UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

OLEG KACHALOV **Petitioner,** **v.** **KRISTI NOEM**, Secretary of the Department of Homeland Security; **PATRICIA H. HYDE**, Acting Field Office Director of the Immigration and Customs Enforcement, Enforcement and Removal Operations Boston Field Office; **CHRISTOPHER BRACKETT**, Superintendent of the Strafford County Department of Corrections **Respondents.**	**Case No.: 1:25-cv-78-LM-TSM**

PETITIONER'S CONSOLIDATED (i) MEMORANDUM OF LAW IN SUPPORT OF HIS CROSS MOTION FOR SUMMARY JUDGMENT, (ii) REPLY IN SUPPORT OF HIS AMENDED PETITION FOR WRIT OF HABEAS CORPUS, AND (iii) OPPOSITION TO RESPONDENTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Since February 13, 2024, Petitioner Oleg Kachalov has been imprisoned for more than 15 months without a bond hearing. Notwithstanding the dismissal of the criminal charges against him—as well as the evidence proffered explaining the circumstances surrounding the dismissal—Respondents do not explain why they continue to detain him beyond stating that they placed him in removal proceedings "due to criminal history" and "criminal conduct[.]" Docket Number (DN) 20-2 at 2 ¶5, 3 ¶ 9, 4 ¶21.

Respondents do not dispute that Petitioner's criminal charges were dismissed in his favor. DN 17-1 (Letter from ADA of the Kings County District Attorney's Office; "the dismissal in this case is deemed terminated in favor of the accused . . . KCDA has not appealed the determination that the case was dismissed in favor of the accused"). Nor do Respondents contest the Kings County District Attorney's Office's explanation to the Judge in the dismissed criminal case that the complainant had a credibility issue. DN 5-1 at 3 (Bail Hearing Transcript; "Since that time [of setting the bail in the morning], we have been in touch with senior prosecutors in our Special Victims Bureau who will be prosecuting this case and because of new information concerning the complainant's credibility, we are withdrawing our bail request and agreeing to ROR."). Accordingly, in the absence of any counter evidence, the instant case creates a high risk of erroneous deprivation of Petitioner's liberty. Here, Petitioner is not asking this Court for an order releasing him. Rather, he is asking for the bare minimum that due process requires here—namely, an order that merely requires that Petitioner be provided a bond hearing before a neutral Immigration Judge (IJ), at which Respondents have the burden under the clear and convincing evidence standard to justify Petitioner's continued detention.

Respondents advance two points in seeking dismissal of Petitioner's Amended Petition for Writ of Habeas Corpus: (1) Petitioner, as an arriving alien, is "entitled only to the process provided by statute" under the Due Process Clause; and, (2) even if he is entitled to a bond hearing before a neutral decisionmaker under the Due Process Clause, he should not receive such a habeas relief because "resolution of his removal proceedings is readily foreseeable." Govt's Opp. at 2-3. This Court should reject both arguments and grant the Amended Petition for Writ of Habeas Corpus.

The Due Process Clause does not permit Petitioner's unreasonably prolonged detention without a bond hearing in this case. Once mandatory detention becomes unreasonably prolonged—which has occurred here—Petitioner is entitled to an individualized bond hearing where Respondents bear the burden of justifying the detention by clear and convincing evidence under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As summarized below, under the three *Mathews* factors, this Court should find that Petitioner is entitled to an individualized bond hearing.

- (1) Petitioner's liberty interest here is significant. Petitioner's detention at a penal institution has become unreasonably prolonged for more than 15 months, during which time Petitioner prevailed before the IJ on the underlying elements of his asylum claim. The Board of Immigration Appeals (BIA) has remanded his case to the IJ to (i) readdress the discretional component of asylum relief, and (ii) if asylum relief is denied, address Petitioner's claims for statutory withholding of removal and protection under the Convention Against Torture (CAT). Significantly, the scope of the remand before the IJ on Petitioner's asylum claim does *not* include whether the elements of asylum have been met. (The IJ previously concluded that the elements *had* been met, and this conclusion was not appealed.) It is not readily foreseeable when his removal proceedings will end given the unique nature of his proceedings.

- (2) Petitioner faces a high risk of erroneous deprivation of his liberty. While Respondents may have had a valid reason to re-detain him because of the criminal charges, that justification is no longer present given both the dismissal of the charges and the prosecutor's office's stated reasons for dismissal. Despite this dismissal of the criminal charges, no meaningful process exists for Petitioner to contest his continued and prolonged detention.

- (3) The Government's interest in detaining Petitioner—namely, that Petitioner may cause harm or flee during removal proceedings—has been significantly reduced in

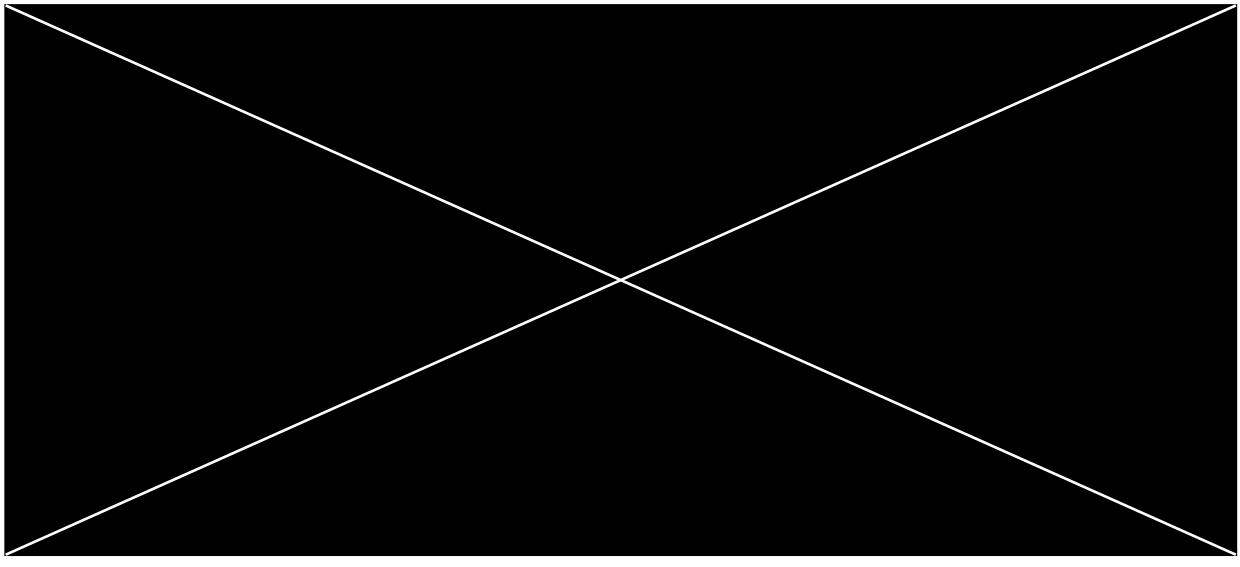
> light of the dismissal of the criminal charges. To the extent that the Government has an interest in promptly removing Petitioner from the United States, that interest is served by the removal proceeding itself. And Respondents elected not to appeal the IJ's factual and legal finding that Petitioner met his burden of satisfying the underlying elements of his asylum claim, and instead only appealed the question of whether—even if these asylum elements have been satisfied as determined by the IJ—the IJ was correct in concluding that Petitioner merits a grant of asylum as a matter of discretion. Where Petitioner has already satisfied the underlying elements of his asylum claim according to the IJ—and, thus, is likely to prevail on his withholding of removal claim if the IJ denies asylum on remand as a matter of discretion—the Government's interest is especially modest relative to Petitioner's weighty interest. This is because the elements of asylum are similar to the elements of withholding of removal relief, and where—unlike asylum relief—withholding of removal relief does not provide discretion to deny this form of relief where the elements of this claim are otherwise satisfied.

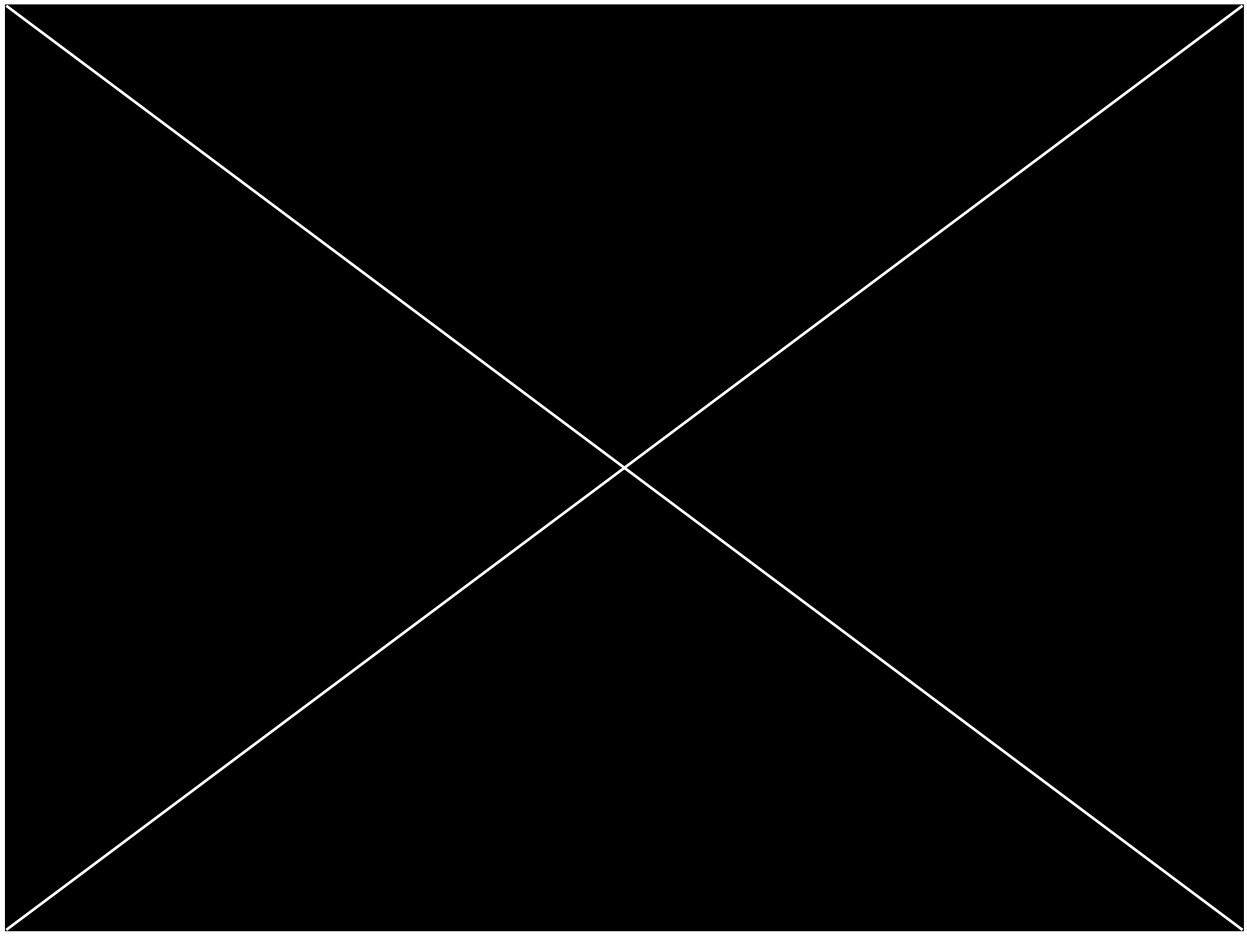
For these reasons, this Court should grant Petitioner's Amended Petition for Writ of Habeas Corpus (DN 4), grant Petitioner's cross motion for summary judgment, and deny Respondents' Motion to Dismiss or, in the Alternative, for Summary Judgment (DN 20).

FACTUAL BACKGROUND

A. Petitioner's Flight from Russia

Petitioner Oleg Kachalov is a 26-year-old asylum seeker from Russia. DN 4-2 at 1. He fled Russia because of fear that he would be harmed, tortured, and killed by [redacted]





networks." *Id.* When Mr. Kachalov "fled Russia," he "changed his phone number and social media accounts" before "moving to the United States." *Id.*

B. Petitioner's Entry to the United States and Apprehension

On or about July 19, 2021, Mr. Kachalov presented himself to the port of authority in San Ysidro, California, and applied for asylum. DN 4-2 at 4; DN 4-4 at 1. Mr. Kachalov was paroled into the United States, and he moved to the New York City area. DN 4-17 at 1. On September 30, 2022, Customs and Border Protection (CBP) placed Petitioner in removal proceedings. DN 20-2 at 2-3 ¶7. On November 19, 2022, an IJ in San Diego, California "dismissed [Petitioner's] removal proceedings without prejudice." *Id.* at 3 ¶8.

On December 2, 2022, Mr. Kachalov was arrested by a local authority in Brooklyn, New York, and charged with Rape, Forcible Sexual Abuse in the first degree, Larceny, Assault, Forcible Touch Intimate Parts, Possession of Stolen Property, Attempted Assault to Cause Physical Injury, Menacing, and Harassment. DN 4-17 at 3, 10. This criminal case was initiated based on the complaint of his ex-girlfriend. DN 4-17 at 3; DN 4-10 at 52.

On December 3, 2022, at the arraignment, Mr. Kachalov was released by the Judge of the Kings Criminal Court (120 Schermerhorn St., Brooklyn, New York). DN 4-17 at 3. This release was due to the discovery that the complainant in the criminal case had a credibility issue. DN 5-1 at 3 ("because of new information concerning the complainant's credibility, we are withdrawing our bail request and agreeing to ROR"). After his release from criminal custody, Mr. Kachalov did not receive any notice to appear for the criminal court hearing. DN 4-17 at 3; DN 4-11 at 71 ("I had no documents about that . . . . I thought the case was closed[.]"). Mr. Kachalov believed that his criminal case was closed. DN 4-11 at 71. Because Mr. Kachalov did not attend his criminal hearing based on his lack of knowledge about the hearing date and time, the Judge of the Kings Criminal Court presumably issued a bench warrant.

During Mr. Kachalov's trip to New England to visit his friend, he was stopped by police for speeding. During the background check, the police learned that he had a pending criminal case in New York. DN 4-17 at 3. Thereafter, on or about February 13, 2024, Respondents detained Mr. Kachalov under immigration law. *Id.*; DN 4-5 at 1.

On June 11, 2024, the criminal charges were dismissed. DN 4-17 at 10-11. The certificate of disposition from the Kings Criminal Court shows as "Dismissed (Speedy Trial (CPL 170.30(1)(e)), Sealed 160.50)" with a disposition date of June 11, 2024. *Id.* Under New York CPL § 160.50—which directs the record to be sealed upon "the termination of a criminal action or

proceeding against a person in favor of such person"—Mr. Kachalov's criminal case has been sealed. On March 26, 2025, Kings County District Attorney's Office wrote a letter, which explained that "the dismissal in th[at] case [wa]s deemed terminated in favor of" Petitioner. DN 17-1 at 1. The letter further explained that the Office did "not appeal[] the determination that the case was dismissed in favor of" Petitioner. *Id.*

C. Petitioner's Removal Proceedings

On or about February 13, 2024, Mr. Kachalov was detained and placed in removal proceedings. DN 4-4. On March 11, 2024, Mr. Kachalov had his first Master calendar hearing before the Boston Immigration Court. DN 4-6. During this hearing, Mr. Kachalov asked for a bond hearing, which was denied by the IJ because the IJ had no jurisdiction over a bond hearing of an arriving alien. The IJ continued the case to allow him to find counsel. *Id.* at 4.

On March 28, 2024, Mr. Kachalov had his second Master calendar hearing. DN 4-7. Although Mr. Kachalov found pro bono counsel, he requested another continuance to allow his attorney to appear in the case. *Id.* at 9. The IJ granted his request and continued the case. *Id.*

On April 15, 2024, Mr. Kachalov had his third Master calendar hearing before the Chelmsford Immigration Court.[1] DN 4-8. Mr. Kachalov's counsel appeared for the hearing and requested an extension to prepare his case. *Id.* at 12-13.

On May 2, 2024, Mr. Kachalov had his fourth Master calendar hearing. During the hearing, Mr. Kachalov admitted to the factual charges and conceded to the removability legal charge contained in the Notice to Appear (charging document). DN 4-9 at 17. After the removability finding, the IJ continued the case to July 30, 2024, at which time Mr. Kachalov would have his

[1] Chelmsford Immigration Court is a new immigration court established in Chelmsford, Massachusetts in 2024.

individual hearing on his application for asylum, statutory withholding of removal, and protection under the CAT. *Id.* at 17-18.

On July 30, 2024, Mr. Kachalov had his first individual hearing. Because the IJ could not complete the individual hearing on that day, the IJ continued the case to a future date. DN 4-10 at 58-59. On October 22, 2024, Mr. Kachalov had his second and last individual hearing. DN 4-11. At the end of the hearing, the IJ granted Mr. Kachalov's asylum. Because the IJ granted asylum, the IJ declined to address Mr. Kachalov's claims for statutory withholding of removal and protection under the CAT. DN 4-2.

On November 8, 2024, DHS timely appealed the IJ's decision granting Mr. Kachalov's asylum to the BIA. DN 4-12; DN 4-13. The scope of DHS's appeal was limited to the last component of the asylum analysis, which consists of whether—even if the asylum elements are met—the noncitizen can show that they merit a grant of asylum as a matter of discretion. DN 4-12. DHS argued that the IJ's exercise of discretion was inappropriate in light of Petitioner's dismissed criminal charges. DHS did not dispute the underlying elements of the asylum claim. *Id.*[2] DHS requested that the BIA remand the case to the IJ to address statutory withholding of removal and protection under the CAT after reversing the IJ's decision on asylum. *Id.*

[2] To qualify for asylum, an applicant must "'demonstrate a well-founded fear of persecution on one of five protected grounds'—race, religion, nationality, political opinion or membership in a particular social group." *Paiz-Morales v. Lynch*, 795 F.3d 238, 243 (1st Cir. 2015) (quoting *Singh v. Holder*, 750 F.3d 84, 86 (1st Cir. 2014)); *see also* 8 U.S.C. 1158(b)(1)(B) ("To establish [asylum], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."). However, even if an applicant meets all of the requirements to qualify as an asylee, the adjudicator may deny a grant of asylum if they feel that the applicant does not merit a favorable exercise of discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) ("an alien who satisfies the applicable standard under § 208(a) does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in his discretion, chooses to grant it"). Here, after finding that Petitioner has met his burden of establishing these elements, the IJ concluded that Petitioner "does merit a favorable exercise of discretion." DN 4-2 at 6. It was this discretionary decision of the IJ—not the IJ's decision on the underlying elements of the asylum claim—that was appealed to the BIA.

On December 26, 2024, the BIA issued a briefing schedule directing both parties (DHS and Mr. Kachalov) to submit their briefs by January 16, 2025. DN 4-14. On January 13, 2025, DHS filed its appeal brief to the BIA. DN 4-15. The scope of DHS's brief was limited to the discretionary element of asylum, as DHS explained in the notice of appeal. *Id.* On January 16, 2025, Mr. Kachalov filed his answering appeal brief to the BIA. DN 4-16.

On February 21, 2025, the BIA vacated the IJ's asylum decision and remanded the case to the IJ to readdress asylum and, if needed, statutory withholding of removal and protection under the CAT. DN 4-18. The BIA specifically concluded that "this record does not support the Immigration Judge's conclusion that a positive exercise of discretion was warranted." *Id.* The BIA added that: "Given the gravity of the charges brought against [Petitioner], a significant negative discretionary factor was introduced into the record. [Petitioner] was therefore bound to submit countervailing evidence to satisfy his burden of proving his fitness for discretionary relief." *Id.* Because "[t]he current record lacks evidence to support [Petitioner's] version of why the charges were dismissed, or to otherwise support the Immigration Judge's determination that discretionary relief was warranted," the BIA believed that "further consideration of this case is warranted." *Id.* The BIA explained that, "[o]n remand, the parties shall supplement the record with relevant evidence of positive and negative discretionary factors, including evidence relating to the 2022 charges," and that "[t]he Immigration Judge shall issue a new decision that includes factual findings and legal analysis consistent with relevant precedent to address [Petitioner's] fitness for discretionary relief, weighing both favorable and unfavorable factors." *Id.* As to asylum, withholding of removal, and CAT relief, the BIA instructed the IJ to address claims as necessary to resolve the case, and the BIA expressed no opinion on the ultimate disposition of these claims. *Id.*

On April 16, 2025, Mr. Kachalov had his first master calendar hearing after the BIA's remand. DN 20-2 at 4 ¶20. The IJ scheduled his individual hearing for June 18, 2025 at 1 pm. Ex. 26 (Notice of Hearing). The IJ indicated during the April 16, 2025 hearing that the IJ expected to consider Mr. Kachalov's claims for asylum, withholding of removal, and protection under the CAT on June 18, 2025. Mr. Kachalov indicated that he would have at least one expert witness for his immigration relief during the June 18, 2025 hearing.[3]

D. Petitioner's Immigration Detention Status

Since Respondents' re-arrest of Mr. Kachalov on or about February 13, 2024, he has been in Respondents' immigration custody under 8 U.S.C. § 1225(b)(1) "due to his criminal history." DN 20-2 at 2 ¶ 5. Respondents initially detained Mr. Kachalov at the Plymouth County House of Corrections in Plymouth, Massachusetts. On or about April 23, 2024, Respondents transferred Mr. Kachalov to the Strafford County Department of Corrections in Dover, New Hampshire.

On July 19, 2024, after the dismissal of Mr. Kachalov's criminal charges, he requested for release on bond to Respondents. DN 4-17. Respondents denied this release request. After the IJ granted Mr. Kachalov's asylum, his (previous) immigration counsel called and emailed a release request to Respondents. However, Respondents did not provide an answer to the request.

Mr. Kachalov remains in Respondents' immigration custody at the Strafford County Department of Corrections in Dover, New Hampshire. During his detention, Mr. Kachalov has participated in various programs, from successfully passing the HiSET (high school equivalency test) to bible studies. DN 12-3. Further, Mr. Kachalov has no misconduct report. *Id.* The chaplain

[3] While there is no transcript available for the April 16, 2025 hearing, Mr. Kachalov's habeas counsel also serves as his immigration counsel in this case and appeared during the April 16, 2025 hearing before the IJ. Furthermore, on remand, Petitioner will be submitting to the IJ all relevant records relating to his dismissed criminal charges that IJ previously did not have. All such records also have been filed with this Court.

of the Strafford County Department of Corrections also wrote a letter for Mr. Kachalov, stating that "[a]s subjective as [his] opinion is, Mr. Kachalov is continuing to learn, adopt and find spiritual tools to meet his goals." DN 13-1. The chaplain also explained that Mr. Kachalov was "a fine example of what one would expect of a U.S. citizen." *Id.*

STANDARD OF REVIEW

This Court provides summary judgment when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Tang v. Citizens Bank, N.A.*, 821 F.3d 206, 215 (1st Cir. 2016).[4] This Court need not consider factual disputes immaterial to the legal issues under review in ruling on a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]") (emphasis in original). When parties cross move for summary judgment, this Court "view[s] each motion separately, drawing all inferences in favor of the nonmoving party." *See Giguere v. Port Res. Inc.*, 927 F.3d 43, 47 (1st Cir. 2019) (quoting Fadili v. Deutsche Bank Nat'l Tr. Co., 772 F.3d 951, 953 (1st Cir. 2014)); *see also Mandel v. Boston Phoenix, Inc.*, 456 F.3d 198, 205 (1st Cir. 2006) ("The presence of cross-motions for summary judgment neither dilutes nor distorts this standard of review."). Thus, this Court must "determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Adria Int'l Grp., Inc. v. Ferré Dev., Inc.*, 241 F.3d 103, 107 (1st Cir. 2001).

ARGUMENT

I. PETITIONER, AS AN ARRIVING ALIEN, HAS DUE PROCESS RIGHTS TO AN

[4] Under Rules Governing Section 2254 Cases and Section 2255 Proceedings, "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." Rule 12. The Court "may apply" this rule to the instant case, which was filed under 28 U.S.C. § 2241. Rule 1(b).

INDIVIDUALIZED BOND HEARING WHEN DETENTION BECOMES UNREASONABLY PROLONGED

A. An Arriving Alien Has Due Process Rights

Petitioner, as an arriving alien, has due process rights. Respondents do not explicitly argue that Petitioner has no due process rights on the ground that he was initially detained upon presenting himself at the border in 2021 as an arriving alien (but was later redetained on February 13, 2024 after this initial detention and after the November 19, 2022 dismissal of his original removal proceedings). DN 20-1 at 9-16. Indeed, due process protects against the arbitrary detention of an "arriving" (or "excludable") noncitizen like Petitioner. *See, e.g., Rosales-Garcia v. Holland*, 322 F.3d 386, 408 (6th Cir. 2003) (en banc) (finding serious constitutional problems with indefinite detention of excludable noncitizens); *Ahad v. Lowe*, 235 F. Supp. 3d 676, 687-88 (M.D. Pa. 2017) ("rising sea of case law" "has consistently determined that detained aliens," including arriving noncitizens, "are entitled to some essential measure of due process"); *Maldonado v. Macias*, 150 F. Supp. 3d 788, 800 (W.D. Tex. 2015) ("[I]t is clear that aliens—even inadmissible aliens—are entitled to some constitutional protections, including some amount of due process.").

Zadvydas v. Davis, 533 U.S. 678 (2001), reinforces this conclusion. Seven of nine Justices in *Zadvydas* agreed that even noncitizens who had final removal orders and had therefore lost all legal right to reside in the United States had the right to "freedom from [unjustified] physical restraint." *Id.* at 690; *see also id.* at 721 (Kennedy, J., dissenting) (acknowledging that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"). If noncitizens who have no legal right to be in the United States have such due process protections, it follows that those who, like Petitioner, do have a right to pursue *bona fide* asylum claims must have at least the same rights.

B. Due Process Requires an Individualized Bond Hearing for an Arriving Alien Once the Detention Becomes Unreasonably Prolonged

Due process requires an individualized bond hearing for Petitioner—who is an arriving alien—once the detention becomes unreasonably prolonged. Respondents advance two arguments in response. First, Respondents rely on three Supreme Court cases for their argument that Petitioner is not entitled to an individualized bond hearing: *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020); and *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (1953). Second, Respondents argue that the First Circuit's decision in *Amanulla v. Nelson*, 811 F.2d 1 (1st Cir. 1987), forecloses Petitioner's request for a bond hearing. This Court should reject each of these arguments. In this case, there is a high risk of erroneous deprivation without an individualized bond hearing under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. ***Jennings*, *Thuraissigiam*, and *Mezei* do not undermine Petitioner's constitutional claim**

Jennings, *Thuraissigiam*, and *Mezei* do not undermine Petitioner's constitutional claim that he is entitled to an individualized bond hearing under the Due Process Clause.

Jennings

Jennings does nothing to undermine Petitioner's due process claims, as *Jennings* was not a constitutional ruling. Rather, *Jennings* merely held that the statute under which Petitioner is detained—8 U.S.C. § 1225(b)(1)(B)(ii)—authorizes detention without a bond hearing.[5] *Jennings*,

[5] Respondents do not explicitly explain under which provision of 8 U.S.C. § 1225(b)(1) Petitioner is currently imprisoned. *See* DN 20-2 at 2 ¶5 ("He is currently held in ICE custody pursuant to 8 U.S.C. § 1225(b)(1)."). However, in other parts of Respondents' brief suggest that he is detained pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii). *See* Govt's Opp. at 2 (citing 8 U.S.C. § 1225(b)(1)(B)(ii)). It is Petitioner's understanding that he is detained under 8 U.S.C. § 1225(b)(1)(B)(ii). That provision applies to individuals who are otherwise subject to expedited removal but establish a "credible fear of persecution" during an interview with an asylum officer. Individuals who establish a credible fear of persecution have shown that there is a "significant possibility" that they are eligible for asylum in the United States.

138 S. Ct. at 842-47. But the Supreme Court specifically declined to address whether prolonged detention without a bond hearing under this statute is constitutionally permissible and remanded that question to the Ninth Circuit. *Id.* at 851 ("[W]e do not reach [the constitutional] arguments."). Accordingly, whether due process requires individualized bond hearings for arriving aliens after detention becomes prolonged is an open question. *See De Ming Wang v. Brophy*, No. 17-CV-6263-FPG, 2019 U.S. Dist. LEXIS 1826, at *5 (W.D.N.Y. Jan. 3, 2019) ("While the Supreme Court held that aliens detained pursuant to § 1225(b) are not statutorily entitled to periodic bond hearings, it did not determine whether arriving aliens facing prolonged detention are entitled to a bond hearing as a matter of constitutional Due Process.") (citing *Jennings*, 138 S. Ct. at 851 and *Brissett v. Decker*, 324 F. Supp. 3d 444, 450 (S.D.N.Y. 2018)).

Thuarissigiam

The due process holding in *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020), also does not foreclose Petitioner's due process claim. *Thuraissigiam* addressed only the right to procedures as to *admission/removal*, not *detention*. *See Gomes v. U.S. Dep't of Homeland Sec.*, 561 F. Supp. 3d 198, 200 (D.N.H. 2020) ("petitioners are not seeking review of asylum eligibility determinations").

Thuraissigiam involved an asylum seeker who was stopped 25 yards after crossing into the United States and challenged as unconstitutional the denial of habeas corpus review of the determination that he had no credible fear of persecution and should be summarily removed. *See Thuraissigiam*, 140 S. Ct. at 1968. The Supreme Court held that Mr. Thuraissigiam had not "effected an entry" into the United States and therefore could be treated as having been stopped at

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Id. § 1225(b)(1)(B)(v). Section 1225(b)(1)(B)(ii) provides that these individuals "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing inside the United States.

the border for purposes of a due process challenge to the procedures for his removal. *Id.* at 1982–83. As such, he had no due process right to judicial review of the *admission* decision. *Id.* at 1983.

Thuraissigiam is inapposite to the facts of this case. The power to exclude and the power to imprison are distinct for purposes of the Due Process Clause. While the Government's authority to exclude is "plenary," its power to detain is not. The fact that the Government can remove those it apprehends at the border without triggering due process does not mean that it can lock them up for lengthy periods without satisfying due process. *Thuraissigiam* says nothing about the process due to an individual like Petitioner, who is challenging his incarceration without a hearing for more than 15 months where the initial reason for redetention and placing him in second removal proceedings has almost completely evaporated. *See Hassoun v. Searls*, 469 F. Supp. 3d 69, 83 n.8 (W.D.N.Y. 2020) (distinguishing *Thuraissigiam* where the petitioner was "seeking not to be allowed into this country in the first instance, *but to be freed from detention within it*"), *vacated as moot*, 976 F.3d 121 (2d Cir. 2020) (emphasis added); *A.L. v. Oddo*, 761 F. Supp. 3d 822, 2025 U.S. Dist. LEXIS 19683, at *5 (W.D. Pa. Jan. 6, 2025) ("Nowhere in [*Thuraissigiam*] did the Supreme Court suggest that arriving aliens being held under § 1225(b) may be held indefinitely and unreasonably with no due process implications, not that such aliens have no due process rights whatsoever.").

Further, unlike Mr. Thuraissigiam—who was found to lack a credible fear and was subject to an expedited removal order—a DHS asylum officer has determined that Petitioner has a *bona fide* asylum claim. As a result, he is legally entitled to remain in the country while he pursues his claim to protection through the administrative process, including any administrative and judicial review. This process can last years. In fact, Respondents allowed Petitioner to parole into the United States prior to the initiation of his first removal proceedings, which were then dismissed.

In short, *Thuraissigiam* does not question that a noncitizen like Petitioner—who has a right to remain in the United States to pursue his asylum claim—has a due process right not to be detained arbitrarily during that period.

Mezei

Shaughnessy v. United States ex rel Mezei, 345 U.S. 206 (1953), also does not support Respondents' position. *Mezei* suggests that noncitizens who have been ordered excluded do not have due process rights with respect to their admission where national security is at issue. *See id.* at 216 ("respondent's *right to enter* the United States depends on the Congressional will") (emphasis added). But it is the power to *detain*, not the power to *admit*, that is at issue here.

There, Mr. Mezei had been ordered excluded after being deemed a threat to national security. *See Mezei*, 345 U.S. at 208. By contrast, here, no one asserts that Petitioner is a threat to national security. In fact, Respondents do not dispute the nature of the dismissal in Petitioner's criminal case (i.e., dismissal in favor of Petitioner and the complainant has a credibility issue), which has undermined Respondents' justification to re-detain him. Numerous courts have distinguished *Mezei* for this reason in cases involving the detention of an arriving alien. *See Rosales-Garcia*, 322 F.3d at 413-14 (noting that *Mezei* is limited to the national security concerns); *Leke v. Hott*, 521 F. Supp. 3d 597, 604 (E.D. Va. 2021) (same); *Kydyrali v. Wolf*, 499 F. Supp. 3d 768, 772 (S.D. Cal. 2020) (same); *Lett v. Decker*, 346 F. Supp. 3d 379, 385–86 & n.11 (S.D.N.Y. 2018) (same), *vacated on the mootness ground* in 2020 U.S. App. LEXIS 42655 (2d Cir. July 30, 2020); *Kouadio v. Decker*, 352 F. Supp. 3d 235, 240 (S.D.N.Y. 2018) (same); *Clerveaux v. Searls*, 397 F. Supp. 3d 299, 315-16 (W.D.N.Y. 2019) (same).

Moreover, unlike *Mezei*—who was refused admission to the United States after his return from a trip abroad and left on Ellis Island—Petitioner has never left the country after being paroled

into the United States, where he lived for more than two and a half years before his immigration detention recommenced after the dismissal of his first removal proceedings. *Cf. Mezei*, 345 U.S. at 215-16. *See also Hernandez-Lara v. Lyons*, 10 F.4th 19, 29 (1st Cir. 2021) ("due process 'applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.") (quoting *Zadvydas*, 533 U.S. at 693). Arriving aliens, like Petitioner, are "person[s]" who cannot "be deprived of . . . liberty . . . without due process of law." U.S. Const. Amend. 5. Like all noncitizens, they are "surely . . . 'person[s]' in any ordinary sense of that term." *See Plyler v. Doe*, 457 U.S. 202, 210 (1982). The Due Process Clause protects "every one of" the noncitizens "within the jurisdiction of the United States" "from deprivation of life, liberty, or property without due process of law." *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (holding that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to" protection under the Due Process Clause). So long as they remain physically located within our borders, the Due Process Clause applies. *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting on other grounds) ("No one can claim, nor since the time of slavery has anyone to my knowledge successfully claims, that persons held within the United States are totally without constitutional protection").

2. The First Circuit's *Amanulla v. Nelson*, 811 F.2d 1 (1st Cir. 1987) does not foreclose or undermine Petitioner's unreasonably prolonged detention claim

The First Circuit's holding in *Amanulla v. Nelson*, 811 F.2d 1 (1st Cir. 1987), does not foreclose or otherwise undermine Petitioner's "unreasonably prolonged detention" claim. In affirming the denial of habeas corpus relief for excludable noncitizens, the First Circuit in *Amanulla* rejected these noncitizens' challenge to the Government's discretionary parole denial decision. *See id.* at 9 ("we conclude that there is no violation of due process inherent in the exercise

by the INS district director of his power to deny parole to the appellants pending the ultimate (seasonable) resolution of the exclusion/asylum proceedings in which they are yet involved").

The instant case is distinguishable from *Amanullah* for several reasons. First, Petitioner's argument is not that his "continuing detention violates the due process clause" and thus he should be immediately released. *Amanullah*, 811 F.2d at 8. Instead, Petitioner's core claim is that his unreasonably prolonged detention *without a bond hearing* violates the due process clause. *See* Pet's Pet. at 12-14. Second, the First Circuit noted an exception to the lawful detention of excludable (or arriving) noncitizens—namely, when "[d]etention has [] been unnecessarily prolonged." *Amanulla*, 811 F.2d at 9. This case raises this very exception. Third, unlike the conditions of confinement in *Amanullah*, Petitioner has been detained in a penal institution. *Compare Amanullah*, 811 F.2d at 4 ("Such confinement has not been unduly onerous . . . [and] the circumstances of the appellants' detention cannot be described as oppressive in any way.") *with Hernandez-Lara*, 10 F.4th at 28 ("Hernandez was incarcerated alongside criminal inmates at the Strafford County Jail for over ten months.").

Lastly, even assuming that *Amanullah* is on point (and it is not), this case predates the Supreme Court's *Zadvydas* decision, which held that (i) due process applies to all persons, and (ii) detention serves no valid purpose and violates the Due Process Clause if the Government can protect the interests of mitigating the risks of danger to the community and flight without imprisonment. *See Zadvydas*, 533 U.S. at 690; *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting on other grounds) (rejecting the government's suggestion that arriving noncitizens in the government's detention are not "persons" for due process purposes). If *Zadvydas* is not enough, the First Circuit's *Hernandez-Lara* decision further enforces the constitutional right against arbitrary detention, in which the First Circuit placed the burden of justifying an asylum seeker's

detention on Respondents. 10 F.4th at 18-29, 39.

For these reasons, *Amanullah* does not foreclose or otherwise undermine Petitioner's due process arguments.

4. Due Process requires a bond hearing for an arriving alien like Petitioner when his detention becomes unreasonably prolonged

The Court should find that due process requires an individualized bond hearing for an arriving alien like Petitioner when his detention becomes unreasonably prolonged. The Due Process Clause forbids prolonged arbitrary imprisonment. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that the [Due Process] Clause protects."). Under fundamental due process principles, detention must "bear [a] reasonable relation to the purpose for which the individual [was] committed." *Id.* at 690 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Where confinement becomes prolonged, due process requires enhanced protection to ensure that detention remains reasonable in relation to its purpose. *Id.* at 701 ("for detention to remain reasonable," greater justification is needed "as the period of . . . confinement grow"); *see also McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 249 (1972) ("If the commitment is properly regarded as a short-term confinement with a limited purpose . . . then lesser safeguards may be appropriate, but . . . the duration of the confinement must be strictly limited."). The First Circuit and other Circuit Courts have similarly affirmed that "[c]ategorical [mandatory] detention is only permitted for a short time as a constitutionally valid aspect of the deportation process." *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016), *vacated and remanded in part*, Nos. 14-1270, 14-1823, 2018 U.S. App. LEXIS 23859 (1st Cir. May 11, 2018) (internal quotation marks omitted); *Ly v. Hansen*, 351 F.3d 263, 269 (6th Cir. 2003) ("the time of incarceration is limited by constitutional considerations, and must bear a reasonable relation to removal").

This basic requirement—namely, that detention must be reasonably related to a government objective—applies regardless of whether a noncitizen was apprehended within the country or, like Petitioner, presented himself at a port of entry, passed a credible fear interview, and is pursuing immigration relief (here, asylum, statutory withholding of removal, and protection under the CAT). The First Circuit has adopted "the three-part balancing test articulated in" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) for due process analysis of the constitutionality of immigration detention. *Hernandez-Lara*, 10 F.4th at 27-28. Under *Mathews*, there are 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.'"

Id. at 28 (quoting *Mathews*, 424 U.S. at 335). Each factor favors Petitioner.

The first *Mathews* factor (the private interest) favors Petitioner. As the First Circuit explained, immigration detention in a penal institution for more than 15 months is "a substantial deprivation of liberty." *Hernandez-Lara*, 10 F.4th at 28 (noting detention "for over ten months"). The First Circuit also found that a noncitizen in "removal proceedings" with "an end point" still has "the liberty interest" even without "prolonged detention." *Id.* at 29-30. Further, Petitioner is an asylum seeker who not only passed the initial screening of the credible fear interview, but also prevailed in the underlying elements of his asylum claim before the IJ. On remand with respect to Petitioner's asylum claim, the only dispute is whether asylym is appropriate as a matter of discretion. *See Garcia v. Barr*, No. 6:19-CV-06327 EAW, 2020 U.S. Dist. LEXIS 17173, at *26 (W.D.N.Y. Feb. 3, 2020) (finding that individuals who passed the initial credible fear interview "have more due process protections than other aliens seeking admission") (citing *Augustin v. Sava*,

735 F.2d 32, 37 (2d Cir. 1984) and *Yiu Sing Chun v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983)); *Rodriguez-Figueroa v. Barr*, 442 F. Supp. 3d 549, 563 (W.D.N.Y. 2020) (same). And if this discretion is not granted as to Petitioner's asylum claim, the IJ likely will then proceed to analyze Petitioner's withholding of removal and CAT claims. It is not readily foreseeable when his removal proceedings would end given the unique nature of his proceedings. Nor does the dismissed criminal charge diminish Petitioner's private interest in which he has maintained his innocence. Here, the prosecutor's office found that the complainant had a credibility issue and ultimately dismissed the case in Petitioner's favor. *See Black v. Dir. Thomas Decker*, 103 F.4th 133, 151 (2d Cir. 2024) (in the context of 8 U.S.C. § 1226(c); "each [petitioner] had served his entire sentence. And their detentions did not arise from new or unpunished conduct"). This Court should find in favor of Petitioner for the first *Mathews* factor.

The second *Mathews* factor (the risk of an erroneous deprivation) also favors Petitioner. There is a high risk of erroneous deprivation of Petitioner's liberty, as no meaningful process exists for Petitioner to contest his continued and prolonged detention. Given Petitioner's circumstances, there is real reason to think such a process would be meaningful. The initial reason for the Respondents to re-detain the Petitioner was because of criminal charges. DN 20-2 at ¶ 5 ("Petitioner last entered ICE custody on February 13, 2024, after he was placed into proceedings due to his criminal history."). That initial reason has been significantly diminished (if not completed eliminated) in light of the dismissal of the criminal charges. This dismissal was in favor of the Petitioner due to the complainant's credibility issue in the criminal case. And the prosecutor's office decided not to appeal the dismissal in favor of the Petitioner in the criminal case. Indeed, "proving a negative (especially a lack of danger) can often be more difficult than proving a cause of concern." *Hernandez-Lara*, 10 F.4th at 31 (citing *Elkins v. United States*, 364

U.S. 206, 218 (1960)). If this is not enough, Petitioner has produced abundant evidence establishing his good moral character during his detention in Respondents' custody. Petitioner has passed the HiSET, which is equivalent to the GED, while in jail. Petitioner has participated in various programs in jail. Petitioner also received a letter of recommendation from the Chaplain of the Strafford County Department of Corrections, the penal institution where he has been detained. Accordingly, the Court should find that the second *Mathews* factor favors the Petitioner.

The third *Mathews* factor (the Government's interest) also favors Petitioner. "The prompt execution of removal orders is a legitimate governmental interest . . ., which detention may facilitate[.]" *Hernandez-Lara*, 10 F.4th at 32. "What is at stake, however, is not the power of the government to detain [Petitioner] who may cause harm or flee during removal proceedings, but rather" whether there should be a bond hearing to determine such harm or flight. *Id.* In this case, again, the dismissal of the criminal charges questions the validity of the reason for detention. And where Petitioner has already satisfied the underlying elements of his asylum claim according to the IJ—and, thus, likely is to prevail on his withholding of removal claim if the IJ denies asylum as a matter of discretion on remand—the Government's interest is especially modest relative to Petitioner's weighty interest. This is because the elements of asylum are similar to the elements of withholding of removal relief, and where—unlike asylum relief—withholding of removal relief does not provide discretion to deny this form of relief where the elements of this claim are otherwise satisfied.[6]

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[6] Again, to qualify for asylum, an applicant must "'demonstrate a well-founded fear of persecution on one of five protected grounds'—race, religion, nationality, political opinion or membership in a particular social group." *Paiz-Morales*, 795 F.3d at 243; *see also* 8 U.S.C. § 1158(b)(1)(B) ("To establish [asylum], the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.") (emphasis added). Withholding of removal relief is similar under 8 U.S.C. § 1231(b)(3)(A) in that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion,

While Respondents argue that they "ha[v]e [not] unreasonably contributed to the length of [Petitioner's] detention as his proceedings have advanced before the Immigration Court and to the BIA[,]" Respondents also do not assert that Petitioner has done so. Govt's Opp. at 18. Indeed, Petitioner has not only asserted *bona fide* asylum claim, but also previously prevailed before the IJ on the underlying elements of his asylum claim—elements which Respondents have not disputed. Again, Respondents elected not to appeal the IJ's finding that Petitioner met his burden of satisfying the underlying elements of his asylum claim, and instead only appealed the question of whether—even if these asylum elements have been satisfied as determined by the IJ—the IJ was correct in concluding that Petitioner merits a grant of asylum as a matter of discretion. And courts have found that an arriving alien's immigration detention can still be unreasonably prolonged in the absence of Respondents' intentional foot-dragging of the proceedings. *See Arechiga v. Archambeault*, No. 2:23-cv-00600-CDS-VCF, 2023 U.S. Dist. LEXIS 140947, at *9-11 (D. Nev. Aug. 11, 2023) (granting habeas petition for an arriving alien who was detained for 43 months even in the absence of the evidence that delays were caused by the government); *A.L.*, 761 F. Supp. 3d 822, 2025 U.S. Dist. LEXIS 19683, at *6 ("[d]elays while he exercises the rights afforded to him by statute cannot be held against him") (citing *German Santos v. Warden Pike County Correctional Facility*, 965 F.3d 203, 212 (2020)); *Clerveaux*, 397 F. Supp. 3d at 309 (similar); *Kydyrali*, 499 F. Supp. 3d at 774 (similar).

In fact, providing an individualized bond hearing to a person like Petitioner "may save the government, and therefore the public, from expending substantial resources on needless detention."

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nationality, membership in a particular social group, or political opinion"). With asylum, even if an applicant meets all of the requirements to qualify as an asylee, the adjudicator may deny a grant of asylum if they feel that the applicant does not merit a favorable exercise of discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. at 443 (noting that the Attorney General has broad discretion to deny asylum under § 1158(b)(1)(A)). But withholding of removal relief does not have this discretionary component. *See Romilus v. Ashcroft*, F.3d 1, 8 (1st Cir. 2004) (unlike asylum, "[w]ithholding of removal, which provides mandatory relief").

Hernandez-Lara, 10 F.4th at 33. For example, if an IJ agrees that Petitioner is not a danger to the community or a flight risk, the Government would not need to spend more resources to detain Petitioner. Conversely, if the IJ still finds that Respondents justify Petitioner's detention under either prong, Respondents would justify the societal cost of detaining Petitioner with the use of the taxpayer's money. Moreover, an IJ would be in the best position to determine the dangerous and flight risk prongs, as the IJ would also be assessing the asylum claims. Thus, the potential burden on Respondents would be minimal if the Court orders an individualized bond hearing.

Numerous courts have held that arriving aliens like Petitioner are entitled to an individualized bond hearing under the Due Process Clause when their detention becomes unreasonably prolonged. *See A.L.*, 761 F. Supp. 3d 822, 2025 U.S. Dist. LEXIS 19683, at *6 (10 months of detention); *Leke*, 521 F. Supp. 3d at 605 (24 months of detention); *Kydyrali*, 499 F. Supp. 3d at 774 (27 months of detention); *id.* at 771 n.2 (collecting cases from 9 months to 18 months); *Lett*, 346 F. Supp. 3d at 387 (10 months of detention); *Kouadio*, 352 F. Supp. 3d at 236 (34 months of detention); *Didier Kofe Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 850 (E.D. Va. 2020) (22 months of detention).

Because Petitioner favors all three *Mathews* factors, this Court should hold that an individualized bond hearing is warranted under the Due Process Clause.

II. DUE PROCESS REQUIRES THAT RESPONDENTS BEAR THE BURDEN OF PROVING THAT PETITIONER SHOULD CONTINUE TO BE DETAINED BY CLEAR AND CONVINCING EVIDENCE

Due process requires that Respondents prove that Petitioner's unreasonably prolonged detention is justified by clear and convincing evidence. Indeed, for an asylum seeker who did not have a lawful status other than the status of seeking asylum and was not in prolonged detention, the First Circuit found that the burden should be on Respondents to justify the detention. *See*

Hernandez-Lara, 10 F.4th at 41 (requiring the government "to either (1) prove by clear and convincing evidence that she poses a danger to the community or (2) prove by a preponderance of the evidence that she poses a flight risk"). In the case of prolonged detention like Petitioner's detention, this Court should adopt the clear and convincing evidence standard for both prongs. *See A.L.*, 761 F. Supp. 3d 822, 2025 U.S. Dist. LEXIS 19683, at *7 ("Respondents must justify Petitioner's continued detention by a showing of clear and convincing evidence that Petitioner would likely flee or pose a danger to the community if released"); *Kydyrali*, 499 F. Supp. 3d at 774 ("it would be inappropriate to place the burden of proof on the government at a bond hearing"); *Lett*, 346 F. Supp. 3d at 384 ("the Court finds that Petitioner's Due Process rights require that he be afforded an individualized bond hearing during which the Government must prove by clear and convincing evidence that his continued detention is justified"); *Kouadio*, 352 F. Supp. 3d at 241 ("Petitioner is entitled to a bond hearing at which the government must show, by clear and convincing evidence, that Petitioner's dangerousness or flight risk justifies his continued detention.").

CONCLUSION

For the reasons stated above, this Court should grant Petitioner's habeas corpus petition.

Date: May 16, 2025

Oleg Kachalov,

By and through her attorneys,

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