

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MACKSUEL ALVES DA SILVA,

Petitioner,

v.

25-CV-01220-LJV

PAMELA BONDI, in his official capacity as Attorney General
Of The United States, et al.,

Respondents.

**RESPONDENTS' OPPOSITION TO PETITIONER'S REQUEST FOR INJUNCTIVE
RELIEF IN THE PETITION**

Petitioner Macksuel Alves Da Silva has embedded within his Petition (ECF No. 1) an emergency motion for temporary restraining order and stay of transfer. This Court has already enjoined Respondents from transferring Da Silva, and therefore that aspect of the relief sought should be deemed moot. *See* ECF No. 4. Da Silva also seeks an order granting his bond hearing or release as a form of injunctive relief. ECF No. 1 at ¶ 21. He is not entitled to such relief because, as a “certain other alien” who was encountered within 100 miles of the border and 14 days of unlawfully crossing it, he is detained pursuant to 8 U.S.C. § 1225(b)(2)(A)(iii)(I) and his detention is mandatory as an arriving alien. Accordingly, Da Silva’s requests for injunctive relief should be denied.

FACTUAL BACKGROUND

Da Silva is a native and citizen of Brazil who unlawfully entered the United States in 2016. Pet., ECF No. 1, at ¶ 13. He was arrested within 100 miles of the border and 14 days of his entry such that the “certain other alien” provision of expedited removal under 8 U.S.C. § 1225(b)(1)(A)(iii) applied to him. *Id.* at ¶ 14. (Although Da Silva argues he is subject to § 1226 as an alien encountered in the interior of the United States, this is plainly incorrect as he also references being subject to an asylum process which *only* exists under § 1225. Section 1226 has no asylum language anywhere).¹

Apparently, Da Silva was found to have a credible fear of return to Brazil and was transferred to “full” removal proceedings pursuant to § 1229a. This transfer mechanism is

¹ Da Silva also references the recent Board of Immigration Appeals decision in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025), but that case has nothing to do with this one because Da Silva is subject to detention under 8 U.S.C. § 1225(b)(1) and that entire framework of detention is based upon § 1225(b)(2).

provided for in 8 U.S.C. § 1225(b)(1)(B)(ii), again showing that Da Silva is an arriving alien subject to expedited removal proceedings who is now in full removal proceedings.

Although Da Silva does not state how he left ICE custody, because he is subject to § 1225(b), the only mechanism for his release would have been parole. Such parole apparently would have been granted in 2016 upon his initial encounter with ICE. Parole usually is valid for a 2 year period. There is no indication in the Petition that Da Silva ever sought an extension of his parole, and thus, upon information and belief, it expired in 2018.

Da Silva was arrested on or about November 4, 2025. ECF No. 1 at ¶ 15.

LEGAL STANDARD

LEGAL STANDARD FOR THE ISSUANCE OF INJUNCTIVE RELIEF

The decision of whether to grant or deny injunctive relief falls within the Court's sound discretion. *CJ Prod. LLC v. Snuggly Plushez LLC*, 809 F. Supp. 2d 127, 140 (E.D.N.Y. 2011). Because a TRO is "an extraordinary remedy" that may only be awarded "upon a clear showing that the plaintiff is entitled to such relief," it "is never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008); see also *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.") (citation omitted); *Rush v. Hillside Buffalo, LLC*, 314 F. Supp. 3d 477, 483-84 (W.D.N.Y. 2018).²

Generally, even if the moving party establishes irreparable harm, a court may not grant the requested injunctive relief unless the moving party also establishes either (a) that it

² "In the Second Circuit, the standard for a temporary restraining order is the same as for a preliminary injunction." *Jackson v. Johnson*, 962 F. Supp. 391, 392 (S.D.N.Y. 1997).

is likely to succeed on the merits or (b) that there are “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tips decidedly in favor of the party requesting preliminary relief.” *Charette v. Town of Oyster Bay*, 159 F.3d 749, 754 (2d Cir. 1998). Where, as here, “the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme,” the injunction should be granted “only if the moving party meets the more rigorous likelihood-of-success standard.” *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000) (citation omitted); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 424 (2d Cir. 2004) (same).

A party seeking injunctive relief must also show “that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20; *Veramark Techs., Inc. v. Bouk*, 10 F. Supp. 3d 395, 400 (W.D.N.Y. 2014). “Where the government is the opposing party, the final two factors . . .—the balance of the equities and the public interest—merge.” *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *13 (W.D.N.Y. Apr. 2, 2020).

Finally, Da Silva’s request for an order granting him immediate release from custody requests the ultimate relief that he seeks in this matter. As a result of seeking the ultimate relief, he “must show a clear or substantial likelihood of success on the merits, and make a strong showing of irreparable harm in addition to showing that the preliminary injunction is in the public interest.” *Dzhabrailov v. Decker*, 2020 U.S. Dist. LEXIS 91892, at *14 (S.D.N.Y. May 26, 2020). As set forth below, Da Silva fails to meet his burden here.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER THIS CASE

a. 8 U.S.C. § 1252(g) Bars Review Of Da Silva's Claims

Section 1252(g) categorically bars jurisdiction over “*any* cause or claim by or on behalf of any alien *arising from* the decision or action by the [Secretary of Homeland Security] to *commence proceedings*, adjudicate cases, or execute removal orders against any alien.” 8 U.S.C. § 1252(g) (emphasis added). The Secretary of Homeland Security’s decision to *commence removal proceedings*, including the decision to detain an alien pending such removal proceedings, squarely falls within this jurisdictional bar. In other words, detention clearly “aris[es] from” the decision to commence removal proceedings against an alien. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s discretionary decisions to commence removal” and also to review “ICE’s decision to take [plaintiff] into custody and to detain him during removal proceedings”); *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 298 (3d Cir. 2020) (“The text of § 1252(g)... strips us of jurisdiction to review... [T]o perform or complete a removal, the [Secretary of Homeland Security] must exercise [her] discretionary power to detain an alien for a few days. That detention does not fall within some other part of the deportation process.”) (cleaned up) (internal quotations and citations omitted); *Valencia-Mejia v. United States*, No. CV 08–2943 CAS (PJWx), 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) (“The decision to detain plaintiff until his hearing before the Immigration Judge *arose from* this decision to commence proceedings[.]”) (emphasis added); *Wang v. United States*, No. CV 10-0389 SVW (RCx), 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010) (citing *Khorrami v. Rolince*, 493 F. Supp. 2d 1061 (N.D. Ill. 2007) (“[Plaintiff’s] detention necessarily *arises from*

the decision to initiate removal proceedings against him.”) (emphasis added); *Herrera-Correra v. United States*, No. CV 08-2941 DSF (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008) (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007) (“The [Secretary] may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings. ... Thus, an alien’s detention throughout this process *arises from* the [Secretary]’s decision to commence proceedings[]” and review of claims arising from such detention is barred under § 1252(g)) (emphasis added). Put in the Supreme Court’s own words, detention pending removal is a “specification” of the decision to commence proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S. 471, 485 n.9 (1999) (“§ 1252(g) covers” a “specification of the decision to ‘commence proceedings’”). As such, judicial review of Da Silva’s claims is barred by § 1252(g).

b. 8 U.S.C. § 1252(b)(9) Bars Review Of Da Silva’s Claims

Under § 1252(b)(9), “judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove an alien from the United States” is only proper before the appropriate court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (“AADC”). Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels judicial review of all [claims arising from deportation proceedings]” to a court of appeals in the first instance. *Id.*; *see Lopez v. Barr*, No. CV 20-1330 (JRT/BRT), 2021 WL 195523, at *2 (D. Minn. Jan. 20, 2021) (citing *Nasrallah v. Barr*, 590 U.S. 573, 579–80 (2020)).

Moreover, § 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings.

Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they ‘arise from’ removal proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is “unrelated to any removal action or proceeding” is it within the district court’s jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple” (internal quotation marks omitted)).

Critically, “[§] 1252(b)(9) is a judicial channeling provision, not a claim-barring one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.” *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and “receive their day in court.” *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (“The REAL ID

Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns” by permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional claims or questions of law.”).

In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the “decision to detain [an alien] in the first place or to seek removal[.]”). Here, Da Silva challenges the decision and action to detain him, which arises from DHS’s decision to commence removal proceedings, and is thus an “action taken . . . to remove [him] from the United States.” *See* 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government’s decision to “commence proceedings”). As such, the Court lacks jurisdiction over this action. The reasoning in *Jennings* outlines why Da Silva’s claims cannot be reviewed by the Court.

While holding that it was unnecessary to comprehensively address the scope of § 1252(b)(9), the Supreme Court in *Jennings* provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). *See Jennings*, 583 U.S. at 293–94. The Court found that “§1252(b)(9) [did] not present a jurisdictional bar” in situations where

“respondents . . . [were] not challenging the decision to detain them in the first place.” *Id.* at 294–95. In this case, Da Silva *does* challenge the government’s decision to detain him in the first place.. Though the he frames his challenge as relating to detention authority, rather than a challenge to DHS’s decision to detain him in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

The fact that Da Silva is challenging the basis upon which he is detained is enough to trigger § 1252(b)(9) because “detention *is* an ‘action taken . . . to remove’ an alien.” *See Jennings*, 583 U.S. at 319 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). The Court should dismiss Da Silva’s claims for lack of jurisdiction under § 1252(b)(9). He instead must present his claims before the appropriate court of appeals because he challenges the government’s decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

II. DA SILVA HAS FAILED TO SHOW HIS ENTITLEMENT TO INJUNCTIVE RELIEF, REQUIRING THE DENIAL OF HIS MOTION

a. Da Silva Cannot Show Irreparable Harm

Da Silva argues in essentially one-page of briefing that he is entitled to release because he will suffer harm without an order for an individualized custody review. ECF No. 1 at ¶ 21-26. He cannot show such harm because the statutory framework contemplates that arriving aliens (such as him) be detained throughout the immigration process. Thus, his request for injunctive relief should be denied.

Specifically, Da Silva cannot show irreparable harm due to his detention in immigration custody because that is exactly what Congress requires. *See* 8 U.S.C. § 1225(b). The ordinary framework for aliens subject to the expedited removal process, who are then

transferred to full removal proceedings, is to be detained while those proceedings occur. 8 U.S.C. § 1225(b)(1)(B)(ii). Thus, Da Silva cannot show that he is suffering irreparable harm through the usual and ordinary course of detention proceedings. Indeed, continued detention during removal proceedings is insufficient on its own to constitute irreparable harm. *Hernandez-Hernandez v. Feeley*, 535 F. Supp. 3d 142, 151 (W.D.N.Y. Apr. 21, 2021) (“[T]here is ‘much authority foreclosing’ the argument that continued detention, standing alone, is insufficient to constitute irreparable harm.” (quoting *Hossain v. Barr*, No. 6:19-CV-06389-MAT, 2019 WL 5964678, at *5 (W.D.N.Y. Nov. 13, 2019)). There is thus no evidence whatsoever that Da Silva will suffer irreparable harm by his continued detention, requiring the denial of his request for injunctive relief in the form of immediate release.

b. Da Silva Cannot Show A Likelihood Of Success On The Merits

Da Silva’s motion should also be denied because he cannot show a likelihood of success on the merits of his Petition. Aliens such as Da Silva who are subject to expedited removal and then found to have a credible fear are subject to mandatory detention while that claim of fear is litigated in immigration court. 8 U.S.C. § 1225(b)(1)(B)(ii). To the extent that Da Silva argues that he is entitled to seek due process relief in the form of a bond hearing, such relief is foreclosed by Supreme Court precedent. *See Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138 (2020) (quoting precedent that the decisions of administrative officers are due process of law as far as unadmitted aliens are concerned and that procedures authorized by Congress are due process as far as an alien denied entry is concerned). Thus, Da Silva has no due process right to seek a justification of his detention by the government, and his underlying petition will fail on the merits. His request for injunctive relief should therefore be denied.

c. The Balance Of Equities And Public Interest Favor Respondents

Lastly, the final two factors—considered jointly where the government is a party—look to the equities involved and the public interest in the issuance of an injunction. Here, both factors weigh against granting the injunction requested.

In terms of the balance of equities and public interest, Da Silva’s claimed interest is liberty, but he has no right to it as an applicant for admission whose detention is mandated by statute. His interest should therefore be considered minimal. The government has an interest in pursuing immigration policies it chooses. *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 87 (2d Cir. 2020). As the Supreme Court has held, when the government “is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, C. J., in chambers). Likewise, public interest lies in favor of enforcing immigration laws. *You, Xiu Qing v. Nielsen*, 321 F. Supp. 3d 451, 469 (S.D.N.Y. 2018). This is especially true in the present case where the Supreme Court has recognized that the presence of “millions of individuals illegally in the United States, the myriad ‘significant economic and social problems’ caused by illegal immigration, *Brignoni-Ponce*, 422 U.S. at 878, 95 S.Ct. 2574, and the Government’s efforts to prioritize stricter enforcement of the immigration laws enacted by Congress.” *Noem v. Vasquez Perdomo*, No. 25A169, 2025 WL 2585637, at *4 (U.S. Sept. 8, 2025) (Kavanaugh, J., concurring). Accordingly, the Court should find that the balance of equities tips in the government’s favor, and deny Da Silva’s motion.

CONCLUSION

For the foregoing reasons, this Court should deny Da Silva's request for immediate release or a bond hearing in its entirety.

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