IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Nazir BORISOV,

Petitioner,

v. No. 2:25cv1315 JB/GJF

DORA CASTRO, Warden, Otero Processing Center; MARY DE ANDA-YBARRA, Field Office Director, El Paso Field Office, United States Immigration and Customs Enforcement; TODD M. LYONS, Acting Director, United States Immigration and Customs Enforcement; KRISTI NOEM, Secretary of Homeland Security; and PAMELA JO BONDI, Attorney General of the United States, in their official capacities,

Respondents.

RESPONDENTS' MOTION TO DISMISS
PETITION FOR A WRIT OF HABEAS CORPUS

Respondents, Immigration and Customs Enforcement ("ICE"), and the Department of Homeland Security ("DHS") (collectively "Respondents"),[1] hereby submit this motion under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss both the Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 ("Petition") (Doc. 1) and *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 3) because: (1) the Court lacks subject matter jurisdiction, (2) there is no due process violation, (3) the Court lacks jurisdiction to review the Administrative Procedures Act claim, and (4) Petitioner failed to exhaust his administrative remedies. Petitioner, through counsel, opposes this motion.

FACTUAL BACKGROUND

[1] The undersigned does not represent Dora Castro, Warden, Otero County Processing Center, as that is a private facility, and the Warden is not a federal employee. However, all arguments made on behalf of the remaining Respondents apply with equal force to the Warden, as she is detaining the Petitioner at the request of the United States.

On February 16, 2023, Petitioner, a national and citizen of Russia, unlawfully entered the United States at the California border at a time and place other than as designated by the Secretary of Homeland Security. *See* Form I-213, attached as Ex. 1 at 2, 3. Petitioner was not processed for expedited removal; instead, he was served a notice to appear that designated him an arriving alien; placed him in removal proceedings per Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA"); and released him on his own recognizance "due to humanitarian reasons and a lack of detention space." *See id*. at 2, 3. Upon information and belief, on February 27, 2023, Petitioner filed his affirmative asylum application with U.S. Citizenship and Immigration Services.

On February 15, 2024, Petitioner's parole expired, which returned him to his prior status. *See* I-94 printout, attached as Ex. 2 at 1 ("Admit Until Date: 2024 February 15"), obtained from https://i94.cbp.dhs.gov/search/recent-search (last viewed 1/16/26); *see also* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5(e)(1)(ii). Petitioner does not allege that he applied for or was granted an extension of parole.

On December 18, 2024, Petitioner was served a Notice to Appear stating that he was subject to removal under Section 212(a)(7)(A)(i)(I) of the INA and required to appear before an immigration judge on December 4, 2025. *See* Form I-862, attached as Ex. 3 at 1. It also terminated his parole. On November 5, 2025, the hearing was cancelled. *See* Notice, attached as Ex. 4 at 1.

On December 4, 2025, Petitioner reported to a New York City ICE office for a check in and was arrested pursuant to a warrant for arrest of alien. *See* Form I-200, attached as Ex. 5 at 1; *see also* 8 C.F.R. § 236.1(b) (discussing apprehension and detention authority). The I-213 discusses Petitioner's re-detention and notes that he was "subject to be re-detained now that bedspace is available." Ex. 1 at 2. As of the filing of this motion, Petitioner has been in custody for approximately one and a half months (December 4, 2025, to January 20, 2026).

On December 12, 2025, Petitioner was transferred to the Otero County Processing Center. *See* Form I-830, attached as Ex. 6 at 1. Upon information and belief, on January 14, 2026, Petitioner filed a defensive asylum application with the immigration court. On January 15, 2026, an immigration judge sustained the charge of removal.

Petitioner has a master calendar hearing scheduled on February 5, 2026. *See* Notice of Internet-Based Hearing, attached as Ex. 7 at 1; *see also* Immigration Court Practice Manual, Chapter 4.15 – Master Calendar Hearing, https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15 (last viewed 1/20/26).

ARGUMENT

I. The Court lacks subject matter jurisdiction over the Petition.

Petitioner asserts that he is improperly detained under 8 U.S.C. § 1225(b)(2)(A), and the Court has jurisdiction to review the Petition under 28 U.S.C. § 2241 and other statutes. *See* Doc. 1 at 3 (jurisdictional citations), 14 (reference to *Matter of Yajure Hurtado*), 15, 16 (references to "§ 1225(b)(2)(A)"). Respondents disagree because at least three provisions of 8 U.S.C. § 1252 bar district court review of Petitioner's claims.

A. 8 U.S.C. § 1252(e)(3) bars review of Petitioner's claims.

Section 1252(e)(3) deprives this court of jurisdiction, including habeas corpus jurisdiction, over Petitioner's challenge to his detention under § 1225(b)(2)(A). Section 1252(e)(3) limits judicial review of "determinations under section 1225(b) of this title and its implementation" to only the District Court for the District of Columbia. 8 U.S.C. § 1252(e)(3). Paragraph (e)(3) further confines this limited review to (1) whether § 1225(b) or an implementing regulation is constitutional or (2) whether a regulation or other written policy directive, guideline, or procedure implementing the section violates the law. *See* 8 U.S.C. § 1252(e)(3)(A)(i)-(ii); *see also M.M.V. v. Garland*, 1 F.4th 1100, 1109 (D.C. Cir. 2021). Unlike other provisions within section 1252(e), section 1252(e)(3) applies broadly to judicial review of section 1225(b), not just determinations under section 1225(b)(1). *Compare* 8 U.S.C. § 1252(e)(1)(A), (e)(2), *with* 8 U.S.C. § 1252(e)(3)(A); *see also Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("'[W]here 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' . . . We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.").

Here, Petitioner challenges the determination, set forth in writing by both the Department of Justice and DHS, that aliens who entered the United States without inspection are subject to mandatory detention under § 1225(b)(2). Petitioner thus seeks judicial review of a written policy or guideline implementing § 1225(b), which is covered by § 1252(e)(3)(A)(ii).

B. 8 U.S.C. § 1252(g) bars review of Petitioner's claims.

Section 1252(g) categorically bars jurisdiction over "*any* cause or claim by or on behalf of any alien *arising from* the decision or action by the [Secretary of Homeland Security] to *commence proceedings*, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g) (emphasis added). The Secretary of Homeland Security's decision to *commence removal proceedings*, including the decision to detain an alien pending such removal proceedings, squarely falls within this jurisdictional bar. In other words, detention clearly "aris[es] from" the decision to commence removal proceedings against an alien. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) ("By its plain terms, [§ 1252(g)] bars us from questioning ICE's discretionary decisions to commence removal" and also to review "ICE's decision to take [plaintiff] into custody and to detain him during removal proceedings"); *Tazu v. Att'y Gen. U.S.*, 975 F.3d 292, 298 (3d Cir. 2020) ("The text of § 1252(g) . . . strips us of jurisdiction to review [the claim] . . . [T]o perform or complete a removal, the [Secretary of Homeland Security] must exercise [her] discretionary power to detain an alien for a few days. That detention does not fall within some other part of the deportation process.") (internal quotations and citations omitted); *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) ("The decision to detain plaintiff until his hearing before the Immigration Judge *arose from* this decision to commence proceedings[.]") (emphasis added); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010) (citing *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007)) ("[Plaintiff's] detention necessarily *arises from* the decision to initiate removal proceedings against him.") (emphasis added); *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008) (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)) ("The [Secretary] may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings . . . Thus, an alien's detention throughout this process *arises from* the [Secretary]'s decision to commence proceedings[]" and review of claims arising from such detention is barred under § 1252(g)) (emphasis added). Put in the Supreme Court's words, detention pending removal is a "specification" of the decision to commence proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n.9 (1999) ("§ 1252(g) covers" a "specification of the decision to 'commence proceedings'"). As such, judicial review of the Petitioner's claims is barred by § 1252(g).

C. 8 U.S.C. § 1252(b)(9) bars review of Petitioner's claims.

Under § 1252(b)(9), "judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States" is only proper before the appropriate court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an "unmistakable 'zipper' clause" that "channels judicial review of all [claims arising from deportation proceedings]" to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

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

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

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

Critically, "[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one." *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that "[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) ("[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]"). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and "receive their day in court." *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) ("The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns" by permitting judicial review of "nondiscretionary" BIA determinations and "all constitutional claims or questions of law.").

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the "decision to detain [an alien] in the first place or to seek removal[.]").

Here, Petitioner challenges the decision and action to detain him, which arises from DHS's decision to commence removal proceedings, and is thus an "action taken . . . to remove [him] from the United States." *See* 8 U.S.C. § 1252(b)(9); *see also, e.g.*, *Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge "his initial detention"); *Saadulloev v.*

Garland, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government's decision to "commence proceedings"). As such, the Court lacks jurisdiction over this action. The reasoning in *Jennings* outlines why the Petitioner's claims cannot be reviewed by the Court.

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that "§ 1252(b)(9) [did] not present a jurisdictional bar" in situations where "respondents . . . [were] not challenging the decision to detain them in the first place." *Id.* at 294–95. In this case, the Petitioner *does* challenge the government's decision to detain him in the first place. Though the Petitioner frames his challenge as relating to detention authority, rather than a challenge to DHS's decision to detain him in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

The fact that the Petitioner is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because "detention *is* an 'action taken . . . to remove' an alien." *See Jennings*, 583 U.S. at 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss the Petitioner's claims for lack of jurisdiction under § 1252(b)(9). The Petitioner must present his claims before the appropriate court of appeals because he challenges the government's decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

II. Even if the Court finds jurisdiction, it should still dismiss the Petition because Petitioner's detention is lawful.

A. The removal of an alien who has not been admitted is governed by 8 U.S.C. § 1225, which deems such an alien an applicant for admission for purposes of the INA.

A plain text reading of 8 U.S.C. § 1225 reveals that a noncitizen without authorization is not admitted. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended the INA, and is codified at 8 U.S.C. § 1225, deems such an alien as an applicant for admission for purposes of the INA:

> *An alien present in the United States who has not been admitted* or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) *shall be deemed for purposes of this chapter an applicant for admission*.

8 U.S.C. § 1225(a)(1) (emphasis added); *see generally* Omnibus Consolidated Appropriations Act, 1997, PL 104–208, September 30, 1996, 110 Stat 3009. As defined in the 1996 amendments, "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). Significantly, with certain enumerated exceptions, admitted aliens are generally not deemed applicants for admission and are generally beyond the ambit of § 1225. The removal of admitted aliens is governed by 8 U.S.C. § 1226.

Despite the unequivocal language of the statute, several courts have ruled that Congress did not mean what it said. Notwithstanding the statute's categorical declaration that "[a]n alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission," several courts have held that § 1225 is only applicable to aliens detained at the border. However, these rulings cannot be squared with the unambiguous language of § 1225.

At least seven district courts in fifteen decisions have applied this plain text reading § 1225, and the Court should do the same here. *See Gomez Hernandez v. Lyons*, No. 1:25-CV-216-H, 2026 WL 31775, at *1 (N.D. Tex. Jan. 6, 2026) (finding that noncitizen illegally present for over 25 years remained an "applicant for admission"); *Zuniga v. Lyons*, No. 1:25-CV-221-H, 2025 WL 3755126, at *1 (N.D. Tex. Dec. 29, 2025) (same facts and holding); *Lucero v. Field Off. Dir.*, No. 1:25-cv-823, 2025 WL 3718730 (S.D. Ohio Dec. 23, 2025) (finding that noncitizen, who acknowledged that he was never admitted, remained an "applicant for admission"); *Coronado v. Secretary, Dep't of Homeland Security*, No. 1:25-cv-831, 2025 WL 3628229 (S.D. Ohio Dec. 15, 2025) (finding that § 1225(b)(2) applied to noncitizen who entered the country without inspection and resided in the country for several years); *P. B. v. Bergami*, No. 3:25-CV-02978-O, 2025 WL 3632752, at *3 (N.D. Tex. Dec. 13, 2025) (finding that noncitizen who had parole terminated and was re-detained remained an "applicant for admission"; she failed to exhaust administrative remedies; and her re-detention did not violate the Administrative Procedures Act or due process); *Rodriguez v. Noem*, No. 9:25-CV-00320, 2025 WL 3639440, at *2 (E.D. Tex. Dec. 10, 2025) (finding that noncitizen with unspecified period of unlawful presence remained an "applicant for admission"); *Suarez v. Noem*, No. 1:25-cv-00202, 2025 WL 3312168 (E.D. Mo. Nov. 28, 2025) (finding that noncitizen, who had been in the country for approximately 20 years, was never lawfully admitted and was properly detained without bond under § 1225); *Valencia v. Chestnut*, No. 1:25-CV-01550-WBS-JDP, 2025 WL 3205133 (E.D. Cal. Nov. 17, 2025) (denying motion for temporary restraining order because petitioner, a noncitizen living in the country for 29 years, was unlikely to succeed on the merits of his statutory arguments that he was not an "applicant for admission" under § 1225); *Cabanas v. Bondi*, No. 4:25-CV-04830, 2025 WL 3171331 (S.D. Tex. Nov. 13, 2025) (finding that noncitizen illegally present for over 20 years remained an "applicant for admission”); *Mejia Olalde v. Noem*, No. 1:25-cv-00168, 2025 WL 3131942 (E.D. Mo. Nov. 10, 2025) (finding that noncitizen, who had been in the country continuously for approximately 40 years but never lawfully “admitted,” was an “applicant for admission” based on the plain meaning of § 1225); *Sandoval v. Acuna*, No. 6:25-CV-01467, 2025 WL 3048926, at *5 (W.D. La. Oct. 31, 2025) (finding that noncitizen’s remained an applicant for admission and her re-detention after bedspace became available did not violate due process); *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) (finding that noncitizen detained for over two years remained an “applicant for admission”); *Vargas Lopez v. Trump*, No. 8:25CV526, 2025 WL 2780351 (D. Neb. Sept. 30, 2025) (finding that § 1225(b) applied despite noncitizen’s presence in the country for over ten years and noting “overlap” between § 1225 and § 1226); *Chavez v. Noem*, No. 3:25-CV-02325-CAB-SBC, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025) (finding *Matter of Yajure Hurtado* supported by the plain language of § 1225, and that such an interpretation does not render § 1226 nor amendments to the Laken Riley Act superfluous); *Pena v. Hyde*, No. CV 25-11983-NMG, 2025 WL 2108913 (D. Mass. July 28, 2025) (finding that noncitizen, who had been in the country for approximately 20 years, remained an “applicant for admission” upon straightforward application of the statute).

B. *Jennings* does not forbid the application of § 1225 in this circumstance.

Petitioner reads *Jennings v. Rodriguez*, 583 U.S. 281 (2018), to mandate that the determination of which detention authority applies depends on where in the United States a noncitizen is apprehended. Doc. 1 at 15, 16. However, the Supreme Court’s dicta in *Jennings* that “§ 1225(b) applies primarily to aliens seeking entry into the United States” has been misconstrued. 583 U.S. at 297. While § 1225 primarily applies to aliens encountered at the United States’ borders, it is by its express terms also applicable to any "alien present in the United States who has not been admitted." *Jennings* does not license lower courts to disregard Congress' explicit declaration that such an alien "shall be deemed for purposes of this chapter an applicant for admission." On the contrary, the Supreme Court recognized that § 1225 is applicable to aliens who have not been admitted into the country:

> Under § 302, 110 Stat. 3009–579, 8 U.S.C. § 1225, an alien who "arrives in the United States," or "is present" in this country but "has not been admitted," is treated as "an applicant for admission." § 1225(a)(1).

Jennings, 583 U.S. at 287. Aliens who have been admitted into the United States enjoy rights and privileges that are not afforded to aliens who have not been lawfully admitted. Admitted aliens may still be subject to removal under procedures set forth in 8 U.S.C. § 1226. *Jennings*, 583 U.S. at 288.

Although the designation of an undocumented alien who has been present in the United States for years as an "applicant for admission" may appear counter-intuitive, it reflects Congress' presumption that an alien who is present in the United States is here by choice and would like to remain in the United States. If the statutory presumption is incorrect—if an alien does not want to apply for admission—he can affirmatively withdraw his presumptive application and return whence he came: "An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission and depart immediately from the United States." 8 U.S.C. § 1225(a)(4).

When the statute is read in its entirety, it is manifest that Congress meant what it said: "an alien present in the United States who has not been admitted . . . shall be deemed for purposes of this chapter an applicant for admission" subject to the procedures set forth in § 1225. Most notably, although subsection (b) empowers immigration officers to expeditiously remove many inadmissible aliens who have not previously been admitted without further hearing or review, Congress excepted those who have been physically present in the United States for two years. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

If Congress had intended that § 1225 was to be applied only to aliens interdicted at the nation's borders, the exemption from expedited removal carved out for an "alien who has been physically present in the United States continuously" for two years would be nonsensical. Congress inclusion of this provision in § 1225 evinces Congress' intent that the procedures prescribed in this statute for processing aliens who have not been admitted into the United States are applicable to unauthorized aliens who are present in the United States, specifically including unauthorized aliens who demonstrate that they have been continuously present in the United States for more than two years. The Supreme Court and our Court of Appeals adhere to "the longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506 (2000); *see also Pa Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Fuller v. Norton*, 86 F.3d 1016, 1024 (10th Cir. 1996); *Bridger Coal Co./Pac. Mins., Inc., v. Dir., Off. of Workers' Comp. Programs*, 927 F.2d 1150, 1153 (10th Cir. 1991). Construing § 1225 in a manner that would exclude aliens who have been in the United States for two years or more would violate this fundamental tenet of statutory construction.

C. Petitioner's limited due process rights as an "arriving alien" detained under § 1225 have been met.

Petitioner argues that his detention violates the Due Process Clause of the Fifth Amendment to the United States Constitution. Doc. 1 at 21, 24. However, Petitioner, as an "arriving alien" under § 1225(b)(2)(A), is not entitled to any additional due process beyond that specifically prescribed by statute, which has been followed. There has been no due process violation as a matter of law.

The difference between noncitizens detained under § 1225 and § 1226 is significant for due process purposes. *Dep't of Homeland Security v. Thuraissigiam*, 591 U.S. at 106–07, 138–40 (2020); *see also Mendoza-Linares v. Garland*, 51 F.4th 1146, 1148 (9th Cir. 2022) (noting the "unique constitutional status of arriving aliens with no ties to the United States"). For example, the Supreme Court has considered whether § 1225(b) imposes a time limit on the length of detention and whether such noncitizens detained under this authority have a statutory right to a bond hearing. *Jennings*, at 296–303 (holding that "nothing in the statutory text [of § 1225(b)] imposes any limit on the length of detention" nor "says anything whatsoever about bond hearings"). The sole means of release for noncitizens detained pursuant to § 1225(b) is temporary parole at the discretion of DHS under 8 U.S.C. § 1182(d)(5). *Id.* at 300.

For "more than a century" the Supreme Court has held the rights of such noncitizens are confined exclusively to those granted by Congress. *Thuraissigiam*, 591 U.S. at 131; *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

Thuraissigiam dealt with a habeas action involving a noncitizen detained under § 1225(b) who raised Fifth Amendment due process challenges. 591 U.S. at 106–07. The Supreme Court reiterated that a noncitizen seeking initial entry to the United States has no entitlement to any legal rights, constitutional or otherwise, other than those expressly provided by statute. *Id.* at 107.[2]

Accordingly, Congress may authorize the detention of aliens at the border, even for prolonged periods of time, and such a detention does not deprive aliens "of any statutory or

[2] Respondents recognize that some decisions differentiate between apprehensions made at the border and those made within the interior. *See, e.g., Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958).

constitutional right." *Id*. An alien who enters the country illegally is treated as an "applicant for admission" and has only those rights that Congress has provided by statute. *Thuraissigiam,* 591 U.S. at 140. The due process clause requires nothing more. *Id*.

D. Petitioner may be detained while his asylum application is pending.

Section 1225(b) authorizes "mandatory detention" of individuals seeking asylum, without a bond hearing, while their cases are pending. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."). In this circumstance, i.e., a noncitizen not subject to a final order of removal detained with a pending asylum application, some district courts in the Ninth Circuit have adopted the following six-part balancing test that considers the due process concerns relative to the length of the detention: "(1) the total length of detention to date; (2) the likely duration of future detention; (3) the conditions of detention; (4) delays in the removal proceedings caused by the detainee; (5) delays in the removal proceedings cause by the government; and (6) the likelihood that the removal proceedings will result in a final order of removal." *Markosian v. Bondi*, No. 25-CV-3494-JES-BLM, 2026 WL 25850, at *2 (S.D. Cal. Jan. 5, 2026).

Though not binding on this Court, applying the six-factor test from *Markosian* here reveals that Petitioner's detention does not violate due process. Under the first factor, Petitioner has been detained for approximately 1.5 months, which is a relatively short amount of time. For comparison, in *L.G. v. Choate*, 744 F. Supp. 3d 1172, 1187 (D. Colo. 2024), the court found that petitioner's 30-month detention under § 1226 justified burden shifting at a bond hearing but not immediate release from custody. Under the second factor, Petitioner's future detention will be governed by the resolution of his asylum application, which is moving quickly, with a scheduling hearing set for February 2026. Under the third factor, Petitioner has made no allegations about substandard detention conditions. Under the fourth factor, Petitioner's detention is extended because of his asylum application, and DHS has statutory authority under § 1225(b)(1)(B)(iii)(IV) to detain him while it is adjudicated. Under the fifth factor, Petitioner has not alleged that the government has delayed the proceedings. And finally, under the sixth factor, Respondents decline to speculate about the merits of the asylum application, and Petitioner has made no assertions about the strength of his claim.

III. Respondents did not violate the INA, regulations, or the APA.

Petitioner alleges that Respondents failed to comply with regulations to revoke his parole, which is an abuse of discretion under the Administrative Procedures Act ("APA"). Doc. 1 at 22, 23. Petitioner asserts that the expiration of parole noted in the I-94—February 15, 2024—is not binding. *See* Doc. 1 at 18; Ex. 2 at 1. It is not clear how long beyond February 15, 2024, Petitioner believes his expired parole lasts, but he appears to assert that his parole remains valid until his asylum application is adjudicated—whenever that may be. Doc. 1 at 19.

As an initial matter, the Court lacks jurisdiction to consider this claim. The APA permits judicial review for "[a] person suffering legal wrong because of agency action," 5 U.S.C. § 702, and provides that an agency action is reviewable if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(A). However, the APA explicitly excludes any such review "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a)(1), (2). Petitioner's APA challenge to ICE's discretionary decision to revoke his parole fails under the first clause of § 701(a)(1) because the Court is deprived of subject matter jurisdiction by virtue of 8 U.S.C. § 1252(a)(2)(B)(ii). *See, e.g.*, *Bernardo ex rel. M&K Eng'g, Inc. v. Johnson*, 814 F.3d 481, 485 (1st Cir. 2016) (noting "§

1252(a)(2)(B)(ii) withdraws judicial review from decisions committed to the Secretary of Homeland Security's discretion"). DHS's decision to grant and revoke Petitioner's parole is discretionary. *See* 8 U.S.C. § 1182(d)(5)(A) ("The Secretary of Homeland Security may . . . in his discretion parole into the United States temporarily . . . for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States . . . .").

Even if the Court determines it has jurisdiction to consider the claim and agrees with Petitioner's assertion that his discretionary parole expiration date is not legally binding, the I-213 shows that an individualized determination took place. Specifically, it states that Petitioner is "subject to be re-detained now that bedspace is available." Ex. 1 at 3. This determination addresses changed circumstances relating to the initial reason that Petitioner was granted parole—"humanitarian reasons and a lack of detention space." *Id.* at 2.

Further, Petitioner cannot argue, and does not argue, that he was unaware that his parole term expired, which further undercuts any suggestion that his parole revocation was arbitrary or an abuse of discretion. *See* Ex. 2 at 1; *see also* 8 C.F.R. § 212.5(e)(1)(ii) ("Parole shall be automatically terminated without written notice . . . at the expiration of the time for which parole was authorized."). Re-detention of a parolee in these circumstances is lawful. *See P. B. v. Bergami*, No. 3:25-CV-02978-O, 2025 WL 3632752, at *9 (N.D. Tex. Dec. 13, 2025). To the extent Petitioner contends that he should have received advance notice of the revocation of his parole, he cites no regulation or statute that requires such prior notice.

IV. Petitioner failed to exhaust his administrative remedies, which warrants dismissal.

A. Legal background.

"A habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention." *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018). "The exhaustion requirement is prudential, rather than jurisdictional, for habeas claims." *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). There does not appear to be a Tenth Circuit case on point discussing exceptions to the exhaustion requirement in the immigration context, but the court stated in a prisoner habeas cases that "[a] narrow exception to the exhaustion requirement applies if a petitioner can demonstrate that exhaustion is futile." *Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). The District Court for the Northern District of Ohio has dismissed at least three petitions as premature where the petitioner did not meet exhaustion requirements. *Abdoulaye Ba v. Dir. of Detroit Field Off.*, No. 4:25-cv-02208, 2025 WL 2977712 (N.D. Ohio Oct. 22, 2025); *Laguna Espinoza v. Dir. of Detroit Field Off.*, No. 4:25-cv-02107, 2025 WL 2878173 (N.D. Ohio Oct. 9, 2025); *Monroy Villalta v. Greene*, No. 4:25-cv-1594, 2025 WL 2472886 (N.D. Ohio Aug. 25, 2025). Similarly, the District Court for the Northern District of Texas denied a petition where petitioner, who was paroled and re-detained, did not file an appeal to challenge his detention. *P. B.*, 2025 WL 3632752, at *6.

B. The futility exception does not apply, so dismissal is warranted.

Petitioner has not filed any motions or appeals with the immigration court to assert his claim that he is categorized under the wrong detention statute. *See* Doc. 1 at 6. In the four cases cited above where the court dismissed for failure to exhaust (*Abdoulaye Ba*, *Laguna Espinoza*, *Monroy Villalta*, and *P.B.*), the noncitizen was in the same circumstance as Petitioner but took the initial step of requesting a bond hearing. Petitioner's novel legal argument that he is exempted from seeking administrative review should be rejected. The Court should not allow Petitioner to shortcut the administrative process by foregoing administrative relief to seek habeas relief.

In the prisoner habeas context, the Tenth Circuit has applied the prudential exhaustion requirement strictly, noting that "exhaustion of available administrative remedies is a prerequisite for § 2241 habeas relief, although we recognize that the statute itself does not expressly contain such a requirement." *Garza*, 596 F.3d at 1203. Policy considerations also underscore the importance of exhaustion. *See Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

Petitioner's failure to exhaust administrative remedies should not be excused under the futility exception, even in light of the precedential decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). In *Laguna Espinoza*, the court found that the futility exception did not apply, despite petitioner's awareness of *Hurtado*, because even "a high probability of denial" of an appeal does not weigh in favor of waiving exhaustion. 2025 WL 2878173, at *3 (citation omitted). *Laguna Espinoza* discussed the policy justifications favoring exhaustion in the immigration context, "includ[ing] protecting the authority of administrative agencies, limiting interference in agency affairs, developing the factual record to make judicial review more efficient, and resolving issues to render judicial review unnecessary." *Id.*

Similarly, in *P.B.*, the court noted that *Hurtado* does not address detention under 8 C.F.R. § 212.5(e)(2)(i), which is the authority Petitioner cites in his motion. 2025 WL 3632752, at *6; *see also* Doc. 1 at 17. The Court should not speculate about the viability of an administrative appeal and instead uphold the requirement of proper exhaustion.

A necessary question when considering exhaustion is which party bears the burden of proof. In the immigration context, there does not appear to be a Tenth Circuit case on point, and none of the four district court decisions cited above discuss the burden. However, in the prisoner habeas context, the burden appears to be on the respondents. *See Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007). However, in the immigration habeas context, some district courts have held that the burden is on the petitioner to show unlawful detention, which may require petitioner to justify failure to exhaust. *See, e.g., Maldonado v. Olson*, 795 F. Supp. 3d 1134, 1143

(D. Minn. 2025) (collecting cases). If the Court adopts the *Roberts* burden standard, the key piece of evidence that shows Respondents have met their burden is Petitioner's admission that he took no administrative action to obtain release. *See* Doc. 1 at 6.

V. The Court lacks jurisdiction to enjoin Petitioner's transfer.

Petitioner asks the Court to enjoin his transfer and deportation. Doc. 1 at 24. The Court lacks jurisdiction to grant Petitioner's request and should deny it. *See Edison v. Decker*, 2021 WL 1997386, at *6 (D.N.J. May 19, 2021) (citing cases). Even if the Court has jurisdiction, it should decline to enjoin transfer because the Court retains jurisdiction, regardless of Petitioner's location. *See Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004) ("[W]hen the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release.").

VI. Petitioner's request for attorney's fees is premature.

Petitioner's request for attorney's fees should be denied because it is not ripe. In *Daley v. Ceja*, 158 F.4th 1152 (10th Cir. 2025), the court held that fees are available in immigration habeas actions under the Equal Access to Justice Act. However, Petitioner should be required to file an application and allege why Respondents' position was not substantially justified. *See Molina Ochoa v. Noem*, No. 1:25-CV-00881-JB-LF, 2025 WL 3125846, at *16 (D.N.M. Nov. 7, 2025) (PFRD) (recommending denying request pending outcome of petition and application). Here, Respondents' position is substantially justified because there is minimal or nonexistent Tenth Circuit and Supreme Court precedent on these issues, and this area of law is rapidly evolving. But, in any event, this issue is not ripe.

VII. If the Court orders a bond hearing, burden shifting is not warranted at the initial bond hearing or at any future bond hearings.

Petitioner cites *Salazar v. Dedos*, No. 1:25-cv-00835-DHU-JMR, 2025 WL 2676729 (D.N.M. Sept. 17, 2025), for the proposition that the government should bear the burden of clear and convincing evidence at the bond review hearing. Doc. 1 at 13, 24. *Salazar* applied two different legal tests to analyze the burden shifting question: (1) the three-factor test from *Matthews v. Eldridge*, 424 U.S. 319 (1976), as applied in *L.G. v. Choate*, 744 F. Supp. 3d 1172 (D. Colo. 2024), and (2) the balancing test from *Diaz-Ceja v. McAleenan*, No. 19-cv-00824-NYW, 2019 WL 2774211, at *9 (D. Colo. 2019). Should the Court conclude that § 1226 applies and a bond hearing is authorized—which Respondents dispute—burden shifting is not justified under either legal test.

Regarding the first test, reliance on *L.G. Choate* is misplaced because it is largely distinguishable. Doc. 1 at 14. There, the petitioner's detention lasted 30 months, compared to just 1.5 months here. *Id.* at 1178. Further, applying the *Matthews* factors to this case reveals that burden shifting is not warranted. Under the first factor—balancing the private interest affected by the official action—Petitioner's brief detention is part of noncitizen removal proceedings, his case is moving quickly, and his asylum application is under review, which is akin to civil confinement, not incarceration. *Compare L.G. Choate*, 744 F. Supp. 3d at 1182 ("Petitioner has been detained for over 30 months under conditions another court in this District has recognized as more akin to incarceration than civil confinement."). Under the second factor—risk of erroneous deprivation of the petitioner's private interest through procedures used and the probable value of additional or different procedural safeguards—it is not clear why Petitioner needs additional procedural safeguards because he is represented by counsel in a fast-moving immigration case, and he chose not to file an administrative appeal, which shows that he is not employing procedural safeguards that are already in place. Further, if the Court finds that the immigration judge must conduct a bond hearing, there is no evidence to suggest the immigration judge will disregard Petitioner's arguments at the hearing. Finally, under the third factor—the government's interest in avoiding additional procedures—the interests are significant. The government should not be tasked with higher burdens of proof then those proscribed by statute in the absence of a prolonged detention, like the 30-month detention in *L.G. Choate*.

Burden shifting is also not warrant under the alternative dual balancing test used in *Diaz-Ceja*. Simply put, there is a statutory process for a bond hearing, and absent specific facts present in *Diaz-Ceja*, like the 27-month detention and circuitous procedural path, Petitioner is not entitled to burden shifting. *See* 2019 WL 2774211, at *1 (D. Colo. 2019).

Relatedly, Petitioner asks the Court enjoin Respondents from re-detaining him unless the re-detention is ordered by a neutral judge at a hearing where the government bears the burden. Doc. 1 at 25. This request is without support and overbroad. Taken at face value, it would add an unnecessary burden on DHS, forever, regardless of future rulings from the Tenth Circuit or U.S. Supreme Court clarifying detention authority or other circumstances mandating detention. Hypothetically, if taken to the logical extreme, Petitioner's request would require burden shifting if he was released and subject to mandatory detention for committing a homicide, *see* 8 U.S.C. § 1226(c)(1)(E)(ii), or domestic terrorism, *see* 8 U.S.C. § 1226a(a)(1).

VIII. There is no legal authority to grant immediate release.

Petitioner requests immediate release from custody but cites no authority to support this relief. Doc. 1 at 24. The Court should decline Petitioner's invitation to circumvent the immigration court in this way, particularly as § 1226 determinations (the type of which Petitioner is seeking) are not subject to judicial review. 8 U.S.C. § 1226(e) ("The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review."); *see also* *Demore v. Kim*, 538 U.S. 510, 516 (discussing challenges to discretionary decisions that are barred under § 1226(e) and challenges to statutory framework as a whole permitting detention without bail that are not barred under §1226(e)).

Whether or not to grant release or bond under § 1226 would be a discretionary decision, barred from judicial review under § 1226(e). *Id.* It would make little sense for Congress' clear intent to be so easily thwarted by proactive habeas filings demanding immediate release from federal courts.

IX. A preliminary injunction is not warranted.

Because Respondents have had the opportunity to submit briefing, the Court should either find the motion for temporary restraining order (Doc. 3) moot—because *ex parte* relief is unavailable after Respondents were served and filed a brief—or convert the motion to a request for preliminary injunction. *Miller v. Austin*, 622 F. Supp. 3d 1105, 1109 (D. Wyo. 2022). Should the Court do the latter, under Rule 65 of the Federal Rules of Civil Procedure:

> [A] party seeking a preliminary injunction must show: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.

DTC Energy Grp., Inc. v. Hirschfeld, 912 F.3d 1263, 1269–70 (10th Cir. 2018) (internal citations and quotation marks omitted).

Here, the factors weigh against granting Petitioner's request. First, Petitioner is not "substantially likely" to prevail on the merits because there is no Tenth Circuit or U.S. Supreme Court case on point, and there is significant authority to support Respondents' positions. Second, denying the request will not cause Petitioner to suffer irreparable injury because his asylum case is in the early stages, and he does not have a final order of removal—and there is an extensive process before an order of removal is final, *see* 8 C.F.R. § 1241.1—so he will not be subject to a surprise removal. Third, the injunction will introduce unnecessary deadlines and hearings into the case, further slowing down DHS's ability to review Petitioner's case and other immigration cases quickly. And fourth, the injunction is adverse to the public interest because it introduces unnecessary deadlines into well-established immigration court procedures and regulations.

CONCLUSION

The Court should dismiss the Petition on multiple, independent bases, including that the Court lacks subject matter jurisdiction; the plain language of 8 U.S.C. § 1225 supports detention; there is no due process violation; there is no APA violation; and Petitioner failed to exhaust his administrative remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2026, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following pro se party to be served by first-class postal mail as more fully reflected on the Notice of Electronic Filing:

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