UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.J.O.H.,

Petitioner,

- against -

PAUL ARTETA; *et al.*,

Respondents.

No. 25 Civ. 5278 (ALC)

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

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The government, by its attorney, Jay Clayton, United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in opposition to the motion for a preliminary injunction, filed on July 3, 2025, by petitioner J.J.O.H. ("Petitioner").

PRELIMINARY STATEMENT

Petitioner is an alien who is currently in removal proceedings and has been detained by U.S. Immigration and Customs Enforcement ("ICE") under 8 U.S.C. § 1226(a) for less than six months. He received an initial bond hearing in March 2025, at which an immigration judge set a $5,000 bond; ICE appealed that decision and invoked an automatic stay, authorized by regulation, of the immigration judge's decision pending appeal. In mid-May, the Board of Immigration Appeals ("BIA") sustained ICE's appeal in part, finding that the immigration judge erred in its flight risk determination by setting only a $5,000 bond, and remanded for the immigration judge to set a higher bond. On May 30, the immigration judge held a hearing and determined that a $9,500 bond was sufficient to mitigate Petitioner's risk of flight. ICE again immediately appealed and again invoked an automatic stay of that custody order to maintain the status quo while it appeals—to date, it has been 45 days since the immigration judge set that bond (and only 33 days since Petitioner attempted to post it).

Petitioner brings this action to challenge his continued detention on account of ICE's use of the automatic stay provision, arguing that it violates due process and 8 U.S.C. § 1226(a). At bottom, Petitioner argues that it is unfair for ICE to unilaterally stay the immigration judge's custody order, and instead argues that if ICE wishes to obtain a stay, it should be required to file a motion for a discretionary stay with the BIA. But today, July 14, ICE did just that—it filed its appellate brief with the BIA along with a separate motion for a discretionary stay of the immigration judge's custody order pending resolution of the appeal. For the reasons that follow, the Court should deny Petitioner's motion for a preliminary injunction.

BACKGROUND

A. Procedural History

On June 24, 2025, Petitioner filed his petition for a writ of habeas corpus under 28 U.S.C. § 2241. Pet. (ECF No. 1). His petition asserts four counts: (1) a procedural due process claim, *id.* ¶¶ 62-65; (2) a substantive due process claim, *id.* ¶¶ 66-71; (3) a statutory claim, *id.* ¶¶ 72-76; and (4) a claim under the Administrative Procedure Act ("APA"), *id.* ¶¶ 77-80. Petitioner seeks an order directing that he be released from detention "on his own recognizance or under parole, bond, or reasonable conditions of supervision." *Id.* (Prayer for Relief).

On July 3, 2025, Petitioner filed a motion for a temporary restraining order ("TRO") and a preliminary injunction. Pet'r Mot. (ECF Nos. 16, 17). The motion seeks the ultimate relief sought in the habeas petition, *i.e.*, Petitioner's immediate release from detention. *Id.*

On July 3, 2025, the Court denied Petitioner's motion for a TRO and directed briefing on the motion for a preliminary injunction. ECF No. 20.

B. Legal Background

For more than a century, the immigration laws have authorized immigration officials to charge aliens as removable from the country, to arrest aliens subject to removal, and to detain aliens for removal proceedings. *See Demore v. Kim*, 538 U.S. 510, 523-26 (2003); *Abel v. United States*, 362 U.S. 217, 232-37 (1960) (discussing longstanding administrative arrest procedures in deportation cases). In the Immigration & Nationality Act ("INA"), Congress enacted a multi-layered statutory scheme for the civil detention of aliens 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. "Detention during removal proceedings is a constitutionally valid aspect of the deportation process." *Velasco Lopez v. Decker*, 978 F.3d 842, 848 (2d Cir. 2020) (citing *Demore*, 538 U.S. at 523); *see Demore*, 538 U.S. at 523 n.7 ("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 [the] 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 for arresting and detaining . . . aliens pending their removal." *Jennings v. Rodriguez*, 583 U.S. 281, 288 (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) (emphasis added). The Attorney General and the Department of Homeland Security ("DHS") thus have broad discretionary authority to detain an alien during removal proceedings.[1] *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*, 586 U.S. 392, 409 (2019) (highlighting that "subsection (a) creates authority for *anyone's* arrest or release under § 1226—and it gives the Secretary broad discretion as to both actions"). When an alien 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*, 594 U.S. 523, 527 (2021) (citing 8 C.F.R.

[1] 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 aliens 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).

§§ 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 alien, 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 an alien should remain detained during the pendency of his removal proceedings, the alien 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 alien, based on a variety of factors that account for the alien's ties to the United States and evaluate whether the alien poses a flight risk or danger to the community. *See Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);[2] *see also* 8 C.F.R. § 1003.19(d) ("The determination of the Immigration Judge as to custody 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]."). The immigration judge may also "consider the amount of bond that is appropriate." *Matter of Guerra*, 24 I. & N. Dec. at 40.

Section 1226(a) does not provide an alien 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); *cf. 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."). Nor does § 1226(a) explicitly address the burden of proof that should apply or any particular factors that must be considered in

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[2] The BIA has identified the following non-exclusive 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 to 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." *Matter of Guerra*, 24 I. & N. Dec. at 40.

bond hearings. Rather, it grants DHS and the Attorney General broad discretion to determine whether to detain or release an alien during his removal proceedings. *See id.* In the exercise of this broad discretion, and consistent with the regulations, the BIA—whose decisions are binding on immigration judges—has placed the burden of proof on the alien, who "must establish to the satisfaction of the Immigration Judge and this Board that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Matter of Guerra*, 24 I. & N. Dec. at 38; *accord Matter of Adeniji*, 22 I. & N. Dec. at 1114. The BIA's "to the satisfaction" standard is equivalent to a preponderance of the evidence standard. *See Matter of Barreiros*, 10 I. & N. Dec. 536, 537 (BIA 1964).[3]

If, after the bond hearing, the immigration judge concludes that the alien should not be released, or the immigration judge has set a bond amount that the alien believes is too high, the alien may appeal that decision to the BIA within 30 days of the order. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). Moreover, if the alien's circumstances materially change following his initial bond hearing, he may request a subsequent hearing, *see* 8 C.F.R. § 1003.19(e), and the outcome of that hearing is also appealable to the BIA, *see Matter of Uluocha*, 20 I. & N. Dec. 133, 134 (BIA 1989). The BIA is required to decide appeals as soon as practicable, with a priority given to cases or custody appeals involving detained aliens. *See* 8 C.F.R. § 1003.1(e)(8).

If, on the other hand, the immigration judge concludes that the alien has met his burden and sets a bond for the alien's release, DHS may also appeal that decision to the BIA. *See* 8 C.F.R.

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[3] The Second Circuit has not issued a generally applicable rule with respect to the allocation and quantum of the burden of proof at initial § 1226(a) immigration court bond hearings. Rather, the Second Circuit held only that when an alien demonstrates that his detention has become unreasonably prolonged (in that case, for 15 months) in violation of due process, he is entitled to receive a new bond hearing at which DHS bears the burden of demonstrating by clear and convincing evidence that the alien is either a danger to the community or a flight risk. *See Velasco Lopez*, 978 F.3d at 855.

§§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3). As a general matter, either party's appeal to the BIA of a bond decision "shall not operate to delay compliance with the order . . . nor stay the administrative proceedings or removal." 8 C.F.R. §§ 236.1(d)(4), 1236.1(d)(4). However, when an immigration judge grants an alien bond, DHS may file a request with the BIA for a discretionary stay of the immigration judge's custody order, and the BIA has the authority to stay the immigration judge's order. 8 C.F.R. § 1003.19(i)(1). In certain circumstances, in its discretion, DHS may instead invoke an automatic stay of the immigration judge's custody order, provided that DHS files a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and so long as DHS files a notice of appeal with the BIA within ten business days of the immigration judge's order. *See* 8 C.F.R. §§ 1003.6(c); 1003.19(i)(2). The stay remains in effect until the BIA decides the appeal, or 90 days from the filing of the appeal, whichever occurs first. 8 C.F.R. § 1003.6(c)(4).[4]

C. Factual Background

On September 3, 2022, Petitioner, a native and citizen of Venezuela, unlawfully crossed the U.S.-Mexico border near Eagle Pass, Texas, and he was apprehended by U.S. Border Patrol the same day. *See* Declaration of Deportation Officer Michael Charles ("Charles Decl.") ¶¶ 3-4. On September 4, 2022, Border Patrol issued Petitioner a Form I-94 and released him on parole pursuant to 8 U.S.C. § 1182(d)(5). *Id.* ¶ 4.

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[4] In cases where DHS invokes the automatic stay, DHS, the immigration court, and the BIA are directed to take prompt action. *See* 8 C.F.R. §§ 1003.6(c), 1003.19(i)(2) (requiring DHS to (1) file a notice of intent to appeal within one business day of the immigration judge's custody order, and (2) file its notice of appeal within 10 business days as opposed to within 30 days of the immigration judge's order; the immigration judge is supposed to prepare a written decision within 5 business days of being advised of DHS's appeal; the immigration court is supposed to prepare and submit the record of proceedings "without delay"; and the BIA is supposed to track the progress of the custody appeal "in order to avoid unnecessary delays in completing the record for decision").

While he was at liberty, Petitioner filed a Form I-589 application with U.S. Citizenship and Immigration Services ("USCIS"). *Id.* ¶ 5. USCIS ultimately closed its review of that application after Petitioner was placed into removal proceedings. *Id.*

On January 30, 2025, Homeland Security Investigations ("HSI") Special Agents of U.S. Immigration and Customs Enforcement ("ICE") encountered Petitioner at a home in Brooklyn, New York when executing an arrest warrant for another individual. *Id.* ¶ 6. HSI arrested Petitioner, and during processing, issued and served him with a Notice to Appear ("NTA"), the charging document used to commence removal proceedings, charging him as removable pursuant to 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.[5] *Id.*

On February 6, 2025, Petitioner appeared without counsel for his first master calendar hearing before an immigration judge at the Varick Immigration Court in New York, New York. *Id.* ¶ 8. The immigration judge provided advisals regarding the nature of immigration proceedings and Petitioner's right to obtain counsel, and he was connected with the New York Immigration Family Unity Project. *Id.* The immigration judge adjourned the case to February 20, 2025. *Id.*

On February 20, 2025, Petitioner appeared with counsel for his second master calendar hearing. *Id.* ¶ 10. At this hearing, Petitioner, through counsel, requested an adjournment for additional time to prepare the matter. *Id.* The immigration judge granted that request and adjourned the case to March 4, 2025. *Id.*

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[5] Petitioner is currently detained at the Orange County Jail in Goshen, New York, and he has spent most of the duration of his detention at that facility. Charles Decl. ¶ 7. For a three-week period, between March 14, 2025, and April 5, 2025, Petitioner was temporarily detained elsewhere. *Id.*

On March 4, 2025, Petitioner was not produced for the master calendar hearing because he was in quarantine at the Orange County Jail due to potential tuberculosis exposure. *Id.* ¶ 11. The case was rescheduled for March 6, 2025. *Id.* On March 6, 2025, Petitioner was again not produced because he was still in quarantine due to the potential tuberculosis exposure, but the master calendar hearing went forward with his counsel present. *Id.* ¶ 12. At this hearing, counsel for Petitioner denied the factual allegations contained in the NTA, asserting that ICE failed to establish alienage, and denied the removal charge. *Id.* Counsel also stated that she would be filing a Motion to Suppress and Terminate the removal proceedings. *Id.* Petitioner was given until March 25 to file his motion, and ICE was given until April 1 to oppose. *Id.* The immigration judge adjourned the matter to March 25, 2025. *Id.*

On March 6, 2025, Petitioner filed a Motion to Calendar a Custody Redetermination Hearing, and the immigration court scheduled a bond hearing for March 12, 2025. *Id.* ¶ 13. On March 12, 2025, Petitioner was not produced for the bond hearing because he was still in quarantine at the Orange County Jail. *Id.* ¶ 14. Counsel for Petitioner withdrew the request for a bond hearing and was directed by the immigration judge to refile a new request, which counsel did later that same day. *Id.* ¶¶ 14, 15. The bond hearing was scheduled for March 18, 2025, and the day before, on March 17, 2025, both ICE and J.J.O.H. submitted their respective evidence packets for that hearing. *Id.* ¶¶ 16, 17.

On March 18, 2025, the immigration judge held a bond hearing, at which Petitioner was present with his counsel. *Id.* ¶ 17. At the conclusion of the hearing, the immigration judge determined that Petitioner had met his burden of demonstrating that he is not a danger to the community, and with respect to flight risk, determined that any flight risk concerns could be mitigated by a bond in the amount of $5,000. *Id.* That same day, ICE filed with the immigration

court a Notice of Intent to Appeal Custody Redetermination, Form EOIR-43, invoking an automatic stay of the immigration judge's bond decision pending a decision by the BIA, pursuant to 8 C.F.R. § 1003.19(i)(2). *Id.* ¶ 18.

On March 25, 2025, Petitioner appeared with counsel for a master calendar hearing. *Id.* ¶ 19. At the hearing, counsel for Petitioner requested the immigration judge to order ICE to release Petitioner. *Id.* The immigration judge declined to do so, stating that she did not have the authority to do so because ICE had filed the form EOIR-43, and that ICE had three more days to file their appeal of the bond decision. *Id.* The immigration judge also told both parties that she was waiting on Petitioner's Motion to Suppress and Terminate Proceedings and ICE's opposition to that motion. *Id.* The immigration judge adjourned the case to April 8, 2025. *Id.*

Later on March 25, 2025, Petitioner filed a Motion to Suppress Evidence and Terminate Proceedings, and ICE filed its opposition to that motion on April 1, 2025. *Id.* ¶¶ 20, 22.

On March 27, 2025, ICE filed a notice of appeal with the BIA of the immigration judge's March 18 bond decision. *Id.* ¶ 21. On April 1, 2025, the immigration judge issued a written decision memorializing the March 18 bond decision. *Id.* ¶ 23. On April 2, 2025, the BIA issued a notice to the parties on the bond appeal, setting a briefing deadline of April 23, 2025. *Id.* ¶ 24.

On April 8, 2025, Petitioner appeared with counsel for a master calendar hearing, at which the immigration judge stated that she intended to deny Petitioner's Motion to Suppress Evidence and Terminate Proceedings. *Id.* ¶ 26. The immigration judge directed Petitioner to submit all applications for relief by April 15, 2025, and she adjourned the case until that date. *Id.*

On April 15, 2025, Petitioner submitted his applications for relief to the immigration court. *Id.* ¶ 27. At the master calendar hearing on that date, the immigration judge scheduled a merits

hearing for June 9, 2025, to address the merits of Petitioner's relief applications. *Id.* That hearing was later rescheduled to June 26, 2025. *Id.* ¶¶ 28-30.

On April 22, 2025, ICE submitted its brief to the BIA on the custody appeal, and Petitioner submitted his brief on April 23, 2025. *Id.* ¶ 25.

On May 19, 2025, the BIA issued a decision on ICE's appeal of the immigration judge's March 18 bond decision. *Id.* ¶ 31. The BIA affirmed the immigration judge's decision in all respects except on flight risk. *Id.* The BIA held that the immigration judge erred in determining that Petitioner's degree of flight risk was low enough to warrant a $5,000 bond and remanded the matter for the immigration judge to set a higher bond amount. *Id.*

On May 29, 2025, Petitioner submitted additional evidence to the immigration judge in the bond proceedings. *Id.* ¶ 32.

On May 30, 2025, the immigration judge held a bond hearing pursuant to the BIA's remand order. *Id.* ¶ 33. On the date of the hearing, ICE submitted additional evidence in support of its claim that Petitioner is a member of Tren De Aragua and argued that the BIA's remand order allowed the immigration judge to consider this evidence for both flight risk and danger. *Id.* The immigration judge declined to accept the additional evidence filed by either Petitioner or ICE and relied solely on the evidence submitted for March 18 bond hearing. *Id.* At the conclusion of the hearing, the immigration judge set bond at $9,500 for purposes of addressing flight risk. *Id.*

Later that same day, on May 30, 2025, ICE filed with the immigration court a Notice of Intent to Appeal Custody Redetermination, Form EOIR-43, invoking an automatic stay of the immigration judge's May 30 bond decision pending a decision by the BIA, pursuant to 8 C.F.R. § 1003.19(i)(2). *Id.* ¶ 34.

On June 4, 2025, Petitioner filed a Motion to Terminate or Administratively Close Proceedings due to a newly filed pending application for Temporary Protective Status before USCIS. *Id.* ¶ 35. On June 6, 2025, ICE filed an opposition to that motion. *Id.* ¶ 36. On June 9, 2025, the immigration judge issued a written order denying Petitioner's Motion to Terminate. *Id.* ¶ 37.

On June 11, 2025, Petitioner attempted to post the $9,500 bond, but this effort was denied because the custody order was stayed by ICE's filing of the EOIR-43. *Id.* ¶ 38. On June 13, 2025, ICE filed a notice of appeal with the BIA of the immigration judge's May 30 bond decision. *Id.* ¶ 39. On June 23, 2025, the immigration judge issued a written decision memorializing the May 30 bond decision. *Id.* ¶ 40. On June 26, 2025, the BIA issued a notice to the parties on the bond appeal, directing that all briefs must be filed no later than July 17, 2025. *Id.* ¶ 41. The appeal is currently pending as of today's date. *Id.*

On June 26, 2025, Petitioner appeared with counsel before the immigration judge for his merits hearing. *Id.* ¶ 42. At the beginning of the hearing, the immigration judge suggested that Petitioner move to continue the hearing due to the pending habeas petition, which Petitioner did, and the immigration judge granted the motion over ICE's objection. *Id.* The immigration judge adjourned the merits hearing to August 6, 2025. *Id.*

On July 14, 2025, ICE filed with the BIA a motion for a discretionary stay of the Immigration Judge's May 30 bond decision, pursuant to 8 C.F.R. § 1003.19(i)(1). *Id.* ¶ 43 & Ex. A. Also on July 14, 2025, ICE filed with the BIA its brief on the custody appeal. *Id.*

STANDARD OF REVIEW

"[A] preliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 585 U.S. 155, 158 (2018) (per curiam) (quotations and citation omitted). Preliminary injunctive relief is an "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689

(2008), and should be awarded only "upon a clear showing that the plaintiff is entitled to such relief," *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20.

ARGUMENT

The Court should deny Petitioner's motion for a preliminary injunction because he has not sustained the high burden to establish that he meets the stringent requirements for that extraordinary remedy. As a threshold matter, fatal to Petitioner's motion is that he seeks the ultimate relief—release from detention—as a preliminary injunction. In any event, his motion fails under the traditional preliminary injunction analysis. First, Petitioner has not shown a likelihood of success on the merits of his claims. Second, Petitioner has not shown irreparable harm. And third, the balance of equities favors the government's interest in detaining an alien whose risk of flight is at issue. Petitioner's motion therefore should be denied.

A. The Motion Should Be Denied As Improper

As a threshold matter, the Court should deny Petitioner's motion for a preliminary injunction because it seeks the ultimate relief sought in the case—immediate release. Petitioner's request inverts the fundamental purpose of preliminary injunctive relief, which is "merely to preserve the relative positions of the parties until a trial on the merits can be had." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "The purpose of a preliminary injunction is not to give the plaintiff the ultimate relief it seeks. It is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996); *see also, e.g., Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974) (TROs "should be restricted to serving their underlying

purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer."); *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but rather a device for preserving the status quo and preventing the irreparable loss of rights before judgment."); *Unicon Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966) ("It is hornbook law that 'the general purpose of a preliminary injunction is to preserve the status quo *pending final determination* of the action.'").

Instead, Petitioner improperly asks this Court to turn the status quo on its head by granting him the very relief he hopes to obtain through this action—release from detention. *See, e.g.*, *Powell v. Fannie Mae*, No. 16 Civ. 1359 (LTS) (KNF), 2017 WL 712915, at *2 (S.D.N.Y. Feb. 2, 2017) (R&R) (injunctive relief "is improper where it would give the plaintiff substantially all the ultimate relief [he] seeks"); *Guy v. Tanner*, Civil Action No. 13-6750, 2014 WL 2818684, *3 (E.D. La. June 23, 2014) ("Guy's motion is no more than a veiled attempt to expedite the resolution of his habeas petition. This is not a proper basis for issuing an injunction."); *see also, e.g.*, *Dzhabrailov v. Decker*, No. 20 Civ. 3118 (PMH), 2020 WL 2731966, at *4 (S.D.N.Y. May 26, 2020) ("Petitioner's request for injunctive relief is a request for the ultimate relief Petitioner seeks: release from OCJ. Ordinarily, this type of ultimate relief request is fatal to a preliminary injunction application because the reality is that the preliminary injunction stage of the litigation occurs well in advance of any dispositive trial or hearing."); *Lawry v. Wolcott*, No. 20 Civ. 588 (JLS), 2020 WL 4018344, at *6 (W.D.N.Y. July 15, 2020) ("Because the temporary restraining order and preliminary injunction seek the same relief—'immediate release' from Orleans—as the petition, the Court denies Lawry's motion"); *Barchha v. TapImmune, Inc.*, No. 12 Civ. 8530 (PKC), 2013 WL 120639, at *2 (S.D.N.Y. Jan. 7, 2013) ("An injunction ordering defendants to facilitate

plaintiff's sale of shares would not be a limited measure to preserve the status quo, but instead equivalent to a final adjudication of the merits of plaintiff's claims.").

Thus, for this reason alone, the Court should deny Petitioner's motion for a preliminary injunction. In any event, the Court should deny Petitioner's motion because he has failed to demonstrate entitlement to such extraordinary relief, as discussed further below.

B. Likelihood of Success on the Merits

1. Procedural Due Process Claim

In Count One, Petitioner argues that his detention violates procedural due process because he remains detained as a result of ICE's "unilateral" action of staying the immigration judge's bond decision granting release on $9,500 bond while ICE pursues an appeal to the BIA. This claim is unlikely to succeed.

As a threshold matter, Petitioner has no absolute 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 aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. When assessing the validity of procedures in the immigration context, courts must "weigh heavily" the fact "that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). Courts also must consider that Congress "emphatic[ally]" intended the government's discretionary decisions regarding detention to be "presumptively correct and unassailable except for abuse." *Carlson*, 342 U.S. at 540.

While procedural due process imposes outer-limit constraints on governmental decisions which deprive individuals of liberty interests, it is not a technical conception with a fixed content

unrelated to time, place, and circumstances. *Mathews v. Eldridge*, 424 U.S. 319, 332-34 (1976). Rather, due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333 (quotations omitted). Whether the administrative procedures provided are constitutionally sufficient requires analysis of 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." *Id.* at 335. Applying the three factors here, the procedures provided to Petitioner are more than adequate.

Petitioner challenges his continued detention on account of ICE's invocation of the automatic stay provision on May 30, arguing that it is a unilateral action that provides no opportunity to be heard, and excludes not only Petitioner from the process, but also the BIA. But as noted above, on July 14, ICE filed a discretionary stay motion with the BIA, employing the very process that Petitioner contends is constitutionally sufficient. *See* Pet. ¶¶ 53-54, 64. Thus, the circumstances of this case have materially changed since this action was filed. Nonetheless, an analysis of the *Mathews* factors demonstrates that there is no due process violation under the facts here.

With respect to the first *Mathews* factor—the private interest at stake—while it is true as a general matter that freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (punctuation omitted), the Supreme Court has clarified that "[i]n the exercise of its broad power over naturalization and

immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Demore*, 538 U.S. at 522. Accordingly, while the "Fifth Amendment entitles aliens to due process of law in deportation proceedings, detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process." *Id.* at 523. Any assessment of the private interests at stake must therefore account for the fact that the Supreme Court has never held that aliens have a constitutional right to be released from custody during the pendency of removal proceedings, and has in fact held precisely the opposite. *Id.* at 530; *Carlson*, 342 U.S. at 538. Further, consideration of the private interest must also account for circumstances in which an alien who has not held lawful status in the United States is not simply asserting a right to be at liberty, but rather a right to be at liberty in the United States. *Cf. Flores*, 507 U.S. at 306 ("Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General.").

As for the second *Mathews* factor—the existing framework governing ICE's options to obtain a stay of an immigration judge's custody decision pending an appeal provides sufficient procedural safeguards to protect against arbitrary deprivation of liberty while also protecting the government's interests in ensuring that aliens do not abscond or commit crimes while removal proceedings are ongoing. First, with respect to the automatic stay provision, ICE must promptly invoke it by filing a notice within one day of the immigration judge's custody order, and must thereafter promptly file a notice of appeal within ten business days of the immigration judge's custody order; the decision to invoke the automatic stay must be made by a senior legal official at ICE who must certify that sufficient factual and legal bases exist to justify the continued detention; and the automatic stay remains in effect for a finite, limited period of time, ending either when the BIA issues a decision, or after 90 days, whichever occurs first. *See, e.g.*, 8 C.F.R. § 1003.6(c).

These safeguards are meant to guard against abuse of the automatic stay provision and ensure that the custody appeal is promptly adjudicated. Further, a the 90-day limit on the automatic stay strikes a reasonable balance between the government's interests and the alien's interests. *Cf. Zadvydas*, 533 U.S. at 701 (in the context of post-removal-order detention, "we think it practically necessary to recognize some presumptively reasonable period of detention . . ."). Second, ICE may also file a motion with the BIA for a discretionary stay during the entire pendency of the appeal (even if greater than 90 days), which Petitioner argues is the "appropriate procedure" for ICE to obtain a stay of the immigration judge's custody order. Pet'r Mot. 13. Today, July 14, ICE did just that—it filed a motion for a discretionary stay with the BIA, along with its brief on appeal. Petitioner can file an opposition to ICE's motion with the BIA, and if the BIA grants the motion, Petitioner may still seek to dissolve the stay through other motions. Moreover, the regulations dictate that the BIA prioritize custody appeals for detained aliens and to resolve them "as soon as practical." 8 C.F.R. § 1003.1(e)(8).

Finally, regarding the third *Mathews* factor—the government's interest—the Second Circuit recognized that the government's important interests in detaining aliens under § 1226(a) to ensure that aliens do not abscond and do not commit crimes are "well established and not disputed." *Velasco Lopez*, 978 F.3d at 854. Section 1226(a) reflects Congress's intent to afford "broad discretion" to the government in determining which individuals should remain detained during removal proceedings, *Preap*, 586 U.S. at 409, and to increase the probability that aliens who are ordered removed are in fact removed, "Detention Issues Pertaining to Removal of Criminal and Illegal Aliens," H.R. Rep. No. 104-469(I), at 123. Indeed, Congress enacted § 1226(a) based on its concern that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through the course of their

deportation proceedings." H.R. Rep. No. 104-469, at 123. The government's interests in maintaining the existing procedures for custody appeals for aliens detained under § 1226(a) are thus significant. Indeed, the automatic stay provision allows ICE to temporarily stay an immigration judge's custody decision granting an alien release pending ICE's appeal to the BIA, which serves the legitimate purpose of maintaining the status quo until either the BIA rules on ICE's appeal or otherwise grants or denies a discretionary stay motion filed by ICE. Without such an automatic stay, the government would bear an unacceptable risk that the alien will be immediately released and will abscond or cause harm to others, all before the BIA has a chance to either stay the immigration judge's custody order or otherwise rule on ICE's appeal. Petitioner even concedes that the government has a "legitimate interest" in ensuring that aliens do not abscond during the pendency of their removal cases. Pet'r Mot. at 14. ICE's use of the automatic stay provision here is a reasonable means of furthering this legitimate interest given its concerns with respect to Petitioner's risk of flight.

2. Substantive Due Process Claim

In Count Two, Petitioner argues that his detention violates substantive due process. Petitioner is unlikely to succeed on this claim because the facts of this case do not support a substantive due process violation. "In order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Charles v. Orange Cty.*, 925 F.3d 73, 85 (2d Cir. 2019) (quotation marks and citations omitted); *Guo Hua Ke v. Morton*, No. 10 Civ. 8671 (PGG), 2012 WL 4715211, at *9 (S.D.N.Y. Sept. 30, 2012) ("[T]o trigger a violation of substantive due process, official conduct must be outrageous and egregious under the circumstances; it must be truly 'brutal and offensive

to human dignity." (citing *Lombardi v. Whitman*, 485 F.3d 73, 81 (2d Cir. 2007))). Petitioner has not done so.

Petitioner is currently in removal proceedings, and so his detention pending resolution of those proceedings is statutorily authorized by 8 U.S.C. § 1226(a). *See Jennings*, 583 U.S. at 306 ("§ 1226(a) authorizes [DHS] to arrest and detain an alien 'pending a decision on whether the alien is to be removed from the United States.'"); *Preap*, 586 U.S. at 409 (highlighting that "subsection (a) creates authority for *anyone's* arrest or release under § 1226—it gives the Secretary broad discretion as to both actions"). Petitioner contends that his detention no longer serves "the special justifications for immigration detention" because an immigration judge has granted him bond, Pet. ¶ 68, but contrary to Petitioner's telling, both the immigration judge and the BIA found that Petitioner is a flight risk—at issue is what amount of bond, if any, is appropriate to mitigate his established risk of flight. Far from taking action that is "so egregious" and "so outrageous" to "shock the contemporary conscious," *Charles*, 925 F.3d at 85, ICE has sought to temporarily maintain the status quo while it appeals the immigration judge's bond decision, which would be in vain if Petitioner were released and fled in the meantime. Further, ICE has not taken action contrary to statute or regulation—to the contrary, ICE's invocation of the time-limited automatic stay provision was an exercise of discretion expressly authorized by longstanding agency regulation. Such action can hardly be deemed to violate substantive due process.

Additionally, Petitioner claims that ICE is subjecting him to indefinite detention by invoking the automatic stay provision. Pet. ¶ 69. But this is untrue. As of today's date, it has been 45 days since the immigration judge granted Petitioner bond in the amount of $9,500, and only 33 days since he attempted to post that bond. Moreover, far from creating "indefinite detention," the automatic stay lasts for a finite period—for 90 days or when the BIA decides the

appeal, whichever occurs first. Further, while the immigration judge initially granted Petitioner release on $5,000 bond in March 2025, ICE's appeal was sustained in part, with the BIA determining that the immigration judge erred in assessing flight risk and determining that $5,000 was an insufficient amount. The administrative custody review process remains ongoing, and it will resolve soon when the BIA rules on ICE's appeal, as the regulations direct the BIA to give priority to custody appeals involving detained aliens. Moreover, since the filing of this action, ICE has filed a motion for a discretionary stay with the BIA, and if the BIA grants that stay motion, Petitioner will no longer be held on account of ICE's automatic stay, and instead will be held based on the BIA's independent discretionary determination to grant a stay.

3. Statutory Claim under the INA

In Count Three, Petitioner argues that ICE's invocation of the automatic stay provision violates 8 U.S.C. § 1226(a). *See* Pet. ¶¶ 72-76. This claim is unlikely to succeed because the very premise of Petitioner's claim is incorrect. Petitioner argues that § 1226(a) "grants immigration judges the authority to re-determine custody status unless mandatory detention applies," and it "also empowers the BIA to review immigration judges' custody determinations." Pet. ¶ 73. Therefore, he argues, ICE's invocation of an automatic stay of an immigration judge's custody decision while ICE appeals to the BIA "is *ultra vires* to the INA" because ICE's action "eliminate[s] the discretionary authority of immigration judges . . . [and] thereby exceed[s] the authority bestowed upon the agency by Congress." *Id.* ¶ 75.

But Petitioner's statutory claim finds no support in the text of § 1226(a), and it conflates the regulatory structure created by the Executive with the broad discretionary grant of the statute. The statute prescribes nothing about bond hearings before immigration judges, custody appeals, or any specified procedures. Instead, the statute provides the Attorney General/Secretary of DHS with an express grant of discretion to "continue to detain the arrested alien" or to "release the alien"

on specified terms. *See* 8 U.S.C. § 1226(a). *Cf. Jennings v. Rodriguez*, 583 U.S. 281, 306 (2018) ("Nothing in § 1226(a)'s text—which says only that the Attorney General 'may release' the alien 'on . . . bond'—even remotely supports the imposition of [required periodic bond hearings or a specified burden of proof]."); *Johnson v. Arteaga-Martinez*, 596 U.S. 573, 581 (2022) ("On its face, the statute [8 U.S.C. § 1231(a)] says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required."). It is federal regulations—not the statute—that provide a process through which the Attorney General/Secretary of DHS exercise their statutory discretionary authority over decisions to detain or release aliens under § 1226(a), which includes an initial custody determination made by DHS, and if the alien remains detained, bond hearings before an immigration judge. The entire custody review process is a product of agency regulation promulgated pursuant to broad statutory authority, not a direct statutory creation, and is not "even remotely" contrary to the organic statute. Thus, Petitioner's statutory claim is without merit.

4. Administrative Procedure Act Claim

In Count Four, Petitioner merely repackages his habeas/due process challenge to ICE's invocation of the automatic stay provision as an APA claim. This duplicative claim is not likely to succeed, not only for the reasons stated above, but more fundamentally because Petitioner cannot invoke the APA given that he has an adequate remedy at law: a petition for a writ of habeas corpus. The APA permits judicial review of agency action only when, *inter alia*, "there is no other adequate remedy in a court." 5 U.S.C. § 704. The Supreme Court has made clear that where an alien's claims for relief "necessarily imply the invalidity of their confinement," those claims "must be brought in habeas." *Trump v. J.G.G.*, 145 S. Ct. 1003, 1005 (2025). Here, Petitioner's claims not only "necessarily imply the invalidity of [his] confinement," he expressly seeks outright release. Thus, Petitioner is unlikely to prevail on his APA claim.

C. Irreparable Harm

Petitioner has not shown that irreparable injury is likely in the absence of a preliminary injunction. "To satisfy the irreparable harm requirement, [the petitioner] must demonstrate that absent [relief] [he] will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (quotation marks omitted). Petitioner cannot make the required showing.

Petitioner cites to the alleged toll detention has taken on him, Pet'r Mot. 17, but all of the alleged irreparable harm that he claims he would suffer in the absence of a preliminary injunction is harm that would result from *any* detention (even detention that unquestionably comports with due process). The alleged irreparable harm is simply not related to the claims that Petitioner brings in this case—which ultimately concern the 33 days of detention after he attempted to post bond but was unable to due to ICE's invocation of the automatic stay provision while it appeals the immigration judge's custody decision. Petitioner also argues that he is irreparably harmed because he is being "unreasonably detained," *id.* at 16-17, but as an alien in removal proceedings, the government is statutorily authorized to detain him during the pendency of those proceedings, 8 U.S.C. § 1226(a). And again, such detention during removal proceedings is constitutionally valid, despite the imposition on aliens. *Velasco Lopez v. Decker*, 978 F.3d at 848.

Further, ICE has engaged in the very process that Petitioner argues would ameliorate due process concerns—filing a motion for a discretionary stay with the BIA, which Petitioner can oppose, and which will permit the BIA to decide whether to stay the immigration judge's custody order pending resolution of that appeal. At bottom, Petitioner's grievance is with the fact that he remains detained while ICE appeals the immigration judge's decision over whether he should be released. But continued detention, by itself, does not equate to irreparable harm in this context.

Cf. Paz Nativi v. Shanahan, No. 16-cv-8496 (JPO), 2017 WL 281751, at *2 (in the exhaustion context, "continued detention . . . is insufficient to qualify as irreparable injury justifying non-exhaustion"); *Giwah v. McElroy*, No. 97-cv-2524 (RWS), 1997 WL 782078, at *4 (S.D.N.Y. Dec. 19, 1997) ("If incarceration alone were the irreparable injury complained of, then the exception would swallow the rule that the [ICE] administrative remedies must be exhausted before resorting to the federal courts.").

D. Balance of the Equities and Public Interest

The balance-of-equities factors "merge" because the government is the opposing party, and the government's interest *is* the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, this factor weighs strongly in the government's favor and heavily against granting the injunctive relief that Petitioner seeks—release from detention. Granting Petitioner's request that he be immediately released, in spite of his established flight risk and before the BIA has an opportunity to consider ICE's request for a discretionary stay or to rule on ICE's appeal, harms the government and is not in the public interest. Indeed, the Second Circuit recognized in *Velasco Lopez* that the government's important interests in detaining aliens under § 1226(a) to ensure that aliens do not abscond and do not commit crimes are "well established and not disputed." *Velasco Lopez*, 978 F.3d at 854. Here, while an immigration judge has decided that Petitioner's flight risk can be mitigated by a $9,500 bond, ICE disagrees and has permissibly appealed that decision to the BIA. ICE's invocation of the automatic stay during the pendency of that bond appeal is not unreasonable, as it serves the purpose or preserving the status quo until either the BIA grants ICE's motion for a discretionary stay or until the BIA rules on the bond appeal. Indeed, it is within the public interest to ensure that aliens unlawfully present in the United States, such as Petitioner, do not abscond while their removal proceedings are pending. *See, e.g.*, *Demore*, 538 U.S. at 523 (detention during removal proceedings serves the legitimate purpose of "preventing deportable . . .

aliens from fleeing prior to or during their removal proceedings"). Further, it is well-settled that the public interest in enforcement of United States immigration laws is significant. *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (additional citation omitted)). Under the circumstances of this case, the balance of hardships and public interest weigh in favor of the government and against Petitioner.

* * *

For all of the above reasons, the Court should conclude that Petitioner has failed to satisfy the stringent burden for issuance of a preliminary injunction in this case.

E. The Remedy Is Not Immediate Release

Petitioner argues that the appropriate remedy in this case is immediate release. He is incorrect. If the Court grants Petitioner's motion (or the petition)—which it should not—the Court should, at most, order that Petitioner be released only upon satisfying the conditions set by the immigration judge, *i.e.*, upon posting the $9,500 bond. *See, e.g.*, *Gunaydin v. Trump*, No. 25 Civ. 1151 (JMB), 2025 WL 1459154, at *11 (D. Minn. May 21, 2025) (in case involving the automatic stay provision, ordering the petitioner's release "subject to the conditions previously imposed by the Immigration Judge, including the $5,000 bond"). To direct Petitioner's immediate release on his own recognizance, as Petitioner asks of this Court, would be manifestly inappropriate and grant Petitioner a windfall, particularly where an immigration judge and the BIA have already determined that he presents a flight risk, and where the immigration judge held that a bond of

$9,500 is necessary to mitigate his risk of flight.[6] Further, Petitioner has not challenged the immigration judge's decision to set a $9,500 bond, and an order from this Court directing that Petitioner be released on his recognizance would essentially set aside the immigration judge's discretionary decision on bond, in violation of 8 U.S.C. § 1226(e).

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's motion for a preliminary injunction.

Dated: New York, New York
July 14, 2025

Respectfully submitted,

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[6] Indeed, the BIA previously sustained ICE's appeal challenging $5,000 as insufficient to mitigate flight risk based on the individual circumstances of Petitioner's case, and ICE has appealed the immigration judge's subsequent determination that $9,500 is sufficient. The BIA will ultimately decide that issue, so if the Court determines that release is appropriate at this juncture, it should be within the context of posting the bond set by the immigration judge.

Certificate of Compliance

Pursuant to Local Civil Rule 7.1(c), the above-named counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 8,403 words.