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

JORGE ARMANDO OLAYA RODRIGUEZ, ***Petitioner,*** **v.** **PAMELA BONDI,** **In her official capacity as Attorney General of the United States,** **KRISTI NOEM,** **In her official capacity as Secretary of Homeland Security,** **TODD M. LYONS,** **In his official capacity as Acting Director, Immigration and Customs Enforcement;** **JAMES A. MULLAN,** **In his official capacity as Assistant Field Officer in charge of ICE Washington Field Office,** **JEFFREY CRAWFORD,** **In his official capacity as Warden of the Farmville Detention Center.** ***Respondents.***	**Case No: 1:25-CV-791-AJT-WBP** **REPLY TO RESPONDENTS' OPPOSITION TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS**

REPLY TO RESPONDENTS' OPPOSITION TO AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Jorge Armando Olaya Rodriguez ("Mr. Olaya"), files this reply to Respondents' opposition to his amended petition for habeas corpus. The Department of Homeland Security ("DHS") has detained Mr. Olaya without explanation, after he had been released from prior

custody and while he was in the process of preparing for ongoing immigration court proceedings. Since then, DHS has not responded to Mr. Olaya's request for release, and the immigration court has found that it has no jurisdiction to consider his request for bond This violates his due process rights because Mr. Olaya, who has been present in the United States for two years without criminal incident, has no other way to challenge his continued detention, and unlike an "arriving alien" who may be entitled to less procedural rights because he is "at the gates," Mr. Olaya has been physically present in the United States for two years after being paroled in.

LEGAL FRAMEWORK

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" that the Due Process Clause protects. *Zadvydas v Davis*, 533 U.S. at 678, 690 (2001). Moreover, the Supreme Court has held that all individuals within the United States, including noncitizens, are entitled to due process *Zadvydas*, 533 U.S. at 693; *Reno v. Flores*, 507 U S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings ") The Supreme Court has distinguished noncitizens who are detained shortly after entry from those who have been in the United States for years, *DHS v. Thuraissigiam*, 591 U.S. 103, 140 (2020), a distinction on which Respondents rely to allege that Mr. Olaya is not entitled to any mechanism to challenge his detention before a neutral arbiter

"Any [noncitizen] who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such [noncitizen's] status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title " 8 U S.C § 1158(a)(1) "If an immigration officer

determines that an alien . . . who is arriving in the United States . . . indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer *shall* refer the alien for an interview by an asylum officer under subparagraph (B)." 8 U.S.C. § 1225(b)(1)(A)(ii) (emphasis added). This process requires a credible fear interview ("CFI"), and if a decision is favorable, a referral for proceedings before the immigration court. If an applicant "is found to have a credible fear of persecution or torture, the asylum officer will" provide the record and notes of the decision. 8 C.F.R. § 208.30(f). From there, "USCIS has complete discretion to either" refer the case "for full consideration of the asylum and withholding of removal claim in [immigration court], or retain jurisdiction over the application for asylum[.]" *Id.* If the asylum officer determines that a noncitizen does not have a credible fear of persecution or torture, at the election of the applicant, review will be done by an immigration judge. 8 C.F.R. § 208.30(g)(1); *see* 8 C F.R. § 1003.42.

Alternatively, the Department of Homeland Security ("DHS") has the discretion to place someone into removal proceedings without the CFI process, where they will have the opportunity to seek asylum before an immigration judge. *See* 8 U.S.C. §§ 1158, 1225(b)(2)(A). Whether a noncitizen is designated by DHS as an arriving alien when placed into removal proceedings is ordinarily indicated on a Form I-862 Notice to Appear ("NTA") *See* 8 C.F.R § 235.6(a)(i).

THIS COURT SHOULD GRANT MR. OLAYA'S HABEAS PETITION

This Court should grant the petition for a writ of habeas corpus because Mr. Olaya's detention, which occurred without explanation as he was preparing for his removal hearings and after he had lived in Massachusetts for over the last two years, violates his constitutional rights. Critically, Mr. Olaya has been denied any individualized, neutral consideration of his request for release. Providing for release or a bond hearing before an impartial arbiter where the government

bears the burden to justify continued detention would remedy this violation

Respondents primarily oppose Mr. Olaya's habeas petition on the basis that he is considered an arriving alien and thus has very limited due process rights Opp., ECF Doc. 16, p. 2, 13. But notably, DHS has not established Mr. Olaya's status as an arriving alien. *See* Exhibit (appended), Notice to Appear (April 19, 2023) Mr Olaya arrived in the United States on or about April 8, 2023. He was placed into expedited removal processing, found to have a credible fear of returning to Colombia, and then referred to the immigration court. In charging Mr. Olay, the DHS alleged that Mr Olaya is "an alien present in the United States who has not been admitted or paroled" and charged that he is inadmissible under both 8 U.S.C. §§ 1182(a)(7)(A)(i)(I) and (a)(6)(A)(i) At a hearing on April 22, 2025, the immigration court sustained only the charge under 8 U.S.C. § 1182(a)(6)(A)(i) for being an alien present in the United States without having been admitted or paroled.

After his entry and initial detention, Mr. Olaya was paroled by DHS. Upon termination of the parole, the regulations, 8 C.F.R. § 212.5(e)(2)(i), "restored" Mr Olaya "to the status that he . had at the time of parole." In this case, this makes Mr. Olaya inadmissible under § 1182(a)(6)(A)(i) There has been no subsequent determination that Mr. Olaya is inadmissible under 8 U S.C § 1182(a)(7)(A)(i)(I).

The crux of this case is whether this Court will permit Respondents to treat people paroled into the United States, who have been living in the U.S pursuant to that parole as if they were arriving at the borders of the country. Mr. Olaya asks this Court make a clear distinction between those two types of applicants, considering that none of the cases cited by Respondents allow for a person inadmissible under § 1182(a)(6)(A)(i) and already living in the U S. to be subject to absolute, unconditional detention without any ability to challenge that detention

Mr Olaya contends that he, after being paroled into the U.S. and living here for two years, is distinguishable from the individual in *Thuraissigiam*, who sought habeas relief when he was detained near the U.S. border at the time of his entry, 591 U.S. at 107. Likewise, Respondents rely on cases from the 1950s to note that noncitizens who were detained at the border prior to entry had limited due process rights. Opp p 10 (discussing *United States ex rel. Knauff v. Shaughnessy*, 338 U S 537, 539-40 (1950); *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 207 (1953)) But restoring Mr. Olaya to the status he had at the time he was paroled (and importing a finding of inadmissibility not made by the immigration judge) is completely different than trying to turn back time and pretend that Mr. Olaya is actually arriving at the border today. For the reasons that follow, this Court should acknowledge the distinction between those noncitizens arriving at the border or a port of entry and those who, after having been paroled into the U.S. are re-detained and merely treated as arriving aliens on paper. With that distinction in mind, the Court should find Mr. Olaya more closely resembles those noncitizens detained under 8 U.S.C § 1226(a) and order that Mr Olaya is entitled to due process to challenge the lawfulness and reasonableness of his custody through a bond hearing before a neutral arbiter

I. MR. OLAYA IS MATERIALLY DISTINGUISHABLE FROM AN ARRIVING ALIEN SUCH THAT HIS DUE PROCESS RIGHTS SHOULD NOT BE LIMITED.

Plainly, Mr. Olaya is not detained based on being stopped at the border; he has been in the United States for more than two years after DHS first encountered him at the border and paroled him into the U.S , and he has been subject to ongoing proceedings before an immigration judge to adjudicate his removability and potential eligibility for relief since the time of his entry *Mezei*, 345 U.S at 212 ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). Notwithstanding these distinctions, Respondents assert that Mr. Olaya's

residence, connections, and life in the United States are irrelevant because he has the same immigration status as someone who is applying for admission at a port of entry from outside the U.S. Opp. at 13. This Court should reject this blanket attempt to obviate due process rights of those who have been residing for years within the United States.

Notably, Respondents do acknowledge that a bond hearing can be warranted for certain noncitizens who are considered arriving aliens.[1] But, Respondents argue, Mr. Olaya has not been detained long enough to warrant a bond hearing, conceding that the protections exist for arriving aliens only once detention has become unreasonably prolonged. Opp. pp. 6, 14, 16-17, 23-24 However, Mr. Olaya is not arguing that his length of detention has become unreasonable, he is instead seeking the opportunity to contest his continued detention before any neutral tribunal since he is not actually in the position of an arriving alien seeking entry to the United States. *Cf.* Opp. p. 12 (arguing that Mr Olaya is not entitled to periodic bond hearings).

The cases which provide an arriving alien a bond hearing only once detention become unreasonably prolonged are also not directly applicable, as those cases focus on detention of those who have never been free in the United States as opposed to those who have been stripped of freedom they had already obtained. *See discussion in Mbalivoto v. Holt*, 527 F. Supp. 3d 838, 848-50 (E.D.Va. 2020); *Leke v. Hott*, 521 F.Supp.3d 597, 602 (E.D Va. 2021) ("because detention of a person without any sort of process is a deprivation of that person's bodily 'liberty,' an arriving alien subject to prolonged and indefinite detention is detained in violation of the Fifth

[1] Respondents cite cases involving detention of noncitizens who sought review while in expedited removal proceedings under 8 U.S C. § 1225(b). *See, e.g.*, Opp. pp. 12-13. However, Mr Olaya is in full removal proceedings before an immigration judge under 8 U.S.C. § 1229b and is no longer in expedited removal proceedings. *See* Am. Pet , ¶ 3; Opp. Exh. 1 ¶ 10. This distinction is material; *Thuraissigiam* involved applicants in expedited removal proceedings under § 1225(b) that may not have the "same procedural rights" as noncitizens in removal proceedings before an immigration judge. *Thuraissigiam*, 591 U.S. at 109-11.

Amendment."). But here, Mr. Olaya is more similar to those detained under 8 U.S.C. § 1226(a), who are present in the United States after admission and thereafter detained by ICE as a matter of discretion. Such detainees are accorded a bond hearing by statute, and it is irreconcilable that due process would afford these persons a bond hearing and deprive Mr. Olaya of any hearing.

II. BIA AND ATTORNEY GENERAL PRECEDENT INTERPRETING THE INA OPERATE TO DEPRIVE MR. OLAYA OF DUE PROCESS.

Exhausting his alternatives, Mr Olaya has attempted to present his arguments before an immigration judge who denied the request under *Matter of M-S-*, 27 I. & N. Dec. 509 (A.G 2019), *see also Matter of Q. Li*, 29 I. & N. Dec. 66 (BIA 2025). In *Matter of M-S-*, the Attorney General determined that a noncitizen who was initially placed in expedited removal proceedings but who was then transferred to full proceedings before an immigration judge after establishing a credible fear of persecution or torture should be treated as an arriving alien in expedited proceedings and not eligible for bond. 27 I & N. Dec. at 515. The Attorney General explained that the expedited removal statute requires detention "'for further consideration of the application for asylum.'" *Id.* (quoting 8 U.S.C. § 1225(b)(1)(B)(ii)). Because the noncitizens who are transferred from expedited removal proceedings to full removal proceedings are placed in full proceedings so they can seek asylum, the Attorney General reasoned they are still covered by § 1225(b)(1)(B)(ii) despite no longer being in expedited removal proceedings. 27 I. & N Dec. at 516; *accord Jennings v Rodriguez*, 583 U S 281, 299 (2018) (recognizing that § 1225(b) detention continues until an immigration officer finishes considering the application for asylum or until removal proceedings have concluded). Recently, in *Matter of Q. Li*, the Board expanded the holding in *Matter of M-S-* to rule that an individual who is paroled and then re-detained prior to the completion of removal proceedings is also not subject to bond. 29 I. & N. Dec. 70-71.

Matter of Q. Li is wrong and the Board and Attorney General are entitled to no deference

in how the INA is interpreted in these cases. *Loper Bright Enterprises v Raimondo*, 603 U.S 369 (2024). Critically, the Supreme Court in *Jennings* and the Attorney General in *Matter of M-S-* both reasoned that it made "little sense" to allow DHS to detain an individual at the border without a warrant but then require them to issue a warrant for an individual already in custody should the proceedings be transferred to full removal proceedings. *Jennings*, 583 U.S. at 302; *Matter of M-S-*, 27 I. & N. Dec. at 517

But in *Q Li*—as the case is here—the noncitizen was *re*-detained and returned to custody. *Matter of Q. Li*, 29 I. & N. Dec at 67. It would make little sense to allow that re-detention—of a noncitizen who had been living and abiding by laws within the United States—without a warrant for arrest. In fact, an individual, like Mr. Olaya, is in a far different position than the noncitizens in *Jennings* and *M-S-*, who had never received parole, had never been released from DHS's custody, and had not obtained the constitutional due process protections of individuals who have entered and resided in the United States. Indeed, Mr. Olaya has been forced to return to immigration custody without any explanation or reason after living with his wife and infant in another state. He must now litigate his claim for asylum from a detention facility, and can no longer support his U.S citizen child in the meantime. His inability to challenge that continued detention in any way is a due process violation of his liberty rights.

It also bears noting that in reviewing Mr. Olaya's request for bond, the immigration judge believed she was bound by *Matter of M-S-* and that she lacked jurisdiction over Mr. Olaya's custody However, she made an alternative finding that if she had jurisdiction, Mr. Olaya "would not present a danger to the community or be a flight risk." Declaration of James A Mullan, ECF 16-1 at ¶ 19.[2] Thus, without *Matter of M-S-* to strip the immigration judge of jurisdiction, she

[2] Notably absent from Mr. Mullan's declaration is any reference to Mr. Olaya's April 18, 2025

would have ordered Mr. Olaya released. *Id.*

To be sure, Mr Olaya has no other avenue to raise a challenge to his detention. *See e g McCarthy v Madigan*, 503 U.S. 140, 147-48 (1992) ("[A]n administrative remedy may be inadequate [because] . . an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute" or "where the administrative body . . has otherwise predetermined the issue before it."). DHS has not responded to his request for release from custody, there are no procedural rules for the manner or timing of DHS's custody review, DHS's custody determination are generally discretionary and not subject to review, and ICE is not a neutral arbiter of his detention. *Mbalivoto*, 527 F. Supp. 3d at 848 ("Petitioner's statutory opportunity for parole, which he twice requested and was twice denied, has highly 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."). And when he did request bond, the immigration judge—who was a neutral arbiter—lacked jurisdiction to consider the issue under Department of Justice precedent. Habeas relief is the only remaining vehicle for Mr. Olaya to contest his detention. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner '").

III. THE CONSTITUTION REQUIRES THAT A PERSON LIVING IN THE UNITED STATES FOR TWO YEARS IS ENTITLED TO AN OPPORTUNITY TO CHALLENGE THE LAWFULNESS AND REASONABLENESS OF HIS CUSTODY.

Procedural due process claims are ordinarily adjudicated through the balancing of factors

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discretionary request to ICE that he be released from custody. *See* ECF 16-1.

identified in *Mathews*, 424 U.S. 319.[3] Applying the *Mathews* framework, the Court should grant habeas relief. Specifically, *Mathews* requires review of three factors: (1) the private interest affected by government action; (2) the risk of "erroneous deprivation" of the private interest "through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) the government's interest and its "fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Id.* at 335. Each of the *Mathews* factors weighs heavily in favor of requiring a bond hearing for Mr. Olaya.

A. The Fundamental Nature of Mr. Olaya's Liberty Interest Favors Him

First, the "importance and fundamental nature" of an individual's liberty interest is well-established. *See Salerno*, 481 U.S. at 750; *compare Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment . . . lies at the heart of [] liberty") with *Hechavarria v. Sessions*, 15-CV-1058LJV, 2018 WL 5776421 at *8 (W.D N.Y. 2018) ("this Court finds little difference between Hechavarria's detention and other instances where the government seeks the civil detention of an individual to effectuate a regulatory purpose."). In Mr Olaya's case, the fundamental nature of freedom weighs in his favor, as he has lived (pursuant to a grant of parole) for more than two years in the United States, has a U.S. citizen daughter, and has never been convicted of any crime – much less a crime which would subject him to detention.

Respondents argue that Mr Olaya's liberty interest is less compelling because he is an

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[3] Mr. Olaya agrees with Respondents that the factors outlined in *Portillo v Hott* are not directly applicable. *See* Resp. Opp. at 23 (noting that *Portillo* factors apply to claims brought by noncitizens detained under the criminal mandatory detention provisions of 8 U.S.C § 1226(c)). Mr. Olaya has no criminal history in the U.S and so the factors are not relevant to address the purportedly mandatory detention in his case, namely that Respondents pretend he is an arriving alien after two years in the U.S Mr. Olaya proceeds in agreement that the *Mathews* factors should guide the Court's procedural due process inquiry. *See Miranda v Garland*, 34 F.4th 338, 358-59 (4th Cir. 2022).

arriving alien. Opp. p. 20-21 But Respondents fail to recognize the plain distinction between Mr. Olaya and the line of cases which limit custody protections for arriving aliens. On paper, Mr. Olaya may be an arriving alien. But in reality, Mr. Olaya "arrived" two years ago and was paroled into the United States Whatever identifying term Respondents give him, during that time he has been in our country he has been employed and he has a family here including an American child. He was also present in the U.S. during that time pursuant to DHS's own grant of parole, lawfully pursuing the removal process established for him.

The crux of Respondents' defense is that DHS may, in its unreviewable discretion or through automatic termination, *un-parole* Mr. Olaya and whisk him back in time, asking this Court to join in pretending that he is at the border and ignore that he was allowed into the U.S. two years ago. For such persons, jurisprudence on due process in civil detention generally remains instructive, that as a person who has lived within the borders of the U.S., obeyed our laws, and who was going through the ordinary process of seeking asylum, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U S 739, 755 (1987) The Court should distinguish the facts here—Mr. Olaya's years-long residence with his family in the United States without criminal history—and conclude that the private interest heavily favors affording Mr. Olaya more due process than one who has only just arrived at the border or a port of entry.

B. <u>The Risk to Mr. Olaya of Being Erroneously Deprived of His Liberty is Significant.</u>

Second, the risk that a noncitizen's freedom will be erroneously deprived is significant, as any internal process to demonstrate to ICE that release is warranted is not subject to review or challenge, and indeed has no published procedural rules. All § 1225 detainees who seek release from custody must provide evidence to their individual ICE detention officer who reviews the

evidence and makes a decision on custody. Whether that decision is subject to supervisor review is unknown, and possibly not universally enforced. And even if it were, ICE is not a neutral arbiter of whether a noncitizens' detention is necessary—indeed, one cannot be both judge and jailer and still be called neutral.

Moreover, requiring detained noncitizens to obtain and submit evidence within a detention facility is extremely onerous. Barriers such as indigence, language and cultural separation, limited education, and mental health issues often associated with past persecution or abuse further complicate detainees' ability to successfully obtain such records and present them in support of release The mere fact of detention – in what are often county jails or for-profit prisons[4] located miles from individuals' community – presents a significant obstacle to accessing the outside world and makes communication with family and counsel difficult and at times, prohibitively expensive. *See e g Moncrieffe v Holder*, 569 U.S. 184, 201 (2013) (noting that immigrant detainees "have little ability to collect evidence"). Thus, there is a significant risk of erroneous, unwarranted detention.

Respondents argue that Mr. Olaya received sufficient process because he can request parole from DHS. Opp. p. 21. Mr. Olaya did make such a request *See* ECF 1-1. But, as discussed, DHS is not a neutral arbiter and does not provide any timeline or standards for addressing requests for release, and has not done so here despite seven weeks to review his request. Simply put, a request for parole from the agency that has re-detained Mr. Olaya without explanation or notice is insufficient process to meet a constitutional standard, particularly as it has now been seven weeks with no answer and no mechanism for ensuring any review. *See Mbalivoto*, 527 F. Supp 3d at

[4] Farmville Detention Center is a private immigration detention facility materially indistinguishable from a jail or prison.

848.

C. *The Procedure Mr. Olaya Proposes Does Not Meaningfully Prejudice the Government.*

Third, and finally with respect to the *Mathews* analysis, the proposed procedures – namely requiring that DHS prove detention is necessary to serve a legitimate government interest – does not meaningfully prejudice the government's interest in detaining dangerous noncitizens during removal proceedings. There is not likely to be any dispute that Mr. Olaya is not dangerous—he has no criminal record in the United States, was previously paroled by ICE, and has otherwise complied with all orders by immigration authorities. Nor have Respondents alleged any reason to believe that the government could not promptly execute a removal order should one be issued at the conclusion of the removal proceedings. *See* Opp. p. 22.

Respondents also argue, if a bond hearing were ordered, that the government should not be required to bear the burden of proof. Opp. p. 26. But the reason for the burden to be placed on the government to justify further detention is just an extension of the principle that liberty is the norm. Mr. Olaya should not be detained only because he could not present enough evidence to prove a negative—that he is not a danger or a flight risk—while requiring the government to present nothing. That would be to presume detention is necessary—backwards of the due process contemplated for those living in the United States who have then been detained by immigration authorities.

Thus, all three *Mathews* factors favor requiring the Government to bear the burden of proof during immigration custody hearings, as it does during other civil detention contexts *See e.g Portillo*, 322 F.Supp.3d at 709 (noting "the strong tradition that the burden of justifying civil detention falls on the government" and ordering "the burden of justifying petitioner's continued detention falls upon the government . . . to demonstrate by clear and convincing evidence that

petitioner's ongoing detention is appropriate[.]"); *Mbalivoto*, 527 F. Supp.3d at 852 ("The Court concludes that at Petitioner's bond hearing under § 1225(b), due process requires that the Government bear the ultimate burden of persuasion that Petitioner is a flight risk or a danger to the community to justify denial of bond in light of the full range of bond conditions available under the circumstances.").

CONCLUSION

For these reasons, this Court should grant Mr. Olaya's petition and issue a writ of *habeas corpus* ordering Respondents to immediately hold a custody hearing before a neutral arbiter at which DHS shall bear the burden of proof to establish that his continued detention is necessary. Alternatively, the Court should order Mr. Olaya immediately released from immigration detention so he may continue preparing for his upcoming removal hearings.

Respectfully submitted,

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