

United States District Court
Western District of Texas
San Antonio Division

Jose Luis Alvarez Martinez,
Petitioner,

v.

Kristi Noem, Secretary of United States
Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-01007-JKP-ESC

**Response in Opposition to
Petitioner's Motion for Temporary Restraining Order
and/or Preliminary Injunctive Relief**

Petitioner, through counsel, filed a habeas petition with this Court on or about August 15, 2025. ECF No. 1. The Court ordered service on Respondents and a response within 30 days of that service. ECF No. 7. Federal Respondents have calendared their habeas response as due on September 24, 2025.

On August 21, 2025, Petitioner filed a Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction, requesting, *inter alia*, that the Court order his immediate release from custody pursuant to a \$3,000 bond granted to him by an Immigration Judge. ECF No. 6 at 15–16. Petitioner challenges the lawfulness of his pre-removal-order detention, but concedes that he (1) entered the United States without being admitted or paroled; (2) was convicted of firearm possession in 2010; (3) is in removal proceedings, although they are currently administratively closed pending a decision on an affirmative benefit application; and (4) has been detained in pre-removal-order ICE custody since May 2025. *Id.* at 1, 5–8

While the parties disagree on the governing detention statute in this case, this Court need not resolve that issue to dispose of this TRO motion or the underlying habeas petition. Regardless of the correct detention authority, Petitioner is not entitled to release from pre-removal-order

custody at this time, and the Court lacks jurisdiction to review ICE's discretionary decision to stay his bond order pending appeal. Moreover, Petitioner's detention is not in violation of the constitution as applied to him, because he is being given sufficient procedural due process through a bond appeal where he is represented by counsel and has already submitted a brief in opposition to ICE's appeal. His detention is also not in violation of substantive due process, because it is neither unreasonably prolonged nor indefinite. As such, Petitioner is not likely to succeed on the merits of these claims, and this TRO should be denied.

Specifically, Petitioner is not likely to succeed for several reasons: (1) his pre-removal detention is authorized by statute in the exercise of ICE's discretion, regardless of whether the appropriate detention authority is § 1226(a), § 1225(b), or § 1226(c); (2) ICE's discretionary decision to continue detention and seek a stay of a bond decision during an appeal of a non-final agency action is not subject to judicial review; (3) while this Court may review an as-applied constitutional challenge, Petitioner cannot show that his continued detention violates procedural due process where he is pending administrative review of the bond decision before the BIA and has already filed, through counsel, a full brief in opposition to ICE's bond appeal; (4) his detention is not unconstitutionally prolonged (or indefinite) in violation of his substantive due process rights, because he has been detained less than 90 days in pre-removal-order detention and those proceedings, including the bond appeal, will eventually conclude; and (5) he has not shown good reason to believe that the BIA will deny ICE's bond appeal or that he has any other relief immediately available to him that would mandate his release from custody. This TRO should be denied, and habeas petition should be denied in its entirety.¹

¹ While this Court could *sua sponte* deny this habeas petition with further input from the government, Federal Respondents do intend to respond to the habeas petition in full within 30 days of service, as contemplated by the Court's Order at ECF No. 7.

I. Relevant Background

Petitioner is a native and citizen of Mexico. ECF No. 1 at ¶ 23. He is currently detained in ICE custody pending his removal proceedings. *Id.* ¶ 5. Petitioner concedes that he was placed into removal proceedings after being convicted of firearm possession. *Id.* ¶ 24. During those removal proceedings, Petitioner was granted bond in 2011, but he was taken back into ICE custody in 2017 after having been arrested for driving without a license. *Id.* ¶ 25. After being granted a \$15,000 bond following the 2017 encounter, Petitioner remained released on bond until May 2025, when ICE took him back into custody in the exercise of discretion to continue his removal proceedings. *Id.* ¶ 27. Petitioner alleges that his removal proceedings are currently administratively closed due to his pending benefit application. *Id.* ¶¶ 1, 26.

Petitioner requested and received a bond hearing in July 2025, and the Court granted him a \$3,000 bond, rejecting the government's arguments that he was subject to mandatory detention as an applicant for admission. *Id.* ¶¶ 28–31. ICE reserved appeal and filed an automatic stay of the bond decision pending appeal. *Id.* ¶ 32. The parties have both filed legal briefs with the BIA in the bond appeal, and the bond appeal is ripe for decision. *See* Exhibits A (DHS brief) and B (alien brief).

Petitioner takes issue with ICE's certification in support of the automatic stay and complains that he has no opportunity to challenge that certification. *See* ECF No. 1 ¶¶ 21–22, 34. For that reason, he claims that the automatic stay process deprives him of his due process rights. *Id.* Petitioner filed this habeas petition through counsel on or about August 15, 2025, requesting release from custody. *Id.* at 10. He filed his motion for TRO shortly thereafter on August 21, and this Court ordered a response to the TRO motion by today, August 26, at 3pm. Respondents herein timely file their response as ordered.

II. Legal Standards

A preliminary injunction is an “extraordinary and drastic remedy.” *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As such, it is “not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion.” *Black Fire Fighters Ass’n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). “The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.” *Canal Auth.*, 489 F.2d at 572. A preliminary injunction should be granted only if the movant has “clearly” carried the burden of persuasion on all four of these prerequisites. *Id.* at 573.

III. Argument

A. Plaintiff Is Unlikely to Succeed on the Merits.

Petitioner is unlikely to succeed on the merits of his as-applied constitutional claims. To establish a due process violation, Petitioner must show that he was deprived of liberty without adequate safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Fifth Circuit finds no due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). Petitioner is receiving due process protections, both substantively and procedurally, and his detention is both statutorily permissible and constitutional as applied to him.

This Court has very extensively reviewed almost identical arguments in a similar case from 2007. *See Kambo v. Poppel*, No. SA-07-CV-800-XR, 2007 WL 3051601 (W.D. Tex. Oct. 18,

2007). In that case, the Court exercised jurisdiction over the alien's as-applied due process challenge to pre-removal-order detention. *Id.* at *1. The Court, however, rejected the alien's challenges to ICE's use of automatic and discretionary stays in that case, finding that 8 U.S.C. § 1252(a)(5) precludes review of ICE's discretionary decisions. *See id.* at *8.

Still, the Court carefully outlined the extent of its jurisdiction to review an as-applied constitutional challenge to pre-removal-order detention. *Id.* at *10. In noting the government's "extensive regulations governing custody and detention," the Court specifically analyzed the regulations that authorize automatic stays, acknowledging the various procedural protections afforded to aliens that are embodied in the regulations. *Id.* *12. One such protection, the Court noted, is the BIA's obligation to track the progress of each custody appeal that is subject to an automatic stay to avoid unnecessary delays. *Id.* (citing 8 C.F.R. §§ 1003.6(c)(3); 1003.19(i)(1) and recognizing a 90-day lapse of the stay, subject to extensions).

Moreover, the Court explored the stay provision itself, finding that it simply preserves "the status quo briefly while DHS seeks expedited appellate review of the immigration judge's custody decision." *Id.* at *19 (citing 71 Fed.Reg. 57873, 57880). The Court clarified, however, that if the administrative record begins to call into doubt the likelihood of a removal order being entered on the merits, the government must at that point offer an "adequate regulatory purpose" to justify continued detention. *Id.* at *20. Around the one-year of detention mark in *Kambo*, the Court noted that although pre-removal-order detention was not indefinite, Kambo's removal no longer seemed likely following an immigration judge's decision on the merits. *Id.* As a result, continued detention for the purpose of ensuring his future compliance with a removal order, the Court reasoned, proved too weak a justification to overcome the alien's liberty interests. *Id.*

Kambo is instructive here. Unlike Kambo, though, Petitioner Alvarez has been detained

for only three months, as opposed to one year. Despite the fact that Petitioner's removal proceedings are administratively closed, he nonetheless remains in removal proceedings, and the assurances associated with his pending benefit application lapse in October 2025. *See* ECF No. 6 at 6. Moreover, the receipt notice for that application makes clear that the pending application does not grant him any immigration status or benefit. ECF No. 6-2 at 36–37. The ultimate relief, therefore, is speculative. Indeed, if Petitioner is granted some sort of immigration benefit that mandates his release from ICE detention, then his claim will be moot. Presently, however, Petitioner offers no basis to determine that his pre-removal-order detention without bond during ICE's bond appeal deprives him of due process.

Petitioner is not likely to succeed on such a claim under these circumstances where he has been detained only three months, is pending removal proceedings, and has fully briefed through counsel his opposition to the government's bond appeal.

B. Remaining Factors Do Not Favor Relief.

With respect to the balancing of the equities and public interest, it cannot be disputed that (1) Petitioner is in removal proceedings, which entitles the government to detain him in the exercise of discretion; and (2) both the government and the public at large have a strong interest in the enforcement of the immigration laws and the removal of criminal aliens. Petitioner's own conduct led to his firearm conviction, which triggered his removal proceedings.

Moreover, Petitioner has provided no basis for this Court to determine that his continued detention pending the BIA's expedited review of the immigration judge's bond order will cause him irreparable harm. Indeed, Petitioner is represented by counsel in this habeas and in bond proceedings before the BIA, and he has already, through counsel, submitted a robust argument to the BIA in support of the bond order. *See* Ex. B. The built-in procedural safeguards in the

regulations further weaken his claim that he is likely to suffer irreparable harm without this Court's intervention. The Court should therefore deny the TRO and dismiss this case in its entirety.

IV. Conclusion

This TRO motion should be denied, and the Court should deny the Petition.

Respectfully submitted,

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