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 REPLY IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

After Petitioner Oleg Kachalov presented himself at the United States border on or about July 19, 2021, Respondents released him on parole. Docket Number (DN) 20-2 at 2 ¶7 ("United States Customs and Border Protection ('CBP') paroled the Petitioner into the United States."). While Respondents do not explain their parole determination, Respondents presumably made this determination because they were satisfied that the traditional risks justifying detention—namely, "the risk of alien's either absconding or engaging in criminal activity before a final decision is made," *see Jennings v. Rodriguez*, 583 U.S. 281, 285 (2018)[1]—were not present. After Petitioner's release, Petitioner's removal proceedings were also dismissed in November 2022.[2] DN 20-2 at 3 ¶8.

On or about February 13, 2024, Respondents redetained Petitioner because of "his criminal conduct[.]" DN 20-2 at 3 ¶9. This "criminal conduct" stemmed from a December 2, 2022 arrest for multiple charges that were subsequently dismissed on June 11, 2024. Respondents do not contest or dispute the nature of the dismissal of Petitioner's criminal charges, including the dismissal in his favor and the prosecutor's finding that the complainant had a credibility issue. Nor do Respondents argue that Petitioner's current and continued detention is to ensure the public's

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[1] *See also id.* at 288 ("applicants for admission may be temporarily released on parole 'for urgent humanitarian reasons or significant public benefit") (quoting 8 U.S.C. § 1182(d)(5)(A)).

[2] Petitioner requests that this Court not address the question of whether he is properly detained under 8 U.S.C. § 1225(b) or another statute, such as 8 U.S.C. § 1226(a), in light of this dismissal of his prior removal proceedings. For the purpose of this habeas petition, Petitioner does not dispute that Petitioner is detained under 8 U.S.C. § 1225(b)(2)(A) in this case but without conceding that that will be Petitioner's counsel's position in future cases. *See, e.g., Rivera-Medrano v. Wolf*, 2020 DNH 055, 2020 U.S. Dist. LEXIS 59609, at *7-8 (D.N.H. Apr. 4, 2020) ("it is unnecessary to decide which statute governs Rivera-Medrano's detention" since "[e]ven if § 1231(a) applies, . . . Rivera-Medrano would be entitled to a bond hearing under the Due Process Clause").

Separately, Petitioner previously noted that it was his "understanding that he [wa]s detained under 8 U.S.C. § 1225(b)(1)(B)(ii)." DN 24 at 12 n.5. However, after further careful examination of the facts and the statute, it is unclear whether 8 U.S.C. § 1225(b)(1)(B)(ii) applies to Petitioner's case because Petitioner never received a credible fear of persecution interview by an asylum officer. DN 20-2 at 2-3 ¶¶7-8. Thus, assuming that 8 U.S.C. § 1225(b) is applicable to Petitioner's detention, he is likely detained under 8 U.S.C. § 1225(b)(2)(A).

safety. Instead, Respondents justify Petitioner's continued detention by focusing on flight risk, arguing that Petitioner's "detention pursuant to § 1225(b) is still tied to its statutory purpose of ensuring his presence through all phases of his proceedings." DN 26 at 8. However, Respondents have presented no tangible evidence that Petitioner is a flight risk. In addition, Respondents argue that Petitioner's detention will become unreasonably prolonged under the Due Process Clause only if Respondents use "dilatory tactics or intentional foot-dragging by the government." *Id.* This, too, is incorrect. The Due Process Clause provides more protection than Respondents' narrow interpretation.

For these reasons, this Court should grant Petitioner's habeas corpus petition and order a bond hearing at which Respondents must justify continued detention by clear and convincing evidence.[3]

ARGUMENT

I. PETITIONER HAS DUE PROCESS RIGHTS TO AN INDIVIDUALIZED BOND HEARING BECAUSE HIS DETENTION HAS BECOME UNREASONABLY PROLONGED

Petitioner has a due process right to an individualized bond hearing because his detention has become unreasonably prolonged.

Respondents do not argue that Petitioner's detention can never become unreasonably prolonged. DN 26 at 8 ("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."). But they do argue that detention under 8 U.S.C. § 1225(b) for those like Petitioner who are subject to a pre-final removal

[3] Petitioner notes that Respondents recently terminated the parole status of approximately 500,000 Cuban, Haitian, Nicaragua, and Venezuelan arriving aliens, like Petitioner, who have been paroled into the United States. *See Noem v. Doe*, No.24A1079, 2025 U.S. LEXIS 2070 (May 30, 2025). While each case is unique and different for due process purposes, this Court's decision will likely impact all detained arriving aliens who were previously paroled into the United States but rearrested and remain detained by Respondents in New Hampshire. *See, e.g., Fuenmayor Pacheco v. FCI Berlin, Warden et al*, No. 1:25-cv-200-LM-TSM (D.N.H. May 27, 2025).

order can only become unreasonably prolonged "if it were attributable to dilatory tactics or intentional foot-dragging by the government." DN 26-8. According to Respondents, this is because such dilatory tactics or intentional foot-dragging by the government would render "the purpose of the detention [] unconnected with ensuring the alien's presence during his removal proceedings but for punitive or other reasons." DN 26-8. Respondents are incorrect, as the Due Process Clause provides more protection than Respondents' narrow interpretation. Contrary to Respondents' view, the question of whether Respondents delayed the proceedings is only one non-exhaustive and non-dispositive factor of the due process analysis in determining whether detention has become unreasonably prolonged.

Beyond (incorrectly) arguing that the dispositive question is whether the Government delayed the underlying proceedings, Respondents do not meaningfully engage in, or otherwise respond to, Petitioner's argument under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Compare* DN 24 at 2-3, 19-23 *with* DN 26 at 6-9. The individualized assessment required under *Matthews* goes beyond the question of who delayed the removal proceedings. This is especially the case because of the breadth and scope of detention under 8 U.S.C. § 1225(b). As noted by the United States Supreme Court and the First Circuit, detention provisions that do "not apply narrowly to a small segment of particularly dangerous criminals, say, suspected terrorists, but broadly to aliens" for "various reasons" raise constitutional concerns. *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001); *Hernandez-Lara v. Lyons*, 10 F.4th 19, 36 (1st Cir. 2021) ("Unlike [8 U.S.C. §] 1226(c), [8 U.S.C. §] 1226(a) applies to a wide swath of noncitizens, many of whom, like Hernandez, have no criminal record at all."). Indeed, "under § 1225(b)(2)(A), the Government detains all arriving aliens pending removal proceedings, without regard to their danger to society or lack thereof or to

the manner in which aliens were seeking to enter the United States—whether legal or illegal." *Maldonado v. Macias*, 150 F. Supp. 3d 788, 806 (W.D. Tex. 2015).

Due to the overbreadth of detention under 8 U.S.C. § 1225(b), this Court should analyze each case using the three-part test established in *Mathews*, taking into account the unique facts of each case. This overbreadth is also another reason why this Court should not rely on the United States Supreme Court's holding in *Demore v. Kim*, 538 U.S. 510 (2003) to endorse Respondents' position that detention categorically is never unreasonably prolonged absent the Government engaging in dilatory tactics. *See Hernandez-Lara*, 10 F.4th at 36; *Maldonado*, 150 F. Supp. 3d at 806 ("the reasoning of courts that have read *Zadvydas* and *Demore* together to apply reasonable time limitations to § 1226(c) detention applies even more clearly to § 1225(b)(2)(A) detention, because—unlike § 1226(c) detention which applies only to criminal aliens—detention pursuant to § 1225(b)(2)(A) applies to both criminal and non-criminal aliens.").

Accordingly, courts have rejected Respondents' position that detention can never become unreasonably prolonged absent the Government's delay of the underlying removal proceedings. *See* DN 24 at 22 (collecting arriving alien cases where courts held that exercising asylum seekers' statutory rights cannot be held against them for the due process analysis). *See also G.P. v. Garland*, 2024 DNH 001, 2024 U.S. Dist. LEXIS 14841, at *13 (D.N.H. Jan. 29, 2024) ("when a court considers a due process claim, it may tailor relief to the specific problem that gives rise to the due process violation"), *aff'd on other grounds by G.P. v. Garland*, 103 F.4th 898 (1st Cir. 2024). Indeed, in different contexts, courts have also found that an immigration detention can become unreasonably prolonged without any delay from the government. *See Reid v. Donelan*, 819 F.3d 486, 499 (1st Cir. 2016) ("The government did not 'delay' proceedings, and yet the detention still reached an unreasonable duration."), *opinion withdrawn by Reid v. Donelan*, 2018 U.S. App.

LEXIS 23859 (1st Cir. May 11, 2018); *German Santos v. Warden Pike Cty. Corr. Facility*, 965 F.3d 203, 211 (3d Cir. 2020) ("we do not hold an alien's good-faith challenge to his removal against him, even if his appeals or applications for relief have drawn out the proceedings."); *Smorodska v. U.S. Imm. And Customs Enf.*, Civil No. 20-cv-446-JL, at * (D.N.H. May 14, 2020) ("the court is disinclined to characterize an appeal to the BIA as a dilatory tactic" because "Courts do not consider bona fide immigration proceedings, initiated by the alien, as grounds to deny a bond hearing") (citing and quoting *Rivera-Medrano v. Wolf*, No. 20-cv-194-JD, 2020 U.S. Dist. 59609, at *10 (D.N.H. Apr. 6, 2020), *vacated by Rivera-Medrano v. Mayorkas*, No. 20-1573, 2023 U.S. App. LEXIS 15551 (1st Cir. June 14, 2023) (vacatur by a joint motion)). This is because "[d]oing so, and counting this extra time as reasonable, would 'effectively punish [an alien] for pursuing applicable legal remedies." *German Santos*, 965 F.3d at 211 (modification in original).

Finally, Respondents contend that "the 'definite termination point' of the Petitioner's detention under 8 U.S.C. § 1225(b) is approaching rapidly[.]" DN 26 at 9. This is not the case. Respondents suggest that, "[i]f the IJ ultimately orders Petitioner removed and Petitioner becomes subject to a final order of removal, ICE's authority to detain [him] will shift to 8 U.S.C. § 1231, which requires detention for purpose of removal from the United States." DN 26 at 9. This is not true. Petitioner will appeal any denial by the IJ of Petitioner's claim for asylum, statutory withholding of removal, and protection under the Convention Against Torture (CAT) to the Board of Immigration Appeals (BIA), and thus, the statutory basis for continued detention would not shift after the IJ's decision. Further, Respondents note that "if Petitioner is successful in obtaining relief from removal, he could seek parole from ICE on account of changed circumstances." DN 26 at 9. However, Respondents do not say when and whether Respondents might change their position on Petitioner's detention. If Respondents are suggesting that Petitioner could seek parole

from ICE if he successfully obtains relief before the IJ, there is little reason to believe that such a parole request would be meaningfully considered, where Respondents earlier rejected a parole request when Petitioner previously prevailed before the IJ. *See* DN 4 at 9 ¶41 ("After the IJ granted Mr. Kachalov's asylum, his immigration counsel called and emailed a release request to Respondents (DHS and ICE). However, Respondents did not provide an answer to the request."). On the other hand, if Respondents are suggesting that Petitioner could seek parole from ICE if he successfully obtains relief before the BIA, this appeal process will further increase the period of detention. Thus, Respondents' point that Petitioner's conclusion of his removal proceedings "appear imminent"—at which time his detention pursuant to Section 1225(b) will terminate—is incorrect. Of course, Respondents may elect not to appeal the IJ's decision if the IJ grants Petitioner's asylum relief. However, Respondents do not share their position in their brief if this event occurs.

CONCLUSION

The Due Process Clause does not permit Petitioner's unreasonably prolonged detention without a bond hearing in this case. All three factors under *Mathews* favor Petitioner's habeas corpus claim. *See* DN 24 at 2-3. The Court should grant Petitioner's Amended Petition for Writ of Habeas Corpus (DN 4) and grant Petitioner's cross motion for summary judgment (DN 23).[4]

[4] Petitioner has an individual hearing for his asylum, statutory withholding of removal, and CAT protection on June 18, 2025. Petitioner submitted all evidence including the evidence submitted in this habeas case on June 10, 2025. Petitioner will notify the Court about the outcome of his June 18, 2025 hearing after the hearing.

Date: June 11, 2025

Respectfully submitted,

Oleg Kachalov

By and through her attorneys,

/s/ SangYeob Kim
Gilles R. Bissonnette (NH Bar: 265393)
SangYeob Kim (NH Bar: 266657)
Chelsea Eddy (NH Bar: 276248)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
Phone: 603.333.2081
gilles@aclu-nh.org
sangyeob@aclu-nh.org
chelsea@aclu-nh.org