *Cassell v. Snyders*, 990 F.3d 539, 544 (7th Cir. 2021). The party seeking a TRO or preliminary injunction must make a clear showing of entitlement to such extraordinary relief. *See W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1122 (N.D. Ill. 2018) (quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)). This requires showing: (1) a likelihood of success on the merits; (2) the lack of an adequate remedy at law; and (3) that the movant will suffer irreparable harm without injunctive relief. *Cassell*, 990 F.3d at 544–45. If these requirements are met, the Court must then consider: (4) the irreparable harm the non-moving party will suffer if preliminary relief is granted and balance it against the irreparable

⁸ Notably, the BIA recently expressly adopted this position in a separate removal proceeding, finding that under the plain language of 8 U.S.C. § 1225(b)(2), foreign nationals present in the United States without admission, like Petitioner here, are subject to mandatory detention without a bond hearing during their removal proceedings, until removed. *Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025).

harm to the moving party if relief is denied; and (5) the public interest (i.e., the consequences of granting or denying the injunction to non-parties). *Id.* at 545.

ARGUMENT

A. The Court Lacks Jurisdiction Under 8 U.S.C. § 1252.

A bedrock principle of the federal judicial system is that district courts possess limited subject-matter jurisdiction and are entrusted with “only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”).

One area in which judicial review is curtailed is in immigration. *See, e.g., I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm. (“AADC”)*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (noting that “the power over aliens is of a political character and therefore subject only to narrow judicial review”). The Supreme Court has “underscore[d] the limited scope of inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo*, 420 U.S. at 792 (internal quotes omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The expansive authority over immigration matters that Congress has afforded the government necessarily encompasses detention, given that the authority to detain is essential to the authority to remove and because of the importance of public safety. *See Shaughnessy v.*

United States, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing*, 163 U.S. at 235 (“Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.”); *Demore*, 538 U.S. at 531 (“Detention during removal proceedings is a constitutionally permissible part of that process.”); *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) (noting that Congress possesses “sweeping powers . . . to prescribe the treatment of aliens” and affirming the constitutionality of mandatory detention without bond under § 1226(c) where petitioner lacked defense to removal).

In this case, the Court’s jurisdiction is constrained under 8 U.S.C. § 1252(b)(9) and (g). Section 1252(b)(9) mandates that “[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order.” 8 U.S.C. § 1252(b)(9). It further strips district courts of “jurisdiction, by habeas corpus . . . or by any other provision of law,” to review such questions except in that context. *Id.* Moreover, “no court shall have jurisdiction to hear any cause or claim” that arises from “the decision or action” to “commence” removal proceedings or “adjudicate [those] cases.” *Id.* § 1252(g).⁹

⁹ In *Parra*, the Seventh Circuit held that 8 U.S.C. § 1252(g) did not bar review of a challenge to detention without bond under 8 U.S.C. § 1226(c). 172 F.3d at 957. But that case is distinguishable, as here Petitioner does not challenge the constitutionality of mandatory detention. Rather, he argues that ICE’s discretionary invocation of the automatic stay in the context of removal proceedings and his resultant temporary detention is unconstitutional.

While these jurisdictional bars may still allow foreign nationals to challenge the *conditions* of confinement or the *length* of detention during removal proceedings, it does not permit the use of habeas to “challeng[e] the decision to detain them in the first place or to seek removal.” *Jennings v. Rodriguez*, 583 U.S. 281, 294 (2018) (plurality opinion).¹⁰ But that is precisely what Petitioner seeks to do here. He asks this Court to second-guess whether and how he is detained amid ongoing removal proceedings by weighing in on questions of law tied up in the government’s interpretation of statutory and regulatory provisions. That is exactly the sort of interference Congress precluded in 8 U.S.C. § 1252. As the Supreme Court explained in *Jennings*, habeas cannot be used to “challeng[e] the decision to detain them in the first place.” *Id.* The Supreme Court has been explicit: detention pending removal is a “specification of the decision to ‘commence proceedings’ which . . . § 1252(g) covers.” *AADC*, 525 U.S. at 485 n.9.

Section 1252(b)(9) is extraordinarily broad, channeling “*all questions of law and fact*” that arise from removal actions into the petition-for-review process. 8 U.S.C. § 1252(b)(9). Courts may retain jurisdiction to hear claims entirely independent of removal, but not those—like Petitioner’s—that strike at the heart of the government’s authority to detain during removal proceedings. His challenge is inextricably bound up with the adjudication of his case before the immigration court and, therefore, falls directly within the statute’s jurisdiction stripping provisions.

In short, Petitioner is inviting this Court to disregard Congress’s carefully constructed

¹⁰ As Justice Thomas explained in his concurrence in *Jennings*, “Section 1252(b)(9) is a ‘general jurisdictional limitation’ that applies to ‘all claims arising from deportation proceedings’ and the ‘many decisions or actions that may be part of the deportation process.’ Detaining an alien falls within this definition—indeed, this Court has described detention during removal proceedings as an ‘aspect of the deportation process.’ . . . The phrase ‘any action taken to remove an alien from the United States’ must at least cover congressionally authorized portions of the deportation process that necessarily serve the purpose of ensuring an alien’s removal.” *Jennings*, 583 U.S. at 317-18 (Thomas, J., concurring in part and concurring in the judgment) (citations omitted).

jurisdictional framework and insert itself into ongoing removal proceedings. Congress has been clear that questions about whether, when, and under what circumstances a foreign national is detained during removal proceedings must be addressed through the statutory review process, not through habeas collateral attacks.

Petitioner contends that ICE's interpretation of 8 U.S.C. § 1225(b)(2) is wrong. Even assuming Petitioner is correct—that is, that the proper detention authority is instead 8 U.S.C. § 1226(a)—§ 1252(a)(2)(B)(ii) precludes review of discretionary decisions to continue detention. Section 1252(a)(2)(B)(ii) precludes review of decisions made discretionary by statute, like § 1226(a), which states that, except when detention is mandatory based on the foreign national's criminal history, “pending such decision, the Attorney General . . . may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1) (emphasis added); see *Bouarfa v. Mayorkas*, 604 U.S. 6, 13–14 (2024) (“As [t]his Court has repeatedly observed, ‘the word may clearly connotes discretion.’” (emphasis in original)). Cf. *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031–32 (E.D. Wis.), aff'd sub nom. *Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007) (“To the extent the [automatic stay provision] represents the judgment of the Attorney General as to how best implement the authority granted him by 8 U.S.C. § 1226, judicial review may be barred by § 1226(e).”). In any event, Petitioner is properly detained under the automatic stay of 8 C.F.R. § 1003.19(i)(2), and any decision to release him on parole likewise rests in the sole discretion of DHS. See 8 U.S.C. § 1182(d)(5)(A).

Because the INA precludes review, the Court should dismiss the Petition without reaching the merits. But even if the Court is inclined to address Petitioner's arguments, the outcome should be the same for the reasons articulated in the following pages.

B. Petitioner is Lawfully Detained.

The current operative mechanism of Petitioner's detention is the automatic stay of release on bond for a maximum of 90 days under 8 C.F.R. §§ 1003.19(i)(2), 1003.6(c). This confinement is consistent with 8 U.S.C. § 1225(b)(2), which requires detention throughout the entire removal proceedings (and which is the basis for ICE's appeal to the BIA). However, Petitioner argues that his temporary detention is improper because that regulation is *ultra vires*, that he is not properly subject to detention under § 1225(b)(2), and his Fifth Amendment Due Process rights are being violated. He is wrong on all points.

1. Petitioner is properly subject to detention under 8 U.S.C. § 1225(b)(2).

Petitioner's arguments that § 1225(b)(2) does not apply to him as an unadmitted foreign national present in the United States are unpersuasive. ICE's determination that Petitioner is subject to detention pursuant to § 1225(b)(2) aligns with the plain text of § 1225 and the Supreme Court's decision in *Jennings*.

Section § 1225(b)(2)(A) mandates detention during the pendency of removal proceedings "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A). Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement.

Petitioner is indisputably an "applicant for admission" to the United States. As described above, Congress defined an "applicant for admission" to include a foreign national "present in the United States who has not been admitted." 8 U.S.C. § 1225(a)(1). Petitioner is present in the United States, and he does not contend he has been admitted. *See generally* ECF 1, 4; *cf.* ECF 1-3 (Notice to Appear charging Petitioner with being present without being admitted or paroled).

As Petitioner cannot demonstrate to an inspecting immigration officer that he is “clearly and beyond a doubt entitled to be admitted”—because he does not deny he is present in the United States without being admitted or paroled and is inadmissible per 8 U.S.C. §§ 1182(a)(6) and (a)(7)(A)(i)(I)—his detention is mandatory. 8 U.S.C. § 1225(b)(2)(A); *Alvarenga Pena v. Hyde*, No. 25-cv-11983-NMG, 2025 WL 2108913, at *2 (D. Mass. Jul. 28, 2025) (“Because petitioner remains an applicant for admission, his detention is authorized so long as he is ‘not clearly and beyond doubt entitled to be admitted’ to the United States”); *Florida v. United States*, 660 F. Supp. 3d 1239, 1275 (N.D. Fla. 2023) (rejecting assertion that DHS has discretion to choose to detain an applicant for admission under either § 1225(b) or § 1226(a), which “would render mandatory detention under 8 U.S.C. § 1225(b) meaningless”). Petitioner is therefore properly detained pursuant to § 1225(b)(2)(A). *See Chavez v. Noem*, No. 3:25-CV-02325, 2025 WL 2730228, at *4 (S.D. Cal. Sept. 24, 2025) (agreeing with the government that “[p]etitioners [who] do not contest that they are ‘alien[s] present in the United States who ha[ve] not been admitted’” are, “[b]y the plain language of § 1225(a)(1), . . . ‘applicants for admission’ and thus subject to the mandatory detention provisions of ‘applicants for admission’ under § 1225(b)(2).”).

Supreme Court precedent supports this construction of § 1225(b)(2). As explained in *Jennings* and touched on above, applicants for admission fall into one of two categories: those covered by Section 1225(b)(1) and those covered by Section 1225(b)(2). 583 U.S. at 287. Section 1225(b)(1) applies to foreign nationals arriving in the United States who are initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation. Section 1225(b)(2), on the other hand, is “broader” and “serves as a catchall provision that applies to all applicants for admission not covered by 1225(b)(1) (with specific exceptions not

relevant here).” *Id.* Put another way, while § 1225(b)(1) applies to those “arriving” in the United States, § 1225(b)(2) applies to all “other” foreign nationals who are applicants for admission—like Petitioner. Moreover, the Supreme Court has confirmed that this statutory mandate for detention extends for the entirety of removal proceedings. *Id.* at 302 (“[Section] 1225(b)(2) . . . mandates[s] detention of aliens throughout the completion of applicable proceedings and not just until the moment those proceedings begin.” (emphasis added)).¹¹

Petitioner represents that federal courts across the country “have all disagreed” with Respondents’ interpretation. ECF 4-1, pp. 8–9. Admittedly, some courts have disagreed with the argument advanced by Respondents, but not all. Recently several courts have sided with the government. *See, e.g., Pena*, 2025 WL 2108913, at *1; *Chavez*, 2025 WL 2730228, at *4; *Vargas Lopez v. Trump*, No. 8:25CV526, 2025 WL 2780351, at *9–10 (D. Neb. Sept. 30, 2025). Respondents respectfully submit that the Court should follow these recent decisions; in well-reasoned opinions, they properly reject arguments like those Petitioner advances.

Some the cases cited by Petitioner have concluded that 8 U.S.C. § 1225(b) authorizes detaining those seeking admission upon *immediate* arrival in the country, whereas § 1226(a) authorizes the government to detain certain noncitizens *already in* the country. *See, e.g., Gomes v. Hyde*, No. 25-cv-11571-JEK, 2025 WL 1869299, at *1 (D. Mass. Jul. 7, 2025). These decisions essentially read a temporal limitation into § 1225(b), a limitation Petitioner himself advances. ECF 1, ¶¶ 48–49. But this reading is untethered to the text.

All foreign nationals present in the United States without being admitted are “applicant[s] for admission,” regardless of when they entered. *See* 8 U.S.C. § 1225(a)(1). When an

¹¹ The only means of release for an applicant for admission is discretionary parole on a case-by-case basis for urgent humanitarian reasons or a significant public benefit. *See* 8 U.S.C. § 1182(d)(5); *see also* 8 C.F.R. §§ 212.5(b), 235.3(c)

immigration officer encounters and examines an applicant for admission who seeks to remain in the United States, and that individual (like Petitioner) desires to remain in the United States, he is necessarily “seeking admission” within the meaning of 8 U.S.C. § 1225(b)(2)(A). Otherwise, the noncitizen must “withdraw the application for admission and depart immediately from the United States.” 8 U.S.C. § 1225(a)(4). Petitioner obviously has not departed willingly and desires to remain in the United States. A foreign national continues to be “seeking admission” while in immigration removal proceedings to determine whether he can “be admitted to the United States.” *See* 8 U.S.C. § 1229a(3).

Notably, Congress *did* place a temporal limitation in one part of § 1225 regarding the scope of expedited removal—§ 1225(b)(1)(iii)(II)—but placed no such temporal limitation as to when it mandated detention in § 1225(b)(2). Thus, Congress clearly knew it could temporally limit provisions in the INA and opted not to with respect to who is “seeking admission.” Because Petitioner cannot and does not point to any temporal limitation in the statute, the fact that Petitioner has been present since 2018 does not undercut the conclusion that he is subject to mandatory detention as an “applicant for admission.”

In the *Pena* case, the petitioner illegally entered the United States about 20 years before ICE detained him under § 1225(b)(2). 2025 WL 2108913, at *1. Consistent with Respondents’ argument in this case, the court there stated that “[b]ecause petitioner remains an applicant for admission, his detention is authorized [under Section 1225(b)(2)(A)] so long as he is not clearly and beyond doubt entitled to be admitted to the United States.” *Id.* at *2. As with Petitioner in the instant case, there was no evidence that *Pena* was admitted to the United States. *Id.* The court therefore determined that not only was *Pena*’s detention authorized by § 1225(b)(2)(A)—it was mandated by it. *Id.* So the Court should find in the instant case.

Other decisions cited by Petitioner suggest that detaining foreign nationals under the catch-all provision of 8 U.S.C. § 1225(b)(2) conflicts with or would render 8 U.S.C. § 1226 superfluous. *See, e.g., Maldonado v. Olson*, No. 25-CV-3142 (SRN/SGE), 2025 WL 2374411, at *12 (D. Minn. Aug. 15, 2025). Petitioner advances this argument, too. ECF 1, ¶¶ 50–53. But that putative conflict is illusory.

Section 1226(a) authorizes a noncitizen to be “arrested and detained pending a decision” on removal. Section 1225 is an additional detention authority that applies in narrower circumstances—where someone is an “applicant for admission.” Thus, even if a foreign national is arrested based upon a warrant, if the examining officer determines that § 1225(b)(2)(A) applies—that is, for individuals like Petitioner who are present in the United States and have not been admitted—that individual “shall be detained.” 8 U.S.C. § 1225(b)(2)(A). The specific mandatory language of § 1225(b)(2)(A) governs over the general permissive language of § 1226(a). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific governs the general.”). These two statutory authorities complement each other, and do not conflict. *See, e.g., Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (“[O]ur task is to fit, if possible, all parts into a harmonious whole.” (citation omitted)). *Cf. Vargas Lopez*, 2025 WL 2780351, at *9–10 (the “overlapping relationship between § 1225(b) and § 1226(a) is not only consistent with the plain language of the two provisions but consistent with the interpretation of the two provisions under *Jennings*.”).

Petitioner also argues that recent amendments to 8 U.S.C. § 1226(c)’s mandatory detention provision undermine or render superfluous § 1225’s explicit definition of “alien[s] present in the United States who ha[ve] not been admitted” as “applicants for admission.” *See* ECF 1 at ¶ 51. But those amendments, to the extent they include individuals who are present

without inspection, merely reflect a “congressional effort to be doubly sure” that such unlawful noncitizens are detained, *Barton v. Barr*, 590 U.S. 222, 239 (2020), and cannot change what Congress intended in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (“These later enacted laws, however, are beside the point. They do not declare the meaning of earlier law . . . or a change in the meaning of an earlier statute.”). Those amendments also apply to foreign nationals who were previously inspected and admitted and are removable (and are therefore not applicants for admission once apprehended). They thus serve an important separate purpose.

Finally, Petitioner’s assertion that ICE’s determination that he is subject to detention under § 1225(b)(2) is a “reversal of ICE’s longstanding practice of treating noncitizens taken into custody while living in the United States as detained pursuant to 8 U.S.C. section 1226(a),” ECF 1 at ¶ 25, does not change the analysis. The agency’s prior practice carries little weight, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 432–33 (2024), and Petitioner does not claim that DHS ever stated that U.S.C. § 1225(b)(2) did *not* apply to applicants for admission who entered without inspection. To be sure, “when the best reading of the statute is that it delegates discretionary authority to an agency,” the Court must “independently interpret the statute and effectuate the will of Congress.” *Id.*, at 395 (cleaned up). As the Supreme Court stated in *Jennings*, “[r]ead most naturally, §§ 1225(b)(1) and (b)(2) [] mandate detention for applicants for admission until certain proceedings have concluded.” 583 U.S. at 297 (cleaned up).

When the plain text of a statute is clear, that meaning is controlling and courts should not resort to searching legislative history for meaning. *See DirecTV, Inc. v. Barczewski*, 604 F.3d 1004 (7th Cir. 2010). As discussed above, the statutory language is unambiguous, but to the extent legislative history is relevant here, it confirms Respondents’ reading. Congress passed

IIRIRA to correct “an anomaly whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully.” *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc); see also *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 108 (2020) (noting that immigration laws tried those who arrive at a port of entry the same as those that are caught trying to enter). It “intended to replace certain aspects of the [then] current ‘entry doctrine,’ under which illegal aliens who have entered the United States without inspection gain equities and privileges in immigration proceedings that are not available to aliens who present themselves for inspection at a port of entry.” *Torres*, 976 F.3d at 928 (quoting H.R. Rep. 104-469, pt. 1, at 225); see also 8 U.S.C. § 1225(a)–(b) (1995) (former § 1225 providing that those who sought admission at a port were subject to mandatory detention, with potential release solely by means of § 1182(d)(5) parole).

Finally, Petitioner’s suggested reading would be unfair to those arriving legally. Specifically, finding Petitioner entitled to release on bond would put undocumented foreign nationals who crossed the border unlawfully in a better position than those who present themselves for inspection at a port of entry. Individuals who presented at port of entry would be subject to mandatory detention under § 1225, while those who crossed illegally between those points of entry, like Petitioner, would be eligible for a bond under § 1226(a) when later arrested in the United States. It is incumbent on this Court to avoid “creat[ing] a perverse incentive to enter at an unlawful rather than a lawful location.” *Thuraissigiam*, 591 U.S. at 140.

2. The application of the automatic stay of 8 C.F.R. § 1003.19(i)(2) to Petitioner is valid.

Ultra vires claims are generally confined to “extreme agency error where the agency has stepped so plainly beyond the bounds of its statutory authority, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court.” *Fed. Express Corporation v.*

United States Department of Commerce, 39 F.4th 756, 764 (D.C. Cir. 2022). Judicial review of *ultra vires* claims is limited to “where (i) there is no express statutory preclusion of all judicial review; (ii) ‘there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.’” *Id.* The automatic stay of 8 C.F.R. § 1003.19(i)(2) does not satisfy these.

Contrary to Petitioner’s argument that the automatic stay lacks congressional authorization, ECF 1 at ¶ 58, Congress has delegated the rule-making process to DHS. DHS did just that, and the automatic stay provision is consistent with, and indeed serves to implement, the mandatory detention provision of 8 U.S.C. § 1225(b), which is what ICE is arguing before the BIA. The automatic stay provision serves a legitimate purpose, as it provides a means for DHS to maintain the status quo in those cases where it chooses to seek an expedited review of the IJ’s custody order by BIA. *See Hussain*, 492 F. Supp. 2d at 1031.¹²

Petitioner contends that he will be indefinitely detained under the automatic stay provision, but this is incorrect. His detention is not indefinite and will likely last no more than 90 days. *See id.* (“The cases upon which [petitioner] relies to support his argument that the regulation violates due process addressed the previous regulation under which the duration of the automatic stay was indefinite.”). And any extension of the temporary detention is limited to 30 days and requires that DHS provide some justification for the extension. *See* 8 C.F.R. § 1003.6(c)(5). Here, the BIA is going to entertain arguments from both parties, affording full due process to the parties. Thus, “providing for an automatic stay until the BIA can review the IJ’s

¹² Interestingly, the fact that the IJ held a bond hearing and granted release when Petitioner is subject to mandatory detention means that Petitioner actually received more process than that to which he was entitled. ICE has appealed and invoked the automatic stay, and Petitioner will have his day before the BIA. This Court should permit that process to play out to completion.

order for release is not unreasonable.” *Hussain*, 492 F. Supp. 2d at 1032.

Petitioner’s argument that the automatic stay violates due process also fails, as he overlooks the relationship between DHS, the IJs, and the BIA, and their respective role in exercising the authority of the Attorney General to make custody determinations in cases involving the removal of aliens. *Id.* at 1032. When the current regulation was implemented, the Attorney General explained:

In most cases, an immigration judge’s order granting an alien release will result in the alien’s release upon the posting of bond or on recognizance, in compliance with the immigration judge’s decision. The Attorney General has determined, however, that certain bond cases require additional safeguards before an alien is released during the pendency of removal proceedings against him or her. In these cases, the immigration judge’s order is only an interim one, pending review and the exercise of discretion by another of the Attorney General’s delegates, the Board. Barring review by the Attorney General, it is the Board’s decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond.

Id. (quoting 75 Fed. Reg. 57873, 80). Thus, the Attorney General made an “operational decision” with respect to how her discretion in a limited class of cases where DHS sought to detain a foreign national without bond (or with a bond of \$10,000 or more) and disagrees with the IJ’s interim custody decision. *Id.* Accordingly, 8 C.F.R. § 1003.19(i)(2) “reveals the division of authority the Attorney General has established within the executive branch to exercise [her] overall authority to determine the custodial status of aliens facing removal proceedings. It is difficult to see how DHS’s exercise of its responsibilities within that system operates as a denial of due process.” *Id.*

The automatic stay provision requires that DHS provide immediate, one-day, notice of the appeal. 8 C.F.R. § 1003.19(i). This assures that, if an IJ authorizes release, DHS may appeal that decision before release and without undue delay to the detainee. In this case, DHS filed the appropriate notice of intent to appeal on a Form EOIR-43 containing the appropriate assurances. DHS perfected the appeal, and the custody redetermination issue is properly before the BIA. This

does not violate due process on its face. The fact that the appeal involves a simple filing is immaterial. Requiring the filing of a rigorous motion for a stay with the IJ would be superfluous and only serve to delay BIA review of the release decision.

In summary, the automatic stay and its invocation in this case is not *ultra vires*. Rather, it is consistent with the delegation of discretionary authority by the Attorney General. *See Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008) (regulation was not *ultra vires* where it guided the discretion accorded to the Attorney General in immigration matters).

3. Petitioner's detention does not violate the Due Process Clause.

Finally, Petitioner challenges his detention under the Fifth Amendment Due Process Clause, but he has not plausibly alleged a colorable claim that his temporary detention is unconstitutional. As an initial matter, immigration detention, including detention during removal proceedings, has survived Due Process review, and detention periods of 180 days or longer have been upheld as constitutional. *See, e.g., Jennings*, 583 U.S. at 323 (“This Court has never held that detention during removal proceedings is unconstitutional. To the contrary, this Court has repeatedly recognized the constitutionality of that practice.”) (Thomas, J., concurring in part and concurring in the judgment) (citations omitted); *see also Demore*, 538 U. S. at 523 (explaining that detention is ‘a constitutionally valid aspect of the deportation process’); *accord, Reno*, 507 U. S. at 305–06; *Shaughnessy*, 345 U. S. at 215; *Carlson*, 342 U. S., at 538, 542; *see also Parra*, 172 F.3d at 958 (detention during removal proceedings constitutional).

Petitioner is in removal proceedings and currently subject to a 90-day automatic stay on the IJ's bond order while he and ICE litigate the issue before the BIA. This detention is neither prolonged, nor indefinite. Indeed, Petitioner has only been detained since June 3, 2025, and his temporary detention under the automatic stay began on July 15, 2025. BIA has a duty to act

quickly in light of the automatic stay. 8 C.F.R. § 1003.6(c)(3). Even if the BIA ends up agreeing with ICE that Petitioner is subject to mandatory detention pending the outcome of his removal proceedings, pre-removal-order detention nevertheless “has a definite termination point: *the conclusion of removal proceedings.*” *Castaneda v. Perry*, 95 F.4th 750 (4th Cir. 2024) (emphasis in original) (paraphrasing *Jennings*, 583 U.S. at 304).

As Petitioner notes, he is scheduled for a hearing with the IJ in his removal proceedings later this month, on October 29, 2025. He is due the process afforded him in removal proceedings, 8 U.S.C. § 1229a(b)(4), and he does not contend that he is not receiving such process. Resolution one way or another is undoubtedly forthcoming, and the ample available process in his removal proceedings demonstrate no lack of procedural due process—nor any deprivation of liberty so “truly outrageous” as to establish a substantive due process claim. *See Powers v. Lightner*, 820 F.2d 818, 822 (7th 1987); *see also generally Reed v. Goertz*, 598 U.S. 230, 236 (2023).

The fact of the matter is that Congress provided that even with those full removal proceedings, as a foreign national present without inspection, Petitioner “*shall* be detained.” 8 U.S.C. § 1225(b)(2)(A) (emphasis added). And mandatory detention is a “constitutionally permissible part of that process.” *See Demore*, 538 U.S. at 531. Even if Petitioner ends up detained under § 1225(b)(2), his detention will not be delayed beyond anything other than ordinary litigation processes. *See Linares v. Collins*, 1:25-CV-00584-RP-DH, ECF No. 14 at 15 (W.D. Tex. Aug. 12, 2025) (collecting cases and finding that foreign nationals cannot assert viable due process claims when their detention is caused by their own plight, because delay due to litigation activity does not render detention indefinite).

The United States has a “powerful interest in maintaining the detention in order to ensure that removal actually occurs.” *Parra*, 172 F.3d at 958. And Petitioner has not established a colorable basis on which to find his detention exceeds that power interest and the government’s broad authority in this area, nor that it offends the Due Process Clause of the Fifth Amendment. Consequently, the Petition ought to be dismissed.

C. Petitioner is not Entitled to Interim Injunctive Relief.

Setting aside Petitioner’s substantive habeas arguments, his TRO motion should be denied because he has not established entitlement to interim injunctive relief. The first and most important criterion for a TRO or preliminary injunction is the likelihood of success on the merits. *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 771 (7th Cir. 2023), cert. denied sub nom. *Metro. Sch. Dist. of Martinsville v. A. C.*, 144 S. Ct. 683, 217 L. Ed. 2d 382 (2024); *see also Reinders Bros. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 49 (7th Cir. 1980) (describing likelihood of success on the merits as a “threshold requirement for entitlement to preliminary relief”).

Petitioner fails this fundamental, threshold requirement. In the TRO Motion, he requests immediate release in accordance with the IJ’s order. ECF 4 at p. 2. The basis for the TRO is the same as his habeas Petition—namely, that his detention under the automatic stay regulation violates his due process rights, the INA, and is *ultra vires*. ECF 4-1 at p. 5. But for the reasons articulated at length above, Petitioner is properly, temporarily detained pending ICE’s appeal of the IJ’s bond order, is subject to mandatory detention pending removal under 8 U.S.C. § 1225(b)(2) anyways, and his detention does not pose constitutional concerns. Thus, Petitioner has not established a likelihood of succeeding on the merits of his TRO motion, and it should be denied for that reason alone.

CONCLUSION

For all these reasons, Respondents respectfully request that the Court deny Petitioner's TRO Motion and dismiss the Petition.

Dated at Milwaukee, Wisconsin this 3rd day of October 2025.

Respectfully submitted,

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