**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW HAMPSHIRE**

| | |
|---|---|
| **JOHN DOE**<br><br>*Plaintiff-Petitioner*,<br><br>v.<br><br>**CHRISTOPHER BRACKETT**<br>Superintendent of Strafford County<br>Department of Corrections;<br><br>**PATRICIA H. HYDE**<br>Boston Field Office Director<br>Immigration and Customs Enforcement<br><br>**TODD M. LYONS**<br>Acting Director<br>U.S. Immigration and Customs Enforcement<br><br>**KRISTI NOEM**<br>Secretary<br>U.S. Department of Homeland Security<br><br>*Defendants-Respondents*. | Civ. No: 25-CV-158-PB-TSM |

**RESPONDENTS' REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS**

Petitioner asks this Court to re-evaluate the evidence that he presented to the Immigration Judge (IJ) in support of his motion for a bond redetermination, asking this Court to 1) overrule the IJ's decision and find that his evidence establishes a material change in circumstances, and 2) order the IJ to conduct a new bond hearing. The relief Petitioner seeks is expressly precluded by 8 U.S.C. § 1226(e), and the Court should dismiss the Petition.

## I. Petitioner's reliance on *Wilkinson* in support of his jurisdictional argument is erroneous.

Petitioner cites *Wilkinson v. Garland*, 601 U.S. 209 (2024), for the proposition that this Court has jurisdiction to review the IJ's ruling on his motion for bond redetermination, arguing that "[m]ixed questions of law and fact are 'legal questions' for the purposes of immigration-stripping statutes." Opp. to Mot. to Dismiss, DN 17-1, at 13. Petitioner ignores two important distinctions between the jurisdiction-stripping statute at issue in *Wilkinson*, 8 U.S.C. § 1252(a)(2)(D), and the statute at issue in this case, 8 U.S.C. § 1226(e). First, on its face, 8 U.S.C. § 1252, titled "Judicial review of orders of removal," applies only after a final order of removal has been entered, and Petitioner's removal proceedings remain pending. *See* Declaration of Keith Chan, DN 15-2, ¶ 15; *see also Khalil v. Joyce*, 2025 WL 1232369, *32 (D.N.J. Apr. 29, 2025) (finding that 8 U.S.C. § 1252(b)(9), "as a categorical matter," does not apply to "cases like this one, in which a final order of removal has not been entered"). Second, § 1252(a)(2)(D) expressly carves out authority for courts to review "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals." By contrast, § 1226(e) does not.

In *Wilkinson*, the petitioner sought review of an IJ's denial of his application for cancellation of removal. 601 U.S. at 212. The IJ determined that the petitioner was ineligible for cancellation of removal because he failed to establish that his removal would result in exceptional and extremely unusual hardship to a qualifying relative. *Id.* The question before the Court in *Wilkinson* was "whether the IJ's hardship determination is reviewable under § 1252(a)(2)(D)." *Id.* The Court explained that § 1252 "generally grants federal courts the power to review final orders of removal." *Id.* at 218 (citing 8 U.S.C. § 1252(a)(1). The statute

"then strips courts of jurisdiction for certain categories of removal order[s]." *Id.* (citing 8 U.S.C. § 1252(a)(2)). "Finally, it restores jurisdiction to review 'constitutional questions or questions of law'." *Id.* (citing 8 U.S.C. § 1252(a)(2)(D)). In finding that the IJ's hardship determination was reviewable under § 1252(a)(2)(D), the Court observed that "application of a statutory legal standard . . . to an established set of facts is a quintessential mixed question of law and fact" and "such questions are reviewable under § 1252(a)(2)(D)." *Id.* (citing *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 225 (2020)).

Section 1226(e) contains no such carve out for "questions of law." By contrast, the statute mandates as follows: "No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e) (emphasis added). The IJ's ruling on Petitioner's motion for bond redetermination is a decision regarding Petitioner's detention or release, and thus falls squarely within the category of decisions that is expressly precluded from judicial review under 8 U.S.C. § 1226(e).[1]

While §1226(e) bars judicial review of an IJ's decision relating to bond or detention, the Supreme Court has clarified that § 1226(e) is not a jurisdictional bar to all challenges relating to an alien's detention. *See, e.g., Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018). Specifically, claims that do not challenge a specific action or decision of the Attorney General regarding bond

---

1 Petitioner cites a Ninth Circuit case that extended the holding in *Wilkinson* to find that 1226(e) did not deprive it of jurisdiction to review the BIA's determination regarding an alien's dangerousness in the context of a bond hearing. Pet. Mem., DN 17-1, at 13; *see Martinez v. Clark*, 124 F.4th 775 (9th Cir. 2024). Respondents submit that this non-binding case was wrongly decided, as it goes against the plain language of § 1226(e) and ignores the important textual distinction between §§ 1252(a)(2)(D) and 1226(e).

or detention are ripe for judicial review. In *Jennings*, for instance, the Court considered whether various immigration detention statutes authorized prolonged detention in the absence of individualized bond hearings. The Court explained that "§ 1226(e) precludes an alien from challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release." *Id.* (internal quotation marks and citations omitted). However, the Court distinguished these types of challenges from the issue before it in *Jennings*, emphasizing that "§ 1226(e) *does not* preclude challenges to the statutory framework that permits the alien's detention without bail." *Id.* (emphasis added) (internal quotation marks and citations omitted); *see also Demore v. Kim*, 538 U.S. 510, 516-17 (2003) ("[R]espondent does not challenge a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release. . . [r]ather, respondent challenges the statutory framework that permits his detention without bail."); *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999) ("Section 1226(e) likewise deals with challenges to operational decisions, rather than to legislation establishing the framework for those decisions."); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 689 (D. Mass. 2018) (§ 1226(e) did not bar jurisdiction because petitioner "[was] not challenging the IJ's discretionary decision to keep him in detention," but instead was arguing that the allocation of the burden of proof in "the immigration bond system" was unconstitutional).

Viewed in light of controlling case law, it is clear that Petitioner's challenge here is of the nature expressly barred by § 1226(e). His Petition should be dismissed.

## II. Petitioner's "constitutional claim" conflates the bond analysis with the bond redetermination analysis.

Petitioner cites no authority for the proposition that "the IJ's consideration of alternatives to detention must be an essential component of her decision on whether a new bond hearing is warranted under 8 C.F.R. § 1003.19(e)." Opp. to Mot. to Dismiss, DN 17-1, at 3. The provision that governs subsequent bond redeterminations provides as follows: "After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered *only upon a showing* that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e) (emphasis added). The plain language of the regulation at issue requires the IJ to find that the alien's circumstances have materially changed since the prior bond redetermination. Absent such a showing, the IJ is precluded from holding a new bond hearing. The IJ in this case expressly found that Petitioner had failed to establish a material change in circumstances. *See* Decision of the Immigration Court dated May 19, 2025, DN 13-1, at 2. Accordingly, no further inquiry or analysis was warranted.

In attempting to cast his disagreement with the IJ's decision as a constitutional claim, Petitioner relies on cases finding that, in the context of a *bond hearing* under 1226(a), due process required the IJ to consider alternatives to detention in determining whether the alien was a danger or a flight risk. *See* DN 17-1 at 4 (discussing *Brito v. Garland*, 22 F.4th 240, 254 (1st Cir. 2021)). But danger and flight risk are not part of the *bond redetermination* analysis under 8 C.F.R. § 1003.19(e), and therefore Petitioner's reliance on *Brito* is misplaced. Only if the IJ finds that circumstances have materially changed and orders a new bond hearing is the IJ required to consider danger and flight risk. The IJ here found that Petitioner had not established

a material change in circumstances and thus declined to order a new bond hearing. *See* Decision of the Immigration Court dated May 19, 2025, DN 13-1, at 2 ("Considering *all of the evidence*, the Court found no change in material circumstances to warrant a new custody hearing on March 27, 2025.") (emphasis added). Accordingly, the IJ was not required to make findings regarding danger or flight risk and was not constitutionally required to consider alternatives to detention.

**III. The BIA is empowered to grant meaningful redress.**

In encouraging this Court to hear his unexhausted claim, Petitioner argues that the BIA is without authority to grant meaningful redress because Petitioner has raised a constitutional claim that the BIA is without authority to decide. Opp. to Mot. to Dismiss, DN 17-1, at 4 (citing *Khalil v. Joyce*, 2025 WL 1232369, *32 (D.N.J. Apr. 29, 2025). But he offers no convincing authority for his assertion that the BIA is "not empowered to address" whether the IJ appropriately applied the materiality standard or engaged in the correct legal analysis in deciding his motion for bond redetermination. *Id.* at 2.

The cases that recognize the BIA's lack of jurisdiction over constitutional claims often involve systemic challenges to the statutory scheme itself, a scheme that the BIA is without authority to invalidate or strike down as unconstitutional. *See, e.g., Matter of C-*, 20 I & N Dec. 529, 532 (BIA 1992) ("[I]t is settled that the immigration judge and [the BIA] lack jurisdiction to rule upon the constitutionality of the [Immigration and Nationality] Act and the regulations."). Sometimes, as in *Khalil*, they recognize that it is outside the province of the immigration court to litigate and decide what are essentially Fourth Amendment suppression issues or First Amendment claims in the context of a removal proceeding. *Khalil v. Joyce*, --- F.Supp.3d ----

2025 WL 1232369, *31-33 (D.N.J. Apr. 29, 2025). But nothing in these cases can reasonably be read to cast doubt on the BIA's authority to review the legality of *an IJ's own order*. Questions regarding the IJ's application of the law to the facts or the adequacy of the IJ's legal analysis are *precisely* the types of questions that the BIA is empowered to address and has the unique expertise to decide.

## IV. CONCLUSION

For these reasons, this Court should dismiss the Petition for lack of subject matter jurisdiction and grant Respondent's Motion to Dismiss.

Respectfully submitted,

JOHN J. MCCORMACK
Acting United States Attorney

Dated: June 23, 2025

By: /s/ Kasey A. Weiland
Kasey A. Weiland
Assistant U.S. Attorney
VA Bar #82785
53 Pleasant Street, 4th Floor
Concord, New Hampshire 03301
(603) 225-1552
kasey.weiland2@usdoj.gov