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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

PEDRO HENRIQUE ROBERTO)
FERREIRA DA SILVA)
Petitioner,)
)
v.)
)
E.L. TATUM,)
Warden of FCI Berlin;)
)
PATRICIA HYDE,)
Acting Field Office Director,)
U.S. Customs and Immigration,)
Enforcement and Removals Operations,)
Boston;)
)
TODD LYONS, Acting Director,)
U.S. Immigration and Customs)
Enforcement;)
)
KRISTI NOEM,)
Secretary of U.S. Department of)
Homeland Security;)
)
Respondents.)

Case No. 1:25-cv-00329-PB-AJ

**RESPONSE TO MOTION TO DISMISS
OR ALTERNATIVELY FOR
SUMMARY JUDGMENT**

1. Pedro Henrique Roberto Ferreira da Silva (hereinafter referred to as “Pedro Henrique,” “Mr. Ferreira da Silva,” or “Petitioner”) responds to the Motion to Dismiss for Failure to State a Claim or Alternatively for Summary Judgment filed by Petitioners on September 17, 2025. Doc. 6.

INTRODUCTION

2. Petitioner **has been detained since July 17, 2025 (76 days)**, despite having an order from the immigration court since July 31, 2025, ordering his release upon payment of bond.
3. In order to prevent Petitioner from being released, Respondents have filed an appeal with the Board of Immigration Appeals (“BIA”) that automatically stayed the Immigration Judge’s decision, based on an interpretation that the Immigration Court did not have jurisdiction to redetermine his custody.
4. The appeal is still pending before the BIA, which is part of the Executive Office for Immigration Review (“EOIR”). The EOIR operates under the Department of Justice (DOJ)’s authority, and it has supported DHS’s interpretation of the statute to deny the Immigration Court’s jurisdiction over bond hearings for most noncitizens. *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025).
5. The interpretation set by the DOJ and DHS has been strongly rejected in several federal court rulings.¹ By accepting Respondents’ Motion to Dismiss, this Court would force

¹ *Aguiriano Romero v. Hyde*, No. 25-cv-11631-BEM, 2025 WL 2403827 (D. Mass. Aug. 19, 2025); also *Diaz Martinez v. Hyde*, — F. Supp. 3d —, 2025 WL 2084238 (D. Mass. July 24, 2025); see also, e.g., *Rodriguez Vazquez v. Bostock*, — F. Supp. 3d —, 2025 WL 1193850 (W.D. Wash. Apr. 24, 2025) (holding same); *Gomes v. Hyde*, 2025 WL 1869299 (D. Mass. July 7, 2025) (same); *Garcia v. Hyde*, Civ. No. 25-11513 (D. Mass. July 14, 2025) (same); *Rosado v. Bondi*, 2025 WL 2337099 (D. Ariz. Aug. 11, 2025) (same), *report and recommendation adopted without objection*, 2025 WL 2349133 (D. Ariz. Aug. 13, 2025); *Lopez Benitez v. Francis*, — F. Supp. 3d —, 2025 WL 2371588 (S.D.N.Y. Aug. 13, 2025) (same); *dos Santos v. Lyons*, 2025 WL 2370988 (D. Mass. Aug. 14, 2025) (same); *Aguilar Maldonado v. Olson*, 2025 WL 2374411 (D. Minn. Aug. 15, 2025) (same); *Escalante v. Bondi*, 2025 WL 2212104 (D. Minn. July 31, 2025) (granting preliminary relief after positively weighing likelihood of success), *report and recommendation adopted sub nom. O. E. v. Bondi*, 2025 WL 2235056 (D. Minn. Aug. 4, 2025); *Arrazola-Gonzalez v. Noem*, 2025 WL 2379285 (C.D. Cal. Aug. 15, 2025) (granting individualized bond hearings on *ex parte* motion for temporary restraining order after finding likelihood of success); *Garcia Jimenez v. Kramer*, 2025 WL 2374223 (D. Neb. Aug. 14, 2025) (granting relief from stay of bond order pending BIA appeal); *Mayo Anicasio v. Kramer*, 2025 WL 2374224 (D. Neb. Aug. 14, 2025) (same); *Rodrigues De Oliveira v. Joyce*, 2025 WL 1826118 (D. Me. July 2, 2025) (recognizing disagreement as to the detention statutes and granting habeas petition on due process grounds). *But see Pena v. Hyde*, 2025 WL 2108913 (D. Mass. July 28, 2025).

Petitioner to remain detained and refile a habeas petition once his appeal is denied. In the meantime, Petitioner would be at risk of receiving a final removal order and being removed from the country. Respondents' motion attempts to perpetuate an egregious violation of Petitioner's due process rights, which this Court should not accept.

STATUTORY AND REGULATORY SCHEME

6. 8 U.S.C. § 1226 sets forth the government's authority to arrest and detain noncitizens present in the country pending the outcome of removal proceedings, while 8 U.S.C. § 1225(b) applies primarily to noncitizens trying to enter the United States or apprehended at or near the border. *Jimenez v. FCI Berlin, Warden*, --- F. Supp. 3d ----, 2025 WL 2639390, at *3-4 (D.N.H. Sept. 8, 2025). Noncitizens arrested and detained under § 1226(a) are generally entitled to a bond hearing before an IJ, while noncitizens detained under § 1225(b) are not. *Id.*
7. Both the noncitizen and the government have a right to appeal an IJ's decision regarding a custody status or bond redetermination to the BIA. 8 C.F.R. §§ 1003.19(f), 1003.38. If an IJ issues an order "authorizing release (on bond or otherwise)," § 1003.19(i)(2) ("automatic stay regulation") permits the Department of Homeland Security ("DHS") to automatically stay the IJ's order, resulting in the continued detention of the noncitizen pending DHS's appeal to the BIA. To trigger the stay, DHS need only file a one-page form with the immigration court within one day of its release order. *Id.* § 1003.19(i)(2). Section 1003.6(c)(1) further provides that the stay remains in effect for ten business days to permit DHS to file a notice of appeal with the BIA.
8. Once DHS files the notice of appeal, the stay is automatically extended for ninety days. *Id.* § 1003.6(c)(4). This ninety-day period may be automatically extended by an

additional thirty days if DHS seeks a “discretionary stay” from the BIA pursuant to § 1003.19(i)(1) prior to the expiration of the original ninety-day period. *Id.* § 1003.6(c)(5). Moreover, under § 1003.6(d), if the BIA “authorizes an alien's release (on bond or otherwise), denies a motion for discretionary stay, or fails to act on such a motion before the automatic stay period expires, the alien's release shall be automatically stayed for five [additional] business days,” or for fifteen business days if DHS refers the case to the Attorney General within those five business days. From there, the Attorney General may order a stay “pending the disposition of any custody case.” *Id.*

ARGUMENTS

I. Petitioner is Neither an Applicant for Admission, Nor Subject to Mandatory Detention

9. Respondents argue that Mr. Ferreira da Silva is an “applicant for admission” detained pursuant to 8 U.S.C. § 1225(b)(2), which requires his detention throughout his entire removal proceedings, and that the automatic stay regulation does not offend due process.
10. As this court explained in *Jimenez*, § 1225(b)(2)’s plain language, statutory scheme, history, and context all preclude the expansive reading that the government offers. 2025 WL 2639390, at *5-10; *accord, e.g., Sampiao v. Hyde*, --- F. Supp. 3d ----, 2025 WL 2607924, at *11 (D. Mass. Sept. 9, 2025) (collecting cases). Applying this court’s reasoning in *Jimenez*, it is clear that Petitioner is subject to § 1226(a)’s discretionary detention framework. Mr. Ferreira da Silva has lived in the country for more than six years. When Mr. Ferreira da Silva appealed the government’s decision to detain him to an IJ, the IJ rejected the government’s same argument regarding § 1225(b)(2) that it

makes before this court. Given the facts of this case, Petitioner's detention is governed by § 1226's discretionary framework. Rather than § 1225(b)(2), 8 C.F.R. § 1003.19(i)(2) is the current authority under which Mr. Ferreira da Silva is detained.

II. The Automatic Stay Provision Violates Due Process

11. In regard to Petitioner's claim that the automatic stay regulation violates his right to procedural due process, this court should apply the three-part balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Hernandez-Lara v. Lyons*, 10 F.4th 19, 27 (1st Cir. 2021) (applying *Mathews* balancing test to determine whether due process requires the government to prove by clear and convincing evidence at a § 1226(a) bond hearing before an IJ that the noncitizen is dangerous or a flight risk). "The *Mathews* factors are: (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.'" *Hernandez-Lara*, 10 F.4th at 28 (quoting *Mathews*, 424 U.S. at 335).
12. Applying these factors, the automatic stay regulation violates Petitioner's right to procedural due process under the Fifth Amendment.
13. Looking to the first *Mathews* factor (the private interest at stake), Mr. Ferreira da Silva's liberty interest is great. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("A person's interest in freedom from physical detention is 'the most elemental of liberty interests.'") At present, Petitioner has been imprisoned for over two months. More than half the length of his imprisonment is attributable to the automatic stay regulation.

Moreover, for much of his incarceration, Petitioner has been imprisoned in FCI Berlin alongside criminal detainees. *Cf. Hernandez-Lara*, 10 F.4th at 28 (noncitizen’s “incarcerat[ion] alongside criminal inmates at the Strafford County Jail” increased severity of “substantial deprivation of liberty”). Because the government filed its notice of appeal with the BIA on August 14, 2025, the automatic stay regulation could allow for Mr. Ferreira da Silva’s incarceration until November 12 of this year, pending a decision from the BIA. *See* 8 C.F.R. §§ 1003.19(i)(2), 1003.6(c)(4). As explained *supra*, the government could further extend Mr. Ferreira da Silva’s detention for an additional thirty days by simply filing a motion for a discretionary stay, unilaterally prolonging the automatic stay until December 12, 2025. *Id.* § 1003.6(c)(5). *See Sampiao*, 2025 WL 2607924, at *10 (discussing the many procedural tools that may be used to prolong noncitizen’s detention under § 1003.6). In short, the first *Mathews* factor weighs heavily in Petitioner’s favor.

14. Turning to the second *Mathews* factor, the challenged procedures invite a grave risk of erroneous deprivation. First and foremost, the automatic stay regulation only applies to persons who are entitled to be released on bond pursuant to the determination of an IJ who has considered both the noncitizen’s flight risk and any potential danger to the community. *Sampiao*, 2025 WL 2607924, at *10. In this case, by ordering Mr. Ferreira da Silva released on a \$6,500 bond, the IJ found that that government failed to meet its burden to prove that Petitioner was a danger to the community or that his risk of flight required his continued detention without bond. Nevertheless, invocation of the automatic stay regulation allows the government to essentially nullify this judicial determination for a period of up to ninety days.

15. The automatic stay regulation also allows the government to make an end run around the burden of proof that it bore at the bond hearing. *See Hernandez-Lara*, 10 F.4th at 41; *Sampiao*, 2025 WL 2607924, at *10 (“[the] automatic stay regulation ‘creates a potential for error because it conflates the functions of adjudicator and prosecutor’” (quoting *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1078 (N.D. Cal. 2004))). The very reason the government may invoke an automatic stay under the regulation is because it failed to carry its burden of demonstrating that the petitioner’s release would pose a risk of danger or flight.
16. Relatedly, the regulation “inverts the traditional burdens and standards governing requests for stays pending appeal,” inviting further risk of error. *Sampiao*, 2025 WL 2607924, at *11. Ordinarily, to obtain a stay of a trial court’s order pending appeal, the appealing party must demonstrate that they are likely to succeed on the merits and that they would be irreparably harmed absent a stay. *Id.* But the automatic stay regulation requires no showing of likelihood of success on the merits or irreparable injury, which flouts the entrenched principle that a stay pending appeal is an extraordinary “intrusion into the ordinary processes of administration and judicial review” that should not be “granted as ‘a matter of right.’” *Rhode Island v. Trump*, --- F.4th ----, 2025 WL 2621593, at *3 (1st Cir. Sept. 11, 2025) (quoting *New York v. Trump*, 133 F.4th 51, 65 (1st Cir. 2025)).
17. Additional or substitute procedural safeguards would reduce the risk of erroneous deprivation. A more traditional burden could be imposed on the government to show it has met some set standards entitling it to a stay pending appeal, such as those used in federal courts referenced above. *Sampiao*, 2025 WL 2607924, at *11. Alternatively,

the government could simply apply to the BIA for a discretionary stay, as provided for in another subsection of the same regulation. *Id.* (citing 8 C.F.R. § 1003.19(i)(1)). This option would mitigate the risk of erroneous deprivation because such a stay would require the BIA to make some individualized determination as to whether the government is likely to succeed in arguing on appeal that the noncitizen's release poses a risk of danger or flight. *Id.* In short, the second *Mathews* factor, risk of erroneous deprivation, also weighs heavily in favor of Mr. Ferreira da Silva.

18. Finally, there is the third "*Mathews* factor -- 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail' -- which ultimately entails an assessment of the 'public interest.'" *Hernandez-Lara*, 10 F.4th at 32 (quoting *Mathews*, 424 U.S. at 335, 347). Although the government has a legitimate interest in ensuring noncitizens' appearance at removal proceedings and protecting the safety of the community, *id.*, that interest is not particularly weighty in the circumstances of this case. *See Leal-Hernandez v. Noem*, Civ. No. 25-cv-02428-JRR, 2025 WL 2430025, at *14 (D. Md. Aug. 24, 2025) ("the court has no earthly idea what governmental interest could be served by Petitioner's continued detention should he satisfy the bond order").
19. As explained *supra*, the automatic stay goes into effect only in cases where an IJ has found that a noncitizen poses neither a flight risk nor a danger to the community requiring their continued detention. The government has not demonstrated why it has an interest in automatically prolonging the detention of noncitizens whom an IJ has specifically determined pose neither risk. *Cf. Hernandez-Lara*, 10 F.4th at 32 ("any

detention incidental to removal must ‘bear[] [a] reasonable relation to [its] purpose’” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001))).

20. Similarly, the government has made no argument as to why it could not apply for a discretionary stay under § 1003.19(i)(1) or that it would face fiscal or administrative burdens in so doing. Even assuming there would be some increased burden, it pales in comparison to the harm suffered by someone who is arbitrarily detained. *See Leal-Hernandez*, 2025 WL 2430025, at *14. *See also Sampiao*, 2025 WL 2607924, at *12 (suggesting that the automatic stay regulation increases the cost borne by the government to continue to fund and oversee detention). Finally, there are the great societal costs of prolonged detention “[i]n our society [where] liberty is the norm.” *Hernandez-Lara*, 10 F.4th at 28 (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). Thus, the third *Mathews* factor also weighs in favor of Petitioner.
21. In sum, the automatic stay provision in § 1003.19(i)(2) violates Mr. Ferreira da Silva's right to procedural due process under the Fifth Amendment. The government's argument otherwise echoes those made in many other cases across the country that have all reached the same conclusion. *See, e.g., Singh v. Lewis*, Civ. No. 4:25-cv-96-RGJ, 2025 WL 2699219, at *5 (W.D. Ky. Sept. 22, 2025); *Lopez-Arevelo v. Ripa*, Civ. No. 25-cv-337-KC, 2025 WL 2691828, at *12 (W.D. Tex. Sept. 22, 2025); *Hasan v. Crawford*, Civ. No. 1:25-cv-1408-LMB, 2025 WL 2682255, at *13 (E.D. Va. Sept. 19, 2025); *Arce v. Trump*, Civ. No. 25-cv-520, 2025 WL 2675934, at *6 (D. Neb. Sept. 18, 2025); *Vazquez v. Feeley*, Civ. No. 25-cv-01542-RFB, 2025 WL 2676082, at *21 (D. Nev. Sept. 17, 2025); *Palma v. Trump*, Civ. No. 25-cv-3176-JFB, 2025 WL 2624385, at *4 (D. Neb. Sept. 11, 2025); *Sampiao*, 2025 WL 2607924, at *12; *Martinez v. Noem*,

Civ. No. 25-cv-01007-JKP, 2025 WL 2598379, at *4 (W.D. Tex. Sept. 8, 2025); *Herrera v. Knight*, --- F. Supp. 3d ----, 2025 WL 2581792, at *12 (D. Nev. Sept. 5, 2025); *Leal-Hernandez*, 2025 WL 2430025, at *13; *Maldonado v. Olson*, --- F. Supp. 3d ----, 2025 WL 2374411, at *14 (D. Minn. Aug. 15, 2025); *Mohammed H. v. Trump*, --- F. Supp. 3d ----, 2025 WL 1692739, at *5 (D. Minn. June 17, 2025); *Gunaydin v. Trump*, 784 F. Supp. 3d 1175, 1190 (D. Minn. 2025).

Respectfully submitted,

/s/ Timothy Caron

Timothy G. Caron
Counsel for Petitioner

Dated: October 1, 2025

VERIFICATION PURSUANT TO 28 U.S.C. § 2242

I represent Petitioner Pedro Henrique Roberto Ferreira da Silva, and I submit this verification on his behalf. I hereby verify that the factual statements made in the foregoing document are true and correct to the best of my knowledge.

Dated this 1st day of October 2025.

/s/ Timothy Caron
Timothy G. Caron

CERTIFICATE OF SERVICE

I, Timothy Caron, hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF (NEF) and paper copies will be sent to those indicated as non-registered participants.

Dated: October 1, 2025

/s/ Timothy Caron
Timothy Caron, Esq.