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

WILIAN ALEXANDER MEJIA ROMERO, *Petitioner*, v. PAMELA BONDI, *et al.* *Respondents.*	Case No. 1:25-cv-993 (RDA/WEF)

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

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INTRODUCTION

Petitioner, a native and citizen of El Salvador, challenges his alleged prolonged detention of *two (2)-months*, and asks this Court or the immigration court to conduct a bond hearing where the Government bears the burden of proof of his continued detention. Both parties agree that Petitioner is detained as an "arriving alien" under section 1225(b) of the Immigration and Nationality Act ("INA"). And despite the Supreme Court making clear the due process afforded to arriving aliens "are due process of law," Petitioner claims his detention violates his procedural and substantive due process rights under the Fifth Amendment. This Court should not entertain Petitioner's due process challenge to his two (2)-month detention, which falls far short of the period that courts have repeatedly upheld as constitutional, and should dismiss his Petition.

Petitioner purports to seek much more than just a bond hearing. Indeed, Petitioner asks this Court to grant remedies that it has no authority to grant, namely his immediate release. Petitioner also asks this Court to find that Immigration and Customs Enforcement's ("ICE's") discretionary authority to detain or grant bond to an alien upon initial apprehension *and* a Board of Immigration Appeal's ("BIA's") and Attorney General decision that deems Petitioner ineligible for bond violates Petitioner's due process. But as the Supreme Court, Immigration and Nationality Act, and caselaw make clear, Petitioner can only challenge his *prolonged* detention in a habeas petition. And as Petitioner has been detained for just over two (2) months at the time he filed his Petition, his detention in no way violates his procedural or substantive due process rights.

This Court should deny the Petition. *First*, Petitioner's Fifth Amendment claim is "inexplicitly intertwined" with his removal proceedings, meaning his claim arises out of actions taken during removal proceedings. The INA clearly forbids review of such actions arising out removal proceedings, and because Petitioner challenges his removal proceedings, this Court lacks jurisdiction over the Petition. *Second*, even if this Court were to find it has jurisdiction to hear Petitioner's claim, the

Supreme Court has made clear that the INA provides all process that is due to an arriving alien. And if this Court were to inquire if Petitioner were owed additional process, Petitioner's mere two-month detention is nowhere near the timeframes that this Court and other jurists of this Court have found compels the holding of a bond hearing.

Therefore, Federal Respondents respectfully request this Court deny and dismiss the instant habeas petition.

BACKGROUND

A. Statutory and Regulatory Background

Before proceeding to the factual and legal premise of the instant habeas petition, it is important to explain the statutory and regulatory provisions governing petitioner's civil immigration detention. The various statutory bases on which the United States ("U.S.") may seek to remove an alien from the country, the instances in which the U.S. is either required (or has the discretion) to detain such aliens, and the interaction between the two, have been the subject of extensive recent judicial discussion. *See generally Department of Homeland Security ("DHS") v. Thuraissigiam*, 591 U.S. 103 (2020); *Jennings v. Rodriguez*, 583 U.S. 281 (2018). There are two types of removal proceedings – "full" removal proceedings, *see* 8 U.S.C. § 1229a, and "expedited" removal proceedings, *see id.* § 1225(b). This instant habeas petition involves detention under section 1225(b).

Important to any understanding of this statutory scheme is the concept of "admission." As the INA provides, "admission" is "the lawful entry of [an] alien into the U.S. after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(13)(A). The Supreme Court has explained that "[t]he power to admit or exclude aliens is a sovereign prerogative," and that the Constitution gives "'the political department of the government' plenary authority to decide which aliens to admit." *Thuraissigiam*, 591 U.S. at 132 (quoting *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 659 (1892)). As will be seen, the INA authorizes the removal of certain aliens who have not been admitted to the U.S. through

different (and at times, circumscribed) procedures, and as the Supreme Court has unequivocally held, requires federal immigration officials to detain these aliens pending the conclusion of any necessary proceedings. An alien, such as Petitioner, "who arrives in the [U.S.]" is treated as "an applicant for admission." 8 U.S.C. § 1225(a)(1); *see* 8 C.F.R. § 1.2 (defining arriving alien).

In the event that "an immigration officer determines that an alien . . . is inadmissible," the officer "shall order the alien removed from the [U.S.] 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 his 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), *see* 8 C.F.R. § 235.3.3(c)(1) ("any arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to section 240 of the [INA] shall be detained in accordance with section 235(b) of the [INA]").

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; *Matter of Q. Li.*, 29 I. & N. Dec. 66 (BIA 2025); *see also Matter of M-S-*, 27 I. & N. Dec. 509, 519 (A.G. 2019) ("all aliens transferred from expedited to full [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 this 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).[1]

B. Petitioner's Immigration History

1. Unlawful Entries and Criminal Charges

Petitioner is a 44-year-old native and citizen of El Salvador. Declaration of XXXX Cole, Acting Director, Federal Respondents' Exhibit 1 ("FREX 1") ¶ 5; *see* Pet. ¶ 12. On August 10, 2000, Petitioner *first* entered the U.S. by unlawfully crossing the border between the U.S. and Mexico near Rio Grande City, Texas. FREX 1 ¶ 6; *see* Pet. ¶ 18. Petitioner was not admitted or paroled by an immigration officer. FREX 1 ¶ 6. Petitioner was apprehended by Customs and Border Protection officers shortly after his unlawful entry to the U.S. *Id.* When apprehended, Petitioner claimed to be a native and citizen of Mexico and voluntarily returned to Mexico. *Id.*

After he entered without inspection for a *second* time, Petitioner applied for Temporary Protected Status ("TPS") which was approved on June 11, 2003, and effective until September 9, 2003.[2] *Id.* ¶ 8; *see* Pet. ¶ 19. He also married his U.S. citizen wife. Pet. ¶ 19. On April 7, 2004, Petitioner

[1] Relevant here, if an alien has been released, whether it is pursuant to parole or bond, "such release may be revoked at any time." 8 C.F.R. § 235.1(c)(9). And when such alien is re-detained under this section, "any outstanding bond shall be revoked and canceled." *Id* (emphasis added).

[2] An alien's TPS status can be withdrawn once he fails to re-register his TPS status or travels outside the U.S. without parole. *See* 8 U.S.C. § 1254a(c)(3) ("The Attorney General *shall* withdraw [TPS]") (emphasis added); 8 C.F.R. §§ 244.15, 244.17. ICE has no record of Petitioner renewing his TPS status. And even if Petitioner maintained TPS status until he left for El Salvador in 2019, his status was

was charged in Fairfax County, Virginia with felony Manufacturing, Sale, Possession of a Controlled Substance in violation of Virginia Code § 18.2-248 and felony Attempt to Commit a Noncapital Offense in violation of Virginia Code § 18.2-26. FREX 1 ¶ 9. Both charges were nolle prosequi on August 24, 2012. *Id.*

On September 13, 2017, U.S. Citizenship and Immigration Services ("USCIS") approved Petitioner's family-based visa petition, the Form I-130, Alien Relative Petition, filed by his U.S. citizen wife. *Id.* ¶ 10, Pet. ¶ 20. Petitioner also filed the Form I-601A, Application for provisional Unlawful Presence Waiver. FREX 1 ¶ 11; Pet. ¶ 20. Petitioner's waiver application was approved on March 12, 2018. FREX 1 ¶ 11. On July 15, 2018, Petitioner traveled to El Salvador to execute his immigrant visa application. FREX 1 ¶ 12; Pet. ¶ 20. On July 31, 2019, the U.S. Consulate in El Salvador denied Petitioner's visa application because he was found to be ineligible under 8 U.S.C. § 1182(a)(2)(C), as an alien who committed acts relating to a controlled substance[3]. FREX 1 ¶ 13. On August 25, 2019, Petitioner entered the U.S. unlawfully a *third* time, crossing the border between the U.S. and Mexico near Lukeville, Arizona. FREX 1 ¶ 14; NTA, Federal Respondents' Exhibit 2 ("FREX 2"), at 1; Pet. ¶¶ 21-22. Petitioner was not admitted or paroled by an immigration officer. FREX 1 ¶ 14; FREX 2, at 1. Petitioner was apprehended by Customs and Border Protection officers shortly after his unlawful entry to the U.S. *Id.*

2. *Expedited and Full Removal Proceedings*

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withdrawn when he traveled outside the U.S. without advance parole. *See* 8 U.S.C. § 1254a(c)(3)(B); 8 C.F.R. § 244.15.

[3] In the Petition, Petitioner seems to imply that the State Department erroneously denied his immigrant visa application. *See* Pet. ¶ 20 ("Despite the pre-approved I-601A waiver, the consular officer denied his visa."). But Petitioner's approved I-601A waiver only waived Petitioner's inadmissibility under 8 U.S.C. § 1181(a)(9)(B), not his inadmissibility pursuant 8 U.S.C. § 1182(a)(2)(C). *See Instructions for Application for Provisional Unlawful Presence Waiver*, USCIS, OMB No. 1615-0123 (expires Mar. 31, 2027) (retrievable at: https://www.uscis.gov/sites/default/files/document/forms/i-601ainstr.pdf (last accessed June 19, 2025)).

On August 30, 2019, Petitioner was placed in expedited removal proceedings pursuant to 8 U.S.C. § 1225. FREX 1 ¶ 15; Pet. ¶ 22. Petitioner was detained at the La Palma Correctional Center in Eloy, Arizona, pursuant to 8 U.S.C. § 1225(b)(1)(B)(iii)(IV), as an alien in expedited removal proceedings pending a final determination of credible fear of persecution. FREX 1 ¶ 15. On October 3, 2019, Petitioner attended a credible fear interview conducted by USCIS pursuant to 8 U.S.C. § 1225(b)(1)(B)(i). *Id.* ¶ 16; FREX 2, at 3. USCIS determined that Petitioner had established a credible fear of torture. FREX 1 ¶ 16; FREX 2, at 6; Pet. ¶ 22. On October 4, 2019, ICE issued Petitioner a Notice to Appear ("NTA") charging him with removability for being inadmissible under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, and 8 U.S.C. § 1182(a)(7)(A)(i)(I), as an alien who, at the time of application for admission to the U.S. was not in possession of any valid entry document. FREX 2, at 1; *see* FREX 1 ¶ 17; Pet. ¶ 22.

On November 6, 2019, Petitioner appeared before the Tucson, Arizona Immigration Court. FREX 1 ¶ 18. Petitioner admitted the factual allegations and conceded the charges of removability contained in the NTA. *Id.* The Immigration Judge ("IJ") sustained the charges of removability. *Id.* On November 21, 2019, Petitioner attended a custody redetermination hearing and an IJ granted bond in the amount of $15,000. *Id.* ¶ 19; Pet. ¶ 22.[4] Petitioner was released from immigration custody on November 25, 2019. FREX 1 ¶ 20. And on January 22, 2021, Petitioner filed a Form I-589, Application for Asylum and Withholding of Removal[5], with the Immigration Court. FREX 1 ¶ 21. Petitioner's attorney filed a Form EOIR-28, Notice of Entry of Appearance, before the Immigration Court on

[4] At the time of Petitioner's 2019 grant of bond, a nationwide injunction was in place requiring aliens to be scheduled bond hearings despite being ineligible for bond under *Matter of M-S-*. *See Padilla v. U.S. ICE*, 379 F. Supp. 3d 1170, 1173 (W.D. Wash. 2019), *modified sub nom. Padilla v. U.S. ICE*, 387 F. Supp. 3d 1219 (W.D. Wash. 2019), and *aff'd in part, vacated in part, remanded sub nom. Padilla v. ICE*, 953 F.3d 1134 (9th Cir 2020), *cert. granted, judgment vacated*, 141 S. Ct. 1041 (2021).

[5] Although not relevant to this Petition, USCIS determined that Petitioner is ineligible for asylum under 8 C.F.R. § 208.13(c)(4) and can only seek withholding of removal or protection pursuant to the Convention Against Torture ("CAT"). *See* FREX 3, at 7.

July 21, 2021. *Id.* ¶ 22.

On March 31, 2025, Petitioner was charged in Loudon County, Virginia with misdemeanor assault on a family member in violation of Virginia Code § 18.2-57.2. *Id.* ¶ 23; Pet. ¶ 26. On April 17, 25, the charge was dismissed as nolle prosequi. *Id.* On April 17, 2025, upon release from local custody, Petitioner was placed in immigration detention at the Farmville Detention Center. FREX 1 ¶ 24; Notice of Custody Determination, Federal Respondents' Exhibit 3 ("FREX 3"); Pet. ¶ 26; *see* 8 C.F.R. § 235.1(c)(9) (authority to re-detain and revoke bond). On May 20, 2025, Petitioner appeared before the Immigration Court for a custody redetermination hearing. FREX 1 ¶ 25; Pet. ¶ 27. The IJ denied Petitioner's request for release on bond, finding that Petitioner was ineligible for bond pursuant to *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019) because he is alien who was transferred from expedited removal proceedings to full removal proceedings. *Id.* On May 22, 2025, Petitioner filed a request for release with ICE through bond or parole. Pet. ¶ 29. As of the date the Petition was filed, ICE has not acted on Petitioner's request. *Id.* Petitioner is scheduled for an individual hearing before the Annandale, Virginia Immigration Court on August 1, 2025. FREX 1 ¶ 26.

As of the date of this filing, Petitioner remains subject to mandatory detention under 8 U.S.C. § 1225(b)(1)(B)(ii), as an alien who has a credible fear of persecution and is detained for further consideration of the asylum application. FREX 1 ¶ 27.

C. The Instant Petition

On June 11, 2025, Petitioner filed the instant Petition. *See* Dkt. 1. Petitioner alleges to "challenge his continued detention[,]" Pet. ¶ 44, but he also challenges several aspects of his removal proceedings, such as his ineligibility for bond, *see id.* ¶ 53 ('the application of *Matter of M-S-* and *Matter of Q. Li* to Mr. Mejia . . . violates his due process rights"), and ICE's initial custody determination, *see id.* ¶ 54 ("the existing procedure before ICE to seek release is without meaningful process"). Petitioner seeks "immediate release" or a bond hearing, whether it be in front of this Court or the immigration

court, where the Government bears the burden of justifying Petitioner's detention. *See id.* ¶ 61; Prayer for Relief. Petitioner also asks this Court to rule "that the agency precedent *Matter of M-S-* and *Matter of Q. Li* cannot be applied in this case as they violate [his] due process rights." *Id.* ¶ 61. On June 13, 2025, this Court issued an Order to Show Cause directing Respondents to respond to the petition on or before June 20, 2025. *See* Dkt 2. This Court further ordered that Petitioner may file a response to the Government's response on or before June 25, 2025. *See id.* The Court also ordered that hearing on this matter be scheduled for July 1, 2025. *See id.* Undersigned counsel filed his notice of appearance for Federal Respondents on June 18, 2025. *See* Dkt. 3.

ARGUMENT

I. This Court should Deny the Petition

This Court should deny the Petitioner for two reasons. *First*, Petitioner's Fifth Amendment claim is "explicitly intertwined" with his removal proceedings, and because Petitioner challenges his removal proceedings, this Court lacks jurisdiction under the INA. *See infra* Part A. *Second*, even if this Court were to find it has jurisdiction to hear Petitioner's claim, the Supreme Court has made clear that INA provides all due process that is due to an arriving alien. *See infra* Part B. Therefore, this Court should deny and dismiss the Petition.

A. This Court lacks jurisdiction over the Petition because his claims are barred by the jurisdictional stripping provisions of the INA.

Petitioner's allegations are *not* a "challenge his *continued* detention[,]" Pet. ¶ 44 (emphasis added), but a challenge to his ineligibility to receive bond his removal proceedings, *see id.* ¶ 53 ('the application of *Matter of M-S-* and *Matter of Q. Li* to Mr. Mejia . . . violates his due process rights"), and a challenge to ICE's discretionary initial custody determination, *see id.* ¶ 54 ("the existing procedure before ICE to seek release is without meaningful process"). Indeed, in seeking relief, Petitioner ultimately "requests that this custody hearing be held before this Court, or otherwise ordered to occur the immigration court with a ruling that the agency precedent *Matter of M-S-* and *Matter of Q. Li* cannot

be applied in this case as they violate [Petitioner's] due process rights." *Id.* ¶ 61. The INA precludes Petitioner's claim. *See* 8 U.S.C. §§ 1252(a)(2)(A)(iv), (b)(9), (e)(3)(A)-(B), (g).

First, Petitioner's claim is barred from review under 8 U.S.C. § 1252(a)(2)(A)(iv). This jurisdiction-stripping provision states:

> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, *no court shall have jurisdiction* to review . . . (iv) procedures and policies adopted by the Attorney General to *implement* the provisions of section 1225(b)(1) of this title.

Id. § 1252(a)(2)(A) (emphasis added). Petitioner seeks release and a bond hearing because he cannot receive bond under Attorney General's decision in *Matter of M-S-*. *See* Pet ¶ 61 ("Mr. Mejia requests that this custody hearing be held before this Court, or otherwise ordered to occur the immigration court with a ruling that the agency precedent *Matter of M-S-* and *Matter of Q. Li* cannot be applied in this case as they violate Mr. Mejia's due process rights."). Both decisions involved an arriving alien's ineligibility for bond and addressed the section 1225(b) afforded the appropriate due process for arriving aliens. And an arriving alien's bond ineligibility is explicitly intertwined with the implementation of section 1225(b)(1). Therefore, as Petitioner bases his entirety of his Petition off this ineligibility to receive bond, section 1252(a)(2)(A)(iv) applies, and this Court lacks jurisdiction over the petition.

Petitioner's challenge that ICE's custody determination does not have any meaningful process is too barred under 8 U.S.C. § 1252(a)(2)(A)(iv). ICE's initial custody determination allows ICE to decide whether to arrest an alien or release an alien without charging him or placing him in expedited removal. *See* 8 C.F.R. § 236.1(c)(8) ("Any officer authorized to issue a warrant of arrest *may*, in the officer's discretion, *release* an alien not described in section 236(c)(1) of the [INA]"). Since Petitioner is an alien not described in 8 U.S.C. § 1226(c)(1) and is unquestionably detained pursuant to 8 U.S.C.

§ 1225(b)(1), ICE's initial custody determination, a procedure used to implement section 1225(b)(1), is barred from judicial review. *See* 8 U.S.C. § 1252(a)(2)(A)(iv).

Second, the INA further provides that, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding* brought to remove an alien from the U.S. under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added). "This section, known as the 'zipper' clause, consolidates review of matters *arising from* removal proceedings 'only in judicial review of a final order under this section,' and strips courts of habeas jurisdiction over such matters." *Afanwi v. Mukasey*, 526 F.3d 788, 796 (4th Cir. 2008), *vacated on other grounds*, 558 U.S. 801 (2009). In fact, "most claims that even relate to removal" are improper if brought before the district court. *E.O.H.C. v. Sec. U.S. DHS.*, 950 F.3d 177, 184 (3d Cir. 2020); *see also Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC")*, 525 U.S. 471, 483 (1999) (labeling section 1252(b)(9) an "unmistakable zipper clause," and defining a zipper clause as "[a] clause that says 'no judicial review in deportation cases unless this section provides judicial review.'"); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016) ("Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue – whether legal or factual – arising from any removal-related activity can be reviewed only through the [petition for-review] process."); *Afanwi*, 526 F.3d at 796. Petitioner's claim cannot withstand this jurisdiction-stripping provision of the INA.

Because of this precedent, the Court should conclude that Petitioner must bring his Fifth Amendment claim as a challenging his detention in immigration court, not in federal district court. *See Johnson v. Whitehead*, 647 F.3d 120, 125 (4th Cir. 2011), *Massieu v. Reno*, 91 F.3d 416, 423 (3d Cir. 1996) (reaffirming that district court review is not appropriate and review of removal is not meaningfully precluded when "the challenge by the aliens is neither procedural nor collateral to the merits").

Third, 8 U S.C § 1252(e) expressly states that reviews over the application of detaining under section 1225(b) are not reviewable in *this* Court. *See Tejeda Reyes v. Saldana*, 2017 WL 102967, at *3 (E.D. Va. Jan. 10, 2017) (Hilton, J.). Indeed, the plain text states that "[j]udicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the [U.S.] District Court for the *District of Columbia*." 8 U.S.C. § 1252(e)(3)(A) (emphasis added). And even so, judicial review is limited. *See id.* § 1252(a)(3)(A)(i), (ii). Notwithstanding other challenges and requests for relief, Petitioner challenges his detention under section 1225(b). *See* Pet. ¶ 1. Petitioner's detention is an implementation of section 1225(b). Therefore, only the District Court for the District of Columbia may hear Petitioner's claim. Petitioner can also not challenge the regulatory scheme of how ICE implement's section 1225(b), including its initial custody determination. *See* 8 U.S.C. § 1252(e)(3)(B); *Tejeda Reyes*, 2017 WL 102967, at *3.

Mehla v. U.S. DHS is illustrative. 424 F. Supp. 3d 997 (S.D. Cal. 2019). In *Mehla*, petitioner challenged guidance issued by the Government to asylum officers conducting credible fear screenings. Id. at 999. The court found that it lacked jurisdiction over the habeas petition because "[section] (e)(3) broadly provides for review of written policies, directives, guidelines, and procedures [relating to section 1225(b)(1)], but *limits* the forum where the petitioner may bring claims." Id. at 1003. Similarly, here, Petitioner challenges his detention based off an IJ's decision that he is ineligible for bond through Attorney General decision issued in *Matter of M-S-*. *See* Pet. ¶¶ 50-53. These decisions are applicable to section 1252(e)(3)'s jurisdiction-limiting provision as they are challenges to guidance and decision issued to carry out the purpose of section 1225(b). And following the reasoning of *Mehla*, Petitioner cannot bring his habeas claim in this forum, as the basis for his detention can only be brought in the District Court for the District of Columbia.

Finally, section 1252(g), as amended by the REAL ID Act, specifically deprives courts of jurisdiction, including habeas corpus jurisdiction, to review "any cause or claim by or on behalf of any

alien arising from the decision or action by the Attorney General to [1] commence proceedings, [2] adjudicate cases, or [3] execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Section 1252(g) eliminates jurisdiction "[e]xcept as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory)." *Id.* Though this section "does not sweep broadly," *Tazu v. Attorney General U.S.*, 975 F.3d 292, 296 (3d Cir. 2020), its "narrow sweep is firm," *E.F.L. v. Prim*, 986 F.3d 959, 964–65 (7th Cir. 2021). Except as provided by § 1252, courts "cannot entertain challenges to the enumerated executive branch decisions or actions." *Id.*

The statute was "'directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion,'" to protect "'no deferred action' decisions and similar discretionary decisions." *Tazu*, 975 F.3d at 297 (quoting *AADC*, 525 U.S. at 485). This limitation exists for "good reason": "[a]t each stage the Executive has discretion to abandon the endeavor." *AADC*, 525 U.S. at 483–84. In addition, through section 1252(g) and other provisions of the INA, Congress "aimed to prevent removal proceedings from becoming 'fragment[ed], and hence prolong[ed].'" *Tazu*, 975 F.3d at 296 (alterations in original) (quoting *AADC*, 525 U.S. at 487); *see Rauda v. Jennings*, 55 F.4th 773, 777–78 (9th Cir. 2022) ("Limiting federal jurisdiction in this way is understandable because Congress wanted to streamline immigration proceedings by limiting judicial review to final orders, litigated in the context of petitions for review."). The fact Petitioner raises Fifth Amendment claims does not restore the jurisdiction of this Court. *See Tazu*, 975 F.3d at 296–98 (holding that any constitutional claims must be brought in a petition for review, not a separate district court action), *Elgharib v. Napolitano*, 600 F.3d 597, 602–04 (6th Cir. 2010) (noting that "a natural reading of 'any other provision of law (statutory or nonstatutory)' includes the U.S. Constitution" and finding additional support for the court's interpretation from the remainder of the statute). Indeed, the Supreme Court held that a prior version of section 1252(g) barred claims similar to those brought here. *See AADC*, 525 U.S. at 487–92. In *AADC*, aliens alleged that the "INS was selectively enforcing immigration laws against

them in violation of their First and Fifth Amendment rights." *Id.* at 473–74. The Court found that "[a]s a general matter—and assuredly in the context of claims such as those put forward in the present case—an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *Id.* at 488.

Therefore, this Court lacks jurisdiction over the Petition, and the Court should accordingly dismiss the Petition.[6]

B. Even if this Court were to find it has jurisdiction over the Petition, section 1225(b) governs Petitioner's detention, and 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 INA *mandates* Petitioner's detention; the statute could hardly be clearer about whether an alien in such circumstances is subject to civil immigration detention:

> If the officer determines at the time of the interview that an alien has a credible fear of persecution . . . the alien *shall be detained for further consideration of the application for asylum.*

8 U.S.C. § 1225(b)(1)(B)(ii) (emphasis added). And once again, as the Supreme Court has held, nowhere in the statutory rubric did Congress even mention a bond hearing or state a maximum period of time within which an alien could be held in such mandatory detention without providing a bond hearing. *See Jennings*, 583 U.S. at 297. And as he affirmatively admits (Pet. ¶ 22), Petitioner entered the U.S. without inspection, meaning that he is "'treated' for due process purposes 'as if stopped at the border.'" *Thuraissigiam*, 591 U.S. at 139 (quoting *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 215 (1953)).

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[6] In any sense, Petitioner's requests to have this Court find that *Matter of M-S-*, *Matter of Q. Li*, and ICE's discretionary authority to detain or issue bond, violate his due process are relief this Court cannot grant under the INA's jurisdiction-stripping provisions. *See supra* Part A.

1. The process rights due to arriving aliens in immigration proceedings are only what the INA provides.

The Supreme Court's *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 [U.S]." 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. 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 [U.S.], 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 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 United 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 [U.S.] and detained at Ellis Island." *U.S. 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 [U.S.] shall prescribe." *Id.* at 542, 544.[7] 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 [U.S.] 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 U.S. "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 a two-year journey to Europe, was stopped upon his return and detained at Ellis Island after being excluded.

[7] 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.").

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 U.S. for nearly thirty (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 [U.S]"—even temporarily on bond—"depend[ed] on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216; *see also St. Charles v. Barr*, 514 F. Supp. 3d 570, 579 (W.D.N.Y. 2021) ("while [p]etitioner undoubtedly developed ties to the [U.S.]

during the time he resided here with TPS, that fact does not, under binding Supreme Court precedent, entitle him to additional process").

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.").[8] And because the alien had received the asylum procedures that the 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

[8] 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).

naturally, does not give detained aliens the right to periodic bond hearings during the course of their detention." *Id.* at 286.

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 U.S., 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)).[9] This line of authority clearly demonstrates that only the INA provides the process Petitioner is due, and this Court should thus dismiss the Petition.

2. The recognized limitation on arriving aliens' due process rights applies to Petitioner's 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.

[9] Relevant here, a court made clear that a person with "TPS [like Petitioner] [is] not entitled [] to additional process." *St. Charles*, 514 F. Supp. 3d at 578; *see Del Cid-Nolasco v. Holder*, 388 F. App'x 18, 19 (2d Cir. 2010).

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. U.S.*, 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 [U.S.]" (citation omitted)). As recently as 2020, 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).[10]

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.

[10] This Court is not alone in reaching this conclusion. *See, e.g.*, *St. Charles*, 514 F. Supp. 3d at 579 ("this [c]ourt is constrained to find that [p]etitioner does not have a constitutional right to any additional procedure"); *Batarneh 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).

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 petitioner was based off of his special immigrant juvenile status. 747 F. Supp. 3d at 915-16. And the court determined that the petitioner in *Rodriguez* was detained under a wholly different statute, § 1226 not § 1225, from 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 *Mbalivoto*, both acknowledged *Thuraissigiam* and the centenarian limitation on arriving aliens' due process rights. *See Leke*, 521 F. Supp. 3d at 604; *Mbalivoto*, 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." *Mbalivoto*, 527 F. Supp. 3d at 845; *see Leke*, 521 F. Supp. 3d at 604. In other words, *Mbalivoto* 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. U.S.*, 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 *Mbalwoto* 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").[11] And *Mezei*

[11] 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").

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 [U.S.] 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 *Mbalivoto* thus cannot withstand scrutiny.

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.[12] At most, *Leke* and *Mbalivoto* 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; *Mbalivoto*, 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 [U.S.] and one who has

[12] *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).

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 [U.S.] 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 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.[13] *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

[13] 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.

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 Petition in this case, this Court need only follow the Supreme Court's pellucid instructions. Granting the Petition, by contrast, would require a reading of the Due Process Clause that the Supreme Court has never 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.").

C. 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.

1. <u>The governing procedural due process framework confirms that Petitioner's claim lacks merit</u>

The Fourth Circuit analyzes an alien's due process claim by weighing the factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Miranda v. Garland*, 34 F.4th 338, 359-65 (4th Cir. 2022); *see also Landon*, 459 U.S. at 34 (finding the *Mathews*'s analysis applies to procedural due process claims in the immigration context).[14] 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. 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.'" *U.S. 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.

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[14] Despite going through the *Mathews v. Eldridge* procedural due process analysis, Petitioner also claimed that his substantive due process rights were violated. *See* Compl. Count One. But jurists of this Court have continuously found that ensuring aliens appear for their removal proceedings is a legitimate government interest. *See Rodriguez v. Perry*, 747 F. Supp. 3d 911, 917 (E.D. Va. Sept. 3 2024) (Brinkema, J.); *Toure v Hott*, 458 F. Supp 3d 387, 403 (E D. Va. 2020) (O'Grady, J). And "[b]ecause the [G]overnment has a substantial interest in ensuring a [alien's] appearance at immigration hearings . . . Petitioner is not entitled to immediate release." *Rodriguez*, 747 F. Supp 3d at 917. "Rather, [Petitioner's] liberty interests must be weighed against the government's interests." Id. Therefore, Petitioner's substantive due process claim must be dismissed. *See id.*; *Toure*, 458 F. Supp. 3d at 403.

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." Pet. ¶ 36 (quoting *Addington*, 551 U.S. at 425); *see id.* ¶¶ 36-39. 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. 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)

Petitioner's assertions that there is no set timeline for adjudication of his requests for release (Pet. ¶ 54), 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. Crouse*, 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. 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 [U.S.] 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.

2. 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 detention of aliens who detained under section 1225(b), *some* jurists of this Court have applied a five-factor test, *Portillo v. Hott*, 322 F. Supp. 3d 698, 707 (E.D. Va. 2018) (Brinkema, J.)[15]; *see Abreu*, 2025 WL 51475, at *7 (Nachmanoff, J.); *Rodriguez*, 747 F. Supp. 3d 911, 919 (Brinkema, J.); *Leke*, 521 F. Supp. 3d 597 (Ellis, J.); *Mbalivoto*, 527 F. Supp. 3d 838 (Trenga, J.). 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*).[16] But even if it does apply, those factors would not compel the specialized bond hearing Petitioner seeks.

[15] "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).

[16] Significantly, the Fourth Circuit recently found that the *Mathews* test is the proper vehicle for analyzing due process claims for aliens civilly detained. *See Castaneda*, 95 F.4th at 762 n.13.

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 Petitioner does cite, several of those cases involved aliens detained pursuant to section 1226(a) and (c) 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 *Zadvydas* nor *Demore* 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. Pet. ¶¶ 1, 4. 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 responding to his request for release. *See* Pet. ¶¶ 4, 29. But whether and when to act on Petitioner's request is within the total discretion of ICE. *See* 8 C.F.R. § 236.1. 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). Petitioner is ineligible for asylum and can only seek withholding of removal and CAT relief. *See supra* at 6 n.5. 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.

CONCLUSION

For the foregoing reasons, Federal Respondents respectfully request that the Court decline to issue a Writ of Habeas Corpus and dismiss the Petition.

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Respectfully submitted,

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By: /s/

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