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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

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|---|---|-----------------------------|
| SEGUNDO ELOY | : | No. 1:25-CV-01650 |
| GUAMAN-GUASCO, | : | |
| Petitioner | : | |
| | : | (Bloom, C.M.J.) |
| v. | : | |
| | : | |
| BRIAN MCSHANE, et al.,¹ | : | |
| Respondents | : | Filed Electronically |

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

This is a habeas action filed on September 3, 2025, by Petitioner Segundo Eloy Guaman-Guasco, an immigration detainee in the custody of the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), at the Pike County Correctional Facility in Hawley, Pennsylvania. Doc. 8, First Amended

¹ Although Petitioner named several other government officials, the only proper respondent in this case is Craig Lowe, the Warden of Pike County Correctional Facility. *See Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004) (“In habeas challenges to present physical confinement – ‘core challenges’ – the default rule is that the proper respondent is the warden of the facility where the prisoner is being held.”). Petitioner requests release from confinement. *See* Doc. 8, First Amended Verified Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, at 45, ¶ 7.

Verified Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, at 18. Specifically, Guaman-Guasco requests the Court grant his Petition and order his release, on his own recognizance or under parole, bond or reasonable conditions of supervision. *Id.* at 45. He also requests that the Court assume jurisdiction of this matter, order respondents to show cause as to why his writ should not be granted, declare his detention is a due process violation, a violation of the Immigration and Nationality Act pursuant to 8 U.S.C. § 1226(a), violates the Administrative Procedure Act, award attorney's fees and costs and any other relief the Court deems just and proper. *Id.*

On September 8, 2025, this Court entered an order directing Respondent to respond to the Petition within twenty-one days of the Order, or on or before September 29, 2025. Doc. 4, Order to Show Cause. This Response is filed in accordance with that Order.

I. Background

A. Factual and Procedural History

The Petitioner is a native and citizen of Ecuador who entered the United States without inspection on or about July 17, 2014. Exhibit 1, Record of Deportable/Inadmissible Alien, at 2. He was encountered by

border patrol agents, served with expedited removal order, and he expressed fear of return. *Id.* at 2-3. Petitioner's removal order was cancelled, and a notice to appear was issued to him. *Id.* These proceedings were terminated by an immigration judge for prosecutorial discretion. *Id.*

On July 18, 2025, Petitioner was encountered in Williamsport, Pennsylvania, and he admitted he illegally entered the United States in 2014. *Id.* at 2. ICE officers arrested Petitioner and placed him in removal proceedings with service of a Notice to Appear. The Notice to Appear charges the Petitioner as inadmissible pursuant to 8 U.S.C. §1182(a)(6)(A)(i) because he entered the country without inspection. Exhibit 2, Notice to Appear. On August 29, 2025, DHS further charged Petitioner as removable pursuant to 8 U.S.C. §1182(a)(7)(A)(i)(I) because he was not in possession of a valid document as required by the Attorney General. Exhibit 3, Additional Charges of Inadmissibility/Deportability (Form I-261).

Petitioner requested a bond redetermination hearing before an immigration judge, which was held on August 18, 2025. Exhibit 4, Order of the Immigration Judge. At the hearing, DHS argued Petitioner was

an applicant for admission under 8 U.S.C. §1225(a)(1); therefore, he was ineligible for bond. The immigration judge disagreed and ordered Petitioner to be released on bond in the amount of \$10,000.00. *Id.*

The next day, on August 19, 2025, DHS filed its notice of intent to appeal the custody determination, triggering the automatic stay of Petitioner's release on bond pursuant to 8 C.F.R. §1003.19(i)(2).² Exhibit 5, Notice of ICE Intent to Appeal Custody Redetermination. DHS filed a formal Notice of Appeal with the Board of Immigration Appeals (BIA) on August 29, 2025. Exhibit 6, Notice of Appeal (Form EOIR-26).

The automatic stay 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 as his next hearing is scheduled for November 24, 2025. Exhibit 7, EOIR automated case information. Petitioner remains

² 8 C.F.R. 1003.19(i)(2) states as follows: “***Automatic stay in certain cases.*** In any case in which DHS has determined that an alien should not be released or has set a bond of \$10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR-43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 CFR 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board. The decision whether or not to file Form EOIR-43 is subject to the discretion of the Secretary.”

detained at the Pike County Correctional Facility. Doc. 8 at 18. *See also* ICE Online Detainee Locator System (available at <https://locator.ice.gov/odls/#/search>) (enter Petitioner’s A-Number and Country of Birth) (last visited October 6, 2025, at 9:00 a.m.).

Petitioner challenges his temporary detention pursuant to the automatic stay by filing a habeas action on September 3, 2025, against respondents Kristi Noem, Secretary of the United States DHS, Pamela Bondi, Attorney General of the United States, and Brian McShane, acting Philadelphia Field Office Director for United States Immigration and Customs Enforcement. *See generally* Doc. 8.

B. Noncitizens Seeking Admission to the United States

For more than a century, this country’s immigration laws have authorized immigration officials to charge noncitizens³ as removable from the country, arrest noncitizens subject to removal, and detain noncitizens during removal proceedings. *See Abel v. United States*, 362 U.S. 217, 232–37 (1960). “The rule has been clear for decades: ‘[d]etention during deportation proceedings [i]s ... constitutionally valid.’” *Banyee v.*

³ The INA employs the term “alien,” defined as “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3). Herein, “noncitizen” means any person as defined in 8 U.S.C. § 1101(a)(3).

Garland, 115 F.4th 928 (8th Cir. 2024) (quoting *Demore v. Kim*, 538 U.S. 510, 523 (2003)), *rehearing by panel and en banc denied*, *Banyee v. Bondi*, No. 22-2252, 2025 WL 837914 (8th Cir. Mar. 18, 2025); *see Carlson v. Landon*, 342 U.S. 524, 538 (1952) (“Detention is necessarily a part of this deportation procedure.”); *Demore*, 538 U.S. at 523 n.7 (“In fact, prior to 1907 there was no provision permitting bail for *any* [noncitizens] during the pendency of their deportation proceedings.”). Indeed, removal proceedings “would be [in] vain if those accused could not be held in custody pending the inquiry into their true character.” *Demore*, 538 U.S. at 523 (quoting *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)).

Congress has 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. It is the interplay between these statutes that is at issue here.

i. Inspection and detention under 8 U.S.C. § 1225

“To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.” *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018). Section

1225 governs inspection, the initial step in this process, *id.*, stating that all noncitizen “applicants for admission . . . shall be inspected by immigration officers.” 8 U.S.C. § 1225(a)(3). The statute—in a provision entitled “ALIENS TREATED AS APPLICANTS FOR ADMISSION”—dictates who “shall be deemed for purposes of this chapter an applicant for admission,” defining that term to encompass *both* a noncitizen “present in the United States who has not been admitted *or* [one] who arrives in the United States” *Id.* § 1225(a)(1) (emphasis added).

Paragraph (b) of the Section 1225 governs the inspection procedures applicable to all applicants for admission. They “fall into one of two categories, those covered by Section 1225(b)(1) and those covered by Section 1225(b)(2).” *Jennings*, 583 U.S. at 287.

Section 1225(b)(1) applies to those “arriving in the United States” and “certain other”⁴ noncitizens “initially determined to be inadmissible

⁴ The “certain other” noncitizens referred to are addressed in Section 1225(b)(1)(A)(iii), which gives the Attorney General sole discretion to apply (b)(1)’s expedited procedures to a noncitizen who “has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that [he or she] has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility,” subject to an exception inapplicable here. The statute therefore explicitly confirms application of its inspection procedures for

due to fraud, misrepresentation, or lack of valid documentation.” *Id.* § 1225(b)(1)(A)(i), (iii). Noncitizens falling under this subsection are generally subject to expedited removal proceedings “without further hearing or review.” *See id.* § 1225(b)(1)(A)(i). But where the applicant “indicates an intention to apply for asylum . . . or a fear of persecution,” immigration officers will refer him or her for a credible fear interview. *Id.* § 1225(b)(1)(A)(ii). An applicant “with a credible fear of persecution” is “detained for further consideration of the application for asylum.” *Id.* § 1225(b)(1)(B)(ii). If he 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 removal from the United States. *Id.* §§ 1225(b)(1)(A)(i), (B)(iii)(IV).

Section 1225(b)(2) is “broader” than (b)(1), “serv[ing] as a catchall provision that applies to all applicants for admission not covered by § 1225(b)(1).” *Jennings*, 583 U.S. at 287 (citing 8 U.S.C. § 1225(b)(1)). Subject to exceptions not applicable here, “if the examining immigration officer determines that [the noncitizen] seeking admission is not clearly and beyond a doubt entitled to be admitted, the [noncitizen] *shall* be

those already in the country, including for a period of years.

detained for a removal proceeding.” 8 U.S.C. § 1225(b)(2)(A) (emphasis added); *see also Matter of Q. Li*, 29 I&N Dec. 66, 68 (BIA 2025) (“for [noncitizens] 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). DHS retains sole discretionary authority to temporarily release on parole “any [noncitizen] applying for admission” 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. Apprehension and discretionary detention under 8 U.S.C. § 1226(a)

“Even once inside the United States, [noncitizens] do not have an absolute right to remain here. For example, [a noncitizen] present in the country may still be removed if he or she falls ‘within one or more . . . classes of deportable aliens.’ §1227(a).” *Jennings*, 583 U.S. at 288 (citing 8 U.S.C. § 1227(a), which outlines “classes of deportable aliens” among those already “in *and admitted* to the United States”) (emphasis added). “Section 1226 generally governs the process of arresting and detaining that group of [noncitizens] pending their removal.” *Id.* Applicable “[o]n

a warrant issued by the Attorney General,” it provides that a noncitizen may be arrested and detained pending a decision” on the removal. 8 U.S.C. § 1226(a). For noncitizens arrested under Section 1226(a), the Attorney General and the DHS have broad discretionary authority to detain a noncitizen during removal proceedings.⁵ See 8 U.S.C. § 1226(a)(1) (DHS “may continue to detain the arrested” noncitizen during the pendency of removal proceedings).

Following apprehension under Section 1226(a), a DHS officer makes an initial discretionary determination concerning release. See 8 C.F.R. § 236.1(c)(8). DHS “may continue to detain the” noncitizen. 8 U.S.C. § 1226(a)(1). “To secure release, the [noncitizen] must show that he does not pose a danger to the community and that he is likely to appear

⁵ 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 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).

for future proceedings.” *Johnson v. Guzman Chavez*, 594 U.S. 523, 527 (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 condition his 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, he may request a bond hearing before an immigration judge, within the Department of Justice’s Executive Office for Immigration Review. *See* 8 C.F.R. §§ 236.1(d)(1), 1003.19, 1236.1(d). The immigration judge conducts a bond hearing and decides whether release is warranted, based on a variety of factors that account for his ties to the United States and the possible risks of flight or danger to the community. *See Guerra*, 24 I&N Dec. 37, 40 (BIA 2006) (identifying nine non-exhaustive factors); 8 C.F.R. § 1003.19(d) (“The determination . . . 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 grant “any *right* to release on bond.” *Matter of D-J-*, 23 I&N Dec. at 575 (citing *Carlson*, 342 U.S. at 534). Nor

does it address the applicable burden of proof or particular factors that must be considered. *See generally* 8 U.S.C. § 1226(a). Rather, it grants DHS and the Attorney General broad discretionary authority to determine, after arrest, 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 noncitizen. 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. Review of custody determinations at the BIA

The BIA is an appellate body within the Executive Office for Immigration Review (EOIR). *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 immigration judge 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).

If an automatic stay is invoked, regulations require the BIA to track the progress of the custody appeal “to avoid unnecessary delays in completing the record for decision.” 8 C.F.R. § 1003.6(c)(3). The stay lapses in 90 days, unless the detainee seeks an extension of time to brief the custody appeal, 8 C.F.R. § 1003.6(c)(4), or unless DHS seeks, and the

BIA grants, a discretionary stay. 8 C.F.R. § 1003.6(c)(5).

If the BIA denies DHS's custody appeal, the automatic stay remains in effect for five business days. 8 C.F.R. § 1003.(d). DHS may, during that five-day period, refer the case to the Attorney General under 8 C.F.R. § 1003.1(h)(1) for consideration of the case. *Id.* Upon referral to the Attorney General, the individual's release is stayed for 15 business days while the case is considered. The Attorney General may extend the stay of release upon motion by DHS. *Id.*

Here, the automatic stay has been in place for approximately forty-eight (48) days and will end either with a BIA decision or at the 90 day-mark, whichever is shorter.

ARGUMENT

A. Standard of Review

In a petition for a writ of habeas corpus, the petitioner is challenging 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). Specifically, 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 [noncitizens] 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 [noncitizens].” *Fiallo*, 430 U.S. at 792 (internal quotation omitted); *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 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*, 538 U.S. at 531 (“Detention during removal proceedings is a constitutionally permissible part of that process.”)

A. This Court lacks jurisdiction over Petitioner’s claims; therefore, it should dismiss the Petition.

As a threshold matter, 8 U.S.C. §§ 1252(g) and (b)(9) preclude review of Petitioner’s claims. *First*, Section 1252(g) specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review “any cause or claim by or on behalf of an alien arising from the decision or action by the Attorney General to [1] *commence proceedings*, [2] *adjudicate cases*, or [3] *execute removal orders* against any alien under this chapter.” 8 U.S.C. § 1252(g) (emphasis added). Section 1252(g) eliminates jurisdiction “[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory),

including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title.”⁶ Except as provided in § 1252, courts “cannot entertain challenges to the enumerated executive branch decisions or actions.” *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021).

Section 1252(g) also bars district courts from hearing challenges to the *method* by which the Secretary of DHS chooses to commence removal proceedings, including the decision to detain an alien pending removal. *See Alvarez v. ICE*, 818 F.3d 1194, 1203 (11th Cir. 2016) (“By its plain terms, [§ 1252(g)] bars us from questioning ICE’s discretionary decisions to commence removal” and also to review “ICE’s decision to take [plaintiff] into custody and to detain him during removal proceedings”).

Petitioner’s claims stem from his detention during removal proceedings. That detention arises from the decision to commence such proceedings. *See, e.g., Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 298–99 (3d

⁶ Congress initially passed Section 1252(g) in the IIRIRA, Pub. L. 104-208, 110 Stat. 3009. In 2005, Congress amended Section 1252(g) by adding “(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title” after “notwithstanding any other provision of law.” REAL ID Act of 2005, Pub. L. 109-13, § 106(a), 119 Stat. 231, 311.

Cir. 2020) (holding that 8 U.S.C. § 1252(g) and (b)(9) deprive district court of jurisdiction to review action to execute removal order); *Valencia-Mejia v. United States*, No. CV 08–2943, 2008 WL 4286979, at *4 (C.D. Cal. Sept. 15, 2008) (“The decision to detain plaintiff until his hearing before the Immigration Judge arose from this decision to commence proceedings[.]”); *Wang v. United States*, No. CV 10-0389, 2010 WL 11463156, at *6 (C.D. Cal. Aug. 18, 2010).

As other courts have held, “[f]or the purposes of § 1252, the Attorney General commences proceedings against an alien when the alien is issued a Notice to Appear before an immigration court.” *Herrera-Correra v. United States*, No. CV 08-2941, 2008 WL 11336833, at *3 (C.D. Cal. Sept. 11, 2008). “The Attorney General may arrest the alien against whom proceedings are commenced and detain that individual until the conclusion of those proceedings.” *Id.* at *3. “Thus, [a noncitizen’s] detention throughout this process arises from the Attorney General’s decision to commence proceedings,” and review of claims arising from such detention is barred under § 1252(g). *Id.* (citing *Sissoko v. Rocha*, 509 F.3d 947, 949 (9th Cir. 2007)); *Wang*, 2010 WL 11463156, at *6; 8 U.S.C. § 1252(g). As such, judicial review of the claim that Petitioner is

entitled to bond is barred by Section 1252(g). This Court should dismiss the Petition for lack of jurisdiction.

Second, under Section 1252(b)(9), “judicial review of all questions of law . . . including interpretation and application of statutory provisions . . . arising from any action taken . . . to remove [a noncitizen] from the United States” is only proper before the appropriate federal court of appeals in the form of a petition for review of a final removal order. *See* 8 U.S.C. § 1252(b)(9); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Section 1252(b)(9) is an “unmistakable ‘zipper’ clause” that “channels judicial review of all [claims arising from deportation proceedings]” to a court of appeals in the first instance. *Id.*

Moreover, Section 1252(a)(5) provides that a petition for review is the exclusive means for judicial review of immigration proceedings:

Notwithstanding any other provision of law (statutory or nonstatutory), . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) [concerning aliens not admitted to the United States].

8 U.S.C. § 1252(a)(5). “Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition-for-review] process.” *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) (emphasis in original); *see id.* at 1035 (“§§ 1252(a)(5) and [(b)(9)] channel review of all claims, including policies-and-practices challenges . . . whenever they ‘arise from’ removal proceedings”); *accord Ruiz v. Mukasey*, 552 F.3d 269, 274 n.3 (2d Cir. 2009) (only when the action is “unrelated to any removal action or proceeding” is it within the district court’s jurisdiction); *cf. Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 151 n.3 (2d Cir. 2006) (a “primary effect” of the REAL ID Act is to “limit all aliens to one bite of the apple”) (internal quotation marks omitted)).

Critically, “[Section] 1252(b)(9) is a judicial channeling provision, not a claim-barring one.” *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007). Indeed, 8 U.S.C. § 1252(a)(2)(D) provides that “[n]othing . . . in any other provision of this chapter . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this

section.” *See also Ajlani v. Chertoff*, 545 F.3d 229, 235 (2d Cir. 2008) (“[J]urisdiction to review such claims is vested exclusively in the courts of appeals[.]”). The petition-for-review process before the court of appeals ensures that aliens have a proper forum for claims arising from their immigration proceedings and “receive their day in court.” *J.E.F.M.*, 837 F.3d at 1031–32 (internal quotations omitted); *see also Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (“The REAL ID Act of 2005 amended the [INA] to obviate . . . Suspension Clause concerns” by permitting judicial review of “nondiscretionary” BIA determinations and “all constitutional claims or questions of law.”).

In evaluating the reach of subsections (a)(5) and (b)(9), the United States Court of Appeals for the Second Circuit explained that jurisdiction turns on the substance of the relief sought. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011). Those provisions divest district courts of jurisdiction to review both direct and indirect challenges to removal orders, including decisions to detain for purposes of removal or for proceedings. *See Jennings*, 583 U.S. at 294–95 (section 1252(b)(9) includes challenges to the “decision to detain [an alien] in the first place or to seek removal[.]”). Here, Petitioner challenges the government’s

decision and action to detain, which arises from DHS’s decision to commence removal proceedings against an arriving noncitizen and is thus an “action taken . . . to remove [them] from the United States.” See 8 U.S.C. § 1252(b)(9); *see also, e.g., Jennings*, 583 U.S. at 294–95; *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (finding that 8 U.S.C. § 1226(e) did not bar review in that case because the petitioner did not challenge “his initial detention”); *Saadulloev v. Garland*, No. 3:23-CV-00106, 2024 WL 1076106, at *3 (W.D. Pa. Mar. 12, 2024) (recognizing that there is no judicial review of the threshold detention decision, which flows from the government’s decision to “commence proceedings”). As such, this Court lacks jurisdiction over this action.

Furthermore, the reasoning in *Jennings* outlines why petitioner’s claims are unreviewable here. While holding that it was unnecessary to comprehensively address the scope of Section 1252(b)(9), the Supreme Court in *Jennings* also provided guidance on the types of challenges that may fall within the scope of § 1252(b)(9). 583 U.S. at 293–94. The Court found that “§1252(b)(9) [did] not present a jurisdictional bar” in situations where “respondents . . . [were] not challenging the decision to detain them in the first place.” *Id.* at 294–95. In this case, Petitioner

does challenge the government’s decision to detain him in the first place. Though Petitioner may attempt to frame this challenge as one relating to detention authority, rather than a challenge to DHS’s decision to detain him pending his removal proceedings in the first instance, such creative framing does not evade the preclusive effect of § 1252(b)(9).

Indeed, the fact that petitioner is challenging the basis upon which he is detained is enough to trigger Section 1252(b)(9) because “detention is an ‘action taken . . . to remove’ an alien.” *See Jennings*, 583 U.S. at 318 (Thomas, J., concurring); 8 U.S.C. § 1252(b)(9). This Court should also dismiss the Petition for lack of jurisdiction under Section 1252(b)(9). Petitioner must present his claims before the appropriate federal court of appeals because they challenge the government’s decision or action to detain him, which must be raised before a court of appeals, not this Court. *See* 8 U.S.C. § 1252(b)(9).

B. Alternatively, if this Court exercises jurisdiction over the Petition, the Petitioner is lawfully detained.

If this Court determines it has jurisdiction here, then it should deny the Petition because petitioner is lawfully detained. 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 him

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 meet his burden of demonstrating his temporary detention violates the law, his Petition must be denied.

The current operative mechanism of Petitioner's detention is an automatic stay of release on bond for a maximum of 90 days under 8 C.F.R. § 1003.19(i)(2), but this confinement is statutorily authorized by 8 U.S.C. § 1225(b)(2), which requires detention throughout his entire removal proceedings.

Pursuant to 8 U.S.C. § 1225(b)(2)(A), "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a." 8 U.S.C. § 1225(b)(2)(A). The Supreme Court has held that 8 U.S.C. § 1225(b)(2)(A) is a mandatory detention statute and that noncitizens detained pursuant to that provision are not entitled to bond. *Jennings*, 583 U.S. at 287 ("Both § 1225(b)(1) and § 1225(b)(2) authorize the detention of certain aliens.").

Petitioner falls squarely within the ambit of Section 1225(b)(2)(A)'s mandatory detention requirement, as he is an “applicant for admission” to the United States. As described above, an “applicant for admission” is a noncitizen present in the United States who has not been admitted. 8 U.S.C. § 1225(a)(1). Congress’s broad language here is unequivocally intentional—an undocumented noncitizen is to be “deemed for purposes of this chapter an applicant for admission.” *Id.* Petitioner is “deemed” an applicant for admission based on his failure to seek lawful admission to the United States before an immigration officer, which has not been disputed. *See generally* Doc. 8. 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.⁷ 8 U.S.C. § 1225(b)(2)(A). Thus, Petitioner is properly detained pursuant to 8 U.S.C. § 1225(b)(2)(A), which mandates that he “shall be” detained.

⁷ “[A noncitizen] who tries to enter the country illegally is treated as an ‘applicant for admission,’ §1225(a)(1), and [a noncitizen] who is detained shortly after unlawful entry cannot be said to have ‘effected an entry.’” *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020). Applicants for admission are “treated, for constitutional purposes, as if stopped at the border.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (internal quotation marks omitted).

This reasoning is supported by the Supreme Court, which has confirmed a noncitizen 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*, 583 U.S. at 289 & 299. In *Jennings*, the Supreme Court reversed the United States Court of Appeals for the Ninth Circuit’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 noncitizen, 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, Petitioner, v. Patricia Hyde, et al., Respondents.*, No. CV 25-11983-NMG, 2025 WL 2108913 (D. Mass. July 28, 2025). The Court explained this resulted in the “continued detention” of a noncitizen during removal proceedings as commanded by statute. *Id.*

The precise issue – Section §1225’s application – has now been resolved by the BIA. Indeed, Section 1225 applies to aliens who are present in the country *even for years* and who have not been admitted. *See Matter of Yajure Hurtado*, 29 I&N Dec. 216, 226 (BIA 2025) (“the statutory text of the INA . . . is instead clear and explicit in requiring mandatory detention of all aliens who are applicants for admission, without regard to how many years the alien has been residing in the United States without lawful status.”) (citing 8 U.S.C. §1225)).

In *Hurtado*, the BIA affirmed the decision of the immigration judge finding the immigration court lacked jurisdiction to conduct a bond hearing because the alien who was present in the United States for almost three years but was never admitted shall be detained under 8 U.S.C. §1225 for the duration of his removal proceedings. *Id.* The case involved a noncitizen who unlawfully entered the United States in 2022 and was granted temporary protected status in 2024. *Id.* at 216-17. However, that status was revoked in 2025, and the noncitizen was subsequently apprehended and placed in removal proceedings. *Id.* at 217. Like the Petitioner in this case, the noncitizen was initially served with a Notice of Custody Determination, informing him of his detention

under 8 U.S.C. § 1226 and his ability to request bond. *Id.* at 226. However, when the noncitizen sought a redetermination of his custody status, the immigration judge held the Court did not have jurisdiction under Section 1225. *Id.* at 216. The noncitizen appealed to the BIA. *Id.*

In affirming the decision of the immigration judge who determined he lacked jurisdiction, the BIA found Section 1225 clear and unambiguous. *See id.* at 228. Thus, because the alien was present in the United States (regardless of how long) and he was never admitted, he shall be detained during his removal proceedings.

Also, the BIA rejected the noncitizen's argument that the mandatory detention scheme under § 1225 rendered the recent amendment to § 1226 under the Laken Riley Act superfluous. *Id.* The BIA explained, "nothing in the statutory text of section 236(c), including the text of the amendments made by the Laken Riley Act, purports to alter or undermine the provisions of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), requiring that aliens who fall within the definition of the statute "shall be detained for [removal proceedings]." *Id.* at 222. The BIA explained further that any redundancy between the two statutes

does not give license to “rewrite or eviscerate” one of the statutes. *See id.* (quoting *Barton v. Barr*, 590 U.S. 222, 239 (2020)).

The BIA additionally reasoned that it matters not that the noncitizen was initially served with a warrant listing Section 1226 and informing him of his ability to seek bond. *See id.* at 226-27. Rather, the BIA explained that the immigration court cannot bestow jurisdiction upon itself with that initial paperwork when said jurisdiction has been specifically revoked by Congress in § 1225. *Id.* (explaining “the mere issuance of an arrest warrant does not endow an immigration judge with authority to set bond for an alien who falls under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).”). The BIA further pointed out, “[o]ur acknowledgement that noncitizens ‘detained under section 236(a) may be eligible for discretionary release on bond’ does not mean that *all* [noncitizens] detained while in the United States with a warrant of arrest are detained under section 236(a) and entitled to a bond hearing before the Immigration Judge, regardless of whether they are applicants for admission under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A).” *Id.* at 227. Thus, the BIA rejected this and every

argument raised by the noncitizen to find Section 1225 applied to him despite residing in the country for years. *Id.*

So now, the BIA mandate is clear: “under a plain language reading of section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), Immigration Judges lack authority to hear bond requests or to grant bond to aliens, like the respondent, who are present in the United States without admission.” *Id.* at 225. Indeed, this ruling emphasizes that § 1225 applies to noncitizens like the Petitioner who is also present in the United States, but has not been admitted.⁸

Petitioner highlights the fact that a number of courts have disagreed with the analysis promulgated in *Hurtado*. Doc. 8 at 29-30. Notwithstanding that fact, other district courts have agreed with the BIA and found that the immigration court lacked jurisdiction under § 1225. *See Chavez v. Noem*, --- F.Supp.3d ---, 2025 WL 2730228 (S.D. Cal. Sept. 24, 2025) (denying application for temporary restraining order and

⁸ It’s important to note that the BIA also addressed the fact that immigration judges had previously conducted bond hearings for noncitizens who entered the United States without inspection. *See Hurtado*, 29 I&N at 225 n. 6. In response, however, the BIA indicated that it was unaware of the Government ever previously advocating for the interpretation of § 1225 that limited the jurisdiction of the immigration judges.

preliminary injunction because petitioner could not demonstrate a likelihood of success on the merits due to lack of jurisdiction under § 1225); *Vargas Lopez v. Trump*, --- F.Supp.3d ---, 2025 WL 2780351 (D. Neb. Sept. 30, 2025) (denying habeas petition and finding it was unnecessary to reach the automatic stay provision because petitioner was lawfully detained under § 1225).

The operative automatic stay of release pending appeal at issue in this case merely ensures that DHS has an opportunity to vindicate Congress's mandatory detention scheme. Because the Petitioner shall be detained during removal proceedings and the proceedings are uncontrovertibly ongoing, the temporary detention is lawful. As such, this Court should reject Petitioner's argument that Section 1226(a) governs his detention instead of Section 1225(b)(2).⁹

⁹ If this Court would determine that Petitioner is detained pursuant to Section 1226(a), it is the Respondent's position that he should be required to exhaust his challenges to his detention in immigration court and at the BIA before bringing those challenges in federal court. Courts within the Middle District of Pennsylvania have split on whether to impose exhaustion requirements on petitioners who challenge their detention with immigration authorities. See *Pierre v. Sabol*, No. 1:11-CV-2184, 2012 WL 2921794, at *1-2 (M.D. Pa. July 17, 2012) (Caldwell, J.) (holding that petitioner was required to appeal denial of bond to BIA, rather than return to the Court that ordered the hearing); *German Chajchic v. Rowley*, No. 1:17-cv-00457, Rep. and Recomm., 2017 WL 4401895, at *7-

D. Petitioner’s detention does not offend due process.

As mentioned above, Congress broadly crafted “applicants for admission” to include undocumented noncitizens present within the United States like Petitioner. *See* 8 U.S.C. § 1225(a)(1). And Congress directed noncitizens like the Petitioner to be detained during their removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *Jennings*, 583 U.S. at 297 (“Read most naturally, §§ 1225(b)(1) and (b)(2) thus mandate detention of applicants for admission until certain proceedings have concluded.”). In so doing, Congress made a legislative judgment to detain undocumented noncitizens during removal proceedings, as they—by

8 (M.D. Pa. Jul. 25, 2017) (Carlson, M.J.), *adopted by* No.1:17-CV-0457, 2017 WL 4387062, at *9 (M.D. Pa. Oct. 3, 2017) (Conner, C.J.) (“as a threshold matter this court could decline to further review this bond determination at this time and insist instead that Chajchic fully exhaust his administrative appeals through an appeal of this bond decision to the BIA.”); *Quinteros v. Sabol*, No. 4:CV-15-2098, 2016 WL 6525295, at *1 (M.D. Pa. Nov. 3, 2016) (Brann, J.) (“prior to satisfactory showings of exhaustion and finality, the district court should not revisit the merits of the immigration judge’s determination”); *Anwari v. Lowe*, No. 3:CV-17-1512, 2018 WL 2103827, (M.D. Pa. May 7, 2018) (Mariani, J.); *Kamara v. Doll*, No. 1:CV-17-1176, 2017 WL 6497362 (M.D. Pa. Dec. 19, 2017) (Kane, J.). *Compare Luciano-Jimenez v. Doll*, 543 F.Supp.3d 69, (M.D. Pa. Jun. 15, 2021) (Mehalchick, M.J.) (finding that petitioner was not required to administratively exhaust when allegations involved failure to comply with the court’s writ of habeas corpus); *Santos v. Lowe*, No. 1:18-CV-1553, 2020 WL 4530728 (M.D. Pa. Aug. 6, 2020) (Rambo, J.) (same).

definition—have crossed borders and traveled in violation of United States law. As explained above, that is the prerogative of the legislative branch serving the interest of the Government and the United States.

The Supreme Court has recognized this profound interest. *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.”). And with this power to remove noncitizens, the Supreme Court has recognized the United States’ longtime Constitutional ability to detain those in removal proceedings. *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*, 538 U.S. at 531 (2003) (“Detention during removal proceedings is a constitutionally permissible part of that process.”); *Jennings*, 583 U.S. at 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 (noncitizens 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 noncitizens during the entire course of their removal proceedings who were convicted of certain crimes. 538 U.S. at 513. In that case, similar to undocumented noncitizens like Petitioner, 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 [noncitizens] *pending their removal proceedings*, the detention necessarily serves the purpose of preventing the [noncitizens] 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, 121 S.Ct. 2491, 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*.”¹⁰ In light of Congress’s interest in dealing with illegal immigration by keeping specified noncitizens in detention pending the removal period, the Supreme Court dispensed of any Due Process concerns without engaging in the “*Mathews v. Eldridge* test.” *See generally id.*

Following this precedent, the United States District Court for the District of Massachusetts (case mentioned above) dismissed a habeas action, finding that it was not a violation of due process to detain an undocumented noncitizen during the course of his removal proceedings.

¹⁰ In 2018, the Court again highlighted the significance of a “definite termination point” for detention of certain aliens pending removal. *See Jennings*, 583 U.S. at 304.

See 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 roughly two months after the bond redetermination hearing as his *process* continues to unfold, which began with his arrest and the immigration officer's initial custody determination. Thus, in the present case, when DHS (ICE) asserted mandatory detention pursuant to 8 U.S.C. § 1225(b) at the bond redetermination hearing, the immigration judge could have considered and should have recognized that she did not have jurisdiction to set a bond under 8 U.S.C. § 1226(a).

Nevertheless, this matter has now been determined by the BIA. As detailed above, in *Hurtado*, the BIA affirmed "the Immigration Judge's determination that he did not have authority over [a] bond request because aliens who are present in the United States without admission are applicants for admission as defined under section 235(b)(2)(A) of the INA, 8 U.S.C. § 1225(b)(2)(A), and must be detained for the duration of their removal proceedings." 29 I&N at 220.

This Court should consider that the only significant factual difference in the present case from that presented in *Hurtado* is the fact that the immigration judge in this case failed to accept DHS's argument at the bond redetermination hearing that the immigration judge did not have jurisdiction under Section 1225, necessitating DHS's invocation of the automatic stay pursuant to a regulation. Based upon the BIA's decision in *Hurtado*, the immigration judge's decision granting this petitioner a bond is likely to be reversed soon. Therefore, Section 1225 lawfully applies, and the invocation of the automatic stay becomes irrelevant.

Indeed, Petitioner's arguments that the automatic stay violates Due Process weakens when it is likely the immigration judge erred in authorizing the release to begin with because Section 1225 called for mandatory detention. Moreover, the Respondent has an enormous interest in its use of detention, particularly in the context of immigration proceedings, and Congress and the Supreme Court have historically agreed. *See, e.g., Demore*, 538 U.S. at 531.

Further, Petitioner's next removal hearing is before the immigration judge on November 24, 2025. *See* Exhibit 7. Resolution one

way or another is undoubtedly forthcoming. Petitioner's 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). Congress simply made the decision to detain him pending removal which is a “constitutionally permissible part of that process.” *See Demore*, 538 U.S. at 531.

The United States is aware of prior district court rulings outside this Commonwealth in which the court held that the automatic stay provision violates due process. *See Mohammed H. v. Trump*, 786 F.Supp.3d 1149 (D. Minn. June 17, 2025); *Aguilar Maldonado v. Olson*, --- F.Supp.3d ---, 2025 WL 2374411, at *9-14 (D. Minn Aug. 15, 2025); *Jacinto v. Trump*, --- F.Supp.3d ---, 2025 WL 2402271 (D. Neb. Aug. 19, 2025); *Leal-Hernandez v. Noem*, No. 1:24-cv-02428, 2025 WL 2430025 (D. Md. Aug. 24, 2025). In light of *Hurtado* and the BIA's finding that the immigration court does not have the authority over a bond request because noncitizens present in the United States without admission are applicants for admission and subject to detention during their removal

proceedings in accordance with Section 1225(b)(2)(A), the automatic stay provision is irrelevant. 29 I&N at 220.

E. Petitioner’s claim that the automatic stay provision is ultra vires lacks merit.

Petitioner claims the automatic stay provision of 8 C.F.R. § 1003.19(i)(2) is ultra vires and exceeds DHS’s authority. Doc. 8 at 39-40. To the contrary, it is consistent with the delegation of discretionary authority by the Attorney General. *See Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008) (regulation was not ultra vires where it guided the discretion accorded to the Attorney in immigration matters).

“Ultra vires claims are confined to extreme agency error where the agency has stepped so plainly beyond the bounds of its statutory authority, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court.” *Fed. Express Corporation v. United States Department of Commerce*, 39 F.4th 756, 764 (D.C. Cir. 2022). Judicial review of ultra vires claims are limited to “where (i) there is no express statutory preclusion of all judicial review; (ii) ‘there is no alternative procedure for review of the statutory claim; and (iii) the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory.” *Id.*

(quoting *Nyunt v. Chairman, Broadcasting Board of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009)). One of these factors is not present here.

In addressing the nature of the automatic stay at issue here, one court has noted that:

The purpose of the automatic stay provision is to provide a means for DHS to maintain the status quo in those cases where it chooses to seek an expedited review of the IJ's custody order by BIA. 71 Fed. Reg. 57873. To the extent the challenged regulation represents the judgment of the Attorney General as to how best implement the authority granted him by 8 U.S.C. § 1226, judicial review may be barred by § 1226(e). But even if it is not, providing for an automatic stay until the BIA can review the IJ's order for release is not unreasonable. 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. *See, e.g., Zavala v. Ridge*, 310 F.Supp.2d 1071, 1075 (N.D.Cal.2004). The current regulation provides that the automatic stay will lapse 90 days after the filing of the notice of appeal. 71 Fed. Reg. 57873, 57874.

Hussain v. Gonzales, 492 F. Supp. 2d 1024, 1031-32 (E.D. Wis. 2007).

When the current regulation was implemented, the Attorney General explained:

In most cases, an immigration judge's order granting an alien release will result in the alien's

release upon the posting of bond or on recognizance, in compliance with the immigration judge's decision. The Attorney General has determined, however, that certain bond cases require additional safeguards before an alien is released during the pendency of removal proceedings against him or her. In these cases, the immigration judge's order is only an interim one, pending review and the exercise of discretion by another of the Attorney General's delegates, the Board. Barring review by the Attorney General, it is the Board's decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond. Thus, the Attorney General made an operational decision under section 236(a) of the INA with respect to how his discretion should be exercised in a limited class of cases where DHS, which now has independent statutory authority in this area, had sought to detain the alien without bond or with a bond of \$10,000 or more and disagrees with the immigration judge's interim custody decision.

Id. (quoting 75 Fed. Reg. 57873, 80). Accordingly, the “regulation reveals the division of authority the Attorney General has established within the executive branch to exercise his overall authority to determine the custodial status of aliens facing removal proceedings. It is difficult to see how DHS's exercise of its responsibilities within that system operates as a denial of due process.” *Hussain*, 492 F. Supp. 2d at 1032. Based on the foregoing, the stay and its invocation in this case is not ultra vires. Rather, it

is consistent with the delegation of discretionary authority by the Attorney General. *See Samuels v. Chertoff*, 550 F.3d 252, 257 (2d Cir. 2008) (regulation was not ultra vires where it guided the discretion accorded to the Attorney in immigration matters).

CONCLUSION

Because Guaman-Guasco's detention is lawful, Respondent respectfully requests the Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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