

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELHASSEN NDIAYE,

Petitioner,

v.

J.L. JAMISON, et. al.,

Respondents.

Case No. 2:25-cv-06007

J. Sánchez

**REPLY TO RESPONDENT’S OPPOSITION TO MOTION FOR PRELIMINARY
INJUNCTION**

Petitioner Elhassen Yayha Ndiaye, through undersigned counsel, respectfully submits this reply to the Respondent’s Response, filed November 10, 2025. ECF No. 8.

I. JURISDICTION

a. 1252(g) does not bar review

8 U.S.C. § 1252(g) does not apply here and Respondents’ argument to the contrary is unavailing. First, a factual clarification—Respondents state that “[o]n October 20, 2025, Petitioner was detained at his second mandatory check-in with ICE and placed in removal proceedings.” ECF No. 8, at 4. This is incorrect. Mr. Ndiaye was issued a Notice to Appear, commencing removal proceedings under 8 U.S.C. § 1229a, on June 13, 2023. ECF No. 1-3. Mr. Ndiaye’s first hearing in immigration court was on July 9, 2024, and he was scheduled for his final “merits” hearing in 2026. ECF No. 1, at 8. His arrest by ICE in October 2025 was unrelated to the initiation of removal proceedings in June of 2023.

Second, Mr. Ndiaye *is not* challenging the initiation of removal proceedings—indeed, his entire purpose in coming to the United States was seek asylum, or to be placed into removal proceedings so that he could present his meritorious claim to an immigration judge.

Third, the Respondents miscite or misconstrue authority. For example, the Respondents' write that the "decision to detain is a 'specification of the decision to commence proceedings [implicating § 1252(g)]'" quoting footnote 9 from *American-Arab Anti-Discrimination Comm* ("AADC"). 525 U.S. 471, 485 n.9 (1999). The footnote actually states that

we know of no case challenging 'the decision ... to issue a show cause order¹' (though that might well be considered a mere specification of the decision to "commence proceedings" which some cases do challenge and which § 1252(g) covers). Section 1252(g) was directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion. It does not tax the imagination to understand why it focuses upon the stages of administration where those attempts have occurred.

Id. This footnote has nothing to do with detention or linking the decision to detain with the decision to commence proceedings, as the Respondents suggest.

The Respondents cite the 11th Circuit Case *Alvarez v. ICE* for the proposition that § 1252(g) bars review of a decision to detain a noncitizen. 818 F.3d 1194, 1202–03 (11th Cir. 2016). The *Alvarez* Court also explained that in interpreting the scope of *AADC* the "Third Circuit has taken a different approach—although significantly, for our purposes, also a narrow one—holding that the provision 'only applies to suits challenging the government's selective enforcement of the immigration laws.'" *Id.* at 1202–03 (citing *DeSousa v. Reno*, 190 F.3d 175, 182 (3d Cir.1999)). In other words, the Third Circuit has a *narrower* view of the § 1252(g) bar than other Circuits, including the 11th. As Judge Bibas more recently explained, "[s]ection 1252(g) does not sweep broadly. It reaches only these three specific actions, not everything that arises out of them." *Tazu v. Att'y Gen. United States*, 975 F.3d 292, 296 (3d Cir. 2020).

¹ At the time *AADC* was filed and litigated in the lower Courts, immigration proceedings were initiated with an "Order to Show Cause." This was replaced with the "Notice to Appear."

This case is emphatically not about one of the three discreet actions listed in § 1252(g). This is a challenge to the legal authority to detain Petitioner in the first place. The word “detain” does not appear in § 1252(g), and the Supreme Court and Third Circuit have been extremely clear that that provision is narrow.

b. 1252(b)(2) does not bar review

This issue has been settled. The Third Circuit, relying on *Jennings v. Rodriguez*, 583 U.S. 281 (2018), explained the scope of 1252(b)(2):

We must ask: If not now, when? If the answer would otherwise be never, then § 1252(b)(9) poses no jurisdictional bar. In other words, it does not strip jurisdiction when aliens seek relief that courts cannot meaningfully provide alongside review of a final order of removal. As the First Circuit has noted, the point of the provision is to channel claims into a single petition for review, not to bar claims that do not fit within that process.

E.O.H.C. v. Sec’y U. S. Dep’t of Homeland Sec., 950 F.3d 177, 186 (3d Cir. 2020) (Bibas, J.).

Indeed, the interpretation of 1252(b)(2) that the Respondents now advance was explicitly rejected in *E.O.H.C.*: “[c]onsider a detained alien who needs halal or kosher food, or a diabetic who alleges that the Government is depriving him of insulin. Or take *Jennings’s* example of a challenge to prolonged detention. Under the Government’s reading, these aliens could get no judicial review until the Board enters their final orders of removal. That cannot be so.” *Id.* at 186.

Here, the questions presented are whether Respondents have the statutory authority to detain Mr. Ndiaye under § 1225 or if they have violated his due process rights in revoking their prior decision to release him. These questions cannot be litigated through the section 1252 process, as *only* final orders of removal, and not bond decisions, are reviewable via Petition for Review to the Circuit Courts. *See* 8 C.F.R. § 1003.19(d) (“Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or

proceeding.”; *see also* 8 U.S.C. § 1252(b) (review of orders of removal). Mr. Ndiaye would be detained until final adjudication of his claim, and then he would be granted status and presumably released, or he would be deported. He would never be able to raise the current challenge.

II. EXHAUSTION

Exhaustion is prudential and discretionary, and largely seeks to advance judicial economy. Requiring further administrative exhaustion would frustrate efficiency, not promote it, as the Board of Immigration Appeals (“BIA”) has clearly spoken on this issue. Going back to the BIA would be utterly futile. The *Yajure Hurtado* decision is two months old, yet the Respondents suggest Mr. Ndiaye return to the BIA and ask them to reconsider a recent precedential decision that was the culmination of a policy shift that began with *Q. Li* in May, and then the DHS Guidance memorandum in July. ECF Doc. 1, ¶¶32–36; *Matter of Q. Li*, 29 I&N Dec. 66 (BIA 2025). The DHS and the BIA have made their decision on this question, and it is up to this Court to correct the error. Requiring additional litigation just to have the BIA, after additional indeterminate delay, simply reiterate its position before returning to this Court is a waste of time and resources.

Finally, the BIA is owed no deference and has no special expertise that this Court does not also hold, as it is the “duty” of the courts to “say what the law is.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024). The BIA has explained its position and reasoning, and this Court is instructed by the Administrative Procedures Act to “decide legal questions by applying their own judgment.” *Id.* at 392.

Dated: November 11, 2025

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on November 11, 2025, this motion and all attachments were filed using the Court's CM/ECF system. All party counsel are e-filers and will receive a copy via ECF.

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