IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-03134-DDD-STV

EARLIN ORANDE AHINSHA RICHARDS,

Petitioner,

v.

JOHNNY CHOATE, in his official capacity as warden of the Aurora Contract Detention Facility owned and operated by GEO Group, Inc.;
JAMISON MATUSZEWSKI, in his official capacity as Interim Field Office Director, Denver, U.S. Immigration and Customs Enforcement;
KRISTI NOEM, in her official capacity as Secretary, U.S. Department of Homeland Security;
TODD M. LYONS, in his official capacity as Acting Director of Immigration and Customs Enforcement;
PAMELA BONDI, in her official capacity as Attorney General of the United States,

Respondents.

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER (Doc. 2)

Respondents respond to Petitioner's Motion for Temporary Restraining Order filed on October 6, 2025, *see* Doc. 2, which the Court has construed as a motion for preliminary injunction, *see* Doc. 6.

The Court should deny Petitioner's motion because Petitioner's detention is lawful. Petitioner is a noncitizen subject to mandatory detention during the pendency of his removal proceedings. Due process does not require a bond hearing before the removal proceedings are final, especially where there is no suggestion of any improper or undue delay by the government in pursuing or completing the proceedings. Finally, even if this Court were to order some relief, the Constitution does not require the specific bond-hearing procedures that Petitioner requests.

BACKGROUND

I. Statutory Background

In the Immigration and Nationality Act ("INA"), Congress determined when certain aliens may or must be detained or removed. As relevant here, 8 U.S.C. § 1225 governs detention and removal of "applicants for admission." An applicant for admission is an "alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .) . . . ." 8 U.S.C. § 1225(a)(1). Section 1225(b)(1) governs the inspection and detention of certain aliens who are arriving and inadmissible on various grounds not relevant here. *See* 8 U.S.C. § 1225(b)(1)(A)(i)-(iii). Section 1225(b)(2) is a "catchall" provision that applies to those applicants for admission not covered by Section 1225(b)(1). *See Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018). Under Section 1225(b)(2)(A), any "applicant for admission" who is "seeking admission into the United States" and who an immigration officer determines is "not clearly and beyond a doubt entitled to be admitted," "shall be detained for" removal proceedings under 8 U.S.C. § 1229a. In other words, for those aliens subject to Section 1225(b)(2)(A), detention is mandatory during removal proceedings. Section 1225 does not provide for bond hearings during removal proceedings.

Lawful permanent residents of the United States are "regarded as seeking an admission into the United States for purposes of the immigration laws" under certain circumstances. *See* 8 U.S.C. § 1101(a)(13)(C). As relevant here, an "alien lawfully admitted for permanent residence" who "has committed an offense identified in section 1182(a)(2) of this title" is "regarded as seeking an admission into the United States for purposes of" the INA. 8 U.S.C. § 1101(a)(13)(C)(v). Offenses identified in Section 1182(a)(2) include, among other things, violations of "any law or regulation of a State, the United States, or a foreign country relating to

a controlled substance . . . ." 8 U.S.C. § 1182(a)(2)(A)(i)(II); *see also* 21 U.S.C. § 812 (identifying "marihuana" as a controlled substance in Schedule I(c)(10)).

Separately, 8 U.S.C. § 1226(c) requires the Attorney General to take into custody certain categories of "criminal aliens" and to detain them during their removal proceedings—that is, they are not able to receive bond hearings. *See* 8 U.S.C. § 1226(c)(1). Among those aliens subject to mandatory detention under Section 1226(c) are those who are "inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title . . . ." 8 U.S.C. § 1226(c)(1)(A). Section 1226(c) authorizes the government to release aliens detained under that section only if the government decides relief is necessary for witness-protection purposes *and* "the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(4). Otherwise, section 1226(c) mandates detention "pending a decision on whether the alien is to be removed from the United States." *Id.* § 1226(a).

The Supreme Court "has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). Detention "gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made." *Jennings*, 583 U.S. at 285.

II. Factual Background

Petitioner is a citizen of St. Vincent and the Grenadines and a lawful permanent resident of the United States. Doc. 1 ¶1; *see also* **Exhibit 1**, Declaration of Mark Kinsey, ¶¶4-5. In 2009, Petitioner was convicted of possession of marijuana under Texas law. Ex. 1 ¶6.

On March 5, 2025, Petitioner departed the United States. *Id.* ¶7. Four days later,

Petitioner arrived back at a United States port of entry, seeking admission into the United States. *Id.* ¶8. U.S. Customs and Border Patrol issued Petitioner a Notice to Appear, initiating removal proceedings under 8 U.S.C. § 1229a. *Id.* ¶9. The Notice to Appear charged Petitioner with being inadmissible to the United States, due to his drug conviction. *Id.* ¶¶6, 9. Petitioner was detained pursuant to Section 1225(b) beginning on or about March 10, 2025. *See id.* ¶¶8-9; Doc. 1 ¶11.

On March 25, 2025, Petitioner filed an application for cancellation of removal. Ex. 1 ¶12. Petitioner twice appeared before an immigration judge: once for his initial appearance in removal proceedings and again for his individual hearing. *Id.* ¶¶13-14. On May 16, 2025, the immigration judge denied Petitioner's application and ordered him removed. *Id.* ¶14; Doc. 1-2 at 16. Petitioner appealed the decision to the Board of Immigration Appeals ("BIA"). Ex. 1 ¶15. That appeal remains pending. *Id.* ¶17; *see also* Doc. 1 ¶31.

STANDARD OF REVIEW

To obtain a preliminary injunction, the moving party must prove: (1) that he is "substantially likely to succeed on the merits"; (2) that he will "'suffer irreparable injury' if the court denies the injunction"; (3) that his "'threatened injury' (without the injunction) outweighs the opposing party's under the injunction"; and (4) that "the injunction isn't 'adverse to the public interest.'" *Chiles v. Salazar*, 116 F.4th 1178, 1199 (10th Cir. 2024) (quoting *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019)). The third and fourth factors "merge" when the government is the party opposing injunctive relief. *Id.* Where the "requested injunction would 'change[] the status quo,' the preliminary injunction motion is considered 'disfavored,'" and the moving party "must make a 'strong showing'" that the likelihood-of-success-on-the-merits and balance-of-harms factors tilt in his favor. *Id.* (quoting

Free the Nipple, 916 F.3d at 797).

ARGUMENT

Petitioner asks the Court to "order his immediate release" from ICE custody or "that he be presented before a neutral adjudicator within seven days of this Court's order . . . ." Doc. 2 at 3. This request mirrors the relief he seeks in his Petition: "a writ of habeas corpus directing Respondents to release [him]" or, alternatively, to provide him an "individualized bond hearing before an impartial adjudicator," at which the government "bears the burden of establishing by clear and convincing evidence that continued detention is justified" and the "adjudicator is required to meaningfully consider alternatives to imprisonment" and his "ability to pay a bond." Doc. 1 at 19.

The Court should deny the requested relief because Petitioner's detention is lawful. Petitioner is a noncitizen subject to mandatory detention during the pendency of his removal proceedings. ICE's custody of Petitioner during his removal proceedings does not violate due process.

I. Petitioner's due process claim is unlikely to succeed on the merits.

A. Petitioner is subject to mandatory detention.

Petitioner is being detained subject to Section 1225(b). *See* Ex. 1 ¶11. As an alien "who arrive[d] in the United States" at a port of entry, *see* Ex. 1 ¶¶7-8, he is an "applicant for admission" for purposes of the INA. *See* 8 U.S.C. § 1225(a)(1). Moreover, being a lawful permanent resident who "has committed an offense identified in section 1182(a)(2)"—his offense "relating to a controlled substance," *see* 8 U.S.C. § 1182(a)(2)(A)(i)(II); *see also* Ex. 1 ¶6 (marijuana possession conviction)—he is deemed to be "seeking an admission into the United States for purposes of the immigration laws . . . ." 8 U.S.C. § 1101(a)(13)(C)(v). He is "not

clearly and beyond a doubt entitled to be admitted," 8 U.S.C. § 1225(b)(2)(A), because his drug conviction is grounds for finding him inadmissible under the INA, *see* 8 U.S.C. § 1182(a) (setting forth grounds making aliens "ineligible to be admitted" to the United States); Ex. 1 ¶9. Therefore, Petitioner "shall be detained for a [removal] proceeding under section 1229a of this title." 8 U.S.C. § 1225(b)(2)(A).

Petitioner's removal proceeding is ongoing. An order of removal does not become final until either the BIA has affirmed the removal order or the time to seek BIA review has expired without an appeal. 8 U.S.C. § 1101(a)(47)(B).[1] Here, Petitioner's appeal of his removal order is pending before the BIA. Ex. 1 ¶¶15-17; *see generally* Doc. 1-2 (Petitioner's "Brief on Appeal"). Petitioner therefore continues to be subject to mandatory detention under 8 U.S.C. § 1225(b).

B. ICE's detention of Petitioner does not violate due process.

The question for the Court is whether the mandatory detention scheme during removal proceedings is unconstitutional in the absence of an individualized bond hearing. The Supreme Court upheld mandatory detention during removal proceedings (in the Section 1226(c) context) in *Demore v. Kim*, 538 U.S. 510 (2003), and the same reasoning applies to mandatory detention during removal proceedings under Section 1225(b)(2)(A). The *Demore* court reiterated its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings . . . ." *Id.* at 526. The Court reasoned that mandatory detention of criminal aliens "*pending their removal proceedings*" "necessarily serves" an immigration purpose "of preventing deportable criminal aliens from fleeing prior to or

[1] Petitioner's removal period has not yet started. *See* 8 U.S.C. § 1231(a)(1)(B) (providing that the removal period begins on the latest of: (1) the date the order of removal becomes administratively final; (2) the date of a reviewing court's final order (if the court orders a stay of removal); or (3) the date the alien is released from detention or confinement).

during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 527-28 (emphasis in original). And the Court concluded that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Id.* at 531.

The Supreme Court rejected the petitioner's argument in *Demore* that he was entitled to an individual bond hearing. *See id.* at 524-25. The Court said that the petitioners in *Carlson v. Landon*, 342 U.S. 524 (1952), "like respondent in the present case [*Demore*] . . . challenged their detention on the grounds that there had been no finding that they were unlikely to appear for their deportation proceedings when ordered to do so." *Demore*, 538 U.S. at 524. The Court then went on to explain that in *Carlson*, it had "rejected the aliens' claims that they were entitled to be released from detention if they did not pose a flight risk," and that even without individualized findings of dangerousness or flight risk, the denial of bail was permissible "by reference to the legislative scheme." *Id.*

This Court has rightly interpreted *Demore* as holding that Fifth Amendment due process does not require a bond hearing for aliens subject to mandatory detention during removal proceedings. *See Basri v. Barr*, 469 F. Supp. 3d 1063, 1073 (D. Colo. 2020) (Domenico, J.) ("In *Demore*, the Court held that the Fifth Amendment does not require a bond hearing for an alien detained under Section 1226(c)."). "Under *Demore*, the government can detain an alien *without bond* for the entirety of his removal proceedings." *Id.* at 1074 (emphasis in original); *see also Aguayo v. Martinez*, No. 20-cv-00825-DDD-KMT, 2020 WL 2395638, at *3 (D. Colo. May 12, 2020) (Domenico, J.) (holding that the petitioner's nine-month detention under § 1226(c) "does not violate the Constitution"). The Court should reach the same conclusion here.

C. Petitioner's detention is not unreasonable or unjustified.

Nevertheless, concern that prolonged detention may *become* unreasonable or unjustified has led some courts to order bond hearings for aliens based on an interpretation of Justice Kennedy's concurrence in *Demore*. In his concurrence, Justice Kennedy wrote that "since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring). Justice Kennedy then explained: "Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against the risk of flight or dangerousness, but to incarcerate for other reasons." *Id.* at 532-33 (Kennedy, J., concurring).

The concern about unreasonable delay and incarceration for other reasons expressed in Justice Kennedy's concurrence is inapplicable to Petitioner's detention here because there has been no showing that ICE has unreasonably delayed the pursuit or completion of Petitioner's proceedings. Petitioner's removal proceedings have progressed at a reasonable pace. *See* Ex. 1 ¶¶8-14 (showing the immigration judge ruled on Petitioner's application within two months of its filing and the BIA appeal is progressing but pending); *see also* Doc. 1 ¶2 (stating Petitioner was first detained on 3/10/25); *id.* ¶31 (stating the order of removal was issued approximately two months later); Doc. 1-2 at 1, 26 (showing filing and service of the appellate brief on 9/2/25).

In sum, the proceedings are progressing diligently toward a "'definite termination point': the conclusion of removal proceedings." *Jennings*, 583 U.S. at 304 (quoting *Demore*, 538 U.S. at 529). Because the removal proceedings have a definite end, Petitioner's detention is different

from the "potentially permanent" detention under Section 1231(a)(6)[2] that concerned the Supreme Court in *Zadvydas*, when removal itself was not possible and thus detention's goal was no longer attainable. *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). In both *Zadvydas* and *Demore*, the Supreme Court distinguished permissible detention pending a determination of removability from "'indefinite' and 'potentially permanent'" post-removal-period detention because the determination of removability has an "obvious termination point" and detention during removal proceedings "necessarily serves" a valid purpose. *Demore*, 538 U.S. at 528-29; *Zadvydas*, 533 U.S. at 697.

D. The Court should not use Petitioner's proposed balancing test.

Petitioner points to cases from this district in which courts use multifactor balancing tests to determine whether an alien's mandatory detention violates due process. *See* Doc. 2 at 6-7. This Court properly has declined to employ this test in the context of mandatory detention during removal proceedings.[3] *See Aguayo*, 2020 WL 2395638, at *4. *Demore* held that "'detention during removal proceedings'—even longer-than-average-detention—'is a constitutionally permissible part of that process' so long as there is no evidence that the government isn't improperly or arbitrarily delaying removal." *Id.* (quoting *Demore*, 538 U.S. at 531). The "Supreme Court has warned lower courts not to graft 'some arbitrary time limit' onto pre-removal detention" in the context of detention pursuant to Section 1226(c). *Id.* (quoting *Jennings*, 583 U.S. at 304). Here, Petitioner's detention "continues to be tethered to the

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[2] Section 1231 governs detention after an order of removal becomes final. *See generally* 8 U.S.C. § 1231.

[3] Other courts, too, have rejected a multifactor balancing test. *See Banyee v. Garland*, 115 F.4th 928, 933 (8th Cir. 2024) (explaining that *Demore* left "no room for a multi-factor 'reasonableness' test" given that the "the government can detain an alien for as long as deportation proceedings are still '*pending*'").

government's legitimate interest in detaining him during removal proceedings." *Id.* (quoting *Demore*, 538 U.S. at 512).

Rather than tallying rigid factors, the Court should consider whether the government has "improperly or arbitrarily" delayed removal proceedings. *Id.* Petitioner has not made any showing of improper or arbitrary delay in his proceedings.[4]

E. Even if Petitioner is subject to detention under Section 1226(c), his claim is unlikely to succeed.

Petitioner contends that he is being detained pursuant to Section 1226(c), *see* Doc. 1 ¶33, not Section 1225(b)(2)(A). But, even if the Court analyzed Petitioner's detention under that provision, it should reach the same result. Petitioner would still be subject to mandatory detention, given his drug conviction, *see* 8 U.S.C. § 1226(c)(1). For the same reasons explained above, mandatory detention during removal proceedings does not violate due process. *See, e.g.*, *Demore*, 538 U.S. at 531; *Aguayo*, 2020 WL 2395638, at *3.

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[4] Even if the Court applied Petitioner's balancing test, the test favors Respondents. *First*, the length of Petitioner's detention—approximately seven months—has not become unreasonable or unjustified, as his removal proceedings have proceeded at a reasonable pace. *Second*, Petitioner's detention is not indefinite, because "it ends at the conclusion of removal proceedings." *Aguayo*, 2020 WL 2395638, at *4 (citing the discussion of *Demore* in *Jennings*, 583 U.S. at 304, for the proposition that pre-removal detention "has 'a definite termination point'"). *Third*, Petitioner does not explain why the Court should consider conditions-of-confinement, which must be challenged through civil rights lawsuits, not habeas petitions. *See Basri*, 469 F. Supp. 3d at 1066-1071. *Fourth*, most of the time spent in detention has been due to Petitioner's appeal. *Fifth*, the government has not unreasonably delayed detention; it issued an order of removal within two months of his detention. *Sixth*, it is likely that the proceedings will result in a final order of removal because Petitioner's appeal would require the BIA to overturn the immigration judge's credibility determination and exercise of discretion. *See* Doc. 1-2 at 2. Petitioner does not sufficiently show that overturning the order of removal is substantially likely. These factors do not reveal exceptional circumstances warranting an individualized bond hearing.

II. The remaining TRO factors disfavor Petitioner.

Petitioner is not entitled to a preliminary injunction because he is not likely to succeed on the merits of his habeas petition. His detention without bond is lawful under either Section 1225(b)(2)(A) or Section 1226(c), and his continued detention for the definite period necessary to complete his removal proceedings does not violate due process.

The remaining factors of the preliminary injunction test also weigh against Petitioner. Petitioner contends that he is suffering irreparable harm because he is being denied a "constitutionally adequate bond hearing . . . ." *See* Doc. 2 at 4. However, as explained, the Fifth Amendment does not create a right to a bond hearing in mandatory detention cases prior to a final order of removal. Petitioner also generally suggests that "individuals like Mr. Richards continue to suffer in ICE custody," Doc. 2 at 5, but he does not adduce evidence of conditions personally causing him irreparable harm.

The balance of equities and public interest also weigh in favor of the government. The detention of an alien during removal proceedings serves an important public interest: "preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Demore*, 538 U.S. at 528. The immigration judge in Petitioner's case noted evidence that Petitioner previously was arrested for failing to appear in court in connection with a domestic assault case in 2008 (although the arrest "did not lead to any conviction"). Doc. 1-2 at 12. Continued detention supports a legitimate government interest.

III. Due process does not require that the government bear the burden of clear and convincing proof at a bond hearing.

Even if the Court were to award Petitioner bond relief, due process does not require that

the burden of proof shift to ICE in bond hearings. *See Basri*, 469 F. Supp. at 1073-74 ("the Fifth Amendment clearly does not require the government to bear the burden of proof in bond proceedings"); *de Zarate v. Choate*, No. 23-cv-00571-PAB, 2023 WL 2574370, at *5 (D. Colo. Mar. 20, 2023) (granting a bond hearing, but ordering that the Petitioner bear the burden of proof). Thus, if the Court rules that Petitioner is entitled to a bond hearing before an immigration judge, the Court should not shift the burden at that hearing to the government. Petitioner's argument that the government must prove by clear and convincing evidence that he is a flight risk or danger to the community runs counter to the INA, DHS regulations, and Supreme Court precedent.

Other bond provisions under the INA place the burden at an immigration bond hearing squarely on the alien. For example, the Attorney General may release an alien subject to Section 1226(c) if release from custody is necessary for witness protection purposes. But even then, Congress permits release "only if … *the alien satisfies the Attorney General* that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. § 1226(c)(4) (emphasis added). Similarly, eligible detainees bear the burden on a bond hearing pursuant to § 1226(a). When a bond hearing is held pursuant to Section 1226(a), the applicable regulations make clear that "*the alien must demonstrate* to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8) (emphasis added).

For decades, the Supreme Court has affirmed the constitutionality of detaining aliens pending removal proceedings and has not shifted the burden to the government. *See Demore*, 538 U.S. at 524-25; *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Carlson*, 342 U.S. at 538. Even

Justice Kennedy's concurrence in *Demore* makes clear that the detainee would bear the burden at any such bond hearing. Justice Kennedy wrote that "the permissibility of continued detention pending deportation proceedings turns solely upon the alien's ability to satisfy the ordinary bond procedures—namely, whether if released the alien would pose a risk of flight or a danger to the community." *Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

Because "the government can detain an alien *without bond* for the entirety of his removal proceedings," "if the government chooses to provide a detainee . . . with a bond hearing, the Constitution dictates no specific procedures in that proceeding, including any specific allocation of the burden of proof." *Basri*, 469 F. Supp. 3d at 1074 (emphasis in original). Petitioner's request for the Court to dictate how any bond hearing would be conducted should be denied.

CONCLUSION

The Court should deny Petitioner's Motion for Temporary Restraining Order, Doc. 2.

Respectfully submitted on October 28, 2025.

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I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

s/Thomas A. Isler
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CERTIFICATE OF SERVICE

I certify that on October 28, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will serve all counsel of record, including:

Michael Z. Goldman, Esq.
Counsel for Petitioner

s/Thomas A. Isler
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