

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 25-25773-CIV-WILLIAMS

MICHEL HERNANDEZ-HERNANDEZ,

Plaintiff,

v.

ELISA M. SUKKAR, et al.,

Defendants.

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO ENFORCE**

1. As the government correctly notes, the petitioner requested a hearing under 8 U. S. C. § 1226 in his petition. (D.E. 16, at 4 (citing D.E. 1, ¶4).) But the Court ordered more than that after full and fair briefing.¹ The Court ordered “an individualized bond hearing consistent with 8 U.S.C. § 1226(a).” (D.E. 11, at 12 (emphasis added).)

While it is true that subsections (a) and (c) are part of § 1226, it is not true that § 1226(c) is part of § 1226(a), or vice versa. Subsections (a) and (c) are different subsections, and they do different work. Barring someone from “an individualized bond hearing consistent with 8 U.S.C. § 1226(a)” (D.E. 11, at 12) via reliance on and application of subsection (c) is not the provision of a bond hearing under § 1226(a). It is the opposite. And not what the Court ordered.

¹ This full and fair briefing includes a traverse from the plaintiff arguing that, despite the government’s mention of his criminal history, “the government has not suggested that the petitioner’s criminal history is an impediment to his having a bond hearing under 8 U. S. C. § 1226(a), and has thus forfeited any such claim.” (D.E. 9, at 8.) Despite having over a month to request the opportunity to submit a surreply prior to the Court’s order, the government accuses the plaintiff of “disingenu[ity]” (D.E. 16, at 4) as a way to avoid coming to terms with its belated regret over its failure to argue § 1226(c) to this Court.

As plaintiff noted in his Motion to Enforce, the regulatory procedure for the conducting of a *Matter of Joseph* hearing is one that exists “to seek a determination from an Immigration Judge ‘that the alien is not properly included within’ certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction.” 22 I. & N. Dec. 799, 802 (BIA 1999) (citing 8 CFR § 3.19(h)(2)(ii)); see 8 CFR § 1003.19(h)(2)(ii) (redesignated section). The government does not dispute that this is what agency precedent holds.

Again, a *Joseph* hearing serves the purpose of “determin[ing]” whether a case is subject to “the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction.” *Id.* Here, “the [relevant] regulatory provisio[n] which would deprive the Immigration Judge of bond jurisdiction,” *id.*, is the one that implements 8 U. S. C. § 1226(c). Thus, as applied here, the immigration judge conducted a *Joseph* hearing to determine whether § 1226(c) forbids a bond hearing under § 1226(a). While this may have been a hearing under § 1226, it was not “an individualized bond hearing consistent with 8 U.S.C. § 1226(a)” (D.E. 11, at 12).

Boldly, the government claims that, “by ordering a hearing be provided ‘consistent with § 1226(a)’, this Court mandated that the immigration judge to make a *Joseph* determination as one had not previously been made by an IJ or this Court.” (D.E. 8, at 16.) It bears repetition, barring someone from “an individualized bond hearing consistent with 8 U.S.C. § 1226(a)” (D.E. 11, at 12) via reliance on and application of subsection (c) is not the provision of a bond hearing under § 1226(a). It is the opposite. If the government wanted relief from this Court’s order, it needed to come to this Court or to the Court of Appeals for that relief — not an immigration judge.²

² The plaintiff wishes to make clear that the immigration judge is an honorable and just adjudicator, who does his best to rule as he thinks is correct in a given case. As explained below, the problem before this Court is due to agency counsel’s failure to adequately work together with

2. The government seems to be claiming surprise as a defense. (D.E. 16, at 5.) To be sure, the AUSAs from the Civil Division are honorable and ethical attorneys. But they are not immigration experts, and they are doing their best to ride the tidal wave of immigration habeas petitions flooding the district courts since last year.

However, the AUSAs do strive to work closely with agency counsel in agency cases, such as immigration habeas cases.³ Agency counsel in immigration habeas cases are usually attorneys from U. S. Immigration and Customs Enforcement with significant experience in immigration court, and who earn their way up from arguing cases in immigration court to being promoted to work on federal court cases with the USAO's Civil Division. Agency counsel cannot claim surprise that § 1226(c) was a potential issue in this case, especially when it was made sure that the plaintiff's criminal history would be included as an exhibit to the government's return. (D.E. 8-7, 8-8, 8-9, 8-10.) For example, in the audio of the *Joseph* hearing, the immigration judge asked the ICE attorney on the case why the USAO did not argue § 1226(c) before this Court.

3. Setting aside the application of issue preclusion, the government again fails to make

the USAO's Civil Division to present its case the way it wishes it had had.

Additionally, despite the government's protestations to the contrary (D.E. 16, at 9), surreplies have been allowed in immigration habeas cases in this very district. See Paperless Order (D.E. 17), *Lingeswaran v. U. S. Att'y Gen.*, 20-60162-CIV-RUIZ (S.D. Fla. Apr. 8, 2020); Joint Motion for Leave to File Sur-Reply (D.E. 16), *Lingeswaran* (Apr. 8, 2020) ("to address **new arguments raised in petitioner's reply** (DE 15), and a recent Eleventh Circuit opinion dated March 26, 2020") (emphasis added).

³ But there is a plethora of reporting about how DHS agency counsel is not cooperating with USAOs and other DOJ offices across the country. See, e. g., the egregious account from *Protected Whistleblower Disclosure of Erez Reuveni Regarding Violation of Laws, Rules & Regulations, Abuse of Authority, and Substantial and Specific Danger to Health and Safety at the Department of Justice* (June 24, 2025), available at:

https://www.judiciary.senate.gov/imo/media/doc/06-24-2025_-_Protected_Whistleblower_Disclosure_of_Erez_Reuveni_Redacted.pdf (accessed Feb. 25, 2026).

any meaningful argument that § 1226(c) applies to this case. Specifically, a conviction for a crime involving moral turpitude (CIMT) precludes an immigration judge bond hearing because a CIMT conviction makes one “inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title.” § 1226(c)(1)(A); see 1182(a)(2)(A)(i)(I) (“a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime”). The government correctly acknowledges that plaintiff’s traverse “argues that his convictions do not constitute moral turpitude.” (D.E. 16, at 5.) And the plaintiff’s motion to enforce argues at length, under the categorical approach, why this is so. (D.E. 13, at 6–12.)

But, aside from ad hominem attacks, the government says nothing in response to this issue on the merits. Rather, it says the Court cannot do anything about it. (D.E. 16, at 7 (“this Court may not address the merits of the mandatory detention argument at this stage”), 9–12 (arguing that the Court lacks jurisdiction to decide the issue), 12–13 (arguing a lack of exhaustion).

a. The Court undoubtedly and clearly has subject matter jurisdiction to determine whether someone is precluded from a bond hearing under § 1226(c) — just like it had jurisdiction to determine whether someone is precluded from a bond hearing under § 1225(b). Neither § 1226(e) nor 1252(b)(9) preclude judicial review here. The out of Circuit District Court cases relied upon by the government misapplied Supreme Court precedent.

i. To begin with, § 1226(e) does not even apply to habeas cases. And it definitely does not apply to claims relating to the scope of government’s statutory detention authority.

The Supreme Court long ago rejected the idea that the legality of § 1226(c)’s application to a given case is an unreviewable exercise of discretion. *Demore v. Kim*, 538 U.S. 510, 516 (2003) (“The *amicus* argues that respondent is contesting a ‘decision by the Attorney General’ to detain him under § 1226(c), and that, accordingly, no court may set aside that action.”) (cita-

tion omitted). “But [the plaintiff] does not challenge a ‘discretionary judgment’ by the Attorney General or a ‘decision’ that the Attorney General has made regarding his detention or release.” *Id.*, at 516–17 (emphasis added). “Rather, [the plaintiff] challenges the statutory framework that [purportedly] permits his detention without bail.” *Id.*, at 517. This understanding has been repeatedly reaffirmed.

As more recently held by the Supreme Court, “challenging the extent of the Government’s detention authority under the ‘statutory framework’ as a whole,” *Jennings v. Rodriguez*, 583 U. S. 281, 295–96 (2018), “falls outside of the scope of § 1226(e),” *id.*, at 296, “[b]ecause the extent of the Government’s detention authority is not a matter of ‘discretionary judgment,’ ‘action,’ or ‘decision,’” *id.*, at 296. And a year after *Jennings*, the Supreme Court repeated the point again:

Respondents’ argument is not that the Government exercised its statutory authority in an unreasonable fashion. Instead, they dispute the extent of the statutory authority that the Government claims. Because this claim of authority does not constitute a mere “discretionary” “application” of the relevant statute, our review is not barred by § 1226(e).

Nielsen v. Preap, 586 U. S. 392, 401 (2019); accord *Zadvydas v. Davis*, 533 U. S. 678, 688 (2001) (“The aliens here, however, do not seek review of the Attorney General’s exercise of discretion; rather, they challenge the extent of the Attorney General’s authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion.”) (interpreting, *inter alia*, § 1226(e)); *Rogers v. Ripa*, No. 1:21-CV-24433-JLK, 2022 WL 708493, at *3 (S.D. Fla. Jan. 22, 2022) (Becerra, J.), *report and recommendation adopted*, No. 1:21-CV-24433-JLK, 2022 WL 574389 (S.D. Fla. Feb. 25, 2022) (rejecting government’s broad interpretation of § 1226(e)); see also *Martinez v. Clark*, 124 F.4th 775, 781–82 (CA9 2024) (“We explained that § 1226(e) ‘restricts jurisdiction only with respect to the executive’s exer-

cise of discretion’ but that discretionary judgment does not include constitutional claims or questions of law.”) (citation omitted).

More importantly, the Supreme Court ruled long ago that § 1226(e) does not even apply to habeas cases. “[W]here a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress’ intent.” *Demore*, 538 U. S., at 517 (citing *INS v. St. Cyr*, 533 U. S. 289, 308–09, 298 & 327 (2001)). And “Section 1226(e) contains no explicit provision barring habeas review” *Id.*⁴ Courts of Appeals and District Courts (including in this District) have recognized this point. *Al-Siddiqi v. Achim*, 531 F. 3d 490, 494 (CA7 2008) (“Because this provision contains no explicit bar to constitutional challenges or habeas review, the Supreme Court has held that habeas review survives.”) (citing *Demore*, 538 U. S., at 516–17); *Saint Fort v. Ashcroft*, 329 F. 3d 191, 200–01 (CA1 2003) (discussing *Demore*); *Sierra v. INS*, 258 F. 3d 1213, 1218 (CA10 2001) (“We hold that § 1226(e) does not ‘speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute.’”) (quoting *St. Cyr*, 533 U. S., at 313); *Abreu v. Rivera*, No. 25-20821-CIV, 2025 WL 2163051, at *3 (S.D. Fla. May 12, 2025), *report and recommendation adopted*, No. 25-20821-CIV, 2025 WL 2160163 (S.D. Fla. July 30, 2025) (“A Petition for a Writ of Habeas Corpus is the proper procedure for a person to challenge their detention under Section 1226 of the INA, because ‘Section 1226(e) contains no explicit provision barring habeas review.’”) (quoting *Demore*, 538 U. S., at 517); *J.G. v. Warden, Irwin Cnty. Det. Ctr.*, No. 7:20-CV-93

⁴ Concurring in part, Justices O’Connor, Scalia, and Thomas did not join the majority’s jurisdictional ruling that § 1226(e) has no effect on habeas jurisdiction, *id.*, at 533 (“I cannot join Part I because . . .”) (O’Connor, J., concurring in part), because, in their view, “Congress’ failure to mention § 2241 in this context . . . lacks the significance that the Court accorded Congress’ silence on the issue in *St. Cyr*,” *id.*, at 536. Notably, when Congress amended § 1252 to expressly address habeas jurisdiction in response to *St. Cyr*, it did **not** amend § 1226(e). § 106, REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, 119 Stat. 302, 310–11 (May 11, 2005).

(HL), 2021 WL 5413661, at *2 (M.D. Ga. Jan. 15, 2021) (“The Supreme Court has interpreted § 1226(e) to allow habeas claims and constitutional challenges.”) (citations omitted).

The plaintiff’s argument that he is not subject to mandatory detention under 8 U.S.C. § 1226(c) based upon the legal claim that his fleeing conviction is categorically not a CIMT is a clear “challeng[e] [to] the extent of the Government’s detention authority under the ‘statutory framework’ as a whole,” *Jennings*, 583 U.S., at 295–96, which “falls outside of the scope of § 1226(e),” *id.*, at 296. Section 1226(e) does not apply here.

ii. Nor does § 1252(b)(9) apply here. The provision is not a jurisdictional bar as to any type of subject matter, but is rather a channeling provision that places certain types of claims before the Courts of Appeals, as opposed to the District Courts. *E.O.H.C. v. Sec’y United States Dep’t of Homeland Sec.*, 950 F.3d 177, 180 (CA3 2020) (“When a detained alien seeks relief that a court of appeals cannot meaningfully provide on petition for review of a final order of removal, § 1252(b)(9) does not bar consideration by a district court.”). As the Eleventh Circuit has explained:

Section 1252(b)(9)—commonly known as the “zipper clause”—“bars review of claims arising from ‘action[s]’ or ‘proceeding[s] brought to remove an alien.’ ” *DHS v. Regents of Univ. of Cal.*, 591 U.S. —, 140 S. Ct. 1891, 1907, 207 L.Ed.2d 353 (2020) (alterations in original) (quoting 8 U.S.C. § 1252(b)(9)). As the Supreme Court recently explained, the zipper clause “**does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined.**” *Id.* (alterations adopted) (quotation marks omitted). Our Court has similarly clarified that **the zipper clause only affects cases that “involve[] review of an order of removal.”** *Madu*, 470 F.3d at 1367.

Canal A Media Holding, LLC v. USCIS, 964 F.3d 1250, 1257 (CA11 2020) *Id.*, a 1257 (emphasis added).

In that case, the District Court below “applied the zipper clause because it found the Plaintiffs’ claims to be ‘inextricably linked to any ultimate removal order against Mr. Archila.’ ”

Id. (citation omitted). The government is essentially making the same argument here by arguing that the underlying basis regarding bond eligibility, and a potential ground of removability which is not even charged in the removal case against the plaintiff (D.E. 8-3) — whether the plaintiff has a conviction for a CIMT — are “intertwined” (D.E. 16, at 11). But “[t]his [i]s error.” *Canal A Media*, 964 F. 3d, at 1257. Specifically:

[Such an] expansive interpretation of the zipper clause does not square with that provision's “narrow” scope. *see Regents*, 140 S. Ct. at 1907. **The zipper clause is not intended to cut off claims that have a tangential relationship with pending removal proceedings.** *see J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) (“[C]laims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9).”). Instead, **a claim only “aris[es] from” a removal proceeding when the parties are “challenging . . . removal proceedings.”** *Regents*, 140 S. Ct. at 1907; *see Madu*, 470 F.3d at 1367. This rule makes sense. The zipper clause promotes judicial economy by consolidating “challenges to any action related to removal proceedings . . . with the review of the final order of removal.” 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3664 (4th ed. Apr. 2020 update). Here, **because the Plaintiffs have not brought any challenge to Mr. Archila’s removal proceedings, the zipper clause’s channeling function has no role to play.**

Id. (emphasis added). “[F]inal orders of removal encompass only the rulings made by the immigration judge or Board of Immigration Appeals **that affect the validity** of the final order of removal.” *Nasrallah v. Barr*, 590 U. S. 573, 582 (2020) (emphasis added). The plaintiff challenges whether he is eligible for a bond hearing. The outcome of that question has no effect on the pending removal proceeding,⁵ and at most has a mere “tangential relationship with pending removal proceedings.” *Canal A Media*, 964 F. 3d, at 1257 (citation omitted). In sum, “the zipper clause’s channeling function has no role to play.” *Id.*

⁵ And given that “[r]es judicata does not apply to proceedings for habeas corpus,” *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260, 265, n. 4 (1954) (citations omitted), a ruling by this Court on eligibility for a bond hearing would not constrain an immigration judge’s rulings in removal proceedings which are independent and separate from bond proceedings. *Immigr. Ct. Pract. Manual* ch. 8.3(a) (“Bond proceedings are separate from removal proceedings.”), available at: <https://www.justice.gov/eoir/policy-manual-eoir/part-II/icpm/chapter-8-3>.

b. Exhaustion also does not apply here either.

No exhaustion is statutorily required for a habeas claim because “Section 2241 itself does not impose an exhaustion requirement.” *Santiago-Lugo v. Warden*, 785 F.3d 467, 474 (CA11 2015). Thus, the issue is “whether a common law exhaustion requirement is applicable” which is an “inquiry [that] gives broad discretion to district courts.” *Yahweh v. U. S. Parole Comm’n*, 158 F. Supp. 2d 1332, 1341 (S.D. Fla. 2001) (citations omitted). With that in mind:

it is important to recognize that requiring exhaustion has many benefits. See *McKart v. United States*, 395 U.S. 185, 193–95, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). Exhaustion avoids “premature interruption of the administrative process” and allows the exercise of proper “executive and administrative autonomy.” *Id.* at 193–94, 89 S.Ct. 1657. In addition, “frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.” *Id.* at 195, 89 S.Ct. 1657. Finally, requiring an individual to pursue his administrative remedies, may, if he is successful, obviate the need for court interference. *Id.* at 194–95, 89 S.Ct. 1657.

Id., at 1342. “However, in spite of these benefits to exhaustion, the common law exhaustion requirement is permeated with exceptions.” *Id.* For example:

exhaustion should not be required where it may “occasion undue prejudice to subsequent assertion of a court action.” *Id.* at 147, 112 S.Ct. 1081. Second, the Court held that exhaustion is not required where an administrative remedy would be inadequate. For example, the administrative remedy may be inadequate when an agency “lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute,” or “where the challenge is to the adequacy of the agency procedure itself.” *Id.* at 147–48, 112 S.Ct. 1081. Third and finally, the Court held that “an administrative remedy may be inadequate where the administrative body has been shown to be biased or has otherwise predetermined the issue before it.” *Id.* at 148, 112 S.Ct. 1081.

Id.

Beginning with whether there is any benefit to prudentially require exhaustion here, specifically as to the topic of agency “institutional competence,” *id.*, and “expertise,” *id.*, at 1343, the applicability of § 1226(c) is an issue that depends on the application of the categorical approach to a state criminal statute. Even in the foregone era of *Chevron* deference, the immigra-

tion system never received any deference on this type of issue. *Talamantes-Enriquez v. U. S. Att’y Gen.*, 12 F. 4th 1340, 1349 (CA11 2021) (“The question is not one that lends itself to agency expertise but instead involves a purely legal question, which falls within the expertise of federal courts.”); *Vassell v. U. S. Att’y Gen.*, 839 F. 3d 1352, 1356 (CA11 2016) (“We also owe no deference to the BIA’s views on state law. Instead we ‘are bound to follow any state court decisions that define or interpret the statute’s substantive elements.’”) (citation omitted).

There is simply no reason to require exhaustion here. See *Yahweh*, 158 F. Supp. 2d, at 1343 (“Finally, it is important to note that the Supreme Court has committed the decision of whether to require common law exhaustion in a given case to the ‘sound discretion of the district courts.’”) (citation omitted); *id.*, at 1343–44 (“‘circumstances may mitigate against exhaustion in a given case’”) (quoting *Jean v. Nelson*, 711 F. 2d 1455, 1505 (CA11 1983)). The immigration system has no special competence in interpreting state law and applying the categorical approach. Rather, this Court is the expert and best tribunal to apply the categorical approach, something that it does regularly in criminal sentencings. The only argument for requiring exhaustion from the government is that plaintiff has not argued futility. (D.E. 16, at 12.) But there is more to exhaustion than that, and the government gives no reason to require it.

Most importantly, the government never even argues that the plaintiff’s conviction is a CIMT under the categorical approach. (Nor could it given the plaintiff’s arguments on that point.) The government simply wants exhaustion to create more delay. The Court should reject that approach because “requir[ing] Petitioner to remain detained while awaiting the BIA’s ruling . . . would verge on Orwellian.” *J.N.C.G. v. Warden, Stewart Det. Ctr.*, No. 4:20-CV-62-MSH, 2020 WL 5046870, at *3 (M.D. Ga. Aug. 26, 2020).

In sum, the Court should grant the plaintiff’s Motion to Enforce.

Signature Page

Dated: February 25, 2026

Respectfully submitted,

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