

Brian J. McGoldrick – 169104
Law Office of Brian J. McGoldrick
4916 Del Mar Avenue
San Diego, CA 92107
619-675-2366
attorney@brianmcgoldrick

Attorney for Petitioner

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

OSAMA MAKHLOUF

Petitioner,

v.

CHRISTOPHER LAROSE, et al.

Respondents.

Case No.: **3: 26-cv-02636-LEK-JLB**

**TRAVERSE TO PETITION FOR WRIT
OF HABEAS CORPUS AND ORDER TO
SHOW CAUSE**

[oral argument waived]

Petitioner Osama Makhlof, replies to Respondents' Return, stating as follows:

**A. Mr. Makhlof's Classification as an "Arriving Alien" and Subjection to 8
U.S.C. § 1225(b)(1) Notwithstanding, He Has Due Process Rights Beyond Those**

That Congress Has Provided, and *Thuraissigiam* Does Not Bar Substantive Due Process Claims

Respondents argue that under the Supreme Court's decision in *Department of Homeland Security v. Thuraissigiam*, 591 U.S. 103 (2020), Petitioner as an "arriving alien" has no due process rights beyond those that Congress has provided. In *Thuraissigiam*, the Supreme Court rejected a habeas petitioner's argument that the due process clause conferred rights to challenge his order of expedited removal beyond those established by Congress, stating that "an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause." 591 U.S. at 107. The petitioner in that case had "attempted to enter the country illegally and was apprehended just 25 yards from the border." *Id.*

The Supreme Court determined that the "political department of the government" had plenary authority to admit or exclude aliens seeking initial entry, and thus "an alien in respondent's position has only those rights regarding admission that Congress has provided by statute." *Id.* at 139-40. Respondents argue that because Petitioner is an "arriving alien," due process provides him nothing beyond the mandatory detention scheme established by Section 1225(b)(1). Although, as Respondents correctly point out, following the Supreme Court's decision in *Thuraissigiam*, some district courts have adopted Respondents' reasoning to dismiss or deny habeas petitions in the context of arriving aliens

1 subject to mandatory detention under Section 1225(b)(1)¹. However, most courts
2 have ruled otherwise. *See Abdul-Samed v. Warden of Golden State Annex Det. Facility*,
3 No. 25-cv-98-SAB-HC, 2025 WL 2099343, at *6 (E.D. Cal. July 25, 2025) ("Although
4 the Ninth Circuit has yet to take a position on whether due process requires a bond
5 hearing for noncitizens detained under 8 U.S.C. § 1225(b) 'essentially all district
6 courts that have considered the issue agree that prolonged mandatory detention
7 pending removal proceedings, without a bond hearing, will—at some point—violate
8 the right to due process.'" (citing *Martinez v. Clark*, No. C18-1669-RAJ-MAT, 2019
9 WL 5968089, at *6 (W.D. Wash. May 23, 2019)); *Kydyrali v. Wolf*, 499 F. Supp. 3d
10 768, 772 (S.D. Cal. 2020) ("[T]he Court joins the majority of courts across the
11 country in concluding that an unreasonably prolonged detention under 8 U.S.C. §
12 1225(b) without an individualized bond hearing violates due process.")).

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15 Recently, Judge Huie applied the same reasoning as the majority of courts,
16 holding that a petitioner detained under Section 1225(b)(1) may assert a due
17 process challenge to prolonged mandatory detention. *Mingzhi Gao v. Larose*, No. 25-
18 cv-2084-RSH-SBC, 2025 WL 495253, at *4 (S.D. Cal. Sep. 26, 2025).

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¹ E.g. *Petgrave v. Aleman*, 529 F. Supp. 3d 665, 669 (S.D. Tex. 2021) ("As far as Petitioner is concerned, whatever procedure Congress has authorized is sufficient due process."); *Gonzales Garcia v. Rosen*, 513 F. Supp. 3d 329, 336 (W.D.N.Y. 2021) ("Petitioner is on the threshold of initial entry into the United States and he accordingly is not entitled to procedural protections beyond those provided by statute.")

1 There, the Court agreed with the majority position that a petitioner detained
2 under Section 1225(b)(1) may assert a due process challenge to prolonged
3 mandatory detention without a bond hearing. It agreed with those district courts
4 that interpret *Thuraissigiam* as circumscribing an arriving alien's due process rights
5 to admission, rather than limiting that person's ability to challenge detention.
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7 Another local court has made the same conclusion in *Vadim Sufiiarov v. Warden*,
8 25cv3265-LL-DDL (S. D. Cal Jan 6, 2026) See A.L. v. Oddo, 761 F. Supp. 3d 822, 825
9 (W.D. Pa. 2025) ("Nowhere in [*Thuraissigiam*] did the Supreme Court suggest that
10 arriving aliens being held under § 1225(b) may be held indefinitely and
11 unreasonably with no due process implications, nor that such aliens have no due
12 process rights whatsoever."); *Hernandez v. Wofford*, No. 25-cv-986-KES-CDB (HC),
13 2025 WL 2420390, at *3 (E.D. Cal. Aug. 21, 2025) ("Although the Supreme Court has
14 described Congress's power over the 'policies and rules for exclusion of aliens' as
15 'plenary,' and held that this court must generally 'defer to Executive and Legislative
16 Branch decision-making in that area,' it is well-established that the Due Process
17 Clause stands as a significant constraint on the manner in which the political
18 branches may exercise their plenary authority'—through detention or otherwise.")
19 (citations omitted); *Padilla v. ICE*, 704 F. Supp. 3d 1163, 1171-72 (W.D. Wash. 2023)
20 ("The holding in *Thuraissigiam* does not foreclose Plaintiffs' due process claims
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1 which seek to vindicate a right to a bond hearing with certain procedural
2 protections.").

3 Lastly, *Mezei*² also does not help the government as the government does not
4 contend that this case involves particularized national security risks or emergency
5 regulations, as in *Mezei*, 345 U.S. at 214-16. See *Jennings v. Rodriguez*, 583 U.S. 281,
6 340 (2018) (Breyer, J., dissenting); *Jean v. Nelson*, 472 U.S. 846, 872 (1985)
7 (Marshall, J., dissenting); *Mezei*, 345 U.S. at 217 (Black, J., dissenting).

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9 Therefore, this Court should follow most courts in this district, and find that
10 Mr. Makhoulf is entitled to due process protections beyond those provided by
11 statute.

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13 **B. The Fifth Amendment Applies to “All Persons,” Including Mr. Makhoulf**

14 The Fifth Amendment’s Due Process Clause applies to “all persons” within the
15 United States. This protection is not contingent on immigration status or the “entry
16 fiction.” Petitioner’s liberty interest in freedom from physical restraint is profound
17 and protected. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Singh v. Holder*, 638 F.3d
18 1196, 1203 (9th Cir. 2011).

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20 The Supreme court has long been solicitous of the constitutional rights of
21 noncitizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The fourteenth

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24 ² The Court held that the Attorney General’s continued exclusion of the alien without a hearing does not amount to an unlawful detention, and courts may not temporarily admit him to the United States pending arrangements for his departure abroad.

1 amendment to the constitution is not confined to the protection of citizens.”). Both
2 “removable and inadmissible aliens are entitled to be free from detention that is
3 arbitrary or capricious.” *Zadvydas* at 721.

4 **C. Judicial Forum Required for Constitutional Claims**

5 Denying Mr. Makhoulf a forum to challenge his prolonged detention would
6 raise a “serious constitutional question” under *Webster v. Doe*, 486 U.S. 592, 603
7 (1988). As Judge Sabraw recognized in *Domingo-Ros v. Archambeault*, No. 25-cv-
8 1208-DMS-DEB, 2025 WL 27541, at *2 (S.D. Cal. May 18, 2025), statutes cannot be
9 construed to deny any judicial forum for a colorable constitutional claim.
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11 Petitioner’s claim that his detention violates substantive due process is precisely
12 such a claim.
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14 **D. Mr. Makhoulf’s Detention Has Become “Unreasonably Prolonged,”** 15 **Which Without a Bond Hearing Violates Due Process**

16 Even before *Jennings*, many courts recognized detention became
17 unreasonably prolonged at six months. Applying the canon of “constitutional
18 avoidance,” the Ninth Circuit has ruled that “[a]s a general matter, detention is
19 prolonged when it has lasted six months and is expected to continue more than
20 minimally beyond six months.” *Diouf v. Napolitano*, 634 F. 3d 1081, 1092 (9th Cir.
21 2011). Specifically addressing mandatory detention, the court found detention at six
22 months was “prolonged” requiring an “automatic individualized bond hearing[]” at
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1 which the government bore the burden of persuasion as to why detention should
2 continue. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.*
3 *Jennings*, 583 U.S. 281.

4 Other circuits had similarly adopted a six-month benchmark for when
5 detention becomes constitutionally problematic. In *Lora v. Shanahan*, 804 F.3d 601
6 (2nd Cir. 2015), *cert. granted, judgment vacated*, 583 U.S. 1165 (2018), the court
7 observed that “every other circuit to have considered this issue” determined that
8 bond hearings were required after six months. *Lora v. Shanahan* at 606. *See also Ly v.*
9 *Hansen*, 351 F.3d 263, 275 (6th Cir. 2003). In 2018, in *Jennings*, the Supreme Court
10 reversed the *Rodriguez* holding that automatic bond hearings are mandated every
11 six months as a matter of constitutional avoidance. But the Court left open the
12 application of due process as *applied* in specific cases.

13 As a judge in this district assessed, “*Jennings* did not determine the
14 constitutional question at issue here—whether arriving aliens subject to prolonged
15 detention under 8 U.S.C § 1225(b) are entitled to a bond hearing as a matter of due
16 process.” *Kydyrali*, 499 F. Supp. 3d at 772 (citing *Jennings*, 138 S. Ct. at 851); see also
17 *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir.
18 2020)(“*Jennings* ... left our framework for assessing as-applied constitutional
19 challenges intact”).
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1 Many other local courts have found detention at or less than one year gives
2 rise to due process concerns. *See, e.g., Hoyos Amado*, 2025 WL 3079052, at *5
3 (“Courts have found detention over seven months without a bond hearing weighs
4 toward a finding that it is unreasonable.”) (collecting cases); *Tanoyan v. Andrews*,
5 No. 1:25-CV-00815-SKO (HC), 2025 WL 3013684, at *4 (E.D. Cal. Oct. 28, 2025)
6 (“Petitioner has been detained approximately 11 months. This period ... qualifies as
7 prolonged.”); *Gao*, 2025 WL 2770633, at *5 (“The Court finds that Petitioner’s
8 detention for over 10 months without a bond hearing, in the context of the specific
9 circumstances described above, has become unreasonable and violates due
10 process.”); *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022) (“Petitioner
11 has been in immigration detention ... approximately one year. District court have
12 found shorter lengths of detention ... without a bond hearing to be unreasonable.”)
13 (collecting cases). Therefore, Mr. Makhoulf’s prolonged detention without an
14 individualized bond hearing violates substantive due process. This Court must apply
15 the *Kydyrali* factors (recently applied by Judge Huie in *Mingzhi Gao*).

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18 **The *Kydyrali* factors favor the release of the Mr. Makhoulf as follows:**

19 *Duration of Detention*

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21 First, Mr. Makhoulf has been detained since June 5, 2025. This is an
22 “unreasonably prolonged” period and the lack of any individualized assessment or
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1 prospect for release makes the detention inherently punitive and unconstitutional
2 under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

3 *Government's Interest*

4 Second, the government's interest is minimal. Respondents make no
5 allegation of danger to the community or flight risk. They offer no justification
6 beyond the bare assertion of mandatory detention. Policy quotas or administrative
7 convenience are insufficient interests to override liberty interests. (*Hernandez v.*
8 *Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) - noting staggering detention costs).
9 Indeed, Mr. Makhoulf was ready to prosecute his case as soon as he was detained.
10 Mr. Makhoulf has already had his asylum application adjudicated. He has filed an
11 appeal with the Board of Immigration Appeals. No schedule for his case has been
12 set. This will take at least a year to adjudicate. After his entry into the United States,
13 he was first given a CAT interview followed by his Credible Fear Interview. It was
14 not until September 4, 2025, nearly 3 months after his entry, that a court finally
15 allowed his case to move forward. Since then he has filed all his required
16 documents. His final hearing date was February 18, 2026. Mr. Makhoulf had already
17 been waiting 8 months to have his first day of testimony. Unfortunately, the
18 Immigration Judge denied his request for asylum asserting that Christians are now
19 safe under the new Syrian president, a former terrorist leader that massacred whole
20 villages of Christians. He has appealed this decision. This will take 6 months to a
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1 year to resolve. There is no possibility of his removal in the foreseeable future. His
2 continued detention without a hearing as to flight risk and danger to the community
3 violates the U.S. Constitution and federal law. This adds at least another year to Mr.
4 Makhlouf' case. Thus, the IJ's decision will not be administratively final and he will
5 remain subject to Section 1225(b)(1)(B)(ii).
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7 *Petitioner's Liberty Interest & Risk of Error*

8 Mr. Makhlouf has a profound liberty interest in freedom from physical
9 restraint (*Morrissey v. Brewer*, 408 U.S. 471 (1972)). The risk of erroneous
10 deprivation is high without an individualized hearing. There is no sign that he is a
11 danger to the community or a flight risk. Mr. Makhlouf has not attempted to ask for a
12 bond hearing because the courts have routinely found that it lacked jurisdiction to
13 entertain the motion.
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15 *Fiscal/Administrative Burden*

16 The burden of releasing Mr. Makhlouf is nil and the burden of providing a
17 bond hearing is negligible compared to the substantial cost of detention
18 (\$158/day/detainee) and the constitutional imperative. Release is fiscally prudent
19 and administratively simple.
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21 Finally, under *Mathews*, the balance of factors tips sharply in favor of – at a
22 minimum – requiring an individualized bond hearing to assess Mr. Makhlouf's flight
23 risk and dangerousness. The government's bare reliance on a statutory classification
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(even if applicable) cannot substitute for the individualized determination required by due process before depriving a person of liberty for a significant period. (*Kydryali*, 499 F. Supp. 3d at 772; *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019)).

Duration of Detention / Likelihood of Final Order of Removal

Mr. Makhlouf has been detained since June 5, 2025. In addition to this being an “unreasonably prolonged” period, the lack of any individualized assessment or prospect for release makes the detention inherently punitive and unconstitutional under *Mathews*. As mentioned above, the delay in allowing his case to go forward and the delay in setting the individual hearing means that the final determination of his underlying case nearly a year away. Thus, the IJ’s decision will not be administratively final and he will remain subject to Section 1225(b)(1)(B)(ii).

E. Mr. Makhlouf Has a Protected Liberty Interest and the *Mathews v. Eldridge* Balancing Test Tips in his Favor

Under the test set forth in *Mathews*, this Court must consider the following three factors: “first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally the government’s interest, including the function involved

1 and the fiscal and administrative burdens that the additional or substitute
2 procedural requirements would entail." See *Mathews v. Eldridge*, 424 U.S. 319, 335
3 (1976).

4 The Matthews factors all favor Mr. Makhlouf. The government's interest in
5 keeping Mr. Makhlouf in detention is very low, and when weighed against his
6 significant private interest in his liberty, the scale tips sharply in favor of releasing
7 Mr. Makhlouf from custody. Moreover, detention cannot have a punitive purpose.
8 Respondents cannot plausibly assert an interest in continuing to detain Mr.
9 Makhlouf after almost a year of detention. There is no indication of Mr. Makhlouf
10 being a danger to the community or a flight risk.
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12 The government's interest in detaining Mr. Makhlouf is extremely low at best.
13 That ICE has a policy to make a minimum number of arrests each day under the new
14 administration does not constitute a valid increase in the government's interest in
15 detaining him. Moreover, the "fiscal and administrative burdens" that release from
16 custody would provide are nil. In fact, release from custody is far less costly than
17 keeping Mr. Makhlouf detained. As the Ninth Circuit noted in 2017, which remains
18 even more true today, "[t]he costs to the public of immigration detention are
19 'staggering': \$158 each day per detainee, amounting to a total daily cost of \$6.5
20 million." *Hernandez v. Session*, 872 F.3d 976, 996 (9th Cir. 2017).
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F. The balance tips in Mr. Makhoul's favor under the Lopez test as well.

Respondents contend that applying the three-factor balancing test discussed in *Lopez v. Garland*, 631 F. Supp. 3d 870 (E.D. Cal. 2022) shows that Petitioner's detention is not unreasonably prolonged. Courts in the Ninth Circuit have used various factor tests to determine whether due process requires a bond hearing in immigration detention cases, including the *Lopez* test. See e.g., *Loba L.M. v. Andrews*, No. 1:25-CV-00611 JLT SAB (HC), 2025 WL 3187577, at *1 n.1 (E.D. Cal. Nov. 14, 2025). In the *Lopez* test, the court considers "the total length of detention to date, the likely duration of future detention, and the delays in the removal proceedings caused by the petitioner and the government." *Lopez*, 631 F. Supp. 3d at 879. Petitioner has been in immigration detention since June 5, 2025, which is nearly one year. Courts have found detentions of similar and shorter duration without a bond hearing weigh toward a finding that they are unreasonable. See, e.g., *Sadeqi v. LaRose*, 2025 WL 3154520, at *4 (finding detention of over eleven months weighs toward a finding of unreasonableness); *Tonoyan v. Andrews*, No. 1:25-CV-00815-SKO (HC), 2025 WL 3013684, at *4 (E.D. Cal. Oct. 28, 2025) (over eleven months); *Lopez*, 631 F. Supp. 3d at 879 (approximately one year); *Masood v. Barr*, No. 19-CV-07623-JD, 2020 WL 95633, at *3 (N.D. Cal. Jan. 8, 2020) (nearly nine months); *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018) (over seven months). Therefore, the Court should find the length of detention weighs in favor of Petitioner.

1 Next, the Court should consider the likely duration of future detention. Mr.
2 Makhoulf has appealed his negative finding by the immigration court. This appeal
3 could take another year. Although it is unclear when removal proceedings will
4 conclude, it will likely be a substantial amount of time. The Court should find this
5 factor weighs in favor of Petitioner. Finally, the Court must consider whether delays
6 in the removal proceedings were caused by Petitioner or the government. Currently,
7 the longest delay seems to be from the government. Removal proceedings were not
8 initiated until three months after Mr. Makhoulf was initially detained. There is
9 potentially no end in sight to Mr. Makhoulf's detention. The Court must find this
10 delay factor weighs slightly in favor of Petitioner.
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15 **G. The Petition Meets All Habeas Rule 2(c) Requirements**

16 - Rule 2(c) Compliance: Petition "specifies all the grounds for relief" and
17 "states the facts supporting each ground."
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19 - Specific Factual Allegations:

20 Detention duration: Nearly 12 months as of May 2026.

21 No individualized assessment of flight risk or danger to community.

22 Government delays: Six months just to begin removal proceedings and
23 another 4 months to set an individual hearing.
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1 This court should find in the Petitioner's favor and grant the petition.

2
3 Dated: May 13, 2026

/s/Brian J. McGoldrick
Brian J. McGoldrick
Attorney for Petitioner

1 I, Brian J. McGoldrick, CERTIFY

2 I am over the age of 18 and not a party to this matter. My business address is 4916 Del Mar Avenue, San
3 Diego, CA 92107. On May 13, 2026, I served a copy of this

4 **TRAVERSE TO PETITION FOR WRIT OF HABEAS CORPUS AND ORDER TO
SHOW CAUSE**

5 by the method and to the parties listed below:

6 On May 13, 2026, I accessed the electronic mailing list for CM/ECF users in this case and
7 representatives of all parties are CM/ECF users and are noticed as follows:

- 8 • **Camille Savedra**
camille.savedra@usdoj.gov, brenda.seyler@usdoj.gov, USACAS.Habeas2241@usdoj.gov, casevie
9 w.ecf@usdoj.gov, darryl.brooks@usdoj.gov, Efile.dkt.civ@usdoj.gov
- 10 • **U S Attorney CV**
Efile.dkt.civ@usdoj.gov

11 /s/Brian J. McGoldrick
12 Brian J. McGoldrick, Esq.
13 Counsel for Petitioner
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