UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Petitioner
Ahoka Isaac Lokombe

v.

Respondent
U.S. Immigration and Customs Enforcement and Removal Operations, Field Office Director
other
David Wesling

Respondent
U.S. Immigration and Customs Enforcement, Acting Director
other
Todd Lyons

Respondent
U.S. Department of Homeland Security, Secretary
other
Kristi Noem

Respondent
U.S. Attorney General
other
Pamela Bondi

Respondent
Strafford County Department of Corrections, Superintendent
other
Christopher Brackett

Case No. 1:26-cv-00053

Petition for Writ of Habeas Corpus

INTRODUCTION

1. Ahoka Isaac Lokombe is a national of the Democratic Republic of the Congo. Petitioner is an asylum seeker with a pending appeal to the Board of Immigration Appeals based on a Motion to Pretermit.

2. When Petitioner entered the United States without inspection around October 11, 2024, he was originally arrested by the Maverick County Police for Criminal Trespass, before being transferred to Immigration and Customs Enforcement ("ICE") Custody and placed into removal proceedings.

3. Petitioner was taken into ICE custody on June 27, 2025, while appearing for an in-person check-in at the Scarborough, ME ERO Office.

4. Petitioner was granted bond in the amount of $7,500 by an Immigration Judge ("IJ") at the Chelmsford Immigration Court on August 14, 2025, but remains detained due to ICE's invocation of the automatic stay provision under 8 C.F.R. § 1003.13(19)(i)(2).

5. Accordingly, to vindicate Petitioner's constitutional rights, this Court should grant the instant petition for a writ of habeas corpus.

6. Petitioner asks this Court to find that his continued detention is unconstitutional and order his immediate release.

JURISDICTION AND VENUE

7. This action arises under the Constitution of the United States and the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*.

8. This Court has subject matter jurisdiction under 28 U.S.C. § 2241 (habeas corpus) and 28 U.S.C. § 1331 (federal question).

9. Under 28 U.S.C. § 2241, "[w]rits of habeas corpus may be granted by . . . the district courts within their respective jurisdictions" when a petitioner "is in custody in violation

of the Constitution or laws or treaties of the United States." This jurisdiction includes "writs of habeas corpus filed by immigration detainees before and after a final order of removal has been issued." *Dambrosio v. McDonald*, 2025 U.S. Dist. LEXIS 67848 at *4 (D. Mass Apr 9, 2025) (citing *Zadvydas v. Davis*, 533 U.S. 678, 688, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001); *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)).

10. The First Circuit has routinely held that "district courts retain jurisdiction over challenges to the legality of detention in the immigration context." *Aguilar v. U.S. Immigr. & Customs Enf't div. of Dep't of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (citing *Hernandez v. Gonzales*, 424 F.3d 42 (1st Cir. 2005) (holding that detention claims are independent of removal proceedings and, thus, not barred by section 1252(b)(9))). Specifically, "constitutional challenges regarding the availability of bail" fall within this Court's habeas review. *Id.* (citing *Demore v. Kim*, 538 U.S. 510 (2003)).

11. Because Petitioner is solely contesting his ongoing detention through his Petition, this Court has jurisdiction and maintains the authority to order him immediately released. *See contra Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 19 (2020) ("[Section] 1252(b)(9) 'does not present a jurisdictional bar' where those bringing suit 'are not asking for review of an order of removal,' 'the decision to seek removal,' or 'the process by which removability will be determined'" (ellipses omitted) (quoting *Jennings*, 583 U.S. at 294-95)).

12. In the alternative, this Court has jurisdiction and maintains the authority to order Petitioner be provided with a bond hearing in the Immigration Court where DHS bears the burden of demonstrating he is a danger to the community or a flight risk. *See Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (1st Cir. 2021) ("[D]ue process requires the government to either (1) prove

by clear and convincing evidence that [he] poses a danger to the community or (2) prove by a preponderance of the evidence that [he] poses a flight risk.").

13. The legal issue here is "wholly collateral to the removal process." *Gicharu v. Carr*, 983 F.3d 13, 16 (1st Cir. 2020).

14. Venue is proper because Petitioner is in the custody of the Immigration and Customs Enforcement in Dover, New Hampshire, which is within the jurisdiction of this District. *See Rumsfeld v. Padilla*, 542 U.S. 426, 443 (2004) ("The plain language of the habeas statute thus confirms the general rule that . . . jurisdiction lies in only one district: the district of confinement.") (*cited in Trump v. J.G.G.*, 145 S. Ct. 1003, 1006-07 (2025) (per curiam)).

PARTIES

15. The Petitioner Ahoka Isaac Lokombe is a national of the Democratic Republic of Congo and asylum seeker.

16. Respondent U.S. Immigration and Customs Enforcement and Removal Operations, Field Office Director is David Wesling. Respondent Wesling is a legal custodian of Petitioner.

17. Respondent U.S. Immigration and Customs Enforcement, Acting Director is Todd Lyons. Respondent Lyons is a legal custodian of Petitioner.

18. Respondent U.S. Department of Homeland Security, Secretary is Kristi Noem. Respondent Noem is a legal custodian of Petitioner.

19. Respondent U.S. Attorney General is Pamela Bondi. Respondent Bondi is a legal custodian of Petitioner.

20. Respondent Strafford County Department of Corrections, Superintendent is Chrisopher Brackett. Respondent Brackett is the immediate custodian of Petitioner.

21. All respondents are named in their official capacities.

FACTUAL ALLEGATIONS

22. Petitioner, Ahoka Isaac Lokombe, is a native and citizen of the Democratic Republic of Congo. He entered the United States without inspection on or about October 11, 2024. *See* Ex. A, Form I-213, Record of Deportable/Inadmissible Alien.

23. Petitioner was initially arrested by the Maverick County Department of Public Safety for Criminal Trespass, in relation to his entry into the United States. *See id.*

24. On November 18, 2024, Petitioner was then convicted and sentenced to 38 days of incarceration. *See id.*

25. On November 20, 2024, Petitioner was taken into ICE custody and released on an Order of Release on Recognizance. *See id.*

26. On June 27, 2025, Petitioner was taken into custody by ICE while appearing for an in-person check-in at the ERO Scarborough, Maine office. *See id.* He was approached by two Deportation Officers who "placed him into handcuffs without incident." *See id.*

27. On July 8, 2025, Petitioner filed a Form I-589, Application for Asylum and Withholding of Removal. *See* Ex. B, File-Stamped Cover Page of Form I-589.

28. On August 14, 2025, Petitioner was scheduled for a custody redetermination hearing before the Chelmsford Immigration Court. *See* Ex. C, Notice of Custody Redetermination Hearing in Immigration Proceedings. At this hearing, the IJ granted Petitioner bond in the amount of $7,500. *See* Ex. D, Order of the Immigration Judge ("Bond Order") (granting release on bond of $7,500).

29. The same day, the Department of Homeland Security ("DHS") stayed Petitioner's release by filing Form EOIR-43, Ex. E, Form EOIR-43, Notice of Intent to Appeal Custody Redetermination.

30. On August 27, 2025, DHS filed a formal appeal with the Board of Immigration Appeals ("BIA" or "the Board"). *See* Ex. F, Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge, with attachment ("DHS Appeal").

31. On December 19, 2025, DHS filed a Motion to Pretermit. *See* Ex. G, The Department of Homeland Security's Motion to Pretermit the Respondent's Protection Applications ("Motion to Pretermit").

32. On December 22, 2025, an IJ at the Chelmsford Immigration Court granted DHS's Motion to Pretermit and ordered Petitioner removed to Uganda. *See* Ex. H, Order of the Immigration Judge ("Pretermit Order") (pretermitting Petitioner's relief applications based on the Uganda Asylum Cooperative Agreement); Ex. I, Order of the Immigration Judge ("Removal Order") (ordering removal to Uganda).

33. On January 6, 2026, Petitioner filed an appeal with the Board of Immigration Appeal to challenge the IJ's grant of the Motion to Pretermit. *See* Ex. J, Form EOIR-26, Notice of Appeal from a Decision of an Immigration Judge (appealing the IJ removal order).

34. As of January 29, 2026, Petitioner remains at the Strafford County Correctional Facility in Dover, NH. *See* Ex. K, ICE Online Detainee Locator System.

LEGAL BACKGROUND

35. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1991). For government detention to be justified, it must either be "ordered in a

criminal proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (emphasis in the original) (internal citations omitted).

36. The Supreme Court has long held that "The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these [noncitizens] from deprivation of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). It continued: "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id.*; *see Zadvydas*, 533 U.S. at 693 ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States"). The Supreme Court affirmed its previous holdings in *Reno v. Flores*, finding that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." 507 U.S. 292, 306 (1992).

37. At question is the effect of the automatic stay provision under 8 C.F.R. § 1003.19(i)(2) on Petitioner's detention, which states:

> In any case in which DHS has determined that an alien should not be released or has set a bond of $ 10,000 or more, any order of the immigration judge authorizing release (on bond or otherwise) shall be stayed up-on 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 C.F.R. 1003.6(c), shall remain in abeyance pending decision of the appeal by the Board.

38. Petitioner argues that the automatic stay provision violates both procedural due process and substantive due process, in addition to being *ultra vires*.

39. Further, under 8 C.F.R. § 1003.6, the automatic stay provision lapses 90 days after DHS files its notice of appeal of a bond decision, and thus the automatic stay expired on

November 25, 2025, for Petitioner. DHS did not move the Board of Immigration Appeals for a discretionary stay of the Immigration Judge's bond decision, as contemplated by 8 C.F.R. § 1003.6, and now holds Petitioner in custody in violation of statute, regulation, and the Immigration Judge's bond decision.

I. The automatic stay provision under 8 C.F.R. § 1003.19(i)(2) violates both procedural and substantive due process.

40. Since 2025, courts across the United States found that the automatic stay provision under 8 C.F.R. § 1003.19(i)(2) violates due process. *See, e.g.*, *Sampiao v. Hyde*, 799 F. Supp. 3d 14, 35 (D. Mass. 2025) (finding the regulation violated procedural due process); *Günaydin v. Trump*, 784 F. Supp. 3d 1175, 1184 (D. Minn. 2025) (finding the same); *Anicasio v. Kramer*, No. 4:25CV3158, 2025 WL 2374224, 2025 U.S. Dist. LEXIS 157236 (D. Neb. Aug. 14, 2025) (finding the regulation violated procedural and substantive due process). Litigation over the unconstitutionality of the automatic stay provision has also been ongoing for over 20 years. *See, e.g.*, *Ashley v. Ridge*, 288 F. Supp. 2d 662, 673 (D.N.J. 2003) (finding the regulation violated substantive and procedural due process); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 (N.D. Cal. 2004) (finding the same); *Bezmen v. Ashcroft*, 245 F. Supp. 2d 446 (D. Conn. 2003) (finding the regulation violated substantive due process).

A. The automatic stay provision violates due process.

41. For nearly 50 years, the standard to determine a violation of procedural due process requires balancing three factors:

> (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 the probable value, if any, of additional or substitute procedural safeguards;" and
> (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 474 U.S. 319, 335 (1976). The First Circuit in *Hernandez-Lara v. Lyons*, 10 F.4th 19 (1st Cir. 2021), applied this three-part *Mathews* test in considering "[w]hether the Due Process clause of the Fifth Amendment entitles a noncitizen detained pursuant to section 1226(a) to a bond hearing at which the government bears the burden of proving by clear and convincing evidence that the noncitizen is dangerous or a flight risk." *Id.* at 27–35.

42. The question before this Court is nearly identical to the one presented in *Günaydin*: "whether the challenged regulation—one that permits one party in the adversarial process to unilaterally override the outcome of a *Joseph* hearing—passes the *Mathews* test." 784 F. Supp. 3d at 1187 (citing *Jennings v. Rodriguez*, 583 U.S. 281, 289 n.1 (2018) (explaining that a *Joseph* hearing (*Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999)) is a hearing before an IJ where the issue is whether a noncitizen is subject to mandatory or discretionary detention)).

43. **Private Interests.** Petitioner's private interests in this matter concern "the most elemental of liberty interests—the interest in being free from physical detention by one's own government" *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). His private interests are amplified because "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). In *Hernandez-Lara*, the First Circuit considered that the noncitizen was "incarcerated alongside criminal inmates[,] . . . separated from her fiancé and unable to maintain her employment." 10 F.4th at 28 (citing *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (discussing how incarceration indistinguishable from punishments from criminal defendants is more than being "detained")). The First Circuit also considered that the "exact length of detention . . . is impossible to predict and can be quite lengthy." *Hernandez-Lara*, 10 F.4th at 29.

44. Here, Petitioner is held at the Strafford County Correctional Facility ("SCCF"). *See* Ex. K, ICE Online Detainee Locator System ("ODLS"). Respondent Brackett spoke to a reporter in February of 2025 and stated that ICE detainees "are in the general population" of the facility and that correctional officers "treat them the same" as other inmates. *See* Karen Dandurant, *Inside Strafford County Jail: What it Looks like for ICE Detainees*, Milwaukee Journal Sentinel (Feb. 20, 2025, 4:15 A.M. CT), https://www.jsonline.com/story/news/local/2025/02/20/inside-strafford-county-jail-ice-detainees/78601660007/. Detaining civil noncitizen detainees in identical conditions to criminal detainees supports the finding that Petitioner is "suffer[ing] a substantial deprivation of liberty." *Hernandez-Lara*, 10 F.4th at 28. Despite being granted bond in August of 2025, Petitioner remains detained in January 2026 – almost six months later.

45. **Risk of Erroneous Deprivation.** District Judge Landya McCafferty of the District of New Hampshire wrote: "First and foremost, the automatic stay regulation only applies to persons who are entitled to be released on bond pursuant to the determination of an IJ who has considered both the noncitizen's flight risk and any potential danger to the community." *Alves da Silva v. United States Immigr. & Customs Enf't*, No. 25-cv-284-LM-TSM, 2025 WL 2778083, 2025 DNH 117, 2025 U.S. Dist. LEXIS 191101 at *10 (D.N.H. Sept. 29, 2025). Judge McCafferty continued: "[I]nvocation of the automatic stay regulation allows the government to essentially nullify this judicial determination for a period of up to ninety days (to say nothing of the other potential extensions described above)." *Id.* In *Alves da Silva*, the Court relied heavily on Judge Kobick's decision in *Sampiao v. Hyde*, which stated: "[T]he automatic stay regulation empowers ICE—the losing party in the bond hearing— to unilaterally override the decision of the Judge and keep the noncitizen detained pending appeal. Such a rule allows the government to

bypass its burden of proof at bond hearings and usurp the role of the Immigration Judge." 799 F. Supp. 3d at 29–30.

46. Here, the appeal filed by the Department of Homeland Security focuses **solely** on whether Petitioner (referred to as "Respondent" in his removal and bond proceedings) is (A) an applicant for admission and thus subject to mandatory detention or (B) subject to discretionary detention and thus eligible for an immigration judge to redetermine his custody and conditions of release on bond. *See* Ex. E, DHS Appeal. The only contention that the Department of Homeland Security brought before the Board of Immigration Appeals ("BIA") is that Petitioner's detention falls within mandatory detention under 8 U.S.C. § 1225 and not discretionary detention under 8 U.S.C. § 1226. This Court has the authority to find which statute controls his detention in determining its lawfulness. In her decision, the Immigration Judge noted that Petitioner "was released on his recognizance," complied with the conditions of his enrollment in "Alternatives to Detention," and then was re-detained without cause within the United States. *See* Ex. L, Memorandum Concerning the August 4, 2025, Decision of the Immigration Judge, Sept. 12, 2025.[1]

47. As to the sole contention, the risk of Petitioner being erroneously being deprived of his private interests is guaranteed. This Court has repeatedly held that a noncitizen in Petitioner's position is not an applicant for admission and is eligible for custody redetermination. *See, e.g.*, *Ashqui-Mejia v. Riendeau*, No. 1:25-cv-0308-JL-AJ, 2025 WL 3687942, 2025 DNH 147, 2025 U.S. Dist. LEXIS 262389 (D.N.H. Dec. 19, 2025) (finding noncitizen subject to

[1] The Immigration Judge's Memorandum incorrectly refers to Petitioner's custody redetermination hearing as having occurred on August 4, 2025, in the title, but correctly identified August 14, 2025, as the custody redetermination hearing date within the Memorandum.

discretionary detention and eligible for a bond hearing); *K-S v. Warden, FCI-Berlin*, No. 25-cv-288-SE, 2025 U.S. Dist. LEXIS 260379 (D.N.H. Dec. 15, 2025) (finding same); *Jimenez v. FCI Berlin*, No. 25-cv-326-LM-AJ, 2025 WL 3671774, 2025 DNH 145, 2025 U.S. Dist. LEXIS 176165 (D.N.H. Sept. 8, 2025) (finding same). Where, as here, the Immigration Judge found that Petitioner was eligible for bond, the District of New Hampshire's position on eligibility for bond for similarly situated individuals is clear, and evidence from DHS indicates that Petitioner was previously released under 8 U.S.C. § 1226, this Court should find that Petitioner is being erroneously deprived of his private interest to liberty and freedom from government detention.

48. Specific to the automatic stay provision, multiple courts have found that the "risk of error could, of course, be lessened if ICE were held to the same standard as a party seeking a stay pending appeal in federal court." *Sampiao*, 10 F. Supp. 3d at 32; *Alves da Silva*, No. 25-cv-284-LM-TSM, 2025 WL 2778083, 2025 DNH 117, 2025 U.S. Dist. LEXIS 191101 at *11 ("Additional or substitute procedural safeguards would reduce the risk of erroneous deprivation."). However, instead of seeking a discretionary stay, as allowed under the regulations, DHS avoided utilizing a process which "would require the BIA to make some individualized determination as to whether the government is likely to succeed in arguing on appeal that the noncitizen's release poses a risk of danger or flight." *Alves da Silva*, *supra*, at *12.

49. **Competing Interests & Burdens.** In *Zadvydas*, the Supreme Court considered that immigration detention, as a civil matter, is assumed to be "nonpunitive in purpose and effect." 533 U.S. at 690. The government interest in detaining a noncitizen falls clearly within two categories: dangerousness or flight risk. *See id.* at 690–91; see also *Hernandez-Lara*, 10 F.4th at 33 (finding that detention is limited to "only those noncitizens who are dangerous or a flight risk"). On appeal, the government did not argue that Petitioner poses a danger but instead

focused on eligibility for bond. *See* Ex. E, Notice of Appeal. When the First Circuit previously assessed the third *Mathews* factor with regard to noncitizen detainees, it posited the issue as: "What is at stake, however, is not the power of the government to detain noncitizens who may cause harm or flee during removal proceedings, but rather who should bear the burden of proving noncitizens pose a danger or a flight risk." *Hernandez-Lara*, 10 F.4th at 32. Similarly, the issue is whether the government's interest in maintaining the status quo and the burdens of additional procedural requirements outweigh Petitioner's liberty interests and the risk of erroneous deprivation of those liberty interests after an IJ found that Petitioner is not dangerous and that $7,500 was a sufficient bond to ameliorate his risk of flight.

50. In *Hernandez-Lara*, the First Circuit found that "limiting the use of detention to only those noncitizens who are dangerous or a flight risk may save the government, and therefore the public, from expending substantial resources on needless detention." *Id.* at 33. It also considered that "unnecessary detention imposes substantial societal costs," creating "ruptures in the fabric of communal life which impact society in intangible ways that are difficult to calculate in dollars and cents." *Id.* Petitioner is similarly situated to the noncitizen in *Sampiao*, where the "ICE justifies its appeal to the BIA by asserting that [the noncitizen] is an applicant for admission under Section 1225(b)(2)(A)." 799 F. Supp. 3d at 31. In accordance with precedent, this Court has the authority to find that Petitioner is detained pursuant to 8 U.S.C. § 1226 and render the entirety of the government's interest on appeal to be moot.

51. Furthermore, in *Hernandez-Lara*, the First Circuit found that due process required "that the government must bear the burden of proving dangerousness or flight risk in order to continue detaining a noncitizen under section 1226(a)." 10 F.4th at 39. The automatic stay procedure essentially allows the government to indefinitely detain a noncitizen that was granted

bond through due process with no external oversight. *See Mohammed H. v. Trump*, 786 F. Supp. 3d 1149, 1158 (D. Minn. 2025) ("Simply by fiat—without introducing any proof and without immediate judicial review—the Government effectively overruled the bond decision and kept Petitioner detained. In doing so, the automatic stay rendered Petitioner's continued detention arbitrary and gave him no chance to contest the Government's case for detention."). In other words, "[t]he automatic stay regulation also allows the government to make an end run around the burden of proof that it bore at the bond hearing." *Alves da Silva*, No. 25-cv-284-LM-TSM, 2025 WL 2778083, 2025 DNH 117, 2025 U.S. Dist. LEXIS 191101 at *10. Accordingly, this Court should find that 8 C.F.R. § 1003.19(i)(2) violates procedural due process.

B. <u>The automatic stay provision violates substantive due process.</u>

52. On the issue of substantive due process and 8 C.F.R. §1003.19(i)(2), the question is whether the government can offer a "sufficiently strong justification for indefinite civil detention." *Zadvydas*, 533 U.S. at 690. The historical context of the regulation is key to understanding the justification behind the automatic stay regulation. 8 C.F.R. §1003.19(i)(2) was created in the wake of the 9/11 terror attacks, and the Department stated:

53. The immediate implementation of this interim rule without prior public comment is necessary to prevent the release of aliens who may pose a threat to national security and to provide a clear set of procedural rules of administrative procedure with respect to determining the custody conditions and bond status for aliens during the pendency of removal proceedings.

54. Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,910 (Oct. 31, 2001). The first justification cannot apply because DHS has not argued that Petitioner is dangerous, let alone a threat to national security. *See* Ex. E, DHS Appeal. This leaves the second justification, creating "a clear set of procedural rules" regarding

custody redetermination." 66 Fed. Reg. at 54, 910. This reasoning similarly fails because, as noted above, the government's interest in detaining noncitizens— dangerousness or flight risk— is protected by the custody redetermination process. *See Hernandez-Lara*, 10 F.4th at 39. When other courts have considered this issue, there has been widespread support for finding the regulation is a violation of substantive due process because "the automatic stay provision renders the [IJ's] bail determination an empty gesture." *Ashley*, 288 F. Supp. 2d at 668.[2]

II. The automatic stay provision under 8 C.F.R. § 1003.19(i)(2) is *ultra vires.*

55. To determine whether the automatic stay provision under 8 C.F.R. § 1003.19(i)(2) is *ultra vires*, a court must determine whether an agency has acted improperly, beyond their jurisdiction. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). At its core, the issue is "whether the agency has gone beyond what Congress has permitted it to do." *Id.* at 298. Under 28 U.S.C. § 510, "Congress has permitted the Attorney General to delegate detention determinations to 'any other officer, employee, or agency of the Department of Justice.'" *Anicasio v. Kramer*, No. 4:25CV3158, 2025 WL 2374224, 2025 U.S. Dist. LEXIS 157236 (D. Neb. Aug. 14, 2025), at *13. An IJ is an administrative judge appointed by the Attorney General who "shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe."8 U.S.C. § 1101(b)(4). As such, the Attorney General has the power to delegate

[2] *See Anicasio*, *supra*, at *12 ("The governmental interest in the continued detention of these least-dangerous individuals, in contravention of the order of a neutral fact-finder, does not outweigh the liberty interest at stake."); *Zavala v. Ridge*, 310 F. Supp. 2d 1071 1077 (N.D. Cal. 2004) ("The regulation, which permits unilateral government detention of individuals without a case-by-case determination after a reasoned finding that they do not pose threat to safety or a risk of flight, violates the Due Process Clause because no special justification exists that outweighs the individual's constitutionally protected interest in avoiding physical restraint."); *Leal-Hernandez v. Noem*, No. 1:25-cv-02428, 2025 WL 2430025 (D. Md. Aug. 24, 2025) ("Invocation of the automatic stay per 8 C.F.R. § 1003.19(i)(2) renders the IJ's custody redetermination order an 'empty gesture' absent demonstration of a compelling interest or special circumstance left unanswered by IJ Bailey.").

the authority to make immigration detention determinations to IJs. Alternatively, DHS cannot be delegated this authority because it is not within the Department of Justice. See 6 U.S.C. § 111; *see also Anicasio*, *supra*, at *13.

56. 8 C.F.R. § 1003.19(i)(2) was enacted with the explicit purpose of "allow[ing] the Service to maintain the status quo while it seeks review by the Board, and thereby avoid[ing] the necessity for a case-by-case determination of whether a stay should be granted in particular cases." EOIR, Review of Custody Determinations, 66 Fed. Reg. at 54,910 (Oct. 31, 2001). Because the custody redetermination process wherein DHS carries the burden to prove dangerousness or flight risk comports with due process, this regulation blatantly disregards due process and allows DHS to set aside the decision of an IJ. *See Hernandez-Lara*, F.4th at 39; *see also Mohammed H. v. Trump*, 786 F. Supp. 3d 1149, 1158 (D. Minn. 2025). Challenges to this expanded regulation have resulted in multiple courts finding: "By permitting DHS to unliterally extend the detention of an individual, in contravention of the findings of an agent (the IJ) properly delegated the authority to make such a determination, 8 C.F.R § 1003.19(i)(2) exceeds the statutory authority Congress gave to the Attorney General." *Anicasio*, *supra*, at *13.[3]

57. This Court should consider that the expanded regulation "fails to impose any certain time parameters for final resolution of the custody determination." *Zavala v. Ridge*, 310 F. Supp. 2d 1071, 1075 (N.D. Cal. 2004). Although 8 C.F.R § 1003.6(c)(4) states that "the automatic stay shall lapse 90 days after the filing of the notice of appeal," a noncitizen's

[3] *See Zavala*, 310 F. Supp. 2d at 1079 ("Because this back-ended approach effectively transforms a discretionary decision by the immigration judge to a mandatory detention imposed by the Service, it flouts the express intent of Congress and is ultra vires to the statute."); *Zabadi v. Chertoff*, No. C 05-01796, 2005 WL 1514122, 2005 U.S. Dist. LEXIS 50670 at *2 (N.D. Cal. June 17, 2005) ("T]his order finds the regulation ultra vires because it eliminates the discretionary authority of immigration judges to determine whether an individual may be released, thereby exceeding the authority bestowed upon [ICE] by Congress.").

"detention may last longer still, because the automatic stay regulation gives the government the power to unilaterally extend his detention." *Sampiao v. Hyde*, 799 F. Supp. 3d 14, 28 (D. Mass. 2025). 8 C.F.R § 1003.6(c)(5) provides that "DHS may seek a discretionary stay pursuant to 8 C.F.R. § 1003.19(i)(1) to stay the immigration judge's order in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay." Because 8 C.F.R. § 1003.19(i)(2) essentially "has the effect of mandatory detention of a new class of aliens, although Congress has specified that such individuals are not subject to mandatory detention," this Court should find the regulation to be *ultra vires*. *Zavala*, 310 F. Supp. 2d at 1079.

58. As applied to Petitioner, he has been detained well beyond the 90-day automatic stay period. Because the ICE/DHS filed its Notice of Appeal on August 27, 2025, the automatic stay period lapsed on November 25, 2025. Petitioner has been detained an additional two months after the automatic stay lapsed, which "has the effect of mandatory detention . . . although Congress has specified that [individuals such as Petitioner] are not subject to mandatory detention" as the *Zavala* court cautioned, thus compelling the conclusion that the regulation as applied to Petitioner is *ultra vires*.

III. Though the 90-day automatic stay lapsed on November 25, 2025, DHS has not moved for a discretionary stay from the Board of Immigration Appeals and has no authority to continue detaining Petitioner.

59. As explained above, the 90-day automatic stay lapsed on November 25, 2025, and DHS did not move for a discretionary stay from the Board of Immigration Appeals as federal regulations provide at 8 C.F.R. § 1003.19(i)(2) and 8 C.F.R. § 1003.6(c)(5).

60. Without either the automatic stays provided by 8 C.F.R. § 1003.19(i)(2) and 8 C.F.R. § 1003.6 or a discretionary stay ordered by the Board, DHS now has no authority to continue detaining Petitioner because the Immigration Judge's bond redetermination decision

controls. Under INA § 236(a), 8 C.F.R. § 1003.19(i)(2), 8 C.F.R. § 1003.6(c)(5), and the Immigration Judge's bond decision, DHS must release Petitioner, but the agency continues to refuse his release, in violation of all legal authority.

EXHAUSTION

61. Exhaustion of administrative remedies falls within two distinct categories: statutory and common law. *See Brito v. Garland*, 22 F.4th 240, 255 (1st Cir. 2021). Where, as here, the statute does not require administrative exhaustion, "sound judicial discretion governs." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *cited in Morgan v. Garland*, 120 F.4th 913, 927 (1st Cir. 2024).

62. Decades of precedent stands for the proposition that "*generally speaking*, a plaintiff's failure to exhaust his or her administrative remedies precludes the plaintiff from obtaining federal review of claims that would have properly been raised before the agency in the first instance." *Brito,* 22 F.4th at 255 (emphasis added); *see McCarthy*, 503 U.S. at 144–45 ("This Court long has acknowledged the *general rule* that parties exhaust prescribed administrative remedies before seeking relief from the federal courts.") (emphasis added).

63. As use of the phrases "generally speaking" and "general rule" imply, there are exceptions to the exhaustion requirement. *See McCarthy*, 503 U.S. at 146 ("This Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion.").

64. Waiver of the exhaustion requirement is justified in three circumstances: (1) "when unreasonable or indefinite delay threats unduly to prejudice the subsequent bringing of a judicial action," (2) "if a substantial doubt exists about whether the agency is empowered to grant meaningful redress," and (3) "if the potential decisionmaker is biased or can be shown to

have predetermined the issue." *Portela-Gonzalez v. Secretary of the Navy*, 109 F.3d 74, 77 (1st Cir. 1997) (citing *McCarthy*, 503 U.S. at 145-48). This third circumstance is commonly used where seeking administrative remedies would be "futile." *Portela-Gonzalez*, 109 F.3d at 78; *McCarthy*, 503 U.S. at 148.

65. **Futility.** The Board of Immigration Appeal's recent decision in *Matter of Yajure Hurtado* singlehandedly demonstrates why exhaustion is futile. On September 5, 2025, the Board issued a decision finding that Immigration Judges "have no authority to redetermine the custody conditions of an alien who crossed the border unlawfully without inspection." *Matter of Yajure Hurtado*, 29 I&N Dec. 216, 228 (BIA 2025). Despite the *Guerrero Orellana* decision that finds that noncitizens in Petitioner's position are bond eligible, noncitizens like Petitioner continue to be held as though subject to mandatory detention.

66. **Unreasonable and Indefinite Delay.** In the current political and legal climate, requiring Petitioner to first wait for a decision from the Board on DHS's appeal is inefficient, prejudicial, and needlessly delays his release. Under *Matter of Yajure Hurtado*, the Board decided that noncitizens in Petitioner's situation are subject to mandatory detention. By requiring Petitioner exhaust administrative remedies, Petitioner must wait until after the Board grants DHS's appeal and finds that he is subject to mandatory detention to begin the habeas process. In *Sampiao*, the Court noted that "Irreparable harm may be established where a petitioner will be incarcerated or detained pending the exhaustion of administrative remedies." 799 F. Supp. 3d at 15. The Court further noted that "the average processing time for bond appeals exceeded 200 days in 2024." *Id.* at 16 (citing *Rodriguez v. Bostock*, 779 F. Supp. 3d 1239, 1248 (W.D. Wash. 2025)). Here, Petitioner has already been detained for 154 days since he was granted bond by an IJ. Enforcing an administrative remedies exhaustion requirement in ICE detention proceedings

would only serve to prejudice noncitizens and allow the government free rein to transfer, detain, and otherwise infringe on the liberty of noncitizens without checks and balances.

CLAIMS FOR RELIEF

Count I
Violation of the Fifth Amendment's Procedural Due Process Clause

67. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

68. Petitioner has a fundamental interest in liberty and being free from official restraint.

69. The government's detention of Petitioner after an Immigration Judge granted him bond violates procedural due process and the *Mathews* balancing test.

Count II
Violation of the Fifth Amendment's Substantive Due Process Clause

70. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

71. Petitioner has a fundamental interest in liberty and being free from official restraint.

72. The government's detention of Petitioner after an Immigration Judge granted him bond violates substantive due process.

Count III
Ultra Vires Federal Regulation: 8 C.F.R. § 1003.19(i)(2)

73. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

74. Where an agency acts beyond its jurisdiction, the agency action is *ultra vires* and invalid.

75. 8 C.F.R. §1003.19(i)(2) exceeds the Department of Homeland Security's statutory power because it allowed the Department of Homeland Security to unilaterally set aside an Immigration Judge's decision in custody redetermination proceedings and hold Petitioner despite the Immigration Judge's bond order, which conflicts with the INA's delegation of power to the Immigration Judge to override DHS's custody and bond determinations.

Count IV

Violation of INA § 236(a), 8 U.S.C. § 1226(a), and 8 C.F.R. § 1003.19

76. Petitioner repeats, re-alleges, and incorporates by reference each and every allegation in the preceding paragraphs as if fully set forth herein.

77. DHS has not moved the Board of Immigration Appeals for a discretionary stay of the Immigration Judge's bond decision, and the automatic stay of 90 days following the filing of their notice of appeal in bond proceedings has passed. Thus, DHS now holds Petitioner in violation of the Immigration Judge's bond order and thus in violation of INA § 236(a) and 8 C.F.R. § 1003.19 which provide for the Immigration Judge's authority to order bond.

PRAYER FOR RELIEF

Wherefore, Petitioner respectfully requests this Court to grant the following:

1) Assume jurisdiction over this matter;

2) Order that Petitioner shall not be removed from the United States nor transferred outside the District of New Hampshire pending the Court's consideration of this habeas petition;

3) Issue an Order to Show Cause under 28 U.S.C. § 2243 ordering Respondents to show cause why this Petition should not be granted within three days;

4) Declare that Petitioner's detention violates the Due Process Clause of the Fifth Amendment and 8 U.S.C. § 1226(a);

5) Issue a Writ of Habeas Corpus ordering Respondents to:

(a) immediately release Petitioner from detention, or alternatively, immediately accept payment of the bond and release Petitioner from detention;

(b) return all of Petitioner's possessions to him upon release; and

(c) timely inform counsel of Petitioner's release time and location, to enable coordination of his return to Maine;

6) Award Petitioner's attorney's fees and costs under the Equal Access to Justice Act ("EAJA"), as amended, 28 U.S.C. § 2412, and on any other basis justified under law; and

7) Grant any further relief this Court deems just and proper.

Respectfully submitted,

Date: January 30, 2026

/s/ Hillary S. Cheng

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28 U.S.C. § 2242 VERIFICATION STATEMENT

I represent Petitioner, Ahoka Isaac Lokombe, and submit this verification on their behalf. I hereby verify under penalty of perjury that the factual statements made in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my knowledge.

Respectfully submitted,

Date: January 30, 2026

/s/ Amelia L. Ritenour

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