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9
10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 MUSTAFA ALSHAHER,

13 Petitioner,

14 v.

15 MARKWAYNE MULLIN; et al.,

16 Respondents.
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Case No.: 26-cv-2402-BAS-VET

**RESPONDENTS' RETURN TO
HABEAS PETITION**

I. Introduction

Petitioner has filed a habeas petition under 28 U.S.C. § 2241. Petitioner is currently in removal proceedings under 8 U.S.C. § 1229a and is charged with deportability/removability under 8 U.S.C. § 1227(a)(1)(B), as an individual who was admitted to the United States but remained for a time longer than permitted by law (i.e., a visa overstay). As such, Petitioner is detained pursuant to 8 U.S.C. § 1226(a). Petitioner is eligible for a bond hearing before an immigration judge (IJ) pursuant to 8 U.S.C. § 1226(a) but has not requested one as of today. Based on the arguments set forth below, the Court should deny any requests for relief and dismiss the petition.

II. Factual Background¹

Petitioner is a native and citizen of Iraq. *See* Exhibit 1 (Notice to Appear). On September 4, 2017, he was admitted into the United States on a nonimmigrant visa. *See id.* On July 2, 2020, Petitioner was issued a Notice to Appear (NTA) after his application for asylum (I-589) was referred to an immigration judge (IJ) by United States Citizenship and Immigration Services (USCIS). USCIS determined that Petitioner was deportable/removable under 8 U.S.C. § 1227(a)(1)(B), as a visa overstay. *See* Exhibit 1. The issuance of the NTA placed Petitioner in removal proceedings under 8 U.S.C. § 1229a. *See id.* Within his removal proceedings under § 1229a, Petitioner had the opportunity to apply for relief from removal before an IJ, including asylum under 8 U.S.C. § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the Convention Against Torture. On October 9, 2024, the IJ denied all applications for relief and ordered Petitioner removed to Iraq. *See* Exhibit 2 (IJs removal order). On October 28, 2024, Petitioner timely filed an appeal of the IJs removal order to the Board of Immigration Appeals (BIA).² *See* Exhibit 3 (BIA Filing Receipt for Appeal).

¹ The attached exhibits are true copies, with redactions of private information, of documents obtained from ICE counsel.

² Petitioner is not subject to a final order of removal. *See* 8 C.F.R. § 1241.1

1 On March 9, 2026, Petitioner was detained by the Department of Homeland
2 Security (DHS) and transferred to the Otay Mesa Detention Center. *See* Exhibit 4 (I-
3 830). Petitioner is currently detained at the Otay Mesa Detention Center under 8 U.S.C.
4 § 1226(a). Given that he is an overstay and has failed to request a bond hearing,
5 petitioner is lawfully detained under 8 U.S.C. § 1226(a). Based on the arguments set
6 forth below, the Court should deny any requests for relief and dismiss the petition.

7 **III. Argument**

8 **A. Petitioner is Lawfully Detained Under 8 U.S.C. § 1226(a)**

9 Section 1226 provides for arrest and detention “pending a decision on whether
10 the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). Under § 1226(a),
11 the government may detain an alien during her removal proceedings, release her on
12 bond, or release her on conditional parole. By regulation, immigration officers can
13 release aliens upon demonstrating that the alien “would not pose a danger to property
14 or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8).
15 An alien can also request a custody redetermination (i.e., a bond hearing) by an IJ at
16 any time before a final order of removal is issued. *See* 8 U.S.C. § 1226(a); 8 C.F.R. §§
17 236.1(d)(1), 1236.1(d)(1), 1003.19.

18 As set forth above, Petitioner was detained pursuant to 8 U.S.C. § 1226(a). DHS
19 determined that Petitioner is deportable/removable under 8 U.S.C. § 1227(a)(1)(B), as
20 a visa overstay. Accordingly, Petitioner is entitled to a bond hearing before an IJ but
21 has not requested one as of today. Therefore, because Petitioner has not had a bond
22 hearing adjudicated on the merits, Petitioner is lawfully detained pursuant to 8 U.S.C.
23 § 1226(a).

24 **B. Administrative Remedies Should Be Exhausted**

25 The Court should ensure Petitioner properly exhausts administrative remedies.
26 The Ninth Circuit requires that “habeas petitioners exhaust available judicial and
27 administrative remedies before seeking relief under § 2241.” *Castro-Cortez v. INS*, 239
28 F.3d 1037, 1047 (9th Cir. 2001). “When a petitioner does not exhaust administrative

1 remedies, a district court ordinarily should either dismiss the petition without prejudice
2 or stay the proceedings until the petitioner has exhausted remedies, unless exhaustion
3 is excused.” *Leonardo v. Crawford*, 646 F.3d 1157, 1160 (9th Cir. 2011); *see also*
4 *Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014) (issue exhaustion is a
5 jurisdictional requirement); *Tijani v. Holder*, 628 F.3d 1071, 1080 (9th Cir. 2010) (no
6 jurisdiction to review legal claims not presented in the petitioner’s administrative
7 proceedings before the BIA).

8 Here, as explained above, Petitioner is eligible for a bond hearing before an IJ
9 pursuant to 8 U.S.C. § 1226(a). However, the Petitioner has failed to request a bond
10 hearing. Accordingly, the Court should dismiss without prejudice or stay these
11 proceedings until a bond hearing is conducted and concluded on the merits before an IJ.

12 **C. Petitioner’s Improper Habeas Claims**

13 To the extent Petitioner asserts claims regarding the commencement of removal
14 proceedings and the conditions of his detention, such claims are improper. An
15 individual may seek habeas relief under 28 U.S.C. § 2241 if he is “in custody” under
16 federal authority “in violation of the Constitution or laws or treaties of the United
17 States.” 28 U.S.C. § 2241(c). But habeas relief is available to challenge only the legality
18 or duration of confinement. *Pinson v. Carvajal*, 69 F.4th 1059, 1067 (9th Cir. 2023);
19 *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979); *Dep’t of Homeland Security v.*
20 *Thraissigiam*, 591 U.S. 103, 117 (2020) (The writ of habeas corpus historically
21 “provide[s] a means of contesting the lawfulness of restraint and securing release.”).
22 The Ninth Circuit squarely explained how to decide whether a claim sounds in habeas
23 jurisdiction: “[O]ur review of the history and purpose of habeas leads us to conclude
24 the relevant question is whether, based on the allegations in the petition, release is
25 *legally required* irrespective of the relief requested.” *Pinson*, 69 F.4th at 1072 (emphasis
26 in original); *see also Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016) (The key
27 inquiry is whether success on the petitioner’s claim would “necessarily lead to
28 immediate or speedier release.”). Here, a review of such claims would not automatically

entitle Petitioner to release from detention. *See Guselnikov v. Noem*, No. 25-cv-1971-BTM-KSC, 2025 WL 2300783, at *1 (S.D. Cal. Aug. 8, 2025) (finding petitioners' claims did not arise under § 2241 because they were not arguing they were unlawfully in custody and receiving the requested relief would not entitle them to release); *Giron Rodas v. Lyons*, No. 25cv1912-LL-AHG, 2025 WL 2300781, at *3 (S.D. Cal. Aug. 1, 2025) ("Like in *Pinson*, the Court lacks jurisdiction over Petitioner's § 2241 habeas petition since it cannot be fairly read as attacking 'the legality or duration of confinement.'") (quoting *Pinson*, 69 F.4th at 1065).

D. Claims and Requested Relief Jurisdictionally Barred

Petitioner bears the burden of establishing that this Court has subject matter jurisdiction over asserted claims. *See Ass'n of Am. Med. Coll. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Finley v. United States*, 490 U.S. 545, 547-48 (1989).

In general, courts lack jurisdiction to review a decision to commence or adjudicate removal proceedings or execute removal orders. *See* 8 U.S.C. § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders."); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) ("There was good reason for Congress to focus special attention upon, and make special provision for, judicial review of the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders'—which represent the initiation or prosecution of various stages in the deportation process."); *Limpin v. United States*, 828 Fed. App'x 429 (9th Cir. 2020) (holding district court properly dismissed under 8 U.S.C. § 1252(g) "because claims stemming from the decision to arrest and detain an alien at the commencement of removal proceedings are not within any court's jurisdiction"). In other words, § 1252(g) removes district court jurisdiction over "three discrete actions that the Attorney may take: [his] 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Reno*, 525 U.S. at 482

1 (emphasis removed). Congress has explicitly foreclosed district court jurisdiction over
2 claims that necessarily arise “from the decision or action by the Attorney General to
3 commence proceedings [and] adjudicate cases,” over which. 8 U.S.C. § 1252(g).

4 Section 1252(g) also bars district courts from hearing challenges to the method
5 by which the government chooses to commence removal proceedings, including the
6 decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203
7 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s
8 discretionary decisions to commence removal” and bars review of “ICE’s decision to
9 take [plaintiff] into custody and to detain him during his removal proceedings”).

10 Other courts have held, “[f]or the purposes of § 1252, the Attorney General
11 commences proceedings against an alien when the alien is issued a Notice to Appear
12 before an immigration court.” *Herrera-Correra v. United States*, No. 08-2941 DSF
13 (JCx), 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). “The Attorney General
14 may arrest the alien against whom proceedings are commenced and detain that
15 individual until the conclusion of those proceedings.” *Id.* at *3. “Thus, an alien’s
16 detention throughout this process arises from the Attorney General’s decision to
17 commence proceedings” and review of claims arising from such detention is barred
18 under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*,
19 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g).

20 Moreover, under 8 U.S.C. § 1252(b)(9), “[j]udicial review of all questions of law
21 and fact . . . arising from any action taken or proceeding brought to remove an alien
22 from the United States under this subchapter shall be available only in judicial review
23 of a final order under this section.” Further, judicial review of a final order is available
24 only through “a petition for review filed with an appropriate court of appeals.” 8 U.S.C.
25 § 1252(a)(5). The Supreme Court has made clear that § 1252(b)(9) is “the unmistakable
26 ‘zipper’ clause,” channeling “judicial review of all” “decisions and actions leading up
27 to or consequent upon final orders of deportation,” including “non-final order[s],” into
28 proceedings before a court of appeals. *Reno*, 525 U.S. at 483, 485; *see J.E.F.M. v.*

1 *Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (noting § 1252(b)(9) is “breathhtaking in
2 scope and vise-like in grip and therefore swallows up virtually all claims that are tied to
3 removal proceedings”). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any*
4 issue—whether legal or factual—arising from *any* removal-related activity can be
5 reviewed *only* through the [petition for review] PFR process.” *J.E.F.M.*, 837 F.3d at
6 1031 (“[W]hile these sections limit *how* immigrants can challenge their removal
7 proceedings, they are not jurisdiction-stripping statutes that, by their terms, foreclose
8 *all* judicial review of agency actions. Instead, the provisions channel judicial review
9 over final orders of removal to the courts of appeal.”) (emphasis in original); *see id.* at
10 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-
11 practices challenges . . . whenever they ‘arise from’ removal proceedings”).

12 Critically, “1252(b)(9) is a judicial channeling provision, not a claim-barring
13 one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D)
14 provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed
15 as precluding review of constitutional claims or questions of law raised upon a petition
16 for review filed with an appropriate court of appeals in accordance with this section.”
17 *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review
18 such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review
19 process before the court of appeals ensures that noncitizens have a proper forum for
20 claims arising from their immigration proceedings and “receive their day in court.”
21 *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*,
22 627 F.3d 58, 61 (2d Cir. 2010) (“The REAL ID Act of 2005 amended the [INA] to
23 obviate . . . Suspension Clause concerns” by permitting judicial review of
24 “nondiscretionary” BIA determinations and “all constitutional claims or questions of
25 law.”). These provisions divest district courts of jurisdiction to review both direct and
26 indirect challenges to removal orders, including decisions to detain for purposes of
27 removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9)

1 includes challenges to the “decision to detain [an alien] in the first place or to seek
2 removal”).

3 In evaluating the reach of subsections (a)(5) and (b)(9), the Second Circuit has
4 explained that jurisdiction turns on the substance of the relief sought. *Delgado v.*
5 *Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of
6 jurisdiction to review both direct and indirect challenges to removal orders, including
7 decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S.
8 at 294–95 (section 1252(b)(9) includes challenges to the “decision to detain [an alien]
9 in the first place or to seek removal[.]”).

10 Here, Petitioner challenges the government’s decision and action to detain, which
11 arises from DHS’s decision to commence removal proceedings, and is thus an “action
12 taken . . . to remove [him/her] from the United States.” *See* 8 U.S.C. § 1252(b)(9); *see*
13 *also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850
14 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because
15 the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No.
16 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that
17 there is no judicial review of the threshold detention decision, which flows from the
18 government’s decision to “commence proceedings”).

19 Accordingly, this Court lacks jurisdiction over this petition under 8 U.S.C.
20 § 1252.

21 IV. CONCLUSION

22 For the foregoing reasons, Respondents respectfully request that the Court
23 dismiss this action.

24 DATED: May 6, 2026

Respectfully submitted,

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