IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JORGE ARMANDO OLAYA RODRIGUEZ,

Petitioner,

v.

PAMELA BONDI, *et al.*

Respondents

Case No. 1:25-cv-791 (AJT/WBP)

FEDERAL RESPONDENTS' RESPONSE IN OPPOSITION TO THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

INTRODUCTION

Petitioner Jorge Armando Olaya Rodriguez, a native and citizen of Colombia, challenges the lawfulness of his *two (2)-month detention* as well as United States Immigration and Customs Enforcement's ("ICE's") established authority to civilly detain him pending proceedings to remove him from the United States. On or about April 7, 2023, Petitioner entered the United States without inspection and was placed in expedited removal proceedings pursuant to 8 U.S.C. § 1225(b)(1). After establishing a credible fear if he were returned to Colombia, Petitioner was placed in removal proceedings to have his asylum application heard in front of an immigration judge ("IJ") At the discretion of the Secretary of Homeland Security (hereinafter, the "Secretary"), Petitioner was paroled out of ICE custody, *for a one-year period*, an important fact Petitioner avoids in his petition After his parole expired, ICE re-detained and placed Petitioner into custody in March 2025, and he remains detained pursuant to 8 U.S.C. § 1225(b). Despite this clear statutory authority, Petitioner nonetheless asserts that his detention for just under *two (2) months* is illegal and that he should be immediately released, or at least given a specialized bond hearing, not required by any statute or regulation, that is procedurally stacked in favor of release. Petitioner also claims that such mandatory detention violates both the Immigration and Nationality Act ("INA") and Administrative Procedure Act ("APA").

Petitioner's challenge fails on several fronts. *First*, as an arriving alien, his due process rights are co-extensive with applicable statutory procedures—as the Supreme Court has uniformly held for more than a century—and his detention complies with those statutes. *Second*, even if Petitioner had some extra-statutory due process protections, the relevant test does not require the relief he seeks. *Third*, there is no warrant for his immediate release or a specialized bond hearing—should the Court conclude that due process requires relief in this case, the only appropriate remedy would be a bond hearing under usual procedures And *lastly*, because civil claims are not recognizable in habeas proceedings, Petitioner cannot bring forth his claims under the INA and APA.

Therefore, Federal Respondents respectfully request this Court deny the Petition for a Writ of Habeas Corpus.

BACKGROUND

A. Statutory and Regulatory Framework

The statutory authority for detaining an alien during and after removal proceedings has been the subject of extensive judicial discussion, especially in recent years. *See generally Jennings v. Rodriguez*, 138 S. Ct. 830, 837-38 (2018). Stated briefly, 8 U.S.C. § 1225 governs the Department of Homeland Security's ("DHS's") authority[1] to detain an alien during the pendency of administrative removal proceedings, also known as "expedited removal proceedings."

"The power to admit or exclude aliens is a sovereign prerogative." *DHS v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (alteration omitted) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)), *see U.S. v. Guzman*, 998 F.3d 562, 568 (4th Cir. 2021) (same). And "the Constitution gives 'the political department of the government' *plenary authority* to decide which aliens to admit." *Thuraissigiam*, at 139. (emphasis added) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)). Critically for purposes of this case, "a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted." *Id.*; *see Jennings*, 583 U.S. at 286 ("To implement its immigration policy, the Government must be able to decide (1) who may enter the country and (2) who may stay here after entering.").

As established by Congress, this "process of decision generally begins at the Nation's borders and ports of entry, where the Government must determine whether an alien seeking to enter the country is admissible." *Jennings*, 583 U.S. at 287. An alien, such as Petitioner, "who arrives in the United States" is treated as "an applicant for admission." 8 U.S.C. § 1225(a)(1), *see* 8 C.F.R. § 1.2. All

[1] Although the statutory text refers to the Attorney General, the authority pertaining to detention and removal, with few exceptions, has transferred to DHS. 6 U.S.C. § 251(2); *DHS v. Thuraissigiam*, 591 U.S. 103, 109 n.3 (2020).

"[a]pplicants for admission must 'be inspected by immigration officers' to ensure that they may be admitted into the country consistent with U.S. immigration law." *Jennings*, 583 U.S. at 287 (quoting 8 U.S.C. § 1225(a)(3)); *see* 8 C.F.R. § 235.1(f)(1).

In the event that "an immigration officer determines that an alien . . . is inadmissible," the officer "shall order the alien removed from the United States without further hearing or review." 8 U.S.C. § 1225(b)(1)(A)(i). An alien may, however, be referred to an asylum officer to consider if he has a fear of persecution in returning to their native country. *Id.* § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.3(b)(4). An alien "*shall be detained*" pending the credible fear interview. 8 C.F.R. § 235.3(b)(4)(ii). If the alien is found to have a credible fear of persecution, he is placed in standard removal proceedings under 8 U.S.C. § 1229. 8 U.S.C. § 1225(b)(1)(B), 8 C.F.R. § 235.6(a)(1)(i). An alien still "*shall be detained* for a [removal] proceeding" unless the "examining immigration officer determines" that the alien is "clearly and beyond a doubt entitled to be admitted." *Id.* § 1225(b)(2)(A) (emphasis added).[2]

Although detention pursuant to section 1225(b) is mandatory, it is not indefinite. On the contrary, "§§ 1225(b)(1) and (b)(2) . . . provide for detention for a specified period of time." *Jennings*, 583 U.S. at 299. Specifically, "detention must continue until immigration officers have finished 'consider[ing]' the application for asylum or until removal proceedings have concluded." *Id.* (internal citation omitted). But "[o]nce those proceedings end, detention under § 1225(b) must end as well." *Id.* at 297. Further, while section 1225(b) does not provide for bond hearings, *see id.* at 297-303, *see also Matter of M-S-*, 27 I. & N. Dec. 509, 519 (A.G. 2019) ("all aliens transferred from expedited to full

[2] Though Petitioner is detained under 8 U.S.C. § 1225(b)(1), the INA also authorizes detention under 8 U.S.C. §§ 1226, 1231. Section 1226 generally authorizes DHS to detain non-arriving aliens during the course of their removal proceedings. Section 1226(a) provides DHS with the discretion to detain aliens, whereas section 1226(c) requires the mandatory detention of certain aliens—specifically, those who were convicted under certain criminal offenses listed in § 1227 or are inadmissible under certain provisions in 8 U.S.C. § 1182. *See generally Guzman Chavez v. Hott*, 940 F.3d 867, 873 (4th Cir. 2019). Section 1231 mandates detention of aliens during the statutorily defined "removal period." *See also id.* at 874.

[removal] proceedings after establishing a credible fear are ineligible for bond"), it does contain "a specific provision authorizing release from . . . detention". The Secretary "may 'for urgent humanitarian reasons or significant public benefit' temporarily parole aliens detained under §§ 1225(b)(1) and (b)(2)," *id.* at 300 (quoting 8 U.S.C. § 1182(d)(5)(A)), *see* 8 C.F.R. §§ 212.5 (implementing regulations), 235.1(h)(2).

The Secretary has delegated his authority to grant parole to designees within DHS. *See* 8 C.F.R. § 212.5(a) ("The Secretary or his designees may invoke, in the exercise of discretion, that authority under section 212(d)(5)(A) [(8 U.S.C.§ 1182(d)(5)(A))] of the [INA]."") (emphasis added), *see also Mbalwoto v. Holt*, 527 F. Supp. 3d 838, 848 (E.D. Va. 2020) (Trenga, J.) ("parole . . . is subject to the unreviewable discretion of the [Secretary]"). Parole allows for an alien to be released from ICE custody temporarily but does not confer immigration status. *Id.* Parole is *not* an admission into the United States. *See* 8 U.S.C. §§ 1101(a)(13)(B) (defining admission), 1182(d)(5)(A), *see also* 8 C.F.R. § 1.2 ("An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) [(8 U.S.C. § 1182(d)(5)(A))] of the [INA], and even after any such parole is terminated or revoked.") (emphasis added). An alien granted parole remains an applicant for admission, even while in the United States. 8 U.S.C. § 1182(d)(5)(A). Moreover, there is no statute or regulation that defines "urgent," "humanitarian reasons," or "significant public benefit," nor is there any method or manner of consideration of requests for parole prescribed, other than the limitation on grants of parole on "case-by-case" bases. *See id.* When the Secretary determines that "the purposes of [the] parole . . have been served[,] the alien shall . . . return or be returned to the custody from which he was paroled." 8 U.S.C. § 1182(d)(5)(A), *see Jennings*, 583 U.S. at 288. After that, the alien's "case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." *Id.*

B. Petitioner's Immigration History and Current Removal Proceedings

Petitioner is a native and citizen of Colombia who entered the United States on or about April 7, 2023, at or near Eagle Pass, Texas, without being admitted or paroled by an immigration officer. Amended Petition ("Am. Pet.") ¶¶ 2-3, 31, Declaration of James A. Mullan, Supervisory Detention and Deportation Officer, Federal Respondents Exhibit 1 ("FREX 1") ¶¶ 5-6. That same day, United States Customs and Border Patrol ("CBP") placed Petitioner in expedited removal proceedings under 8 U.S.C. § 1225(b)(1). Am. Pet. ¶¶ 3, 33; FREX 1 ¶ 7. While meeting with CBP, Petitioner claimed a fear of returning to Colombia. *Id* Under 8 U.S.C. § 1225(b)(1)(ii), Petitioner was referred to an asylum officer to determine whether Petitioner had a credible fear of persecution if he was in fact removed to Colombia. *Id.* On or about April 10, 2023, Petitioner was placed in immigration custody at the South Texas ICE Processing Center in Pearsall, Texas. FREX 1 ¶ 8. On or about April 17, 2023, an asylum officer from U.S. Citizenship and Immigration Services ("USCIS") determined that Petitioner met the definition of having a credible fear of persecution. Pet. ¶¶ 3, 33; FREX 1 ¶ 9.

On or about April 19, 2023, Petitioner was issued a Notice to Appear ("NTA"), placing him in removal proceedings under 8 U S.C § 1229. Pet. ¶¶ 4, 33; *see* FREX 1 ¶ 9 The NTA charged Petitioner with two charges of removability: (1) 8 U.S.C. § 1182(a)(6)(A)(i) as an alien who is present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General; and (2) 8 U S C. § 1182(a)(7)(A)(i)(I) as an alien who, at the time of seeking admission, is not in possession of a valid entry document. FREX 1 ¶ 11. Petitioner remained detained pursuant to the mandatory detention authority of 8 U S.C § 1225(b)(1)(B)(ii), as an alien who has a credible fear of persecution *Id* ¶ 10 On or about May 1, 2023, ICE used a notice paroling Petitioner from its custody pursuant to 8 U S C § 1182(d)(5)(A) Pet ¶¶ 5, 33; FREX 1 ¶ 13; *see* Doc No 1-2, Request for Custody Review and Release, Petitioner's Exhibit 1 ("PEX 1"), at 6 (Petitioner's "Interim Notice Authorizing Parole"). Petitioner's "parole authorization

[was] *valid for one year* beginning from the date on [the] notice and [] *automatically* terminate[s] . at the *end of the one-year period* unless ICE provides [him] with an extension at its discretion." PEX 1, at 6 (emphasis added); *see* FREX 1 ¶ 13 ("The parole authorization was valid for one year and set to automatically terminate upon his departure or removal or at the end of the one-year period.").[3] Therefore, Petitioner's parole expired on May 1, 2024. *Id.* On May 2, 2023, Petitioner was released from immigration custody. FREX 1 ¶ 14.

On or about March 20, 2025, Petitioner, whose parole had *expired*, was brought into ICE custody in Boston, Massachusetts. *Id.* ¶ 15. (emphasis added) Petitioner was issued a Form I-286, Notice of Custody Determination, stating that he would be detained pending a final administrative decision. *Id.* On or about March 22, 2025, Petitioner was transferred to the Farmville Detention Center in Farmville, Virginia. *Id.* ¶ 16. On or about April 18, 2025, Petitioner filed a request with ICE to be released from custody under ICE's discretionary parole authority. Id.[4] On or about April 22, 2025, Petitioner filed a Form I-589, Application for Asylum and Withholding of Removal. *Id* ¶ 17. Petitioner's merits hearing on his application is currently scheduled for July 17, 2025. *Id.* On or about May 5, 2025, Petitioner filed a motion for a custody determination with the immigration court. *Id.* ¶ 18. On May 13, 2025, Petitioner appeared before the Court for a custody redetermination hearing. *Id* ¶ 19; Am. Pet. ¶ 13. The IJ denied Petitioner's request for release on bond, finding Petitioner was ineligible for bond pursuant to *Matter of M-S-*, 27 I. & N. Dec 509 (A.G. 2019), because he is an alien

[3] Despite the clear wording of Petitioner's parole authorization, *see* PEX 1 at 6, Petitioner implies several times in his Amended Petition that ICE should have informed him of his termination and revocation of discretionary parole. *See* Pet. ¶¶ 7, 32. Petitioner's parole notice gave clear notice that his parole would terminate after one year *See infra*; PEX 1, at 6 ("parole authorization is *valid for one year* beginning from the date on this notice and it automatically terminate[s] . . . at the end of the one-year period unless ICE provides you with an extension at its discretion.") (emphasis added); *see also* FREX 1 ¶ 13 ("The parole authorization was valid for one year and set to *automatically terminate* upon his departure or removal or *at the end of the one-year period.*") (emphasis added). Therefore, Petitioner's now-expired parole does not render his detention unlawful. *See* Am. Pet. ¶ 15.

[4] As of the date of this filing, ICE has not made a decision on Petitioner's request. Am. Pet. ¶ 12

who was transferred from expedited removal proceedings to full removal proceedings. *Id.* Alternatively, the IJ found that Petitioner would not present a danger to the community or be a flight risk. FREX 1 ¶ 19. Petitioner reserved appeal of this decision. *Id.*

C. Procedural History

Petitioner filed his initial habeas petition on May 7, 2024. *See generally* Pet. On May 9, 2025, this Court issued an Order to Show Cause to Respondents requiring them to respond to the Petition with three days. Doc. No. 4. This Court also stayed Petitioner's removal until this Court resolves the Petition *Id.* On May 9, 2025, Federal Respondents moved for an extension of time to file their Response to the Order to Show Cause and Petition. *See* Doc. No 7. On May 12, 2025, this Court granted the Federal Respondents' motion, making Federal Respondents' Response to the Order to Show Cause and Petition due on May 19, 2025. *See* Doc No. 8.

On May 14, 2025, undersigned counsel received notification via email that Petitioner intended to file an Amended Petition with the Court. *See* Doc. No. 10 ¶ 5. On May 19, 2025, undersigned counsel reached out to opposing counsel to seek their position on a joint briefing schedule for Petitioner's anticipated filing of his Amended Petition. *Id.* Although Petitioner's counsel did not oppose any extension of time, she did not respond to undersigned counsel's repeated inquiries regarding the anticipated filing of the Amended Petition. Therefore, Federal Respondents filed another motion, unopposed by Petitioner, for an extension of time. *See* Doc. No. 10 This Court granted the motion and ordered that, absent a filing of an Amended Petition, Federal Respondents shall file their Response to the Court's Order to Show Cause on or before May 23, 2025, and further ordered that, if an Amended Petition is filed, Federal Respondents shall file their Response to the Amended Petition within seven (7) days of such Amended Petition being filed. Doc No. 11. Later that day, Petitioner filed the instant Amended Petition, claiming that his detention violates the Fifth Amendment to the Constitution, the INA, and the APA. *See generally*, Am Pet Pursuant to this Court's

Order dated May 19, 2025 (Doc No 11), Federal Respondents' Response to the Amended Petition is due on or before May 27, 2025.

ARGUMENT

Petitioner's habeas claim is fatally deficient. As a threshold matter, a century of Supreme Court precedent holds that the due process rights of an arriving alien, such as Petitioner, are limited to what applicable statutes provide. As this Court recognized, "an entering alien has only those rights concerning his admissibility as Congress has statutorily provided." *Mbalwoto*, 527 F. Supp 3d at 845 Because Petitioner's detention complies with the relevant statutes, "the Due Process Clause provides nothing more." *Thuraissigiam*, 591 U.S. at 140. Even if Petitioner did have some extra-statutory due process protections, neither the Supreme Court's procedural due process test, nor the five-factor test that this Court has applied in other contexts, warrants relief in this case. Finally, if *some* relief were called for, it should be limited only to a bond hearing pursuant to usual procedures rather than Petitioner's immediate release or the specialized bond hearing that he requests.

I. Because Section 1225(b) Governs Petitioner's Detention, the Process Provided by Statute is "Due Process as Far as [He] is Concerned."

Petitioner alleges that his mandatory detention for just *two (2) months* without a specialized bond hearing violates his due process rights. To assess the merits of this claim, it is necessary to determine first what due process rights Petitioner has. The discussion above makes clear that Petitioner is an arriving alien who is detained pursuant to section 1225(b). As he affirmatively admits (Am. Pet. ¶ 3), Petitioner presented himself "at [a] port[] of entry," meaning that he is "'treated' for due process purposes 'as if stopped at the border.'" *Thuraissigiam*, 591 U S. at 139 (quoting *Shaughnessy v. United States ex rel Mezei*, 345 U S 206, 215 (1953)).

A. The due process rights of arriving aliens in immigration proceedings are only what applicable statutes provide.

The Supreme Court's recent *Thuraissigiam* decision considered an arriving alien's due process challenge to expedited removal proceedings. In so doing, the court canvassed its case law concerning the due process rights of such aliens. 591 U.S. at 106-07, 138-40. From an unbroken line of precedent emerged a "century-old rule regarding the due process rights of an alien seeking initial entry"—"that Congress is entitled to set the conditions for an alien lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause." *Id.* at 107, 139.

The first case, decided in 1892, is *Nishimura Ekiu*. There, a Japanese national petitioned for habeas corpus after being "detained at San Francisco upon the ground that she should not be permitted to land in the United States." 142 U.S. at 651. Although the petitioner, who had arrived by ship, was not entitled to land, an immigration official had placed her in a mission house in San Francisco with the intent of "keeping her there" until judicial proceedings concluded. *Id.* at 661.[5] After determining that the petitioner had been "restrained of h[er] liberty" and was "doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint [wa]s lawful," the Supreme Court explained that arriving aliens' due process rights are closely circumscribed:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government.

Id. at 660. "As to such persons," the court concluded, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, *are due process of law*." *Id.* (emphasis added) Looking to the statute at issue, the court held that the immigration officer's decision to prevent

[5] As with parole, removing the petitioner from the ship and detaining her in the United States "left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steam-ship." *Nishimura Ekiu*, 142 U.S. at 661.

the petitioner from landing was made in accordance with that statute; that his determination "was final and conclusive against the petitioner's right to land in the Unites States"; and that the petitioner therefore was "not unlawfully restrained of her liberty." *Id.* at 663-64. In other words, the government's adherence to the statute authorizing her detention after a determination that she could not land was the only due process right the petitioner could claim.

In 1950, the German wife of an American citizen petitioned for habeas corpus after being "temporarily excluded from the United States and detained at Ellis Island." *United States ex rel. Knauff v Shaughnessy*, 338 U.S. 537, 539-40 (1950) In affirming the denial of her petition, the Supreme Court emphasized that "[t]he exclusion of aliens is a fundamental act of sovereignty." *Id.* at 542. The petitioner, as an arriving alien, "had no vested right of entry" and instead sought a "privilege" that was to be "granted . . . only upon such terms as the United States shall prescribe." *Id.* at 542, 544.[6] And in this respect, citing to *Nishimura Ekiu*, the court reaffirmed that "[w]hatever the procedure authorized by Congress is, *it is due process as far as an alien denied entry is concerned.*" *Id.* at 544 (emphasis added). Because the petitioner's exclusion and detention complied with the applicable statute and presidential proclamation, there was "no legal defect" warranting habeas relief. *Id.* at 544-47.

The Supreme Court again confronted this issue, in even starker terms, three years later in *Mezei*. There, an alien "permanently excluded from the United States on security grounds but stranded . . . on Ellis Island because other countries w[ould] not take him back" petitioned for habeas corpus, seeking temporary admission into the United States "on bond until arrangements [we]re made for his departure abroad." 345 U S. at 207. The petitioner, who had resided in this country for 25 years before

[6] The Supreme Court took pains here to distinguish between an arriving alien and one already admitted into the country but subject to removal proceedings, observing that the judiciary's role is far more limited with respect to the former *See Knauff*, 338 U S. at 543 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

a two-year journey to Europe, was stopped upon his return and detained at Ellis Island after being excluded. *Id.* at 208 Several unsuccessful attempts to repatriate the petitioner to Europe, however, resulted in his remaining on Ellis Island for almost two years, with no end in sight. *See id.* at 208-09. "Asserting unlawful confinement . . . , he sought relief through a series of habeas corpus proceedings." *Id* at 209. The district court, concerned that the petitioner had "no place to go," "deemed further 'detention' after 21 months excessive and justifiable only by affirmative proof of respondent's danger to the public safety" *Id.* When the government declined, on national-security grounds, to present evidence in support of detention, the district court ordered him released on bond. *See id.* at 207-09.

The Supreme Court reversed. Again "recogniz[ing] the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control," *id.* at 210, the court drew the same distinction between an arriving alien and one already admitted into the country as in *Knauff* Thus, although the latter "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law," an alien "on the threshold of initial entry stands on a different footing." *Id.* at 212; *see also id.* at 215-16 (noting that petitioner "present[ed] different considerations" with respect to release on bond than a "resident alien temporarily detained pending expeditious consummation of deportation proceedings"). As to arriving aliens, the rule in *Knauff* and *Nishimura Ekiu* controls: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544). Even though the petitioner had lived in the United States for nearly 30 years and had a wife and a home in New York, the fact that he was an arriving alien conclusively disposed of his claim to any process beyond what the statute provided. *See id.* at 212-16. His "right to enter the United States"—even temporarily on bond—"depend[ed] on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id* at 216.

Thuraissigiam confirms that this rule—that due process entitles arriving aliens only to those rights that Congress and the Executive establish—remains in force today. Relying on *Mezei*, *Knauff*, and *Nishimura Ekiu*, the Supreme Court held that the petitioner in *Thuraissigiam*, an arriving alien seeking asylum, "ha[d] no entitlement to procedural rights other than those afforded by statute." 591 U.S. at 107; *see id.* at 140 (explaining that an alien "in [the petitioner's] position has only those rights regarding admission that Congress has provided by statute.").[7] And because the petitioner had received the asylum procedures that the applicable statute allowed, "the Due Process Clause provide[d] nothing more." *Id.*

Jennings provides further clarity. 583 U.S. 281 (2018). In *Jennings*, aliens alleged, notwithstanding other statutory detention provisions, that § 1225(b) provided for periodic bond hearings where the government must prove by clear and convincing evidence that such detention remains justified. 583 U.S. at 291. However, the Court found that "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.* at 297. The Court also took note that that the clear exception to detention under § 1225(b) "implies that there are no *other* circumstances under which aliens detained under 1225(b) may be released." *Id.* at 300 (emphasis in the original). The Court's emphasis here thus implies that the Petitioner may not be released on bond. *See id.* Indeed, "the text of [] [§ 1225(b)], when read most naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention." *Id.* at 286.

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[7] Other decisions cited in *Thuraissigiam* underscore that American "immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . and those who are within the United States after an entry " *Leng May Ma v Barber*, 357 U.S. 185, 187 (1958); *see Kaplan v Tod*, 267 U.S. 228 (1925) (holding that an alien paroled pending admissibility proceedings was "regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared"). "In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Leng May Ma*, 357 U.S. at 187 (quoting *Mezei*, 345 U.S. at 212).

Despite this line of clear Supreme Court authority, in 2005, the Board of Immigration Appeals ("BIA") found that an alien mandatorily detained pursuant to 8 U.S.C. § 1225(b) but who was found to have a credible fear of persecution or torture and placed into standard removal proceedings was eligible for a bond redetermination hearing before an IJ. *In re X-K-*, 23 I. & N. Dec. 731 (BIA 2005). But in 2019, the Attorney General overruled *In re X-K-* by issuing a decision in *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G. 2019), finding "[a]n alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond." *Id.* And the BIA recently, consistent with *Matter of M-S-*, held that an alien who was originally detained under 8 U.S.C. § 1225(b), but was later paroled into the United States, and then re-detained after his parole expired, was still subject to mandatory detention under § 1225(b) and could not be released on bond. *Matter of Q. Li.*, 29 I. & N. Dec. 66 (BIA 2025); *see also Jennings*, 583 U.S. at 302 (rejecting the position that when once detention authority ends under § 1225(b), aliens can only be detained under § 1226(a).

B. The recognized limitation on arriving aliens' due process rights applies to civil immigration detention.

As is apparent from the discussion above, this limitation on arriving aliens' due process rights is unqualified. The Supreme Court has reaffirmed and applied it for more than 100 years and, as far as we are aware, has never deviated from it. Nor has the court ever even suggested that a different rule might apply depending on what aspect of the immigration process is at issue.

Other jurists of this Court long applied this straightforward rule to hold that aliens "'on the threshold of initial entry' are entitled only to 'the procedure authorized by Congress'" even as concerns detention. *Hong v. United States*, 244 F. Supp. 2d 627, 634 (E.D. Va. Feb. 13, 2003) (quoting *Mezei*, 345 U.S. at 212) (denying habeas petition to compel bond hearing for legal permanent resident stopped at the border); *see also Bukhari v. Piedmont Reg'l Jail Auth.*, 2010 WL 3385179, at *4-5 (E.D. Va. Aug. 20, 2010) ("aliens standing on the threshold of entry are not entitled to the constitutional protections

provided to those within the territorial jurisdiction of the United States." (citation omitted)). As recently as 2020, a jurist of this Court followed the Supreme Court precedent summarized above to deny a habeas petition requesting the same sort of bond hearing that Petitioner seeks here. *Aslanturk v. Hott*, 459 F. Supp. 3d 681, 692-94 (E.D. Va. 2020) (Alston, J.) ("[T]he due process rights afforded to Petitioner as an arriving alien are not those of the 'traditional standards of fairness encompassed in due process of law[,]' but rather, Petitioner's due process rights flow from those prescribed by Congress." (quoting *Mezei*, 345 U.S. at 212)), *recon. denied*, 2020 WL 5745799 (E.D. Va. June 30, 2020).[8]

Nevertheless, other jurists of this Court *and* this Court have granted bond hearings to arriving aliens detained pursuant to section 1225(b). *See Abreu v. Crawford*, 2025 WL 51475, at *7 (E.D. Va. Jan. 8, 2025) (Nachmanoff, J.), *Rodriguez v. Perry*, 747 F Supp. 3d 911, 919 (E.D. Va. 2024) (Brinkema, J.), *Leke v. Hott*, 521 F. Supp. 3d 597 (E.D Va. 2021) (Ellis, J.), *Mbalivoto v. Holt*, 527 F Supp. 3d 838 (E D Va. 2020) (Trenga, J.). The underling facts of *Abreu* and *Rodriguez* are easily distinguishable from Petitioner's case In *Abreu*, although the court determined that one of the petitioners was properly detained under section 1225(b), petitioner also had several criminal convictions warranting removal, and was detained by ICE much longer than Petitioner here. *See* 2025 WL 51475, at *5. As for *Rodriguez*, the entire basis for the court's determination that additional due process was warranted to the

[8] Judge Alston is not alone in reaching this conclusion. *See, e.g.*, *Bataineh v Lundgen*, 2020 WL 3572597, at *9 (D. Kan. July 1, 2020) (stating that, under *Thuraissigiam*, "if Petitioner is an 'arriving alien' detained under § 1225(b) he is not entitled to a bond hearing"), *Gonzalez Aguilar v. Wolf*, 448 F Supp 3d 1202, 1212 (D.N.M. 2020) ("The Court declines to hold that evolving notions of due process compel Petitioner's release or the provision of a bond hearing Though some courts have so held, numerous other courts disagree, including the Supreme Court in *Mezei* and *Knauff*.") (collecting cases); *Aracely, R. v. Nielsen*, 319 F Supp. 3d 110, 144-45 (D.D C 2018) (holding that plaintiffs were "unlikely to succeed on their request for bond hearings" because although "*Mezei* may be under siege, it is still good law" (emphasis omitted)); *Poonjani v Shanahan*, 319 F. Supp. 3d 644, 649 (S D.N.Y. 2018) ("[B]ecause the immigration statutes at issue here do not authorize a bond hearing, *Mezei* dictates that due process does not require one here."); *see also Am Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 60 (D.D.C 1998) ("[I]n view of the long-standing precedent holding that aliens have no [procedural] due process rights, the Court concludes that the alien plaintiffs here cannot avail themselves of the protections of the Fifth Amendment to guarantee certain procedures with respect to their admission."), *aff'd*, 199 F.3d 1352 (D.C. Cir. 2000).

petitioner was based off of his special immigrant juvenile status. 747 F. Supp. 3d at 915-16. And the petitioner there was detained under § 1226, not § 1225 like the Petitioner in this case. *Id.* Here, Petitioner has no status and only has a pending asylum application with an IJ, which gives him no legal status. FREX 1 ¶ 17.

As for *Leke* and *Mbalwoto*, both acknowledged *Thuraissigiam* and the centenarian limitation on arriving aliens' due process rights. *See Leke*, 521 F. Supp. 3d at 604; *Mbalwoto*, 527 F. Supp. 3d at 845-46. But each court then purported to distinguish the underlying cases on the ground that they "did not consider whether an entering alien's status also limited his ability to challenge the legality of his detention." *Mbalwoto*, 527 F. Supp. 3d at 845; *see Leke*, 521 F. Supp. 3d at 604. In other words, *Mbalwoto* and *Leke* concluded that the cases cited above did not consider arriving aliens' due process rights specifically as regards civil detention. Writing on that supposedly blank slate, each decision ordered a bond hearing, necessarily concluding that the Due Process Clause in fact *does* compel more process for arriving aliens than the applicable statute.

The distinction these decisions purported to draw finds no support in governing law. In fact, it demonstrably conflicts with the plain terms of the binding authority discussed above. As the Supreme Court stated in *Thuraissigiam*, "a concomitant" of the government's "plenary authority to decide which aliens to admit" is "the power to set the procedures to be followed *in determining whether an alien should be admitted.*" 592 U.S. at 139 (emphasis added). A century of binding precedent establishes that "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens," is a "valid" part of that process. *Wong Wing v United States*, 163 U.S 228, 235 (1896).

Indeed, contrary to the attempts in *Mbalwoto* and *Leke* to distinguish the Supreme Court precedent discussed above as not bearing on the question of detention, the Fourth Circuit has previously relied on precisely those decisions to reject the habeas petition of a detained alien. In *Palma*

v. Verdeyen, 676 F.2d 100 (4th Cir. 1982), an arriving alien ordered removed to Cuba, but whom Cuba had refused to accept, petitioned for habeas corpus to challenge his detention. In rejecting his claim, the Fourth Circuit cited *Wong Wing*, *Mezei*, *Nishimura Ekiu*, and *Knauff* in agreeing with the point that Federal Respondents advance here: The government "may detain an alien pending exclusion," and "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 103 (citation omitted) ("Section 1225(b) of 8 U.S.C. provides that an arriving alien *may be detained* for inquiry." (emphasis added)). Neither *Mbalvoto* nor *Leke* considered *Palma* in their analyses.

Further, the attempted distinction in those cases between civil detention and every other aspect of the immigration process for arriving aliens misreads the facts of the relevant Supreme Court decisions. Both *Nishimura Ekiu* and *Mezei* expressly addressed the legality of each petitioner's detention during their respective exclusion proceedings. *See Mezei*, 345 U.S. at 209 ("In short, [the petitioner] sat on Ellis Island because this country shut him out and others were unwilling to take him in."); *Nishimura Ekiu*, 142 U.S. at 664 ("[T]he petitioner is not unlawfully restrained of her liberty") [9] And *Mezei* explicitly considered—and rejected—a request for temporary bond, which is exactly what Petitioner seeks here. Candidly, the Supreme Court could not have been clearer in this respect: "The issue is whether the Attorney General's continued exclusion of respondent without a hearing amounts to an unlawful detention, *so that courts may admit him temporarily to the United States on bond* until arrangements are made for his departure abroad." 345 U.S. at 207 (emphasis added). The cramped readings of these decisions in *Leke* and *Mbalvoto* thus cannot withstand scrutiny.

[9] If there were ever any doubt that *Nishimura Ekiu* ruled on the petitioner's due process rights vis-à-vis her detention, *Thuraissigiam* erased it. *See* 591 U S at 131 (explaining that, in deciding "whether the alien was detained in violation of federal law," "the Court held that the only procedural rights of an alien seeking to enter the country are those conferred by statute").

To reach their contrary conclusions, both cases tellingly cited not a single Supreme Court decision even hinting that arriving aliens have extra-statutory due process rights in the civil-detention context. That is not surprising, given that the Supreme Court has repeatedly characterized the restriction on arriving aliens' due process rights as categorical and applied it across a variety of contexts within the immigration system.[10] At most, *Leke* and *Mbalwoto* tried to draw support from *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003), two decisions analyzing whether detained *lawful permanent residents* were entitled to seek release pending, respectively, (i) the execution of a final order of removal or (ii) the conclusion of removal proceedings. *See Leke*, 521 F. Supp. 3d at 602-03; *Mbalwoto*, 527 F. Supp. 3d at 846-48.

Zadvydas and *Demore* are inapposite because they concerned aliens admitted into the country who had obtained lawful status, rather than an arriving alien such as Petitioner (and the petitioners in *Thuraissigiam*, *Mezei*, *Knauff*, and *Nishimura Ekiu*) This distinction "ma[kes] all the difference" when it comes to due process. *Zadvydas*, 533 U.S. at 693. Indeed, *Zadvydas* made just this point: Acknowledging that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law," the Supreme Court conceded that aliens "who have not yet gained initial admission to this country *would present a very different question.*" 533 U.S. at 682, 693 (emphasis added); *see id* at 693 ("[C]ertain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). So even on its own terms, *Zadvydas*'s analysis of the process due to an alien admitted into the country says nothing about the process to which an arriving alien, such as Petitioner, is entitled. *See also Jennings*, 583 U.S. at

[10] *See Thuraissigiam*, 591 U.S. at 138-40 (rejecting claim that due process entitled arriving alien to judicial review of asylum request); *Mezei*, 345 U.S. at 212 (holding that former resident alien's exclusion and resulting prolonged detention did not violate due process); *Knauff*, 338 U S. at 544 (rejecting war bride's petition seeking review of her exclusion and concomitant detention); *Nishimura Ekiu*, 142 U.S at 660 (holding that detention of arriving alien after determination that she should not be allowed to land did not violate due process).

298 ("nothing in the text of § 1225(b)(1) or § 1225(b)(2) even hints that those provisions restrict detention after six months"). Indeed, "*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6)." *Jennings*, at 300.

Demore is even less helpful to Petitioner's cause. There, the Supreme Court held that mandatory civil detention of a legal permanent resident during removal proceedings—with no opportunity to seek release on bond—did not violate due process. *See* 538 U.S. at 526 ("[T]he Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings"). Far from suggesting that arriving aliens have extra-statutory due process rights concerning their civil detention, *Demore* held that even aliens admitted into the country, with a stronger liberty interest, do not necessarily possess such rights.[11] *Mbalivoto*'s and *Leke*'s reliance on *Zadvydas* and *Demore* to grant bond hearings to arriving aliens is therefore misplaced.

* * *

For more than 100 years, the Supreme Court has applied a simple, bright-line rule when it comes to arriving aliens: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Thuraissigiam*, 591 U.S. at 139 (quoting *Knauff*, 338 U.S. at 544). The court has never suggested that a different rule applies in the detention context; on the contrary, the same rule applies to arriving aliens challenging their civil detention—including one seeking, as Petitioner does, a chance for release on bond. To deny the Amended Petition in this case, this Court need only follow the Supreme Court's pellucid instructions. Granting the Amended Petition, by contrast, would require a reading of the Due Process Clause that the Supreme Court has never

[11] In so holding, the court reaffirmed that proceedings to remove aliens from the country "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Demore*, 538 U.S. at 523 (quoting *Wong Wing*, 163 U.S. at 235). This principle applies with at least equal force to Petitioner's detention.

endorsed and in fact has repeatedly rejected. *See Jennings*, 583 U.S. at 297 ("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"). This Court should decline to take such a drastic step. *See Mathews v. Diaz*, 426 U.S. 67, 81 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.").

II. The Court Should Not Order a Specialized Bond Hearing Even If Petitioner Could Show He Is Entitled to More Process Than Is Provided by Statute.

The discussion above establishes, beyond reasonable dispute, that Petitioner's due process rights extend no further than what applicable statutes provide. And because his detention complies with those statutes, his claim that due process entitles him to something more must fail.

Even if, contrary to the binding authority just discussed, Petitioner possessed some extra-statutory due process right concerning his civil detention, his petition would still call for denial. As set out below, the governing procedural due process framework counsels in favor of sustaining the existing detention regime. The same result would obtain even under the five-factor test this Court has applied in other immigration-detention contexts. Finally, if the Court determines that a bond hearing is required, any such hearing should comply with established regulations.

A. The governing procedural due process framework confirms that Petitioner's claim lacks merit.

The Fourth Circuit analyzes an alien's due process claim by weighing the factors set out in *Mathews v. Eldridge*. *See Miranda*, 34 F.4th at 359-65, *see also Landon*, 459 U.S. at 34 (finding the *Mathews*'s analysis applies to procedural due process claims in the immigration context). The three factors relevant to assessing Petitioner's due process claim are: (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." *Mathews*, 424 U S. 319, 335 (1976) Petitioner cannot show that he is entitled to the specialized bond hearing he seeks; indeed, *Demore* precludes such a showing.

1. The first factor weighs in favor of the government.

As an arriving alien, Petitioner has a less compelling liberty interest—the first factor—than the legal permanent resident in *Demore*. *See Hong*, 244 F. Supp. 2d at 635 ("Hong's liberty interest, as an inadmissible alien seeking admission into the country, is more attenuated than the liberty interest of a deportable alien already present in the country."); *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 635 (E D Va 2003) (detention of inadmissible alien pending removal did not violate due process) The Supreme Court and Fourth Circuit even made clear that an arriving alien who has not been admitted "does not have the same status for due process purposes as an alien who has 'effected entry.'" *United States v. Guzman*, 998 F.3d 562, 569 (4th Cir. 2021) (quoting *Thuraissigiam*, 591 U.S. at 139-40 (cleaned up)); *see also Matter of M-S-*, 27 I. & N at 509.

The Supreme Court has emphasized that "detention during deportation proceedings [remains] a constitutionally valid aspect of the deportation process." *Demore*, 538 U S. at 523. Any assessment of the private interest at stake therefore must account for the fact that the Supreme Court has never held that aliens have a constitutional right to be released from custody during the pendency of removal proceedings, and in fact has held precisely the opposite. *See id* at 530; *see also Carlson v. Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure.").

To support his claim that he warrants additional due process, Petitioner cites to *Addington v Texas*, 551 U.S. 418, 425 (1979) claiming that his detention "constitutes a significant deprivation of liberty that requires due process protection." Am. Pet. ¶ 42 (quoting *Addington*, 551 U S at 425); *see* Am Pet. ¶¶ 42-44 But recently, the Fourth Circuit made clear that "[t]he requirements in *Addington*, which apply to the detention of *citizens*, do not apply in the context of immigration removal proceedings." *Miranda*, 34 F.4th at 359 (emphasis added). As the Supreme Court has made clear, in

regards to "foreigners who have never . even been *admitted* into the country pursuant to law," "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are due process of law*." *Nishimura Ekiu*, 142 U.S. at 660 (emphasis added).

Accordingly, the first *Mathews* factor weighs in favor of the government.

2. The second factor weighs in favor of the government.

And yet, regarding the second factor, Petitioner has already received more process because his ability to seek parole exceeds the opportunity for release available to the *Demore* petitioner, who was detained pursuant to 8 U.S.C. § 1226(c) and therefore could be released only for narrow, witness-protection purposes *Id.* § 1226(c)(2), *see* 538 U.S. at 513-14. Petitioner, by contrast, may be paroled for any "urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A). In fact, as Petitioner concedes, he already *was* released on parole. *See* Am. Pet. ¶¶ 5, 33

Petitioner's assertions that there is no set timeline for adjudication of his requests for release (Am Pet ¶ 56), are not relevant. As the Fourth Circuit recently noted in affirming denial of a habeas petition by an alien seeking a bond hearing, "[t]he absence of a date certain—imminent or not—for the conclusion of . . proceedings is of no moment." *Castaneda v. Perry*, 95 F.4th 750, 758 (4th Cir. 2024). What may happen in the future is likewise immaterial to this proceeding, as Petitioner may challenge only his present detention. *See D.B. v. Cardall*, 826 F.3d 721, 734 n.10 (4th Cir. 2016) (explaining that "the question before the district court" in an immigration habeas proceeding is "whether [the petitioner's] *current detention* complies with federal statutes and the Constitution" (emphasis added)); *Doe v Perry*, 2022 WL 1837923, at *2 (E D. Va. Jan. 31, 2022), *see also Browning v. Cronse*, 356 F 2d 178, 181 (10th Cir. 1966) (holding habeas not available to attack presently legal detention that might *become* illegal) Indeed, Petitioner's May 13, 2025, hearing on his motion for custody determination was additional due process. *See* FREX 1 ¶ 19.

Therefore, the second *Mathews* factor accordingly weighs even less strongly in Petitioner's favor than for the unsuccessful petitioner in *Demore*.

3. The third factor weighs in favor of the government.

Regarding the third *Mathews* factor, the government's interests in mandatory detention pursuant to section 1225(b) are legitimate and significant. "[T]he government interest includes detention." *Miranda*, 34 F.4th at 364. A court "must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *Landon*, 459 U.S. at 34; *Miranda*, 34 F.4th at 364 (same). "Congress has repeatedly shown that it considers immigration enforcement—even against otherwise non-criminal aliens—to be a vital public interest[.]" *Miranda*, 34 F.4th at 364. And for one, Petitioner's argument that the Due Process Clause mandates a specialized bond hearing flouts the Supreme Court's directive that the government "need[s] . . . flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication" when it comes to immigration regulation. *Diaz*, 426 U.S. at 81.

Additionally, "[t]here is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings [Congress] established, and permit[s] and prolong[s] a continuing violation of United States law." *Nken v. Holder*, 556 U.S. 418, 436 (2009); *see Landon*, 459 U.S. at 34 ("The government's interest in efficient administration of the immigration laws . . . is weighty."). Mandatory detention remedies this risk by "increasing the chance that, if ordered removed, [Petitioner] will be successfully removed." *Demore*, 538 U.S. at 528.

Petitioner's mandatory detention indisputably serves each of these interests And as the Supreme Court has made clear, civil immigration detention is "constitutionally valid" as long as it "serve[s] its purported immigration purpose " *Demore*, 538 U.S. at 523, 527; *see Zadvydas*, 533 U.S at 690 ("[W]here detention's goal is no longer practically attainable, detention no longer 'bear[s][a]

reasonable relation to the purpose for which the individual [was] committed.'" (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972))).

B. The *Portillo v. Hott* factors do not apply to an arriving alien's civil detention and would not compel a specialized bond hearing in any event.

In the context of mandatory detention of aliens who have committed certain crimes, *see* 8 U.S.C. § 1226(c), this Court has applied a five-factor test, *Portillo v. Hott*, 322 F. Supp. 3d 698, 707 (E.D. Va. 2018) (Brinkema, J.)[12]; *see Mbalivoto*, 527 F. Supp. 3d at 850.[13] Defendants respectfully disagree with this approach, as the Fourth Circuit *in dicta* has applied the Mathews test when considering whether an alien was afforded sufficient due process. *See Miranda*, 34 F.4th 338 at 358-59 (finding that *Mathews* applies to an alien's due process claim); *id.* at 358 n.8 ("The *Mathews* balancing test has been the subject of some criticism . . [n]evertheless, it remains binding law"), *see also Aslanturk*, 459 F Supp 3d at 694 (applying *Mathews*).[14] But even if it did, those factors (to the extent that they map onto this context) would not compel the specialized bond hearing Petitioner seeks.

Duration of Civil Detention. Petitioner has been detained for just *two* (2) months—and cites no caselaw finding that a similar detention length violates the Fifth Amendment. For the cases

[12] "The five factors are: '(1) the duration of detention, including the anticipated time to completion of the alien's removal proceedings, (2) whether the civil detention exceeds the criminal detention for the underlying offense, (3) dilatory tactics employed in bad faith by the parties or adjudicators; (4) procedural or substantive legal errors that significantly extend the duration of detention; and (5) the likelihood that the government will secure a final removal order.'" *Portillo*, 322 F. Supp. 3d at 707 (citation omitted).

[13] This court has previously only looked to three out of the five factors addressed in *Portillo*. *See Mbalivoto*, 527 F. Supp 3d at 850 ("In determining whether an alien's continued detention is unreasonable without a bond hearing, courts have considered a variety of factors, which generally include (1) the length of Petitioner's detention; (2) the length of any delays attributable to the Petitioner; and (3) his likelihood of ultimately being ordered removed.") Federal Respondents still address each *Portillo* factor in full

[14] It bears noting, in this respect, that the Fourth Circuit recently indicated that the *Mathews* test is the proper vehicle for analyzing due process claims in the context of civil immigration detention. *See Castaneda*, 95 F.4th at 762 n.13.

Petitioner does cite, several of those cases involved aliens detained pursuant to section 1226(c) (*i.e.*, aliens already present and admitted in the country), who are entitled to more process than an arriving alien such as Petitioner. And finally, the outcomes of those cases often hinged on comparing the petitioners' detention periods to the detention periods found reasonable in *Zadvydas* and *Demore*. But neither decision purported to set a precise outer limit on the permissible period of detention. On the contrary, *Demore* expressly approved mandatory detention "during the limited period necessary for . . . removal proceedings." 538 U S. at 526. And as Petitioner admits, he is still in removal proceedings as an IJ considers his asylum application. FREX 1 ¶¶ 15, 17 As for *Zadvydas*, Petitioner's detention has not come close to, let alone exceeds, the presumptively valid six-month detention period for aliens detained after the conclusion of their removal proceedings. And despite *Zadvydas* setting a presumptively valid six-month detention period—*after* the conclusion of removal proceedings and any attendant detention—the Supreme Court held that an alien may continue to be "held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future," meaning that six months is by no means the limit on constitutionally permissible detention. 533 U.S. at 701 Indeed, neither §§ 1225(b)(1) or (b)(2) "can reasonably be read to limit detention to six months." *Jennings*, 583 U.S. at 301. "Nothing in the statutory text imposes any limit on the length of detention." *Id.* at 297. But in this case, where Petitioner's detention has lasted two months, this detention falls unquestionably within the constitutional guideposts that the Supreme Court has set.

Duration of Criminal Detention. This factor, which clearly pertains only to criminal aliens detained pursuant to section 1226(c), has no application to an arriving alien Indeed, because section 1225(b) does not require any sort of conviction to justify detention, considering this factor in the context of arriving aliens would essentially always be a strike against the government, thus creating an effective presumption of unconstitutionality. Such a presumption cannot be squared with *Thuraissigiam*

(and its precursors), *Demore*, *Zadvydas*, *Jennings*, or the legion of other Supreme Court decisions recognizing the general constitutionality of civil detention during immigration proceedings.

Dilatory Tactics and Bad Faith. This factor is neutral. There is no evidence ICE has engaged in any conduct to prolong the proceedings nor in any bath faith. Petitioner implies, however, the ICE acted in bad faith by not providing him with notification of the termination of his parole. *See* Am Pet. ¶¶ 7, 33. But Petitioner's parole document could not have been more clear. "parole authorization is *valid for one year* beginning from the date on this notice and [] *automatically* terminate[s] . . . at the *end of the one-year period* unless ICE provides you with an extension at its discretion." PEX 1, at 6 (emphasis added). Petitioner's parole authorization was issued on May 1, 2023, and because ICE did not extend Petitioner's parole, it automatically expired on May 1, 2024. *See id.* Therefore, this factor cannot weigh in Petitioner's favor *Portillo*, 322 F. Supp. 3d at 708 ("This factor d[id] not appear to favor either party" because "[a]lthough the proceedings ha[d] been ongoing for a relatively long time, the delays d[id] not appear to have been unreasonable.").

Errors Extending Detention Period. This factor is also neutral. There have been no errors by either party that have extended the detention period. Indeed, Petitioner is scheduled for a hearing on his asylum application in a little more than a month's time. As there is no evidence that the resulting delays are "unreasonable," meaning that this factor is neutral as well. *Portillo*, 322 F Supp. 3d at 708.

Likelihood of Final Removal Order. This factor is also neutral. It is "purely speculative" whether Petitioner will obtain relief from removal, *Mauricio-Vasquez v. Crawford*, 2017 WL 1476349, at *5 (E.D Va. Apr. 24, 2017). Neither party can predict the outcome of Petitioner's asylum application. At most, then, this factor "does not provide any guidance to the Court in this case." *Mauricio-Vasquez*, 2017 WL 1476349, at *5.

Each *Portillo* factor thus either favors the government or is neutral (or inapplicable). Petitioner accordingly cannot establish that his detention violates due process.[15]

C. If the Court is inclined to grant the Amended Petition, the only relief the Court should order is a bond hearing pursuant to normal procedures.

If the Court concludes that the amended petition should be granted, the Court should order only a bond hearing pursuant to the usual procedures. *See Martinez v. Hott*, 527 F. Supp. 3d 824, 837-38 (E.D. Va. 2021) (Alston, J.); *Santos Garcia v. Garland*, 2022 WL 989019, at *7 (E.D. Va. Mar. 31, 2022) (Alston, J.). There is no warrant to adopt Petitioner's novel burden-shifting framework that would require the government to bear the burden of proof to justify denying bond by clear and convincing evidence.

Under the regulations governing bond hearings for detained aliens, the alien bears the burden to show both that his release would not pose a danger to property or persons and that he is likely to appear for future proceedings. 8 C.F.R. §§ 236.1(c)(8), 1236.1(c)(8) ("[T]he alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding"); *Matter of Fatahi*, 26 I. & N. Dec. 791, 795 n 3 (BIA 2016) ("We have consistently held that alien have the burden to establish eligibility for bond while proceedings are pending"); *accord Matter of R-A-V-P-*, 27 I. & N. Dec. 803, 804 (BIA 2020), *Matter of Sinanaskas*, 27 I & N. Dec. 207, 210 (BIA 2018) The Fourth Circuit has confirmed that such bond procedures outlined in 8 U.S.C § 1226(a). *See Miranda*, 34 F.4th at 366 ("Supreme Court

[15] Indeed, if the Court were to use the same test it used in *Mbalivoto*, *see supra* at 19 n.12, those three factors also favor the goveinment or are at best neutral for both parties. The second and third factors are neutral as either ICE nor Petitioner have sought to delay Petitioner's removal proceedings, and neither party knows whether or not the IJ will grant Petitioner asylum. As for factor one, the length of delay, the Court in *Mbalivoto* emphasized that the petitioner's twenty-two (22) month "detention ha[d] exceeded those periods the Supreme Court, and other courts, have found constitutionally unreasonable." 527 F. Supp 3d 850; *see id* n.13 (citing cases) Petitioner fails to point to any caselaw demonstrating that a *two-month* detention pursuant to 8 U S C. § 1225(b) violates Petitioner's due process rights. Indeed, Federal Respondents could find any caselaw finding such short detention violates Petitioner's due process rights.

precedent establishes that the current procedures used for detention under § 1226(a) satisfy due process").

Petitioner's claim that due process requires departing from the usual rules is meritless. In *Zadvydas*, the Supreme Court perceived no constitutional difficulty in assigning the burden of proof to an alien facing prolonged detention to make a case for release on bond in the first instance. Thus, after the presumptively reasonable six-month detention period following a final order of removal, it is up to *the alien* to "provide[] good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future " 533 U S. at 701, *see Ming Hui Lu v Lynch*, 2016 WL 375053, at *6 (E.D. Va Jan. 29, 2016) ("[T]he initial burden of proof rests with the alien to provide 'good reason to believe' that there is no likelihood of removal in the reasonably foreseeable future."). Then, and only then, is the government required to "respond with evidence sufficient to rebut that showing." *Zadvydas*, 533 U.S. at 701.

Even the dissent in *Jennings*, which would have interpreted the INA's detention provisions as authorizing bond hearings, concluded that any such bond hearings "should take place in accordance with customary rules of procedure and burdens of proof rather than the special rules" Petitioner seeks. 583 U.S. at 356 (Breyer, J., dissenting). The Fourth Circuit reached a similar conclusion in a decision that has since been overruled on other grounds. *See Guzman Chavez v. Hott*, 940 F.3d 867, 874, 882 (4th Cir. 2019) ("The petitioners must carry their burden of proving that they are eligible for conditional release, and agency officials enjoy broad discretion in making detention-related decisions."), *rev'd on other grounds, Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021). And accordingly, several decisions from jurists of this Court ordering bond hearings for detained aliens have declined to adjust the usual burden-of-proof scheme *See Cardona Tejada v. Crawford*, 2021 WL 2909587, at *4 n 9 (E D Va. May 19, 2021) ("It is inappropriate to direct the [IJ] . . . to apply a specific standard of proof [or] to place the burden of proof on [the government] . . . ."), Order at 18, *Palomares Gastelum v. Barr*, No. 1:19-cv-

1428 (E.D. Va. Feb. 19, 2020), ECF No. 28 ("Existing regulations . guide the Court's determination on this matter."); *Mauricio-Vasquez*, 2017 WL 1476349, at *6 ("It is . . not the place of a federal court to craft a new standard, and this Court will therefore instead defer to the agency's existing regulations in this regard.").[16]

Therefore, if this Court were to grant the Amended Petition, it should order a bond hearing adhering to the constitutional bond procedures outlined in the Code of Federal Regulations.

III. Petitioner May Not Seek Relief under the INA and APA in a Habeas Petition.

In this proceeding, Petitioner expressly challenges his civil detention in the absence of a bond hearing. *See, e.g.*, Am. Pet. ¶¶ 40-56; 57-66. Such a challenge must be brought in the form of a petition for a writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (holding that when a detainee "is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus"); *see also, e.g.*, *Miller v. Commw of Pa.*, 588 F. App'x 96, 97 n.1 (3d Cir. 2014) ("Relief in the form of . . . release from custody indicates a challenge to 'the very fact or duration of [one's] physical imprisonment' and may be sought *only* through a petition for a writ of habeas corpus[]" (emphasis added) (quoting *Preiser*, 411 U.S. at 500)). Put simply, "release from ICE custody . . . is a remedy that is *only* available through a habeas petition." *Armando C G v. Tsoukaris*, 2020 WL 4218429, at *7 (D.N.J. July 23, 2020) (emphasis added). And indeed, a "Petition for a Writ of Habeas Corpus" is exactly what Petitioner filed. *See* Pet. at 1; Am. Pet. at 1.[17] Yet in the

[16] If the Court orders a bond hearing and shifts the burden of proof to the government, at the very least, the Court should require only proof "to the satisfaction of the [IJ]" rather than clear and convincing evidence. *Bah v. Barr*, 409 F Supp 3d 464, 472 (E D Va. 2019) (quoting 8 C F.R § 1236.1(c)(8)); *see Leke*, 2021 WL 710727, at *4 n.10 ("It is for the [IJ], in the first instance, to determine the appropriate standard of proof at the bond hearing.")

[17] Also bearing mention in this respect is the fact that Plaintiff appears to have paid only the $5 filing fee for a habeas petition rather than the $405 fee for a civil action, thus underscoring that the essence of this action is a habeas challenge. *See* Doc. No. 1; 28 U.S.C § 1914(a); U.S. District Court for the

Amended Petition, he also purports to assert claims under the APA and INA—civil claims. *Id.* ¶¶ 67-72 (INA claim), 73-78 (APA claim). This he may not do, as a civil claim is not cognizable in the habeas context. *See, e.g., Mesina v. Wiley*, 352 F. App'x 240, 241-42 (10th Cir. 2009) (holding that petition asserting APA claim "does not state a habeas claim"). That is because, as the Fourth Circuit recently held in the context of the Equal Access to Justice Act, a "habeas proceeding [i]s not a 'civil action'"; rather, such proceedings "are 'unique' and occupy a special place of their own in our system." *Obando-Segura v. Garland*, 999 F.3d 190, 192-93 (4th Cir. 2021) (quoting *Harris v. Nelson*, 394 U.S. 286, 293-94 (1969)); *see Smith v. Angelone*, 111 F.3d 1126, 1130 (4th Cir. 1997) ("Although a habeas proceeding is considered a civil action for some purposes, it is 'more accurately regarded as being *sui generis*.'" (citation and internal citation omitted)). Petitioner may not both avail himself of the specialized procedural rules attendant to habeas proceedings while also maintaining a mine-run civil claim that, in the usual course, is subject to the Federal Rules of Civil Procedure.[18]

Even if Petitioner could assert an APA and INA claim in this case (he may not), it would fail as a matter of law. The only action he challenges as allegedly violative of the APA or INA is the IJ's decision not to hold a bond hearing because Petitioner is detained as an arriving alien. But his argument for why this decision was arbitrary and capricious is the mistaken premise that he is detained pursuant to section 1226(a). *See* Pet. ¶ 65. Because he is in fact detained pursuant to section 1225(b), as discussed above, which indisputably does not provide for a bond hearing, the IJ's decision was not even incorrect, much less arbitrary and capricious. *See Nat. Res. Def. Council v. EPA*, 16 F.3d 1395, 1400-01 (4th Cir. 1993) (explaining agency action is not arbitrary or capricious as long as "a rational

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Eastern District of Virginia, Court Fees, *available at* https://www.vaed uscourts.gov/court-fees (last visited May 13, 2025).

[18] The *raison d'être* for this peculiar mixing of habeas and civil claims may be the Amended Petition's notable request for attorney's fees under the APA, Pet., Prayer ¶ f, which appears to be an attempt to circumvent the Fourth Circuit's recent decision holding that such fees are not available in a habeas action under the Equal Access to Justice Act, *see Obando-Segura*, 999 F.3d at 191.

basis exists for its decision"); *see also Jennings*, 583 U.S. at 297 ("neither § 1225(b)(1) nor § 1225(b)(2) says anything whatsoever about bond hearings").

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Court deny the Amended Petition for a Writ of Habeas Corpus.

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Date: May 27, 2025

Respectfully submitted,

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By: /s/

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