UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Vraj Dilipbhai PATEL (A[redacted], Petitioner, v. JEFF TINDALL, Jailer, Oldham County Detention Center; SAMUEL OLSON, Field Office Director, Chicago Field Office, Immigration and Customs Enforcement; KRISTI NOEM, Secretary of the U.S. Department of Homeland Security; and PAMELA BONDI, Attorney General of the United States, Respondents.	)	Case No. 3:25-cv-00373-RGJ

PETITIONER'S RESPONSE TO RESPONDENTS' MOTION TO DISMISS

Petitioner, VRAJ DILIPBHAI PATEL, by and through his own and proper person and through his attorneys KRIEZELMAN BURTON & ASSOCIATES, LLC, hereby submits his response to Defendant's Motion to Dismiss, and in support thereof states as follows:

Factual Background and Procedural Posture

Petitioner is a citizen of India who arrived in the United States on foot near Otay Mesa, California on March 5, 2024. (Doc. 1, PageID.17435, ¶ 2.). On that date, Petitioner presented himself to Department of Homeland Security Customs and Border Protection officers, who issued him an I-862, Notice to Appear (NTA), placing him in section 1229a (or "normal") removal proceedings, and released him into the United States. (Doc. 19-2, PageID.125-27.). The NTA assigned Petitioner an initial hearing in section 1229a removal proceedings in the Memphis Immigration Court on August 25, 2025. *Id.*

Petitioner sought immigration counsel and filed form I-589, Application for Asylum and for Withholding of Removal (asylum application), on October 10, 2024 with the Memphis Immigration Court. (Doc. 15-1, PageID.79.). Petitioner expressed fear of returning to India in his asylum application based on being a victim of politically motivated persecution, particularly he was physically attacked by members of the Bharatiya Janata Party (BJP), the dominant political party in India, due to organizing rallies for the opposing Indian National Congress party. (Doc. 15-1, PageID.97-98.). Petitioner's previous counsel submitted written pleadings to the Memphis Immigration Court on April 23, 2025, meaning Petitioner's case was ready to be set for a final individual hearing on the merits of his asylum case. Exh. PX 1.

On June 9, 2025, Respondents detained Petitioner at his first and only ICE check-in. (Doc. 22-1, PageID.166.). Upon his detention, Respondents issued Petitioner an expedited removal order despite Petitioner's section 1229a proceedings still being active and under the jurisdiction of an immigration judge. (Doc. 22-2, PageID.168-69.). The same day, DHS filed a motion to dismiss Petitioner's section 1229a proceedings. (Doc. 19-3, PageID.128-29.). Petitioner immediately retained new immigration counsel and requested a bond hearing. (Doc. 19-5, PageID.134.). The immigration judge scheduled the bond hearing for 9:00 A.M. on June 18, 2025. *Id.* The immigration judge later scheduled a master calendar hearing for 10:00 A.M. on the same day. (Doc. 19-4, PageID.132-33.).

On June 18, 2025, approximately 10 days after Respondents issued an expedited removal order against Petitioner, an immigration judge reversed the scheduled order of the bond hearing and master calendar hearing, and granted DHS's opposed motion to dismiss Petitioner's proceedings. (Doc. 15-2, PageID.107-08.). The immigration judge then held a bond hearing and denied bond because he found Petitioner to be a flight risk since his "removal case has been

dismissed", and "the Department anticipates placing [Petitioner] into expedited removal proceedings." (Doc. 19-6, PageID.135-36.). On June 24, 2025, Petitioner filed an appeal for his dismissed asylum claim with the Board of Immigration Appeals. Exh. PX 2.

On June 19, 2025, Petitioner's counsel filed this writ of habeas corpus under 28 U.S.C. 2241. On June 25, 2025, this Court held a hearing on the writ of habeas corpus, allowed Respondents to re-file a Motion to Dismiss, and issued a briefing schedule on Respondents' Motion to Dismiss. (Doc. 17, PageID.110-11.). On June 26, 2025, Petitioner filed a Motion for Temporary Restraining Order (TRO). (Doc. 19, PageID.113-15.). On July 3, 2025, Respondents filed a new Motion to Dismiss and their Response to Petitioner's Motion for TRO. (Doc. 22, PageID.143-164.). On July 8, 2025 Petitioner filed a Reply to Respondents' Response to Petitioner's Motion for TRO. (Doc. 24, PageID.180-89.). Petitioner has been detained at Oldham County Detention Center since June 9, 2025. (Doc. 22-1, PageID.2.).

Issues of Fact

Petitioner's presence is required at all future hearings to resolve the timeline of when he was issued an expedited removal order. The timing of when the government issued the expedited removal order is significant as it determines whether the government violated his due process rights afforded to him in section 1229a proceedings and whether he is unlawfully detained. Additionally, Petitioner can attest to the status of his section 1229a immigration proceedings as of June 9, 2025, when he was detained. He can affirm his case was ready to be set for a final merits hearing, which substantiates that the government's attempt to place Petitioner into section 1225 proceedings is judicial waste. Petitioner speaks Gujarati and requires an interpreter.

Argument

I. This Court has subject matter jurisdiction to hear Petitioner's habeas corpus petition and Respondents' 12(b)(1) motion should be denied.

A. Standard of Review

If the defendant/respondent presents both a Rule 12(b)(1) and Rule 12(b)(6) motion, the Court must "consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if [the] court lacks subject matter jurisdiction." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990). Plaintiffs bear the burden of demonstrating that subject matter jurisdiction exists when faced with a Rule 12(b)(1) motion to dismiss. *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). However, the extent of Plaintiffs' burden of proof depends on whether the motion raises a factual or facial challenge. *Id.* at 15-16.

A facial attack challenges the sufficiency of the pleading and factual attacks challenge the facts in the pleading. *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). When presented with a facial attack, the court must accept all well-pleaded factual allegations as true and if those allegations establish a federal claim, then jurisdiction exists. *Id.* Here, Respondents' motion does not question the facts in Petitioner's pleading but rather makes a facial attack. (*See* Doc. 22, PageID.143-64.). Thus, this Court must take the facts in the complaint as true. *Gentek Bldg. Prods.*, 491 F.3d at 330.

B. This Court has jurisdiction over Petitioner's habeas corpus claim because Petitioner seeks release from and review of the constitutional violations that led to his unlawful detention.

This court has subject matter jurisdiction over Petitioner's writ of habeas corpus petition. This action arises under the Suspension Clause of the U.S. Constitution (28 U.S.C. § 2241, art. I, § 9, cl. 2) and 28 U.S.C. section 1331. This Court's jurisdiction derives from 8 U.S.C. section 1252(a)(2)(A), which states that judicial review of an expedited removal order is limited to certain inquiries. Certainly, 8 U.S.C. section 1252(e)(2) limits habeas review to three matters: " first, 'whether the petitioner is an alien'; second, 'whether the petitioner was ordered removed';

and third, whether the petitioner has already been granted entry as a lawful permanent residence, refugee, or asylee." *Dept. of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 111 (2020). When an expedited removal order has not been issued, this Court may order a removal hearing under 8 U.S.C. section 1252(e)(4)(B). The statute explicitly allows for this Court to determine "whether such an order [of removal] in fact was issued and whether it relates to the petitioner" in the section 1225(b)(1) context. 8 U.S.C. § 1252(e)(4)(B).

Historically, a habeas petition "is at its core a remedy for unlawful executive detention". *Munaf v. Geren*, 553 U.S. 674, 693 (2008). The Supreme Court in *Demore v. Kim* specifically found that 8 U.S.C. section 1226(e) did not explicitly bar habeas review of constitutional claims. 538 U.S. 510, 517 (2003). Further, the Sixth Circuit recognizes a district court's jurisdiction over detention-based claims, which are distinct from removal-based claims. *Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018).

Respondents rely on *Thuraissigiam*, to support their claim that Petitioner's detention and the government's actions are lawful under 8 U.S.C. section 1225. 591 U.S. 103 (2020). However, *Thuraissigiam* dealt with a non-citizen who was seeking review of his credible fear determination instead of seeking release from unlawful detention. *Id.* at 114-15. Here, Petitioner is not asking this Court to make any judgment on his fear of returning to India. Rather he seeks release from his current unlawful detention and a resolution on the unlawful issuance of an expedited removal against him, as he was already released from detention after his initial entry into the United States and accorded the right to pursue asylum through 1229a proceedings.

Respondents claim 8 U.S.C. section 1252(e)(2) precludes this Court's jurisdiction in the present matter because Respondents believe Petitioner seeks review of his expedited removal order and his dismissed immigration proceedings. (Doc. 22, PageID.145.). However, Petitioner's

claims fall squarely within 8 U.S.C. section 1252(e)(2)(B). Petitioner contests that Respondents had jurisdiction to place him in expedited removal proceedings under section 1225(b). (Doc. 435, PageID.17443, ¶ ¶ 46-48. If Respondents lacked jurisdiction to place Petitioner in expedited removal proceedings and did so anyway, that is a clear violation of Petitioner's due process rights. Further, the jurisdictional issue puts into question whether the expedited removal order issued by Respondents is valid, whether Petitioner was in fact ordered removed, and whether Petitioner is lawfully detained. Review of these issues by this Court are permissible under 8 U.S.C. section 1252(e)(4) and in accordance with the findings in *Thuraissigiam*. 591 U.S. at 111. Thus, this Court has subject matter jurisdiction over Petitioner's claim.

II. Petitioner has stated a claim upon which relief can be granted by this Court and should deny Respondents' 12(b)(6) motion.

A. Legal Standard

A court may dismiss a complaint under Rule 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). When reviewing a Rule 12(b)(6) dismissal, "all allegations in the complaint are taken as true and the complaint is construed liberally in favor of the party opposing the motion to dismiss." *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). While a complaint must plead sufficient facts to state a claim to relief that is plausible on its face, detailed factual allegations are not required. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (1955). In fact, a complaint need only include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A well-pleaded complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (1937).

B. Expedited removal proceedings and normal immigration proceedings are distinct.

A non-citizen cannot be in section 1229a and 1225(b) proceedings simultaneously. Given the novelty and contemporaneous nature of this issue, most courts have not ruled on this specific set of facts and issue before. Thus, Petitioner must rely on the strict interpretation of the statute and regulations, as well as how courts and the Board of Immigration Appeals have interpreted other similar immigration statutes and regulations.

A Notice to Appear (NTA) is the charging document that the government files when placing a non-citizen in immigration proceedings under 8 U.S.C. § 1229a. 8 C.F.R. § 1239.1(a). The Immigration and Nationality Act (INA) affirms that an immigration proceeding under section 1229a "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or...removed from the United States." 8 U.S.C. § 1229a(a)(3); *Martinez v. Larose*, 968 F.3d 555, 561 (6th Cir. 2020). An immigration judge has jurisdiction over section 1229a immigration proceedings. *Id.*; 8 C.F.R. § 1003.14(a)-(b). The regulations also make clear that immigration officials cannot arbitrarily cancel an NTA that places a non-citizen in section 1229a proceedings after jurisdiction vests with the immigration judge. 8 C.F.R. § 1239.2(a); *see Matter of G-N-C-*, 22 I&N Dec. 281, 284 (BIA 1998); *In re W-C-B-*, 24 I&N Dec. 118, 122 (BIA 2007). In a 2003 decision, the U.S. District Court for the Eastern District of Michigan questioned DHS's authority to use expedited removal against noncitizens who had been paroled into the United States at some earlier point, concluding that the government had "not provided any authority to show that expedited removal applies to [noncitizens] who are 'arriving aliens' based solely on the entry fiction doctrine and who have been residing in the interior of the United States for some time." *Am.-Arab Anti-Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 667-68 (E.D. Mich. 2003).

Upon Petitioner's entry to the United States, Respondents chose to place Petitioner in normal immigration proceedings by filing an NTA against him and initiating proceedings under section 1229a. (Doc. 19-2, PageID.125-27.). As of June 9, 2025, when Respondents detained Petitioner and issued an expedited removal order against him under section 1225, his section 1229a proceedings were still active and under the jurisdiction of the immigration judge presiding over his case. (Doc. 15-2, PageID.107-08.). Respondents have attempted to place Petitioner in both section 1229a and 1225(b) proceedings at the same time, which is not permissible by statute. Therefore, Petitioner's detention is unlawful.

C. The government incorrectly issued Petitioner a final expedited removal order, violating his right to due process in his 1229a immigration proceedings.

Respondents claim that the re-initiation of Petitioner's section 1225 expedited removal is consistent with applicable statutes and not subject to judicial review. (Doc. 22, Page ID#154.). Respondents fail to address the crucial fact in this case: the government incorrectly issued Petitioner an expedited removal order 10 days before an immigration judge dismissed his section 1229a proceedings. (Doc. 22-2, PageID.168-69.). This fact does not comport with the relevant statutes and regulations governing section 1229a proceedings. 8 U.S.C. § 1229a(a)(3); 8 C.F.R. §§ 1239.1(a), 1239.2(a), 1003.14(a)-(b). As Respondents point out, Congress provides outlines "arriving" non-citizen rights through statute. *Thuraissigiam*, 591 U.S. at 140. At the choice of the government, Petitioner was placed in section 1229a immigration proceedings, which afford him more due process protection than section 1225 proceedings. 8 U.S.C. § 1229a(b)(4). Immigration officials cannot retract NTAs after an immigration judge has vested jurisdiction. 8 C.F.R. § 1239.2(a). Accordingly, by incorrectly issuing Petitioner an expedited removal order, the government failed to abide by the due process protections outlined in the statute and regulations.

Petitioner's section 1229a proceedings continue to be active, as the decision of an immigration judge becomes final upon waiver of appeal or upon expiration of the time to appeal, which is 30 days from the date of the decision. 8 C.F.R. §§ 1003.39, 1240.15. Petitioner timely filed an appeal of the immigration judge's decision on June 24, 2025. Exh. PX 2. Thus, Petitioner remains in section 1229a proceedings and his detention under section 1225 is unlawful and violates the Fifth Amendment's Due Process Clause.

Respondents rely on *Thuraissigiam* extensively, emphasizing the burden of the credible fear process and fraudulent asylum claims takes on an already overwhelmed immigration system. 591 U.S. at 112-13; (Doc. 22, PageID.152.). However, Respondents fail to acknowledge the significant resources being wasted by Petitioner's unlawful detention. Petitioner already demonstrated he has a credible fear of returning to India by submitting an application for asylum and awaiting his final merits hearing. Exh. PX 1; (Doc. 15-1, PageID.79.). Attempting to re-initiate section 1225 proceedings essentially restarts the immigration process for Petitioner. Now, at the U.S. government's expense, Petitioner is detained unlawfully and must undergo a credible fear interview before being placed in section 1229a proceedings again. 8 U.S.C. §§ 1225(b)(1)(A)(i)-(ii); 8 C.F.R. §§ 208.30(e)(2)-(3), (f). This type of judicial waste is what Supreme Court Justice Alito warned of in *Thuraissigiam*.

Petitioner has stated a sufficiently detailed claim upon which relief can be granted by this Court. This Court should deny Respondents' 12(b)(6) motion.

Conclusion

For the foregoing reasons, this Honorable Court should deny Defendant's Motion to Dismiss.

Dated: July 14, 2025 Respectfully Submitted,

Vraj Dilipbhai PATEL

By: /s/ Maya A. Flores

One of his attorneys

MAYA A. FLORES
KRIEZELMAN BURTON & ASSOCIATES
200 West Adams Street, Suite 2211
Chicago, Illinois 60606
Phone: (312) 332-2550
Fax: (312) 782-0158
mflores@krilaw.com
Attorney # Illinois 6338974

NICOLE PROVAX
KRIEZELMAN BURTON & ASSOCIATES
200 West Adams Street, Suite 2211
Chicago, Illinois 60606
Phone: (312) 332-2550
Fax: (312) 782-0158
brivera@krilaw.com
Attorney # Illinois 6336591

KHIABETT OSUNA
KRIEZELMAN BURTON & ASSOCIATES
200 West Adams Street, Suite 2211
Chicago, Illinois 60606
Phone: (312) 332-2550
Fax: (312) 782-0158
kosuna@krilaw.com
Attorney # Texas 24116863
*Pro hac vice motion pending

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2025, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to counsel for the Respondents.

/s/ Maya A. Flores
Maya A. Flores
Kriezelman Burton & Associates