

United States District Court
Western District of Texas
El Paso Division

Fernando Manuel Herculano-Caballero,
Petitioner,

v.

No. 3:25-CV-00428-LS

Kristi Noem, in her official capacity as
Secretary, U.S. Department of Homeland
Security *et al*,
Respondents.

**Response to
Petition for Writ of Habeas Corpus**

Federal Respondents provide the following timely response to Petitioner's habeas petition.¹

Any allegations that are not specifically admitted herein are denied. Petitioner is not entitled to the relief he seeks, including attorney's fees under the Equal Access to Justice Act ("EAJA")², and this Court should deny this habeas petition without the need for an evidentiary hearing.

I. Introduction

Petitioner is lawfully detained on a mandatory basis as an applicant for admission pending removal proceedings before an immigration judge. This case is governed not only by the plain language of the statute, but also by Supreme Court precedent. There is no jurisdiction for this Court to review Petitioner's challenge to the Department of Homeland Security's ("DHS") initial decision to detain him for removal proceedings, because his claims directly arise from the decision

¹ Given the consolidated briefing schedule in this case, following a consolidated hearing, Federal Respondents herein use "he/him/his" to refer to each petitioner, with the understanding that these arguments nonetheless apply equally to the male and the female petitioner. *See* ECF No. 10. A separate filing for each petitioner will contain the relevant facts, procedural history, and documentation to protect confidentiality. *Id.*

² *Barco v. Witte*, 65 F.4th 782 (5th Cir. 2023).

to commence and/or adjudicate removal proceedings against him. To the extent that Petitioner challenges the interpretation or the constitutionality of the statute under which his removal proceedings are brought, he must raise that challenge in the court of appeals upon review of a final order of removal. While as applied constitutional challenges may be brought in district court under certain circumstances, Petitioner has not raised any colorable claim that his mandatory detention under § 1225(b) is unconstitutional as applied to him. His detention is neither indefinite, nor prolonged, as it will end upon the completion of his removal proceedings.

Finally, this Court lacks jurisdiction under habeas to order an immigration judge to hold a bond hearing. The only remedy available through habeas is release from custody, but even if this Court ordered Petitioner's immediate release, which it should not, such release would not provide him any lawful status in the United States and produce him no net gain. For these reasons and those that follow, this Court should deny this habeas petition without the need for an evidentiary hearing.

II. Relevant Facts and Procedural History

Given the consolidated briefing schedule in this case and in a related case represented by the same counsel, Federal Respondents will submit a separate filing with an appendix relevant to each Petitioner. *See* ECF No. 10.

III. Argument

As a threshold issue, the only relief available to Petitioner through habeas is release from custody. 28 U.S.C. § 2241; *DHS v. Thuraissigiam*, 591 U.S. 103, 118–19 (2020). Petitioner, however, has no claim to any lawful status in the United States that would permit him to reside lawfully in the United States upon release. Even if this Court were to order his release from custody, he would be subject to re-arrest as an alien present within the United States without having

been admitted. Ordering release in this circumstance produces no net gain to Petitioner, while mandating continued detention until at least the conclusion of removal proceedings furthers the government's interests in enforcing the immigration laws. ICE will release Petitioner from custody, but only under a grant of relief from removal or an executed removal order.

A. Mandatory Detention and the "Catchall" Provision

There are two types of aliens living unlawfully within the United States who are subject to "full" removal proceedings under 8 U.S.C. § 1229a and not expedited removal: (1) those who have never been admitted but have lived in the United States for longer than two years (*i.e.*, inadmissible under § 1182); and (2) those who were once admitted but no longer have permission to remain (*i.e.*, removable under § 1227). The inadmissible aliens in this context are detained on a mandatory basis under § 1225(b)(2)(A), while the removable aliens are detained under § 1226(a) and eligible to seek bond.

B. Start with the Statutory Text: § 1225(b) Unambiguously Defines an Applicant for Admission as an Alien Present in the United States Without Having Been Admitted.

The statutory language is unambiguous: "An alien present in the United States who has not been admitted ... shall be deemed ... an applicant for admission." 8 U.S.C. § 1225(a)(1); *Thuraissigiam*, 591 U.S. at 109; *Jennings v. Rodriguez*, 583 U.S. 281, 288 (2018); *Vargas v. Lopez*, No. 25-CV-526, 2025 WL 2780351 at *4–9 (D. Neb. Sept. 30, 2025); *Chavez v. Noem*, No. 25-CV-23250CAB-SBC, 2025 WL 2730228 at *4–5 (S.D. Cal. Sept. 24, 2025).

Even though DHS encountered Petitioner within the interior of the United States, he is nonetheless an applicant for admission who DHS has determined through the issuance of a Notice to Appear (NTA) is an alien seeking admission who is not clearly and beyond a doubt entitled to be admitted to the United States. *See* 8 U.S.C. §§ 1225(b)(2)(A); 1229a. In other words, the Immigration and Nationality Act ("INA") mandates that he "shall be detained for a proceeding

under section 1229a [“full” removal proceedings]....” 8 U.S.C. § 1225(b)(2)(A).

Given the plain language of § 1225(a)(1) and charge on his NTA, Petitioner cannot plausibly argue that he is not an applicant for admission. Nor can Petitioner plausibly challenge a DHS’s officer’s determination that he is “seeking admission” simply because he is not currently at the border requesting to come in. The Fifth Circuit explored these nuances in detail while analyzing a different INA provision that is not at issue here (8 U.S.C. § 1182(h)). *See Martinez v. Mukasey*, 519 F. 3d 532, 541–42 (5th Cir. 2008).³

In *Martinez*, the Court reviewed § 1182(h)(2), which statutorily bars certain aliens from eligibility for a discretionary inadmissibility waiver if, for example, the alien was “admitted to the United States as an alien lawfully admitted for permanent residence” and convicted of an aggravated felony since that “admission.” *Id.* The relevant question in *Martinez* was whether Congress intended to also statutorily bar those aliens who had adjusted their status to lawful permanent resident (“LPR”) within the interior of the United States, as opposed to only those who were initially admitted at the port of entry as LPRs. *Id.* at 541–42. *Martinez* argued that because he had adjusted his status to LPR while in the interior, as opposed to having been admitted as an LPR at the border, he was not statutorily barred from applying for the waiver under § 1182(h)(2). *Id.* at 542. The government, however, argued that because of the agency’s interpretation of the word “admission” in the INA’s aggravated felony removal provision, the Court should find that aliens who adjusted their status to LPR are also barred from seeking discretionary waivers under

³ Petitioner did not raise an argument under *Martinez* in his petition, his TRO Motion, or during the evidentiary hearing. On October 14, 2025, counsel for both parties conferred in person regarding *Martinez* before and after an emergency hearing in an unrelated, yet almost identical, habeas litigation. Having heard each other’s legal arguments regarding the application of *Martinez* at that emergency hearing, counsel agreed to keep the existing briefing schedule and respond herein to the anticipated argument.

§ 1182(h)(2), reasoning that adjusting status “accomplished admission” for purposes of the aggravated felony provision. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii); *In re Rosas-Ramirez*, 22 I&N Dec. 616 (BIA 1999)). The Fifth Circuit, as a result, was left with the task of deciding which interpretation to use to determine whether an LPR who adjusted status within the United States was statutorily barred from seeking a discretionary waiver. *Id.* at 543.

The Fifth Circuit rejected *Chevron* deference, because the Court found the language of the INA to be unambiguous:

For determining ambiguity... if this statutory text stood alone, we would define “admitted” by its ordinary, contemporary, and common meaning. ... Congress has relieved us from this task, however, by providing the following definition: “The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of that alien into the United States *after inspection and authorization* by an immigration officer.” 8 U.S.C. § 1101(a)(13)(A) (emphasis added). Under this statutory definition, “admission” is the lawful entry of an alien after inspection, something quite different ... from post-entry adjustment....

Id. at 544. The Court further noted that the phrase “lawfully admitted for permanent residence” is an entirely separate term of art defined in § 1101(a)(20), which does encompass both admission to the United States as an LPR and post-entry adjustment of status. *Id.* at 546. Section 1182(h), however, expressly incorporates that term of art, as defined by § 1101(a)(2), separate and apart from its use of “admitted,” as defined by § 1101(a)(13). In other words, waivers are denied only to those aliens who have been admitted [§ 1101(a)(13)] to the United States as an alien lawfully admitted for permanent residence [§ 1101(a)(20)].

Like the Fifth Circuit in *Martinez*, this Court should navigate these nuanced issues by examining the unambiguous language of the controlling INA provisions in this case, which clearly define these various terms in proper context, to determine the following: Petitioner (1) has not been “admitted” to the United States after inspection by an immigration officer [§§ 1182(a)(6),

1101(a)(13)]; (2) is an “applicant for admission” [§ 1225(a)(1)];⁴ and (3) is subject to detention during “full” removal proceedings as an alien who DHS has determined to be seeking admission and who is not clearly and beyond a doubt entitled to be admitted [§ 1225(b)(2)(A)]. DHS is properly detaining Petitioner on a mandatory basis during his removal proceedings.

C. Congress Intended to Mandate Detention for All Applicants for Admission, Not Just Those Who Presented for Inspection at a Designated Port of Entry.

Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), corrected an inequity in the prior law by substituting the term “admission” for “entry.” *See Chavez*, 2025 WL 2730228, at *4 (citing *Torres v. Barr*, 976 F.3d 918, 928 (9th Cir. 2020); *United States v. Gambino-Ruiz*, 91 F.4th 918, 990 (9th Cir. 2024)). Under the prior version of the INA, aliens who lawfully presented themselves for inspection were not entitled to seek bond, whereas aliens who “entered” the country after successfully evading inspection were entitled to seek bond. *Id.* DHS’s current interpretation of the mandatory nature of detention for aliens subjected to the “catchall” provision of § 1225 furthers that Congressional intent. *Id.* Petitioner’s interpretation, however, would repeal the statutory fix that Congress made in IIRIRA. *Id.*

1. Section 1226(a) Is Not Superfluous, Nor Does It Entitle Release or Provide a Bond Hearing Where DHS Bears the Burden of Proof by Clear and Convincing Evidence.

That does not leave § 1226(a) meaningless. Section 1226(a) applies to aliens within the interior of the United States who were once lawfully admitted but are now subject to removal from the United States under 8 U.S.C. § 1227(a). *See Jennings*, 583 U.S. at 287–88. Section 1226(a) allows DHS to arrest and detain an alien during removal proceedings and release them on bond,

⁴ Nothing in § 1101(a)(4) contradicts this definition. Section 1101(a)(4) simply differentiates between an alien seeking admission to the United States at entry (with DHS) versus an alien by applying for a visa (with the State Department) with which to eventually seek admission at entry into the United States.

but it does not mandate that all aliens found within the interior of the United States be processed in this manner. 8 U.S.C. § 1226(a). Nothing in the plain language of § 1226(a) entitles an applicant for admission to a bond hearing, especially not one that requires DHS to bear the burden of proof by clear and convincing evidence.

2. The Laken Riley Act Is Not Superfluous.

Nor does this interpretation render the Laken Riley Act superfluous simply because it appears redundant. Indeed, “redundancies are common in statutory drafting ... redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute...” *Barton v. Barr*, 590 U.S. 222, 229 (2020).

D. Petitioner Does Not Overcome Jurisdictional Hurdles.

1. Initial Decision to Commence Removal Proceedings

Where an alien, like this Petitioner, challenges the decision to detain him in the first place or to seek a removal order against him, or if an alien challenges any part of the process by which his removability will be determined, the court lacks jurisdiction to review that challenge. 8 U.S.C. § 1252(g); *see also Jennings*, 583 U.S. at 294–95. In *Jennings*, the Court did not find that the claims were barred, because unlike Petitioner here, the aliens in that case were challenging their continued and allegedly prolonged detention during removal proceedings. *Id.* Here, Petitioner is challenging the decision to detain him in the first place, which arises directly from the decision to commence and/or adjudicate removal proceedings against him.

2. Review of Any Decision Regarding the Admission of an Alien, Including Questions of Law and Fact, or Interpretation and Application of Constitutional and Statutory Provisions, Must Be Raised Before an Immigration Judge in Removal Proceedings, Reviewable Only by the Circuit Court After a Final Order of Removal.

Even if the alien claims he is not appropriately categorized as an applicant for admission

subject to § 1225(b), such a challenge must be raised before an immigration judge in removal proceedings. 8 U.S.C. § 1225(b)(4). In other words, if an alien contests that he is an applicant for admission subject to removal under § 1225(b), any claim challenging his continued detention under § 1225(b) is inextricably intertwined with the removal proceedings themselves, meaning that judicial review is available only through the court of appeals upon following a final administrative order of removal. *See* 8 U.S.C. § 1225(b)(4)⁵. This is consistent with the channeling provision at 8 U.S.C. § 1252(b)(9), which mandates that judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action or proceeding brought to remove an alien from the United States must be reviewed by the court of appeals upon review of a final order of removal. *See SQDC v. Bondi*, No. 25–3348 (PAM/DLM), 2025 WL2617973 (D. Minn. Sept. 9, 2025).

E. On Its Face and As Applied to Petitioner, Section 1225(b) Comports with Due Process.

Section 1225 does not provide for a bond hearing, regardless of whether the applicant for admission is placed into full removal proceedings. The Supreme Court upheld the facial constitutionality of § 1225(b) in *Thuraissigiam*, 591 U.S. at 140 (finding that applicants for admission are entitled only to the protections set forth by statute and that “the Due Process Clause provides nothing more”). An “expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.” *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983).

That the alien in *Thuraissigiam* failed to request his own release in his prayer for relief does not make the holding any less binding here. *But see Lopez-Arevelo v. Ripa*, No. 25–CV–337–

⁵ While bond proceedings under § 1226(a) are separate and apart from removal proceedings under § 1229a, challenges to decisions under § 1225(b), including the mandatory detention provision found within that statute, are to be raised in the same § 1229a proceedings. *See* 8 U.S.C. § 1225(b)(4).

KC, 2025 WL 2691828 (W.D. Tex. Sept. 22, 2025). The alien in *Thuraissigiam* undisputedly brought his claim in habeas, and the Court noted that even if he had requested release, his claim would have failed. *Thuraissigiam*, 591 U.S. at 118–19. Regardless of whether the alien in *Thuraissigiam* was on “the threshold of entry” as an applicant for admission detained under § 1225(b)(1), as opposed to an applicant for admission found within the interior and detained under § 1225(b)(2), the reasoning of *Thuraissigiam* extends to all applicants for admission. Petitioner is not entitled to more process than what Congress provided him by statute, regardless of whether the applicable statute is § 1225(b) or § 1226(a). *Id.*; see also *Jennings*, 583 U.S. at 297–303.

Mandatory detention of an applicant for admission during “full” removal proceedings does not violate due process, because the constitutional protections are built into those proceedings, regardless of whether the alien is detained. The alien is served with a charging document (NTA) outlining the factual allegations and the charge(s) against him. He has an opportunity to be heard by an immigration judge and represented by counsel of his choosing at no expense to the government. He can seek reasonable continuances to prepare any applications for relief from removal, or he can waive that right and seek immediate removal or voluntary departure. Should he receive any adverse decision, he has the right to seek judicial review of that decision not only administratively, but also in the circuit court of appeals.

While an as-applied constitutional challenge, such as a prolonged detention claim, may be brought before the district court in certain circumstances, Petitioner here raises no such claim where he has been detained for only a brief period pending his removal proceedings. For aliens, like Petitioner, who are detained during removal proceedings as applicants for admission, what Congress provided to them by statute satisfies due process. *Thuraissigiam*, 591 U.S. at 140. The “catch all” provision at § 1225(b)(2)(A) requires two things: (1) a determination that the alien

seeking admission is not clearly and beyond a doubt entitled to be admitted; and (2) detention during “full” removal proceedings. 8 U.S.C. § 1225(b)(2)(A). Petitioner: (1) has an NTA that charges him as removable due to his presence without admission; and (2) is detained during “full” removal proceedings with an upcoming immigration court hearing. As applied here, § 1225(b)(2)(A) does not violate due process. *See Thuraissigiam*, 591 U.S. at 140.

F. Ex Post Facto Clause Does Not Apply.

Even if Petitioner relied on the prior interpretation of the INA, there is no indication that the new interpretation punishes as a crime Petitioner’s prior “innocent” actions. The Supreme Court’s decisions in *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) and *Vartelas v. Holder*, 566 U.S. 257, 66 (2012) are both distinguishable, as the alien in those had relied on prior versions of the law when considering a criminal conviction. The Fifth Circuit’s decision in *Monteon-Camargo v. Barr* is distinguishable for the same reasons – a new agency interpretation retroactively affected the immigration consequences of prior criminal conduct. 918 F.3d 423 (5th Cir. 2019). Petitioner’s entry in this case was unlawful at the time he entered the United States and remains unlawful for the same reasons. The current interpretation of the controlling detention statute is not punitive, nor does it deprive him of any defense to removal charges that were available to him under the prior interpretation. The only thing that has changed is the agency’s interpretation as to whether Petitioner can seek release on bond. The statute itself, however, has not changed since Petitioner’s entry.

The federal Constitution prohibits both Congress and the States from enacting any “ex post facto Law.” U.S. Const. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1. “Retroactive application of a law violates the Ex Post Facto Clause only if it: (1) ‘punish[es] as a crime an act previously committed, which was innocent when done;’ (2) ‘make[s] more burdensome the punishment for a

crime, after its commission;’ or (3) ‘deprive[s] one charged with crime of any defense available according to law at the time when the act was committed.’” *Jackson v. Vannoy*, 981 F.3d 408, 417 (5th Cir. 2020) (quoting *Collins v. Youngblood*, 497 U.S. 37, 52 (1990)). “A statute can violate the Ex Post Facto Clause . . . only if the statute is punitive.” *Does 1-7 v. Abbott*, 945 F.3d 307, 313 (5th Cir. 2019) (per curiam) (citation omitted).

The Supreme Court and the Fifth Circuit have long recognized that removal proceedings are nonpunitive. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *Gonzalez Reyes v. Holder*, 313 F. App’x 690, 695 (5th Cir. 2009). With IIRIRA in 1996, Congress intended to enact a civil, nonpunitive regulatory scheme to fix a statutory inequity between those aliens who present themselves for inspection and those who do not. IIRIRA, among other things, substituted the term “admission” for “entry,” and replaced deportation and exclusion proceeding with removal proceedings. *See Martinez v. Att’y Gen. of U.S.*, 693 F. 3d 408, 413 n.5 (3d Cir. 2012). In other words, in amending the INA, Congress acted in part to remedy the “unintended and undesirable consequence” of having created a statutory scheme that rewarded aliens who entered without inspection with greater procedural and substantive rights (including bond eligibility) while aliens who had “actually presented themselves to authorities for inspection were restrained by ‘more summary exclusion proceedings’” and subjected to mandatory detention. *Id.* (quoting *Hing Sum v. Holder*, 602 F.3d1092, 1100 (9th Cir. 2010)). Therefore, application of the IIRIRA to Petitioner does not violate the Ex Post Facto Clause.

This administration’s interpretation of mandatory detention of applicants for admission only advances Congressional intent to equalize the playing field between those who follow the law and those who do not. Nothing prevents the agency from implementing policy decisions and interpretations that differ from those of prior administrations. The plain language of the statute in

this case is clear, regardless of whether the agency interpreted it differently in the past than it interprets it today. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385-86 (2024); *Niz-Chavez v. Garland*, 593 U.S. 155, 171 (2021) (no amount of policy talk can overcome a plain statutory command). DHS does not dispute that this interpretation differs from the interpretation that the agency has taken previously, nor does it dispute that the agency's own regulations necessarily support the prior interpretation. The statute itself, however, has not changed. Based upon the foregoing, DHS's current interpretation of the mandatory nature of detention under § 1225(b) is nonpunitive, and Petitioner's ex post facto claim is not plausible on its face.

III. Conclusion

Petitioner is not left without a remedy. Though sparsely granted in only the most extenuating circumstances, Petitioner nonetheless may seek a humanitarian parole, which is granted in the exercise of DHS's discretion. 8 U.S.C. § 1182(d)(5). Petitioner is already in "full" removal proceedings before an immigration judge, which includes the right to counsel at no expense to the government and the right to seek judicial review administratively and through the circuit court. 8 U.S.C. § 1229a. Relief applications are heard more expeditiously on the detained docket than the non-detained docket, and some relief applications are available only to detained applicants due to annual caps on certain benefits. Finally, detention is not indefinite, because removal proceedings will end, either with a grant of relief or with an order of removal. The Court should deny the Petition.

Respectfully submitted,

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