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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Hector Lopez-Melo

Petitioner-Plaintiff,

v.

Pam Bondi, in her Official Capacity, Attorney General of the United States; et al.

Respondents-Defendants.

Case No. 25-CV-03394-PHX-DJH (JZB)

A[redacted]

REPLY TO RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Respondents unlawfully detain Petitioner, Hector Lopez Melo, under a mistaken assertion that INA § 235(b)(2) requires mandatory detention of individuals who entered without inspection. Because DHS has improperly invoked § 235(b)(2), Petitioner has been deprived of the opportunity for an individualized bond hearing and remains in unlawful detention in violation of the INA, the APA, and the Constitution.

Mr. Lopez Melo meets the TRO standard. He is likely to succeed on the merits, he faces immediate and irreparable harm from unlawful detention, and the equities and public interest weigh heavily in his favor. Habeas relief is available when a person "is in custody in violation of the Constitution or laws or treaties of the United States[.]" 28 U.S.C. § 2241(c)(3). Mr. Lopez-Melo seeks habeas relief, as he is being unlawfully detained in violation of the INA, his Fifth Amendment due process rights, and the Administrative Procedure Act.

The INA contemplates two detention regimes for noncitizens pending removal proceedings. The first, § 1225, states that "in the case of [a noncitizen] who is an applicant for admission, if the examining immigration officer determines that [a noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A).

This statute mandates detention for noncitizens to whom it applies. Noncitizens detained under § 1225 are not entitled to bond hearings. See *Jennings v. Rodriguez*, 583 U.S. 281, 297, 138 S. Ct. 830, 842 (2018). By contrast, § 1226 provides that "[o]n a warrant issued by the Attorney General, [a noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a) (emphasis added).

Subject to some limited exceptions for noncitizens with certain criminal charges, arrests, or the like, see § 1226(c)2 , this section further provides that the Attorney General may release a noncitizen on bond or conditional parole. § 1226(a)(1)-(2). Under federal regulations, noncitizens detained under § 1226(a) are entitled to individualized bond hearings at the outset of detention. Jennings, 583 U.S. at 306, 138 S. Ct. at 847 (2018) (citing 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1)).

II. DISCUSSION

A. The Respondent Advocates an Erroneous Statutory Interpretation

Firstly, Petitioner has no criminal record, and he is therefore not subject to mandatory detention.

Petitioner was denied the opportunity to present relevant facts and arguments about his eligibility for bond when the IJ concluded she had no jurisdiction to consider bond based on an erroneous application of INA § 235(a), and the

misclassification of Petitioner's detention under § 1225, rather than § 1226. See Exhibit A.

Providing Petitioner with an additional bond hearing under § 1226 ensures that these facts and arguments can be properly assessed by an IJ in considering whether Petitioner should be released on bond.

Petitioner continues to suffer harm each day he is unlawfully detained without a bond hearing. Without definite assurances of a prompt and appropriate bond hearing under § 1226, Petitioner retains a significant interest in the outcome of his Petition.

§ 1226, not § 1225, should have governed Petitioner's detention from the outset. As stated by the Supreme Court, "U.S. immigration law authorizes the Government to detain certain [noncitizens] seeking admission into the country under §§ 1225(b)(1) and (b)(2)" and to "detain certain [noncitizens] already in the country pending the outcome of removal proceedings under §§1226(a) and (c)." Jennings, 583 U.S. at 289, 138 S. Ct. at 838 (emphasis added).

Noncitizens who are detained shortly after entry into the United States cannot be said to have "effected an entry" and remain, like a noncitizen detained at a port of entry, subject to § 1225 as a "[noncitizen] seeking admission into the country." See *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140, 140 S. Ct. 1959, 1982 (2020) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S. Ct. at 2500

(2001)). Once a noncitizen is within the United States, "[§] Case 1:25-cv-00835-DHU-JMR Document 28 Filed 09/17/25 Page 7 of 19 8 1226 generally governs the process of arresting and detaining [these noncitizens] pending their removal." Jennings, 583 U.S. at 288, 138 S. Ct. at 837.

The Supreme Court's understanding of these two statutes is consistent with the plain text of §§ 1225 and 1226, traditional canons of statutory construction, the statute's legislative history, and longstanding agency practice. See *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1256-61 (W.D. Wash. 2025) (on a motion for preliminary injunction, finding a similarly situated plaintiff to Petitioner likely to succeed on the merits based on analysis of the two statutes' plain text, their relationship to one another, legislative history, and longstanding DHS practice).

DHS's own Notice to Appear alleges that Defendant is "present in the United States without admission or parole," not an "arriving alien." See Exhbit C. These facts point to Petitioner being present in the United States and subject to § 1226 rather than § 1225 as a noncitizen "seeking admission."

B. The Respondents Advocate Violating Petitioner's Due Process Right to a Meaningful Hearing

Petitioner alleges that the Government's denial of a meaningful bond hearing, and his continued detention without one, violates his due process rights. The Fifth Amendment's Due Process Clause prohibits the government from depriving any

person of liberty without due process of law. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690, 121 S. Ct. at 2498 (2001).

The Due Process Clause's protections extend to all persons in the United States, including non-citizens, "whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693. Respondents acknowledge that our immigration laws distinguish between noncitizens seeking entry into the country and those who are present within the U.S. after entry.

Because § 1226 governs Petitioner's detention, the due process owed to Petitioner is that provided for in § 1226—namely, an individualized bond hearing before an IJ. See *Lopez-Campos v. Raycraft*, No. 2:25-cv-12486, 2025 WL 2396379, at *9 (E.D. Mich. Aug. 29, 2025). Having erroneously concluded that Petitioner was mandatorily detained under § 1225, the IJ in Petitioner's case declined to make an individualized assessment of whether Petitioner posed any danger to the community, threatened national security, or was at risk of flight.

Thereafter, Petitioner's continued detention without the bond hearing that should have been provided to him pursuant to § 1226 constitutes an ongoing violation of his constitutional right to due process. See id. at *10; *Arostegui-Maldonado v. Baltazar*, No. 25-cv-2205-WJM-STV, 2025 WL 2280357, at *9 (D.

Colo. Aug. 8, 2025); *Rodrigues De Oliveira v. Joyce*, No. 2:25-cv-00291-LEW, 2025 WL 1826118, at *6 (D. Me. July 2, 2025).

The power of federal courts to issue injunctions to protect rights guaranteed by the Constitution has long been recognized. See *Maehr v. U.S. Dep't of State*, 5 F.4th 1100, 1106 (10th Cir. 2021) (citing *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946)). And "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1276 (1971). It is the "nature of the violation" that "determines the scope of the remedy." Id. at 17.

Pursuant to its broad equitable powers and to remedy this constitutional violation, Petitioner asks this Court to order that Petitioner be afforded a bond review hearing before a neutral IJ pursuant to § 1226(a), rather than § 1225.

C. Respondents Advocate an Erroneous Interpretation of the Administrative Procedure Act

Petitioner asserts that his detention under § 1225 constitutes a violation of the Administrative Procedure Act ("APA"). Under the APA, a reviewing court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Petitioner alleges that "Respondents have acted contrary to the plain text of the

statute, longstanding agency practice, and binding precedent" by subjecting him to mandatory detention under § 1225 instead of providing him an individualized bond review under § 1226.

D. Respondents are precluded from re-detaining Petitioner based on Res Judicata

Respondents indicate that Petitioner was previously released on a $3,000 bond during a prior detention. Response p. 6. This is not something of which Petitioner's attorney was previously aware.

Respondents have not indicated that there is a material change in circumstances that merit redetention. Bond hearings are collateral hearings that determine whether a respondent should be released from custody. The bond hearings assess the respondent's eligibility for bond, Respondent's flight risk, and whether the respondent poses a danger to the community. Bond hearings are separate from removal proceedings, because the assessment for the bond is conducted while removal proceedings are pending.

Respondents did not argue that Petitioner was subject to mandatory detention at his previous bond hearing, as he was granted a $3,000 bond. Turning to the issue of raising or re-raising issues that were or could have been addressed in a previous proceeding is governed by the doctrine of *res judicata*.

The doctrine of *res judicata* bars further litigation on a claim where there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties. *Mendoza v. Holder*, 606 F.3d 1137, 1140 (9th Cir. 2010); see also *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003). The defense of *res judicata* may be invoked in immigration proceedings. *See Ramon-Sepulveda v. INS,* 824 F.2d 749, 750 (9th Cir. 1987). In *Mendoza*, the convictions used in the two removal proceedings were different, and the combination of these constituted a claim that could not have been litigated in the first removal proceeding. Comparing our case to the analysis in *Mendoza*, DHS is not alleging to different claims. *Mendoza*, 606 F.3d at 1140.

Here, all three elements for *res judicata* have been met: the identity of the claims, the privity between the parties, and a final judgement on the merits exist. There are no new circumstances which merit revisiting the bond request.

Though bond determinations are interlocutory, *res judicata* prevents DHS from re-litigating an issue that was already adjudicated. This is particularly the case, because the same parties were involved and the bond grant was a final judgment. Moreover, DHS failed to raise any argument under § 236(c) in the original bond proceeding, or appeal the bond decision in 2012.

To go back and correct a past lawfully issued bond retroactively based on a later decision goes against fundamental principles and due process rights.

"Immigration proceedings, although not subject to the full range of constitutional protections, must conform to the Fifth Amendment's requirement of due process." *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1162 (9th Cir. 2005) (as amended); *see also Grigoryan v. Barr,* 959 F.3d 1233, 1240 (9th Cir. 2020); *Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir 2013) (as amended); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012); *Pangilinan v. Holder*, 568 F.3d 708, 709 (9th Cir. 2009).

The factors that were considered in the original hearing such as Respondent's criminal history, ties to the community, flight risk and compliance with immigration requirements remain the same. If DHS were allowed to re-raise the same issues and relitigate the same claim, this would set a repetitive and dangerous precedent on bond decisions. There is no newly discovered evidence, no material change in circumstances, and no legal justification for revisiting the 2012 bond grant, and should not be applied retroactively.

E. Petitioner asks that the Respondents bear the burden of demonstrating that continued detention is merited

Petitioner asks this Court to find that Petitioner's detention should have been governed by § 1226 and that the denial of a meaningful bond review and his resultant continued detention violates his due process rights, the Court agrees with the other

district courts that have addressed similar cases and finds that Petitioner is entitled to a prompt individualized bond hearing before a neutral IJ. See, e.g., *Kostak v. Trump*, No. 3:25-1093, 2025 WL 2472136, at *4 (W.D. La. Aug. 27, 2025); *Lopez-Campos*, 2025 WL 2496379, at *10; *Rodriguez v. Bostock*, 779 F. Supp. 3d at 1263.

On this issue, courts have taken two different approaches to determining what process is due a noncitizen in a § 1226(a) bond hearing. The first, exemplified by *L.G. v. Choate*, applies the *Mathews v. Eldridge* framework, balancing (1) the private interest affected by the official action, (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value of additional or different procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). The second, exemplified by *Diaz-Ceja v. McAleenan*, follows the framework established for discerning what process is due for involuntary civil detainees awaiting trial or mental health treatment. See, e.g., *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809 (1979). As discussed below, regardless of which test is utilized here, because this case involves a continuing constitutional violation, the Government should bear the burden of showing that Petitioner's continued detention is appropriate.

Finding the Government should bear the burden of proof at a § 1226(a) custody hearing, the District Court in *L.G. v. Choate* recognized the "strong private

interest in being free from civil detention." 744 F. Supp. 3d 1172, 1182 (D. Colo. 2024). The court found that the risk of an erroneous deprivation of this interest is reduced by shifting the burden of proof to the Government, given the difficulty of proving a negative (that a noncitizen is not a flight risk or danger to the community) compared to the resources available to the Government to gather information. *Id.* at 1183-84. On the third *Mathews* factor, the court found the burden of proving flight risk or danger minimal when the Government has had ample time—30 months—to gather information on a detained noncitizen. *Id.* at 1185. Finally, the court reasoned that while the Government certainly has an interest in ensuring appearances at hearings and protecting the community, there is no such interest without a showing that a noncitizen is, in fact, a flight risk or a danger to the community. Id.

Petitioner's private interest in being free from detention—and unlawful detention at that—is at stake now. This factor cuts in Petitioner's favor. Second, shifting the burden to the Government at a subsequent bond hearing likely will reduce the risk of the continuing erroneous deprivation of Petitioner's liberty interests.

In preparation for his initial bond hearing before an IJ, Petitioner submitted a comprehensive packet with evidence supporting his release on bond. See Exhibit D. This packet includes evidence of Petitioner's ties to the community, low flight risk, and low risk of danger to the community. *Id.*

These materials represent an attempt by Petitioner, in the first instance, to meet his burden of proving that he poses no danger to persons or property, presents no threat to national security, and is not a flight risk.

Because the IJ determined he lacked jurisdiction to conduct an individualized custody determination altogether, these materials were considered by the IJ. Had Petitioner received the initial custody determination to which he was entitled under § 1226(a), the Government would have had the opportunity to cross examine or rebut Petitioner's claims that he is not a flight risk or a danger to the community or to argue before the IJ that Petitioner failed to meet his burden to prove as much. More than two months after submitting them, Petitioner remains detained without meaningful consideration of these materials. Respondent's conduct in this case is not an isolated incident, as cases like this one have cropped up across the country in recent weeks. See generally *Romero v. Hyde*, 2025 WL 2403827; *Lopez Benitez v. Francis*, No. 25 Civ. 5937, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Kostak*, 2025 WL 2472136; Lopez-Campos, 2025 WL 2496379; *Maldonado v. Olson,* No. 25-cv-3142, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Rodriguez*, 779 F. Supp. 3d 1239.

Requiring the Government to prove by clear and convincing evidence that Petitioner is a flight risk and/or a danger to the community ameliorates those

concerns. Finally, the Government's interest in detaining Petitioner only outweighs his liberty interests if he is a flight risk or a danger to his community. The Government's interest in ensuring appearance at hearings and protecting the community dissolves if Petitioner is neither a flight risk nor dangerous. Shifting the burden to the Government to justify detention may actually promote the Government's separate interest in managing overcrowding at DHS detention facilities. See *Velasco Lopez v. Decker*, 978 F.3d 842, 854 (2d Cir. 2020).

For all the above reasons, this Court should find that Mr. Lopez-Melo warrants a temporary restraining order and a preliminary injunction ordering that Respondents (1) release him from his unlawful custody; and (2) refrain from sending him to any place outside of the United States.

Dated: September 25, 2025

Respectfully submitted,

/s/ Siovhan Ayala
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