UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

JOSE AUGUSTO ALVES DA SILVA, Petitioner, v. CHRISTOPHER BRACKETT, Superintendent, Strafford County Department of Corrections; PATRICIA HYDE, Field Office Director, U.S. Customs and Immigration, Enforcement and Removal Operations, Boston; TODD LYONS, Acting Director, U.S. Immigration and Customs Enforcement; KRISTI NOEM, U.S. Secretary of Homeland Security; And PAMELA BONDI, U.S. Attorney General Respondents.	)	No. 1:25-cv-284-LM

FEDERAL RESPONDENTS' MOTION TO DISMISS HABEAS PETITION

Petitioner Jose Augusto Alves Da Silva, a non-citizen who entered the United States without inspection and without authorization, challenges his temporary decision pending resolution of his removal proceedings and asks this Court for release under 28 U.S.C. § 2241. Am. Pet. (ECF No. 16). He claims that 8 CFR §1003.19(i)(2), the regulation authorizing his detention, is unconstitutional. That regulation allows the Department of Homeland Security ("DHS") to invoke an automatic stay of a petitioner's release when, as here, an immigration judge orders the petitioner released on bond and DHS wishes to appeal that decision. Not only was the regulation lawfully enacted, but more importantly, its automatic stay is authorized by 8

U.S.C. § 1225(b)(2). Therefore, to grant his release, Petitioner asks this Court to set aside a lawfully enacted regulation and statute, finding both unconstitutionally applied, as alleged violations of the Due Process Clause of the United States Constitution.

However, the Supreme Court has long recognized Congress's broad power and immunity from judicial control to expel aliens from the country and to detain them while doing so. *See e.g., Shaughnessy v. United States*, 345 U.S. 206, 210 (1953); *Carlson v. Landon*, 342 U.S. 524, 538 (1952). The United States' temporary detention of Petitioner in no way exceeds this broad authority and does not deprive Petitioner of Due Process. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."). Because Petitioner's temporary detention is lawful, his habeas petition should be dismissed.

FACTS

The facts of this Petition are largely undisputed. Petitioner Jose Augusto Alves Da Silva is a native and citizen of Brazil, who entered the United States without admission or parole after inspection by an immigration officer at an unknown date and location. Declaration of Keith Chan § 6, attached as Exhibit A. His sister states that he has been part of her community in the United States since 2012. Am. Pet., Ex. 3 at 10 (ECF No. 16).

On May 5, 2025, Petitioner was arrested by the Lowell, MA Police Department on a charge of unlicensed operation of a motor vehicle. *Id.*, Ex. 2 at 5 (ECF No. 16). On leaving the police department, Petitioner was arrested by U.S. Customs and Border Patrol ("CBP") officers and entered ICE custody. Chan. Decl., ¶¶ 7-8. The following day, Petitioner was detained at Strafford County Department of Corrections in Dover, New Hampshire. *Id.* ¶ 8.

On May 19, 2025, ICE filed a Notice to Appear with the Chelmsford Immigration Court in Chelmsford, Massachusetts, initiating removal proceedings and charging Petitioner as inadmissible pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) ("An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."). *Id.* ¶9. On July 11, 2025, ICE filed additional charges of inadmissibility with the Chelmsford Immigration Court, charging Petitioner as inadmissible under 8 U.S.C. § 1182(a)(7)(A)(i)(I) (an immigrant who at the time of admission lacked any of a variety of valid documents authorizing entry as a non-citizen is inadmissible). *Id.* ¶ 11.

On July 8, 2025, Petitioner filed a motion for a custody redetermination hearing before the Chelmsford Immigration Court, and a hearing on the matter was held on July 14, 2025. *Id.* ¶¶ 10, 12. ICE argued that Petitioner was subject to detention under 8 U.S.C. § 1225 as an applicant for admission. *Id.* ¶ 12; *see* Am. Pet. Ex. 2 at 3 (ECF No. 16-2). The Immigration Judge disagreed, finding that Petitioner was eligible for a hearing under 8 U.S.C. § 1226, and ordered the release of the Petitioner under bond of $6,500. *Id.* ¶ 12. ICE reserved appeal. *Id.*

On July 15, 2025, ICE filed a Notice of ICE Intent to Appeal Custody Determination, invoking a 90-day automatic stay of the Immigration Judge's bond order. *Id.* ¶ 13. On July 28, 2025, ICE filed the notice of appeal along with the appropriate certification with the Board of Immigration Appeals ("BIA") to perfect the 90-day automatic stay of the Immigration Judge's bond order. *Id.* ¶ 14. The automatic stay of the Immigration Judge's bond order will cease upon a decision of the BIA or 90 days, whichever is shorter. *See* 8 C.F.R. § 1003.6(c)(4). Petitioner's removal proceedings continue before Judge Larsen, as Petitioner's next hearing is scheduled for

October 17, 2025. *See* EOIR, "Automated Case Information," https://acis.eoir.justice.gov/en/ (searching by Petitioner's A-number).[1]

Petitioner now challenges his continued detention under 8 CFR § 1003.19(i)(2), alleging that the automatic stay provision is unconstitutional as applied to him because it violates his procedural due process rights under the Fifth Amendment. Am. Pet. ¶ 24.

STANDARD OF REVIEW

A person in custody who petitions for a writ of habeas corpus challenges the legality of his restraint or imprisonment. *See* 28 U.S.C. § 2241. The burden is on the petitioner to show the confinement is unlawful. *See Walker v. Johnston*, 312 U.S. 275, 286 (1941). Here, Petitioner challenges his temporary civil immigration detention pending his removal proceeding.

Judicial review of immigration matters, including of detention issues, is limited. *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-492 (1999); *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Reno v. Flores*, 507 U.S. 292, 305 (1993); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a political character and therefore subject only to narrow judicial review"). The Supreme Court has thus "underscore[d] the limited scope of inquiry into immigration legislation," and "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo*, 430 U.S. at 792 (cleaned up); *Matthews v. Diaz*, 426 U.S. 67, 79-82 (1976); *Galvan v. Press*, 347 U.S. 522, 531 (1954).

The plenary power of Congress and the Executive Branch over immigration necessarily

[1] A copy of the automated information for Petitioner as it appeared at close of business on today's date is attached as Attachment 1 to undersigned counsel's Declaration, Exhibit A.

encompasses immigration detention, because the authority to detain is elemental to the authority to deport, and because public safety is at stake. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.")

ARGUMENT

Petitioner's temporary detention pursuant to the automatic stay of 8 C.F.R. § 1003.19(i)(2) is reinforced by Congress's command to detain his throughout his removal proceedings pursuant to 8 U.S.C. § 1225(b)(2). Moreover, this temporary detention does not violate Due Process. Because Petitioner cannot show his temporary detention violates the law, his Petition must be dismissed. *See* 28 U.S.C. § 2241.

I. Petitioner is temporarily detained pursuant to 8 U.S.C. § 1225(b)(2).

Petitioner's current detention arises 8 C.F.R. § 1003.19(i)(2), which automatically stays his release on bond for a maximum of 90 days. This regulation is statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention throughout his entire removal proceedings.

Under 8 U.S.C. § 1225(b)(2)(A), where a non-citizen is "an applicant for admission," and an examining immigration officer determines that the non-citizen seeking admission "is not

clearly and beyond a doubt entitled to be admitted," the non-citizen "*shall* be detained for a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A) (emphasis added).

Petitioner is subject to this mandatory detention requirement because he is an "applicant for admission" to the United States. An "applicant for admission" is a non-citizen present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Congress's broad language here is purposeful and clear on its face: the provision applies to all non-citizens who are present and have not been admitted, without qualification. *Id.* And because Petitioner has not demonstrated to an examining immigration officer that he is "clearly and beyond a doubt entitled to be admitted," his detention is mandatory. 8 U.S.C. § 1225(b)(2)(A). Thus, the Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he "shall be" detained.

The Supreme Court has confirmed that a non-citizen present in the country but never admitted is deemed "an applicant for admission" and that "detention must continue" "until removal proceedings have concluded" based on the "plain meaning" of 8 U.S.C. § 1225. *Jennings v. Rodriguez*, 583 U.S. 281, 289 & 299 (2018). Interpreting the statute, the Supreme Court reversed the Ninth Circuit Court of Appeal's imposition of a six-month detention time limit into the statute. *Id.* at 297. The Court clarified there is no such limitation in the statute and reversed on these grounds, remanding the constitutional due process claims for initial consideration before the lower court. *Id.*

Applying this reasoning, the United States District Court for the District of Massachusetts recently confirmed in a habeas action that an unlawfully present alien, who had been unlawfully present in the country for approximately 20 years, was nonetheless an "applicant for admission" upon the straightforward application of the statute. *See Webert Alvarenga Pena v. Patricia*

Hyde, et al., Respondents., No. CV 25-11983-NMG, 2025 WL 2108913, at *1 (D. Mass. July 28, 2025). The Court explained this resulted in the "continued detention" of an alien during removal proceedings as commanded by statute. *Id.*

Because under 8 U.S.C. § 1225(b)(2)(A), Petitioner shall be detained during his removal proceedings and his proceedings are uncontrovertibly ongoing, his temporary detention is lawful.

II. Petitioner's temporary detention does not offend due process.

Petitioner claims that his current temporary detention pending removal violates due process under the three-part balancing test found in *Mathews v Eldredge*, 424 U.S. 319, 335 (1976). Am. Pet. at 3, ¶ 23-24. This claim fails.

Mathews requires courts to weigh three factors: first, "the private interest that will be affected by the official action"; second, "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 third, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Hernandez-Lara v. Lyons*, 10 F.4th 19, 28 (1st Cir. 2021) (cleaned up).

Federal respondents cannot dispute that the private interest here, the deprivation of liberty, is significant. *See id.*[2] But the other *Mathews* factors are less clear cut.

[2] However, Federal Respondents do dispute the significance of the fact that Petitioner is detained "alongside criminal inmates at the Strafford County Jail," Am. Pet. at 3 (quoting *Hernandez-Lara*, 10 F.4th at 28), in the absence of specific allegations about Strafford County House of Corrections and how simply being held in the same facility as "criminal inmates" – many of whom are pre-trial detainees not yet convicted of crimes – exacerbates Petitioner's deprivation of liberty. Moreover, the distinction between "criminal inmates" and "immigration detainees" is immaterial in the case of immigration detainees who have themselves been convicted of "violent felonies and other serious crimes." *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020). Certainly, Petitioner does not fall into that category, but he could be detained alongside people with such convictions in a dedicated immigration facility as easily as in a county jail.

As a threshold matter, Federal Respondents note that Petitioner relies almost entirely on the reasoning found in *Günaydın v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 WL 1459154 (D. Minn. May 21, 2025). But this case is materially distinguishable because there, an immigration judge had not only granted the petitioner bond, but had also ruled that DHS could not sustain the only charge of removability they had levied and had terminated the petitioner's removal proceedings altogether. *Id.* at *3. The *Günaydın* court relied heavily on this fact throughout the order and expressly framed the issue of the case as "whether a regulation can permit an agency official to unilaterally detain a person after a judge has ordered the person's release and *after a judge has dismissed the underlying proceedings.*" *Id.* at *7. Here, no such ruling has occurred; Petitioner's removal proceedings have not been dismissed, and he has an individual hearing set for October 17, 2025. *See* EOIR, "Automated Case Information."

Further, the court in *Günaydın* further framed the regulation at issue by detailing criticism of an earlier, interim version of the rule, rather than identifying authority challenging the constitutionality of the current version. *See* 2025 WL 1459154 at *3-4. For instance, the order describes "nearly unanimous criticism" of the rule's earlier version "on due process grounds." *Id.* at *4. However, this "criticism" consisted of five public comments out of six, and it is impossible to parse ratio of criticism to praise in a vacuum; it stands to reason that parties who have no objection to a proposed rule will be less motivated to comment publicly than those who are opposed. *Id.*

In its review of the regulation's history, the *Günaydın* court cites approvingly to cases holding that the prior, interim rule violated due process but fails to acknowledge the cases that have disagreed with those holdings. *See, e.g.*, *Farias v. Garland*, No. 24-CV-4366 (MJD/LIB), 2024 WL 6074470 (D. Minn. Dec. 6, 2024) (disagreeing with *Ashley v. Ridge*, 288 F. Supp. 2d

662, 673 (D.N.J. 2003) (cited in *Gunaydin* at *4)); *Galarza-Solis v. Ashcroft*, No. 03 C 9188, 2004 WL 728199 (N.D. Ill. Mar. 30, 2004) (recognizing the abrogation of *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003) and *Uritsky v. Ridge*, 286 F.Supp.2d 842, 846-47 (E.D.Mich.2003) (both cited in *Gunaydin* at *4)); *Altayar v. Lynch*, No. CV1602479PHXGMSJZB, 2016 WL 7383340 (D. Ariz. Nov. 23, 2016), *report and recommendation adopted,* No. CV-16-02479-PHX-GMS, 2016 WL 7373353 (D. Ariz. Dec. 20, 2016) (finding that *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1075 (N.D. Cal. 2004) (cited in *Gunyadin* at *4) is no longer good law, as it relied on fact that automatic stay was indefinite; finding no due process violation in imposition of automatic 90-day stay); *Fisher v. Aviles*, No. CIV.A. 10-6369 FSH, 2011 WL 765977, at *7 (D.N.J. Feb. 23, 2011) (declining to rely on *Uritsky* (cited in *Gunyadin* at *4), among others, because "[n]one of these cases are binding on this Court, and this Court, respectfully, does not find them persuasive in any event, as the circumstances of their prolonged detention are markedly different from the instant case.").

In so construing the issue, the *Günaydın* court, like Petitioner here, takes as given that the *Mathews v. Eldridge* test applies in this setting. But both fail to recognize that the distinctiveness of the government's authority over immigration and how Supreme Court case law "leaves no room for a multi-factor "reasonableness" test." *Banyee v. Garland*, 115 F.4th 928, 933 (8th Cir. 2024).

As mentioned above, Congress broadly crafted "applicants for admission" to include non-citizens present within the United States without authorization, like Petitioner. *See* 8 U.S.C. § 1225(a)(1). Congress further directed that such non-citizens shall be detained during their removal proceedings. 8 U.S.C. § 1225(b)(2)(A). This was a legislative judgment to detain individuals who have crossed borders and traveled in violation of United States law.

The Supreme Court has recognized the government's profound interest in this arena. *See Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). The Supreme Court has recognized the United States' longtime Constitutional ability to detain those in removal proceedings as a necessary part of the power to remove aliens. *Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure."); *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation."); *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process."); *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien's status without running the risk of the alien's either absconding or engaging in criminal activity before a final decision can be made.").

In another immigration context (aliens already ordered removed awaiting their removal), the Supreme Court has explained that detaining these aliens less than six months is presumed constitutional. *See Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). But even this presumptive constitutional limit has been subsequently distinguished as perhaps unnecessarily restrictive in other contexts. For example, in *Demore*, the Supreme Court explained Congress was justified in detaining aliens during the entire course of their removal proceedings who were convicted of certain crimes. 538 U.S. at 513. In that case, Congress provided for the detention of certain

convicted aliens during their removal in 8 U.S.C. § 1226(c). *See id.* The Court emphasized the constitutionality of the "definite termination point" of the detention, which was the length of the removal proceedings. *Id.* at 512 ("In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," *id.*, at 690-691, the record shows that § 1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas*.").[3]

Given Congress's interest in dealing with illegal immigration by keeping specified aliens in detention pending the removal period, the Supreme Court dispensed of any Due Process concerns without engaging in the "*Mathews v. Eldridge* test." *See id. generally.*

Following this precedent, as noted above, the United States District Court for the District of Massachusetts dismissed a habeas action, finding that it was not a violation of due process to detain an undocumented alien during his removal proceedings. *See Alvarenga Pena*, 2025 WL 2108913, at *1 (highlighting the petitioner had been detained for 17 days leading up to the court's decision, far less than other detention times found constitutional in other cases).

Likewise, Petitioner's temporary detention pending his removal proceedings does not violate Due Process. He has been detained for approximately three- and one-half months as his process unfolds. His next removal hearing is scheduled for October; resolution one way or

[3] In 2018 the Court again highlighted the significance of a "definite termination point" for detention of certain aliens pending removal. *See Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018).

another is undoubtedly forthcoming. Petitioner's ample available process in his current removal proceedings demonstrate no lack of procedural due process, nor any deprivation of liberty "sufficiently outrageous" required to establish a substantive due process claim. *See generally Reed v. Goertz*, 598 U.S. 230, 236 (2023); *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 628 (8th Cir. 2001), *as corrected* (Mar. 27, 2001), *as corrected* (May 1, 2001). Congress simply made the decision to detain his pending removal which is a "constitutionally permissible part of that process." *See Demore v. Kim*, 538 U.S. 510, 531 (2003).

CONCLUSION

For the above reasons, Petitioner's motion should be dismissed.

Respectfully submitted,

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