

United States District Court
Western District of Texas
San Antonio Division

Hayam EL GAMAL, et. al.
Petitioner,

v.

Kristi Noem, Secretary of the United States
Department of Homeland Security et. al.,
Respondents.

No. 5:25-cv-01261-FB

**Response in Opposition to
Petitioner's Motion for Temporary Restraining Order
and/or Preliminary Injunctive Relief**

This is Petitioner's¹ second attempt at securing her release from civil immigration detention via habeas, after her first petition was dismissed in July for lack of subject matter jurisdiction. *See El Gamal v. Noem*, --- F.Supp.3d ---, 2025 WL 1857593 at *3–4 (W.D. Tex. July 2, 2025) (finding no jurisdiction under 8 U.S.C. § 1252(g) to review discretionary detention decisions and no jurisdiction under § 1252(b)(9) to review questions arising from removal proceedings). This time, Petitioner shifts focus to what she refers to as an “ultra vires” automatic stay regulation, which allows the Department of Homeland Security (DHS), in the exercise of discretion and subject to various regulatory procedures, to maintain the status quo by keeping her detained during removal proceedings while the agency appeals what they believe to be an erroneous bond decision. Despite this repackaging, Petitioner is nonetheless attacking the underlying discretionary decision to detain her during removal proceedings, and this Court lacks jurisdiction to review such a claim.

¹ The lead Petitioner is the mother of the remaining petitioners. Any reference herein to “Petitioner” applies equally to the lead Petitioner and her children.

I. Relevant Background

Lead Petitioner is a native of Saudi Arabia and citizen of Egypt. Exhibit A (Notice to Appear). Petitioner was detained by ICE and placed into removal proceedings after she overstayed her tourist visa. *Id.* Her next immigration court hearing is October 22, 2025. Exhibits B (Notice of Hearing), C (Order on Motion to Continue). Following the dismissal of her first habeas petition, on September 19, 2025, an immigration judge granted Petitioner's release from ICE custody upon payment of a \$15,000 bond. ECF No. 2 at 5. ICE reserved appeal of that bond decision, and in the exercise of discretion, filed an automatic stay of the order with the Board of Immigration Appeals (BIA) under 8 C.F.R. § 1003.19(i)(2). *Id.*; *see also* Exhibit D (Notice of Appeal).

On October 2, 2025, ICE filed a Notice of Appeal with the BIA. *Id.* ICE included a preliminary brief in support of the appeal, arguing that Petitioner is subject to mandatory detention where the evidence shows she is "described in" the Immigration and Nationality Act (INA) as "the spouse of an alien who is removable as described in INA § 212(a)(3)(B)." *Id.* The referenced section of the INA refers to terrorist activity and renders a spouse or a child inadmissible based solely on a familial relationship to an alien who committed the conduct. *Id.*; *see also* 8 U.S.C. § 1182(a)(3)(B). On June 1, 2025, Petitioner's husband yelled "Free Palestine" and threw Molotov cocktails at demonstrators attending a march for Israeli hostages in Colorado, resulting in twelve people being injured. *Id.* On appeal, ICE claims that neither of the two statutory exceptions for this terrorism inadmissibility ground applies to Petitioner, and even if they did, she remains a flight risk and should not be released on bond. *Id.* On October 15, 2025, ICE filed a motion for discretionary stay of the bond decision under 8 C.F.R. § 1003.19(i)(1). Exhibit E (Emergency Stay Motion). Both the bond appeal and the discretionary stay motion remain pending before the BIA.

On October 6, 2025, Petitioner filed her second writ of habeas corpus and a motion for temporary restraining order (TRO). ECF Nos. 1; 2. The Court ordered Respondents to reply to the TRO motion no later than October 17, 2025, or within seven days after conference. ECF No. 10. On October 14, 2025, the parties conferenced, setting Respondents' deadline for October 21, 2025. ECF No. 12.

In Petitioner's TRO motion, she challenges the constitutionality of the automatic stay provision and requests her immediate release from custody pursuant to the \$15,000. ECF No. 2 at 8–9. Despite the robust procedural protections during a bond appeal and during removal proceedings, generally, Petitioner nonetheless claims the automatic stay of the bond order deprives her of due process, both substantive and procedural. ECF No. 2 at 7–11. Petitioner challenges the lawfulness of the automatic stay and claims the government is using continued detention to punish her for the alleged acts of her husband. ECF No. 2 at 5. She further claims that ICE is keeping her “confined for no lawful purpose,” even though ICE believes Petitioner is a flight risk if released from custody and is appealing on that basis. *Id.* at 6. Petitioner claims that the unilateral nature of the stay regulation is “ultra vires and therefore unlawful.” *Id.* She also argues she faces irreparable harm while detained during removal proceedings and that the government's interests are minimal in comparison. *Id.* at 11–12.

II. Legal Standards

A preliminary injunction is an “extraordinary and drastic remedy.” *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). As such, it is “not to be granted routinely, but only when the movant, by a clear showing, carries [the] burden of persuasion.” *Black Fire Fighters Ass'n v. City of Dallas*, 905 F.2d 63, 65 (5th Cir. 1990) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). “The four prerequisites are as follows: (1) a substantial

likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest.” *Canal Auth.*, 489 F.2d at 572. A preliminary injunction should be granted only if the movant has “clearly” carried the burden of persuasion on all four of these prerequisites. *Id.* at 573.

III. Argument

A. Plaintiff Is Unlikely to Succeed on the Merits.

Petitioner is not likely to succeed on the merits of her claim for several reasons: (1) ICE’s unreviewable discretionary decision to seek a stay of the bond decision during an appeal of a non-final agency action simply preserves the status quo during administrative review; (2) the automatic stay does not deprive Petitioner of any procedural due process, because the bond appeal process itself and the corresponding removal proceedings provide Petitioner with built-in protections, including ample notice and a full opportunity to respond, through counsel, to the reasons for her continued detention and the charges pending against her; (3) pre-removal order detention is facially constitutional; (4) Petitioner’s detention is not unconstitutionally prolonged (or indefinite) in violation of her substantive due process rights, because those proceedings, including the bond appeal, will eventually conclude; and (5) there is no indication the bond appeal is frivolous or otherwise likely to be dismissed due to a change in circumstances in the removal proceedings. This TRO should be denied, and the habeas petition should be denied in its entirety.²

² While this Court could *sua sponte* deny the underlying habeas petition without further input from the government, Federal Respondents do intend to respond to the habeas petition in full upon the issuance and service of an Order to Show Cause.

As a threshold issue, a challenge to discretionary custody decisions is protected from judicial review. *See El Gamal*, --- F.Supp.3d ---, 2025 WL 1857593 at *3–4 (collecting cases). As Judge Garcia noted in the first iteration of this case, however, an as-applied challenge to a statute’s mandatory detention provision can be lodged, even if the statute itself has been found constitutional on its face. *Id.* at *4. In other words, this Court lacks jurisdiction to review ICE’s discretionary basis for requesting the automatic stay but may review whether the automatic stay provision itself is unconstitutional as applied to Petitioner.

To establish a due process violation, Petitioner must show that she was deprived of liberty without adequate safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The Fifth Circuit finds no due process violation where the constitutional minima of due process is otherwise met. *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). The automatic stay is preserving the status quo while ICE seeks administrative review of a discretionary bond decision. Regardless of her continued detention, Petitioner is receiving robust due process protections during her removal proceedings, both substantively and procedurally, and her detention is both statutorily permissible and constitutional as applied to her.

In 2007, Judge Rodriguez extensively reviewed almost identical arguments in a similar case. *See Kambo v. Poppel*, No. SA-07-CV-800-XR, 2007 WL 3051601 (W.D. Tex. Oct. 18, 2007). In that case, the Court exercised jurisdiction over the alien’s as-applied due process challenge to pre-removal-order detention. *Id.* at *1. The Court, however, rejected the alien’s challenges to ICE’s use of automatic and discretionary stays in that case, finding that 8 U.S.C. § 1252(a)(5) precludes review of ICE’s discretionary decisions. *See id.* at *8.

Still, the Court carefully outlined the extent of its jurisdiction to review an as-applied constitutional challenge to pre-removal-order detention. *Id.* at *10. In noting the government’s

“extensive regulations governing custody and detention,” the Court specifically analyzed the regulations that authorize automatic stays, acknowledging the various procedural protections afforded to aliens that are embodied in the regulations. *Id.* *12. One such protection, the Court noted, is the BIA’s obligation to track the progress of each custody appeal that is subject to an automatic stay to avoid unnecessary delays. *Id.* (citing 8 C.F.R. §§ 1003.6(c)(3); 1003.19(i)(1) and recognizing a 90-day lapse of the stay, subject to extensions).

Moreover, the Court explored the stay provision itself, finding that it simply preserves “the status quo briefly while DHS seeks expedited appellate review of the immigration judge’s custody decision.” *Id.* at *19 (citing 71 Fed.Reg. 57873, 57880). The Court clarified, however, that if the administrative record begins to call into doubt the likelihood of a removal order being entered on the merits, the government must at that point offer an “adequate regulatory purpose” to justify continued detention. *Id.* at *20. Around the one-year of detention mark in *Kambo*, the Court noted that although pre-removal-order detention was not indefinite, *Kambo*’s removal no longer seemed likely following an immigration judge’s decision on the merits of his relief application. *Id.* As a result, continued detention for the purpose of ensuring his future compliance with a removal order, the Court reasoned, proved too weak a justification to overcome the alien’s liberty interests. *Id.*

Kambo is instructive here. Unlike *Kambo*, though, Petitioner has been detained for only four and a half months, as opposed to one year. The automatic stay, which is valid for only 90 days, has been pending for just over a month. Before that month even elapsed, ICE took an additional step by asking the BIA on an emergency basis to grant a discretionary stay of the bond order during the appeal. A decision on that emergency motion should be imminent and will moot

this issue entirely. *See Alvarez Martinez v. Noem*,³ No. 5:25-CV-01007-JKP, 2025 WL 2598379 at *6 (W.D. Tex. Sept. 8, 2025)

In her removal proceedings, Petitioner filed an application for relief and was previously scheduled for a final hearing, until Petitioner sought a continuance. *See* Exh. C (order granting motion to continue). But for that continuance, Petitioner's final removal hearing would have already concluded. Nothing in the record indicates that DHS's bond appeal is frivolous or otherwise likely to be dismissed, and there have been no developments in the removal proceedings that make a removal order less likely since the automatic stay was issued. A pending relief application does not grant any immigration status or benefit. Indeed, if Petitioner is granted some sort of immigration benefit that mandates her release from ICE detention, then her habeas claim will be moot. Presently, however, Petitioner offers no basis to determine that ICE's discretionary decision to maintain the status quo by detaining her during removal proceedings deprives her of due process.

B. Remaining Factors Do Not Favor Relief.

With respect to the balancing of the equities and public interest, it cannot be disputed that (1) Petitioner is in removal proceedings, which entitles the government to detain her in the exercise of discretion; and (2) both the government and the public at large have a strong interest in the enforcement of the immigration laws, especially as it relates to alleged terrorist activity. Moreover, Petitioner has provided no basis beyond conclusory allegations to corroborate her claim that her continued pre-removal-order detention pending the BIA's review will cause her irreparable harm. Indeed, Petitioner, represented by counsel, is provided a full opportunity to be heard on appeal of

³ The parties in *Alvarez Martinez* disputed the controlling detention authority in that case, but there is no dispute in this case that the governing statute is 8 U.S.C. § 1226(a).

the bond order. The built-in procedural safeguards in the regulations further weaken her claim that she is likely to suffer irreparable harm without intervention. Moreover, Respondents have already filed a motion for discretionary stay with the BIA, which Respondents expect should be adjudicated soon. The Court should therefore deny this TRO and dismiss this case in its entirety.

C. In the Alternative, this Court Should Allow Additional Time for the BIA to Rule on the Pending Emergency Motion for Discretionary Stay.

In the alternative, Respondents request that the Court allow an additional 14 days for the BIA to rule on ICE's motion for a discretionary stay of the bond order pursuant to 8 C.F.R. § 1003.19(i)(1). While courts differ on the constitutionality of the automatic stay provision, a discretionary stay is undoubtedly appropriate, as "it presents a narrowly tailored, less restrictive means whereby the government's interest in seeking a stay of custody redetermination hearing may be protected without unduly infringing upon [petitioner's] liberty interest. *Alvarez Martinez v. Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379 at *6 (W.D. Tex. Sept. 8, 2025) (quoting *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446, 451 (D. Conn. 2003) (interpreting the predecessor to 8 C.F.R. § 1003.19(i)(1), 8 C.F.R. § 3.19(i)(1)). Good cause exists to allow ICE to maintain the status quo (detention) for an additional 14 days while the BIA adjudicates the pending emergency motion.

IV. Conclusion

This TRO should be denied, and the Court should deny the Petition outright without the need for any further briefing. In the alternative, the Court should allow the BIA an additional 14 days to rule on Respondents' request for a discretionary stay of the bond decision.

Respectfully submitted,

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