UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

BALWINDER SINGH — PETITIONER

v. — NO. 4:25-CV-96-RGJ

SAMUEL OLSON, in his Official Capacity as Field Office Director, Chicago Field Office, U.S. Immigration and Customs Enforcement; and MIKE LEWIS, in his Official Capacity as Hopkins County Jailer — RESPONDENTS

RESPONDENT'S RESPONSE TO PETITIONER'S HABEAS PETITION

Respondent Samuel Olson, in his official capacity as Field Office Director for U.S. Immigration and Customs Enforcement (ICE) Chicago Field Office, responds to Petitioner's writ of habeas corpus petition:[1]

INTRODUCTION

Petitioner bears the burden to show that his detention is unlawful. *Freeman v. Pullen*, 658 F. Supp. 3d 53, 58 (D. Conn. 2023) (quoting *McDonald v. Feeley*, 535 F. Supp. 3d 128, 135 (W.D.N.Y. 2021)). After Plaintiff's arrest by Indiana law enforcement for driving under the influence in late June, ICE completed a warrant for Petitioner's arrest due to his ongoing removal proceedings, and it filed a detainer with the Indiana authorities so Petitioner could be detained under ICE's authority after he was released

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[1] This response to Petitioner's habeas petition is filed on behalf of Respondent Samuel Olson. 28 U.S.C. § 517 allows the Office of the United States Attorney to make appearances in court to attend to the United States' interests, and consistent with that statute and *Roman v. Ashcroft*, 340 F.3d 314, 319-20 (6th Cir. 2003), this filing attends to the United States' interests to the extent that the petition names Mike Lewis, the Hopkins County Jailer, as a respondent.

from custody due to his criminal charge. Petitioner was then provided a bond hearing before an immigration judge, and the immigration judge determined that Petitioner could be released if he paid bond of $6,500.

DHS appealed the immigration judge's decision on two grounds to the Board of Immigration Appeals under 8 C.F.R. § 1003.19(i)(2). DHS appealed because Petitioner is an "applicant for admission," and therefore, he is subject to the provisions of 8 U.S.C. § 1225(b), not 8 U.S.C. § 1226, pursuant to which the immigration judge offered him release on bond. DHS also appealed because it contended the immigration judge incorrectly found that Petitioner was not a danger to the public.

At the time of the hearing in this matter, Respondents argued that the constitutionality of 8 C.F.R. § 1003.19(i)(2) was the pressing issue. If that regulation was constitutional, then Petitioner's detention under it was permissible. But on Friday, September 5, 2025, the BIA issued a decision in a related matter and held that 8 U.S.C. § 1225(b), not 8 U.S.C. § 1226, is the proper statute under which "applicants for admission," like Petitioner, are detained. *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025) (*available at* https://www.justice.gov/eoir/media/1413311/dl?inline, last accessed on Sept. 7, 2025). The BIA resolved that "applicants for admission"—whether subject to expedited removal or not—are, consequently, not eligible for bond hearings because § 1225(b) does not provide for such relief. *Id.* at 218-29. The BIA held: "under a plain language reading of . . . 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests or to grant bond to aliens, like respondent, who are present in the United States without admission." *Matter of Yajure Hurtado*, 29 I&N Dec.

at 225. The BIA's reasoning in *Matter of Yajure Hurtado* is persuasive and shows that Petitioner should not have been provided a bond hearing and that his detention is lawful.

But, even if the BIA had not opined that there is no statutory support for providing bond hearings to applicants for admission, Petitioner's detention is still lawful. 8 C.F.R. § 1003.19(i)(2) has been in place and unchanged for almost 20 years. It authorizes ICE to detain Petitioner while DHS appeals the immigration judge's bond decision on the ground that the immigration judge improperly decided that, if released, Petitioner was not a danger to the public. Petitioner's challenge to the constitutionality of his detention under 8 C.F.R. § 1003.19(i)(2) should be denied, and he should remain in custody pending resolution of DHS's appeal.

FACTUAL BACKGROUND

Petitioner, a citizen of India, entered the United States without authorization or inspection and not at a port of entry on or about May 1, 2013. [Doc. 1-3, PageID. 35.] Petitioner was deemed inadmissible and subject to removal. [Doc. 1, ¶ 21.] Petitioner was served with a Notice to Appear because an asylum officer found that he had demonstrated credible fear of being removed to India, but his petition was never fully adjudicated. [Doc. 1-3, PageID. 35.]

In February 2016, Petitioner was convicted of a level 6 felony for fraud in Indiana, which the state court reduced to a Class A misdemeanor. [Doc. 1-4, PageID. 44.] On June 29, 2025, Petitioner was arrested in Indiana for driving under the influence. [*See* Doc. 1-7, PageID. 65.] ICE placed a detainer on Petitioner on July 2, 2025, notifying

state authorities that Petitioner should remain detained after he was released from state custody. [Doc. 1-2, PageID. 33.] Petitioner is in 8 U.S.C. § 1229a removal proceedings, as he has been since 2013. [Doc. 1 at ¶ 22, PageID. 5.]

Petitioner requested that ICE's custody determination be reviewed by an immigration judge. [Doc. 1, ¶ 25.] A hearing on Petitioner's request was conducted on July 16, 2025. [*Id.*, ¶ 26.] On July 28, the immigration judge granted Petitioner's request and ordered him released under a bond of $6,500. [Doc. 1-1, PageID. 30.] On that same day, under the authority of 8 C.F.R. § 1003.19(i)(2), the Department of Homeland Security (DHS) timely appealed the immigration judge's bond decision to the Board of Immigration Appeals. [Doc. 1-6, PageID. 60.] The chief counsel to ICE's Chicago Office of the Principal Legal Advisor approved filing the appeal. [Doc. 1-7, PageID. 66.] DHS's appeal automatically stayed the immigration judge's custody decision until the Board of Immigration Appeals (BIA) resolves the appeal or 90 days passes, whichever happens first. *Id.* § 1003.6(c)(4).[2]

DHS filed its brief in support of appeal and argued that the immigration judge should have denied Petitioner's request for release for two reasons: (1) because Petitioner should have been mandatorily detained under 8 U.S.C. § 1225, not § 1226, and thus should not have been provided a bond hearing; and (2) because Petitioner poses a danger to the public. [Doc. 1-7, PageID. 65]; *see* 8 C.F.R. § 1236.1(c)(8) (stating

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[2] 8 C.F.R. § 1003.6 provides for additional process, but that is not at issue in this case because the BIA has not resolved this appeal, nor has Petitioner been detained for 90 days, which will occur on or around October 26, 2025.

that "the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons" to be released on bond). Regarding the first reason for DHS's appeal of the immigration judge's bond determination, DHS contends that 8 U.S.C. § 1225(b)(2)(A) provides the detention authority for Petitioner. Previously 8 U.S.C. § 1226(a) was, at least in some instances,[3] interpreted to be applicable to "applicants for admission" – i.e., aliens who entered the United States without admission or parole – and who were in 8 U.S.C. § 1229a removal proceedings. DHS contends, as the BIA held in *Matter of Yajure Hurtado*, that § 1225 is the correct detention authority.

But DHS appealed the immigration judge's bond determination for the alternate and independent reason that Petitioner poses a danger to the public. Driving under the influence is extremely dangerous and presents a serious risk of injury to other persons and property. *See Matter of Siniauskas*, 27 I. & N. Dec. 207, 208 (2018) (quoting cases). In *Matter of Siniauskas*, the BIA vacated an immigration judge's decision to set bond for an alien arrested for drunk driving, noting "[d]riving under the influence is a significant adverse consideration in bond proceedings." *Id.* at 209. "Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield v. North Dakota*,

[3] The immigration judge in *Matter of Yajure Hurtado* concluded that he lacked jurisdiction to set bond, 29 I&N Dec. at 217, while the immigration judge in Petitioner's matter obviously held to the contrary.

579 U.S. 438, 443 (2016)). Thus, this separate reason for appeal still stands regardless of any conclusion regarding 8 U.S.C. § 1225(b)(2)(A).

LEGAL BACKGROUND

For more than a century, the immigration laws have authorized immigration officials to charge noncitizens as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during their removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). In the INA, Congress enacted a multi-layered statutory scheme for the civil detention of noncitizens 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. "The rule has been clear for decades: "[d]etention during deportation proceedings [i]s ... constitutionally valid." *Banyee v. Garland*, 115 F.4th 928 (8th Cir. 2024) (citing *Demore v. Kim*, 538 U.S. 510, 523 (2003)); *see Demore*, 538 U.S. at 523 n.7 ("In fact, 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 this deportation procedure.").

I. Detention under 8 U.S.C. § 1225.

Section 1225 applies to "applicants for admission," who are defined as "alien[s] present in the United States who [have] not been admitted" or "who arrive[] in the United States." 8 U.S.C. § 1225(a)(1). Applicants for admission "fall into one of two categories, those covered by § 1225(b)(1) and those covered by § 1225(b)(2)." *Jennings v. Rodriguez*, 583 U.S. 281, 287 (2018); *see also Matter of Yajure Hurtado*, 29 I&N Dec. 216

(BIA 2025).

Section 1225(b)(1) applies to arriving aliens and "certain other" noncitizens "initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation." *Id.*; 8 U.S.C. § 1225(b)(1)(A)(i), (iii). These noncitizens are generally subject to expedited removal proceedings. *See* 8 U.S.C. § 1225(b)(1)(A)(i). But if the individual "indicates an intention to apply for asylum . . . or a fear of persecution," immigration officers will refer the alien for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An individual "with a credible fear of persecution" is "detained for further consideration of the application for asylum." Id. § 1225(b)(1)(B)(ii). If the individual does not indicate an intent to apply for asylum, express a fear of persecution, or is "found not to have such a fear," he is detained until removed. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

Section 1225(b)(2) is "broader" and "serves as a catchall provision." *Jennings*, 583 U.S. at 287. It "applies to all applicants for admission not covered by § 1225(b)(1)." *Id.* Under § 1225(b)(2), an individual "who is an applicant for admission" shall be detained for a removal proceeding "if the examining immigration officer determines that [the] alien seeking admission is not clearly and beyond a doubt entitled to be admitted." 8 U.S.C. § 1225(b)(2)(A); *see Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025) ("for aliens arriving in and seeking admission into the United States who are placed directly in full removal proceedings, section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), mandates detention 'until removal proceedings have concluded.'") (citing *Jennings*, 583 U.S. at 299). Still, DHS has the sole discretionary authority to temporarily release on

parole "any alien applying for admission to the United States" on a "case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A); *see Biden v. Texas*, 597 U.S. 785, 806 (2022).

II. Detention under 8 U.S.C. § 1226(a).

Section 1226 "generally governs the process of arresting and detaining . . . aliens pending their removal." *Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (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). The Attorney General and the Department of Homeland Security ("DHS") thus have broad discretionary authority to detain a noncitizen during removal proceedings.[4] *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*, 139 S. Ct. 954, 966 (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 a noncitizen 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

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[4] 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 noncitizens 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).

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*, 141 S. Ct. 2271, 2280–81 (2021) (citing 8 C.F.R. §§ 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 noncitizen, 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 a noncitizen should remain detained during the pendency of his removal proceedings, the noncitizen 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 noncitizen, based on a variety of factors that account for the noncitizen's ties to the United States and evaluate whether the noncitizen poses a flight risk or danger to the community. *See Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006);[5] *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].").

Section 1226(a) does not provide a noncitizen with a right to release on bond. *See*

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[5] The BIA has identified the following non-exhaustive 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 in 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." *Guerra*, 24 I. & N. Dec. at 40.

Matter of D-J-, 23 I. & N. Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor does § 1226(a) explicitly address the burden of proof that should apply or any particular factor that must be considered in bond hearings. Rather, it grants DHS and the Attorney General broad discretionary authority to determine whether to detain or release a noncitizen during his removal proceedings. *See id.* If, after the bond hearing, either party disagrees with the decision of the immigration judge, that party may appeal that decision to the BIA. *See* 8 C.F.R. §§ 236.1(d)(3), 1003.19(f), 1003.38, 1236.1(d)(3).

Included within the Attorney General and DHS's discretionary authority are limitations on the delegation to the immigration court. Under 8 C.F.R. § 1003.19(h)(2)(i)(B), the immigration judge does not have authority to redetermine the conditions of custody imposed by DHS for any arriving alien. The regulations also include a provision that allows DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2) ("The decision whether or not to file [an automatic stay] is subject to the discretion of the Secretary.").

III. Automatic stay provision under 8 C.F.R. § 1003.19(i)(2).

Included within the Attorney General and DHS's discretionary authority is a provision that allows DHS to invoke an automatic stay of any decision by an immigration judge to release an individual on bond when DHS files an appeal of the custody redetermination. 8 C.F.R. § 1003.19(i)(2). The regulations provide that, once DHS has invoked an automatic stay, the following procedures apply:

- The "stay shall lapse if DHS fails to file a notice of appeal within ten (10) days of the issuance of order of the immigration judge." 8 C.F.R. § 1003.6(c)(1).

- "To preserve an automatic stay," DHS must file, with the notice of appeal, "a certification by a senior legal official that the official has approved the filing of the notice of appeal and that the motion has evidentiary support, and the legal arguments are warranted by existing law or by a non-frivolous argument." *Id.* § 1003.6(c)(1)(i), (ii).

- "The immigration judge shall prepare a written decision explaining the custody determination within five (5) business days after the immigration judge is advised that DHS has filed a notice of appeal or, with the approval of the Board in exigent circumstances, as soon as practicable thereafter (not to exceed five business days). *Id.* § 1003.6(c)(2).

- Further, "[t]he Board will track the progress of each custody appeal which is subject to an automatic stay in order to avoid unnecessary delays in completing the record for decision." *Id.* § 1003.6(c)(3).

- "If the Board has not acted on the custody appeal, the automatic stay shall lapse 90 days after the filing of the notice of appeal." *Id.* § 1003.(c)(4).[6]

Pursuant to the BIA Practice Manual, once an appeal is filed, the Board will issue a briefing schedule allowing the parties to file briefs within twenty-one (21) days. *See* BIA Practice Manual § 7.3(b)(1), § 4.2(e). The BIA Practice Manual also provides a process by which the Board may consider a motion to expedite the consideration of an appeal based on a "demonstration of impending and irreparable harm or similar good cause." *Id.* at § 6.4.

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[6] The regulations provide that the automatic stay provision is intended as a public safeguard, as well as a measure to enhance the agency's ability to effect removal should that be the ultimate decision in a case. 71 Fed. Reg. 57873, 57874 (November 1, 2006). In addition, the automatic stay allows ICE to "maintain the status quo" while it seeks expedited review by the BIA of the custody order. *Id.*

IV. Review of custody determinations at the Board of Immigration Appeals (BIA).

The BIA is an appellate body within the Executive Office for Immigration Review ("EOIR"), which is under the authority of the Attorney General. *See* 8 C.F.R. § 1003.1(d)(1). Members of the BIA possess delegated authority from the Attorney General. 8 C.F.R. § 1003.1(a)(1). The BIA is "charged with the review of those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it," including IJ custody determinations. 8 C.F.R. §§ 1003.1(d)(1), 236.1; 1236.1. The BIA not only resolves particular disputes before it, but also "through precedent decisions, [it] shall provide clear and uniform guidance to DHS, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations." *Id.* § 1003.1(d)(1). "The decision of the [BIA] shall be final except in those cases reviewed by the Attorney General." 8 C.F.R. § 1003.1(d)(7).

ARGUMENT

I. Petitioner is detained under 8 U.S.C. § 1225 and not eligible for bond.

In light of the BIA's decision in *Yajure Hurtado*, the Court should find that Petitioner, as an applicant for admission, is detained under § 1225 and is ineligible for bond. "Under the plain reading of the INA, we affirm the Immigration Judge's determination that he did not have authority over the bond request because aliens who are present in the United States without admission are applicants for admission as

defined under . . . 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings." 29 I&N Dec. at 220.

Like the petitioner in *Yajure Hurtado*, Petitioner here is an applicant for admission because he entered the United States without inspection. *Id.* at 221. Petitioner has been in the United States for several years, but that is irrelevant to whether he is detained under § 1225 and subject to mandatory detention until his removal proceedings are complete: "Remaining in the United States for a lengthy period of time following entry without inspection, by itself, does not constitute an 'admission.'" *Id.* at 228. Further, that Petitioner was detained under a DHS warrant does not change Petitioner's status. "[T]he mere issuance of an arrest warrant does not endow an Immigration Judge with authority to set bond for an alien who falls under" § 1225(b)(2)(A). *Id.* at 227.

Because Petitioner is subject to mandatory detention by virtue of him being an applicant for admission in removal proceedings, his detention is lawful, and the immigration judge's bond determination was issued in error. Petitioner is subject to mandatory detention under 8 U.S.C. § 1225(b)(2)(A) until his removal proceedings are concluded.

II. The Court should deny the petition because Petitioner has failed to exhaust his administrative remedies.

8 C.F.R. § 1003.6(c)(1) sets forth a detailed process for the appeal of a bond determination pursuant to an automatic stay that is expedited and limited to ninety (90) days. If the appeal is not sustained within ninety days, the automatic stay will lapse, and the immigration judge's bond release order will be reinstated. 8 C.F.R. §

1003.6(c)(3). Petitioner has the opportunity to opposed DHS's appeal and, if he wishes, to file a motion for expedited briefing and consideration. *See* BIA Practice Manual §§ 4.2(e), 6.4 and 7.3(b)(1). If the BIA rules against Petitioner, he can appeal a final order of the BIA to the appropriate court of appeals.

There is no statutory requirement precluding Petitioner from seeking habeas relief while the appeal of the bond decision is pending, but the doctrine of prudential exhaustion supports requiring Petitioner to exhaust the process that is ongoing before the BIA. The Southern District of Ohio recently imposed a prudential exhaustion requirement on a habeas petitioner by utilizing a test the Sixth Circuit has tacitly endorsed. *Torrealba v. U.S. Dep't of Homeland Sec.*, 2025 WL 2444114, 2025 U.S. Dist. LEXIS 164153, at *23-24, n.16 (S.D. Ohio Aug. 25, 2025) (citing *Rabi v. Sessions*, 2018 U.S. App. LEXIS 19661 (July 16, 2018)). Prudential exhaustion should be ordered when:

> (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
> (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and
> (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

Id. (quoting *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007).

In consideration of the foregoing factors, the Court should find, just like the *Torrealba* court, that administrative exhaustion is required. *See also Villalta v. Greene*, 2025 WL 2472886, 2025 U.S. Dist. LEXIS 169688 (N.D. Ohio Aug. 5, 2025); *Castillo Lachapel v. Joyce*, 2025 WL 1685576, 2025 U.S. Dist. LEXIS 115808 (S.D.N.Y. June 16, 2025) (citing other cases). The reasoning the court used in *Torrealba* is also applicable here. *See*

Torrealba, 2025 U.S. Dist. LEXIS 164153, at *24-29. With regard to the first element, the BIA is the administrative body designated to "interpret and apply immigration laws." *Board of Immigration Appeals*, https://www.justice.gov/eoir/board-of-immigration-appeals (last visited Sept. 5, 2025). BIA decisions are typically appealable to a federal court. The BIA is experienced in interpreting the INA and applying its provisions. The bond appeal is based on the INA and related regulations, and the BIA should be allowed to apply its expertise to the pending appeal.

As to the second factor, the *Torrealba* court found it favored requiring exhaustion. 2025 U.S. Dist. LEXIS 164153, at *27. The petitioner in that case complained that the BIA was unlikely to rule in her favor and that the administrative process would take too long. *Id.* The court explained that creating a shortcut through habeas relief would "encourage the deliberate bypass of the administrative scheme in favor of what may be perceived as a potentially more favorable and/or timely reviewing body, i.e., federal court." *Id.* The court highlighted that exhaustion is important because administrative agencies have been delegated duties, and agencies should be permitted to exercise their responsibilities with limited interference by courts in that process. *Id.*

The third factor is closely related. Allowing the BIA to determine whether DHS's arguments are correct may preclude the need for judicial review. *Id.* at 26. The appeal process from immigration judge to the BIA is designed to provide a second level review to correct errors. Moreover, the BIA recently considered and issued a reasoned opinion on the relationship between 8 U.S.C. § 1225 and § 1226. *Matter of Q. Li*, 29 I. & N. Dec. 66, 68 (BIA 2025). And then, last week, the BIA issued its opinion in *Yajure Hurtado*.

Although those factors favor requiring exhaustion, a court can override the balance tipping in favor of exhaustion if "administrative remedies are inadequate or not efficacious, pursuit of administrative remedies would be a futile gesture, irreparable injury will result, or the administrative proceedings would be void." *Torrealba*, 2025 U.S. Dist. LEXIS 164153, at *28 (quotation omitted). The remedy BIA can provide is the same as the Court. The pursuit isn't futile, nor will the proceedings be void: the BIA is an independent body from DHS that is empowered to adjudicate bond appeals. Finally, although Petitioner obviously wants to be released from detention, "continued imprisonment does not constitute irreparable harm." *Martin v. Puzio*, 2025 WL 1678472, 2025 U.S. Dist. LEXIS 112790, at *7 (D. Conn. June 13, 2025) (citing cases). "If incarceration alone were the irreparable injury complained of, then the exception would swallow the rule that the INS administrative remedies must be exhausted before resorting to the federal courts." *Giwah v. McElroy*, 1997 WL 782078, at *4, 1997 U.S. Dist. LEXIS 20136, at *13 (S.D.N.Y. Dec. 19, 1997).

The Court should conclude that Petitioner has available to him an expeditious and effective means to challenge his bond determination which he must first exhaust before seeking habeas relief.

III. The automatic stay under 8 C.F.R. § 1003.19(i)(2) is constitutional.

Petitioner wrongly alleges that DHS's appeal of the immigration judge's bond decision and the invocation of 8 C.F.R. § 1003.19(i)(2)'s automatic stay violates (1) his Fifth Amendment due process rights, (2) the INA, and (3) that § 1003.19(i)(2) is *ultra vires*. [Doc. 1, PageID. 25-28.] First, the automatic stay does not violate the substantive

due process clause of the Fifth Amendment—"An automatic stay of up to 90 days does not violate due process because it is narrowly tailored to serve a compelling government interest." *Altayar v. Lynch*, 2016 U.S. Dist. LEXIS 175819, at *13 (D. Ariz. Nov. 23, 2016)—and Petitioner has not alleged any procedural deficiency. Second, Petitioner's claim that the INA is being violated is wrong as the BIA just found in *Yajure Hurtado*. Third, § 1003.19(i)(2) is a valid application of the Attorney General's discretion that was provided to her under 8 U.S.C. § 1226: "In essence, the challenged regulation reveals the division of authority the Attorney General has established within the executive branch to exercise [her] overall authority to determine the custodial status of aliens facing removal proceedings." *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1032 (E.D. Wisc. 2007).

A. 8 C.F.R. § 1003.19(i)(2)'s automatic stay complies with the Fifth Amendment.

i. Petitioner's detention does not offend due process.

The Fifth Amendment's Due Process Clause requires that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. Due process contains both procedural components, which require the government to follow certain procedures before a deprivation, and substantive components, which "bar[ ] certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotation omitted); *Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 145 (4th Cir. 2014).

"[A]liens ... have a substantive due process right to be free of arbitrary confinement pending deportation proceedings." *Rodriguez v. Perry*, 747 F. Supp. 3d 911, 917 (E.D. Va. 2024) (citing *Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991)). "It is axiomatic, however, that an alien's right to be at liberty during the course of deportation proceedings is circumscribed by considerations of the national interest." *Id.* *See also Rodriguez-Diaz v. Garland*, 53 F.4th 1189, 1213 (9th Cir. 2022) (recognizing that while both interests are substantial, "the private interest of a detained alien under § 1226(a) is lower than that of a detained U.S. citizen, and the governmental interests are significantly higher in the immigration detention context.").

Relevant here, the Supreme Court has consistently held that for certain purposes under the Fifth Amendment there is a constitutionally sound distinction in immigration law between applicants for admission and those who have already entered the United States. *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 845 (E.D. Va. 2020) (citing *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 138-39 (2020)); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."); *see also Thuraissiagiam*, 591 U.S. 103. "In that regard, an entering alien has only those rights concerning his admissibility as Congress has statutorily provided." *Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 845 (E.D. Va. 2020). Moreover, the Supreme Court has recognized that "[d]etention during removal proceedings is a constitutionally permissible part of that process." *Demore v. Kim*, 538

U.S. 510, 531 (2003) (holding that mandatory detention under 8 U.S.C. § 1226(c) is facially constitutional); *see also Miranda v. Garland*, 34 F. 4th 338, 364 (4th Cir. 2022).

Laws that infringe a "fundamental" right protected by the Due Process Clause are constitutional only if "the infringement is narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302 (1993). The automatic stay as applied here to Petitioner does not violate substantive due process, as it is narrowly tailored to serve the Government's compelling interest in detaining him while the immigration judge's decision is appealed. The filing of the bond appeal by DHS under 8 C.F.R. § 1003.19(i)(2) had the effect of automatically staying the bond decision of the immigration judge for a limited and defined period, as the automatic stay expires 90 days from the date of DHS's appeal (8 C.F.R. § 1003.6(c)(3)). Petitioner has currently only been detained due to the bond appeal for around 40 days, and his potential detention up to 90 days does not offend his limited due process rights as an applicant for admission. Here, as the District Court found in *Altayar v. Lynch*, "a stay of some length is afforded precisely because it allows the Government an opportunity to appeal before a detainee might flee." 2016 WL 7383340, at *4 (D. Ariz. Nov. 23, 2016) (citing *El-Dessouki, v Cangemi*, 2006 WL 2727191, at *3 (D. Minn. Sept. 22, 2006) ("a finite period of detention to allow the BIA an opportunity to review the immigration judge's bond redetermination is a narrowly tailored procedure that serves the government's interest in preventing flight of aliens likely to be ordered removable and in protecting the community").

An automatic stay of up to 90 days does not violate due process because it remains in effect only until the BIA has an opportunity to review the appeal. The

limited stay is also narrowly tailored to enhance the agency's ability to effect removal should that be the ultimate decision in a case. Moreover, the stay allows DHS to "maintain the status quo" while it seeks expedited review by the BIA of the custody order. 71 Fed. Reg. 57873, 57874 (November 1, 2006). In this respect, many of the cases Petitioner relies on to support his due process claims are distinguishable because they concern the previous automatic stay regulation under which the duration of the stay was indefinite (*see, e.g., Reynoso Jacinto v. Trump*, 2025 WL 2402271, 2025 U.S. Dist. LEXIS, at * (D. Neb. Aug. 19, 2025) (citing *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1076 (N.D. Cal. 2004)). *Cf. Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1032 (E.D. Wisc. 2007) ("The cases upon which Hussain relies to support his argument that the regulation violates due process addressed the previous regulation under which the duration of the automatic stay was indefinite." (citing *Zavala*)).

Contrary to Petitioner's claims, the automatic stay is not arbitrary nor does it neuter the immigration judge's decision simply because the Government may unilaterally continue Petitioner's detention for a limited period of time. Rather, as observed by the Court in *Altayar*, "the regulations under 8 C.F.R. § 1003.38 provide for a constitutionally permissive appellate process in compliance with due process, which provides both parties in bond proceedings with an avenue to appeal the Immigration Judge's custody and bond decision." *See* 2016 WL 7383340, at *5 (citing 8 C.F.R. § 1003.38). In this respect, the *Altayar* court concluded that "the automatic stay [] does not turn the IJ decision into a meaningless formality because it affords the BIA time to consider an appeal," and "the purpose of the automatic stay is to 'avoid the necessity of

having to decide whether to order a stay on extremely short notice with only the most summary presentation of the issues.'" *Id.* (citing *Review of Custody Determinations*, 71 FR 57873-01, 2006 WL 2811410).

ii. The procedural due process provided was adequate.

Procedural due process requires the "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Ronald Fagan, M.D., P.C. v. U.S. Dep't of Health & Hum. Servs.*, 2025 WL 1837402, at *12 (D. Md. July 2, 2025); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). To determine whether administrative procedures afford adequate due process protection, courts must consider (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. When considered here, Petitioner's limited due process rights as an inadmissible alien do not overcome the Government's substantial interests, discussed *supra*, in maintaining his detention during the limited automatic stay time period. Further, as Petitioner has not contested the underlying basis for his detention, nor is there any indication that he is not properly detained as an applicant for admission, the risk that he is inappropriately being deprived of his freedom during this limited period of time is not significant.

Finally, Petitioner cannot show that the automatic stay in his case has rendered his proceeding so "fundamentally unfair" that it has "prejudiced the outcome of his case." *See Anim v. Mukasey*, 535 F.3d 243, 256 (4th Cir. 2008) ("To succeed on a due process claim in an asylum or deportation proceeding, the alien must establish two closely linked elements: (1) that a defect in the proceeding rendered it fundamentally unfair and (2) that the defect prejudiced the outcome of the case.") Prejudice requires that the "rights of [an] alien have been transgressed in such a way as is likely to impact the results of the proceedings." *Rusu v. U.S. Immig. & Naturalization Serv.*, 296 F.3d 316, 320-321 (4th Cir. 2002). Petitioner does not argue that his current detention has prejudiced his removal proceedings. Further, Petitioner's counsel received notice of the stay request and is opposing DHS's efforts at overturning the immigration judge's bond decision. *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 926–27 (9th Cir. 2007) ("Where an alien is given a full and fair opportunity . . . to present testimony and other evidence in support of the application, he or she has been provided with due process.").

B. The automatic stay is not *ultra vires*.

Petitioner also incorrectly argues that the automatic stay provision is *ultra vires* and exceeds ICE's authority under the INA. As the District Court in Minnesota recently observed in facing a similar challenge to application of the automatic stay to a removal, the text of 1225(b) expressly commits the decision of whether to release or deny release to a person awaiting removal to the "Attorney General" not to immigration judges. *See Farias v. Garland*, 2024 WL 6074470, 2024 U.S. Dist. LEXIS 246147, at *3-8 (D. Minn. Dec. 6, 2024); *see also Hussain v. Gonzalez*, 492 F. Supp. 2d 1024, 1031-32 (E.D. Wisc. 2007). The

regulations grant the Government the discretion to release certain aliens already detained under § 1225(b)(2)(A). However, the regulation contemplates such release only as an exercise of the Attorney General's parole power under 8 U.S.C. § 1182(d)(5)(A). *See* 8 C.F.R. § 235.3(c)(1) ("Parole of such alien [detained under 8 U.S.C. § 1225(b)] shall only be considered in accordance with § 212.5(b) of this chapter."); 8 C.F.R. § 212.5 (citing § 1182 as authority for the Government's power to parole those detained under § 1225). Like in *Farias*, Petitioner's argument here "also [does] not find support in the regulations promulgated by the Attorney General which make clear that immigration judges act only 'as the Attorney General's delegates in the case that come before them.'" *Farias*, 2024 WL 6074470, *2, citing 8 C.F.R. § 1003.10(b). As is clear from a plain reading, 8 U.S.C. § 1225(b)(2)(A) does not delegate authority to immigration judge but, instead, the effect of the provision under which Petitioner was found removable specifically prevents immigration judges from exercising their judgment independent of the Attorney General. Therefore, the Court should find Petitioner's argument that DHS's appeal of the immigration judge's bond determination and invocation of the automatic stay were not *ultra vires* or otherwise inconsistent with the INA.

CONCLUSION

Petitioner's petition for habeas relief should be denied because he is lawfully detained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2025, I filed this document via CM/ECF, which will automatically provide service to all counsel of record.

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