

**UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND**

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**ANTON PEREVOZNIKOV,**  
Petitioner,

**Case No.: 1:25-cv-00085-JJM-  
LDA**

**-against-**

**Michael Nessinger et al.,**  
Respondents.

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**Petitioner's Reply to Respondents' Response to Petition for a Writ of Habeas Corpus  
Oral Argument Requested**

**Table of Contents**

**INTRODUCTION**..... 1

**STATEMENT OF FACTS**..... 2

**Point 1. Exhaustion does not preclude this Petition**..... 8

**Point 2. The regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) cannot be read to preclude Petitioner’s right to a bond hearing.** ..... 10

**Point 3. Whether or not Petitioner’s other convictions may render him subject to mandatory detention does not make this petition moot.** ..... 13

**Point 4. Respondent is not seeking release from custody on the basis that his detention has been unreasonably prolonged.** ..... 15

**CONCLUSION** ..... 16

**Table of Authorities**

**Cases**

*Ashley v. Ridge*, 288 F. Supp. 2d 662 (D.N.J. 2003) ..... 12

*Brito v. Garland*, 22 F.4th 240 (1st Cir. 2021) ..... 10, 16

*Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 207 L. Ed. 2d 353 (2020)..... 13

*Hernandez-Lara v. Lyons*, 10 F.4th 19, 26 (1st Cir. 2021),..... 10

*In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 37 F.4th 746 (1st Cir. 2022)..... 14

*In Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004)..... 12

*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)..... 14

*Nielsen v. Preap*, 586 U.S. 392, 139 S. Ct. 954, 203 L. Ed. 2d 333 (2019) ..... 10

*Rogers v. United States*, 180 F.3d 349 (1st Cir. 1999) ..... 8

*Sayyah v. Farquharson*, 382 F.3d 20 (1st Cir. 2004) ..... 8

*Sousa v. I.N.S.*, 226 F.3d 28 (1st Cir. 2000)..... 8

*Torosyan v. Nielsen*, No. 218CV5873PSGSK, 2018 WL 5784708 (C.D. Cal. Sept. 27, 2018), report and recommendation adopted, No. 218CV5873PSGSK, 2018 WL 6167918 (C.D. Cal. Oct. 26, 2018) ..... 11

*Trustees of Indiana Univ. v. United States*, 618 F.2d 736 (Ct. Cl. 1980)..... 11

**Statutes**

18 U.S.C. § 371 ..... 2, 5, 13

18 U.S.C. § 554..... 2

22 U.S.C. § 2778..... 2, 4

28 U.S.C. § 2241..... 8

8 U.S.C. § 1186(c) ..... 4

8 U.S.C. § 1186a(c)..... 2

8 U.S.C. § 1186a(c)(3)(B)..... 3

8 U.S.C. § 1226(a) ..... 10

8 U.S.C. § 1226(c) ..... 10

8 U.S.C. § 1226(c)(1)(B) ..... 4

8 U.S.C. § 1226(c)(1)(D) ..... 1, 10

8 U.S.C. § 1227(a)(1)(D)(i) ..... 3

8 U.S.C. § 1227(a)(2)(A)(i) ..... 3

8 U.S.C. § 1227(a)(2)(A)(ii) ..... 3

8 U.S.C. § 1227(a)(3)(A) ..... 11

8 U.S.C. § 1227(a)(4)..... 1, 4

8 U.S.C. § 1227(a)(4)(A) ..... passim

8 U.S.C. § 1227(a)(4)(A) or (B) ..... 1

8 U.S.C. § 1227(a)(4)(A)(i) ..... 4  
8 U.S.C. § 1227(a)(4)(A)(ii) ..... 5  
8 U.S.C. § 1227(a)(4)(B) ..... 1, 4, 5, 10  
New Jersey Criminal Statutes 2C:20-7 ..... 2  
U.S.C. § 1227(a)(4)..... 5

**Other Authorities**

*In re Joseph*, 22 I. & N. Dec. 799 (1999) ..... 12  
*In Re Ponce De Leon-Ruiz*, 21 I. & N. Dec. 154 (BIA 1996)..... 9  
*Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989) ..... 6, 9  
*Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009) ..... 11

**Regulations**

15 C.F.R. § 30 ..... 2  
8 C.F.R. § 1003.19 ..... 9  
8 C.F.R. § 1003.19(h)(2)(i)(C)..... passim  
8 C.F.R. § 1003.19(h)(2)(ii)..... 12  
8 C.F.R. § 1003.19(i)(2)..... 12

This is Petitioner's Reply to Respondents' Response to this Petition for a Writ of Habeas Corpus.

### INTRODUCTION

This case arises from the denial by an Immigration Judge ("IJ") at the Immigration Court in Chelmsford, Massachusetts, of Petitioner's request for a bond hearing on the sole basis that a DHS regulation prohibits such a hearing, even though the INA specifically authorizes it.

The regulation in question, 8 C.F.R. § 1003.19(h)(2)(i)(C), prohibits a custody/bond redetermination hearing for a non-citizen who is alleged to be deportable under any subsection of 8 U.S.C. § 1227(a)(4) ("[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens: (C) Aliens described in section [1227](a)(4) of the Act;"; 8 C.F.R. § 1003.19(h)(2)(i)). This effectively subjects them to detention without the possibility of a bond hearing while their removal proceedings are pending.

The INA at 8 U.S.C. § 1226 governs detention of non-citizens pending removal proceedings. 8 U.S.C. § 1226(a) authorizes the release on a bond or conditional parole of non-citizens "except as provided in subsection (c)". Subsection (c) makes certain classes of non-citizens ineligible for release on bond or conditional parole, including, at 8 U.S.C. § 1226(c)(1)(D), people who are deportable under 8 U.S.C. § 1227(a)(4)(B) ("The Attorney General shall take into custody any alien who: D. is.... deportable under section 1227(a)(4)(B) of this title;"; 8 U.S.C. § 1226(c)(1)).

8 U.S.C. § 1227(a)(4) has several subsections, (A) – (F). This case only concerns subsections (A) and (B). 8 U.S.C. § 1227(a)(4)(A) renders deportable those who have engaged in any (i) activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or

sensitive information; (ii) any other criminal activity which endangers public safety or national security, or (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means. 8 U.S.C. § 1227(a)(4)(B) makes deportable any non-citizen alleged to have engaged in terrorist activities as described elsewhere in the INA.

In 8 U.S.C. § 1226(c)(1)(D), Congress made only those alleged to be deportable under 8 U.S.C. § 1227(a)(4)(B) (for terrorist activities) ineligible for release on a bond. Thus, Respondents' application of the regulation to find Petitioner ineligible for a bond hearing results in a far wider set of non-citizens being subjected to mandatory detention than provided for in the INA. As a result, Petitioner filed the instant Petition, asking the Court to declare the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) ultra vires and invalid to the extent it precludes from bond eligibility non-citizens who are alleged to be deportable under 8 U.S.C. § 1227(a)(4)(A). The Petition asks the Court to either order him released or else direct Respondents to provide him with a bond hearing within fifteen days.

#### STATEMENT OF FACTS

Petitioner is a citizen of Kazakhstan, who entered the US on a J-1 visa on May 22, 2006. He adjusted status to conditional permanent resident on March 8, 2010, based on his marriage, to Nataliya Kovalska, a US citizen. On December 13, 2011, he Ms. Kovalska jointly filed Form I-751 petition to lift the condition on his permanent residence, as required by 8 U.S.C. § 1186a(c). They were interviewed in connection with this petition in 2013, and the I-751 then stayed pending for another eleven years, during which time they got divorced (in April 2015). (ECF 1, ¶ 20)

Meanwhile, Petitioner was convicted of three criminal offenses. On February 10, 2012 he pled guilty to Receiving Stolen Property in the Third Degree, in violation of New Jersey Criminal Statutes 2C:20-7, and was sentenced to two years' probation. On October 24, 2018, he pled guilty in the U.S. District Court for the Eastern District of Pennsylvania (Case 2:15-cr-0044) to a violation of 18 U.S.C. § 371, namely, exporting defense items without a license in violation of 22 U.S.C. § 2778. On August 31, 2021, he was sentenced to 48 months imprisonment and three years supervision for this offense. On June 28, 2021, he pled guilty in the US District Court for the Eastern District of New York (Case 1:20-cr-00415) to a violation of 18 U.S.C. § 371, namely, conspiracy to export information, smuggle electronic devices, and defraud the United States, in violation of 13 U.S.C. § 305 (failure to file export information), 15 C.F.R. § 30 (requirements for filing electronic export information), and 18 U.S.C. § 554 (exporting or sending goods from the US contrary to any law of the United States). The devices in question were iPads, iPhones and MacBooks. On September 21, 2022, he was sentenced to imprisonment for eighteen months to run concurrently with the August 2021 sentence, and 2 years of supervision upon release. (ECF 1, ¶¶ 22 - 23)

Petitioner was discharged from federal prison on or about August 22, 2024, and immediately taken into ICE custody, where he remains. On the same date, USCIS issued a decision denying Petitioner's I-751, thirteen years after it had been filed, and purporting to terminate his permanent residence. That decision referenced a different case number than that assigned to Petitioner's I-751, and wrongly stated that it had been filed by Petitioner on his own, in 2015, after he had been divorced, instead of jointly filed in 2011 while he was still married. The decision acknowledged that Petitioner and his wife had demonstrated that theirs was a good-faith marriage, but then stated that because it was not jointly filed, it was denied as a matter of

discretion on account of Respondent's criminal convictions. However, as it was a jointly-filed petition, USCIS lacked authority to deny it as a matter of discretion, 8 U.S.C. § 1186a(c)(3)(B). And USCIS's own documents, obtained from a Freedom of Information Act (FOIA) request, state that the I-751 had been approved back in 2018. (ECF 1, ¶¶ 24 - 25)

On August 23, 2024, Respondent was placed into removal proceedings by the issuance of a Notice to Appear (ECF 1-2). On September 26, 2024 the Department of Homeland Security (DHS) filed superseding charges of removability, alleging that Mr. Perevoznikov is deportable under four separate statutory provisions of the INA (ECF 1-3). First, under 8 U.S.C. § 1227(a)(1)(D)(i) because of the termination of his conditional permanent residence, Second, under 8 U.S.C. § 1227(a)(2)(A)(i) (conviction of a CIMT committed within five years of admission for which a sentence of one year or more can be imposed). Third, under 8 U.S.C. § 1227(a)(2)(A)(ii) (conviction of two or more CIMTs at any time after admission). Fourth, under 8 U.S.C. § 1227(a)(4)(A)(i) (engaged in conspiracy to fail to file export information, smuggle electronic devices, and defraud the United States relating to the international transportation of electronic devices from the United States to a foreign country). (ECF 1, ¶¶ 27)

On December 30, 2024, Petitioner filed a motion for a bond hearing (ECF 1-4), arguing that he was not subject to mandatory detention under 8 U.S.C. § 1186(c), because his shoplifting arrest and conviction had occurred more than five years after his admission in May 2006, and neither his shoplifting conviction nor his October 2018 conviction for violating 22 U.S.C. § 2778 were crimes involving moral turpitude, and so he had not been convicted of two or more such crimes at any time after admission. He also argued he was not subject to mandatory detention under 8 C.F.R. § 1003.19(h)(2)(i)(C), because that regulation conflicted with the INA, which only made people who were subject to 8 U.S.C. § 1227(a)(4)(B) ineligible for bond, and as he

was alleged to be a person described in 8 U.S.C. § 1227(a)(4)(A), he was statutorily eligible for bond.<sup>1</sup> (ECF 1, ¶ 28)

On January 13, 2025, DHS filed a “Notice of Bond Ineligibility” (ECF 1-6), asserting that Petitioner was not eligible for a bond hearing for three separate reasons. First, under 8 U.S.C. § 1226(c)(1)(B), because he was deportable for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct. Second, under 8 U.S.C. § 1226(c)(1)(C), because he was deportable for having been convicted of a crime involving moral turpitude within five years of admission for which a sentence of one year or longer could be imposed. Third, under 8 C.F.R. § 1003.19(h)(2)(i)(C) because he was a person described in 8 U.S.C. § 1227(a)(4) as he had engaged in “any activity... to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information”. Petitioner and DHS then each filed supplemental legal arguments ((ECF 1, ¶¶ 29 – 30; ECF 1-7, 1-8).

A short hearing was held on January 23, 2025, at the conclusion of which the IJ stated, that she was bound to follow the language of the regulation in question (8 C.F.R. § 1003.19(h)(2)(i)(C)), even if it conflicted with the statute. She then issued an order stating that Petitioner was “statutorily ineligible for IJ custody redetermination”. (ECF 1 ¶ 31; ECF 1-9).

On February 20, 2025, Petitioner timely filed an appeal with the Board of Immigration Appeals from this decision, and on March 6, 2025 the IJ issued a written decision explaining the reason for her denial (ECF 7-7).<sup>2</sup> The IJ acknowledged the arguments regarding whether or not

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<sup>1</sup> Petitioner, through prior counsel, had earlier filed a motion for a bond hearing, and DHS had filed a Notice of Bond Ineligibility. The bond motion was then withdrawn so that he could adequately brief the issue, and it was re-filed in December 2024 by new counsel (counsel herein).

<sup>2</sup> Filing an appeal is in fact the only way to obtain a written decision from an IJ. If no appeal is filed, the only document is the IJ’s short form order (ECF 1-9)

Petitioner's criminal convictions constituted CIMTs such that they rendered him deportable and ineligible for bond ("The respondent has multiple criminal convictions that could implicate the Court's bond jurisdiction."), but specifically declined to reach them. Instead, "the Court based [sic] its decision solely on his conviction for conspiring to fail to file export information, smuggle electronic devices, and defraud the United States in violation of 18 U.S.C. § 371" which brought him within the scope of 8 U.S.C. § 1227(a)(4)(A)(ii). The IJ acknowledged Petitioner's argument, that the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) is ultra vires because the INA at 8 U.S.C. § 1226(c)(1)(D) specifies that only a noncitizen deportable under § 1227(a)(4)(B) is subject to mandatory detention and that it is thus not lawful to deny bond hearings to those, like him, who fall under other subsections of U.S.C. § 1227(a)(4) (ECF 1, ¶¶ 32 – 34; ECF 7-7, p. 3). Nonetheless, she found that "This Court, however, lacks the authority to determine the legality of regulations" and that "Whatever the merit of the respondent's ultra vires argument, then, this Court is bound to follow the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) as written." (*id.*)

A Notice of Appeal of this decision was timely filed with the Board of Immigration Appeals (BIA) (ECF 1, ¶ 34), but that appeal is futile, because precedential BIA decisions require it to follow its own regulations even where they conflict with a statute, or the US Constitution. *Matter of Anselmo*, 20 I. & N. Dec. 25, 30 (BIA 1989). Further, a decision on that bond appeal will likely take many months, exceeding the time for completion of Petitioner's underlying removal hearing.

Meanwhile, the underlying removal hearings continue. Petitioner's prior attorney had initially filed a written pleading admitting the charges of removability, and on January 13, 2025, submitted amended pleadings in response to the additional charges of removability which DHS

had filed. In those pleadings, Petitioner denied the charges of removability.<sup>3</sup> On February 5, 2025, Petitioner's prior attorney filed a motion for continuance of the removal hearing scheduled for February 11, because he was waiting for the results of a Freedom of Information Act (FOIA) request to obtain the records from U.S.C.IS relating to adjudication of his I-751, and because he wanted to change attorney. On February 11, 2025, the Immigration Court denied the motion to continue based on substitution of counsel as untimely, and the hearing proceeded on February 12, 2025. After taking testimony of an expert witness, the hearing was continued to June 4, 2025, for Petitioner to testify.<sup>4</sup> The Immigration Court subsequently granted the motion to substitute counsel.

Petitioner filed the instant action on March 9, 2025, claiming that the regulation in question is ultra vires the INA, sought a declaratory judgment to that effect, and asked for an Order granting his immediate release from Respondents' custody, or in the alternative, an Order directing Respondents to provide him with a bond hearing within fifteen days. (ECF 1) On March 11, 2025, the Court issued an order directing Respondents to respond to the Petition by April 15, 2025 (ECF 4).

On April 15, 2025, Respondents filed their opposition (ECF 7), a 31-page Memorandum of Law titled "Opposition to Petition for Writ of Habeas Corpus and Motion to Dismiss" (ECF 7, p. 1). The Response has seven attachments: the Notice to Appear (ECF 7-1), the PACER docket report and indictment for USA v. Perevoznikov, US District Court Eastern District of

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<sup>3</sup> Respondent fails to include this in their statement of facts, stating only that he conceded the charges on October 28, 2024 (ECF 7, p. 11)

<sup>4</sup> This is contrary to the statement of ICE Officer Chan (ECF 7-5, ¶ 27), and there is nothing in the record of the proceedings to support Officer Chan's statement. In fact, Officer Chan states that he obtained the information in his declaration from ICE's EARM, yet the records of Petitioner's removal proceedings, including the oral rulings of the Immigration Judge, are not contained in EARM, but in the EOIR record of proceedings, which Respondents have not filed as an exhibit to their response. Accordingly, Officer Chan is not competent to testify or offer a declaration as to what transpired at the Immigration Court hearings, unless there is a written document corroborating it, as he was not present for any of the proceedings.

Pennsylvania, Case No. 2:15-cr-00441-JHS (ECF 7-2), the PACER docket report and indictment for USA v. Perevoznikov, US District Court Eastern District of New York, Case No. 1:20-cr-00415-ARR-5 (ECF 7-3), the additional charges of inadmissibility/deportability (ECF 7-4), a declaration from ICE Assistant Field Office Director Keith Chan (ECF 7-5), DHS's "Notice of Ineligibility For Bond" filed with the Immigration Court on November 2, 2024 (ECF 7-6), the Immigration Judge's January 23, 2025 Order and March 6, 2025 decision denying bond (ECF 7-7).

Respondents now ask the Court to dismiss the petition, for four separate reasons. First, for failure to exhaust administrative remedies (ECF 7, pp. 9 – 10). Second, because Petitioner is a non-citizen described at 8 U.S.C. § 1227(a)(4) and the IJ therefore lacks jurisdiction under 8 C.F.R. § 1003.19(h)(2)(i)(C) to hold a bond hearing (*id.*, pp. 10 – 11), and that the regulation is not ultra vires the statute (*id.*, pp. 11 – 14). Third, because Petitioner is otherwise subject to mandatory detention (*id.*, pp. 14 – 27). Fourth, because Petitioner's detention is not sufficiently prolonged that it violates the due process clause (*id.*, pp. 27 – 30). Finally, Respondents ask that if the Court grants relief, that it order a bond hearing rather than release, with the burden on Petitioner to show lack of dangerousness and that he is not a flight risk (*id.*, pp. 30 – 31).

None of Respondents' arguments have any merit.

**Point 1. Exhaustion does not preclude this Petition.**

Respondents argue that this Petition should be dismissed, because "an incarcerated person must exhaust his or her administrative remedies before filing a petition for habeas corpus under 28 U.S.C. § 2241", citing *Rogers v. United States*, 180 F.3d 349, 356-58 (1st Cir. 1999). However, that case addressed the requirement that a criminal detainee exhaust Federal Bureau of

Prisons' Administrative Remedies Program before filing a habeas petition (see *id.*), and so has no relevance to the matter at bar.

Respondents cite no statutory provision requiring exhaustion of a bond appeal by an immigration detainee to the BIA before seeking habeas relief. But even if there were, or if there were a prudential (rather than jurisdictional or statutory) exhaustion requirement, it would not apply here. The First Circuit, like many others, recognizes exceptions to exhaustion “where a resort to the agency would be futile because the challenge is one that the agency has no power to resolve in the applicant's favor” *Sousa v. I.N.S.*, 226 F.3d 28, 32 (1st Cir. 2000), *Sayyah v. Farquharson*, 382 F.3d 20, 28, n. 8 (1st Cir. 2004).

Here, the Board has previously held in precedential decisions that Immigration Judges must follow EOIR regulations, even where they conflict with statutes passed by Congress, *In Re Ponce De Leon-Ruiz*, 21 I. & N. Dec. 154, 158 (BIA 1996) (“A regulation promulgated by the Attorney General has the force and effect of law as to this Board and Immigration Judges”) or the US Constitution, *Matter of Anselmo*, 20 I. & N. Dec. 25, 30 (BIA 1989) (“A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer.”) The Immigration Judge acknowledged as much in her decision, see ECF 7-7, p. 3.

Thus, although Petitioner filed an appeal of the IJ's bond decision with the BIA, and briefed it, solely as a prudential matter (filing an appeal was also the only way to get the Immigration Court to issue a written decision), the BIA appeal is not an administrative remedy which can afford Petitioner any relief. Accordingly, Respondents' exhaustion argument fails.

**Point 2. The regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) cannot be read to preclude Petitioner's right to a bond hearing.**

Respondent argues, in essence, that the INA at 8 U.S.C. § 1226 does not give a right to a bond hearing, but instead allows DHS to make an initial custody determination, while the regulations at 8 C.F.R. § 1003.19 merely gives an IJ the right to redetermine DHS's custody determination. (ECF 7, pp. 10 – 14) Specifically, Respondent argues that “Petitioner had the opportunity to obtain release on bond from DHS initially, but the agency chose to keep him in custody. The challenged regulation restricted his ability to appeal DHS's determination before an immigration judge.” (*id.*, pp. 11 – 12). Respondents' arguments miss the mark.

It is settled law that 8 U.S.C. § 1226(a) gives non-citizens in removal proceedings the right to a bond hearing before an Immigration Judge, *Hernandez-Lara v. Lyons*, 10 F.4th 19, 26 (1st Cir. 2021), *Brito v. Garland*, 22 F.4th 240, 244 (1st Cir. 2021); see also *Nielsen v. Preap*, 586 U.S. 392, 397, 139 S. Ct. 954, 959–60, 203 L. Ed. 2d 333 (2019).<sup>5</sup> Further, at such a hearing, “the Government must prove the alien is either dangerous by clear and convincing evidence or a risk of flight by a preponderance of the evidence.”, *Brito v. Garland, supra*, 22 F.4th 244. The exception is if the person is within the class of non-citizens listed at 8 U.S.C. § 1226(c). That sub-section includes, as relevant here, at § 1226(c)(1)(D), non-citizens who are deportable for terrorist activities under 8 U.S.C. § 1227(a)(4)(B). It does not include people who are deportable under 8 U.S.C. § 1227(a)(4)(A). Thus, under the INA, a non-citizen in removal

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<sup>5</sup> Defendants seem to argue that ICE's initial custody determination acts as the equivalent of as a bond hearing, just one from which he cannot appeal, unlike mandatory detention determinations (ECF 7, pp. 11 – 12). However, Defendants have not provided counsel or the Court with any pre-bond hearing custody determination stating that Petitioner was denied bond by DHS because he has been found deportable under 8 U.S.C. § 1227(a)(4)(A). Certainly, the declaration from AFOD Chan does not reference one. But even if they had, a “custody determination” by DHS is not the equivalent of a bond hearing before an Immigration Judge at which the burden of proof rests with the agency. *Brito v. Garland, supra*, 22 F.4th 244. Nor have Respondents pointed to the existence of any procedure whereby Petitioner could have such an evidentiary hearing before DHS.

proceedings who does not come within the scope of 8 U.S.C. § 1226(c) is eligible for a bond hearing before an Immigration Judge, pursuant to 8 U.S.C. § 1226(a).

The Immigration Judge, and Respondents, however, claim that the DHS regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) also precludes people who are deportable under 8 U.S.C. § 1227(a)(4)(A) from eligibility for a bond hearing. Defendants justify this position by claiming that Immigration Judges' authority to conduct bond hearings derive only from regulations and not from the INA. That misses the point: the issue is not where the IJ's authority comes from, the issue is whether or not Petitioner has been denied the right to a bond hearing before an Immigration Judge to which the statute and case law entitles him. Defendants cannot enact a regulation which contracts the rights given to non-citizens by Congress. If this were the case, Defendants could enact another regulation to preclude an Immigration Judge from conducting bond hearings for people who for example, are alleged to be deportable under 8 U.S.C. § 1227(a)(3)(A) (failure to timely file a change of address). The purpose of the regulation giving Immigration Judge's authority over bond hearings is to implement the statutory directive at 8 U.S.C. § 1226, not to override it.<sup>6</sup>

Defendants' argument is also directly contradicted by *Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009), which held that "an interpretation of the regulation limiting the Immigration Judge's authority to ameliorate the terms of release imposed by the DHS would be inconsistent with the language of section 236(a) of the Act.", *Id.*, at 96, citing *Trustees of Indiana Univ. v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980) (stating that a regulation must be

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<sup>6</sup> The broader implications of Defendants' arguments should not be ignored. The ground of deportability at 8 U.S.C. 1227(a)(4)(A)(ii) is particularly broad, and vague: it renders deportable a non-citizen who has engaged "at any time after admission" "any... criminal activity which endangers public safety or national security." It doesn't require a conviction, or even a criminal charge. Under Defendants' theory, anyone charged with this ground of deportability would be ineligible for a bond hearing before an Immigration Judge.

interpreted so as to harmonize with and not to conflict with the objective of the statute it implements).

The regulation at issue has previously been found invalid for precisely this reason both by an Immigration Judge and later by a District Court judge: “[B]y requiring mandatory detention for all offenses listed under § 1227(a)(4) without specifying any of that section’s subparagraphs, the 1003.19 regulation effectively mandates detention for a broader set of crimes than the ones Congress categorically and narrowly specified in § 1226(c).” *Torosyan v. Nielsen*, No. 218CV5873PSGSK, 2018 WL 5784708, at \*7 (C.D. Cal. Sept. 27, 2018), report and recommendation adopted, No. 218CV5873PSGSK, 2018 WL 6167918 (C.D. Cal. Oct. 26, 2018).

Other decisions have stricken regulations which contract the authority of an Immigration Judge to conduct a bond hearing under § 1226(a). In *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) the District Court invalidated the automatic stay provision of 8 C.F.R. § 1003.19(i)(2), in which “the immigration judge’s individualized determination that the alien poses neither a danger to the community nor a significant flight risk is automatically stayed upon filing of an appeal. The regulation therefore has the effect of mandatory detention of a new class of aliens, although Congress has specified that such individuals are not subject to mandatory detention.”, *id.*, 1079. Accord, *Ashley v. Ridge*, 288 F. Supp. 2d 662, 673 (D.N.J. 2003) “The invocation of the automatic stay provision effectively converts any alien detained pursuant to the discretionary detention provision of § 1226(a) into one held pursuant to the mandatory detention provision of § 1226(c). Such an application of § 1003.19(i)(2) seems to fly in the face of congressional intent...”

Respondents also argue that Petitioner can request a so-called “Joseph hearing” to determine “whether he is properly subject to removal under Section 1227(a)(4)(A)” (ECF 7, p.

13, citing 8 C.F.R. § 1003.19(h)(2)(ii) and *In re Joseph*, 22 I. & N. Dec. 799 (1999)).

Respondents' argument makes little sense. The issue is not whether Petitioner is subject to removal under § 1227(a)(4)(A); the issue is that Defendants have adopted a regulation which makes people deportable under § 1227(a)(4)(A) ineligible for a bond hearing, whereas the INA makes such people eligible for a bond hearing. *In re Joseph, id.* is irrelevant.

Because the regulation has the effect of imposing mandatory detention on a broader set of non-citizens than Congress provided for in the INA, it is invalid.

**Point 3. Whether or not Petitioner's other convictions may render him subject to mandatory detention does not make this petition moot.**

Respondents argue that "Petitioner fails to acknowledge that he is subject to mandatory detention for an independent statutory reason: two or more convictions for CIMTs", (ECF 7, at 14). This is incorrect: the Petition fully discussed Petitioner's criminal convictions as well as Respondents claim that they subject him to mandatory detention (Petition, ECF 1, ¶¶ 28, 29).<sup>7</sup> In fact, Petitioner argued to the Immigration Court, with his bond motion, that he was not subject to mandatory detention based on those convictions, and the issue was extensively briefed (see O'Dwyer Declaration, ECF 1-2; ECF 1-4 through 1-7). However, the Immigration Judge acknowledged but then explicitly declined to address those issues: "The respondent has multiple criminal convictions that could implicate the Court's bond jurisdiction. However, the Court based its decision solely on his conviction for conspiring to fail to file export information, smuggle electronic devices, and defraud the United States in violation of 18 U.S.C. § 371." – i.e., the conviction which made him deportable under 8 U.S.C. § 1227(a)(4)(A). See ECF 7-7, Page 2, Part III.

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<sup>7</sup> Notably, Respondents have not submitted any actual evidence of Petitioner's convictions.

The Court cannot dismiss this Petition on the basis that the Immigration Judge would have found Petitioner subject to mandatory detention on grounds that she explicitly declined to consider. As the Supreme Court held in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909–10, 207 L. Ed. 2d 353 (2020) “An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.” Further, “courts may not accept appellate counsel’s post hoc rationalizations for agency action.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443 (1983), *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 37 F.4th 746, 761 (1st Cir. 2022).

In fact, the IJ’s decision to not reach the issue, despite it having been so heavily briefed to her by both Petitioner and DHS (see ECF 1-4 through 1-7), should counsel against this Court making those findings on her behalf. Indeed, counsel’s arguments to this Court, that the crimes constitute CIMTs and thus deportable offenses, are similar to the arguments DHS made to the Immigration Court in their “Second Notice of Ineligibility for Bond”, (ECF 1-6), and which the Immigration Judge expressly declined to consider. If the Court finds that 8 C.F.R. § 1003.19(h)(2)(i)(C) does not deprive Petitioner of the right to a bond hearing and remands the case back to the IJ, she can make those findings in the first instance.

Respondent also misstates the record with regard to the issue of removability, stating that “Petitioner conceded that he is subject to removal for having been convicted of two or more CIMTs at his hearing immigration court hearing on October 28, 2024. It logically follows that the same charge that renders him removable also subjects him to mandatory detention.” (ECF 7, p. 15). Although Petitioner initially conceded those charges, his attorney withdrew them, and in

January 13, 2025, filed a motion for amended written pleadings in which he denied (or “contended” [sic]) all charges of removability (Exhibit A, pp. 28 – 29).

In short, whether or not Petitioner’s convictions qualify as crimes involving moral turpitude and thus constitute removable offenses is an issue to be determined by the Immigration Judge in the first instance, and then on appeal to the Board of Immigration Appeals, if necessary. This Court should not usurp the role of the Executive Office for Immigration Review in making those determinations, particularly when the Immigration Judge herself explicitly declined to reach them.

**Point 4. Respondent is not seeking release from custody on the basis that his detention has been unreasonably prolonged.**

Respondents argue that Petitioner’s detention is not unreasonably prolonged so as to violate the Due Process clause (ECF 7, pp. 27 – 30). Petitioner has not raised this claim, and so the Court need not rule on it. However, in doing so, Petitioner does not concede either the allegations of Petitioner-caused delay or the legal arguments made in this section of Petitioner’s brief.

The only issue raised in this Petition is whether the regulation at 8 C.F.R. § 1003.19(h)(2)(i)(C) is ultra vires and invalid to the extent it precludes from bond eligibility non-citizens who are deportable under 8 U.S.C. § 1227(a)(4)(A) (ECF 1, Count 1, ¶¶ 36 – 40). Thus, the Court need not trouble itself with questions not raised, such as whether Petitioner might be subject to mandatory detention under some other provision or the INA, or whether his detention is unduly prolonged.

### CONCLUSION

For the foregoing reasons, the Court should reject Respondents' arguments, grant the Petition, and remand the case back to the Immigration Judge with an Order to hold a bond hearing (or otherwise rule as to Petitioner's eligibility for bond) within fifteen days, or to release Petitioner from custody in the event they fail to do so. At such a hearing, consistent with First Circuit precedent, the burden should be on the Government to prove by clear and convincing evidence that Petitioner is dangerous or by a preponderance of the evidence that he is flight risk. *Brito v. Garland, supra*, 22 F.4th 244.

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