IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NORBERTO SALINAS GALLARDO,	)	
Petitioner,	)	
	)	
v.	)	CIV-25-1090-R
	)	
SAM OLSON, et al.,	)	
Respondents.	)	

RESPONDENTS' OBJECTION TO REPORT AND RECOMMENDATION

Respondents *respectfully* object to the Report and Recommendation (R&R) entered on October 28, 2025 (Doc. 16).

This objection expressly reasserts and does not waive the arguments set forth in the Response (Doc. 13), but focuses on two particular points: (1) the R&R misapplied the jurisdiction stripping provision of 8 U.S.C. § 1252(g); and (2) the R&R failed to properly apply the plain language of § 1225(b)(2)(A) and instead engaged in a broader structural analysis that creates more ambiguity than it purports to resolve and that cannot be squared with the text, title, and purpose of the statute.

Before addressing those points, it should be noted that most of the contentions in the R&R are not found in the Petition, nor in a reply brief (which was not filed). As such, many of the contentions are advanced by the Court in the first instance and this is the Respondents first opportunity to respond. *See* Response (Doc. 13) at 12-13 (noting the lack of argument and requesting "the Court preclude or not entertain arguments not explicitly included—or merely referenced without elaboration—in the Petition."). Accordingly, the Respondents *respectfully* assert that de novo review of the Response is warranted and

renew their request that consideration of the Petition be limited to what is asserted therein.

By way of one critical example, the R&R asserts that Petitioner is *not* "seeking admission" and then finds resulting statutory ambiguity in the application of § 1225. R&R at 14 (asserting Petitioner "never sought admission"). But Petitioner, with the benefit of counsel, did *not* make that assertion. Further, Petitioner *is* seeking admission. Ex. 1 (first page, 42B motion to cancel removal[1]). The R&R's contrary assertion and resulting assessment of statutory ambiguity does not apply to this case and was not asserted by Petitioner.

I. Petitioner's Statutory Claim (Count I) Is Barred by Section 1252(g)

A. Petitioner Did Not Carry His Burden

Petitioner bears the burden of demonstrating jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377(1994). Respondents asserted that the jurisdiction channeling and stripping provisions of the INA operate as a jurisdictional bar to Petitioner's statutory claim (Count I). Despite being represented by counsel and bearing the burden, Petitioner did not respond. Therefore, the point was confessed, precluding Count I relief.

Nonetheless, the R&R includes various arguments and case quotations to evaluate the jurisdictional issue. But none of those points were made by Petitioner. It is *respectfully*

---

[1] *See* 8 U.S.C. § 1229b ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien …"); *Djong v. Mayorkas*, No. 24-CV-00475-CNS, 2024 WL 5089985, at *4 n.5 (D. Colo. Dec. 12, 2024) ("The INA allows immigration judges to adjust the status of certain noncitizens to lawful permanent resident during a removal proceeding to avoid removal.").

submitted that the Court should not act as advocate and make arguments that the Petitioner elected not to. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) ("the court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments"). Accordingly, relief under Count I should be denied.

B. Section 1252(g) Applies to Count I

Section 1252(g) states that courts lack jurisdiction to consider "any cause or claim by or on behalf of any alien arising from the decision or action by [DHS] to *commence* proceedings, *adjudicate* cases, or *execute* removal orders against any alien under this chapter." (emphasis added). As the R&R correctly notes, the bar should be read narrowly.

In the Tenth Circuit, the test is whether a challenged decision or action is directly and immediately connected to a decision to commence proceedings. *See Tsering v. U.S. Immigr. & Customs Enf't*, 403 F. Appx 339, 343 (10th Cir. 2010) ("We agree with the Fifth Circuit that claims that clearly are included within the definition of arising from are those claims connected *directly and immediately* with a decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." (cleaned up)) *Mochama v. Zwetow*, 14-cv-2121-KHV, 2017 WL 36363, at *8 (D. Kan. Jan. 3, 2017) ("The Tenth Circuit reviews whether claims are connected directly and immediately with a decision or action by the Attorney General to commence proceedings.").

Here, the immigration officer's examination of Petitioner and subsequent determination under § 1225(b)(2)(A) directly and immediately effected the *commencement* of the proceedings against Petitioner. The charges filed are based on the discretionary determinations of the officer. If Petitioner contends that the immigration officer's

examination and "determin[ation]" under § 1225 is not the basis of DHS's discretionary decision to commence removal proceedings, it is not stated in the Petition. Nor is it addressed or explained in the R&R. The application of § 1225(b)(2)(A) is an integral part of DHS's discretionary choice to commence proceedings and seek the deportation.

Petitioner's assertion that DHS should have used § 1226 instead of § 1225 underscores this point. Specifically, in § 1226(e), Congress made clear that the decision whether to use any of § 1226's provisions is itself an unreviewable discretionary act. *See* 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review."). And critically, "§ 1252g was directed against … attempts to impose judicial constraints upon prosecutorial discretion." *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1315 (10th Cir. 2015) (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.* [AADC], 525 U.S. 471, 485 n. 9 (1999)).

The R&R cites to *Jennings* for the proposition that the Court's *AADC* decision "did not interpret [§ 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." R&R at 7. Putting aside that the quote is from the three-judge plurality, Respondents' assertion of § 1252(g) for the discretionary determinations of an immigration officer is not just "any claim." It is an act intimately tied to the commencement of proceedings. 8 U.S.C. § 1225(b)(2)(A) ("shall be detained for a proceeding under section 1229a"). And it bears repeating that Petitioner's and R&R's assertion that § 1226 should have been used instead *is expressly protected by that very provision as discretionary*—which is what § 1252(g) is intended to protect. *AADC*, 525 U.S. at 487 (characterizing § 1252(g) as a "discretion-protecting provision").

The R&R also attempts to recast Count I as merely challenging the legal basis of Petitioner's detention. R&R at 7. But that conflates Counts I (statutory challenge) and II (constitutional challenge). Petitioner's due process claim (Count II) challenges his detention as a due process violation. But the statutory argument of Count I is different. It challenges the *means* DHS selected to commence proceedings against Petitioner. Specifically, Petitioner contends DHS should have used § 1226 instead of § 1225. But critically, there is no detention element to that debate. For example, detention plays no role in deciding whether Petitioner is an "applicant for admission" or "seeking admission" under § 1225. The availability of a bond determination for Petitioner is a *collateral* consequence of that debate. Thus, the crux of the challenge in Count I is *not* detention.

The R&R also cites to several recent district court opinions that are not binding on this court. Those opinions assert that § 1252(g) does not bar the review of purely legal determinations that require no factual development. *See* R&R at 7-8 (citing, for example, *Gutierrez v. Baltasar,* No. 25-CV-2720-RMR, 2025 WL 2962908, at *3 (D. Colo. Oct. 17, 2025), which is grounded in the assertion that "[t]hese 'purely legal' questions fit the exception to § 1252(g)'s jurisdiction-stripping provision, as they can be decided in the abstract on an undisputed factual record"). But the Tenth Circuit has not adopted a "purely legal" or "abstract" non-factual exception to § 1252(g). And, as noted above, the application of § 1225 *does* involve factual issues regarding Petitioner's ongoing "seeking admission." As such, those opinions use the wrong standard and presume "abstract" facts that are different than this case.

In short, Petitioner asks the court to construe DHS to have exercised its discretion

in a manner it did not. That is barred by § 1252(g). *See Alvarez v. U.S. Immigr. & Customs Enf't*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars [courts] from questioning ICE's discretionary decisions to commence removal—and thus necessarily prevents [courts] from considering whether the agency should have used a different statutory procedure to initiate the removal process."); *Acxel S.Q.D.C.*, 2025 WL 2617973, at *3 ("Petitioner precisely challenges Respondents' decision to detain him. Although he contends that § 1252(b)(9) does not bar his claims because he is challenging his ongoing detention, not the initial decision to detain him, this difference does not alter the Court's conclusion.").[2]

II. The Report's Statutory Analysis Is Inconsistent with the Text, Title, and Purpose of the INA

The R&R starts by asserting that the language of § 1225 is ambiguous as to whether it applies to someone present in the country without admission. Based on that conclusion, the R&R then departs the language of the statute to review its title, structure, recent legislative history, and prior regulatory statements to ultimately conclude §§ 1225 and 1226 are mutually exclusive, and therefore that § 1226 applies to Petitioner. Respectfully, the R&R is wrong at *each* step.

[2] In a footnote, the R&R asserts that *Alvarez* is factually distinguishable, without further elaboration. R&R at 8 n.2. While it is true that *Alvarez* addressed Bivens claims, it nonetheless applied § 1252(g) to the discretionary acts of electing to bring charges under particular provisions rather than others—like the issue in this case. The fact that the holding occurs in the Bivens context (which implicates constitutional issues, like this case) does not meaningfully distinguish the holding. Likewise, the assertion that some district courts have "recently disagreed" with *Alvarez*, without more, does not change that conclusion.

A. The Plain Language of § 1225 Applies to Petitioner

Section 1225(a)(1) 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). Petitioner concedes that he is *present in the United States* and *has not been admitted*. In short, he is plainly an "applicant for admission." The R&R's suggestion of ambiguity cannot be squared with the plain language of the statute.

Next, § 1225(b)(2)(A) provides that:

> [I]n the case of an alien that 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, the alien shall be detained for a proceeding under section 1229a of this title.

Petitioner was detained and proceedings commenced against him pursuant to this provision. The R&R finds that "seeking admission" requires present action and concludes that passive residency in the United States is insufficient. R&R at 14. Further, the R&R asserts that Petitioner "never sought admission." *Id.* Based on those premises, the R&R concludes that § 1225(b)(2)(A) does not apply.

But that is clearly wrong. As noted above, Petitioner did *not* contend that he has never and is not currently seeking admission. There is no basis for that assertion. Rather, the Petitioner is seeking admission as noted above. Accordingly, Petitioner is an "applicant for admission" that is "seeking admission" for which an immigration officer determined "is not clearly and beyond a doubt entitled to be admitted." By any reasonable construction of the plain language of the provision, § 1225(b)(2)(A) applies to Petitioner.

Moreover, the R&R's construction leads to the absurd result that immigration

officers cannot immediately detain a noncitizen residing in the United States without determining if they were somehow *actively* seeking admission at that moment (a standard not identified or defined in the INA). Put differently, the R&R creates more statutory ambiguity than it purports to resolve. Instead, the proper standard for the immigration officer is that which is stated in the INA; namely, whether the noncitizen is "entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A).

The R&R's interpretation also cannot be squared with other parts of § 1225 and recent enforcement initiatives thereunder. Pursuant to § 1225, DHS has exercised its unreviewable authority to designate noncitizens that have entered illegally and been present in the country for up to two years (i.e., not "arriving") for expedited removal. *See* 8 U.S.C. § 1225(b)(1)(A)(iii); Designating Aliens for Expedited Removal, 90 FR 8139 (Jan. 24, 2025). The R&R's reading is inconsistent with that statutorily authorized initiative.

In any event, given the plain language of the § 1225(b)(2)(A) clearly applies to Petitioner, the Court need not go further. The Petition should be denied. But the remaining steps in the R&R's analysis are also wrong.

B. The Title of § 1225 Is Consistent with Respondent's Reading and Inconsistent with the R&R's Construction

Having decided that ambiguity exists, the R&R next evaluates the title of the section and concludes that it limits the application of the section to "arriving aliens." R&R 11-12. That conclusion suffers several infirmities, including a notable omission *of the remainder of the title* and the resulting incongruence with—if not outright superfluity of—the text of the provision if accepted.

Before addressing those points, it is worth pausing to recognize that the resort to a statutory title is unnecessary unless there is ambiguity not found here and that a title should not limit the plain text. *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("To be sure, a subchapter heading cannot substitute for the operative text of the statute."); *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("The title of a statute cannot limit the plain meaning of the text." (cleaned up)).

The title of § 1225 reads:

> <u>Inspection by immigration officers</u>, *expedited removal of in admissible arriving aliens*, **referral for hearing.**

The R&R focuses (and italicizes) only the reference to "*arriving aliens*." R&R at 12. But that ignores the rest of the title. The first underlined portion is a reference to subpart (a)'s inspection obligations. The second italicized portion refers to the expedited proceedings of (b)(1) for "arriving aliens." Importantly, however, the third **bolded** portion of the title is a reference to the full removal proceedings under (b)(2)(A) for noncitizens present in the country. That is because "arriving aliens" under (b)(1) are subject to *expedited* removals and do not get full removal hearings pursuant to § 1229a.[3] In contrast, noncitizens present in the country with arguably more established due process interests are provided *full* removal hearings. *See* § 1225(b)(2)(A) ("detained for a proceeding under section 1229a"); *Sandoval v. Acuna*, 2025 WL 3048926, at *4 (W.D. La. Oct. 31, 2025)

---

[3] It is also clear that the "hearing" in the title is a reference to the § 1229a removal hearing. That is plain from the use of the term throughout § 1225. *See, e.g.*, 8 U.S.C. § 1225(a)(2) ("In no case may a stowaway be considered an applicant for admission or eligible for a *hearing under section 1229a of this title*." (emphasis added)).

("However, aliens subject to removal under § 1225(b)(2) are not subject to expedited removal but, rather, removal proceedings in the ordinary course pursuant to § 1229a.").

That same conclusion is also apparent from the subtitles within § 1225 that the R&R does not address. The title of (b)(1) is "Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled." In contrast, (b)(2) has *no* reference to arriving aliens. It reads "Inspection of other aliens." Critically, the use of "arriving" in (b)(1) but not (b)(2) must be given effect. The R&R's interpretation renders the "arriving" in (b)(1) superfluous if all of § 1225 only applies to "arriving aliens."

More generally, Congress used the phrase "arriving alien" throughout Section 1225. *See, e.g.* 8 U.S.C. §§ 1225(a)(2), (b)(1), (c)(1), (d)(2). The phrase distinguishes a noncitizen presently or recently "arriving" in the United States from other "applicants for admission" who, like Petitioner, have been in the United States without being admitted. But Congress *did not* use the word "arriving" to limit the scope of § 1225(b)(2)(A)'s mandatory-detention provision. Had Congress intended to limit § 1225(b)(2)(A)'s scope to "arriving" noncitizens, it would have used that phrase like it did in § 1225(b)(1), a mere one subsection prior. Or it could have included a general provision that the section only applies to arriving noncitizens. But Congress did not and that election to selectively use "arriving" must be given effect. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where 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." (cleaned up)); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (concluding that "[t]he Government's request that we read [a specific] phrase into

[a statutory] exception, when it is clear that Congress knew how to specify [those words] when it wanted to, runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

C. The R&R's Conclusion that § 1225 Is Limited to "Arriving" Noncitizens Is Inconsistent with the Purpose of the IIRIRA

The R&R's interpretation effectively repeals a statutory fix Congress enacted with IIRIRA. Specifically, prior to the 1996 passage of IIRIRA, an "anomaly" existed "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). The addition of § 1225(a)(1) "ensure[d] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission.'" *Id.*; *see also* H.R. Rep. No. 104-469, pt. 1, at 225 (1996) ("This subsection is intended to replace certain aspects of the 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.").

The R&R's interpretive insertion of an "arriving" limitation into *all* of § 1225 undoes that fix and incentivizes noncompliance with immigration laws by providing more protection to those that bypass border inspections and evade detection to reside within the United States—a result at odds with the intent of Congress when amending § 1225 of the

INA. *See Chavez v. Noem*, Case No. 3:25-cv-02325-CAB, 2025 WL 2730228, at *4 (S.D. Cal. Sept. 24, 2025) (rejecting Petitioner's reading because it would repeal the IIRIRA statutory fix); *Sandoval*, 2025 WL 3048926, at *6 n.7 ("For this Court to conclude that an alien who has unlawfully entered the United States and managed to remain in the country for a sufficient period of time is entitled to a bond hearing, while those who seek lawful entry and submit themselves for inspection are not, not only conflicts with the unambiguous language of the governing statutes, but would also seemingly undermine the intent of Congress in enacting the IIRIRA.").

Importantly, the R&R does not address the purpose behind the fix to § 1225. Instead, the R&R addresses the *amendment to § 1226*. Specifically, the R&R block quotes a district court case explaining that the amendment to § 1226(a) restated the detention authority previously found in its predecessor provision to detain and release on bond a noncitizen. R&R at 14-15. From that citation, the R&R seems to suggest—but not state—that the amendment to § 1226(a) somehow addresses the concern noted.

But to state the obvious, that quote is about § 1226—not the amendment to § 1225 intended to put arriving and residing noncitizens on equal footing. Put simply, the observation is inapposite.

D. Discretionary Past Practice Is Consistent with Respondent's Reading

Next, the R&R points to the contemporaneous commentary explaining the implementing regulations for IIRIRA to suggest that the Executive understood § 1225 to only apply to arriving aliens. Specifically, it *partially* quotes from 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) as stating: "Aliens who are present without having been admitted or paroled (formerly referred to as aliens who entered without inspection) will be eligible for bond and bond redetermination." R&R at 18 (adding the signifier "(citation modified)").

But omitted from the R&R's quotation is the beginning of that same sentence stating: "*Despite being applicants for admission*, aliens who are present … ." 62 Fed. Reg. at 10323 (emphasis added). The italicized, omitted beginning to the sentence acknowledges the plain language of the statute that noncitizens in the country *are* "applicants for admission" under § 1225, but announces the *discretionary* choice to use § 1226 for detentions and thus permit bond hearings. A new administration has deviated from that discretionary choice, as it is permitted to do. Thus, the R&R (and the decisions it cites) erroneously conflate prior enforcement discretion with statutory interpretation.

E. The Laken Riley Act Does Not Render § 1225(b)(2)(A) Superfluous

Finally, the R&R asserts that the Laken Riley Act "renders the government's interpretation of § 1225(b)(2)(A) superfluous." R&R at 15. But that assertion suffers several problems.

First, Section 1226(a)'s general detention authority, which permits the issuance of warrants to detain all noncitizens for their removal proceedings, must be read alongside § 1225, which specifically addresses the detention of applicants for admission which is a subset of noncitizens subject to § 1226. And § 1226 does not displace the more specific provisions in § 1225 governing the detention of applicants for admission. It is well established that where "there is no clear intention otherwise, a specific statute will not be

controlled or nullified by a general one." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 375 (1990) (citation omitted). Here, § 1225 is narrower in scope than § 1226. It applies only to "applicants for admission," which includes noncitizens present in the United States who have not been admitted. *See* 8 U.S.C. § 1225(a)(1).

To be sure, as amended by the LRA, § 1226(c)(1)(E) mandates detention for a group of noncitizens that includes a narrow subset of applicants for admission that may also be subject to § 1225(b)(2)(A) detention; namely, those who both entered without inspection and were arrested for, committed, or have admitted to committing one of a list of enumerated crimes. But § 1226(c)(1)(E) applies to *all* noncitizens who meet the criminal criteria and is thus broader. Conversely, the mandatory detention provisions of § 1226(c)(1)(E) do not reach the rest of applicants for admission under § 1225(b)(2)(A) who do *not* meet the criminal criteria. Put simply, the two enforcement provisions have overlap much like a Venn diagram, but they are not perfectly overlapping so as to make a provision superfluous. *See Jennings* 583 U.S. at 305 (rejecting a claim of superfluity in the INA context by observing "[a]lthough the two provisions overlap in part, they are by no means congruent" and "apply to different categories of aliens in different ways"); *cf. Am. Car Rental Ass'n v. Humphreys*, No. 1:24-CV-02450-DDD, 2025 WL 1758898, at *5 (D. Colo. May 29, 2025) ("There is, to be sure, significant overlap between the two. But the canon against superfluity only requires what its name implies; it does not require that each provision have entirely distinct coverage—just that total superfluity be avoided.").

As the Supreme Court has acknowledged, some overlap and redundancies "are common in statutory drafting—sometimes in a congressional effort to be doubly sure,

sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, 590 U.S. 222, 239 (2020). "Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Id.*; *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019) ("Sometimes the better overall reading of the statute contains some redundancy."). Section 1225(b)(2)(A) allows detention upon encountering an immigration agent and § 1226(c) provides for detention by the issuance of a warrant; two *different* routes to detention, in addition to two *different* (albeit with some overlap) groups of noncitizens affected.

Finally, even if there is some overlap in the class of noncitizens between § 1225(b)(2)(A) and the LRA, the two provisions provide different means, procedures, and obligations that independently demonstrate a lack of superfluity. Section 1225(b)(2)(A) requires a personal examination of the noncitizen by an immigration officer and then, based on determinations drawn from the examination, potential detention. But § 1226 is different. It permits a warrant to be issued and a noncitizen detained in order to facilitate the later examination and determinations regarding admission. Further, while examination of any particular applicant for admission under § 1225 is subject to discretion as encountered, § 1226 imposes a mandate of arrest for certain noncitizens regardless of other enforcement priorities. As such, the two provisions use different means, have different obligations, and invert the order of detention and examination. Those differences independently undercut the R&R's assertion of superfluity.

CONCLUSION

The Respondents respectfully request that the Court reject the Report and Recommendation, deny the Petition, and dismiss the case.

Dated: November 4, 2025

Respectfully submitted,
ROBERT J. TROESTER
United States Attorney

/s/ Scott Maule

Scott Maule (OBA 31760)
Assistant U.S. Attorney
United States Attorney's Office
Western District of Oklahoma
210 Park Avenue, Suite 400
Oklahoma City, OK 73102
(405) 553-8832/8700
scott.maule@usdoj.gov