UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.J.O.H.,

Petitioner,

v.

PAUL ARTETA *in his official capacity as* Sheriff of Orange County, New York *and* Warden, Orange County Jail; WILLIAM JOYCE, *in his official capacity as* Acting Field Office Director, New York Field Office, United States Immigration and Customs Enforcement; TODD M. LYONS, *in his official capacity as* Acting Director, United States Immigration and Customs Enforcement; KRISTI NOEM, *in her official capacity as* Secretary of Homeland Security; PAMELA BONDI, *in her official capacity as* United States Attorney General,

Respondents.

No. 25-cv-5278 (ALC)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

J.J.O.H. ("Petitioner" or "J.J.O.H.") seeks emergency relief from this Court because he has been unlawfully detained for three and a half months despite an Immigration Judge twice ordering him released on bond. His detention clearly violates the Due Process Clause, the Administrative Procedure Act ("APA"), and the Immigration and Nationality Act ("INA"). Petitioner is a 31-year-old asylum seeker from Venezuela who had a timely asylum application pending with United States Citizenship and Immigration Services ("USCIS") at the time he was arrested by Immigration and Customs Enforcement ("ICE"). J.J.O.H. was detained by ICE during a home raid merely because he happened to be home when ICE officers entered by force, looking for someone who no longer lived in the house. Despite his lack of criminal history and his pending asylum application, DHS arrested him, along with eight other Venezuelans who were present that day, and charged him with removability pursuant to section 212(a)(6)(A)(i) of the INA for being present in the United States without being admitted or paroled. The Form I-213, "Record of Deportable/Inadmissible Alien" filed by the Department of Homeland Security ("DHS") in support of the sole charge of removability included a conclusory and unsubstantiated allegation that J.J.O.H. was a member of the Tren de Aragua gang.

After a bond hearing on March 18, 2025, the Immigration Judge rejected DHS's false claims that J.J.O.H. was a Tren de Aragua member, and found that he would not present a danger to the public or a flight risk if released on bond, citing his lack of criminal history, his pending asylum application and his community support. DHS, however, invoked an extraordinary and rarely-used 'automatic stay' provision in 8 C.F.R. § 1003.19(i)(2) to keep J.J.O.H. detained while it appealed the Immigration Judge's decision to the Board of Immigration Appeals ("BIA").

In its appeal, DHS argued that the Immigration Judge should have credited DHS's unsupported claim regarding J.J.O.H.'s alleged gang membership. However, the BIA rejected this argument, finding that the Immigration Judge properly determined that J.J.O.H. did not pose a danger to the public. The BIA remanded solely for the Immigration Judge to increase the bond to account for any concerns regarding risk of flight. On remand, the Immigration Judge complied with the BIA's instructions and nearly doubled the bond amount. However, DHS immediately invoked the automatic stay provision again and filed a baseless appeal to the BIA, keeping J.J.O.H. stuck in indefinite detention in violation of his due process rights and the Immigration Judge's discretionary authority to determine custody status.

J.J.O.H. has now been unlawfully detained by ICE for three and a half months since the Immigration Judge first ordered him released on bond. Such an arbitrary and unlawful deprivation of liberty cannot stand under the Constitution and laws of the United States. J.J.O.H. is likely to prevail on his claims that his detention violates the Due Process Clause, the Administrative Procedure Act ("APA"), and the Immigration and Nationality Act ("INA"). He will suffer irreparable harm if he remains subject to arbitrary detention, and both the balance of the equities and the public interest weigh in his favor. This Court should issue an order pursuant to Fed. R. Civ. P. 65 directing Respondents to immediately release J.J.O.H.

STATEMENT OF FACTS

I. Petitioner's Immigration History

J.J.O.H. is a 31-year-old asylum seeker from Venezuela. When he arrived at the border, DHS interviewed him and paroled him into the country. Pet. ¶20. He filed a timely, affirmative application for asylum with USCIS on July 9, 2023, on the basis of persecution he faced as a political opponent of the Maduro regime. Pet. ¶21. He also applied for and obtained work

authorization, and found work in construction and as a delivery person. *Id.* He resided in the Bronx, NY without incident until his arrest by DHS on January 30, 2025. Pet. ¶22.

J.J.O.H. lived in large house with more than ten different rooms, each of which were rented separately. Pet. ¶23. Despite having entered the house to look for someone who no longer lived there, DHS agents rounded up J.J.O.H. and eight other Venezuelans present in the house, handcuffing them and demanding to see their identification documents. *Id.* J.J.O.H. and the eight other Venezuelans were arrested by DHS. Petitioner has remained in ICE custody since his arrest. *Id.*

J.J.O.H. was then placed in removal proceedings and charged with removability pursuant to section 212(a)(6)(A)(i) of the INA for being present in the United States without being admitted or paroled. Pet. ¶24. The I-213 filed by DHS in support of the sole charge of removability contained a conclusory and unsupported assertion that J.J.O.H. "has been identified as a Tren De Aragua gang member." ECF No. 1-1, I-213, dated January 30, 2025. J.J.O.H. has no criminal history in the United States or Venezuela, nor had he been arrested prior to his encounters with DHS. Pet. ¶26.

II. An Immigration Judge Has Twice Ordered Petitioner Released On Bond

At a custody re-determination hearing on March 18, 2025, the Immigration Judge considered evidence submitted by both J.J.O.H. and DHS, including J.J.O.H.'s testimony, and found he had shown by clear and convincing evidence "that he does not represent a danger to the community and is not a flight risk." ECF No. 1-2, First Bond Decision at 1. In finding that J.J.O.H. is not a danger to the community, the Immigration Judge relied on the fact that he has no criminal history in the United States or in Venezuela, and that he has work authorization, occasional employment with DoorDash and stable housing. The Immigration Judge also noted the numerous letters of support "detailing his good moral character." *Id.* at 2.

DHS claimed that J.J.O.H. was classified as a member of Tren de Aragua "because he was apprehended at a residence where other members of Tren de Aragua were located." *Id.* at 3. However, none of the other people apprehended at the residence were identified as members of Tren de Aragua, nor was the person who was the subject of the alleged warrant that triggered the home raid. *Id.* Instead, "the extent of the information listed [on the I-213] about these individuals is simply that they were 'a positive match for being in the United States illegally.'" *Id.* The Immigration Judge found that "it became abundantly clear throughout this proceeding that the Department was not able to provide meaningful justification for [the gang] assertion," and that J.J.O.H. gave "credible testimony stating that he is not and has never been a member of Tren De Aragua." *Id.* at 3-4.

The Immigration Judge also found that J.J.O.H. does not pose a flight risk, citing the fact that after entering the country, he timely applied for asylum and work authorization and has a stable place to live with his partner, who provided both a letter from her landlord and proof of her income. *Id.* at 4. The bond decision also noted that "as he has a viable path for relief pending, this makes him more likely to show up for future proceedings." *Id.* The Immigration Judge ordered J.J.O.H. released on $5,000 bond.

DHS, however, invoked a seldom used 'automatic stay' provision in 8 C.F.R. § 1003.19(i)(2) to keep J.J.O.H. detained and prevent bond from being paid. In general, prior to this year, absent individualized and extraordinary circumstances, when an Immigration Judge granted a non-citizen bond, that person was released from ICE custody once bond was paid even where DHS appealed the bond decision to the BIA. The automatic stay provision was rarely employed. Now it is being exploited to unlawfully hold non-citizens, like Petitioner, in ICE custody. On May 19, 2025, the BIA found that the Immigration Judge "properly held that

[J.J.O.H.] met his burden of proving that his release was not a danger to the community" but remanded to the Immigration Judge to set bond in an amount higher than $5,000 to ensure his presence at future court appearances. ECF No. 1-3, BIA Decision at 2, 3.

On May 30, 2025, following the instructions in the BIA's decision, the Immigration Judge nearly doubled the bond previously set, ordering J.J.O.H. released on $9,500 bond. ECF No. 1-4, Second Bond Decision. The Immigration Judge noted that she considered both the BIA's concerns regarding flight risk—which the BIA specifically found would be mitigated by setting a higher bond amount—and the evidence that he "has a pending application for relief alongside a filed TPS application, has been granted work authorization, and his sponsor has agreed to allow him to reside with her should he be released." *Id.* at 2. The Immigration Judge found that J.J.O.H. "has met his burden of establishing that any flight risk concerns can be mitigated by his posting bond in the amount of $9,500." *Id.* She found that "this would be a significant amount for [Petitioner] given his financial means and that "if the bond amount were to be set any higher, [Petitioner] would be unable to pay the amount, rendering the granting of bond moot." *Id.*

Despite the Immigration Judge's clear compliance with the BIA's instructions, DHS again invoked the automatic stay provision in 8 C.F.R. § 1003.19(i)(2) to prevent J.J.O.H. from being released on bond and appealed the Immigration Judge's bond decision once again. As a result, five months after DHS arrested him, and three and a half months after an Immigration Judge ordered him released on bond, J.J.O.H. remains in detention despite the BIA's order upholding the Immigration Judge's decision finding he is not a danger to the public and granting bond.

III. The History of the 'Automatic Stay' Provision.

Section 236(a) of the INA (codified as 8 U.S.C. § 1226(a)) confers discretion to the Attorney General and DHS to make decisions in some circumstances as to the detention and bond of people charged with removal actions while they await removal decisions. The INA grants

people detained pursuant to 8 U.S.C. § 1226(a) the right to seek review of the initial custody determination before an immigration judge at any time. 8 U.S.C. §§ 1226(a)(1), (c)(1); 8 C.F.R. § 1003.19(a). If an immigration judge finds that a detainee is eligible for bond, DHS may appeal the decision of the immigration judge to the BIA. 8 C.F.R. § 1003.19(f).

Prior to 2001, detainees subject to discretionary detention under 8 U.S.C. § 1226(a) who were then granted bond by an immigration judge remained detained only if the BIA granted a request to stay the bond order. *See, e.g.*, 8 C.F.R. § 3.19(i)(2) (1998) (permitting the use of automatic stays only where the noncitizen was subject to a mandatory detention statute). On October 31, 2001, following the terrorist attacks of September 11, 2001, the Immigration and Naturalization Service ("INS")—an agency whose functions now fall under DHS's purview—implemented an interim rule to expand its authority to issue automatic stays to prevent immigration judges' custody decisions from being implemented pending appeal. *See Executive Office for Immigration Review; Review of Custody Determination*, 66 Fed. Reg. 54909, 54910 (Oct. 31, 2001). For circumstances in which the INS was previously required to seek an emergency stay from the BIA to prevent the effectuation of an immigration judge's order for release on bond, the new rule allowed the INS to unilaterally invoke an emergency stay at its own discretion to prevent the detainee's release in any case where it determined that a detainee should not be released or when bond had been set in the amount of $10,000 or more. *Id.* The INS emphasized that the stay was "a limited measure," to be used only "where the Service determines that it is necessary to invoke the special stay procedure pending appeal." *Id.*

The new automatic stay regulation raised due process concerns from its inception. For example, a former General Counsel of INS, David Martin, provided testimony in 2003 to the National Commission on Terrorist Attacks in which he voiced his concern regarding the agency's

use of automatic stays. *See* David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate, Testimony Before the National Commission on Terrorist Attacks Upon the United States, December 8, 2003*, 18 Geo. Immigr. L.J. 305 (2004). He stated that "there are indications that the automatic stay mechanism is now being used routinely and without careful calculation by the enforcement agencies of the individual merits that led the [immigration judge] to reduce the bond in the first place." *Id.* at 313. He urged the agency to repeal the automatic stay provision and revert to the old process of seeking emergency stays from the BIA, which, he believed, would provide "sufficient safeguards, both of public safety and of the core interest in liberty." *Id.*

During this same period, several federal district courts concluded that the automatic stay provision violated the due process rights of people in ICE custody. In *Ashley v. Ridge*, 288 F. Supp. 2d 662, 668 (D.N.J. 2003), for example, the court found that the automatic stay provision "render[ed] the Immigration Judge's bail determination an empty gesture," and violated a detainee's substantive and procedural due process rights. *See also Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003) (finding the automatic stay provision unconstitutional); *Zabadi v. Chertoff*, No. 05-CV-1796 (WHA), 2005 WL 1514122 (N.D. Cal. June 17, 2005) (same); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (same).

In 2006, the Department of Justice promulgated its final rule. *See Executive Office for Immigration Review; Review of Custody Determination*, 71 Fed. Reg. 57873 (Oct. 2, 2006). The final rule included the language of the interim rule, with some notable changes. First, "to allay possible concerns that in some case the automatic stay might be invoked. . . without an adequate factual or legal basis," the final rule added a requirement that the decision to invoke an automatic stay "is subject to the discretion of the Secretary [of DHS]," and a senior legal official at DHS

must certify "there is factual and legal support justifying the continued detention." *Id.* at 57874. Second, the final rule imposed some time limitations. The final rule provides that DHS's order of automatic stay will lapse ninety days after the filing of the notice of appeal if the BIA has not acted on the custody appeal. 8 C.F.R. § 1003.6(c)(4) (2006). Thus, the regulations also provide DHS the unilateral authority to automatically stay an immigration judge's bond order and keep the person who was granted bond detained pending DHS's appeal to the BIA. *See* 8 C.F.R. § 1003.19(i)(2).

However, the rule actually allows for continued detention well beyond ninety days. DHS may seek an additional discretionary stay from the BIA to prevent the stay from lapsing if the BIA has not yet acted on the appeal. To do so, DHS can submit a motion to the BIA asking for a discretionary stay pending the BIA's decision on the custody appeal. The automatic stay would then remain in place for up to thirty additional days to permit the BIA time to rule on the stay motion. 8 C.F.R. § 1003.6(c)(5). If the BIA denies the discretionary stay, fails to act upon it within the requisite period, or issues a decision upholding the immigration judge's custody ruling, then the automatic stay would remain in place for an additional five business days (potentially 7 calendar days) to permit the Secretary or a designated DHS official to decide whether to refer the decision for the Attorney General's review. 8 C.F.R. § 1003.6(d). If the agency decides to refer the decision, then the automatic stay would remain in place for an additional fifteen business days (potentially nineteen calendar days) to permit the Attorney General time to consider the merits of the referred decision and decide whether to act on the referred decision. *Id.* Therefore, although DHS's automatic stay order could lapse after ninety days without action from the BIA, DHS could also maintain the automatic stay for a total of 140-146 days without judicial review of any kind.

Additionally, nothing in the regulations prevents DHS from invoking the automatic stay provision and appealing the immigration judge's bond decision to the BIA multiple times in a row,

as they have in the instant case. The result is indefinite detention. DHS has subjected J.J.O.H. to unlawful detention for three and a half months after the Immigration Judge initially ordered him released on bond with no end in sight.

IV. J.J.O.H. Has Experienced Severe Emotional and Physical Distress Because of His Unlawful Detention

ICE violently upended the new life J.J.O.H. was building when it arrested him in a raid on his home. Prior to his arrest, J.J.O.H. had been granted parole and was permitted to be in the United States for his affirmative asylum application to be adjudicated. *See* Ex. A., J.J.O.H. Decl. ¶3. He was granted work authorization and was working "at whatever job [he] could get," including in construction and as a delivery driver to help support family members, including his ten-year-old daughter. *Id.* ¶23.

Now, in detention, J.J.O.H. struggles with hopelessness and "[f]or the first time, [he's] thought about what it would be like to end [his] life." *Id.* ¶16. He struggles with an impossible choice between remaining in indefinite detention where he experiences suicidal ideation or choosing to give up and be removed to Venezuela where he would be tortured or killed. *Id.* ¶¶17,19. He also worries about the stress and financial hardship his detention has caused his family. *Id.* ¶22. Every time he speaks his mother, "she breaks down in tears" and her health has deteriorated. *Id.* When he is able to speak to his daughter she always asks him when he is "getting out of that bad place," but he does not know what to tell her. *Id.*

He has also been detained in inhumane conditions. He is in nearly constant pain from two broken teeth, headaches and a knee injury, but has not received sufficient access to medical care. *Id.* ¶18. ICE has transported him on multi-day trips across the country and back, shackled by his wrists and ankles without notice or explanation, terrified he was being unlawfully deported. *Id.* ¶¶10, 11. He does not have sufficient access to food or hygienic products, is frequently in isolated

conditions and he is "surrounded by . . . fighting and physical violence." *Id.* ¶¶20, 21.

ARGUMENT

J.J.O.H. is entitled to a temporary restraining order and preliminary injunction directing his immediate release from Respondents' arbitrary and unlawful detention. To warrant preliminary relief, J.J.O.H. "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tip in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 273-274 (2d Cir. 2021); *New York v. U.S. Dep't of Educ.*, 477 F. Supp. 3d 279, 293 (S.D.N.Y. 2020). The balance of equities and the public interest factors merge in cases against the government. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The standards for issuing a temporary restraining order and a preliminary injunction "are identical." *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l, Ltd.*, 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002). In J.J.O.H.'s case, all four factors weigh in favor of a temporary restraining order or preliminary injunction.

I. J.J.O.H. is likely to succeed on the merits of his petition.

A. J.J.O.H. is likely to succeed on his claim that his detention violates his right to procedural due process.

J.J.O.H. is likely to succeed on his claim that his detention violates his right to procedural due process because DHS invoked the automatic stay provision to unilaterally detain him in violation of two decisions from an Immigration Judge ordering his release on bond, as well as the BIA's decision upholding the Immigration Judge's bond grant.[1] The time limits set forth in the

[1] As the Supreme Court has repeatedly instructed, freedom "from government custody, detention, or other forms of physical restraint" is at "the heart" of what the Due Process Clause protects. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). This is particularly true in the context of

automatic stay provision do not remedy the violation as DHS may continually appeal the immigration judge's grant of bond, resulting in indefinite detention. In *Gunaydin v. Trump*, the court recently considered a similar circumstance, where the petitioner was detained pursuant to the automatic stay provision in spite of two rulings from an immigration judge ordering his release. No. 25-cv-01151, 2025 WL 1459154 (D. Minn. May 21, 2025). That court concluded that the petitioner's detention pursuant to the automatic stay provision violated his procedural due process rights and ordered his immediate release. *Id.* at 10.

To determine whether a civil detention violates a detainee's procedural due process rights, courts apply the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020) (applying *Mathews* test to a challenge involving discretionary noncitizen detention). Pursuant to *Mathews*, courts weigh the following three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

The first *Mathews* factor requires consideration of the private interest affected by Respondents' invocation of the automatic stay provision. This factor weighs heavily in Petitioner's

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civil detention. *See, e.g., Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (requiring "strict procedural safeguards" to justify involuntary civil commitment of certain sex offenders); *Foucha*, 504 U.S. at 81-82, 86 (holding unconstitutional a state civil commitment "statute that place[d] the burden on the detainee to prove that he is not dangerous").

favor because J.J.O.H.'s interest in being free from physical detention is "the most elemental of liberty interests." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

Additionally, the conditions of J.J.O.H.'s detention add weight to his private interest. When assessing this factor, courts consider the conditions under which detainees are currently held, including whether a detainee is held in conditions indistinguishable from criminal incarceration. *See Velasco Lopez*, 978 F.3d at 852 (noting that a noncitizen was incarcerated in conditions identical to those imposed on criminal defendants after being convicted of "violent felonies and other serious crimes"). J.J.O.H. is being detained in the Orange County Jail, a jail that houses civil detainees in the immigration context, pre-trial criminal arrestees, and incarcerated prisoners serving criminal sentences. He is experiencing all the deprivations of incarceration, including loss of contact with his daughter, mother and brother, complete loss of income, lack of privacy, and the lack of freedom of movement.

Beyond these common deprivations of incarcerations, he is suffering because of inhumane conditions. While incarcerated, he has been shackled at both his wrists and ankles for extended periods of time, denied access to medical care for painful medical conditions, been held in chaotic and violent conditions, and not given sufficient food or hygienic supplies. *See* Ex. A, J.J.O.H. Decl. ¶¶10, 11, 18, 20, 21. His experience is not an isolated one. Orange County Jail has been the subject of an extensive complaint to DHS's Office of Civil Rights and Civil Liberties for flagrant civil rights violations, including medical neglect, lack of access to food that is not rotten or expired, and abuse, harassment, and retaliation by jail personnel.[2]

[2] *See* Mar. 21, 2023 CRCL Complaint Regarding Ongoing Abuse at Orange County Jail, https://www.law.nyu.edu/sites/default/files/2023.March_.21.%20CRCL%20Complaint%20re%20OCCF.pdf.

The second *Mathews* factor requires courts to assess whether the challenged procedure creates a risk of erroneous deprivation of individuals' private rights and the degree to which alternative procedures could ameliorate these risks. The automatic stay provision of Section 1003.19(i)(2) creates a substantial risk of erroneous deprivation of Petitioner's interest in being free from arbitrary confinement because the only people adversely effected by DHS's automatic stay are people who have already prevailed at a judicial hearing. DHS does not invoke this provision to stay decisions that are favorable to it. "Thus, the challenged regulation permits an agency official who is also a participant in the adversarial process to unilaterally override the immigration judge's decisions. Such a rule is anomalous in our legal system." *Gunaydin*, 2025 WL 1459154, at *7; *see also Zavala*, 310 F. Supp. 2d at 1078 (noting that the automatic stay provision "creates a potential for error because it conflates the functions of adjudicator and prosecutor"); *Ashley*, 288 F. Supp. 2d at 671 (concluding that the regulation creates a "patently unfair situation by taking the stay decision out of the hands of the judges altogether and giving it to the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified") (quotation omitted).

Regarding the value of additional safeguards, there is a clear alternative to the automatic stay set forth in Section 1003.19(i)(1) which also provides a process by which DHS can request an emergency stay of an immigration judge's custody determination from the BIA. Requesting a stay from an appellate court is the appropriate procedure because "a stay of an order directing the release of a detained individual is an especially extraordinary step" and such a decision should not be in the hands of the prosecutorial agency. *Gunaydin*, 2025 WL 1459154, at *9 (internal quotations omitted).

The third *Matthews* factor, the Government's interest, also weighs in favor of granting this petition. The Government's only legitimate interest at stake is its interest in ensuring that people facing removal do not endanger the public or abscond during the pendency of their removal cases. In this case, the Immigration Judge has already emphatically determined twice that J.J.O.H. has proved he does not pose a danger to the public, and that any flight risk is mitigated by bond. The BIA agrees. Therefore, J.J.O.H.'s detention violates his procedural due process rights.

B. J.J.O.H. is likely to succeed on his claim that his detention violates his right to substantive due process.

J.J.O.H. is likely to succeed on the merits of his claim that his detention violates the substantive component of the Due Process Clause because both the Immigration Judge and the BIA have determined that J.J.O.H.'s detention without bond does not bear a reasonable relation to the purposes of civil immigration detention.

At a bare minimum, "the Due Process Clause includes protection against *unlawful or arbitrary* personal restraint or detention." *Zadvydas v. Davis*, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) (emphasis added). To meet the strictures of due process, J.J.O.H.'s detention must "bear[] a reasonable relation to the purpose[s]" of civil immigration detention, which the Supreme Court has identified as mitigating flight risk and mitigating danger to the community. *Id.* at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715 (1972)) (quotation marks omitted). An Immigration Judge—after an adversarial hearing—found that J.J.O.H. had met his burden to prove he was neither a danger to the community nor a flight risk. That Judge has *twice* ordered J.J.O.H.'s release on bond and DHS continues to invoke the automatic stay provision, overruling and rendering meaningless the Immigration Judge's bond determination, as well as the BIA's decision affirming the decision to release J.J.O.H. on bond.

Several district courts have considered similar challenges and found that the automatic stay provision violates detainees' substantive due process rights. *See, e.g.*, *Ashley*, 288 F. Supp. 2d at 669 (finding a substantive due process violation where the automatic stay provision was invoked to detain a petitioner with a criminal conviction even though the immigration judge's bond decision addressed any concerns regarding danger to the public or flight risk); *Zavala*, 310 F. Supp. 2d at 1077 (finding a substantive due process violation where a petitioner with one criminal conviction was detained pursuant to the automatic stay provision after an immigration judge had ordered him released on bond because no "'special justification' exists which outweighs Petitioner's constitutional liberties so as to justify his continued detention without bail."). In light of the Immigration Judge's individualized findings, which the BIA affirmed (aside from an instruction to increase the amount of bond), Respondents have not and could not show that J.J.O.H.'s detention without bond is necessary to prevent flight or to mitigate danger. Accordingly, the "application of the automatic stay is certainly 'excessive in relation to the regulatory goal Congress sought to achieve.'" *Ashley*, 288 F. Supp. 2d at 669 (citing *United States v. Salerno,* 481 U.S. 739, 747 (1987).

C. J.J.O.H. is likely to succeed on his claim that his detention violates the APA.

The Administrative Procedure Act ("APA") enables courts to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2). After Respondents' first use of the automatic stay provision to detain Petitioner, the BIA found the Immigration Judge's decision to release him on bond was correct, but remanded for the Immigration Judge to increase the amount of bond. The Immigration Judge did just that, nearly

doubling the amount of bond previously set, after conducting a second adversarial hearing and carefully considering Petitioner's financial means. Because an appellate court already reviewed the Immigration Judge's decision to grant bond and the Immigration Judge acted in accordance with the BIA's express instructions, Respondents' current invocation of the automatic stay provision to appeal the bond decision yet again was arbitrary and capricious.

D. J.J.O.H. is likely to succeed on his claim that his detention violates the INA.

An agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quotation marks and citation omitted). Here, DHS has done just that.

Section 1226(a) of Title 8 of the U.S. Code grants immigration judges the authority to re-determine custody status unless mandatory detention applies. The INA also empowers the BIA to review immigration judges' custody redeterminations. Petitioner has been properly granted bond *twice* by an Immigration Judge. The BIA has also affirmed the Immigration Judge's decision to permit Petitioner to be released on bond. Accordingly, DHS's mandate that Petitioner must be held without bond in violation of the orders of both the Immigration Judge and the BIA is *ultra vires* to the INA. DHS's actions eliminate the discretionary authority of immigration judges to determine whether an individual may be released, thereby exceeding the authority bestowed upon the agency by Congress. Thus, Petitioner's detention violates Section 1226(a), and he is entitled to immediate release from custody.

II. J.J.O.H. will suffer irreparable harm if a TRO and/or preliminary injunction is not granted.

Absent a preliminary injunction directing his immediate release, J.J.O.H. will continue to suffer irreparable harm from Respondents' flagrant violation of his constitutional rights, the APA

and the INA. Respondents' deprivation of Petitioner's liberty constitutes irreparable harm. No right is more fundamental than the right to freedom from unreasonable government detention. *See Zadvydas*, 533 U.S. at 690. Unlawful immigration detention is in itself irreparable harm. *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (holding that plaintiffs demonstrated "irreparable harm by virtue of the fact that they are likely to be unconstitutionally detained for an indeterminate period of time"); *Matacua v. Frank*, 308 F. Supp. 3d 1019, 1025 (D. Minn. 2018) (granting a preliminary injunction for an immigration detainee and concluding that "loss of liberty . . . is perhaps the best example of irreparable harm"). For every day that Petitioner remains in detention, this irreparable harm compounds.

J.J.O.H. will separately suffer irreparable harm because of the severe emotional and physical toll of his detention. For the first time in his life, he is experiencing suicidal ideation. *See* Ex. A ¶16. He cannot work, so he can no longer help support his daughter and his mother. *Id.* ¶23. He struggles with the pain of untreated medical conditions, the insufficient food and hygienic products, and the isolation and violence of detention. *Id.* ¶¶18, 20, 21. These harms have compounded, and as J.J.O.H.'s detention inexplicably continues despite him having twice been ordered released on bond, his mental state worsens, he continues to lose weight and he thinks about giving up. *Id.* ¶¶16, 17, 19. J.J.O.H. will continue to suffer irreparable harm absent action by the Court.

III. The remaining factors weigh in favor of a TRO and/or preliminary injunction.

The remaining factors—the possibility of harm to other interested parties and the public interest—also weigh in favor of granting a TRO and preliminary injunction directing J.J.O.H.'s immediate release. *First*, Respondents will not be harmed by releasing J.J.O.H. By granting immigration judges the authority to re-determine custody status unless mandatory detention applies, Congress clearly indicated that their expertise should govern these custody decisions. The

government therefore does not have an interest in detaining a noncitizen already ordered released on bond by an Immigration Judge and the BIA. In J.J.O.H.'s case, both the Immigration Judge and the BIA found that he had met his burden to prove he was not a danger to the public and that any flight risks concerns would be mitigated by bond. The injuries to J.J.O.H. caused by his unlawful detention far outweigh any prejudice the government may claim to suffer in releasing him.

Second, the public interest is served by a TRO and preliminary injunction ordering J.J.O.H.'s release because "[t]he public interest is best served by ensuring the constitutional rights of persons within the United States are upheld." *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2537266 at *13 (S.D.N.Y. May 23, 2018). J.J.O.H. shows a clear likelihood of success on the merits of his unlawful detention claims and will clearly suffer irreparable harm if the Court does not order his release. Accordingly, preventing the ongoing deprivation of J.J.O.H.'s right to liberty serves the public interest. *See e.g., Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 343 (S.D.N.Y. 2018) ("It is evident that '[t]here is generally no public interest in the perpetuation of unlawful agency action.'") (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). The public has an interest in ensuring that the government respect fundamental due process principles so that no one can be subject to unlawful detention and that no one can be arbitrarily deprived of their liberty.

IV. The proper remedy is immediate release.

The proper remedy for Respondents' lawless detention of J.J.O.H. is to order his release. "It is clear, not only from the language of [28 U.S.C.] §§ 2241(c)(3) and 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also Munaf v. Geren*, 553 U.S. 674, 693 (2008) ("The typical remedy [for unlawful detention] is, of course,

release.") (citation omitted); *Martinez v. McAleen*, 385 F. Supp. 3d 349, 372 (S.D.N.Y. 2019) ("[T]here is no appropriate remedy to fix the egregious violations of Petitioner's fundamental rights other than for the Court to issue his immediate release from custody").

J.J.O.H.'s claims strike at the heart of the freedom that habeas corpus has historically been used to vindicate. Despite prevailing at two adversarial bond hearings, he is being unilaterally detained by DHS because of baseless accusations of gang membership that both the Immigration Judge and the BIA have rejected. The appropriate remedy is immediate release.

CONCLUSION

J.J.O.H. merits a TRO and preliminary injunction directing his release. He shows a clear likelihood of success on his claim that Respondents are detaining him in clear violation of the Due Process Clause. J.J.O.H. also shows a likelihood of success on his claims that his detention violates the APA and the INA. The other factors for a temporary restraining order and/or preliminary injunction weigh in his favor. J.J.O.H. therefore respectfully requests that the Court issue an order pursuant to Fed. R. Civ. P. 65 directing Respondents to immediately release J.J.O.H.

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Respectfully submitted,

/s/ Alyssa Briody

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