



U.S. Department of Justice

United States Attorney
Southern District of New York

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November 25, 2025

By ECF

The Honorable Dale E. Ho
United States District Judge
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *E.M.M. v. Almodovar, et al.*, No. 25 Civ. 9592 (DEH)

Dear Judge Ho:

This Office represents the government in the above-referenced immigration habeas corpus action, brought by petitioner E.M.M. (“Petitioner”), an alien in removal proceedings, challenging his detention by U.S. Immigration and Customs Enforcement (“ICE”). The primary legal issue presented in this case concerns the statutory authority for Petitioner’s detention—whether it is 8 U.S.C. § 1226(a) or § 1225(b)—and the attendant due process issues stemming from such authority. Petitioner principally seeks an order from this Court directing ICE to release him from detention in accordance with the Immigration Judge’s bond order and with no additional conditions beyond those imposed by that order.

While reserving all rights, including the right to appeal, the government submits this letter in lieu of a formal responsive memorandum of law to conserve judicial and party resources, and to expedite the Court’s consideration of this case, in light of this Court’s decision on the principal legal issues in *Lopez Benitez v. Francis*, No. 25 Civ. 5937 (DEH), 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025) (“*Lopez Benitez*”), as discussed below.

Relevant Underlying Facts

Petitioner, a native and citizen of El Salvador, unlawfully entered the United States at some point prior to May 19, 2025. *See* Decl. of Mincheol So dated Nov. 24, 2025, ECF No. 15 (“So Decl.”), ¶¶ 3–4. According to Petitioner, he has lived in the United States for the past 18 years. *See* Am. Pet., ECF No. 9, ¶¶ 16; Declaration of E.M.M., ECF No. 1-2, ¶ 2.

ICE arrested Petitioner in Huntington Station, New York, on May 19, 2025. *So* Decl. ¶ 4. That day, ICE served Petitioner with a Notice to Appear (“NTA”), charging him with removability pursuant to Immigration and Nationality Act (“INA”) § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. *Id.* ¶ 5 & Ex. A. Petitioner was booked into the 26 Federal Plaza, New York City Hold Room, and, later that day, transferred to the Orange County Jail, where he currently remains detained. *Id.* ¶ 7.

On May 22, 2025, ICE filed the NTA with the Executive Office for Immigration Review, thereby commencing removal proceedings. *Id.* ¶ 9. The NTA directed Petitioner to appear before an Immigration Judge (“IJ”) on May 27, 2025. *Id.* Petitioner appeared for several master calendar hearings between May 27, 2025, and July 29, 2025. *Id.* ¶¶ 10-12, 14-16.

On August 1, 2025, Petitioner filed a motion for release on bond pursuant to 8 U.S.C. § 1226(a) with the IJ. *Id.* ¶ 17. On August 11, 2025, the IJ held a bond hearing, granted Petitioner’s motion for bond, and ordered Petitioner released from custody under bond of \$7,500. *Id.* ¶ 19. Petitioner was not released, however, because DHS filed a Notice of Service Intent to Appeal Custody Redetermination (Form EOIR-43) that same day, which automatically stayed the IJ’s order that Petitioner be released on bond. *Id.* ¶ 20. On August 21, 2025, DHS appealed the IJ’s bond determination to the Board of Immigration Appeals (“BIA”), contending in the appeal that Petitioner was not eligible for bond because his detention was governed by 8 U.S.C. § 1225(b)(2)(A), which mandates detention, rather than by 8 U.S.C. § 1226(a), which permits release on bond. *See id.* ¶ 22.

On August 13, 2025, Petitioner filed an application for relief from removal with the immigration court, *id.* ¶ 21, and, on September 12, 2025, Petitioner appeared for a merits hearing before the IJ regarding that request, *Id.* ¶ 24. The IJ denied Petitioner’s application for relief and ordered him removed to El Salvador. *Id.* Petitioner appealed the IJ’s order of removal with the BIA on October 8, 2025. *Id.* ¶ 25. That appeal remains pending. *Id.*

On November 20, 2025, the BIA issued a decision sustaining DHS’s appeal of the IJ’s August 11, 2025, order granting Petitioner release on bond. *Id.* ¶ 26. The BIA’s decision vacated the IJ’s bond order on the basis that there was no authority to grant bond because Petitioner is present in the United States without admission and, accordingly, his detention is governed by 8 U.S.C. § 1225(b)(2)(A). *Id.*

Habeas Petition

Petitioner commenced this action on November 17, 2025. ECF No. 1 (“Pet.”). At that time, the BIA had not yet resolved DHS’s appeal, and the IJ’s bond order remained automatically stayed as a result of ICE’s filing of the Form EOIR-43. *Id.*; So Decl. ¶¶ 20, 26. Petitioner argued in his petition that the automatic stay of the IJ’s bond order violated his due process rights and that the mandatory detention provision of 8 U.S.C. § 1225(b)(2)(A) does not apply to him because he had already entered and had been residing in the United States at the time he was arrested by ICE. *Pet.*

Petitioner amended his petition after the BIA issued its November 20, 2025, decision. ECF No. 9 (“Am. Pet.”). He repeated the arguments he made in the Petition and also argued that his detention, which has exceeded six months, has become unconstitutionally prolonged, entitling him to a bond hearing regardless of whether he is detained pursuant to § 1226(a) or § 1225(b)(2)(A). In his first and second claims for relief, he argues that the application of an automatic stay to his case and ICE’s assertion of its authority to detain him without bond under § 1225(b)(2)(A) violate substantive and procedural due process. *See Am. Pet.* ¶¶ 87-99. In his third claim for relief, he argues that the automatic stay regulation exceeded the authority given to the Attorney General by Congress under the INA and that his detention pursuant to § 1225(b)(2)(A) unlawfully mandates his continued detention and thus also violates the INA. *See id.* ¶¶ 100-106. In his fourth claim for relief, he argues that the application of the automatic stay and of § 1225(b)(2) in this case violates

the Administrative Procedure Act. *See id.* ¶¶ 107-111.

In his prayer for relief, Petitioner asks that the Court declare that § 1226(a) is the appropriate statutory provision that governs his detention and eligibility for bond, declare his detention unlawful, and issue a writ of habeas corpus ordering his immediate release in accordance with the IJ's bond order and with no additional conditions beyond those imposed by the IJ. Am. Pet. at 31-32 (Prayer for Relief).

Lopez Benitez v. Francis

On August 13, 2025, in a habeas case challenging an alien's detention pursuant to § 1225(b)(2), this Court issued a decision on the principal legal question presented here. The alien had been re-detained in July 2025 after prior release in 2023 on an order of recognizance. The Court concluded that the petitioner was detained pursuant to § 1226, not § 1225.¹ *Lopez Benitez*, 2025 WL 2371588, at *9. The Court reached this conclusion “for two independent reasons.” *Id.* at *3. First, the Court explained that DHS had “consistently treated Lopez Benitez as subject to detention on a discretionary basis under § 1226(a),” as Lopez Benitez was initially detained at the border in 2023, served with an arrest warrant referencing 8 U.S.C. § 1226, released on an order of recognizance that also referenced § 1226, and arrested again in July 2025 following an immigration court hearing and again served a copy of an arrest warrant referencing § 1226. Second, the Court performed a statutory analysis and held that “a proper understanding of the relevant statutes, in light of their plain text, overall structure, and uniform case law interpreting them, compels the conclusion that § 1225's provision for mandatory detention of noncitizens ‘seeking admission’ does not apply to someone . . . who has been residing in the United States for more than two years.” *Id.* at *3; *see id.* The Court relied on the contemporaneous documentation as well as two decisions from Massachusetts, *Gomes v. Hyde*, No. 25 Civ. 11571, 2025 WL 1869299 (D. Mass. July 7, 2025), and *Martinez v. Hyde*, __ F. Supp. 3d __, 2025 WL 2084238 (D. Mass. July 24, 2025). *Id.* at 4–5.

Having concluded that the petitioner's detention was governed by § 1226, the Court conducted the three-part due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and found that the petitioner was “entitled to more process than he received.” *Id.* at 12. The Court directed the government to transport the petitioner, who had been transferred out of the district for bedspace reasons, “back to the Southern District of New York,” and “immediately upon effectuating his transfer, to release [petitioner] from custody.” *Id.* at 15.

This Court has followed its holding in *Lopez Benitez* in finding that petitioners are subject to detention under § 1226, rather than § 1225, in subsequent cases. *See Samb v. Joyce*, No. 25 Civ. 6373 (DEH), 2025 WL 2398831 (S.D.N.Y. Aug. 19, 2025); *Segovia v. Joyce*, No. 25 Civ. 9551 (DEH), ECF No. 13; *Huang v. Almodovar*, No. 25 Civ. 9346 (DEH), ECF No. 10.

¹ ICE contends that the petitioner's detention was governed by 8 U.S.C. § 1225 because, as an alien who entered without inspection or parole, and was initially detained soon after crossing the border, he was an applicant for admission who is treated, for constitutional purposes, as if stopped at the border. As such, he would not be entitled to release or a bond hearing. *See Lopez Benitez v. Francis*, No. 25 Civ. 5937 (DEH), ECF No. 8, at 6–12 (gov't brief).

Discussion

This case turns on whether Petitioner is properly detained under § 1226(a) or § 1225(b)(2)(A). As noted, this Court has already held in a prior case that “§ 1225’s provision for mandatory detention of noncitizens ‘seeking admission’ does not apply to someone . . . who has been residing in the United States for more than two years.” *Lopez Benitez*, 2025 WL 2371588, at *3. This Court held, instead, that such an alien is detained pursuant to § 1226. *Id.* Moreover, the Court held that § 1225 did not apply to Lopez Benitez because ICE had “consistently treated [him] as subject to § 1226,” including in the documents authorizing the arrest that precipitated the detention at issue. *Id.* at *4-5 (noting that the government “most recently detained [Lopez Benitez] last week pursuant to” § 1226).

While the government respectfully disagrees with the Court’s decision in *Lopez Benitez*, the government also acknowledges that that decision would appear to control the result in this case if the Court adheres to it. First, Petitioner claims that he has resided in the United States for the past 18 years. Second, like Lopez Benitez, the warrant for Petitioner’s arrest authorized the arrest pursuant to “section 236 of the Immigration and Nationality Act”—i.e., § 1226. *Id.* at *4.²

To the extent Petitioner challenges ICE’s invocation of the automatic stay, that challenge is moot. Once the BIA issued its November 20, 2025, decision vacating the IJ’s release order, the automatic stay of that release order dissolved. Accordingly, the Court cannot grant Petitioner relief from the automatic stay because it is no longer in place. *See Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) (“The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed.”). If the Court determines that Petitioner’s challenge to the automatic stay is not moot, however, the government similarly notes that this Court already concluded in a prior case that ICE’s invocation of an automatic stay to an IJ’s bond order violated due process. *J.M.P. v. Arteta*, ___ F. Supp. 3d ___, 2025 WL 2984913 (S.D.N.Y. 2025). While the government respectfully disagrees with that decision, it acknowledges that it likely would control the result in this case, notwithstanding that this case can be resolved on other grounds.

Accordingly, to conserve judicial resources and to expedite the Court’s consideration of this case, the government hereby relies upon, and incorporates by reference, the legal arguments it presented in *Lopez Benitez* and *J.M.P.*,³ and the Court can decide this matter without further briefing. However, should the Court prefer to receive a formal opposition brief in this matter, we

² The facts of this case are different in certain respects from those in *Lopez Benitez* because the Petitioner in this case entered the United States unlawfully at some point, but then was not encountered by DHS until his arrest in May 2025. Unlike Petitioner here, the petitioner in *Lopez Benitez* had twice been arrested by DHS with a warrant that referenced § 1226 (once in 2023 and again in 2025), and had been released on recognizance pursuant to § 1226. Thus, the Court’s reasoning in *Lopez Benitez* that DHS “consistently treated” that petitioner as being “subject to detention on a discretionary basis under § 1226(a),” arguably would not apply here. The Court stated in *Lopez Benitez*, however, that it premised its holding on the “independent” ground that the statute did not apply to aliens who already had resided in the United States for two years or more.

³ Specifically, the government incorporates by reference all arguments raised in its opposition brief in *Lopez Benitez*. *See Lopez Benitez v. Francis*, No. 25-cv-5937 (DEH), ECF No. 8, and its briefs in *J.M.P.*, *see J.M.P. v. Arteta*, ECF Nos. 23, 28.

will file such a brief upon the Court's request.

Further, notwithstanding its submission of this letter in lieu of a formal brief, the government reserves all rights, including the right to appeal. Accordingly, for the reasons set forth in the government's brief in *Lopez Benitez*, the government respectfully requests that the Court deny this habeas petition.

If the Court grants the petition and orders release, it should issue an order as did in *JMP*, directing Petitioner's release on bond pursuant to the terms set by the IJ in its August 11, 2025 bond determination. This would be consistent with the relief Petitioner seeks in the Amended Petition.

* * *

I thank the Court for its consideration of this submission.

Respectfully submitted,

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