

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 25-cv-20406-ALTONAGA/Reid

DARYL SANTIAGO,

Petitioner,

v.

FIELD OFFICE DIRECTOR,

Miami Field Office,

U.S. Immigration and Customs Enforcement,

Respondent.

**PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO WRIT OF HABEAS
CORPUS**

The petitioner, Daryl Santiago, hereby submits this Traverse to Respondent's Return, D.E. 8, to his Verified Petition for Writ of Habeas Corpus, and states the following in support:

I. The Court, sitting in habeas, has jurisdiction to review the petitioner's claims of unlawful detention.

The petitioner claims that his detention is unlawful for three primary reasons. First, petitioner alleges that when the Board of Immigration Appeals granted the respondent's request for a discretionary stay on September 25, 2024, the September 22, 2024, custody order of the immigration judge was already executed because the petitioner previously paid his immigration bond and was released from custody. Therefore, because the custody order had already been executed, the BIA did not have an order to stay, and the respondent did not possess the lawful authority to re-detain the petitioner on October 26, 2024, and his current and continued civil immigration detention is unlawful. D.E. 1, Petition, ¶ 74-89. Second, because BIA's discretionary stay order was *ultra vires*, pursuant to *Matter of Sugay*, 17 I&N Dec. 637 (BIA

1981), the respondent must have petitioned the immigration judge to demonstrate that a change in circumstances warranted the revocation of his bond, which the respondent did not do. *Id.*, ¶ 90-95. Lastly, the respondent's use of an "emergency" discretionary under 8 CFR § 1003.19(i)(1) stay in this situation, instead of following the prescribed automatic stay procedures of § 1003.19(i)(2), contradicts the governing regulations, subverts the regulatory framework's intent, and it thus unlawful. *Id.*, ¶ 96-114. Thus, the petitioner contends that the respondent does not possess the legal authority to detain him, and "the extent of that [detention] authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001).

The respondent primarily contends that this Court lacks jurisdiction to review the petitioner's claims under 8 U.S.C. § 1252(g), which strips jurisdiction of any court over any cause or claim, "arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." § 1252(g). To be sure, the respondent is proposing an unprecedented rule that would effectively bar any and all habeas actions in which a noncitizen sought district court review of their civil immigration detention. Nowhere in the Supreme Court's extensive jurisprudence over habeas cases challenging a noncitizen's civil immigration detention has such an argument been made or even entertained, regardless as to whether the Court is reviewing pre, § 1226, or post, § 1231, final-order detention of a noncitizen. *I.N.S. v. St. Cyr*, 533 U.S. 289, 311 n.34 (2001) (dismissing in a footnote any notion that § 1252(g) would bar habeas review of unlawful detention); *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (dismissing in a parenthetical any notion that § 1252(g) would bar review of the government's detention authority); *Demore v. Kim*, 538 U.S. 510 (2003) (not discussing § 1252(g)); *Jennings v. Rodriguez*, 583 U.S. 281 (2018) (not considering whether § 1252(g) would bar habeas review of alleged unconstitutional detention, while *sua sponte*

discussing the bar to injunctive relief under § 1252(f)); *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) (no discussion of § 1252(g)); *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022) (same); *Clark v. Martinez*, 543 U.S. 371 (2005) (same); *Nielsen v. Preap*, 586 U.S. 392 (2019) (same); *Johnson v. Guzman Chavez*, 594 U.S. 523 (2021) (Thomas, J. dissenting) (no discussion of § 1252(g), despite sue sponte alleging that § 1252(b)(9) barred the habeas claims at issue).

The respondent supports their contention by citing to two Eleventh Circuit decisions, *Gupta v. McGahey*, 709 F.3d 1062 (11th Cir. 2013) and *Johnson v. Acting United States A.G.*, 847 Fed. Appx. 801 (11th Cir. 2021), for the proposition that “securing an alien while awaiting a removal determination,” constitute actions taken to “commence” removal proceedings within the scope of § 1252(g). However, both of those cases involved *Bivens* claims of money damages, and involved situations where the ICE agents prepared Notices to Appear and Records of Deportable Aliens, and served the noncitizens with Notice to Appear at the time of their arrest and seizures. *Gupta*, 709 F.3d at 1064. However, the respondent cannot a single habeas case in which § 1252(g) was interpreted to preclude the Court from exercising jurisdiction to review the legality of a noncitizen’s immigration detention.

Here, the petitioner has brought a quintessential or “core” habeas claim, *Trump v. J.G.G.*, 604, U.S. ____ (2025), at 2, challenging the government’s authority to detain him, and requesting release from custody. E.g., *Thuraissigiam*, 591 U.S. at 117 (“The writ simply provided a means of contesting the lawfulness of restraint and securing release.”). The petitioner’s claims challenging the respondent’s legal authority to detain him do not attack the “prosecutorial discretionary” decisions to “commence proceedings, adjudicate cases, or execute removal orders” that § 1252(g) was intended to protect. *Reno v. Am.-Arab Anti-Discrimination*

Comm. (AADC), 525 U.S. 471, 482 (1999). And, as the Court more recently explained, that the phrase “arising from” is “not interpret[ed] . . . to sweep in any claim that can technically be said to ‘arise from’ the three listed actions of the Attorney General.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018). Furthermore, the legality of the petitioner’s detention—in so far as he challenges that the BIA could not issue a discretionary stay of the immigration judge’s custody order that had already been executed—cannot be within the scope of “an action to commence proceedings,” § 1252(g), because “bond proceedings” or “custody redetermination proceedings” before an immigration judge are separate and apart from the deportation or removal proceedings, 8 CFR § 1003.19(d).

The respondent’s claims—questioning the existence of a custody order which the BIA had to the authority to “stay”—is much more akin to the claim presented by the petitioner in *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362 (11th Cir. 2006). There, the petitioner brought a habeas petition challenging whether there existed an outstanding removal order against him that the government could execute. *Madu*, 470 F.3d at 1365. The Court held that § 1252(g) did not bar the Court from reviewing his habeas claims: “While this provision bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions. . . . Here, *Madu* does not challenge the INS’s exercise of discretion. Rather, he brings a constitutional challenge to his detention and impending removal.” *Id.*, at 1368 (citing *Reno v. AADC*, 525 U.S. at 485 n.9).

The Court should not take the respondent’s invitation to apply the limited holdings of *Gupta* and *Johnson*, two *Bivens* actions for monetary damages, to a habeas petition challenging the legal authority of the petitioner’s immigration detention. None of the petitioner’s claims involve the review of “decisions or actions” that “arise from” the commencement of proceedings,

adjudication of his case, or execution of his removal order. 8 U.S.C. § 1252(g). In fact, the respondent's decision to re-detain the petitioner, and his current unlawful detention, have all occurred after the immigration judge's order terminating the removal proceedings in questions.

However, even if the Court were to conclude that a noncitizen's detention constitutes an action to "commence proceedings" such that § 1252(g) bars review of those claims, habeas corpus cannot be suspended in this situation. D.E. 1, ¶ 9. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U. S. Const., Art. I, § 9, cl. 2. Even if § 1252(g) were to provide a clear statement intending to bar habeas review, no other mechanism of review provides an "adequate substitute" for habeas corpus before this Court. *Boumediene v. Bush*, 553 U.S. 723, 779, (2008). "We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Id.* (citing *St. Cyr*, 533 U.S., at 302).

Additionally, if § 1252(g) were to have the breath to preclude habeas claims of unlawful detention, such an interpretation would entirely render the bar at § 1226(e) superfluous and unnecessary. 8 U.S.C. § 1226(e) ("No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."). And as to § 1226(e), like challenge in *Demore v. Kim*, here the petitioner, "does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Demore*, 538 U.S. at 516. Additionally, "Section 1226(e) contains no explicit provision barring habeas review." *Id.*, at 517.

II. The petitioner's detention is unlawful.

In response to the petitioner's primary contention—that because the custody order had already been executed, the BIA did not have an order to stay, and the respondent did not possess the lawful authority to re-detain the petitioner on October 26, 2024, and his current and continued civil immigration detention is unlawful and violates due process, D.E. 1, Petition, ¶ 74-89, ¶ 114-117—the respondent states that the BIA can still grant a discretionary stay of a custody order under 8 CFR § 1003.19(i)(1) even after the custody order is executed. In support of this claim, they cite to the BIA Emergency Stay Requests Fact Sheet, which states that that BIA, “will consider a stay request an emergency” if “the [noncitizen's] release from custody is imminent, and DHS requests in writing an emergency stay of release from detention.” D.E. 8, p. 11. However, nothing in the respondent cites to provides the BIA the authority to grant a discretionary stay when the custody order is already executed. Black's Law Dictionary defines the word imminent to mean: “1. (Of a danger or calamity) threatening to occur immediately; dangerously impending <imminent peril>. 2. About to take place <the appointment is now imminent>.” IMMINENT, Black's Law Dictionary (12th ed. 2024). Just because the BIA can grant a discretionary stay of a custody order if the noncitizen's release is “about to take place, *Id.*, does not mean that such a stay is valid if the custody order has already been executed by the noncitizen posting the required bond.

The plain and unambiguous language of the governing regulations supports the petitioner's point. 8 CFR § 1003.19(i)(1) only authorizes the BIA to, “stay **the order** of an immigration judge redetermining the conditions of custody of an alien.” § 1003.19(i)(1) (emphasis added); *see also* 8 CFR § 1003.6(c)(5) (“DHS may seek a discretionary stay pursuant to 8 CFR § 1003.19(i)(1) to **stay the immigration judge's order ...**”) (emphasis added); *compare to* 8 CFR 8 CFR §

1003.6(d) (providing for an automatic stay of “**the alien’s release**” for five (5) business days, to allow DHS/ICE to seek Attorney General review pursuant to 8 CFR 1003.1(h)(1), and describing process, “if the Board authorizes an alien’s **release** ...”) (emphasis added). And The regulations neither authorize nor contemplate the discretionary stay under procedure of 8 CFR § 1003.19(i)(1) to be used to re-detain an alien already released on a previously executed custody order issued by an immigration judge in custody proceedings. *See* 8 CFR § 1003.6(c)(5) (“... the motion may incorporate by reference the arguments presented in its brief in support of the need for **continued detention** of the alien during the pendency of the removal proceedings.”) (emphasis added). In fact, the BIA’s order granting ICE’s motion for discretionary says exactly that: “After consideration of all information, the Board has concluded that the motion for emergency stay of the bond **order** will be granted. ORDER: The request for **stay of execution of the bond order** is granted.” Appx, Tab C, p. 18 (emphasis added).

CONCLUSION

For the foregoing reasons, and for the additional reasons contained in his Verified Petition for Writ of Habeas Corpus, D.E. 1, the Court should GRANT the petitioner’s writ, and order his immediate release.

Respectfully submitted,

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