

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOSE MADRID LEIVA,

Petitioner,

v.

JACOB WELSH, Warden, Chase County Jail;
CHRISTOPHER CHAMBERLAIN, Acting
Assistant Director, ICE Kansas City Field Office;
KRISTI NOEM, Secretary of Homeland Security,

Respondents.

Case No. 25-cv-3075-TC

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS

At the outset, Petitioner's mixing of habeas and Administrative Procedure Act (APA) claims unnecessarily complicates this case. Petitioner's Amended Complaint asserts both habeas and APA claims. In his response to Respondents' motion to dismiss, however, Petitioner asserts that he raises "two specific matters"—both brought under the APA and purportedly unreviewable by the relevant court of appeals "because they involve issues of detention." Doc. 20, p. 3. Regardless of Petitioner's characterization of his claims, 8 U.S.C. § 1252 strips this Court of jurisdiction to review them.

I. Petitioner does not identify a formal agency "interpretation" of the BFD Notice.

Petitioner first claims that "the parties disagree about the legal implications of the BFD notice" and that Respondents' "interpretation" of the BFD Notice is a final agency action under the APA. Doc. 20, pp. 3, 5. The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA defines "agency action" as an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Two

conditions must be satisfied for such agency action to be considered “final.” “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process [S]econd, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted).

Here, Petitioner does not identify any agency “interpretation” of the BFD Notice anywhere in his Amended Complaint or in his response brief. Rather, Petitioner’s assertion that Respondents misinterpret the BFD Notice stems solely from Immigration and Customs Enforcement (ICE)’s decision to execute his removal despite the existence of the BFD Notice. Thus, Petitioner requests review of ICE’s decision to execute his removal. And, as addressed in Respondents’ Motion to Dismiss, 8 U.S.C. § 1252(g) prohibits review of the decision “to commence proceedings, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g).

Although Petitioner asserts that the question to be resolved here is “‘too remote’ or collateral to the removal process” to be jurisdictionally barred, the cases Petitioner cites raise challenges that, unlike Petitioner’s claims, *are* distinct from the removal process, such as challenges to the length of, conditions of, or reason for detention. *See, e.g., Jennings v. Rodriguez*, 583 U.S. 281, 290 (2018) (challenge to prolonged detention without a bond hearing); *Mahdawi v. Trump*, 781 F. Supp. 3d 214 (D. Vt. 2025) (petitioner argued “he was detained in retaliation for the exercise of First Amendment rights”); *Mohammed H. v. Trump*, No. 25-1576, 2025 WL 1334847 (D. Minn. May 5, 2025) (same); *Aditya W.H. v. Trump*, No. 25-cv-1976, 2025 WL 1420131 (D. Minn. May 14, 2025) (same); *E.D.Q.C. v. Warden, Stewart Det. Ctr.*, No. 4:25-cv-50-CDL-AGH, 2025 WL 1575609 (M.D. Ga. June 3, 2025) (authorizing jurisdictional discovery where the petitioner had been transferred to detention in El Salvador); *Karki v. Jones*, No. 1:25-cv-281, 2025 WL 1638070 (S.D. Ohio June 9, 2025) (noting that it lacked jurisdiction over the

petitioners’ “removal-based claims” and exercising jurisdiction over only the petitioners’ prolonged “detention-based claim”); *Ayala v. Noem*, No. 3:25-CV-5185-JNW, 2025 WL 1616075 (W.D. Wash. June 5, 2025) (concluding that § 1252(g) does not bar APA challenges for unreasonable agency delay in benefit adjudications brought under 5 U.S.C. § 706(1)); *Mochama v. Zwetow*, No. 14-2121-KHV, 2017 WL 36363 (D. Kan. Jan. 3, 2017) (addressing petition for monetary damages based on the plaintiff’s allegations that ICE agents had engaged in excessive force against him, had unlawfully placed him in solitary confinement, and retaliated against him for constitutionally-protected speech); *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249 (D. Conn. 2008) (addressing request for monetary damages stemming from alleged conditions of confinement). *But see Ayala v. Bondi*, No. 2:25-CV-01063-JNW-TLF, 2025 WL 2084400 (W.D. Wash. July 24, 2025) (concluding it had jurisdiction to address the petitioner’s claim that “his deferred action status . . . bars his removal and makes continued detention unlawful”).¹

Respondents do not contest that 8 U.S.C. § 1252(g) does not strip district courts of jurisdiction over cases involving prolonged detention, unconstitutional conditions of confinement, or unreasonably delayed agency action. But, Petitioner does not bring those claims here. Whether styled as a habeas claim or an APA claim, Petitioner’s challenge to ICE’s decision to execute his removal is barred by 8 U.S.C. § 1252(g).

II. Petitioner’s challenge to his reinstatement process is barred by 8 U.S.C. § 1252(a)(5).

As addressed in Respondents’ Motion to Dismiss, under 8 U.S.C. § 1252(a)(5), this Court lacks jurisdiction over Petitioner’s allegation of procedural irregularities in his reinstatement of

¹ Notably, unlike the *Ayala* petitioner, Petitioner, has not been granted deferred action. Doc. 19, pp. 5-6; see also *United States v. Davila-Hernandez*, No. 7:25-MJ-1452, 2025 WL 1909582, at *3 (S.D. Tex. July 8, 2025) (“a BFD, alone, does not confer some sort of lawful status to be or remain in the United States”). Moreover, *Ayala* conflicts with Tenth Circuit precedent regarding § 1252(g). See *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1274-75 (10th Cir. 2018); see also Doc. 19, pp. 3-4 (discussing cases).

removal. *See* Doc. 19, pp. 6-8. In response, Petitioner argues that if not for alleged violations of 8 C.F.R. § 241.8(b), he would have been able to present mitigating evidence and, as a result, would not have been detained. *See* Doc. 20, pp. 12-13.² As such, Petitioner asserts that “the prejudice is unequivocally tied to unlawful detention” and cannot “effectively be reviewed at the Court of Appeals.” *Id.*

Petitioner’s claim, however, is identical to a claim previously addressed by the Tenth Circuit on a petition for review: “he suffered prejudice as a result of DHS’s reinstatement procedure.” *Cadenas-Campuzano v. Garland*, No. 21-9524, 2021 WL 5561434, at *3-4 (10th Cir. Nov. 29, 2021) (unpublished) (addressing claim that the Department of Homeland Security “did not comply with the applicable procedural mandates of 8 C.F.R. § 241.8 for reinstatement proceedings”). Similar allegations have been addressed in petitions for review even when petitioners linked their claims to unlawful detention. *Aguayo v. Garland*, 78 F.4th 1210, 1215 (10th Cir. 2023) (addressing petition for review where petitioner alleged “ICE violated the Fourth Amendment, the INA, and agency regulations by issuing the immigration detainer and unlawfully taking him into ICE custody”).

Moreover, the Tenth Circuit in *Gonzalez-Alarcon* recognized that although a habeas petitioner’s “detention fit[] within the framework of traditional habeas,” his habeas petition was nevertheless barred by § 1252(a)(5) where the appropriate court of appeals could review the petitioner’s claim that he was a U.S. citizen. *Gonzalez-Alarcon v. Macias*, 884 F.3d 1266, 1275-79 (10th Cir. 2018); *see also Varela-Sebastian v. Mukasey*, 269 F. App’x 804, 805 (10th Cir. 2008) (unpublished) (dismissing habeas petition where immigration detainee sought release from custody on the basis that she was wrongfully detained and the government denied her due process).

² Respondents dispute that 8 C.F.R. § 241.8(b) was not followed, but recognize that the Court must accept all well-pleaded factual allegations as true at this stage.

In support of his argument that this Court may review his due process claim concurrently with the Eighth Circuit’s review, Petitioner cites four cases. Doc. 20, p. 14. But none of those cases address a challenge to the process received during reinstatement of removal or removal proceedings. Instead, all four petitioners asserted that their detention had become unconstitutionally prolonged—a habeas challenge explicitly authorized in certain circumstances by the U.S. Supreme Court. *See Godfrey v. Ball*, No. 23-7104, 2024 WL 4471571 (2d Cir. Oct. 11, 2024); *Espinoza v. Wofford*, No. 1:24-cv-01118-SAB-HC, 2025 WL 1556590 (E.D. Cal. May 30, 2025); *Kapila v. Murray*, No. 24-cv-914, 2024 WL 5090012 (E.D. Cal. Dec. 12, 2024); *Kumar v. U.S. Dep’t of Homeland Sec.*, No. 19-2404, 2020 WL 2904685 (6th Cir. June 1, 2020); *see also Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (“We conclude that § 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention.”).

Respondents do not dispute that “a due process challenge to detention . . . and a petition for review challenging the merits of removal order” can coexist. *See Doc. 20, pp. 13-14*. Rather, Petitioner’s specific due process challenge—the alleged failure to comply with 8 C.F.R. § 241.8(b)—seeks “judicial review of an order of removal” and falls within the scope of 8 U.S.C. § 1252(a)(5). As such, § 1252(a)(5) prohibits this Court from exercising jurisdiction over Petitioner’s due process challenge to his reinstatement procedure.

Finally, Petitioner appears to have abandoned his claim that Respondents have an “unlawful policy of not properly serving the reinstatement paperwork as required by law.” Am. Pet. ¶ 43. Petitioner’s APA claim based on Respondents’ alleged failure to serve the reinstatement order should therefore also be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 3, 2025, the foregoing was electronically filed with the Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Audrey D. Koehler
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