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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 KHALIL SHAHIN,
13 Petitioner,
14
15 v.
16 KRISTI NOEM, Secretary, U.S.
Department of Homeland Security; et al.,
17 Respondents.

Case No.: 25-cv-2496-AGS-KSC

**RESPONDENTS' RESPONSE TO
PETITIONER'S SUPPLEMENTAL
BRIEFING REGARDING
SUBSTANTIVE DUE PROCESS**

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I. Introduction

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2 Following a hearing the Court provided a tentative finding that Petitioner’s
3 detention is mandatory under 8 U.S.C. § 1225(b)(1), because he is an arriving alien and
4 “applicant for admission” as defined by 8 U.S.C. § 1225(a)(1) as an “alien present in
5 the United States who has not been admitted or who arrives in the United States. . . .” 8
6 U.S.C. § 1225(b)(1)(B)(ii) (“If the officer determines at the time of the interview that
7 [the] alien has a credible fear of persecution . . . , the alien *shall be detained* for further
8 consideration of the application for asylum.”) (emphasis added); *see also Matter of M-S*,
9 27 I. & N. Dec. 509, 519 (AG 2019) (“all aliens transferred from expedited to full
10 [removal] proceedings after establishing a credible fear are ineligible for bond”). The
11 Court made a further tentative finding that such mandatory detention provisions did not
12 violate Petitioner’s procedural due process rights. The Court then ordered supplemental
13 briefing on whether Petitioner’s continued detention without a bond hearing violates his
14 substantive due process rights.

15 The Constitution does not cover Petitioner while he is in removal proceedings
16 because he is an arriving alien and for constitutional purposes, he has not yet entered
17 the United States. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), on which Petitioner
18 relies, does not apply to aliens, such as Petitioner, who are still in removal proceedings.
19 It applies to aliens who have been ordered removed but who are unable to be removed
20 in the “reasonably foreseeable future.” *Id.* at 685.

21 If the Court does find that Petitioner has a substantive due process right, it should
22 define that right narrowly, and it should find that on these facts, where the immigration
23 authorities have diligently advanced Petitioner’s case, there is no offense to substantive
24 due process, and certainly nothing that shocks the conscience.

II. Background

A. The Removal Proceeding Process

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27 Title 8 U.S.C. § 1225(b)(1) sets forth expedited removal proceedings for a subset
28 of individuals who are inadmissible noncitizens, like Petitioner. A noncitizen who is

1 subject to 8 U.S.C. § 1225(b)(1) proceedings is ordered removed, unless he or she
2 indicates an intent to apply for asylum or a fear of persecution. 8 U.S.C. §
3 1225(b)(1)(A)(i). If fear is expressed, pursuant to 8 U.S.C. § 1225(b)(1)(B), they are
4 referred to a U.S. Citizenship and Immigration Services (USCIS) asylum officer for a
5 determination on whether there is a credible fear of persecution or torture if removed.
6 If an asylum officer “determines that a[] [noncitizen] does not have a credible fear of
7 persecution, the officer shall order the [noncitizen] removed from the United States
8 without further hearing or review.” 8 U.S.C. § 1225(b)(1)(B)(iii)(I). A noncitizen may,
9 however, seek review of an asylum officer’s negative credible fear determination before
10 an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III). If a positive credible fear
11 determination is made, the noncitizen is issued a Notice to Appear and placed into
12 removal proceedings under 8 U.S.C. § 1229a, where they have the opportunity to apply
13 for relief from removal before an immigration judge, including asylum under 8 U.S.C.
14 § 1158, withholding of removal under 8 U.S.C. § 1231(b)(3), and relief under the
15 Convention Against Torture. Detention through this process is mandated by 8 U.S.C.
16 § 1225(b)(1)(B).

17 The initial hearing before an Immigration Judge (IJ) is called a “Master Calendar
18 Hearing” (MCH)¹ It is at the MCH when the IJ advises the person of the charges in the
19 Notice to Appear, advises the person of their rights (such as the right to be represented
20 by counsel), sets deadlines for filing applications for relief from removal, and schedules
21 the Individual (merits) Hearing. If either party is not prepared for an Individual Hearing
22 the MCH may be continued. At the Individual Hearing, the immigration court receives
23 evidence and determines whether the individual qualifies for relief from removal. At
24 the conclusion of proceedings, the IJ orders removal from the United States or relief

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27 ¹ Within immigration removal proceedings held pursuant to 8 U.S.C. § 1229a,
28 immigration judges hold either master calendar hearings (for pleadings, scheduling, and
other similar matters) or individual hearings (evidentiary hearings on contested
matters). EOIR, Immigration Court Practice Manual,
<https://www.justice.gov/eoir/reference-materials/ic/chapter-4/15>.

1 from removal. Either party may appeal the IJ's order to the Board of Immigration
2 Appeals (BIA) and/or the Ninth Circuit Court of Appeals.

3 **B. Petitioner's Proceedings**

4 Petitioner is currently in removal proceedings under § 1229a that were first
5 initiated through expedited removal proceedings under § 1225(b)(1).

6 On November 30, 2024, U.S. Border Patrol agents apprehended Petitioner near
7 Tecate, California, after he unlawfully entered the United States. Petitioner claimed to
8 be from Morocco and Syria. Petitioner did not then have any valid entry documents to
9 enter the United States. At that time he was determined to be inadmissible under
10 U.S.C. § 1182(a)(7)(A)(i)(I), detained in Immigration and Customs Enforcement (ICE)
11 custody under 8 U.S.C. § 1225(b)(1)(B)(ii), and was placed in expedited removal
12 proceedings pursuant to 8 U.S.C. § 1225(b)(1).

13 On January 10 and 14, 2025, Petitioner was interviewed by a USCIS asylum
14 officer (pursuant to 8 U.S.C. § 1225(b)(1)(B)) to determine whether he had a credible
15 fear of persecution or torture if removed. The interview resulted in a positive
16 determination. Accordingly, on January 20, 2025, Petitioner was issued a Notice to
17 Appear, which initiated removal proceedings under § 1229a. An initial MCH was set
18 for February 3, 2025. The subsequent hearings proceeded as follows:²

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- 20 • February 3, 2025: MCH was continued, at Petitioner's request, so that
21 Petitioner could obtain counsel.
 - 22 • February 19, 2025: Petitioner appears *pro se*, admitted the factual
23 allegations, and conceded charge of inadmissibility set for in the NTA; IJ
24 continues MCH to give Petitioner time to file Form I-589, Application for
25 Asylum and Withholding of Removal.
 - 26 • March 13, 2025: Petitioner appears *pro se* and states that he is working on
27 an application for Special Immigrant Juvenile Status (SIJS). An Attorney
28 named "Miller" addresses the court and states that she is assisting
Petitioner with the SIJS application but does not represent Petitioner in

² The chronology of Petitioner's hearings before the Immigration Court in 2025 is based on representations made by DHS counsel to the undersigned Assistant U.S. Attorney and are not believed to be in dispute. Should Petitioner dispute this chronology, the United States requests a continuance of sufficient time to order, receive, and transcribe the audio recordings of these hearings.

1 removal proceedings. The IJ continues the MCH to allow Petitioner time
2 to submit a copy of the SIJS petition or to file an I-589.

- 3 • April 23, 2023: Petitioner appears *pro se*. Petitioner states that he is still
4 working on his SIJS petition and his I-589. The IJ grants a continuance to
5 allow Petitioner to continue working on those documents.
- 6 • May 15, 2025: Petitioner appears *pro se*. Attorney Miller appears as an
7 “observer.” The IJ continues the MCH to allow time for Attorney Miller
8 to assist Petitioner to complete his I-589.
- 9 • May 29, 2025: Petitioner appears *pro se*. Attorney Miller again appears as
10 an “observer” for Petitioner. Petitioner states that he is still working on his
11 I-589. The IJ continues the MCH to allow Petitioner time to work on his I-
12 589.
- 13 • June 11, 2025: Petitioner appears *pro se*. The IJ continues the MCH to
14 allow Petitioner time to work on his I-589.
- 15 • June 17, 2025: Petitioner appears *pro se*. Petitioner files his I-589 as to
16 Syria but requests additional time to file an I-589 as to Morocco. The IJ
17 continues the MCH to allow Petitioner time to work on the additional I-
18 589 for Morocco.
- 19 • July 16, 2025: Attorney Szeles files a Notice of Appearance as counsel.
20 Attorney Miller appears as a “friend of the court” for Petitioner. Attorney
21 Miller files an I-589 as to Morocco and represents that SIJS state findings
22 have been made and that she is working on filing a Form I-360 (relating to
23 immigration benefits for Special Immigrant Juveniles). The IJ continues
24 the MCH to allow time to file an I-360.
- 25 • August 7, 2025: Attorney Szeles files a motion to withdraw as counsel.
26 Attorney Miller indicates she will substitute in. The IJ continues the MCH
27 to allow Attorney Miller to make an appearance.
- 28 • August 13, 2025: Petitioner appears *pro se*. Attorney Miller has not yet
filed a notice of appearance. The IJ continues the MCH to allow Petitioner
to file a declaration relating to his SIJS application.
- September 10, 2025: Attorney Sanchez enters an appearance and requests
time to file a declaration and consult with Attorney Miller regarding SJIS
application.
- October 29, 2025: Attorney Miller files a notice of appearance; IJ sets an
Individualized (merits) Hearing for February 3, 2026.

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III. Argument

A. The Due Process Clause provides limited protections to Petitioner as an “applicant for admission.”

Petitioner asserts a substantive due process right to avoid “prolonged and indefinite” detention. Petitioner’s Supplemental Brief, Dk. 9 at 5. At the threshold, before finding a violation of a substantive due process right, the Court must find that Petitioner has a cognizable due process right that the Constitution protects.

In *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 138–40 (2020), the Supreme Court addressed the due process rights of individuals like Petitioner, who are inadmissible arriving noncitizens seeking entry into the United States. Such persons have no due process rights “other than those afforded by statute.” *Id.* at 107; *see also id.* at 140 (“[A]n alien in respondent’s position has only those rights regarding admission that Congress has provided by statute.”). The Court cited “more than a century of precedent” supporting this holding. *Id.* at 138 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Mezei*, 345 U.S. at 212; *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

Following *Thuraissigiam*, several courts recognize that an alien detained under 8 U.S.C. § 1225(b)(1) does not have a due process right to release, or to a bond hearing, while removal proceedings are ongoing. *See Rodriguez Figueroa v. Garland*, 535 F. Supp. 3d 122, 126–27 (W.D.N.Y. 2021); *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 336 (W.D.N.Y. 2021); *St. Charles v. Barr*, 514 F. Supp. 3d 570, 579 (W.D.N.Y. 2021); *Petgrave v. Aleman*, 529 F. Supp. 3d 665, 667 (S.D. Tex. 2021).

The Supreme Court has specifically affirmed the government’s immigration detention authority where the statute continues to “serve its purported immigration purpose.” *Demore v. Kim*, 538 U.S. 510, 527 (2003) (citing *Zadvydas*, 533 U.S. at 690 (detention of alien, pursuant to no-bail provision of Immigration and Nationality Act (INA), did not violate alien’s due process rights under the Fifth Amendment)). The Court has affirmed that this immigration detention authority applies to juveniles (and

1 specifically rejecting any substantive due process claim). *See Reno v. Flores*, 507 U.S.
2 292, 306 (1993) (“Respondents contend that this procedural system is unconstitutional
3 because it does not require the Service to determine in the case of each individual alien
4 juvenile that detention in INS custody would better serve his interests than release to
5 some other ‘responsible adult.’ This is just the ‘substantive due process’ argument recast
6 in ‘procedural due process’ terms, and we reject it for the same reasons.”); *Carlson v.*
7 *Landon*, 342 U.S. 524, 540 (1952) (finding indefinite detention of aliens without bail
8 does not violate Due Process Clause of the Fifth Amendment).

9 Petitioner incorrectly asserts that his detention is “indefinite.” Dk. No. 9 at 5. It
10 is not. The immigration court has set an Individual Hearing on the merits of his asylum
11 claim in less than eight weeks from the filing of this brief, on February 3, 2026.
12 Following that hearing, if Petitioner is granted asylum, and absent any appeals, he will
13 be released to reside and work in the United States. If asylum is denied and the
14 immigration judge orders his removal from the United States, the law provides that the
15 Secretary of Homeland Security “shall remove the alien from the United States within
16 a period of 90 days.” 8 U.S.C. § 1231(a)(1)(A). Either way, his detention is not
17 indefinite.

18 Petitioner relies on *Zadvydas*, 533 U.S. at 690, and *Clark v. Martinez*, 543 U.S.
19 371, 380 (2005), to argue that the Due Process Clause imposes a limit on the amount of
20 time an individual can be held without bond during removal proceedings. But neither
21 of those cases concerned detention while removal proceedings were ongoing. To the
22 contrary, they concerned aliens who had been ordered removed but could not be
23 removed in the “reasonably foreseeable” future. *Zadvydas*, 533 U.S. at 685; *Clark*, 543
24 U.S. at 378. *Zadvydas* recognized that once an alien has been ordered removed, he or
25 she cannot be detained indefinitely where removal is not “reasonably foreseeable.” 533
26 U.S. at 685. *Zadvydas* did not imply a constitutional right to release while removal
27 proceedings are ongoing.³

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³ *Zadvydas* specifically concerned two individuals who were subject to final

1 As this Court recently recognized, “*Zadvydas* due process analysis does not begin
2 until the close of the statutory 90-day removal period.” *Rios v. U.S. Department of*
3 *Homeland Security*, 2025 WL 3022854, at *3 (S.D. Cal. Oct. 29, 2025) (citing
4 *Zadvydas*, 533 U.S. at 682); *see also Jennings v. Rodriguez*, 583 U.S. 281, 308–09
5 (2018) (“*Zadvydas* concerned § 1231(a)(6), which authorizes the detention of aliens
6 who have already been ordered removed from the country.”). *Zadvydas* does not apply
7 to aliens, such as Petitioner, whose proceedings are ongoing.

8 Petitioner relies on *Jennings* to apply *Zadvydas*’ due process analysis to general
9 removal proceedings. But *Jennings* did the opposite. It overruled the Ninth Circuit’s
10 requirement of periodic detention review hearings (bond hearings) while removal
11 proceedings are pending. *Jennings*, 583 U.S. at 283. In *Jennings*, an alien detained for
12 three years while litigating his removal filed a habeas petition asserting that he was
13 entitled to a bond hearing under *Zadvydas* to determine whether his continued detention
14 was justified. 583 U.S. at 290. The alien argued that the statutory detention provisions
15 in the INA—§§ 1225(b), 1226(a), and 1226(c)—do not authorize “prolonged” detention
16 without an individualized bond hearing at which the government bears the burden to
17 prove continued detention is justified. *Id.* The district court entered an injunction
18 mandating periodic bond hearings every six months, and the Ninth Circuit affirmed. *Id.*
19 The Supreme Court reversed and affirmed the general detention provision in the INA.
20 *Id.* at 305–06 (explaining that the asylum statutes “mandate detention for a specific
21 period of time: until immigration officers have finished considering the asylum
22 application or until removal proceedings have concluded.”) (internal quotations and
23 citations omitted).

24 Thus, while removal proceedings are ongoing an arriving alien has no due
25 _____
26 orders of removal where there were implications of the impossibility of repatriation.
27 *Zadvydas* was stateless and both countries to which he potentially could have been
28 deported (the country where he was born and the country of which his parents were
citizens) refused to accept him because he was not a citizen. *See Zadvydas*, 533 U.S. at
684. The deportation of the other petitioner in *Zadvydas*, Ma, was prevented because
there was no repatriation agreement at that time between the United States and
Cambodia. *Id.* at 685.

1 process right, whether substantive or procedural, “other than those afforded by statute.”
2 *Thuraissigiam*, 591 U.S. 107. “There is no constitutional right to political asylum
3 itself.” *Maldonado-Perez v. I.N.S.*, 865 F.2d 328, 332 (D.C. Cir. 1989). The plain
4 language of 8 U.S.C. § 1158(d)(7) expressly disclaims any substantive or procedural
5 rights under the statute. *See* 8 U.S.C. § 1158(d)(7) (“Nothing in this subsection shall be
6 construed to create any substantive or procedural right or benefit that is legally
7 enforceable by any party against the United States or its agencies or officers or any other
8 person.”).

9 Since the due process clause does not cover Petitioner while his removal
10 proceedings are ongoing, the Court should reject Petitioner’s claimed substantive due
11 process violation.

12 **B. If the Court finds that the Constitution protects arriving aliens in**
13 **removal proceedings it should find no substantive due process violation**
14 **on these facts where removal proceedings have been prolonged due**
primarily to the alien’s request.

15 If the Court finds that the Constitution applies to Petitioner while removal
16 proceedings are ongoing, it should reject the asserted substantive due process violation
17 presented by these facts.

18 The Fifth Amendment provides that “[n]o person shall . . . be deprived of life,
19 liberty, or property, without due process of law[.]” U.S. Const. amend. V. The Due
20 Process Clause contains both a substantive and a procedural component. *United States*
21 *v. Salerno*, 481 U.S. 739, 746 (1987); *Cancino Castellar v. McAleenan*, 388 F. Supp.
22 3d 1218, 1231 (S.D. Cal. 2019) (finding aliens have a substantive due process right to
23 prompt presentment before an immigration judge following detention). Substantive due
24 process “forbids the government to infringe certain ‘fundamental’ liberty interests at
25 all, no matter what process is provided, unless the infringement is narrowly tailored to
26 serve a compelling state interest.” *Cancino Castellar*, 388 F. Supp. 3d at 1231 (quoting
27 *Reno v. Flores*, 507 U.S. 292, 301–02 (1993)).

28 A substantive due process analysis entails two elements. First, a plaintiff must

1 show a government deprivation of life, liberty, or property. *Cancino Castellar*, 388 F.
2 Supp. 3d at 1231 (citing *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 948 (9th
3 Cir. 2004)). Second, whether substantive due process is violated turns on the nature of
4 the challenged government conduct. A plaintiff “must allege conduct that ‘shock[s] the
5 conscience and offend[s] the community’s sense of fair play and decency.’” *Id.* (citing
6 *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 518 (9th Cir.
7 2018)). Any “shock the conscience” analysis necessarily requires consideration of the
8 justification the government offers, if any, for the alleged infringement. *See Reno*, 507
9 U.S. at 301–02.

10 “Substantive due process analysis must begin with a careful description of the
11 asserted right.” *Id.* (cleaned up). Here, Petitioner has not identified the specific liberty
12 interest that violates Due Process Clause. Petitioner does not contest that 8 U.S.C. §
13 1225(b)(1)(A)(ii) mandates his detention while removal proceedings are pending, and
14 he does not assert that arriving aliens have a constitutional right to asylum. Instead,
15 Petitioner complains in conclusory fashion that his detention “has continued far beyond
16 the point at which detention can advance any legitimate regulatory function” Dk. 9 at
17 2. But he must acknowledge that his proceedings are ongoing, and the United States has
18 legitimate interest in excluding aliens in removal proceedings. *See Shaunnessy v. United*
19 *States ex. Rel. Mezei*, 345 U.S. 206, 208 (1953); *Demore*, 538 U.S. at 531 (immigration
20 detention during removal proceedings and for a limited period following a final order
21 of removal is a constitutionally permissible exercise of government’s power to
22 administer immigration laws). Petitioner cannot meet his burden with such a vague and
23 conclusory description of the substantive due process right he purports to assert.
24 *Cancino Castellar*, 388 F. Supp. 3d at 1231.

25 Petitioner cannot sustain a substantive due process claim with such an ill-defined
26 description of the right at issue because, in assessing a substantive due process claim,
27 the Court must keep in mind the traditional “reluctan[ce] to expand the concept of
28 substantive due process because guideposts for responsible decision making in this

1 unchartered area are scarce and open-ended.” *Collins v. City of Harker Heights*, 503
2 U.S. 115, 125 (1992). As the Sixth Circuit cautions: “[t]he ‘shock the conscience’
3 standard, fuzzy under the best of circumstances, becomes fuzzy beyond a court’s power
4 to interpret objectively where there is a dearth of previous decisions on which to base
5 the standard.” *Braley v. City of Pontiac*, 906 F.2d 220, 225 (6th Cir. 1990). The Supreme
6 Court further cautions that “the mere novelty of . . . a claim is reason enough to doubt
7 that ‘substantive due process’ sustains it[.]” *Reno*, 507 U.S. at 303.

8 The Court may construe the asserted right as a right to speedy removal
9 proceedings. Courts recognize that removal proceedings can be prolonged, but
10 Petitioner cites no case that has found a due process right to speedy removal
11 proceedings, and several courts to consider the issue have outright rejected that such a
12 right exists. *See Arabzada v. Donis*, 725 F. Supp. 3d 1, 19 (D.D.C. 2024) (no cognizable
13 due process claim in expeditious asylum proceeding); *Mudric v. Att’y Gen. of the U.S.*,
14 469 F.3d 94, 99 (3d Cir. 2006) (“[F]ederal immigration laws do not vest in aliens a
15 constitutional right to have their immigration matters adjudicated in the most
16 expeditious manner possible.”); *Garrido v. Att’y Gen. of U.S.*, 391 F. App’x 220, 222
17 (3d Cir. 2010) (noncitizens “do not have a due process right to prompt adjudication of
18 asylum applications”); *Lixandru v. U.S. Att’y Gen.*, 359 F. App’x 102, 108 (11th Cir.
19 2009) (“In the absence of a cognizable due process right to have his asylum application
20 adjudicated in a timely manner, [petitioner’s] due process claim must fail.”).

21 In the alternative, the Court may construe Petitioner’s claim generally as a right
22 to an individual bond hearing while removal proceedings are ongoing. But the Supreme
23 Court specifically rejected such claims in *Jennings*, on statutory grounds, declining to
24 reach the Constitutional issues. 583 U.S. at 309. The Court also rejected such claims in
25 *Demore*, 538 U.S. at 527 (detention of alien, pursuant to no-bail provision of INA, did
26 not violate alien’s due process rights under the Fifth Amendment).

27 Here, as set forth above, the government has diligently advanced Petitioner’s
28 removal proceedings, and on these facts, the Court should find no conduct offending

1 Substantive Due Process, much less conduct that shocks the conscience. To the extent
2 the proceedings have been prolonged, it was at Petitioner's request and for his benefit.
3 Contrary to Petitioner's assertions, his confinement is not indefinite. Petitioner has a
4 hearing set for February 3, 2026, after which his path to release or removal should be
5 clear.

6 **IV. CONCLUSION**

7 For the foregoing reasons, Respondents respectfully request that the Court
8 dismiss this action.

9 DATED: December 17, 2025

Respectfully submitted,

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