

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

ELENA PAUN, a.k.a.
"Elena Chicui,"

Petitioner,

vs.

No. 1:25-cv-00718-DHU-LF

DORA CASTRO¹, Director, Otero
Processing Center; MARY DE ANDA-
YBARRA, Field Director of the El Paso
Field Office of U.S. Immigration and
Customs Enforcement (ICE); TODD M.
LYONS, Acting Director of U.S. ICE;
and KRISTI NOEM, Director of the U.S.
Department of Homeland Security
(DHS),

Respondents.

**RESPONDENTS' MOTION TO DISMISS
PETITIONER'S WRIT OF HABEAS CORPUS (DOC. 1)**

INTRODUCTION

Respondents, Mary De Anda-Ybarra, Field Director of the El Paso Field Office of U.S. Immigration and Customs Enforcement ("ICE"); Todd M. Lyons, Acting Director of U.S. ICE; Kristi Noem, Director of the U.S. Department of Homeland Security ("DHS"), (collectively, "Respondents"), hereby request dismissal of Petitioner's Writ of Habeas Corpus (Doc. 1).

Petitioner challenges her detention on the grounds that detention without a bond hearing violates Fifth Amendment Due Process rights and mandatory detention of criminal aliens under 8 U.S.C. § 1226(c) is unconstitutional. Doc. 1 at 3 ¶ 12-13. Respondents respectfully request the Court dismiss Petitioner's Writ of Habeas Corpus (Doc. 1) as Petitioner's claims are moot,

¹ The undersigned does not represent Dora Castro, Warden, Otero County Processing Center, as Otero is a private facility, and Warden Castro is not a federal employee. However, all arguments made on behalf of the remaining Respondents apply equally to Warden Castro.

Petitioner's claims are jurisdictionally barred, and Petitioner has failed to state a claim upon which relief may be granted.

FACTUAL BACKGROUND

On February 9, 2010, Petitioner entered the United States unlawfully, without admission or parole. *See* Exhibit A, Declaration of Acting Assistant Field Office Director Francisco Ruiz, Case No. 1:25-cv-00718, D.N.M., October 15, 2025, at ¶ 4. On August 24, 2012, Petitioner was ordered removed after failing to appear at her immigration court hearing. *Id.* at ¶ 5. Petitioner ultimately departed the United States on a date unknown to Respondents. *Id.* at ¶ 6.

On January 25, 2022, Petitioner again entered the United States unlawfully and was detained in Arizona. *Id.* at ¶ 7. Petitioner was released from custody through alternative detention and paroled into the United States. *Id.* at ¶ 8. Petitioner was placed into removal proceedings on the non-detained docket of the Baltimore Immigration Court.

On or about July 11, 2025, Petitioner was arrested in Maryland by Hartford County Police and charged with Theft \$100 to \$1500 and Theft Scheme \$100 to \$1500². *Id.* at ¶ 11. Upon information and belief, those charges remain pending. On July 12, 2025, Petitioner was detained by Respondents pursuant to the Laken Riley Act (“LRA”). *Id.*

On August 26, 2025, Petitioner, represented by legal counsel, withdrew her pending applications for relief before the immigration court and accepted a final order of removal to Romania. *Id.* at ¶ 13. Petitioner waived any right to appeal. *Id.* Respondents removal efforts are ongoing pursuant to the final order of removal. *Id.* at ¶ 14.

² Although Respondents contend the factual allegations themselves do not change the legal analysis, Petitioner has grossly mischaracterized the charges as “unauthorized use of a credit card to purchase milk and other groceries”. *See* Doc. 1 at 2 ¶ 8. Review of investigative reports, however, indicate a more complex credit and gift card fraud scheme spanning multiple incidents, store locations and even states. These reports are available upon Court request.

LEGAL BACKGROUND

The Immigration and Nationality Act (“INA”) provides a statutory scheme for the civil detention of aliens both pending removal proceedings and once a final order of removal has been entered. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. The time and circumstances of entry, as well as the stage of the removal process, determines where an alien falls within this scheme and whether detention of the alien is discretionary or mandatory.

I. Discretionary Detention §1226(a) v. Mandatory Detention §1226(c)

For aliens who have entered the United States without inspection or who have been admitted but have stayed beyond the period of admission, 8 U.S.C. § 1226 “generally governs the process of arresting and detaining ... [noncitizens] pending their removal.” *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018). Section 1226(a) provides the default rule that an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States. 8 U.S.C. § 1226(a). Pursuant to §1226(a), ICE has discretion to arrest an alien and then either continue detention for removal proceedings or to release the alien on “bond...or conditional parole.” 8 U.S.C. § 1226(a)(1)–(2). Per regulation, ICE has discretion to release “provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). If ICE opts for continued detention, the alien can seek review of that decision at a bond hearing before an Immigration Judge (“IJ”). *Id.* § 236.1(d)(1). An IJ’s decision to continue detaining an alien may be appealed to the Board of Immigration Appeals (“BIA”). 8 C.F.R. § 236.1(d)(3).

Where §1226(a) provides for discretion in arrest, detention, and release of an alien, §1226(c) mandates detention of criminal aliens. 8 U.S.C. § 1226(c). Section 1226(c) provides, in relevant part, that the Attorney General *shall* take into custody any alien who:

(E) (i) is inadmissible under [8 U.S.C. § 1182(a)(6)(A), (6)(C), or (7)] of this title; and

(ii) is charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of any burglary, theft, larceny, shoplifting, or assault of a law enforcement officer offense, or any crime that results in death or serious bodily injury to another person, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

Id. The use of the word *may* is of course to be contrasted with the use of the word *shall*. *See e.g. Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171-72 (2016) (holding that a statute is unambiguous when it uses “shall” in one provision and “may” in another). When a statute distinguishes between “may” and “shall” it is generally clear that “shall” imposes a mandatory duty while the word “may” implies discretion. *Id.* at 172.

II. Jurisdictional Bars to Review

A. 8 U.S.C. §1252(b)(9)

Congress prescribed a single path for judicial review of orders of removal: “a petition for review filed with an appropriate court of appeals.” *See* 8 U.S.C. § 1252(a)(5). Judicial review of all questions of law and fact, arising from any action taken to remove an alien from the United States shall be available only in judicial review of a final order under this section.” 8 U.S.C. § 1252(b)(9). Read in conjunction with §1252(b)(9), §1252(a)(5) expresses the clear intent of Congress to channel and consolidate judicial review of every aspect of removal proceedings into the petition-for-review process in the Courts of Appeals. *See e.g. Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 483 (1999) (labeling section 1252(b)(9) an

“unmistakable zipper clause,” and defining a zipper clause as “[a] clause that says ‘no judicial review in deportation cases unless this section provides judicial review’”).

B. 8 U.S.C. § 1226(e)

Section 1226(e) bars judicial review of actions and decisions made by the Attorney General under 8 U.S.C. § 1226:

The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

8 U.S.C. § 1226(e). As the Supreme Court explained in *Demore v. Kim*, 538 U.S. 510, 516–17 (2003), this provision applies to strip jurisdiction of judicial review to ICE’s judgments and decisions to arrest and detain aliens subject to 8 U.S.C. § 1226.

III. Post-Removal Order Detention

The seminal case on detention following orders of removal is *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas* the Supreme Court reviewed cases where “resident aliens” had been ordered removed yet remained detained for more than ninety days following their removal orders. The question presented was whether potentially indefinite detention was constitutionally permissible. *See Zadvydas*, 533 U.S. at 693; *See also Demore v. Kim*, 538 U.S. 510, 511 (2003) (brief discussion of central issue in *Zadvydas*). The Supreme Court held that following an order of removal, detention of up to six months was presumptively valid and did not implicate constitutional violations. *Id.* at 701. After this six-month detention period, continued detention may still be constitutionally permissible depending upon the significant likelihood of removal in the reasonably foreseeable future. *Id.*

IV. FRCP 12(b)(1) Dismissal for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction, they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress. *Henry v. Off. of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994). The party invoking federal jurisdiction, generally the plaintiff, bears the burden of establishing its existence. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). Rule 12(b)(1) allows defendants to raise the defense of lack of subject matter jurisdiction by motion. *See* Fed. R. Civ. P. 12(b)(1).

IV. FRCP 12(B)(6) Dismissal for Failure to State a Claim

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move for dismissal if the complaint fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6); *See generally Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This pleading standard does not impose a probability requirement, but it demands “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Although the court must accept the truth of all properly alleged facts and draw all reasonable inferences in the plaintiff’s favor, the plaintiff still “must nudge the claim across the line from conceivable or speculative to plausible.” *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). The complaint must provide “more than labels and conclusions” or merely “a formulaic recitation of the elements of a cause of action,” because “courts are not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555. There must be something more than “naked assertions devoid of further factual enhancement.” *Ashcroft*, 556 U.S. at 678. A claim will also fail if it asserts a legal theory that is not cognizable as matter of law. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

ARGUMENT

I. Petitioner’s Habeas Petition Is Moot

Petitioner requests the Court grant “immediate release on bond, allowing her to remain with her child and continue her asylum proceedings without undue hardship.” *See* Doc. 1 at 3 ¶ 14. However, Petitioner’s asylum claims are no longer pending. Petitioner has accepted a final order of removal to Romania and waived any right to appeal. *See* Exhibit B, Order of the Immigration Judge dated August 26, 2025.

Petitioner is lawfully detained to effectuate a final order of removal. *See generally Zadvydas*. If Petitioner currently had any plausible claim against detention, it is not contained within Petitioner’s Writ of Habeas Corpus (Doc. 1). Petitioner’s counsel, despite full knowledge of this development, has refused to file a voluntary dismissal or any amended pleadings to contest the detention. *See e.g.* Doc. 15 (unopposed motion to extend deadline pending voluntary dismissal).

For these reasons, independent of any further legal analysis, Petitioner’s Writ of Habeas Corpus (Doc. 1) should be dismissed as moot and lacking redressability.

II. §1252(b)(9) Bars Judicial Review

Congress prescribed a single path for judicial review of orders of removal: “a petition for review filed with an appropriate court of appeals.” 8 U.S.C. § 1252(a)(5). Petitioners may challenge removal in front of an IJ, who will determine removability. Petitioners then have a right to appeal an adverse order from the IJ to the BIA. If unsuccessful with the administrative appeal, Petitioners can obtain Article III judicial review by filing a petition for review with the appropriate Court of Appeals. These appellate avenues have been affirmatively waived by Petitioner, who is now subject to a final order of removal. *See generally* Exhibits A and B. There is no legal authority,

nor even claim contained within Petitioner's Writ of Habeas Corpus (Doc. 1), to allow Petitioner to now argue for habeas release before this Court.

Therefore, Petitioner's Writ of Habeas Corpus (Doc. 1) should be dismissed for lack of subject matter jurisdiction.

III. §1226(e) Bars Judicial Review of §1226 Detention

In addition to 8 U.S.C. § 1252(b)(9), 8 U.S.C. § 1226(e) strips the Court of jurisdiction over Petitioner's Writ of Habeas Corpus (Doc. 1). Congress has made clear that ICE's "discretionary judgment regarding the application of [§1226] shall not be subject to review." 8 U.S.C. § 1226(e). Section 1226(e) further directs that "[n]o court may set aside any action or decision by [ICE] under this section regarding the detention of any alien or the revocation or denial of bond or parole." *Id.* As such, this provision blocks judicial review of ICE's decisions to arrest and detain aliens subject to 8 U.S.C. § 1226. ICE's decision to arrest and detain Petitioner pursuant to 8 U.S.C. § 1226 is not reviewable by the Court pursuant to 8 U.S.C. § 1226(e).

As such, Petitioner's Writ of Habeas Corpus (Doc. 1) should be dismissed for lack of subject matter jurisdiction.

IV. Petitioner Fails to State A Claim Under FRCP Rule 12(b)(6)

Independent of the jurisdictional hurdles, Petitioner's Writ of Habeas Corpus (Doc. 1) is legally insufficient to state a claim for which relief may be granted. Petitioner argues that detention without a bond hearing per se violates the Fifth Amendment and that 8 U.S.C. § 1226(c), "as amended by the Laken Riley Act" is unconstitutional. *See* Doc. 1, at ¶¶ 12-13. In support of these two naked constitutional assertions, Petitioner relies solely on *Araujo-Cortes v. Shanahan*, 35 F. Supp. 3d 533 (S.D.N.Y. 2014) for support. However, Petitioner's reliance upon this case is misplaced for several reasons.

First, *Araujo-Cortes* was a lawful permanent resident (“LPR”) entitled to additional due process considerations completely inapplicable to Petitioner. *Id.* at 536. *See generally Demore*, at 510 (discussing the procedural history of the case; “Ninth Circuit held that §1226(c) violates substantive due process as applied to respondent *because he is a lawful permanent resident, the most favored category of aliens*”; before reversing as “Detention during removal proceedings is a constitutionally permissible part of that process”) (emphasis added). Petitioner is not an LPR, and in fact has twice entered the country illegally and twice been subject to removal orders. Petitioner is not entitled to any of the additional due process considerations that may be applicable to LPRs.

Second, *Araujo-Cortes* does not address the constitutionality of mandatory detention under §1226(c) as Petitioner infers. *See* Doc. 1, at ¶ 12-13. *Araujo-Cortes* argued, not that §1226(c) was unconstitutional, but that §1226(c) did not apply to him due to a five-year gap between his release for the underlying criminal offense and the §1226(c) immigration detention for removal proceedings.³ *Araujo-Cortes*, at 540, 545, 550. The sole question before the court in *Araujo-Cortes* was whether mandatory detention without a bond hearing under §1226(c) applies to a non-citizen who had not been taken into immigration custody “when released” from criminal detention. *Id.* at 542. This argument is unavailable to Petitioner as judicially noticeable facts establish Petitioner’s seamless transition from criminal detention to immigration detention. *See* Exhibit A at ¶ 11. Therefore, there is no plausible argument that §1226(c) does not apply to Petitioner in the above-captioned case and the Court should dismiss any comparison to *Araujo-Cortes*.

³ The legal argument dealt with the release clause language of §1226(c)(1), “The Attorney General shall take into custody...*when the alien is released*”. *Araujo Cortes* argued that because the government did not detain him under 1226(c) “when released”, but five-years later, the mandatory detention under § 1226(c) no longer applied to him. This argument is inapplicable to Petitioner based upon judicially noticeable facts. *See* Exhibit A at ¶ 11; *See also* Exhibit B.

Third, even if Petitioner’s cursory constitutional assertions had any cognizable legal support; there would still be no legal authority for the sought relief of “immediate release on bond”. Doc. 1 at ¶ 13. The relief available to *Araujo-Cortes* was the opportunity for an individualized bond hearing. *Araujo-Cortes*, at 550.

Petitioner cites no authority to support the entitlement to immediate release, and the legal theory advanced by Petitioner (Doc. 1 at ¶ 12-13) is not cognizable as matter of law. Petitioner has therefore not stated a claim upon which relief may be granted, a dismissal of Petitioner’s Writ of Habeas Corpus (Doc. 1) is therefore appropriate under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

The Court should dismiss Petitioner’s Writ of Habeas Corpus (Doc. 1) as developments in the immigration case, specifically Petitioner’s acceptance of removal and waiver of appeal rights, have rendered the petition moot. Even if the petition was not moot, there are additional independent reasons upon which to deny, and ultimately dismiss, this challenge jurisdictionally: (1) 8 U.S.C. § 1252(b)(9), which limits judicial review of questions of law and fact arising from removal proceedings to courts of appeal and (2) 8 U.S.C. § 1226(e), which bars judicial review of any action or decision under §1226. Finally, Petitioner has failed to state a claim upon which relief may be granted.

For all these reasons, individually or collectively, dismissal is appropriate.

Respectfully submitted,

RYAN ELLISON
Acting United States Attorney

/s/ RYAN M. POSEY 10/17/25
Ryan M. Posey
Assistant United States Attorney
201 3rd Street, NW Suite 900
Albuquerque, NM 87102

(505) 346-7274
ryan.posey@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2025, I filed the foregoing document electronically through the CM/ECF system. Pursuant to the CM/ECF Administrative Procedures Manual, §§ 1(a), 7(b)(2), such filing is the equivalent of service on parties of record.

/s/ Ryan M. Posey 10/3/2025
RYAN M. POSEY
Assistant United States Attorney