

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

OLEG KACHALOV,)
)
 Petitioner,)
)
 v.)
)
 KRISTI NOEM, Secretary of the)
 Department of Homeland Security;)
 PATRICIA H. HYDE, Acting Field Officer)
 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-00078-LM-TSM

FEDERAL RESPONDENTS’ CONSOLIDATED REPLY IN SUPPORT OF
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT,
AND RESPONSE IN OPPOSITION TO PETITIONER’S CROSS-MOTION
FOR SUMMARY JUDGMENT

Oleg Kachalov (“Petitioner”) falls within a class of aliens subject to mandatory detention through the conclusion of his removal proceedings pursuant to 8 U.S.C. § 1225(b). The mandate of § 1225 is clear, and it applies to all arriving aliens regardless of their criminal history (or lack thereof), ties to the community (or lack thereof), or other indicia that the alien either is or is not a danger or a flight risk. Petitioner does not frame his argument as an attack on the constitutionality of § 1225 itself and, indeed, the Supreme Court has long upheld the constitutionality of similar mandatory detention provisions in the Immigration and Nationality Act (INA). *See Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention under § 1226(c) though it requires no finding of dangerousness or flight risk). Though aliens subject to

mandatory detention cannot be held in custody indefinitely, *Zadvydas v. Davis*, 533 U.S. 678 (2001), there is no constitutional violation where, as here, the conclusion of the removal proceedings (and thus, the termination of detention under § 1225) is reasonably foreseeable. The Court should dismiss the Petition.

ARGUMENT

I. AN ALIEN SEEKING ADMISSION IS ONLY ENTITLED TO THE PROCESS THAT CONGRESS HAS AUTHORIZED

“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.” *Zadvydas* 533 U.S. at 693. This limitation on constitutional protection extends to aliens seeking initial entry into the United States, with respect to whom the Supreme Court has long held that “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” *Dept. of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 138 (2020) (quoting *Nishimura Ekiu*, 142 U.S. at 660); *see also Zadvydas*, 533 U.S. at 693-94.

In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Supreme Court expressly held that the continued exclusion and detention without a hearing of an arriving alien did not deprive the alien of any statutory or constitutional rights. *Mezei* involved “an alien immigrant permanently excluded from the United States on security grounds but stranded in his temporary haven on Ellis Island because other countries will not take him back.” *Id.* at 207. *Mezei* had resided without incident in the United States for twenty-five years before traveling to Romania to visit his dying mother. *Id.* at 208. When he attempted to re-enter the United States some 19 months later, immigration officials denied him entry based on unspecified security concerns. *Id.* Officials failed to remove *Mezei* because they could find no other

country willing to permit him entry. *Id.* at 209. As a result, Mezei remained detained at Ellis Island and sought relief through a series of habeas petitions. *Id.*

In rejecting the lower courts' holding that Mezei's continued, indefinite detention could only be justified by proof of his danger to the public, the Supreme Court emphasized that "an alien on the threshold of initial entry stands on a different footing" than those who have affected entry into the United States. *Mezei*, 345 U.S. at 212. In these circumstances, the Court held, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* (internal quotation marks and citations omitted). The Court has since made clear that this "basic territorial distinction" was fundamental to its rejection of Mezei's challenge to his continued detention. *Zadvydas*, 533 U.S. at 694.

Petitioner characterizes *Mezei* as "suggest[ing] that noncitizens who have been ordered excluded do not have due process rights with respect to their admission where national security is at issue." DN 24 at 16. But *Mezei*'s holding was not so narrow, and the Court has applied it outside the national security context. *See, e.g., Thuraissigiam*, 591 U.S. 103 (2020). Moreover, *Mezei* considered the due process implications related not just to the alien's exclusion, but also his prolonged detention. *Mezei*, 345 U.S. at 215. *Mezei* and subsequent cases illustrate that "[a]s to excludable aliens, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Amanullah v. Nelson*, 811 F.2d 1, 8 (1st Cir. 1987). While the admission of arriving aliens was at issue in many of the cases that embody this principle, the First Circuit has recognized that where detention "is entirely incident" to an alien's attempted entry into the United States, that, too, is "entirely within the powers expressly conferred by Congress." *Id.* at 9.

Petitioner cites *Zadvydas* as reinforcing his position that arriving aliens have at least the same due process rights as noncitizens subject to final orders of removal, who have “lost all legal right to reside in the United States.” DN 24 at 12. To the contrary, the Court in *Zadvydas* highlighted that the case concerned “aliens who were *admitted to the United States* but subsequently ordered removed,” and emphasized that “[a]liens who have *not yet gained initial admission* to this country would present a very different question.” *Zadvydas*, 533 U.S. at 682 (emphasis added). Thus, *Zadvydas* supports the principle that arriving aliens have more limited constitutional protections than those applicable to aliens who have affected entry into the United States.

II. MANDATORY DETENTION WITHOUT A BOND HEARING IN THIS CONTEXT IS AUTHORIZED BY STATUTE AND CONSTITUTIONALLY PERMISSIBLE

Petitioner in this case is detained pursuant to § 1225(b), which mandates detention of arriving aliens who are seeking asylum or placed in removal proceedings until those proceedings have concluded. See 8 U.S.C. §§ 1225(b)(1) and (b)(2). In *Jennings v. Rodriguez*, several aliens in removal proceedings argued that these provisions “do not authorize ‘prolonged’ detention in the absence of an individualized bond hearing at which the Government proves by clear and convincing evidence that [their] detention remains justified.” 583 U.S. 281, 291 (2018). The Supreme Court rejected this argument, holding that, “subject only to express exceptions, §§ 1225(b) and 1226(c) authorize detention until the end of applicable proceedings.” *Id.* at 296-97. “Once those proceedings end, detention under § 1225(b) must end as well.” *Id.* at 297. “Until that point, however, nothing in the statutory text imposes any limit on the length

of detention. And neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings.” *Id.*

While the Court in *Jennings* did not have occasion to consider whether mandatory detention without a bond hearing could give rise to a constitutional violation, it addressed that question in *Demore v. Kim*, 538 U.S. 510 (2003). In *Demore*, a lawful permanent resident was placed in removal proceedings based on a series of criminal convictions and detained pursuant to § 1226(c) pending those proceedings. *Id.* at 513. The alien filed a habeas petition challenging his mandatory detention as unconstitutional because INS had made no determination that he was a danger or a flight risk. *Id.* at 513-14. Both the district court and the Ninth Circuit agreed with the alien. *Id.* at 514-15.

The Supreme Court disagreed, affirming its “longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings.” *Demore*, 538 U.S. at 526. The Court observed that § 1226(c) was adopted “against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens.” *Id.* at 518. Congress’ investigations showed that the INS “could not even *identify* most deportable aliens, much less locate them and remove them from the country.” *Id.* Moreover, the evidence before Congress revealed that “one of the major causes of the INS’ failure to remove deportable criminal aliens was the agency’s failure to detain those aliens during their deportation proceedings.” *Id.* at 519. Thus, while the Court acknowledged that “the Fifth Amendment entitles aliens to due process of law in deportation proceedings,” it nevertheless recognized “detention during deportation proceedings as a constitutionally valid aspect of the deportation process.” *Id.* at 523. The Court likewise endorsed the authority of

immigration officials to deny bail to criminal aliens even in the absence of individualized findings as to dangerousness or flight risk. *Id.* at 524-25.

Of course, the “brief period” of detention at issue in *Demore*—six months prior to the District Court’s order granting habeas relief—would not, by today’s standards, be considered “prolonged.” *See id.* at 530-31. Indeed, it is considerably shorter than the period that Petitioner has been detained.¹ But reading the Court’s decision in *Demore* together with its decision in *Zadvydas* highlights the difference between detention that is simply prolonged and detention that has become *unreasonably* prolonged. The critical distinction is not a magic number of days or months; rather, it is the presence of an obvious and determinate end point.

III. DETENTION THAT IS PROLONGED IS NOT *PER SE* UNREASONABLE

The Supreme Court in *Zadvydas* recognized constitutional limitations on the government’s authority to detain indefinitely aliens subject to a final order of removal. *See* 533 U.S. at 689. It did not extend its holding to aliens like Petitioner who are in removal proceedings. Read in proper context, *Zadvydas* supports Respondents’ position in this case.

Zadvydas arose in the context of post-removal order detention—a vastly different procedural posture than an inadmissible alien in removal proceedings. *Zadvydas*, 533 U.S. at 697 (“[I]mportantly, post-removal-period detention, *unlike detention pending a determination of removability* or during the subsequent 90-day removal period, has no obvious termination point.”) (emphasis added). It concerned two resident aliens placed in removal proceedings due to their criminal histories and ultimately ordered removed. *Id.* at 684-85. As the Court

¹ That said, it was considerably *longer* than the typical timeline for adjudication of removal proceedings at the time. *Demore*, 538 U.S. at 529-530.

explained, after an alien has been ordered removed, “the Government ordinarily secures the alien’s removal during a subsequent 90-day statutory ‘removal period,’ during which time the alien normally is held in custody.” *Id.* at 682. When immigration officials are unable to remove the alien within the 90-day window, as was the case with the aliens in *Zadvydas*, § 1236(a)(6) authorizes continued detention. *Id.* The Court thus addressed whether the “post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien’s removal.” *Id.* Stated differently, *Zadvydas* considered whether “aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.” *Id.* at 695.

Framed thusly, the Court found “nothing in the history of [§ 1231(a)] that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention.” *Zadvydas*, 533 U.S. at 698. Accordingly, the Court “interpret[ed] the statute to avoid a serious constitutional threat,” holding that “once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.” *Id.* In reaching this conclusion, the Court reasoned that where detention’s goal (i.e., ensuring removal of the alien) is no longer practically attainable, detention “no longer bears a reasonable relation to the purpose for which the individual was committed.” *Id.* at 690 (internal quotation marks and citation omitted). It was precisely this disconnect that made the detention at issue in *Zadvydas* unreasonable. There is no such disconnect here because Petitioner’s proceedings remain pending.

In measuring the “reasonableness” of detention, the Court in *Zadvydas* did not merely count the number of days, weeks, or months in custody. The Court focused instead on

“whether the detention in question exceeds a period reasonably necessary to secure removal” and explained that reasonableness should be measured “primarily in terms of the statute’s basic purpose, namely, assuring the alien’s presence at the moment of removal.” *Zadvydas*, 533 U.S. at 699. Where removal is no longer practically attainable, detention pursuant to the post-removal-period statute has become untethered from its statutory purpose and, thus, unreasonable. *Id.* at 699-700.

Petitioner is held pursuant to a statute that mandates detention for arriving aliens through the conclusion of their asylum and/or removal proceedings. *See* 8 U.S.C. § 1225(b). “Detention during th[e]se proceedings gives immigration officials time to determine an alien’s status without running the risk of the alien’s either absconding or engaging in criminal activity before a final decision can be made.” *Jennings*, 583 U.S. at 285. Because Petitioner is still in proceedings, detention pursuant to § 1225(b) is still tied to its statutory purpose of ensuring his presence through all phases of his proceedings. Therefore, his detention remains reasonable.

Moreover, the statute authorizing Petitioner’s detention “provide[s] for detention for a specified time period.” *Id.* at 299. This “definite termination point . . . marks the end of the Government’s detention authority” under § 1225(b). *Jennings*, 583 U.S. at 304. This distinguishes Petitioner’s detention from the indefinite and potentially permanent detention that the Court found constitutionally infirm in *Zadvydas*.

This is not to say that an alien’s detention under § 1225(b) could never be deemed unreasonable so long as he is in removal proceedings. For instance, prolonged detention could become unreasonable if it were attributable to dilatory tactics or intentional foot-dragging by the government. There, the purpose of the detention is unconnected with ensuring the alien’s

presence during his removal proceedings but for punitive or other reasons. But Petitioner here alleges no such conduct by the government and nothing in the record would support any such inference. Thus, Petitioner's detention, while prolonged, is still rationally related to its statutory purpose of ensuring his presence through the conclusion of his proceedings. It is therefore reasonable.

Finally, the "definite termination point" of the Petitioner's detention under § 1225(b) is approaching rapidly, as the Immigration Court is scheduled to consider all of Petitioner's applications for relief at a hearing on June 18, 2025. If the IJ ultimately orders Petitioner removed and Petitioner becomes subject to a final order of removal, ICE's authority to detain Petitioner will shift to 8 U.S.C. § 1231, which requires detention for purpose of removal from the United States. Alternatively, if Petitioner is successful in obtaining relief from removal, he could seek parole from ICE on account of changed circumstances. In either case, Petitioner's detention pursuant to § 1225(b) will terminate with the conclusion of his proceedings, which appears imminent.

CONCLUSION

For the foregoing reasons, Petitioner's detention without a bond hearing is both authorized by statute and constitutionally permissible. As such, this Court should dismiss the Petition or, in the alternative, grant the Respondents' motion for summary judgment.

Respectfully submitted,

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