

1 Brian J. McGoldrick – 169104
2 Law Office of Brian J. McGoldrick
3 4916 Del Mar Avenue
4 San Diego, CA 92107
5 619-675-2366
6 attorney@brianmgoldrick

7 Attorney for Petitioner

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 BISRAT GIDEY DERBEW,

11 Petitioner,

12 v.

13 CHRISTOPHER LAROSE, et al.

14 Respondents.

Case No.: 26-cv-02803-JAO-DEB

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

[oral argument waived]

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21 Petitioner Bisrat Gidey Derbew, replies to Respondents’ Return, stating as follows:

22 **A. Mr. Derbew’s Classification as an “Arriving Alien” and Subjection to 8**
23 **U.S.C. § 1225(b)(1) Notwithstanding, He Has Due Process Rights Beyond Those**
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1 **That Congress Has Provided, and *Thuraissigiam* Does Not Bar Substantive Due**
2 **Process Claims**

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

13 The Supreme Court determined that the “political department of the
14 government” had plenary authority to admit or exclude aliens seeking initial entry,
15 and thus “an alien in respondent’s position has only those rights regarding
16 admission that Congress has provided by statute.” *Id.* at 139-40. Respondents argue
17 that because Petitioner is an “arriving alien,” due process provides him nothing
18 beyond the mandatory detention scheme established by Section 1225(b)(1).
19 Although, as Respondents correctly point out, following the Supreme Court’s
20 decision in *Thuraissigiam*, some district courts have adopted Respondents’
21 reasoning to dismiss or deny habeas petitions in the context of arriving aliens
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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.
6

7 Another local court has made the same conclusion in *Vadim Sufiarov 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).

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

11 **B. The Fifth Amendment Applies to "All Persons," Including Mr. Derbew**

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

17 The Supreme court has long been solicitous of the constitutional rights of
18 noncitizens. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth
19 amendment to the constitution is not confined to the protection of citizens."). Both
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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 “removable and inadmissible aliens are entitled to be free from detention that is
2 arbitrary or capricious.” *Zadvydas* at 721.

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

4 Denying Mr. Derbew a forum to challenge his prolonged detention would raise
5 a “serious constitutional question” under *Webster v. Doe*, 486 U.S. 592, 603 (1988).
6 As Judge Sabraw recognized in *Domingo-Ros v. Archambeault*, No. 25-cv-1208-DMS-
7 DEB, 2025 WL 27541, at *2 (S.D. Cal. May 18, 2025), statutes cannot be construed to
8 deny any judicial forum for a colorable constitutional claim. Petitioner’s claim that
9 his detention violates substantive due process is precisely such a claim.
10

11 **D. Mr. Derbew’s Detention Has Become “Unreasonably Prolonged,”** 12 **Which Without a Bond Hearing Violates Due Process**

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

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

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14 As a judge in this district assessed, “*Jennings* did not determine the
15 constitutional question at issue here—whether arriving aliens subject to prolonged
16 detention under 8 U.S.C § 1225(b) are entitled to a bond hearing as a matter of due
17 process.” *Kydyrali*, 499 F. Supp. 3d at 772 (citing *Jennings*, 138 S. Ct. at 851); see also
18 *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 210 (3d Cir.
19 2020)(“*Jennings* ... left our framework for assessing as-applied constitutional
20 challenges intact”).

21
22 Many other local courts have found detention at or less than one year gives
23 rise to due process concerns. *See, e.g., Hoyos Amado*, 2025 WL 3079052, at *5
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1 (“Courts have found detention over seven months without a bond hearing weighs
2 toward a finding that it is unreasonable.”) (collecting cases); *Tanoyan v. Andrews*,
3 No. 1:25-CV-00815-SKO (HC), 2025 WL 3013684, at *4 (E.D. Cal. Oct. 28, 2025)
4 (“Petitioner has been detained approximately 11 months. This period ... qualifies as
5 prolonged.”); *Gao*, 2025 WL 2770633, at *5 (“The Court finds that Petitioner’s
6 detention for over 10 months without a bond hearing, in the context of the specific
7 circumstances described above, has become unreasonable and violates due
8 process.”); *Lopez v. Garland*, 631 F. Supp. 3d 870, 879 (E.D. Cal. 2022) (“Petitioner
9 has been in immigration detention ... approximately one year. District court have
10 found shorter lengths of detention ... without a bond hearing to be unreasonable.”)
11 (collecting cases). Therefore, Mr. Derbew’s prolonged detention without an
12 individualized bond hearing violates substantive due process. This Court must apply
13 the *Kydyrali* factors (recently applied by Judge Huie in *Mingzhi Gao*).

14
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16 **The *Kydyrali* factors favor the release of the Mr. Derbew as follows:**

17 *Duration of Detention*

18 First, Mr. Derbew has been detained since September 10, 2025. This is an
19 “unreasonably prolonged” period and the lack of any individualized assessment or
20 prospect for release makes the detention inherently punitive and unconstitutional
21 under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

22
23 *Government’s Interest*

1 Second, the government's interest is minimal. Respondents make no
2 allegation of danger to the community or flight risk. They offer no justification
3 beyond the bare assertion of mandatory detention. Policy quotas or administrative
4 convenience are insufficient interests to override liberty interests. (*Hernandez v.*
5 *Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) - noting staggering detention costs).
6 Indeed, Mr. Derbew was ready to prosecute his case as soon as he was detained.
7 Respondents have refused him his day in court. They have alleged that he must be
8 removed to Uganda where they allege he can have his asylum claim adjudicated.
9 Uganda is currently experiencing an Ebola outbreak that threatens millions of lives.
10 He has filed an appeal with the Board of Immigration Appeals. No schedule for his
11 case has been set. This will take at least a year to adjudicate. His final hearing date
12 was set for March 23, 2026 but instead his case was pretermitted on March 4, 2026
13 and he was ordered removed to Uganda. Mr. Derbew had already been waiting 6
14 months to have his first day of testimony. He has appealed this decision. This will
15 take 6 months to a year to resolve. There is no possibility of his removal in the
16 foreseeable future. His continued detention without a hearing as to flight risk and
17 danger to the community violates the U.S. Constitution and federal law. This adds at
18 least another year to Mr. Derbew' detention. Thus, the IJ's decision will not be
19 administratively final and he will remain subject to Section 1225(b)(1)(B)(ii).
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23 *Petitioner's Liberty Interest & Risk of Error*
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1 Mr. Derbew has a profound liberty interest in freedom from physical restraint
2 (Morrissey v. Brewer, 408 U.S. 471 (1972)). The risk of erroneous deprivation is
3 high without an individualized hearing. There is no sign that he is a danger to the
4 community or a flight risk. Mr. Derbew has not attempted to ask for a bond hearing
5 because the courts have routinely found that it lacked jurisdiction to entertain the
6 motion.
7

8 *Fiscal/Administrative Burden*

9 The burden of releasing Mr. Derbew is nil and the burden of providing a bond
10 hearing is negligible compared to the substantial cost of detention
11 (\$158/day/detainee) and the constitutional imperative. Release is fiscally prudent
12 and administratively simple.
13

14 Finally, under *Mathews*, the balance of factors tips sharply in favor of – at a
15 minimum – requiring an individualized bond hearing to assess Mr. Derbew’s flight
16 risk and dangerousness. The government’s bare reliance on a statutory classification
17 (even if applicable) cannot substitute for the individualized determination required
18 by due process before depriving a person of liberty for a significant period.
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20 (*Kydryali*, 499 F. Supp. 3d at 772; *Banda v. McAleenan*, 385 F. Supp. 3d 1099, 1106
21 (W.D. Wash. 2019)).

22 *Duration of Detention / Likelihood of Final Order of Removal*
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1 Mr. Derbew has been detained since September 10, 2025. In addition to this
2 being an “unreasonably prolonged” period, the lack of any individualized
3 assessment or prospect for release makes the detention inherently punitive and
4 unconstitutional under *Mathews*. As mentioned above, the delay in allowing his case
5 to go forward means that the final determination of his underlying case nearly a
6 year away. Thus, the IJ’s decision will not be administratively final and he will
7 remain subject to Section 1225(b)(1)(B)(ii).
8

9
10 **E. Mr. Derbew Has a Protected Liberty Interest and the *Mathews v.***
11 ***Eldridge* Balancing Test Tips in his Favor**
12

13 Under the test set forth in *Mathews*, this Court must consider the following
14 three factors: “first, the private interest that will be affected by the official action;
15 second, the risk of an erroneous deprivation of such interest through the procedures
16 used, and the probative value, if any, of additional or substitute procedural
17 safeguards; and finally the government’s interest, including the function involved
18 and the fiscal and administrative burdens that the additional or substitute
19 procedural requirements would entail.” See *Mathews v. Eldridge*, 424 U.S. 319, 335
20 (1976).
21

22 The *Mathews* factors all favor Mr. Derbew. The government’s interest in
23 keeping Mr. Derbew in detention is very low, and when weighed against his
24

1 significant private interest in his liberty, the scale tips sharply in favor of releasing
2 Mr. Derbew from custody. Moreover, detention cannot have a punitive purpose.
3 Respondents cannot plausibly assert an interest in continuing to detain Mr. Derbew
4 after almost a year of detention. There is no indication of Mr. Derbew being a danger
5 to the community or a flight risk.
6

7 The government's interest in detaining Mr. Derbew is extremely low at best.
8 That ICE has a policy to make a minimum number of arrests each day under the new
9 administration does not constitute a valid increase in the government's interest in
10 detaining him. Moreover, the "fiscal and administrative burdens" that release from
11 custody would provide are nil. In fact, release from custody is far less costly than
12 keeping Mr. Derbew detained. As the Ninth Circuit noted in 2017, which remains
13 even more true today, "[t]he costs to the public of immigration detention are
14 'staggering': \$158 each day per detainee, amounting to a total daily cost of \$6.5
15 million." *Hernandez v. Session*, 872 F.3d 976, 996 (9th Cir. 2017).
16

17 **F. The balance tips in Mr. Derbew's favor under the Lopez test as well.**

18 Respondents contend that applying the three-factor balancing test discussed
19 in *Lopez v. Garland*, 631 F. Supp. 3d 870 (E.D. Cal. 2022) shows that Petitioner's
20 detention is not unreasonably prolonged. Courts in the Ninth Circuit have used
21 various factor tests to determine whether due process requires a bond hearing in
22 immigration detention cases, including the *Lopez* test. See e.g., *Loba L.M. v. Andrews*,
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1 No. 1:25-CV-00611 JLT SAB (HC), 2025 WL 3187577, at *1 n.1 (E.D. Cal. Nov. 14,
2 2025). In the *Lopez* test, the court considers “the total length of detention to date,
3 the likely duration of future detention, and the delays in the removal proceedings
4 caused by the petitioner and the government.” *Lopez*, 631 F. Supp. 3d at 879.
5
6 Petitioner has been in immigration detention since September 10, 2025, which is
7 nearly one year. Courts have found detentions of similar and shorter duration
8 without a bond hearing weigh toward a finding that they are unreasonable. See, e.g.,
9 *Sadeqi v. LaRose*, 2025 WL 3154520, at *4 (finding detention of over eleven months
10 weighs toward a finding of unreasonableness); *Tonoyan v. Andrews*, No. 1:25-CV-
11 00815-SKO (HC), 2025 WL 3013684, at *4 (E.D. Cal. Oct. 28, 2025) (over eleven
12 months); *Lopez*, 631 F. Supp. 3d at 879 (approximately one year); *Masood v. Barr*,
13 No. 19-CV-07623-JD, 2020 WL 95633, at *3 (N.D. Cal. Jan. 8, 2020) (nearly nine
14 months); *Cabral v. Decker*, 331 F. Supp. 3d 255, 261 (S.D.N.Y. 2018) (over seven
15 months). Therefore, the Court should find the length of detention weighs in favor of
16
17 Petitioner.

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19 Next, the Court should consider the likely duration of future detention. Mr.
20 Derbew has appealed his pretermission. This appeal could take another year.
21 Although it is unclear when removal proceedings will conclude, it will likely be a
22 substantial amount of time. The Court should find this factor weighs in favor of
23
24 Petitioner. Finally, the Court must consider whether delays in the removal

1 proceedings were caused by Petitioner or the government. Currently, the longest
2 delay seems to be from the government. Respondents have refused to allow Mr.
3 Derbew to have his day in court and want to send him to Africa to have his case
4 heard there. There is potentially no end in sight to Mr. Derbew's detention. The
5 Court must find this delay factor weighs slightly in favor of Petitioner.
6

7 **G. The Petition Meets All Habeas Rule 2(c) Requirements**

8 - Rule 2(c) Compliance: Petition "specifies all the grounds for relief" and
9 "states the facts supporting each ground."

10 - Specific Factual Allegations:

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

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

13 Government delays: Six months just to begin removal proceedings and
14 another 4 months to set an individual hearing.
15

16 This court should find in the Petitioner's favor and grant the petition.
17

18 Dated: May 20, 2026

19 /s/Brian J. McGoldrick
20 Brian J. McGoldrick
21 Attorney for Petitioner
22
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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 20, 2026, I served a copy of this

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

6 by the method and to the parties listed below:

7 On May 20, 2026, I accessed the electronic mailing list for CM/ECF users in this case and
8 representatives of all parties are CM/ECF users and are noticed as follows:

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

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/s/Brian J. McGoldrick
Brian J. McGoldrick, Esq.
Counsel for Petitioner