UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HUMBERTO LUNA DELGADO,

Petitioner,

Case No.: 6:25-cv-06612-MAV

v.

JOSEPH E. FREDEN, in his official capacity as ICE Deputy Field Office Director; et al.

Respondents.

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION

An immigration judge ("IJ") set a bond for Petitioner after finding that Petitioner, who entered the United States without inspection, was detained under 8 U.S.C. § 1226(a). But the Department of Homeland Security appealed to the Board of Immigration Appeals on the basis that Petitioner was detained under 8 U.S.C. § 1225(b)(2), which requires mandatory detention, instead of under 8 U.S.C. § 1226(a), which permits the non-citizen to get a bond. DHS also invoked an automatic stay of the IJ's decision under 8 C.F.R. § 1003.19(i)(2) while its appeal was pending. Later, DHS also sought and received a discretionary stay from the Board.

The sole basis of DHS's appeal and main basis for the government's motion to dismiss is that the Petitioner, who entered the United States without inspection, is detained under 8 U.S.C. § 1225(b)(2) based on *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Numerous courts around the country, including this Court and at least two other judges in the Western District of New York, have rejected this argument and held that the individuals who have entered without inspection, like Petitioner, are detained under 8 U.S.C. § 1226(a). In addition, at least one court in this district has held that once a petitioner has been detained under 8 U.S.C. § 1226(a), he should be allowed to pay his bond, notwithstanding the automatic and discretionary stays. Therefore, the Court should hold that Petitioner is detained under 8 U.S.C. § 1226(a), overrule the stays, and allow him to pay the bond so that he can be released from custody. For these reasons, Petitioner opposes the motion to dismiss and asks the court to deny the motion and grant Petitioner's habeas petition.

STATEMENT OF FACTS

Petitioner is a native and citizen of Mexico. On or about July 9, 2025, DHS issued Petitioner a Notice to Appear ("NTA"). Dkt. No. 7-1. In the NTA, DHS alleges that Petitioner

entered the United States without inspection on or about December 1, 2010, and charges him with violating Immigration and Nationality Act § 212(a)(6)(i), i.e., that he is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. Dkt. No. 7-1. In the NTA, DHS designated his status as falling under 8 U.S.C. § 1226(a) by checking the box that states, "You are an alien present in the United States who has not been admitted or paroled."

On or about August 28, 2025, an immigration judge issued an order declaring that Petitioner fell under 8 U.S.C. § 1226(a) and granted him a bond of $10,000. Dkt. No. 7-2. In her written order dated September 25, 2025, the immigration judge explained that her decision to grant this bond was based on the facts that Petitioner has lived in the United States continuously for over fourteen years, had a job since 2011, and has filed taxes. The immigration judge also noted that Petitioner "has been married to a Lawful Permanent Resident since March 8, 2022, and is the caregiver to his United States citizen three-year-old granddaughter." A true and accurate copy of the written decision, dated September 25, 2025, is attached as **Exhibit C** to Dkt. No. 7.

On or about August 28, 2025, DHS filed Form EOIR-43 entitled Notice of ICE Intent to Appeal Custody Redetermination. A true and accurate copy of this form is attached as **Exhibit D** to Dkt. No. 7. This form triggers an automatic stay of the immigration judge's custody redetermination decision under 8 C.F.R. § 1003.19(i)(2). *See* **Exhibit D** to Dkt. No. 7. On or about September 12, 2025, DHS filed its notice of appeal and brief with the Board of Immigration Appeals. A true and accurate copy of the notice of appeal, EOIR-43 Senior Legal Official Certification, and accompanying brief is attached as **Exhibit E** to Dkt. No. 7. DHS based its appeal on the claim that Petitioner was detained under 8 U.S.C. § 1225(b), which precludes an immigration judge from issuing a bond, instead of 8 U.S.C. § 1226(a). ***See*** **Exhibit E** to Dkt. No.

7.

Upon information and belief, Petitioner does not have a criminal record. Upon information and belief, DHS has not claimed either in its appeal or in other settings that he is a danger to persons or property or a flight risk. DHS's basis for appealing this case is that it contends that Petitioner should be classified under 8 U.S.C. § 1225(b) and not 8 U.S.C. § 1226(a). **Exhibit E** to Dkt. No. 7. Petitioner asserts in his verified petition that he is detained under 8 U.S.C. § 1226(a) instead of 8 U.S.C. § 1225(b).

On or about October 22, 2025, Petitioner filed a petition for a writ of habeas corpus with this Court, challenging the automatic stay invoked by DHS that prevented him from paying the immigration court-issued bond. Dkt. No. 1. On November 7, 2025, Petitioner filed an amended petition for a writ of habeas corpus. Dkt. No. 7. On November 12, 2025, the government filed a motion to dismiss for failure to state a cause of action. Petitioner now files this opposition.

LEGAL STANDARD

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). "A court should consider the motion by 'accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff.'" *Gedney v. DolGen N.Y., LLC*, 763 F. Supp. 3d 356, 360 (W.D.N.Y. 2025) quoting *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 566 (2d Cir. 2016). "To withstand dismissal, a plaintiff must set forth 'enough facts to state a claim to relief that is plausible on its face.'" *Gedney*, 763 F. Supp. 3d at 360, quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged.'" *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). "To state a plausible claim, the complaint's '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 218 (2d Cir. 2014), quoting *Twombly*, 550 U.S. at 555).

ARGUMENT

I. PETITIONER IS DETAINED UNDER 8 U.S.C. § 1226(a) AND SHOULD BE ALLOWED TO PAY THE BOND ISSUED BY THE IMMIGRATION COURT.

Respondents argue that this case should be dismissed because Petitioner is detained under 8 U.S.C. § 1225(b). But this argument is also problematic. For the reasons that follow, the Court should deny the motion to dismiss on this basis.

Two statutory provisions govern the detention of non-citizens present in the US pending the outcome of their removal proceedings. Broadly speaking, 8 U.S.C. § 1225 governs the detention of non-citizens arriving in the United States. 8 U.S.C. § 1226 governs the detention of non-citizens already physically present in the United States. DHS and the Board of Immigration Appeals claim that Petitioner is detained under 8 U.S.C. § 1252(b)(2). But this is incorrect.

8 U.S.C. § 1225(b)(2) states in relevant part that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding

under" 8 U.S.C. § 1229a. 8 U.S.C. § 1225(a)(1) defines an "applicant for admission" as "[a]n alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . .)."

8 U.S.C. § 1226(a) states that "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." After that arrest, the Attorney General "may continue to detain the arrested alien" or release the alien on a bond with conditions or on conditional parole. 8 U.S.C. § 1226(a)(1)-(2).

In July 2025, DHS took the position that anyone who is an applicant for admission is no longer detained under 8 U.S.C. § 1226(a) and is instead an applicant for admission seeking admission under 8 U.S.C. § 1225(b). The Board of Immigration Appeals later adopted this position in *Matter of Yajure Hurtado*, 29 I&N Dec. 216 (BIA 2025). Therefore, all individuals who were once eligible for bond under 8 U.S.C. § 1226(a) were now detained under 8 U.S.C. § 1225(b) and no longer eligible for bond. But as demonstrated below, this interpretation is not supported by the plain language of the detention provisions, the legislative history, past practice, and DHS's treatment of this Petitioner.

a. The plain text of 8 U.S.C. § 1225 and § 1226 does not support Respondents' position.

First, the plain text of these statutes does not support the government's position. The term "seeking admission" denotes an active activity. The term "seeking" is a present participle denoting something happening in the present. As one court explained, while the term "seeking admission" is not defined in 8 U.S.C. § 1225(b)(2)(A), the term "necessarily implies some sort of present-tense action." *Benitez v. Francis*, 2025 U.S. Dist. LEXIS 157214, at *19 (S.D.N.Y. Aug. 8, 2025) (internal citations and quotations omitted). That court further explained, "The INA defines 'admitted' and 'admission' as 'the lawful entry of the alien into the United States after inspection

and authorization by an immigration officer.'" *Id.* quoting 8 U.S.C. § 1101(a)(13)(A). Even if an individual never lawfully enters the United States and is an "applicant for admission," "it does not follow that he continues to be actively 'seeking' such lawful entry at this time. [The non-citizen] has already 'entered' the country (albeit unlawfully)." *Id.* "The Respondents' interpretation of § 1225(b)(2)(A) simply ignores the statute's present-tense active language." *Id.*

This interpretation of "seeking" in the present tense is also reflected in the accompanying regulations. In 8 C.F.R. § 1225, the regulations use the phrase "seeking admission" to denote inspection at the border. For example, 8 C.F.R. § 1225(a)(5) states,

> An applicant for admission may be required to state under oath any information sought by an immigration officer regarding the purposes and intentions of the applicant in seeking admission to the United States, including the applicant's intended length of stay and whether the applicant intends to remain permanently or become a United States citizen, and whether the applicant is inadmissible.

The phrase "seeking admission" is used in the context of an inspection at the border. Similarly, 8 C.F.R. § 1225(b)(2)(A) states, "Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." Likewise, 8 C.F.R. § 235.1(f)(1), titled "Alien applicants for admission"— provides that

> [e]ach alien *seeking admission at a United States port-of-entry* must present whatever documents are required and must establish to the satisfaction of the inspecting officer that the alien is not subject to removal under the immigration laws, Executive Orders, or Presidential Proclamations, and is entitled, under all of the applicable provisions of the immigration laws and this chapter, to enter the United States.

"This suggests that those "seeking admission" are at or near the border."*Ortiz*, 2025 U.S. Dist. LEXIS 217654, at *17.Again, "seeking admission" is done in the present at the border by an immigration officer.

The *Benitez* court used the following analogy. Suppose someone sneaks into a movie theater without purchasing a ticket and then sits through the first part of a movie. *Id.* at *21. Even if that person, after being detected, offered to pay for a ticket, one would not ordinarily describe them as "seeking admission" (or "seeking" "lawful entry") at that point — one would say that they had entered unlawfully but now seek a lawful means of remaining there. *Id.* Similarly, a person who has been in the United States for a period of time cannot be said to be actively seeking admission to the United States. Therefore, an individual who has been present for several years and already designated by DHS as present, even if not admitted or paroled, could not be said to be seeking admission to the United States.

In addition, the terms "applicant for admission" and "seeking admission" are not synonymous because this would create surplusage problems with the INA. It is axiomatic that every clause and word of a statute should have meaning. *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 432 (2023). "It is a basic canon of statutory interpretation that a statute should be construed as to give effect to all its provisions and that no part will be superfluous." *J.U. v. Maldonado*, No. 25-CV-04836 (OEM), 2025 U.S. Dist. LEXIS 191630, at *22 (E.D.N.Y. Sep. 29, 2025) citing *Corley v. United States*, 556 U.S. 303, 314 (2009). "This presumption is 'strongest when an interpretation would render superfluous another part of the same statutory scheme." *J.U.*, 2025 U.S. Dist. LEXIS 191630, at *22-23 quoting *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 386 (2013).

> Mandatory detention under § 1225(b)(2)(A) applies to a noncitizen who meets three criteria: (1) one who is an "applicant for admission" (a "term of art" in the INA that includes noncitizens who arrive in the United States," as well as those already present in the United States who have not been admitted, U.S.C. § 1225(a)(1)); (2) who is actively "seeking admission" to the country, and (3) whom an examining immigration officer determines "is not clearly and beyond a doubt entitled to be admitted.

Benitez, 2025 U.S. Dist. LEXIS 157214, at *17-18 (cleaned up). "If, as Respondents argue, § 1225(b)(2)(A) were intended to apply to all 'applicant[s] for admission,' there would be no need to include the phrase 'seeking admission' in the statute." *Id.* at *18. In other words, if mandatory detention was required for all applicants for admission, the statutes would not use the phrase "seeking admission. *Id.* The "statute would instead provide for mandatory detention for any 'applicant for admission,' if the examining immigration officer determines that [the] alien ~~seeking admission~~ is not clearly and beyond a doubt entitled to be admitted.'" *Id.*

Second, 8 U.S.C. § 1226(c)(1)(A) states that the "Attorney General shall take into custody any alien who is inadmissible by reason of having committed any offense covered in" 8 U.S.C. § 1182(a)(2), which includes offenses such as crimes of moral turpitude and offenses relating to controlled substances. *J.U.*, 2025 U.S. Dist. LEXIS 191630, at *23. "'[T]his mandatory detention under [8 U.S.C. § 1226(c)] would be unnecessary if all persons who have not been admitted into the United States were already subject to § 1225(b)'s mandatory detention provisions.'" *Id.* quoting *Hasan v. Crawford*, No. 1:25-cv-1408 (LMB/IDD), 2025 U.S. Dist. LEXIS 184734, *9 (E.D. Va. Sep. 19, 2025). In a similar vein, in January 2025, Congress passed the Laken Reily Act, which amended 8 U.S.C. § 1226 and 8 U.S.C. § 1226(c)(1)(E). This amendment makes noncitizens subject to mandatory detention if (1) they are inadmissible under certain provisions in 8 U.S.C. § 1182 and (2) are charged with, arrested for, convicted of, or admit to having committed certain crimes. 8 U.S.C. § 1226(c)(1)(E). Even under this new amendment, Congress intended for mandatory detention to apply only when both the inadmissibility and criminal conduct criteria are satisfied. *J.U.*, 2025 U.S. Dist. LEXIS 191630, at *23-24.

Finally, the entire structure of these sections and the sections surrounding them support Petitioner, "Notably, sections 1221 through 1225a all deal with noncitizens arriving in the United

States—or in the case of section 1225a—seeking to arrive." *Ortiz v. Freden*, No. 25-CV-960-LJV, 2025 U.S. Dist. LEXIS 217654, at *20 (W.D.N.Y. Nov. 4, 2025). Logically, it does not make sense to "sandwich section 1225 between sections dealing exclusively with arrival or attempted arrival of noncitizens if it were intended to broadly apply to all noncitizens present in the United States who have not been admitted." *Id.* at 20-21. Finally, the title of section 1225 is "Inspection by immigration officers; expedited removal of inadmissible *arriving* aliens; referral for hearing." 8 U.S.C. § 1225 (emphasis added). *Id.* at 21 (also citing other cases supporting the use of the term "arriving" in the title of the section.

The plain text of the these detention statutes supports Plaintiff's interpretation and refutes the Respondents' interpretation.

b. Case law rejects Respondents' interpretation of 8 U.S.C. §§ 1225 and 1226.

Both Supreme Court precedent and recent decisions by numerous courts around the country, including here in the Western District of New York and other districts in this Circuit have rejected Respondents' argument. First, in, the Supreme Court has noted that "U.S. immigration law authorizes the Government to detain certain aliens seeking admission into the country under [8 U.S.C. §1225(b)(1) and 8 U.S.C. § 1225(b)(2)]. It also authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings under §§1226(a) and (c)." *Jennings v. Rodriguez*, 583 U.S. 281, 289 (2018). In other words, the court distinguishes between those who are seeking admission from those already in the country.

Respondents' reliance on *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103 (2020) is misplaced and even supports Petitioner's case. In that case, Court was asked to consider whether a petition for a writ of habeas corpus, usually used to challenge unlawful detentions, could be used to obtain "additional administrative review of [an] asylum claim, and ultimately to obtain

authorization to stay in" the United States," *Id.* at 107. The Court said that this was not a proper use of the writ. *Id.*

In addition, that petitioner also invoked a due process argument by claiming due process rights even though he "enter[ed] the country illegally and was apprehended just 25 yards from the border" and put into expedited removal. *Id.* at 107. The Supreme Court also rejected this argument distinguishing between those who "have established connections in this country" and those "at the threshold of initial entry." *Id.* Respondents' reliance on the Court's reference to "paroled elsewhere in the country for years" fares no better. DHS can parole noncitizens who fall under 8 U.S.C. § 1225 (b) (2). But parole does not change the status of arriving alien because parolees are treated as if they are still at the border. 8 U.S.C. § 1182(d)(5) (when the purposes of parole are accomplished, the noncitizen shall return or be returned "from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."). Therefore, the reference from this case to parolees is limited to those designated as arriving aliens, which Petitioner was not, a fact verified by DHS's acknowledgment on his NTA that he was present in the United States without admission or parole.

In addition to this Court, Chief Judge Wolford and Judge Vilardo from the Western District of New York have joined numerous courts in the Second Circuit and around this country in rejecting the Respondents' re-interpretation of these detention provisions because it goes against "the plain language of the statute, the legislative history, and traditional canons of statutory interpretation." *Astudillo v. Hyde*, No. 25-551-JJM, 2025 U.S. Dist. LEXIS 214063, at *7 (D.R.I. Oct. 30, 2025) (internal citations and quotations omitted); *see e.g., Andrade Lozano v. Hyde, et al.* 6:25-cv-06528-MAV, Dkt. No. 20 (October 17, 2025); *Ortiz*, 2025 U.S. Dist. LEXIS 217654, at *3 (W.D.N.Y. Nov. 4, 2025)(rejecting *Yajure Hurtado* and collecting cases of courts rejecting the

holding of *Yajure Hurtado*); ; *Quituizaca Quituisaca v. Bondi, et al.*, 6:25-cv-06527-EAW, at Dkt. No. 15 (W.D.N.Y. Nov. 12, 2025); *Mendoza v. Bondi*, et al., 1:25-cv-954-EAW, at Dkt. No. 15 (W.D.N.Y. Nov. 12, 2025); *Najeem v. Bondi*, 6:25-cv-06584-EAW, at Dkt. No. 6 (W.D.N.Y. Nov. 12, 2025); *see also Orellana v. Moniz*, Civil Action No. 25-cv-12664-PBS, 2025 U.S. Dist. LEXIS 196282, at *13-14 (D. Mass. Oct. 3, 2025) (collecting cases)

c. The legislative history of the detention statutes and historical practice also support Petitioner's position.

The legislative history of these statutes also supports Petitioner's position. In drafting the detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [division C of Public Law 104–208] [As Amended Through P.L. 112–176, Enacted September 28, 2012] ("IIRIRA"), "Congress clarified that the IIRIRA amendment of § 1226(a) simply "restate[d]" the detention authority previously found at § 1252(a) "to arrest, detain, and release on bond a noncitizen who is not lawfully in the United States." *Vazquez v. Feeley*, No. 2:25-cv-01542-RFB-EJY, 2025 U.S. Dist. LEXIS 182412, at *11 (D. Nev. Sep. 17, 2025) (internal citations and quotations omitted and cleaned up). "In distinguishing between noncitizens arriving versus noncitizens residing in the U.S., Congress reflected its understanding of longstanding due process precedent that recognizes the more substantial due process rights of noncitizens already residing in the U.S. with those of noncitizens recently arriving." *Id.* at 12. Amendments to 8 U.S.C. § 1225(b)(1) and (b)(2) "were designed to address the perceived problem of noncitizens *arriving* in the U.S." *Id.* at 11-12.

Until recently, when DHS and DOJ adopted this new interpretation, it was the "longstanding practice of the agencies charged with interpreting and enforcing the INA applied § 1226(a) to noncitizens like Petitioner, who entered the U.S. without inspection and were apprehended while residing in the U.S." *Id.* at 12. "[I]n the decades since IIRIRA was enacted,

DHS and the EOIR have applied § 1226(a) to the detention of individuals apprehended within the continental U.S. who entered without inspection and provided them access to release on bond." *Id.* at 13.

Respondents contend that *Loper Bright Enters. v. Raimondo,* 603 U.S. 369 (2004) gives them permission to change agency practices and, therefore, the court should give longstanding agency practice little weight. Dkt. No. 17-1 at 11. Respondents state that the "weight given to agency interpretations "must always depend upon their thoroughness, the validity of their reasoning, the consistency with earlier and later pronouncements, and all those factors which give them power to persuade." Dkt. No. 17-1 at 11 quoting *Loper Bright*, 603 U.S. at 432-33 (internal citations and quotations omitted). But this only supports Petitioner's argument. Respondents' new interpretation cannot be squared with the plain language of the statutes, historical context, and past practice. In other words, there is very little to support Respondents' new interpretation. In addition, *Loper Bright* does not require this Court to give deference to the Respondents' new interpretation if there is very little or nothing to support it, as is the case here.

d. Respondents have designated and treated Petitioner as detained under 8 U.S.C. 1226(a).

As a practical matter, DHS has affirmatively designated Petitioner as falling under 8 U.S.C. 1226(a). The NTA has specific boxes for those who fall under 8 U.S.C. § 1225(b)(1) and (b)(2). Those under 8 U.S.C. § 1225(b)(1) fall under the box that states, "Section 235(b)(1) order was vacated pursuant to: [ ] 8 CFR 208.30 [ ] 8 CFR 235.3(b)(5)(iv)." Those under 8 U.S.C. 1225(b)(2) fall under the box that states, "You are an arriving alien." Finally, those who fall under 8 U.S.C. § 1226(a) fall under the box entitled "You are an alien present in the United States who has not been admitted or paroled."

In the NTA dated October 24, 2024, DHS designated him as an "alien present in the United States who has not been admitted or paroled." Dkt. No. 1-1. This is the designation generally given to those who are detained under 8 U.S.C. § 1226. DHS did not place him into expedited removal. *Id.* It did not designate him as an arriving alien. *Id.* In addition, when he was re-detained in 2025, DHS continued his removal proceedings based on the October 24, 2025 NTA. Therefore, the Court should declare him to be detained under 8 U.S.C. § 1226(a) and grant him a bond hearing.

II. THE AUTOMATIC STAY UNDER 8 C.F.R. § 1003.19(i)(2) VIOLATES THE PETITIONER'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION, IS UNCONSTITUTIONAL BOTH FACIALLY AND AS APPLIED, AND IS ULTRA VIRES.

Petitioner is currently prohibited from paying his bond under the automatic stay. 8 C.F.R. § 1003.19(i)(2)h states:

> 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 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, 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.

This regulation has been constitutionally problematic since its inception as an interim regulation and remains so.[1] With respect to the automatic stay, there are two separate detentions at issue, and due process requirements must be satisfied for both detentions.

The first detention was based on ICE's initial detention of Petitioner, which was conducted under 8 U.S.C. § 1226(a). Petitioner received due process by obtaining a bond hearing from an IJ.

[1] A history of this regulation can be found at *Günaydin v. Trump*, 2025 U.S. Dist. LEXIS 99237, at *8-14 (D. Minn. 2025) and *Torralba v. Knight*, No. 2:25-cv-01366-RFB-DJA, 2025 U.S. Dist. LEXIS 173272, at *8 (D. Nev. Sep. 5, 2025)

The IJ gave Petitioner a $10,000 bond.

The second detention took place when ICE invoked 8 C.F.R. § 1003.19(i)(2), which automatically stayed the IJ's decision. Under this regulation, the decision to invoke the automatic stay provision is left solely to the discretion of the Secretary of Homeland Security, based on his or her determination that the alien should not be released or that the IJ has set a bond of $10,000 or more.

This regulation contains no requirement for DHS to seek a discretionary stay from the Board before seeking the automatic stay. The regulation contains no provision that allows Petitioner any review of this determination by the Secretary. The regulation also includes no requirement that the Secretary and/or his designee provide any meaningful justification for his or her decision or meet any meaningful standard to invoke this automatic stay provision. This violates Petitioner's procedural and substantive due process rights because it allows an agency official to unilaterally detain a person after an IJ has granted a bond with no check on that agency official.

a. Petitioner's detention and the application of the automatic stay violate his procedural due process rights under *Mathews v. Eldridge.*

The Due Process Clause of the Fifth Amendment of the U.S. Constitution prevents the "Government from depriving any person of 'life liberty or property, without due process of law.'" *J.U.*, 2025 U.S. Dist. LEXIS 191630, at *27. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Due Process Clause] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

It is well-established that the Due Process clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693.

The Second Circuit applies the *Mathews v. Eldridge* three-factor balancing test to

determine whether there is adequate due process in civil immigration confinement. *Velasco Lopez v. Decker*, 978 F.3d 842, 851 (2d Cir. 2020) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). This test requires courts to consider (1) the private interest that will be affected by the government action; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the government's interest. *Mathews*, 424 U.S. at 335.

With respect to the first factor, "the most significant liberty interest there is, is the interest in being free from imprisonment." *Velasco Lopez*, 978 F.3d at 851. Petitioner has been in the United States for almost 15 years. Per the NTA issued to him on or about July 9, 2025, DHS determined that he was detained under 8 U.S.C. § 1226(a). He correctly requested a bond hearing before an IJ. The IJ agreed with his claim that he was detained under 8 U.S.C. § 1226(a) and properly issued a bond for $10,000. For its part, DHS argued that Petitioner was detained under 8 U.S.C. § 1225(b) based on a dramatic reinterpretation of 8 U.S.C. § 1225(b)(2), one rejected by the IJ. While DHS has the right to appeal against that decision, Mr. Luna Delgado has not been allowed to post that bond because of 8 C.F.R. § 1003.19(i)(2). Based on a unilateral decision by DHS, the IJ's decision was stayed, and Petitioner's liberty interest was directly impacted with no remedy. In addition to the broader impact against Petitioner, he has a strong personal liberty interest. The IJ found that he was a caregiver to his three-year-old granddaughter. Dkt. No. 7-3. Therefore, Petitioner has established his liberty interest, and this factor weighs heavily in favor of Petitioner.

The second factor concerns erroneous deprivation of Petitioner's "interest through the procedures used, and the probable value, if any, of additional or substitute and probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. The "automatic stay provision creates an extreme risk of erroneous and arbitrary confinement." *Torralba v.*

Knight, No. 2:25-cv-01366-RFB-DJA, 2025 U.S. Dist. LEXIS 173272, at *29 (D. Nev. Sep. 5, 2025). Both facially and as applied, there is an extraordinarily high risk of "erroneous deprivation of a noncitizen's liberty interest when DHS invokes the automatic stay." *Id.* at 29-30. First, the regulation gives no identifiable standard "that would guide any purported due process procedures." *Id.* at 30. "Such an undefined and subjective standard clearly creates a likelihood of arbitrary and capricious application." *Id.* Second, the likelihood of erroneous deprivation is also very high because the automatic stay is usually only invoked after the IJ has already issued a bond after the non-citizen has had to establish by clear and convincing evidence that he or she is not a danger to persons or property and not a flight risk. "As such, the stay is effectively a unilateral automatic stay pending appeal as of right afforded to the losing party—the agency official who has just failed to present evidence or argument sufficient to convince a neutral decisionmaker that detention is warranted." *Id.*

The automatic stay constitutes an unchecked power vested in DHS to "prolong an individual's detention" and "cannot . . . be a carefully limited exception to an individual's right to liberty" required by the Due Process Clause. *Id.* This regulation outlines no discernible process or standard that the Agency must follow "other than a vague requirement that the stay be warranted under the facts and law." *Id.* at 30-31.

The automatic stay is very different from other types of stays filed to challenge a judge's order. In most cases, the applicant is required to show a likelihood of success on the merits and irreparable harm to receive a stay. *Id.* at 31. In addition, there is a problematic conflict of interest with the automatic stay. DHS constitutes both the "unreviewable discretionary authority" deciding to invoke the automatic stay and the prosecuting authority appealing the IJ's decision. *Id.* This makes "erroneous deprivation not just a risk, but likely." *Id.* There is a process in the regulation

that allows DHS to seek an emergency stay from the Board on an emergency basis that can preserve the government's interest in preventing an erroneous release." *Id.* at 32. While Respondents have sought and obtained a discretionary stay in this place, this discretionary stay does not vacate the automatic stay in this matter. Therefore, the automatic stay still creates a high risk of an erroneous deprivation of Petitioner's right to procedural safeguards. Therefore, the second *Mathews* factor also weighs heavily in favor of the Petitioner.

The third factor, the government's interest and burden of additional process, also favors the Petitioner. Indeed, the government has a broad interest in applying a consistent enforcement of immigration laws, protecting the public from dangerous criminal aliens, and securing an alien's ultimate removal if it comes to that point. *Id* at 33. But an IJ has already found that he is not a danger to persons or property and not a flight risk. Indeed, the only basis DHS has asserted for appealing the IJ's decision is that it believes Petitioner should be detained under 8 U.S.C. § 1225(b) rather than under 8 U.S.C. § 1226(a). It has made no allegation that Petitioner is either a danger or a flight risk. As demonstrated above, Petitioner argued, and the IJ agreed, that he is detained pursuant to 8 U.S.C. § 1226(a). If the Court determines that Petitioner is detained under 8 U.S.C. § 1226(a), the government has no interest in his continued detention. On November 12, 2025, Chief Judge Wolford of the Western District of New York ruled that a petitioner should be allowed to pay an already-issued bond, notwithstanding an automatic stay and Board-issued discretionary stay already in place. *See Quituizaca Quituisaca v. Bondi, et al.*, 6:25-cv-06527-EAW, at Dkt. No. 15 (W.D.N.Y. Nov. 12, 2025). Therefore, the third factor heavily favors the Petitioner.

As all three factors favor Petitioner, the Court should hold that the implementation of the automatic stay as against the Petitioner violates his procedural due process rights.

b. The application of the automatic stay violates the substantive due process rights of Petitioner.

The application of the automatic stay violates Petitioner's substantive due process rights for two reasons. First, the Fifth Amendment states that no person shall be deprived of liberty without due process of law. While the government can detain individuals, there must be "adequate procedural safeguards" in criminal detention and, in non-criminal detentions, some special justification that "outweighs an individual's constitutionally protected interest in avoiding physical restraint." *Fernandez v. Lyons*, No. 8:25CV506, 2025 U.S. Dist. LEXIS 171020, at *10 (D. Neb. Sep. 3, 2025). DHS cannot provide any special justification for applying the automatic stay in this case as its only argument is that Petitioner should be subject to mandatory detention under 8 U.S.C. § 1225(b) rather than under 8 U.S.C. § 1226(a). There is no allegation that Petitioner is either a danger or a flight risk.

In addition, as noted above, numerous federal courts have already rejected this theory. And even if they had not, Petitioner is being held under the automatic stay at this juncture after a neutral factfinder ordered a bond. "Respondents' interest in securing his presence via detention 'in contravention of the order of a neutral fact-finder[] does not outweigh the liberty interest at stake.'" *Maza v. Hyde*, Civil Action No. 1:25-cv-12407-IT, 2025 U.S. Dist. LEXIS 205956, at *15 (D. Mass. Oct. 20, 2025), quoting *Jacinto v. Trump*, 2025 U.S. Dist. LEXIS 160314, 2025 WL 2402271, at *4 (D. Neb. Aug. 19, 2025).

Therefore, the automatic stay also violates Petitioner's substantive due process rights.

c. The automatic state is ultra vires and violates the Immigration and Nationality Act.

8 U.S.C. § 1226(a) gives the Attorney General authority to detain or release non-citizens.

The Attorney General may delegate that authority to another officer, employee, or agency of the Department of Justice, e.g., an IJ. *Maza*, 2025 U.S. Dist. LEXIS 205956, at *16. The automatic stay gives DHS authority to override an IJ's decision by simply submitting a form. But DHS is not a part of the U.S. Department of Justice. It is a separate executive agency. This enables DHS to usurp the Department of Justice's authority to make detention and bond determinations. Therefore, this regulation exceeds Congressional authority. *Id.*

The Government concedes this point that the Attorney General and Secretary of Homeland Security have different roles when it comes to determining when someone should be detained. Dkt. No. 9-1 at 16, n. 3. While they share some authority with respect to detention. the Attorney General has authority to "detain, or authorize bond for noncitizens under section 1226(a)" while the Secretary of Homeland Security makes "the initial determination whether an alien will remain in custody during removal proceedings." *Id.* (cleaned up) citing *Matter of D-J-*, 23 I. & N. Dec. 572, 574 n.3 (A.G. 2003). The Government cites no statute that permits DHS to unilaterally overrule an immigration judge, regardless of what "safeguards" are in place, because such "safeguards" are on the far side of an ultra vires action that lacks any basis in law.

The Government's reliance on *Rojas v. Olson*, No. 25-cv-1437-bhl, 2025 U.S. Dist. LEXIS 213983 (E.D. Wis. Oct. 30, 2025) is inapposite. Dkt. No. 9-1 at 17. That court relied on ambiguities and misapplied the standard for stays. That court stated, "Congress has entrusted the handling of immigration proceedings, including appeals over bond rulings, to the Attorney General and Department of Justice." *Id.* quoting *Rojas*, 2025 U.S. Dist. LEXIS 213983 at *32. While this is generally true, the regulation must have some basis in a statute authorizing it. Neither the *Rojas* court nor the Government has identified exactly what statute authorizes this type of regulation. In addition, by the Government's own admission, DHS has authority to make initial determinations

about whether an alien will remain in custody, while the Attorney General has the authority to detain or authorize bond for individuals detained under 8 U.S.C. § 1226(a). Dkt. No. 9-1 at 16, n. 3.

In addition, the standard for stays is relatively strict. While stays may be "a common practice in our legal system," Dkt. No. 9-1 at 17 quoting *Rojas*, 2025 U.S. Dist. LEXIS 213983 at *42, automatic stays represent a significant outlier. As this Court has noted, "A stay is "[t]he postponement or halting of a proceeding, judgment, or the like" or "[a]n *order* to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." *Stay*, Black's Law Dictionary (11th ed. 2019) (emphasis added)." *Loachamin v. Kurzdorfer*, No. 25-CV-6124-MAV, 2025 U.S. Dist. LEXIS 145753, at *12 (W.D.N.Y. July 23, 2025). In addition, "A stay is an 'intrusion into the ordinary processes of administration and judicial review' and, accordingly, 'is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Id.* at *12 quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009). Under the traditional rules governing a stay, to receive a stay, usually the party seeking a stay has the burden to demonstrate both a strong likelihood of success on the merits and irreparable harm if the stay is not granted and to assess the public harm and public interest. *Nken v. Holder*, 556 U.S. at 434-36 (discussing the requirements for a stay of removal). Under the automatic stay rule, none of these is required.

Furthermore, Congress was very aware of the principle of automatic stays in the immigration context, specifically with respect to removal when a non-citizen was appealing a decision by the Board of Immigration Appeals. *Id.* at 435. Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress permitted the use of automatic stays to prevent removals while an appeal was pending acknowledging that removal might be irreparable. *Id.* By permitting a non-citizen to continue an appeal after removal,

it did away with the automatic stay. *Id.* If Congress wanted to permit the Secretary of Homeland Security to impose the automatic stay, it certainly could have done so. But by the Government's own admission, for those detained under 8 U.S.C. § 1226(a), the Secretary of Homeland Security makes the initial detention determination and the Attorney General through the Immigration Judge makes the subsequent determination. Here, the IJ decided to grant Petitioner a bond. DHS has not statutory authority to unilaterally overrule that.

This *ultra vires* act is even more egregious when one considers that the entire basis for DHS's appeal is that he is detained under 8 U.S.C. § 1225(b). But as Petitioner has demonstrated above, he is not detained under that statute. But rather, he is detained under 8 U.S.C. § 1226(a), which permits the Immigration Judge to give him a bond.

For these reasons, the Court should overrule the automatic stay and permit Petitioner to pay the bond.

III. THE DISCRETIONARY STAY VIOLATES THE PETITIONER'S PROCEDURAL DUE PROCESS UNDER THE FIFTH AMENDMENT, INSOFAR AS IT PREVENTS PETITIONER FROM PAYING HIS BOND IF HE IS DETAINED UNDER 8 U.S.C. § 1226(a).

The sole basis for DHS's appeal of the IJ's bond order to the Board of Immigration Appeals is that DHS contends that, pursuant to *Yajure Hurtado*, Petitioner is detained under 8 U.S.C. § 1225(b) instead of 8 U.S.C. § 1226(a) and, therefore, subject to mandatory detention. If this Court holds that Petitioner is detained under 8 U.S.C. § 1226(a), then to the extent that the discretionary stay issued by the Board on November 5, 2025, prevents him from posting the bond already issued by an IJ, this violates Petitioner's due process rights under the Fifth Amendment of the U.S. Constitution. On November 12, 2025, Chief Judge Wolford of the Western District of New York ruled that a petitioner should be allowed to pay an already issued bond, notwithstanding an

automatic stay and Board-issued discretionary stay already in place. *See Quituizaca Quituisaca v. Bondi, et al.*, 6:25-cv-06527-EAW, at Dkt. No. 15 (W.D.N.Y. Nov. 12, 2025).

CONCLUSION

For these reasons, the Court should deny the Respondents' motion to dismiss and grant Petitioner's Petition for a Writ of Habeas Corpus.

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Batavia, New York

Respectfully submitted,

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