

**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 HABEAS PETITION

Respondents submit the following Response to the Petition for Habeas Relief, ECF No. 1, and the Court's Order to Show Cause, ECF No. 16. Petitioner Jesus Morales Lopez seeks habeas relief in the form of a writ directing that he be released on bond. See ECF No. 1 at 31. As explained below, the Court should deny the petition because Petitioner is lawfully detained pursuant to 8 U.S.C. § 1225(b)(2)(A), and under this statute, he is not entitled to be released on bond. And, were the Court to determine that Petitioner should be held pursuant to 8 U.S.C. § 1226(a), the Court should find that Petitioner's detention remains lawful due to Respondents' invocation of an automatic stay of the bond.

INTRODUCTION

This Petition for habeas presents two questions. The first is whether 8 U.S.C. § 1225(b)(2), a provision of law that applies to non-citizens who are present in this country but have not been admitted, applies to Petitioner, such that the Department of Homeland Security (“DHS”) is properly detaining him under that provision rather than under 8 U.S.C. § 1226(a). Though Petitioner does not directly challenge the legality of his detention under Section 1225(b), resolution of this question is necessary before addressing his challenge to the automatic stay of his bond. This is because non-citizens detained under Section 1225(b)(2) are subject to mandatory detention, and thus are not eligible for bond in the first instance. Thus, if Petitioner is properly detained under Section 1225(b)(2), then his challenge to the stay of the bond he had been granted by an immigration judge would necessarily be moot and would fail.

The Court should find that Petitioner *is* covered by Section 1225(b)(2) and therefore is not entitled to bond. The scope of Section 1225 generally, and the scope of 1225(b)(2) specifically, was explained by the Supreme Court in *Jennings v. Rodriguez*, 583 U.S. 281 (2020). There, the Court explained that under § 1225 “an alien who ... ‘is present’ in this country but ‘has not been admitted’ is treated as ‘an applicant for admission.” See *Jennings*, 583 U.S. at 287-89. Section 1225(b)(2) serves as a “catchall provision that applies to all ‘applicants for admission’ not covered by § 1225(b)(1)” [which applies to a subcategory of aliens subject to expedited removal]”; and that non-citizens “covered by § 1225(b)(2)” are subject to detention under § 1225(b)(2)(A). See *id.* As explained below, Petitioner here fits that definition: he (a) is present in this

country and has never been admitted, and (b) is not subject to expedited removal and thus is subject to Section 1225(b)(2)(A). Respondents recognize that numerous nonprecedential decisions have reasoned otherwise, resisting the interpretation that a non-citizen who entered the country without being admitted is an “applicant for admission” covered by § 1225(b)(2). But as explained below, a close reading of how the Supreme Court in *Jennings* explained the scope of Section 1225—which, unlike all those decisions, is binding on this Court—supports Respondents’ view.

The primary question raised by the Petition is, if Petitioner was entitled to a bond hearing, whether DHS violated Petitioner’s due process rights, and engaged in ultra vires actions, by invoking a regulatory provision that allows DHS to obtain an automatic stay of a bond, 8 C.F.R. § 1003.19(i)(2), during DHS’s appeal of the Immigration Judge’s grant of a bond.

Again, if the Court determines that Petitioner is subject to detention under Section 1225(b)(2), it need not address the legality of the automatic stay of Petitioner’s release on bond as Petitioner is not entitled to bond in the first instance. But if the Court were to conclude that Petitioner is detained pursuant to Section 1226(a) and thus entitled to a bond hearing, the Court should still uphold the regulation allowing for the automatic stay of the bond issued by the Immigration Judge. Under the special due process standards applicable to Petitioner, the invocation of the automatic stay has not denied him due process. And Petitioner has not shown that the automatic stay provision meets the exceptionally high standards for an ultra vires claim.

BACKGROUND

I. Legal background.

In the INA, Congress established rules governing when non-citizens may be detained or removed. As relevant here, 8 U.S.C. § 1225 governs the processes for the detention and removal of “applicants for admission.” Section 1225 defines an “applicant for admission” as any “alien present in the United States who has not been admitted or who arrives in the United States.” 8 U.S.C. § 1225(a)(1) (emphasis added). As the Supreme Court explained the structure in *Jennings*, “Under ... 8 U.S.C. § 1225, a non-citizen who “arrives in the United States,” or “is present” in this country but “has not been admitted,” is “*treated*” as “an applicant for admission.” 583 U.S. at 287 (emphasis added). Thus, an “applicant for admission” in Section 1225 includes a non-citizen who is present in the United States but who has not lawfully entered the country.

Such “applicants for admission” fall into different subcategories. *Jennings*, 583 U.S. at 287. Two subcategories are described in Section 1225(b)(1). One subcategory is arriving inadmissible non-citizens: those who are arriving at the United States and are determined to be inadmissible under various grounds. *Id.* § 1225(b)(1)(A)(i). Another subcategory is those who were *not* admitted, but have been unlawfully present for less than two years. That subcategory applies to non-citizens who have “not been admitted or paroled into the United States,” who have not “affirmatively shown, to the satisfaction of an immigration officer, that [they] have been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility,” and who also are inadmissible under various provisions. *Id.* § 1225(b)(1)(A)(i), (iii)(II). Non-citizens within those two subcategories in Section

1225(b)(1) are subject to special expedited removal procedures, see 8 C.F.R.

§ 235.3(b). 8 U.S.C. §§ 1225(b)(1)(B)(ii), (iii)(IV).¹

Section 1225(b)(2) then covers other remaining “applicants for admission”—a term, as described above, that describes both arriving non-citizens (who are inspected at a port of entry) as well as those who are unlawfully present *without* having been admitted. As the Court in *Jennings* described it, “Section 1225(b)(2) is broader. It applies to all applicants for admission not covered by § 1225(b)(1) (with specific exceptions not relevant here)...” 583 U.S. at 287.

Non-citizens covered by § 1225(b)(2) are not subject to *expedited* removal proceedings. Rather, non-citizens “covered by § 1225(b)(2) are detained pursuant to a different process”—the process set forth in “§ 1225(b)(2)(A).” *Id.* at 288. Under 8 U.S.C. § 1225(b)(2)(A), such individuals who an immigration officer determines are “not clearly and beyond a doubt entitled to be admitted” shall be detained for ordinary removal proceedings under 8 U.S.C. § 1229a. Section 1225(b)(2)(A) also generally requires detention, during removal proceedings, for such individuals—*i.e.*, non-citizens who are treated as applicants for admission but who do not fall within one of the two categories described in Section 1225(b)(1).

The Court in *Jennings* also recognized that individuals who are treated as a matter of law as “applicants for admission”—even those who fall into the catchall category of § 1225(b)(2), which includes those who were never admitted and have been

¹ Depending on the circumstances, a non-citizen who is ordered removed under Section 1125(b)(1)(A)(i) but who is not removed within 90 days of the removal order may be released under an order of supervision. 8 U.S.C. § 1231(a)(3).

unlawfully present for more than two years—are viewed as “seeking admission.” *Id.* (“In sum, U.S. immigration law authorizes the Government to detain certain aliens *seeking admission* into the country under §§ 1225(b)(1) and (b)(2).”). *Id.* at 289.

Some non-citizens, of course, may be admitted to the United States, such as through a visa or entry at a port of entry or otherwise, and thus fall outside § 1225, which (as explained above) applies to those who have *not* been admitted. Those admitted non-citizens may later face removal for various reasons. *Id.* at 288 (explaining that non-citizens may face removal if they “were inadmissible at the time of entry or who have been convicted of certain criminal offenses since admission”). But the Court in *Jennings* explained that such non-citizens may be detained under a different provision—§ 1226. *Id.* (“Section 1226 generally governs the process of arresting and detaining *that* group of aliens pending their removal.”) (emphasis added).

The procedures for detention and removal of non-citizens covered by Section 1226 are different from those provided for non-citizens subject to detention under Section 1225. While Section 1225(b) requires mandatory detention, Section 1226(a) provides the possibility of release on bond. If the Attorney General issues a warrant, a non-citizen *may* be arrested and detained “pending a decision on whether the alien is to be removed from the United States.” During the pendency of removal proceedings, a non-citizen arrested under Section 1226 may remain detained or may be released on bond or conditional parole.² By regulation, immigration officers can release such a non-

² Section 1226(c), however, requires the Attorney General to take into custody certain defined categories of “criminal aliens,” and to detain them during their removal proceedings—*i.e.*, they are not able to receive bond hearings. 8 U.S.C. § 1226(c).

citizen if he demonstrates that he “would not pose a danger to property or persons” and “is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8). If not released by an immigration officer, the non-citizen can request a custody redetermination by an immigration judge at any time before a final order of removal is issued. *See id.* §§ 236.1(d)(1), 1236.1(d)(1), 1003.19.

For those non-citizens detained under Section 1226(a) and afforded a bond hearing, regulations provide for appeal of an immigration judge’s decision to grant or deny bond. *See* 8 C.F.R. §§ 1003.19(f), 1003.38. As relevant here, if an immigration judge has ordered a non-citizen released on bond and DHS wishes to appeal that decision to the BIA, 8 C.F.R. § 1003.19(i)(2) permits ongoing detention of the non-citizen pending that appeal. This DOJ regulation, commonly referred to as the “automatic stay regulation,” provides that if DHS “determine[s] that an alien should not be released ..., 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 ... with the immigration court within one business day of the order.” *Id.* § 1003.19(i)(2). If DHS files a timely notice of appeal, the automatic stay regulation further provides that “any order of the immigration judge authorizing release (on bond or otherwise)” shall, “except as otherwise provided in 8 CFR 1003.6(c), ... remain in abeyance pending decision of the appeal by the [BIA].” *Id.* § 1003.19(i)(2). Stay of the bond will “lapse 90 days after the filing of the notice of appeal,” absent a BIA decision. *Id.* § 1003.6(c)(4).

II. Factual and Procedural Background

Petitioner is a citizen of Mexico. Ex. 1 at ¶ 4 (Declaration of Mark Kinsey). In 2005, U.S. Customs and Border Patrol granted him voluntary return after he illegally entered the United States. *Id.* at ¶ 5. In 2006, he unlawfully entered the United States without inspection. ECF No. 1 at ¶ 22; Ex. 1 at ¶ 6 (Declaration of Mark Kinsey).

In 2012, Petitioner was convicted twice of driving without a license and careless driving. *Id.* at ¶ 10. ICE learned of these convictions through its ordinary check of relevant immigration and criminal justice databases. *Id.* at ¶ 12. In July 2025, U.S. Immigration and Customs Enforcement (ICE) detained Petitioner during a vehicle stop. *Id.* at ¶ 13. ICE determined that Petitioner is removable from the United States, arrested him, 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 ¶¶ 14, 16.

While Petitioner was originally detained under Section 1226, ICE then cancelled his detention under that Section and detained him pursuant to Section 1225(b). *Id.* at ¶ 15. On July 17, 2025, Petitioner appeared before the immigration judge for an initial hearing. *Id.* at ¶ 17. He admitted the allegations and the immigration judge sustained the charge against him. *Id.*

On July 29, 2025, Petitioner filed an application for cancellation of removal with the Executive Office for Immigration Review (EOIR). *Id.* at ¶ 18. On July 31, 2025, Petitioner appeared at a calendar hearing in his removal case and stated he was ready to schedule a final hearing on his application. *Id.* at ¶ 19. Petitioner's final hearing was first scheduled for October 6, 2025, but—at Petitioner's request—was continued several times and is currently set for October 29, 2025. *Id.* at ¶¶ 20, 25-30, 32.

In August 2025, Petitioner appeared for a custody redetermination hearing. *Id.* at ¶ 23. He was granted a \$7,500 bond by an immigration judge. *Id.* DHS appealed the immigration judge's custody decision to the Board of Immigration Appeals, which triggered an automatic stay of the Immigration Judge's decision on bond pursuant to 8 C.F.R. § 1003.19(i)(2). *Id.* at ¶¶ 23-24. Petitioner remains detained at the ICE detention facility in Aurora, Colorado. *Id.* at ¶ 33.

On October 1, 2025, Petitioner filed the instant habeas petition challenging his detention. *See generally* ECF No. 1. He challenges the regulation that led to the automatic stay of his bond during the pendency of DHS' appeal to the Board of Immigration Appeals. *Id.* at 8-14. He seeks release from custody and a declaratory judgment finding his detention, and the automatic stay provision, unconstitutional. *See id.* at 16.

ARGUMENT

I. **Petitioner is properly detained under Section 1225(b) and thus is not entitled to bond.**

Petitioner's challenge in this case is based on the incorrect premise that he is detained under Section 1226(a) and thus was entitled by that statutory provision to a bond determination. DHS's decision to instead detain Petitioner under a different provision, Section 1225(b), is lawful because Petitioner is a non-citizen present in the United States who has not been admitted. And because Section 1225(b)(2)(A) requires that he be detained, he does *not* have a statutory right to seek release on bond under Section 1226(a).

As explained above, Section 1225(b)(2)(A) mandates detention for a non-citizen

“who is an applicant for admission” if an immigration officer determines that the non-citizen is “seeking admission is not clearly and beyond a doubt entitled to be admitted.” The statute defines “[a]pplicant for admission” to include non-citizens who (1) are “present in the United States who ha[ve] not been admitted” or (2) “arrive[] in the United States.” *Id.* § 1225(a)(1). In other words, a non-citizen who is present in the United States but was not inspected or admitted is treated, as a matter of law, as an applicant for admission.

That definition of “applicant for admission” describes Petitioner. When ICE took him into custody, he was present in the United States. And he has not been “admitted” (*i.e.*, made a “lawful entry”).” 8 U.S.C. § 1101(a)(13)(A). Thus, Petitioner is an applicant for admission. And he does not argue that he is “clearly and beyond a doubt entitled to be admitted.” *Id.* § 1225(b)(2)(A).

Textual arguments. Section 1225(b)(2) includes those non-citizens “who are otherwise ‘applicants for admission.’” The Section makes clear that “applicants for admission” includes both those just arriving in the United States *and* those who entered without inspection and have been residing here. For example, Section 1225(b)(1) is not limited to aliens “arriving in the United States” who are rendered inadmissible for the specified reasons (*i.e.*, misrepresentation or lack of a valid entry document). Section 1225(b)(1) also applies, through its reference to Section 1225(b)(1)(A)(iii), to some aliens who have *already* been residing in the United States and are inadmissible for the same reasons—that is, applicants for admission who have “not been admitted or paroled” and have not “affirmatively shown, to the satisfaction of an immigration officer,

that [they] ha[ve] been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.” 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

Section 1225(b)(2) is broader than Section 1225(b)(1): the Supreme Court has recognized that Section 1225(b)(2) refers to a “broader” category of aliens than those described in 1225(b)(1). In *Jennings*, the Court referred to Section 1225(b)(2) as a “catchall provision that applies to *all applicants for admission* not covered by § 1225(b)(1).” 583 U.S. 281, 287 (2020) (emphasis added). Accordingly, Section 1225(b)(2) applies *both* to applicants for admission just arriving at the border who do not fall within Section 1225(b)(1)(A)(i) *and* to applicants for admission who have been physically present in the United States but are not covered by Section 1225(b)(1)(A)(iii)(II). While Section 1225(b)(2) is titled “Inspection of other aliens,” the “other aliens” in the title simply refers to the fact that it covers a category of aliens that is not covered by Section 1225(b)(1).

Section 1225 indicates that anyone falling within the category of applicants for admission is deemed, as a matter of law, to be seeking admission. See 8 U.S.C. § 1225(a)(3) (“All aliens . . . who are applicants for admission or *otherwise seeking admission* . . . shall be inspected by immigration officers.” (emphasis added)). And, as noted, the Supreme Court has treated Section 1225(b)(2)(A) as applying to “*all applicants for admission* not covered by § 1225(b)(1).” *Jennings*, 583 U.S. at 287 (emphasis added).

Even if Section 1225(b)(2)(A) were read (contrary to *Jennings*) more narrowly to

require a non-citizen to be actively “seeking admission,” as a court in this District suggested, Petitioner still meets that definition. See *Nava Hernandez v. Baltazar, et al.*, 25-cv-03094-CNS (ECF No. 26, October 24, 2025 at 10-11) (noting that “[f]or a non-citizen to be deemed ‘seeking admission’ they must be currently taking active steps or some kind of present-tense action to seek lawful entry into the U.S.”). Here, by challenging his removal, Petitioner is taking steps to remain in the United States—that is, to become lawfully admitted.

Section 1225(b)(2)(A) applies to Petitioner even if Section 1226(a) could also be read to include Petitioner. Section 1226(a)’s general detention authority, which permits the issuance of warrants to detain non-citizens for their removal proceedings, must be read alongside Section 1225, which is narrower in scope than Section 1226. It specifically applies only to “applicants for admission,” which includes non-citizens (like Petitioner) who are present in the United States who have not been admitted. See 8 U.S.C. § 1225(a)(1). Section 1226 does not displace the more specific provisions in Section 1225 governing the detention of applicants for admission. Where “there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.” *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 375 (1990) (citation omitted).

To be sure, 8 U.S.C. § 1226(c)(1)(E) mandates detention for a narrow category of non-citizens who entered the country without inspection: those who both entered without inspection and were later arrested for, committed, or have admitted to committing one of a list of enumerated crimes. It requires DHS to take such aliens into

custody after their release from criminal custody and detain them. See *Nielsen v. Preap*, 586 U.S. 392, 414-15 (2019) (explaining that Section 1226(c)(1)'s "when released" clause clarifies that DHS custody begins "upon release from criminal custody," not before, and that it "exhort[s] [DHS] to act quickly"). But the fact that Congress, in Section 1226(c)(1)(E), added further rules for detention of one subcategory of non-citizens who entered without inspection does not mean that Section 1225(b)(2)(A) can logically be read—despite its text, as interpreted by the Supreme Court *Jennings*—not to apply to non-citizens who entered without inspection.

Put another way, it is true that for a certain subset of non-citizens—those who entered without inspection and then committed (or may have committed) certain crimes—Congress has mandated their detention in two separate provisions, both Section 1225(b)(2)(A) and Section 1226(c)(1)(E). But this overlap—this redundancy in requiring mandatory detention certain non-citizens who committed (or may have committed) certain crimes—does not mean that Section 1225(b)(2)(A) does not still govern the detention of other aliens who entered without inspection. As the Supreme Court has acknowledged, redundancies "are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton v. Barr*, 590 U.S. 222, 239 (2020). "Redundancy in one portion of a statute is not a license to rewrite or eviscerate another portion of the statute contrary to its text." *Id.* The Court should not read Section 1226 to require courts to ignore the express detention and removal provisions in Section 1225.

Nor is there any indication that Congress intended courts to ignore the detention provisions in Section 1225. In enacting the Laken Riley Act (which added Section 1226(c)(1)(E)), Congress did not alter Section 1225(b)(2)(A). See PL No. 119-1, 139 Stat. 3 (2025). It is implausible that in the Laken Riley Act, Congress intended—without ever saying so—to displace the authority in Section 1225(b)(2)(A) to detain applicants for admission who are present in the United States and have not been admitted.

Other decisions. It is true that nonprecedential district court decisions have concluded that non-citizens who enter without inspection and then reside in the United States fall within the scope of Section 1226(a) rather than Section 1225(b)(2)(A). ECF No. 1 at 10-11 (collecting cases).³ But those decisions do not explain why the text of Section 1225(b)(2)(A) does not apply to non-citizens who enter without inspection and then reside in the United States. In interpreting Section 1225(b)(2), this Court must follow *Jennings*, not those decisions.

In a recent decision, this Court noted the number of district court rulings rejecting Respondents' position on the scope of Section 1225(b)(2). See *Moya Pineda v. Baltasar*, Civil Action No. 25-cv-029550-GPG-TPO (D. Colo.), ECF No. 21. But the nonprecedential decisions cited with approval in *Moya Pineda* likewise do not analyze how their reading of Section 1225(b)(2) can be read consistently with the Supreme Court's interpretation of that provision in *Jennings*. For example, in one decision cited with approval in *Moya Pineda*, the district court, in the portion of its opinion addressing

³ Not all district courts have agreed. See *Chavez v. Noem*, No. 25-cv-02325-CAB-SBC, 2025 WL 2730228, at *1 (S.D. Cal. Sept. 24, 2025) (holding that Section 1225(b) applied to an alien who entered without inspection).

the proper scope of Section 1225(b)(2), did not cite or address the *Jennings* decision at all. See *Cordero Pelico v. Polly Kaiser*, No. 25-cv-07286-EMC, 2025 WL 2822876, at *14 (N.D. Cal. Oct. 3, 2025). In another case, the district court briefly discussed *Jennings* but then suggested that *Jennings* supports the view that non-citizens who are present in the United States are *not* covered by Section 1225—but did so without acknowledging or addressing the Supreme Court’s explanation that a non-citizen who is present in this country but has not been admitted is treated as an applicant for admission subject to 1225(b)(2). *Cerritos Echevarria, v. Bondi*, No. 25-cv-03252-PHX-DWL-ESW, 2025 WL 2821282, at *7 (D. Ariz. Oct. 3, 2025); see *id.* at **4-5 (explaining that the scope of Section 1225(b)(2) is a “complicated and debatable question” and that the government’s view of its scope “appears, at first blush, to be consistent” with the statutory language, but then relying on a Ninth Circuit decision in rejecting the government’s position).

In short, in reviewing the court decisions interpreting the scope of Section 1225(b), the Court should adhere to the view of that position adopted by the Supreme Court in *Jennings*. That approach supports the view that Petitioner is subject to, and thus lawfully held pursuant to, Section 1225(b)(2).

II. The Court should reject Petitioner’s challenge to the automatic stay regulation.

The Court should deny Petitioner’s request for a declaratory judgment holding the automatic stay of his bond to be unlawful.

As a threshold issue, should the Court accept Respondent’s position that Petitioner is properly detained pursuant to Section 1225(b), he is not entitled to bond.

Because Petitioner would be subject to mandatory detention under Section 1225(b)(2)(A), his challenge to the automatic stay of his previously-granted bond would be moot, and would fail. See *Hussain v. Gonzales*, 492 F. Supp. 2d 1024, 1031 (E.D. Wis. 2007) (finding that where the petitioner was no longer held pursuant to the automatic stay provision of 8 C.F.R. § 1003.19(i)(2), his challenge to the automatic stay was moot), *aff'd sub nom. Hussain v. Mukasey*, 510 F.3d 739 (7th Cir. 2007).

Were the Court to find that Petitioner must be detained pursuant to Section 1226(a), however, it should still deny Petitioner's challenge to the automatic stay of his bond. First, Petitioner has not shown that application to of the automatic stay regulation deprives him of due process. Second, the regulation is not *ultra vires*.

A. The automatic stay does not deprive Petitioner of due process.

Petitioner argues that the automatic stay deprives him of his procedural and substantive due process rights. As to the former, Petitioner argues that the automatic stay deprives him of his liberty without adequate process and safeguards. As to the latter, Petitioner argues that the automatic stay permits Respondents to detain him without articulating any justification for doing so that outweighs his liberty interest.

Here, invocation of the automatic stay does not deprive Petitioner of due process under the Fifth Amendment.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). But in the immigration context, the Supreme Court has held that for non-citizens

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”).

Here, that approach means that even if Petitioner were subject to detention under Section 1226(a), his rights as to bond are 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 non-citizen 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 on bond. The BIA, not the IJ, is the final agency decision maker on bond, and Petitioner's due process arguments to an extent rely on a misunderstanding of the procedural processes in immigration proceedings and the relationship between DHS, the Immigration Judges, and the BIA. "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*, 492 F. Supp. 2d at 1032. 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 Board'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 still receiving due process—a decision on bond—but that process has not yet been completed.

B. The auto-stay is not *ultra vires* nor unauthorized by the INA.

Finally, Petitioner argues that the provision in the auto-stay regulation is *ultra vires*—beyond the agency's authority. But Petitioner has not shown that the regulatory

provision is ultra vires under the exceptionally high standards that apply to those claims, as the Supreme Court has recently 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 continued 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, because he fails to show that Congress has *specifically* prohibited the practice adopted in the automatic stay provision. Petitioner’s basic argument is that the automatic-stay provision allows DHS to “effectively transform[] a discretionary decision

by the Immigration Judge.” ECF No. 1 at 14. Petitioner argues that Section 1226(a) vests the authority to grant bond in the immigration judge. *Id.*

But 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. And, as Petitioner admits, *id.* at 9, the automatic stay regulation was promulgated by the Attorney General—not DHS. 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”). Moreover, 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). But 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 has deprived the BIA of its authority to make a final decision on bond. In sum, the automatic stay provision does not deprive the Attorney General of authority to make a bond decision.

Even if Petitioner had been able to identify some tension between the automatic-stay provision and Section 1226(a), Petitioner's argument would still fail because Petitioner fails to identify a provision that Congress adopted in Section 1226(a) that *specifically* prohibits the practice adopted, or *specifically* withholds the authority exercised, in the automatic-stay provision. Absent such 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*.

CONCLUSION

For the reasons stated herein, the Court should deny the Petition because Petitioner is lawfully held pursuant to Section 1225(b), and the automatic stay of bond while the BIA determines the custody redetermination appeal is not unlawful.

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 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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