

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

ASAEL PEREIRA,

Petitioner,

v.

MITCHELL DIAZ Assistant Field Office
Director for Detention at Broward
Transitional Center; **GARRETT RIPA,**
Director of Miami Field Office, U.S.
Immigration and Customs Enforcement,
Enforcement and Removal Operations;
TODD LYONS, Acting Director, U.S.
Immigration and Customs Enforcement
KRISTI NOEM Secretary of the U.S.
Department of Homeland Security; and
PAMELA BONDI, Attorney General of the
United States, in their official capacities

Respondents.

Civil No. **0:25-cv-62402-EA**

**PETITIONER'S REPLY TO RESPONDENT'S RESPONSE BRIEF ON SUBJECT
MATTER JURISDICTION**

The Petitioner hereby submits a Reply to the Respondents' Response [ECF No. 7] in further support of his Petition for Writ of Habeas Corpus [ECF No. 1].

Respondents contend that 8 U.S.C. § 1226(e) deprives this Court of subject-matter jurisdiction. That contention fails for three independent reasons. First, section 1226(e) bars review only of discretionary judgments, not constitutional challenges. Second, Respondents ignored Petitioner's constitutional arguments, which fall outside § 1226(e)'s scope. Third, section 1226(e) does not insulate Immigration Judge bond decisions from review where the challenge concerns legal error or abuse of discretion, because bond determinations often involve mixed questions of law and fact.

Furthermore, Respondents' reliance on 8 U.S.C. § 1252(g) mischaracterizes both the nature of the Petitioner's claim and the scope of that jurisdiction-stripping provision.

ARGUMENT

I. 8 U.S.C. § 1226(e) Does Not Bar Review of Constitutional Challenges

8 U.S.C. § 1226(e) precludes review only of "[t]he Attorney General's discretionary judgment regarding the application of this section." By its plain terms, the statute bars judicial reweighing of individualized discretionary determinations. It does not, however, eliminate jurisdiction over constitutional challenges to the statutory framework authorizing continued detention.

Courts have consistently recognized that § 1226(e) does not prohibit noncitizens from challenging "the statutory framework that permits [their] detention without bail." *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). Because § 1226(e) does not contain an explicit bar to Habeas Corpus review, federal courts retain jurisdiction to review constitutional challenges to the

legislation authorizing detention. Congress must clearly state its intent to foreclose Habeas review; § 1226(e) contains no such clear statement.

Petitioner does not merely challenge a discretionary bond determination. Petitioner raises constitutional challenges to the legality of detention. [ECF No. 1 ¶¶ 53-59]. Respondents' brief, however, treats the petition as if it challenges only a discretionary custody decision and relies on § 1226(e) to argue lack of jurisdiction. That framing is incomplete and by ignoring the constitutional arguments, Respondents fail to meet their burden of establishing that this Court lacks jurisdiction.

Respondents argue in the alternative that INA § 1252(g) precludes jurisdiction to review a Habeas claim. [ECF No. 7, Page Id 5]. Petitioner acknowledges this Court's decision in *Mokanu v. Warden Miami Fed. Det. Ctr., US Dep't of Homeland Sec.*, No. 1:25-CV-24121-EA, 2026 WL 472294 (S.D. Fla. Feb. 19, 2026), however Petitioner's Fifth Amendment Due Process claim in his Petition for Writ of Habeas Corpus significantly differ from the Petitioner's claim in *Mokanu*. [ECF No. 1]. The *Mokanu* Petitioner's Due Process violation claim is based on the revocation of his humanitarian parole, which is an affirmative immigration benefit not related to removal proceedings. Id at *2.

Here, Petitioner argues *infra* the constitutional basis for his claim and for this Court's jurisdiction.

II. § 1252(g) Does not Deprives this Court of Subject Matter Jurisdiction

Under *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001), the Petitioner's request for release does not challenge the decision to commence removal proceedings; rather, it challenges the legality and constitutional limits of his continued detention. [ECF No. 4].

A. The Petition Challenges Detention, Not the Decision to Commence Proceedings

In *Zadvydas*, the Supreme Court held that federal courts retain Habeas jurisdiction to review challenges to immigration detention. 533 U.S. at 687–88. The Court emphasized that detention must remain tethered to its statutory purpose and constitutional limits. When detention becomes prolonged or unreasonable, courts have authority to order release.

Here, the petitioner does not seek to enjoin, invalidate, or otherwise interfere with the government’s decision to initiate removal proceedings. He accepts that proceedings may go forward. His claim instead challenges the legality of his continued custody pending those proceedings. [ECF No. 4, Page Id 7]. That distinction is critical.

Section 1252(g) is narrow. As the Supreme Court explained in *Reno v. American-Arab Anti-Discrimination Committee*, § 1252(g) applies only to three discrete actions: the decision to commence proceedings, adjudicate cases, or execute removal orders. It does not bar review of “many other decisions or actions” that occur during the deportation process. 525 U.S. 471, 482 (1999). [ECF No. 4, Page Id 6].

A bond or release determination is not a challenge to the commencement of proceedings. It concerns the separate question of whether detention is legally permissible while those proceedings continue. Specially, when there are alternatives to detention to ensure compliance with removal proceedings. [ECF No. 1, ¶ 53].

B. Detention Is Legally Distinct from Commencement of Proceedings

The statutory authority to detain is separate from the discretionary act of initiating removal proceedings. Courts routinely review detention under §§ 1226 and 1231 without treating such review as barred by § 1252(g). [ECF No. 4, Pages Id 6, 7]. If detention automatically “arose from” the commencement decision in the jurisdiction-stripping sense, then *Zadvydas* itself would have been barred, yet the Supreme Court squarely exercised jurisdiction to review detention.

The Court in *Zadvydas* rejected precisely the notion that immigration detention decisions are insulated from judicial review simply because they occur within the removal framework. *Id.* at 688 (noting the “serious constitutional problem” that would arise if statutes were construed to allow indefinite detention).

C. The “Directly and Immediately Connected” Theory Is Overbroad

Virtually every action taken after initiation of removal proceedings, including custody determinations, continuances, venue decisions, and evidentiary rulings, could be said to “arise from” that initial decision. Yet the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee* expressly rejected such an expansive reading of § 1252(g), emphasizing that it is not a “zipper clause” covering all claims related to removal. 525 U.S. at 482. Release on bond does not invalidate, delay, or prevent the government from adjudicating or pursuing removal. It merely regulates the conditions of custody. [ECF No. 1, ¶¶ 44-52].

In this case, Petitioner does not contest the Attorney General’s authority to initiate removal proceedings, adjudicate matters, or carry out removal orders. Instead, he challenges the legality of his detention. That type of claim remains subject to judicial review. See *Canal A Media Holding, LLC*, 964 F.3d at 1257–58 (holding § 1252(g) did not bar review where the challenged action did not fall within one of the three enumerated categories, emphasizing that courts must focus on the specific conduct at issue when determining whether § 1252(g) applies); see also *Maldonado v. Olson*, No. 25-cv-3142, 2025 WL 2374411, at *6 (D. Minn. Aug. 15, 2025) (concluding that a due process challenge was not barred because it did not contest the commencement of proceedings, adjudication of cases, or execution of removal orders); *Vazquez v. Feeley*, No. 25-cv-01542, 2025 WL 2676082, at *8 (D. Nev. Sept. 17, 2025) (determining that a challenge to the lawfulness of detention during removal proceedings does not implicate the “three discrete events along the road

to deportation” covered by § 1252(g)); *Leal-Hernandez v. Noem*, No. 25-cv-02428, 2025 WL 2430025, at *5 (D. Md. Aug. 24, 2025) (finding jurisdiction proper where the petitioner challenged only his continued detention, and noting that § 1252(g) does not bar review of allegedly unconstitutional custody); *Sanchez v. LaRose*, No. 25-cv-2396, 2025 WL 2770629, at *2 (S.D. Cal. Sept. 26, 2025) (holding that review of the legality of detention does not require interference with the Attorney General’s prosecutorial decisions and warning that a broader reading of § 1252(g) would foreclose review of unlawful detention claims); and *Campos Leon v. Forestal*, No. 25-cv-01774, 2025 WL 2694763, at *1–2 (rejecting the government’s reliance on § 1252(g) and exercising jurisdiction over a habeas petition challenging DHS’s failure to comply with an immigration judge’s bond order). Thus, the petitioner’s claim fits squarely within the core of Habeas review preserved in *Zadvydas*: a challenge to unlawful or unreasonably prolonged detention, not a challenge to prosecutorial discretion in commencing proceedings.

This Court should therefore consider changing its position and reject the expansive interpretation of § 1252(g) and recognize that Habeas jurisdiction remains available to assess the legality of continued detention pending removal proceedings.

III. Petitioner’s Constitutional Claims Fall Outside § 1226(e)’s Scope

Petitioner raises constitutional challenges to the legality of detention. Respondents do not meaningfully address the constitutional dimension of Petitioner’s claims. Instead, they rely on § 1226(e), which applies only to discretionary judgments. This omission is significant. Because constitutional challenges fall outside § 1226(e)’s jurisdictional bar, Respondents have not carried their burden of establishing that jurisdiction is lacking.

Although Congress possesses broad authority to establish immigration and naturalization rules, including rules that might be impermissible if applied to citizens, that authority is not without constitutional limits. The Supreme Court has repeatedly recognized that the political branches' plenary power over immigration remains subject to the constraints of the Constitution. *Demore v. Kim*, 538 U.S., 510, 521-23 (2003)

Most fundamentally, noncitizens physically present in the United States are entitled to the protections of the Fifth Amendment's Due Process Clause, regardless of immigration status.

Whether a noncitizen has received constitutionally adequate process in a bond hearing is not a matter of unreviewable discretion. It is a constitutional question squarely within the province of the judiciary. Section 1226(e) bars review of discretionary custody determinations, but it does not insulate the government from judicial scrutiny where a petitioner alleges a violation of procedural or substantive due process. Habeas review in this context properly encompasses examination of whether the initial bond procedures were constitutionally sufficient and whether continued detention has become constitutionally impermissible. *Velasco Lopez v. Decker*, 978 F.3d 842, 851–52 (2d Cir. 2020) (holding that burden-shifted bond hearing is appropriate once § 236(a) detention is prolonged and requiring DHS to justify continued detention by clear and convincing evidence).

Procedural due process has long required a meaningful opportunity to be heard before the government may deprive a person of liberty. *Mathews v. Eldridge* 424 U.S. 319, 335 (1976) (Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment).

The Fifth Amendment's Due Process Clause requires "adequate procedural protections" to ensure that the government's asserted justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In almost every civil confinement context, the Supreme Court has found that the hallmark of procedural due process is an individualized custody hearing before a neutral adjudicator. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 81, 86 (1992) (citing *United States v. Salerno*, 481 U.S. 747-51 (1987)); *Addington v. Texas*, 441 U.S. 418, 433 (1979); *Zadvydas*, 533 U.S. at 690-92 (collecting cases). The Second Circuit recently affirmed that these civil commitment precedents apply with equal force to immigration detention. *Velasco Lopez v. Decker*; see also *Hernandez-Lara v. Lyons*, 10 F.4th 19, 39, 45-46 (1st Cir. 2021) (holding that procedural due process requires government to bear the burden of proof at all bond hearings under § 236(a)).¹

Accordingly in this case, the immigration judge must consider ability to pay a bond and the availability of release with conditions as an alternative sufficient to protect any government interest in preventing flight risk or danger. See, e.g., *Hernandez v. Sessions*, 872 F.3d 976, 990-94 (9th Cir. 2017) (concluding that due process requires IJs in § 1226(a) bond hearings to consider ability to pay and alternative conditions of release); *Black*, 103 F.4th at 158-59 (same, in § 236(c) habeas-ordered bond hearings). Petitioner was unlawfully denied bond due to Respondents' failure to consider alternatives to detention in custody determinations and failure to consider the evidence

¹ Respondents acknowledged that the 11th Circuit has not ruled on the issue of the burden of proof in an immigration bond hearing. [ECF No. 6, Page Id 4, footnote 2].

presented by Petitioner. [ECF No. 1, ¶¶ 7-10]. *See* Exhibit A Affidavit from Andrea Bowers.² *See* also Exhibit B Affidavit of Lawrence O. Bruman.³

Substantive due process, in turn, requires that deprivations of liberty be reasonable, non-arbitrary, and justified by a legitimate governmental purpose. U.S. Const. Amend. V. In the context of civil, nonpunitive detention, due process demands particularly strong justification because physical liberty lies at the core of the Fifth Amendment’s protections. *See Chavez-Alvarez v. Warden York Cnty. Prison*, 783 F.3d 469, 474–75 (3d Cir. 2015), abrogated on other ground by *Jennings*, 583 U.S. at 303-04 (addressing the due process limitations on detention without individualized review in the context of INA § 236(c), and explaining: “[D]ue process requires us to recognize that, at a certain point—which may differ case by case—the burden to [a noncitizen’s] liberty outweighs a mere presumption that the [noncitizen] will flee and/or is dangerous. At this tipping point, the Government can no longer defend the detention against claims that it is arbitrary or capricious by presuming flight and dangerousness: more is needed to justify the detention as necessary to achieve the goals of the statute.”). *Id.*

The Supreme Court has recognized only two sufficiently weighty interests that may justify immigration detention: (1) ensuring a noncitizen’s appearance at removal proceedings and facilitating removal, and (2) protecting the community where the individual poses a danger. Detention that extends beyond or is untethered from these purposes raises serious constitutional concerns. In *Mathews v. Eldridge*, the Supreme Court articulated the governing framework for evaluating procedural due process claims in administrative proceedings. Courts assessing due

² Petitioner’s Immigration Attorney addresses the factual background on Respondent’s response, the evidence provided and her experiences during the Bond Proceedings.

³ Former Immigration Judge Lawrence O. Bruman raises Due Process concerns as to denial of bond on “flight risk” determinations and current lack of neutrality within the Immigration Court system.

process challenges in immigration custody cases apply the familiar three-factor balancing test. *See Velasco Lopez v. Decker*; *see also Hernandez-Lara v. Lyons*. Under *Eldridge*, courts weigh: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation under the existing procedures and the probable value of additional safeguards; and (3) the government's interest, including fiscal and administrative burdens.

In the context of § 1226(a) bond proceedings, courts apply the *Eldridge* framework to determine whether due process is satisfied when a noncitizen bears the burden of proving that he or she is neither a flight risk nor a danger to the community. The private interest at stake, freedom from physical restraint, is substantial. The risk of erroneous deprivation may be significant where procedures are limited or the burden allocation increases the likelihood of continued detention. And while the government has legitimate interests in ensuring appearance and protecting the public, those interests must be weighed against the profound liberty interest at stake.

The *Eldridge* balancing test thus serves as a critical constitutional check. It ensures that the executive's exercise of immigration detention authority, though broad, is not immune from judicial oversight. By requiring courts to weigh liberty interests against governmental justifications, *Eldridge* provides the doctrinal mechanism through which federal courts enforce meaningful due process protections in immigration detention proceedings.

IV. Section 1226(e) Does Not Bar Review of Abuse of Discretion or Legal Error in Bond Decisions

Even if Petitioner's claims were framed as only challenging the Immigration Judge's bond determination, § 1226(e) would not bar review where the claim alleges legal error or abuse of discretion.

In *Martinez v. Clark*, 124 F.4th 775 (9th Cir. 2024), the Ninth Circuit clarified that immigration bond determinations involve mixed questions of law and fact, holding that district courts have jurisdiction to review questions of whether a person is a flight risk or danger to the community in a court-ordered bond hearing.⁴ The court explained that while factual findings underlying a bond decision may be entitled to deference, the application of the legal standard—such as the interpretation of “dangerousness,” “flight risk,” or the burden of proof, is a legal question subject to judicial review. See *Wilkinson v. Garland*, 601 U.S. at 225 (2024); see also *Lopez-Martinez v. U.S. Attorney General*, 149 F.4th 1202 (2025) (So, adopting substantial-evidence review for a mixed question doesn't necessarily exclude arbitrary-and-capricious review. An agency action might be “supported by the required substantial evidence,” and yet “in another *1210 regard” be arbitrary and capricious—“for example, because it is an abrupt and unexplained departure from agency precedent.”(citations omitted).

Because bond decisions are not purely discretionary but instead require application of defined legal standards to established facts, they necessarily involve reviewable legal components.⁵ Section 1226(e) bars only review of the discretionary judgment itself, not review of whether the correct legal framework was applied.

⁴ *Martinez v. Clark*, 144 S. Ct. 1339 (2024) - vacating Ninth Circuit decision finding no jurisdiction to review a dangerousness finding at a bond hearing, remanding case to the Ninth Circuit in light of *Wilkinson v. Garland*, 601 U.S. 209 (2024).

⁵ Under Administration Procedure Act's (APA) substantial-evidence standard, reviewing court asks whether on record as a whole there is substantial evidence to support agency's findings. 5 U.S.C.A. § 706(2)(E). See *Lopez-Martinez*. Regardless of who bears the burden of proof, the Immigration Judge did not consider the substantial evidence provided by Petitioner. [ECF No.1, ¶¶ 7-8.

Thus, where a petitioner alleges that the Immigration Judge abused discretion by misapplying the law or by applying an incorrect legal standard, the claim falls outside § 1226(e)'s jurisdictional limitation.

CONCLUSION

Neither 8 U.S.C. § 1226(e) nor 8 U.S.C. § 1252(g) strip this Court of jurisdiction over constitutional challenges or claims alleging legal error and abuse of discretion in bond proceedings. Therefore, jurisdiction properly lies under 28 U.S.C. §§ 2241 and 1331, and authority to grant appropriate relief under § 1651.

Petitioner has been detained for almost 10 months. His family is suffering, his presence is critical to the emotional and financial stability of the household, particularly as his wife continues to recover from breast cancer and for his younger son who has special needs. Petitioner's continued detention has caused severe hardship to his family, including emotional distress and financial instability. Therefore, Petitioner respectfully requests that the Court assume jurisdiction over his Petition for Writ of Habeas Corpus.

Date: March 3, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 3, 2026, the foregoing was electronically filed with the Clerk of Court by causing a copy to be electronically filed via the CM/ECF system, which will send notice of the filing to all attorneys of record.

/s/ Vanessa McCarthy
Vanessa McCarthy
Attorney for Petitioner