

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)

**REPLY BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

J.J.O.H. (“Petitioner” or “J.J.O.H.”) seeks emergency relief from this Court because he has been unlawfully detained for four months despite an Immigration Judge twice ordering him released on bond. His ongoing 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.¹ 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 INA § 212(a)(6)(A)(i) for being present in the United States without being admitted or paroled. The January 30, 2025, 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

¹ J.J.O.H. rented an individual room in boarding room-type house, and did not know the majority of the other renters. ECF No. 18-1 ¶ 7.

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”).²

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 to the Immigration Judge for the narrow purpose of increasing the bond to account for a potential risk of flight. On remand, the Immigration Judge complied exactly with the BIA’s instructions and nearly doubled the bond amount on May 30, 2025. 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.

On June 26, 2025, the Immigration Judge granted J.J.O.H.’s Motion for a Continuance of his asylum hearing, made after the Immigration Judge suggested it, due to DHS’s ongoing violation of Petitioner’s rights. The Immigration Judge said to J.J.O.H., “[u]sually I wouldn’t do this but I do believe that your due process rights are being violated.” Ex. A, Declaration of Ilana Herr (“Herr Decl.”) ¶17. She further explained to J.J.O.H. that adjourning the merits hearing “will also give you an opportunity to be released and to be able to actually have your case adjudicated while you can participate more in the case” from outside of ICE custody. *Id.*

² The automatic stay provision, as noted in its implementing regulations, is supposed to be an exceptional action. *See Executive Office for Immigration Review, Review of Custody Determination*, 66 Fed. Reg. 54909 (Oct. 31, 2001) (describing the automatic stay as a “limited measure”). In fact, from 2015-2021, DHS only invoked the automatic stay provision on average, 26 times per year. *See* Stacy L. Brustin, *A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings*, 88 Brook. L. Rev. 163, 225 n.231 (2022); *see also* Ex. A, Herr Decl. ¶ 4 (“In my nearly seven years of representing detained individuals in their removal proceedings before EOIR, I have never seen ICE invoke this auto-stay provision in any of my cases, including cases involving individuals with criminal records.”).

J.J.O.H. filed the instant Motion for a Temporary Restraining Order and/or Preliminary Injunction on July 3, 2025, and consented to an extension for Respondents to file their Opposition by July 14, 2025. ECF Nos. 16, 22. On that day, DHS requested from the BIA—and received less than two hours later—an “emergency discretionary stay”, with no opportunity for J.J.O.H. to respond. Respondents filed their Opposition to the instant motion hours later. However, the unlawfulness of J.J.O.H.’s detention cannot be cured with post-hoc, procedurally improper rationalizations. J.J.O.H. has been unlawfully detained since DHS first invoked the automatic stay on March 18, 2025 to prevent his release, remained unlawfully detained when DHS invoked the automatic stay a second time on May 30, 2025, and is still unlawfully detained. This Court should issue an order pursuant to Fed. R. Civ. P. 65—or in the alternative, pursuant to *Mapp v. Reno*, directing Respondents to immediately release J.J.O.H.

ARGUMENT

I. Respondents are subjecting Petitioner to indefinite detention in violation of due process.

A. There is no end in sight to Petitioner’s detention

Respondents claim that Petitioner’s detention is not indefinite because “the automatic stay lasts for a finite period—for 90 days or when the BIA decides the appeal, whichever occurs first.” Opp. at 19-20.³ This argument is disingenuous for two reasons.

First, as both the Petition and the Motion for a TRO/PI clearly explain, the automatic stay rules do not have a strict 90-day finite period. See ECF No. 18, Mem. of Law in Support of Motion for TRO/PI at 18; ECF No. 1 at 12; *see also Gunaydin v. Trump*, No. 25-CV-01151, 2025 WL 1459154, at *5 (D. Minn. May 21, 2025) (describing how DHS can substantially prolong the 90-

³ They also state that it has been 45 days since the Immigration Judge’s second bond decision and “only” 33 days since Petitioner tried to post bond. Opp. at 19.

day automatic stay period). Second, here, the serial applications of the automatic stay provision allow for indefinite detention, regardless of the merits of DHS's challenge to the bond decision. After the first automatic stay period came to an end, DHS immediately imposed a second automatic stay once the Immigration Judge again ordered Petitioner released on bond. Respondents have maintained Petitioner's unlawful detention through the use of the automatic stay provision since March 18, 2025, a period of 120 days and counting. The incarceration effectuated by two consecutive uses of the automatic stay provision should be analyzed as one single period of detention. There is nothing to indicate that if the BIA issues another narrow remand, DHS would not invoke the automatic stay provision yet again, further prolonging J.J.O.H.'s detention.

B. Respondents' actions suggest they are not above gamesmanship to prolong Petitioner's detention.

In order to invoke the automatic stay provision a second time, DHS filed a tenuous appeal with the BIA, despite the Immigration Judge complying exactly with the BIA's instructions on remand. The BIA discussed each potential basis for remand that DHS raised in their first appeal and explicitly declined to remand on those bases, but stated "[w]e will remand, however, for the Immigration Judge to set a higher bond amount" that "will ensure [Petitioner's] presence at future hearings." ECF No. 1-3, BIA Decision at 3. After remand, the Immigration Judge nearly doubled the bond amount, yet DHS is now claiming on appeal that the BIA's remand order required the Immigration Judge to accept new evidence into the record before raising the bond amount. However, no such requirement exists in the remand order.⁴ *See* Herr Decl. ¶24.

The Immigration Judge took the unusual step of putting on the record her concerns that Respondents are behaving unethically and unconstitutionally in J.J.O.H.'s case. She described an

⁴ The Immigration Judge permissibly rejected new evidence from both parties. *See* Herr Decl. ¶¶ 25-27 (setting forth the tenuous basis for DHS's second custody redetermination appeal).

edited and resubmitted I-213, dated May 23, 2025, as “highly irregular,” and stated that even if she were to allow it to be submitted into evidence, she would give it “absolutely no weight.” *Id.* ¶9. The Immigration Judge went further in expressing her concerns to the ICE attorney, stating that raising these implausible and unsubstantiated Tren de Aragua allegations “impinges your reputations going forward on every case I see.” *Id.* ¶19. She explained that she was adjourning J.J.O.H.’s asylum hearing because “I’m also pretty sick of the [government’s] shenanigans. So I’m going to let a federal judge figure this out because they have more authority than I do.” *Id.* ¶18. The Immigration Judge told J.J.O.H. directly that she was adjourning his case to see if a federal judge would release him, allowing him to fully participate in his asylum case because “I do believe that your due process rights are being violated.” *Id.* ¶17.

II. Petitioner’s due process claims relate back to DHS’s first invocation of the automatic stay provision and cannot be cured by this post-hoc rationalization of his detention

Respondents’ violation of J.J.O.H.’s due process rights relates back to DHS’s first invocation of the automatic stay provision on March 18, 2025, and cannot be cured by any *post hoc* rationalization after that unlawful detention is challenged. Due process requires that detention be lawful *at the time* of detention, not weeks or months later if an alternative basis for detention subsequently emerges.⁵ Judge Román, for example, rejected ICE’s attempts to correct its initial unlawful detention of a noncitizen where the agency sought to provide him notice of its intent to reinstate his removal order well after he filed a petition seeking release. *See Martinez v. McAleenan*, 385 F. Supp. 3d 349, 365 (S.D.N.Y. 2019). As the court concluded, “[the writ of habeas corpus] relates back to when Petitioner was first unlawfully detained, and it can be used to

⁵ Respondents claim Petitioner concedes that a discretionary stay would not violate due process. Opp. at 22. This argument ignores that Petitioner’s discussion of a discretionary stay was in the context of its use in DHS’s initial appeal of a custody determination, rather than after four months of unlawful detention pursuant to the automatic stay provision.

equitably redress that unlawful detention.” *Id.* The court further noted that “the Supreme Court has repeatedly upheld prisoners’ rights to challenge the constitutionality of their detentions, and allow[ed] courts to implement corrective remedies, regardless of whether there were other bases for the petitioners to be subsequently detained.” *Id.* at 366; *see also Arias Gudino v. Lowe*, No. 1:25-CV-00571, 2025 WL 1162488 (M.D. Pa. Apr. 21, 2025) (granting a motion for a preliminary injunction and ordering petitioner’s release where respondents provided notice of the revocation of his release after his unlawful detention). The habeas court “must use their authority to consider not only the present circumstances of confinement, but the actions that led to it.” *Ozturk v. Trump*, No. 2:25-CV-374, 2025 WL 1145250, at *15 (D. Vt. Apr. 18, 2025).

It was not until Petitioner moved for a TRO that Respondents manufactured a separate basis for J.J.O.H.’s detention by requesting a discretionary stay from the BIA on the same day that Respondents filed their Opposition to the instant motion.⁶ Herr. Decl. ¶21. Notably, DHS did not request a discretionary stay during the first bond appeal, prior to the filing of this Petition.

III. The discretionary stay, here, is procedurally improper and violative of due process

The discretionary stay cannot cure the due process violations because its issuance was procedurally improper. 8 C.F.R. § 1003.6(c) states, “the following procedures will be applicable with respect to custody appeals in which DHS has invoked an automatic stay DHS may seek a discretionary stay pursuant to 8 C.F.R. § 1003.19(i)(1) to stay the immigration judge’s order *in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay.*” (emphasis added). The BIA may issue a decision on the discretionary stay motion only “[i]f . . . the Board is unable to resolve the custody appeal within the period of the automatic

⁶ Petitioner granted Respondents’ counsel additional time to oppose the instant motion out of professional courtesy. That time appears to have been used, at least in part, to allow DHS to file a motion for a discretionary stay with the BIA in an attempt to moot the instant case.

stay.” *Id.* As there are still 43 days left in the automatic stay period, the discretionary stay is procedurally improper.

Additionally, the issuance of a discretionary stay in this instance is violative of due process. It was granted less than two hours after filing, with no opportunity for Petitioner to oppose. In particular, where, as here, Petitioner remains detained, there can be no argument that such an *ex parte* determination was justified.

IV. Petitioner is suffering irreparable harm

Respondents suggest that Petitioner’s continued unlawful detention and its “alleged toll” does not constitute irreparable harm. Opp. at 22. This argument fails. It is well-established that no right is more fundamental than the right to freedom from unreasonable government detention. *See Zadvydas v Davis*, 533 U.S. 678, 690 (2001). 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. is separately suffering irreparable harm because of the severe emotional and physical toll of his detention, including experiencing suicidal ideation for the first time in his life. *See* ECF. No. 18-1 ¶16. J.J.O.H. will continue to suffer irreparable harm absent this Court’s intervention.

V. The balance of equities and public interest factors support release

Respondents argue that “the government’s interest *is* the public interest” and Petitioner’s release would “harm the government,” since Respondents oppose his release. Opp. at 23. But the public’s interest is not synonymous with whatever position Respondents choose to take. In this

case, the public interest favors release because “[t]here is generally no public interest in the perpetuation of unlawful agency action” and “[t]he public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.” *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) (internal quotations omitted); *Sajous v. Decker*, No. 18-cv-2447, 2018 WL 2537266 at *13 (S.D.N.Y. May 23, 2018).

Additionally, Respondents claim that if Petitioner were released, the government would bear an “unacceptable risk” that he would “abscond or cause harm to others.” Opp. at 18. J.J.O.H. has never been arrested, neither in his three years in the United States nor in Venezuela. Prior to his detention, he timely applied for asylum, he was working, providing for his family members and forming strong community ties. Respondents attempted to impute gang membership to him because of his nationality, because he has common tattoos (*i.e.*, a rose, in honor of his grandmother, Rosa), and because he resided at a boarding house with other Venezuelans. J.J.O.H. was guilty of nothing more than lacking the financial resources to afford his own apartment.

The Immigration Judge in his case rejected DHS’s arguments and made two well-reasoned, individualized determinations that J.J.O.H. met his burden to prove that he was not a danger to the public and any risk of flight would be sufficiently mitigated through bond. The BIA conducted its own analysis and 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.” ECF No. 1-3, BIA Decision at 2; *see also id.* at 3 (“DHS failed to support the allegation in the Form I-213 that [Petitioner] is a member of Tren de Aragua.”). In the pending BIA appeal, even DHS is not arguing that Petitioner poses a threat to the community. *See generally* ECF No. 25-1 (arguing that excluded DHS evidence goes to flight risk). So Respondents’ assertion here that he poses a threat to the public is baseless.

Finally, the Immigration Judge made an individualized assessment of Petitioner's financial means and determined that a bond of the amount of \$9,500 would properly address risk of flight. ECF No. 1-4, Second Bond Decision at 2 (“[T]his would be a significant amount for [Petitioner] given his financial means” and “if the bond amount were to be set any higher, [Petitioner] would be unable to pay the amount, rendering the granting of bond moot.”). Respondents provide no reason why their conclusory arguments that the bond amount is insufficient should be credited over the Immigration Judge's well-reasoned findings.

VI. Release is the appropriate remedy

The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *See Arias v. Decker*, 459 F. Supp. 3d 561, n.9 (S.D.N.Y. 2020) (citing *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261 (2d Cir. 1996)). Courts in this district have granted release to non-citizens in civil immigration detention pending final adjudication of habeas petitions, where necessary—as here—to prevent irreparable harm. *See, e.g., id.* Further, pending adjudication of a habeas petition, courts apply *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001) and grant release on bail where a petitioner establishes substantial claims in the Petition, extraordinary circumstances, and that the grant of bail is necessary to make the habeas remedy effective. *See Ozturk*, 2025 WL 1145250, at *16; *see also Mohammed H. v. Trump*, Civ. No. 25-1576, 2025 WL 1692739 (D. Minn. June 17, 2025) (petitioner released on bond after DHS invoked the automatic stay provision, which the court later found unconstitutional).

Under both of these analyses, immediate release here is necessary and appropriate. Petitioner has shown irreparable harm and that his release is in the public interest. *See supra* Section IV-V. The Petition sets forth strong claims that his detention is unlawful and that DHS is serially invoking a rarely used provision to override proper determinations of the Immigration

Judge and keep Petitioner indefinitely detained. Furthermore, release on bail is necessary to effectuate the habeas remedy, because DHS is unlawfully forcing Petitioner to fight his removal proceedings while detained—a proceeding where he seeks asylum and protection from deportation—despite having been ordered released on bond.⁷ If DHS’s hijinks are successful not only would he remain detained for his merits hearing, but he would remain detained during any merits appeal, whether he wins or loses. DHS is aware that Petitioner’s physical and mental health are deteriorating in detention. ECF 18-1 ¶¶ 16-19. And that he has to choose between fighting his removal proceedings and facing depression and suicidal ideations in detention, or giving up and face torture or death in Venezuela.⁸ *Id.*

Lastly, Respondents claim that if this Court releases Petitioner without bond it would be a “windfall” for Petitioner. Opp. at 24. It would not be a windfall for J.J.O.H. to finally be released after fourth months of unlawful detention, during which J.J.O.H. twice attempted to post bond, but bond was rejected because of DHS’s invocation of the automatic stay provision, Herr Decl. ¶¶ 6, 11; he was separated from his family and unable to provide for them, ECF No. 18-1 ¶¶ 17, 22-23, and developed suicidal ideation for the first time in his life, *id.* ¶19. In light of his lack of criminal history, his affirmative asylum application, his work history, and his community support, he should be released immediately and will abide by the conditions set by this Court.⁹

CONCLUSION

For the reasons set forth above and in Petitioner’s opening brief, ECF No. 18, J.J.O.H.

⁷ See Herr Decl. ¶ 17 (“[The Immigration Judge] further explained to J.J.O.H. that by adjourning the merits hearing ‘it will also give you an opportunity to be released and to be able to actually have your case adjudicated while you can participate more in the case’ from outside of ICE custody”); *see also* ECF No. 18-1 ¶ 24.

⁸ Practically, Petitioner seeks a return to a *status quo* before DHS unlawfully stayed his release on bond.

⁹ Respondents further argue that if this Court does release Petitioner, it should impose the same bond amount that the Immigration Judge most recently set. Opp. at 25 n.6. They cannot have it both ways, arguing that the Immigration Judge’s bond decisions are flawed and must be overturned, but also that if the Court releases J.J.O.H., the Immigration Judge’s bond decisions should be implemented.

respectfully requests that the Court issue an order pursuant to Fed. R. Civ. P. 65—or in the alternative, pursuant to *Mapp v. Reno*, directing Respondents to immediately release him.

Dated: July 16, 2025

Respectfully submitted,

/s/ Alyssa Briody

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