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After appeals court ruling, pathway for wrongful immigration detention lawsuits in Nebraska narrows

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Petitions for habeas corpus, a civil lawsuit to challenge unlawful detention, have skyrocketed amongst immigration detainees. (Photo courtesy of ICE. Graphic by Molly Ashford)

Attorneys representing Nebraska immigration detainees in wrongful detention lawsuits will need to shift gears after the Eighth U.S. Circuit Court of Appeals ruled in favor of the government's mass detention policy.

Late last month, a three-judge panel on the appellate court **ruled** 2-1 in favor of the government's position of detaining most undocumented immigrants without bond, regardless of their criminal

history or community ties. The ruling is binding on federal courts in Nebraska, Minnesota, Iowa, Missouri, South Dakota, North Dakota and Arkansas.

Courts across the country have seen a sharp **uptick** in immigration-related petitions for habeas corpus, a type of civil lawsuit challenging wrongful detention, since the government **reshaped** its mandatory detention policy last summer. Previously, mandatory detention was understood only to apply to immigrants encountered at the border – not people detained for immigration violations after living in the country for a period of time.

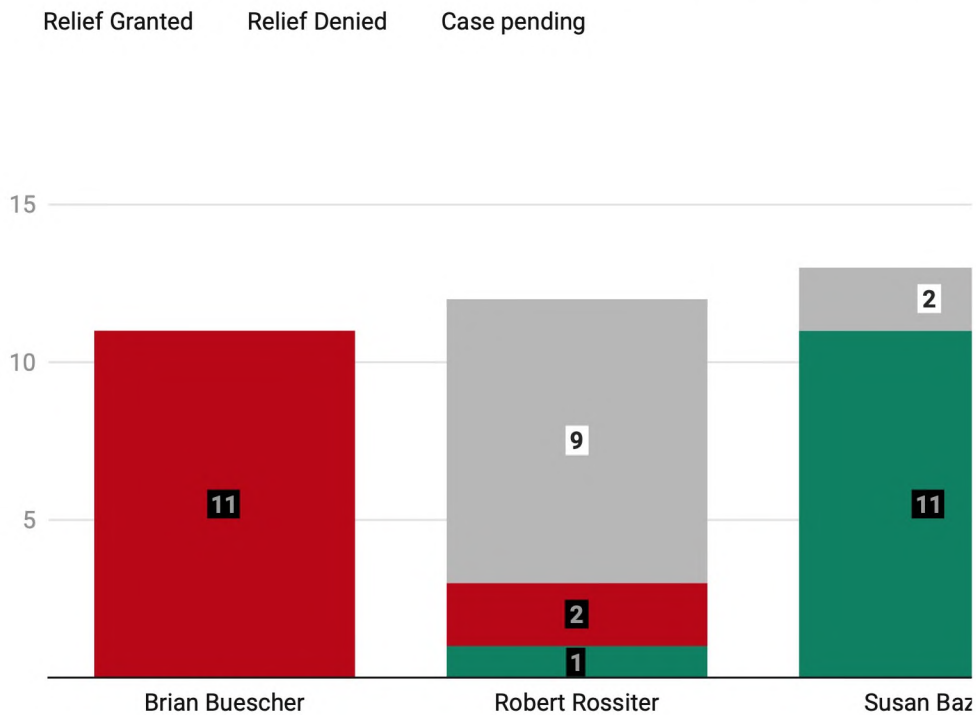
But the Eighth Circuit opinion supported the government's interpretation that there is no statutory difference between an undocumented immigrant seeking admission at the U.S. border and one who is encountered in the interior of the country, and neither are eligible for a bond hearing.

Prior to the appellate decision, Nebraska judges ruled in favor of the detained immigrants in the majority of cases. Only one judge, Brian Buescher, consistently ruled in favor of the government.

Another Nebraska judge has denied a habeas petition in light of the ruling. Chief U.S. District Court Judge Robert Rossiter issued a **decision** Wednesday denying relief to a Kyrgyzstani immigrant detained at the ICE detention facility in McCook. Rossiter wrote that the detainee's argument was "plausible," but any relief was "foreclosed by the Eighth Circuit's recent determination."

Status of immigration-related habeas petitions considered by judges in the District of Nebraska since 2025

U.S. District Court Judge Brian Buescher is the only Republican appointee on Nebraska's federal bench. He was appointed by President Donald Trump in 2019. Chief U.S. District Court Judge Robert Rossiter ruled in favor of an immigrant who was denied a bond hearing prior to the Eighth Circuit ruling. But after the appellate ruling, he ruled against an immigrant in a similar case.



Alternative remedies

Grant Friedman, an attorney for the ACLU of Nebraska, said the decision is prospective and will not impact the dozens of people in Nebraska who were granted a bond hearing or release by a federal judge in recent months.

“The default is no retroactivity – unless there is a specific holding or finding to the otherwise, the assumption is law is always forward-looking,” he said. “For the clients that we had released on habeas grounds, this court case has no bearing on their case.”

Without the ability to argue that their clients are entitled to a bond hearing on statutory grounds, attorneys like Friedman will start looking at other strategies.

“The basis for detention in immigration law is multifaceted and heavily codified in both statute and regulation – but at the baseline, before all

of that, there is the U.S. Constitution,” Friedman said. “The U.S. Constitution protects all persons' right to due process, and so we will continue to see more and more immigrants rights cases in the District of Nebraska. They just will look different given this opinion.”

They will likely look toward strategies employed in states under the Fifth U.S. Circuit Court of Appeals, which was the first circuit court to **rule** on mandatory detention. In a 2-1 decision from February, that court ruled in favor of the mandatory detention policy. The ruling is binding on federal courts in Texas, Louisiana and Mississippi.

After the ruling, some immigrants subject to the Fifth Circuit opinion brought **due process** claims separate from the statutory issues decided by the appellate court. Some judges in Texas have **granted bond** hearings for detained immigrants after the appellate decision on due process grounds, **finding** that immigrants who live in the country for a period of time “acquire a liberty interest in being free from government detention without due process.”

Since the Eighth Circuit opinion similarly only addressed the statutory question, and not due process challenges, Friedman said that avenue is open in Nebraska, too.

Though the Fifth and Eighth Circuit Courts are the only federal appellate courts to rule on the issue so far, similar cases are pending in other circuits. The issue is likely to make its way to the U.S. Supreme Court.

“The bulk of what the Supreme Court likes to do is settle circuit splits – which is the situation that is emerging right now, where it depends what part of the country you live in for what the laws are,” Friedman said. “In terms of the Supreme Court’s timeline, and the likelihood of that going up, that would be reading the tea leaves.”

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