

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Claudio Marcelo Rocano Buestan,

Petitioner,

v.

Brian McShane, in his official capacity as
Acting Field Office Director of New York,
Immigration and Customs Enforcement;

Kristi Noem, in her official capacity as
Secretary, Department of Homeland
Security;

Pam Bondi, in her official capacity as
Attorney General of the United States;

Respondents.

C/A No. 7:25-cv-8544

**PETITION FOR WRIT OF HABEAS
CORPUS AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. Petitioner Claudio Marcelo Rocano Buestan has remained physically present since entering the United States in March 2009.
2. On October 12, 2025, masked immigration authorities, who lacked a warrant, apprehended and detained Petitioner in New York, New York.
3. Petitioner is currently detained at the Orange County Correctional Facility by immigration authorities and is the subject of a pending removal hearings. *See* Exhibit – ICE Detainee Locator.
4. Immigration officials have provided Petitioner with a Notice to Appear in Removal Proceedings based on an allegation that he entered the United States without inspection and being present without valid immigration documents. 8 U.S.C. § 1182(a)(6)(A)(i), § 1182(a)(7)(A)(i).

5. Petitioner's first appearance is scheduled for October 23, 2025, but officers at the detention facility have threatened to move him out of New York on or before Friday, October 17, 2025.

6. Despite contrary authority from this Court, *Benitez v. Francis*, 25 Civ. 5937 (DEH), __ F.Supp.3d __, 2025 U.S. Dist. LEXIS 157214 *24-25, (S.D.N.Y. Aug. 11, 2025), immigration officers have alleged that Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) and ineligible for release on payment of a bond because he allegedly entered without inspection.

7. This Court should follow the persuasive reasoning of *Benitez* and immediately rule that 8 U.S.C. § 1225(b)(2)(A) does not apply to Petitioner because he is not seeking entry and has been placed in removal proceedings.

8. Respondents' detention of Petitioner is unlawful and a violation of his rights to due process.

9. Petitioner seeks 1) an Order to Show Cause that prevents any transfer out of New York; and 2) his immediate release from detention until a final ruling on the merits.

JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 2241 (federal habeas statute); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201-2 (declaratory judgment); United States Constitution Article I, Section 9 (Suspension Clause).

11. The All Writs Act, 28 U.S.C. § 1651, further "authorizes a federal court to protect that jurisdiction" through immediate orders to stay and maintain the status quo. *See, e.g., Loc. 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n, Inc.*, 965 F.2d 1224, 1237 (2d Cir. 1992); *Garcia-Izquierdo v. Gartner*, No. 04 Civ. 7377, 2004 WL 2093515, at *2 (S.D.N.Y. Sept. 17, 2004) (observing that, under the All Writs Act, 28 U.S.C. § 1651, a district court "may order that a petitioner's deportation be stayed . . . when a stay is necessary to preserve the Court's

jurisdiction of the case”); *Khalil v. Joyce*, No. 25 Civ. 1935, ECF No. 9 (S.D.N.Y. Mar. 10, 2025) (barring the government from removing petitioner from the United States until the Court could address his claim); *cf. Michael v. I.N.S.*, 48 F.3d 657, 661-62 (2d Cir. 1995) (holding that the All Writs Act provides a federal court of appeals reviewing a final removal order with a basis to stay removal).

12. Venue is proper in the Southern District of New York because this is a civil action in which Respondents are individuals operating in their official capacity for the United States and Petitioner is detained at the Orange County Correctional Facility, which lies within this District. 8 U.S.C. § 1391(e).

PARTIES

13. Petitioner Claudio Marcelo Rocano Buestan is a citizen and national of Ecuador. He has two United States citizen children and resides in Newburgh, New York.

14. Respondent Brian McShane is the Acting Field Office Director of New York, Immigration and Customs Enforcement, which has responsibility for the arrest and detention of foreign nationals. Acting Director McShane is sued in her official capacity.

15. Respondent Kristi Noem is the Secretary of the Department of Homeland Security (“DHS”), and is sued in her official capacity. The Secretary of Homeland Security is charged with the administration and enforcement of immigration laws. 8 U.S.C. § 1103(a).

16. Respondent Pam Bondi is the Attorney General of the United States and is sued in her official capacity as the head of the Department of Justice. The Attorney General is responsible for the fair administration of the laws of the United States.

LEGAL BACKGROUND

17. The Immigration and Nationality Act (“INA”) prescribes three basic forms of detention for noncitizens in removal proceedings.

18. First, 8 U.S.C. § 1226 authorizes the detention of noncitizens in standard non-expedited removal proceedings before an immigration judge (IJ). *See* 8 U.S.C. § 1229a. Individuals in § 1226(a) detention are entitled to a bond hearing at the outset of their detention, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), while noncitizens who have been arrested, charged with, or convicted of certain crimes are subject to mandatory detention, *see* 8 U.S.C. § 1226(c).

19. Second, the INA provides for mandatory detention of noncitizens subject to expedited removal under 8 U.S.C. § 1225(b)(1) and for other recent arrivals seeking admission referred to under § 1225(b)(2).

20. Last, the Act also provides for detention of noncitizens who have been previously ordered removed, including individuals in withholding-only proceedings, *see* 8 U.S.C. § 1231(a)–(b).

21. This case concerns the detention provisions at §§ 1226(a) and 1225(b)(2).

22. The detention provisions at § 1226(a) and § 1225(b)(2) were enacted as part of the *Illegal Immigration Reform and Immigrant Responsibility Act* (“IIRIRA”) of 1996, Pub. L. No. 104–208, Div. C, §§ 302–03, 110 Stat. 3009–546, 3009–582 to 3009–583, 3009–585. Section 1226(a) was most recently amended earlier this year by the Laken Riley Act, Pub. L. No. 119–1, 139 Stat. 3 (2025).

23. Following enactment of the IIRIRA, the Attorney General drafted new regulations explaining that, in general, people who entered the country without inspection were not considered detained under § 1225 and that they were instead detained under § 1226(a). *See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of*

Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10323 (Mar. 6, 1997).

24. Thus, in the decades that followed, most people who entered without inspection—unless they were subject to some other detention authority—received bond hearings. That practice was consistent with many more decades of prior practice, in which noncitizens who were not deemed “arriving” were entitled to a custody hearing before an IJ or other hearing officer. *See* 8 U.S.C. § 1252(a) (1994); *see also* H.R. Rep. No. 104-469, pt. 1, at 229 (1996) (noting that § 1226(a) simply “restates” the detention authority previously found at § 1252(a)).

25. Respondents’ have announced a new policy that completely changed its prior view of the law. *Matter of Yajure-Hurtado*, 29 I. & N. Dec. 216 (BIA 2025).

26. District Courts, including this one, have rejected Respondents’ new view. *See, e.g., Benitez*, 2025 U.S. Dist. LEXIS 157214 *24-25; *Belsai v. Bondi, et al.*, No. 25-cv-3862 (KMM/EMB), 2025 WL 2802947 (D. Minn. Oct. 1, 2025); *Lepe v. Andrews*, No. 1:25-CV-01163-KES-SKO (HC), 2025 WL 2716910 (E.D. Cal. Sept. 23, 2025); *Giron Reyes v. Lyons*, No. C25-4048-LTS-MAR, ---F.Supp.3d ---, 2025 WL 2712417 (N.D. Iowa Sept. 23, 2025); *Salazar v. Dedos*, No. 1:25-cv-00835-DHU-JMR, 2025 WL 2676729 (D. N.M. Sept. 17, 2025); *Vasquez Garcia v. Noem*, 2025 WL 2549431 (S.D. Cal. Sept. 3, 2025); *Lopez-Campos v. Raycraft*, No. 2:25-cv-12486, 2025 WL 2496379 (E.D. Mich. Aug. 29, 2025); *Kostak v. Trump*, No. 3:25-cv01093-JE, 2025 WL 2472136 (W.D. La. Aug. 27, 2025); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428-JRR, 2025 WL 2430025 (D. Md. Aug. 24, 2025); *Romero v. Hyde*, No. 25-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); *Arrazola-Gonzalez v. Noem*, No. 5:25-cv-01789-ODW, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025); *Aguilar Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411 (D. Minn. Aug. 15, 2025); *Dos Santos v. Noem*, No.

1:25-cv-12052-JEK, 2025 WL 2370988 (D. Mass. Aug. 14, 2025); *Rocha Rosado v. Figueroa*, No. CV 25-02157, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025), *report and recommendation adopted* 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Martinez v. Hyde*, No. CV 25-11613-BEM, 2025 WL 2084238, at *9 (D. Mass. July 24, 2025); *Gomes v. Hyde*, No. 1:25-cv-11571-JEK, 2025 WL 1869299, at *8 (D. Mass. July 7, 2025).

27. The plain text of the statutory provisions demonstrates that § 1226(a), not § 1225(b), applies to people like Petitioner.

28. Section 1226(a) applies by default to all persons “pending a decision on whether the [noncitizen] is to be removed from the United States.” These removal hearings are held under § 1229a, which “decid[e] the inadmissibility or deportability of a[] [noncitizen].”

29. The text of § 1226 also explicitly applies to people charged as being inadmissible, including those who entered without inspection. *See* 8 U.S.C. § 1226(c)(1)(E). Subparagraph (E)’s reference to such people makes clear that, by default, such people are afforded a bond hearing under subsection (a). Section 1226 therefore leaves no doubt that it applies to people who face charges of being inadmissible to the United States, including those who are present without admission or parole.

30. By contrast, § 1225(b) applies to people arriving at U.S. ports of entry or who recently entered the United States. The statute’s entire framework is premised on inspections at the border of people who are “seeking admission” to the United States. 8 U.S.C. § 1225(b)(2)(A).

31. Accordingly, the mandatory detention provision of § 1225(b)(2) does not apply to people like Petitioner who are alleged to have entered the United States without admission or parole.

STATEMENT OF THE FACTS

32. Petitioner has resided in the United States since March 2009.
33. He is a business owner in New York and has two United States children. Petitioner is eligible for non-lawful permanent resident cancellation of removal under § 1229b(b).
34. On October 12, 2025, masked immigration officers stopped Petitioner on the street and asked him for “his papers.”
35. When Petitioner did not provide proof of lawful residency, immigration officers arrested him and transported him to the Orange County Correctional Facility.
36. No individualized determination as to factors such as his flight risk or dangerousness occurred before ICE arrested him on October 23, 2025.
37. While in detention, immigration officers handed Petitioner a Notice to Appear in Removal Proceedings, dated October 12, 2025.
38. Petitioner is scheduled to appear before an immigration judge in New York on October 23, 2025.
39. Petitioner is charged with entered the United States without inspection and being present without valid immigration documents. 8 U.S.C. § 1182(a)(6)(A)(i), § 1182(a)(7)(A)(i).
40. The immigration officers allegedly plan to move Petitioner in the coming days.

CAUSE OF ACTION

Petitioner’s Detention Violates His Fifth Amendment Rights To Procedural Due Process

41. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.
42. The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. V. “Freedom from imprisonment— from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the Clause

protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491 (2001).

43. Petitioner has a fundamental interest in liberty, being free from official restraint, and punitive detention. *Id.*

44. It is well established that such protection extends to noncitizens, including those who are in removal proceedings. *See id.* at 693 (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Reno v. Flores*, 507 U.S. 292, 306, 113 S. Ct. 1439 (1993).

45. “Even noncitizens have a liberty interest in continued freedom from civil immigration confinement.” *Valdez v. Joyce*, No. 25 Civ. 4627, 2025 U.S. Dist. LEXIS 117131, 2025 WL 1707737, at *2 (S.D.N.Y. June 18, 2025) (citing *Lopez v. Sessions*, No. 18 Civ. 4189, 2018 U.S. Dist. LEXIS 98712, 2018 WL 2932726, at *12 (S.D.N.Y. June 12, 2018) (“Petitioner’s re-detention, without prior notice, a showing of changed circumstances, or a meaningful opportunity to respond, does not satisfy the procedural requirements of the Fifth Amendment.”)).

46. No individualized determination as to factors such as his flight risk or dangerousness occurred before ICE arrested him on October 19, 2025.

47. As the Court found in *Benitez*, 2025 U.S. Dist. LEXIS 157214 *31-32, “[t]he utter lack of transparency here is problematic, to say the least, as it makes it impossible to determine why [Petitioner] was detained in the first place.”

48. “At a minimum,... § 1226(a) requires a valid exercise of DHS’s discretion. And here, there is nothing to suggest that DHS exercised any discretion at all in detaining [Petitioner].” *Benitez*, 2025 U.S. Dist. LEXIS 157214 *33.

49. Petitioner was “entitled to more process than he received” pursuant to § 1226(a) and its implementing regulations. *Id.* at *34 (internal quotations and citations omitted).

50. The government's detention of Petitioner without any individualized assessment violated his rights to due process.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

- A. Assume jurisdiction over this matter;
- B. Order Respondents to not remove Petitioner from the State of New York until The Court rules on the Petition;
- C. Order Respondents to release Petitioner because his detention violated his rights to due process;
- D. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and
- E. Order further relief as this Court deems just and appropriate.

October 15, 2025

Respectfully Submitted,

/s/Cory Evan Forman

Cory Evan Forman
Cohen Forman Barone, PC
950 Third Ave., 11th Floor
New York, NY 10022
(212) 766-9111
cory@cfblaw.com
NY Bar#: 3926961
Counsel for Petitioner