IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 25-cv-03078-WJM-KAS

JESUS MORALES LOPEZ,

Petitioner,

v.

JUAN BALTASAR, Warden of the Denver Contract Detention Facility, Aurora, Colorado, in his official capacity;
ROBERT GAUDIAN, Field Office Director, Denver Field Office, U.S. Immigration and Customs Enforcement, in his official capacity;
KRISTI NOEM, Secretary, U.S. Department of Homeland Security, in her official capacity;
TODD LYONS, Acting Director of Immigration and Customs Enforcement, in his official capacity; and
PAM BONDI, Attorney General, U.S. Department of Justice, in her official capacity,

Respondents.

RESPONDENTS' RESPONSE TO PETITIONER'S SECOND MOTION FOR A TEMPORARY RESTRAINING ORDER (ECF No. 14)

Respondents respectfully submit the following Response to Petitioner's second Motion for a Temporary Restraining Order (ECF No. 14). Petitioner's Motion should be denied. First, the Motion should be denied without prejudice because Petitioner failed to confer. Second, the Motion should be denied because Petitioner has not met his burden to demonstrate he is entitled to a disfavored TRO.

BACKGROUND

Petitioner's detention. Petitioner is a non-citizen who entered the country without inspection in 2006. *See* ECF No. 1 at ¶ 22. In July 2025, U.S. Immigration and Customs Enforcement (ICE) arrested Petitioner and charged him pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) as a non-citizen present in the United States who was not lawfully admitted. *Id.* at ¶ 23. Petitioner sought and was granted a $7,500 bond by an immigration judge. *Id.* at ¶ 29. The Department of Homeland Security (DHS) argued that Petitioner was subject to 8 U.S.C. § 1225(b)(2)(A), which applies to applicants for admission, and thus was subject to mandatory detention. *Id.* at ¶ 28. On August 14, 2025, the immigration judge (IJ) granted Petitioner release on bond. *Id.* at ¶¶ 28-29.

On September 5, 2025, the Board of Immigration Appeals (BIA) issued a decision determining that immigration judges lack authority to grant bond to aliens who are present in the United States without admission. *See Matter of Yajure Hurtado*, 29 I. & N. Dec. 216, 2025 WL 2674169 (BIA September 5, 2025). Decisions of immigration judges are governed by decisions of the BIA. See 8 C.F.R. § 1001.10(d). And the BIA has express authority to review decisions of immigration judges. *See* 8 C.F.R. § 1001.10(d).

Here, DHS appealed the IJ's custody decision to the BIA. ECF No. 1 at ¶ 30. That appeal triggered an automatic stay of the bond pursuant to 8 C.F.R. § 1003.19(i)(2). *Id.* at ¶ 30. That regulation provides that an order of an immigration judge is held in abeyance "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 generally "shall remain in abeyance pending decision of the appeal by the Board."[1] This regulation was promulgated by the Attorney General. *See* Final Rule, "Procedures for the Detention and Release of Criminal Aliens by the Immigration and Naturalization Service and for Custody Redeterminations by the Executive Office for Immigration Review," 63 Fed. Reg. 27,441, 27,441 (May 19, 1998) (explaining that the Department of Justice had proposed the rule to establish procedures for "a stay of an immigration judge's custody decision in conjunction with an appeal of the custody decision to the Board of Immigration Appeals" and, in doing so, "codified a long-standing administrative practice").

Consistent with the DOJ regulatory provision, the IJ's bond decision remains stayed until a final decision by the BIA. Petitioner thus remains detained at the ICE detention facility in Aurora, Colorado, pending the BIA decision. *Id.* at ¶ 15.

The habeas proceeding. On October 1, 2025, Petitioner filed a habeas petition challenging his detention. *See generally* ECF No. 1. In his petition, Petitioner makes two central arguments. First, he argues that he is not subject to 8 U.S.C. § 1225(b)(2)(A) and thus is not subject to mandatory detention under that provision. *Id.* at 5-7. Petitioner argues that he is instead subject to a different provision, Section 1226(a), which does

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[1] That provision reads: "**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."

not result in mandatory detention but instead grants him the ability to seek release on bond. *Id.*

Second, Petitioner challenges the regulation that permitted the automatic stay of his bond during the pendency of DHS' appeal to the BIA. *Id.* at 7-11. Petitioner seeks release from custody and a declaratory judgment finding his detention, and the automatic stay provision, unconstitutional. *See id.* at 16.

On October 7, 2025, this Court directed Respondents to show cause by October 27, 2025, why the petition should not be granted. ECF No. 9. The Court directed Petitioner to file a reply by November 12, 2025. *Id.* And the Court set oral argument on the Petition for November 20, 2025. *Id.*

On October 2, 2025, Petitioner's counsel received a notice of hearing before an immigration judge. *See* ECF No. 10 at 11-12. Petitioner's hearing in the underlying removal proceedings was scheduled for October 15, 2025. ECF No. 10 at ¶ 33.

On October 10, 2025, Petitioner, without complying with the obligation to confer on the motion, filed a motion seeking a temporary restraining order about the timing of his hearing in immigration court. ECF No. 10. The Court denied the motion. ECF No. 13. On Petitioner's request, his hearing in immigration court was continued to October 29, 2025. ECF No. 16 at ¶ 1.

On October 20, 2025, Petitioner filed a second Motion for a Temporary Restraining Order in this matter. ECF No. 14. Again, Petitioner's counsel did not comply with the obligation to confer with counsel for Respondents before filing this Motion.

Petitioner's second motion for TRO requests the same relief requested by his underlying habeas petition—his immediate release pursuant to the Immigration Judge's grant of bond. *Compare* ECF Nos. 1 and 14. But it primarily advances one argument: that he "is more than likely to succeed on the merits of his claim that he is unlawfully detained under the automatic stay provision of 8 C.F.R. § 1003.19(i)(2)...." ECF No. 14 at 3. Petitioner argues that the automatic-stay provision violates his *Id.* at 3.

ARGUMENT

I. The motion should be denied without prejudice because Petitioner failed to confer before filing it.

The Court should deny the motion without prejudice. In violation of D.C.COLO.LCivR 7.1(a), Petitioner, for a second time, did not confer with counsel for Respondents before filing this Motion. Under these circumstances, it is appropriate to deny the motion, without prejudice to Petitioner refiling the motion if the issue cannot be adequately addressed by conferral.

II. Petitioner has not met his heightened burden to demonstrate the need for a disfavored TRO.

In his Motion, Petitioner seeks a TRO pursuant to Federal Rule of Civil Procedure 65. Specifically, Petitioner seeks his immediate release from detention—the same relief requested in his underlying habeas petition.

An injunction is disfavored when (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win. *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). When a movant seeks a "disfavored injunction," he must meet a

heightened standard, and must make a "strong showing" as to the likelihood-of-success-on-the-merits and the balance-of-harms factors. *Id.*

Here, Petitioner seeks a disfavored TRO. He asks that the Court order Respondents to immediately release him from detention—a request to change the status quo. And he requests the Court grant him the full relief he seeks in his underlying habeas petition. Thus, Petitioner must make a strong showing on both the likelihood-of-success and balance-of-harms factors.

A. Petitioner has not shown a likelihood of success on the merits.

Petitioner's argument in the motion is that automatic-stay provision violates his due process rights, and that it is ultra vires because DHS, by invoking it, obtained an automatic stay of the immigration judge's grant of bond.

1. Invocation of the automatic stay did not deprive Petitioner of due process.

Under the special due process rules that apply to noncitizens like Petitioner who have never been admitted, Petitioner has not shown that he was denied due process.

In the immigration context, the Supreme Court has held that for aliens who have never been admitted into the United States, the due process rights are those set forth by Congress:

> In 1892, the Court wrote that as to "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." … Since then, the Court has often reiterated this important rule.

Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 138–39 (2020). Accordingly, a non-citizen who has not been admitted into the country "has only those rights regarding admission that Congress has provided by statute." *Id.* at 140 (explaining that where Congress provided an alien a right to a determination regarding asylum, and he "was given that right," "the Due Process Clause provides nothing more" and thus "does not require review of that determination or how it was made").

That approach means that even if Petitioner is subject to detention under Section 1226(a), his rights as to bond are limited to those provided by Congress. In Section 1226(a), Congress has provided that a non-citizen "may be arrested and detained pending a decision on whether the alien is to be removed," that the government "may continue to detain the arrested alien" or "may release the alien on … bond," and also may "at any time … revoke a bond." 8 U.S.C. § 1226(a)(1), (2), (b). But Congress has not granted non-citizens like Petitioner an absolute right to bond, or a right to release before a final decision on bond—i.e., while an immigration judge's decision on bond is being appealed.

Petitioner thus has not shown that *Congress* has granted him the right he seeks here—a right not to have bond revoked pending a final decision by the Board of Immigration Appeals. The BIA, not the immigration judge, is the final agency decision maker on bond. "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." *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1032 (E.D. Wis. 2007). But "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]." *Id.* "[I]t is the [BIA]'s decision that the Attorney General has designated as the final agency action with respect to whether the alien merits bond." *Id.* (finding that 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," and noting that DHS's exercise of its delegated responsibilities does not amount to a denial of due process). At this stage, Petitioner is receiving due process, but that process has not yet been completed.

2. Petitioner also has not shown that the auto-stay provision is ultra vires.

Petitioner argues that the provision in the auto-stay regulation is ultra vires—beyond agency authority. But Petitioner fails to explain this argument, and he thus does not meet his burden to show that the regulatory provision is ultra vires under the exceptionally high standards that apply to those claims. As the Supreme Court has explained, such an ultra-vires argument claim "is essentially a Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 681–82 (2025) (internal quotation marks omitted) (hereinafter *NRC*).

In *NRC*, the Supreme Court explained that a party's claim that an agency has acted "ultra vires" cannot succeed except where the agency order at issue "was an attempted exercise of power that had been specifically withheld," and the agency's

order violated a "specific prohibition" in the governing statute. *Id.*, at 188–189 (internal quotation marks omitted). The Court explained that such an ultra vires argument cannot be accepted "simply because an agency has arguably reached a conclusion which does not comport with the law," because then "ultra vires review could become an easy end-run around the limitations of … other judicial-review statutes." *Id.* "Rather, it applies only when an agency has taken action entirely in excess of its delegated powers and contrary to a *specific prohibition*" in a statute." *Id.* (emphasis in original) (internal quotation marks omitted). In addition, "ultra vires review is not available [where a party] had an alternative path to judicial review," such as through review of the agency's ultimate final order. *Id.* at 682.

Here, Petitioner's ultra vires argument falls far short of meeting this high standard. While Petitioner does not advance any argument in support of his ultra vires argument, the decision on which he relies does explain its logic on this issue, which is essentially that only the Attorney General can decide whether to grant bond:

> "Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them." U.*S. ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). The statutory section under which Petitioner is charged permits the Attorney General to detain or release aliens on bond. 8 U.S.C. § 1226(a). Congress has permitted the Attorney General to delegate detention determinations to "any other officer, employee, or agency of the Department of Justice." 28 U.S.C. § 510. IJs are administrative law judges within the DOJ and are thus properly delegated bond-determination authority. *See* 8 U.S.C. § 1101(b)(4). By contrast, DHS, the party that invoked the automatic stay provision, is not within the Department of Justice, but is a separate executive department. *See* 6 U.S.C. § 111. By permitting DHS to unliterally extend the detention of an individual, in contravention of the findings of an agent (the IJ)

> properly delegated the authority to make such a determination....

Anicasio v. Kramer, No. 4:25CV3158, 2025 WL 2374224, at *5 (D. Neb. Aug. 14, 2025).

This logic fails for two reasons. First, Congress did not provide in Section 1226(a) that an *immigration judge* has *final* authority to grant bond. Rather, as explained above, the BIA has the final authority. The ultimate bond decision is made by the BIA, which is part of the Department of Justice. As the Supreme Court has explained, "Congress has empowered the Secretary [of Homeland Security] to enforce the Immigration and Nationality Act, ... though the Attorney General retains the authority to administer removal proceedings and decide relevant questions of law." *Nielsen v. Preap*, 586 U.S. 392, 398 n.1 (2019). Here, even if the statute were read to reserve the bond decision to the Department of Justice, Petitioner has not shown that the automatic-stay provision—a regulation adopted by the *Department of Justice* about when an immigration judge's order on bond will be stayed pending a decision by the BIA, another body within the Department of Justice—has deprived the Attorney General of its authority to make a final decision on bond. Rather, the IJ's decision is stayed in accordance with the Attorney General's regulations, pending a decision by the BIA.

Second, even if Petitioner had been able to identify some conflict between the automatic-stay provision and Section 1226(a), Petitioner's argument would still fail. Petitioner does not identify a provision that Congress adopted in Section 1226(a) that *specifically* prohibits the practice or *specifically* withholds the authority exercised, in the automatic-stay provision. Absent a specific prohibition on the practice reflected in the

automatic-stay provision, Petitioner cannot show that the regulatory provision at issue here is ultra vires, under the high standard set by the Supreme Court in *NRC*.

B. Petitioner also has not shown that irreparable harm will result if the motion is not granted, or that the other factors weigh in his favor.

Petitioner also has not demonstrated irreparable harm absent a TRO. "To constitute irreparable harm, an injury must be certain, great, actual, and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks omitted).

Petitioner argues that his detention constitutes irreparable harm. ECF No. 14 at 4-5. But this Court has already established a reasonable schedule that permits the parties time to brief the merits of the habeas petition. The rule that Petitioner advocates for—that detention during the pendency of habeas proceedings alone constitutes irreparable harm—cannot be enough. If "detention in and of itself constitutes irreparable harm . . . then many if not most habeas petitioners would be entitled to such relief." *Abshir H.A. v. Barr*, 19-cv-1033 (PAM/TNL), 2019 WL 3292058, at *4 (D. Minn. May 6, 2019), *report and recommendation adopted by Abi v. Barr*, 2019 WL 2463036 (D. Minn. June 13, 2019). Petitioner has not established what is unique to his circumstances that constitutes irreparable harm.

Petitioner has not established why he will suffer irreparable harm if a TRO is not granted in the likely short interim during which his underlying habeas petition is considered and decided by the Court. Briefing on Petitioner's habeas petition will be complete at the latest by November 12, 2025. *See* ECF No. 9. That briefing will include full argument on the merits as to whether Petitioner's requested habeas relief should be

granted. The Court has set this matter for a hearing, and is likely to rule expeditiously. *Id.* Petitioner has not identified what unique harm he will suffer if he is not afforded a TRO in the likely short time it will take to resolve his underlying habeas petition.

In addition, Petitioner has not established that the public interest and balance of the equities weigh strongly in his favor. The Supreme Court has recognized that the public interest in the enforcement of the United States' immigration laws is significant. *See, e.g., Nken v. Holder*, 556 U.S. 418, 436 (2009). Here, given that Petitioner has not disputed that he was not admitted to the United States, Respondents have a valid statutory basis for detention, *see* 8 U.S.C. § 1225(b)(2)(A), and "detention during [removal] proceedings [is] a constitutionally valid aspect of the deportation process," *Demore v. Kim*, 538 U.S. 510, 523 (2003).

CONCLUSION

For the reasons stated above, the Court should deny Petitioner's Motion for a TRO, or should reserve ruling on it until it has a chance to consider the briefing and argument on the merits of Petitioner's habeas petition.

Dated: October 23, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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