UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

AMM, *Petitioner,* v. **BOBBY THOMPSON,** Warden, South Texas ICE Processing Center; **MIGUEL VERGARA,** Field Office Director, San Antonio Field Office, United States Immigration and Customs Enforcement; **TODD M. LYONS,** Acting Director, United States Immigration and Customs Enforcement; **KRISTI NOEM,** Secretary of Homeland Security; **PAMELA BONDI,** United States Attorney General, *in their official capacities,* *Respondents.*	Civil Case No. 5:25-cv-01210-FB-HJB **PETITIONER'S SUPPLEMENTAL BRIEF**

PETITIONER'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

Petitioner AMM respectfully and timely submits the following supplemental brief in compliance with this Court's November 4, 2025 order (Dkt. 37), in support of her petition for writ of habeas corpus and motion for preliminary injunction (PI).

Understanding the withholding-only proceedings in *Riley v. Bondi* and *Johnson v. Guzman-Chavez* demonstrates why Ms. M—in *asylum*-only proceedings—is entitled to either immediate release or bond. To answer the Court's question clearly, Ms. M provides background on the basic, irreconcilable differences between asylum-only proceedings and withholding-only proceedings and the impact of those critically different procedural postures on which detention statute governs. However, at bottom, Ms. M's current detention during her

ongoing asylum proceedings—which Respondents have acknowledged and which are evidenced by the record—cannot be governed by 8 U.S.C. § 1231 because such detention is not for the purpose of Ms. M's removal. In fact, given Ms. M's asylum proceedings, the government *cannot* presently remove her. Instead, because Ms. M is in asylum proceedings and has no criminal history, 8 U.S.C. § 1226(a) governs her detention.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Ms. M entered the U.S. in September 2023 under the Visa Waiver Program (VWP), 8 U.S.C. § 1187. (Dkt. 1 ¶¶ 13–15.) Ms. M affirmatively applied for asylum with USCIS in December 2023. (*Id.* ¶16.) Almost two years later, without a decision on that application, Ms. M was arrested by ICE and placed in ICE custody on September 15, 2025. (*See id.* ¶¶ 13–18.) She has remained detained in ICE custody since that date. (*Id.* ¶7.)

In a notice dated October 21, 2025, the Department of Homeland Security (DHS) referred Ms. M's pending asylum case to an Immigration Judge (IJ).[1] (Dkt. 32, Ex. 4.) Ms. M was then set for an initial master calendar hearing[2] before an IJ for asylum-only proceedings. (Dkt. 32, Ex. 5.) All parties agree that Ms. M is in active, pending asylum proceedings. (Dkt. 18; Dkt. 32, Exs. 4–5.)

III. LEGAL STANDARDS

A. Immigration Detention Statutory Framework

Immigration detention is governed by select provisions of the Immigration and Nationality Act (INA) in which Congress expressly grants the government authority to detain

[1] USCIS and ICE are component agencies of DHS. *See* Dep't of Homeland Security, *Operational and Support Components*, https://www.dhs.gov/operational-and-support-components (last visited Nov. 8, 2025).

[2] A master calendar hearing is the immigration proceedings equivalent of an arraignment, as Ms. M's counsel explained at the October 24, 2025, conference before the Court. *See* 8 C.F.R. § 1240.17(f)(1).

certain noncitizens. *See* 8 U.S.C. §§ 1226 and 1231.

Section 1226 governs the detention of noncitizens "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a); *see also Malets v. Horton,* 2021 WL 4197594, at *4 (N.D. Ala. Sep. 15, 2021). "In other words, § 1226 authorizes the Government to detain certain aliens already in the country pending the outcome of removal proceedings." *Malets*, 2021 WL 4197594, at *4 (citing *Jennings v. Rodriguez*, 138 S.Ct. 830, 837 (2018)) (internal quotations omitted). Noncitizens detained under § 1226(a) are generally entitled to a bond hearing at the outset of their detention, *see* 8 C.F.R. §§ 1003.19(a), 1236.1(d), with the exception of noncitizens who have been arrested, charged with, or convicted of certain crimes. *See* 8 U.S.C. § 1226(c).

Section 1231, on the other hand, governs the detention and removal of noncitizens who are waiting for ICE to execute a final, executable removal order. *See* 8 U.S.C. § 1231. Section 1231(a)(2) authorizes a 90-day period of mandatory post-final-removal-order detention, during which ICE is instructed to effectuate removal. *Id.* § 1231(a)(2). By contrast, 8 U.S.C. § 1187, the Visa Waiver Program statute, does not provide any detention authority. *See Malets,* 2021 WL 4197594, at *2 n.6; *see also* Dkt. 1 ¶¶ 37–46.

B. Asylum-Only Proceedings and Withholding-Only Proceedings

During ongoing asylum proceedings, an asylum applicant is awaiting a determination on whether they can be removed. *See* 8 U.S.C. § 1158; *see also* 8 C.F.R. § 208.14. Accordingly, a removal order cannot be executed during asylum proceedings. *See infra*, Section IV Part B. Asylum, if granted, provides fulsome immigration relief. 8 U.S.C. § 1158(c)(1). Asylees can eventually adjust their status, becoming lawful permanent residents and then U.S. citizens. 8 U.S.C. § 1159(b); 8 C.F.R. § 209.2; 8 U.S.C. § 1427(a).

By contrast, withholding of removal, provided by a different statutory authority, is country-specific relief. *See* 8 U.S.C. § 1231(b)(3). Withholding of removal does not afford immigration status or prevent the execution of a removal order. *Id.*; *see Lanza v. Ashcroft*, 389 F. 3d 917, 933 (9th Cir. 2004). Under 8 U.S.C. § 1231(b)(3)(A), "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country[.]" Importantly, even if withholding is granted in withholding-only proceedings, *a noncitizen's removal order may still be executed.* This is because a noncitizen could be removed "to a third country other than the country to which removal has been withheld or deferred." 8 C.F.R. § 208.16(f); 8 U.S.C. § 1231(b)(2)(E); *see also Lanza*, 389 F. 3d at 933.

C. Final Administrative Orders of Removal (FAROs) and Immigration Detention

When a Final Administrative Order of Removal (FARO) is issued, it puts an immigration case in a highly complicated posture that may look different in each circumstance. Not every FARO relies on the same legal authority. *See, e.g.*, 8 U.S.C. § 1228(b) (FARO for certain noncitizens convicted of an aggravated felony); *Riley v. Bondi*, 606 U.S. 259, 264 (2025) (DHS issued a FARO pursuant to § 1228 due to petitioner's aggravated felony conviction). Counterintuitively, sometimes a FARO is a final, executable removal order, and sometimes it is not.[3] Further, the statutory detention authority also varies when a FARO is

[3] Respondents agree that a FARO under the VWP statute (INA § 217, 8 U.S.C. § 1187) when a noncitizen has been referred to asylum-only proceedings is not a final, executable order of removal (Dkt. 14 at 4 n.1). Respondents originally distinguished *Kim v. Obama*, 2012 WL 10862140 (W.D. Tex. July 10, 2012), from Ms. M's case because the petitioner in *Kim* claimed fear after being served with a notice of intent to issue a VWP FARO, explaining that the *Kim* petitioner did not have a final order of removal. *Id.* Respondents argued that because Ms. M allegedly did not claim fear or challenge her removal order, her removal order was final. *Id.* However, Ms. M in fact told Respondents she did not understand the paperwork, because it was in English, and asked to speak to her counsel. (Dkt. 17 at 3). The parties resolved this paperwork matter shortly thereafter. (Dkt. 18). Ms. M claimed fear again as soon as she understood the paperwork. (*Id.*; *see also* Dkt. 17).

present.

Specifically, the answer to whether a FARO is a final, executable order of removal differs depending on whether the noncitizen is in asylum-only proceedings or withholding-only proceedings. When a noncitizen has a FARO and is in withholding-only proceedings, the detention authority is § 1231 because the noncitizen is subject to an executable order of removal, and may be removed even if withholding is granted. *See Riley*, 606 U.S. at 272. By contrast, when a noncitizen has a FARO and is in asylum-only proceedings, the detention authority is § 1226 because there *is* a pending decision on whether or not the noncitizen can be removed. *See, e.g.*, *Emila N. v. Ahrendt*, 2019 WL 1123227, at *3 (D.N.J. Mar. 12, 2019); *Gjergj G. v. Edwards*, 2019 WL 1254561, at *2–3 (D.N.J. Mar. 18, 2019).

IV. ARGUMENT

A. *Riley* and *Guzman-Chavez* are distinguishable due to key differences between asylum-only and withholding-only proceedings.

The Supreme Court's decisions in *Riley v. Bondi* and *Johnson v. Guzman-Chavez* are distinguishable from Ms. M's case because of important differences between asylum-only and withholding-only proceedings. 606 U.S. 259 (2025); 594 U.S. 523 (2021). Both *Riley* and *Guzman-Chavez* involved withholding-only proceedings, not asylum-only proceedings, and are accordingly distinguishable from the case at hand. *Riley*, 606 U.S. at 264–65; *Guzman-Chavez*, 594 U.S. at 532. *Riley* and *Guzman-Chavez* involved noncitizens subject to final, executable removal orders, who had already been issued a decision that they could be removed from the U.S. *Id.*

Moreover, Ms. M already had a pending affirmative asylum claim with USCIS prior to the issuance of the FARO, so DHS is charged with knowing that she had already claimed fear. (Dkt. 1, Ex. 1.) Accordingly, Respondents agree that a FARO in the current posture is not a final, executable removal order.

In *Riley*, the petitioner had been issued a FARO based on his conviction of an aggravated felony under 8 U.S.C. § 1228, which also disqualified him from applying for asylum. *See* 606 U.S. at 264–65; *see also* 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i) (noncitizens convicted of particularly serious crimes do not qualify for asylum, and aggravated felonies are considered particularly serious crimes). In the case of *Guzman-Chavez*, the noncitizens had a prior final removal order reinstated after leaving and re-entering the U.S., which our Circuit has explained also disqualifies a person from applying for asylum. 594 U.S. at 532; *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 491 (5th Cir. 2015) (concluding that "aliens whose removal orders are reinstated may not apply for asylum").

By contrast, all parties agree that Ms. M is in ongoing asylum proceedings. (Dkt. 18.) It is uncontested that she has no criminal history, so no § 1228 FARO could be issued on that basis, unlike in *Riley*. (*See* Dkt. 1 ¶32; Dkt. 17 at 8.) She is also not subject to reinstatement of a prior removal order after re-entering the U.S., which was the procedural posture in *Guzman Chavez*. Indeed, she has not left the U.S. since affirmatively applying for asylum in 2023. (*See* Dkt. 1 ¶¶ 13, 16–18.) Given her pending asylum proceedings, Ms. M's case posture is fundamentally different from that of the petitioners in *Riley* and *Guzman-Chavez*; the statutory authority to detain her is likewise different. *Compare* 8 U.S.C. § 1158 *with id.* § 1231(b)(3). Ms. M's case is pending a decision on whether she is to be removed, meaning she is therefore detained under § 1226(a).

B. Ms. M is not detained under 8 U.S.C. § 1231 because her detention is not for the purpose of removal.

Ms. M cannot be detained under 8 U.S.C. § 1231 because the government cannot presently remove her. The statutory purpose of 8 U.S.C. § 1231 is to detain noncitizens with final orders of removal *in order to effectuate removal. Zadvydas v. Davis,* 533 U.S. 678, 697

(2001) (Section 1231's "basic purpose" is to "effectuat[e] an alien's removal."). Because of Ms. M's ongoing asylum proceedings, Ms. M cannot presently be removed. (*See* Dkts. 18 and 32, Ex. 5.)

The premise that Ms. M cannot be removed during the pendency of her asylum case may seem obvious and overly basic, because it is. However, it is this premise that goes to the root of why Ms. M is currently detained under § 1226(a) and not § 1231. Asylum applicants cannot be removed during their proceedings, before a final determination has been made on the merits of their asylum claim. *See, e.g.*, 8 C.F.R. § 1003.6(a) (even in the context of a final order of removal by an immigration judge that a noncitizen appeals to the BIA, such decision cannot be executed while the appeal is pending, because a decision on removability is therefore still pending). Removing an asylum applicant to the country or countries from which they are seeking asylum, during the pendency of asylum proceedings, would be a *de facto* denial of the right to apply for asylum under federal law, 8 U.S.C. § 1158, and would violate both that domestic federal law and the United States's obligations under international law. *See* Refugee Act of 1980, Pub L. No. 96-212, 94 Stat. 102 (codified as amended in sections of 8 U.S.C.); *see also* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

Further, if the government had the ability to remove asylum applicants during the pendency of their asylum proceedings, Congress's provision of asylum-only proceedings in the VWP statute would be rendered without purpose. *See* 8 U.S.C. § 1187(b)(2). In fact, the VWP statute itself confirms this conclusion by noting that an asylum application *is* a basis to contest removal. *Id.* Further buttressing this legal conclusion, Respondents have indicated to Ms. M's counsel, and to this Court at the October 24, 2025 status conference, that they do not intend to remove Ms. M

during the pendency of her proceedings. Because Ms. M cannot be removed during the pendency of her asylum proceedings, she cannot be detained under 8 U.S.C. § 1231.

The decision in *Emila N. v. Ahrendt*, 2019 WL 1123227 (D.N.J. Mar. 12, 2019), further illustrates why § 1231 is not the detention authority in Ms. M's circumstances. The petitioner in *Emila N.*, like Ms. M, entered the U.S. through the Visa Waiver Program and was taken into custody after the VWP period elapsed. 2019 WL 1123227, at *1. She then filed an asylum application, which was pending at the time her habeas petition was adjudicated. *Id.* In finding that the petitioner was detained under 8 U.S.C. § 1226(a) and therefore entitled to a bond hearing, the Court explained that "she is not an arriving alien subject to detention under § 1225, nor is she truly subject to a final, executable order of removal that would subject her to detention under § 1231 insomuch as she is still in asylum proceedings." *Id.* at *3. The Court concluded that § 1226(a) "is the only [detention section] which appears would otherwise be applicable to those such as Petitioner who remain in asylum proceedings and have not committed an applicable crime." *Id.* Like the petitioner in *Emila N.*, Ms. M's ongoing asylum proceedings preclude her detention under § 1231.

Multiple courts have already rejected the argument that VWP holders in asylum proceedings are subject to detention under § 1231. *See, e.g.*, *Emila N.*, 2019 WL 1123227 at *3; *Malets*, 2021 WL 4197594, at *1–5; *Gjergj G. v. Edwards*, 2019 WL 1254561 (D.N.J. Mar. 18, 2019). Additionally, the text of § 1231(a)(2) explicitly links the statute's detention authority to the 90-day removal period, during which ICE is supposed to effectuate removal. As Ms. M cannot be removed, she cannot be detained under 8 U.S.C. § 1231.[4]

[4] Even if this Court does find that Ms. M is detained under 8 U.S.C. § 1231, it should order her immediate release pursuant to *Zadvydas v. Davis*, 533 U.S. 678 (2001). Civil immigration detention violates due process if it is not reasonably related to its statutory purpose. *Id.* at 690 (citing *Jackson v. Indiana,* 406 U.S. 715, 738 (1972)). Ms. M's detention is in no way related to

Notably, even the Board of Immigration Appeals (BIA) did not consider § 1231 to be a viable detention authority in the VWP posture. *Matter of A-W-*, 25 I. & N. Dec. 45 (BIA 2009). In *Matter of A-W-*, the BIA considered instead whether the applicant was detained under § 1226 or § 1187. The central issue before this Court is the same, and for the reasons laid out below, and in Ms. M's prior briefing, this Court should find that Ms. M is detained under § 1226.

C. Ms. M is detained under 8 U.S.C. § 1226(a), not 8 U.S.C. § 1187.

When noncitizens are in asylum proceedings pending a decision on removability, like Ms. M, the government's detention authority stems from 8 U.S.C. § 1226(a). However, in *Matter of A-W-*, the BIA determined that Visa Waiver Program participants are detained under the Visa Waiver Program statute itself, 8 U.S.C. § 1187. The BIA made this finding despite "the biggest roadblock" to such an interpretation being "the code section's failure to mention detention at all." *Malets*, 2021 WL 4197594, at *2 n.6. Unlike § 1226(a), § 1187 makes no provision for a bond hearing – which is unsurprising given the statute likewise makes no provision for detention. In line with this agency decision, the government has refused to provide Ms. M with a bond hearing.

Even during the *Chevron* era of agency deference, every federal court that fully analyzed this issue rejected the agency decision in *Matter of A-W-*. (*See* Dkt. 1 ¶¶ 37–46); *see also Chevron, U.S.A., Inc. v. Nat. Res. Dev. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Those courts uniformly held that a Visa Waiver Program participant who later applies for asylum is

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the statutory purpose of § 1231, which is to effectuate removal, because as explained above, she cannot be removed during her ongoing asylum proceedings. Accordingly, there can be no doubt that her removal is not significantly likely in the reasonably foreseeable future. *See id.* at 701. If this Court finds she is detained under § 1231 and is not inclined to immediately grant habeas on *Zadvydas* grounds, it should grant Ms. M's motion for PI and order her release for the pendency of this case given the straightforward likelihood of success on a *Zadvydas* claim.

detained under 8 U.S.C. § 1226 and entitled to a bond hearing. *See* Dkt. 1 ¶¶ 37–46. Today, in the *Loper Bright* era, this Court need not defer to a clearly incorrect agency decision which has already been repeatedly rejected by its sister courts. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *see also* Dkt. 1 ¶¶ 37–46. This Court has the authority to, and should, instead join its sister courts in upholding Congress's clear mandate that § 1226(a) is the proper detention authority for a noncitizen in active asylum proceedings.

Though the Court in *Kim v. Obama* followed *Matter of A-W-*, *Kim* also illustrates why Ms. M should be released. 2012 WL 10862140 (W.D. Tex. July 10, 2012); *see also* Dkt. 14 at 4 (n.1). First, even after adopting *Matter of A-W-* and finding no statutory basis for a bond hearing, the *Kim* court went on to analyze whether the petitioner's release was warranted as a constitutional matter. *Id.* at *2–3. This Court can and should do the same. Because Ms. M does not pose a danger or a flight risk, and her liberty interest far outweighs the government's purpose in detaining her when it cannot even remove her, this Court should order her immediate release on substantive due process grounds. (*See* Dkt. 1 ¶¶ 61–64.) Second, the *Kim* court adopted *Matter of A-W-* without any statutory analysis whatsoever, presumably because *Kim* was decided in the *Chevron* era of agency deference. *See Chevron*, 467 U.S. at 842–43. In the time since *Kim* was decided, *Loper Bright* made clear that this Court owes no allegiance to faulty agency interpretations and is instead charged with interpreting the statute itself to resolve Ms. M's statutory claim. *See Loper Bright*, 603 U.S. 369; (*see also* Dkt. 1 ¶¶ 37–46.)

Section 1187 makes no mention of detention, and thus grants no such authority. By contrast, Congress spoke clearly that § 1226 is the authority for detaining immigrants, like Ms. M, who are pending a determination on removability. This Court should follow Congress's clear

mandate and its sister courts in finding that Ms. M is detained under § 1226(a) and is therefore entitled to a bond hearing.

V. CONCLUSION AND PRAYER FOR RELIEF

Ms. M is detained despite, undisputedly, not posing a danger to the community or a flight risk. On that basis alone, she urges this Court to grant her immediate release as a substantive due process matter under the federal Constitution. (Dkt. 1 ¶¶ 61–64.) Further, Ms. M urges this Court to find that she is detained under 8 U.S.C. § 1226(a) and thus entitled to a bond hearing. Because she does not pose a danger to the community or a flight risk, Ms. M should have been released on bond promptly after her arrest. The government's refusal to provide her with a bond hearing at all, under such circumstances, violates her procedural due process rights. (*See* Dkt. 1 ¶¶ 65–71.) As both a statutory matter and a constitutional matter, Ms. M is entitled to a bond hearing.

Ms. M is an elderly woman with numerous medical conditions who the government has, cruelly and unnecessarily, forced to suffer medical emergency after medical emergency in detention. Shortly after this Court held a status conference, Ms. M suffered another medical emergency on October 26, 2025 and was hospitalized yet again that day. *See* Ex. 1 (seeking leave to file under seal). The government's utterly pointless detention of Ms. M without bond, which serves neither to protect the community nor to enforce immigration law, grows in cruelty and further threatens Ms. M's health each day it continues.

This Court should not delay further in ordering Ms. M's immediate release, whether by granting her petition for writ of habeas corpus (Dkt. 1) in its entirety, or by granting her motion for PI (Dkt. 5) and ordering her release for the pendency of this case. Ms. M respectfully re-urges this Court to grant her habeas petition and motion for PI, and order her immediate release.

Dated: November 10, 2025

Respectfully submitted,

/s/ Kate Gibson Kumar

Daniel Hatoum
Texas Bar No. 24099136
Texas Civil Rights Project
P.O. Box 219
Alamo, Texas 78516
(956) 787-8171 ext. 208
daniel@texascivilrightsproject.org

Kate Gibson Kumar
Texas Bar No. 24137588
Texas Civil Rights Project
P.O. Box 17757
Austin, Texas 78760
(512) 474-5073 ext. 225
kate@texascivilrightsproject.org

S. Denni Arnold
Texas Bar. No. 2413556
Texas Civil Rights Project
P.O. Box 219
Alamo, Texas 78516
denni@texascivilrightsproject.org

CERTIFICATE OF SERVICE

I certify that on November 10, 2025, I served the foregoing document via CM/ECF, which will notify all parties of the filing.

/s/ Kate Gibson Kumar

Kate Gibson Kumar
Attorney for Petitioner