

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 25-cv-01151-JMB-DLM

Dogukan Gunaydin,

Plaintiff,

v.

Donald J. Trump, Joel Brott, Peter Berg, Jamie Holt,
Todd Lyons, Kristi Noem, and Marco Rubio,

Defendants.

**RESPONDENTS' RETURN
TO SECOND AMENDED
PETITION FOR WRIT OF
HABEAS CORPUS**

INTRODUCTION

Petitioner Dogukan Gunaydin (Gunaydin) remains in immigration custody under 8 U.S.C. § 1226(a) and 8 C.F.R. § 1003.19(i)(2), pending the resolution of Respondents' appeals to the Board of Immigration Appeals (BIA) on the Bond Redetermination Order dated April 14, 2025 (ECF No. 22-1) and the Immigration Court's Written Decision of the Immigration Judge Regarding Contested Removability dated April 28, 2025 (ECF No. 29-5). Pursuant to BIA order, on May 8, 2025, both parties filed briefs on the Bond Redetermination appeal. Siekert Declaration, ¶¶ 4, 5, 6, Exhibits 24 and 25. DHS's detention authority persists during the pendency of removal proceedings. 8 USC 1226(a). The removal proceedings will not be administratively final until the BIA decides the merits appeal. 8 C.F.R. § 1003.6(a).

On the merits of removability, after the Immigration Judge issued her Written Decision of the Immigration Judge Regarding Contested Removability on April 30, 2025, ECF No. 29-5, DHS immediately appealed the IJ's dismissal of the NTA charge to the BIA and satisfied any and all other conditions to perfect that appeal. As of this writing on

May 19, 2025, the BIA has not set a briefing schedule on the merits and neither party has submitted briefs or arguments on the merits to the BIA. Both the bond redetermination issue and the merits of removal proceeding remain pending before the BIA.

Meanwhile, in this action for habeas corpus relief, Gunaydin filed a second amended petition at 9:30 p.m. on Thursday, May 19, 2025. ECF No. 37. The Court ordered Respondents to file a return on May 19, 2025. ECF No. 38. Pursuant to that directive, Respondents now file this return.

Even though appeals are pending before the BIA on the custody and the merits issues, Gunaydin seeks a writ of habeas corpus from this Court ordering his immediate release from immigration detention. But, had Gunaydin lost in the Immigration Court, he would remain detained pending any appeals to the BIA that he would have made; therefore, he should remain detained while the BIA processes and decides the DHS appeals. Such immigration custody remains appropriate except as the BIA may dictate otherwise. Such detention until the removal proceedings are administratively final is constitutional and appropriate. The Court should deny the second amended petition.

PERTINENT FACTS AND PROCEDURAL HISTORY

A. IMMIGRATION PROCEEDINGS.

On April 7, 2025, as a result of his DWI conviction, DHS filed an additional charge in Gunaydin's Immigration Court proceeding, charging Gunaydin as having "engaged in criminal activity which endangers public safety or national security" in violation of INA Section 237(a)(4)(A)(ii). See 8 U.S.C. § 1237(a)(4)(A)(ii). ECF No. 22-1. After a Master Calendar hearing and a *Joseph* hearing, the Immigration Court entered a "Bond

Redetermination” Order on April 14, 2025 in which the Immigration Court determined that the DHS was “unlikely to establish the charge of removability [public safety threat] that would otherwise subject [Gunaydin] to mandatory detention.” ECF 22-1 at 5. The Immigration Court analyzed Gunaydin’s case under the discretionary bond factors, concluded that Gunaydin did not pose a danger to the community or a flight risk, and ordered Gunaydin’s release on a \$5,000 bond. ECF 22-1 at 6-7. DHS immediately appealed to the BIA. ECF 22-2 and 22-3. The BIA ordered and both parties filed briefs on the bond/detention issue on May 8, 2025. Siekert Declaration, ¶¶ 4, 5, 6, Exhibits 24 and 25.

The filing of the bond appeal by DHS under 8 C.F.R. § 1003.19(i)(2) had the effect of automatically staying the bond decision of the Immigration Judge. The automatic stay expires 90 days from the date of DHS’s appeal. 8 C.F.R. § 1003.6(c)(3). The stay of the Immigration Court’s bond decision remains in place until the BIA decides to affirm, amend, reverse, or remand that decision. 8 C.F.R. §§1003.19(i)(2), 1003.6(c).

On the merits of Gunaydin’s removability, the Immigration Court entertained memoranda and exhibits from both DHS and Gunaydin. See 29-1, 29-2, 29-3, 29-4. Then, on April 30, 2025, the Immigration Court entered its “Written Decision of the Immigration Judge Regarding Contested Removability.” ECF 29-5. While finding that Gunaydin had engaged in dangerous activity, the Immigration Judge concluded the evidence was insufficient to establish that he had placed a large segment of the general population at risk. *Id.* at 4. The Immigration Court concluded that DHS had not sustained the charge of removability under INA Section 237(a)(4)(A)(ii) by clear and convincing evidence and terminated the removal proceedings. *Id.* at 5. DHS appealed to the BIA immediately. ECF

29-6. The BIA has not set a merits briefing schedule as of this writing. The filing of the merits appeal by DHS on May 1, 2025 stayed the merits decision of the Immigration Judge. The Immigration Judge's merits decision is stayed and not final until the BIA makes its decision on the merits appeal. 8 C.F.R. § 1003.1(d)(7)(i). Neither the INA or regulations allow for a DHS appeal of an adverse decision on the merits.

So, as of this writing, the issues of Gunaydin's removability and continued immigration detention are pending before the BIA. Gunaydin remains in DHS's detention in Sherburne County Jail in Elk River, MN pursuant to 8 U.S.C. § 1226(a) and 8 C.F.R. § 1003.19(i)(2), pending the resolution of DHS's detention/bond and removal appeals. Robinson Supplemental Declaration, ¶ 10 (ECF No. 29).

B. HABEAS PROCEEDINGS.

On April 25, 2025, Plaintiff filed a Motion for Temporary Restraining Order ("TRO") with supporting documents. ECF Nos. 24-27. Three days later, on April 28, 2025, the Court granted Plaintiff's TRO motion in part and ordered that, while DHS may continue to detain Gunaydin, DHS must do so in Minnesota, pending the hearing on May 12, 2025. ECF No. 28 at 6, 10. The Court denied the other requested injunctive relief, namely reinstatement of Gunaydin's student status. *Id.*

The Court held a hearing on May 12, 2025 to consider whether to convert the TRO into a preliminary injunction. Shortly after the hearing, the Court entered an Order that extended the previously issued TRO for an additional 14 days temporarily enjoining Respondents from transferring Gunaydin out of Minnesota. ECF No. 34.

On May 15, 2025, Gunaydin filed this Second Amended Petition for Writ of Habeas Corpus. Respondents now file their return. This Court should dismiss the second amended habeas petition for the reasons described in Respondents' earlier filings and the additional reasons stated below.

ARGUMENT

A. Gunaydin's Current Detention is lawful.

The Respondents' position has been consistent and focused throughout this litigation. Gunaydin has been and is detained under 8 U.S.C. § 1226(a) and 8 C.F.R. § 1003.19(i)(2) for the purpose of facilitating his removal proceedings. *See* ECF 10 at 4-8; ECF 14 at 4-5.¹ Respondents' decisions to institute removal proceedings, to litigate in immigration court the question of whether his DWI conviction makes him removable, and to invoke the automatic stay and appeal adverse decisions to the Board of Immigration Appeals (BIA), have always been within Respondents' authority. The issues of Gunaydin's ongoing detention and removability are squarely before the BIA and will be decided by the BIA in the foreseeable future. Invocation of the automatic stay, the appeals to the BIA, and Gunaydin's ongoing detention pending the BIA determinations comports with due process, is consistent with the law of this circuit, and is lawful. The Court should deny the second amended habeas petition.

¹ Respondents have not repeated all of the arguments and authority cited there, and respectfully asks permission to incorporate those arguments by reference here.

1. This Court's review must focus on Gunaydin's current detention.

Gunaydin's detention during his removal proceedings is lawful, and this Court should deny the second amended habeas petition. The proper inquiry in this habeas matter is the legality of the Gunaydin's current detention. 28 U.S.C. § 2241; see *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973); *Spencer v. Haynes*, 774 F.3d 467, 469 (8th Cir. 2014); *Archuleta v. Hedrick*, 365 F.3d 644, 647 (8th Cir. 2004); *Kruger v. Erickson*, 77 F.3d 1071, 1073 (8th Cir. 1996). This Court may review any constitutional challenges to the Petitioner's detention, but habeas review is limited to that inquiry and the only relief available is release. There is persuasive authority in this district to support the Attorney General's discretionary decision to detain Gunaydin under 1226(a). ECF 14 at 5-8.

In the second amended petition, however, Gunaydin again focuses on issues collateral to the legality and constitutionality of his current detention. The Court should continue to decline to review immigration law and the proceedings in immigration court. See 8 U.S.C. § 1252. This Court does not have jurisdiction to review ICE's decision to institute removal proceedings or to determine what charges fit the facts presented. ECF 10 at 8-10. To the extent Gunaydin challenges the progression of the charging decisions, those amendments were appropriate based on the facts known by ICE and Gunaydin cannot show any prejudice resulting from the amendments. See *Copeland v. Minnesota*, No. CIV.03-3631 ADM/JSM, 2004 WL 1701034, at *4 (D. Minn. July 29, 2004); Cf. *United States v. Gomez-Rosario*, 418 F.3d 90, 108 (1st Cir. 2005) (rejecting claim of due process violation for alleged delay in superseding indictment because no prejudice was identified). Prejudice is a necessary element of a due process claim. *United States v. Lovasco*, 431 U.S. 783, 790

(1977); *United States v. Bartlett*, 794 F.2d 1285, 1289 (8th Cir. 1986). Indeed, the Immigration Court has made its rulings on the charges against Gunaydin and the threat to public safety charge is before the BIA. The BIA should be given the opportunity to address that charge and the concomitant immigration detention.

Congress's jurisdiction-stripping provision in 1252(g) prohibits this Court from reviewing decisions to commence and adjudicate proceedings. ECF 10 at 8. Moreover, this Court has already declined to address the issue of reinstatement of Gunaydin's SEVIS record and his request for immediate release from detention. ECF 28 at 6-7.

In this case, the Immigration Court has afforded Gunaydin ample due process. It conducted a *Joseph* hearing, ruled in Gunaydin's favor on both the bond determination and removability issues, and ultimately terminated the removal proceedings. DHS appealed and Gunaydin remains detained under the automatic stay provisions of 8 C.F.R. § 1003.19(i) and 8 U.S.C. § 1226(a). This process properly accounted for Gunaydin's individual liberty interests and it provided a mechanism that removes the risk of lengthy detention or any erroneous deprivation of liberty. The detention issue is squarely before the BIA. Gunaydin has offered no reason for this Court to jump in and interfere with this appeal process.

When reviewing the procedural protections, this Court must also consider the Government's interest, along with the function involved and the burdens that the additional procedural requirements would create. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Government has a compelling interest in detaining aliens pending their removal proceedings and preventing them from absconding during those proceedings, despite competing liberty interests that the Constitution safeguards. That compelling interest is

rooted in ensuring that the individuals of most concern complete their removal proceedings. *Demore*, 538 U.S. at 520.

The Supreme Court has consistently affirmed the constitutionality of detention pending removal proceedings, and it has *never* required the government to bear the burden of justifying that detention, let alone by clear and convincing evidence. *See, e.g., Demore*, 538 U.S. at 531 (affirming categorical detention of certain criminal noncitizens); *Reno v. Flores*, 507 U.S. 292, 306 (1993) (affirming detention of juvenile noncitizens on suspicion of being deportable); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (affirming categorical detention of Communist Party associates); *cf. Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (permitting release only after the noncitizen bears the initial burden to show “that there is no significant likelihood of [his] removal in the reasonably foreseeable future”). In the immigration context, the government’s plenary authority is at its zenith, *see Flores*, 507 U.S. at 305, and immigration detention pending completion of removal proceedings has a definite termination point, *see Demore*, 538 U.S. at 529; *Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018). Nor has the Supreme Court ever held immigration detention during removal proceedings to the same standard it has applied to the indefinite (and potentially permanent) civil detention of individuals (generally U.S. citizens) in *Addington v. Texas*, 441 U.S. 418 (1979), *Foucha v. Louisiana*, 504 U.S. 71 (1992), or *Kansas v. Hendricks*, 521 U.S. 346 (1997), or to the pretrial criminal detention² of individuals in *United States v. Salerno*, 481 U.S. 739 (1987).

² Even the Bail Reform Act contains provisions requiring certain individuals (including U.S. citizens) to bear the burden to show they are not a danger to the community and a flight risk. *See Miranda v. Garland*, 34 F.4th 338, 363 (4th Cir. 2022). Accordingly, “it

Continued detention pending the BIA’s determinations is consistent with the Eighth Circuit’s decision in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024) and with Judge Davis’s decision in *Barajas Farias* (Order, *Ernesto Ruben Barajas Farias v. Garland, et al.*, No. 24-cv04366 (MJD/LIB) (Dec. 6, 2024)). Both of those decisions are faithful to the congressional design of 8 U.S.C. § 1226 and uphold its application in the face of constitutional challenges. *Banyee* did so in the face of detention that exceeded a year. This is not an extraordinary case. Detention during removal proceedings has long been part of the process: “The rule has been clear for decades: ‘[d]etention during deportation proceedings [i]s ... constitutionally valid.’” *Banyee*, 115 F. 4th at 931 (citing *Demore*, 538 U.S. at 523).

2. Legal and Statutory Authority for Detention.

For more than a century, the immigration laws have authorized immigration officials to charge noncitizens as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of noncitizens pending a decision on removal, during the administrative and judicial review of removal orders, and in preparation for removal. *See generally* 8 U.S.C. §§ 1225, 1226, 1231. “The rule has been clear for decades: “[d]etention during deportation proceedings [i]s ... constitutionally valid.” *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *rehearing by panel and en banc denied*, *Banyee v.*

cannot be unconstitutional for the government to place a similar burden on [noncitizens] facing removal proceedings, especially considering the detention lasts only until removal.” *Id.*

Bondi, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); see *Demore*, 538 U.S. at 523 n.7 (“In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings.”); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”). Indeed, removal proceedings ““would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.”” *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Section 1226 “generally governs the process of arresting and detaining . . . aliens pending their removal.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018). Section 1226(a) provides that “an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. § 1226(a). The Attorney General and the Department of Homeland Security (“DHS”) thus have broad discretionary authority to detain a noncitizen during removal proceedings.³ See 8 U.S.C. § 1226(a)(1) (DHS “may continue to detain the arrested alien” during the pendency of removal proceedings); *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019) (highlighting that “subsection (a) creates authority for *anyone’s* arrest or release under § 1226—and it gives the Secretary

³ Although the relevant statutory sections refer to the Attorney General, the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), transferred all immigration enforcement and administration functions vested in the Attorney General, with few exceptions, to the Secretary of Homeland Security. The Attorney General’s authority—delegated to immigration judges, see 8 C.F.R. § 1003.19(d)—to detain, or authorize bond for noncitizens under section 1226(a) is “one of the authorities he retains . . . although this authority is shared with [DHS] because officials of that department make the initial determination whether an alien will remain in custody during removal proceedings.” *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003).

broad discretion as to both actions”).

When a noncitizen is apprehended, a DHS officer makes an initial custody determination. *See* 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the arrested alien.” 8 U.S.C. § 1226(a)(1). “To secure release, the alien must show that he does not pose a danger to the community and that he is likely to appear for future proceedings.” *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2280–81 (2021) (citing 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8); *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1113 (BIA 1999)).

If DHS decides to release the noncitizen, it may set a bond or place other conditions on release. *See* 8 U.S.C. § 1226(a)(2); 8 C.F.R. § 236.1(c)(8). If DHS determines that a noncitizen should remain detained during the pendency of his removal proceedings, the noncitizen may request a bond hearing before an immigration judge. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge then conducts a bond hearing and decides whether to release the noncitizen, based on a variety of factors that account for the noncitizen’s ties to the United States and evaluate whether the noncitizen poses a flight risk or danger to the community. *See Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);⁴ *see also* 8 C.F.R. § 1003.19(d) (“The determination of the Immigration Judge as to custody

⁴ The BIA has identified the following non-exhaustive list of factors the immigration judge may consider: “(1) whether the alien has a fixed address in the United States; (2) the alien’s length of residence in the United States; (3) the alien’s family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien’s employment history; (5) the alien’s record of appearance in court; (6) the alien’s criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien’s history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien’s manner of entry to the United States.” *Guerra*, 24 I. & N. Dec. at 40.

status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or [DHS].”).

Section 1226(a) does not provide a noncitizen with a right to release on bond. *See Matter of D-J-*, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does § 1226(a) explicitly address the burden of proof that should apply or any particular factor that must be considered in bond hearings. Rather, it grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release a noncitizen during his removal proceedings. *See id.* If, after the bond hearing, either party disagrees with the decision of the immigration judge, that party may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

Included within the Attorney General and DHS’s discretionary authority is a provision that allows DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2) (“The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary.”). If an automatic stay is invoked, regulations require the DHS to perfect the appeal and require the BIA to track the progress of the custody appeal “to avoid unnecessary delays in completing the record for decision.” 8 C.F.R. § 1003.6(c)(3). The stay lapses in 90 days, unless the detainee seeks an extension of time to brief the custody appeal, 8 C.F.R. § 1003.6(c)(4), or unless DHS seeks, and the BIA grants, a discretionary stay. 8 C.F.R. § 1003.6(c)(5).

3. Gunaydin’s detention is constitutional.

In his Second Amended Petition, Gunaydin asserts his detention violates the Fifth

Amendment. Gunaydin's claims fail as a matter of law because his removal proceedings and detention follow from his criminal record. He is receiving all the process that is due to him under the statutory and regulatory scheme set out by Congress in 8 U.S.C. § 1226(a). Gunaydin is not in prolonged detention. He has been in detention for about eight weeks during which time his removal and detention have been adjudicated in the Immigration Court and are now on appeal to the BIA.

Gunaydin has no right to be released during the pendency of his immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General."). Importantly, "when the Government deals with deportable [noncitizens], the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. And as the Supreme Court has ruled, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and quotation marks omitted). Due process demands only that the government provide "'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'outweighs the individual's constitutionally protected interest in avoiding physical restraint.'" *Prieto-Romero v. Clark*, 534 F.3d 1053, 1065 (9th Cir. 2008) (quoting *Zadvydas v. Davis*, 533 U.S. 679, 690-91 (2001)).

During their removal proceedings, noncitizens like Gunaydin who are detained under § 1226(a) receive numerous procedural safeguards. Gunaydin has had several hearings in Immigration Court and indeed has been successful thus far. But, that does not

mean he should be released. Both the bond/detention issue and the merits of his removal are pending before the BIA and this Court should not intervene with those BIA proceedings. Gunaydin has not been denied due process. The Court should deny the second amended habeas petition.

“Detention of aliens pending their removal in accordance with the INA is constitutional and is supported by legitimate governmental objectives.” *Hope*, 972 F.3d at 328–29 (citing *Demore*, 538 U.S. at 531, and *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)). Indeed, the Supreme Court “has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.” *Demore*, 538 U.S. at 522. Because “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Id.* at 522–23. Accordingly, the Supreme Court has long held that “detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process.” *Id.* at 522–23. This has resulted in the Supreme Court ruling that individuals held during the pendency of removal proceedings may be detained even without an individualized determination as to flight risk or dangerousness. *See, e.g., Carlson v. Landon*, 342 U.S. 524, 528–34, 538 (1952); *Wong Wing*, 163 U.S. at 235 (holding deportation proceedings “would be vain if those accused could not be held in custody pending the inquiry into their true character.”).

Instead of addressing this line of cases, Gunaydin appears to argue that mitigating flight risk and preventing danger to the community can be the only legitimate purposes for immigration detention. That is incorrect. “The enforcement of our immigration laws is the

government's sovereign prerogative, and detention is *necessarily* a part of the removal procedure." *Miranda v. Garland*, 34 F.4th 338, 366 (4th Cir. 2022) (emphasis added). *Carlson* is particularly instructive here. There, four petitioners had been arrested and charged with being members of the Communist Party of the United States. *Id.* at 529. The petitioners challenged their detention without bond while in custody during the pendency of consideration of their deportability. *Id.* The Supreme Court upheld their detention without bond, recognizing that "evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention." *Id.* at 535. Gunaydin has been charged as removable on public safety grounds. "It cannot be expected that the Government should be required in addition to show specific acts of sabotage or incitement to subversive action." *Id.* at 535. Therefore, Gunaydin is wrong and his current detention is not punishment or for deterrence.

Zadvydas v. Davis, 533 U.S. 679 (2001), is not controlling here. In *Zadvydas*, the detention statute at issue, § 1231, concerned post-removal hearing detention where indefinite detention without the possibility of removal posed a "serious constitutional problem." 533 U.S. 678, 690 (2001). But § 1226 does not pose those same problems. The statute authorizes detention until the end of one's removal proceedings. 8 U.S.C. § 1226(a); 8 C.F.R. § 1003.6(a).

In *Farass Ali v. Brott, et al.*, No. 19-1244, 2019 WL 1748712 (8th Cir. Apr. 16, 2019), the Court held the language of 1226(a), which allows for detention during removal proceedings, was clear. Farass Ali had been taken into ICE custody in May 2017 and charged with removability based on fraud or misrepresentation at the time of his entry. *Id.*

at *1. Because he was detained under § 1226(a), Ali received a bond hearing, which the IJ denied. In September 2018, after over a year in detention, Ali filed a habeas petition arguing his detention was unconstitutional. *Id.* The district court granted Ali's petition and ordered him released, reasoning the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001) (which governs § 1231 post-removal order detention), and the doctrine of constitutional avoidance required the Court to read a "reasonableness limitation" into the time an alien could be detained during removal proceedings. *Id.* at *2.

The Eighth Circuit reversed and remanded. The court reasoned, citing *Jennings*, that § 1226 is not susceptible to more than one construction as to the length of detention.

In contrast to the statute analyzed in *Zadvydas*, § 1226(a) limits the period of detention to the period "pending a decision on whether the alien is to be removed from the United States." While this is not subject to precise calculation, it is, nonetheless, a defined period that does have an end.

Id. at *3. With respect to § 1226(c), the *Ali* court continued:

It is significant the Supreme Court has found unambiguous the language of § 1226(c), which requires mandatory detention until a decision regarding removal is reached, and therefore has refused to use constitutional avoidance to read an extra-textual "reasonableness" limitation into the statute. We see no principled basis for viewing § 1226(a)'s text regarding the length of detention any differently.

Id. at *4. Even if this Court were to consider the merits of the detention question here, there is no question that this short period of detention, coupled with the process afforded Gunaydin, is valid. The Court should deny the second amended habeas petition.

4. The automatic stay provision is constitutional as applied to Gunaydin.

The fact that ICE has invoked the automatic stay provision to keep Gunaydin during his bond appeal does not change the constitutionality of his detention. Judge Davis recently

rejected a constitutional challenge to another provision of the regulations implementing the exercise of the Secretary's discretion under § 1226(a). Order, *Ernesto Ruben Barajas Farias v. Garland, et al.*, No. 24-cv04366 (MJD/LIB) (Dec. 6, 2024) (ECF No. 18, hereinafter Order Denying Petition). There, Judge Davis was considering a challenge 8 C.F.R. § 1003.19(h)(2)(i)(C), which allowed DHS to exempt a category of individuals from receiving any bond hearing under 1226(a).

Judge Davis explained the statutory structure of immigration detention as set out in Section 1226 and the accompanying DOJ regulations. Order to Show Cause, 24-cv-4366 (MJD/LIB) (Dec. 4, 2024) (ECF No. 14, hereinafter "Order to Show Cause"). Congress's scheme in 1226 clearly gave discretion to the Attorney General under 1226(a) to make detention decisions for the individuals in removal proceedings. Judge Davis wrote:

In exercising that discretion, the Attorney General has decided that some detainees . . . will not be released on bond, while other detainees will be given a more granular determination. This appears entirely consistent with the delegation of authority to the Attorney General effected by 1226(a).

Order to Show Cause at 3. Judge Davis recognized that this statutory structure was like one Congress set up for the Bureau of Prisons that the Supreme Court upheld in *Lopez v. Davis*, 531 U.S. 230 (2001). Order to Show Cause at 3-4. There, the Supreme Court upheld a BOP regulation categorically denying a sentence reduction provision to a category of inmates, as an exercise of discretion given to it by Congress. Order to Show Cause at 4 (citing *Lopez*, 531 U.S. at 233, 244).

In his Order Denying the Petition, Judge Davis carefully considered and rejected several arguments made by the petitioner. Judge Davis's reasoning focused on the text of section 1226, "which expressly commits" detention authority to the Attorney General's

discretion. Order Denying Petition at 4. The Attorney General’s further delegation, via regulation, to immigration judges is constrained by the Attorney General’s finding that for individuals charged under section 1227(a)(4), no IJ review is allowed. *Id.* at 5. Judge Davis rejected an argument that *Lopez* was not applicable because this detention is in the civil context. *Id.* at 6-7.

Finally, Judge Davis highlighted the Eighth Circuit’s very recent precedent in *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025). The *Banyee* decision rejects a constitutional challenge to mandatory detention under 1226(c) for the length of an individual’s removal proceedings. 115 F. 4th at 931 (“The rule has been clear for decades: ‘[d]etention during deportation proceedings [i]s ... constitutionally valid.’”) (citing *Demore*, 538 U.S. at 523). *Banyee* and *Farass Ali* (*see* ECF 10 at 16-17) make clear that the Eighth Circuit reads section 1226 to allow for constitutional detention during removal proceedings, and this Court’s review of the detention is constrained. Judge Davis distinguished and disagreed with out-of-district authority to the contrary. *Id.* at 7. This Court should adopt Judge Davis’s reasoning and find that Gunaydin’s detention is constitutional as his removal proceedings progress.

5. The Court should reject Gunaydin’s arguments about the automatic stay.

In his second amended petition, Gunaydin makes a number of arguments and claims that the DHS appeal and the invocation of the automatic stay somehow violates Gunaydin’s due process rights. Gunaydin does not cite any circuit court cases and bases his claims on dated district court case law from other districts that also predates the current rendition of

the automatic stay provision which was last amended in the 2006-2008 timeframe. The Court should reject these arguments.

Initially, the current automatic stay procedure appears to have corrected any perceived defects in the prior version and in fact appears to benefit persons in Gunaydin's position. Put simply, the automatic stay provisions demands that DHS immediately within one day give notice of the appeal. 8 C.F.R. § 1003.19(i). This provision simply assures that, if an immigration judge authorizes release, DHS may appeal that release decision. *Id.* In this case, DHS filed the appropriate appeal on a Form EOIR-43 containing the appropriate assurances. DHS perfected the appeal, both parties have filed briefs in the BIA, and the bond redetermination issue is before the BIA. This does not violate due process on its face.

The fact that the appeal involves a simple filing does not matter. Requiring the filing of a rigorous motion for a stay with the Immigration Court would be superfluous and merely delay BIA review of the release decision.

Gunaydin complains that Congress did not specifically approve an automatic stay provision. But, Congress appropriately delegated the rule-making process to DHS. DHS did just that and has amended the regulation several times over the years. The fact that DHS made the decision to appeal within the discretion of DHS and thus not reviewable by this Court does not in itself raise any constitutional concerns; rather, it is entirely consistent with Congress's desire to streamline the process and funnel all reviews to the Courts of Appeal. Now that both parties have briefed the immigration court's release

decision, the merits of the release decision are on review in the BIA and Guhaydin does not appear to have been prejudiced in any way by operation of the automatic stay provision.

Under the regulation, the initial stay is to be for only 90 days and subsequent extensions are to be 30 days. Extension of a stay requires some effort by the DHS or the BIA and request for an extension itself does not seem to implicate any due process concerns. In any specific case, like this one, the BIA will entertain arguments from both parties. Due process is preserved in the regulations.

Gunaydin asserts that, since the stay provision does not provide review by the immigration court or method to challenge the automatic stay in the immigration court or the BIA, this is a clear due process violation. But, Gunaydin has had the opportunity and has in fact filed arguments in the BIA in support of the Immigration Court's bond redetermination. Again, the initial stay and any short extension thereof must be requested and persons in Gunaydin's position can argue against the extension.

Gunaydin also argues that, since the Immigration Court after a bond hearing has already determined that he should be released, the purpose of any stay has already been fulfilled. But, any such bond redetermination and release order necessarily is adverse to DHS and its ability to enforce the immigration laws. Were the Court to adopt Gunaydin's position, it would undermine the statute and DHS's enforcement efforts. As in virtually any situation, the losing party is entitled to at least one appeal and the automatic stay and DHS appeals simply allow for that one review by the BIA.

Gunaydin next argues that the automatic stay provision is *ultra vires* and that DHS has weaponized it to detain individuals like Gunaydin indefinitely and in violation of their

due process rights. Second Amended Petition at 31-32. Gunaydin argues that Congress conferred the power to determine release on bond to the Attorney General through immigration judges, the automatic stay provision effectively makes the individualized custody determination effectively a charade. Nothing can be further from the truth.

The Homeland Security Act of 2002 transferred Section 1226 detention authority from the Attorney General to the Secretary of Homeland Security, and Section 1226 never conferred any authority directly to immigration judges. Congress did not confer detention review authority to immigration judges, but rather to DHS and the Secretary of Homeland Security. More specifically, ICE, under the umbrella of DHS, assumed the detention, removal, enforcement, and investigative functions of the former INS. *See* 6 U.S.C. § 252; 8 C.F.R. § 2.1. Relevant here, ICE officers “make[] an initial custody determination and may allow the alien’s release on bond.” *Hernandez v. Sessions*, 872 F.3d 976, 982, 982 n.6 (9th Cir. 2017); *see* 8 C.F.R. § 236.1(c)(8)). Through regulations, DHS confers authority on immigration judges to provide bond hearings in most cases where the detainee is detained pursuant to Section 1226(a). 8 C.F.R. § 236.1(d); 8 C.F.R. § 1003.19(c). There are exceptions, however. Section 1003.19(h)(2)(i)(C), though infrequently applied, nonetheless clearly withholds authority from immigration judges to review bond decisions for aliens, like Gunaydin, described by Section 1227(a)(4)(A). In cases where an immigration judge’s review of the bond denial is not available, such as here, a detainee has other recourse to seek relief. Petitioner may seek a bond redetermination from ICE “in accordance with part [] 1236 of this chapter.” 8 C.F.R. § 1003.19(h)(2)(i)(C). The plain language of the statute, the enacting regulations, and

Supreme Court precedent all demonstrate that 8 U.S.C. § 1226(a) confers discretionary detention authority on the Secretary of Homeland Security and not immigration judges; and the plain language of the regulations conferred limited authority on immigration judges to review ICE's bond determinations, excepting for aliens described in Section 1227(a)(4). See 8 C.F.R. § 1003.19(h)(2)(i). But the decision remains in ICE's discretion, and an alien has recourse to seek release from ICE again or to challenge his inclusion under Section 1003.19(h)(2)(i) in immigration court and on appeal to the BIA. Section 1226(a) confers no authority directly on immigration judges. *Barajas Farias v. Garland*, Civil No. 24-cv-4366 (MJD/LIB), ECF No. 18 at 5.

In this case, notwithstanding the prohibition in 8 C.F.R. § 1003.19(h)(2), the Immigration Judge in this case actually held a *Joseph* hearing and ordered that Gunaydin be released on bond. The Immigration Judge actually provided Gunaydin more due process than that to which he was entitled. The immigration court acted *ultra vires*, but to the benefit of Gunaydin. DHS has appealed and invoked the automatic stay. The matter is fully briefed and the BIA will determine whether release is appropriate in this case. This Court should permit the BIA appeal to proceed.

Finally, Gunaydin raises some related points about the automatic stay. See Second Amended Petition, ECF No. 37 at 33-48. He also restates many of the same claims and arguments as he did in his two earlier petitions. Respondents would like the opportunity to address those arguments but have run out of time to do so. Respondents incorporate their arguments in their prior returns and memoranda.

CONCLUSION

For all these reasons, and those described in Respondents' earlier returns and memoranda, the Court should deny the second amended habeas petition.

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