

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

JOSE AUGUSTO ALVES DA SILVA

**Petitioner,**

v.

**PATRICIA H. HYDE**, Acting Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations, Boston Field Office; **TODD LYONS**, Acting Director, U.S. Immigration and Customs Enforcement; **KRISTI NOEM**, Secretary of U.S. Department of Homeland Security; **PAMELA BONDI**, U.S. Attorney General; **CHRISTOPHER BRACKETT**, Superintendent, Strafford County Department of Corrections

**Respondents.**

**Case Number: 1:25-cv-284-LM-TSM**

**AMENDED PETITION FOR WRIT OF HABEAS CORPUS**  
**PURSUANT TO 28 U.S.C. § 2241**  
**(Expedited Consideration Requested)**

**INTRODUCTION**

This case involves the question of whether a regulation permitting the Department of Homeland Security (DHS) to unilaterally and mandatorily detain a person after an Immigration Judge (IJ) has ordered the person's release is constitutional as applied to Petitioner. The Court should find that 8 C.F.R. § 1003.19(i)(2) is unconstitutional. *See Günaydin v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 U.S. Dist. LEXIS 99237, at \*27 (D. Minn. May 21, 2025) ("In conclusion, all three *Mathews* factors favor [the petitioner's] position, and the Court concludes the

automatic stay regulation at § 1003.19(i)(2) violates [the petitioner’s] procedural due process rights under the Fifth Amendment.”).

Petitioner Jose Augusto Alves Da Silva is a noncitizen from Brazil whom the IJ already granted a release with the condition of posting a \$6,500 bond on July 14, 2025 because the IJ found that Respondents failed to satisfy the dangerous prong under the clear and convincing evidence or the flight risk prong under the preponderance of evidence. Ex. 1 (IJ Bond Order). This bond decision is unsurprising because the only criminal record Petitioner has is a pending charge of operating a vehicle without a license. Ex. 2 (DHS Evidence); Ex. 3 (Petitioner’s Bond Motion and Evidence).

However, Petitioner could not be released because Respondents filed Form EOIR-43, a notice of intent to appeal the IJ’s bond decision, with the Immigration Court within one business day, which triggered an automatic stay of release under 8 C.F.R. § 1003.19(i)(2). Ex. 4 (Form EOIR-43). Subsequently, Respondents appealed the IJ’s bond decision to the Board of Immigration Appeals (BIA), which continued the automatic stay of release while the appeal is pending before the BIA.<sup>1</sup> *See* 8 C.F.R. § 1003.19(i)(2) (“any order of the immigration judge authorizing release (on bond or otherwise) . . . shall remain in abeyance pending decision of the appeal by the Board”). *See also* 8 C.F.R. § 1003.6(c).

It is well-settled that Petitioner has due process rights under the Fifth Amendment of the Constitution. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”). This Court’s due process “inquiry

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<sup>1</sup> Petitioner does not have access to a copy of the notice of appeal Respondents filed with the BIA yet because the BIA has not processed Petitioner’s counsel’s appearance before the BIA. However, it appears that Respondents filed the notice of appeal on July 28, 2025. *See* Docket Number (DN) 10-2 (“Date the BIA Case was Filed: 07/28/2025”).

is guided by the three-part balancing test articulated in *Mathews v. Eldridge*[,]” 424 U.S. 319, 335 (1976). *Id.* at 27.

All three *Mathews* factors weigh heavily in Petitioner’s favor.

*First*, “[t]here is no question that [Petitioner] suffer[s] a substantial deprivation of liberty” who remains in detention “alongside criminal inmates at the Strafford County Jail[.]” *Hernandez-Lara*, 10 F.4th at 28; *Günaydin*, 2025 U.S. Dist. LEXIS 99237, at \*20-21 (similar analysis).

*Second*, the automatic stay of release regulation, 8 C.F.R. § 1003.19(i)(2) “creates a substantial risk of erroneous deprivation of a detainee’s interest in being free from arbitrary confinement” particularly as “the automatic stay regulation includes no requirement that the agency official invoking it consider any individualized or particularized facts[.]” *Günaydin*, 2025 U.S. Dist. LEXIS 99237, at \*21-23. Indeed, the risk of erroneous deprivation is more substantial than the burden of proof question presented in *Hernandez-Lara*. *See Hernandez-Lara*, 10 F.4th at 31 (“proving a negative (especially a lack of danger) can often be more difficult than proving a cause for concern”). Here, Respondents have never attempted to demonstrate that Petitioner poses a risk of flight or a risk of danger to the community. Nor have they provided any reason why their interests would be prejudiced by allowing the IJ’s decision to take affect while it is reviewed by the BIA. *Id.*

*Third*, while “prompt execution of removal orders is a legitimate government interest . . . , which detention may facilitate,” the government’s interest is less compelling in Petitioner’s case. *Id.* at 32-33. Indeed, “limiting the use of detention to only those noncitizens who are dangerous or a flight risk may save the government, and therefore the public, from expending substantial resources on needless detention.” *Id.* at 33.

Because “the automatic stay regulation at § 1003.19(i)(2) violates [Petitioner’s] procedural due process rights under the Fifth Amendment[,] [t]he Court [should] order[] [Petitioner’s] immediate release.” *Günaydin*, 2025 U.S. Dist. LEXIS 99237, at \*27.

Petitioner further alleges as follows:

### **PARTIES**

1. Petitioner Jose Augusto Alves da Silva is a noncitizen from Brazil who is currently detained by Respondents at the Strafford County Department of Corrections in Dover, New Hampshire.

2. Respondent Patricia Hyde is the Acting Boston Field Office Director, U.S. Immigration and Customs Enforcement, and she is being sued in her official capacity. She is Petitioner’s legal custodian.

3. Respondent Todd Lyons is the Acting Director, U.S. Immigration and Customs Enforcement, and he is being sued in his official capacity. He is Petitioner’s legal custodian.

4. Respondent Kristi Noem is the Secretary of U.S. Department of Homeland Security, and she is being sued in her official capacity. She is Petitioner’s legal custodian.

5. Respondent Pamel J. Bondi is the United States Attorney General, and she is being sued in her official capacity. She oversees Immigration Judges and the Board of Immigration Appeals. She is also Petitioner’s legal custodian.

6. Respondent Christopher Brackett is the superintendent of the Strafford County Department of Corrections, and he is being sued in his official capacity as the warden. He is Petitioner’s immediate custodian.

### **JURISDICTION AND VENUE**

7. The Court has jurisdiction under 28 U.S.C. § 1331, 2241 (habeas corpus) and Article I, Section 9, Clause 2 of the U.S. Constitution (“Suspension Clause”).

8. Venue is proper in the District of New Hampshire because Petitioner is currently detained by the Strafford County Department of Corrections in Dover, New Hampshire, which is in the territorial jurisdiction of this Court. 28 U.S.C. § 1391; *Vasquez v. Reno*, 233 F. 3d 688, 696 (1st Cir. 2000).

### **FACTS**

9. Petitioner is 36 years old and from Brazil. Ex. 2 (DHS Evidence before the Bond Hearing) at 5.

10. Petitioner entered the United States without lawful entry in or about 2012. Ex. 2 at 5.

11. On May 5, 2025, Petitioner was arrested by the Lowell Police Department for operating a vehicle without a license. Ex. 2 at 5. This case is pending.

12. On the same day, when Petitioner was released from the police custody, Respondents arrested and detained him pursuant to an administrative arrest warrant. Ex. 2 at 5; Ex. 5 (Warrant for Arrest of Alien); Ex. 6 (Initial Custody Determination).

13. Respondents placed Petitioner in removal proceedings. Ex. 7 (Charging Document).

14. Petitioner filed an asylum application in removal proceedings. Ex. 8 (Asylum Application).

15. On July 8, 2025, Petitioner requested a bond hearing before the IJ pursuant to 8 U.S.C. § 1226(a). Ex. 3.

16. On July 11, 2025, Respondents argued, first, that Petitioner was detained under 8 U.S.C. § 1225(b) instead of 8 U.S.C. § 1226(a) because all inadmissible noncitizens are detained under 8 U.S.C. § 1225(b) as applicants for admission. Ex. 2 at 2.<sup>2</sup>

17. On July 14, 2025, the IJ rejected the Respondent's arguments, found that he was detained under 8 U.S.C. §1226(a), further found that Respondent failed to prove Petitioner was a flight risk or danger to the community and granted Petitioner's release with the condition of posting a bond of \$6,500. Ex. 1.

18. However, Petitioner could not post the bond because Respondents filed Form EOIR 43, Notice of ICE Intent to Appeal Custody Redetermination. Ex. 4. This filing within one business day of the IJ's bond decision triggered the automatic stay of release under 8 C.F.R. § 1003.19(i)(2).

19. On July 28, 2025, Respondents filed a notice of appeal to the Board of Immigration Appeals (BIA). DN 10 at 2.

### **CLAIMS FOR RELIEF**

#### **COUNT 1**

#### **U.S. CONSTITUTION - FIFTH AMENDMENT**

20. The foregoing allegations are realleged and incorporated herein.

21. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend V.

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<sup>2</sup> Petitioner notes that it appears that Respondents have recently changed their position. As of July 2025, Respondents took the position that “aliens who have not been admitted or paroled but who can establish that they have been physically present in the United States continuously for the 2-year period immediately preceding their encounter with immigration authorities are exempt from expedited removal proceedings and their detention is governed instead by § 1226.” Docket Number (DN) 14, at 2 n.1, *Duchi-Naula v. Tatum et al*, 1:25-cv-247-LM-AJ. Cf. Ex. 2 at 9 (Petitioner “has been a dedicated member of our community since 2012”).

22. It is undisputed that Petitioner has a right not to be detained arbitrarily. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021) (any “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections”) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)) (emphasis in original).

23. This Court’s due process “inquiry is guided by the three-part balancing test articulated in *Mathews v. Eldridge*[,]” 424 U.S. 319, 335 (1976). *Id.* at 27.

24. The Court should find that 8 C.F.R. § 1003.19(i)(2) is unconstitutional as applied to Petitioner, who is neither a danger to the community nor a flight risk. *See Günaydin v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 U.S. Dist. LEXIS 99237, at \*27 (D. Minn. May 21, 2025) (“In conclusion, all three *Mathews* factors favor [the petitioner’s] position, and the Court concludes the automatic stay regulation at § 1003.19(i)(2) violates [the petitioner’s] procedural due process rights under the Fifth Amendment.”).

#### **PRAYER FOR RELIEF**

Petitioner asks that this Court grant the following relief:

- (1). Assume jurisdiction over this matter;
- (2). Issue a Writ of Habeas Corpus directing Respondents to immediately release Petitioner;
- (3). Award Petitioner attorney’s fees and costs under the Equal Access to Justice Act, and on any other basis justified under law; and
- (4). Order any further relief this Court deems just and proper.

Respectfully submitted this 6th day of August 2025.

Jose Alves da Silva,

By and through his Counsel,

/s/ SangYeob Kim

Gilles R. Bissonnette (NH Bar: 265393)

SangYeob Kim (NH Bar: 266657)

Chelsea Eddy (NH Bar: 276248)

AMERICAN CIVIL LIBERTIES UNION OF

NEW HAMPSHIRE

18 Low Avenue

Concord, NH 03301

Phone: 603.333.2081

[gilles@aclu-nh.org](mailto:gilles@aclu-nh.org)

[sangyeob@aclu-nh.org](mailto:sangyeob@aclu-nh.org)

[chelsea@aclu-nh.org](mailto:chelsea@aclu-nh.org)

Maeve Healy, Esq. (NH Bar: 279462)

Carl Hurvich, Esq. (Pro Hac Vice)

Brooks Law Firm

10 High Street, Ste 3

Medford, MA 02155

(617) 245-8090

[maeve@brookslawfirm.com](mailto:maeve@brookslawfirm.com)

[carl@brookslawfirm.com](mailto:carl@brookslawfirm.com)