

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

Civil Action No. 25-cv-03260-CNS-CYC

OSCAR ARTOLA ARAUZ,

Petitioner,

v.

JUAN BALTAZAR, in his official capacity as warden of the Aurora ICE Processing Center,

ROBERT GAUDIAN, in his official capacity as 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 LYONS, in his official capacity as Acting Director Immigration and Customs Enforcement,

PAMELA BONDI, in her official capacity as Attorney General of the United States, in her official capacity,

Respondents.

**CONSOLIDATED RESPONSE TO PETITIONER'S VERIFIED PETITION FOR WRIT
OF HABEAS CORPUS (ECF No. 1) AND MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION (ECF No. 6)**

Respondents submit this response to the Petition for Writ of Habeas Corpus (ECF No. 1, the Petition) and Petitioner's Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 3, the Motion). The Court should deny the Petition and the Motion because Petitioner's detention is authorized by statute.

INTRODUCTION

This case involves a question of statutory interpretation. The Department of Homeland Security (DHS) is detaining Petitioner under 8 U.S.C. § 1225(b)(2)(A), which

applies to noncitizens who, like Petitioner, entered the United States without inspection and have never been admitted. Section 1225(b)(2)(A) requires detention of an “applicant for admission” if an “examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted.”

Petitioner claims he is not subject to § 1225(b)(2)(A) and is instead subject to 8 U.S.C. § 1226(a), a catchall provision that permits detention of aliens. The practical difference between the two sections is that Congress has provided that noncitizens detained under § 1225(b)(2)(A) are ordinarily not eligible for bond hearings, while those detained under § 1226(a) are. Based on the premise that his detention is governed by § 1226(a), he requests a bond hearing in seven days, or immediate release.

The Court should reject this challenge. Under the Immigration and Nationality Act (INA), Congress has provided courts of appeals—*not* district courts—with authority to review decisions like the one Petitioner seeks to challenge here—whether he is subject to § 1225(b)(2)(A) or not. But even if the Court had jurisdiction, it should deny Petitioner’s requests for relief because he is subject to 8 U.S.C. § 1225(b)(2)(A) and thus does not have a right to a bond hearing.

BACKGROUND

I. Legal background

In the INA, Congress established rules governing when certain noncitizens 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). The INA defines “admission” and “admitted” as “the lawful entry of the alien into the United States *after inspection and authorization* by an immigration officer.” *Id.* § 1101(a)(13)(A) (emphasis added). So an applicant for admission is a noncitizen who is (1) arriving in the United States or (2) present in the United States who did not lawfully enter after inspection.

Section 1225(b)(1) describes two categories of applicants for admission, which together describe some—but not all—of those applicants. The first category includes those noncitizens who are arriving and are inadmissible under 8 U.S.C. § 1182(a)(6)(c) or (a)(7).¹ *Id.* § 1225(b)(1)(A)(i). The second category includes those noncitizens who, in addition to being inadmissible under § 1182(a)(6)(c) or (a)(7), have “not been admitted or paroled into the United States,” and 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.” *Id.* § 1225(b)(1)(A)(i), (iii)(II). Noncitizens within the two categories described in § 1225(b)(1) are subject to expedited removal, see 8 C.F.R. § 235.3(b), and “shall be detained” until removed (or until the end of asylum or credible fear proceedings). 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV).

But those two categories do not encompass all applicants for admission. Section 1225(b)(2) is a catchall for all remaining applicants for admission. Under § 1225(b)(2)(A), all other applicants for admission who an immigration officer

¹ Section 1182(a)(6)(c) and (a)(7) address inadmissibility based on misrepresentation or the lack of valid entry documents.

determines are “not clearly and beyond a doubt entitled to be admitted” shall be detained for removal proceedings under 8 U.S.C. § 1229a. Section 1225(b)(2)(A) thus generally provides for detention, during removal proceedings, of noncitizens who are applicants for admission but who do not fall within one of the two categories described in § 1225(b)(1) (*i.e.*, noncitizens who are arriving or subject to expedited removal), and not clearly entitled to be admitted. Section 1225 does not provide for a bond hearing.

The two categories of noncitizens described in § 1225(b)(1) and the additional catchall category of noncitizen “applicants for admission” described in § 1225(b)(2) do not encompass all noncitizens who may be subject to removal—for example, a noncitizen might be lawfully admitted, and then later determined to be subject to removal. For noncitizens who fall outside the categories in § 1225, another provision—§ 1226—provides procedures for detention and removal. Unlike § 1225, § 1226 is not limited to applicants for admission but broadly applies to all noncitizens facing removal.

The procedures provided in § 1226 for detention and removal of noncitizens are different from those provided for aliens subject to detention under § 1225.

Section 1226(a) provides that if the Attorney General issues a warrant, a noncitizen may be arrested and detained “pending a decision on whether the alien is to be removed from the United States.” Following arrest, the noncitizen generally may remain detained or may be released on bond or conditional parole. Immigration officers can release such a noncitizen if they show that they “would not pose a danger to property or persons” and are “likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). If not released, the noncitizen can request a custody redetermination by an immigration judge (IJ) at

any time before a final order of removal. *See id.* §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

Section 1226(c) also requires the Attorney General to take into custody certain categories of “criminal aliens” when they are released from other forms of custody (or upon DHS’s own initiative), and to detain them during their removal proceedings. 8 U.S.C. § 1226(c). These individuals are generally not entitled to bond hearings.

II. Factual background

Petitioner is a native and citizen of Nicaragua who entered the United States in the late 1980s without inspection. ECF No. 1 ¶ 24. He was not admitted or paroled into the United States. Ex. 1 at ¶¶ 6-7. Petitioner has an extensive criminal history. *Id.* ¶ 10. Petitioner was taken into ICE custody on June 12, 2025, in Florida, and was later transferred to the Denver Contract Detention Facility (Denver CDF), where he is being detained pursuant to 8 U.S.C. § 1225(b). *Id.* ¶¶ 13-15.

ICE initiated removal proceedings on August 5, 2025 by issuing a Notice to Appear (NTA) charging Petitioner with being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i). *Id.* ¶ 20. Petitioner’s first appearance before an IJ on that charge was August 18, 2025; he requested and was granted additional time for a hearing and, on September 17, 2025, he admitted to the charges in the NTA and notified the IJ that he would apply for relief from removal. *Id.* ¶ 22-30. He has a hearing scheduled for October 30, 2025. *Id.* ¶ 30. Petitioner had a bond hearing on October 6, 2025. *Id.* ¶ 28. The IJ found that she did not have jurisdiction to consider bond. *Id.* ¶ 28.

The GEO Group provides medical services at the Denver CDF. *Id.* ¶ 16. GEO medical staff determined on July 9, 2025, that Petitioner needed emergency medical

attention, and ICE took him to UC Health that same day, where he was admitted until July 18, 2025. *Id.* ¶¶ 17-18. Petitioner was diagnosed with heart failure. He was again sent to the UC Health emergency department on October 21, 2025, for chest pain and he received care and was discharged the same day. *Id.* ¶ 32. The After Visit Summary provided by UC Health for that care stated that a number of lab and imaging tests had been completed during that visit and “[p]lease follow up with cardiology clinic as soon as possible.” Ex. 1 ¶ 32. Petitioner is scheduled for an appointment with a cardiologist on October 28, 2025. *Id.* ¶ 33.

III. Procedural background

Petitioner challenges his detention as violating (1) the provisions regarding detention in § 1226(a); (2) the regulations implementing § 1226; (3) the APA insofar as he is detained under § 1225; (4) the APA insofar as the DHS policy regarding detention under § 1225 allegedly should have proceeded by notice and comment; and (5) due process. ECF No. 1 ¶¶ 74-97. He generally argues that he is not subject to § 1225 but instead § 1226.

As relief in both the Petition and the Motion, Petitioner seeks a bond hearing within seven days or immediate release, and for an order enjoining Respondents from transferring him outside of the District of Colorado. *Id.* at 25; ECF No. 3 at 2. The Court ordered Respondents to respond to the Motion and the Petition and partially granted Petitioner’s request for a TRO, ordering Respondents not to transfer Petitioner without further leave of court. ECF No. 6.

ARGUMENT

I. This Court lacks jurisdiction to hear Petitioner's challenge to the determination that § 1225(b)(2)(A) applies to him.

Congress has provided noncitizens with a vehicle to challenge the statutory provision that ICE relies on for removal. Specifically, Congress provided 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). Congress defined such review to include 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). Congress also—in § 1252(b)(9)—deprived district courts of jurisdiction to hear such a challenge. The Supreme Court has explained that § 1252(b)(9) “makes clear that Congress understood the statutory term ‘questions of law and fact’ to include the application of law to facts.” *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 230–31 (2020).

The decision that Petitioner is subject to § 1225(b)(2)(A) is a question of law arising from his removal proceedings. This issue could thus be reviewed by the immigration court, and ultimately by the appropriate court of appeals.

This Court recently held that it has jurisdiction to hear a habeas challenge to § 1225(b)(2) detention. *Garcia Cortes v. Noem*, No. 1:25-cv-02677-CNS, 2025 WL 2652880, at *1-2 (D. Colo. Sept. 16, 2025). In doing so, the Court relied primarily on an opinion of the Tenth Circuit. *Id.* at *2 (citing *Mukantagara v. U.S. Dep’t of Homeland Sec.*, 67 F.4th 1113 (10th Cir. 2023)). But the Tenth Circuit's ruling in *Mukantagara* does not show that district courts have jurisdiction to review a decision by ICE about the

statutory provision that applies to the noncitizen and permits removal and detention. That case did not involve removal proceedings (to which § 1252(b)(9) applies); rather, it addressed the decision of U.S. Citizenship and Immigration Services (USCIS) to terminate a noncitizen's refugee status, which, the court expressly held, did *not* arise from an "action taken. . . to remove an alien from the United States." *Mukantagara*, 67 F.4th at 1115-16 (citation omitted). Here, however, Petitioner's case *does* arise from such an action, because he is being detained for a removal proceeding.

Section 1252(b)(9) thus bars Petitioner's challenge to ICE's determination that § 1225(b)(2) applies to him. Indeed, Petitioner can raise such a challenge through his immigration court proceedings, and in the court of appeals. Petitioner has not shown that he is unable to present his challenge in that manner.²

² Petitioner thus has not shown that ICE's determination that § 1225(b)(2) applies to him will be effectively unreviewable through his immigration proceedings. In *Jennings v. Rodriguez*, 583 U.S. 281 (2018), Justice Alito, joined by two other justices, opined that § 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 Petitioner's 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 just 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 § 1225(b)(2)(A) applies to him—and he has not shown that his challenge cannot be presented through his immigration proceedings.

II. Even if the Court had jurisdiction, Petitioner's statutory challenge fails because he is subject to § 1225(b)(2)(A).

The plain text of § 1225(b)(2)(A) makes clear that Petitioner falls within its scope. Section 1225(b)(2)(A) mandates detention for a noncitizen “who is an applicant for admission” if they are “not clearly and beyond a doubt entitled to be admitted.” The statute defines “[a]pplicant for admission” to include noncitizens who (1) are “present in the United States who ha[ve] not been admitted” or (2) “who arrive[] in the United States.” 8 U.S.C. § 1225(a)(1). In other words, a noncitizen who is present in the United States but has not been inspected or admitted is an applicant for admission.

Petitioner is an “applicant for admission.” He is present in the United States, and he has not been “admitted” (*i.e.*, he has not made a “lawful entry. . . after inspection and authorization by an immigration officer”). 8 U.S.C. § 1101(a)(13)(A); Ex. 1 ¶¶ 5-7, 20, 25. He falls within the scope of § 1225(b)(2)(A).

Petitioner resists this plain reading of § 1225(b)(2)(A). He makes three arguments about why this section should not apply to him: arguments from other text of the INA, the INA's legislative history, and the Government's past practice.³ None of these arguments overcome the text's plain language.

TEXTUAL ARGUMENTS. First, Petitioner makes textual arguments about why § 1225 does not apply to him, and why § 1226 does.

³ Petitioner cites district court decisions ruling that aliens who enter without inspection and then reside in the United States fall within the scope of § 1226(a) rather than § 1225(b)(2)(A). ECF No. 1 ¶¶ 55-56 (collecting cases); ECF No. 3 at 10-11 (same). Those district courts relied on the same types of flawed arguments Petitioner makes here.

The text of § 1225. He argues that § 1225 should be construed as limited to just those newly arriving in the United States. ECF No. 1 ¶ 63; ECF No. 3 at 7-8.

But that reading of § 1225(b)(2)(A)—that it extends only to *new* arrivals—does not comport with its text or make sense in the context of the whole section. Rather, § 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, § 1225(b)(1)(A)(i) is not limited to noncitizens “arriving in the United States” who are rendered inadmissible for the specified reasons (*i.e.*, misrepresentation or lack of a valid entry document). Instead, § 1225(b)(1)(A)(i) also applies, through its reference to § 1225(b)(1)(A)(iii), to some noncitizens 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).

Petitioner’s argument also disregards that § 1225(b)(2) is broader than § 1225(b)(1). Section 1225(b)(2) is titled “Inspection of other aliens.” The “other aliens” in the title refers to a category of noncitizens not covered by § 1225(b)(1). The Supreme Court has recognized that § 1225(b)(2) refers to a “broader” category of noncitizens than those in § 1225(b)(1). In *Jennings v. Rodriguez*, the Court recognized that § 1225(b)(2) is a “catchall provision that applies to *all applicants for admission* not

covered by § 1225(b)(1).” 583 U.S. at 287 (emphasis added). Accordingly, § 1225(b)(2) applies *both* to applicants for admission just arriving at the border who do not fall within § 1225(b)(1)(A)(i) *and* to applicants for admission who have been physically present in the United States but are not covered by § 1225(b)(1)(A)(iii)(II).

The phrase “seeking admission” in § 1225(b)(2)(A) is not limited to noncitizens who are *actively* taking some step to gain admission to the United States. Section § 1225 indicates that *anyone* falling within the category of “applicants for admission” is to be 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)); *id.* § 1225(a)(5) (“An applicant for admission may be required to state. . . the purposes and intentions of the applicant *in seeking admission*. . . .” (emphasis added)).

Indeed, the Supreme Court has recognized that § 1225(b)(2)(A) applies to “*all applicants for admission* not covered by § 1225(b)(1).” *Jennings*, 583 U.S. at 287 (emphasis added). The Court in *Jennings* confirmed that an “applicant for admission” includes an alien who “‘is present’ in this country but ‘has not been admitted,’” and that all noncitizens who are “applicants for admission” are “seeking admission.” *Id.* at 287. The Court further explained that the “law authorizes the Government to detain certain aliens *seeking admission* into the country under §§ 1225(b)(1) and (b)(2).” *Id.* at 289 (emphasis added). But § 1225(b)(1) contains no such “seeking admission” language. Its detention provision applies, in the Attorney General’s discretion, even to some noncitizens who are not “arriving” at the time of their inspection by an immigration

officer. See § 1225(b)(1)(A)(i) (applying to an “alien . . . who is arriving in the United States or is described in clause (iii)” (emphasis added)); *id.* § 1226(b)(1)(A)(iii) (describing a noncitizen “who has not affirmatively shown” that they have “been physically present in the United States continuously for the 2-year period immediately prior to the date of determination of inadmissibility”).

Petitioner relies on *Garcia Cortes*, 2025 WL 2652880, at *2-3, for the proposition that only applicants for admission who are also “seeking admission” are subject to detention under § 1225(b)(2)(A). But that decision did not address *Jennings* or adequately explain why a noncitizen who is deemed an “applicant for admission” must be actively “seeking admission” to fall within § 1225(b)(2)(A). Moreover, *Garcia Cortes* is factually distinguishable. In that case, the Court explained that the petitioner was no longer “seeking admission” because he had previously been admitted into the United States on a B-2 visa. *Id.* at *3. Here, however, Petitioner has *never* been admitted into the United States, Ex. 1 ¶¶ 4-7, and so he remains an applicant for admission. It may be that Petitioner was not undertaking any “present-tense action,” *Garcia Cortes*, 2025 WL 2652880, at *3 (citation omitted), to obtain admission at the time of his apprehension. But that is simply because he evaded the necessary “inspection and authorization by an immigration officer” up until then. 8 U.S.C. § 1101(13)(A).

The text of § 1226. Petitioner next argues that § 1225(b)(2)(A) does not apply to him because the catchall provision, § 1226(a), should. First, he urges that § 1226(a) is the “default” rule that should apply to all noncitizens “pending a decision on whether the [noncitizen] is to be removed.” ECF No. 1 ¶ 42; ECF No. 3 at 6. In support, he argues

that “the text of section 1226 also explicitly applies to people charged as being inadmissible, including those who entered without inspection.” *Id.* ¶ 43. He argues that the specific requirement of mandatory detention for a category of noncitizens who entered without inspection in § 1226(c)(1)(E) means that § 1226(a) applies to *all* noncitizens who entered without inspection. *Id.* at ¶ 44.

Petitioner’s argument contradicts normal rules of statutory interpretation. Section 1226(a)’s general detention authority, which permits the issuance of warrants to detain noncitizens for their removal proceedings, must be read alongside § 1225, which *specifically* addresses the detention of applicants for admission. And § 1226 does not displace the more specific provisions in § 1225 governing the detention of applicants for admission. 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, § 1226(c)(1)(E) mandates detention for a narrow category of noncitizens 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 noncitizens into custody after their release from criminal custody and detain them. But the fact that § 1226(c)(1)(E) provides rules for detention of a category of noncitizens who entered without inspection and then had criminal-related conduct does not show that § 1225(b)(2)(A) does not still

apply to other such noncitizens who entered without inspection.

Put differently, it is true that for a certain narrow subset of noncitizens Congress has now mandated their detention in two separate provisions, both § 1225(b)(2)(A) (based on their entry without inspection) and § 1226(c)(1)(E) (also based on their criminal-related conduct). But any redundancy in requiring mandatory detention for that subset of noncitizens subject to § 1226(c)(1)(E) does not affect § 1225(b)(2)(A)'s general applicability to other noncitizens who entered without inspection. Redundancies “are common in statutory drafting” and “[r]edundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text.” *Barton v. Barr*, 590 U.S. 222, 239 (2020). The Court should not read § 1226 to require courts to ignore the express detention and removal provisions in § 1225.

Nor did Congress signal that courts should ignore the existing scope (and detention provisions) of § 1225 when Congress enacted the Laken Riley Act. That Act added § 1226(c)(1)(E), but did not alter § 1225(b)(2)(A). See Pub. L. No. 119-1, 139 Stat. 3 (2025). There is no indication that in modifying § 1226 through that Act, Congress intended, without ever saying so, to displace the authority in a separate provision—§ 1225(b)(2)(A)—to detain other applicants for admission.

Finally, Petitioner points to stray language from *Jennings* to attempt to bolster his reading of §§ 1225 and 1226. ECF No. 1 ¶¶ 45, 61. In *Jennings*, the Supreme Court addressed whether noncitizens were entitled to periodic bond hearings during prolonged detention under §§ 1225 and 1226. 583 U.S. at 291-92. In doing so, the Court suggested that “§ 1225(b) applies primarily to aliens seeking entry into the United

States,” *id.* at 297, and that § 1226(a) is the “default rule” for noncitizens “inside the United States,” *id.* at 288. But *Jennings* actually confirms that § 1225(b)(2) should apply to noncitizens who entered without inspection. Specifically, the *Jennings* Court described § 1225(b)(2) as a “catchall provision that applies to *all applicants for admission* not covered by § 1225(b)(1).” *Id.* at 287 (emphasis added). And neither Congress nor the Court has limited § 1225(b) to those just arriving in the United States.

LEGISLATIVE HISTORY. Petitioner argues that before Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), another provision—8 U.S.C. § 1252(a) (1994)—authorized release on bond for noncitizens present in the United States when they were detained for deportation proceedings. ECF No. 1 ¶¶ 67-68. According to Petitioner, the IIRIRA re-codified the availability of bond hearings for most noncitizens, and he points to the House Report stating that § 1226(a) “restates the current provisions . . . regarding the authority . . . to arrest, detain, and release on bond a [noncitizen].” *Id.* (citation omitted).

But the legislative history supports Respondents’ interpretation of §§ 1225 and 1226. Before the IIRIRA, § 1225 provided for the inspection of noncitizens only when they were arriving at a port of entry. See 8 U.S.C. § 1225(a) (1990) (discussing inspection of all noncitizens “arriving at ports of the United States”). It required that noncitizens arriving at a port of entry be placed in exclusion proceedings. *Id.* § 1225(c). By contrast, noncitizens “in the United States” who “entered without inspection” were deemed deportable under 8 U.S.C. § 1251(a)(1)(B) (1994), and placed in deportation proceedings, where they could request release on bond, *id.* § 1252(a)(1) (1994).

In short, under the pre-IIRIRA regime, whether a noncitizen was placed in exclusion proceedings or deportation proceedings depended on whether they had “entered” the country. But this focus on “entry” “resulted in an anomaly”—“non-citizens who had entered without inspection could take advantage of the greater procedural and substantive rights afforded in deportation proceedings, while non-citizens who presented themselves at a port of entry for inspection were subjected to more summary exclusion proceedings.” *Hing Sum v. Holder*, 602 F.3d 1092, 1100 (9th Cir. 2010).

The IIRIRA sought to address this anomaly “by substituting ‘admission’ for ‘entry’ and by replacing deportation and exclusion proceedings with a general ‘removal’ proceeding.” *Id.* Congress thus expanded § 1225 to address not only those who presented themselves at a port of entry, but to include *all* applicants for admission—*i.e.*, noncitizens present in the United States who had not been admitted, as well as those just arriving. The House Report confirms Congress intended such a fix with the IIRIRA. According to the Report, the IIRIRA was

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. Hence, the pivotal factor in determining an alien’s status will be whether or not the alien has been lawfully admitted.

H.R. Rep. No. 104-469, pt. 1, at 225 (1996). The Report also explains that before the IIRIRA “aliens who ha[d] entered without inspection [were] deportable under section [1251(a)(1)(B)]” but that after the IIRIRA “such aliens will not be considered to have been admitted.” *Id.* at 226. The revisions to § 1225 “ensure[d] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country,”

would be on “equal footing in removal proceedings” as applicants for admission. *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020) (en banc) (citing 8 U.S.C. § 1225(a)(1)).

If the Court interprets § 1225 in the manner advocated by Petitioner, it would undo the fix that Congress enacted through the IIRIRA. Such a reading would recreate the anomalous pre-IIRIRA incentives for those entering the country without inspection. But as the Supreme Court has recognized, a statutory interpretation that would allow applicants for admission to avoid mandatory detention simply by evading immigration officers when they enter the country would enshrine in our law “a perverse incentive to enter at an unlawful rather than a lawful location.” *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 (2020).

PAST PRACTICE. Finally, Petitioner argues that his detention conflicts with past practice. Specifically, he points to a 1997 Federal Register entry 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 ¶ 69 (citation omitted)).

That citation does not support Petitioner for at least two reasons. First, it appears to acknowledge that noncitizens present without having been admitted are “applicants for admission,” implicitly acknowledging 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, the citation does 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 Enterprises v. Raimondo*, 603 U.S. 369, 388 (2024) (citation omitted). Here, the agency provided little analysis to support 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 in interpreting the text of § 1225.

In sum, none of Petitioner’s arguments overcome § 1225’s text.

III. Petitioner’s APA claims fail

The Court lacks jurisdiction to consider an APA claim here. Congress limited the APA to situations where “there is no other adequate remedy in a court that [is] subject to judicial review.” 5 U.S.C. § 704. If the Court were to have jurisdiction over Petitioner’s claim, it would be a habeas claim because Petitioner is challenging the legality of his detention. *JGG v. Trump*, 604 U.S. 670, 673 (2025). Thus, the availability of a habeas claim bars APA jurisdiction.

Even if there were APA jurisdiction, Petitioner’s two APA claims would fail. Petitioner’s first APA claim is that ICE’s application of § 1225(b)(2) to him is contrary to law and arbitrary and capricious. ECF No. 1 ¶¶ 83-86. That argument fails because, as explained above, § 1225(b)(2) does, in fact, apply to Petitioner.

Petitioner’s second APA claim is that ICE’s application of § 1225(b)(2) to him is the result of a new regulation (DHS’s policy issued July 8, 2025), and DHS did not follow the notice-and-comment procedures required to issue such a new regulation.

Petitioner relies on 5 U.S.C. § 553 as the source for the notice-and-comment requirement he alleges was violated. See ECF No. 1 ¶¶ 88-91. However, that section does not apply here for two reasons.

First, § 553 does not apply if “there is *involved* a military or foreign affairs function of the United States.” 5 U.S.C. § 553(a)(1) (emphasis added). “Involved” is a broad term. The policy Petitioner challenges is involved with foreign affairs functions of the United States. “[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). Second, § 553 does not apply to “interpretive rules.” 5 U.S.C. § 553(b)(A). The DHS policy interprets § 1225 and therefore it is not subject to notice and comment.

Accordingly, Petitioner’s APA notice-and-comment claim fails.

IV. Petitioner has not shown that due process requires a bond hearing.

Petitioner also claims that he is entitled to a bond hearing as a matter of due process. See ECF No. 1 ¶¶ 93-97.

That claim fails. In a different immigration context—noncitizens already ordered removed and indefinitely awaiting their removal—the Supreme Court has explained that detention of less than six months is presumptively constitutional. See *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). But in other contexts even this presumptive constitutional limit has been distinguished as unnecessarily restrictive. In *Demore v.*

Kim, 538 U.S. 510 (2003), the Supreme Court explained that noncitizens who were convicted of certain crimes may be detained during the entire course of their removal proceedings. 538 U.S. at 513. In that case, like this one, Congress mandated detention pending removal proceedings. See *id.*; 8 U.S.C. § 1226(c). The Court reasoned that the “definite termination point” of the detention at the end of removal proceedings assuaged any constitutional concern. See *Demore*, 538 U.S. at 512.

The same is true here. Petitioner has been detained for a little over four months. His removal proceedings are moving toward a definite endpoint. See Ex. 1 ¶¶ 20-31. His detention will conclude with a final order of removal or relief from removal. Congress’s decision to detain him pending removal is a “constitutionally permissible part of [this] process.” See *Demore*, 538 U.S. at 531.

Nor has Petitioner shown that he has been denied due process by being denied procedures where he can challenge the determination that § 1252(b)(2)(A) applies to him. As he will have that opportunity through his immigration proceedings, he has not shown a violation of his rights to procedural due process. See *Duran-Hernandez v. Ashcroft*, 348 F.3d 1158, 1163 (10th Cir. 2003) (where a noncitizen failed to show “that additional procedural safeguards would have changed” the immigration court’s decision, this “failure to prove prejudice leads us to reject [his] due process claim”).

Petitioner has failed to demonstrate that due process requires any additional process be provided to him.

V. If the immigration court were to hold a bond hearing, the government should not bear the burden of proof.

Petitioner contends that, at a bond hearing, the government should bear the

burden of proof to justify his ongoing detention by clear and convincing evidence. See ECF No. 61 ¶ 122. Courts in this district are split on to whether due process requires the government to bear the burden to justify detention at a bond hearing. *Compare, e.g., Basri v. Barr*, 469 F. Supp. 3d 1063, 1074 (D. Colo. 2020) with *L.G. v. Choate*, 744 F. Supp. 3d 1172, 1185 (D Colo. 2024). Respondents submit that the former cases are more persuasive because their reasoning relies on Supreme Court immigration cases.

VI. Petitioner is not entitled to a preliminary injunction.

In his Motion, Petitioner seeks emergency preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65. A court may enter such relief only after the moving party proves: “(1) that she’s substantially likely to succeed on the merits, (2) that she’ll suffer irreparable injury if the court denies the injunction, (3) that her 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.” *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (internal quotation marks omitted).

When a movant seeks a “disfavored injunction,” they must meet a heightened standard. *Id.* at 797. An injunction is disfavored when “(1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win.” *Id.* When seeking a disfavored preliminary injunction, the moving party must make a “strong showing” as to the likelihood-of-success-on-the-merits and the balance-of-harms factors. *Id.*

Petitioner seeks a disfavored injunction. Petitioner requests that the Court order Respondents to immediately release him from detention—a request to change the

status quo. In the alternative, Petitioner requests that Respondents provide him with a bond hearing within seven days—a request that mandates action. Thus, Petitioner must make a strong showing on both the likelihood-of-success and balance-of-harms factors.⁴

Furthermore, in this case, it makes sense for the Court to simply rule immediately on the merits of the Petition and therefore obviate the need to consider the Motion. See *e.g.*, *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 884 (10th Cir. 2021) (“If the harm is not ‘likely to occur before the district court rules on the merits,’ there is no need for preliminary injunctive relief.”) (citations omitted).

A. Petitioner has not established a likelihood of success on the merits.

Request for bond hearing. Petitioner requests either immediate release or, in the alternative, a bond hearing. ECF No. 3 at 2. His basis for these requests appears to be that his detention should be governed by § 1226(a) rather than § 1225(b)(2). For the reasons described above, Petitioner’s detention is governed by § 1225(b)(2), not § 1226(a). Thus, he has not established a strong likelihood of succeeding on the merits on his request for a bond hearing.

Request for immediate release. Even if the Court were to determine that Petitioner is likely to succeed on his challenge to his detention under § 1225(b)(2) rather than § 1226(a), the appropriate relief would be to order that Petitioner receive a bond hearing. Section 1226(a) does not require release—it provides DHS the discretion to

⁴ Petitioner also requests that he not be transferred from the District of Colorado or removed during this proceeding, which the Court has already granted. That request is not subject to the heightened standard.

grant a noncitizen release on bond. It requires nothing more than a bond hearing.

No transfer. Petitioner requests that the Court enjoin Respondents from “transferring [him] outside the District of Colorado,” ECF No. 3 at 2, which the Court has granted. ECF No. 6. The Court should lift this order because it is not necessary in aid of its jurisdiction. See 28 U.S.C. § 1651(a). The Court would retain jurisdiction even if Petitioner was transferred out of this district to another facility in the United States. See *Serna v. Commandant, USDB-Leavenworth*, 608 F. App’x 713, 714 (10th Cir. 2015). And because Petitioner is not yet subject to a final removal order, he cannot be removed from the United States at this time.

B. Petitioner has not established irreparable harm.

Petitioner argues that his detention is irreparable harm. Detention itself is not irreparable harm. See, e.g., *Abshir H.A. v. Barr*, 19-cv-1033 (PAM/TNL), 2019 WL 3292058, at *4 (D. Minn. May 6, 2019), *report & recommendation adopted by Abi v. Barr*, 2019 WL 2463036 (D. Minn. June 13, 2019). Nor has Petitioner alleged any harm of a constitutional dimension as described above in § IV.

Petitioner also alleges that his specific medical conditions constitute irreparable harm. But that argument also fails for at least two reasons. First, he is receiving medical care. On October 21, 2025, Petitioner was taken to the UC Health emergency room for chest pain. Ex. 1 ¶ 32. He was evaluated, tested, and returned to the detention center that same day with instructions to follow up with a cardiology clinic as soon as possible. *Id.* He is scheduled for an appointment with a cardiologist for October 28, 2025. *Id.* ¶ 33.

Petitioner alleges that in the past his cardiac condition was not properly treated

while he was in detention. But “[t]he purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance.” *Schrier v. Univ. Of Co.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (citation omitted). Given Petitioner’s very recent evaluation at UC Health, he has not shown that any irreparable harm “will surely result” without an injunction. Respondents have already followed the instructions from UC Health—to schedule an appointment with a cardiologist. At this time, it is unknown what the cardiologist will recommend and/or what steps Respondents will take to implement those recommendations.

Second, Petitioner’s allegations of improper conditions of confinement must be brought through a civil action, not in this habeas petition. See *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012). Allegations regarding improper medical care are not cognizable in habeas actions. See, e.g., *Mackovich v. Richardson*, No. 13-3064-RDR, 2013 WL 2152191, at *4-5 (D. Kan. May 17, 2013) (petitioner fails to state habeas claim by alleging denial of medical care and entitlement to transfer to medical facility because those are conditions-of-confinement claims).⁵

C. Petitioner has not established that the public interest and balance of equities weigh strongly in his favor.

The third and fourth factors—regarding the balance of the equities and whether a

⁵ A habeas claim is limited to the fact or duration of confinement, so a court cannot order a change in conditions of confinement on the basis of a habeas petition. See *Palma-Salazar*, 677 F.3d at 1035. The Court ordered Respondents specifically to show cause as to “why Petitioner should not be ordered temporarily released from detention, while remaining in custody, in order to seek appropriate care for his serious health concerns.” ECF No. 8. Such an order would go beyond the limited relief allowed through habeas. In any case, UC Health evaluated him on October 21, 2025, gave instructions for a cardiology appointment to be made, and that is set. Ex. 1 ¶¶ 32-33.

preliminary injunction would be in the public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). The Supreme Court has recognized that the public interest in the enforcement of the United States’ immigration laws is significant. *See, e.g., id.* at 436. Here, Respondents have a valid statutory basis for detention, *see* 8 U.S.C. § 1225(b)(2)(A), and “detention during [removal] proceedings [is] a constitutionally valid aspect of the deportation process,” *Demore*, 538 U.S. at 523.

Petitioner argues that granting an injunction would not harm Respondents because it would simply require them to return to a past practice. ECF No. 3 at 17. But adherence to a particular practice is not required where a different approach is consistent with the statutory scheme. And as the Supreme Court recently indicated, any time that the Government is “enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) (citation omitted) (Roberts, C.J., in chambers). Enjoining Respondents from carrying out their statutory obligations would harm the Government and, thus, these factors weigh against the Court granting an injunction.⁶

CONCLUSION

For the reasons discussed above, the Court should dismiss or deny the Petition and deny the Motion.

⁶ Federal Rule of Civil Procedure 65(c) provides that “[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” If the Court grants Petitioner’s request for a preliminary injunction, Respondents request that the Court require appropriate security.

Dated: October 23, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I 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 recipients by e-mail:

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and I certify that on the same date I am causing the foregoing to be delivered to the following non-CM/ECF participants in the manner (mail, email, hand delivery, etc.) indicated by the nonparticipant's name:

none.

s/ Timothy Bart Jafek
Timothy Bart Jafek