

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

J.J.O.H.,

Petitioner,

v.

PAUL ARTETA *in his official capacity as* Sheriff of Orange County, New York *and* Warden, Orange County Jail; WILLIAM JOYCE, *in his official capacity as* Acting Field Office Director, New York Field Office, United States Immigration and Customs Enforcement; TODD M. LYONS, *in his official capacity as* Acting Director, United States Immigration and Customs Enforcement; KRISTI NOEM, *in her official capacity as* Secretary of Homeland Security; PAMELA BONDI, *in her official capacity as* United States Attorney General,

Respondents.

No. 25-cv-5278 (ALC)

PETITIONER'S REPLY BRIEF TO RESPONDENTS' SUR-REPLY

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	2
I. Petitioner’s due process claims relate back to DHS’s first invocation of the automatic stay provision	2
II. The discretionary stay, here, is procedurally improper and violates due process.....	3
A. The issuance of the discretionary stay is procedurally improper.....	3
B. The issuance of the discretionary stay violates due process	4
III. Petitioner has suffered irreparable harm and warrants release	6
IV. Petitioner merits release pursuant to <i>Mapp v. Reno</i>	7
V. J.J.O.H. is being improperly targeted	8
CONCLUSION.....	11

PRELIMINARY STATEMENT

The government's actions that led to J.J.O.H.'s current detention are extraordinary and caused irreparable harm. Respondents invoked the automatic stay provision against an Immigration Judge's ("IJ") order releasing J.J.O.H. on bond, when he has no criminal record. This provision has been used on average only 26 times per year¹ on a detained population that numbers in the tens of thousands on any given day.² DHS invoked the automatic stay *again* after the Board of Immigration Appeals ("BIA") agreed Petitioner should be released and the IJ granted bond a second time. Notably, DHS's actions led the IJ to observe that DHS's evidence against J.J.O.H. was "highly irregular," to state on the record that she believed DHS was violating J.J.O.H.'s due process rights, and to suggest a federal court ought to order his release through a habeas. ECF No. 27-1 ("Herr Decl.") ¶¶9, 15, 17, 18. Further, Respondents requested an emergency discretionary stay from the BIA only after Petitioner filed the instant TRO/PI motion and its grant was not procedurally proper nor does it cure J.J.O.H.'s unlawful detention as it is merely a *post hoc* rationalization for his detention. Respondents have targeted Petitioner and made false allegations of gang membership for constitutionally impermissible reasons, including Petitioner's nationality, age, and lack of financial resources.

This is precisely the type of unlawful detention that demands the intervention of federal habeas courts. Accordingly, this Court should issue an order pursuant to Fed. R. Civ. P. 65—or in the alternative, pursuant to *Mapp v. Reno*—directing Respondents to immediately release J.J.O.H.

¹ See Stacy L. Brustin, *A Civil Shame: The Failure to Protect Due Process in Discretionary Immigration Custody & Bond Redetermination Hearings*, 88 Brook. L. Rev. 163, 225 n.231 (2022).

² See *ICE Detention Trends*, Vera Institute of Justice available at <https://www.vera.org/ice-detention-trends>.

ARGUMENT

I. Petitioner's due process claims relate back to DHS's first invocation of the automatic stay provision

“The Supreme Court has been unambiguous that executive detention orders, which occur without the procedural protections required in courts of law, call for the most searching review.” *Velasco Lopez v. Decker*, 978 F.3d 842, 850 (2d Cir. 2020) (citing *Boumediene v. Bush*, 553 U.S. 723, 781–83, (2008)). The violation of J.J.O.H.’s due process rights relate back to DHS’s first invocation of the automatic stay provision on March 18, 2025, and cannot be cured by any *post hoc* rationalization, including a discretionary stay, after that unlawful detention is challenged. Respondents, in their sur-reply, did not challenge this argument. Due process requires that detention be lawful *at the time* of detention, not weeks or months later if an alternative basis for detention subsequently emerges.³ See *Martinez v. McAleenan*, 385 F. Supp. 3d 349, 365 (S.D.N.Y. 2019); *Arias Gudino v. Lowe*, No. 1:25-CV-00571, 2025 WL 1162488 (M.D. Pa. Apr. 21, 2025); ECF No. 27 at 5-6.

Therefore, the BIA’s issuance of a discretionary stay does not moot this case, and Petitioner’s arguments that he is likely to succeed on the merits of his claims remain. See ECF No. 18 at 10-16. The cases that Respondents cite to support their argument to the contrary are inapposite, distinguishable, and non-controlling. In *Hussain v. Gonzales*, by the time the habeas petition was heard, the IJ who had initially ordered release made a subsequent determination after a merits hearing that petitioner was a member of a terrorist organization and therefore denied his renewed request for release. 492 F. Supp. 2d 1024, 1031 (E.D. Wis.). In *Murillo-Flores v.*

³ Respondents claim Petitioner concedes that a discretionary stay would not violate due process. Opp. at 22. This argument ignores that Petitioner’s discussion of a discretionary stay was in the context of its hypothetical use in DHS’s initial appeal of a custody determination, rather than after four months of unlawful detention pursuant to the automatic stay provision and only after Petitioner brought a TRO/PI motion.

Mukasey, a discretionary stay was never requested and by the time the petition was heard the BIA had reversed the bond grant and determined that petitioner, who had three criminal convictions, should be held without bail. No. 08-cv-0943, 2009 WL 310143, at *1–2 (D. Ariz. Feb. 6, 2009).⁴ Finally, in *El-Dessouki v. Cangemi*, the court found that the discretionary stay did not violate due process because petitioner was able to file an opposition before the BIA made its decision. No. 06-cv-3536, 2006 WL 2727191, at *3 (D. Minn. Sept. 22, 2006).

II. The discretionary stay, here, is procedurally improper and violates due process.

The issuance of the discretionary stay in this case was procedurally improper, violated due process, and, if given credence, would serve to shield the unconstitutional use of the automatic stay provision from judicial review.⁵ Thus, the discretionary stay here does not alter—and in fact, it highlights and exacerbates—the illegality of Petitioner’s detention.

A. The issuance of the discretionary stay is procedurally improper

Respondents claim that Petitioner’s procedural argument “borders on frivolity” and characterize Petitioner as claiming that “ICE can seek a discretionary stay only if the BIA does not decide the bond appeal before the stay expires.” Sur-Reply at 2-3. Respondents misunderstand Petitioner’s argument. Petitioner argued in his reply, and reasserts here, that the regulations provide that a discretionary stay is available to allow the BIA more time to decide a custody appeal if the automatic stay expires. Petitioner does not contend that the BIA can only act on a discretionary stay request after the automatic stay expires, but that it must do so only if it becomes clear that it will be unable to resolve the custody appeal before the expiration of the automatic stay

⁴ Similarly, in *Altayar v. Lynch*, the BIA also reversed the bond grant and determined that petitioner, who had been convicted of felony aggravated assault, should be held without bail. No. 16-cv-2479, 2016 WL 7383340, at *1 (D. Ariz. Nov. 23, 2016).

⁵ A central purpose of habeas review in federal court is to consider claims that the discretionary process itself was constitutionally flawed. See *Velasco Lopez*, 978 F.3d at 850.

period. 8 C.F.R. § 1003.6(c) plainly states, “the following procedures will be applicable with respect to custody appeals in which DHS has invoked an automatic stay DHS may seek a discretionary stay pursuant to 8 C.F.R. § 1003.19(i)(1) to stay the IJ’s order *in the event the Board does not issue a decision on the custody appeal within the period of the automatic stay.*” (emphasis added). The BIA may issue a decision on the discretionary stay motion “[i]f . . . the Board is unable to resolve the custody appeal within the period of the automatic stay.” *Id.* The proper time for the BIA to grant a discretionary stay is clearly not with 43 days left in the automatic stay period and before the custody appeal is even fully briefed by both parties,⁶ as it did in this case.

To be clear, Petitioner does not contend that the regulations prohibit ICE from *seeking* a discretionary stay prior to the expiration of the automatic stay period. Only that the timing of Respondents’ request and their claim that it “moot[s] the challenges to ICE’s use of the automatic stay provision,” (ECF No. 26) suggest the request was made from a desire to insulate their unconstitutional application of the automatic stay provision in this case from judicial review, rather than a concern that the BIA may not decide the custody appeal in time. *See infra* n.6.

B. The issuance of the discretionary stay violates due process

The issuance of a discretionary stay in this instance is also violative of due process. In *Hamama v. Adducci*, the court found that the BIA’s issuance of discretionary stay without an opportunity for petitioner to be heard and with no clear decisional standards violated due process. No. 17-CV-11910, 2018 WL 1905074, at *2 (E.D. Mich. Apr. 23, 2018). Similarly, in J.J.O.H.’s case, the BIA granted the motion less than two hours after it was made in a conclusory decision that offered no insight into its reasoning. *See id.* (“the problem is lack of notice and opportunity to

⁶ Per the BIA’s briefing schedule on the second custody appeal, both parties’ briefs were due on July 17, 2025. DHS chose to submit their BIA brief, along with the discretionary stay request, early—on the day the government’s brief opposing the instant TRO/PI motion was due.

be heard, as well as lack of clear decisional standards. Due process has long condemned these types of unfairness.”). First, J.J.O.H. was deprived of his ability to be freed from physical detention, “the most elemental of liberty interests.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).⁷

Second, there was no pre-deprivation opportunity for J.J.O.H. to be heard, thus, the BIA’s near instantaneous grant of the motion for a discretionary stay created a serious risk of erroneous deprivation, in particular because of “the lack of standards by which stays are granted.” *Hamama*, 2018 WL 1905074 at *2 (citing *Giaccio v. State of Pa.*, 382 U.S. 399, 403 (1966) (“Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.”)).⁸ Moreover, there was no exigency to justify depriving Petitioner of his right to be heard pre-deprivation. Respondents cite *Organista v. Sessions*, 2018 WL 776241, at *2-3 (D. Ariz. Feb. 8, 2018) to argue no pre-deprivation opportunity to be heard is required. However, *Organista*’s facts are not analogous here and, in fact, highlight the types of extraordinary circumstances discretionary stays have been used for: the petitioner there had been released after the court found the use of the automatic stay provision unconstitutional, so “exigency justify[ed] a rapid decision on its request for discretionary stay because this detainee is wealthy and is the subject of Mexican and Interpol arrest warrants.” *Id.* Here, DHS failed to identify what “exigency” exists that led it to request this discretionary stay since Petitioner is currently detained by the automatic stay provision. Additionally, even in *Organista*, “DHS informed Petitioner’s counsel of its stay request and provided them with a copy of that request” prior to filing it. *Id.* The discretionary stay in that case was not granted until the next day. *Id.*

⁷ Addressing the private interest factor in the *Mathews v. Eldridge* analysis. 424 U.S. 319 (1976).

⁸ Addressing the second *Mathews* factors of an erroneous deprivation of individuals’ private rights and the degree to which alternative procedures could ameliorate these risks. As to the third *Mathews* factor, the government’s interest is negligible, because the only legitimate interest in civil immigration detention is ensuring that people facing removal do not endanger the public or abscond during the pendency of their removal case, and none of these interests were at issue in failing to provide J.J.O.H. an adequate opportunity to respond.

J.J.O.H. requested that the BIA reconsider its decision to grant a discretionary stay on July 17, 2025. *See* Ex. A, BIA Appeal Brief. However, the procedural due process violation cannot be cured after the deprivation has already occurred by allowing a motion to reconsider. *See Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Cir. 2014) (internal citation and quotations omitted) (“Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest.”); *see also Hamama*, 2018 WL 1905074, at *2 (finding a post-deprivation opportunity to be heard insufficient in this circumstance).

III. Petitioner has suffered irreparable harm and warrants release

The “sliding scale” approach to preliminary injunction analysis requires courts to consider factors “taken together,” such that a plaintiff who shows great harm has leeway to show less success on the merits. *Reilly v. City of Harrisburg*, 858 F.3d 173 (3d Cir. 2017), *as amended* (June 26, 2017). Additionally, in the Second Circuit, a “showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.” *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (internal quotations and citations omitted).

The severity of the irreparable harm Petitioner is currently facing adds further support to his application for release. Not only has the basis for his detention been unconstitutional and lead him to struggle with increasing suicidal ideation, but also his ability to participate meaningfully in his asylum proceedings is compromised by his detention. *See* Herr Decl. ¶7 (The IJ told J.J.O.H. that adjourning his case to allow the habeas petition to be adjudicated “will also give you an opportunity to be released and to be able to actually have your case adjudicated while you can participate more in the case.”). If J.J.O.H. is released, as the IJ and BIA have ordered, he would be able to find witnesses, gather evidence, and freely consult with his attorney both before and during his asylum hearing. Additionally, if J.J.O.H. is released, he will not be at risk of either unlawful

deportation, or a no win-situation of choosing between being removed to Venezuela where he faces torture or death or remaining detained and suffering increased risk of self-harm.

IV. Petitioner merits release pursuant to *Mapp v. Reno*

In addition to satisfying the requirements for release through a preliminary injunction as detailed in Petitioner's prior briefing, *see generally* ECF No. 18, Petitioner also merits release pursuant to *Mapp v. Reno*. *See* ECF No. 26 at 9. *Mapp* established the controlling bail standard: "a court considering a habeas petitioner's fitness for bail must inquire into whether the habeas petition raises substantial claims and whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." 241 F.3d at 230 (cleaned up).

A substantial claim exists where the petitioner demonstrates that he is "very likely to succeed" on the claim. *United States v. Manson*, 788 F. App'x 30, 32 (2d Cir. 2019). Petitioner's prior briefing, *see* ECF No. 18 at 10-16, details his argument that he is likely to succeed on his claims, and the BIA discretionary stay does not alter this. *See supra* Section I-II. In particular, J.J.O.H.'s substantive and procedural due process claims raise "important issues concerning potential constitutional violations" that "satisfy the *Mapp* requirement of substantial questions." *Mahdawi v. Trump*, No. 2:25-CV-389, 2025 WL 1243135, at *11 (D. Vt. Apr. 30, 2025).

Under *Mapp*, courts find "extraordinary circumstances" before granting bail. It is evident that Respondents' serial application of rarely employed procedural stays to prevent his release, *supra* Sections II-II, in spite of three judicial findings ordering him released on bond constitute extraordinary circumstances. Additionally, J.J.O.H.'s declining health in custody provides another basis for finding extraordinary circumstances. *See Ozturk v. Trump*, No. 2:25-CV-374, 2025 WL 1420540, at *8 (D. Vt. May 16, 2025) (Petitioner's "declining health in custody," in particular her asthma, is "additional extraordinary circumstance which warranted immediate release."). J.J.O.H.'s detention is inhumane and life-threatening. Over the course of six months of detention,

he has struggled with worsening depression, and is now experiencing suicidal ideation and enduring unrelenting pain from broken teeth, headaches and a knee injury, but has not received adequate access to medical care. *See* ECF No. 18-1, J.J.O.H. Decl. ¶¶16, 18. As J.J.O.H. is facing an impossible choice between enduring continued detention causing increasing pain and suicidal ideation, or giving up and returning to Venezuela where he would be tortured or killed, is it necessary for him to be released to make the habeas remedy effective. *Id.* ¶¶17,19; *see also Ozturk*, 2025 WL 1420540 at *8 (“if the Court later finds that [his] substantial claims are in fact proven claims, [his] detention will have been an unconstitutional deprivation with no public purpose or benefit.”).

Finally, as the IJ and the BIA have already found, J.J.O.H. proved he would not endanger the public nor pose a flight risk if released on bond. J.J.O.H. should be released given his lack of a criminal record, affirmative asylum application, strong community ties, and work history. *See id.* (ordering petitioner released even though an IJ had denied bond and DHS urged the court to avoid “‘improper judicial review of a bail determination’ of the IJ.”); *see also Mapp*, 241 F.3d at 244 (noting that the district court had ordered release after finding that petitioner was not a serious flight risk or threat to the community).

V. J.J.O.H. is being improperly targeted

When evaluating the constitutionality of a noncitizen’s confinement, particularly pursuant to a discretionary process, the habeas court “must use [its] authority to consider not only the present circumstances of confinement, but the actions that led to it.” *Ozturk*, 2025 WL 1145250, at *15. In *Ozturk*, a detainee presented evidence “that her detention, though discretionary, is motivated by unconstitutional purposes in violation of the Due Process Clause” warranting *Map* release. *Id.* at *6, 7; *see also Mahdawi*, 2025 WL 1243135, at *11 (petitioner was ordered released where he argued that he was detained as punishment for his speech).

J.J.O.H.'s continued detention in violation of the IJ and the BIA's findings has all the hallmarks of unusual, discriminatory detention, and it does not serve any legitimate government purpose. Petitioner himself was not the intended target of the ICE raid of the house he lived in, but was detained because DHS is targeting Venezuelan men. Nine Venezuelans present in the boarding house were arrested by DHS, despite none of them being the subject of the search. J.J.O.H. Decl. ¶7. After DHS submitted an updated Form I-213 with additional conclusory gang allegations in J.J.O.H.'s case, which the IJ described as "highly irregular," the IJ noted that she had seen this same language added to the same form for another Venezuelan man. Herr Decl. ¶9; *see also* Ex. A at 9, n.6. Similarly, the petitioner in *Arias Gudino*, a Venezuelan man who the court released pursuant to Fed. R. Civ. P. 65, was also detained during a raid at a boarding house where he lived with other Venezuelan men and was the subject of similar false and conclusory Tren de Aragua allegations. 2025 WL 1162488 at *3. There are media reports detailing DHS's discriminatory and inaccurate targeting of Venezuelan men,⁹ and at least one instance where a federal court found a likelihood of success on claims that DHS is violating the equal protection rights of Venezuelan TPS holders because of discriminatory animus towards Venezuelans. *See Nat'l TPS All. v. Noem*,

⁹ *See, e.g.*, Alan Feuer, The New York Times, *U.S. Tied Migrants to Gang Based Largely on Clothes or Tattoos, Papers Show* (Mar. 31, 2025), available at <https://www.nytimes.com/2025/03/31/us/politics/us-deportations-tren-de-aragua-deportation-guidance.html> ("The Trump administration has granted itself the authority to summarily deport Venezuelan migrants accused of being members of a violent street gang on the basis of little more than whether they have tattoos or have worn clothing associated with the criminal organization, new court papers show."); Axios, *Trump keeps calling Venezuelan and Congolese migrants criminals* (Oct. 5, 2024), <https://www.axios.com/2024/10/05/trump-migrants-venezuelan-congolese-rhetoric> (Between Sept. 1, 2023 and Oct. 2, 2024, Trump has called migrants from Venezuela criminals 70 times); Texas Tribune, *Trump administration knew most Venezuelans deported from Texas to a Salvadoran prison had no U.S. convictions* (May 30, 2025), <https://www.texastribune.org/2025/05/30/trump-el-salvador-deportees-criminal-convictions-cecot-venezuela/> (The Trump administration knew that many of the Venezuelans deported earlier this year did not have criminal convictions and yet referred to them frequently as "rapists," "savages," "monsters," and "the worst of the worst."); NPR, *Federal judge orders stop to indiscriminate immigration raids in Los Angeles* (Jul. 11, 2025), <https://www.npr.org/2025/07/11/nx-s1-5462618/federal-judge-orders-stop-to-indiscriminate-immigration-raids-in-los-angeles> (a court in the Central District of California, found "a mountain of evidence" ICE agents are arresting people solely based on their race, accents, or employment, in violation of the Fourth Amendment's protection against unreasonable government seizure.).

773 F. Supp. 3d 807, 865 (N.D. Cal. 2025) (“[The government’s] [g]eneralization of criminality to the Venezuelan TPS population as a whole is baseless and smacks of racism predicated on generalized false stereotypes.”).

This context is relevant to irreparable harm and *Mapp*’s “extraordinary circumstances” analysis. The court in *Arias Gudino* explained the Government’s attempts to continue deporting Venezuelan men who were in removal proceedings to a prison in El Salvador under the Alien Enemies Act and the Government’s position that it was unable to comply with court orders to facilitate the return of people sent there. 2025 WL 1162488 at *2. These extraordinary government actions informed the degree of irreparable harm petitioner faced in immigration detention, weighing in favor of his release, and these actions are similarly relevant to J.J.O.H.’s current risk of harm of his unlawful detention.¹⁰

In light of these facts, Respondents’ false allegations against J.J.O.H. and their serial use of the automatic stay provision against him are even more constitutionally suspect, and led the IJ to state that she believed DHS was behaving unethically and violating his constitutional rights. *See* ECF. No. 27 at 2, 5. The use the automatic stay provision to prolong the detention of someone who has no law enforcement involvement is itself unusual.¹¹ *Cf. Organista*, 2018 WL 776241, at *3 (petitioner was “wealthy and [] the subject of Mexican and Interpol arrest warrants”); *Murillo-Flores*, 2009 WL 310143, at *1–2 (petitioner had three criminal convictions, including one for sexual battery). These circumstances demonstrate “the irregular nature of the government’s actions” and are exactly the sort of “unusual sequence of events,” that amount to due process violations and that merit release. *Ozturk*, 2025 WL 1420540, at *6, 7.

¹⁰ J.J.O.H. was likely nearly deported to El Salvador and detained in CECOT, an infamous Salvadoran prison, given that he was inexplicably, and with no notice, transferred to Texas where the CECOT flights departed, shortly before these AEA deportations of Venezuelans were enjoined. J.J.O.H. Decl. ¶¶10, 11.

¹¹ ECF No. 27 at 2, n.2.

CONCLUSION

J.J.O.H. respectfully requests that the Court issue an order directing Respondents to immediately release him.

Dated: July 21, 2025

Respectfully submitted,

/s/ Alyssa Briody

Alyssa Briody

Lucas Marquez

BROOKLYN DEFENDER SERVICES

177 Livingston Street, 7th Floor

Brooklyn, NY 11201

Tel: 718-254-0700

Email: abriody@bds.org

Email: lmmarquez@bds.org