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

CESAR CRUZ-HERNANDEZ,	)	
	)	
Petitioner,	)	
	)	CIV-25-1378-D
v.	)	
	)	
KRISTI NOEM, et al.,	)	
	)	
Respondents.	)	

RESPONDENTS' OBJECTION TO REPORT AND RECOMMENDATION

Respectfully submitted,
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RESPONDENTS' OBJECTION TO REPORT AND RECOMMENDATION

Respondents respectfully object to the Report and Recommendation (R&R) entered on December 12, 2025 (Doc. 10).

This objection expressly reasserts and does not waive the arguments set forth in the Response (Doc. 8), but focuses on two particular points: (1) the R&R misapplied the jurisdiction stripping and channeling provisions of the INA; and (2) the R&R failed to properly apply the plain language of § 1225(b)(2)(A) and instead engaged in a broader structural analysis that that is inconsistent with the text, title, and purpose of § 1225 and that creates more ambiguity than it purports to resolve.[1]

I. Petitioner's Statutory Claim (Count One) Is Barred by the INA's Jurisdiction Channeling and Stripping Provisions

Section 1252(g) states that courts lack jurisdiction to consider "any cause or claim

[1] Respondents acknowledge the Court's opinions in *Colin v. Holt*, No. CIV-25-1189-D, 2025 WL 3645176 (W.D. Okla. Dec. 16, 2025) and *Escarcega v. Olson*, CIV-25-1129-J, 2025 WL 3243438 (W.D. Okla. Nov. 20, 2025) and understand that the same holding will likely be applied in this case even though not cited by the R&R. But "[a] growing number of courts have gone the other way." *Coronado v. DHS*, 1:25-CV-831, 2025 WL 3628229, at *7 (S.D. Ohio Dec. 15, 2025); *see also*, *Valencia v. Chestnut*, No. 1:25-CV-01550 WBS JDP, 2025 WL 3205133, at *3 (E.D. Cal. Nov. 17, 2025); *Altamirano Ramos v. Lyons*, No. 2:25-CV-09785-SVW-AJR, 2025 WL 3199872 (C.D. Cal. Nov. 12, 2025); *Cabanas v. Bondi*, No. 4:25-CV-04830, 2025 WL 3171331 (S.D. Tex. Nov. 13, 2025); *Olalde v. Noem*, No. 1:25-CV-00168-JMD, 2025 WL 3131942 (E.D. Mo. Nov. 10, 2025); *Oliveira v. Patterson*, 6:25-cv-01463-DCJ-DJA, 2025 WL 3095972 (W.D. La. Nov. 4, 2025); *Sandoval v. Acuna*, Case No. 6:25-cv-01467, 2025 WL 3048926 (W.D. La. Oct. 31, 2025); *Kum v. Ross*, No. 6:25-CV-00451, 2025 WL 3113646 (W.D. La. Oct. 22, 2025), *report and recommendation adopted*, No. 6:25-CV-00451, 2025 WL 3113644 (W.D. La. Nov. 6, 2025); *Rojas v. Olson*, Case No. 25-cv-1437-bhl, 2025 WL 3033967 (E.D. Wis. Oct. 30, 2025);*Vargas Lopez v. Trump*, No. 25-CV-526, 2025 WL 2780351 (D. Neb. Sept. 30, 2025); *Chavez v. Noem*, No. 25-CV-2325-CAB-SBC, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025).

by or on behalf of any alien arising from the decision or action by [DHS] to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." As the R&R correctly notes, the bar should be read narrowly. In the Tenth Circuit, the test is whether a challenged decision or action is "directly and immediately" connected to an enumerated action (commencing, adjudicating, or executing). *See Tsering v. U.S. Immigr. & Customs Enf't*, 403 F. Appx 339, 343 (10th Cir. 2010); *Mochama v. Zwetow*, 2017 WL 36363, at *8 (D. Kan. Jan. 3, 2017) ("The Tenth Circuit reviews whether claims are connected directly and immediately with a decision or action by the Attorney General to commence proceedings."). The R&R does not address this test.

Here, the immigration officer's examination of Petitioner and subsequent determination under § 1225(b)(2)(A) directly and immediately effected the *commencement* of the proceedings against Petitioner. 8 U.S.C. § 1225(b)(2)(A) ("if the examining immigration officer determines ... the alien shall be detained for a proceeding under section 1229a"). The charges filed are based on the discretionary determinations of the officer. If Petitioner contends that the immigration officer's examination and "determination" under § 1225 is not the basis of DHS's discretionary decision to commence removal proceedings, it is not stated in the Petition. Nor is it addressed or explained in the R&R. The application of § 1225(b)(2)(A) is an integral part of DHS's discretionary choice to commence proceedings and seek the deportation.

Petitioner's assertion that DHS should have used § 1226 instead of § 1225 underscores this point. Specifically, in § 1226(e), Congress made clear that the decision whether to use any of § 1226's provisions is itself an unreviewable discretionary act. *See*

8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review."). And critically, "§ 1252g was directed against … attempts to impose judicial constraints upon prosecutorial discretion." *Veloz-Luvevano v. Lynch*, 799 F.3d 1308, 1315 (10th Cir. 2015) (quoting *Reno v. Am.–Arab Anti–Discrimination Comm.* [AADC], 525 U.S. 471, 485 n. 9 (1999)).

The R&R cites to *Jennings* for the proposition that the Court's *AADC* decision "did not interpret [§ 1252(g)] to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General." R&R at 8. Putting aside that the quote is from the three-judge plurality *not* adopted by other members of the Court, Respondents' assertion of § 1252(g) for the discretionary determinations of an immigration officer is not just "any claim." It is an act intimately tied to the commencement of proceedings. And it bears repeating that Petitioner's and R&R's assertion that a § 1226 warrant should have been used instead *is expressly protected by that very provision as discretionary*—which is what § 1252(g) is intended to protect. *AADC*, 525 U.S. at 487 (characterizing § 1252(g) as a "discretion-protecting provision"). Indeed, protected discretion includes the option to be both more forgiving or more exacting. Here, DHS has made the determination to more fully utilize § 1225(b)(2)(A). That is a form of protected discretion under § 1252(g). *See Aguilar-Alvarez v. Holder*, 528 F. App'x 862, 870–71 (10th Cir. 2013) (applying § 1252(g) to the re-assertion of removal proceedings). Moreover, such a statutory challenge can be reviewed later, by the court of appeals pursuant to channeling provision of § 1252(b)(9). *Cf. Ba v. Dir. of Detroit Field Off., ICE*, 2025 WL 3264535, at *2 (N.D. Ohio Nov. 24, 2025) ("Put another way, a constitutional challenge to detention pending removal and

entitlement to a bond hearing pending removal collapse into analysis of the statutory and regulatory regime—something Congress has made clear a district court may not do, even on a habeas petition under Section 2241.").

The R&R also attempts to recast Count One as merely challenging the legal basis of Petitioner's detention. R&R at 9. But that conflates Counts One (statutory challenge) and Two (constitutional challenge). Petitioner's due process claim (Count Two) challenges his detention as a due process violation. But the statutory argument of Count One is different. It challenges the *means* DHS selected to initiate review and commence proceedings against Petitioner. Specifically, Petitioner contends DHS should have used a § 1226 warrant instead of the authority provided in § 1225. But critically, there is no detention element to that debate. For example, detention plays no role in deciding whether Petitioner is an "applicant for admission" or "seeking admission" under § 1225. The availability of a bond determination for Petitioner is a *collateral* consequence of that debate. Thus, the crux of the challenge in Count One is *not* detention—it is to the discretionary enforcement authority.

The R&R also cites to several recent district court opinions that are not binding on this court. Those opinions assert that § 1252(g) does not bar the review of purely legal determinations that require no factual development. *See* R&R at 9 (citing, for example, *Gutierrez v. Baltasar,* 2025 WL 2962908, at *3 (D. Colo. Oct. 17, 2025), which is grounded in the assertion that "[t]hese 'purely legal' questions fit the exception to § 1252(g)'s jurisdiction-stripping provision, as they can be decided in the abstract on an undisputed factual record"). But the Tenth Circuit has not adopted a "purely legal" or "abstract" non-

factual exception to § 1252(g).

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

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

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

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[2] In a footnote, the R&R asserts that *Alvarez* is factually distinguishable. R&R at 10 n.6. While *Alvarez* addressed Bivens claims, it nonetheless applied § 1252(g) to the discretionary acts of electing to bring charges under particular provisions rather than others. The fact that the holding occurs in the Bivens context (which implicates constitutional issues, like this case) does not meaningfully distinguish the holding. Likewise, the assertion that some district courts have "recently disagreed," without more, is not a reason to disregard *Alvarez*.

A. The Plain Language of § 1225 Applies to Petitioner

Section 1225(a)(1) defines an "applicant for admission" as any "*alien present in the United States who has not been admitted* or who arrives in the United States." 8 U.S.C. § 1225(a)(1) (emphasis added). Petitioner concedes that he is *present in the United States* and *has not been admitted*. In short, he is plainly an "applicant for admission." The R&R's suggestion of ambiguity cannot be squared with the plain language of the statute. *See, e.g., P.B. v. Bergami*, No. 3:25-CV-02978-O, 2025 WL 3632752, at *3 (N.D. Tex. Dec. 13, 2025) ("To start, it is undisputed that Petitioner clearly meets the statutory definition of an applicant for admission. Petitioner does not hide that she is present in the country illegally and does not contend that she has been admitted. Thus, Petitioner is plainly an applicant for admission[.]").

Next, § 1225(b)(2)(A) provides that:

> [I]n the case of an alien that is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

Petitioner was detained and proceedings commenced against him pursuant to this provision. The R&R finds that "seeking admission" requires present action and concludes that passive residency in the United States is insufficient. R&R at 15. But that conclusion contravenes ordinary language, the deeming provision of the INA, and Petitioner's efforts to remain "in the United States continuously for over twenty years[.]" R&R at 15. Indeed, if Petitioner was not seeking to remain in the United States (i.e., "seeking admission"), he would voluntarily self-deport. But he has not done so.

As an initial matter, crafting a distinction between an "applicant" and one who is "seeking" defies common understandings of language. It is akin to saying an "applicant for college admission" is not "seeking admission to college"; or that an "applicant for a job" is not "seeking the job." In each instance, the individuals are "seeking" by virtue of being an applicant. If it were otherwise, they would not be an "applicant" in the first instance.

A review of the definitions of these terms is instructive. Merriam-Webster defines "seeking" as "asking for" or "trying to acquire or gain." Seeking, Merriam-Webster, https://www.merriam-webster.com/dictionary/seeking (last visited December 19, 2025). Moreover, Merriam-Webster defines "applicant" as "one who applies." Applicant, Merriam-Webster, https://www.merriam-webster.com/dictionary/applicant (last visited December 19, 2025). Thus, an "applicant for admission" is one who *applies* for admission. Again, that accords with common understandings of plain language. The college applicant and the job applicant are *seeking* admission to college and a job, respectively. Here, Petitioner is *deemed* to be an applicant for admission. *See Cabanas*, 2025 WL 3171331, at *5 ("There is no material disjunction—by the terms of the statute or the English language—between the concept of 'applying' for something and 'seeking' something. That Petitioner has resided in the United States without valid permission for years thus doesn't render § 1225(b)(2)(A) inapplicable." (cleaned up)); *Coronado v. Sec'y, Dep't of Homeland Sec.*, No. 1:25-CV-831, 2025 WL 3628229, at *8 (S.D. Ohio Dec. 15, 2025) ("the Court concludes that the more natural reading is that the phrase 'alien seeking admission' is just another way of saying 'alien who is an applicant for admission.' After all, in normal usage,

someone who is an "applicant for admission" is also necessarily "seeking admission." Indeed, that is what it means to apply for admission.").

The R&R resists this straight-forward application by suggesting "the terms 'applicant for admission' and 'seeking admission' in § 1225(b)(2) do not cleanly apply to aliens like Petitioner." R&R at 15. But the INA's deeming provision *conclusively* resolves that question. Section 1225(a)(1) provides that noncitizens residing in the country are "deemed" an applicant for admission; meaning there is no need to inquire as to subjective intent or whether a noncitizens actions are sufficient to suggest an intent to apply. To the contrary, Congress included the deeming provision to obviate any such inquiry. As a matter of law, by being "present in the country" without being "admitted," Petitioner *is* deemed an "applicant for admission." *Olalde*, 2025 WL 3131942, at *3 ("[T]he statute *defines* [petitioner] as seeking admission ... Because [petitioner] is an alien, present in the United States, who has not been admitted, the law defines him to be an applicant for admission. He is thus seeking admission."); *Valencia*, 2025 WL 3205133, at *3 ("The statutory language may cover a pro-active engagement with the process of becoming a lawful entrant, but courts both in this circuit and elsewhere have recognized that the term also functions as a legal designation -- describing an individual's legal status for purposes of the statutory removal scheme -- rather than a description of present conduct."); *Sandoval*, 2025 WL 3048926, at *5 n.5 ("The fact that Petitioner may have lacked the subjective intent to ever apply for admission does not prevent her from being categorized as an 'applicant for admission' under § 1225. For this Court to hold otherwise would clearly contravene the plain statutory language and Congress's intent."); *Oliveira*, 2025 WL

3095972, at *5 n.4 (same); *Vargas Lopez*, 2025 WL 2780351, at *9 ("just because [petitioner] illegally remained in this country for years does not mean that he is suddenly not an 'applicant for admission' under § 1225(b)(2)"). The Court need not—and should not—look further.[3]

But if the Court does look further, the immigration officer's determination that, *when confronted*, Petitioner was seeking a form of admission is confirmed by the fact that Petitioner has failed to voluntarily self-deport. *See Rojas*, 2025 WL 3033967, at *8 ("Indeed, one suspects that upon apprehension most unadmitted aliens promptly seek admission and permission to stay; their alternative is to elect to remove themselves voluntarily."). Resisting removal is a step towards seeking a form of admission.

Moreover, the R&R's construction leads to the absurd result that immigration officers cannot immediately detain a noncitizen residing in the United States without determining if they were somehow *actively* seeking admission at that time (a standard not identified or defined in the INA). Put differently, the R&R creates more statutory ambiguity than it purports to resolve. Instead, the proper standard for the immigration officer is that which is stated in the INA; namely, whether the noncitizen is "entitled to be admitted." 8

[3] Section 1225(a)(3) further underscores this point. That section provides that "[a]ll aliens … who are applicants for admission *or otherwise seeking admission* … shall be inspected." (emphasis added)). Because "applicants for admission" (a subset of noncitizens) are deemed to be "seeking admission," the catchall additional phrase "or otherwise seeking admission" is intended to sweep *even further* to all noncitizens seeking admission. *See Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 963 (11th Cir. 2016) (en banc) ("By using 'or otherwise' to join the verbs in this section, Congress made [the preceding verbs] a subset of [the succeeding verbs]."). A reading that renders "applicants for admission" somehow not seeking admission makes no sense in the context of the provision and the clear intent of the 1996 amendment that created it.

U.S.C. § 1225(b)(2)(A).

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

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

Having decided that ambiguity exists, the R&R next evaluates the title of the section and concludes that it limits the application of the section to "arriving aliens." R&R 13 ("At the outset, giving effect to each clause and word of a statute includes an analysis of the statute's title."). That conclusion suffers several infirmities, including the failure to review *the remainder of the title* and the resulting incongruence with the text of the provision if accepted.

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

In any event, the title of § 1225 reads:

> Inspection by immigration officers, *expedited removal of inadmissible arriving aliens*, **referral for hearing.**

The R&R focuses (and italicizes) only the reference to "*arriving aliens*." R&R at 13. But that ignores the rest of the title. The first underlined portion is a reference to subpart

(a)'s inspection obligations. The second italicized portion refers to the expedited proceedings of (b)(1) for "arriving aliens." Importantly, however, the third **bolded** portion references full removal proceedings under (b)(2)(A) for noncitizens present in the country. That is because "arriving aliens" under (b)(1) are subject to *expedited* removals and do *not* get full removal hearings pursuant to § 1229a. In contrast, noncitizens present in the country with arguably more established due process interests are provided *full* removal hearings. *See* § 1225(b)(2)(A) ("detained for a proceeding under section 1229a"); *Sandoval*, 2025 WL 3048926, at *4 ("However, aliens subject to removal under § 1225(b)(2) are not subject to expedited removal but, rather, removal proceedings in the ordinary course pursuant to § 1229a."). In short, the bolded portion of the title does not support the R&R's reading of an "arriving" limitation.

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

More generally, Congress used the phrase "arriving alien" throughout Section 1225. *See, e.g.* 8 U.S.C. §§ 1225(a)(2), (b)(1), (c)(1), (d)(2). The phrase distinguishes a noncitizen presently or recently "arriving" in the United States from other "applicants for admission" who, like Petitioner, have been in the United States without being admitted. But Congress *did not* use the word "arriving" to limit the scope of § 1225(b)(2)(A)'s mandatory-detention

provision. Had Congress intended to limit § 1225(b)(2)(A)'s scope to "arriving" noncitizens, it would have used that phrase like it did in § 1225(b)(1), a mere one subsection prior. Or it could have included a general provision that the section only applies to arriving noncitizens. *Cabanas*, 2025 WL 3171331, at *5 ("The problem with the argument, however, is that Congress could have said that § 1225(b) applied only to *arriving aliens* if that's what was meant. But it didn't, even as three other closely related subsections did."). But Congress did not and that election to selectively use "arriving" must be given effect. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (cleaned up)); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (concluding that "[t]he Government's request that we read [a specific] phrase into [a statutory] exception, when it is clear that Congress knew how to specify [those words] when it wanted to, runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.").

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

have been here for years upon years and never proceeded to obtain any form of citizenship, are not seeking admission under § 1225(b)(2)(A)" (R&R at 15, quotation and citation omitted) is inconsistent with that statutory provision (and the new authorized initiative thereunder).

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

The R&R's interpretation effectively repeals a statutory fix Congress enacted with IIRIRA. Specifically, prior to the 1996 passage of IIRIRA, an "anomaly" existed "whereby immigrants who were attempting to lawfully enter the United States were in a worse position than persons who had crossed the border unlawfully." *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020). The addition of § 1225(a)(1) "ensure[d] that all immigrants who have not been lawfully admitted, regardless of their physical presence in the country, are placed on equal footing in removal proceedings under the INA—in the position of an 'applicant for admission.'" *Id.*; *see also* H.R. Rep. No. 104-469, pt. 1, at 225 (1996) ("This subsection is intended to replace certain aspects of the current 'entry doctrine'").

The R&R's interpretive insertion of an "arriving" limitation into *all* of § 1225 undoes that fix and incentivizes noncompliance with immigration laws by providing more protection to those that bypass border inspections and evade detection to reside within the United States—a result at odds with the intent of Congress when amending § 1225 of the INA. *See Chavez v. Noem*, 2025 WL 2730228, at *4 (S.D. Cal. Sept. 24, 2025) (rejecting Petitioner's reading because it would repeal the IIRIRA statutory fix); *Sandoval*, 2025 WL 3048926, at *6 n.7 ("For this Court to conclude that an alien who has unlawfully entered

the United States and managed to remain in the country for a sufficient period of time is entitled to a bond hearing, while those who seek lawful entry and submit themselves for inspection are not, not only conflicts with the unambiguous language of the governing statutes, but would also seemingly undermine the intent of Congress in enacting the IIRIRA.").

Importantly, the R&R does not address the purpose behind the fix to § 1225. Instead, the R&R addresses the *amendment to § 1226*. Specifically, the R&R block quotes a district court case explaining that the amendment to § 1226(a) restated the detention authority previously found in its predecessor provision to detain and release on bond a noncitizen. R&R at 16. From that citation, the R&R seems to suggest—but not state—that the amendment to § 1226(a) somehow addresses § 1225. But to state the obvious, that quote is about § 1226—not the amendment to § 1225 intended to put arriving and residing noncitizens on equal footing.

D. Discretionary Past Practice Is Consistent with Respondents' Reading

Next, the R&R points to the contemporaneous commentary to the implementing regulations for the IIRIRA to suggest that the Executive understood § 1225 to only apply to arriving aliens. Specifically, it quotes from Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings, Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997), which states, "**Despite 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." R&R at 20 (emphasis added). But the R&R does not address and in fact

omits the bolded introductory phrase. That is critical for two reasons. First, the opening refrain "Despite being applicants for admission" acknowledges the plain language of the statute that noncitizens in the country *are* "applicants for admission" under § 1225, but then announces the *discretionary* choice to use § 1226 for detentions and thus permit bond hearings. A new administration has deviated from that discretionary choice, as it is permitted to do. Thus, the R&R (and the decisions it cites) erroneously conflates prior enforcement discretion with statutory interpretation. Second, the R&R's reading cannot account for the introductory phrase. If § 1225 only applies to arriving noncitizens, then the opening phrase makes no sense. In short, the cited commentary is inconsistent with the R&R's reading and consistent with the Respondents' reading.

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

Finally, the R&R asserts that the Laken Riley Act "renders the government's interpretation of § 1225(b)(2)(A) superfluous." R&R at 17. But that assertion suffers several problems more fully discussed in the Response (at 18-22) and not addressed in the R&R.

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

Fund, 493 U.S. 365, 375 (1990) (citation omitted). Here, § 1225 is narrower in scope than § 1226. It applies only to "applicants for admission," which includes noncitizens present in the United States who have not been admitted. *See* 8 U.S.C. § 1225(a)(1).

To be sure, as amended by the LRA, § 1226(c)(1)(E) mandates detention for a group of noncitizens that includes a narrow subset of applicants for admission that may also be subject to § 1225(b)(2)(A) detention; namely, those who both entered without inspection and were arrested for, committed, or have admitted to committing one of a list of enumerated crimes. But § 1226(c)(1)(E) applies to *all* noncitizens who meet the criminal criteria and is thus broader. Conversely, the mandatory detention provisions of § 1226(c)(1)(E) do not reach the rest of applicants for admission under § 1225(b)(2)(A) who do *not* meet the criminal criteria. Put simply, the two enforcement provisions have overlap much like a Venn diagram, but they are not perfectly overlapping so as to make a provision superfluous. *See Jennings v. Rodriguez*, 583 U.S. 281, 305 (2018) (rejecting a claim of superfluity in the INA context by observing "[a]lthough the two provisions overlap in part, they are by no means congruent" and "apply to different categories of aliens in different ways"); *cf. Am. Car Rental Ass'n v. Humphreys*, 2025 WL 1758898, at *5 (D. Colo. May 29, 2025) ("There is, to be sure, significant overlap between the two. But the canon against superfluity only requires what its name implies; it does not require that each provision have entirely distinct coverage—just that total superfluity be avoided.").

As the Supreme Court has acknowledged, some overlap and redundancies "are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply

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

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

And finally, the R&R's reliance on the LRA suffers from a basic chronology problem. The Laken Riley Act passed on January 22, 2025, and was signed by the President

on January 29, 2025. But as noted in the Petition, the more expanded use of § 1225 was not announced by ICE and DOJ until July 8, 2025. Doc. 1 at ¶ 4. Further, *Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 216 (BIA 2025) was decided later, in September of 2025. As such, Congress did not have the benefit of knowing the Executive's expanded use of § 1225 when it passed the Laken Riley Act. It was legislating against the backdrop of a more restrained enforcement strategy of the prior administration. That is significant:

> When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect. Here, at the time of enactment, the Laken Riley Act *did* have such effect, given that it *required* mandatory detention for criminal, inadmissible aliens who had not been subject to it—under either § 1225 or § 1226—by longstanding practice of prior Administrations. But this means only that Congress determined to narrow aspects of the discretion available to any Administration prioritizing removal proceedings toward § 1226. It doesn't follow that the Laken Riley Act undercuts the more fulsome, executive authority that Congress provided to exist independently under the text of § 1225(b)(2)(A). Simply put, amendment by the recent Laken Riley Act to § 1226 isn't superfluous.

Cabanas, 2025 WL 3171331, at *6 (cleaned up); *see also Valencia*, 2025 WL 3205133, at *4 ("This argument reverses the order of events. The Laken Riley Act was passed before the new interpretation of Section 1225 was issued. The Laken Riley Act could not therefore 'perform the work' of the expansive reading of Section 1225, because that work had not yet been done.").

CONCLUSION

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

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Respectfully submitted,
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