

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Daniel Fernandes Alves,
Petitioner,

v.

Kristi Noem, Secretary, Department of
Homeland Security; **Garrett Ripa**, Field Office
Director, U.S. Immigration and Customs
Enforcement, Office of Enforcement and Removal
Operations, Miami, Florida,
Respondents.

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Case No.:

**PETITION FOR A WRIT OF HABEAS CORPUS
REQUEST FOR EXPEDITED HEARING
REQUEST FOR ORAL ARGUMENT**

This is an action for habeas corpus relief under 28 U.S.C. §2241 and the Suspension Clause of the U.S. Constitution. Petitioner seeks an Order requiring Respondents to release Petitioner from detention.

SUBJECT MATTER JURISDICTION

1. That this Court has habeas corpus jurisdiction pursuant to 28 U.S.C. §2241 *et seq.*, and Article I, § 9, Clause 2 of the U.S. Constitution ("Suspension Clause"). See INS v. St Cyr, 533 U.S. 289 (2001); Demore v. Kim, 538 U.S. 510 (2003); Zadvydas v. Davis, 533 U.S. 678 (2001).

2. That Petitioner is in custody for purposes of habeas corpus relief. He is currently detained in the custody of the U.S. Department of Homeland Security ("Department"), acting under color of authority of the United States.

VENUE

3. That venue is proper in the Southern District of Florida, Miami Division, because Petitioner is currently detained at the Krome Service Processing Center ("Krome") in Miami, Florida, within the territorial jurisdiction of the Miami Division.

PARTIES

4. That Petitioner, **Daniel Fernandes Alves** (A , is a native and citizen of Brazil.
5. That Respondent, **Kristi Noem**, is the Secretary of Homeland Security and she is being sued in his official capacity. In her official capacity, Respondent Noem is in charge of enforcing the immigration laws of the United States. It is Respondent Noem's refusal to release Petitioner from custody that is the subject of this petition.
6. That Respondent, **Garrett Ripa**, is the Field Office Director of U.S. Immigration and Customs Enforcement ("ICE") in Miami, Florida and he is being sued in his official capacity. Respondent Ripa exercises authority over immigration enforcement matters within the Miami District. It is

Respondent Ripa's decision to not effectuate Petitioner's release that is the subject of this petition.

STATEMENT OF CLAIM

7. That Petitioner is a native and citizen of Brazil. Prior to his arrest and detention, Petitioner was residing in Orange County, Florida.
8. That Petitioner is a native and citizen of Brazil whose native language is Portuguese.
9. That Petitioner neither currently has, nor has he ever had, any proficiency in either the Spanish language or the English language.
10. That on or about March 22, 2005, Petitioner entered the United States without inspection and was thereafter arrested and detained by the U.S. Border Patrol ("USBP") almost immediately following his entry to the United States.
11. That the USBP is a component of U.S. Customs and Border Protection ("CBP"), an agency within the U.S. Department of Homeland Security ("Department").
12. That on or about March 22, 2025, Petitioner was issued a Form I-862, Notice to Appear ("NTA"). This NTA included an initial hearing date requiring Petitioner's presence before the Immigration Court in Harlingen, Texas on April 27, 2005.
13. That Petitioner was ordered removed *in absentia* when he failed to appear before the Harlingen Immigration Court on April 27, 2005.

14. That Petitioner did not attend his initial hearing before the Harlingen Immigration Court because he had been released from detention without any understanding of how the Immigration Court system operated and without any knowledge that he was required to appear for a hearing on April 27, 2005.
15. That Petitioner posits that he was not equipped with an understanding of how the Immigration Court system operated because he was never provided a Portuguese language interpreter during the entire time he was detained by the Department following his unlawful entry. To make this point very clear, Petitioner never spoke with anyone in his native Portuguese from the time of his arrest by the USBP through his release from the Department's custody.
16. That Petitioner concedes that the NTA issued against him indicates that he was "provided notice in the Portuguese language of the time and place of his or her hearing and the consequences of failure to appear as provided in [8 U.S.C. §1229a](b)(7)." Petitioner has executed a declaration under penalty of perjury attesting to the fact that he was released from the Department's custody without ever being afforded a Portuguese interpreter.
17. That an order of removal entered *in absentia* can be rescinded through two means. The first is a motion filed within 180 days of entry of the order of removal that establishes "exceptional circumstances" that prevented the alien's appearance. The other is a motion filed at any time claiming that the alien did not receive proper notice of the hearing where the alien was ordered

removed *in absentia*. See generally 8 U.S.C. §1229a(b)(5)(C); 8 C.F.R.

§1003.23(b).

18. That on or about August 19, 2019, the Harlingen Immigration Court received a Motion to Reopen *In Absentia* Order Of Deportation (“2019 Motion”). This motion was filed through prior counsel. The introductory paragraph of the 2019 Motion indicates that it was being filed “[p]ursuant to Section 240(b)(5)(C)(i) of the INA, 8 U.S.C. §§1229a(b)(5)(C)(i) and 8 C.F.R. §3.23(b)(4)(ii)” and informs the tribunal that it has “the discretion to reopen the foregoing case due to *lack of notice...*” (emphasis in original).

19. That notwithstanding the introductory language set forth in the paragraph above, the 2019 Motion further explains that

“[a]lthough the Respondent was given a Notice to Appear with a hearing date and time, the Respondent affirms that the immigration officer insisted this hearing would be in Florida because that is where he was going to live with his family. The Respondent was further instructed that his new notice of hearing would be sent to his address in Florida.”

20. That the 2019 Motion never attempts to argue or to otherwise establish that Petitioner had not been provided proper notice of the time, date and place of his initial hearing before the Harlingen Immigration Court.

21. That on or about February 26, 2020, the 2019 Motion was denied by an Immigration Judge (“IJ”) sitting in Harlingen, Texas.

22. That on or about on or about March 16, 2020, the Board of Immigration Appeals (“Board”) received a Form EOIR-26, Notice of Appeal

(“Form EOIR-26”), filed through prior counsel. This Form EOIR-26 sought to challenge the IJ’s denial of the 2019 Motion.

23. That on or about September 15, 2020, the Board entered a written decision dismissing Petitioner’s appeal.

24. That on or about March 22, 2021, the Harlingen Immigration Court received Petitioner’s §240(b)(5)(C) Motion to Rescind Order of Removal and Memorandum of Law in Support (“2021 Motion”).

25. That Petitioner’s 2021 Motion was accompanied by a detailed declaration signed under penalty of perjury wherein he provides details relating to his arrest by the USBP, his detention by ICE and his subsequent release from custody.

26. That on or about May 20, 2021, an IJ sitting in Harlingen, Texas denied the 2021 Motion based on a purported lack of jurisdiction.

27. That on or about June 21, 2021, the Board received a Form EOIR-26 challenging the IJ’s denial of the 2021 Motion.

28. That on or about May 5, 2025, the Board entered an order sustaining Petitioner’s appeal and further remanded the matter to the Harlingen Immigration Court with an order that it adjudicate the 2021 Motion.

29. That on or about May 29, 2025, the 2021 Motion was denied by an IJ sitting in Harlingen, Texas.

30. That the IJ concluded that the 2021 Motion was “number barred.” Despite the substance of the 2019 Motion including no claim or any argument that

Petitioner had not been properly notified of the April 27, 2005 hearing, the IJ concluded that

“[t]he issue was already addressed and denied by the immigration judge in the order dated February 26, 2020 and was subsequently sustained by the Board of Immigration Appeals in a decision dated 09/15/2020.”

31. That on or about June 4, 2025, Petitioner was arrested by the Department when he appeared at a scheduled appointment with the Intensive Supervision Appearance Program (“ISAP”)¹ office in Orlando, Florida.

32. That Petitioner is currently detained at Krome in Miami, Florida.

33. That Petitioner has filed a Form EOIR-26 with the Board to challenge the May 29, 2025 denial of the 2021 Motion. The filing package including this appeal was received by the Board on June 10, 2025. As of the submission of this complaint, however, Petitioner has not yet received a formal filing receipt to help establish that this appeal was received.

34. That in defining the term “removal period,” 8 U.S.C. §1231(a)(1)(A) provides that:

“[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the “removal period”).”

¹ ISAP is operated by a private contractor. The contractor works with U.S. Immigration and Customs Enforcement (“ICE”) and its Office of Enforcement and Removal Operations (“ERO”) and generally assists with the day-to-day supervision of aliens with cases either pending before, or already decided by, the Executive Office for Immigration Review (“EOIR”). EOIR includes both the Office of the Immigration Judge and the Board of Immigration Appeals.

35. That the Immigration and Nationality Act (“INA” or “Act”) further specifies when the “removal period” begins. The Act provides that:

“[t]he removal period begins on the latest of the following:

- (i) The date the order of removal becomes administratively final.
- (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
- (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.” 8 U.S.C. §1231(a)(1)(B).

36. That the Act provides for certain suspensions of the “removal period.”

Specifically, 8 U.S.C. §1231(a)(1)(C) provides that

“[t]he removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.”

37. That the Act also provides that

“[d]uring the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.” 8 U.S.C. §1231(a)(2).

38. That notwithstanding the statutorily mandated 90-day removal period, the

Supreme Court has found that this period may be extended for a period reasonably necessary to effectuate removal; a “reasonable time” limitation of six months. *See Zadvydas v. Davis*, 533 U.S. at 691-702 (2001); *Clark v.*

Martinez, 543 U.S. 371 (2005) (applying the Zadvydas 6-month ruling to inadmissible persons stopped at the border; finding that 8 U.S.C. §1231(a)(6) authorizes post-final order detention of such persons only for the period reasonably necessary to effectuate removal (6 months)). Thus, if removal is not reasonably foreseeable in the immediate future, detention beyond a six-month period is unconstitutional.

39. That Petitioner submits that the removal period began to run when a final administrative order of removal was entered against him on April 27, 2005.

40. That Petitioner notes that an administrative stay of removal was requested before the Board during the time Petitioner's appeal of the IJ's denial of the 2021 Motion was pending before it. The Board granted this stay of removal in its May 5, 2025 order, but only for as long as it took the Harlingen Immigration Court to adjudicate the merits of the 2021 Motion.

41. That the administrative stay of removal discussed above expired on or about May 29, 2025, when an IJ sitting at the Harlingen Immigration Court denied the 2021 Motion.

42. That Petitioner has not filed any request for a judicial stay of removal at any point on or after April 27, 2005.

43. That Petitioner has not engaged in any conduct described at §1231(a)(1)(C) subsequent to the IJ's issuance of the final order on April 27, 2025.

44. That Petitioner remains concerned that he could be removed to a country other than Brazil. *See* 8 U.S.C. §1231(b)(2). Were the Department intent on

effectuating the final administrative order by removing Petitioner to a country other than Brazil, Petitioner submits that he is entitled to notice of any such intention and an opportunity to apply for the benefits described at 8 U.S.C. §1231(b)(3) as to any country (or countries) to which it intends to send Petitioner in accordance with the outstanding and administratively final order of removal entered against Petitioner on April 27, 2005.

45. That Petitioner submits that he has neither taken any course of action nor refused to undertake any course of action which would justify any suspension of the removal period within the meaning of 8 U.S.C. §1231. *See Edwards v. Gonzalez*, 2007 U.S. Dist. LEXIS 96645 (N.D. Fla. Oct. 2, 2007) (upholding *Zadvydas* and *Clark* but denying petition finding petitioner had not cooperated with ICE to effectuate his removal); *Jian Bin Tang v. Gonzalez*, 2006 U.S. Dist. LEXIS 93576 (N.D. Fla. Oct. 13, 2006) (same).
46. That while the INA contemplates that the execution of most orders of removal can be effectuated within the 90-day period defined at 8 U.S.C. §1231(a), the Act provides a pathway allowing certain individuals to be released from detention following completion of the “removal period” if the order of removal could not be executed within this period. Specifically, 8 U.S.C. §1231(a)(3) states that:

“[i]f the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien--

- (A) to appear before an immigration officer periodically for identification;
- (B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;
- (C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and
- (D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien."

47. That Petitioner contends that the removal period applicable to his case terminated on or about July 26, 2005, the expiration of the 90-day period following entry of a final administrative order of removal against him. *See Benitez v. Wallis*, 402 F.3d 1133 (11th Cir. 2005) (relying on Clark to hold that an inadmissible alien can no longer be detained beyond the statutory 90-day removal period of §1231(a)(1), where there was no significant likelihood of removal in the reasonably foreseeable future). The six month "reasonable time" period to effectuate the order of removal as contemplated in Zadvydas was reached on or about October 24, 2005.

48. That Petitioner contends that there is no reasonable foreseeable likelihood of effectuating the outstanding order of removal entered against him; that the reasonable period for his detention has been exceeded and that his detention is accordingly in violation of the U.S. Constitution.

49. That there is no mechanism for Petitioner to appeal the failure of Respondents to order his release in accordance with 8 U.S.C. §1231(a)(3). As a result, Petitioner contends that his detention is of indefinite length.
50. That more importantly, Petitioner contends that the outstanding order of removal entered against him when he failed to appear is the result of the Department's violation of his rights to substantive and procedural due process as afforded in accordance with the Fifth Amendment of the United States Constitution. Petitioner did not appear at his April 27, 2005 hearing as a direct result of the Department having failed to provide a Portuguese language interpreter to him while he was detained so as to ensure that he understood that removal proceedings had been initiated against him, that he was required to appear at an initial hearing before the Harlingen Immigration Court on April 27, 2005 and that he understood the adverse consequences that could inure were he to fail to appear.

CAUSES OF ACTION

51. **FIRST CLAIM.** Petitioner detention is evidence of its intention to effectuate the order of removal entered against him in violation of his substantive and procedural due process rights under the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V.

EXHAUSTION

52. That Petitioner has exhausted his administrative remedies. While the administrative process allows for remedies to overcome the entry of an order

of removal entered *in absentia*, the agency tasked with adjudicating these remedies has thus far failed to address Petitioner's requests to alleviate the injuries inflicted as a result of the violation of his substantive and procedural due process rights under the Fifth Amendment of the United States Constitution.

53. That to the extent that any administrative process may exist, exhaustion of administrative remedies, which is a prudential requirement, is not required here because any administrative appeal would be futile, and Petitioner raises a serious constitutional question.

PRAYER FOR RELIEF

Petitioner respectfully prays that this Court grant the following relief:

1. Assume jurisdiction over this matter;
2. Declare that Petitioner's continued detention is in violation of the Constitution and laws of the United States because his continued and indefinite detention is unconstitutional or otherwise unlawful;
3. Grant temporary and permanent injunctive relief precluding the execution of any outstanding order of removal entered against Petitioner;

4. Award Petitioner his costs and reasonable attorneys' fees in this action as provided by 28 U.S.C. §2412 or other statute; and
5. Grant such further relief as the Court deems just and proper.

Dated: June 16, 2025

Respectfully submitted,

/s/ David Stoller /s/
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Table of Contents
Documents in Support of Complaint

Daniel Fernandes Alves v.
Kristi Noem, Secretary, Department of Homeland Security, *et al.*,

- Exhibit 1: Final Administrative Order of Removal issued against Petitioner (April 27, 2005);
- Exhibit 2: Order of the Board of Immigration Appeals sustaining Petitioner's appeal and remanding case to Harlingen Immigration Court (May 5, 2025);
- Exhibit 3: Order of the Immigration Judge denying Petitioner's §240(b)(5)(C) Motion to Rescind Order of Removal and Memorandum of Law in Support (May 29, 2025);
- Exhibit 4: Form I-862, Notice to Appear, issued against Petitioner;
- Exhibit 5: Joint Declaration of Daniel Fernandes Alves and Maria Silvia Dos Santos in support of Petitioner's §240(b)(5)(C) Motion to Rescind Order of Removal and Memorandum of Law in Support.