

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROGELIO BOLUFE IZQUIERDO,

Petitioner,

v.

No. 1:25-cv-01304-JB-SCY

MELISSA ORTIZ, Warden, Torrance
County Detention Facility; JOEL
GARCIA, Field Office Director,
El Paso Field Office, United States
Immigration and Customs
Enforcement; TODD M. LYONS,
Acting Director, United States
Immigration and Customs
Enforcement; KRISTI NOEM,
Secretary of Homeland Security; and
PAMELA JO BONDI, United
States Attorney General,
in their official capacities,

Respondents.

**MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS (DOC. 1)**

INTRODUCTION

Respondents, Immigration and Customs Enforcement (“ICE”), the Department of Homeland Security (“DHS”), and the United States Attorney General (collectively “Respondents”), hereby submit this Response to Petitioner’s Petition for Writ of Habeas Corpus (Doc. 1), pursuant to the Court’s expedited briefing schedule (Doc. 8).

Petitioner challenges his continued immigration detention on the ground that he has not received a bond hearing. *See* Doc. 8 at 1. However, Petitioner’s assertions are without factual or legal merit, as Petitioner was provided a bond review and remains eligible for further bond review before the U.S. Immigration Court. Respondents therefore assert that the Petition (Doc. 1) is moot

and/or not ripe for review by this Court and move for dismissal for lack of subject matter jurisdiction.

FACTUAL AND PROCEDURAL HISTORY

Petitioner, a native and citizen of Cuba, was lawfully admitted to the United States on or about January 22, 2020, as a B2 visa holder. *See* Exhibit A, Notice to Appear. Upon information and belief, Petitioner's B2 visa status expired on July 21, 2020. *Id.* Petitioner overstayed his B2 visa without authorization. On August 18, 2025, Petitioner was encountered by Respondents following a Florida arrest for cocaine possession. *See* Exhibit B, Record of Deportable/Inadmissible Alien I-213. Petitioner was subsequently charged as removable pursuant to Immigration and Nationality Act ("INA") § 237 (a)(1)(B) and taken into immigration custody pending removal proceedings.

Petitioner requested a bond hearing before the U.S. Immigration Court pursuant to 8 C.F.R. § 1236. On September 30, 2025, a bond hearing was held and no action¹ was taken. *See* Exhibit C, Order of the Immigration Judge dated September 30, 2025. As a visa overstay, Petitioner is not subject to INA § 235 mandatory detention and remains eligible for a bond review upon request. On November 13, 2025, Petitioner's immigration case was heard on the merits. Petitioner's request for asylum and withholding of removal were denied, and Petitioner was ordered removed to Ecuador. *See* Exhibit D, Order of the Immigration Judge dated November 20, 2025. Upon information and belief, Petitioner filed an appeal of the removal order to the Board of Immigration Appeals ("BIA") on December 22, 2025. That appeal remains pending.

Respondents do not dispute Petitioner's eligibility for review of bond under INA § 236, including during the pendency of the merits appeal.

¹ No action is a designation typically requested by Petitioners seeking additional time to gather evidence in support of their legal or factual claims. Importantly, this designation is distinct from "Denied."

LEGAL BACKGROUND

I. Limitations on Judicial Review

Judicial review of immigration matters, including of detention issues, is limited. *See generally I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (“the power over aliens is of a political character and therefore subject only to narrow judicial review”). The Supreme Court has thus “underscore[d] the limited scope of inquiry into immigration legislation,” and “has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation.”); *Demore v. Kim*, 538 U.S. 510, 531 (2003) (“Detention during removal proceedings is a constitutionally permissible part of that process.”)

Additionally, and specific to cases arising under INA § 236, judicial review of actions and decisions made by the Attorney General under 8 U.S.C. § 1226 is barred:

The Attorney General’s discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention of any alien or the revocation or denial of bond or parole.

8 U.S.C. § 1226(e). As the Supreme Court explained in *Demore v. Kim*, 538 U.S. 510, 516–17 (2003), this provision applies to strip jurisdiction of judicial review to decisions to arrest and detain aliens subject to 8 U.S.C. § 1226.

II. Burden of Proof in Immigration Proceedings

In an immigration context, under both §1225 and §1226, it is generally the petitioner’s burden to show that he or she is eligible for release or bond. *See, e.g.*, 8 C.F.R. § 236.1(c)(8) (“Any officer authorized to issue a warrant of arrest may, in the officer’s discretion, release an alien . . . provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding.”); *See also Matter of Adeniji*, 22 I. & N. Dec. 1102, 1102 (BIA 1999). This principle is well established in immigration law, even in cases where additional due process and individualized procedures are applicable. *See, e.g., Demore v. Kim*, 538 U.S. 510, 532, (2003) (Justice Kennedy concurring and citing *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“the permissibility of continued detention pending deportation proceedings turns solely upon the alien’s ability to satisfy the ordinary bond procedures – namely, whether if released the alien would pose a risk of flight or danger to the community)) (emphasis added).

Similarly, it is also the petitioner’s burden to show entitlement to relief from removal on the merits. *See, e.g.*, 8 U.S.C. § 1229a(c)(2) (outlining the burden of proof in removal proceedings: “the alien has the burden of establishing . . . that the alien is clearly and beyond doubt entitled to

be admitted and is not inadmissible . . . or by clear and convincing evidence that the alien is lawfully present); *see also* 8 U.S.C. § 1229a(c)(4)(B) (when considering applications for relief from removal “the immigration judge will determine whether or not . . . the applicant has satisfied the applicant’s burden of proof”); *Matter of Gabriel Almanza-Arenas*, 24 I. & N. Dec. 771, 774-776 (BIA 2009) (in determination of whether the immigration judge improperly applied the REAL ID Act to petitioner’s case, the BIA found that “respondent is seeking discretionary relief from removal, so he bears the burden of proof”).

III. Administrative Exhaustion

Petitioners may seek habeas relief to challenge his detention as unconstitutional or unauthorized by statute. *See, e.g., Demore*, 538 U.S. at 517 (2003). However, “[a] habeas petitioner must normally exhaust administrative remedies before seeking federal court intervention.” *Michalski v. Decker*, 279 F. Supp. 3d 487, 495 (S.D.N.Y. 2018). “The exhaustion requirement is prudential, rather than jurisdictional, for habeas claims.” *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). Administrative exhaustion may be waived if petitioner can demonstrate that exhausting administrative remedies is “futile”. *See e.g. Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010).

IV. FRCP 12(b)(6) Dismissal for Failure to State a Claim

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move for dismissal if the complaint fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This pleading standard does not impose a probability requirement, but it demands “more than a sheer possibility that a

defendant has acted unlawfully.” *Id.* Although the court must accept the truth of all properly alleged facts and draw all reasonable inferences in the plaintiff’s favor, the plaintiff still “must nudge the claim across the line from conceivable or speculative to plausible.” *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1281 (10th Cir. 2021). The complaint must provide “more than labels and conclusions” or merely “a formulaic recitation of the elements of a cause of action,” because “courts are not bound to accept as true a legal conclusion couched as a factual allegation.” *Twombly*, at 555. There must be something more than “naked assertions devoid of further factual enhancement.” *Ashcroft*, at 678.

The court’s role when reviewing “a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff’s complaint alone is legally sufficient to state a claim for which relief may be granted.” *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

V. FRCP 12(b)(1) Dismissal for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction, they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress. *Henry v. Off. of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994). The party invoking federal jurisdiction, generally the plaintiff, bears the burden of establishing its existence. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998). Rule 12(b)(1) allows defendants to raise the defense of lack of subject matter jurisdiction by motion. *See Fed. R. Civ. P. 12(b)(1)*.

Ripeness is a justiciability doctrine derived from the case or controversy clause of Article III. *Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass’n*, 823 F. App’x 686, 690 (10th Cir. 2020). Whether a claim is ripe for review bears on a court’s subject matter jurisdiction. *Id.* The

Tenth Circuit has “distilled Article III’s ripeness requirement into a two-factor analysis, examining (1) ‘the fitness of the issue for review,’ and (2) ‘the hardship to the parties’ of withholding judicial review.” *Travelers Cas. Ins. Co. of Am. v. A-Quality Auto Sales, Inc.*, 98 F.4th 1307, 1314 (10th Cir. 2024). As to the first factor, for an action to be ripe for review it cannot be dependent on “contingent future events that may not occur as anticipated or indeed may not occur at all.” *Id.* The second factor considers whether the challenged action creates “a direct and immediate dilemma” for the parties. *Id.*

ARGUMENT

I. §1226(e) Bars Judicial Review of §1226 Detention

8 U.S.C. § 1226(e) strips the Court of jurisdiction, as Congress has made clear that ICE’s “discretionary judgment regarding the application of [§1226] shall not be subject to review.” 8 U.S.C. § 1226(e). Section 1226(e) further directs that “[n]o court may set aside any action or decision by [ICE] under this section regarding the detention of any alien or the revocation or denial of bond or parole.” *Id.* As such, this provision blocks judicial review of ICE’s decisions to arrest and detain aliens subject to 8 U.S.C. § 1226.

Petitioner’s Writ of Habeas Corpus (Doc. 1) should therefore be dismissed for lack of subject matter jurisdiction.

II. Petition is Moot and/or Not Ripe for Review

Respondents do not dispute Petitioner’s eligibility for bond review. The only issue preventing further review of bond is Petitioner’s own inaction.

The specific designation of “no action” on Petitioner’s prior bond order is significant: had the IJ found, for example, that INA § 235(b) applied, the IJ would have had no jurisdiction to review bond and therefore denied the request outright. *See, e.g., Matter of Yajure Hurtado*, 29 I. & N. Dec. 216 (BIA 2025), Interim Decision 4125, 2025 WL 2674169. Instead, the IJ retained jurisdiction under INA § 236, took no action and further bond review remains available. The Court should not allow Petitioner to proceed directly in federal court via habeas, essentially circumventing the U.S. Immigration Court entirely, while bond review remains available before that administrative body. As bond review remains available the petition is not ripe, and as Respondents do not dispute Petitioner’s eligibility for bond review, there is no active case or controversy before the Court.

Petitioner’s Writ of Habeas Corpus (Doc. 1) should therefore be dismissed for lack of subject matter jurisdiction.

III. Petitioner has Failed to Exhaust Administrative Remedies

Similarly, Petitioner has failed to exhaust readily available administrative remedies. Petitioner is currently eligible for bond review and there is no evidence that such a proceeding would be futile. Petitioner’s own inaction in U.S. Immigration Court should not provide a basis for waiver of the prudential requirements of administrative exhaustion.

The Court should therefore dismiss Petitioner’s Writ of Habeas Corpus (Doc. 1) due to Petitioner’s failure to exhaust administrative remedies.

IV. Petitioner’s Assertions of Poor Confinement Conditions are not Proper Habeas Corpus Assertions and Thus Fail to State a Claim

Petitioner raised numerous allegations of detention conditions being unsatisfactory. *See generally* Doc. 1-2. As an initial matter, and not insignificant, Respondent is not able to fully review these claims. Petitioner cites, in a Memorandum of Law in Support of Petition (Doc. 2) at least 25 exhibits, none of which have been provided to Respondents. Respondents are unable to review, assess or challenge these claims without access to these exhibits, should they exist.

Nevertheless, the Tenth Circuit in *Palma-Salazar v. Davis*, 677 F.3d 1031 1035 (2012), following U.S. Supreme Court precedence, distinguishes between habeas actions (challenges to the legality of detention) and civil rights cases (challenges to the “conditions of confinement”). “In [the Tenth Circuit], a prisoner who challenges the fact or duration of his confinement ... must do so through an application of habeas corpus. In contrast, a prisoner who challenges the conditions of his confinement must do so through a civil rights action.” *Id. See also Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (“A civil rights action, in contrast [to a habeas petition] is the proper method of challenging ‘conditions ... of confinement’”)(*internal citation omitted*).

V. Petitioner’s Reliance on *Zadvydas* is Misplaced

It is well established that detention is a constitutionally valid aspect of the deportation process. *See generally Zadvydas v. Davis*, 533 U.S. 678 (2001); *see also Demore v. Kim*, 538 U.S. 510 (2003); *Jennings v. Rodriguez*, 583 U.S. 281 (2018). Indeed, Congress has made clear that a removable alien may be detained *during* his removal proceedings *and after* he receives an order of removal that becomes final. *See* 8 U.S.C. §§ 1225, 1226, 1231. “An alien is not adjudged deportable until an order enters concluding that the alien is deportable or ordering deportation, and such an order is not final until affirmed by the Board of Immigration Appeals or until the time expires for seeking review.” *Demore v. Kim*, 538 U.S. 510, 542 n. 3 (2003) (Justices Souter, Stevens, Ginsburg *concurring* (internal citation omitted)). Once an alien becomes subject to an

administratively final removal order, the authority for his detention shifts to 8 U.S.C. § 1231(a). *See Johnson v. Guzman Chavez*, 594 U.S. 523, 528–29 (2021); *see also* 8 U.S.C. § 1231(a). After a removal order becomes final, the Supreme Court has held that detention of up to six months was presumptively constitutional and does not implicate constitutional violations. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). After this six-month detention period, continued detention may still be constitutionally permissible depending upon the significant likelihood of removal in the reasonably foreseeable future. *Id.*

Since Petitioner has not received a final removal order, *Zadvydas* does not apply, and even if it did, Petitioner has not been detained for six months. Thus, Petitioner’s arguments based upon legal analysis in *Zadvydas* should be discarded.

CONCLUSION

The Court should deny or dismiss Petitioner’s Writ of Habeas Corpus (Doc. 1) as the petition is not ripe, does not involve an active case or controversy, judicial review is statutorily precluded, and Petitioner has also failed to exhaust readily available administrative remedies. For these reasons, individually or collectively, denial or dismissal is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2026, I filed the foregoing pleading electronically through the CM/ECF system, which caused the pro se party to be served by first-class postal mail as more fully reflected on the Notice of Electronic Filing:

Rogelio Bolufe Izquierdo



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/s/ Allison Shokes

ALLISON SHOKES

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