

1 *removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from  
2 fleeing prior to or during such proceedings. Second, while the period of detention at issue in  
3 *Zadvydas* was “indefinite” and “potentially permanent,” *id.*, at 690–691, 121 S.Ct. 2491, the  
4 record shows that § 1226(c) detention not only has a definite termination point, but lasts, in  
5 the majority of cases, for less than the 90 days the Court considered presumptively valid in  
6 *Zadvydas*.”<sup>3</sup> In light of Congress’s interest in dealing with illegal immigration by keeping  
7 specified aliens in detention pending the removal period, the Supreme Court dispensed of  
8 any Due Process concerns without engaging in the “*Mathews v. Eldridge* test” *See id. generally*.

9 Likewise, in the case at bar, Petitioner’s temporary detention pending his removal  
10 proceedings does not violate Due Process. Petitioner has been detained for a few months as  
11 his *process* unfolds. The procedure Congress has established for applicants for admission like  
12 Petitioner does not include the provision of bond hearings or the right to be released during  
13 their removal proceedings. Instead, for applicants for admission such as Petitioner, “if the  
14 examining immigration officer determines that [he] is not clearly and beyond a doubt  
15 entitled to be admitted, the alien *shall* be detained for a proceeding under section 1229a.”  
16 U.S.C. § 1225(b)(2)(A). That is, Congress has provided that Petitioner shall be detained for  
17 removal proceedings before an immigration judge, which afford the alien a host of  
18 procedural protections. *See* 8 U.S.C. § 1229a.

19 More than a century of precedent from the Supreme Court confirms that applicants  
20 for admission are treated differently under the law for due process purposes from other  
21 categories of detained aliens. *See, e.g., Zadvydas*, 533 U.S. at 693 (“The distinction between  
22 an alien who has effected an entry into the United States and one who has never entered  
23 runs throughout immigration law.”). In the relevant provisions of the INA, Congress has  
24 decided to treat applicants for admission differently, in order to effectuate their exclusion  
25 from the United States while considering whether to admit them, by holding them in  
26 detention during those ongoing proceedings. Unlike admitted aliens placed in removal

27 \_\_\_\_\_  
28 <sup>3</sup> In 2018 the Court again highlighted the significance of a “definite termination point” for  
detention of certain aliens pending removal. *See Jennings*, 583 U.S. at 304.

1 proceedings and detained under 8 U.S.C. § 1226, applicants for admission are “request[ing]  
2 a privilege,” *Landon*, 459 U.S. at 32, and therefore “stand[ ] on a different footing,”  
3 *Shaughnessy*, 345 U.S. at 212-13.

4 In sum, the constitutional due process rights of applicants for admission are limited  
5 to the process that Congress chooses to provide. In § 1225(b) and related provisions,  
6 Congress has afforded applicants for admission a variety of protections, but has excluded  
7 the possibility of release pursuant to bond hearings. *See Jennings*, 583 U.S. at 297 (“[N]either  
8 § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.”). The United  
9 States thus respectfully maintains Petitioner has not been deprived of Due Process in light of  
10 the aforementioned precedent.

11 **D. The Court Lacks Jurisdiction to Entertain Petitioner’s Action under 8 U.S.C. §**  
12 **1252**

13 As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of Petitioner’s  
14 claims. Accordingly, Petitioner is unable to show a likelihood of success on the merits.

15 First, Section 1252(g) specifically deprives courts of jurisdiction, including habeas  
16 corpus jurisdiction, to review “any cause or claim by or on behalf of an alien arising from  
17 the decision or action by the Attorney General to [1] *commence proceedings*, [2] *adjudicate*  
18 *cases*, or [3] *execute removal orders against any alien under this chapter.*”<sup>4</sup> 8 U.S.C. §  
19 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction “[e]xcept as provided in  
20 this section and notwithstanding any other provision of law (statutory or nonstatutory),  
21 including section 2241 of title 28, United States Code, or any other habeas corpus provision,  
22 and sections 1361 and 1651 of such title.”<sup>5</sup> Except as provided in Section 1252, courts  
23 “cannot entertain challenges to the enumerated executive branch decisions or actions.”

24 <sup>4</sup> Much of the Attorney General’s authority has been transferred to the Secretary of Homeland  
25 Security and many references to the Attorney General are understood to refer to the Secretary.  
26 *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005)

27 <sup>5</sup> Congress initially passed § 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005,  
28 Congress amended § 1252(g) by adding “(statutory or nonstatutory), including section 2241  
of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and  
1651 of such title” after “notwithstanding any other provision of law.” REAL ID Act of 2005,  
Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

1 *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

2 Section 1252(g) also bars district courts from hearing challenges to the method by  
3 which the Secretary of Homeland Security chooses to commence removal proceedings,  
4 including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194,  
5 1203 (11th Cir. 2016) (“By its plain terms, [Section 1252(g)] bars us from questioning ICE’s  
6 discretionary decisions to commence removal” and also to review “ICE’s decision to take  
7 [plaintiff] into custody and to detain him during removal proceedings”).

8 Petitioner’s claim stems from his detention during removal proceedings. That  
9 detention arises from the decision to commence such proceedings against them. *See, e.g.,*  
10 *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at \*4  
11 (C.D. Cal. Sept. 15, 2008) (“The decision to detain plaintiff until his hearing before the  
12 Immigration Judge arose from this decision to commence proceedings[.]”); *Wang v. United*  
13 *States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at \*6 (C.D. Cal. Aug. 18, 2010);  
14 *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 298–99 (3d Cir. 2020) (holding that 8 U.S.C. § 1252(g)  
15 and (b)(9) deprive district court of jurisdiction to review action to execute removal order).

16 As other courts have held, “[f]or the purposes of § 1252, the Attorney General  
17 commences proceedings against an alien when the alien is issued a Notice to Appear before  
18 an immigration court.” *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008  
19 WL 11336833, at \*3 (C.D. Cal. Sept. 11, 2008). “The Attorney General may arrest the alien  
20 against whom proceedings are commenced and detain that individual until the conclusion  
21 of those proceedings.” *Id.* at \*3. “Thus, an alien’s detention throughout this process arises  
22 from the Attorney General’s decision to commence proceedings” and review of claims  
23 arising from such detention is barred under Section 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509  
24 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at \*6; 8 U.S.C. § 1252(g). As  
25 such, the Court should dismiss Petitioner’s Motion for lack of jurisdiction.

26 Second, under Section 1252(b)(9), “judicial review of all questions of  
27 law . . . including interpretation and application of statutory provisions . . . arising from any  
28 action taken . . . to remove an alien from the United States” is only proper before the

1 appropriate federal court of appeals in the form of a petition for review of a final removal  
2 order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S.  
3 471, 483 (1999). Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels  
4 judicial review of all [claims arising from deportation proceedings]” to a court of appeals in  
5 the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at \*2  
6 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

7 Moreover, Section 1252(a)(5) provides that a petition for review is the exclusive  
8 means for judicial review of immigration proceedings:

9 Notwithstanding any other provision of law (statutory or nonstatutory), . . . a  
10 petition for review filed with an appropriate court of appeals in accordance with  
11 this section shall be the sole and exclusive means for judicial review of an order  
12 of removal entered or issued under any provision of this chapter, except as  
13 provided in subsection (e) [concerning aliens not admitted to the United States].

14 8 U.S.C. § 1252(a)(5). “Taken together, Sections 1252(a)(5) and 1252(b)(9) mean that *any*  
15 issue—whether legal or factual—arising from *any* removal-related activity can be reviewed  
16 *only* through the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th  
17 Cir. 2016) (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review  
18 of all claims, including policies-and-practices challenges . . . whenever they ‘arise from’  
19 removal proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only  
20 when the action is “unrelated to any removal action or proceeding” is it within the district  
21 court’s jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir.  
22 2006) (a “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple”  
23 (internal quotation marks omitted)).

24 Critically, Section “1252(b)(9) is a judicial channeling provision, not a claim-barring  
25 one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D)  
26 provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed as  
27 precluding review of constitutional claims or questions of law raised upon a petition for  
28

1 review filed with an appropriate court of appeals in accordance with this section.” *See also*  
2 *Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review such claims is  
3 vested exclusively in the courts of appeals[.]”). The petition-for-review process before the  
4 court of appeals ensures that aliens have a proper forum for claims arising from their  
5 immigration proceedings and “receive their day in court.” *J.E.F.M.*, 837 F.3d at 1031–32  
6 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (“The  
7 REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns” by  
8 permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional  
9 claims or questions of law.”).

10 In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained  
11 that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d  
12 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review  
13 challenges regarding decisions to detain aliens for purposes of removal or for proceedings.  
14 *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the “decision to  
15 detain [an alien] in the first place or to seek removal[.]”). Here, Petitioner challenges the  
16 United States’ decision and action to detain them, which arises from DHS’s decision to  
17 commence removal proceedings, and is thus an “action taken . . . to remove [them] from the  
18 United States.” *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco*  
19 *Lopez*, 978 F.3d at 850 (finding that 8 U.S.C. § 1226(e) did not bar review in that case  
20 because the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No.  
21 3:23-CV-00106, 2024 WL 1076106, at \*3 (W.D. Pa. Mar. 12, 2024) (recognizing that there  
22 is no judicial review of the threshold detention decision, which flows from the government’s  
23 decision to “commence proceedings”). As such, the Court lacks jurisdiction over this action.  
24 The reasoning in *Jennings* outlines why Petitioner’s claims are unreviewable here.

25 While holding that it was unnecessary to comprehensively address the scope of  
26 Section 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of  
27 challenges that may fall within the scope of Section 1252(b)(9). *See Jennings*, 583 U.S. at  
28 293–94. The Supreme Court found that “§1252(b)(9) [did] not present a jurisdictional bar”

1 in situations where “respondents . . . [were] not challenging the decision to detain them in  
2 the first place.” *Id.* at 294–95. In this case, however, Petitioner *does* challenge the United  
3 States’ decision to detain him in the first place. Petitioner ultimately challenges DHS’s  
4 decision to detain him in the first instance under Section 1225, and thus Petitioner’s Motion  
5 cannot not evade the preclusive effect of Section 1252(b)(9).

6 Indeed, the fact that Petitioner is challenging the basis upon which they are detained  
7 is enough to trigger Section 1252(b)(9) because “detention is an ‘action taken . . . to  
8 remove’ an alien.” *See Jennings*, 583 U.S. 318, 319 (Thomas, J., concurring); 8 U.S.C.  
9 § 1252(b)(9). The Court should deny Petitioner’s Motion and Petition for lack of  
10 jurisdiction under Section 1252(b)(9). If anything, Petitioner must present his claims before  
11 the appropriate federal court of appeals because he challenges the United States’ decision  
12 or action to detain him, which must be raised before a court of appeals, not this Court. *See*  
13 8 U.S.C. § 1252(b)(9).

#### 14 **E. Request for Fees Should be Denied**

15 Petitioner seeks attorney’s fees. The Federal Respondents construe this request as a  
16 request for attorney’s fees and and costs pursuant to § 2412 of the Equal Access for Justice  
17 Act (“EAJA”), which allows fee-shifting in civil actions by or against the United States.  
18 EAJA has two parts, agency adversarial adjudication fee-shifting, 5 U.S.C. § 504, and fee-  
19 shifting in civil actions in federal court, 28 U.S.C. § 2412. Petitioner cannot obtain fees in  
20 this case under 5 U.S.C. § 504 since that provision excludes administrative immigration  
21 proceedings. *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129 (1991). His  
22 only recourse for fees is pursuant to § 2412(d)(1)(A), which provides, subject to exceptions  
23 not relevant here, that in an action brought by or against the United States, a court must  
24 award fees and expenses to a prevailing non-government party “unless the court finds that  
25 the position of the United States was substantially justified or that special circumstances  
26 make an award unjust.” 28 U.S.C. § 2412(d)(1)(A).

27 Here, Petitioner’s request is premature because he is not a prevailing party. Second,  
28 even if Petitioner were to prevail in this case, the Federal Respondents’ position asserted in

1 this Response is substantially justified because other courts have found the arguments  
2 presented herein to be persuasive and that DHS can lawfully detain, under the mandatory  
3 detention provisions of 8 U.S.C. § 1225, other petitioners who are similarly situated as  
4 Petitioner.

5 As described above, the United States District Court for the District of Nebraska  
6 and the United States District Court for the Southern District of California have both  
7 issued decisions holding that, under the plain language of § 1225(a)(1), aliens present in the  
8 United States who have not been admitted are “applicants for admission” and are thus  
9 subject to the mandatory detention provisions of “applicants for admission” under §  
10 1225(b)(2). *See Vargas Lopez*, 2025 WL 2780351; *Chavez*, 2025 WL 2730228. Because other  
11 federal judges have found persuasive the positions advanced by the Federal Respondents in  
12 this case, the Federal Respondents’ position is substantially justified. *See Medina Tovar v.*  
13 *Zuchowski*, 41 F.4th 1085, 1091 (9th Cir. 2022) (finding that the district court did not abuse  
14 its discretion, in finding that the United States’ position was substantially justified for  
15 purposes of EAJA, where different judges disagreed about the proper reading of the statute  
16 and the case involved an issue of first impression).

17 Because the United States’ position in this case is substantially justified, Petitioner’s  
18 request for attorney’s fees under EAJA cannot prevail.

#### 19 IV. Conclusion

20 For these reasons, Federal Respondents request that the Petition be denied.

21 Respectfully submitted this 5th day of November 2025.

22  
23 SIGAL CHATTAH  
Acting United States Attorney

24  
25 /s/ Christian R. Ruiz  
CHRISTIAN R. RUIZ  
Assistant United States Attorney  
26  
27  
28