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Counsel for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA (Las Vegas)

ALEXIS ENRIQUE SILVA HERNANDEZ

Petitioner,

v.

KRISTI NOEM, U.S. DEPARTMENT OF HOMELAND SECURITY; PAMELA J. BONDI, U.S. DEPARTMENT OF JUSTICE; TODD LYONS, JASON KNIGHT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; and **JOHN MATTOS,**

Respondents.

Case No.: 2:25-cv-2304

MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Petitioner is presently detained by U.S. Immigration and Customs Enforcement. In accordance with Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, Petitioner hereby applies for a temporary restraining order or preliminary injunction requiring that Respondents immediately release Petitioner from custody pursuant to the immigration judge's bond order issued on August 14, 2025.

Petitioner does not seek ex parte consideration of this Motion. However, because Petitioner is suffering irreparable harm of continuing detention, he asks that this Court expeditiously order that his Petitioner for a Writ of Habeas Corpus be served on Petitioners for expedite briefing and consideration of this Motion.

While seeking expedited consideration of this matter, Petitioner notes that the Counsel Michael Kagan will be on medical leave from December 2 through 8 due to a previously scheduled surgery on December 2. Petitioner's counsel respectfully requests that the Court not schedule in person hearings or filing deadlines during this period.

As set forth in the accompanying Memorandum of Law, Respondents are detaining Petitioner in violation of his procedural and substantive due process rights guaranteed by the U.S. Constitution. Without a restraining order or preliminary injunction ordering Petitioner's immediate release, he will continue to suffer irreparable injury by continued unlawful detention.

DATED this 19th day of November, 2025.

Respectfully Submitted,
/s/Michael Kagan
Michael Kagan
Nevada Bar. No. 12318C

/s/Drianna Dimatulac
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Student Attorney Practicing

Under Nevada Supreme Court Rule 49.3

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MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

Petitioner respectfully requests this Court's immediate action to order his immediate release from detention in accordance with the Immigration Court's bond order. He applies for a Temporary Restraining Order, or alternatively, a Preliminary Injunction, for the reasons stated below.

I. INTRODUCTION

Petitioner Alexis Enrique Silva Hernandez is a 30-year-old resident of Utah. *See* Declaration of Petitioner ("**Ex. A**") at 002. He is currently detained at the Nevada Southern Detention Center in Pahrump, Nevada. Despite an immigration judge's order on August 14, 2025 that Petitioner be released on bond, he remains in detention solely because Respondent triggered the automatic stay under 8 C.F.R. § 1003.19(i)(2). *See* Immigration Judge's Bond Order ("**Ex. B**") at 004–006. This Court has already held in *Herrera Torralba v. Knight* that the automatic stay—which allows DHS to unilaterally and without a hearing extend detention regardless of a duly appointed IJ's bond order—violates constitutional due process. *See Herrera Torralba v. Knight*, Case No. 2:25-cv-1366-RFB-DJA, Order (D. Nev. Sept. 5, 2025) (Boulware, J.). Accordingly, Petitioner filed a writ of habeas corpus under § 2241 with this Court. Petitioner now moves for a TRO, or in the alternative, a preliminary injunction, to ensure his immediate release in accordance with the Immigration Court's bond order and constitutional due process.

II. FACTS

Petitioner is originally from Venezuela. Ex. A at 002. On or about September 11, 2023, Petitioner entered the United States without inspection through Eagle Pass, Texas. *Id.* Customs

and Border Patrol (CBP) detained Petitioner for four days then released him after scheduling a hearing in the San Antonio, Texas Immigration Court for September 27, 2024. *Id.*

DHS served Petitioner a Notice to Appear (NTA) on September 28, 2023, which does not designate him as an arriving alien under 8 U.S.C. § 1225(b)(2) nor in expedited removal proceedings under § 1225(b)(1). *See* Notice to Appear ("**Ex. C**") at 008. DHS explicitly failed to designate him as an arriving alien under 8 U.S.C. § 1225(b)(2) and in expedited removal proceedings under § 1225(b)(1). Additionally, Petitioner does not have a criminal history that subjects him to § 1226(c). Accordingly, he is subject to removal proceedings under § 1226(a).

On August 6, 2025, Petitioner moved for a custody redetermination hearing in accordance with 8 C.F.R. § 1003.19(e). Ex. B at 005. Immigration Judge Baker heard the motion on August 14, 2025, and after finding that Petitioner is eligible for bond under § 1226(a) and is neither a danger nor flight risk, he granted bond in the amount of $5,000. *Id.* at 006.

The next day, Respondent unilaterally and unlawfully invoked an automatic stay of the IJ's bond order under 8 C.F.R. § 1003.19(i)(2) by filing an EOIR-43 Notice of Intent to Appeal. *See* EOIR 43 Notice of Intent to Appeal ("**Ex. G**") at 022–023. Respondent filed its appeal with the BIA on August 21, 2025. *See* Filing Receipt for Appeal ("**Ex. H**") at 000; *see also* BIA Receipt Notice ("**Ex. I**") at 000. BIA cases can take 10 months or more to resolve. *See Herrera Torralba*, No. 2:25-cv-1366-RFB-DJA at *13. Meanwhile, Petitioner remains separated from his girlfriend, friends, and family, is unable to work and obtain income, and lacks access to critical resources to assist him with his removal proceedings, all the while being stripped of constitutional due process.

This Court's decision in *Herrera Torralba v. Knight* makes clear that the automatic stay after a duly appointed IJ grants bond is a procedural and substantive due process violation.

See Herrera Torralba, Case No. 2:25-cv-1366-RFB-DJA at *22. Thus, Respondent's invocation of the automatic stay is a clear deprivation of Petitioner's due process, warranting his immediate release from detention pursuant to the IJ's bond order.

III. LEGAL STANDARDS FOR A TRO/PRELIMINARY INJUNCTION

Under Federal Rule of Civil Procedure 65, a court may grant a preliminary injunction to prevent "immediate and irreparable injury." Fed. R. Civ. P. 65(b). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The standard for obtaining a TRO and a preliminary injunction is the same. *Quiroga v. Chen*, 735 F. Supp. 2d 1226, 1228 (D. Nev. 2010).

To obtain a TRO or preliminary injunction, a plaintiff must establish the following *Winter* factors: (1) a likelihood of success on the merits; (2) that the plaintiff will likely suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that the public interest favors an injunction. *Winter, Inc.*, 555 U.S. at 22. When the government is the defendant, "the balance of the equities and public interest factors merge." *Id.* (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)). Consequently, even if a plaintiff raises only "serious questions" as to the merits of his claims, the court can grant relief if the balance of hardships tips "sharply" in the plaintiff's favor, and the remaining equitable factors are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (2011).

This Court should grant Petitioner's application for a TRO, or in the alternative, a preliminary injunction, because the four factors concerning whether to grant a TRO or preliminary injunction weigh heavily in Petitioner's favor. The most important factor—

Petitioner's likelihood of success on the merits—is particularly strong due to established case law and constitutional guarantees all favoring Petitioner.

IV. ARGUMENT

A. Petitioner is not required to exhaust administrative remedies before filing this habeas corpus petition.

As a threshold matter, Petitioner is permitted to file the instant habeas corpus petition. Neither 8 U.S.C. § 2241 nor any relevant provision of the INA requires the exhaustion of administrative remedies before filing such petition. *See Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004) (citing *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001)). And while courts may require administrative exhaustion as a prudential matter, such discretion applies only when the following factors are met:

> (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
> (2) relaxation of this requirement would encourage the deliberate bypass of the administrative scheme; and
> (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

Puga v. Chertoff, 488 F.3d 812, 815 (9th Cir. 2007). Courts may waive administrative exhaustion if a petitioner demonstrates at least one of the following elements:

> (1) administrative remedies are inadequate or not efficacious;
> (2) the pursuit of administrative remedies would be a futile gesture;
> (3) irreparable injury will result; or
> (4) the administrative proceedings would be void.

Laing, 370 F. 3d at 1000; *see also Ortega-Rangel v. Sessions*, 313 F.Supp.3d 993, 1003 (9th Cir. 2018).

The waiver of administrative exhaustion in this case is appropriate. This Court granted such a waiver in an analogous case on September 5, 2025, finding that it would be nonsensical to require the petitioners—who also challenged the constitutionality of the automatic stay—to await the BIA's resolution of DHS's appeal. *See Herrera Torralba*, Case No. 2:25-cv-1366-RFB-DJA at *13. Likewise, here, the *Puga* factors weigh against requiring administrative exhaustion.

First, the legal questions raised—namely, the constitutionality of the automatic stay under 8 C.F.R. § 1003.19(i)(2) as applied to Petitioner—are purely legal and require no agency expertise. Courts are primarily responsible for resolving such questions, not agencies. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024).

Second, there is no risk of bypassing agency procedures because Petitioner has no available relief in Immigration Court. Petitioner *has* exhausted his administrative remedies—he sought a custody redetermination and successfully established by clear and convincing evidence that he should be released on bond. Petitioner merely asks this Court to enforce the IJ's bond order. Requiring him to appeal to the BIA to *affirm* the IJ's order runs contrary to the very notion of an 'appeal.' Additionally, Petitioner's constitutional claims fall beyond the scope of BIA's jurisdiction. *See Matter of G.K.*, 26 I&N Dec. 88, 96-97 (BIA 2013) (explaining that "[n]either the [BIA] nor the Immigration Judges have the authority to rule on the constitutionality of the statutes we administer[.]"). The writ of habeas corpus is the appropriate mechanism for challenging "constitutional claims or questions of law" related to conditions of immigration detention. *See Dep't of Homeland Sec. v. Thuraissigian*, 591 U.S. 103 (2020).

Third, administrative review would not result in the agency correcting its mistake. The automatic stay allows for at least 90 days of unreviewable detention. By the time the BIA

resolves DHS's appeal, Petitioner would have been subject to an extended and unlawful detention with no remedy.

Fourth, for reasons that will be discussed in more detail, infra, he suffers irreparable harm through continued unlawful detention.

B. Petitioner is likely to succeed on the merits.

The likelihood of success factor is the most important factor in a preliminary injunction analysis and is especially important where a plaintiff seeks such relief due to an alleged constitutional violation. *Baird v. Bonta*, 81 F.4th 1036, 1042 (9th Cir. 2023).

Petitioner challenges the constitutionality of the automatic stay regulation, which is the sole basis for his detention. He is likely to succeed on the merits because this Court addressed this exact issue in *Herrera Torralba v. Knight*, holding that the automatic stay is likely a procedural due process violation both facially and as applied to the circumstances of that particular case, and a substantive due process violation as applied. *See Herrera Torralba*, Case No. 2:25-cv-1366-RFB-DJA at *22.

Over the past twenty years, numerous federal courts across the country have found that the automatic stay provision likely violates the due process rights of detainees. *See Martinez v. Sec'y of Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379 (W.D. Tex. Sept. 8, 2025) (finding that all three *Mathews* factors favor the petitioner and that he is therefore likely to succeed on his procedural due process claim); *Jacinto v. Trump*, No. 4:25-CV-03161, 2025 WL 2402271 (D. Neb. Aug. 19, 2025) (finding that the automatic-stay regulation violates procedural and substantive due process and is ultra vires because it exceeds the Attorney General's statutory authority); *Maldonado v. Olson*, No. 25-CV-03142 (SRN/SGE), 2025 WL 2374411 (D. Minn. Aug. 15, 2025) (concluding that ICE suffers no cognizable harm by permitting the immigration

process to continue following an IJ's bond order); *Anicasio v. Kramer*, No. 4:25-CV-03158, 2025 WL 2374224 (D. Neb. Aug. 14, 2025) (holding that the automatic stay is both a due process violation and ultra vires, rendering detention on that basis unlawful); *Garcia Jimenez v. Kramer*, No. 4:25-CV-03162, 2025 WL 2374223 (D. Neb. Aug. 14, 2025) (same); *Mohammed H. v. Trump*, No. CV 25-1576 (JWB/DTS), 2025 WL 1692739 (D. Minn. June 17, 2025) (finding that the automatic stay effectively permits the government to override an IJ's bond determination without demonstrating dangerousness, flight risk, or any other legitimate basis for detention, rendering the petitioner's continued detention arbitrary and unlawful); *Gunaydin v. Trump*, No. 25-CV-01151 (JMB/DLM), 2025 WL 1459154 (D. Minn. May 21, 2025) (finding that the automatic stay violates procedural due process under the *Mathews* test); *Zabadi v. Chertoff*, No. 05-CV-01796 (WHA), 2005 WL 1514122 (N.D. Cal. June 17, 2005) (rejecting multiple arguments by the government and concluding that the automatic stay is both unconstitutional and ultra vires); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (emphasizing that the overriding purpose of the regulation—to protect the public from noncitizens who pose a national security or public safety threat—is not served where an IJ has already found that the noncitizen is neither a danger nor flight risk); and *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003) (finding that the absence of any time limits for resolving the appeal results in indefinite detention and that the regulation's goals are not furthered where the petitioner is not a threat).

While some courts have upheld the regulation, several did so based on the mistaken belief that the automatic stay provides a definite termination point by providing a deadline by which the BIA must resolve the case. *See Pisciotta v. Ashcroft,* 311 F.Supp.2d 445 (D.N.J.2004) (mistakenly construing the 90-or 180-day period in 8 C.F.R. § 1003.1(e)(8) in which the BIA

must resolve a case as a *deadline* rather than a *guideline*); *Marin v. Ashcroft,* No. 04-CV-675 (D.N.J. Mar. 17, 2004) (same); and *Alameh v. Ashcroft,* No. 03-6205 (D.N.J. Jan. 6, 2004) (same). Other courts found the regulation constitutional based on the erroneous premise that noncitizens lack any constitutional right to release during removal proceedings. *See Perez-Cortez v. Maurer,* No. 03-2244 (D.Colo. Nov. 20, 2003) (finding that the petitioner has *no* constitutional right to release while removal proceedings are underway); *Inthathirath v. Maurer,* No. 03-2245 (D.Colo. Nov. 20, 2003) (same).

1. The automatic stay is a procedural due process violation.

The Due Process Clause prohibits deprivations of life, liberty, or property without due process of law. *See* U.S. Const., amend. V. These protections extend to noncitizens. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."). Noncitizen detainees charged with being in the U.S. unlawfully are entitled to procedural due process, meaning the notice and opportunity to be heard. *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025). The government's discretion to incarcerate noncitizens is always constrained by due process requirements. *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017). To determine whether detention violates procedural due process, courts apply the three-part test set forth in *Mathews v. Eldridge*: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the probable value, if any, of additional or substitute procedural safeguards. 424 U.S. 319, 335 (1976).

a. Petitioner's Private Interest

Petitioner's interest in being free from imprisonment is "the most elemental of liberty

interests." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). In this country liberty is the norm and detention "is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Here, the automatic stay infringes on Petitioner's fundamental right to freedom from government detention. Petitioner has been incarcerated for six months, three of which have been unlawful, resulting in separation from his friends and family, inability to work and obtain income, and lack of access resources to prepare for his ongoing removal proceedings. This significant deprivation strongly favors Petitioner.

b. The Risk of Erroneous Deprivation

In evaluating this factor in *Herrera Torralba v. Knight*, this Court found that the automatic stay creates an extreme risk of erroneous and arbitrary confinement." *See Herrera Torralba*, Case No. 2:25-cv-1366-RFB-DJA at *17. This is because the regulation lacks any identifiable and specific procedural due process standard. *Id.* The regulation merely contains a vague requirements that the stay be warranted under the facts and law, thereby creating a likelihood of arbitrary and capricious application. *Id.* at *17–18. Further, the automatic stay was invoked only after the IJ already granted bond to Petitioner based on his individualized finding that he is not a danger or flight risk. As such, the stay effectively affords a right to the losing party—who failed to present evidence sufficient to convince the IJ that detention is warranted. *Id.* at *18. Accordingly, the extraordinary high risk of erroneous deprivation favors Petitioner.

c. Respondent's Interest and Burden of Additional Process

Respondent has interests in "protecting the public from dangerous criminal aliens" and "securing an alien's ultimate removal," both of which are "interests of the highest order." *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1188–89 (2022). In *Herrera Torralba*, this Court acknowledged these interests but found that they already protected by the § 1225 mandatory

detention scheme and the § 1226 discretionary detention scheme, which is based on an individualized determination by an IJ on whether the noncitizen should be granted bond. *Herrera Torralba*, Case No. 2:25-cv-1366-RFB-DJA at *19.

Here, Respondent's interest in protecting the public is not furthered by Petitioner's continued unlawful detention. A duly appointed IJ found by clear and convincing evidence that Petitioner poses no danger or flight risk, so this is a non-issue. Thus, Respondent's interest does not outweigh the other factors in finding a procedural due process violation.

2. The automatic stay is a substantive due process violation.

Substantive due process protects individuals from arbitrary government confinement, which violates a noncitizen's substantive due process rights except in certain "special and narrow nonpunitive circumstances where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint. *Zadvydas*, 533 U.S. at 690.

As applied, the automatic stay violates substantive due process because Respondent has asserted no interest—let alone a compelling interest—that outweighs Petitioner's constitutionally protected liberty interest in freedom from imprisonment. The regulation instead permits Respondent to unilaterally detain Petitioner without a case-by-case determination, even after a reasoned finding based on clear and convincing evidence that he does not pose a danger or flight risk. Accordingly, the automatic stay violates Petitioner's substantive due process.

C. Petitioner will continue to suffer irreparable harm without a TRO.

The Ninth Circuit has held that a petitioner at risk of continuing immigration detention has demonstrated irreparable harm. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Here, Petitioner is not merely *at risk* of continued detention, rather, he has already suffered irreparable harm for more than three months now due to Respondent's failure to comply

with the IJ's bond order. Through the automatic stay, Respondent deliberately chose to prolong Petitioner's detention—stripping him away from his girlfriend, friends, and family in Utah without any justification. Further, Petitioner's detention has caused substantial financial harm since he has been unable to work and obtain income.

D. The balance of equities and public interest favors a TRO.

The balance of equities weighs heavily in favor of granting Petitioner's request for a TRO. Petitioner faces significant disadvantages, including his lengthy detention, lack of access to resources, and undocumented status. By contrast, Respondents possess substantial institutional resources. Respondents have not acted in good faith toward Petitioner, nor in a manner befitting a government committed to respect for legal procedures. They have completely disregarded this Court's established case law, the Immigration Judge's bond order, and Petitioner's due process rights. Further, the public interest will not be harmed by ordering the government to comply with the law. Without action by this court, Petitioner's illegal detention would be allowed to persist without a judicial remedy. This is not in the public interest.

E. This Court should not require Petitioner to provide security before the TRO.

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damage sustained by any party found to have been wrongfully enjoined or restrained." However, district courts exercise discretion in cases brought by indigent and/or incarcerated people, and in the vindication of immigrants' rights. *See e.g., Ashland v. Cooper*, 863 F.2d 691, 693 (9th Cir. 1988); *P.J.E.S. by & through Escobar Francisco v. Wolf*, 502 F. Supp. 3d 492, 520 (D.D.C. 2020). Additionally, courts "may dispense with the filing of a bond when," as here, "there is no realistic likelihood of harm to the defendant from

enjoining his or her conduct," *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003), or plaintiff shows a high likelihood of success on the merits. *See, e.g.*, *People of State of Cal. ex rel. Van De Kamp v. Tahoe Reg'l Plan. Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985), *amended*, 775 F.2d 998 (9th Cir. 1985).

Here, this Court should exercise its discretion to waive the security requirement because Petitioner is financially burdened due to his inability to work for more than three months as a result of incarceration. Given Petitioner's circumstances, this Court should waive the security requirement.

CONCLUSION

The Court should grant Petitioner's motion for a temporary restraining order, or alternatively, a preliminary injunction, to order Petitioner's immediate release from detention in accordance with his bond order and constitutional due process.

DATED this 19th day of November, 2025.

Respectfully Submitted,
/s/Michael Kagan
Michael Kagan
Nevada Bar. No. 12318C

/s/Drianna Dimatulac
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EXHIBIT LIST