IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ERIC GONZALEZ ORDONEZ, *Petitioner*, v. PAUL PERRY, *et al.*, *Respondents*.	Case No 1:25-cv-00662

PETITIONER'S REPLY TO GOVERNMENT'S RESPONSE TO HABEAS PETITION

In this Court, it is "well-established that [non-citizens] detained under § 1226 must receive bond hearings if their lengthy detentions violate Due Process." *See Bah v Barr*, 409 F Supp 3d 464, 467 (E D. Va. 2019) Distracting from this Court's well-established precedent, the Government primarily relies on two Supreme Court cases – *Demore v. Kim*, 538 U S 510 (2003) and *Mathews v. Eldridge*, 424 U.S 319 (1976). But neither of these cases is inconsistent with the oft-utilized *Portillo* factors, which this Court established in 2018 and should apply here. Most, if not all, of the *Portillo* factors favor Mr Gonzalez Ordonez and warrant a constitutionally adequate bond hearing At the bond hearing, Mr. Gonzalez Ordonez respectfully requests that this Court order the Government to bear the burden of proof to justify his detention by clear and convincing evidence and that the adjudicator consider his ability to pay and alternatives to detention Additionally, Mr Gonzalez Ordonez respectfully asks that this Court conduct the bond hearing to ensure that his constitutional rights are adequately and expeditiously protected.

ARGUMENT

I. Continued Detention Without an Individualized Bond Hearing Is Not a Constitutional Means of Carrying Out the Purpose of 8 U.S.C. § 1226(c).

The Government asserts that 8 U.S.C. § 1226(c) serves the twin purposes of protecting the community and ensuring that noncitizens appear for all scheduled hearings, and if necessary, for their removal. Resp. Br. at 11-12. But to achieve these goals, the Government need not keep a person locked up for an inordinately long period of time without so much as an individualized assessment of whether that person indeed presents a flight risk or a danger to the community. This Court should declare that Mr. Gonzalez Ordonez's prolonged detention without an individualized bond hearing conducted by a neutral adjudicator violates the Fifth Amendment's Due Process Clause and order a bond hearing with the burden on the Government to show by clear and convincing evidence that Mr. Gonzalez Ordonez is a flight risk or a danger to the community.

A. This Court should analyze Mr. Gonzalez Ordonez due process claim using the *Portillo* Test.

For nearly a decade, this Court's consistent law and practice have been to evaluate the individual circumstances of noncitizens subject to prolonged detention without bond to determine whether due process entitles them to a court-ordered bond hearing. *See, e.g., Abreu v. Crawford*, No. 1:24-cv-01782, 2025 WL 51475 (E.D. Va. Jan. 8, 2025); *Santos Garcia v. Garland*, No. 1:21-cv-742, 2022 WL 989019 (E.D. Va. Mar. 31, 2022); *Martinez v. Hott*, 527 F. Supp. 3d 824 (E.D. Va. 2021); *Deng v. Crawford*, No. 2:20-cv-199, 2020 WL 6387326 (E.D. Va. Oct. 30, 2020); *Songlin v. Crawford*, No. 3:19-cv-895, 2020 WL 5240580 (E.D. Va. Sep. 2, 2020), *Gutierrez v. Hott*, 475 F. Supp. 3d at 496-97 (E.D. Va. 2020); *Urbina v. Barr*, 1:20-cv-325, 2020 WL 3002344 (E.D. Va. June 4, 2020); *Palomares-Gastelum v. Barr, et al.*, No. 1:19-cv-1428, Order (Dkt. No. 28) (E.D. Va. Feb. 19, 2020), *Bah*, 409 F. Supp. 3d at 467; *Portillo v. Hott*, 322 F. Supp. 3d 698

(E.D Va 2018); *Mauricio-Vasquez v. Crawford*, No. 1:16-cv-01422, 2017 WL 1476349, at *1 (E D Va Apr 24, 2017); *Haughton v Crawford*, No 1:16-cv-634, 2016 WL 5899285, at *10 (E.D. Va. Oct. 7, 2016)

The Government primarily relies on *Demore* for the proposition that no one detained under § 1226(c) is entitled to receive a bond hearing, no matter how long their detention lasts This is ironic, given that Justice Kennedy's concurrence in *Demore* was the origin of the law on which Petitioner relies The *Demore* court rejected a *facial* challenge to 8 U.S.C. § 1226(c) but expressly left open *as-applied* challenges such as this one. 538 U.S. at 532 ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident [noncitizen] such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (Kennedy, J , concurring).

This Court has repeatedly noted this important distinction between facial challenges and as-applied challenges, as have circuit courts *See, e.g Bah*, 409 F Supp 3d at 470 (noting that *Demore* "recognized that the prolonged detention of [noncitizens] absent justification could violate Due Process"), *Black v. Decker*, 103 F.4th 133, 142 (2d Cir. 2024) ("Critically, however, *Demore* and *Jennings* leave open the question whether prolonged detention under section 1226(c) without a bond hearing will *at some point* violate an individual detainee's due process rights ") (emphasis in original). And this distinction gave rise to this Court's creation of the *Portillo* factors, *see* 322 F. Supp. 3d at 706, which has been nearly universally applied thereafter *See, e g , Martinez*, 527 F. Supp. 3d at 836.

The Government argues that because removal proceedings have a definite termination point, "mandatory detention under § 1226(c) is constitutional so long as it continues to serve its

purpose of preventing risk of flight or dangerousness..." Resp. Br. at 12. But this is the whole point of the *Portillo* analysis: to ensure, on a case-by-case basis, that a neutral adjudicator evaluates whether a noncitizen is a flight risk or danger. To the extent the Government means that § 1226(c) detention is constitutional so long as ICE *alleges* someone is a flight risk or a danger, this is nonsensical Most noncitizens subject to mandatory detention have no statutory or regulatory entitlement to any individualized review of their custody whatsoever, not even an internal review by ICE. This standard would lead to nearly every noncitizen remaining detained until the end of their proceedings without the opportunity for an as-applied challenge. *See Santos Garcia*, 2022 WL 989019, at *5 (noting that under a "'purpose-based standard' derived from *Demore*. . it is difficult to imagine a mandatory detention scenario that would fail this purposive standard . . . [and] it is also difficult to square this position with the language of *Demore* itself") ICE may not deprive noncitizens of liberty indefinitely during their removal proceedings with a mere allegation of dangerousness or flight risk. "At some point," prolonged detention under § 1226(c) will violate an individual detainee's due process rights *Black*, 103 F.4th at 142 (citing *Demore* and *Jennings*)

The Government proposes, with little explanation, that the Court should apply the three-factor test from *Mathews v. Eldridge*, 424 U S. 319 (1976), instead of *Portillo*. Resp. Br. at 13. But for over a decade, this Court has used the *Portillo* factors, which are derived from *Mathews* and its commitment to an individualized due process analysis. *See Portillo*, 322 F. Supp. 3d at 705 (citing *Mathews* and observing that its analysis is "consistent with how the Due Process Clause has traditionally been understood").

B. Under the Five-Factor *Portillo* Test, Mr. Gonzalez Ordonez is Entitled to a Bond Hearing.

Though rehashing the entirety of the *Portillo* factors is not necessary, the Respondents present a few particularly flawed points worth rebutting here.

First, the Respondents argue that length of detention should not be deemed the most important of the *Portillo* factors. Resp. Br at 20. In so arguing, the Respondents point only to *Mathews* and argue that the public interest should be weighed equally. *Id.* But *Mathews* never said that its three factors always must be weighed equally. Instead, the *Mathews* Court was careful to emphasize that "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Moreover, in discussing the public interest, the *Mathews* Court focused on the financial cost to the taxpayers of additional payment of benefits pending an administrative decision. *Id.* at 347-48. In the context of continued detention, the taxpayers bear the cost of the prolonged detention that Mr. Gonzalez Ordonez is currently challenging. Immigration detention is quite expensive to taxpayers. Congress appropriated $3.4 billion in taxpayer dollars for fiscal year 2024 for ICE detention, and ICE detention costs on average $152 per day per detainee.[1] As of the date of this filing, Mr. Gonzalez Ordonez has been detained by ICE for 513 days. Pet. Br. at 5, 7. Using only the published average daily cost of ICE detention, ICE has likely spent over $77,000 on Mr. Gonzalez Ordonez's detention, a figure that does not account for the increased medical services that he requires. Accordingly, the public interest weighs in favor of his freedom.

With respect to the second factor, the Respondents urge this Court to drastically over-emphasize the weight of Mr. Gonzalez Ordonez's single misdemeanor conviction by considering the entirety of Mr. Gonzalez Ordonez's sentence of 12 months, even though all but 60 days were suspended. In *Portillo*, this Court was clear that the relevant time frame is "time served." *Portillo,*

[1] U.S. Immigration and Customs Enforcement, *Alternatives to Detention,* https://www.ice.gov/features/atd

322 F. Supp. 3d at 708 In fact, in *Portillo*, the noncitizen also had had the majority of his sentence suspended. This Court considered only the amount of time he actually served in its comparison with the length of ICE detention. *Id.* The Court should do the same here and consequently find that this factor strongly weighs in Mr. Gonzalez Ordonez's favor.

Finally, the fifth *Portillo* factor is not neutral as the Respondents contend. This Court has explicitly found that the fifth factor weighs "strongly in petitioner's favor" when the government appeals to the BIA because "given the favorable disposition at the IJ level, petitioner has a much stronger argument that a final removal order is unlikely to be forthcoming than does the average [noncitizen] detained under § 1226(c)." *Haughton*, 2016 WL 5899285 at *10. In such cases, "the foreseeability of proceedings ending adversely is relatively low and the government's interest in mandatory detention is diminished." *Id.* Accordingly, the fifth factor weighs strongly in favor of Mr. Gonzalez Ordonez.

C. Mr. Gonzalez Ordonez is Entitled to an Individualized Bond Hearing Even if this Court applies the *Mathews* Test.

Under the three-factor *Mathews* test, a court must consider: (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 requirements would entail. 424 U.S. at 335.

This Court recognizes a noncitizen's liberty interest under the first *Mathews* factor as "undoubtedly the most significant liberty interest there is. . [f]reedom 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." *Castaneda v Perry*, No. 1:21-cv-1407, 2022 WL 4624832,

at *5 (E D. Va. Sept 30, 2022) (internal citations and quotation marks omitted), *aff'd*, 95 F.4th 750 (4th Cir 2024), *see also Cardona Tejada v. Crawford*, No 1:21-cv-314, 2021 WL 2909587, at *3 (E D Va. May 19, 2021).

Yet the Government attempts to downplay Mr. Gonzalez Ordonez's liberty interest by citing an old case in which this Court determined that a noncitizen who had unlawfully entered did had a liberty interest falling somewhere between that of a person outside the United States and that of a person who had been granted lawful permanent resident status Resp. Br. at 16. *Wilson v. Zeithern*, 265 F. Supp 2d 628, 634 (E.D. Va. 2003). This Court then determined that Mr Wilson's detention did not violate due process because his four-month-long post-final order detention was not unreasonably prolonged and his removal was imminent. *Id.* at 634-35.

In addition to *Wilson* predating *Portillo* by 15 years, it is simply inapt Unlike Mr. Wilson, Mr Gonzalez Ordonez has been detained for 16 months and there is no known end date for his detention. Indeed, the Government concedes that it cannot even provide average processing times. Resp. Br. at 12. Unlike in *Wilson*, Mr. Gonzalez Ordonez has a very strong interest in freedom from prolonged imprisonment This first factor thus unequivocally favors Mr. Gonzalez Ordonez.

Regarding the second factor, the risk of erroneous deprivation is very high where a person is never afforded the opportunity for any individualized assessment of flight risk and dangerousness Mr. Gonzalez Ordones has never had a bond hearing. Indeed, he has never had the opportunity to have a neutral arbiter evaluate whether he is a flight risk or a danger. Respondents' contention is that Mr. Gonzalez Ordonez has no right to release from detention but for a narrow exception for witness protection that is still cabined by DHS' discretionary authority to deny even in that circumstance. *See* Resp Br. at 18. But this "statutory opportunity for parole . . has high restrictive criteria and limited transparency, is subject to the unreviewable discretion of the

Attorney General, and has no opportunity for an actual hearing before a neutral decisionmaker." *Mbalivoto v. Holt*, 527 F Supp 3d 838, 848-49 (E.D. Va 2020) (concluding that the statutory parole remedy was constitutionally inadequate).

Respondents note that Mr. Gonzalez Ordonez recently had a "custody review." But this custody review was not conducted by a neutral arbiter—it was conducted by the very agency now arguing for his continued detention Moreover, the primary basis for this custody decision appears to be that Mr. Gonzalez Ordonez is subject to mandatory detention, the very reason that he filed the instant habeas petition *See* Dkt. No. 9-1 at 189 This procedure was constitutionally insufficient, and it does nothing to mitigate the due process problem posed by Mr. Gonzalez Ordonez's prolonged detention. This second factor accordingly favors Mr. Gonzalez Ordonez.

The procedure that Mr Gonzalez Ordonez has requested — an individualized bond hearing with the burden of proof on the Government, *see* Pet Br. at 2—is not administratively or fiscally burdensome to the Government Nor does an individualized bond hearing insert unnecessary "rigidity" that somehow flouts the Government's sovereign prerogative to conduct foreign relations and carry out wars *See* Resp. Br. at 18. Indeed, it hardly undermines the Government's interests in protecting the community and ensuring that noncitizens appear for all scheduled hearings, and if necessary, for their removal "If Respondents are as confident as they are now that Petitioner does not have a compelling case for release on bond, then the administrative burden of conducting a bond hearing is minimal and a hearing should be welcomed by Respondents to confirm their view" *Cardona Tejada v. Crawford*, 2021 WL 2909587, at *4. To the extent that Respondents truly believe that Mr. Gonzalez Ordonez's criminal history compels them to continue to detain him, they would have the opportunity to present that argument at a bond hearing. *Id.* The

final *Mathews* factor therefore favors Mr. Gonzalez Ordonez. *See Santos Garcia*, 2022 WL 989019, at *7-8 (granting habeas petition after applying both the *Portillo* and *Mathews* tests)

II. At the Individualized Bond Hearing, the Government must Bear the Burden of Proof and the Adjudicator Must Consider Alternatives to Detention.

As previously explained, to place the burden on Mr. Gonzalez Ordonez at a bond hearing meant to remedy the violation of his constitutional rights would be "inconsistent with having found his continued detention unconstitutional." *Jarpa v. Mumford*, 211 F Supp. 3d 706, 722 (D. Md. 2016); *see also Zadvydas*, 533 U.S at 692 (finding post-order immigration custody review procedures deficient in part because they placed burden on detained noncitizen). Requiring him to prove "that he is neither a flight risk nor a danger would also logically mean that he is *presumed* validly and constitutionally detained unless he demonstrates otherwise." *Jarpa*, 211 F Supp. 3d at 722 (emphasis in the original). This Court should accordingly assign the burden of proof to the Government, as this Court did in *Portillo* and again recently in *Rodriguez v Perry*, 1:24-cv-651, at *7 (E D. Va. Sept. 3, 2024)

Additionally, Due Process requires that the adjudicator consider Mr Gonzalez Ordonez's ability to pay bond and alternatives to detention in addition to, or in lieu of, monetary bond. *See Bah*, 409 F. Supp 3d at 472 (ordering bond hearing at which government "must prove . . . [that] no condition or combination of conditions, including electronic monitoring, will reasonably assure the appearance of the person as required and the safety of any other person"). When the Government fails to either consider a noncitizen's financial circumstances or consider alternatives to detention, it potentially justifies impermissible detention based solely on the individual's indigence, rather than the two legitimate purposes of detention: mitigating danger to the community and flight risk

III. The Individualized Bond Hearing Should Be Conducted by this Court.

Respondents wrongly contend that only Immigration Judges (IJs) have the authority to conduct a bond hearing. While 8 U.S.C. § 1226 certainly gives IJs the power to conduct bond hearings in the immigration context, no federal statute deprives this court of jurisdiction to conduct bond hearings as a habeas remedy Indeed, 28 U.S.C. § 2243 broadly authorizes habeas courts to order relief "as law and justice require." Other courts have recognized that district courts have "concurrent jurisdiction and responsibilities" in bond matters *Deptula v Lynch*, No 1:15-cv-2228, 2016 WL 98152, at *5 (M.D. Pa. Jan. 8, 2016). This Court similarly should conclude that it can conduct the bond hearing in the first instance

Respondents also wrongly allege that conducting a bond hearing would waste this Court's judicial resources As aptly explained in *Alli v Decker*, a bond hearing conducted by the habeas court actually conserves judicial resources by preventing the need for repetitive habeas actions 644 F. Supp 2d 535, 542 (M.D Pa. 2009), *rev'd in part, vacated in part on other grounds*, 650 F.3d 1007 (3d Cir 2011) (explaining that if the agency denies bond, the only recourse for a noncitizen dissatisfied with the outcome is to file another habeas action) The Respondents' contention is further belied by recent cases in which noncitizens had to return to the district court with a motion to enforce because the IJ failed to comply with the court order *See, e g, Abreu v. Crawford*, 1·24-cv-1782, Dkt No. 31 (E.D. Va. Feb 14, 2025) (granting a Motion to Enforce after IJ failed to comply with the district court's order to hold the Government to its burden) The court would have spent less time and resources had it simply done the hearing itself. More importantly, the back and forth in these cases simply prolongs the noncitizen's detention *See, e g , Alli*, 644 F. Supp. 2d at 542.

CONCLUSION

For the foregoing reasons, the Court should order an individualized bond hearing with the burden on the government to show by clear and convincing evidence that Mr Gonzalez Ordonez is either a flight risk or a danger to the community. During that bond hearing, the adjudicator should consider Mr. Gonzalez Ordonez's ability to pay and alternatives to detention. Mr. Gonzalez Ordonez asks that this Court conduct the bond hearing In the alternative, this Court should order that an Immigration Judge promptly conduct such a bond hearing

Dated: May 9, 2025

Respectfully submitted,

/s/ Adina Appelbaum

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CERTIFICATE OF SERVICE

I, undersigned counsel, hereby certify that on this date, I filed this Petitioner's Reply to Government Response to Habeas Petition and any attachments using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Dated May 9, 2025

Respectfully submitted,

/s/ Adina Appelbaum