

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 25-cv-3062-GPG

JAVIER DE DOMINGO CAMPOS,

Petitioner,

v.

JUAN BALTASAR, Warden of the Denver Contract Detention Facility, Aurora, Colorado, in his official capacity;

ROBERT GAUDIAN, Field Office Director, Denver Field Office, U.S. Immigration and Customs Enforcement, in his official capacity;

KRISTI NOEM, Secretary, U.S. Department of Homeland Security, in her official capacity;

TODD LYONS, Acting Director of Immigration and Customs Enforcement, in his official capacity; and

PAM BONDI, Attorney General, U.S. Department of Justice, in her official capacity,

Respondents.

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**RESPONSE TO PETITION FOR HABEAS RELIEF**

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Respondents submit the following Response to the Petition for Habeas Relief, ECF No. 1, and the Court's Order to Show Cause, ECF No. 16. Petitioner Javier De Domingo Campos seeks habeas relief in the form of a writ directing that he be released on bond. See ECF No. 1 at 31. As explained below, the Court should deny the petition because Petitioner is lawfully detained pursuant to 8 U.S.C. § 1225(b)(2)(A), and under this statute, he is not entitled to be released on bond. And, even were the Court to determine that Petitioner should be held pursuant to 8 U.S.C. § 1226(a), the Court

should find that Petitioner's detention remains lawful due to Respondents' invocation of an automatic stay of the bond.

## INTRODUCTION

This Petition for habeas relief presents two questions. The first is a question of statutory interpretation: whether the Department of Homeland Security ("DHS") has properly determined that 8 U.S.C. § 1225(b)(2), a provision of law that applies to aliens who are present in this country but have not been admitted, applies to Petitioner, such that he is properly detained under that provision rather than under 8 U.S.C. § 1226(a). The material distinction is that non-citizens detained under Section 1225(b)(2) are not eligible for bond, while those detained under Section 1226(a) are.

The Court should find that Petitioner is covered by Section 1225(b)(2). The scope of Section 1225 generally, and the scope of 1225(b)(2) specifically, was explained by the Supreme Court in *Jennings v. Rodriguez*, 583 U.S. 281 (2020). There, the Court explained that under § 1225 "an alien who ... 'is present' in this country but 'has not been admitted' is treated as 'an applicant for admission;'" that section 1225(b)(2) serves as a "catchall provision that applies to all 'applicants for admission' not covered by § 1225(b)(1)" [which applies to a subcategory of aliens subject to expedited removal]; and that aliens "covered by § 1225(b)(2)" are subject to detention under § 1225(b)(2)(A). *See Jennings*, 583 U.S. at 287-89. As explained below, Petitioner here fits that definition: he (a) is present in this country and has never been admitted, (b) is not subject to expedited removal and thus is subject to section 1225(b)(2), and (c) thus is subject to detention under 1225(b)(2)(A). Respondents recognize that numerous

nonprecedential decisions have reasoned otherwise, resisting the interpretation that an alien who entered the country without being admitted is an “applicant for admission” covered by § 1225(b)(2). But as explained below, a close reading of how the Supreme Court in *Jennings* explained the scope of section 1225—which, unlike all those decisions, is binding on this Court—supports Respondents’ view.

The second question raised by the Petition is, if detention under Section 1225(b)(2)(A) is not lawful and Petitioner is thus entitled to a bond hearing, whether DHS has violated Petitioner’s due process rights, and engaged in ultra vires actions, by invoking a regulatory provision that allows DHS to obtain an automatic stay of a bond, 8 C.F.R. § 1003.19(i)(2), during DHS’s appeal of the Immigration Judge (IJ)’s grant of a bond.

If the Court determines that Petitioner is subject to Section 1225(b)(2), it need not address the legality of the automatic stay of Petitioner’s release on bond, because Petitioner is not entitled to bond in the first instance. But even if the Court were to conclude that Petitioner instead must be detained pursuant to Section 1226(a) and thus was entitled to a bond hearing, the Court should still uphold the regulation allowing for the automatic stay of the bond issued by the IJ. Under the special due process standards applicable to Petitioner, the invocation of the automatic stay has not denied him due process. And Petitioner also has not shown that the automatic stay provision meets the exceptionally high standards for an ultra vires claim.

## **BACKGROUND**

### **I. Legal background.**

In the INA, Congress established rules governing when certain non-citizens 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). As the Supreme Court explained the structure in *Jennings*, “Under ... 8 U.S.C. § 1225, an alien who “arrives in the United States,” or “is present” in this country but “has not been admitted,” is “*treated*” as “an applicant for admission.” 583 U.S. at 287 (emphasis added). Thus, an “applicant for admission” in section 1225 is a term of art that includes a non-citizen who is present in the United States but who has not lawfully entered the country.

As the Supreme Court in *Jennings* explained, such “applicants for admission” fall into different subcategories. *Id.* Two subcategories are described in Section 1225(b)(1). One subcategory is arriving inadmissible noncitizens: those who are arriving at the United States and are determined to be inadmissible under various grounds. *Id.* § 1225(b)(1)(A)(i). Another subcategory are those who were *not* admitted, but have been unlawfully present for less than two years. It applies to non-citizens 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 various provisions. *Id.* § 1225(b)(1)(A)(i), (iii)(II). Non-citizens within those two subcategories in

section 1225(b)(1) are subject to special expedited removal procedures, see 8 C.F.R. § 235.3(b). 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV).<sup>1</sup>

Section 1225(b)(2) then covers other remaining “applicants for admission”—a term, as described above, that describes both arriving noncitizens (who are inspected at the port of entry) as well as those who are unlawfully present *without* having been admitted. As the Court in *Jennings* described it, “Section 1225(b)(2) is broader. It serves as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here)...” 583 U.S. at 287.

“Aliens who are instead covered by § 1225(b)(2) are detained pursuant to a different process”—the process set forth in “§ 1225(b)(2)(A).” *Id.* at 288. Under 8 U.S.C. § 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. Thus, Section 1225(b)(2)(A) generally provides for detention, during removal proceedings, for non-citizens 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 non-citizens or other non-citizens subject to expedited removal).

In summing up this overview, the Court in *Jennings* recognized that individuals who are treated as a matter of law as “applicants for admission”—even those who fall into the catchall category of § 1225(b)(2), which includes those who were never

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<sup>1</sup> Depending on the circumstances, a non-citizen who is ordered removed under Section 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).

admitted and have been unlawfully present for more than two years—can be viewed as “seeking admission.” *Id.* (“In sum, U.S. immigration law authorizes the Government to detain certain aliens *seeking admission* into the country under §§ 1225(b)(1) and (b)(2).”). *Id.* at 289.

A different category of noncitizens may be admitted to the United States (and thus fall outside § 1225) but then later face removal for various reasons. *Id.* at 288 (explaining that aliens may face removal if they “were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission”). The Court in *Jennings* explained that such aliens may be detained under a different provision—§ 1226. *Id.* (“Section 1226 generally governs the process of arresting and detaining *that* group of aliens pending their removal.”) (emphasis added).

The procedures for detention and removal of non-citizens covered by Section 1226 are different from those provided for non-citizens subject to detention under Section 1225. Whereas Section 1225(b) requires mandatory detention, Section 1226(a) provides the possibility of release on bond. If the Attorney General issues a warrant, a non-citizen *may* be arrested and detained “pending a decision on whether the alien is to be removed from the United States.” During the pendency of removal proceedings, a non-citizen arrested under Section 1226 may remain detained or may be released on bond or conditional parole.<sup>2</sup> By regulation, immigration officers can release such a non-

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<sup>2</sup> Section 1226(c), however, requires the Attorney General to take into custody certain defined categories of “criminal aliens,” and to detain them during their removal proceedings—i.e., they are not able to receive bond hearings. 8 U.S.C. § 1226(c).

citizen 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 non-citizen can request a custody redetermination by an IJ at any time before a final order of removal is issued. *See id.* §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

For those non-citizens detained under Section 1226(a) and afforded a bond hearing, regulations also provide for appeal of an IJ’s decision to grant or deny bond. *See* 8 C.F.R. §§ 1003.19(f), 1003.38. As relevant here, if an IJ has ordered a non-citizen released on bond and DHS wishes to appeal that decision to the BIA, 8 C.F.R. § 1003.19(i)(2) permits ongoing detention of the non-citizen pending that appeal. This regulation, commonly referred to as the “automatic stay regulation,” provides that if DHS “determine[s] that an alien should not be released ..., any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon [DHS’s] filing of a notice of intent to appeal the custody redetermination ... with the immigration court within one business day of the order.” *Id.* § 1003.19(i)(2). If DHS files a timely notice of appeal, the automatic stay regulation further provides that “any order of the immigration judge authorizing release (on bond or otherwise)” shall, “except as otherwise provided in 8 CFR 1003.6(c), ... remain in abeyance pending decision of the appeal by the [BIA].” *Id.* § 1003.19(i)(2). Stay of the bond will “lapse 90 days after the filing of the notice of appeal,” absent a BIA decision. *Id.* § 1003.6(c)(4).

## II. Factual and Procedural Background

Petitioner is a citizen of Mexico who illegally entered the United States in March 1996. See Ex. 1 at ¶ 4 (Declaration of Michael Ketels).

In September 2024, he was convicted of assault and disturbing the peace and sentenced to one year of probation. *Id.* at ¶ 8. On July 18, 2025, DHS encountered Petitioner, determined that he had entered the U.S. unlawfully, and took him into custody. *Id.* at ¶¶ 9, 10. Though he was initially detained under 8 U.S.C. § 1226, ICE later cancelled his detention under that section and now detains him pursuant to 8 U.S.C. § 1225(b). *Id.* at ¶ 11. Petitioner is charged under 8 U.S.C. §§ 1182(a)(6)(A)(i) and 1182(a)(7)(i)(I) for being presented in the United States without admission. *Id.* at ¶¶ 12, 16.

ICE initiated removal proceedings, and on August 1, 2025, Petitioner appeared before an IJ for an initial hearing in those proceedings. *Id.* at ¶ 13. Petitioner sought additional time to hire counsel, and the IJ granted his request. *Id.* On August 14, 2025, Petitioner appeared before the IJ for a custody redetermination hearing. *Id.* at ¶ 17. The IJ found that Petitioner was held under 8 U.S.C. § 1226(a) and granted release on bond. *Id.* ICE then filed a notice of intent to appeal the IJ's custody determination, automatically staying Petitioner's bond. *Id.* On August 19, 2025, ICE filed a notice of appeal with the BIA, triggering an additional stay of Petitioner's bond. *Id.* at ¶ 19. The briefing deadline before the BIA on the custody determination issue was September 24, 2025. *Id.* at ¶ 20.

On September 4, 2025, the IJ found the charge against Petitioner under 8 U.S.C. § 1182(a)(6)(A)(i) was sustained. *Id.* at ¶ 21. On September 17, 2025, Petitioner filed an

application for cancellation of his removal with the Executive Officer for Immigration Review. *Id.* at ¶ 22. A merits hearing on Petitioner's application for relief from removal before the IJ is scheduled for October 30, 2025. *Id.* at ¶ 23.

## ARGUMENT

### I. **Petitioner is properly detained under Section 1225(b) and thus is not entitled to bond.**

DHS's decision to hold Petitioner under Section 1225(b) without bond is lawful. First, the Court lacks jurisdiction to review DHS's decision that Petitioner is subject to Section 1225; that decision may be reviewed only by the court of appeals. Second, even were the Court to conclude it has jurisdiction, Petitioner, as a non-citizen present in the United States who has not been admitted, is lawfully being held under Section 1225(b)(2)(A).

#### A. **This Court lacks jurisdiction over Petitioner's requests for relief.**

This Court cannot consider Petitioner's challenge to his detention insofar as he is challenging ICE's decision that he is subject to 8 U.S.C. § 1225(b)(2)(A) and that he is thus detained under that provision rather than 8 U.S.C. § 1226(a). As explained below, the INA channels challenges arising from actions taken to remove a non-citizen to the appropriate court of appeals.

Congress has provided non-citizens with a vehicle to challenge the statutory provision that ICE relies on to detain and remove non-citizens. Specifically, Congress provided, in the INA, that claims related to removal orders are to be presented to the appropriate court of appeals through a petition for review. 8 U.S.C. § 1252(a)(5). Review of a final order includes 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.” *Id.* § 1252(b)(9). The decision that Petitioner is subject to Section 1225(b)(2)(A) is a question of law arising from his removal proceedings. This issue could be reviewed by the appropriate court of appeals as part of an appeal of a final order of removal. And Congress made that mechanism for review—in the court of appeals—exclusive, providing that such judicial review “shall be available only in judicial review of a final order” as provided in Section 1252(b)(9).

While certain Justices of the Supreme Court have suggested that there may be an exception to this exclusive-review rule where a non-citizen cannot effectively seek review of his detention through his immigration proceedings and is detained for a prolonged period, Petitioner has not shown he falls within that exception. In *Jennings v. Rodriguez*, 583 U.S. 281 (2018), Justice Alito, joined by only two other Justices, opined that Section 1252(b)(9) did not bar a challenge to detention under § 1225 where the detention was “prolonged” and thus became “effectively unreviewable.” *Id.* at 293. But in that opinion Justice Alito clarified that the parties in that case were “not challenging the decision to detain them in the first place or to seek removal.” *Id.* at 294. His opinion thus did not suggest that district courts have authority to review a challenge—like the one Petitioner advances here—to the *initial* determination of ICE to seek removal and detain a noncitizen based on the determination that § 1225 applies to the noncitizen. And Petitioner has not shown that his detention has been prolonged. Similarly, in *Nielsen v. Preap*, 586 U.S. 392 (2019), Justice Alito, again writing for only two other

justices, opined that § 1252(b)(9) did not bar review of a challenge by noncitizens to their detention where they were “not even challenging any part of the process by which their removability will be determined.” *Id.* at 402. Here, in contrast, Petitioner *is* challenging a core basis for his removability—whether Section 1225(b)(2)(A) applies to him—and he has not shown that his challenge cannot be presented through his immigration proceedings.

Finally, to the extent Petitioner is seeking to challenge DHS’s decision to rely on Section 1225(b)(2) rather than Section 1226, another provision of the INA limits this type of challenge. 8 U.S.C. § 1252(g) states that, except as otherwise provided in Section 1252, courts lack jurisdiction to consider “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings . . . against any alien under this chapter.” This bar on considering the commencement of cases includes a bar on considering challenges to the *basis on which* ICE chooses to commence removal proceedings. *See Alvarez v. U.S. Immigr. & Customs Enft*, 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.”).

Accordingly, Congress—in Section 1252(a)(5) and (b)(9)—provided non-citizens (like Petitioner) with a vehicle to challenge the basis on which ICE seeks to detain and remove them, in the court of appeals; but Congress also—in sections 1252(b)(9) and

(g)—deprived district courts (like this Court) of jurisdiction to review an non-citizen’s challenge to DHS’s decision about the basis his removal proceedings.

**B. Petitioner is not entitled to a bond hearing.**

Even if the Court were to determine that it has jurisdiction to consider Petitioner’s challenge to his detention him under Section 1225(b)(2)(A) rather than Section 1226(a), that challenge fails because Petitioner falls within the text of Section 1225(b)(2)(A).

Section 1225(b)(2)(A) mandates detention for a non-citizen “who is an applicant for admission” if an immigration officer determines that the non-citizen “seeking admission is not clearly and beyond a doubt entitled to be admitted.” The statute defines “[a]pplicant for admission” to include non-citizens who (1) are “present in the United States who ha[ve] not been admitted” or (2) “arrive[ ] in the United States.” *Id.* § 1225(a)(1). In other words, a non-citizen who is present in the United States but has not been inspected or admitted is treated, as a matter of law, as an applicant for admission.

That definition of “applicant for admission” describes Petitioner. When ICE took him into custody, he was present in the United States. And he has not been “admitted” (*i.e.*, made a “lawful entry”).” 8 U.S.C. § 1101(a)(13)(A). Thus, Petitioner is an applicant for admission. And he does not argue that he is “clearly and beyond a doubt entitled to be admitted.” *Id.* § 1225(b)(2)(A).

Petitioner resists this plain reading of Section 1225(b)(2)(A). He argues, based on the statute’s text and the Respondents’ past practice, that the statute should not apply to him. But his arguments do not overcome a plain reading of the text.

**Textual arguments.** First, Petitioner makes arguments about why Section 1225 does not apply to him and why Section 1226 does.

Petitioner argues that the text of Section 1225 focuses on those just arriving in the United States. He argues it is limited to those arriving at U.S. ports or interdicted in international waters or encountered *at or near the border.*” ECF No. 1 at 7.

That limited reading of Section 1225(b)(2)(A) does not comport with its text or make sense in the context of the section as a whole. As Petitioner admits, Section 1225(b)(2) also includes those “who are otherwise ‘applicants for admission.’” ECF No. 1 at 7. Section 1225 makes clear that “applicants for admission” includes both those just arriving in the United States *and* those who entered without inspection and have been residing here. For example, Section 1225(b)(1) is not limited to aliens “arriving in the United States” who are rendered inadmissible for the specified reasons (*i.e.*, misrepresentation or lack of a valid entry document). Section 1225(b)(1) also applies, through its reference to Section 1225(b)(1)(A)(iii), to some aliens who have *already* been residing in the United States and are inadmissible for the same reasons—that is, applicants for admission who have “not been admitted or paroled” and have not “affirmatively shown, to the satisfaction of an immigration officer, that [they] ha[ve] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

Section 1225(b)(2) is broader than Section 1225(b)(1): the Supreme Court has recognized that Section 1225(b)(2) refers to a “broader” category of aliens than those

described in 1225(b)(1). In *Jennings v. Rodriguez*, the Court referred to Section 1225(b)(2) as a “catchall provision that applies to *all applicants for admission* not covered by § 1225(b)(1).” 583 U.S. 281, 287 (2020) (emphasis added). Accordingly, Section 1225(b)(2) applies *both* to applicants for admission just arriving at the border who do not fall within Section 1225(b)(1)(A)(i) *and* to applicants for admission who have been physically present in the United States but are not covered by Section 1225(b)(1)(A)(iii)(II). While section 1225(b)(2) is titled “Inspection of other aliens,” the “other aliens” in the title simply refers to the fact that it covers a category of aliens that is not covered by Section 1225(b)(1).

Section 1225 indicates that anyone falling within the category of applicants for admission is deemed, as a matter of law, to be seeking admission. See 8 U.S.C. § 1225(a)(3) (“All aliens . . . who are applicants for admission or *otherwise seeking admission* . . . shall be inspected by immigration officers.” (emphasis added)). And, as noted, the Supreme Court has treated Section 1225(b)(2)(A) as applying to “*all applicants for admission* not covered by § 1225(b)(1).” *Jennings*, 583 U.S. at 287 (emphasis added).

Petitioner also argues that Section 1225(b)(2)(A) does not apply to him because Section 1226(a) should. See ECF No. 1 at 7-13. First, he argues that Section 1226(a) is the “default rule” that should apply to persons “pending a decision on whether the [noncitizen] is to be removed.” *Id.* at 12 (citations omitted). He argues that the “plain language of § 1226 applies to people charged as inadmissible for entering without inspection.” *Id.*

But Section 1226(a)'s general detention authority, which permits the issuance of warrants to detain non-citizens for their removal proceedings, must be read alongside Section 1225, which specifically addresses the detention of applicants for admission. And Section 1226 does not displace the more specific provisions in Section 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, Section 1225 is narrower in scope than Section 1226. It applies only to "applicants for admission," which includes non-citizens present in the United States who have not been admitted. See 8 U.S.C. § 1225(a)(1).

To be sure, 8 U.S.C. § 1226(c)(1)(E) mandates detention for a narrow category of non-citizens who entered the country without inspection: those who both entered without inspection and were later arrested for, committed, or have admitted to committing one of a list of enumerated crimes. It requires DHS to take such aliens into custody after their release from criminal custody and detain them. See *Nielsen v. Preap*, 586 U.S. 392, 414-15 (2019) (explaining that Section 1226(c)(1)'s "when released" clause clarifies that DHS custody begins "upon release from criminal custody," not before, and that it "exhort[s] [DHS] to act quickly"). But the fact that Section 1226(c)(1)(E) provides further rules for detention of one category of non-citizens who entered without inspection does not mean that Section 1225(b)(2)(A) no longer applies to all other such non-citizens.

Put another way, it is true that for a certain subset of non-citizens—those who

entered without inspection, and then committed (or may have committed) certain crimes—Congress has mandated their detention in two separate provisions, both Section 1225(b)(2)(A) and Section 1226(c)(1)(E). But this overlap—this redundancy in requiring mandatory detention certain non-citizens who committed (or may have committed) certain crimes—does not mean that Section 1225(b)(2)(A) does not still govern the detention of other aliens who entered without inspection. As the Supreme Court has acknowledged, 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.* The Court should not read Section 1226 to require courts to ignore the express detention and removal provisions in Section 1225.

Nor is there any indication that Congress intended courts to ignore the detention provisions in Section 1225. In enacting the Laken Riley Act (which added Section 1226(c)(1)(E)), Congress did not alter Section 1225(b)(2)(A). See PL No. 119-1, 139 Stat. 3 (2025). It is implausible that in the Laken Riley Act, Congress intended—without ever saying so—to displace the authority in Section 1225(b)(2)(A) to detain applicants for admission who are present in the United States and have not been admitted.

Finally, Petitioner points to stray language from *Jennings* to bolster his reading of Sections 1225 and 1226. ECF No. 1 at 12-13. In *Jennings*, the Supreme Court first explained the scope of non-citizens subject to Section 1225(b). 583 U.S. at 287-89.

The Court then went on to address whether non-citizens were entitled to periodic bond hearings during detentions under Sections 1225 and 1226 that became prolonged. 583 U.S. at 291-92. In that later discussion, the Court briefly referred back to its earlier discussion, stating that Section “1225(b) applies primarily to aliens seeking entry into the United States,” *id.* at 297, and that Section 1226(a) is the “default rule” for aliens “inside the United States,” *id.* at 288.

But the Court’s earlier, more detailed explanation of Section 1225 fully supports the position that Section 1225(b)(2) applies to aliens who entered without inspection and remain unlawfully present. In that earlier discussion, the Court made clear that Section 1225(b) is not limited to those just arriving in the United States, but also extends to others—including those who were not admitted and are unlawfully present—who are “treated” by the immigration statute as “applicants for admission” covered by Section 1225(b). *Id.* at 287. And it explained that Section 1225(b)(2) is a “catchall provision that applies to *all applicants for admission* not covered by § 1225(b)(1).” *Id.* at 287 (emphasis added).

**Past practice.** Petitioner next argues that detaining non-citizens like him under Section 1225(b)(2)(A) conflicts with past practice. Specifically, he points to an entry in the Federal Register from 1997 which states that “[d]espite being applicants for admission, 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.” ECF No. 1 at 7 (citing 62 Fed. Reg. 10312, 10323).

First, this citation from the Federal Register does not support Petitioner’s

argument. The entry appears to acknowledge that non-citizens who are present without having been admitted are “applicants for admission.” Thus, the cited language implicitly acknowledges that applicants for admission are not eligible for bond hearings under the statute. Instead, it apparently regarded them as eligible for bond hearings as a matter of administrative discretion, not of statutory interpretation.

Second, this statement in the Federal Register did not change the plain language of the statute. The weight given to agency interpretations must “depend upon their thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 388 (2024) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Here, the agency provided little analysis to support the reasoning for its statement about granting bond hearings to applicants for admission. See 62 Fed. Reg. at 10323. A prior practice by the agency of making such individuals eligible for bond hearings therefore carries little weight.

**Other decisions.** Petitioner points to numerous nonprecedential district court decisions concluding that non-citizens who enter without inspection and then reside in the United States fall within the scope of Section 1226(a) rather than Section 1225(b)(2)(A). ECF No. 1 at 10-11 (collecting cases).<sup>3</sup> Those district court decisions uniformly fail to show that the text of the statute does not apply to non-citizens who enter without inspection and then reside in the United States. In interpreting Section

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<sup>3</sup> Not all district courts have agreed. See *Chavez v. Noem*, No. 25-cv-02325-CAB-SBC, 2025 WL 2730228, at \*1 (S.D. Cal. Sept. 24, 2025) (holding that Section 1225(b) applied to an alien who entered without inspection).

1225(b)(2), this Court must follow *Jennings*, not those decisions.

In a recent decision, this Court noted the number of district court rulings rejecting Respondents' position on the scope of Section 1225(b)(2). See *Moya Pineda v. Baltasar*, Civil Action No. 25-cv-029550-GPG-TPO (D. Colo.), ECF No. 21. But the nonprecedential decisions cited with approval in *Moya Pineda* do not analyze how their reading of Section 1225(b)(2) can be read consistently with the Supreme Court's interpretation of that provision in *Jennings*. For example, in one decision cited with approval in *Moya Pineda*, the district court, in the portion of its opinion addressing the proper scope of Section 1225(b)(2), did not cite or address the *Jennings* decision at all. See *Cordero Pelico v. Polly Kaiser*, No. 25-cv-07286-EMC, 2025 WL 2822876, at \*14 (N.D. Cal. Oct. 3, 2025). In another case, the district court briefly discussed *Jennings* but then suggested that *Jennings* supports the view that non-citizens who are present in the United States are *not* covered by Section 1225—but did so without acknowledging or addressing the Supreme Court's explanation that a non-citizen who is present in this country but has not been admitted is treated as an applicant for admission subject to 1225(b)(2). *Cerritos Echevarria, v. Bondi*, No. 25-cv-03252-PHX-DWL-ESW, 2025 WL 2821282, at \*7 (D. Ariz. Oct. 3, 2025); see *id.* at \*\*4-5 (explaining that the scope of Section 1225(b)(2) is a "complicated and debatable question" and that the government's view of its scope "appears, at first blush, to be consistent" with the statutory language, but then relying on a Ninth Circuit decision in rejecting the government's position).

In short, in reviewing the court decisions interpreting the scope of Section 1225(b), the Court should adhere to the view of that position adopted by the Supreme

Court in *Jennings*. That approach supports the view that Petitioner is subject to, and thus lawfully held pursuant to, Section 1225(b)(2).

**II. The Court should reject Petitioner's challenge to the automatic stay regulation.**

The Court should deny Petitioner's request for a declaratory judgment holding the automatic stay of his bond to be unlawful.

As a threshold issue, should the Court accept Respondent's position that Petitioner is properly detained pursuant to Section 1225(b), he is not entitled to bond. Petitioner's challenge to the automatic stay of bond would then become moot, and the Court need not address it. *See Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031 (E.D. Wis. 2007) (finding that where the petitioner was no longer held pursuant to the automatic stay provision of 8 C.F.R. § 1003.19(i)(2), his challenge to the automatic stay was moot), *aff'd sub nom. Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007).

Were the Court to find that Petitioner must be detained pursuant to Section 1226(a), however, it should still deny Petitioner's challenge to the automatic stay of his bond. First, Petitioner has not shown that application to of the automatic stay regulation deprives him of due process. Second, the regulation is not *ultra vires*.

**A. The automatic stay does not deprive Petitioner of due process.**

Petitioner argues that the automatic stay deprives him of his procedural and substantive due process rights. As to the former, Petitioner argues that the automatic stay deprives him of his liberty without adequate process and safeguards. As to the latter, Petitioner argues that the automatic stay permits Respondents to detain him without articulating any justification for doing so that outweighs his liberty interest.

Here, invocation of the automatic stay does not deprive Petitioner of due process under the Fifth Amendment.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But in the immigration context, the Supreme Court has held that for non-citizens who have never been admitted into the United States, the due process rights are those set forth by Congress:

In 1892, the Court wrote that as to “foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law,” “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” ... Since then, the Court has often reiterated this important rule.

*Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138–39 (2020). Accordingly, a non-citizen who has not been admitted into the country “has only those rights regarding admission that Congress has provided by statute.” *Id.* at 140 (explaining that where Congress provided an alien a right to a determination regarding asylum, and he “was given that right,” “the Due Process Clause provides nothing more” and thus “does not require review of that determination or how it was made”).

Here, that approach means that even if Petitioner is subject to detention under Section 1226(a), his rights as to bond are those provided by Congress. In Section 1226(a), Congress has provided that a non-citizen “may be arrested and detained pending a decision on whether the non-citizen is to be removed,” that the government “may continue to detain the arrested alien” or “may release the alien on ... bond,” and

also may “at any time ... revoke a bond.” 8 U.S.C. § 1226(a)(1), (2), (b). But Congress has not granted non-citizens like Petitioner an absolute right to bond, or a right to release before a final decision on bond—i.e., while an IJ’s decision on bond is being appealed.

Petitioner thus has not shown that *Congress* has granted him the right he seeks here—a right not to have bond revoked pending a final decision by the Board of Immigration Appeals on bond. The BIA, not the IJ, is the final agency decision maker on bond, and Petitioner’s due process arguments to an extent rely on a misunderstanding of the procedural processes in immigration proceedings and the relationship between DHS, the Immigration Judges, and the BIA. “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.” *Hussain*, 492 F. Supp. 2d at 1032. But, “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 [BIA].” *Id.* “[I]t 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.* (finding that the regulation “reveals the division of authority the Attorney General has established within the executive branch to exercise his overall authority to determine the custodial status of aliens facing removal proceedings,” and noting that DHS’s exercise of its delegated responsibilities does not

amount to a denial of due process). At this stage, Petitioner is still receiving due process— a decision on bond—but that process has not yet been completed.

**B. The auto-stay is not *ultra vires* nor unauthorized by the INA.**

Finally, Petitioner argues that the provision in the auto-stay regulation is *ultra vires*—beyond the agency’s authority. But Petitioner has not shown that the regulatory provision is *ultra vires* under the exceptionally high standards that apply to those claims, as the Supreme Court has recently explained. Such an *ultra vires* argument claim “is essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds.” *Nuclear Regul. Comm’n v. Texas*, 605 U.S. 665, 681–82 (2025) (internal quotation marks omitted) (hereinafter *NRC*).

In *NRC*, the Supreme Court explained that a party’s claim that an agency has acted “*ultra vires*” cannot succeed except where the agency order at issue “was an attempted exercise of power that had been specifically withheld,” and the agency’s order violated a “specific prohibition” in the governing statute. *Id.*, at 188–189 (internal quotation marks omitted). The Court continued that such an *ultra vires* argument cannot be accepted “simply because an agency has arguably reached a conclusion which does not comport with the law,” because then “*ultra vires* review could become an easy end-run around the limitations of ... other judicial-review statutes.” *Id.* “Rather, it applies only when an agency has taken action entirely in excess of its delegated powers and contrary to a *specific prohibition*” in a statute.” *Id.* (emphasis in original) (internal quotation marks omitted). In addition, “*ultra vires* review is not available [where a party]

had an alternative path to judicial review,” such as through review of the agency’s ultimate final order. *Id.* at 682.

Here, Petitioner’s ultra vires argument falls far short of meeting this high standard, because he fails to show that Congress has *specifically* prohibited the practice adopted in the automatic stay provision. Petitioner’s basic argument is that the automatic-stay provision “effectively rewrites § 1226(a) by eliminating the IJ’s discretion to release on conditions.” ECF No. 1 at 24. But Congress did not provide in Section 1226(a) that an *immigration judge* has *final* authority to grant bond; rather, as explained above, the BIA has the final authority.

Petitioner also argues that Congress’s reference to the “Attorney General” in Section 1226(a) restricts the authority to grant bond to the Attorney General and thus to immigration judges. ECF No. 1 at 24. The ultimate bond decision is made by the BIA, which is part of the Department of Justice. And, the automatic stay regulation was promulgated by the Attorney General—not DHS. See Final Rule, “Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review,” 63 Fed. Reg. 27,441, 27,441 (May 19, 1998) (explaining that the Department of Justice had proposed the rule to establish procedures for “a stay of an immigration judge’s custody decision in conjunction with an appeal of the custody decision to the Board of Immigration Appeals” and, in doing so, “codified a long-standing administrative practice”). Moreover, as the Supreme Court has explained, “Congress has empowered the Secretary [of Homeland Security] to enforce the Immigration and Nationality Act, ...

though the Attorney General retains the authority to administer removal proceedings and decide relevant questions of law." *Nielsen v. Preap*, 586 U.S. 392, 398 n.1 (2019). But even if the statute were read to reserve the bond decision to the Department of Justice, Petitioner is not arguing that the automatic-stay provision has deprived the BIA of its authority to make a final decision on bond. In sum, the automatic stay provision does not deprive the Attorney General of authority to make a bond decision.

Even if Petitioner had been able to identify some tension between the automatic-stay provision and Section 1226(a), Petitioner's argument would still fail because Petitioner fails to identify a provision that Congress adopted in Section 1226(a) that *specifically* prohibits the practice adopted, or *specifically* withholds the authority exercised, in the automatic-stay provision. Absent such a *specific* prohibition on the practice reflected in the automatic-stay provision, Petitioner cannot show that the regulatory provision at issue here is ultra vires, under the high standard set by the Supreme Court in *NRC*.

### CONCLUSION

For the reasons stated herein, the Court should deny the Petition because Petitioner is lawfully held pursuant to Section 1225(b), and the automatic stay of bond while the BIA determines the custody redetermination appeal is not unlawful.

Dated: October 23, 2025

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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