IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

PATRICIA GARCIA-REYNOSO,	:	
	:	
Petitioner,	:	
	:	**Case No. 4:25-CV-278-CDL-ALS**
v.	:	**28 U.S.C. § 2241**
	:	
WARDEN, STEWART DETENTION CENTER,	:	
	:	
	:	
Respondent.	:	

RESPONDENT'S RESPONSE

On September 8, 2025, the Court received Petitioner's petition for a writ of habeas corpus ("Petition"). ECF No. 1. On the same day, the Court ordered Respondents to file a comprehensive response within twenty-one (21) days of the Court's order. ECF No. 3. For the reasons explained below, the Petition should be denied.

BACKGROUND

Petitioner is a native and citizen of Mexico who is mandatorily detained pre-final order of removal pursuant to 8 U.S.C. § 1225(b). Declaration of Deportation Officer David Graumenz ("Graumenz Decl.)" ¶¶ 2, 5, 9. On June 16, 2025, Petitioner was encountered by Immigration and Customs Enforcement, Enforcement and Removal Operations ("ICE/ERO") at the Johnston County Sheriff's Office in Wrightsville, Georgia. *Id.* ¶ 3 & Ex. A. On June 18, 2025, Petitioner entered ICE/ERO custody. *Id.* ¶ 4. Petitioner was transferred to the Stewart Detention Center in Lumpkin, Georgia on July 9, 2025. *Id.* On June 18, 2025, ICE/ERO served Petitioner with a Form I-862, Notice to Appear ("NTA") charging her with inadmissibility pursuant to Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i) (8 U.S.C. § 1182(a)(6)(A)(i)). *Id.* ¶ 5 & Ex. B.

On July 17, 2025, Petitioner appeared for her initial master calendar hearing before an immigration judge ("IJ"), and Petitioner requested a continuance to find an attorney. Graumenz Decl. ¶ 6. The IJ granted Petitioner's request, and the case was re-set to August 21, 2025. *Id.* & Ex. C. On July 29, 2025, Petitioner appeared with her attorney for a bond hearing pursuant to her request for bond redetermination. *Id.* ¶ 7. The IJ determined that the court had jurisdiction under INA § 236(a) (8 U.S.C. § 1226(a)), granted Petitioner's request for bond through an oral order, and set a bond of $4,000. *Id.* & Ex. D. On July 29, 2025, the Department of Homeland Security ("DHS") filed a Notice of ICE Intent to Appeal Custody Redetermination, which triggered the automatic stay provision of 8 C.F.R. § 1003.19(i)(2). *Id.* ¶ 8 & Ex. E.

On July 30, 2025, DHS counsel served a Form I-261: Additional Charges of Inadmissibility/Deportability on Petitioner charging her with inadmissibility under INA § 212(a)(7)(A)(i)(I) (8 U.S.C. § 1182(a)(7)(A)(i)(I)). Graumenz Decl. ¶ 9 & Ex. F. On August 5, 2025, DHS appealed the IJ's bond order by filing a Notice of Appeal to the Board of Immigration Appeals ("BIA"). *Id.* ¶ 10 & Ex. G. On August 14, 2025, the IJ issued a written decision on the oral bond redetermination from July 29, 2025. *Id.* ¶ 11 & Ex. H.

On August 21, 2025, Petitioner appeared for her master calendar hearing, but Petitioner's counsel did not appear, and the matter was rest to August 28, 2025. *Id.* ¶ 12 & Ex. I. On August 28, 2025, Petitioner appeared with counsel, and the IJ continued Petitioner's case to September 30, 2025, for Petitioner to file an application for relief from removal. *Id.* ¶ 13 & Ex. J.

At the request of DHS, the IJ held a bond redetermination hearing as to Petitioner on September 17, 2025. *Id.* ¶ 14. The IJ held that he did not have jurisdiction to redetermine bond and declined to reconsider the previous bond-determination. *Id.* ¶ 14 & Ex. K. On September 19, 2025, DHS filed a motion to reconsider the IJ's custody determination. *Id.* ¶ 15.

LEGAL FRAMEWORK

This case comes to the Court under atypical circumstances. Petitioner was granted a bond hearing by the IJ, at which DHS argued she is mandatorily detained pursuant to § 1225(b) as an applicant for admission. The IJ disagreed and determined that Petitioner's detention authority was pursuant to § 1226(a). Graumenz Decl. ¶ 7 & Ex. D. Because DHS continued to believe that Petitioner's detention was mandatory under § 1225(b), it utilized the automatic stay provision to maintain the status quo in order to appeal the IJ's decision to the BIA. *Id*. ¶ 8. That decision has been vindicated by the subsequent decision of the BIA in *In the Matter of Yajure-Hurtado*, 29 I&N Dec. 216 (BIA 2025), wherein the BIA affirmed an Immigration Judge's determination that the detainee was detained pursuant to 8 U.S.C. § 1225(b), and held that the detainee was properly classified as an "applicant for admission" and detained pursuant to the mandatory detention provision in § 1225(b) and was not entitled to a bond redetermination. *Hurtado*, 29 I&N Dec. at 217. Citing *Jennings v. Rodriguez*, 583 U.S. 281 (2018), the BIA found that the "plain meaning" of § 1225(b) is properly read to require that applicants for admission be mandatorily detained throughout their immigration proceedings. *Hurtado*, 29 I&N Dec. at 219.

Despite that precedential ruling from the BIA, the IJ later determined that he was without authority to reconsider the bond determination in Petitioner's case because that case had been appealed and was with the BIA and because the implementing regulations did not allow for redetermination of bond on the request of DHS. *Id*. ¶ 14 & Ex. K. Therefore, Petitioner remains subject to the temporary stay under 8 C.F.R. § 1003.19(i)(2). Petitioner's status will change upon application of the *Hurtado* decision, whether that occurs at the BIA or by the IJ.

When a non-citizen is discretionarily detained pre-final order of removal pursuant to 8 U.S.C. § 1226(a)—which Petitioner is not—an IJ may review the non-citizen's custody status through a bond hearing. 8 C.F.R. §§ 236.1(d)(1), 1003.19(a), (d). Both the non-citizen and DHS

have the right to appeal an IJ's bond decision to the BIA. 8 C.F.R. §§ 236.1(d)(3)(i), 1003.19(f). When DHS appeals an IJ's order granting bond, DHS may invoke an automatic stay of that order:

> 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 [IJ] 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 . . . shall remain in abeyance pending decision of the appeal by the [BIA].

8 C.F.R. § 1003.19(i)(2). Invocation of the automatic stay is committed to DHS's discretion. *Id.*

To invoke the automatic stay, DHS must "file a notice of appeal with the [BIA] within ten business days of the issuance of the [IJ's bond] order[.]" 8 C.F.R. § 1003.6(c)(1). Thereafter, the IJ prepares a written decision explaining his bond decision and transmits it to the BIA. 8 C.F.R. § 1003.6(c)(2). The automatic stay is of short duration: if the BIA does not issue a decision on the appeal, the automatic stay terminates after 90 days unless the non-citizen requests an extension of the briefing period. 8 C.F.R. § 1003.6(c)(4). Once the short period of the automatic stay expires, DHS may request a discretionary stay from the BIA. 8 C.F.R. § 1003.6(c)(5).

ARGUMENT

The Petition asserts three causes of action: (1) that the automatic stay regulation (8 C.F.R. § 1003.19(i)(2)) is *ultra vires*; (2) that her continued detention during removal proceedings violates procedural due process protections; and (3) that her continued detention constitutes a deprivation of her substantive due process rights. Petitioner's claims should be denied for two reasons. First, the automatic stay regulation is a proper and lawful exercise of discretionary authority granted by Congress. Second, Petitioner's temporary detention pursuant to the automatic stay complies with due process.

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

"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 Corp. v. U.S. Dep't of Commerce*, 39 F.4th 756, 764 (D.C. Cir. 2022). Judicial review of *ultra vires* claims is 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). Petitioner cites to several recent cases holding that the automatic stay provision violates due process. Pet. 8 (citing *Mohammed H. v. Trump*, 2025 WL 1692739 (D. Minn. June 17, 2025); *Gunaydin v. Trump*, ---F. Supp. 3d--- 2025 WL 1459154 (D. Minn. May 21, 2025). Those cases, however, either miscomprehend or failed to address "the relationship between DHS, the IJs, and the BIA, and their respective role in exercising the authority of the Attorney General to make custody determinations

in cases involving the removal of aliens." *Hussain*, 492 F. Supp. 2d at 1032. 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 [her] 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 General in immigration matters).

Congress, through numerous grants of statutory authority, has delegated significant discretion to the Attorney General to enforce immigration laws, detain or release non-citizens in removal proceedings, and to promulgate regulations in furtherance of those aims. *See Iquique v. U.S. Att'y Gen.*, 374 F. App'x 901 (11th Cir. 2010) (rejecting an *ultra vires* challenge to a different regulation promulgated related to immigration appeals). The Attorney General is authorized to create an Executive Office for Immigration Review and promulgate regulations for its operations,

including the operations of the BIA. 6 U.S.C. § 521(a). The Attorney General is authorized to establish regulations and review administrative determinations in immigration proceedings. 8 U.S.C. § 1103(g)(1) and (2). And the detention or release of non-citizens is delegated to the discretion of the Attorney General subject to certain statutory limitations. 8 U.S.C. § 1226.

The automatic stay of a bond redetermination granted by an IJ furthers the aims of Congress in granting this authority to the Attorney General and does not exceed that statutory authority. In § 1226(a), Congress directed as to non-criminal aliens: "On a warrant issued by the Attorney General, 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). Further, "the Attorney General (1) may continue to detain the arrested alien; and (2) may release the alien [on bond with conditions or conditional parole]." *Id*. § 1226(a)(1) & (2). Additionally, "The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien." *Id*. § 1226(b).

The breadth of this authority is clear. The Attorney General has broad discretion, not limited with any specific directives from Congress regarding when or how a non-citizen should be detained during their removal proceedings. Congress did not utilize "shall" with regard to the detention or release on bond or conditional parole of non-criminal non-citizens. This contrasts with the direction given with regard to certain criminal non-citizens, for whom Congress has mandated detention during removal proceedings. 8 U.S.C. § 1226(c). Instead, as to non-criminal non-citizens, Congress invested discretion in the Attorney General to determine who should be held during removal proceedings using the permissive "may continue to detain" or "may release" language. 8 U.S.C. § 1226(a)(1) & (2). Further, Congress stated the Attorney General "may revoke" any prior decision to release a non-criminal non-citizen "at any time," without caveats. *Id*. § 1226(b). This permissive

language shows Congress' intention to grant wide latitude to the Attorney General in detention matters as to this class of non-citizens in removal proceedings.

With such latitude granted, the Attorney General is well within the statutory framework to create regulations to fill the gaps and outline the process for when that discretionary authority to detain or release will be exercised. As one district court found in rejecting a similar challenge:

> Rather than decide what to do with the other detainees, Congress left the decision to the Attorney General. *See* 8 U.S.C. § 1226(a). The Attorney General, in turn, has established rules to ensure that similar detainees are treated similarly when an immigration judge determines whether to release the detainee during the pendency of removal proceedings.

Farias v. Garland, No. 24-CV-4366 (MJD/LIB), 2024 WL 6074470, at *3 (D. Minn. Dec. 6, 2024). The Attorney General exercised that discretion, in part, in 8 C.F.R. § 1003.19, wherein more specifics of the process for when and how to grant bond were described, and wherein a process was created for the situation at hand: what to do when the IJ grants a bond to a non-citizen who DHS deems unfit for release and DHS intends to appeal the decision to the BIA. 8 C.F.R. § 1003.19(i). The Attorney General, in an exercise of the authority granted by Congress, determined that a limited stay of a bond order during the short time in which it should take the BIA to make a determination on the appeal is an appropriate procedure. *Id*. § 1003.19(i)(2). Given the latitude granted by Congress, this is a reasonable and consistent exercise of that discretion, and does not "exce[ed]" the statutory framework, nor is it "arbitrary or capricious," and therefore it is "in accordance with law," contrary to Petitioner's suggestions. Pet. 6. The Court should reject Petitioner's claim that the regulation is *ultra vires*.

II. The automatic stay complies with procedural and substantive due process.

The Supreme Court has held that 8 U.S.C. § 1226(e) allows "challenges to the statutory framework." *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018). Petitioner raises such a challenge, as she asserts that the "continued detention of Petitioner pursuant to the 'automatic stay' regulation

violates her due process rights." Pet. 8.[1] Petitioner raises both a procedural and substantive due process claim. *See id.* at 6-9. Analysis of the substantive and procedural due process frameworks largely overlap, and the automatic stay complies with due process under both frameworks.

1. Procedural Due Process

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). To determine whether procedural protections satisfy due process, courts have applied the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which analyzes three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. In applying the *Mathews* factors in the immigration context, courts "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Application of the factors here shows that the narrow and temporary detention pursuant to the automatic stay complies with procedural due process.

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[1] Petitioner does not appear to challenge DHS's decision to invoke the automatic stay provision as to her specifically, but to the extent the Court construes the Petition as doing so, it lacks jurisdiction over that claim pursuant to 8 U.S.C. § 1226(e). That subsection provides in full:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

"§ 1226(e) precludes an alien from challenging a discretionary judgment by the Attorney General or a decision that the Attorney General has made regarding his detention or release." *Jennings v. Rodriguez*, 583 U.S. 281, 295 (2018) (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)) (internal alterations and quotations omitted). Rather, § 1226(e) permits only "challenges to the statutory framework." *Id.* (quoting *Demore*, 538 U.S. at 517) (internal alterations and quotations omitted). The Court lacks subject matter jurisdiction to review DHS's decision to invoke the automatic stay at to Petitioner specifically because that decision falls within the scope of the section 1226(e) jurisdictional bar. *Jennings*, 583 U.S. at 295.

As to the first *Mathews* factor, Petitioner's liberty interest is limited. For more than a century, the Supreme Court has held that detention during removal proceedings without bond complies with due process. *Demore*, 538 U.S. at 511 ("[D]etention during [removal] proceedings is a constitutionally valid aspect of the process."); *Flores*, 507 U.S. at 306 ("Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings."); *Carlson*, 342 U.S. at 538 ("Detention is necessarily a part of this deportation procedure."); *Wong Wing*, 163 U.S at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid."). Indeed, "Congress [has] eliminated any presumption of release pending deportation, committing that determination to the discretion of" ICE/ERO. *Flores*, 507 U.S. at 306 (citations omitted).

Furthermore, The Supreme Court has long held that "the due process rights of an alien seeking initial entry" are no greater than "[w]hatever the procedures authorized by Congress." *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 109–113 (2020) (citation omitted). For unadmitted aliens, like Petitioner here, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *accord Thuraissigiam*, 591 U.S. at 138–140.[2] *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province

[2] Congress has chosen to provide aliens present without inspection, despite being applicants for admission, with the due process of full removal proceedings. *See* 8 U.S.C. § 1229a(a)(4). But with those full removal proceedings, Congress indicated that aliens present without inspection "shall be detained." 8 U.S.C. § 1225(b)(2)(A).

of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) ("[T]he decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law."); *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) ("Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress."). Thus, Petitioner's liberty interest is limited to the rights afforded her by Congress.

As to the second factor, the risk of erroneous deprivation is minimal. Under the existing procedures, the automatic stay remains in effect for a limited 90-day period. 8 C.F.R. § 1003.6(c)(4). The current regulation was amended to add this time limitation in an effort to expedite the process of appealing a bond decision. *See* 8 C.F.R. § 1003.1(e)(8) (prioritizing BIA resolution of appeals in "cases or custody appeals involving detained noncitizens"). The regulation incorporates this short 90-day duration based on evidence that the BIA had "been able to issue a decision within a 90-day time frame in most automatic stay cases[.]" Review of Custody Determinations, 71 Fed. Reg. 57873 (Oct. 2, 2006). Thus, there is little likelihood of prolonged detention pending a ruling on the bond appeal. In the post-final order of removal context, the Supreme Court has held that six months of detention pursuant to one detention authority—twice the length of the automatic stay period—is a presumptively reasonable period of detention. *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001). And the Eleventh Circuit has recognized the same as to pre-final order of removal detention. *Sopo v. U.S. Attorney General*, 825 F.3d 1199, 1217 (11th Cir. 2016).

Despite this brief period of application under narrow prescribed terms, Petitioner claims that the automatic stay "allow[s] the prosecuting agency—after losing at the bond hearing—to veto the

[IJ's] order[.]" Pet. 7. But, "[t]he automatic stay . . . does not turn the IJ decision into a meaningless formality because it affords the BIA time to consider an appeal." *Altayar v. Lynch*, No. CV-16-02479, 2016 WL 7383340, at *4 (D. Ariz. Nov. 23, 2016), *recommendation adopted*, 2016 WL 7373353 (D. Ariz. Dec. 20, 2016). To this end, the 90-day stay "avoid[s] the necessity of having to decide whether to order a stay on extremely short notice with only the most summary presentation of the issues." 71 Fed. Reg. 57873.

Moreover, during this brief 90-day period, Petitioner has the right to submit a brief in support of the IJ's bond order to the BIA. Thus, Petitioner has the opportunity to be heard regarding the bond appeal after invocation of the automatic stay. In *Mathews* itself, the Supreme Court held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. at 333 (internal quotations and citations omitted). Because the automatic stay affords Petitioner this opportunity in an expeditious manner, the Court should find that this second factor favors the Government.

As to the third *Mathews* factor, the Government has a key interest in detention during removal proceedings. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("*Diaz*"). In enacting and enforcing immigration laws, the Government's interest is at its zenith. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). Mandatory pre-final order of removal detention serves the Government interest by ensuring non-citizens' presence during removal proceedings. *Demore*, 538 U.S. at 521.

In addition to these overarching interests (regulating the relationship between the US and alien visitors and ensuring presence during proceedings), the Government also has a strong interest in the automatic stay specifically. "[T]he purpose of the automatic stay rule is to provide a means for DHS to seek an expedited review of custody decisions by the Board before being obligated to

release certain detained aliens whom DHS has strong reason to believe should not be released." 71 Fed. Reg. 57873; *see also* 8 C.F.R. § 1003.19(i)(2) (committing the decision to invoke the automatic stay to DHS's discretion). The Government's interest in determining whether a non-citizen should be detained or released during removal proceedings is so strong that Congress has cabined judicial review of that exercise of discretion. 8 U.S.C. § 1226(e). Further, "[a]n automatic stay of limited duration allows the Government to pursue its appeal before the subject might post bond and flee." *Altayar v. Lynch*, No. CV-16-02479, 2016 WL 7383340, at *4 (D. Ariz. Nov. 23, 2016) (citation omitted), *recommendation adopted*, 2016 WL 7373353 (D. Ariz. Dec. 20, 2016). Thus, the availability of the automatic stay is a valid means of achieving the underlying purposes of pre-final order of removal detention.

As discussed above, the automatic stay furthers the statutory scheme which vests the detention or release determination in the executive branch, as explained in the implementation of the regulation:

> 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 [BIA]. Barring review by the Attorney General, it is the [BIA]'s decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond.

71 Fed.Reg. 57873, 80. This is especially important when there is a disputed issue of law that was initially considered by the IJ, but for which (at least at the time of the appeal) there was not yet a definitive decision of the BIA, such as is the case here. The IJ determined that Petitioner is subject to detention pursuant to 8 U.S.C. § 1226(a) despite the arguments from DHS that § 1225(b) applies. That issue has been resolved by the BIA's decision in *In the Matter of Yajure-Hurtado*, 29 I&N

Dec. 216 (BIA 2025), wherein the BIA found that the non-citizen at issue, who, like Petitioner, was not admitted into the United States, but has lived in the interior of the country for more than 2 years, was properly subject to mandatory detention pursuant to § 1225(b) and thus not entitled to a bond hearing under § 1226(a). 29 I&N Dec. at 220. The Government has a strong interest in maintaining uniformity of the country's immigration laws, and the automatic stay allows the maintenance of the status quo for a short duration while cases like Petitioner's work through the appeals process. The BIA's decision finding that a non-citizen similarly situated in all relevant respects to Petitioner is mandatorily detained under § 1225(b) shows why it is appropriate to maintain the status quo in these circumstances.

Other courts have considered the automatic stay and held that its use complies with due process. *See Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031-32 (E.D. Wis. 2007); *Altayar*, 2016 WL 7383340, at *4-6; *Pisciotta v. Ashcroft*, 311 F. Supp. 2d 445, 454-55 (D.N.J. 2004). This Court should reach the same conclusion. The automatic stay's limited applicability, short duration, and allowance for both sides to brief issues to the BIA complies with procedural due process. *See Plasencia*, 459 U.S. at 35 ("[T]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.").

2. Substantive Due Process

Where a law affects a "fundamental liberty interest," it complies with due process if it "is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302 (internal quotations and citations omitted). "Substantive due process analysis must begin with a careful description of the asserted right[.]" *Id.* (internal quotations and citations omitted). The automatic stay is narrowly tailored to a Government interest and does not unduly infringe on Petitioner's limited interest.

Petitioner argues the automatic stay infringes upon her interest in "[f]reedom from bodily restraint." Pet. 8. While it is true as a general matter that freedom from physical restraint "lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690, the Supreme Court has held that pre-final order of removal detention—like Petitioner's here—"is necessarily a part of the deportation process," *Carlson*, 342 U.S. at 538. Thus, at the outset, because Petitioner's removal proceedings remain ongoing during the appeals to the BIA, her liberty interest is limited. Additionally, Petitioner's claim regarding the automatic stay concerns only a discrete subset of pre-final order of removal detention: the 90-day period during which the automatic stay is in place. Thus, "[t]he liberty interest at issue in this case is [even more] narrow: [P]etitioner's right to be released on bond pending the BIA's review of the [IJ's] bond redetermination." *El Dessouki v. Cangemi*, No. 06-3536, 2006 WL 2727191, at *3 (D. Minn. Sept. 22, 2006). And given that Petitioner was *never* entitled to bond due to her mandatory detention under section 1225(b), *Hurtado*, 29 I&N Dec. at 220, she cannot establish any general liberty interest to release on bond. *See Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 (11th Cir. 1985) ("Excludable aliens have fewer rights than do deportable aliens, and those seeking initial admission to this country have the fewest of all." (citing *Landon*, 459 U.S. at 32)).

As explained above in reference to the third *Mathews* factor, the Government also has a compelling interest in the 90-day detention during the automatic stay. Namely, pre-final order of removal detention "provide[s] a means for DHS to seek an expedited review of custody decisions by the Board before being obligated to release certain detained aliens whom DHS has strong reason to believe should not be released." 71 Fed. Reg. 57873. The automatic stay preserves the status quo to permit appeal of a bond decision.

For many of the reasons set forth above regarding the second *Mathews* factor, the automatic stay provision is narrowly tailored to serve this Government interest. Central to this prong of the

substantive due process analysis is the Supreme Court's admonition that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal." *Demore*, 538 U.S. at 528. Rather, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Id.* at 522 (citations omitted). To this end, the Supreme Court has recognized that pre-final order of removal detention "*necessarily serves the purpose* of preventing [such] aliens from fleeing prior to or during their removal proceedings." *Id.* at 527-28 (emphasis added).[3]

As to the automatic stay specifically, the procedure is narrowly tailored because it does not apply in all cases. Instead, DHS has the discretion to invoke the automatic stay when it believes a non-citizen should not be released. 8 C.F.R. § 1003.19(i)(2); 71 Fed. Reg. 57873. And that discretion is not limited solely to criminal non-citizens. *Id*. This allows DHS to accomplish its purpose of preventing flight and ensuring community safety while pursuing its appeal of the IJ's bond decision. *Altayar*, 2016 WL 7383340, at *4, *see also El-Dessouki v. Cangemi*, No. CIV 063536 DSD/JSM, 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.").

Finally, the length of the automatic stay's application is also narrowly tailored to a brief 90-day period to permit expeditious resolution of DHS's appeal of a bond order. 8 C.F.R. § 1003.6(c)(4). Whereas the original version of the automatic stay incorporated no temporal limit,

[3] Although the Court was speaking specifically of "deportable criminal aliens" in this quote from *Demore*, its holding was not so limited and the reasoning is applicable to non-criminal deportable aliens as well. *See Demore*, 538 U.S. at 528.

DHS amended the regulation in 2006 to incorporate this 90-day limit based on evidence that most bond appeals were resolved within 90 days. Review of Custody Determinations, 71 Fed. Reg. 57873 (Oct. 2, 2006). For these reasons, the automatic stay also complies with substantive due process.

CONCLUSION

The record is complete in this matter and the case is ripe for adjudication on the merits. For the reasons stated herein, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted this 29th day of September, 2025.

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