IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 26-cv-00787-SBP

RICARDO MORENO SANTANA,

Petitioner,

v.

JUAN BALTAZAR, Warden of the Denver Contract Detention Facility, Aurora, Colorado, in his official capacity,
GEORGE VALDEZ, Acting Field Office Director ,U.S. Immigration and Customs Enforcement, in his official capacity,
TODD LYONS, Acting Director of Immigration and Customs Enforcement, in his official capacity,
KRISTI NOEM, Secretary, U.S. Department of Homeland Security, in her official capacity, and
PAMELA BONDI, Attorney General, U.S. Department of Justice, in her official capacity,

Respondents.

RESPONSE TO ORDER TO SHOW CAUSE

Respondents hereby respond to the Court's Order to Show Cause (ECF No. 4), directing them to respond to Petitioner's petition for a writ of habeas corpus. ECF No. 1. Claims 1-3, related to the automatic stay, should be denied, and Claim 4, premised on a statutory basis for detention, should be dismissed as unripe.

INTRODUCTION

Petitioner, an immigration detainee, received a bond hearing before an immigration judge, and the judge granted bond pursuant to 8 U.S.C. § 1226(a). The Department of Homeland Security (DHS) appealed that determination to the Board of

Immigration Appeals (BIA), arguing that Petitioner is subject to mandatory detention under § 1225(b)(2)(A), and simultaneously invoked the regulation providing for an automatic 90-day stay of certain bond determinations pending appeal to the BIA, 8 C.F.R. § 1003.19(i)(2).

Petitioner claims that the automatic stay provision violates 8 U.S.C. § 1226(a); the bond regulations, found at 8 C.F.R. §§ 236.1, 1236.1, and 1003.19; and his Fifth Amendment due process rights. Petitioner is incorrect regarding the automatic stay provision. For the reasons outlined below the automatic stay does not violate due process. And Petitioner's argument that he is a member of the *Maldonado Bautista* class is not yet ripe because he is currently detained under § 1226(a), and whether he is eventually detained under § 1225(b) depends on future contingent events. The petition should be denied.

BACKGROUND

Petitioner is a noncitizen who entered the United States without inspection in April 2025. ECF No. 1 at ¶ 1. He asserts that he was taken into custody by ICE in December 2025. ECF No. 1 at ¶ 4. He sought a bond redetermination in immigration court. *Id.* The immigration judge determined that Petitioner had been originally detained pursuant to § 1226(a), and was thus eligible for bond. ECF No. 1-6. The immigration judge agreed and set bond in the amount of $5,000. *Id.*

DHS then filed an EOIR-26 form indicating that it was appealing the immigration judge's bond decision to the BIA and invoking the automatic stay provision of 8 C.F.R. § 1003.19(i)(2). ECF No. 1-8. Petitioner alleges (and Respondent agrees) that the

premise of DHS's appeal to the BIA is that Petitioner is properly detained under § 1225(b)(2)(A), and thus that the immigration judge lacked jurisdiction to order bond. ECF No. 1 at 5. The BIA has not yet ruled on DHS's appeal.

ARGUMENT

I. The automatic stay provision does not violate the INA nor the bond regulations.

Petitioner claims, without meaningfully developing this argument, that the automatic stay violates the INA, namely § 1226(a), and the bond regulations. But the automatic stay is consistent with both the statute and the regulations.

As a general matter, § 1226(a) gives the Attorney General discretion to release certain noncitizens on bond. It provides that the "Attorney General . . . (2) may release the alien on—(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole . . . ." By regulation, a noncitizen may seek release on bond by making such a request to an immigration judge. 8 C.F.R. §§ 1236.1(d)(1), 1003.19.

The Department of Justice regulations that govern immigration judges and the BIA provide that "the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first." 8 C.F.R. § 1003.39 (in 8 C.F.R. Part 1003, Subpart C (Immigration Court—Rules of Procedure)).

Where DHS elects to appeal to the BIA, however, the immigration judge's ruling on bond is stayed, and thus does not become operative:

(i) Stay of custody order pending appeal by the government—

> * * *
> (2) 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 immigration judge authorizing release (on bond or otherwise) shall be stayed upon DHS's filing of a notice of intent to appeal the custody redetermination (Form EOIR–43) with the immigration court within one business day of the order, and, except as otherwise provided in 8 C.F.F. § 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.

8 C.F.R. § 1003.19(i)(2).

This longstanding rule was adopted by the Department of Justice in interim form in 1998 and finalized in 2006. *See* Final Rule: Review of Custody Determinations, 71 Fed. Reg. 57,873, 57,873 (Oct. 2, 2006). The rule is essentially a rule of judicial procedure, as it governs the proceedings before the quasi-judicial Department of Justice officials—the immigration judges and the BIA—that preside over immigration proceedings. In other words, it is not a rule adopted by DHS, which is a party in those proceedings; it is a rule of the Attorney General, who presides over those proceedings through those subordinate Department of Justice officials.

Accordingly, the automatic stay is consistent with the statue and regulations, and claims 1 and 2 should be dismissed.

II. The automatic stay provision does not violate due process.

Petitioner next argues the automatic stay violate due process. But, for the reasons explained below, the stay violations neither procedural nor substantive due process, and thus, claim 3 should thus be denied.

A. The automatic stay is consistent with procedural due process.

Where immigration detainees are concerned, the Supreme Court recently clarified that "detainees are entitled to notice and opportunity to be heard 'appropriate to the nature of the case.'" *Trump v. J.G.G.*, 604 U.S. 670, 673 (2025) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). As described above in Section I.A., above, Petitioner is being given, in accordance with the regulatory process, notice and an opportunity to be heard on whether he should be released on bond.

The process for evaluating bond for noncitizens—the very process currently playing out before the BIA here—provides the requisite notice. *Miranda v. Garland*, 34 F.4th 338, 362, 364 (4th Cir. 2022) (holding that the regulatory process for evaluating bond for noncitizens gives them the "fundamental features of due process—notice and an opportunity to be heard" because the noncitizens has multiple "separate opportunities to make their case concerning bond"). Petitioner has not shown that he is not receiving notice and opportunity to be heard as to bond, and he has thus not made out a procedural due process violation.

Instead of applying the "notice and opportunity to be heard" test, Petitioner argues that the court should apply a test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* ECF No. 1 at 23. Under that test, courts evaluate procedural due process claims by considering (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 . . . ." *Id.* at 335.

The *Eldridge* test does not apply here. The Supreme Court has never used the framework set forth in *Eldridge* to evaluate due process for noncitizens. Rather, the Court has suggested that the procedural due process analysis for noncitizens is deferential. In considering procedural due process, "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). "After all, in the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim*, 538 U.S. 510, 521 (2003).

But even if the *Eldridge* test did apply, the three factors do not show a violation of procedural due process.

Liberty interest. Petitioner has a recognizable liberty interest in connection with his pre-removal detention. But because Petitioner is a noncitizen in removal proceedings, "that liberty interest is limited." *Rojas v. Olson*, No. 25-cv-1437-BHL, 2025 WL 3033967, at *13 (E.D. Wis. Oct. 30, 2025) (rejecting a due process challenge to the automatic stay provision of 8 C.F.R. § 1003.19(i)(2)).

Moreover, the liberty interest at issue here is the length of time from when the immigration judge ruled on bond until when the BIA rules. As of this filing, that deprivation has lasted 52 days, and its total duration is not likely to significantly exceed 90 days. *See* 8 C.F.R. § 1003.6(c)(4) (providing that the automatic stay expires after 90 days if the BIA has not yet ruled), (d) (providing for five additional days after expiration for DHS to seek a further stay from the Attorney General). The mere "potential" for

prolonged detention is not enough to show a strong liberty interest. *Cf. United States v. Dominguez*, 509 F. App'x 28, 30 (2d Cir. 2013) (holding that a "potential" 14-month detention period "does not, per se, constitute a violation of a defendant's due process rights" but the individual "is free to raise the argument in the future").

Risk of erroneous deprivation. The second *Eldridge* factor is the risk of an erroneous determination, which reflects a concern for accuracy. *See City of Los Angeles v. David*, 538 U.S. 715, 718 (2003) (referring to the "second *Eldridge* factor" as reflecting a "concern for accuracy"). Here, further review by the BIA will enhance, not reduce, the accuracy of a bond decision, and this factor thus does not weigh in favor of a due process violation.

The government's interest. The government has a legitimate interest in maintaining custody over Petitioner while his custody is being reviewed because release could render the review process illusory. The Department of Justice extensively justified its interest in the stay rule. For example, it provided statistics about the difficulties of removing noncitizens who were not detained, establishing a strong interest in preventing flight risks:

> Given that over 52,000 aliens who had been released from custody—45% of the total number of respondents who were released on bond or on their own recognizance—failed to show up for their scheduled removal hearings in just the past 4 years, the Attorney General has very good reason to provide a special process for prompt review by the Board of initial decisions by the immigration judges in certain cases.

See Final Rule: Review of Custody Determinations, 71 Fed. Reg. 57,873, 57,878 (Oct. 2, 2006).

In sum, even if the *Eldridge* factors controlled, they do not establish a violation of procedural due process.

B. The automatic stay provision does not violate substantive due process.

Petitioner additionally argues that application of the automatic stay provision violates substantive due process. ECF No. 1 at 11. But because Petitioner is in removal proceedings, his substantive due process challenge to his detention fails.

The Supreme Court "has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process." *Demore v. Kim*, 538 U.S. 510, 523 (2003). The Court in *Demore* relied on a broad principle: the Court's "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings. . . ." *Id.* at 526. Later, in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), the Court observed that in *Demore,* the Court, in rejecting the due process challenge, had relied on the principle that the detention during removal proceedings "has a definite termination point: the conclusion of removal proceedings." 583 U.S. at 304 (internal marks omitted).

Here, under *Demore*, Petitioner has not shown that his detention is unconstitutional. He is detained during his removal proceedings, which will have a definite end point.

C. Cases invalidating the automatic stay are not persuasive.

Respondents recognize that courts, including in this district, have found the automatic stay violates due process. *See Merchan-Pacheo v. Noem, et al.*, 1:25-cv-03860-SBP, 2026 WL 88526, at *16 (D. Colo. Jan. 12, 2026). But Respondents

respectfully submit that the *Merchan-Pacheo* decision relies on the inaccurate premise that the immigration judge's ruling was an operative decision of the Attorney General that is somehow later overridden by DHS. *See, e.g., Merchan-Pacheo*, 2026 WL 88526, at *15 ("the automatic stay regulation empowers ICE—the losing party in the bond hearing—to unilaterally override the decision of the" immigration judge).

That same inaccurate premise is reflected in numerous other decisions. Petitioner refers to the "near unanimity" of decisions holding that DHS cannot detain a non-citizen where an immigration judge has set a bond. *M.P.L. v. Arteta*, No. 25-CV-5307 (VSB), 2025 WL 3288354, at *7 (S.D.N.Y. Nov. 25, 2025). But those decisions show that courts are consistently reaching the result by treating the immigration judge's ruling on bond as a final decision that DHS is then overruling. *See, e.g., Mohammed H. v. Trump*, 786 F. Supp. 3d 1149, 1158 (D. Minn. 2025) ("the Government effectively overruled the bond decision"); *Gunaydin v. Trump*, 784 F. Supp. 3d 1175, 1187 (D. Minn. 2025) ("the challenged regulation permits an agency official who is also a participant in the adversarial process to unilaterally override the immigration judge's decisions"); *Anicasio v. Kramer*, No. 4:25CV3158, 2025 WL 2374224, at *3 (D. Neb. Aug. 14, 2025) ("the automatic stay provision allowed DHS, the party who lost its bond argument, to unliterally deprive Petitioner of her liberty"); *Garcia Jimenez v. Kramer*, No. 4:25CV3162, 2025 WL 2374223, at *3 (D. Neb. Aug. 14, 2025) ("the automatic stay provision allowed DHS, the party who lost its bond argument, to unliterally deprive Petitioner of her liberty"); *Maldonado v. Olson*, 795 F. Supp. 3d 1134, 1152–53 (D. Minn. 2025) ("the challenged regulation permits an agency official who is also a

participant in the adversarial process to unilaterally override the immigration judge's decision") (quotation marks omitted); *Jacinto v. Trump*, 796 F. Supp. 3d 584, 590 (D. Neb. 2025) ("the automatic stay provision allowed DHS, the party who lost its bond argument, to unilaterally deprive Petitioner of her liberty"); *Leal-Hernandez v. Noem*, 803 F. Supp. 3d 409, 427 (D. Md. 2025) ("The automatic stay is a violent distortion of proper, legitimate process whereby the Government, as though by talisman, renders itself at once prosecutor and adjudicator"); *Perez v. Berg*, 798 F. Supp. 3d 955, 961 (D. Neb. 2025) ("the automatic stay provision allowed DHS, the party who lost its bond argument, to unliterally deprive Petitioner of his liberty"); *Martinez v. Sec'y of Noem*, No. 5:25-CV-01007-JKP, 2025 WL 2598379, at *3 (W.D. Tex. Sept. 8, 2025) ("the automatic stay provision allowed Respondents, who lost their bond argument, to unliterally deprive Martinez of his liberty").

These decisions, in sum, all start from the same incorrect premises, (1) viewing the immigration judge's ruling as operative and final, even during an appeal; and (2) viewing the automatic-stay regulation as an exercise of power by DHS, not the adjudicator (the Attorney General). But an immigration judge's ruling was never intended to be the final bond decision of the Attorney General and is not operative when that ruling is being appealed. And, invoking the automatic stay does not reflect DHS seizing authority from the Department of Justice. Rather, it is authorized by a Department of Justice regulation, 8 C.F.R. § 1003.19(i), reflecting the decision of the Attorney General—the official authorized by Congress under 8 U.S.C. § 1226(a) to

grant bond—about how and when the Attorney General's bond decision should become operative.

The Court should thus not rely on the sheer number of authorities to conclude that the automatic-stay regulation violates due process.

II. Claim 4 concerns mandatory detention under § 1225(b), and should be dismissed as not yet ripe.

In addition to his claims regarding the automatic stay, Petitioner raises a claim premised on a presumption that he is currently detained pursuant to § 1225(b)(2)(A). *See* ECF No. 1 at 15-20, 23-24. Specifically, Petitioner asserts that because he is being held under mandatory detention pursuant to § 1225(b), he is a member of the *Maldonado Bautista* class, and Respondents' continued detention of him thus violates the court's orders in that case. *See id.* at 23-24. But because Petitioner is *not* currently detained under § 1225(b), any challenge to his detention under that statute is not properly before the Court and thus is not justiciable at this time.

Petitioner is currently detained under § 1226(a)—not § 1225(b)(2)(A). When Petitioner sought a bond hearing before the immigration judge, the immigration judge held that Petitioner was detained under § 1226(a) and thus entitled to a bond hearing pursuant to the nationwide class action in *Bautista*. ECF No. 1-6. It is true that DHS' appeal is based on the premise that Petitioner is properly detained under § 1225(b)(2)(A), and thus that the immigration judge lacked jurisdiction to order a bond. *See* ECF No. 1-8. For now, though, and the BIA has not yet ruled on that appeal, and the only basis for Petitioner's current detention is § 1226(a). Petitioner's request for a

ruling on the § 1225/§ 1226 issue thus amounts to a plea for this court to pre-decide the BIA appeal before it has even been fully briefed.

Petitioner is thus in custody pursuant to § 1226(a), until such time as the BIA either affirms or reverses the immigration judge's decision on bond under that provision. The federal habeas statute empowers the court to grant relief only where the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *see also Maleng v. Cook*, 490 U.S. 488, 490 (1989). Petitioner is currently "in custody" under § 1226(a), not § 1225, so the court lacks jurisdiction under § 2241 to grant relief based on the § 1225/§ 1226 issue.

Moreover, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). And where agency decision-making is concerned, "the absence of final agency action is dispositive" of the ripeness inquiry. *Los Alamos Study Group v. U.S. Dep't of Energy*, 692 F.3d 1057, 1065 (10th Cir. 2012). As discussed at length above, the Department of Justice has not yet reached a final decision regarding Petitioner's request for release on bond. In addition, whether Petitioner will *ever* be in custody under § 1225 depends on "contingent future events," namely a ruling from the BIA in an appeal that has not yet been fully briefed. Petitioner's claims based on §§ 1225 and 1226 are thus not ripe for review and should be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, claims 1-3 should be denied and claim 4 should be dismissed for lack of jurisdiction.

Dated: March 6, 2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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